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FEDERAL TRADE COMMISSION,
Respondent.

THE SHERWIN-WILLIAMS COMPANY,
Petitioner,
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FEDERAL TRADE COMMISSION,
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1 UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION; SS.

In the Matter of
National Lead Company, *et al.* } Docket No. 5253.

I, D. C. Daniel, Secretary of the Federal Trade Commission and official custodian of its records, do hereby certify that transmitted herewith is a full, true, and complete transcript of proceedings had before the Federal Trade Commission in the above entitled matter, in twenty-two parts, as follows:

Part 1—Pleadings—11-25-44 to 5-27-46, incl.
Part 2—Pleadings— 5-28-46 to 12-30-47, incl.
Part 3—Pleadings—12-31-47 to 5-24-48, incl.
Part 4—Pleadings— 5-25-48 to 2- 4-53, incl.
Part 5—Testimony—Pages 1 to 961, incl.
Part 6—Testimony—Pages 962 to 1931, incl.
Part 7—Testimony—Pages 1932 to 2783, incl.
Part 8—Testimony—Pages 2784 to 3630, incl.
Part 9—Testimony—Pages 3631 to 4398, incl.
Part 10—Exhibits—Documentary—Commission 1 to 522, incl.
Part 11—Exhibits—Documentary—Commission 523 to 661, incl.
Part 12—Exhibits—Documentary—Commission 662 to 793, incl.
Part 13—Exhibits—Documentary—Commission 794 to 825, incl.
Part 14—Exhibits—Documentary—Commission 826 to 833, incl.
Part 15—Exhibits—Documentary—Commission 834 to 840, incl.
Part 16—Exhibits—Documentary—Commission 841 to 846, incl.
Part 17—Exhibits—Documentary—Commission 847.
Part 18—Exhibits—Documentary—Commission 848 to 868, incl.
Exhibits—Documentary—Respondent 1 to 39, incl.
Part 19—Exhibits—Documentary—Respondent 40 to 89, incl.

Part 20—Exhibits—Documentary—Respondent 90 to 126, incl.

Part 21—Exhibits—Documentary—Respondent 127 to 184, incl.

Part 22—Exhibits—Documentary—Respondent 185 to 309, incl.

and separate original physical exhibits:

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That this transcript is certified to the United States Court of Appeals for the Seventh Circuit, pursuant to the filing in said Court of a petition for review of an Order to Cease and Desist dated January 12, 1953, issued by the Federal Trade Commission in the above indicated proceeding.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said Federal Trade Commission, at its office in the City of Washington, D. C., this 21st day of May, A. D. 1953.

D. C. Daniel,
Secretary.

(Seal)

• • • • •

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

In the Matter of National Lead Company, a corporation, Eagle-Picher Lead Company, a corporation, Eagle-Picher Sales Company, a corporation, Anaconda Copper Mining Company, a corporation, International Smelting & Refining Company, a corporation, The Sherwin-Williams Company, a corporation, and The Glidden Company, a corporation.	Docket No. 5253. 5

COMPLAINT.

This complaint is filed to obtain relief against respondents because of their violations, jointly and severally, as hereinafter alleged in Count I herein, of Section 5 of an act of Congress entitled "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes", commonly referred to as the Federal Trade Commission Act, as approved September 26, 1914, and amended March 21, 1938 (38 Stat. 717; 15 U. S. C. A. sec. 41; 52 Stat. 111), and because of their violations, as alleged in Count II herein, of Section 2(a) of an act of Congress entitled "An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes", commonly referred to as the "Clayton Act", as approved October 15, 1914, and amended June 19, 1936 (38 Stat. 730; 15 U. S. C. A. sec. 12, 49 Stat. 1526; 15 U. S. C. A., sec. 13, as amended).

Count I.

The Charge Under the Federal Trade Commission Act.

Paragraph One: Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the au-

thority vested in it by said Act, the Federal Trade Commission, having reason to believe that the parties named in the caption hereof, and more particularly described and referred to hereinafter as respondents, have violated the provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof
would be in the public interest, hereby issues its com-
3 plaint, stating its charges in that respect as follows:

Nature of Charges.

Paragraph Two: Respondent National Lead Company is charged in this Count I of the complaint with having monopolized and attempted to monopolize the interstate sale of white lead and with having acted unlawfully to secure a monopolistic control over the prices of white lead in the United States, and with having combined, conspired and cooperated with the other respondents to hinder, lessen and eliminate price competition in the sale of white lead in the United States. It and each of the other respondents are charged with using unfair, oppressive, discriminatory and deceptive acts, methods and practices in connection with the sale of white lead in the United States.

Description of Respondents.

Paragraph Three: Each of the respondents is particularly named and described as follows: (a) National Lead Company, a New Jersey corporation with its principal offices at 111 Broadway, New York, N. Y. (sometimes hereinafter referred to merely as National). (b) Eagle-Picher Lead Company, an Ohio corporation with its principal offices at 901 Temple Bar Building, Cincinnati, Ohio, parent corporation of respondent Eagle-Picher Sales Company. (c) Eagle-Picher Sales Company, a Delaware corporation with its principal offices at 901 Temple Bar Building, Cincinnati, Ohio, the wholly-owned subsidiary of respondent Eagle-Picher Lead Company (sometimes hereinafter respondents Eagle-Picher Lead Company and Eagle-Picher Sales Company both are referred to merely as Eagle-Picher). (d) Anaconda Copper Mining Company, a Montana corporation with its principal office located at 25 Broadway, New York, N. Y., parent corporation of respondent International Smelting & Refining Company (sometimes hereinafter referred to merely as Anaconda). (e) International Smelting & Refining Company, a Montana corporation with its principal office at 25 Broadway, New York, N. Y., a wholly-owned subsidiary of respondent Anaconda Copper Mining Company (sometimes hereinafter referred to merely as International). (f) The Sherwin-Williams Company, an Ohio corporation, with principal offices at 101 Prospect Avenue Northwest, Cleveland, Ohio (sometimes hereinafter referred to merely as Sherwin-Williams). (g) The Glidden Company, an Ohio corporation with principal offices located at Union Trust Building, Cleveland, Ohio (sometimes hereinafter referred to merely as Glidden).

4 Definitions and Explanation of Terms.

Paragraph Four: Some of the terms hereinafter used are defined and explained as follows:

A. "White lead": White lead is a white, exceedingly fine powder known as basic lead carbonate. It is a chemical compound, analyzing, when carefully manufactured, about 69% carbonate of lead and 31% hydrate of lead. It is derived through processes of corroding metallic pig lead. White lead is frequently referred to in the lead and paint manufacturing industries, by dealers in paint and paint products and painters as "lead pigments", whether in powdered form or in the form of paste after a mixture with some linseed oil. In either of those forms it is usable by paint manufacturers and painters in preparing and producing white lead paint of the desired consistency by simply adding and thoroughly mixing therewith varying amounts of linseed oil and in some instances turpentine.

B. "Pig lead": Pig lead is a product derived from the smelting and refining of lead ore or lead "concentrates". The pig lead is secured after the smelting and refining has removed sulphur and other impurities from the lead ore and which are found in it as it is taken from the mines.

C. "Commerce": The term commerce as hereinafter used means "commerce" as defined in the Federal Trade Commission Act.

Description and History of Industry and the Commerce of Respondents.

Paragraph Five: The respondents herein, either directly or indirectly through subsidiary corporations or operating divisions, are engaged in the manufacture, sale and distribution of white lead in commerce, and some of them, including respondents National, Eagle-Picher, Sherwin-Williams and Glidden, are also engaged in the use of white lead in their manufacture of white lead paint. The white lead that is thus produced is an important item in commerce between and among the several states. It is the principal item used in the manufacture of white lead paint. It is used in the manufacture of white lead paint by the principal paint manufacturers in the United States, as well as by painters throughout the country. The white lead paint thus produced is held in high esteem by painters and users as of the highest possible quality for application to exteriors of buildings, ships and other structures.

For a part of the period covered by this complaint the respondent Eagle-Picher Lead Company directly sold and distributed white lead in commerce, but it has also indirectly sold and distributed white lead in commerce since the formation and incorporation in the State of Delaware of its wholly-owned subsidiary, respondent Eagle-Picher Sales Company, which now serves respondent Eagle-Picher Lead Company as a marketing medium for products of the parent company.

During a part of the period covered by this complaint white lead produced by respondent International Smelting & Refining Company was sold and distributed in commerce directly by respondent Anaconda Copper Mining Company through one of its operating divisions, namely, Anaconda Lead Products Company. However, about 1939, respondent Anaconda Copper Mining Company discontinued its sale and marketing of white lead in commerce through its operating division, the Anaconda Lead Products Company. It has since sold and distributed white lead in commerce through its Anaconda Sales Company, Pigments Division, and as the product if its wholly-owned subsidiary, International Smelting & Refining Company.

The production of the National Lead Company and the other producing respondents accounts for from 85% to 90% of all the white lead produced and sold in the United

States, with the production of the National accounting for approximately 60-65%, Eagle-Picher approximately 15%, and the other respondents for approximately 10% of the total. Therefore, as a practical matter, in the aggregate the producing respondents are the manufacturers and primary sellers to whom purchasers and users of white lead must turn for supplies of white lead. The production and distribution of pig lead, from which white lead is produced, is also concentrated in the hands of a few corporations, which include respondents National and Eagle-Picher.

Offenses Charged.

The Charges Generally Stated.

Paragraph Six: Respondent National Lead Company has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act by monopolizing, attempting to monopolize and, acting to control the sale of white lead and the prices thereof in commerce. Respondents National Lead Company, Eagle-Picher Lead Company, Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting & Refining Company, The Sherwin-Williams Company and The Glidden Company have violated and are now violating the provisions of Section 5 of the Federal Trade Commission Act by combining, conspiring and cooperating between and among themselves and with each other for the purpose and with the effect of restraining, hindering, suppressing and eliminating competition in price in the sale of white lead in commerce. Each of said respondents has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act by engaging in and continuing
6 unfair, oppressive, discriminatory and deceptive acts, methods and practices in connection with sales and offers to sell white lead in commerce.

Charges Particularized.

Paragraph Seven: Respondent National Lead Company at the time of its inception, in 1891, embarked upon the execution of a plan and program to secure unto it a monopoly of and a monopoly power and control over the manufacture, pricing, sale and distribution of white lead in commerce. Pursuant to, in furtherance of, and in order to effectuate the purposes of that plan and program, respondent National has engaged in, continued and is now doing and performing and carrying on the following acts, methods and practices.

A. Bought, merged and otherwise acquired control over or confederated with and secured the cooperation of other producers, buyers and sellers of pig lead destined for use in the manufacture of white lead. In furtherance of that part of its plan and program to monopolize the white lead industry and to secure control over the pricing of white lead in commerce:

(1) National, on or about December 7, 1891, succeeded to the control which had prior thereto been exercised by the National Lead Trust over the operations and activities of approximately sixteen previously independent firms engaged in the manufacture, sale and distribution of white lead, linseed oil and kindred products, and thereafter continued its expansion by acquiring control over additional units in the lead industry.

(2) National, by 1904, became a party to cooperative action with industrial and financial leaders allied in common purposes and objectives, through common financial interests and otherwise. As a result of such cooperation and mutual assistance such leaders, including stockholders of respondent National, gained control of American Smelting & Refining Company (one of the largest corporations in the mining, smelting and refining of metals, including lead, in the United States, and in other parts of the world), American Linseed Oil Company (previously known as Linseed Oil Trust), National Lead Company (respondent National Lead Company herein, which was also previously known as National Lead Trust), and the United Lead Company, all of which proceeded, beginning in 1904, to operate in close harmony and cooperation. The 7 combined resources of said corporations included all lead smelting and refining plants in operation east of the Rocky Mountains and with sufficient capacity to smelt and refine the entire output of lead producing ores of all the mines east of the Rocky Mountains producing smelting ores. They also included all linseed oil producing plants in the United States which were then important factors in commerce.

(3) National, in 1906, acquired control of the United Lead Company which had previously been formed through

the acquisition of what had been numerous independent producers and refiners of lead.

(4) National, in 1907, acquired all of the stock of the Magnus Metal Company (Magnus Company, Inc.).

(5) National, shortly thereafter, acquired control of the business of Heath & Milligan Manufacturing Company of Chicago, the largest paint manufacturer in the West, but in 1919 transferred the control of that paint manufacturer to The Glidden Company, respondent herein.

(6) National, thereafter, acquired all of the stock of the Carter White Lead Company of Chicago and Omaha, the Matheson Lead Company, the River Smelting & Refining Company, Bass-Huerter Paint Company (then the second largest manufacturer of linseed paints and varnishes on the Pacific Coast), San Francisco, Calif., the National Lead Company of Argentina, and Hirst & Begley Company (an Illinois corporation engaged in the crushing of linseed oil which was subsequently reorganized into an operating branch of the National Lead Company).

(7) National has also secured control over a substantial part of the capital stock of respondent Eagle-Picher Lead Company. Up to February 1943, a still more substantial part of the Eagle-Picher Lead Company stock was held by one Edward J. Cornish, who had served as president of respondent National.

(8) National asserts and represents that the price of pig lead f.o.b. New York, N. Y., is the principal factor in its determination and fixing of its price for white lead, since pig lead is the principal item used in the manufacture of white lead.

(9) National through its acts, methods, practices and the relationships it maintains with American Smelting & Refining Company and others, through its employees,
8 agents, representatives, officers, directors and owners,
exerts a monopolistic influence upon and is an important factor in the determination and quotation of the "market" prices on pig lead in the United States and upon the pig lead prices that it incorporates as an element of and factor in computing its prices of white lead. American Smelting & Refining Company holds a dominant position in the sale and production of pig lead in the United States, as well as in other parts of the world and quotes prices on pig lead in terms of cents per pound f.o.b. New York City. The prices thus quoted are "ac-

cepted" and treated as the "market" prices of pig lead not only by American Smelting & Refining Company but also by respondent National Lead Company and are used by both corporations as a basis for trading in that important product throughout the United States.

B. Respondent National has also combined and conspired with the few remaining small and ostensibly independent manufacturers and primary sellers of white lead in the United States. In so doing, it has cooperated with and received assistance and cooperation from respondents Eagle-Picher Lead Company, Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting & Refining Company, The Sherwin-Williams Company, The Glidden Company, and the Lead Industries Association in which organization all respondents are members, in doing and performing the following acts and engaging in the following methods and practices:

(1) Agreed to adopt and have adopted and maintained a system of delivered price quotations which prevents reflection of any differences in the cost of delivery between the respective places of manufacture of respondent producers, the primary sellers and to the respective locations of intending purchasers of white lead;

(2) Agreed to adopt and have adopted and maintained a plan whereby the United States is divided into so-called zones whereby price offers made by the producing and primary selling respondents to all purchasers of a class throughout any one of such zones, regardless of location and the differences in freight rates from shipping point to destination, are matched, except that by prearrangement and understanding the offers made by respondents Glidden, Sherwin-Williams and International are permitted to be made and maintained at fixed differentials below the matched offers of respondents National and Eagle-Picher;

9 (3) Agreed to seek and secure and have sought and secured the advice, assistance and cooperation of the Lead Industries Association, its officers, employees and agents in fixing, adopting, publishing and using noncompetitive terms and conditions of sale in connection with sales and offers to sell white lead in commerce;

(4) Exchanged directly and through the office of the Lead Industries Association and with the cooperation of officials of that Association price factors and information

concerning price factors expected by respondents to be used and which at times have been used by the primary sellers of white lead, including the respondents, in calculating, determining and announcing their offers to sell white lead in commerce;

(5) Agreed to adopt and have adopted, maintained and used terms and conditions of sale embodied in so-called "consignment" or "agency" agreements under the leadership of respondent National Lead Company for the purpose of preventing dealers selling white lead and white lead paint from making offers to sell such products at levels lower than the offers made by the respective respondent producers whose names were affixed to such "consignment" or "agency" agreements;

(6) Agreed to fix, and have fixed and included in offers to sell, the prices, terms and conditions at which white lead is sold and offered for sale in commerce;

(7) Respondents National and Eagle-Picher have discussed and collaborated upon carefully considered ways and means to have written into Federal specifications provisions, designed by respondent Eagle-Picher to eliminate from bidding on Federal Government proposals to buy their industry's products, prospective bidders who were known to solicit Federal Government business through bids based upon specifications different from those applicable to the products of respondents National and Eagle-Picher; and

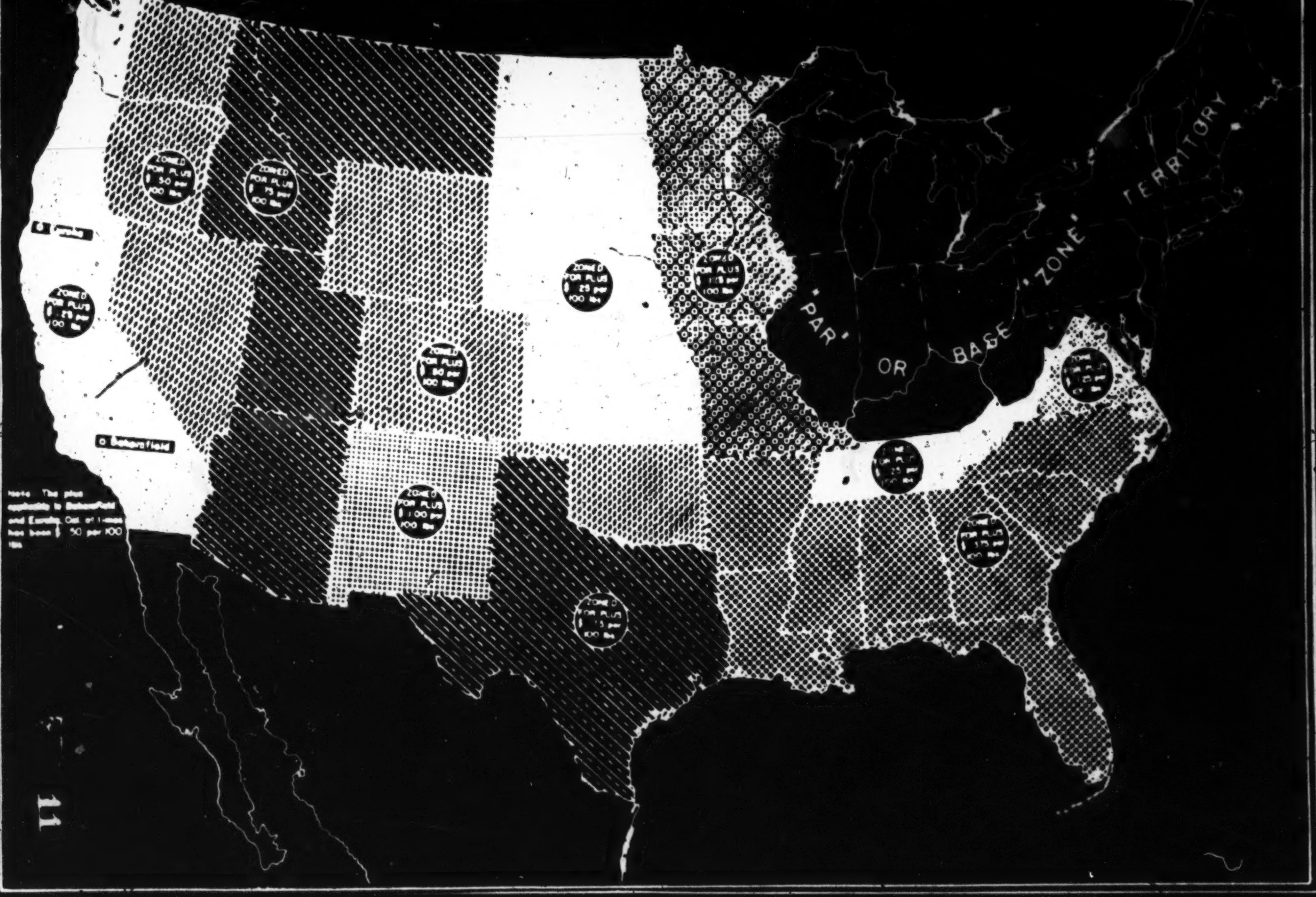
(8) Respondent National entered into contracts and understandings with E. I. du Pont de Nemours Company, Inc., a large paint manufacturer, for the purpose and with the effect of promoting maintenance of the levels of price fixed by National and other producing and primary sellers of white lead.

10 Paragraph Eight: Each of the respondents, National, Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden, through its pursuit, adoption and use of a "Zone Delivered Pricing Method and Practice" as a part of what they hold out to have been an individual and independent course of action is contributing to and furthering the hindrance, lessening, suppression and elimination of competition in price in sales of and in offers to sell white lead in commerce as made by it and other sellers. Each said respondent thereby encourages, supports and furthers the plan and program of respond-

ent National Lead Company, described and set forth in Paragraph Seven of Count I of this complaint, to promote and maintain monopolistic and non-competitive prices and conditions in the sale of white lead.

A. As a part of said common course of action each such respondent uses the "Zone Delivered Pricing Method and Practice" in calculating, determining, making up, announcing, publishing, and distributing its price offers and prices on white lead to its respective customers in commerce. As a part of such method and practice the entire territory of continental United States has been and is now arbitrarily divided by each of such respondents into geographical "Zones", as shown by the map inserted herein immediately following and made a part hereof:

REGIONAL PRICING BY WHITE LEAD INDUSTRY


ZONED FOR PLUS $.50 per 100 lbs.
ZONED FOR PLUS $.75 per 100 lbs.
ZONED FOR PLUS $.25 per 100 lbs.
ZONED FOR PLUS $.80 per 100 lbs.
ZONED FOR PLUS $.25 per 100 lbs.
ZONED FOR PLUS $.125 per 100 lbs.
ZONED FOR PLUS $1.00 per 100 lbs.
ZONED FOR PLUS $.75 per 100 lbs.
ZONED FOR PLUS $.25 per 100 lbs.
ZONED FOR PLUS $.125 per 100 lbs.
ZONED FOR PLUS $.375 per 100 lbs.
Bakersfield
"PAR" OR BASE "ZONE" TERRITORY
Note: The price applicable to Bakersfield and Eureka, Cal. at 1-mass has been $.50 per 100 lbs.

12 B. Each such respondent has thus arbitrarily divided the United States into geographical "Zones" for the purpose of calculating, determining and announcing what the delivered cost shall be as paid by each of its prospective customers for white lead laid down at any given destination in the United States. Within the limits of the "Par" or "Base" zone, as shown on the map immediately preceding this page and which covers the Northeastern part of the country, each of the respondents quotes, in its offers, a base figure in terms of cents per pound as a delivered cost on white lead of a given quantity to all of its prospective purchasers of a given class at each of all of the many locations throughout such "Zone", disregarding differences in cost of delivery from its plant to the thousands of destinations within said zone. The figure thus quoted as a delivered cost is not reduced in offers to sell for delivery to customers at or near the factory door of any of the respondents but is the same figure applied in offers to sell the same quantity of white lead to other customers of such respondent located hundreds of miles away from its point of production in the said "Par" or "Base" Zone territory. Therefore, the said delivered cost figure does not reflect the substantial differences necessarily involved in the costs of sale and delivery to the customers of each of the respective respondents pursuant to the aforesaid offers. Figures quoted by each of the respondents to its customers in each of the other zones are the same at each and all of the destinations within the respective zones. They are arrived at by applying to destinations in what may be designated as Zone 2, an arbitrary mark-up of 12½¢ per hundred pounds above the level of the base figure used in the "Par" or "Base" Zone, and an additional arbitrary mark-up of 12½¢ per hundred pounds for each of the succeeding zones, so that the zones carrying the highest mark-ups of 50¢, 75¢ and $1.00 per 100 pounds are those covering the Rocky Mountain and other Western territory.

C. Each such respondent, when it makes, publishes and distributes "price cards" and other pricing information in printed, mimeographed, typed and other forms in their respective offers to sell white lead in commerce, uses several factors which, when arranged and computed in accordance with the instructions and directions included in such "price cards" and other so-called "pricing" in-

formation, causes to be presented to any given prospective purchaser of white lead of any class at any destination, Matched offers to sell over the names of respondent National and respondent Eagle-Picher in any given quantity and exactly Matched offers of National, Eagle-
13 Picher, Glidden, International and Sherwin-Williams
for their respective sales quotations in small quantities. For example, in their quotations and offers to sell painters in lots of less than 500 pounds, they have exactly matched their offers as follows:

Name of Respondent	100# Keg	50# Keg	25# Keg	12½# Keg
National	$12.75	$6.50	$3.32	$1.69
Eagle-Picher	12.75	6.50	3.32	1.69
International	12.75	6.50	3.32	1.69
Sherwin-Williams	12.75	6.50	3.32	1.69
Glidden	12.75	6.50	3.32	1.69

D. Such precise and exact Matching of offers to sell by such respondents is inherently and necessarily involved when each of them uses the aforesaid "Zone Delivered Pricing Method and Practice" in calculating, making and announcing their quotations, and when in so doing each uses the same factors.

E. Inherently and necessarily involved in such precise and exact Matching of respondents' offers to sell white lead in commerce at an identical delivered cost to purchasers, whenever sales are effected thereby, is a discrimination against nearby customers and in favor of more distant customers. Such discrimination is reflected in terms of substantially different mill-net prices received by each of such respondents for white lead sold in commerce, with their respective customers located at or near the respective factory doors paying more to a given respondent for the same quantity and quality of white lead than customers of the same class located hundreds of miles distant from such respective factory doors. Such discrimination is not only inherent but an obviously necessary part of respondents' aforesaid method and practice of quoting the same figure as a delivered cost to a customer across the street as it quotes to its customer located hundreds of miles away for equal quantity and quality of white lead. That is because no freight charge is involved in any sale and delivery to the customer located across the street, while a substantial part of the total delivered cost represents cost of delivery of such a heavy product when transported to the distantly located customer.

F. Each of the respondents, National, Eagle-Picher,
Anaconda, International, Sherwin-Williams and Glidden,
has represented to its buyers and users of white lead and
other paint products, to representatives of the Federal
Government and to others that it and other sellers of
14 white lead are engaging in active and vigorous price
competition, when such is not the fact. Each respondent for the purpose of promoting the belief that it and other sellers of white lead are in active and vigorous price competition represents that the "Zone Delivered Pricing Method and Practice" originated competitively, is maintained only through competition, and represents efforts of the respondents to compete with each other, when such are not the facts.

Paragraph Nine: Each of the respondents, National, Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden, uses the aforesaid "Zone Delivered Pricing Method and Practice", described in Paragraph Eight of this Count I, for the purpose and with the effect of enabling respondents National and Eagle-Picher to more easily Match their offers to sell white lead in commerce to any given prospective purchaser and to maintain such Matched offers at a prearranged differential above the respective offers of respondents Glidden, Sherwin-Williams and International, and so that each of the latter named three respondents is enabled to maintain its offers to sell white lead in commerce to any given prospective purchaser at a prearranged differential below the aforesaid Matched offers of respondents National and Eagle-Picher.

Effects of Respondents' Actions.

Paragraph Ten: The inherent and necessary effects of the adoption, use and maintenance by each of the respondents National, Eagle-Picher, Anaconda, International, Sherwin-Williams, and Glidden, of their "Zone Delivered Pricing Method and Practice", as particularized in the allegations set forth in C of Paragraph Eight of this Count I, include the following, to wit:

A. The oppressive requirement that those who purchase and use white lead paint within the triangular territory bounded by Kellogg and Wallace, Idaho; Denver and Leadville, Colorado; St. Joseph, Missouri, and St. Paul and Minneapolis, Minnesota, eventually must pay as a part of what is collected by the American Smelting & Refining Company, by the respondents herein, and by others the equivalent of freight or other delivery charges for transportation of pig lead from the producing centers in such territory to New York City and transportation back to or near such producing centers, although such lead was never actually transported to or from New York City, the amounts so charged and exacted being equal to more than 25% of all that is paid by such purchasers for the white lead used by them in paint applied on their homes and barns;

15 B. The oppressive requirement that other users in other extensive territories, including farmers, manufacturing industries and shipbuilders (who use large quantities of white lead in the painting of homes, barns, factories and ships) pay phantom and fictitious freight on lead from various points of origin to New York City and from there to various destinations throughout the United States, when, in truth and in fact, the white lead used by such consumers was never actually transported to or from New York;

C. An undue, unjust and unlawful regional discrimination by respondents against farmers, miners, manufacturing industries and other consumers in the North Central, Rocky Mountain and far Western states producing the raw materials for white lead and white lead paints and in favor of persons similarly engaged in the Northeastern and other states comprising respondents' "Par" or "Base" Zone;

D. Unfair and oppressive discrimination by respondents against the white lead purchasing and consuming public in large areas of the United States by depriving such purchasers of the natural advantage otherwise accruing to them from proximity to the factories of respondents and by compelling such purchasers to pay increases over what the net price of white lead to such purchasers would have been if fixed by competition among respondents, such increment in net prices to respondents approximating the advantages in freight rates to which such purchasers are entitled over purchasers remote from such factories. Such nearby purchasers are thereby compelled to pay not only the actual freight rates on the products purchased by them respectively, but in effect also to pay portions of the cost of transportation of such products to other and more distant purchasers from the respective factories;

E. An undue concentration of white lead and white lead paint manufacturing industries in territories outside of and east of the Midwestern, Rocky Mountain and far Western states which produce the raw materials used in manufacturing said commodities;

F. A denial to prospective purchasers of white lead in commerce of the opportunity to bargain with any one of the respondents for a better price offer than made by the other respondents, thereby precluding purchasers from having any voice in determining the price they are to pay for the commodity;

G. A substantial lessening of competition among
16 respondents in all parts of the United States, through
action of each respondent voluntarily and reciprocally surrendering and cancelling the inherent advantage it has over all competitors within the territory nearer freightwise to its factory than to the factory of a competitor, in consideration of a similar surrender and cancellation by other respondents;

H. The fixation and control through respondents' concurrent and parallel action of an arbitrary and substantial portion of the delivered cost of the product to any and every purchaser upon a basis having no relation to differences in cost of production, in selling costs, and in actual transportation cost, on particular sales. Such arbitrary result is accomplished notwithstanding substantial differences in the delivered cost to the respective respondents of raw materials shipped to them and of white lead shipped by them to their respective customers;

I. An unnecessary and undue enhancement in costs of materials used by industries directly engaged in producing supplies for use in the war effort of the United States;

J. An increase in the costs of paint as paid by users thereof and an encouragement of users to utilize for painting purposes products inferior to white lead paint;

K. The exaction of arbitrary financial payments in varying sums from a large number of customers for the sole purpose of reimbursing respondents for concessions voluntarily made to other customers and of thereby accomplishing their unlawful purpose to destroy price competition in the sale of white lead and to create for themselves a monopoly therein and thereof;

L. The deception of buyers and users of paint into believing that respondents are engaging in active and vigorous price competition when in fact they are frustrating and suppressing it.

Conclusion.

Paragraph Eleven: The combinations, agreements and understandings of the respondents and their acts, practices, pricing methods, systems, devices and policies as hereinbefore alleged, all and singularly, are unfair and to the prejudice of the public; deprive the public of the benefit of competition; create discrimination against some buyers and users of white lead and white lead paint; have a dangerous tendency and capacity to restrain unreasonably commerce in said products; have actually hindered, frustrated, suppressed and eliminated competition in such products in commerce; and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act. 17

Count II.

The Charge Under the Clayton Act.

Paragraph One: Pursuant to the provisions of Section 2 of an act of Congress approved October 15, 1914, entitled "An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes", commonly known as the Clayton Act, as amended by an Act of Congress approved June 19, 1936, commonly known as the Robinson-Patman Act, the Commission, having reason to believe that the parties named in the caption hereof, and more particularly described and referred to hereinafter as respondents, have violated the provisions of said act of Congress as so amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, the Commission hereby issues its complaint, stating its charges in such respect as follows:

Nature of Charges.

Paragraph Two: The charges hereinafter contained in this Count II are that each of the respondents has been and is now unlawfully discriminating as between its customers in the prices it charges, demands, accepts and receives in connection with the sale of white lead in commerce.

Description of Respondents. Definitions and Explanations of Terms. Description and History of Industry and the Commerce of Respondents.

Paragraphs Three To Five, Inclusive: As Paragraphs Three to Five, inclusive, of Count II, the Commission incorporates Paragraphs Three to Five, inclusive, of
18 Count I of this complaint to precisely the same extent and effect as if each and all of them were set forth in full and repeated verbatim in this Count II, except the definition of the term "commerce." The term "commerce" as hereinafter used means "commerce" as defined and set forth in the Clayton Act.

Offenses Charged.

Paragraph Six: Since June 19, 1936, and while engaged as aforesaid in commerce among the several states of the United States and the District of Columbia, each of the respondents National, Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden, has been and is now, in the course of such commerce, discriminating in price between purchasers of said commodities of like grade and quality, sold for use, consumption or resale within the several states of the United States and the District of Columbia, in that each of the respondents has been and is now systematically selling such commodities to many purchasers at a price higher than the price at which commodities of like grade and quality are sold by it to other purchasers and users, including purchasers competitively engaged with others who pay either the lower or the higher discriminatory prices.

Paragraph Seven: Each of the respondents uses a "Zone Delivered Pricing Method And Practice" in calculating, determining, making up, announcing, publishing, and distributing its offers to its respective customers to sell them white lead in commerce. As an incident to and a part of such method and practice, the entire territory of continental United States has been and is now divided by each of such respondents for pricing purposes into geographical "Zones", as shown by the map appearing at page 10 of Count I of this complaint. By this allegation and by such reference said map is hereby inserted as a part of Count II hereof as fully as though it had been physically reproduced at this point.

19 Paragraph Eight: In using its aforesaid "Zone Delivered Pricing Method And Practice," each of the respondents, National, Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden, so quotes prices in its offers to sell that when it sells white lead in commerce in accordance and in connection therewith, the delivered cost on a specified quantity of white lead as paid by any one of its customers located at or near the factory door of such respondent, amounts to as much as the delivered cost on the same quantity of white lead as paid to such respondent by any one of other customers located hundreds of miles away in the same "Zone," although substantial differences are involved in the costs of delivery to such nearby customer and the more distantly located ones.

Paragraph Nine: Systematic discriminations in net prices against nearby customers and in favor of their more distantly located customers are inherent in the use of the aforesaid "Zone Delivered Pricing Method and Practice" when sales are effected and the buyers pay in accordance with quotations of Matched delivered costs as made by each of the respondents, National, Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden, to their respective customers.

Paragraph Ten: When sales are made to customers located at or near the borders of adjoining or contiguous "Zones" pursuant to the aforesaid "Zone Delivered Pricing Method And Practice," each of the respondents, National, Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden, charges, demands, accepts and receives higher prices from some purchasers than from other and competing purchasers in different zones and there is discrimination in the delivered costs of white lead to different purchasers by each of such respondents in addition to substantial differences in the mill net prices received by each of them.

Paragraph Eleven: Each of the respondents, National.

Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden has been and is now classifying its customers to receive from such respondents quantity, trade and regional discounts from quoted prices so that, by virtue of such classifications and action pursuant thereto by each such respondent, it charges, demands, accepts and receives higher prices in connection with sales of white lead in commerce from some of its customers than from other customers, even though said customers who pay such higher prices are competitively engaged with the customers who pay such lower prices.

20 Paragraph Twelve: Each of the respondents, National, Eagle-Picher, International, Sherwin-Williams and Glidden practices the aforesaid systematic discriminations in price, for the purpose and with the effect of enabling respondents National and Eagle-Picher to exactly Match their offers to sell white lead in commerce to any given prospective purchaser and to maintain such Matched offers at a prearranged differential above the respective offers of respondents Glidden, Sherwin-Williams and International, so that each of the latter named three respondents may maintain identical offers to sell white lead in commerce to any given prospective purchasers at a prearranged differential below the aforesaid Matched offers of respondents National and Eagle-Pitcher.

Effects of Price Discriminations Practiced By Respondents.

Paragraph Thirteen: The discriminations in price practiced by respondents, as particularized and alleged in Paragraphs Six, Seven, Eight, Nine, Ten and Eleven of this Count II, include the results and effects set forth as follows:

A. The allegations of the results and effects that are made and set out in subparagraphs A, B, C, D, E, F, G and H of Paragraph Ten of Count I hereof are hereby alleged as results and effects of respondents' price discriminations alleged in Paragraphs Six, Seven, Eight, Nine, Ten and Eleven of this Count II, and are hereby incorporated in this subparagraph of this Paragraph Thirteen of Count II to precisely the same extent as though each of said sugparagraphs A, B, C, D, E, F, G and H of Paragraph Ten of Count I were set forth in full and repeated verbatim as a part hereof;

B. A further effect of the aforesaid discriminations in price by said respondents may be substantially to lessen competition in the sale and distribution of white lead between said respondents and their competitors, tend to create a monopoly in the line of commerce in which the respondents are engaged; and to injure, destroy and prevent competition between said respondents and their competitors in the sale and distribution of white lead;

21 C. Further effects of the aforesaid discriminations in price by said respondents may be substantially to lessen competition between the buyers of white lead receiving the lower discriminatory prices from respondents and other buyers competitively engaged with such favored buyers and who pay higher discriminatory prices; tend to create a monopoly in the lines of commerce in which buyers from respondents are engaged; and to injure, destroy and prevent competition in the lines of commerce in which purchasers from respondents engaged as between the beneficiaries of said discriminatory prices and competing buyers who are required to pay the higher discriminatory prices.

Conclusion.

Paragraph Fourteen: Therefore the aforesaid discriminations in price by each of the respondents constitute violations of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (49 Stat. 1526; 15 U. S. C. A., sec. 13, as amended).

Wherefore, The Premises Considered, the Federal Trade Commission on this 25th day of November, A. D. 1944, issues its complaint against said respondents.

Notice.

Notice is hereby given you, National Lead Company, a corporation, Eagle-Picher Lead Company, a corporation, Eagle-Picher Sales Company, a corporation, Anaconda Copper Mining Company, a corporation, International Smelting & Refining Company, a corporation, The Sherwin-Williams Company, a corporation, and The Glidden Company, a corporation, respondents herein, that the 29th day of December, A. D. 1944, at 2 o'clock in the afternoon, is hereby fixed as the time, and the offices of the Federal Trade Commission, at 45 Broadway, in the City of New York, N. Y., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you will have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violations of the law charged in the complaint.

You are notified and required, on or before the twen-
tieth day after service upon you of this complaint, to
22 file with the Commission an answer to the complaint.

If answer is filed and if your appearance at the place and on the date above stated be not required, due notice to that effect will be given you. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule IX) provide as follows:

In case of desire to contest the proceeding the respondent shall, within twenty (20) days from the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a concise statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.

* * * * *

Failure of the respondent to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the charges set forth in the complaint.

If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondents admits all the material allegations of fact charged in the complaint to be true. Respondent by such answer shall be deemed to have waived a hearing on the allegations of fact set forth in said complaint and to have authorized the Commission, without further evidence, or other intervening procedure, to find such facts to be true.

Contemporaneously with the filing of such answer the respondent may give notice in writing that he desires to be heard on the question as to whether the admitted facts constitute the violation of law charged in the complaint. Pursuant to such notice, the respondent may file a brief, directed solely to that question, in accordance with Rule XXIII.

23 . In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 25th day of November, A. D. 1944.

By the Commission.

Otis B. Johnson,
Secretary.

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137 UNITED STATES OF AMERICA.

BEFORE THE FEDERAL TRADE COMMISSION.

• • (Caption—5253) • •

ANSWER OF ANACONDA COPPER MINING COMPANY.

(Stamp: Federal Trade Commission. Received Feb. 14, 1945. Secretary.)

The respondent Anaconda Copper Mining Company, by its attorneys, reserving all rights to object to lack of jurisdiction herein, answering the complaint herein:

Paragraph One: States that it is without knowledge of the reason for the belief of the Federal Trade Commission as alleged in Paragraph One of Count I of the Complaint that the parties named in the caption hereof have violated the provisions of Section 5 of the Federal Trade Commission Act, or that a proceeding thereunder would be in the interests of the public, and it hereby denies that it has in any way violated Section 5 or any other provision of the Federal Trade Commission Act or that this proceeding is in the public interest.

138 Paragraph Two: States, with respect to Paragraph Two of Count I of the Complaint, that it is without knowledge or information as to any facts forming the basis for the charge that the respondent National Lead Company has monopolized or attempted to monopolize the interstate sale of white lead and that it has acted unlawfully to secure a monopolistic control over the prices of white lead in the United States.

Respondent denies the truth of the charge of having combined, conspired and cooperated with the other respondents to hinder, lessen and eliminate price competition in the sale of white lead in the United States.

Respondent denies the truth of the charge that it is using or has used unfair, oppressive, discriminatory and deceptive acts, methods and practices in connection with the sale of white lead in the United States.

Paragraph Three: With respect to the allegations of Paragraph Three of Count I of the Complaint, respondent admits that it is a Montana corporation, with an office at 25 Broadway, New York, N. Y., and that respondent International Smelting & Refining Company, a wholly owned subsidiary, is a Montana corporation with an office at 25 Broadway, New York, N. Y.

Respondent states that it is without knowledge or information as to the truth of the allegations contained 139 in Paragraph Three of Count I of the Complaint with respect to respondents other than itself and International Smelting & Refining Company.

Paragraph Four: With respect to Paragraph Four A of Count I of the Complaint, respondent admits that white lead is a white, exceedingly fine powder and is a basic lead carbonate. It is a chemical compound derived through processes including corrosion of metallic pig lead. It admits that white lead principally contains lead carbonate and lead hydroxide, but avers that the percentage of each may vary slightly in the products of different manufacturers. White lead is one of several lead pigments. White lead is commonly referred to in its dry or powdered form by paint manufacturers as white lead or dry white lead, and is commonly referred to by painters in its paste form as lead-in-oil. It is in the form of a paste after mixing with linseed oil. Either in the form of powder or paste, it is usable by paint manufacturers in producing white lead paint, although lead paste is not commonly used by paint manufacturers. Paint manufacturers may produce white lead paint of the desired consistency by grinding dry white lead with varying amounts of linseed oil, turpentine, and other thinners and driers. White lead paint of the desired consistency may be made by the painter by mixing with lead paste varying amounts of linseed oil, turpentine, and other thinners and driers. Except as expressly admitted 140 by the foregoing admissions, respondent denies each and every allegation contained in Paragraph Four A of Count I of the Complaint.

Respondent admits the allegations contained in Paragraph Four B of Count I of the Complaint.

Respondent states that it is without knowledge or information as to the truth of the averments contained in Paragraph Four C of Count I of the Complaint.

Paragraph Five: With respect to the allegations of Paragraph Five of Count I of the Complaint, respondent admits:

That certain of respondents herein other than itself are engaged in the manufacture, sale and distribution of white lead in interstate commerce; that respondents National Lead Company and Eagle Picher Lead Company are engaged in the manufacture of white lead paint; that white lead is an important item of the commerce of respondent International Smelting & Refining Company between and among several States; that white lead is the principal item used in the manufacture of white lead paint; that white lead paint or paint produced from white lead-in-oil is held in high esteem by painters and users for application to exteriors of buildings and other structures. Respondent is without knowledge as to whether Sherwin-Williams and Glidden manufacture white lead paint.

141 It is without knowledge as to the period covered by the Complaint during which respondent Eagle Picher Lead Company directly sold and distributed white lead in commerce, or as to whether or when it sold such white lead in commerce indirectly through any subsidiary.

It denies that in any period covered by the Complaint, it either sold or distributed white lead, lead-in-oil, or white lead paint, or that Anaconda Lead Products Company was an operating division.

It admits that Anaconda Lead Products Company was a partly owned subsidiary and until in or about 1936 was engaged in the manufacture and sale of white lead.

It admits that respondent International Smelting & Refining Company has sold and distributed white lead, and that its subsidiary Anaconda Sales Company, Pigments Division, has sold white lead obtained from respondent International Smelting & Refining Company.

The total combined production of the producing respondents constitutes a very substantial proportion of all white lead produced and sold in the United States.

The production and sale of white lead and white lead-in-oil by respondent International Smelting & Refining Company constitutes a small proportion of the total produced
and sold in the United States. Respondent is without
142 knowledge or information as to the exact proportions
of the total produced and sold by the respondents other than International Smelting & Refining Company.

Other than as above referred to by admission, denial or denial of knowledge and information, respondent denies the allegations contained in Paragraph Five of Count I of the Complaint.

Paragraph Six: Denies each and every allegation contained in Paragraph Six of Count I of the Complaint.

Paragraph Seven: Respondent states that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph Seven; Seven A; Seven A(1), (1), (2), (3), (4), (5), (6), (7), (8) and (9) of Count I of the Complaint.

Respondent denies each and every allegation contained in Paragraph Seven B; Seven B (1), (2) (3), (4), (5) and (6) of Count I of the Complaint, and Seven B (7) and (8) in so far as it is alleged that said Seven B (7) and (8) were done with the cooperation and assistance of this respondent; otherwise respondent is without knowledge or information sufficient to form a belief as to the truth of the averments in said Paragraph Seven B (7) and (8).

Paragraph Eight: Denies each and every allegation con-
tained in Paragraph Eight and Eight A, B, C, D, E
143 and F of Count I of the Complaint, and alleges that
respondent International Smelting & Refining Company quotes delivered prices for its products; that said delivered prices vary as between certain geographical areas, sometimes referred to as zones; that such delivered prices are the same within certain areas notwithstanding some variations in freight rates between International Smelting & Refining Company's mill and the customer's location in certain areas; that the variations in delivered prices quoted by International Smelting & Refining Company correspond substantially to those shown on the map referred to in Paragraph Eight A of Count I of the Complaint but are not identical therewith.

That the delivered prices quoted by respondent International Smelting & Refining Company are calculated in terms of differentials above a par price in par territory;

that the delivered prices quoted by respondent International Smelting & Refining Company are not the same as those quoted by its competitors, including the other respondents named in this proceeding, in so far as is known to it; that prices quoted by respondent International Smelting & Refining Company and the pricing methods adopted by it have been quoted and adopted in good faith in order to meet the competition of other sellers of white lead who were at the same time offering and selling in the areas in which it does business competitive white lead products of similar quantities and grades; that respondent is in-
144 formed and believes that dealers purchasing respondent International Smelting & Refining Company's lead-in-oil frequently sell the same at the same price to their customers as they sell the lead-in-oil of other respondents; that certain customers located at or near respondent International Smelting & Refining Company's factory are charged the same price as certain customers located at a greater distance.

Paragraph Nine: Respondent denies each and every allegation contained in Paragraph Nine of Count I of the Complaint.

Paragraph Ten: Respondent denies each and every allegation contained in Paragraph Ten of Count I of the Complaint,

Paragraph Eleven: Respondent denies each and every allegation contained in Paragraph Eleven of Count I of the Complaint.

Paragraph Twelve: Respondent states that it is without knowledge or information as to the reason for the belief of the Federal Trade Commission that the respondents have violated the provisions of the Clayton Act, as amended by the Robinson-Patman Act, as alleged in Paragraph One of Count II of the Complaint, and hereby
145 denies that it has violated the provisions of the Clayton Act, as amended by the Robinson-Patman Act or that this proceeding is in the public interest.

Paragraph Thirteen: With respect to the allegations of Paragraph Two of Count II of the Complaint, respondent denies that during any period covered by the Complaint, it has either sold or distributed white lead, white lead-in-oil, or white lead paint, and therefore denies it has ever unlawfully discriminated in any way as between customers in the sale of white lead, or lead-in-oil, or white lead paint.

Paragraph Fourteen: With respect to Paragraphs Three to Five, inclusive, of Count II of the Complaint, respondent repeats and incorporates herein its answer to Paragraphs Three to Five of Count I of the Complaint as fully as if set forth verbatim herein; and as to the definition of the term "commerce", it states that it is without knowledge or information sufficient to form a belief as to the truth of the averments with respect thereto contained in said Paragraphs Three to Five, inclusive, of Count II of the Complaint.

Paragraph Fifteen: Denies each and every allegation contained in Paragraph Six of Count II of the Com-
146 plaint, in so far as said allegations relate to it.

Paragraph Sixteen: Denies each and every allegation contained in Paragraph Seven of Count II of the Complaint but states that International Smelting & Refining Company quotes delivered prices of white lead which vary in different geographical areas sometimes referred to as zones. Said variations in delivered prices correspond substantially to those shown on the map referred to in said paragraph although they are not identical therewith. It avers that International Smelting & Refining Company's prices and methods of pricing have been adopted in good faith in order to meet the competition of other sellers of white lead who are at the same time offering to sell and selling competitive white lead products of similar quantities and grades.

Paragraph Seventeen: With respect to the allegations contained in Paragraph Eight of Count II of the Complaint, respondent states that delivered prices within certain areas quoted by respondent International Smelting & Refining Company are the same throughout the area notwithstanding that there may be variations in the cost of freight to deliver to one customer in one part of the area as against another customer in another part of the area; and that the price quoted a customer located at or near
147 International Smelting & Refining Company's mill
may be the same as the price quoted a customer located at a distant point in said area. All prices quoted by International Smelting & Refining Company are to meet competition; otherwise it denies the allegations contained in said Paragraph Eight.

Paragraph Eighteen: Denies each and every allegation contained in Paragraph Nine of Count II of the Complaint in so far as said allegations relate to it.

Paragraph Nineteen: With respect to the allegations contained in Paragraph Ten of Count II of the Complaint, respondent states that when sales are made by International Smelting & Refining Company to customers in different areas, located at or near the boundary between said areas, delivered prices to purchasers in one area near said boundary may be higher than delivered prices to purchasers in the other area contiguous to said boundary, otherwise denies the allegations contained in said Paragraph Ten in so far as the same relate to it.

Paragraph Twenty: Denies each and every allegation contained in Paragraph Eleven of Count II of the Complaint but states that International Smelting & Refining Company classifies certain non-competitive customers such as railroads, dealers and industrial users, and that it
148 makes due allowance for differences in the cost of sale and delivery resulting from different quantities in which white lead is purchased by certain purchasers in certain areas.

Paragraph Twenty-One: Denies each and every allegation contained in Paragraphs Twelve, Thirteen and Fourteen of Count II of the Complaint.

Wherefore respondent respectfully prays that the Complaint herein be dismissed.

Chadbourne, Wallace, Parke & Whiteside,
By Horace G. Hitchcock,
Office and Post Office Address:
No. 25 Broadway, Borough of
Manhattan, New York 4, N. Y.
Attorneys for Respondent,
Anaconda Copper Mining
Company.

149 UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

* * (Caption—5253) * *

ANSWER OF INTERNATIONAL SMELTING AND REFINING COMPANY

(Received Feb. 14, 1945.)

The respondent International Smelting and Refining Company, by its attorneys, reserving all rights to object to lack of jurisdiction herein, answering the complaint herein.

Paragraph One: States that it is without knowledge of
the reason for the belief of the Federal Trade Commission
as alleged in Paragraph One of Count I of the Complaint
that the parties named in the caption hereof have violated
the provisions of Section 5 of the Federal Trade Commission Act, or that a proceeding thereunder would be in the
interests of the public, and it hereby denies that it has
in any way violated Section 5 or any other provision
150 of the Federal Trade Commission Act or that this
proceeding is in the public interest.

Paragraph Two: States, with respect to Paragraph Two of Count I of the Complaint, that it is without knowledge or information as to any facts forming the basis for the charge that the respondent National Lead Company has monopolized or attempted to monopolize the interstate sale of white lead and that it has acted unlawfully to secure a monopolistic control over the prices of white lead in the United States.

Respondent denies the truth of the charge of having combined, conspired and cooperated with the other respondents to hinder, lessen and eliminate price competition in the sale of white lead in the United States.

Respondent denies the truth of the charge that it is using or has used unfair, oppressive, discriminatory and deceptive acts, methods and practices in connection with the sale of white lead in the United States.

Paragraph Three: With respect to the allegations of
Paragraph Three of Count I of the Complaint, respondent
admits that Anaconda Copper Mining Company is a Mon-
tana corporation with an office at 25 Broadway, New
151 York, N. Y., and that it is a Montana corporation, with

an office at 25 Broadway, New York, N. Y., and is a wholly owned subsidiary of the respondent Anaconda Copper Mining Company.

Respondent states that it is without knowledge or information as to the truth of the allegations contained in Paragraph Three of Count I of the Complaint with respect to other respondents herein.

Paragraph Four: With respect to Paragraph Four A of Count I of the Complaint, respondent admits that white lead is a white, exceedingly fine powder and is a basic lead carbonate. It is a chemical compound derived through processes including corrosion of metallic pig lead. It admits that white lead principally contains lead carbonate and lead hydroxide, but avers that the percentage of each may vary slightly in the products of different manufacturers. White lead is one of several lead pigments White lead is commonly referred to in its dry or powdered form by paint manufacturers as white lead or dry white lead, and is commonly referred to by painters in its paste form as lead-in-oil. It is in the form of a paste after mixing
152 with linseed oil. Either in the form of powder or paste,
it is usable by paint manufacturers in producing white lead paint, although lead paste is not commonly used by paint manufacturers. Paint manufacturers may produce white lead paint of the desired consistency by grinding dry white lead with varying amounts of linseed oil, turpentine, and other thinners and driers. White lead paint of the desired consistency may be made by the painter by mixing with lead paste varying amounts of linseed oil, turpentine, and other thinners and driers. Except as expressly admitted by the foregoing admissions, respondent denies each and every allegation contained in Paragraph Four A of Count I of the Complaint.

Respondent admits the allegations contained in Paragraph Four B of Count I of the Complaint.

Respondent states that it is without knowledge or information as to the truth of the averments contained in Paragraph Four C of Count I of the Complaint.

Paragraph Five: With respect to the allegations of Paragraph Five of Count I of the Complaint, respondent admits:

That certain of the respondents herein are engaged in the manufacture, sale and distribution of white lead in interstate commerce; that respondents National Lead Company and Eagle Picher Lead Company are engaged in the manufacture of white lead paint; that white lead is 153 an important item of respondent's commerce beween and among the several States; that white lead is the principal item used in the manufacture of white lead paint; that white lead paint or paint produced from white lead-in-oil is held in high esteem by painters and users for application to exteriors of buildings and other structures. Respondent is without knowledge as to whether Sherwin-Williams and Glidden manufacture white lead paint.

It is without knowledge as to the period covered by the Complaint during which respondent Eagle Picher Lead Company directly sold and distributed white lead in commerce, or as to whether or when it sold such white lead in commerce indirectly through any subsidiary.

It denies that at any period covered by the Complaint, Anaconda Copper Mining Company either sold or distributed white lead, lead-in-oil or white lead paint, or that Anaconda Lead Products Company was an operating division of Anaconda Copper Mining Company.

It admits that Anaconda Lead Products Company was a partly owned subsidiary of Anaconda Copper Mining Company and until in or about 1936 was engaged in the manufacture and sale of white lead.

154 It admits that respondent has sold and distributed white lead and that Anaconda Sales Company, Pigments Division, a subsidiary of Anaconda Copper Mining Company, has sold white lead obtained from respondent.

The total combined production of the producing respondents constitutes a very substantial proportion of all white lead produced and sold in the United States. The production and sale of white lead and white lead-in-oil by respondent constitutes a small proportion of the total produced and sold in the United States. Respondent is without knowledge or information as to the exact proportions of the total produced and sold by the respondents other than itself.

Other than as above referred to by admission, denial, or denial of knowledge and information, respondent denies the allegations contained in Paragraph Five of Count I of the Complaint.

Paragraph Six: Denies each and every allegation contained in Paragraph Six of Count I of the Complaint.

Paragraph Seven: Respondent states that it is without knowledge or inforamtion sufficient to form a belief as

155 to the truth of the averments contained in Paragraph Seven; Seven A; Seven A (1), (2), (3), (4), (5), (6), (7), (8) and (9) of Count I of the Complaint.

Respondent denies each and every allegation contained in Paragraph Seven B; Seven B (1), (2), (3), (4), (5) and (6) of Count I of the Complaint, and Seven B (7) and (8) in so far as it is alleged that said Seven B (7) and (8) were done with the cooperation and assistance of this respondent; otherwise respondent is without knowledge or information sufficient to form a belief as to the truth of the averments in said Paragraph Seven B (7) and (8).

Paragraph Eight: Denies each and every allegation contained in Paragraph Eight and Eight A, B, C, D, E and F of Count I of the Complaint, and alleges that respondent quotes delivered prices for its products; that said delivered prices vary as between certain geographical areas, sometimes referred to as zones; that such delivered prices are the same within certain areas notwithstanding some variations in freight rates in certain areas between respondent's mill and the customer's location; that the variations in
156 delivered prices quoted by respondent correspond substantially to those shown on the map referred to in Paragraph Eight A of Count I of the Complaint but are not identical therewith; that the delivered prices quoted by respondent are calculated in terms of differentials above a par price in par territory; that the delivered prices quoted by respondent are not the same as those quoted by its competitors, including the other respondents named in this proceeding, in so far as is known to it; that prices quoted by respondent and the pricing methods adopted by it have been quoted and adopted in good faith in order to meet the competition of other sellers of white lead who were at the same time offering and selling in the areas in which it does business competitive white lead products of similar quantities and grades; that respondent is informed and believes that dealers purchasing its lead-in-oil frequently sell the same at the same price to their customers as they sell the lead-in-oil of other respondents; that certain customers located at or near respondent's factory are charged the same price as certain customers located at a greater distance.

Paragraph Nine. Respondent denies each and every allegation contained in Paragraph Nine of Count I of the Complaint.

157 Paragraph Ten: Respondent denies each and every allegation contained in Paragraph Ten of Count I of the Complaint.

Paragraph Eleven: Respondent denies each and every allegation contained in Paragraph Eleven of Count I of the Complaint.

Paragraph Twelve: Respondent states that it is without knowledge or information as to the reason for the belief of the Federal Trade Commission that the respondents have violated the provisions of the Clayton Act, as amended by the Robinson-Patman Act, as alleged in Paragraph One of Count II of the Complaint, and hereby denies that it has violated the provisions of the Clayton Act, as amended by the Robinson-Patman Act, or that this proceeding is in the public interest.

Paragraph Thirteen: With respect to Paragraph Two of Count II of the Complaint, respondent denies the truth of any charges that it has been or now is unlawfully discriminating as between its customers in the prices it charges, demands, accepts and receives in connection with the sale of white lead in commerce.

Paragraph Fourteen: With respect to Paragraphs Three to Five, inclusive, of Count II of the Complaint,
158 respondent repeats and incorporates herein its answer to Paragraphs Three to Five of Count I of the Complaint as fully as if set forth verbatim hereat, and as to the definition of the term "commerce", it states that it is without knowledge or information sufficient to form a belief as to the truth of the averments with respect thereto contained in said Paragraphs Three to Five, inclusive, of Count II of the Complaint.

Paragraph Fifteen: Denies each and every allegation contained in Paragraph Six of Count II of the Complaint in so far as said allegations relate to it.

Paragraph Sixteen: Denies each and every allegation contained in Paragraph Seven of Count II of the Complaint but states that it quotes delivered prices of white lead which vary in different geographical areas sometimes referred to as zones. Said variations in delivered prices correspond substantially to those shown on the map referred to in said paragraph although they are not identical therewith. It avers that its prices and method of pricing have been adopted in good faith in order to meet the competition of other sellers of white lead who are at the same time offering to sell and selling competitive white lead products of similar quantities and grades.

159 Paragraph Seventeen: With respect to the allegations contained in Paragraph Eight of Count II of the Complaint, respondent states that delivered prices within certain areas quoted by it are the same throughout the area notwithstanding that there may be variations in the cost of freight to deliver to one customer in one part of the area as against another customer in another part of the area; and that the price quoted a customer located at or near its mill may be the same as a price quoted a customer located at a distant point in said area. All prices quoted by it are to meet competition; otherwise it denies the allegations contained in said Paragraph Eight.

Paragraph Eighteen: Denies each and every allegation contained in Paragraph Nine of Count II of the Complaint in so far as said allegations relate to it.

Paragraph Nineteen: With respect to the allegations contained in Paragraph Ten of Count II of the Complaint, respondent states that when sales are made to customers in different areas, located at or near the boundary between said areas, delivered prices to purchasers in one area near said boundary may be higher than delivered 160 prices to purchasers in the other area contiguous to said boundary; otherwise denies the allegations contained in said Paragraph Ten in so far as the same relate to it.

Paragraph Twenty: Denies each and every allegation contained in Paragraph Eleven of Count II of the Complaint but states that it classifies certain non-competitive customers such as railroads, dealers, and industrial users and that it makes due allowance for differences in the cost of sale and delivery resulting from different quantities in which white lead is purchased by certain purchasers in certain areas.

Paragraph Twenty-One: Denies each and every allegation containd in Paragraphs Twelve, Thirteen and Fourteen of Count II of the Complaint.

Wherefore respondent respectfully prays that the Complaint herein be dismissed.

Chadbourne, Wallace, Parke & Whiteside
By Horace G. Hitchcock
Office & Post Office Address
No. 25 Broadway
New York, N. Y.
Attorneys for Respondent.
International Smelting and Refining Company

161 United States of America,

Before the Federal Trade Commission.

* * (Caption—5252) * *

ANSWER OF RESPONDENT, NATIONAL LEAD COMPANY

(Received Feb. 15, 1945.)

Comes now the respondent, National Lead Company, by its attorneys, Alexander & Green, and reserving the right to move to dismiss the complaint herein for lack of jurisdiction and all rights to object to lack of jurisdiction herein, answers the complaint of the Federal Trade Commission in the above entitled matter as follows:

Answer to Count I:

1. Answering Paragraph One of Count I, this respondent states that it is without knowledge of the reason for the belief of the Federal Trade Commission that the parties named in the caption hereof have violated the provisions of Section 5 of the Federal Trade Commission Act, or that a proceeding thereunder would be in the interests of the public, and it hereby denies that it has in any way violated Section 5 or any other provision of the Federal Trade Commission Act or that this proceeding is in the public interest.

2. Answering Paragraph Two of Count I, this respondent denies the truth of he charges against it therein contained and states that it is without knowledge or information as to any facts forming the basis for the charges against the other respondents.

3. Answering the allegations of Paragraph Three of Count I, this respondent admits that it is a New Jersey corporation, with its principal offices at 111 Broadway, New York, N. Y.

162 4. With respect to Paragraph Four of Count I, this respondent states: As to Subdivision A it admits that white lead is a white, exceedingly fine powder, which, when it contains principally lead carbonate and lead hydroxide (the percentages of which may vary slightly in the products of different manufacturers), is a basic

lead carbonate. It is a chemical compound derived through processes including corrosion of metallic pig lead. White lead is one of several lead pigments. It is commonly sold to paint manufacturers in its dry or powdered form and referred to as white lead or dry white lead. It is commonly sold to painters in the form of a paste made by grinding with a small percentage of linseed oil and is referred to as lead-in-oil. So far as this respondent knows dry white lead in powder form is not used by painters in making white lead paint. White lead paint of the desired consistency may be made by mixing paste white lead or lead-in-oil with varying amounts of linseed oil and in some instances turpentine and other thinners and driers. Except as expressly admitted as above, this respondent denies each and every allegation contained in Subdivision A of Paragraph Four of Count I.

5. Answering the allegations of Paragraph Five of Count I of the complaint, this respondent admits:

That certain of the respondents herein are engaged in the manufacture, sale and distribution of white lead in interstate commerce, which is an important item of this respondent's commerce between and among the several states, and that this respondent is engaged in the manufacture of white lead paint. White lead is the principal item used in the manufacture of white lead paint, meaning paint containing no pigment other than white lead, that being the sense in which the term white lead paint is used in the paint industry. White lead paint is held in high esteem by painters and users for application to exteriors of buildings and other structures.

As to the second and third paragraphs of Paragraph
Five of Count I of the complaint, this respondent states
that it is without knowledge with respect thereto, except
that it admits that respondents, Eagle-Picher Lead Company or Eagle-Picher Sales Company, have sold or
163 distributed white lead in commerce, and that at some
period respondents, Anaconda Copper Mining Company or its Division, Anaconda Lead Products Company,
or Anaconda Sales Company, or International Smelting &
Refining Company, or some of them, have manufactured
and sold white lead.

As to the last paragraph of Paragraph Five of Count I, this respondent admits that the total combined production of the producing respondents constitutes a very substantial proportion of all white lead produced and sold in the

United States, and that the production of this respondent represents approximately 55% of all white lead. It is without knowledge as to the exact proportion of the total produced and sold by respondents other than itself or as to the aggregate production of the other respondents.

Other than as above set forth, this respondent states that it is without knowledge with respect to the allegations contained in Paragraph Five of Count I of the complaint.

6. This respondent denies each and every allegation contained in Paragraph Six of Count I of the complaint.

7. Answering Paragraph Seven of Count I, this respondent denies each and every allegation contained in Paragraph Seven A of the complaint and in each and every subdivision thereof, except as hereinafter stated. It admits that:

On or about December 8, 1891, it acquired the properties formerly owned by Cornell Lead Co. of Buffalo, N. Y., The National Lead & Oil Co. of New York, N. Y., Atlantic White Lead & Linseed Oil Co. of New York, N. Y., Salem Lead Co. of Massachusetts, The J. H. Morley Lead Co. of Cleveland, Ohio, The Eckstein White Lead Co. of Cincinnati, Ohio, Anchor White Lead Co. of Cincinnati, Ohio, Maryland White Lead Co. of Baltimore, Maryland, American White Lead Co. of Louisville, Kentucky, Kentucky Lead & Oil Co. of Louisville, Kentucky, Southern White Lead Co. of Chicago, Illinois, D. B. Shipman White Lead Works of Chicago, Illinois, Southern White Lead Company of St. Louis, Missouri, St. Louis Lead and Oil Co. of
164 St. Louis, Missouri, Collier White Lead & Oil Co. of St. Louis, Missouri, and Red Seal Castor Oil Co. of St. Louis, Missouri, together with the following shares of stock in the following companies:

1195	shares	Cornell Lead Co.
9993	shares	The National Lead & Oil Co. of N. Y.
495	shares	Atlantic White Lead & Linseed Oil Co.
670	shares	Salem Lead Co.
1995	shares	The J. H. Morley Lead Co.
6495	shares	The Eckstein White Lead Co.
531	shares	Anchor White Lead Co.
295	shares	Maryland White Lead Co.
950	shares	American White Lead Co.
267	shares	Kentucky Lead & Oil Co.
9995	shares	Southern White Lead Co. of Illinois

2995	shares	D. B. Shipman White Lead Works
9993	shares	Southern White Lead Co. of Missouri
2995	shares	St. Louis Lead & Oil Co.
993	shares	Collier White Lead & Oil Co.
495	shares	Red Seal Castor Oil Co.

the sixteen companies whose properties were acquired as aforesaid having been previously engaged in the manufacture, sale and distribution of white lead, linseed oil and kindred products, the stock ownereship of which had been in or controlled by the National Lead Trust.

In February, 1906, it acquired all of the stock of United Lead Company, which company was engaged principally in the manufacture, sale and distribution of metallic lead and lead alloy products.

In February, 1907, it acquired all of the stock of the Magnus Metal Company (Magnus Company, Inc.). This company never engaged in the manufacture, sale or distribution of white lead, linseed oil or kindred products.

In March, 1913, it acquired all of the stock of the Heath & Milligan Manufacturing Company, and in September, 1919, disposed of such stock to The Glidden Company.

In March, 1906, it acquired all of the stock of Carter White Lead Company, which had properties in Chicago, Illinois, and Omaha, Nebraska; in July, 1912, it acquired
all of the stock of Matheson Lead Company; in 1915,
165 the River Smelting & Refining Company was organ-
ized jointly by National Lead Company and Stone & Webster; in March, 1916, it acquired all of the stock of Bass-Hueter Paint Company; in December, 1917, it organized National Lead Company S. A. (Argentina) as a wholly owned subsidiary; in January, 1919, it acquired the properties and assets of Hirst & Begley Company.

It asserts and represents that the cost of its inventories of corroding quality pig lead and of the lead content of white lead in process and in finished stock is the most important single factor in its determination and fixing of its price for white lead since pig lead is the principal material used in the manufacture of white lead, except that since January, 1942 its prices for white lead have been limited by government regulation.

As to Paragraph Seven B of Count I, this respondent denies each and every allegation contained therein and in each and every subdivision thereof.

8. This respondent denies each and every allegation

contained in Paragraph Eight and each of its subdivisions except as hereinafter stated. This respondent quotes delivered prices for its white lead products, which vary as between certain geographical areas, sometimes referred to as zones. Its delivered prices, within certain areas, are the same even though there are variations in freight rates between this respondent's mills or plants and the customers' locations. The variations in delivered prices quoted correspond generally to those shown on the map referred to in Paragraph Eight A of Count I of the complaint but are not identical therewith, and the zones or territories or geographical areas as shown on the map, while corresponding substantially with those used as the basis for this respondent's delivered prices, are not identical. This respondent's delivered prices are calculated in terms of differentials above a par price in par or base territory. This respondent is without knowledge as to whether the delivered prices which it quotes are the same as those quoted by its competitors, including the other respondents named herein. The pricing methods adopted by this respondent and the prices quoted by it have been adopted
166 and quoted in good faith and its prices are established on the basis of actual and anticipated costs of manufacture and costs of distribution with consideration being given to competitive factors within and without the industry. Under this respondent's pricing methods certain of its customers located at or near its plants are charged the same price as that charged to other customers located at a greater distance.

9. This respondent denies each and every allegation contained in Paragraph Nine of Count I of the complaint.

10. This respondent denies each and every allegation contained in Paragraph Ten of Count I of the complaint.

11. This respondent denies each and every allegation contained in Paragraph Eleven of Count I of the complaint.

Answer to Count II:

12. Answering Paragraph One of Count II of the complaint, this respondent states that it is without knowledge or information as to the reason for the belief of the Federal Trade Commission that the respondents have violated the provisions of the Clayton Act, as amended by the Robinson-Patman Act, as therein alleged, and it hereby

denies that it has violated the provisions of the Clayton Act, as amended by the Robinson-Patman Act, or that this proceeding is in the public interest.

13. With respect to Paragraph Two of Count II of the complaint, this respondent denies the truth of the charges against it therein contained.

14. With respect to Paragraphs Three to Five inclusive of Count II of the complaint, this respondent repeats and incorporates herein its answer to Paragraphs Three to Five of Count I of the complaint as fully as if again set forth verbatim.

167 15. This respondent denies each and every allegation contained in Paragraph Six of Count II of the complaint insofar as the same relate to it.

16. This respondent denies each and every allegation contained in Paragraph Seven of Count II of the complaint insofar as the same relate to it except as hereinafter stated. This respondent quotes delivered prices for white lead sold by it which vary in different geographical areas, sometimes referred to as zones. The variations in delivered prices correspond generally to those shown on the map referred to in said paragraph of the complaint although they are not identical therewith, and the same is true with respect to the geographical areas involved in this respondent's quotation of delivered prices as far as the said map is concerned.

17. This respondent denies each and every allegation contained in Paragraph Eight of Count II of the complaint insofar as the same relate to it, except that it admits that in the delivered prices quoted by it for its white lead the prices quoted throughout a certain geographical area will be the same throughout that area notwithstanding the fact that there may be variations in the cost of freight to deliver to a customer in one part of the geographical area as compared with delivery to another customer in another part of the area. The price quoted a customer located at or near its plant is the same as that quoted a comparable customer located at a more distant point in the same geographical area.

18. This respondent denies each and every allegation contained in Paragraph Nine of Count II of the complaint insofar as the same relate to it.

19. This respondent denies each and every allegation contained in Paragraph Ten of Count II of the complaint

insofar as the same relate to it, except that it states that, when there are sales to customers in different geographical areas located at or near the boundary dividing said areas, this respondent's delivered prices to purchasers in 168 one area near the boundary are higher than its delivered prices to comparable customers in the other area contiguous to the boundary.

20. This respondent denies each and every allegation contained in Paragraph Eleven of Count II of the complaint but states that it has certain price classifications which make due and proper allowance for differences in the cost of sale and delivery resulting from the differences in the quantities of white lead purchases.

21. This respondent denies each and every allegation contained in Paragraphs Twelve, Thirteen and Fourteen of Count II of the complaint.

Wherefore, this respondent respectfully prays that the complaint herein be dismissed.

National Lead Company
By Harold Rowe,
Vice-President.

Alexander & Green,
Attorneys for Respondent,
National Lead Company,
120 Broadway,
New York 5, N. Y.

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169 UNITED STATES OF AMERICA.

Before the Federal Trade Commission.

(Caption 5253)

ANSWER OF THE SHERWIN-WILLIAMS COMPANY.

(Received Feb. 15, 1945.)

Comes now respondent, The Sherwin-Williams Company, by its attorneys, Davies, Richberg, Beebe, Busick & Richardson, 815 Fifteenth Street, N. W., Washington 5, D. C., and T. J. McDowell, 101 Prospect Avenue, N. W., Cleveland, Ohio, and makes this its answer to the complaint issued by the Federal Trade Commission on the 25th day of November 1944:

Count I.

Paragraph One—For answer to Paragraph One of Count I, The Sherwin-Williams Company states it is without knowledge or information as to the reasons for the Commission's belief that it and the other respondents named in the complaint herein have violated the provisions of Section Five of the Federal Trade Commission Act and that a proceeding thereunder is in the interest of the public. It denies, however, that it has in any way violated any of the provisions of the Federal Trade Commission Act or that this proceeding is in the interest of the public and demands strict proof thereof.

Paragraph Two—For answer to Paragraph Two of Count I, The Sherwin-Williams Company denies that 170 it has in any way combined, conspired, or cooperated with the other respondents in this proceeding, or with anyone else, to hinder, lessen or eliminate price competition in the sale of white lead in the United States and further denies that it is using or has used unfair, oppressive, discriminatory or deceptive acts, methods or practices in connection with the sale of white lead in the United States and demands strict proof thereof. It is without knowledge or information as to the truth of the allegations set forth in Paragraph Two with respect to practices allegedly pursued by National Lead Company.

Paragraph Three—For answer to Paragraph Three of Count I, The Sherwin-Williams Company admits that it is an Ohio corporation and that its principal offices are located at 101 Prospect Avenue, N. W., Cleveland, Ohio. It is without knowledge or information as to the truth of the allegations set forth in sub-sections (a), (b), (c), (d), (e) and (g) of Paragraph Three.

Paragraph Four—For answer to Paragraph Four of Count I, The Sherwin-Williams Company admits that white lead is a white, exceedingly fine powder and is a basic lead carbonate. It is a chemical compound derived through processes including corrosion of metallic pig lead. It admits that white lead principally contains lead carbonate and lead hydroxide, but avers that the percentage of each may vary slightly in the products of different manufacturers. White lead is one of several lead pigments. White lead is commonly referred to in its dry or powdered form by paint manufacturers as white lead or

dry white lead, and is commonly referred to by painters in its paste form as lead-in-oil. It is in the form of a paste after mixing with linseed oil. Either in the
171 form of powder or paste, it is usable by paint manufacturers and painters in producing white lead paint, although lead paste is not commonly used by paint manufacturers. White lead paint of the desired consistency may be made by mixing with white lead or lead-in-oil varying amounts of linseed oil, and in some instances turpentine, and other thinners and driers. Except as hereinbefore expressly admitted, The Sherwin-Williams Company denies each and every allegation contained in sub-paragraph A of Paragraph Four. It admits the allegations contained in sub-paragraph B of Paragraph Four.

Paragraph Five—For answer to Paragraph Five of Count I, The Sherwin-Williams Company admits that it is engaged in the manufacture, sale and distribution of white lead and in the use of white lead in the occasional manufacture of white lead paint; that white lead is the principal item in the manufacture of white lead paint and is an important item in commerce between and among the several states but avers that it is engaged only occasionally in the manufacture of white lead paint on orders pursuant to specification bids.

This respondent is without knowledge or information as to the truth of the allegations in the second and third sub-paragraphs of Paragraph Five which allegations are concerned with alleged activities of respondents other other than the Sherwin-Williams Company.

This respondent admits the total combined production of the producing respondents constitutes a very substantia proportion of all white lead produced and sold in the United States, but is without knowledge or information
172 as to the exact proportions produced and sold by the other respondents herein. It avers that its production and sale of white lead and white lead-in-oil, when formerly pursued in normal course of business, constituted an extremely small proportion of the total produced and sold in the United States and did not exceed 3% of the total. Except insofar as this respondent has stated that it is without knowledge or information or has admitted the allegations of Paragraph Five it denies all of such allegations and demands strict proof thereof.

Paragraph Six—For answer to Paragraph Six of Count

I, The Sherwin-Williams Company denies each and every allegation thereof and specifically denies that it has in any way violated Section Five or any other section of the Federal Trade Commission Act by combining, conspiring and cooperating with any of the other respondents herein or any other person, firm or corporation for the purpose or with the effect of injuriously or unlawfully affecting competition in the sale of white lead in commerce between and among the several states and demands strict proof thereof.

Paragraph Seven—For answer to Paragraph Seven of Count I, The Sherwin-Williams Company states that it is without knowledge or information as to the truth of the allegations contained in the first two sentences of Paragraph Seven and in sub-paragraph A thereof and in subsections 1 to 9, inclusive, of sub-paragraph A thereof, which allegations refer solely to alleged activities of another respondent.

The Sherwin-Williams Company denies each and every allegation of sub-paragraph B of Paragraph Seven,
173 including sub-sections 1 to 8, inclusive, and further denies that it has in any way cooperated with or rendered assistance to any of the other respondents named in this complaint, or with the Lead Industries Association, in doing or performing any of the acts or engaging in any of the methods or practices described in sub-sections 1 to 8, inclusive, of sub-paragraph B of Paragraph Seven, and demands strict proof thereof.

Paragraph Eight—For answer to Paragraph Eight of Count I, The Sherwin-Williams Company denies each and every allegation thereof and in sub-paragraphs A to F, thereof, except insofar as hereinafter specifically admitted, and demands strict proof thereof. It avers that its method and practice of arriving at the prices at which it has quoted and sold white lead, represents its own individual and independent course of action. It admits that as part of its method of arriving at its white lead quotations and prices, it has divided the entire continental United States into geographical zones and that in the zones other than the base or par zone, a varying differential is added. It denies that its adoption and use of a pricing system which includes determination of a par or base zone price plus an added differential for more distant zones, plus actual freight from the nearest shipping point to destination in all sales when the purchaser resides outside of the city where the shipping point is located, contributes to, furthers the hindrance of, lessens, suppresses, or eliminates price competition between it and the other respondents in the sale of white lead. It further denies that dealer purchasers located in one zone are in competition to any substantial extent with dealer purchasers located in any other zone.

174 It avers, on the contrary, that such system has a tendency to preserve competition and to prevent such territorial monopoly as would arise under any other system. It avers that such division was decided upon and has been followed in good faith from competitive necessity, and was not arrived at arbitrarily. It avers further that its division of the continental United States into geographical zones does not entirely coincide with the division alleged in Paragraph Eight and illustrated in the map made a part thereof, and is at variance therewith, particularly with respect to portions of the states of California, Oregon, Washington, Idaho and Nebraska.

The Sherwin-Williams Company avers that it maintains a number of branches in each zone; that when orders are received by it from purchasers other than those who buy in relatively small quantities direct from its branch stores, shipments in furtherance of such orders are generally made from the shipping point nearest the purchaser's location, although in some instances shipment is made from the factory at Chicago, Illinois; that irrespective of where the shipment originates the purchasers are charged the zone price for the respective zone plus actual freight from the nearest shipping point to the purchaser's location; that the actual delivered cost to any destination in any zone varies from the delivered cost to any other destination in the same zone to the extent of the difference in the applicable freight rates from the nearest shipping point to the respective destinations; that purchasers located at or near any of these respective shipping points do in fact obtain a lower delivered cost than other purchasers in the same zone who are located farther
175 from such shipping point; that the delivered cost to the various destinations in any zone do in fact reflect differences in the costs of delivery to purchasers at such varying locations.

The Sherwin-Williams Company avers that the differentials applied to the zones other than its par or base zone, are not arbitrary mark-ups, but are applied for the purpose of recouping the freight costs involved in shipping white lead from its only production factory at Chicago, Illinois, to its various shipping points.

The Sherwin-Williams Company avers, on information and belief, that the delivered prices quoted and obtained by the other respondents in connection with their respective sales of white lead, are not the same as the delivered costs for white lead to its customers, which includes f.o.b. prices at many various shipping points, plus freight to destination.

Paragraph Nine — The Sherwin-Williams Company denies each and every allegation contained in Paragraph Nine of Count I and demands strict proof thereof.

Paragraph Ten—For answer to Paragraph Ten of Count I, The Sherwin-Williams Company denies each and every allegation of said paragraph, including those set forth in sub-paragraphs A to L, inclusive and demands strict proof thereof. It also repeats and reasserts every denial contained in the foregoing paragraphs of this answer. It further specifically denies that the effect of its adoption, use, and maintenance of a zoning system as a part of its pricing system, produces any of the effects alleged in sub-paragraphs A to L, inclusive, of said Paragraph Ten, and further specifically denies that such
176 effects, even if they did in fact result, which this respondent does not admit, arise by reason of any unlawful activity on the part of this respondent within the purview of the Federal Trade Commission Act.

The Sherwin-Williams Company avers that all of the pig lead purchased by it for use in manufacturing white lead, is actually shipped by the sellers thereof to The Sherwin-Williams Company at Chicago, Illinois, and it is without knowledge or information as to the factors taken into account by the sellers of such pig lead in determining the price thereof to it, and consequently is without knowledge as to whether any transportation charges, phantom or otherwise, are taken into account by the sellers of such pig lead except such charges as it actually pays in connection with the purchase of pig lead f.o.b. actual shipping point.

The Sherwin-Williams Company avers that purchasers of white lead who are located near any one of its various shipping points in the several zones do in fact obtain the advantages in freight rates which naturally accrue to those purchasers who are located nearer such a point, freight-wise, than other purchasers who are located more distantly, freight-wise, and that the purchasers nearby such shipping points do not pay transportation charges or freight in excess of the actual applicable freight from the various shipping points in the several zones to the respective purchasers' destinations.

Paragraph Eleven—The Sherwin-Williams Company denies each and every allegation contained in Paragraph Eleven of Count I and specifically denies that it entered into any combination, agreement or understanding of
177 the character set forth in the complaint, with any of the other respondents or that any of its acts, practices, pricing methods, systems or policies are unfair or prejudicial to the public, or deprive the public of the benefit of competition or create discrimination among competitive buyers and users of white lead and white lead paint or constitute unfair methods of competition or unfair or deceptive acts or practices in commerce within the intent and meaning of the Federal Trade Commission Act;

Wherefore, The Sherwin-Williams Company prays that Count I of the complaint herein be dismissed as to it.

Count II.

Paragraph One—For answer to Paragraph One of Count II, The Sherwin-Williams Company is without knowledge or information as to the reasons for the Commission's belief that it and the other respondents named in the complaint herein have violated the provisions of Section Two of the Clayton Act as amended by the Robinson-Patman Act and that a proceeding thereunder is in the interest of the public but it specifically denies that it has in any way violated any of the provisions of the said Clayton Act as amended by the Robinson-Patman Act or that this proceeding is in the interest of the public and demands strict proof thereof.

Paragraph Two—For answer to Paragraph Two of Count II, The Sherwin-Williams Company avers the various allegations set forth therein are so vague and indefinite as to the character of unlawful discriminations attempted to be charged that it is without knowledge or in-

formation as to which of its pricing activities are
178 alleged as constituting unlawful discriminations in
price; that such charges, as stated, are conclusions only, and that it is unable to reply definitely and in detail in response to such charges as are stated in said Paragraph Two without the necessary particulars with relation to the specific transactions which form the basis of such alleged violations being furnished to it. This respondent, does, however, expressly deny that it has been, or is, violating Section Two of the Clayton Act or that it is unlawfully discriminating between its customers in the prices it charges, demands, accepts and receives in connection with the sale of white lead in commerce and demands strict proof thereof.

Paragraphs Three to Five, Inclusive—In answer to the charges stated in Paragraphs Three, Four and Five of Count II, The Sherwin-Williams Company repeats, reasserts and incorporates herein its answer to Paragraphs Three to Five, inclusive, of Count I of the complaint herein as fully as if set forth herein.

Paragraph Six—In answer to the charges stated in Paragraph Six of Count II, The Sherwin-Williams Company adopts and reasserts the statement it has heretofore made in answer to Paragraph Two of Count II and also specifically denies each and every allegation set forth in said Paragraph and demands that prior to the beginning of this case on the merits it be furnished with the particulars as to the specific transactions forming the basis of the charge so stated in Paragraph Six in order that it may answer with respect thereto more specifically, and also demands strict proof of such charges.

Paragraphs Seven, Eight and Nine—In answer to
179 Paragraphs Seven, Eight and Nine of Count II, The
Sherwin-Williams Company denies each and every allegation contained in each of said paragraphs, and demands strict proof of each of such allegations. Further in answer to said Paragraphs Seven, Eight and Nine, this respondent repeats, reasserts and incorporates herein its answer to Paragraph Eight of Count I of the complaint as fully as if set forth herein.

Paragraph Ten—In answer to Paragraph Ten of Count II, The Sherwin-Williams Company avers that when sales are made to purchasers who are located at or near the boundary between two zones the delivered cost to such purchasers in one zone may be higher than the delivered cost to purchasers in the other zone and also avers that there is no substantial competition between dealer purchasers located in one zone with dealer purchasers located in any other zone. Except as hereinabove admitted this respondent denies each and every allegation contained in said Paragraph Ten and specifically denies that those purchasers who may be located at or near the boundary of adjoining or contiguous zones and who may incur different delivered costs are in competition with each other in the sale of this respondent's white lead.

Paragraph Eleven—In answer to Paragraph Eleven of Count II, The Sherwin-Williams Company denies each and every allegation thereof and specifically denies that it classifies any of its customers who purchase its white lead for resale in any manner except with respect to quantity discounts. It avers that all customers who purchase its white lead for resale are in a single dealer classi-
fication and all receive the same quantity discounts
180 and that such dealer purchasers in any one zone are
not engaged in competition in any substantial way
with similar dealer purchasers in any other zone. This respondent admits that it has classified certain customers who purchase for use rather than resale, such classifications being as follows:

(1) Contracting painters and large maintenance accounts sold direct

(2) Industrial accounts (including public utilities, privately-owned street railways, petroleum industry)

(3) Railroad and marine accounts

(4) Federal Government, States and Municipalities, and municipally-owned street railways and W. P. A. accounts, and

(5) Small consumers.

It avers that the members of no one of such classifications are competitive, in any way, with the members of any other classification, including the dealer classification.

In applying varying prices to all of such classifications, including the dealer classification, this respondent extends differentials which make only due allowance for differences in the cost of manufacture, cost of selling and cost of delivery resulting from the differing methods or quantities in which its white lead is sold and delivered to such classifications. The Sherwin-Williams Company avers that sales made by it to such purchaser-users who do not buy for resale and who are not competitive with each other do not come within the purview of Section Two of the Clayton Act as amended by the Robinson-Patman Act.

181 Paragraph Twelve—For answer to Paragraph Twelve of Count II, The Sherwin-Williams Company denies each and every allegation thereof and demands strict proof thereof.

Paragraph Thirteen—For answer to Paragraph Thirteen of Count II, The Sherwin-Williams Company denies each and every allegation thereof, including those set forth in sub-paragraph A which are adopted from sub-paragraphs A to H, inclusive, of Paragraph Ten of Count I and also including those allegations set forth in sub-paragraphs B and C of Paragraph Thirteen of Count II. It also repeats and reasserts every denial contained in the foregoing paragraphs of this answer to the various charges stated under Count II of the complaint and also repeats and reasserts, insofar as applicable, all of the statements made by it in answer to Paragraph Ten of Count I and incorporates such statements by reference the same as if copied herein in full.

Paragraph Fourteen—For answer to Paragraph Fourteen of Count II, The Sherwin-Williams Company denies that it has in any way violated the provisions of sub-section (a) of Section Two of the Clayton Act as amended by the Robinson-Patman Act;

Wherefore, The Sherwin-Williams Company prays that Count II of the complaint herein be dismissed as to it.

First Special Defense.

Further answering, and for a first special defense, The Sherwin-Williams Company alleges that its pricing activities which are charged in Counts I and II of the complaint herein as constituting violations, respectively, of the Federal Trade Commission Act and of the Clayton Act as 182 amended by the Robinson-Patman Act were initiated many years ago, and have been pursued subsequently, in a good faith effort to successfully compete, in price and otherwise, with other sellers of white lead who were, and are, simultaneously offering for sale and selling to the same classes of purchasers white lead of substantially similar grade and quality in commerce, as "commerce" is defined in such Acts of Congress, and in direct competition with this respondent despite the fact that this respondent has been at all times a very small producer and primary seller of white lead, selling not more than 3% of the total annual volume and that under such circumstances its pricing activities do not constitute unfair methods of competition or unfair or deceptive acts or practices within the meaning of the Federal Trade Commission Act or unlawful price discriminations under Section Two of the Clayton Act as amended by the Robinson-Patman Act and are not otherwise unlawful.

Second Special Defense.

Further answering, and for a second special defense, The Sherwin-Williams Company alleges, contrary to the allegations of the complaint, that any pricing system for a standardized product such as white lead which results, irrespective of the respective purchasers' distance from the factory or of the relative location of the seller's factory and the factories of its competitors and of other competitive factors, in a uniform net factory return on all sales, or any other system substantially different from that used by this respondent as detailed herein, has the
necessary tendency and capacity to create territorial
183 spheres of monopoly for each manufacturer, seller
or dealer within which spheres such manufacturer, seller or dealer can set or determine, within broad limits, the price at which he is able to sell and still prevent any other competitor having a freight disadvantage from competing in such territory and also has the necessary tendency and capacity to ultimately eliminate the smaller manufacturers, sellers and dealers such as this respondent from competition in such commerce and thereby to substantially lessen, hinder, restrict and suppress competition and to create and encourage monopolies, and also has the further necessary tendency and capacity of disrupting, suppressing and eliminating competition among sellers of white lead on a national scale or on a large territorial scale all to the detriment and injury of the purchasers of white lead and also of the public generally.

Third Special Defense.

Further answering, and for a third special defense, The Sherwin-Williams Company alleges that where its net return from sales of identical quantities to identical classes of purchasers in different zones varies, such variance does not constitute a discrimination in price between different purchasers of a commodity of like grade and quality within the purview of Section Two of the Clayton Act as amended by the Robinson-Patman Act and does not constitute an unfair method of competition or an unfair act or practice within the meaning of the Federal Trade Commission Act and is not otherwise unlawful.

Wherefore, The Sherwin-Williams Company prays that the Commission enter an order dismissing Counts I
184 and II of the complaint in the above-entitled case, insofar as this respondent is concerned.

Respectfully submitted,
Raymond N. Beebe,
James T. Welch,
T. J. McDowell.

Of Counsel:
Davies, Richberg, Beebe,
Busick & Richardson,
815 Fifteenth Street, N. W.,
Washington 5, D. C.
Dated: February 14, 1945.

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185 UNITED STATES OF AMERICA.

BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

ANSWER.

(Received Feb. 16, 1945.)

And now come The Eagle-Picher Lead Company and The Eagle-Picher Sales Company and without waiving their right to object to the jurisdiction of the Federal Trade Commission over the subject matter of the Complaint make Answer to the Complaint as follows:

1. Respondents admit their corporate identity as set forth in the Complaint.

2. Respondents deny illegal conduct under the Federal Trade Commission Act and under the Clayton Act.

3. Respondents assert that, while many facts stated in the Complaint are true or partially true, the statement of these facts is so commingled with interpretative pleading as to require formal denial of many individual paragraphs.

Hence, to avoid repetition in answering the individual
186 paragraphs respondents state that the facts herein-
after enumerated are true and that the subsequent denial of the truth of individual paragraphs of the Complaint is not intended to traverse these facts.

A. Respondents have not utilized to any considerable extent the lead mined by The Eagle-Picher Lead Company for the manufacture of white lead, but purchase substantially their entire requirement from others. Respondents are informed and believe that the lead which they purchase is, for the most part, mined in the Rocky Mountain states and refined in the Chicago industrial area.

B. Respondent, The Eagle-Picher Lead Company, operates a plant which manufactures white lead and white lead in oil at Cincinnati and these two products are resold throughout a substantial part of the United States by the respondent, The Eagle-Picher Sales Company. The respondents do not manufacture white lead at any place other than Cincinnati and do not sell white lead except that manufactured at Cincinnati.

C. Respondent, The Eagle-Picher Sales Company, sells white lead in oil on a delivered price basis.

D. Respondent, The Eagle-Picher Sales Company, in selling white lead in oil, uses a zone map similar
187 to but not identical with that contained in the Com-
plaint. In the use of the zone system, purchasers in some zones are charged a higher price than those in other zones and purchasers in one zone are charged the same price even though some may be situated farther from respondent's plant than others.

E. Respondent, The Eagle-Picher Sales Company, has sold white lead in oil to a substantial extent on the consignment basis during a portion of the period covered by the Complaint.

F. Respondents manufacture and sell two brands of white lead, the Eagle brand and the Hammar brand. The products are identical but the Hammar brand has been sold at a slightly lower price due to the fact that it has not been nationally advertised. Eagle brand has been and is nationally advertised and has been sold at the same price as Dutch Boy white lead manufactured by respondent, The National Lead Company. In the sale of Eagle white lead respondents have followed the price leadership of the respondent, The National Lead Company, but without any agreement or understanding with the respondent, The National Lead Company, or with anyone else as to pricing or pricing policy.

G. Respondents, in the sale of white lead in oil, give functional discounts and quantity discounts which afford the respondents the greatest possible sales vol-
188 ume and which are intended and serve to keep Eagle
white lead competitive with Dutch Boy white lead. The answering respondents act independently of all of the other respondents in all respects except insofar as competition compels respondents to meet competitors' prices.

4. Respondents deny that the practices stated in the preceding paragraphs constitute unfair, oppressive, discriminatory and deceptive acts, methods and practices in connection with the sale of white lead in the United States or that the price differentials at which respondent, The Eagle-Picher Sales Company, sells white lead substantially lessen competition or tend to create a monopoly or injure, destroy or prevent competition.

Specifically answering the numbered paragraphs contained in the two counts of the complaint, the respondents aver:

5. A. Respondents deny each and every allegation contained in Paragraph 1.

B. Insofar as the allegations of Paragraph 2 relate to these respondents they deny each and every allegation contained in this paragraph.

C. Except as heretofore admitted, respondents deny for want of knowledge all of the allegations contained in Paragraph 3.

189 D. Respondents admit that the definitions ~~contained~~
in Paragraph 4 are reasonably correct although the definition of "white lead" contains several rather substantial inaccuracies.

E. Respondents admit that white lead paint is a product which is held in high esteem by painters and users. Respondents further admit that the proportion which the white lead produced by The Eagle-Picher Lead Company bears to the total amount produced in the country varies from year to year but over recent years has averaged approximately 15%. Except as previously noted, all of the other allegations contained in Paragraph 5 are denied for lack of knowledge.

F. Respondents deny each and every allegation contained in Paragraph 6 insofar as such allegations relate to these respondents.

G. Except as previously noted, respondents deny each and every allegation of Paragraph 7 and each subdivision thereof insofar as such allegations relate to these respondents.

H. Except as previously noted, respondents deny each and every allegation of Paragraph 8 and each subdivision thereof.

I. Respondents deny each and every allegation contained in Paragraph 9.

J. Respondents deny each and every allegation contained in Paragraph 10 and each subdivision thereof.

190 K. Respondents deny each and every allegation contained in Paragraph 11.

L. With respect to Count 2 and with the exceptions previously noted, respondents deny each and every allegation contained in each paragraph of said count and each subdivision of each of said paragraphs.

Wherefore these respondents respectfully pray that the Complaint herein be dismissed.

The Eagle-Picher Sales Company,
By M. Bowlley,
President.

The Eagle-Picher Lead Company,
By M. Bowlley,
President.

272 UNITED STATES OF AMERICA.

Before the Federal Trade Commission.

* * (Caption—5253) * *

AMENDED COMPLAINT.

This amended complaint is filed to obtain relief from acts of respondents because of their violations, jointly and severally, as hereinafter alleged in Count I herein, of Section 5 of an act of Congress entitled "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes," commonly referred to as the Federal Trade Commission Act, as approved September 26, 1914, and amended March 21, 1938 (38 Stat. 717; 15 U. S. C. A. sec. 41; 52 Stat. 111), and because of their violations, as alleged in Count II herein, of Section 2 (a) of an act of Congress entitled "An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly referred to as the "Clayton Act," as approved October 15, 1914, and amended June 19, 1936 (38 Stat. 730; 15 U. S. C. A. sec. 12, 49 Stat. 1526; 15 U. S. C. A. sec. 13, as amended).

Count I.

The Charge Under the Federal Trade Commission Act.

Paragraph One: Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the au-
273 thority vested in it by said Act, the Federal Trade
Commission, having reason to believe that the parties named in the caption hereof, and more particularly described and referred to hereinafter as respondents, have violated the provisions of Section 5 of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its amended complaint, stating its charges in that respect as follows:

Nature of Charges.

Paragraph Two: Respondent National Lead Company is charged in this Count I of the amended complaint with having monopolized and attempted to monopolize the interstate sale of lead pigments and with having acted unlawfully to secure a monopolistic control over the prices of lead pigments in the United States, and with having combined, conspired and cooperated with the other respondents to hinder, lessen and eliminate price competition in the sale of lead pigments in the United States. It and each of the other respondents are charged with using unfair, oppressive and discriminatory acts, methods and practices in connection with the sale of lead pigments in the United States.

Description of Respondents.

Paragraph Three: Each of the respondents is particularly named and described as follows: (a) National Lead Company, a New Jersey corporation with its principal offices at 111 Broadway, New York, N. Y. (sometimes hereinafter referred to merely as National). (b) Eagle-Picher Lead Company, an Ohio corporation with its principal offices at 901 Temple Bar Building, Cincinnati, Ohio, parent corporation of respondent Eagle-Picher Sales Company. (c) Eagle-Picher Sales Company, a Delaware corporation with its principal offices at 901 Temple Bar Building, Cincinnati, Ohio, the wholly-owned subsidiary of respondent Eagle-Picher Lead Company (sometimes hereinafter respondents Eagle-Picher Lead Company and Eagle-Picher Sales Company both are referred to merely as Eagle-Picher). (d) Anaconda Copper Mining Company, a Montana corporation with its principal office located at 25 Broadway, New York, N. Y., parent corporation of respondent International Smelting & Refining Company (sometimes hereinafter referred to merely as Anaconda). (e) International Smelting & Refining Company, a Montana corporation with its principal office at 25 Broadway, New York, N. Y., a wholly-owned subsidiary of respondent Anaconda Copper Mining Company (sometimes hereinafter referred to merely as International). (f) The Sherwin-Williams Company, an Ohio corporation, with principal offices at 101
Prospect Avenue Northwest, Cleveland, Ohio (some-
274 times hereinafter referred to merely as Sherwin-
Williams). (g) The Glidden Company, an Ohio corporation with principal offices located at Union Commerce Building, Cleveland, Ohio (sometimes hereinafter referred to merely as Glidden).

Definitions and Explanation of Terms.

Paragraph Four: Some of the terms hereinafter used are defined and explained as follows:

A. "Lead Pigments": This term includes the lead pigments commonly known in the industry as white lead, (both basic carbonate and basic sulfate of lead); blue lead; red lead (or red oxide of lead); litharge (or monoxide of lead); orange mineral and grinders' lead paste. Such pigments are marketed either as dry products, in the form of dry powder, or in oil, in the form of paste after mixture with linseed or other oils.

B. "Pig lead": Pig lead is a product derived from the smelting and refining of lead ore or lead "concentrates". The pig lead is secured after the smelting and refining has removed sulphur and other impurities from the lead ore and which are found in it as it is taken from the mines.

C. "Commerce": The term commence as hereinafter used means "commerce" as defined in the Federal Trade Commission Act.

Description and History of Industry and the Commerce of Respondents.

Paragraph Five: The respondents herein, either directly or indirectly through subsidiary corporations or operating divisions, are engaged in the manufacture, sale and distribution of lead pigments in commerce, and some of them, including respondents National, Eagle-Picher, Sherwin-Williams and Glidden, are also engaged in the use of lead pigments in their manufacture of paint. The lead pigments thus produced are an important item in commerce between and among the several States. They are a principal item used in the manufacture of paint, and the paint produced from such pigments is held in high esteem by builders and users as of the highest possible quality for application to exteriors of buildings, ships and other structures. Such pigments have other important industrial and commercial uses too numerous to mention herein.

275 For a part of the period covered by this amended complaint the respondent Eagle-Picher Lead Company directly sold and distributed lead pigments in commerce, and it has also indirectly sold and distributed such products in commerce since the formation and incorpora-

tion in the State of Delaware of its wholly-owned subsidiary, respondent Eagle-Picher Sales Company, which now serves respondent Eagle-Picher Lead Company as a marketing medium for products of the parent company.

During a part of the period covered by this complaint, respondent Anaconda Copper Mining Company engaged in the production and distribution in commerce of lead pigments through a subsidiary corporation, Anaconda Lead Products Company, and since about 1936 Anaconda Copper Mining Company has distributed in commerce the lead pigments produced by its wholly-owned subsidiary, respondent International Smelting and Refining Company through Anaconda Sales Company, Pigments Division, a subsidiary of Anaconda Copper Mining Company.

The production of the National Lead Company and the other producing respondents accounts for substantially all of the lead pigments produced and sold in the United States, while that of National accounts for more than half of the total production of the respondents. Therefore, in the aggregate, the producing respondents are the manufacturers and primary sellers to whom purchasers and users of lead pigments must turn for supplies of lead pigments; and respondent National is the dominant producer in the field. The production and distribution of pig lead, from which lead pigments are produced, is also concentrated in the hands of a few corporations, including respondents National and Eagle-Picher.

Offenses Charged.

Paragraph Six: Respondent National Lead Company has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act by monopolizing, attempting to monopolize and acting to control the sale of lead pigments and the prices thereof in commerce. Respondents National Lead Company, Eagle-Picher Lead Company, Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting & Refining Company, The Sherwin-Williams Company and The Glidden Company have violated and are now violating the provisions of Section 5 of the Federal Trade Commission Act by combining, conspiring and cooperating between and among themselves and with each other for the purpose and with the effect of restraining, hindering, suppressing

and eliminating competition in prices and terms of sale of lead pigments in commerce. Each of said respondents has violated and is now violating the provisions of
276 Section 5 of the Federal Trade Commission Act by engaging in and continuing unfair, oppressive and discriminatory acts, methods and practices in connection with sales and offers to sell lead pigments in commerce.

Charges Particularized.

Paragraph Seven: Respondent National Lead Company at the time of its inception, in 1891, embarked upon the execution of a plan and program to secure unto it a monopoly of and a monopoly power and control over the manufacture, pricing, sale and distribution of lead pigments in commerce. Pursuant to, in furtherance of, and in order to effectuate the purposes of that plan and program, respondent National has engaged in, continued and is now doing and performing and carrying on the following acts, methods and practices:

A. Bought, merged nad otherwise acquired control over or confederated with and secured the cooperation of other producers, buyers and sellers of pig lead destined for use in the manufacture of lead pigments. In furtherance of that part of its plan and program to monopolize the lead pigments industry and to secure control over the pricing of lead pigments in commerce:

(1) National, on or about December 7, 1891, succeeded to the control which had prior thereto been exercised by the National Lead Trust over the operations and activities of approximately sixteen previously independent firms engaged in the manufacture, sale and distribution of lead pigments, linseed oil and kindred products, and thereafter continued its expansion by acquiring control over additional units in the lead industry.

(2) National, in 1906, acquired control of the United Lead Company which had previously been formed through the acquisition of what had been numerous independent producers and refiners of lead.

(3) National, in 1907, acquired all of the stock of the Magnus Metal Company (Magnus Company, Inc.).

(4) National, shortly thereafter, acquired control of the business of Heath & Milligan Manufacturing Com-

pany of Chicago, the largest paint manufacturer in
277 the West, but in 1919 transferred the control of that
paint manufacturer to The Glidden Company, respondent herein.

(5) National, thereafter, acquired all of the stock of the Carter White Lead Company of Chicago and Omaha, the Matheson Lead Company, the River Smelting & Refining Company, Bass-Hueter Paint Company (then the second largest manufacturer of linseed paints and varnishes on the Pacific Coast), San Francisco, Calif., the National Lead Company of Argentina, and Hirst & Begley Company (an Illinois corporation engaged in the crushing of linseed oil which was subsequently reorganized into an operating branch of the National Lead Company.).

(6) National has also secured control over a substantial part of the capital stock of respondent Eagle-Picher Lead Company. Up to February 1943, a still more substantial part of the Eagle-Picher Lead Company stock was held by one Edward J. Cornish, who had served as president of respondent National.

(7) National asserts and represents that the price of pig lead f. o. b. New York, N. Y., is the principal factor in its determination and fixing of its price for lead pigments, since pig lead is the principal item used in the manufacture of lead pigments.

(8) National through its acts, methods, practices and the relationships it has maintained and now maintains with American Smelting & Refining Company and others, through its employees, agents, representatives, officers, directors and owners, exerts a monopolistic influence upon and is an important factor in the determination and quotation of the "market" prices on pig lead in the United States and upon the pig lead prices that it incorporates as an element of and factor in computing its prices of lead pigments. American Smelting & Refining Company holds a dominant position in the sale and production of pig lead in the United States, as well as in other parts of the world and quotes prices on pig lead in terms of cents per pound f. o. b. New York City. The prices thus quoted are "accepted" and treated as the "market" prices of pig
278 lead not only by American Smelting & Refining Company but also by respondent National Lead Company and are used by both corporations as a basis for trading in that important product throughout the United States.

B. Respondent National has also combined and conspired with the few remaining small and ostensibly independent manufacturers and primary sellers of lead pigments in the United States. In so doing, it has cooperated with and received assistance and cooperation from respondents Eagle-Picher Lead Company, Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting & Refining Company, The Sherwin-Williams Company, The Glidden Company, and the Lead Industries Association in which organization all respondents are members, in doing and performing the following acts and engaging in the following methods and practices:

(1) Agreed to adopt and have adopted and maintained a system of delivered price quotations which prevents reflection of any differences in the cost of delivery between the respective places of manufacture of respondent producers, the primary sellers and to the respective locations of intending purchasers of lead pigments;

(2) Agreed to adopt and have adopted and maintained a plan whereby the United States is divided into so-called zones whereby price offers made by the producing and primary selling respondents to all purchasers of a class throughout any one of such zones, regardless of location and the differences in freight rates from shipping point to destination, are matched, except that by prearrangement and understanding the offers made by respondents Glidden, Sherwin-Williams and International are permitted in some instances to be made and maintained at fixed differentials below the matched offers of respondents National and Eagle-Picher;

(3) Agreed to seek and secure and have sought and secured the advice, assistance and cooperation of the Lead Industries Association, its officers, employees and agents in fixing, adopting, publishing and using noncompetitive terms and conditions of sale in connection with sales and offers to sell lead pigments in commerce;

279 (4) Exchanged directly and through the office of the Lead Industries Association and with the cooperation of officials of that Association price factors and information concerning price factors expected by respondent to be used and which at times have been used by the primary sellers of lead pigments, including the respondents, in calculating, determining and announcing their offers to sell lead pigments in commerce;

(5) Agreed to adopt and have adopted, maintained and used terms and conditions of sale embodied in so-called "consignment" or "agency" agreements under the leadership of respondent National Lead Company for the purpose of preventing dealers selling white lead from making offers to sell such products at levels lower than the offers made by the respective respondent producers whose names were affixed to such "consignment" or "agency" agreements;

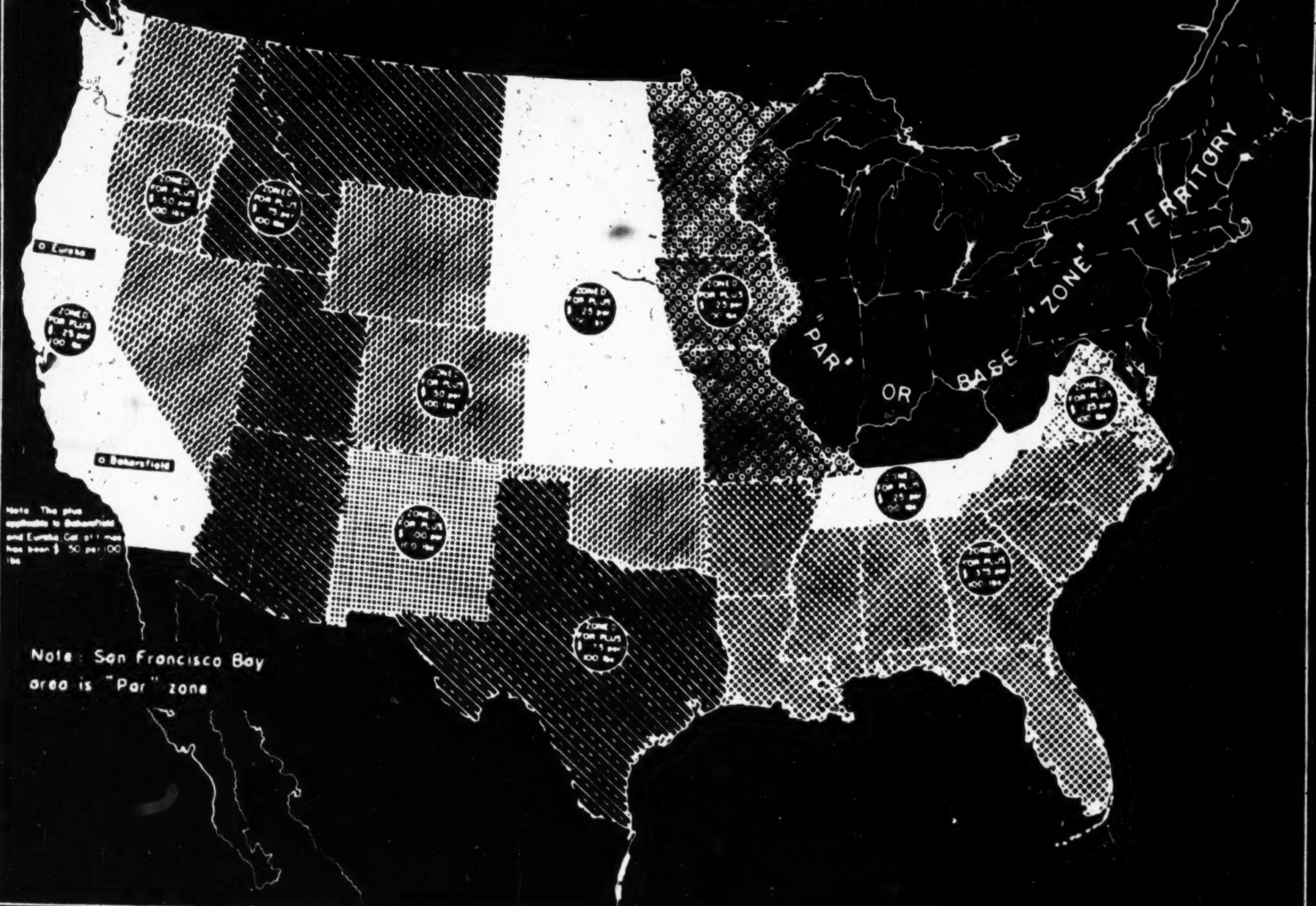
(6) Agreed to fix, and have fixed and included in offers to sell, the prices, terms and conditions at which lead pigments are sold and offered for sale in commerce;

(7) Respondent National entered into contracts and understandings with E. I. du Pont de Nemours Company, Inc., a large paint manufacturer, for the purpose and with the effect of promoting maintenance of the levels of price fixed by National and other producing and primary sellers of white lead.

Paragraph Eight: Each respondent, in offering for sale and selling lead pigments, divides the country into geographical zones for the purpose of price quotations. To all buyers of the same class located in the same zone, each respondent quotes the same delivered cost, irrespective of the location of the buyer within the zone. A "par" or "base" price is quoted to buyers in the "par" or "base" zone, and buyers in other zones are quoted at a fixed differential above the "par" or "base" zone price, irrespective of the transportation costs involved in selling and shipping to such customers on a delivered basis.

A. In offering for sale and selling lead pigments in steel kegs of 100 pounds or less, each respondent quotes and sells upon the basis of the geographical divisions and delivered cost differentials set out in the map inserted herein immediately following this paragraph and made a part hereof.

ZONE PRICING FOR LEAD PIGMENTS IN STEEL KEGS


ZONED FOR PLUS $ .50 per 100 lbs
ZONED FOR PLUS $ .75 per 100 lbs
o Eureka
ZONED FOR PLUS $ .25 per 100 lbs
ZONED FOR PLUS $ .25 per 100 lbs
ZONED FOR PLUS $ .25 per 100 lbs
ZONED FOR PLUS $ .50 per 100 lbs
o Bakersfield
ZONED FOR PLUS $1.00 per 100 lbs
ZONED FOR PLUS $ .75 per 100 lbs
"PAR" OR BASE "ZONE" TERRITORY
ZONED FOR PLUS $ .25 per 100 lbs
ZONED FOR PLUS $ .25 per 100 lbs
ZONED FOR PLUS $ .75 per 100 lbs

Note: The plus applicable to Bakersfield and Eureka, Cal. at times has been $ .50 per 100 lbs.

Note: San Francisco Bay area is "Par" zone

281 B. In offering for sale and selling dry white lead and lead sulphate in barrels or in bags, each respondent quotes and sells at the same delivered cost to all customers in the par or base zone, and 25¢ per 100 pounds is added to the par or base price for delivery to customers located in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, Washington and Wyoming, the par or base zone comprising all other states than those named.

C. In offering for sale and selling dry red lead, litharge and other pigments in barrels or bags in less-than-carload lots, each respondent quotes and sells at the same delivered cost to customers within the par or base zone; 25¢ per 100 pounds is added for delivery to customers in Alabama, Arkansas, California, Florida, Georgia, Louisiana, Mississippi, Oklahoma, Texas and west of the Cascade Mountains in Oregon and Washington; 50¢ per 100 pounds is added for delivery to customers in Colorado, Montana, New Mexico and Wyoming; 75¢ per 100 pounds is added for delivery to customers in Arizona, Idaho, Nevada, Utah and east of the Cascade Mountains in Oregon and Washington. The par or base zone comprises all other states than those named.

D. In offering for sale and selling dry red lead, litharge and other lead pigments in barrels or bags in carload lots of 20 tons or more, each respondent offers to sell dry red lead at $2.50 and litharge at $1.50 per 100 pounds over the American Smelting and Refining Company's closing price of common pig lead at New York on the date the order is received, delivered to customers located in the par or base zone and 25¢ per 100 pounds is added for delivery to customers located in Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, Montana, Nevada, New Mexico, Oklahoma, Texas, Utah, Wyoming and east of the Cascade Mountains in Oregon and Washington. The par or base zone comprises all other states and areas than those named.

Paragraph Nine: Terms and conditions of sale quoted by each respondent in selling and offering for sale lead pigments in commerce have included the following:

A. Each of the respondents in selling and offering to sell lead pigments in commerce to agents or dealers for resale requires its customers to resell such products
282 at prices and terms of sale fixed and determined and

published by it, so that each of respondents is responsible for the price levels to painters and consumers.

B. Each of the respondents in selling and offering to sell lead pigments quotes standard container differentials on keg products, by which 50 pound kegs are sold at a 25¢ differential above 100 pound kegs, 25 pound kegs at 25¢ above 50 pound kegs and 12½ pound kegs at 25¢ above 25 pound kegs.

C. Each respondent, in connection with the sale and distribution of lead pigments to paint manufacturers and large industrial consumers enters into quarterly contracts covering terms of sale and delivery of lead pigments, either at current published quotations or at a fixed differential over the quotation of the American Smelting and Refining Co. for common pig lead at New York. Such quarterly contracts establish the grades and qualities of lead pigments covered, the discounts applicable and the time within which deliveries must be made.

D. Each respondent issue cards or lists showing delivered quotations on lead pigments to various classes of customers for each type of pigment in various packages and quantities and applicable to the various zones and geographical divisions, and including the quotations which must be made by purchasers in reselling to consumers and others. Such "price cards" and other pricing information, when computed and calculated in accordance with the instructions and directions contained therein, cause to be presented to any given prospective purchaser of lead pigments, in any given quantity, in any given type of package, at any given destination, exactly matched offers to sell over the names of each of the respondents, except that in the case of white lead in oil the quotations to dealers or agents for resale of respondents Anaconda, Sherwin-Williams and, at times, Glidden, are matched at a small differential below the matched offers of National and Eagle-Picher.

Paragraph Ten: Each of the respondents uses the systematic method of quoting delivered costs on lead pigments described in Paragraphs Eight and Nine of this Count I for the purpose and with the effect of enabling the respondents to match exactly their offers to sell lead pigments to any prospective purchaser at any destination, thereby eliminating competition between and among themselves.

Inherently and necessarily involved is a systematic dis-
283 crimination against purchasers located near the fac-
tory of any of the respondents and in favor of customers located, freightwise, at a considerable distance.

Effects of Respondents' Actions.

Paragraph Eleven: The inherent and necessary effects of the adoption, use and maintenance by each of the respondents of the zone delivered system of pricing and other practices set forth in Paragraphs Eight and Nine of this Count I include the following, to wit:

A. Unfair and oppressive discrimination by respondents against the lead pigments purchasing and consuming public in large areas of the United States by depriving such purchasers of the natural advantage otherwise accruing to them from proximity to the factories of respondents and by compelling such purchasers to pay increases over what the net price of lead pigments to such purchasers would have been if fixed by competition among respondents, such increment in net prices to respondents approximating the advantages in freight rates to which such purchasers are
entitled over purchasers remote from such factories.
284 Such nearby purchasers are thereby compelled to pay
not only the actual freight rates on the products purchased by them respectively, but in effect also to pay portions of the cost of transportation of such products to other and more distant purchasers from the respective factories;

B. A substantial lessening of competition among respondents in all parts of the United States, through action of each respondent voluntarily and reciprocally surrendering and cancelling the inherent advantage it has over all competitors within the territory nearer freightwise to its factory than to the factory of a competitor, in consideration of a similar surrender and cancellation by other respondents;

C. The fixation and control through respondents' concurrent and parallel action of an arbitrary and substantial portion of the delivered cost of the product to any and every purchaser upon a basis having no relation to differences in cost of production, in selling costs, and in actual transportation cost, on particular sales. Such arbitrary result is accomplished notwithstanding substantial differences in the delivered cost to the respective respondents of raw materials shipped to them and of lead pigments shipped by them to their respective customers.

285

Conclusion.

Paragraph Twelve: The combinations, agreements and understandings of the respondents and their acts, practices, pricing methods, systems, devices and policies as hereinbefore alleged, all and singularly, are unfair and to the prejudice of the public, deprive the public of the benefit of competition; create discrimination against some buyers and users of lead pigments and lead pigment paint; have a dangerous tendency and capacity to restrain unreasonably commerce in said products; have actually hindered, frustrated, suppressed and eliminated competition in such products in commerce; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Count II.

The Charge Under the Clayton Act.

Paragraph One: Pursuant to the provisions of Section 2 (a) of an act of Congress approved October 15, 1914, entitled "An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act, as amended by an Act of Congress approved June 19, 1936, commonly known as the Robinson-Patman Act, the Commission, having reason to believe that the parties named in the caption hereof, and more particularly described and referred to hereinafter as respondents, have violated the provisions of said act of Congress as so amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, the Commission hereby
286 issues its amended complaint, stating its charges in such respect as follows:

Nature of Charges.

Paragraph Two: The charges hereinafter contained in this Count II are that each of the respondents has been and is now unlawfully discriminating as between its customers in the prices it charges, demands, accepts and receives in connection with the sale of lead pigments in commerce.

Description of Respondents; Definitions and Explanation of Terms; Description and History of Industry and the Commerce of Respondents.

Paragraphs Three to Five, inclusive: As Paragraphs Three to Five, inclusive, of Count II, the Commission incorporates Paragraphs Three to Five, inclusive, of Count I of this amended complaint to precisely the same extent and effect as if each and all of them were set forth in full and repeated verbatim in this Count II, except the definition of the term "commerce." The term "commerce" as hereinafter used means "commerce" as defined and set forth in the Clayton Act.

Offenses Charged.

Paragraph Six: Since June 19, 1936, and while engaged as aforesaid in commerce among the several States of the United States and the District of Columbia, each of the respondents National, Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden, has been and is now, in the course of such commerce, discriminating in price between purchasers of said commodities of like grade and quality, sold for use, consumption or resale within the several States of the United States and the District of Columbia, in that each of the respondents has been and is now systematically selling such commodities to many purchasers at a price higher than the price at which commodities of like grade and quality are sold by it to other purchasers and users, including purchasers competitively engaged with others who pay either the lower or the higher discriminatory prices.

Paragraph Seven: Each of the respondents uses a "Zone Delivered Pricing Method And Practice" in calculating, determining, making up, announcing, publishing, and distributing its offers to its respective customers to sell them lead pigments in commerce. As an incident
287 to and a part of such method and practice, the entire
territory of continental United States has been and is now divided by each of such respondents for pricing purposes into geographical "Zones," as alleged in Paragraph Eight of Count I of this amended complaint and the map appearing at page 8A. Paragraph Eight of Count I is hereby incorporated in this Count II to the same extent and effect as if such Paragraph were set forth in full and repeated verbatim herein.

Paragraph Eight: In using its aforesaid "Zone Delivered Pricing Method And Practice," each of the respondents, National, Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden, so quotes prices in its offers to sell that when it sells lead pigments in commerce in accordance and in connection therewith, the delivered cost on a specified quantity of lead pigments as paid by any one of its customers located at or near the factory door of such respondent, amounts to as much as the delivered cost on the same quantity of lead pigments as paid to such respondent by any one of other customers located hundreds of miles away in the same "Zone," although substantial differences are involved in the costs of delivery to such nearby customer and the more distantly located ones.

Paragraph Nine: Systematic discrimination in net prices against nearby customers and in favor of their more distantly located customers are inherent in the use of the aforesaid "Zone Delivered Pricing Method And Practice" when sales are effected and the buyers pay in accordance with quotations of Matched delivered costs as made by each of the respondents, National, Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden, to their respective customers.

Paragraph Ten: When sales are made to customers located at or near the borders of adjoining or contiguous "Zones" pursuant to the aforesaid "Zone Delivered Pricing Method And Practice," each of the respondents, National, Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden, charges, demands, accepts and receives higher prices from some purchasers than from other and competing purchasers in different zones and there is discrimination in the delivered costs of lead pigments to different purchasers by each of such respondents in addition to substantial differences in the mill net prices received by each of them.

288 Paragraph Eleven: Each of the respondents, National, Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden has been and is now classifying its customers to receive from such respondents quantity, trade and regional discounts from quoted prices so that, by virtue of such classification and action pursuant thereto by each such respondent, it charges, demands, accepts and receives higher prices in connection with sales of lead pigments in commerce from some of its customers than

from other customers, even though said customers who pay such higher prices are competitively engaged with the customers who pay such lower prices.

Paragraph Twelve: Each of the respondents practices the aforesaid systematic discriminations in price for the purpose and with the effect of enabling respondents exactly to match their offers to sell lead pigments in commerce to any given prospective purchaser at any given destination, except that as to white lead in oil the purpose and effect has been to match exactly the offers to dealers and agents for resale of respondents Anaconda, Sherwin-Williams and Glidden at a prearranged differential below similar matched offers of respondents National and Eagle-Picher.

Effects of Price Discriminations Practiced by Respondents.

Paragraph Thirteen: The discriminations in price practiced by respondents, as particularized and alleged in Paragraphs Six, Seven, Eight, Nine, Ten and Eleven of this Count II, include the results and effects set forth as follows:

A. The allegations of the results and effects that are made and set out in subparagraphs A, B and C of Paragraph Eleven of Count I hereof are hereby alleged as results and effects of respondents' price discriminations alleged in Paragraphs Six, Seven, Eight, Nine, Ten and Eleven of this Count II, and are hereby incorporated in this subparagraph of this Paragraph Thirteen of Count II to precisely the same extent as though each said subparagraph A, B and C of Paragraph Eleven of Count I, were set forth in full and repeated verbatim as a part hereof;

B. Further effect of the aforesaid discriminations in price by said respondents may be substantially to lessen competition in the sale and distribution of lead pig-
289 ments between said respondents and their competitors, tend to create a monopoly in the line of commerce in which the respondents are engaged and to injure, destroy and prevent competition between said respondents and their competitors in the sale and distribution of lead pigments;

C. Further effects of the aforesaid discriminations in price by said respondents may be substantially to lessen competition between the buyers of lead pigments receiving the lower discriminatory prices from respondents and other buyers competitively engaged with such favored buyers and who pay higher discriminatory prices; tend to create a monopoly in the lines of commerce in which buyers from respondents are engaged; and to injure, destroy and prevent competition in the lines of commerce in which purchasers from respondents engaged as between the beneficiaries of said discriminatory prices and competing buyers who are required to pay the higher discriminatory prices.

Conclusion.

Paragraph Fourteen: Therefore the aforesaid discriminations in price by each of the respondents constitute violations of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (49 Stat. 1526; 15 U. S. C. A., sec. 13, as amended).

Wherefore, the Premises Considered, the Federal Trade Commission on this 12th day of April, A. D. 1946, issues its amended complaint against said respondents.

Notice.

Notice is hereby given you, National Lead Company, a corporation, Eagle-Picher Lead Company, a corporation, Eagle-Picher Sales Company, a corporation, Anaconda Copper Mining Company, a corporation, International Smelting & Refining Company, a corporation, The Sherwin-Williams Company, a corporation, and The Glidden Company, a corporation, respondents herein, that the 17th day of May, A. D., 1946, at 2 o'clock in the afternoon, is hereby fixed as the time, and the offices of the Federal Trade Commission, in the city of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this amended complaint, at which time and 290 place you will have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violations of the law charged in the amended complaint.

You are notified and required, on or before the twentieth day after service upon you of this amended complaint, to file with the Commission an answer to the amended complaint. If answer is filed and if your appearance at the place and on the date above stated be not required, due notice to that effect will be given you. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule IX) provide as follows:

In case of desire to contest the proceeding the respondent shall, within twenty (20) days from the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a concise statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.

* * * * *

Failure of the respondent to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the charges set forth in the complaint.

If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all the material allegations of fact charged in the complaint to be true. Respondent by such answer shall be deemed to have waived a hearing on the allegations of fact set forth in said complaint and to have authorized the Commission, without further evidence, or other intervening procedure, to find such facts to be true.

Contemporaneously with the filing of such answer the respondent may give notice in writing that he desires
291 to be heard on the question as to whether the admitted facts constitute the violation of law charged in the complaint. Pursuant to such notice, the respondent may file a brief, directed solely to that question, in accordance with Rule XXIII.

In Witness Whereof, the Federal Trade Commission has caused this, its amended complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 12th day of April, A.D., 1946.

By the Commission.

Otis B. Johnson,
Secretary.

* * * * *

296 UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

* * (Caption—5253) * *

ANSWER OF RESPONDENT, NATIONAL LEAD COMPANY, TO AMENDED COMPLAINT.

(Received May 27, 1946.)

Comes now the respondent, National Lead Company, by its attorneys, Alexander & Green, and reserving the right to move to dismiss the amended complaint herein for lack of jurisdiction and all rights to object to lack of jurisdiction herein, answers the amended complaint of the Federal Trade Commission in the above entitled matter as follows:

Answer to Count I:

1. Answering Paragraph One of Count I of the amended complaint, this respondent states that it is without knowledge of the reason for the belief of the Federal Trade Commission that the parties named in the caption hereof have violated the provisions of Section 5 of the Federal Trade Commission Act, or that a proceeding thereunder would be in the interests of the public, and it hereby denies that it has in any way violated Section 5 or any other provision of the Federal Trade Commission Act or that this proceeding is in the public interest.

2. Answering Paragraph Two of Count I of the amended complaint, this respondent denies the truth of the charges against it therein contained and states that it is without knowledge or information as to any facts forming the basis for the charges against the other respondents.

297 3. Answering the allegation of Paragraph Three of Count I of the amended complaint, this respondent admits that it is a New Jersey corporation, with its principal offices at 111 Broadway, New York, N. Y.

4. Answering the allegations of Paragraph Five of Count I of the amended complaint, this respondent admits: That certain of the respondents herein are engaged in the manufacture, sale and distribution of certain lead pigments in interstate commerce, and that this constitutes an

important item of this respondent's commerce between and among the several States, and that certain of the respondents herein are engaged in the manufacture of paint in which there are used certain of the lead pigments referred to in the amended complaint, and that the paint produced from such lead pigments is held in high esteem by painters and users for application to exteriors of buildings, ships and other structures.

As to the second and third paragraphs of Paragraph Five of Count I, this respondent denies that it has any knowledge or information thereof sufficient to form a belief as to any of the allegations therein contained, except that it admits that respondents, Eagle-Picher Lead Company, or Eagle-Picher Sales Company, have sold or distributed certain lead pigments in commerce, and that at some period respondent, Anaconda Copper Mining Company, or its Division, Anaconda Lead Products Company, or Anaconda Sales Company, or respondent, International Smelting & Refining Company, or some of them, have manufactured and sold certain lead pigments in commerce.

As to the last paragraph of Paragraph Five of Count I, this respondent admits that the total combined production of the producing respondents constitutes a very substantial proportion of all lead pigments produced and sold in the United States, and that the production of this respondent represents approximately 50% of the production of lead pigments of the respondents, but it asserts that it is without knowledge as to the exact proportion of the total produced and sold by respondents other than itself or as to the aggregate production of the other respondents.

298 Except as hereinabove specifically admitted or otherwise denied, this respondent denies each and every allegation contained in Paragraph Five of Count I of the amended complaint.

5. This respondent denies each and every allegation contained in Paragraph Six of Count I of the amended complaint.

6. Answering Paragraph Seven of Count I of the amended complaint, this respondent denies each and every allegation contained in Paragraph Seven A of the amended complaint and in each and every subdivision thereof, except as hereinafter stated. It admits that:

On or about December 8, 1891, it acquired the properties formerly owned by Cornell Lead Co. of Buffalo, N. Y., The National Lead & Oil Co. of New York, N. Y., Atlantic White

Lead & Linseed Oil Co. of New York, N. Y., Salem Lead Co. of Massachusetts, The J. H. Morley Lead Co. of Cleveland, Ohio, The Eckstein White Lead Co. of Cincinnati, Ohio, Anchor White Lead Co. of Cincinnati, Ohio, Maryland White Lead Co. of Baltimore, Maryland, American White Lead Co. of Louisville, Kentucky, Kentucky Lead & Oil Co. of Louisville, Kentucky, Southern White Lead Co. of Chicago, Illinois, D. B. Shipman White Lead Works of Chicago, Illinois, Southern White Lead Company of St. Louis, Missouri, St. Louis Lead and Oil Co. of St. Louis, Missouri, Collier White Lead & Oil Co. of St. Louis, Missouri, and Red Seal Castor Oil Co. of St. Louis, Missouri, together with the following shares of stock in the following companies:

1195	shares	Cornell Lead Co.
9993	shares	The National Lead & Oil Co. of N. Y.
495	shares	Atlantic White Lead & Linseed Oil Co.
670	shares	Salem Lead Co.
1995	shares	The J. H. Morley Lead Co.
6495	shares	The Eckstein White Lead Co.
531	shares	Anchor White Lead Co.
295	shares	Maryland White Lead Co.
950	shares	American White Lead Co.
267	shares	Kentucky Lead & Oil Co.
9995	shares	Southern White Lead Co. of Illinois
2995	shares	D. B. Shipman White Lead Works
299 9993	shares	Southern White Lead Co. of Missouri
2995	shares	St. Louis Lead & Oil Co
993	shares	Collier White Lead & Oil Co.
495	shares	Red Seal Castor Oil Co.,

the sixteen companies whose properties were acquired as aforesaid having been previously engaged in the manufacture, sale and distribution of white lead, linseed oil and kindred products, the stock ownership of which had been in or controlled by the National Lead Trust.

In February, 1906, it acquired all of the stock of United Lead Company, which company was engaged principally in the manufacture, sale and distribution of metallic lead and lead alloy products.

In February, 1907, it acquired all of the stock of the Magnus Metal Company (Magnus Company, Inc.). This company never engaged in the manufacture, sale or distribution of white lead, linseed oil or kindred products.

In March, 1913, it acquired all of the stock of the Heath

& Milligan Manufacturing Company, and in September, 1919, disposed of such stock to The Glidden Company.

In March, 1906, it acquired all of the stock of Carter White Lead Company, which had properties in Chicago, Illinois, and Omaha, Nebraska; in July, 1912, it acquired all of the stock of Matheson Lead Company; in 1915, the River Smelting & Refining Company was organized jointly by National Lead Company and Stone & Webster; in March, 1916, it acquired all of the stock of Bass-Hueter Paint Company; in December, 1917, it organized National Lead Company S. A. (Argentina) as a wholly owned subsidiary; in January, 1919, it acquired the properties and assets of Hirst & Begley Company.

It asserts and represents that prior to January, 1942 the cost of its inventories of corroding quality pig lead and of the lead content of white lead in process and in finished stock was the most important single factor in its determination of its price for white lead and that as to certain of the other lead pigments the price of pig lead was the most important single factor in its determination of its prices for such pigments, and that since January, 1942, its prices for lead pigments have been controlled by the Office of Price Administration.

300 As to Paragraph Seven B of Count I of the amended complaint, this respondent denies each and every allegation contained therein and in each and every subdivision thereof.

7. This respondent denies each and every allegation contained in Paragraph Eight of Count I of the amended complaint and each of its subdivisions except as hereinafter stated. This respondent quotes delivered prices for certain of its lead pigment products, which vary as between certain geographical areas, sometimes referred to as zones. Its said delivered prices within certain areas are the same irrespective of variations in transportation cost between this respondent's plants and customer locations.

As to subdivision A of Paragraph Eight of Count I of the amended complaint, it admits that the variations in its delivered prices of lead pigments in steel kegs of 100 pounds or less correspond generally to those shown on the map referred to in said subdivision A of Paragraph Eight, but denies that said price variations are identical with those shown upon said map and asserts that the zones or territories or geographical areas shown on said map while corresponding generally with those used as the basis for this respondent's delivered prices are not identical.

As to subdivision B of Paragraph Eight of Count I of the amended complaint, this respondent admits that in offering for sale and selling dry white lead and lead sulphate in barrels or in bags it quotes and sells at the same delivered price to all customers in the par or base zone and at a delivered price of 25¢ per 100 pounds more than the par or base price to customers located in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming, the par or base zone comprising all other States than those just named.

As to subdivision C of Paragraph Eight of Count I of the amended complaint, this respondent admits that in offering for sale and selling dry red lead and litharge in barrels or bags in less-than-carload lots, it quotes and sells at the same delivered price to customers within the par or base zone; at a delivered price of 25¢ per 100 pounds more than the par or base price to customers in Alabama, 301 California, Florida, Georgia, Louisiana, Mississippi, Texas and west of the Cascade Mountains in Oregon and Washington; at a delivered price of 50¢ per 100 pounds more than the par or base price to customers in Colorado, Montana, New Mexico and Wyoming; at a delivered price of 75¢ per 100 pounds more than the par or base price to customers in Arizona, Idaho, Nevada, Utah and east of the Cascade Mountains in Oregon and Washington. The par or base zone comprises all other States than those named.

As to subdivision D of Paragraph Eight of Count I of the amended complaint, this respondent admits that in offering for sale and selling dry red lead and litharge in barrels or bags in carload lots of 20 tons or more, it has offered to sell dry red lead at a delivered price of $2.50 and litharge at a delivered price of $1.50 per 100 pounds more than the American Smelting and Refining Company's closing price of common pig lead at New York on the date the order is received, to customers located in the par or base zone and at a delivered price of 25¢ per 100 pounds more than the par or base price to customers located in Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, Montana, Nevada, New Mexico, Texas, Utah, Wyoming and east of the Cascade Mountains in Oregon and Washington. The par or base zone comprises all other States and areas than those named.

8. This respondent denies each and every allegation contained in Paragraph Nine of Count I of the amended complaint and in each and every subdivision thereof, except that it admits that in respect to white lead-in-oil it has in the past entered into certain agency contracts, for the terms and conditions of which it begs leave to refer to the originals of such contracts as may be produced upon the hearing of this proceeding, and it has sold lead pigments at container differentials on keg products as set forth in subdivision B of said Paragraph Nine; that as to subdivision C of said Paragraph Nine in the past this respondent did from time to time enter into certain quarterly contracts for the sale of certain lead pigments to certain paint and other manufacturers and large industrial or other concerns for their own use, in which quarterly contracts the terms 302 of sale, to-wit, delivery, grades and qualities of lead pigments and the prices thereof, were set forth, and for the exact terms and conditions thereof it begs leave to refer to the originals of any such contracts as may be produced upon the hearing of this proceeding.

9. This respondent denies each and every allegation contained in Paragraphs Ten, Eleven and Twelve of Count I of the amended complaint.

Answer to Count II:

10. Answering Paragraph One of Count II of the amended complaint, this respondent states that it is without knowledge or information as to the reason for the belief of the Federal Trade Commission that the respondents have violated the provisions of the Clayton Act, as amended by the Robinson-Patman Act, as therein alleged, and it hereby denies that it has violated the provisions of the Clayton Act, as amended by the Robinson-Patman Act, or that this proceeding is in the public interest.

11. With respect to Paragraph Two of Count II of the amended complaint, this respondent denies the truth of the charges against it therein contained.

12. With respect to Paragraphs Three to Five inclusive of Count II of the amended complaint, this respondent repeats and incorporates herein its answer to Paragraphs Three to Five of Count I of the amended complaint as fully as if again set forth verbatim.

13. This respondent denies each and every allegation

contained in Paragraph Six of Count II of the amended complaint insofar as the same relate to it.

14. This respondent denies each and every allegation contained in Paragraph Seven of Count II of the amended complaint insofar as the same relate to it except as hereinafter stated. This respondent quotes delivered prices
303 for lead pigments sold by it which vary in different geographical areas, sometimes referred to as zones. The variations in delivered prices correspond generally to those shown on the map referred to in said paragraph of the amended complaint although they are not identical therewith, and the same is true with respect to geographical areas involved in this respondent's quotation of delivered prices as far as the said map is concerned.

15. This respondent denies each and every allegation contained in Paragraph Eight of Count II of the amended complaint insofar as the same relate to it, except that it admits that in the delivered prices quoted by it for its lead pigments the prices quoted throughout a certain geographical area will be the same throughout that area notwithstanding the fact that there may be variations in the cost of freight to deliver to a customer in one part of the geographical area as compared with delivery to another customer in another part of the area. The price quoted a customer located at or near its plants is the same as that quoted a comparable customer located at a more distant point in the same geographical area.

16. This respondent denies each and every allegation contained in Paragraph Nine of Count II of the amended complaint insofar as the same relate to it.

17. This respondent denies each and every allegation contained in Paragraph Ten of Count II of the amended complaint insofar as the same relate to it, except that it states that, if there are sales by this respondent to customers in its different geographical areas or zones located at or near the boundary dividing said areas, this respondent's delivered prices to purchasers in one area near the boundary are higher than its delivered prices to purchasers in the other area contiguous to the boundary.

18. This respondent denies each and every allegation contained in Paragraph Eleven of Count II of the amended complaint but states that it has certain price classifications which make due and proper allowance for differences in
304 the cost of sale and delivery resulting from differences

in the methods or quantities in which such lead pigments are sold and delivered.

19. This respondent denies each and every allegation contained in Paragraphs Twelve, Thirteen and Fourteen of Count II of the amended complaint.

Special Defense.

20. Further answering and for a special defense to the amended complaint, National Lead Company alleges that with respect to lead pigments the pricing methods adopted by it and the prices quoted and obtained by it, have been adopted and quoted by it in good faith, and that said prices are established by it on the basis of actual and anticipated costs of manufacture and costs of distribution with due consideration being given to competitive factors within and without the industry including, among others, such factors as the production and sale of other pigments and ready mixed paints.

Wherefore this respondent respectfully prays that the amended complaint herein be dismissed.

National Lead Company,
Harold Rowe,
Vice-President.

Alexander & Green,
Attorneys for Respondent,
National Lead Company,
120 Broadway,
New York 5, N. Y.

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305. UNITED STATES OF AMERICA.

BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

ANSWER.

(Received May 27, 1946.)

And now come The Eagle-Picher Company and The Eagle-Picher Sales Company and without waiving their right to object to the jurisdiction of the Federal Trade Commission over the subject matter of the Complaint make Answer to the Complaint as follows:

Count I.

1. Paragraph One of the Complaint is denied.

2. Paragraph Two of the Complaint is denied.

3. Paragraph Three of the Complaint is admitted except that The Eagle-Picher Lead Company changed its name to The Eagle Picher Company on April 12, 1945 and the address of this respondent and The Eagle Picher Sales Company is American Building, Cincinnati, Ohio.

4. Paragraph Four of the Complaint is admitted.

5. Paragraph Five of the Complaint is admitted except for the last two lines thereof.

6. Paragraph Six of the Complaint is denied.

7. Paragraph Seven A of the Complaint is admitted save for sub-paragraph (6) which is denied.

306 8. Paragraph Seven B of the Complaint is denied save for sub-paragraph (7) in respect to which these respondents are uninformed.

9. Paragraph Eight of the Complaint is denied subject to the qualification that these respondents are not reliably informed in respect to the sales practice of each other respondent. Also, prices are determined with respect to transportation costs, among other things, and no price is set "irrespective to transportation costs".

10. Paragraph Eight A is denied subject to the qualification that these respondents are not reliably informed in respect to the sales practice of each other respondent. Also these respondents sell white lead in oil, but not their other products, in the manner already stipulated in this case.

11. Paragraph Eight B is denied subject to the qualification that these respondents are not reliably informed in respect to the sales practice of each other respondent. Also these respondents do not sell the specified products or either of them in barrels or in the states of California, Oregon, and Washington.

12. Paragraph Eight C is denied subject to the qualification that these respondents are not reliably informed in respect to the sales practice of each other respondent. Also the allegations are untrue with respect to all products other than red lead and litharge and these are not sold in bags.

13. Paragraph Eight D is denied subject to the qualification that these respondents are not reliably informed
307 in respect to the sales practice of each other respondent. Also red lead and litharge are not sold in bags;

Arkansas and Oklahoma are in the par zone and the entire states of California, Oregon, and Washington are in the same zone with Alabama, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, Montana, Nevada, New Mexico, Texas, Utah, and Wyoming. Moreover, the date the order is received is not the criterion of the price; this is now determined by the date of shipment and previously the customer had the option of choosing between the spot price and the average for the month preceding shipment.

14. Paragraph Nine A is denied subject to the qualification that these respondents are not reliably informed in respect to the sales practice of each other respondent.

15. Paragraph Nine B is denied subject to the qualification that these respondents are not reliably informed in respect to the sales practice of each other respondent. The allegation is true only in respect to the sale of red lead, litharge, and white lead in oil by these respondents, except for the fact that red lead and litharge are not sold in 12½ pound kegs and white lead in oil is also sold in 5 and 1 pound containers.

16. Paragraph Nine C is denied subject to the qualification that these respondents are not reliably informed in respect to the sales practice of each other respondent.
308 However, these respondents have, in the past, utilized written instruments, often colloquially designated contracts by laymen, which performed the function of roughly forecasting quarterly business. The prices indicated by such instruments were those in effect at the commencement of the quarter which were to be altered during the quarter to give the customer the benefit of any lower price announced during the quarter, the initial price constituting the ceiling price for the period.

17. Paragraph Nine D is denied subject to the qualification that these respondents are not reliably informed in respect to the sales practice of each other respondent.

18. Paragraph Ten is denied.

19. Paragraph Eleven is denied.

20. Paragraph Twelve is denied.

Count II.

21. Paragraph One is denied.

22. Paragraph Two is denied.

23. In respect to Paragraphs Three to Five inclusive, the answers thereto, in Count I, are repeated.

24. Paragraph Six is denied.

25. Paragraph Seven is denied subject to the qualification that these respondents are not reliably informed in respect to the sales practice of each other respondent.

26. Paragraph Eight is denied subject to the qualifica-
tion that these respondents are not reliably informed in
309 respect to the sales practice of each other respondent.
These respondents acknowledge selling various prod-
ucts each at a uniform delivered price in a zone applicable
to such product.

27. Paragraph Nine is denied subject to the qualification that these respondents are not reliably informed in respect to the sales practice of each other respondent..

28. Paragraph Ten is denied subject to the qualification that these respondents are not reliably informed in respect to the sales practice of each other respondent. Respondents sell at different prices in different zones without discrimination.

29. Paragraph Eleven is denied subject to the qualification that these respondents are not reliably informed in respect to the sales practice of each other respondent. Respondents deviate from the prices quoted sporadically and for lawful purposes, but do not do so systematically, or according to plan.

30. Paragraph Twelve is denied.

31. Paragraph Thirteen is denied.

32. Paragraph Fourteen is denied.

Affirmative Defense.

These respondents assert that they obeyed and conformed
to the National Recovery Act from the time of its passage
until it was declared unconstitutional at which time they
ceased all collaboration with their competitors includ-
310 ing the other respondents in this action and since have
pursued wholly individualistic sales policies. Further,
these respondents aver that the delivery of goods and mer-
chandise sold in commerce from the buyer to the seller is
an inherently necessary function which must be performed
either by the seller or the buyer; custom in the different
industries has determined which performed the function.
These respondents maintain a substantial and able traffic
department which is more capable of performing the de-
livery service more economically than a majority of the
customers of the respondents. This service is performed

by these respondents for all customers uniformly upon an equal price basis. Further, the delivered price selling, zoned or otherwise, promotes competition among the pigment manufacturers and among their customers and the delivery function cannot be transposed from the sellers to the buyers without disturbing established competition which evolved legally, without creating inequities due to the happenstances of customers' locations in respect to those of pigment plants and without violating the very statutes under which this action is brought.

Wherefore these respondents respectfully pray that the Complaint herein be dismissed.

The Eagle-Picher Sales Company,
By Edmund P. Wood.
The Eagle-Picher Company,
By Edmund P. Wood.

311 UNITED STATES OF AMERICA.

BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

ANSWER OF ANACONDA COPPER MINING COMPANY TO AMENDED COMPLAINT.

(Received May 27, 1946.)

The respondent Anacoda Copper Mining Company, by its attorneys, reserving all rights to object to lack of jurisdiction herein, answering the Amended Complaint herein:

Paragraph One: States that it is without knowledge of the reason for the belief of the Federal Trade Commission as alleged in Paragraph One of Count I of the Amended Complaint that the parties named in the caption hereof have violated the provisions of Section 5 of the Federal Trade Commission Act, or that a proceeding thereunder would be in the interests of the public, and it hereby denies that it has in any way violated Section 5 or any other provision of the Federal Trade Commission Act or that this proceeding is in the public interest.

312 Paragraph Two: States, with respect to Paragraph Two of Count I of the Amended Complaint, that it is without knowledge or information as to any facts forming

the basis for the charge that the respondent National Lead Company has monopolized or attempted to monopolize the interstate sale of lead pigments and that it has acted unlawfully to secure a monopolistic control over the prices of lead pigments in the United States.

Respondent denies the truth of the charge of having combined, conspired and cooperated with the other respondents to hinder, lessen and eliminate price competition in the sale of lead pigments in the United States.

Respondent denies the truth of the charge that it is using or has used unfair, oppressive and discriminatory acts, methods and practices in connection with the sale of lead pigments in the United States.

Paragraph Three: With respect to the allegations of Paragraph Three of Count I of the Amended Complaint, respondent admits that it is a Montana corporation, with an office at 25 Broadway, New York, N. Y. and that respondent International Smelting & Refining Company,
313 a wholly owned subsidiary, is a Montana corporation
with an office at 25 Broadway, New York, N. Y..

Respondent states that it is without knowledge or information as to the truth of the allegations contained in Paragraph Three of Count I of the Amended Complaint with respect to respondents other than itself and International Smelting & Refining Company.

Paragraph Four: Respondent admits the allegations contained in Paragraph Four A and B of Count I of the Amended Complaint, but denies that any of the terms as defined and explained therein have any application to any transactions or activities of this respondent.

Respondent states that it is without knowledge or information as to the truth of the averments contained in Paragraph Four C of Count I of the Amended Complaint.

Paragraph Five: With respect to the allegations of Paragraph Five of Count I of the Amended Complaint, respondent admits:

That certain of respondents herein other than itself are engaged in the manufacture, sale and distribution of lead pigments in interstate commerce; that respondents National Lead Company and Eagle-Picher Lead Com-
314 pany are engaged in the use of lead pigments in the
manufacture of paint; that lead pigments are an important item of commerce between and among several States; that lead pigments are a principal item used in the manufacture of paint; that the paint produced from such

pigments is held in high esteem by builders and users as of the highest quality for application to exteriors of buildings, ships and other structures; that lead pigments have other important industrial and commercial uses. Respondent is without knowledge as to whether Sherwin-Williams and Glidden manufacture paint.

It is without knowledge as to the period covered by the Amended Complaint during which respondent Eagle-Picher Lead Company directly sold and distributed lead pigments in commerce, or as to whether or when it sold such lead pigments in commerce indirectly through any subsidiary.

It denies that in any period covered by the Amended Complaint it either produced or distributed lead pigments in commerce.

It admits that Anaconda Lead Products Company was a partly owned subsidiary and until in or about 1936 was engaged in the production and distribution of some lead pigments.

315 It admits that respondent International Smelting & Refining Company has produced and distributed some lead pigments, and that its subsidiary Anaconda Sales Company, Pigments Division, has sold lead pigments obtained from respondent International Smelting & Refining Company.

Respondent is without knowledge or information as to whether the total combined production of the producing respondents constitutes a very substantial proportion of all of the lead pigments produced and sold in the United States. The production and sale of lead pigments by respondent International Smelting & Refining Company constitute a small proportion of the total produced and sold in the United States. Respondent is without knowledge or information as to the exact proportions of the total produced and sold by the respondents other than International Smelting & Refining Company. Respondent is without knowledge or information as to whether the production and distribution of pig lead, from which lead pigments are produced, is concentrated in the hands of a few corporations, including respondents National and Eagle-Picher.

Other than as above referred to by admission, de-
316 nial or denial of knowledge and information, respondent denies the allegations contained in Paragraph Five of Count I of the Amended Complaint.

Paragraph Six: Denies each and every allegation contained in Paragraph Six of Count I of the Amended Complaint.

Paragraph Seven: Respondent states that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph Seven; Seven A; Seven A (1), (2), (3), (4), (5), (6), (7) and (8) of Count I of the Amended Complaint.

Respondent denies each and every allegation contained in Paragraph Seven B; Seven B (1), (2), (3), (4), (5) and (6) of Count I of the Amended Complaint, and Seven B (7) in so far as it is alleged that said Seven B (7) was done with the cooperation and assistance of this respondent; otherwise respondent is without knowledge or information sufficient to form a belief as to the truth of the averments in said Paragraph Seven B (7).

Paragraph Eight: Denies each and every allegation contained in Paragraph Eight and Eight A, B, C and 317 D of Count I of the Amended Complaint, and alleges that respondent International Smelting & Refining Company quotes delivered prices for its products, dry white lead and white lead-in-oil; that said delivered prices vary as between certain geographical areas, sometimes referred to as zones; that such delivered prices are the same within certain areas notwithstanding some variations in freight rates between International Smelting & Refining Company's mill and the customer's location in certain areas; that the variations in delivered prices quoted by International Smelting & Refining Comapny on its lead pigments in steel kegs of 100 pounds or less correspond substantially to those shown on the map referred to in Paragraph Eight A of Count I of the Amended Complaint but are not identical therewith; that the variations in delivered prices quoted by International Smelting & Refining Company on dry white lead correspond substantially to those alleged in Paragraph Eight B of Count I of the Amended Complaint but are not identical therewith.

That the delivered prices quoted by respondent International Smelting & Refining Company are calculated in terms of differentials above a par price in par territory; that the delivered prices quoted by respondent International Smelting & Refining Company are not the same 318 as those quoted by its competitors, including the other respondents named in this proceeding, in so far as is known to it; that prices quoted by respondent International Smelting & Refining Company and the pricing methods adopted by it have been quoted and adopted in good faith in order to meet the competition of other sellers of lead pigments who were at the same time offering and selling in the areas in which it does business competitive lead pigment products of similar quantities and grades; that certain customers located at or near respondent International Smelting & Refining Company's factory are charged the same price as certain customers located at a greater distance.

Paragraph Nine: Respondent denies each and every allegation contained in Paragraph Nine and Nine A, B, C and D of Count I of the Amended Complaint, and states that International Smelting & Refining Company quotes standard container differentials on keg products; that said differentials make only due allowance for differences in the cost of manufacture resulting from differing methods or quantities in which such commodities are to such purchasers sold or delivered; that International Smelting & Refining Company, in connection with the sale and distribution of its lead pigments to paint manufacturers
319 and large industrial consumers sometimes, but not always, enters into contracts covering the terms of sale or delivery of said lead pigments at current published quotations; that International Smelting & Refining Company issues certain cards or lists of proposed prices but not for the purpose of requiring adherence thereto by others nor for the purpose of matching said prices with others; that respondent is informed and believes that dealers purchasing International Smelting & Refining Company's lead pigments frequently sell the same at the same price to their customers as they sell the lead pigments of certain other respondents.

Paragraph Ten: Respondent denies each and every allegation contained in Paragraph Ten of Count I of the Amended Complaint.

Paragraph Eleven: Respondent denies each and every allegation contained in Paragraph Eleven of Count I of the Amended Complaint.

Paragraph Twelve: Respondent denies each and every allegation contained in Paragraph Twelve of Count I of the Amended Complaint.

Paragraph Thirteen: Respondent states that it
320 is without knowledge or information as to the reason
for the belief of the Federal Trade Commission that the respondents have violated the provisions of the Clayton Act, as amended by the Robinson-Patman Act, as alleged in Paragraph One of Count II of the Amended Complaint, and hereby denies that it has violated the provisions of the Clayton Act, as amended by the Robinson-Patman Act, or that this proceeding is in the public interest.

Paragraph Fourteen: With respect to the allegations of Paragraph Two of Count II of the Amended Complaint, respondent denies that during any period covered by the Amended Complaint it has either sold or distributed lead pigments, and therefore denies it has ever unlawfully discriminated in any way as between customers in the sale of lead pigments.

Paragraph Fifteen: With respect to Paragraphs Three to Five, inclusive, of Count II of the Amended Complaint, respondent repeats and incorporates herein its answer to Paragraphs Three to Five of Count I of the Amended Complaint as fully ~~as if~~ set forth verbatim hereat; and as to the definition of the term "commerce," it states that it is without knowledge or information sufficient to form a belief
321 as to the truth of the averments with respect thereto
contained in said Paragraphs Three to Five, inclusive, of Count II of the Amended Complaint.

Paragraph Sixteen: Denies each and every allegation contained in Paragraph Six of Count II of the Amended Complaint, in so far as said allegations relate to it.

Paragraph Seventeen: Denies each and every allegation contained in Paragraph Seven of Count II of the Amended Complaint and incorporates hereat, in so far as applicable, the allegations made in Paragraph Eight above.

Paragraph Eighteen: With respect to the allegations contained in Paragraph Eight of Count II of the Amended Complaint, respondent states that delivered prices within certain areas quoted by respondent International Smelting & Refining Company are the same throughout the area notwithstanding that there may be variations in the cost of freight to deliver to one customer in one part of the area as against another customer in another part of the area; and that the price quoted a customer located at or near

International Smelting & Refining Company's mill may
322 be the same as the price quoted a customer located at a distant point in said area. All prices quoted by International Smelting & Refining Company are to meet competition; otherwise it denies the allegations contained in said Paragraph Eight.

Paragraph Nineteen: Denies each and every allegation contained in Paragraph Nine of Count II of the Amended Complaint in so far as said allegations relate to it.

Paragraph Twenty: With respect to the allegations contained in Paragraph Ten of Count II of the Amended Complaint, respondent states that when sales are made by International Smelting & Refining Company to customers in different areas, located at or near the boundary between said areas, delivered prices to purchasers in one area near said boundary may be higher than delivered prices to purchasers in the other area contiguous to said boundary; otherwise denies the allegations contained in said Paragraph Ten in so far as the same relate to it.

Paragraph Twenty-One: Denies each and every allegation contained in Paragraph Eleven of Count II of the Amended Complaint but states that International Smelting & Refining Company classifies certain non-
323 competitive customers such as railroads, dealers and industrial users, and that it makes due allowance for differences in the cost of sale and delivery resulting from different quantities in which lead pigments are purchased by certain purchasers in certain areas.

Paragraph Twenty-Two: Denies each and every allegation contained in Paragraphs Twelve, Thirteen and Fourteen of Count II of the Amended Complaint.

Wherefore respondent respectfully prays that the Amended Complaint herein be dismissed.

Chadbourne, Wallace, Parke & Whiteside,
By Horace G. Hitchcock,
No. 25 Broadway,
Borough of Manhattan,
New York 4, N. Y.
Attorneys for Respondent, Anaconda Copper Mining Company.

324 UNITED STATES OF AMERICA.

BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

ANSWER OF INTERNATIONAL SMELTING AND REFINING COMPANY TO AMENDED COMPLAINT.

(Received May 27, 1946.)

The respondent International Smelting and Refining Company, by its attorneys, reserving all rights to object to lack of jurisdiction herein, answering the Amended Complaint herein:

Paragraph One: States that it is without knowledge of the reason for the belief of the Federal Trade Commission as alleged in Paragraph One of Count I of the Amended Complaint that the parties named in the caption hereof have violated the provisions of Section 5 of the Federal Trade Commission Act, or that a proceeding
325 thereunder would be in the interests of the public,
and it hereby denies that it has in any way violated Section 5 or any other provision of the Federal Trade Commission Act or that this proceeding is in the public interest.

Paragraph Two: States, with respect to Paragraph Two of Count I of the Amended Complaint, that it is without knowledge or information as to any facts forming the basis for the charge that the respondent National Lead Company has monopolized or attempted to monopolize the interstate sale of lead pigments and that it has acted unlawfully to secure a monopolistic control over the prices of lead pigments in the United States.

Respondent denies the truth of the charge of having combined, conspired and cooperated with the other respondents to hinder, lessen and eliminate price competition in the sale of lead pigments in the United States.

Respondent denies the truth of the charge that it is using or has used unfair, oppressive and discriminatory acts, methods and practices in connection with the sale of lead pigments in the United States.

326 Paragraph Three: With respect to the allegations
of Paragraph Three of Count I of the Amended Complaint, respondent admits that Anaconda Copper Mining

Company is a Montana corporation with an office at 25 Broadway, New York, N. Y., and that it is a Montana corporation with an office at 25 Broadway, New York, N. Y., and that it is a wholly owned subsidiary of Anaconda Copper Mining Company.

Respondent states that it is without knowledge or information as to the truth of the allegations contained in Paragraph Three of Count I of the Amended Complaint with respect to other respondents herein.

Paragraph Four: Respondent admits the allegations contained in Paragraph Four A and B of Count I of the Amended Complaint, but, except as hereinafter admitted, denies that any of the terms as defined and explained therein have any application to any transactions or activities of this respondent.

Respondent states that it is without knowledge or information as to the truth of the averments contained in Paragraph Four C of Count I of the Amended Complaint.

327 Paragraph Five: With respect to the allegations of Paragraph Five of Count I of the Amended Complaint, respondent admits:

That certain of the respondents herein are engaged in the manufacture, sale and distribution of lead pigments in interstate commerce; that respondents National Lead Company and Eagle-Picher Lead Company are engaged in the use of lead pigments in the manufacture of paint; that lead pigments are an important item of commerce between and among the several States; that lead pigments the use of lead pigments in the manufacture of paint; that the paint produced from such pigments is held in high esteem by builders and users as of the highest quality for application to exteriors of buildings, ships and other structures; that lead pigments have other important industrial and commercial uses. Respondent is without knowledge as to whether Sherwin-Williams and Glidden manufacture paint.

It is without knowledge as to the period covered by the Amended Complaint during which respondent Eagle-Picher Lead Company directly sold and distributed lead pigments in commerce, or as to whether or when it sold such lead pigments in commerce indirectly through any subsidiary.

328 It denies that at any period covered by the Amended Complaint, Anaconda Copper Mining Company either produced or distributed lead pigments.

It admits that Anaconda Lead Products Company was a partly owned subsidiary of Anaconda Copper Mining Company and until in or about 1936 was engaged in the production and distribution of some lead pigments.

It admits that respondent has produced and distributed some lead pigments and that Anaconda Sales Company, Pigments Division, a subsidiary of Anaconda Copper Mining Company, has sold lead pigments obtained from respondent.

Respondent is without knowledge or information as to whether the total combined production of the producing respondents constitutes a very substantial proportion of all the lead pigments produced and sold in the United States. The production and sale of lead pigments by respondent constitutes a small proportion of the total produced and sold in the United States. Respondent is without knowledge or information as to the exact proportions of the total produced and sold by the respondents other than itself. Respondent is without knowledge or information as to whether the production and distribution of pig lead, from which lead pigments are produced, is con-
329 centrated in the hands of a few corporations, including respondents National and Eagle-Picher.

Other than as above referred to by admission, denial, or denial of knowledge and information, respondent denies the allegations contained in Paragraph Five of Count I of the Amended Complaint.

Paragraph Six: Denies each and every allegation contained in Paragraph Six of Count I of the Amended Complaint.

Paragraph Seven: Respondent states that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph Seven; Seven A (1), (2), (3), (4), (5), (6), (7) and (8) of Count I of the Amended Complaint.

Respondent denies each and every allegation contained in Paragraph Seven B; Seven B(1), (2), (3), (4), (5), and (6) of Count I of the Amended Complaint, and Seven B (7) in so far as it is alleged that said Seven B (7) was done with the cooperation and assistance of this respondent; otherwise respondent is without knowledge or information sufficient to form a belief as to the truth of the averments in said Paragraph Seven B (7).

330 Paragraph Eight: Denies each and every allegation contained in Paragraph Eight and Eight A, B,

C, and D of Count I of the Amended Complaint, except as is hereinafter admitted, and alleges that respondent quotes delivered prices for its products, dry white lead and white lead-in-oil, that said delivered prices vary as between certain geographical areas, sometimes referred to as zones; that such delivered prices are the same within certain areas notwithstanding some variations in freight rates in certain areas between respondent's mill and the customer's location; that the variations in delivered prices quoted by respondent on its lead pigments in steel kegs of 100 pounds or less correspond substantially to those shown on the map referred to in Paragraph Eight A of Count I of the Amended Complaint but are not identical therewith; that the variations in delivered prices quoted by respondent on dry white lead correspond substantially to those alleged in Paragraph Eight B of Count I of the Amended Complaint but are not identical therewith; that the delivered prices quoted by respondent are calculated in terms of differentials above a par price in par territory; that the delivered prices quoted by respondent are not the same as those quoted by its competitors, including the other respondents named in this proceeding, in so far as is
331 known to it; that prices quoted by respondent and the pricing methods adopted by it have been quoted and adopted in good faith in order to meet the competition of other sellers of lead pigments who were at the same time offering and selling in the areas in which it does business competitive lead pigment products of similar quantities and grades; that certain customers located at or near respondent's factory are charged the same prices as certain customers located at a greater distance.

Paragraph Nine: Respondent denies each and every allegation contained in Paragraph Nine, Nine A, B, C and D of Count I of the Amended Complaint, except as is hereinafter admitted, and alleges that respondent quotes standard container differentials on keg products; that said differentials make only due allowance for differences in the cost of manufacture resulting from differing methods or quantities in which such commodities are to such purchasers sold or delivered; that respondent in connection with the sale and distribution of its lead pigments to paint manufacturers and large industrial consumers sometimes, but not always, enters into contracts covering the terms of sale or delivery of said lead pigments at current published quotations; that respondent issues certain 332 cards or lists of proposed prices but not for the purpose of requiring adherence thereto by others nor for the purpose of matching said prices with others; that respondent is informed and believes that dealers purchasing its lead pigments frequently sell the same at the same price to their customers as they sell the lead pigments of certain other respondents.

Paragraph Ten: Respondent denies each and every allegation contained in Paragraph Ten of Count I of the Amended Complaint.

Paragraph Eleven: Respondent denies each and every allegation contained in Paragraph Eleven of Count I of the Amended Complaint.

Paragraph Twelve: Respondent denies each and every allegation contained in Paragraph Twelve of Count I of the Amended Complaint.

Paragraph Thirteen: Respondent states that it is without knowledge or information as to the reason for the belief of the Federal Trade Commission that the respondents have violated the provisions of the Clayton Act, as amended by the Robinson-Patman Act, as alleged in Paragraph One of Count II of the Amended Complaint, and hereby denies that it has violated the provisions of 333 the Clayton Act, as amended by the Robinson-Patman Act, or that this proceeding is in the public interest.

Paragraph Fourteen: With respect to the allegations of Paragraph Two of Count II of the Amended Complaint, respondent denies the truth of any charges that it has been or now is unlawfully discriminating as between its customers in the price it charges, demands, accepts and receives in connection with the sale of lead pigments in commerce.

Paragraph Fifteen: With respect to Paragraphs Three to Five, inclusive, of Count II of the Amended Complaint, respondent repeats and incorporates herein its answer to Paragraphs Three to Five of Count I of the Amended Complaint as fully as if set forth verbatim hereat, and as to the definition of the term "commerce," it states that it is without knowledge or information sufficient to form a belief as to the truth of the averments with respect thereto contained in said Paragraphs Three to Five, inclusive, of Count II of the Amended Complaint.

Paragraph Sixteen: Denies each and every allegation contained in Paragraph Six of Count II of the
334 Amended Complaint in so far as said allegations relate to it.

Paragraph Seventeen: Denies each and every allegation contained in Paragraph Seven of Count II of the Amended Complaint, and incorporates hereat, in so far as applicable, the allegations made in Paragraph Eight above.

Paragraph Eighteen: With respect to the allegations contained in Paragraph Eight of Count II of the Amended Complaint, respondent states that delivered prices within certain areas quoted by it are the same throughout the area notwithstanding that there may be variations in the cost of freight to deliver to one customer in one part of the area as against another customer in another part of the area and that the price quoted a customer located at or near its mill may be the same as a price quoted a customer located at a distant point in said area. All prices quoted by it are to meet competition; otherwise it denies the allegations contained in said Paragraph Eight.

Paragraph Nineteen: Denies each and every allegation contained in Paragraph Nine of Count II of the Amended Complaint in so far as said allegations re-
335 late to it.

Paragraph Twenty: With respect to the allegations contained in Paragraph Ten of Count II of the Amended Complaint, respondent states that when sales are made to customers in different areas, located at or near the boundary between said areas, delivered prices to purchasers in one area near said boundary may be higher than delivered prices to purchasers in the other area contiguous to said boundary; otherwise denies the allegations contained in said Paragraph Ten in so far as the same relate to it.

Paragraph Twenty-One: Denies each and every allegation contained in Paragraph Eleven of Count II of the Amended Complaint but states that it classifies certain non-competitive customers such as railroads, dealers, and industrial users and that it makes due allowance for differences in the cost of sale and delivery resulting from different quantities ~~in which~~ lead pigments are purchased by certain purchasers in certain areas.

Paragraph Twenty-Two: Denies each and every alle-

gation contained in Paragraphs Twelve, Thirteen and
336 Fourteen of Count II of the Amended Complaint.

Wherefore respondent respectfully prays that the Complaint herein be dismissed.

Chadbourne, Wallace, Parke & Whiteside,
Attorneys for Respondent,
International Smelting and Refining Company
By Horace G. Hitchcock
Office and P. O. Address,
No. 25 Broadway,
New York 4, N. Y.

* * * * *

352 UNITED STATES OF AMERICA,

BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

ANSWER OF THE SHERWIN-WILLIAMS COMPANY

(Received May 28, 1946)

Comes now respondent, The Sherwin-Williams Company, by its attorneys, Davies, Richberg, Beebe, Busick & Richardson, 815 Fifteenth Street, N. W., Washington 5, D. C., and T. J. McDowell, 101 Prospect Avenue, N.W., Cleveland, Ohio, and makes this its answer to the amended complaint issued by the Federal Trade Commission on the 12th day of April, 1946:

Count I.

Paragraph One—For answer to Paragraph One of Count I, The Sherwin-Williams Company states it is without knowledge or information as to the reasons for the Commission's belief that it and the other respondents named in the Amended Complaint herein have violated the provisions of Section Five of the Federal Trade Commission Act and that a proceeding thereunder is in the interest of the public. It denies, however, that it has in any way violated any of the provisions of the Federal Trade Commission Act or that this proceeding is in the interest of the public and demands strict proof thereof.

353 Paragraph Two—For answer to Paragraph Two of

Count I, The Sherwin-Williams Company denies that it has in any way combined, conspired, or cooperated with the other respondents in this proceeding, or with anyone else, to hinder, lessen or eliminate price competition in the sale of lead pigments in the United States, and further denies that it is using or has used unfair, oppressive or discriminatory acts, methods, or practices in connection with the sale of lead pigments in the United States, and demands strict proof thereof. It is without knowledge or information as to the truth of the allegations set forth in Paragraph Two with respect to practices allegedly pursued by National Lead Company.

Paragraph Three—For answer to Paragraph Three of Count I, The Sherwin-Williams Company admits that it is an Ohio corporation and that its principal offices are located at 101 Prospect Avenue, N. W., Cleveland, Ohio. It is without knowledge or information as to the truth of the allegations set forth in sub-sections (a), (b), (c), (d), (e) and (g) of Paragraph Three.

Paragraph Four—For answer to Paragraph Four of Count I, The Sherwin-Williams Company admits the allegations contained in sub-paragraphs A and B of Paragraph Four.

Paragraph Five—For answer to the first sub-paragraph of Paragraph Five of Count I, The Sherwin-Williams Company admits that it is engaged in the manufacture of dry white lead (basic carbonate), white lead in oil, dry red lead, red lead in oil, and litharge, and in the sale of a portion of its production of such lead pigments in commerce as defined in the Amended Complaint; but denies that it sells blue lead, orange mineral, or grinders lead paste in commerce. It admits that it uses both white lead and red lead in the manufacture of some types of paint, 354 but denies that its use of such lead pigments in the manufacture of paint is pertinent in any way to any of the charges stated in the Amended Complaint. This respondent also admits that white lead, red lead and litharge are important items in commerce, as defined in the Amended Complaint, and that white lead and red lead constitute principal items in the manufacture of certain, but not all, types of paint, and that such paints are held in high esteem as alleged. This respondent avers that the major portion of its production of white lead and red lead is not sold by it, but is used in the manufacture of paint products not involved in this proceeding and that a substantial portion of its remaining production of such lead pigments is sold by it in its own retail stores in transactions which originate and are completed entirely within the confines of a single state and which are not subject to the jurisdiction of the Federal Trade Commission. This respondent avers that its production of litharge is not substantial and is sold, with few exceptions if any, only to large industrial concerns purchasing for use and not for resale.

This respondent is without knowledge or information as to the truth of the allegations in the second and third sub-paragraphs of Paragraph Five which allegations are concerned with alleged activities of respondents other than The Sherwin-Williams Company.

This respondent admits the total combined production of the producing respondents constitutes a very substantial proportion of all lead pigments produced and sold in the United States, but is without knowledge or information as to the exact proportions produced and sold by the other respondents herein. It avers, however, that its sales in commerce as defined in the Amended Complaint of such lead pigments as it does so sell constitutes a very small and negligible part of the total sales of such products by all producers. Except insofar as this respondent
355 has stated that it is without knowledge or information or has admitted the allegations of Paragraph Five it denies all of such allegations and demands strict proof thereof.

Paragraph Six—For answer to Paragraph Six of Count I, The Sherwin-Williams Company specifically denies that it has in any way violated Section Five or any other section of the Federal Trade Commission Act by combining, conspiring or cooperating with any of the other respondents herein or with any other person, firm or corporation for the purpose or with the effect of unlawfully restraining, hindering, suppressing or eliminating competition in the sale of lead pigments in commerce between and among the several states, or by engaging in unfair, oppressive, or discriminatory acts, methods or practices in the sale of lead pigments in such commerce.

Paragraph Seven—For answer to Paragraph Seven of Count I, The Sherwin-Williams Company states that it is without knowledge or information as to the truth of the allegations contained in the first two sentences of Paragraph Seven and in sub-paragraph A thereof, and in subsections 1 to 8, inclusive, of sub-paragraph A thereof, which allegations refer solely to alleged activities of another respondent.

The Sherwin-Williams Company denies each and every allegation of sub-paragraph B of Paragraph Seven, including sub-sections 1 to 7, inclusive, and further denies that it has in any way cooperated with or rendered assistance to any of the other respondents named in this complaint, or with the Lead Industries Association, in doing or performing any of the acts or engaging in any of the methods or practices described in sub-sections 1 to 7, inclusive, of sub-paragraph B of Paragraph Seven, and demands strict proof thereof.

356 Paragraph Eight—For answer to Paragraph Eight of Count I, The Sherwin-Williams Company denies each and every allegation thereof, including those in subparagraphs A through D thereof, except insofar as hereinafter specifically admitted, and demands strict proof thereof. It denies that it has divided the United States into geographical zones of the character described in the Amended Complaint for price quotation purposes, or that it quotes or sells lead pigments to all buyers of the same class located in the same zone, at the same delivered price (misnamed "delivered cost" in the Amended Complaint) irrespective of the location of the buyer within the zone. It avers that as part of its method of arriving at its prices for such lead pigments as it sells it has designated certain cities located in all sections of the United States as "shipping points" and has established warehouses and shipping facilities thereat; that the price quoted at various of such cities is a base or par price and the price quoted at each of the other designated cities includes a differential added to the base or par price which differential varies according to the location of such shipping points; that the shipping points at which the base or par price is applicable and those at which differentials are added may vary depending upon the particular lead pigment being sold, and that its method of arriving at the prices at which it sells lead pigments represents its own individual and independent course of action. It further avers that when orders are received from purchasers shipments in furtherance of such orders are generally made from the shipping point nearest the

purchaser's delivery point, although in some instances shipment is made from its sole factory for manufacturing lead pigments located at Chicago, Illinois; that irrespective of where shipments originate, purchasers pay only the
357 price applicable at the shipping point nearest the ultimate destination plus actual freight or carriage costs therefrom to the purchaser's delivery point, with the result, in the case of shipments from the same shipping point or from shipping points carrying either the base or par price or the same differential above the base or par price, that the actual cost at any destination varies from the cost at any other destination only to the extent of the difference in the applicable freight or carriage costs from such shipping points to the respective destinations; that purchasers accepting delivery at or near any of its many shipping points do, in fact, obtain a lower delivered cost (but not price) than other purchasers located farther, freightwise, from the same shipping point or from any other shipping point having the same applicable price, and that the differentials applied to shipping points other than those which use the base or par price applicable to each type of lead pigment sold are not arbitrary mark-ups, but are applied for the purpose of recouping, in whole or in part, the feright or carriage costs involved in shipping such lead pigments from its only lead pigment plant at Chicago, Illinois, to its various shipping points.

For answer to sub-paragraph A of Paragraph Eight, The Sherwin-Williams Company admits that it sells dry white lead, white lead in oil, dry red lead, red lead in oil, and litharge in steel kegs of one hundred pounds or less upon the basis of price differentials (misnamed "cost differentials" in the Amended Complaint), but avers that its system of adding differentials to the base or par price when shipments are made from some of its shipping points does not coincide with the division indicated in the map forming a part of sub-paragraph A, and is at variance therewith, particularly with respect to portions of the states of
358 California, Oregon, Washington, Idaho, and Nebraska.

For answer to sub-paragraph B of Paragraph Eight, The Sherwin-Williams Company admits that it sells dry white lead in barrels or in bags on a system whereby a differential is added to the base or par price in connection with sales in certain territories, but denies that such territories are properly described. It also avers that it does not sell lead sulphate.

For answer to sub-paragraph C of Paragraph Eight, The Sherwin-Williams Company admits that it sells dry red lead and litharge in barrels or bags in less than carload lots upon a system whereby a differential is added to the base or par price in connection with sales in certain territories, but denies that such territories are properly described. It avers that its total sales of such products in less than carload lots is extremely small. It denies that it sells any lead pigments other than dry white lead, dry red lead, and litharge in barrels or bags.

For answer to sub-paragraph D of Paragraph Eight, The Sherwin-Williams Company admits that in selling dry red lead and litharge in barrels or bags in carload lots of twenty tons or more it sells such products upon a system whereby a differential is added to the base or par price in connection with sales in certain territories, but denies that such territories are properly described. It also denies that its price quotations for such products are at a fixed differential over the American Smelting & Refining Company's closing price of common pig lead at New York on the date the order is received. It avers that dry red lead and litharge are sold only to large industrial users and its price quotations to such customers are based on a differential above the then market price of common pig lead at New York.

359 For further answer to sub-paragraphs B, C, and D of Paragraph Eight, The Sherwin-Williams Company states that its sale of the lead pigments referred to in said sub-paragraphs is negligible.

Paragraph Nine—For answer to Paragraph Nine of Count I, The Sherwin-Williams Company denies each and every allegation thereof, including those in sub-paragraphs A through D thereof, except insofar as herein specifically admitted, and demands strict proof thereof.

For specific answer to sub-paragraph A, the Sherwin-Williams Company denies that it requires its dealer customers who purchase for resale to resell lead pigments bought from it at prices or terms of sale fixed and determined by it, and denies that it is responsible for the price levels for such products beyond its sale thereof to its own customers. It admits that it suggests to its dealers resale prices for sales by such dealers to painters and consumers, but denies that it has any power to require, or exerts any effort toward requiring, that the suggestions be followed, or that it polices in any way the price levels used by such dealers.

For specific answer to sub-paragraph B, The Sherwin-Williams Company admits that in its sale of lead pigments in kegs it charges container differentials, so that the price per hundred pounds, in 50 pound kegs is 25¢ over the price in 100 pound kegs, in 25 pound kegs is 50¢ over the price in 100 pound kegs, and in 12½ pound kegs is 75¢ over the price in 100 pound kegs; but avers that this differential per hundred pounds makes only due allowance for differences in the cost of manufacture, sale and delivery resulting from the different methods and quantities in which such commodities are sold, such as, but not limited to, additional costs incurred in purchasing, filling, and handling the greater number of containers required, per hundred pounds, when sales are made in smaller containers.

For specific answer to sub-paragraph C, the Sherwin-
360 Williams Company denies that it enters into quarterly contracts covering terms of sale and delivery of any lead pigments other than dry white lead. It admits that some of the quarterly contracts negotiated in connection with the sale of dry white lead provide for a price conforming to current published quotations made by it, and that other contracts negotiated for the sale of such products provide for a price at a fixed differential over the then current New York market quotations for common pig lead, but denies that such differentials are based upon the quotations of the American Smelting & Refining Company for common pig lead at New York. It is further admitted that such quarterly contracts establish the grades and qualities of lead pigments covered, the discounts applicable, and the time within which deliveries must be made; but avers that such contracts of this type as it negotiates are entered into as a result of this respondent's individual determination as to the appropriate price and without any direct or implied understanding or agreement of any kind with any of the other respondents herein.

For specific answer to sub-paragraph D, The Sherwin-Williams Company admits that it issues price cards or lists showing quotations on dry white lead, white lead in oil, dry red lead, red lead in oil, and litharge to various classes of customers in various quantities, and admits that such cards or lists are applicable in various geographical areas with price differentials added for areas served by shipping

points other than those using the base or par price; but denies that such cards or lists show delivered quotations on the lead pigments therein referred to, except when delivery is made at one of its many various branch or warehouse shipping points. It avers that such cards and lists affirmatively show that insofar as deliveries are to be made to destinations other than one of its many ship-
361 ping points the price quoted is f.o.b. the shipping point nearest the ultimate destination with the purchaser paying the transportation costs therefrom. This respondent further specifically denies that purchasers, in reselling this respondent's lead pigments, are under any requirement or compulsion to quote or resell such pigments at any price set or fixed by it. It avers, on information and belief, that the delivered prices quoted and obtained by the other respondents in their respective sales of lead pigments are not the same as the delivered costs for lead pigments to its customers, which include f.o.b. prices at many different shipping points plus freight or other carriage costs therefrom to destination.

Paragraph Ten—The Sherwin-Williams Company denies each and every allegation contained in Paragraph Ten of Count I, and demands strict proof thereof.

Paragraph Eleven—For answer to Paragraph Eleven of Count I, The Sherwin-Williams Company denies each and every allegation of said paragraph, including those set forth in sub-paragraphs A through C, and demands strict proof thereof. It also repeats and reasserts herein every denial contained in the foregoing paragraphs of this answer. It further specifically denies that its adoption, use and maintenance of price differentials in connection with shipments made from some of its shipping points as a part of its pricing system or its use of any of the other practices charged in Paragraphs Eight and Nine of Count I of the Amended Complaint produce any of the effects alleged in said sub-paragraphs A through C of said Paragraph Eleven; and further denies that such effects, even if they do in fact, result, which this respondent does not admit, arise by reason of any unlawful activity on the
362 part of this respondent within the purview of the Federal Trade Commission Act.

For specific answer to sub-paragraph B, this respondent avers that it has no inherent advantage over all of its competitors in any territory since its only plant for the production of such lead pigments as it sells is located in Chicago, Illinois, where one of the respondents, National, operates a plant for the production of the same lead pigments. It also avers that another respondent, International Smelting & Refining Company, produces dry white lead and white lead in oil at a plant located in East Chicago, Indiana. It also avers that another respondent, Glidden, has a plant at Hammond, Illinois, for the production of some of the same lead pigments.

Paragraph Twelve—The Sherwin-Williams Company denies each and every allegation contained in Paragraph Twelve of Count I, and specifically denies that it has entered into any combination, agreement, or understanding of the character set forth in Count I of the Amended Complaint with any of the other respondents, or that any of its acts, practices, pricing methods, systems or policies are unfair or prejudicial to the public or deprive the public of the benefits of competition, or create discrimination among competitive buyers and users of lead pigments and lead pigment paint, or have any tendency or capacity to unreasonably restrain commerce in lead pigments, or to otherwise hinder, frustrate, suppress, or eliminate competition in such products in commerce, or otherwise constitute unfair methods of competition or unfair acts or practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Wherefore, The Sherwin-Williams Company prays that Count I of the Amended Complaint herein be dismissed as to it.

363

Count II.

Paragraph One—For answer to Paragraph One of Count II, The Sherwin-Williams Company is without knowledge or information as to the reasons for the Commission's belief that it and the other respondents named in the complaint herein have violated the provisions of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, and that a proceeding thereunder is in the interest of the public; but it specifically denies that it has in any way violated any of the provisions of the said Clayton Act as amended by the Robinson-Patman Act, or that this proceeding is in the interest of the public, and demands strict proof thereof.

Paragraph Two—For answer to Paragraph Two of

Count II, The Sherwin-Williams Company avers the various allegations set forth therein are so vague and indefinite as to the character of unlawful discriminations attempted to be charged that it is without knowledge or information as to which of its pricing activities are alleged as constituting unlawful discriminations in price; that such charges, as stated, are conclusions only, and that it is unable to reply definitely and in detail in response to such charges as are stated in said Paragraph Two without the necessary particulars with relation to the specific transactions which form the basis of such alleged violations being furnished to it. This respondent, does, however, expressly deny that it has been, or is, violating Section Two of the Clayton Act or that it is unlawfully discriminating between its customers in the prices it charges, demands, accepts and receives in connection with the sale of lead 364 pigments in commerce and demands strict proof thereof.

Paragraphs Three to Five, Inclusive—In answer to the charges stated in Paragraphs Three, Four and Five of Count II, The Sherwin-Williams Company repeats, reasserts and incorporates herein its answer to Paragraphs Three to Five, inclusive, of Count I of the complaint herein as fully as if set forth herein.

Paragraph Six—In answer to the charges stated in Paragraph Six of Count II, The Sherwin-Williams Company adopts and reasserts the statements it has heretofore made in answer to Paragraph Two of Count II and also specifically denies each and every allegation set forth in said paragraph, and demands that prior to the beginning of this case on the merits it be furnished with the particulars as to the specific transactions forming the basis of the charge so stated in Paragraph Six in order that it may answer with respect thereto more specifically, and also demands strict proof of such charges.

Paragraphs Seven, Eight and Nine—In answer to Paragraphs Seven, Eight and Nine of Count II, The Sherwin-Williams Company denies each and every allegation contained in each of said paragraphs, and demands strict proof of each of such allegations. Further in answer to said Paragraphs Seven, Eight and Nine, this respondent repeats, reasserts and incorporates herein its answer to Paragraphs Eight, Nine and Ten of Count I of the Amended Complaint as fully as if set forth herein.

Paragraph Ten—In answer to Paragraph Ten of Count
II, The Sherwin-Williams Company admits that when sales
are made to purchasers who are located at or near the
boundary between two areas served by shipping points
365 using different prices the delivered cost to such pur-
chasers in one area may be higher than the delivered
cost to purchasers in the other area, but also avers that
there is no substantial competition between dealer purchasers located in one such area with dealer purchasers located in any other such area; and that such differentials in price are not sufficient in amount to have any appreciable competitive effect in any line of commerce. Except as hereinabove admitted, this respondent denies each and every allegation contained in said Paragraph Ten and specifically denies that those purchasers who may be located at or near the boundary of adjoining or contiguous areas served by different shipping points and who may incur different delivered costs are in competition with each other in the sale of this respondent's lead pigments. This respondent admits that its mill net return varies; but denies that the term "mill net return" is comprehended by or included in the meaning of the term "price," as that term is used in Section 2(a) of the Clayton Act as amended.

Paragraph Eleven—In answer to Paragraph Eleven of Count II, The Sherwin-Williams Company denies each and every allegation thereof and specifically denies, except as to differentials applied to shipments from some of its shipping points, that it classifies any of its customers who purchase its lead pigments for resale in any manner or has done so for many years. It avers that all customers who purchase its lead pigments for resale are in a single dealer classification and all dealers serviced by shipping points using the base or par price or using the same differentials added thereto pay the same prices, and that dealer purchasers serviced by a shipping point using the base or par price or a particular differential added thereto are
not engaged in competition in any substantial way with
similar dealer purchasers serviced by a shipping point
366 not using the base or par price or the same differen-
tial. This respondent admits that it has classified cer-
tain customers who purchase for use rather than resale,
such classifications being as follows:

(1) Contracting painters and large maintenance accounts sold direct

(2) Industrial accounts (including public utilities, privately-owned street railways, petroleum industry)

(3) Railroad and marine accounts

(4) Federal Government, States and Municipalities, and municipally-owned street railways and W.P.A. accounts, and

(5) Small consumers.

It avers that the members of no one of such classifications are competitive, in any way, with the members of any other classification, including the dealer classification, and avers that sales to small consumers are always made by its retail stores as a result of transactions which originate and are completed wholly within the confines of one state.

In applying varying prices to all of such classifications, including the dealer classification, this respondent extends differentials which make only due allowance for differences in the cost of manufacture, cost of selling, and cost of delivery resulting from the differing methods or quantities in which its lead pigments are sold and delivered to such classifications. The Sherwin-Williams Company avers that sales made by it to such purchaser-users who do not buy for resale and who are not competitive with each other do not come within the purview of Section Two of the Clayton Act as amended by the Robinson-Patman Act.

367 Paragraph Twelve — For answer to Paragraph Twelve of Count II, The Sherwin-Williams Company denies each and every allegation thereof, and demands strict proof thereof.

Paragraph Thirteen—For answer to Paragraph Thirteen of Count II, The Sherwin-Williams Company denies each and every allegation thereof, including those set forth in sub-paragraph A which are adopted from sub-paragraphs A, B, and C of Paragraph Eleven in Count I, and also including those allegations set forth in sub-paragraphs B and C of Paragraph Thirteen of Count II. It also repeats and reasserts every denial contained in the foregoing paragraphs of this answer to the various charges stated under Count II, and also repeats and reasserts, insofar as applicable, all of the statements made by it in answer to Paragraph Eleven of Count I, and incorporates such statements by reference the same as if copied herein in full.

Paragraph Fourteen—In answer to Paragraph Fourteen of Count II, The Sherwin-Williams Company denies that it has in any way violated the provisions of sub-section (a) of Section Two of the Clayton Act as amended by the Robinson-Patman Act.

Wherefore, The Sherwin-Williams Company prays that Count II of the Amended Complaint herein be dismissed as to it.

First Special Defense.

Further answering, and for a first special defense, The Sherwin-Williams Company alleges that its pricing activities which are charged in Counts I and II of the Amended Complaint herein as constituting violations, respec-
368 tively, of the Federal Trade Commission Act and of
the Clayton Act as amended by the Robinson-Patman Act were initiated many years ago, and have been pursued subsequently, in a good faith effort to successfully compete, in price and otherwise, with other sellers of lead pigments who were, and are, simultaneously offering for sale and selling to the same classes of purchasers lead pigments of substantially the same grade and quality in commerce, as "commerce" is defined in such Acts of Congress, and in direct competition with this respondent despite the fact that this respondent has been at all times a very small producer and primary seller of lead pigments, and that under such circumstances its pricing activities do not constitute unfair methods of competition or unfair acts or practices within the meaning of the Federal Trade Commission act or unlawful price discriminations under subsection (a) of Section Two of the Clayton Act as amended by the Robinson-Patman Act and are not otherwise unlawful.

Second Special Defense.

Further answering, and for a second special defense, The Sherwin-Williams Company alleges, contrary to the allegations of the Amended Complaint, that any pricing system for standardized products such as lead pigments which results, irrespective of the respective purchasers' distance from the seller's factory or of the relative location of the seller's factory and the factories of its competitors or of other competitive factors, in a uniform net return on
all sales, or any other system substantially different
369 from that used by this respondent as detailed herein,
has the necessary tendency and capacity to create territorial spheres of monopoly for some manufacturers,

sellers and dealers within which spheres such manufacturers, sellers and dealers can set or determine, within broad limits, the price at which they are able to sell and still prevent any other competitor having a freight disadvantage from competing in such territory and also has the necessary tendency and capacity to ultimately eliminate the smaller manufacturers, sellers and dealers, such as this respondent, from competition in such commerce and thereby to substantially lessen, hinder, restrict and suppress competition and to create and encourage monopolies, and also has the further necessary tendency and capacity of disrupting, suppressing and eliminating competition among sellers of lead pigments on a national scale or on a large territorial scale all to the detriment and injury of the purchasers of lead pigments and also of the public generally.

Third Special Defense.

Further answering, and for a third special defense, The Sherwin-Williams Company alleges that where its net return from sales of identical quantities to identical classes of purchasers in different competitive areas varies, such variance does not constitute a discrimination in price between different purchasers of a commodity of like grade and quality within the purview of sub-section (a) of Section Two of the Clayton Act as amended by the Robinson-Patman Act and does not constitute an unfair method of competition or an unfair act or practice within the
370 meaning of the Federal Trade Commission Act and is not otherwise unlawful.

Wherefore, The Sherwin-Williams Company prays that the Commission enter an order dismissing Counts I and II of the Amended Complaint in the above-entitled case, insofar as this respondent is concerned.

Respectfully submitted,
Raymond N. Beebe,
James T. Welch,
T. J. McDowell.

Of Counsel:
Davies, Richberg, Beebe, Busick & Richardson,
815 Fifteenth St., N. W.,
Washington 5, D. C.

Dated: May 27, 1946.

• • • • •

1 BEFORE THE FEDERAL TRADE COMMISSION.

In the Matter of
National Lead Company, a Corporation,
Eagle-Picher Lead Company, a Corporation,
Eagle-Picher Sales Company, a Corporation,
Anaconda Copper Mining Company, a Corporation,
International Smelting & Refining Company, a Corporation,
The Sherwin-Williams Company, a Corporation, and
The Glidden Company, a Corporation.
} Docket No. 5253.

* * * * *

16 Mr. McIntyre: If your Honor please, counsel for the National Lead Company informed me that there are a number of facts alleged in the Complaint concerning which they now stand ready to make certain admissions on the record.

I hand the reporter a statement of such admissions and ask that he copy that statement into the record, and that Mr. Ewing note for the record whether what I have read is correct.

Trial Examiner Ballinger: Mr. Ewing, you are familiar with the copy of transcript handed the reporter
17 by counsel for the Commission?

Mr. Ewing: I am. I wish, however, before making a statement for the record, to have the correction which I have made in this checked by Mr. Bates of The National Lead Company, which will only take a moment.

Trial Examiner Ballinger: The reporter will spread the copy of the transcript handed him by counsel for the Commission on the record.

(Statement copied into the record as follows:

(1) On or about December 8, 1891, Respondent National Lead Company acquired the properties formerly owned by Cornell Lead Co., of Buffalo, N. Y., The National Lead & Oil Co., of New York, N. Y., Atlantic White Lead &

Linseed Oil Company of New York, N. Y., Salem Lead Co., of Massachusetts, The J. H. Morley Lead Co., of Cleveland, Ohio, The Eckstein White Lead Co., of Cincinnati, Ohio, Anchor White Lead Co., of Cincinnati, Ohio, Maryland White Lead Co., of Baltimore, Maryland, American White Lead Co., of Louisville, Kentucky, Kentucky Lead & Oil Co., of Louisville, Kentucky, Southern White Lead Co. of Chicago, Illinois, D. B. Shipman White Lead Works, of Chicago, Illinois, Southern White Lead Company of St. Louis, Missouri, St. Louis Lead & Oil Co., of St. Louis, Missouri, Collier White Lead & Oil Co., of St. Louis, Missouri, and Red Seal Castor Oil Co., of St. Louis, Missouri, together with the following shares of stock
18 in the following companies:

1195 shares Cornell Lead Co.
9993 shares The National Lead & Oil Co., of N. Y.
495 shares Atlantic White Lead & Linseed Oil Co.
670 shares Salem Lead Co.
1995 shares The J. M. Morley Lead Co.
6495 shares The Eckstein White Lead Co.
531 shares Anchor White Lead Co.
295 shares Maryland White Lead Co.
950 shares American White Lead Co.
267 shares Kentucky Lead & Oil Co.
9995 shares Southern White Lead Co. of Illinois
2995 shares D. B. Shipman White Lead Works
9993 shares Southern White Lead Co. of Missouri
2995 shares St. Louis Lead & Oil Co.
993 shares Collier White Lead & Oil Co.
495 shares Red Seal Castor Oil Co.

the sixteen companies whose properties were acquired as aforesaid having been previously engaged in the manufacture, sale and distribution of white lead, linseed oil and kindred products, the stock-ownership of which had been owned or controlled by the National Lead Trust.

(3) In February, 1906, Respondent, National Lead Company acquired all of the stock of United Lead
19 Company, which company was engaged principally in the manufacture, sale and distribution of metallic lead and lead alloy products.

(4) In February, 1907, Respondent, National Lead Company, acquired all of the stock of the Magnus Metal Company (Magnus Company, Inc.). This company never

engaged in the manufacture, sale or distribution of white lead, linseed oil or kindred products.

(5) In March, 1913, Respondent, National Lead Company, acquired all of the stock of the Heath & Milligan Manufacturing Company, and in September, 1919, disposed of such stock to The Glidden Company.

(6) In March, 1906, Respondent, National Lead Company, acquired all of the stock of the Carter White Lead Company, which had properties in Chicago, Illinois, and Omaha, Nebraska; in July, 1912, it acquired all of the stock of Matheson Lead Company; in 1915, the River Smelting & Refining Company was organized jointly by National Lead Company and Stone & Webster; in March, 1916, National Lead Company acquired all of the stock of Bas-Hueter Paint Company; in December, 1917, National Lead Company organized National Lead Company, S. A. (Argentina) as a wholly owned subsidiary; in January, 1919, National Lead Company acquired the properties and assets of Hirst & Begley Company.

20 (8) Respondent, National Lead Company, asserts and represents that the cost of its inventories of corroding quality pig lead and of the lead content of white lead in process and in finished stock, is the most important single factor in its determination and fixing of its price for white lead since pig lead is the principal material used in the manufacture of white lead.)

Mr. Ewing: The statement which Mr. McIntyre has produced is admitted by the National Lead Company and may be taken as facts in this case as far as National Lead is concerned.

Mr. McIntyre: I ask the reporter to mark these documents.

* * * * *

526 PROCEEDINGS.

Trial Examiner Norwood: Come to order, gentlemen. This is a reconvened hearing in Docket 5253, pursuant to the order of the Federal Trade Commission substituting me as Trial Examiner for Hon. James A. Purcell, who had recently been substituted for Hon. Webster Ballinger.

As I understand it, nothing heretofore has been received except exhibits and testimony respecting the same.

The hearing is convened at 10 o'clock a.m., on the 17th day of June, 1946, in the office of the Federal Trade Commission, Room 332, Washington, D. C.

As I have just come into this case, I think it would be constructive to have an understanding about a few matters here.

I will say that there will be some rules of practice issued. They have been adopted already and I will have some copies for the counsel as soon as possible.

Also, we have a new Administrative Procedure Act, and it is the desire of the Commission, as expressed through these rules of practice, that we conform to the principles of this new Procedure Act, although I think that we have six months or more before that becomes effective, but we shall conform to it in principle as far as we can.

Generally, the Commission expects the Trial Examiner
to conduct an orderly and dignified proceeding, and
527 we will try to conform generally to the proceedings
of the District Court. I will state that in my hearings, and I think in those of the majority of the Trial Examiners, we permit counsel to remain seated while propounding questions to the witness, but they are expected to rise and be recognized when making objections and motions and statements of ground, and the Reporter is instructed not to record any speeches or statements of counsel which are not made in accordance with that rule.

It is not necessary, and it does not look well, to see someone interrupted in the middle of a question, or in the middle of another counsel's statement, especially when it is some criticism that is shot out from a seated counsel.

Of course, that does not apply to interrupting to make motions and to be recognized.

I think we should also have a clear understanding about off-the-record. Off-the-record consultations will be allowed by the Trial Examiner in the absence of objection, but when they are allowed they are privileged. It would rob the off-the-record consultation of its usefulness if you are permitted to repeat what other counsel have said during this process of reaching an agreement or reaching a compromise, or something like that.

So if you are not willing to consider the off-the-record
statements as strictly confidential I ask counsel to
528 please make their objections so we will have notice.

I see by the record that you already understand and counsel have agreed that there is an automatic exception to every adverse ruling, and that all counsel have the benefit of exceptions of any other counsel.

Copies of the transcript may be procured from the Reporter. I suppose you all know about that.

Miss Reporter, will you note the appearances on there just as if I had announced them.

We are ready to proceed.

Mr. MacIntyre: May we go off the record, Mr. Examiner?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. MacIntyre: If Your Honor please, I now ask that there be included in the transcript of record a stipulation between Joseph S. Wright, Trial Counsel of the Federal Trade Commission, and the counsel for the respective respondents, dated May 3, 1946. I pass that up to you so you may see it before it is copied into the record by the Reporter.

Trial Examiner Norwood: Counsel agree to that; do they?

Mr. Ewing: We have all signed it, sir.

Trial Examiner Norwood: Let the record so show.

(The stipulation is as follows):

529 UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

STIPULATION.

It Is Hereby Stipulated and Agreed by and between the undersigned parties hereto, by their respective attorneys, as follows:

That the testimony and evidence heretofore received in the record under the original complaint in this matter, except the testimony of witnesses J. B. Wilson and H. E. White and evidence introduced into said record through said witnesses, may be considered as a part of the record under the amended complaint to the same extent and effect as if such testimony and evidence had been received under the amended complaint, provided however, and it is expressly understood, that all agreements of counsel, rulings of the Trial Examiner and the Commission, reservations and exceptions appearing in the record are likewise to be considered a part of the record under the amended complaint.

530 Dated, May 3, 1946.

(Signed) Alexander & Green
Attorneys for National Lead Company, a corporation
(Signed) Edmund P. Wood
Attorneys for Eagle-Picher Lead Company, a corporation, Eagle-Picher Sales Company, a corporation
(Signed) Chadbourne, Wallace, Parke and Whiteside
Attorneys for Anaconda Copper Mining Company, a corporation, International Smelting & Refining Company, a corporation
(Signed) Davies, Richberg, Beebe, Busick & Richardson
Attorneys for The Sherwin-Williams Company, a corporation
(Signed) By J. T. Welch
(Signed) John A. Duncan & Roger Hinds
Attorneys for The Glidden Company, a corporation

(Signed) Jos. S. Wright
Trial Attorney, Federal Trade Commission

Mr. MacIntyre: If your Honor please, I ask that there be included in the transcript of the record a stipulation concerning the substitution of Trial Examiners. It relates to the Commission's order of May 21, 1946, naming as Trial Examiner in this case James A. Purcell.

Trial Examiner Norwood: Inasmuch as Mr. Purcell did not sit in this case, what is the use of putting that
531 on the record?

Mr. MacIntyre: Because next will be a question relating to it that I am going to ask counsel for the respondents.

Trial Examiner Norwood: That may be entered in the record.

(The stipulation is as follows):

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

• • (Caption—5253) • •

STIPULATION.

It is hereby stipulated and agreed by and between counsel for the Commission and counsel for the respondents that the testimony and evidence heretofore received in this matter under Trial Examiner Ballinger is to be considered by all parties to the proceeding to the same extent and effect as if such testimony and evidence had been received originally before Trial Examiner James A. Purcell, appointed as substitute Trial Examiner in the Commission's order of May 21, 1946. It is further agreed that in preparing any report on the evidence, or proposed findings or order in this matter, Trial Examiner Purcell may base such report, proposed findings or order upon the transcript
532 of testimony and evidence heretofore taken and received before Trial Examiner Ballinger, as well as upon the record of testimony and evidence made before Trial Examiner Purcell, subject to the limitations contained in the stipulation between counsel entered into on May 3, 1946.

Dated this 5th day of June, 1946.

(Signed) Chadbourne, Wallace, Parke and Whiteside
Counsel for Anaconda Copper Mining Company and International Smelting and Refining Company, Respondents.
(Signed) Joseph S. Wright
Trial Attorney for Federal Trade Commission.

Mr. MacIntyre: I would now like to ask counsel for the National Lead Company if he has any objection to the substitution of the present Trial Examiner for Trial Examiner Purcell?

Mr. Ewing: None at all.

Mr. MacIntyre: I would now like to ask the same question of counsel for Eagle-Picher.

Mr. Serviss: None at all.

Mr. MacIntyre: And the same question of counsel for Anaconda and International Smelting & Refining Company.

Mr. Gardner: No objection.

Mr. MacIntyre: And The Glidden Company?

533 Mr. Hinds: No objection.

Mr. MacIntyre: And the same question of counsel for Sherwin Williams?

Mr. Welch: No objection.

Mr. MacIntyre: If Your Honor please, we would like to go off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed.

Mr. MacIntyre: If Your Honor please, I refer to a statement made by you that the record now shows that counsel have an automatic exception without stating it.

I also want to refer in that statement to the understanding that an objection made by one inures to the benefit of others.

I want to state that the understanding in so far as counsel for the Commission is concerned is that that relates only to objections that are made timely. Any raised thereafter do not inure to the benefit of any other counsel.

Trial Examiner Norwood: Proceed.

Mr. MacIntyre: Counsel for the Commission now offer into evidence the document heretofore marked for identification as Commission's Exhibit 580. This exhibit has been identified and authenticated at page 297 of the transcript.

Mr. Ewing: No objection.

534 Mr. Hinds: Is this offer against any other respondent?

Mr. MacIntyre: It is to prove the allegations of the complaint, to prove the zoning system and other matters.

Mr. Hinds: That is objected to as entirely irrelevant, immaterial, incompetent, and in no way shown to have any relationship to the respondent Glidden.

Mr. Wood: I would like to object to this if it is to show the Eagle-Picher practice, because it does not coincide with our map.

Mr. Welch: Objection on behalf of Sherwin Williams to the same effect as made by Mr. Hinds.

Mr. Hinds: It has not been shown that Glidden has ever had any map whatsoever, much less that map.

Trial Examiner Norwood: Is this map any different from the map set out in the complaint?

Mr. Ewing: It is different.

Mr. MacIntyre: Any differences that appear in this map from the one set out in the complaint, and the reasons for the differences will presently appear in the record, and the responsibilities of these respondents for any similarities or differences will also appear in the record before it is closed.

Mr. Wood:, Eagle-Picher has stipulated the zone map it has used, and that is already in the record, and that
535 is not our map.

Trial Examiner Norwood: Where did this come from?

Mr. MacIntyre: Pages 297 and 298 of the record disclose the origin of the map so far as we know it, and so far as competent evidence has shown it.

Before the record closes, we will be able to point to the record so far as each individual respondent is concerned, so far as the similarity of any zoning practice of theirs to this map.

Mr. Hinds: My understanding is that the objection extends not only to a complete absence of connection between the map and the other respondents, but a complete lack of identification which will in any way bind any other respondent, so it is as though it were pulled out of a hat so far as we are concerned.

If I am mistaken, I will be glad to be corrected.

Glidden has pleaded it has not used any map in its business. We have not stipulated that is an authentic map ~~even~~ as to National Lead, as to which we have any knowledge.

Trial Examiner Norwood: Is this map connected with any respondent?

Mr. MacIntyre: It was obtained from an official of the National Lead Company, and, as to the proof asked for by Mr. Hinds, we will be able to furnish that from the sum total of evidence in the record before the record is closed.

536 Mr. Hinds: What evidence is there in the form of a stipulation or otherwise as to Glidden, that it is taken from National Lead Company's files, or has any existence whatsoever.

As to our own records, I believe we have made a stipulation ~~as~~ to authenticity, reserving other objections, but as to other respondents' records, I don't understand we have done so, but the competency would have to be shown either by our stipulation or extensively.

Mr. Gardiner: On behalf of Anaconda Copper Mining Company and International Smelting & Refining Company, I object to the introduction of this exhibit on the ground that it is incompetent and irrelevant, and has no application as to those two respondents.

Trial Examiner Norwood: I think we will have an understanding as to these various bits of evidence coming in, and as connected up with one or more of the respondents; an understanding as to the effect upon the other respondents.

There is no use of making formal objections to a bit of paper in order to save yourselves and the record, because you may have an understanding that no evidence is to be considered against any respondent until it is connected up by competent evidence, and until it can be logically and legally applied to that respondent.

Of course, if conspiracy may be properly inferred
537 from the whole record, then this evidence against one
becomes evidence as against the others. But it is not taken as against any respondent until that is found from the entire record.

This evidence is received for all purposes as may appear.

Mr. Hinds: May I ask a question?

Does that apply where the evidence of competency—we are not talking about materiality or relevance—but where the evidence of competency consists solely of a stipulation in this proceeding of one respondent that this is indeed taken from their files?

As I understand the conspiracy rule, a stipulation in this proceeding by one respondent that the document was taken from its files would not be evidence even as against an alleged conspirator of that fact. It would have to be evidence as to each and every—

Mr. MacIntyre: I certainly do not agree to that statement.

Trial Examiner Norwood: Whatever its value and whatever its inferences may be logically, properly, and legally drawn from it may be applied to other respondents if and when conspiracy is shown.

I can't tell you what weight is there until you have

stated the circumstances, but whatever it is and how-
538 ever it may be applied to the particular respondent
connected with it, it will not be applied to the others
until connection is made.

We needn't waste any time saving the same objections on those things where the testimony or the document does not purport to apply to your particular client. We will have that understanding, that it is not to apply to it until logically and legally it may be applied.

I will overrule the objections and receive Commission's Exhibit 580.

I have not had an opportunity to verify this fully, but I am taking the statement of counsel that it is identified properly and connected, and if it appears not to be such I will entertain a motion to strike it.

(The document heretofore marked for identification "COMMISSION'S EXHIBIT NO. 580," was received in evidence.)

Mr. MacIntyre: We now offer into evidence Commission's Exhibit, for identification, 581-A through E—this is in photostatic form—as a statement of the pricing policies of respondent National Lead Company, under date of January 26, 1937, and as it appeared when found in the files of respondent Eagle-Picher.

Trial Examiner Norwood: Any objection?

Mr. MacIntyre: I want to say that the identification of it is shown by the record, page 298 and page 299.

539 Mr. McDermott: Mr. MacIntyre, did you mean National Lead Company?

Mr. MacIntyre: It is a statement of National Lead and was found in the files of respondent Eagle-Picher.

Mr. Hinds: As to respondent Glidden, the same objection is made as was made to the previous offer, the same grounds.

Mr. Wood: This was found in the Eagle-Picher file. I do object to the manner of the identification as a document file in our files showing the pricing policies of the National Lead Company.

The document shows on its face what it is, and it is interpretation to say it shows the pricing policies of the National Lead Company.

I object to the characterization but not the authenticity of the exhibit, or what is shown on its face.

Mr. Ewing: On behalf of National Lead, I object, because there is nothing to show how these papers reached the files of Eagle-Picher or that they emanated officially from National Lead in any way, shape, or form, and there is nothing except as shown in the papers themselves to connect National Lead with them, nor is any price policy of National Lead published in those documents.

Trial Examiner Norwood: Are there any further objections?

540 (No response.)

Trial Examiner Norwood: What is the purpose of this?

Mr. Ewing: I call your attention to the fact that the specimen is endorsed on those papers, or some of them, that would perhaps indicate something with respect to their authenticity.

Trial Examiner Norwood: I understand this is identified as having been found in the files of the Eagle-Picher Company. Is that correct?

Mr. MacIntyre: The transcript, pages 298 and 299, show that fact.

Mr. Ewing: But nothing shows how they got there, where they came from, who issued them, who published them, or anything like that.

Trial Examiner Norwood: If one respondent has the price list with sales information, and so on, of another respondent here—

Mr. Ewing: There is nothing to show, Your Honor, that it is a price list with sales information.

Trial Examiner Norwood: Well, it is whatever it is. One respondent has material which another respondent has evidently issued.

I think we shall have to let material of that kind come in for study. If it is not connected up, it will just
541 be pitched out, but in a case like this we shall have to receive this sort of information.

I overrule the objection and receive the exhibit.

(The document heretofore marked for identification "COMMISSION'S EXHIBIT NO. 581-A, 581-B, 581-C, 581-D, and 581-E," was received in evidence.)

Mr. MacIntyre: We now offer into evidence documents heretofore marked for identification as Commission's Exhibit 582-A, B, C, and D, a statement by Fred McCarthy of National Lead Company, to Harold Rowe, vice-president of that company, under date of January 18, 1944, concerning the marketing practices and pricing policies of National Lead Company, and some showing as to what those practices and policies were with respect to zoning and price discrimination.

Mr. Hinds: For Glidden, the same objection as made to previous offers of documents.

Trial Examiner Norwood: This is inter-office material, isn't it, or is it?

Mr. Ewing: I believe that is material which was prepared—I will check it—at the request of the Commission's investigator.

The letter consisting of two pages, marked Commission's Exhibit 582-A and 582-B, for identification, is an inter-office memorandum prepared by Mr. McCarthy of
National Lead Company following the request of the
542 Commission's investigator, Mr. Dunn, and similarly
the chart, Commission's Exhibit 582-C, is a chart prepared by National Lead Company in compliance with the investigator's request, and Exhibit 582-D is a map, or a description, also prepared at the request of the investigator and referred to in Comimssion's Exhibit 582-A and B.

National Lead, however, objects to the relevancy or competency of the exhibit.

Mr. Hinds: On behalf of Glidden, I would like to expand my objection so as to include the point that not only would this have to be connected up later under the conspiracy rule, but there would have to be some evidence of the fact which counsel has conceded as against National Lead Company but which has not been conceded by Glidden to be a fact, and a statement of one counsel as to what he concedes to be the facts is in no way binding on other counsel, and we ask to have it connected up as to whether or not they are facts.

Trial Examiner Norwood: That may be on the same basis as other evidence. One counsel's admission would be on the same basis, would it not?

Mr. Hinds: I think not. I think a respondent's admission outside of court might, under the conspiracy rule, be binding on the other respondent, but certainly we are not here alleged in court to be conspiring.

Mr. MacIntyre: If Your Honor please, it takes
543 a higher status than the ordinary statement of counsel
in that respect because here we have stipulations by all counsel conceding a statement made by any counsel relating to authenticity and identification.

Mr. Ewing: I made no statement ~~as to the~~ authenticity of the contents of the document. I stated they were prepared by National Lead in response to the Commission's request. I make no concession as to the authenticity or accuracy.

And if I might refer to the exhibit Your Honor ruled on before, the one produced from Eagle-Picher's files, I would like to call attention to the Commission investigator's testimony at page 300 of the record, and it clearly appears in the record that nobody knows where the documents came from and how they got in Eagle-Picher's files.

I would like to renew that objection and ask that you strike the exhibit.

May I read that to you off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Ewing: Under those circumstances, I renew my objection, and ask that the exhibit be stricken.

Mr. MacIntyre: If Your Honor please, with further reference to page 300 of the record, I want to say that
counsel for the Commission is relying quite strongly
544 upon what is shown on page 300 of the record, and,
as is frequently ~~the~~ case in conspiracies such as the one we are here dealing with, conspirators are caught with evidence that they do not recall and cannot state how it came into their possession, but nevertheless it is germane to the issue involved.

This is just another instance of that kind.

Mr. Ewing: I move to strike Mr. MacIntyre's remarks as to conspirators and conspiracies here. That is what he is trying to establish.

Trial Examiner Norwood: I don't think he is making any fresh charges. I am sure he is not.

Mr. Wood: If Mr. MacIntyre is counting on that so heavily, I would like to see its title changed. He gave it the title, when he introduced it, as showing National's price policy in Eagle-Picher's files.

As I pointed out before, that title is entirely Mr. MacIntyre's interpretation, and if that appears in the index it is going to appear as having been proved as showing National's price policies where it is not proved at all.

Mr. MacIntyre: I didn't say it would show National's policies. I said it shows a statement by National as to its policy.

Mr. Ewing: It does not show a statement by National at all until you prove it came from National.

545 Mr. Wood: Would it be possible to have the stenographer read Mr. MacIntyre's remarks in offering that exhibit? I want to be sure I heard it correctly, myself.

Trial Examiner Norwood: I don't know if we could find it, or not. Much water has gone over the dam since then.

Mr. Wood: I think Your Honor has my point, that I object to these things being interpreted by the title given to them.

Mr. Hinds: I would like to explain Glidden's objection to this extent: My understanding is that there has appeared in this case as an undisputed fact, the fact that there is no allegation of conspiracy continuing after January 1, 1946.

Under those circumstances, even though it were not otherwise true,—and I believe it would be,—a statement of counsel having been made in the course of the proceeding, having been made after the date that the alleged conspiracy is conceded to have terminated, can have no effect on any of the other respondents, so it will not stand as against any of the other respondents.

Nor could that lack be supplied by showing the existence of a conspiracy.

Trial Examiner Norwood: I think we have quite a hill to climb before we get to that.

Mr. Ewing: I don't think Your Honor has ruled
546 on my renewed objection or motion.

Trial Examiner Norwood: I want to hear Mr. MacIntyre's statement about this 582-A to D.

What is the purpose of that?

Mr. MacIntyre: It is evidence of statements made by officials of respondent National Lead Company as at the date of January 18, 1944—I believe that is it—as to some policies and practices of National in marketing and pricing white lead.

Trial Examiner Norwood: This was furnished by National to the Commission?

Mr. MacIntyre: Yes. It is a statement by its officials concerning its practices.—

Mr. Hinds: Glidden insists there is no evidence that this was a statement furnished by National Lead to the

Commission. It is evidence as against National Lead that that is a fact because counsel for National Lead is here and admits it, but an admission by counsel for a co-conspirator, particularly after the conspiracy is admitted to have ceased, is not evidence against the others.

Trial Examiner Norwood: It would not be taken as establishing a conspiracy.

Mr. Hinds: It may not be taken for any other purpose.

Trial Examiner Norwood: It might be taken for
547 many other purposes.

Mr. Hinds: Even if a conspiracy is well established it still lacks competency because it is not alleged we are now conspirators. Therefore, a statement by counsel for one conspirator does not in any way affect the others.

Mr. MacIntyre: Mr. Hinds suggests, and would like for us to conveniently overlook the overt act of January 18, 1944, in the form of a declaration and statement by an official of National which is evidenced by this exhibit.

Mr. Hinds: I think there might be some point if there was competent evidence that a declaration of that sort had been made, but there is no such evidence as to us. There is merely an admission by counsel for National Lead that such a declaration may be made.

Trial Examiner Norwood: I think we may receive evidence of a continuation of an unfair practice of any sort, a continuation after the complaint as to what happened before the complaint. If nothing was proven to have been employed, no unfair practice proven to be employed prior to the date of the complaint, nothing thereafter would be counted against the respondent, but if there were you could consider matters that happened after that.

I shall overrule both motions and receive this Commission's Exhibit 582-A through D.

(The documents heretofore marked for identification
548 "COMMISSION'S EXHIBITS NOS. 582-A, 582-B, 582-C, and 582-D," were received in evidence.)

Mr. Ewing: I don't believe Your Honor has ruled on the record with respect to my motion with respect to Commission's Exhibit 581.

Trial Examiner Norwood: I said both objections on both motions.

Mr. MacIntyre: If Your Honor please, I offer into evidence the document heretofore marked for identification as Commission's Exhibit 583. I offer that as evidence of a statement made and declared by an official of National

Lead Company concerning the zoning practice of pricing white lead.

Mr. Ewing: I move to strike out Mr. MacIntyre's characterizations of the paper when he offers it, and I suggest it would save similar objections and magnifying of the record if he would refrain from the characterizations of these documents and let them speak for themselves if and when Your Honor receives them.

Trial Examiner Norwood: I would rather prefer he indicate the purpose.

Mr. Ewing: I have no objection to that, but when he puts his label on it—

Trial Examiner Norwood: That is not taken as evidence.

Will you read the statement, please.

549 (The Reporter read the record.)

Mr. Ewing: He says he offers it as a statement made and declared, and there is no such statement in the record.

Mr. MacIntyre: If Your Honor please, I merely refer to page 389 of the record, which is to the effect that officials of the National Lead Company described this document as a zone map and during the course of a discussion that they had at the time with a representative of the Federal Trade Commission when he was discussing with them an investigation the Commission was making concerning the uniform practice of the industry of selling white lead in oil on a zone basis.

Trial Examiner Norwood: Have counsel any further objection?

Mr. Ewing: I would like to direct Your Honor's attentio to the witness' testimony where he produced this map for identification, and he said:

"Well, this is what is called a zone map by Messrs. Carroll and Reque. I had already told both of those gentlemen that the Commission's investigation concerned the apparently uniform practice in the industry of selling white lead in oil on a zone basis."

That is Mr. Carmichael's statement, the investigator's statement.

Trial Examiner Norwood: It is objected to on the ground of the characterization.

550 Mr. Ewing: I simply objected and wanted to bring up the subject of characterization because I think if characterizations continue we are going to continue to ob-

ject and there will be an awful lot of time wasted and the record will be cluttered.

Mr. Hinds: The same objection as heretofore on behalf of Glidden.

Mr. Ewing: And I object to the document itself.

Trial Examiner Norwood: I want to state to counsel that no such characterization by any attorney of anything that is offered here to go into evidence is going to influence me in any way or any manner whatsoever.

I would like for counsel to characterize it in some way that will indicate to me its general purpose, and I will ask Commission's counsel to be guarded in respect to his characterizations, to keep them well within what they may properly be said about them.

Mr. MacIntyre: If Your Honor please, I merely referred to what the evidence shows concerning this in bringing to your attention what the record does show as the offer was made, and, of course, if counsel are going to persist in making their objections I will merely refer to that portion of the record so that you may, through that reference, find the evidence instead of my mentioning it, because it
is in the transcript at pages 389 and 390 to the precise
551 effect that I have heretofore stated.

Mr. Ewing: I would like to have Mr. MacIntyre's last statement read back where he states what the record shows.

Trial Examiner Norwood: Can you find it, Miss Reporter.

(The Reporter read the record.)

Mr. Ewing: Before I read, Your Honor, on page 389 what the witness said as to the map, Mr. Hinds moved to strike and the Trial Examiner overruled the objection and denied the motion and stated the witness might state what he stated to the representative of the company.

I continue:

"Answer (Continuing). Both Messrs. Carroll and Reque admitted that that was an industry practice and the practice of their own company.

"Mr. Hinds: Move to strike that out.

"Mr. Ewing: I move to strike that out.

"Trial Examiner Ballinger: That motion is granted. The answer is stricken."

So there is no such evidence in the record.

Mr. MacIntyre: Mr. Ewing is not reading lines 1 to 15 on page 390 where I persisted in the line and then continued to get some additional evidence, but I think we are wasting time referring back to that.

552 Trial Examiner Norwood: I think we had better direct our attention to these papers, themselves. Attorneys will make claims. They are not taken by me in any way as evidence.

Mr. Gardiner: On behalf of Anaconda Copper Mining Company and International Smelting & Refining Company, I object to the introduction in evidence as having no relevancy, competency, or bearing as to those two respondents.

Trial Examiner Norwood: Mr. MacIntyre, will you explain to me what this map is?

Mr. MacIntyre: I have just done so on the record. Witness Carmichael has testified that it is what officials of respondent National Lead Company called a zone map, and they did so during the course of the discussion that he had with them concerning an investigation being made by the Commission of a uniform practice in the industry of selling white lead in oil on a zone basis. That is page 389. The record also shows that these officials of the National Lead Company gave this document to the witness as showing the manner in which the practice was carried on. That is at lines 6 to 8, page 390, of the record.

Trial Examiner Norwood: Did Mr. Carmichael give any further information about it, and was he cross-examined about it, and so on?

Mr. Ewing: He was only there to identify the 553 documents. At that time the hearings were restricted to the identification of documents and corporate history, and there was no cross-examination with respect to the merits in any way, shape, or form.

Mr. MacIntyre: I assume National Lead Company has a lot more that they could tell us about that, and they will probably do so before the record is closed.

Mr. Ewing: I move to strike that as an unwarranted statement.

Mr. MacIntyre: They made it up. We don't know what was in their minds when they made it up. They will have to tell us.

Mr. Ewing: I still move to strike that, in addition to the other.

Trial Examiner Norwood: The objection is allowed. I will have to know more about that. I will have to look the record up.

Mr. MacIntyre: In that connection, I refer Your Honor to pages 389 and 390.

Trial Examiner Norwood: I thank you for that.

Mr. MacIntyre: I believe the discussion goes over to page 391.

Trial Examiner Norwood: We will have a five-minute recess.

(There was a short recess taken in the hearing.)

554 Trial Examiner Norwood: The hearing will come to order.

Mr. MacIntyre: If Your Honor please, I now offer in evidence Commission's Exhibit, for identification, 584-A and 584-B as a statement by an official of National Lead Company concerning its marketing and pricing practices of white lead.

Mr. McDermott: What page in the record is the reference?

Mr. MacIntyre: The reference in that connection is made to the record, page 305.

Mr. Ewing: As far as National is concerned, other than the characterization, this 584-A is a note to the investigator, Mr. Dunn, and 584-B was the document supplied him.

Mr. Hinds: On behalf of Glidden, I make the same objection as heretofore, and I find that accuracy now requires that I withdraw a portion of the previous objection that I made in so far as I said that the statements of co-counsel respecting authentically are not competent against the other respondents.

I withdraw my objection because I find I have stipulated the contrary.

I make the same objection with respect to this document on behalf of Glidden.

Mr. MacIntyre: If Your Honor please, the stipula-
555 tion Mr. Hinds is referring to begins at page 8, line 20, and continues following through page 10 of the record.

Trial Examiner Norwood: Yes. I have read that. I agree with counsel about that.

Exhibit, for identification, 584-A and B is received in evidence. The objections are overruled.

(The documents heretofore marked for identification "COMMISSION'S EXHIBIT NOS. 584-A and 584-B," were received in evidence.)

Mr. MacIntyre: I would like to offer in evidence Commission's Exhibit 655-A, B, and C, which purports to be the prices of pig lead of the American Smelting & Refining Company at New York over a period from February 27, 1930, through July 6, 1938, and of white lead in oil, October, 1929, through January, 1942, which is identified in the record at page 392.

Mr. Ewing: National Lead will concede the three documents marked for identification Commission's Exhibits 655-A to C, procured by the Commission's investigator from officials of the National Lead Company, but makes no concession with respect to the accuracy of the statements contained in the document.

Trial Examiner Norwood: Are there any further questions or objections?

Mr. Hinds: The same objection as heretofore made 556 on behalf of Glidden.

Trial Examiner Norwood: I don't think he made an objection. He simply qualified his identification of the document.

Do counsel object to the document?

Mr. Hinds: Our objection now does not go to the accuracy of the statement that counsel for the National Lead Company has just made because I agree that we have stipulated we are accepting counsel's statement as to the authenticity.

My objection goes as to relevancy and materiality as affecting this other respondent.

Mr. Wright: With reference to Mr. Ewing's statement, the exhibits have been already identified in the record. We are not asking him to make any further concession about identification.

Trial Examiner Norwood: The objection is overruled. The exhibits will be received and marked.

(The documents heretofore marked for identification "COMMISSION'S EXHIBITS NOS. 655-A, 655-B, and 655-C," were received in evidence.)

Mr. Wright: I would like to offer in evidence Commission's Exhibit 656-A and B, which are lists of price changes, terms of sales and discounts over a period from 1930 through January, 1944, of the National Lead Company, which are identified at page 394.

557 Mr. Ewing: National concedes that these two documents, 656-A and B, were supplied the investigator by it, but makes no concession with respect to the accuracy thereof.

Trial Examiner Norwood: They will be received and marked.

(The documents heretofore marked for identification "COMMISSION'S EXHIBITS NOS. 656-A and 656-B," were received in evidence.)

Mr. Wright: Your Honor, I would like to offer in evidence Commission's Exhibit 657, which is a list of price changes on white lead in oil and on dry white lead of the National Lead Company, together with the dates the notices of changes were mailed, and the dates they became effective, and the prices which were effective, and, in that connection, I would like to point out that this document was erroneously identified on page 332 of the transcript as Commission's Exhibit 658.

It is obvious from the transcript it is Exhibit 657, that the witness was referring to, and I would like counsel for the respondents to agree that the record may be changed.

Mr. Ewing: That is correct.

Trial Examiner Norwood: I will ask counsel to list that as a correction to the record to be later entered in accordance with the rules of practice.

What we have said here and agreed to is all right,
558 but to make sure that we can find those corrections,
and that we proceed according to the rules of practice, I just ask you to make note of that to be on a list to be submitted later.

I accept the correction to the record.

Mr. Ewing: National Lead has no objection.

Trial Examiner Norwood: It will be received and marked.

(The document heretofore marked for identification "COMMISSION'S EXHIBIT NO. 657," was received in evidence.)

Trial Examiner Norwood: Proceed.

Mr. Wright: Your Honor, I would like to offer in evidence Commission's Exhibits 659-A through Z-51, which are price lists, terms of sale and delivery prices on lead pigments as made and announced by the National Lead Company to its customers over a period from approximately 1922 to 1942.

I might add that this was the subject of a stipulation as to identification in the record at pages 256 to 261.

Trial Examiner Norwood: Any objection?

Mr. Ewing: No objection.

Thial Examiner Norwood: It is received and marked.

(The documents heretofore marked for identification "COMMISSION'S EXHIBITS NOS. 659-A, 659-B, 659-C, 659-D, 659-E, 659-F, 659-G, 659-H, 659-I, 659-J, 659-K, 559 659-L, 659-M, 659-N, 659-O, 659-P, 659-Q, 659-R, 659-S, 659-T, 659-U, 659-V, 659-W, 659-X, 659-X-1, 659-Y, 659-Z, 659-Z-1, 659-Z-2, 659-Z-3, 659-Z-4, 659-Z-5, 659-Z-6, 659-Z-7, 659-Z-8, 659-Z-9, 659-Z-10, 659-Z-11, 659-Z-12, 659-Z-13, 659-Z-14, 659-Z-15, 659-Z-16, 659-Z-17, 659-Z-18, 659-Z-19, 659-Z-20, 659-Z-21, 659-Z-22, 659-Z-23, 659-Z-24, 659-Z-25, 659-Z-26, 659-Z-27, 659-Z-28, 659-Z-29, 659-Z-30, 659-Z-31, 659-Z-32, 659-Z-33, 659-Z-34, 659-Z-35, 659-Z-36, 659-Z-37, 659-Z-38, 659-Z-39, 659-Z-40, 659-Z-41, 659-Z-42, 659-Z-43, 659-Z-44, 659-Z-45, 659-Z-46, 659-Z-47, 659-Z-48, 659-Z-49, 659-Z-50, 659-Z-51," were received in evidence.)

Mr. Wright: Your Honor, I would like to offer in evidence Commission's Exhibit 615-A through D, quotations and price announcements by the National Lead Company to its customers as of April 26, 1941, covering quotations to railroads, steamship lines, industrial accounts, Government, State and municipal accounts, covering lead pigment in general.

Trial Examiner Norwood: Any objections?

Mr. Ewing: I object to the characterization. They are not notices of prices issued to customers, but there is no objection as far as National is concerned to the documents as such.

Trial Examiner Norwood: I thought he was very 560 discreet in his characterization there.

Mr. Ewing: I thought he was, too, but when he referred to customers I would have to take exception.

Trial Examiner Norwood; Any further objections?

(No response.)

Trial Examiner Norwood: The exhibits will be received as marked. The characterization will be disregarded as weighing the testimony.

(The documents heretofore marked for identification "COMMISSION'S EXHIBITS NOS. 615-A, 615-B, 615-C, and 615-D," were received in evidence.)

Trial Examiner Norwood: Proceed.

Mr. Wright: Your Honor, I want to offer in evidence Commission's Exhibits 613-A through C, which is form of agency contract between the National Lead Company and retail dealers covering a sale of white lead in oil. It is identified at page 320 of the transcript.

Mr. Ewing: National has no objection to the receipt in evidence of the document, but, of course, it is not bound by the description.

Trial Examiner Norwood: It will be received as marked.

(The document heretofore marked for identification "COMMISSION'S EXHIBITS NOS. 613-A, 613-B, and 613-C," was received in evidence.)

561 Mr. Wright: If Your Honor please, I wish to offer in evidence Commission's Exhibit 623-A through C, identified at page 327 of the record, consisting of confidential price lists of the National Lead Company applicable to zones 1, 2, and 3 as of October 1, 1943.

Mr. Ewing: No objection.

Trial Examiner Norwood: Received as marked.

(The document heretofore marked for identification "COMMISSION'S EXHIBIT NOS. 623-A, 623-B, 623-C," was received in evidence.)

Mr. Wright: Your Honor please, I wish to offer in evidence Commission's Exhibit 624-A through C, consisting of a form letter from National Lead Company of its agents, and attachment showing the prices and terms of sale and a memorandum attached to it by one of the dealers which is identified at page 328 of this transcript.

Trial Examiner Norwood: Any objection?

Mr. Ewing: I have no objection with respect to the documents now marked Commission's Exhibits 624-A and B, for identification.

I do object to the receipt in evidence of the document marked Commission's Exhibit 624-C, for identification, on the basis of the testimony introduced on behalf of the Commission at page 330, from which it appears that this purports to have been a transcript of a statement made 562 by a man named Diement to Attorney-Examiner R. T. Dunn, there being no evidence in the record at all with respect to who Diement is, what connection, if any, he has with the National Lead or any other respondent.

I therefore submit that the document should be excluded.

Mr. MacIntyre: If Your Honor please, we submit that the connection between respondent National and this party Diement, from whom this document was secured, is said by National to be the relationship of principal and agent.

On the basis of that statement by National, the statements made by Diement to a representative of the Commission in the submission of this document to a representative of the Commission, are binding on National as a respondent here, being made as they were by what National claims to have been its agent.

If, when the record is finally closed, that relationship is found to have not existed, then the document is admissible on other grounds, namely, that of a statement by a co-conspirator with the National in attempting to maintain prices named by one of the respondents here, and a member of the conspiracy here, namely National. He is either an agent or a co-conspirator, and it is admissible on those grounds.

Mr. Ewing: The only trouble with that is that there
is nothing in the record to show who Diement is. I
563 made the same objection in Cleveland, I believe it was,
when the document was marked for identification. We never claimed he was our agent, so far as this proceeding was concerned. I don't know if he is or not.

Mr. MacIntyre: If he isn't an agent he is a co-conspirator.

Trial Examiner Norwood: If he is not your agent—

Mr. Ewing: There is nothing to show who he is. You can't claim he is an agent or co-conspirator. That is not being charged. There is no statement in the record that he made the statement in the course of its agency. If they want the document in I think they should show who Mr. Diement is.

Mr. MacIntyre: The record that has been cited by Mr. Wright clearly shows who Mr. Diement is. Unfortunately, the record has his name spelled B-e-e-m-o-n-t. But the statements made by Diement to a representative of the Commission long before the complaint issued in this case, are to the effect that he was an agent of National and the documents, as well as other information which has been secured from National, are to the effect that National is holding up Diement to be its agent.

I am not so sure when the record is closed whether it will show Diement is an agent at law and in fact, or a co-con-
spirator, but whether it be one or the other it is my
564 contention that the document is admissible against
National.

Mr. Ewing: I submit there is no proof in the record because the Commission's investigator says that Diement may have told him he was or was not an agent. And certainly there is no basis for the statement he was either an agent or a co-conspirator. He might be most anybody. Let him show who he is.

Mr. Hinds: On behalf of Glidden, I enter the other objection, and add the further objection that even if the declarations of the alleged agent as to the fact of his being an agent were competent—it, of course, is not under the well known rule—even then there is a complete failure of sustaining the burden of proof by the Commission to make this evidence competent in that there is no showing that the admission was made in the course of the then business entrusted to the agent. It appears it was an alleged declaration as to some past event.

Agents have no authority to make admissions binding upon their principal as to narratives of the past. At the most they can only speak contemporaneously with respect to business then being transacted.

Mr. MacIntyre: On that point, I merely refer Your Honor to briefs which have been filed on that point, both pro and con, concerning statements made by another agent of the respondents, namely, an official of Eagle-Picher.
565 Those briefs are in the record, if Your Honor desires to examine the authorities and they concern the admissibility of a statement by that agent, namely, Mr. Maston.

Mr. Wood: Even if Mr. Diement, whoever he is, said that he was both an agent and a co-conspirator, it still would not be admissible at this time. I don't care what Mr. Diement may have said.

Trial Examiner Norwood: I want to know a little more about this Mr. Diement. I will reserve my ruling on 624-C.

Mr. MacIntyre: If Your Honor please, I refer you to the record beginning at line 17, page 329 of the record, and continuing through line 20, page 332, and making the correction as you read it from Beemont to Diement. The reporter made a mistake there.

Mr. Ewing: Your Honor, we go on from the bottom of page 331 to the top of page 332.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Make your statement on the record.

Mr. MacIntrye: I would agree to this understanding concerning the pending offer—

Trial Examiner Norwood: That is Exhibit 624-C?

Mr. MacIntyre: Yes, sir; the Diement document.

566 Trial Examiner Norwood: Very well.

Mr. MacIntyre: That it be received at this time subject to the understanding we will connect Diement with the National Lead Company, or other respondents, either as an agent under their so-called agency plan, or as a co-conspirator before the record is closed.

Mr. Ewing: I can't accede to that, Your Honor. If he is simply connected as a selling agent there is no basis for its reception against us. He must establish he was an agent acting within his authority when he wrote that document.

Trial Examiner Norwood: I will construe it that he is to show that Mr. Diement is such an agent as to bind this principal by an admission.

The objection is overruled, and with that understanding Commission's Exhibit 624-A to C is received in evidence.

Mr. McDermott: That is a condition?

Trial Examiner Norwood: Yes, sir; as to 624-C.

(The documents heretofore marked for identification "COMMISSION'S EXHIBITS Nos. 624-A, 624-B, and 624-C," were received in evidence.)

Mr. Wright: Your Honor, I wish to offer in evidence Commission's Exhibit 531-A and B, which is a copy of a
letter from the vice-president of John T. Lewis & Bro-
567 thers Company to Harold Rowe of National Lead Com-
pany, and an enclosure in the form of a letter from the
Eagle-Picher Sales Company to its distributors on its
agency plan. That is on page 145.

The John T. Lewis Company is a wholly-owned subsidiary of National Lead Company.

Mr. Ewing: No objection.

Trial Examiner Norwood: Received and marked.

(The documents heretofore marked for identification "COMMISSION'S EXHIBITS Nos. 531-A and 531-B," were received in evidence.)

Mr. Ewing: But National, of course, makes no concession with respect to the contents and authenticity of 531-B.

Mr. Wood: And Eagle-Picher makes no concession as to authenticity.

Trial Examiner Norwood: Very well.

Mr. Wright: I would like to offer in evidence Commission's Exhibit 713, which is a statement by officials of the National Lead Company as to the freight rates on white lead between various points identified at page 334 of the record.

Mr. Ewing: No objection.

Trial Examiner Norwood: Received and marked.

(The document heretofore marked for identification "COMMISSION'S EXHIBIT No. 713," was received in evidence.)

568 Mr. Wright: Your Honor, I would like to offer in evidence Commission's Exhibit 714, a statement by the manager of the Buffalo branch of National Lead Company, of the freight rates on white lead in oil between various points identified at page 324 of the record.

Mr. Hinds: If and in so far as this is offered as showing freight rates generally, as being on Glidden, the objection is made that there is no issue in this case between the Commission and Glidden as to the effect that Glidden's sales within a given so-called zone, district, are uniform. As to that the matter is not in issue at all. Therefore, it is not relevant.

Mr. MacIntyre: The relevance and materiality of the differences on these freight rates go to and spring from the issues that these respondents systematically subsidized distance shipments for the benefit of distance customers to the disadvantage of neighboring customers of lead pigments under their present method of pricing and the precise amounts of that subsidy and the oppressive character of it as shown through these freight rates.

In other words, we will get into the precise amount of the burden through these exhibits.

Mr. Hinds: I think counsel has missed the point of my objection. He is arguing that the issue, if it existed, would be material. I say it is not in issue because Glidden

569 has admitted its prices within a zone are uniform. That is putting in evidence something that is in evidence in the answer.

Trial Examiner Norwood: I remember that in your answer, but it is not in the other answer.

Mr. Ewing: I object to this document for identification on the ground that if they are attempting to prove freight rates it is not the best evidence. I know nothing about the accuracy of it.

570 And on the further ground it on its face shows it does not relate to any sales, and on the further ground, in view of Mr. MacIntyre's statement in answer to Mr. Hind's objection, that price is not defined under the Robinson-Patman Act in the matter which Mr. MacIntyre specifies.

Trial Examiner Norwood: That is a legal question between you.

Did you want to say something, Mr. Wright?

Mr. Wright: Your Honor, these have been identified as statements of freight rates which were supplied by officials of the National Lead Company to the witness at page 334. It certainly seems they are competent as the rates which the National Lead Company was using in that branch at that time.

Mr. Ewing: There is no indication they were using them.

Trial Examiner Norwood: Who is Mr. McCarthy?

Mr. Wright: Mr. McCarthy is manager of trade sales of National Lead Company.

Trial Examiner Norwood: At the New York office?

Mr. Wright: That is right.

Trial Examiner Norwood: It may be received and marked. The objection is overruled.

571 (The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT 714, was received in evidence.)

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Exhibit 714 has been received. Proceed.

Mr. Wright: Your Honor, I wish to offer in evidence Commission's Exhibit 715-A and -B, which is a statement by the manager of the Cincinnati branch of the National Lead Company of freight rates between various points, and routing and—

Mr. Hinds: Is this offered as evidence of freight rates or is it offered as evidence of some internal business of the National Lead Company?

If it is offered as evidence of freight rates, I object to it.

Mr. Wright: It shows on its face to be a statement of the freight rates applicable at that time to the business of that branch of the National Lead Company.

Mr. Ewing: I object on the same grounds that I objected to the offer of 714 for identification, including again specifically the ground that if this is offered as evidence proving freight rates, then it is not the best evidence.

572 Mr. Hinds: Certainly it is hearsay evidence of freight rates as against The Glidden Company, assuming freight rates are at issue at all—which they are not.

Trial Examiner Norwood: Do you offer to show what the freight rates were?

Mr. Wright: It is offered to show what the National Lead Company said the freight rates were between those points at that time.

Trial Examiner Norwood: Is this a differential they were including in the price?

Mr. Ewing: No, sir. It purports to be a statement of rates between certain points on certain commodities, specific commodities. It was given at their request as prepared information. It is as though they had gone to the Interstate Commerce Commission and asked for such a statement.

Mr. Wright: It is apparent from the background of that and the document itself, that it is a statement of the freight rates which were applicable to the shipments by the National Lead Company, Cincinnati office, at that time.

Trial Examiner Norwood: Is there anything here to show that National at this time was going by these figures?

Mr. Wright: Certainly.

Mr. Ewing: It does not prove we were going by the
figures. They asked for a compilation of freight rates
573 and we apparently got the information and gave it to
them, but there is no proof of any sale or anything.

Mr. Hinds: Suppose it were the mileages between the various cities and the Commission asked National Lead to prepare a list of mileages. As against Glidden, that is not evidence of the mileages.

Mileages, if material, must be proved by some other means.

Freight rates are generally accessible to anybody but what one respondent says are the facts is inadmissible against us.

Mr. Ewing: There is nothing to show any sale has any relation to this document which was never used in our business and was prepared for the Commission.

Mr. Wright: I think an inference can be drawn from the fact that the National Lead Company made a statement that those were the freight rates applicable on shipments from its branch office in Cincinnati to those points, that these were the rates applicable to shipments of National at that time from that branch.

Trial Examiner Norwood: Those were the figures they were using?

Mr. Ewing: There is nothing to show that we used them.

Mr. Wright: Look at this paragraph, "To give a
574 complete picture we list rail and truck rates on white lead-in-oil in kegs reported to us as of today."

Trial Examiner Norwood: If you assume these are not the freight rates, will you check it?

Mr. Ewing: I haven't even a copy of it.

Trial Examiner Norwood: You should have a copy of it. You shall have a copy of it. The objection is overruled and the exhibit is received as marked.

(The document referred to, heretofore marked COMMISSION'S EXHIBIT 715-A and 715-B for identification, was received in evidence.)

Mr. Wright: Your Honor, I offer in evidence Commission's Exhibit 716 which refers back to the same statement we made with regard to 713.

Mr. Ewing: I make the same objection with regard to 716 and the added objection that as a document itself it does not show anything. It doesn't show where it came from.

Mr. Wright: Your Honor, I would like to offer several of these exhibits, all of which are in the same status, so a common objection and common ruling may be made on them.

They are Commission's Exhibits 717, 718, 719-A through -C, 720-A and -B, 721 and 722, and also Commission's Exhibits 740-A, -B, -C, and -D.

575 Mr. Hinds: I object to introducing them collectively and insist they be introduced separately so we can examine them.

Trial Examiner Norwood: We do this quite frequently. It saves quite a bit of time.

Mr. Wright: All of them were offered under the statement as to Commission's Exhibit 713.

I might say they were all identified at page 334 of the record except for Commission's Exhibit 740 which was identified at page 743.

Trial Examiner Norwood: Has the Commission made duplicates of these exhibits for use of counsel?

Mr. McDermott: Mr. MacIntyre said a long time ago he would have photostats made for us but we have not got them as yet.

Mr. MacIntyre: These exhibits are in the form of letters supplied by officials of the National Lead Company to the Attorney-Examiner Dunn of the Federal Trade Commission. It certainly would appear they kept a carbon copy if nothing else.

Mr. Ewing: If the branches had the copies they are scattered all over the United States.

Mr. MacIntyre: If Mr. Ewing does not have such copies in his possession we will be happy this afternoon to make moves to secure a copy of the documents for him and 576 once they are in evidences, he will have copies of what is in evidence.

Trial Examiner Norwood: I hope counsel will make every effort to have copies made.

Mr. Ewing: I object to Exhibit 717 upon the grounds indicated and upon the further ground that the so-called rates given purport to be applicable only to shipments between Chicago and Pittsburgh, and do not, according to the face of document, relate to sales or prospective sales. It is simply inter-branch or inter-company shipments, if you want to call it that.

The same objection with respect to Exhibit 718.

The same objection with respect to 719-A to -C, and the same objection with respect to 720-A and -B.

The same objection with respect to 721, and the same objection with respect to 722.

And with respect to all, I object on the further ground there is nothing to indicate that in connection with any price charged by National for the sale of any of its products there is any recognition specifically of any freight rate of any kind.

I object also with respect to 740-A, -B, -C, and -D upon the further ground that there is nothing in the exhibits to indicate who prepared them, how they were prepared, and, of course, with respect to all exhibits I reserve my 577 right to verify their accuracy.

Mr. Hinds: The respondent Glidden Company, in respect to all of these exhibits, states that most have been shown to be statements made by one official of the National Lead Company to another official of that company with respect to a general fact, namely, freight rates.

As to the respondent Glidden, that is mere hearsay. If the freight rates are to be shown by the statement of an official of the National Lead Company, he should be brought into court so we may have an opportunity of cross-examining him.

In addition to that, as to The Glidden Company, as said before, there is no issue in the case with respect to freight rates, because we admit that our prices are uniform delivered prices within each so-called zone.

Mr. Wright: Your Honor, in reference to a statement by Mr. Ewing, with respect to Commission's Exhibit 740-A to -D, the transcript on page 384 contains testimony by the witness "They are freight rates covering particular shipments of white lead by National Lead Company, which Mr. Carroll, Mr. Reque and myself have examined, and these rates were handed to me by Mr. Carroll who, at my request, had obtained them from the local traffic man on the premises."

Mr. Ewing: That is good hearsay.

Trial Examiner Norwood: What is the page there?

578 Mr. Wright: Page 384.

Trial Examiner Norwood: And who examined them?

Mr. Ewing: Mr. Carroll and Mr. Reque. Mr. Carmichael said they were handed him by Mr. Carroll who at his request obtained them from the local traffic man after they had examined particular shipments of white lead, from their records.

Obviously, Mr. Carroll was not there, and I said there was nothing on the exhibits to show who prepared them or how they were prepared.

Trial Examiner Norwood: The witness had not obtained them from the local traffic man; had he?

Mr. MacIntyre: He obtained them from an official of the National Lead Company who had the traffic manager of the National Lead Company make them up for the investigator.

Carroll and Reque are the officials from whom they were obtained. They are officials charged with operating a large portion of the National Lead Company.

Mr. Hinds: Enlarging my objection on behalf of Glidden, suppose these were actually letters from the National Lead Company to the Commission stating "We have at your request investigated the freight rates and they are as follows:"? How would that be evidence of freight rates against us?

The National Lead Company can bind the rest of us, 579 and we can bind them prima facie under the stipulation as to what the facts are, but not as to the facts set forth in the document.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: I am going to reserve my ruling on this and look them over during the lunch hour.

What is your pleasure as to the lunch hour, gentlemen?

(Discussion off the record.)

Trial Examiner Norwood: We will recess at this time and reconvene at 2 o'clock.

(Whereupon, at 12:30 p. m., a recess was taken until 2:00 p. m., of the same day.)

580 Afternoon Session.

2:00 p.m.

Trial Examiner Norwood: The hearing will come to order.

(Commission's Exhibits 752-A to -Z-144, 714, 715, were marked for identification.)

In regard to Commission's Exhibit 583 for identification, which was offered in evidence this morning, I have looked up the record on that and I want to ask who Mr. Carroll and Mr. Reque are.

Mr. MacIntyre: Officials of the National Lead Company.

Trial Examiner Norwood: They are officials. That is not denied. I will overrule the objections and receive Commission's Exhibit 583 in evidence.

(The paper referred to, heretofore marked for identification COMMISSION'S EXHIBIT 583, was received in evidence.)

Trial Examiner Norwood: Now, respecting Commission's Exhibits for identification 716, 717, 718, 719-A to -C, inclusive, 720-A and -B, 721, 722, and 740-A to -D, the objections are overruled and they are received in evidence.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 716; 717; 718; 719-A, 719-B, 719-C, 720-A, 720-B; 721; 722; 740-A, 740-B, 740-C, 740-D, were received in evidence.)

581 Trial Examiner Norwood: Proceed.

Mr. Wright: Your Honor, in order to follow a logical sequence, we want to take up some matters relating to freight rates and shipments by National Lead Company which have not been identified. They were all supplied to us by the National Lead Company, and I don't think there will be any question about the identification of them, but I want to take that matter up with Mr. Ewing here.

Trial Examiner Norwood: All right.

Mr. Wright: Now, I ask that this letter be marked for identification by the reporter.

Trial Examiner Norwood: What is the next number?

Mr. Wright: That will be 750, I believe, sir.

Trial Examiner Norwood: Was anything marked this morning?

Mr. Wright: No, sir.

Mr. MacIntyre: No. We have numbers already up to 749-D.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Mark it 749, Mr. Reporter.

(The letter referred to was marked Commission's Exhibit 749 for identification.)

Mr. MacIntyre: Off the record.

582 Trial Examiner Norwood: Off the record.

(Discussion off the record.)

(Certain documents were marked Commission's Exhibits 750, 751-A and 751-B for identification.)

Mr. Wright: Another document which will be forthcoming from the National Lead Company tomorrow will be marked Commission's Exhibit 751-C for identification, which relates to 751-A and -B. I would like to hand these to Mr. Ewing and ask him if he is willing to make a statement about identification of them.

Mr. Ewing: Exhibit 749 for identification was prepared by the National Lead Company at the request of Mr. Carl H. Depue and sent to him with a letter written by me dated August 24, 1945.

Mr. MacIntyre: What is your last statement there?

Mr. Ewing: I say I think what it is speaks for itself. I will not describe it any more. Exhibit 750 for identification is the original letter from Mr. Fred McCarthy of National Lead Company addressed to Federal Trade Commission, dated August 21, 1945, written at the request of Mr. Carl H. Depue for the information therein set forth. Exhibit 751-A for identification was prepared by National Lead Company at the request of Mr. Carl H. Depue for the information set forth there, and it was forwarded to Mr. Depue by me with my letter of August 8, 1945.

583 Mr. MacIntyre: That last statement applies to both 751-A and -B?

Mr. Ewing: The same applies to Exhibit 715-B for identification. There are certain corrections to be made on these exhibits which will be supplied in the sheet to be marked 751-C for identification.

Mr. Wright: Your Honor, I wish to offer in evidence Commission's Exhibits 576-A through -E, which is a list of states in which National Lead's white-lead-in-oil was sold under "Fair Trade" contracts, together with a specific contract which was identified on page 154 of the record.

Trial Examiner Norwood: Did the counsel want to offer those others that have been identified?

Mr. Wright: No, sir. I would like to withhold those until we have some other exhibits in the record.

Trial Examiner Norwood: All right.

Mr. Hinds: I would like to have it noted with respect to those that have been identified but not offered that The Glidden Company does not in any way concede that the practices therein stated are facts.

Mr. Ewing: No objection.

Trial Examiner Norwood: Received as marked, Commission's Exhibits 576-A to -E.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 576-A, 576-B,
584 576-C, 576-D and 576-E, were received in evidence.)

Mr. Wright: I would like to offer in evidence Commission's Exhibit 617-A to -C, which is a specimen Fair Trade Agreement entered by the John T. Lewis and Brothers Company, a subsidiary of National Lead, with its customers, identified on page 322 to 325 of the record.

Mr. Ewing: No objection.

Trial Examiner Norwood: Received as marked.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT 617-A, 617-B, and 617-C, was received in evidence.)

Mr. Wright: I would like to offer Commission's Exhibit 618-A to -C, which is a specimen Fair Trade Agreement entered into by the National Lead and Oil Company of Pennsylvania with its customers, department of the National Lead Company, 322 to 325 of the transcript.

Mr. Ewing: No objection.

Trial Examiner Norwood: Received.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBITS 618-A, 618-B, and 618-C, was received in evidence.)

Mr. Wright: I would like to offer in evidence Commission's Exhibit 619-A to -C, which is a specimen Fair Trade Agreement entered into between the National Lead Company with its customers for white lead-in-oil, same
585 page, for identification.

Mr. Ewing: No objection.

Trial Examiner Norwood: Received.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT 619-A, 619-B, and 619-C, was received in evidence.)

Mr. Wright: I would like to offer in evidence Commission's Exhibit 527, which is a carbon copy of a letter from Albert Chatfield to E. J. Cornish, chairman of the board of the National Lead Company, under date of June 15, 1935, which is identified at page 144 of the record.

Mr. Wood: What page is that identified at?

Mr. Wright: 144.

Mr. Wood: I would like to look up where it is identified, for objection.

Trial Examiner Norwood: Yes, go ahead.

Mr. Wood: Mr. Wright and your Honor, I would like to look up Mr. Chatfield's testimony in respect to that exhibit and see whether or not I wish to object after looking at his testimony.

Trial Examiner Norwood: What page is it?

Mr. Wright: 171. I have it right here.

Mr. Wood: I wish to object to this on the grounds that it is completely irrelevant in that it has to do with a transaction that did not go through, that is, it has to do
586 with a proposed transaction that did not go through.

Mr. Ewing: On behalf of National, I object on the further ground that a large portion of it at least represents hearsay.

Trial Examiner Norwood: Who is Mr. Chatfield?

Mr. Wood: Mr. Chatfield is a Cincinnati broker.

Mr. Wright: Who testified at a hearing in Cincinnati, and your Honor will find the record of his testimony concerning this exhibit on page 177 and page 178 of the transcript.

Trial Examiner Norwood: Well, is he connected in any way with—what respondent is he connected with?

Mr. Wright: Well, your Honor, the complaint alleges that National Lead Company attempted to secure a stock control of the Eagle-Picher Company.

Mr. Ewing: It alleges that we did secure it; not that we attempted to.

Mr. Wright: And Mr. Cornish is the chairman of the board of the National Lead Company, to whom this stock broker is writing, and you will see that he testified, when presented with that exhibit for identification and asked if he recognized it as a photostatic copy of the letter he wrote —he says, "I don't remember the letter, but it looks like a photostatic copy of the letter I wrote.

587 "Well, did you write such a letter?

"I wouldn't swear to it, but it has my signature on it, so I must have written it."

Mr. Ewing: Chatfield is wholly independent.

Mr. Wood: He is connected with Eagle-Picher in any way.

Mr. Ewing: Or with National.

Mr. Wright: Well, it is our contention that Chatfield was acting for and in behalf of officials of the National Lead Company in this transaction.

Mr. Ewing: This testimony disproves that.

Mr. Wright: He so testified.

Mr. Ewing: He didn't so testify, Mr. Wright.

Trial Examiner Norwood: Don't make side remarks.

Mr. MacIntyre: May I make an observation on this, if your Honor please?

Trial Examiner Norwood: Let me read it. I will hear you in just a minute.

Mr. Wright: Your Honor, there is another exhibit which is a companion and which is also in exactly the same category which you may wish to consider. I will offer in evidence Commission's Exhibit 528, which is likewise a letter from Mr. Chatfield.

Mr. MacIntyre: If your Honor please, I want to point out that these two exhibits have a bearing on the
588 charge which is made in subparagraph 6 of paragraph
7 of the complaint, appearing on page 5 of the mimeographed copy. This isn't the only evidence that is to be offered concerning the amount of stock in the Eagle-Picher that respondent National sought and did secure. We don't, of course, allege that National did secure this particular stock, all of it, that Chatfield was employed by them to buy

into the Eagle-Picher Company. We do have evidence that there was a substantial amount of stock bought by National or on its behalf, as is alleged in this subparagraph 6 on page 5, and we contend that the two documents that are now in the pending offer will show the purpose of the acquisitions which were made by National to be the purpose that is charged in the preamble of paragraph 7 appearing on page 4 of the mimeographed copy of the complaint. It is relevant to that charge, that is, both of these documents.

Mr. Ewing: The statements by Mr.—

Trial Examiner Norwood: Give me the paragraph there and subparagraph, so I can locate it.

Mr. Ewing: Subparagraph 6.

Mr. MacIntyre: Subparagraph 6 on page 5 of the mimeographed copy of the complaint, and paragraph 7, that is, the preamble in it, as appearing on page 4 of the mimeographed copy of the complaint. That is, the amended complaint.

589 Trial Examiner Norwood: Well, just what is the charge there? What is wrong about the buying up of part of Eagle-Picher?

Mr. MacIntyre: Simply this: The charges that appear on page 4 of paragraph 7 of the complaint is that National, at the time of its inception, in 1891, embarked upon the execution of a plan and program to secure unto it a monopoly of and a monopoly power and control over the manufacture, pricing, sale and distribution of white lead, and there is evidence in the record backing those charges up even at this date; that, following through with that plan, it secured the control over numerous lead producing and distributing concerns.

590 Trial Examiner Norwood: Yes, I recall.

Mr. MacIntyre: Now, when we come to paragraph 7, there is an allegation that in furtherance of that it also secured control of a substantial part of the capital stock of respondent Eagle-Picher Lead Company, and that up to February, 1943, it still held a more substantial part of the Eagle-Picher Lead Company's stock through one Edward J. Cornish, who had served as president of respondent National, and the efforts of National through Cornish and Chatfield, as disclosed through Exhibits 527 and 528, show that they had the purpose to secure a substantial block of approximately a half million shares of Eagle-Picher. That was what they were out to do, and if they had secured that at that time it would have given them absolute control over Eagle-Picher, because at that time the voting stock of Eagle-Picher was only about 900,000 shares.

Trial Examiner Norwood: Well, that is all clear, but what we want to get at is the meat of the thing, as to whether or not this is satisfactory evidence that may be received to support that.

Mr. Ewing: I submit that the letters of this—

Trial Examiner Norwood: Here is this man Chatfield, who was a broker, stock broker, and he is writing to Cornish and to Carter in a way that would indicate that both of these gentlemen had given him an order to buy some of this stock.

Mr. MacIntyre: And he was on the stand and tes-
591 tified that that was the fact, pages 177 and 178 of the record.

Trial Examiner Norwood: Well, I want to see that.

Mr. Ewing: If you can find any testimony that they gave him an order to buy this stock from Chatfield, I would like for you to point it out.

Mr. MacIntyre: The record is very clear at the point I have cited to the effect that they were negotiating with Chatfield to purchase this block of stock from financial interests in Cincinnati.

Mr. Ewing: He was trying to work up a deal, Mr. Chatfield was—there is no doubt about that—with somebody, but he testified, after being asked if he received a response to his letter to Mr. Carter, bottom of page 179, "No, I didn't receive anything". This Mr. Weatherhead, whom he had also communicated with, lived in New York, and he had charge of the whole matter, and nothing came of it. We could not do anything with it. This Mr. Weatherhead has been dead for several years.

Trial Examiner Norwood: Now, the question here is: Did National or these officers of National give this man an order? Is there any evidence that they gave him an order for this stock?

Mr. Ewing: There is none in the record that I know of.

Mr. Wood: My objection is directed to the point
592 that it is Mr. Chatfield's affirmative testimony that nothing came of this.

Trial Examiner Norwood: I don't think that that makes so much difference in the matter of disclosing purpose. It might disclose purpose. But I would like to see it connected up, in some substantial way with some affirmative action on the part of National.

Mr. MacIntyre: Well, if Your Honor please, may I—

Trial Examiner Norwood: 177, did you say?

Mr. MacIntyre: May I refer you to the record beginning with line 6, page 178?

Trial Examiner Norwood: Yes.

Mr. MacIntyre: I put this question to Mr. Chatfield. I am talking about a document marked for identification as 527.

"You accept that it is a copy of a letter from you to Mr. Cornish?"

Now, mind you, at that time Mr. Cornish was one of the chief executives of the National.

"Answer: Well, it must be. I went in to see Mr. Cornish on several occasions originally, about stock owned with National Lead in view of purchasing, and I may have written this letter in answer to that interest.

"Question: But you don't have now, any copy of any of your correspondence with Mr. Cornish?

593 "Answer: No I haven't any of it. I don't think I had ever a letter from Mr. Cornish or Mr. Carter, either one."

But he has testified there, beginning with line 6 at 178, that he did discuss the matter in person with Mr. Cornish on several occasions. That was how he opened his negotiations.

Trial Examiner Norwood: What does Mr. Cornish say?

Mr. MacIntyre: Mr. Cornish, unfortunately, is dead.

Trial Examiner Norwood: And what did he say Mr. Cornish said?

Mr. Ewing: He never testified that Mr. Cornish said anything to him.

Trial Examiner Norwood: Mr. Carter?

Mr. Ewing: He never testified that Mr. Carter said anything to him. As I say, Your Honor, it is perfectly clear from what he did say that he was a stock broker trying to work up a deal.

Mr. MacIntyre: I want to point out to Your Honor that Mr. Ewing has stipulated on the record at page 144 that he has produced these records, the two documents that you hold in your hand, in photostatic form from the files of National Lead Company, a respondent here.

Mr. Ewing: We had them. They were written to us.

Mr. MacIntyre: So how did they get there with
594 Chatfield's name on them from Cincinnati if Chatfield
didn't write them for National?

Trial Examiner Norwood: That may be all right, Mr. MacIntyre, but I just could not be happy about this thing until you connect it a little. If it is true, you will be able to do it, but that is not my responsibility. But I think that I will sustain the objection for the time being to this and give you a chance to connect it up a little better than this, because a man is not responsible for what other people wrote to him.

Mr. MacIntyre: Well, it so happens that National produced these from their files.

Mr. Ewing: Anybody in the United States or the world can write National a letter any time they want.

Trial Examiner Norwood: Now, this does not seem to be in the regular course of business like these people's prices and these people's quotations and all. They are the transactions themselves, and if you find those in the files and they connect up and they are consistent with other things you find in the files, you may consider them, but this is an isolated transaction, so far as I know now, and I am going to sustain the objection, and you can connect it up later.

Mr. Wright: Your Honor, I wish to offer in evidence Commission's Exhibit 664, which is identified at page 342 of the record, which shows the comparative sales of the
National Lead Company of white lead in oil and dry
595 lead over the years 1940, 1941, and 1942, together with
their percentage of the business as to the rest of the industry.

Mr. McDermott: What page of the transcript, please?

Mr. Ewing: Insofar as the typewritten matter appearing in the exhibit is concerned, I have no objection. I haven't the faintest idea whose writing is on the exhibit, and I don't think it should go in.

Trial Examiner Norwood: What about that writing, Mr. Wright?

Mr. Wright: Well, I have no idea where the writing came from. I am now going to offer in evidence Commission's Exhibit 578-A, which should be considered in connection with it, because at page 155 of the record it is stated to be a document prepared by the National Lead Company and furnished to the Federal Trade, with the same effect

Mr. Ewing: Which page did you say, Mr. Wright?

Mr. Wright: That is on page 155 of the transcript.

Mr. Ewing: I have no objection to this.

Trial Examiner Norwood: Well, does that throw any light on the writing?

Mr. Wright: I am not offering the writing. It is just the typewritten material that we are offering in the first exhibit; that is correct.

Trial Examiner Norwood: All right.

Mr. Wright: The second exhibit is handwriting.

596 Trial Examiner Norwood: 664 and 578-A are received in evidence. It is understood that the writing is not included, the handwriting in pencil is not included.

Mr. Wright: In the first one, that is?

Trial Examiner Norwood: In 664, yes. I want to make that clear.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS NOS. 664 and 578-A, were received in evidence.)

Mr. Wright: I wish to offer in evidence Commission's Exhibit 526, which is a notification to Harold Rowe, Chairman, White Lead Sales Committee, by Secretary, showing action of the Board of Directors in setting various prices in white lead in oil as of March 1, 1935.

Mr. Ewing: The letter is dated February 1, 1935?

597 Mr. Wright: Yes, but the prices were March 1.

Mr. McDermott: What page of the record, please?

Mr. Wright: That is identified at page 144.

Mr. Ewing: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification "COMMISSION'S EXHIBIT NO. 526," was received in evidence.)

Mr. Wright: Your Honor, I also offer in evidence 562, which is a letter from Ellis E. Busse, of the Cleveland branch of the National Lead Company, to Harold Rowe, under date of April 17, 1942, identified at page 151 of the record.

Mr. Ewing: I will object to this on the ground that the subject matter which is referred to does not appear in any sufficient detail from the exhibit to form a basis for the reception of the exhibit.

Trial Examiner Norwood: Who is Mr. Busse?

Mr. Ewing: He was, I believe, branch manager of National Lead Company's Cleveland branch at that time.

Mr. Wright: Your Honor, it seems to me that that shows a matter of policy by the National Lead Company in its branches with reference to the method of quoting and prices made to Government agencies on Government bids.

Mr. Ewing: How can you say that an isolated letter
with respect to one or two isolated transactions is
598 evidence of a policy for anything, for that branch, let
alone all the other branches, Your Honor?

Mr. Wright: We don't purport to show by that letter the whole policy of the National Lead Company.

Mr. Ewing: Well, that is what you just said.

Mr. Wright: It is everything that goes to make up that policy.

Mr. Ewing: Well, are you trying to prove the policy with this letter?

Mr. Wright: No. In part.

Mr. Ewing: Well, to the extent that it is offered in part to prove the policy, I object.

Trial Examiner Norwood: I think that that should come in for study.

Objection overruled. Received as marked.

(The document heretofore marked for identification "COMMISSION'S EXHIBIT NO. 562," was received in evidence.)

Mr. Wright: Your Honor, I would like to offer in evidence Commission's Exhibits 539, 540, and 541, which are copies of telegrams by Harold Rowe to branch managers.

Mr. Welch: What were those numbers again, Mr. Wright?

Mr. Wright: 539, 540, and 541. 539 and 540 are copies
of telegrams from Harold Rowe to various branch
599 managers. 541 is a copy of a telegram from the branch
manager of the San Francisco office, National Lead
Company, to Harold Rowe regarding the announcement of
a price change. That is identified at page 147 of the
record.

Mr. Ewing: I will object to these three on the ground that they are irrelevant. They are inter-office communications with respect to price changes.

Mr. Wright: Your Honor, we feel that is relevant as showing a part of the policy of the National Lead Company in making up and announcing its prices to the public through its branches.

Mr. Ewing: Just what is that relevant to, Mr. Wright, may I inquire?

Mr. Wright: It seems to me one of the primary issues in the case is the manner in which prices on white lead in oil are made and announced.

Trial Examiner Norwood: Well, it is a wire to raise the price and lower it, which they all do all the time. It is the only way they can get them up or down.

Mr. Wright: That is right.

Trial Examiner Norwood: If you can connect it up with anything—I just don't see that there is anything there that you can get your teeth in.

Mr. Wright: We think it is relevant, first of all, to
show the interval between the time decisions are made
600 to raise prices and the time price changes are put into
effect.

Mr. Ewing: Standing in and of itself and taking us alone, there is certainly no importance whatsoever as to how we go about raising or lowering the prices.

Mr. MacIntyre: Well, if Your Honor please—

Trial Examiner Norwood: Are you going to connect this up by price information covering about the same time by other respondents, and so forth?

Mr. Wright: Yes, sir,

Mr. MacIntyre: If Your Honor please, it is, first, relevant to another issue that is raised in this complaint, and that is that prices are made by these respondents as administered prices from their corporate offices in New York, Cincinnati, Cleveland, Chicago, and without any reference to the supply-and-demand factors at each of these destinations. In other words, the bargain power of the buyer is nil. It back in those days was handled—that is, the price of this lead—as if it were a seller's market as it is now, when the buyer has nothing to say as to whether he will get it at his price or not.

Trial Examiner Norwood: I don't think that is followed by a firm changing prices and requiring its branches to do the same thing. It has to do it that way.

Mr. MacIntyre: Yes, but it is meeting competition
and making competition, as the respondents contend,
601 the pressure on the prices would not be from New
York but from these various destinations where the
price is applicable.

Trial Examiner Norwood: There is nothing to show that the pressure did not come that way, first.

Mr. Ewing: Naturally, the management fixes the prices.

Mr. MacIntyre: That is exactly what we contend, that the management makes them.

Trial Examiner Norwood: You will have to start somewhere. I will give you an opportunity to connect these up.

I will receive these subject to connection. 539, 540, and 541, the objections are overruled, and they are received in evidence.

(The documents heretofore marked for identification "COMMISSION'S EXHIBITS NOS. 539, 540, and 541," were received in evidence.)

Mr. Wright: Your Honor, I offer in evidence Commission's Exhibit 525, which is a copy of a letter from Harold Rowe, of the National Lead Company, to Sherwin-Williams Company of Canada, under date of December 14, 1933, announcing a price change. Exhibit 525. It is identified at page 144 of the record.

Mr. Ewing: I will object to that, if Your Honor please, on the ground that it is a communication addressed to
602 presumably reaching, the Sherwin-Williams Company of Canada. It is obviously without the scope of this proceeding.

Trial Examiner Norwood: Objection overruled. Received as marked.

Mr. Welch: Your Honor, may I interpose one additional objection before Your Honor rules?

Trial Examiner Norwood: Yes. Go ahead.

Mr. Welch: Sherwin-Williams Company, the defendant in this case, did not on December 14, 1933, own the controlling interest, or any substantial portion of the stock of the Sherwin-Williams Company of Canada.

Trial Examiner Norwood: Well, it appears to me that this is offered to show a national quotation here on this date. Is that right?

Mr. Wright: Well, it is offered to show an announcement by National of a price change.

Mr. Ewing: All the price changes are in exhibits that have already come in. I fail to see the relevance of this letter addressed to a company that is not a respondent, without the States, involving a matter not in issue in this proceeding.

Mr. Wright: Also to show to whom the National Lead Company announced such price changes.

Trial Examiner Norwood: I will receive it subject to connection.

603 (The document heretofore marked for identification "COMMISSION'S EXHIBIT NO. 525," was received in evidence.)

Mr. Wright: Your Honor, I will offer in evidence a series of Commission's Exhibits, 549, 550, 551, 552, and 553, all of which consist of copies of telegrams sent by the Office of Price Administration to the National Lead Company, over a period from January 14 to March 31, 1942, setting ceiling prices on various lead pigments.

Mr. Ewing: That begins at what number?

Mr. Wright: 549.

Mr. McDermott: What page of the transcript, please?

Mr. Wright: That is at page 148.

Mr. Ewing: We object to the offer of all of these exhibits, Your Honor.

As to 549, you will note that that is a telegram from Leon Henderson, Administrator, Office of Price Administration, addressed to National Lead Company, requesting that no such pigments therein mentioned could be sold at prices in excess of prices existing on January 2, 1942. Now, of course, we undoubtedly received such telegram, but I submit that it is not at all relevant to any of the issues in this case unless they are charging, of course, that O. P. A. is a co-conspirator.

With respect to the next exhibit, 550, that is a telegram
calling us into conference to discuss a proposal for
604 stabilization of prices, inquiring as to whether we will
have a representative there. I submit that that is
wholly irrelevant to any of the issues here.

The third one, 551, is a telegram fixing the ceiling prices on certain pigments. We undoubtedly received it. They undoubtedly represent the ceilings, but neither that exhibit nor the succeeding exhibits, 552 and 553, have any relevance that I can see to any issue in this case.

Trial Examiner Norwood: How about 552 and 553?

Mr. Ewing: Same.

Trial Examiner Norwood: You say it is the same objection.

Go ahead, Mr. Wright.

Mr. Wright: Your Honor, we have no intention of charging the O. P. A. as being a party to any conspiracy, and the proffer of that material was simply to make the record complete as to this pricing information so that the full background will be in the record. We have no serious wish to have it in, and we will withdraw the offer if Mr. Ewing objects to it.

Trial Examiner Norwood: Well, I think, inasmuch as it is pleaded there by some of these respondents that they did affect the prices at that time, or that since a certain date they have, I think that it is part of the price picture.

We might just as well leave it in.

605 Objection overruled. 549, 550, 551, 552, and 553 are received. If we find that it is not relevant we can withdraw it.

(The documents heretofore marked for identification "COMMISSION'S EXHIBITS NOS. 549, 550, 551, 552, and 553," received in evidence.)

Mr. Wright: Your Honor, may we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: We will take a 15-minute recess.

(There was a short recess taken.)

Trial Examiner Norwood: The hearing will be in order.

Mr. Wright: I would suggest that we adjourn over until 10 o'clock in the morning, at which time the marking of these exhibits will be complete, and then we can call Mr. Depue at that time and have him testify.

Trial Examiner Norwood: Any objections?

Mr. Ewing: No objection.

Trial Examiner Norwood: We will recess until—do you want it 9:30 or 10 o'clock?

Mr. Ewing: I think 10 o'clock will be preferable with us.

Trial Examiner Norwood: We will recess until 10
606 o'clock tomorrow morning.

In the meantime, will the Reporter mark the exhibits up and be ready?

(Thereupon, at 3:35 o'clock p. m., June 17, 1946, the hearing was adjourned until Tuesday, June 18, 1946, at 10 o'clock a. m.)

607 Room 332, Federal Trade
Commission Building,
Washington, D. C.,
June 18, 1946.

Met pursuant to adjournment, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Everette MacIntyre, Ssq., Paul R. Dixon, Esq., and Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington, D. C.), and T. J. McDowell, Esq. (101 Prospect Avenue, Cleveland, Ohio), appearing for Sherwin-Williams Company.

Henry E. Gardiner, Esq. (Chadbourne, Wallace, Parks & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

608 Edmund P. Wood, Esq. (2801 Carew Tower, Cincinnati, Ohio), and Richard Serviss, Esq. (1100 American Building, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

James D. Ewing, Esq., W. R. McDermott, Esq., and E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

Roger Hinds, Esq. (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

609 Proceedings.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on yesterday, the hearing in Docket 5253 is now reconvened in Room 332, Office of the

Federal Trade Commission, Washington, D. C., at 10 o'clock a. m.

Mr. Wright: Your Honor, I would like to call as a witness Mr. Carl H. Depue.

CARL H. DEPUE was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

(Documents were thereupon marked for identification
as Commission's Exhibits Nos. 752-A, 752-B, 752-C, 752-D,
752-E, 752-F, 752-G, 752-H, 752-I, 752-J, 752-K, 752-L,
752-M, 752-N, 752-O, 752-P, 752-Q, 752-R, 752-S, 752-T,
752-U, 752-V, 752-W, 752-X, 752-Y, 752-Z, 752-Z-1, 752-Z-2,
752-Z-3, 752-Z-4, 752-Z-5, 752-Z-6, 752-Z-7, 752-Z-8, 752-Z-9,
752-Z-10, 752-Z-11, 752-Z-12, 752-Z-13, 752-Z-14, 752-Z-15,
752-Z-16, 752-Z-17, 752-Z-18, 752-Z-19, 752-Z-20, 752-Z-21,
752-Z-22, 752-Z-23, 752-Z-24, 752-Z-25, 752-Z-26, 752-Z-27,
752-Z-28, 752-Z-29, 752-Z-30, 752-Z-31, 752-Z-32, 752-Z-
610 33, 752-Z-34, 752-Z-35, 752-Z-36, 752-Z-37, 752-Z-38, 752-
Z-39, 752-Z-40, 752-Z-41, 752-Z-42, 752-Z-43, 752-Z-44,
752-Z-45, 752-Z-46, 752-Z-47, 752-Z-48, 752-Z-49, 752-Z-50, 752-
-Z-51, 752-Z-52, 752-Z-53, 752-Z-54, 752-Z-55, 752-Z-56, 752-Z-
57, 752-Z-58, 752-Z-59, 752-Z-60, 752-Z-61, 752-Z-62, 752-Z-63,
752-Z-64, 752-Z-65, 752-Z-66, 752-Z-67, 752-Z-68, 752-Z-69,
752-Z-70, 752-Z-71, 752-Z-72, 752-Z-73, 752-Z-74, 752-Z-75,
752-Z-76, 752-Z-77, 752-Z-78, 752-Z-79, 752-Z-80, 752-Z-81,
752-Z-82, 752-Z-83, 752-Z-84, 752-Z-85, 752-Z-86, 752-Z-87,
752-Z-88, 752-Z-89, 752-Z-90, 752-Z-91, 752-Z-92, 752-Z-93,
752-Z-94, 752-Z-95, 752-Z-96, 752-Z-97, 752-Z-98, 752-Z-99,
752-Z-100, 752-Z-101, 752-Z-102, 752-Z-103, 752-Z-104, 752-
Z-105, 752-Z-106, 752-Z-107, 752-Z-108, 752-Z-109, 752-Z-110,
752-Z-111, 752-Z-112, 752-Z-113, 752-Z-114, 752-Z-115, 752-Z-
116, 752-Z-117, 752-Z-118, 752-Z-119, 752-Z-120, 752-Z-121,
752-Z-122, 752-Z-123, 752-Z-124, 752-Z-125, 752-Z-126, 752-
Z-127, 752-Z-128, 752-Z-129, 752-Z-130, 752-Z-131, 752-Z-132,
752-Z-133, 752-Z-134, 752-Z-135, 752-Z-136, 752-Z-137, 752-
Z-138, 752-Z-139, 752-Z-140, 752-Z-141, 752-Z-142, 752-Z-143,
752-Z-144.)

Direct Examination by Mr. Wright.

Q. Mr. Depue, will you state your full name and
611 occupation for the record?

A. Do you want the middle name?

Carl Harmon Depue.

Trial Examiner Norwood: What is the middle name? Carl?

The Witness: Harmon.

I am a certified public accountant and employee of the Commission.

By Mr. Wright:

Q. Mr. Depue, how long have you been employed by the Federal Trade Commission?

A. Seventeen years.

Q. Did you have any occasion to make an examination of the records of National Lead Company?

A. I did.

Q. Approximately over what period of time was that examination conducted?

A. It seems to me it was five or six weeks, in their office; in their offices.

Q. During what time was that, roughly?

A. Wasn't it last year at this time? I think so.

Q. Were you assisted in that examination by any other employees of the Commission?

A. Two of them, yes.

Q. Who were they?

612 A. Frank Brown and—I can't remember the other's name.

Q. Well, was this investigation under your supervision and direction?

A. Yes.

Q. In the course of that investigation, did you consult with various officials of the National Lead Company—

A. I did.

Q. In securing the information?

A. I did.

Q. Who were these officials, if you recall?

A. Mr. Ewing, Mr. McDermott, and Mr. McCarthy.

Q. I show you a document which has been marked as Commission's Exhibit 752-A through Z-144, for identification, and ask you to state what that is.

A. That is an analysis of their sales in about 60 cities, I believe, during the months of January to March, 1941, October to December, 1941, inclusive, and January to March, 1943.

Q. I show you the sheet, now, which is marked Commission's Exhibit 752-B, for identification, and ask you to describe what that is.

A. It is an analysis of a representative sample of sales made by the Boston branch, or the Boston Lead Company, which is a subsidiary of The National Lead Company, during those three three-months' periods. January to March —the first quarter of 1941, last quarter of 1941, first
613 quarter of 1943, in various sizes of containers, which pertains to sales of white lead-in-oil.

Q. And I call your attention to the—

Mr. Ewing: Excuse me, Mr. Wright.

If your Honor please, I move to strike out from that answer so much of it as pertains to the witness' characterization with respect to the witness' analysis, which I believe he called a representative specimen, and also with respect to the characterization of the transaction which he designated as "sales." I think the document speaks for itself, and there should be no conclusions in the answer.

Mr. Wright: I believe, Mr. Ewing, as we get further along with the identification, that it will be perfectly plain exactly what his answer is and what his description is of the document.

Mr. Ewing: That may be, but I certainly prefer not to have a description which represents the witness' conclusion.

Trial Examiner Norwood: Yes.

Read the statement in question.

(The Reporter read the last answer.)

Trial Examiner Norwood: I think we ought to be a little bit more particular in our descriptions there. He may say that it is an analysis of sales at that place and time which he considers representative. I think he may
614 state it that way, or he may—

Mr. Ewing: I have no objection at all to it appearing that he considers it a representative analysis. But, of course, that leaves the question open as to whether it is or isn't, but I think the characterization of the transaction as "sales," also represents the witness' conclusion.

Trial Examiner Norwood: But if he knows, if he wants to commit himself that far—I just want to caution here, inasmuch as the language is objected to—if he wants to commit himself so far as to swear positively that those are the representative sales, he may do so; but he will have to tell you on cross-examination how he knows that, and that will bring on some more talk.

Mr. Ewing: I am not anxious to enlarge the record for the sake of hearing my voice. I can assure you of that.

Mr. Wright: Well, Your Honor, I might say that we are going through this in detail, and I think it will appear perfectly plain before we are through exactly what this information is. I have no desire to have it characterized as anything but what it is.

Trial Examiner Norwood: I will deny the motion for the time being.

Mr. MacIntyre: May we go off the record?

Trial Examiner Norwood: Yes.

(Discussion off the record.)

615 Trial Examiner Norwood: Do you wish to modify that statement there as to its being representative sales, as I have suggested?

The Witness: No.

Trial Examiner Norwood: Motion denied.

Go ahead.

By Mr. Wright:

Q. I call your attention to the first column of 752-B, which is headed "Agents" where there is a list of names, and ask you what those names are.

A. That is the company's classification of those customers, and my information is that they were sold under consignment—that the goods were shipped to them on a consignment basis—

Q. Just a minute. Just answer my question here. In other words, these represent customers of The National Lead Company's branch?

A. That is right.

Mr. McDermott: In referring to these, you refer to the column at the lefthand margin of the page?

Mr. Wright: That is correct.

By Mr. Wright:

Q. I now direct your attention to the second column over, which is headed "January-March, 1941, Invoices, Number" and "Date," and ask you what those two columns represent.

A. Those are the actual numbers and dates that 616 appeared on the invoices that are covered by this summary.

Q. Were those taken from actual invoices of The National Lead Company?

A. They were.

Q. Which were supplied to you by officials of The National Lead Company?

A. That is right.

Q. I now call your attention to the columns marked "1 Pound." "5 Pounds," "12½ Pounds," "25 Pounds," "50 Pounds," "100 Pounds," and ask you what those figures under those columns represent?

A. They represent the quantities sold in those size containers and the prices that appeared on the invoices for those items.

Trial Examiner Norwood: Off the record a minute.

(Discussion off the record.)

By Mr. Wright:

Q. I now direct your attention to the column headed "Total Pounds WHLD, Billed," and the figures appearing thereunder. Will you describe those, please?

A. Well, the first of the two columns that you refer to is the total pounds of white lead that appeared on the invoice.

Q. That were billed to that particular customer which appears at the left of the column?

A. That is right.

617 Q. I now call your attention to the columns marked "Shipments," "Origin," and "Destination," and ask you to explain that.

A. Well, on that particular exhibit no place of origin is given, but the destinations are given, which is the point to which the goods were shipped to the respective customers.

Q. I see. Now, Mr. Depue, was this information taken off original invoices which were brought to you by officials of the National Lead Company?

A. That is right.

Q. In response to what request were the invoices supplied to you?

A. They were requested to furnish, if I remember rightly, all of their invoices during those periods to each class of customers.

Q. You say all of their—

A. In those respective cities.

Q. You say all of their invoices. Then, so far as you know, there was no selection made?

A. They were all shipped to the company's offices in New York and in boxes, of course, and they were sorted according to customer classifications, and then handed to me in bundles of that nature, and then from those bundles I selected what I regarded as a representative sample of the whole.

Q. You did not, then, record all of the invoices
618 which were presented to you covering sales of white
lead—

A. No.

Q. —in those periods?

A. No.

Q. I call your attention to the initials which appear in the upper righthand corner of the sheet, Commission's Exhibit 752-B, "fib" and "hmm," and ask you what those initials are?

A. Those are the initials put there by my two assistants on this work who checked all of the data on these sheets claimed by them—initialed by them. That is to say, they checked the transcription of that information from the respective invoices.

Q. I call your attention to Commission's Exhibit 752-C, and ask you what that represents.

A. Well, it sets forth the information obtained from the invoices rendered by the Boston branch to the customers named in the first lefthand column, and those customers are classified there, and it shows the invoice numbers and dates, and shows the size of containers involved on those invoices, and the prices charged for lead in those sizes of containers, and contains the total white lead in pounds on each of those invoices, and over on the destination shows the points to which the goods were shipped.

Q. I call your attention to the statement "Sales to Steamships and Railroads" at the head of the lefthand
column. From whom did you obtain that classification
619 of customers that appears there?

A. It is evident on the invoices, or was in most instances, anyhow. If that didn't govern, why, they were—I presume they were all indicated by the names on the invoices, but if that wasn't true, they were sorted with a little slip of paper indicating that was the classification.

Q. I call your attention to Commission's Exhibit 752-D, and ask you to state what that represents?

A. The same type of information exactly on invoices rendered by the Boston branch to customers listed on the lefthand side which, in turn, are classified several ways, or there are several classifications of them. Each invoice number and date is given, the prices are shown, and the total under quantities in each size container are shown, and the total quantities on the invoices are shown, together with the destination of those shipments.

Q. I call your attention to the headings in the lefthand column, "Agents Sold to Dealers, Industrials Small, Industrials Large." Whose classification is that?

A. Mr. McCarthy's.

Q. In other words, that classification of customers was supplied to you by The National Lead Company?

A. That is right.

Q. I call your attention to Commission's Exhibit 752-E, and ask you to state what that is.

620 A. Well, it is an analysis of more invoices rendered by the Boston office to agents and dealers and industrials, and gives the number and date of the invoices, and quantities sold in each size container referred to here that is on the invoices, together with the prices for each item, each size container, and the total quantities on those invoices of white lead, and the destination of the respective shipments; and those bills were apparently all in the last quarter of 1941.

Q. I show you Commission's Exhibit 752-F, for identification.

Trial Examiner Norwood: Off the record just a minute.

(Discussion off the record.)

Trial Examiner Norwood: Back on the record.

By Mr. Wright:

Q. Mr. Depue, I show you the remaining sheets marked for identification Commission's Exhibit 752-G through Z-143, and ask you whether those sheets were prepared in a similar manner.

A. They were all of the same nature, except as plainly indicated by the headings; that is to say, they are a record of weights and prices covered by those invoices to the customers shown in the lefthand side of each sheet, and the destination is given of each shipment, and they were all selected by me from the mass of invoices submitted.

Q. In each case the invoice number of The National 621 Lead Company from which the information appearing in the tabulation was secured appears in the second column of each sheet; is that correct?

A. I beg your pardon. I didn't hear the first part.

Q. In each case on all of these sheets does the original invoice number of The National Lead Company covering—does the number of the original invoice of The National Lead Company covering the transaction set out in the tabulation appear in that second column of each sheet?

A. Yes, the number and date of the invoices appear in all instances. I—Yes.

Mr. Wright: I have no further questions at this time.

I have one more question I would like to ask.

Trial Examiner Norwood: Yes.

By Mr. Wright:

Q. You stated from the mass of invoices submitted. Were all these invoices submitted to you by Mr. McCarthy, or other officials of The National Lead Company, in their offices?

A. Yes.

Mr. Wright: That is all.

The Witness: In other words, I made the selection. They did not. But I tried to get a comprehensive, representative sample, and I believe I did.

By Mr. Wright:

622 Q. On the classification of customers appearing in the various sheets, was that secured from officials of The National Lead Company?

A. Yes.

Mr. Wright: I have no further questions.

Mr. Wood: Is that going to be offered in evidence?

Mr. Wright: Yes.

Mr. Wood: I mean it was marked for identification.

Mr. Wright: Well, I was offering him for cross-examination.

Trial Examiner Norwood: Well, as I understand, you have gone into nothing but the matter of identification of this document.

Mr. Wright: I now offer Commission's Exhibit 752-A through Z-144 in evidence.

Trial Examiner Norwood: The counsel may, on account of the nature of this document, cross-examine him on the identification if you want to, or ask him some voir dire questions as to the contents to enable you to direct your objection, if you have any.

Mr. Ewing: That is what I would like to do, Your Honor, and I think it—

Trial Examiner Norwood: I will ask one more thing: Are the invoices on which those tabulations are based available to the counsel for the respondents?

623 Mr. MacIntyre: May I answer that question?

Trial Examiner Norwood: Yes.

Mr. MacIntyre: They are, and a photostat of this exhibit has been in their possession ever since prior to the time it came into our possession.

Trial Examiner Norwood: How long is that?

Mr. MacIntyre: Last summer.

Mr. Ewing: We have the original invoices as represented by this segregated. I have not got them with me, but they were very kind to arrange for us to have the opportunity to make copies.

Trial Examiner Norwood: Commission's Exhibit, for identification, 752-A to Z-144 is now offered in evidence, and are there any objections?

Mr. Hinds: May I ask, does counsel intend to say that photostats have been given to all the respondents?

Mr. Ewing: No. Just us. Just us.

Might I have a couple of minutes to discuss these matters?

Trial Examiner Norwood: Yes.

Mr. Ewing: I would like to shorten cross as much as I can.

Trial Examiner Norwood: We will have a five minutes' recess.

(There was a short recess taken.)

624 Trial Examiner Norwood: The hearing will come to order.

Proceed.

Are there any objections to the proffer?

Mr. Ewing: Before objecting, Your Honor, I would like an opportunity to examine the witness.

Trial Examiner Norwood: Yes. Go ahead.

Mr. Ewing: Mr. Depue—

Mr. MacIntyre: Just a moment. May I inquire whether this is cross-examination, or what it is?

Trial Examiner Norwood: He may ask any voir dire questions with respect to the identification. Of course, it is to be confined to identification until it is received in evidence.

Mr. McDermott: And with respect to the admissibility of the documents, sir, in light of the offer in evidence?

Trial Examiner Norwood: Yes.

Mr. MacIntyre: I would object to cross-examination in the form of a voir dire.

Trial Examiner Norwood: Yes. Well, go ahead and ask the questions. I will pass on them as they are asked, if I am required to do so.

Examination by Mr. Ewing.

Q. Mr. Depue, you testified, I believe, that the
625 invoices which you asked National Lead to produce for
your examination covered three three months' periods;
is that correct?

A. Yes.

Q. And those periods were January to March, 1941; October to December, 1941, and January to March, 1943; is that correct?

A. It is.

Q. If I heard you correctly, I believe you testified that you asked National to produce all of its invoices covering white lead, dry or in oil during those periods?

A. That is correct.

Q. And those invoices were produced for your examination?

A. To the best of my knowledge, they were.

Q. The data shown on those exhibits which have been marked for identification, which you or your assistants took down, does not represent information with respect to all of the invoices during those periods, does it?

A. No, sir; only those that are listed.

Q. About how many invoices would you say are represented by the entries on these 167 or 168 sheets, roughly?

A. How many are listed here?

Q. Just roughly?

A. Eight or ten hundred.

Q. About how many, roughly, invoices did you and your assistants examine?

A. Probably twice that many; maybe more. It
626 depended. It wasn't always the same. In some instances
I took larger proportionate samples than I did in

others in order to get the whole price structure portrayed. I might have to almost exhaust some lots to do that. Other times I may have taken only a quarter of them; maybe a half of them; or something else.

Mr. Ewing: I move to strike the answer, Your Honor, except the figure, approximately, the rest being a voluntary statement of the witness, not responsive to the question.

Mr. MacIntyre: I submit it was responsive.

Trial Examiner Norwood: I think he has given us some information here which we ought to know.

Read the question and answer.

(Last question and answer read by Reporter.)

Trial Examiner Norwood: Those explanations probably will be wanted, but they are not responsive to the counsel's question, and he has a right to have the—

The Witness: I tried to be responsive. I may not have been.

Trial Examiner Norwood: He has a right to have it responsive. So I will allow the motion to strike everything—read that answer again and I will tell you where to stop.

(Last answer re-read by Reporter.)

Trial Examiner Norwood: Strike everything after the words "maybe more" appearing there.

627 Proceed.

By Mr. Ewing:

Q. Mr. Depue, I direct your attention to the sheet marked 752-B, for identification, the first sheet about which you testified. The heading representing the classification is "Agents."

Did I understand you correctly that you testified that the classification or classifications generally were given you by representatives of National Lead?

A. Yes.

Q. Just as were the invoices, themselves?

A. Yes.

Q. But, as far as the data that appears on these sheets is concerned, you selected the particular invoices with respect to which you made notes?

A. That is right.

Q. And the selection was not made by National, or any of its representatives?

A. That is right.

Q. The only classification heading on this sheet 752-B, for identification, is "Agents"; is that correct?

A. That is right.

Q. And every invoice with respect to which you made a notation on that sheet was one of the Boston branch, so-called?

A. That is correct.

628 Q. When you noted on this sheet the data with respect to the first name listed under the heading "Agents," the invoice number 219 and the date 1/24/41, was it your understanding—as I believe you answered or referred on direct—that the shipment of the quantity shown to that concern represented a shipment to it on consignment?

A. Yes.

Q. In other words, it did not represent an actual sale by National Lead Company to B. & D. Wallpaper Company?

A. I would say it does represent a sale. It is an accounting for consigned goods after they had been sold.

Q. It doesn't represent a sale to the B. & D. Wallpaper Company?

A. It doesn't represent the size of that particular shipment, but it does represent a sale, as I understand it.

Q. But what I wanted to get clear was, It was not your understanding that it represented a sale to this B. & D. Wallpaper Company by National Lead? It represented, did it not, an accounting by that concern to National Lead for a withdrawal by it from stock consigned to it?

Mr. MacIntyre: If Your Honor please, I object to this line of questions. It is not voir dire. That is clear. It goes to an analysis of information in the document which is subject only to cross-examination and not to a preliminary examination as to what the document is.

629 Mr. Ewing: It goes, Your Honor, directly to one of the bases for my objections to this document.

Trial Examiner Norwood: What is that?

Mr. Ewing: That is, that this, in the first place, is not a sale, not a single transaction on this sheet is a sale, and, therefore—that is, Exhibit 752-B, for identification.

Trial Examiner Norwood: Well, I suppose it either shows what it is—I don't care to go into the correctness of this document, but you may show how he made it. I don't think you should go into the correctness of this. Your question should be confined to the matter of identification, just what it is.

Mr. Ewing: I submit I should be entitled to show, Your Honor, facts that would render the document inadmissible.

Mr. MacIntyre: Yes, but, if Your Honor please, he is going far beyond that. He is attempting to go into matters of cross-examination and not actually subject to a proper cross-examination of this witness, because what he is attempting to do is to ask this witness to tell him how somebody in The National Lead Company would have interpreted the basis from which this data is made; that is, the legal effect of it. This witness isn't competent to do that. He is going into the legal effect of some document in The National Lead Company's offices.

630 Trial Examiner Norwood: I am going to overrule the objection and ask the counsel to sketch this so that there will be no question about your question being directed purely to the identification of the document.

Mr. Ewing: My second point is that, regardless of what you call this transaction, or any of them that come under that "Agents" classification here in the case of Exhibit 752B, for identification, you have transactions between National Lead's Boston branch and shipment destinations all lying within the State of Massachusetts. Now, it is my position that under those circumstances, regardless of what you call a transaction, it was intrastate, not interstate; that, therefore, the matter sought to be introduced through this sheet is inadmissible.

Mr. Wright: Your Honor—

Trial Examiner Norwood: Now, listen, I think that the matters that you mentioned there go to the weight of the contents there.

Let us hear Mr. Wright.

Mr. Wright: Your Honor, this is one sheet of an entire document which shows a course of business of The National Lead Company, and on that particular sheet perhaps all the destinations are within the same State from which they were shipped, but that document must be taken as a whole. One sheet cannot be singled out.

631 Mr. Ewing: It cannot be taken as a whole. The witness has sampled many more invoices than are represented on the sheet.

Trial Examiner Norwood: Well, you ask him questions that show just what this document is, not whether it is right or wrong. You may take that up and disprove all of it and cross-examine him on that. After it has been received in evidence you may examine him further on that, but just direct your questions now to the identification of the document.

Mr. Ewing: Well, is Your Honor ruling—

Trial Examiner Norwood: What it is, not whether it has weight or whether it is correct.

Mr. Ewing: I understand. I am not questioning the correctness of the document at all. My questions, as I said, are for the purpose of bringing out the fact that these particular items on this particular sheet were transactions on a consignment basis, the agency form of contract having gone in evidence yesterday.

Trial Examiner Norwood: I think those are matters which the document shows for itself. That is going into cross-examination on the document. We did not want to do that at this time.

Mr. McDermott: Sir, doesn't that go to the question of the admissibility of the document?

Trial Examiner Norwood: I don't think so.

632 Mr. Wright: Your Honor, these questions go to the question of whether these transactions amount to sales or whether it is a true agency, and that is one of the issues in the case, and certainly we are not going to establish it through the testimony of this witness on identification of the document.

Mr. Ewing: Well, to make the document properly—

Trial Examiner Norwood: I just asked the counsel if he will not stay within that principle as far as he can. It is really difficult for me to say that this question should be asked or it should not with respect to a document of this kind and the many things it shows.

Go ahead. I overruled the question.

Mr. Ewing: Was there an unanswered question, Your Honor?

Mr. McDermott: Yes, there is an objection by Mr. MacIntyre.

Mr. MacIntyre: May we have the original question read?

Trial Examiner Norwood: Yes; that is right.

Mr. MacIntyre: I think that it will then become clear that it is a question asking this witness to interpret the law as to whether the course of action by National Lead

Company establishes these customers as agents or as dealers, customers.

633 Mr. Ewing: I did not ask the witness for any law. I asked him for his understanding.

Mr. MacIntyre: Let us have the question.

Trial Examiner Norwood: Hold everything.

Read the question.

(The Reporter read the last question.)

Trial Examiner Norwood: I believe that the counsel for the Commission is right about that. I think we ought to stay off of questions like that.

I will reverse my ruling and sustain the objection to this question at this time. You may ask him that later on. You just ask questions that will help you in some way in objecting.

Mr. Ewing: In order to cover myself, so far as the record is concerned, might I have an exception to the sustaining of a similar objection to all the other questions that I would have asked with respect to similar pages of the exhibit?

Trial Examiner Norwood: I believe that that gives counsel full advantage of any other questions he should ask as to anything he wants.

Mr. Ewing: That is all I want. I don't want to go through making a record on 167 sheets.

Trial Examiner Norwood: That is right.

Mr. Ewing: Just one more question, Mr. Depue.

By Mr. Ewing:

634 Q. On each of these sheets which you or your assistants prepared, and which have been marked Exhibit 752-B to Z-143, for identification, there is a column with the heading "Destination"?

A. Yes.

Q. And wherever the information is filled in on each of these sheets in that column, is it your testimony that the destination point so given represents the destination point of the shipment with which it is concerned?

A. Yes, but perhaps I should say that I obtained this information from invoices. If there was any information there to indicate that the destination was not the location of the customer, naturally I followed the terminology "Destination" and picked it up, but if there was nothing on the invoices of that nature other than the customer's address, then those so-called destination points are probably the location of the customer.

Q. And, in any event, that information, just as all the other information on each sheet, is data which you took off the invoices?

A. That is right, with a few exceptions when maybe I also had freight bills.

Q. In every case on these sheets, Mr. Depue, in which you list a transaction with a party which is classified on the sheet as an agent, will you state whether that transaction, or each of those transactions, as indicated by the 635 invoice from which you obtained the data, represented a specific shipment?

A. No, they did not represent separate shipments for a difference of that precise quantity. They were settlements. They were settlements for consigned goods that had been sold.

Mr. Ewing: That is all.

Trial Examiner Norwood: Do counsel object to the exhibit, the proffer?

Mr. Wright: May we have a little redirect, Your Honor?

Trial Examiner Norwood: Yes. Go ahead. Strictly as to the identification.

Mr. Wright: That is right.

Redirect Examination by Mr. Wright.

Q. Mr. Depue, you stated in your last answer that these represented a settlement of accounts of consigned goods. Now, is that answer limited only to those accounts which are headed "Agents" in your tabulations?

A. No, certainly. It is only a dealing with agents.

Q. And all other accounts except those marked "Agents" represent single shipments and sales to customers?

Mr. Ewing: It is a double question, I think, Your Honor. The form of the question I object.

Mr. Wright: I will reframe it. I will withdraw the question.

636 By Mr. Wright:

Q. Then that last answer has no application to any other classification in the tabulation, in the exhibits?

A. Except with respect to the customers classified as agents, all others were—all other transactions are direct sales, outright, direct sales, and presumably represent separate shipments.

Mr. Wright: That is all.

Mr. Ewing: You don't know, yourself, that they were separate shipments?

The Witness: No. They were separate billings, anyhow.

Mr. Ewing: If Your Honor please, I object to the offer of the documents which have been marked for identification Exhibits 752-B to Z-143, inclusive, in so far as the data appearing thereon relates to the classification "Agents," upon the ground that it appears that they were not what the witness, in response to another question, termed outright, direct sales, and upon the further ground, to the extent that it so appears, that they represented intrastate transactions and not interstate transactions.

Mr. MacIntyre: Well, if Your Honor please, in response to that objection—

Trial Examiner Norwood: Are you through stating that objection? Wait just a moment.

637 Mr. Ewing: I should like to make it perfectly clear, to the extent that the objection is based upon the fact that the transaction is an intrastate one, as indicated on these sheets, that objection is not limited to the "agents" classification, but is to apply to all cases where that fact so appears.

Mr. MacIntyre: If Your Honor please, in consideration of the statement made by Mr. Ewing on this matter, of classification of "Agents," I call your attention to page 6 of the mimeographed form of the complaint, and subparagraph 5 appearing thereon, to the following effect: That the respondents, acting in cooperation, agreed to adopt and have adopted, maintained, and used terms and conditions of sale embodied in so-called "consignment" or "agency" agreements under the leadership of respondent National Lead Company for the purpose of preventing dealers selling white lead and white lead paint from making offers to sell such products at levels lower than the offers made by the respective respondent producers whose names were affixed to such "consignment" or "agency" agreements.

So, whether or not, therefore, these particular transactions were outright, direct sales, and direct shipments, or handled through persons who were parties to the so-

called "consignment" contracts of National and other respondents, it is immaterial because it does go—
638 whether it is one or the other—to the charge in the
complaint to which I have just called your attention.

Mr. Ewing: I fail to see, Your Honor, how it can possibly be said that this data supports the charge that we have agreed to adopt and have adopted and maintained and used terms and conditions of sale embodied in "consignment" contracts. These sheets do not prove that. They do not in any way reflect that.

Trial Examiner Norwood: Let me have some of those sheets while you are talking about them.

Mr. Wright: Your Honor, they have already been introduced in evidence, and will be introduced, more of the actual consignment contracts and the terms of sale embodied and connected thereto, which will—

Trial Examiner Norwood: This shows the condition of consignment. Does it show the rates that were charged up to the consignees as the basis of settlement, and so on? Does it show that, Mr. Wright?

Mr. Wright: Those show the amounts for which the agents, so-called, were billed for the white lead-in-oil which they sold during the preceding month.

Trial Examiner Norwood: Do you have any further statement to make, Mr. Ewing?

Mr. Ewing: No, sir.

Trial Examiner Norwood: Do you have any further
639 statement on that?

Mr. Wright: No, sir. Well, as to the intrastate nature of the transaction, as we have already pointed out, this exhibit must be taken as a whole and a single page which does not show interstate—

Mr. Ewing: Each individual transaction is the subject of my objection, and the fact that he binds these sheets together doesn't make it one integral document.

Trial Examiner Norwood: The counsel has his objection to all the documents that are tabulated that are intrastate transactions and contends that they should not enter into the computation as to figuring averages and total results, and so forth. Is that correct?

Well, I think that it is very clear that the courts and the Commission may consider intrastate transactions along with the other to show what the pricing methods are, if it indicates that, and I shall overrule the objection and counsel have their exception to all that, and receive the exhibits as marked.

(The documents heretofore marked for identification
COMMISSION'S EXHIBITS NOS. 752-A, 752-B, 752-C,
752-D, 752-E, 752-F, 752-G, 752-H, 752-I, 752-J, 752-K,
752-L, 752-M, 752-N, 752-O, 752-P, 752-Q, 752-R, 752-S,
752-T, 752-U, 752-V, 752-W, 752-X, 752-Y, 752-Z, 752-Z-1,
752-Z-2, 752-Z-3, 752-Z-4, 752-Z-5, 752-Z-6, 752-Z-7,
640 752-Z-8, 752-Z-9, 752-Z-10, 752-Z-11, 752-Z-12, 752-Z-13,
752-Z-14, 752-Z-15, 752-Z-16, 752-Z-17, 752-Z-18,
752-Z-19, 752-Z-20, 752-Z-21, 752-Z-22, 752-Z-23, 752-Z-24,
752-Z-25, 752-Z-26, 752-Z-27, 752-Z-28, 752-Z-29, 752-Z-30,
752-Z-31, 752-Z-32, 752-Z-33, 752-Z-34, 752-Z-35, 752-Z-36,
752-Z-37, 752-Z-38, 752-Z-39, 752-Z-40, 752-Z-41, 752-Z-42,
752-Z-43, 752-Z-44, 752-Z-45, 752-Z-46, 752-Z-47, 752-Z-48,
752-Z-49, 752-Z-50, 752-Z-51, 752-Z-52, 752-Z-53, 752-Z-54,
752-Z-55, 752-Z-56, 752-Z-57, 752-Z-58, 752-Z-59, 752-Z-60,
752-Z-61, 752-Z-62, 752-Z-63, 752-Z-64, 752-Z-65, 752-Z-66,
752-Z-67, 752-Z-68, 752-Z-69, 752-Z-70, 752-Z-71, 752-Z-72,
752-Z-73, 752-Z-74, 752-Z-75, 752-Z-76, 752-Z-77, 752-Z-78,
752-Z-79, 752-Z-80, 752-Z-81, 752-Z-82, 752-Z-83, 752-Z-84,
752-Z-85, 752-Z-86, 752-Z-87, 752-Z-88, 752-Z-89, 752-Z-90,
752-Z-91, 752-Z-92, 752-Z-93, 752-Z-94, 752-Z-95, 752-Z-96,
752-Z-97, 752-Z-98, 752-Z-99, 752-Z-100, 752-Z-101, 752-Z-102,
752-Z-103, 752-Z-104, 752-Z-105, 752-Z-106, 752-Z-107,
752-Z-108, 752-Z-109, 752-Z-110, 752-Z-111, 752-Z-112,
752-Z-113, 752-Z-114, 752Z-115, 752-Z-116, 752-Z-117,
752-Z-118, 752-Z-119, 752-Z-120, 752-Z-121, 752-Z-122,
752-Z-123, 752-Z-124, 752-Z-125, 752-Z-126, 752-Z-127,
752-Z-128, 752-Z-129, 752-Z-130, 752-Z-131, 752-Z-132,
641 752-Z-133, 752-Z-134, 752-Z-135, 752-Z-136, 752-Z-137,
752-Z-138, 752-Z-139, 752-Z-140, 752-Z-141, 752-Z-142,
752-Z-143, and 752-Z-144, were received in evidence.)

Mr. Wood: I haven't made an objection on behalf of Eagle-Picher, but I do object to these exhibits. There were similar exhibits that were taken from the records of Eagle-Picher. I don't want to anticipate my objection at that time, but I wish to go on the record. It may shorten it slightly if I stated that there are no other grounds for objection.

I object to the use of the word "destination" there. It is an interpretative word. See, these words were prepared weeks or months after the shipment, and currently there is an effort in the use of that word "destination" to create a different implication as to time, as if the order were sent and the price set, and then the shipment came later, whereas the shipment preceded the invoice in fact.

Trial Examiner Norwood: Well, as I take it, this witness is ready now to explain this exhibit. You may go into his testimony, and then he may be cross-examined on that, and the counsel may bring out these further particulars. All we have to decide now is, has it sufficient relevance and reliability to receive into evidence for our consideration?

Mr. Wright: I would like that this be marked for identification as Commissioner's Exhibit 753-A and B.

642 (The document referred to was marked for identification Commission's Exhibit No. 753-A and 753-B.)

Trial Examiner Norwood: Do you want a recess now?

Mr. Wright: Well, I will finish this witness in just about two minutes, and I don't think there will be any objection on the part of counsel.

Trial Examiner Norwood: All right.

Direct Examination (Resumed).

By Mr. Wright:

Q. I hand you herewith a document marked for identification as Commission's Exhibit 753-A and B, and ask you to state what that is.

Mr. Ewing: I concede that is my letter to Mr. Depue with the enclosure which speaks for itself. I have no objection whatsoever.

Mr. McDermott: What is the date of it?

Mr. Wright: September 18, 1945.

I offer that in evidence.

Trial Examiner Norwood: It is received as marked.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 753-A and 753-B, was received in evidence.)

Mr. Wright: I have no other question of this witness.

Trial Examiner Norwood: We will have a five-
643 minute recess.

(There was a short recess taken.)

Trial Examiner Norwood: Proceed, gentlemen.

Cross-Examination by Mr. Ewing.

Q. Mr. Depue, when you went to National Lead Company to make the examination of the invoices to which we have referred, you asked for the production of all of the invoices relating to transactions in certain cities, did you not?

A. I did.

Q. About how many cities were involved?

A. Sixty-seven.

Q. Did you, yourself, select the cities?

A. No.

Q. Do you know who did?

A. Yes.

Q. Will you tell us, please, sir?

A. I believe Mr. MacIntyre.

Q. Do you know, Mr. Depue, the basis for the singling out and selection of these particular cities?

A. No, I don't know. I, of course, have my opinion.

Q. Will you give us your opinion?

Mr. Wright: I object, Your Honor.

Trial Examiner Norwood: I don't see how one man can tell what another man thinks.

644 Objection sustained.

By Mr. Ewing:

Q. Did you have any conversation with Mr. MacIntyre with respect to the selection of these cities?

A. I did not.

Q. Or with anyone else?

A. No, I did not.

Q. Am I correct in understanding, then, that Mr. MacIntyre asked you to examine the invoices during the three months' periods involved, which might be produced with respect to these 67 localities?

A. That is right.

Q. You have just testified that the exhibits which have been produced and identified related to 67 cities. Originally, how many localities did you call upon us to produce invoices from?

A. I don't remember.

Q. Well, do you know whether there were more than 67?

A. I don't remember now whether these sheets covering 67 are the 67 that I asked for, but I think these cover 67 for which the invoices were supplied. I may be wrong.

Q. If I told you that according to my best recollection the original list of cities was 106, would that refresh your recollection?

A. You are probably right; I don't know.

Q. And, in fact, we produced invoices related only
645 to the 67 of which you have a read because we had no
invoices in the other localities during that period?

A. I believe that is right.

Q. Now, you have testified that in going over these invoices you made your own selection which you recorded, or your associates recorded, in these sheets; is that right?

A. That is correct.

Q. What is the purpose that you had in mind in making that selection?

A. I endeavored to record on these sheets the various prices charged each class of csutomer for white lead sold in the respective sizes of containers or in different quantities in each of these localities.

Q. The sheets which relate to transactions of the Boston branch, which have been marked Exhibit 752-B, C, D, E, F, and G, do not purport to set forth the data that each and every invoice of the Boston branch, produced for your inspection, showed relating to the three three months' periods, do they?

A. No, not all of them are recorded here.

Q. Now, in selecting the particular transactions which are recorded on the six sheets that I have just mentioned, will you tell us the criteria which you had in mind in making that selection?

Mr. MacIntyre: I object. There is no showing that there
was any particular criteria used. That should be
646 shown before this question is asked, as to whether
there was such a thing.

Trial Examiner Norwood: Objection overruled. He may tell us everything he can about these.

Answer the question.

The Witness: Well, I might say that I would go through those bunches that came to me and sort them out by the different prices shown, and then give consideration to the quantities involved and endeavor to get a record of all of the different prices and a representative sample of the quantities at which those different prices were charged for each class of customer in each of those periods, and so as a whole get, as I said before, a representative sample of the sales in each of these locations at the different prices for each class of customer.

By Mr. Ewing:

Q. What would make you, for example, in the case of this first sheet, 752-B, select invoice 219, the B. & D. Wallpaper Company, and leave out some other invoice?

A. Well, that is a pretty good illustration. You find the first two items are—or, rather, you will find the first and third refer to just one 12½-pound keg each, and on the fourth line there is 25 pounds, which means two of those 12½-pound kegs, and a bill with 50 pounds, which means four of those kegs, and all the way up to 137½, and
647 so it shows that the price was the same for those different quantities in that particular size container, and, likewise, with these other size containers at the respective prices.

Trial Examiner Norwood: Is the second column the price per 100, $10.50?

The Witness: Yes. In other words, it shows that size of the container to a certain extent at least governs the price differentials rather than the quantity, and the whole thing, of course, was to show the factors that govern the price differential.

By Mr. Ewing:

Q. When you say to show the factors which govern the price differential—

A. In so far as they are reflected by the invoice.

Q. What factors have you in mind?

A. Quantities and containers and customer classes.

Q. Now, in the case of your examination of the invoices in which you would discard some and retain others, except in the case of invoices relating to transactions with agents, you found sometimes, did you not, that an invoice might govern not only white lead-in-oil, say, but also some other product of The National Lead Company, such as red lead, or some other product. Is that correct?

A. Yes.

Q. And when you recorded from any such invoice
648 the information on this sheet, if it was the subject of your selection, you recorded, did you not, only the data relating to white lead?

A. That is right.

Q. And not the data relating to any other?

A. That is right.

Q. It is a fact, is it not, Mr. Depue, that the invoices relating to transactions with agents related to white lead only?

A. Well, I don't remember. Anyhow, there is nothing here except about white lead.

Mr. Wright: I object to that line of questioning because the sheets show the products to which they relate.

Trial Examiner Norwood: I think you are drawing the line too closely there. Let him tell us about this tabulation and how he made it.

The objection is overruled.

The Witness: I think I answered.

Mr. Ewing: I think you did.

By Mr. Ewing:

Q. Mr. Depue, did you have anything to do with the selection of the periods for which invoices were called for?

A. No.

Q. Do you know the reason for the selection of these particular periods?

649 A. I think they are related to the time when price changes occurred.

Mr. MacIntyre: If Your Honor please, I move that the last answer of the witness be stricken unless it is clearly shown that it is based on knowledge instead of supposition. May we have it read?

Trial Examiner Norwood: You may examine him on that point.

Read the answer.

(The reporter read the answer.)

Mr. Wright: The answer still shows that it is not of his own knowledge.

Trial Examiner Norwood: The motion is allowed.

By Mr. Ewing:

Q. Do you know, Mr. Depue, whether there were other prices, that is, prices other than as indicated on these sheets, for any other class of customer?

A. No; I endeavored to get a complete record of the different prices that appeared on the invoices.

Mr. Ewing: That is all.

Redirect Examination by Mr. Wright.

Q. Mr. Depue, you referred several times to transactions in white lead. Is it not true that there are also transactions in other pigments such as red lead and red
650 sulphate, which are interspersed through the exhibit and recorded?

A. I don't think there are. I believe there are sales to paint manufacturers involving some kind of a compound.

Q. The invoices which were brought to you by officials of the National Lead Company for the purpose of examination were sorted as to the various branches and subsidiaries of The National Lead Company, were they, when they were handed to you?

A. No, they came to me in bunches pertaining to the cities listed for which we asked information. Obviously, they came from the districts which controlled the sales in these cities.

Q. And you then inserted them for purposes of this tabulation into the various branches and subsidiaries of The National Lead Company?

A. Oh, yes, it shows the branch.

Q. You testified that you recorded certain of the invoices from the various branches and did not record the other invoices?

A. Yes.

Q. As to the Boston branch, for instance, can you state what proportion of those that were handed you you recorded, and can you state that generally as to the other branches?

A. I don't remember the proportions of representation with respect to each of these, but as I said once before, in order to get what I recorded as a representative
651 sample I may have taken three-quarters of the bills from one city and, in other instances, maybe only one-quarter in order to get such a sample. Which was true in Boston I wouldn't say, but I believe perhaps Boston might have been a half, and I have a pretty elaborate sample here for Boston.

Q. Mr. Depue, did the invoices which you did not record show any differences on their face as to prices or terms of sale to customers of the same classification?

A. No, indeed. This record shows the prices reflected on those invoices—not all the invoices, but there were no different invoices than those recorded here that were relevant, at least. It did not include all products.

Trial Examiner Norwood: Those you discarded were duplicates?

The Witness: Exactly. It would have only encumbered the record, and, moreover, it would have made it much more burdensome.

Mr. Wright: I have no further questions.

Recross Examination by Mr. Ewing.

Q. Mr. Depue, you say that you and two of your associates made this particular examination?

A. That is right.

Q. You made it commencing early in June, 1945, did you not?

A. I think so.

652 Q. And the examination continued until late in July, did it not?

A. It may have. I thought it was about six weeks.

Q. And during that time were the three of you at work on that job?

A. Continuously, yes, in your office.

Q. In The National Lead office?

A. Yes.

Q. So that the examination of the invoices presented to you involving the three three months' periods, and the accounts called for and the recording of the data which you elected to take therefrom, took substantially the time of you three men for six weeks?

A. Yes.

Mr. Ewing: That is all.

Trial Examiner Norwood: Thank you, Mr. Depue.

(Witness excused.)

Trial Examiner Norwood: Call your next witness.

Mr. Wright: May we go off the record a minute?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed, gentlemen.

Mr. Wright: Your Honor, at the hearing yesterday we received as to Commission's Exhibit, for identification, 571-A and B and some additional numbers for the 653 making of an additional exhibit, so I ask that these papers be marked for identification Commission's Exhibits 75-C, D, E, and F.

(The documents referred to were marked for identification as Commission's Exhibits Nos. 751-C, 751-D, 751-E, and 751-F.)

Mr. Wright: Do you care to make a statement about these, Mr. Ewing?

Mr. Ewing: Commission's Exhibit 751-A and B, for identification, are documents prepared by National Lead Company at the request of Mr. Carl H. Depue, and furnished by counsel for The National Lead Company to him.

Commission's Exhibit 751-C and D, for identification, are documents prepared by National Lead Company at the request of the Trial Attorney for the Federal Trade Commission, and furnished to him, representing corrections relating to Exhibit 751-A and B, for identification.

Commission's Exhibit 751-E and F, for identification, is a document prepared by National Lead Company at the request of the Trial Attorney for the Commission and furnished by counsel for National Lead Company to him.

Mr. MacIntyre: May I observe, Mr. Ewing, that 751-C and D was not prepared at the request of counsel for the Commission, and you agree it was not?

Mr. Ewing: If I referred to that as being prepared at your request, I was in error.

654 Mr. MacIntyre: Counsel for the National Lead Company prepared that as an explanation of theirs of material appearing on Commission's Exhibit, for identification, 751-A and B.

Is that correct?

Mr. Ewing: That is correct.

Mr. Wright: I now offer Commission's Exhibit 751-A through F into evidence.

Trial Examiner Norwood: Any objection?

Mr. Wright: These are offered as statements by The National Lead Company as to freight rates to destinations shown thereon.

Mr. Ewing: No objection.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 751-A, 751-B, 751-C, 751-D, 751-E, and 751-F, were received in evidence.)

Mr. Hinds: On behalf of Glidden, I object so far as this shows freight rates, as being hearsay evidence as to Glidden. Records made by someone else not here as a witness in court, and subject to cross-examination, are hearsay and objectionable and incompetent as against Glidden.

Trial Examiner Norwood: You mean a written statement? These are written tabulations of freight rates?

Mr. Hinds: I haven't seen the document, but I
655 heard counsel say they were tabulations of freight
rates.

Trial Examiner Norwood: Made by someone who is not sworn here and may not be cross-examined?

Mr. Hinds: Yes.

Trial Examiner Norwood: Freight-rates are a matter of public information and they may be checked.

Mr. Wright: These are offered as a statement of freight rates supplied to the Commission by National Lead Company.

Mr. Hinds: No objection, then, if not offered against Glidden.

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: I offer into evidence, Your Honor, Commission's Exhibit 749 as a document supplied by The National Lead Company to the Federal Trade Commission showing the location of factories, warehouses, and routing of shipments of lead pigments by The National Lead Company.

Trial Examiner Norwood: Any objection?

Mr. Ewing: I have no objection to 749. I object to any characterization of it.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification
656 COMMISSION'S EXHIBIT NO. 749, was received
in evidence.

Mr. Wright: Your Honor, I offer into evidence Commission's Exhibit 750, for identification, which is a letter from The National Lead Company to the Federal Trade Commission giving shipping weights of containers of white lead-in-oil and dry white lead.

Mr. Ewing: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 750, was received in evidence.)

Mr. Wright: Your Honor, this afternoon we planned to take up documents relating to the Eagle-Picher Company. We have similar tabulations of invoice material which we secured from the Eagle-Picher Company, and I request that it be marked for identification during the noon recess, and that will be Commission's Exhibit, for identification, 754-A through 754-Z-60.

Trial Examiner Norwood: That may be done.

(The documents referred to were marked for identification Commission's Exhibits Nos. 754-A, 754-B, 754-C, 754-D, 754-E, 754-F, 754-G, 754-H, 754-I, 754-J, 754-K, 754-L, 754-M, 754-N, 754-O, 754-P, 754-Q, 754-R, 754-S, 754-T, 754-U, 754-V, 754-W, 754-X, 754-Y, 754-Z, 754-Z-1,
657 754-Z-2, 754-Z-3, 754-Z-4, 754-Z-5, 754-Z-6, 754-Z-7, 754-Z-8, 754-Z-9, 754-Z-10, 754-Z-11, 754-Z-12, 754-Z-13, 754-Z-14, 754-Z-15, 754-Z-16, 754-Z-17, 754-Z-18, 754-Z-19, 754-Z-20, 754-Z-21, 754-Z-22, 754-Z-23, 754-Z-24, 754-Z-25, 754-Z-26, 754-Z-27, 754-Z-28, 754-Z-29, 754-Z-30, 754-Z-31, 754-Z-32, 754-Z-33, 754-Z-34, 754-Z-35, 754-Z-36, 754-Z-37, 754-Z-38, 754-Z-39, 754-Z-40, 754-Z-41, 754-Z-42, 754-Z-43, 754-Z-44, 754-Z-45, 754-Z-46, 754-Z-47, 754-Z-48, 754-Z-49, 754-Z-50, 754-Z-51, 754-Z-52, 754-Z-53, 754-Z-54, 754-Z-55, 754-Z-56, 754-Z-57, 754-Z-58, 754-Z-59, and 754-Z-60.)

Mr. Wright: Your Honor, we would like to offer now some exhibits on Eagle-Picher Company.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. MacIntyre: Your Honor, we now offer into evidence Commission's Exhibit, heretofore marked for identification, as Exhibit 665. It is offered as a statement of respondent Eagle-Picher Lead Company and Eagle-Picher Sales Company, showing the amounts of sales of white lead-in-oil and dry white lead made during the year 1940.

That exhibit was identified at page 343 of the record.

Mr. Wood: No objection.

658 Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 665, was received in evidence.)

Mr. MacIntyre: I now offer into the record Commission's Exhibit, for identification, 585 as a photostat of a map showing zone boundaries of zones used by Eagle-Picher Lead Company, and as furnished by a representative of that company to representatives of the Federal Trade Commission on December 4, 1940.

That is covered by provision of a stipulation in the record at page 207.

Mr. Wood: It is understood, isn't it, Mr. MacIntyre, that this map applies only to white lead-in-oil and nothing else?

Mr. MacIntyre: I don't know that I am ready to agree that it is to be so limited. I would say that we are offering it to apply to such lead pigments as the record, when it is closed, will show that it applies to.

We know it applies to white lead; we know that the pricing practices of Eagle-Picher with respect to some other lead pigments are shown to some extent to coincide with this.

Mr. Wood: You represented this as having been presented to the Commission by a representative of Eagle-Picher. It was not represented, was it, as covering
659 anything but white lead-in-oil?

Mr. MacIntyre: I don't believe it was so represented at that time.

Mr. Wood: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 585, was received in evidence.)

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. MacIntyre: I now offer into evidence Commission's Exhibit, for identification, 586 as a photostatic map showing zone boundaries of the Eagle-Picher Lead Company and Eagle-Picher Sales Company, as furnished by an official of that company to a representative of the Commission on December 30, 1942.

Mr. McDermott: Transcript, please?

Mr. MacIntyre: At page 208.

Mr. Wood: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 586, was received in evidence.)

Mr. MacIntyre: Your Honor, we now offer into evidence Commission's Exhibit 587 as a zone map of the
660 Eagle-Picher Company as furnished by Mr. Hayt, an official of that company, to a representative of the Commission on December 30, 1942, record pages 116 and 306.

Trial Examiner Norwood: Any objections?

Mr. Wood: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 587, was received in evidence.)

Mr. MacIntyre: Your Honor, we now offer into evidence Commission's Exhibit, for identification, 586 as a zone map of the Eagle-Picher Company as furnished by Mr. Hayt, an official of that company, to R. T. Dunn, a representative of the Federal Trade Commission, on December 29, 1943.

See record pages 186 and 212.

Mr. Wood: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 588, was received in evidence.)

Mr. MacIntyre: I now offer into the record Commission's Exhibit, for identification, 589-A and B, as a statement of the Eagle-Picher Sales Company in explanation of its zones, as furnished by Mr. Hayt, an official of that company, to R. T. Dunn, a representative of the Federal
661 Trade Commission on December 30, 1942, record pages 188 and 208.

Trial Examiner Norwood: Any objection?

Mr. Wood: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT 589-A and 589-B, was received in evidence.)

Mr. Wood: There is a slight discrepancy in dates I wanted to clear up.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. MacIntyre: I now offer into the record Commission's Exhibit 590-A to L as a statement of respondent Eagle-Picher in explanation of its zones, and identification of symbols used in connection with its zoning practice, as furnished by an official of that company to a representative of the Federal Trade Commission on December 30, 1942, see record pages 188 and 208.

Mr. Wood: This document is identified on page 208 of the record, and there is no objection to the document, but I prefer the identification that is in the record already.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification
COMMISSION'S EXHIBITS NOS. 590-A, 590-B,
662 590-C, 590-D, 590-E, 590-F, 590-G, 590-H, 590-I, 590-J,
590-K, and 590-L, were received in evidence.)

Mr. MacIntyre: Your Honor, we now offer into evidence Commission's Exhibit, for identification, 626, 627, 628, 629-A through C, 630-A through C, 631-A through F, 632-A through C, 633-A through C, 634-A through C, 635-A through D, 636-A through D, 637-A through D, 638-A through C, 639-A through C, 640-A through C, 641-A through C, 642-A through C, 643-A through C, as statements of provisions which were included in so-called agency or consignment contracts by respondent Eagle-Picher.

These documents have been marked for identification at record page 189 and identified at page 220.

They are statements of those provisions as furnished representatives of the Federal Trade Commission by representatives of the Eagle-Picher Company, respondent.

Trial Examiner Norwood: Any objection?

Mr. Wood: No objection.

I will put it this way: The documents are genuine, they are identified at the previous point in the record, and as there identified there is no objection to them.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification
COMMISSION'S EXHIBITS NOS. 626, 627, 628, 629-A,
629-B, 629-C, 630-A, 630-B, 630-C, 631-A, 631-B, 631-C,
631-D, 631-E, 631-F, 632-A, 632-B, 632-C, 633-A, 633-B,
663 633-C, 634-A, 634-B, 634-C, 635-A, 635-B, 635-C, 635-D,
636-A, 636-B, 636-C, 636-D, 637-A, 637-B, 637-C, 638-A,
638-B, 638-C, 639-A, 639-B, 639-C, 640-A, 640-B, 640-C,
641-A, 641-B, 641-C, 642-A, 642-B, 642-C, 643-A, 643-B,
and 643-C, were received in evidence.)

Mr. MacIntyre: Your Honor, we now offer into evidence Commission's Exhibit, for identification, 658 as a statement furnished by representatives of Eagle-Picher to representatives of the Federal Trade Commission of the dates on which price changes were made by respondent Eagle-Picher during the period December 17, 1926, through October 1, 1939, on white lead-in-oil.

That exhibit was marked for identification on page 189, and identified at pages 206 and 207.

Mr. Wood: Mr. MacIntyre calls our attention to the fact that he thinks there is a mistake in the record as to the dates.

Mr. MacIntyre: I think the ones I read off are the correct ones.

Mr. Wood: If the record is corrected to read October 1, 1939, instead of August 1, 1940, that would straighten things out.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

664 Trial Examiner Norwood: Commission's Exhibit 658 is received in evidence, subject to check.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 658 was received in evidence.)

Mr. MacIntyre: If Your Honor please, I now offer into the record documents heretofore marked for identification as Commission's Exhibits 660-A thorugh 660-Z-2 as a statement of respondent Eagle-Picher of its records of its announcements of its prices as quoted by it to its customers in various locations.

Those documents have been marked at the record page 189-A and identified at record page 221.

Mr. Wood: These documents were all identified in the record, and, as so identified, there is no objection to them.

Trial Examiner Norwood: They are received.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 660-A, 660-B, 660-C, 660-D, 660-E, 660-F, 660-G, 660-H, 660-I, 660-J, 660-K, 660-L, 660-M, 660-N, 660-O, 660-P, 660-Q, 660-R, 660-S, 660-T, 660-U, 660-V, 660-W, 660-X, 660-Y, 660-Z, 660-Z-1, and 660-Z-2, were received in evidence.)

Mr. Wood: Off the record.

665 Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. MacIntyre: If Your Honor please, we wish to introduce into evidence Commission's Exhibit heretofore marked for identification as 644.

I offer this as a statement of the Eagle-Picher Sales Company showing its distribution, dated December 4, 1940, and showing prices in effect for customers on various classes of its distribution system as of October 1, 1939.

I refer to the record, pages 189 and 206.

Trial Examiner Norwood: Any objection?

Mr. Wood: There is no objection to it. I would like, in letting it in, to comment that Mr. Serviss prepared this for his own use, and it is not a document used as a part of the sales policy of the company, Mr. Serviss being house counsel.

Trial Examiner Norwood: We will receive it as marked, and not as described.

Mr. MacIntyre: I respectfully refer Your Honor to the statement on the record appearing at pages 206 and 207.

Trial Examiner Norwood: That is what binds. Counsel is merely objecting to the other counsel's description at times. I merely want to state these exhibits are received as marked, and not necessarily as described by either counsel on either side.

666 Mr. MacIntyre: I am stating what my offer is and what it is offered as.

Trial Examiner Norwood: Your statement is not evidence.

Mr. MacIntyre: But I am telling you why I am offering it, and for what purpose, and if there is no basis in the record for receiving it as such it, of course, could not be received as such.

Trial Examiner Norwood: We are receiving the exhibit for what it is. You may be 100 per cent right, of course. The manner of presenting those will help us in studying the record.

It is received as marked, Commission's Exhibit 644.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 644, was received in evidence.)

Trial Examiner Norwood: Go ahead.

Mr. MacIntyre: Your Honor, we wish to offer into evidence Commission's Exhibits, for identification, 730-A and B, as a statement of the respondent Eagle-Picher of freight rates applying between destinations shown thereon.

Trial Examiner Norwood: Any objection?

Mr. Wood: I can't agree that freight rates apply between two destinations.

Mr. MacIntyre: Probably I should say between

667 the points of origin and the points of destination as shown on the exhibits.

Trial Examiner Norwood: Is there any objection?

(No response.)

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 730-A and 730-B, were received in evidence.)

Mr. MacIntyre: Your Honor, we wish to offer into evidence Commission's Exhibit, for identification, 647.

I offer this as a statement of a quotation and a statement of terms and conditions of sale made by Eagle-Picher Sales Company, which was furnished to a representative of the Federal Trade Commission by a representative of the National Lead Company.

Mr. Wood: What page of the record?

Mr. MacIntyre: The testimony of R. T. Dunn to the effect he secured that from the National Lead Company—

Trial Examiner Norwood: What page?

Mr. Wood: Your Honor, I am going to object to this exhibit as inadmissible until such time as it is explained and connected with the case.

Trial Examiner Norwood: In other words, counsel objects to it as irrelevant. Will counsel go on and complete his proffer and I will withhold the ruling on this.

668 Mr. MacIntyre: I am unable to give you the reference to the record on that at the moment, but it is in Mr. Dunn's testimony as to the source, as he put it.

Trial Examiner Norwood: Could you give me the date?

Mr. MacIntyre: He secured this from Mr. Rowe of The National Lead Company on April 23, 1943.

Trial Examiner Norwood: I mean the date of the record.

Mr. MacIntyre: He was on the stand more than one day. I will have to search for it.

Trial Examiner Norwood: I will reserve the ruling on 647.

Mr. MacIntyre: Mr. Wright has a group of exhibits he wants to offer before the noon hour.

Trial Examiner Norwood: Can't these go over?

Mr. MacIntyre: I would like for these to be offered before we adjourn so that if you want to reserve ruling on any—

Trial Examiner Norwood: How many are there?

Mr. Wright: About 25.

Trial Examiner Norwood: Go ahead.

Mr. Wright: Your Honor, I offer in evidence Commission's Exhibit, for identification, 684, which is a carbon copy of a memorandum to Mr. Maston, vice-president of Eagle-Picher Company from J. Stranad, dated August
669 17, 1933, which is identified at page 204 of the record.

And I also offer in evidence Commission's Exhibit 685—

Mr. Wood: Just a moment.

Mr. Wright: This is related to the prior exhibit, which is a letter from the Atlantic branch of The National Lead Company to Dutch Boy Agents, which appears to be an enclosure to Commission's Exhibit 684.

I also offer Commission's Exhibit 686, which is a letter from W. E. Maston to J. Stranad of the New York office, under date of August 21, 1933, which relates to 684 and 685.

At the same time I offer Commission's Exhibit 702, which is the original of Commission's Exhibit 686, identified at page 214 of the record.

Trial Examiner Norwood: What is the object in offering the original and the duplicate?

Mr. Wright: It was secured in different places, and identified at different places in the record. They are covered by the stipulation.

Mr. Wood: These documents, Your Honor, are stipulated as to their authenticity. I don't want to burden the record with a great many further objections because there is no objection, but I dislike a case in which just quantities of documents go into the record without any explanation of the documents, so that when the case
670 is over and the time comes for briefing counsel can
pick them out and draw all sorts of inferences and implications.

I think this type of thing should be kept out of evidence unless it is connected with the case in some way.

Mr. Wright: Your Honor, that evidence is certainly relevant to the issues. The documents show on their face conversations between representatives of National Lead Company and Eagle-Picher Lead Company regarding the subject of agency.

Trial Examiner Norwood: Complete your proffer and I will look over these during the recess, and I may discard some of them.

Mr. Wright: Your Honor, I offer into evidence Commission's Exhibit, for identification, 687, which is a statement of the organization and officers of the Eagle-Picher Company, under date of July 30, 1941.

I want to state for the record at this time Commission's Exhibit 687 is properly identified at page 287 of the transcript. There is on page 205 of the transcript an identification of 687-A, B, C, and also 688-A, B, and C, and the record is in error on the listing of those exhibits on page 205 of the transcript.

Trial Examiner Norwood: How is that?

Mr. Wright: Apparently in the record Commission's Exhibit 687 is identified on two different pages as two different documents.

671 The proper identification is on page 207, and the purported identification on page 205 is in error.

Trial Examiner Norwood: All right.

I warn you again, however, to list those corrections that are to be made because they have to be submitted in written lists.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 687, was received in evidence.)

Mr. Wright: Your Honor, I offer into evidence Commission's Exhibit, for identification, No. 688, which is identified on page 207 of the record, which is a price schedule of the Eagle-Picher Company for white lead-in-oil, as of May 1, 1941, and that is identified properly at page 207 of the record, and purported identification on page 205 is in error.

Mr. Wood: No objection:

Trial Examiner Norwood: Commission's Exhibit 688 is received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 688, was received in evidence.)

Mr. Wright: Your Honor, I offer into evidence Commission's Exhibit heretofore marked for identification No. 691, which is a photostat of a letter from Frank L. Chinery, chief chemist of Eagle-Picher, to Carleton H. Rose, of The National Lead Comapny, under date of November 29, 1940, and Commission's Exhibit 692, which is a copy of a letter under date of November 20, 1940, from Carleton H. Rose of The National Lead Company to Mr. Chinery of the Eagle-Picher Company, 672 which are identified at pages 209 and 210 of the record.

Mr. Wood: These documents are genuine, but I object to them being received in evidence because I think the documents standing alone as evidence are fallacious. If they can be connected into the case, or their significance brought in, they are unquestionably genuine, but standing alone they are trivial and unrelevant.

Trial Examiner Norwood: They are admitted subject to connection.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 691 and 692 were received in evidence.)

Mr. Wood: I object to a whole mass of unconnected detail on this case.

Trial Examiner Norwood: I shall take these and look over them, and if I can't see their relevance we will lay them aside until their relevancy appears.

Mr. Wright: I now offer in evidence Commission's Exhibit 695, which is a copy of a letter under date of April 15, 1937, to Eagle white lead and oil distributors from the Eagle-Picher Sales Company, signed by H. Bendelari, head of the white lead and oil division, which was produced for a representative of the Commission by Mr. Rowe of National Lead Company, and identified at page 211 of the record.

673 Trial Examiner Norwood: How many more have you got there?

Mr. Wright: About 12.

Trial Examiner Norwood: It is one o'clock. I don't see why they can't wait until this afternoon.

Mr. MacIntyre: Can we adjourn until 2:30?

Trial Examiner Norwood: Yes. We will recess until 2:30.

(Thereupon, at 1 o'clock p. m., a recess was taken in the hearing until 2:30 o'clock p. m. of the same day.)

674 Afternoon Session, 2:30 P. M.

Trial Examiner Norwood: The hearing will come to order.

I have read these exhibits, Commission's Exhibits, for identification, 647, 684, 685, 686, 702, 691, 692, and 695. I did not mark 687. Where is that?

Mr. DuBose: 687 and 688 are in evidence, I believe.

Mr. McDermott: There was no objection to 687, sir.

Trial Examiner Norwood: You are sure 687 is in evidence?

Mr. McDermott: Yes, sir.

Trial Examiner Norwood: The ones I have enumerated, the objections are overruled and they are received in evidence.

(The documents heretofore marked for identification, COMMISSION'S EXHIBITS NOS. 647, 684, 685, 686, 702, 691, 692, and 695, were received in evidence.)

Trial Examiner Norwood: Proceed.

Mr. MacIntyre: May we wait for a few minutes until Mr. Wright returns?

Trial Examiner Norwood: Yes.

(There was a short recess taken.)

Trial Examiner Norwood: Are you ready?

Mr. Wright: Your Honor, I am sorry I had to step 675 out of the room to get a paper.

Were any of these documents you had under consideration rejected?

Trial Examiner Norwood: No. No. They were all received in evidence.

Mr. Wright: Thank you, sir.

Your Honor, I offer into evidence as Commission's Exhibits 696 and 697—Exhibit 696 is a photostat of an original letter from W. R. Dice, the executive vice-president of the Eagle-Picher Lead Company, to F. E. Wormser, the secretary of the Lead Industry Association, under date of November 16, 1937.

697 is a photostat of a carbon copy of a letter from Mr. Wormser to Mr. Dice, under date of November 19, 1937, identified at page 211 of the record.

Mr. Wood: This is objected to, Your Honor, as irrelevant to the issues of the case, though I concede that with appropriate oral testimony it might become pertinent later, but in the absence of testimony I see no relevance in it.

Trial Examiner Norwood: I will overrule the objections and receive them subject to connection.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 696 and 697 were received in evidence.)

676 Mr. Wright: Your Honor, I offer in evidence Commission's Exhibit 700-A and B, which is identified on page 213 of the transcript, which is a letter from the vice-president and treasurer of the Eagle-Picher Lead Company to a representative of the Federal Trade Commission, under date of June 4, 1943, showing a transcript from the records of the stock transfer agent of the Eagle-Picher Company with the holdings of Eagle-Picher stock of Edward J. Cornish in The National Lead Company.

Trial Examiner Norwood: What is the number? 700-A and B?

Mr. Wood: 700-A and B. I object to this, Your Honor. I brought this same point up yesterday, but I didn't make myself clear on the record.

The Federal Trade Commission Act does not include within the jurisdiction of the Commission offenses against the Sherman Act. That was specifically excluded by reason of the court decision that a price-fixing conspiracy is considered an unfair method of competition, so that we have gotten into the habit of thinking of offenses against the Sherman Act as being co-extensive with the jurisdiction of the Commission.

Now, section 2 of the Sherman Act includes the attempt to monopolize as a violation of the Sherman Act, but the point I wanted to make yesterday, and make now, is that
the intent of National, even if it had the intent to
677 monopolize, cannot be an unfair method of competi-
tion. In other words, how can National's intent, whatever it was, be an unfair method of competition?

So I object to all evidence relating to National's intent to monopolize because National's evil thoughts have nothing to do with Eagle-Picher.

Trial Examiner Norwood: They alleged an attempt; didn't they?

Mr. Wright: Yes, sir; the complaint alleges an attempt to monopolize, and an intent on the part of The National Lead Company to monopolize this business.

Mr. Wood: That isn't an unfair method of competition, though.

Trial Examiner Norwood: No. No.

Mr. Wright: It goes to the essential conspiracy in the monopolization case.

Trial Examiner Norwood: No. I don't think that just to prove the intent would be a violation of the Sherman Act, but I think counsel is wrong about saying that the Federal Trade Commission Act is not as extensive as the Sherman Act. It is much more extensive because the Federal Trade Commission can proceed before a monopoly is formed.

Mr. Wood: I will put it this way—

Trial Examiner Norwood: I can check the capacity and tendency.

678 Mr. Wood: Yes; but I will try—

Trial Examiner Norwood: The policy underlying these anti-trust actions are to be considered by the Federal Trade Commission in determining what practices are unfair. So it is really broader.

Mr. Wood: Yes. The point is that Congress in passing the Federal Trade Commission Act gave the Commission jurisdiction as to enforcement of the Clayton Act but not jurisdiction as to enforcement of the Sherman Act, so it is only part of the offenses comprehended by the Sherman Act which are also under the Federal Trade Commission Act. So in other respects it may be broader, as you say.

Mr. MacIntyre: If Your Honor please, we are not proceeding here under the Sherman Act.

Trial Examiner Norwood: No.

Mr. MacIntyre: We are proceeding under a complaint which alleges a violation of section 5 of the Federal Trade Commission Act.

Trial Examiner Norwood: That is what he says. He says we are proceeding under section 5. He is right about that.

Mr. MacIntyre: Your Honor, I will refer you to page 4, paragraph seven, of the mimeographed copy of the complaint, where it is charged that The National Lead Company embarked upon the execution of a plan and
679 program to secure unto it a monopoly of and a monopoly power and control over the manufacture, pricing, sale, and distribution of white lead, and then in subparagraph 6 thereto, on page 5 of the complaint, the further allegation is made that National has also secured a control over a substantial part of the capital stock of Eagle-Picher Lead Company in connection with the execution of that plan, and this exhibit that is now before you is relevant to those two charges.

Trial Examiner Norwood: Mr. Cornish was an officer of National; was he?

Mr. Ewing: That is correct.

Trial Examiner Norwood: Does this have any connection with exhibits that were rejected yesterday?

Mr. Wright: Your Honor, I was about to re-offer Commission's Exhibits 527 and 528 which were considered yesterday, and I would like to do so now while the offer of this other exhibit is pending, that they all three be considered together, and I now make that offer.

Mr. Ewing: The other earlier exhibits that were rejected yesterday have absolutely nothing to do with that transaction.

Mr. Wright: Your Honor, these are letters to Mr. Cornish and Mr. Carter at the time when Mr. Cornish was

shown to have 44,900 shares of Eagle-Picher stock on their stock transfer register. You will notice on Com-
680 mission's Exhibits 527 and 528 at the top they are marked "From the files of FMC." I think it is fair to infer that those are from the files of F. M. Carter, who was at the time president of The National Lead Company.

Trial Examiner Norwood: This tends to show that Mr. Cornish owned stock in Eagle-Picher, and also that he was merely the trustee for National. This one is all right. I don't see how this comes into the picture.

Mr. MacIntyre: If Your Honor please, during the very time when Mr. Cornish was holding this 44,900 shares, which we will show before this record is closed constituted more than 5 percent of the outstanding voting capital stock of Eagle-Picher at that time, while it was owned, nevertheless, did not constitute the total that was sought by National, National seeking, as the other two documents show, approximately a half a million, or more than 50 percent.

Trial Examiner Norwood: Yes; but these two letters from this broker here try to sell National some of this stock. I don't see that that is connected up with this thing.

Mr. Ewing: And the broker testified, Your Honor will recall, nothing came of his attempt to sell.

Mr. Wright: That is true. We realize nothing came of it, but at the same time those letters show a prior course of dealing between Mr. Chatfield, Mr. Carter, and Mr. Cornish, and they were letters kept in the files of The
681 National Lead Company and produced by them under subpoena.

Trial Examiner Norwood: I don't think it shows anything at all except what it shows; that is, that Chatfield wrote to these people and wanted to sell them stock.

Mr. Wright: Referring to the 50,000 shares of stock that were already held.

Trial Examiner Norwood: This is all right, but this does not add anything to the connection with that. Now, you may be able to connect that. We have taken in a lot of stuff here, but it hasn't been connected with it, but I shall overrule the objection and receive Commission's Exhibits, for identification, 700-A and B, and deny the motion, and receive those.

(The documents heretofore marked for identification

COMMISSION'S EXHIBITS NOS. 700-A and 700-B were received in evidence.)

Mr. Wood: I do not believe that there is any dispute, is there, that no one in National now holds any stock in Eagle-Picher? That is, Mr. Cornish's interest has been liquidated and, second, there is no allegation, is there, that National ever exercised any control over Eagle-Picher or participated in the management of Eagle-Picher?

Mr. MacIntyre: We do not agree with that entire statement. We do have some information to the effect that Mr.
Cornish is dead at present, and that at the time of his
682 death National took over his beneficiary interests
which, at the time of Mr. Cornish's death helped buy
out Mr. Cornish.

Mr. Wood: And has been liquidated since.

Mr. MacIntyre: We don't know what the record shows on that.

Mr. Wood: But there is no contention of any control?

Mr. MacIntyre: We do contend that what Mr. Cornish held for National influenced and contributed to the control by Eagle-Picher of that part of National at that time.

Mr. Wood: That is your contention?

Mr. MacIntyre: Yes, sir.

Mr. Wood: We will meet it.

Mr. Wright: Your Honor, I offer in evidence Commission's Exhibit 701, which is an original telegram from The National Lead Company, Scott to W. H. Hayt of the Eagle-Picher Lead Company, under date of 12 March 1941, announcing a raise in prices in white lead-in-oil and red lead dry in Manila. That is identified on page 214 of the record.

Mr. Ewing: I object to that as it relates a price raise in Manila in the Philippine Islands.

Trial Examiner Norwood: Is there any further objection?

Mr. Wood: I think it should be connected with the
case in some way. It is rather an innocuous document
683 as it stands.

Trial Examiner Norwood: I am inclined to receive anything that is part of the price picture.

Mr. MacIntyre: If Your Honor please, we would agree to the reception of that document, limited in its application to proof under count 1. We appreciate that it is not relevant to count 2 in the complaint because of price discriminations under the Clayton Act not being actionable under that Act in the Philippine Islands.

Trial Examiner Norwood: How does it fit into this picture that National wired Eagle-Picher at—where is that Temple Bar Building?

Mr. Wright: That is the home office of Eagle-Picher.

Trial Examiner Norwood: They wire from California.

Mr. Wright: That is the branch office of The National Lead Company in San Francisco.

Trial Examiner Norwood: They wire a change in price. They are competitors at this time; are they?

Mr. Wright: We allege to the contrary.

Trial Examiner Norwood: They are either competitors or one is a subsidiary of the other; isn't that a fact?

Mr. Wood: I did not quite hear Your Honor.

Trial Examiner Norwood: They are either competitors or Eagle-Picher is a subsidiary of National?

Mr. Wright: They are competitors, sir.

684 Trial Examiner Norwood: Well, I think I might well receive that as part of the picture there.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 701 was received in evidence.)

Mr. Wood: We have the illusion, at least, that we are competitors.

Mr. Wright: Your Honor, I offer in evidence Commission's Exhibit 703-A and B, which is an original memorandum addressed to Mr. Joseph Strannan, assistant to the manager of the New York office of Eagle-Picher Company, and signed "WFS," with an enclosure, which is a copy of a form letter from the Atlantic branch of The National Lead Company to its agents, dated July 26, 1933. It is identified at page 214 of the record, and this exhibit relates back to Commission's Exhibits 684 and 685, which are already in evidence.

Mr. Wood: Where was this identified in the record?

Mr. Wright: Page 214. That is item No. 46.

Mr. Wood: This is objected to, Your Honor, as irrelevant, in the first place, and as having no proper place in the record, because it is dated July 26, 1933, which was part of the N.R.A. period, when cooperation between companies in an industry was supposed to be much more intimate than at the present time.

I see that it adds nothing to the case.

685 Mr. Wright: Your Honor, that relates back to two exhibits, which are already in the record, and I might say that this present industry was not under an N.R.A. Code at that time.

Mr. Wood: It was working with them, though.

Trial Examiner Norwood: Are there any exhibits in the record, though, to come out?

Mr. Wright: No, sir.

Trial Examiner Norwood: There was a clause in the N.R.A. that provided that nothing therein can be construed to restrain trade in certain particulars. I am just quoting off-hand, and where it is found that an unauthorized, unjustified method of competition was employed before or after, we have always received evidence of what went on during N.R.A. Sometimes it is very valuable to show how certain methods started. The mere fact that it happened under the N.R.A. wouldn't be grounds for excluding it here, if there is anything in it that would indicate restraint of trade.

Mr. Wood: I will withdraw my objection on that ground because, as I say, it goes to the weight rather than admissibility.

Mr. MacIntyre: If Your Honor please, this is offered, and others will be offered, covering that period, not only showing what took place then, but showing that the acts as thus evidence were not within the purview of any suspension of any anti-trust law either under N.R.A., or any code promulgated thereunder. 686

Mr. Wood: I am not withdrawing my objection that the document is irrelevant.

Trial Examiner Norwood: I will overrule the objection and receive 703-A and B.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 703-A and 703-B, were received in evidence.)

Mr. Wright: I offer into evidence, Your Honor, Commission's Exhibit 704, which is an original letter from W. E. Maston, who is an official of the Eagle-Picher Lead Company, to A. E. Bendelari, president of the Eagle-Picher Lead Company, under date of October 23, 1933. That is identified at page 215 of the transcript.

Mr. Wood: No objection whatsoever.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 704, was received in evidence.)

Mr. Wright: Your Honor, we offer into evidence Commission's Exhibits 705-A through D, and 706-A through F, which consists of an original handwritten letter from Wil-

lard E. Maston, the vice-president of the Eagle-Picher Company, to A. E. Bendelari, the president of the
687 Eagle-Picher Company. That is 705-A to C. 706-A to F consists of an original letter from F. M. Carter, the president of The National Lead Company, to Willard Maston, under date of September 22, 1933, together with draft of a letter to Mr. Trigg, together with a carbon copy of a memorandum prepared from Mr. Marks of National Lead to Mr. Carter, the president of National Lead. 706-A to F appears to be the enclosure referred to in 705-A to C.

Mr. MacIntyre: May we go off the record, Your Honor?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: On the record.

Mr. Wood, I call your attention to line 13 of page 215 of the transcript where Commission's Exhibit 705-A through D was identified, the word "photographic." That word should be "holographic"; should it not?

Mr. Wood: I agree with your correction.

Trial Examiner Norwood: Any objection?

Mr. Wood: There is no objection.

I would like to take this clip off which seems at least to physically connect the two. There is no actual connection. This letter is dated September 22, 1933, and this one is dated Tuesday morning, and no other date.

Mr. Wright: I might point out in that connection, however, that 705 refers to 706-A through F as enclosures.

Mr. Wood: You mean this series is enclosed?

688 Mr. Wright: No. This encloses the others.

Mr. Wood: So far as I know, this is a disconnected document.

Trial Examiner Norwood: Received, as marked.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 705-A, 705-B, 705-C, 705-D, 706-A, 706-B, 706-C, 706-D, 706-E, and 706-F, were received in evidence.)

Mr. Wright: Your Honor, that offer was accepted as to all the material which was submitted there, the handwritten and the typewritten material; was it not?

Trial Examiner Norwood: That is right. Received.

Mr. Wood: There was no objection.

Mr. Wright: I now offer in evidence Commission's Exhibits 707-A through C, identified at page 216 of the record, which consists of a note to Mr. Bendelari, the president of Eagle-Picher, from E. B. Pettee, the secretary to Mr. Roosevelt, who was a vice-president, and an intra-company memorandum to Mr. Bendelari, also signed by Mr. Pettee.

Mr. Wood: No objection.

Trial Examiner Norwood: Received.

Mr. Wood: I hope Your Honor understands when I say "no objection," I still at least have the mental reservation that it should be connected up before the case is over.

Trial Examiner Norwood: Yes, that is the under-
689 standing about all this evidence.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 707-A, 707-B, and 707-C, were received in evidence.)

Mr. Wright: Your Honor, I offer in evidence Commission's Exhibits 708 and 710.

710 is the carbon copy of a letter from W. H. Hayt, the general manager of the White Lead Division of Eagle-Picher Sales Company, to John L. Reque, National Lead Company, Chicago, Ill.

Commission's Exhibit 708 is an original letter from Reque to Hayt, under date of July 30, 1940, in answer to Commission's Exhibit 710.

Mr. Wood: If Your Honor please, I object to these exhibits, and I wish to make a point. These exhibits relate to mixed paint. Now, if the amended complaint, or if this case includes the mixed paint industry, the exhibit is relevant, but if it doesn't—and as I understand it, it doesn't—the exhibit is not relevant, so I object to it as irrelevant.

Mr. Wright: Your Honor, we don't contend that that letter directly concerns white lead-in-oil. However, it does show an interchange of price information between competitors in the very period which is in question here regarding a paint which both companies were at that time developing and marketing out of white lead. Its prin-
690 cipal ingredient is white lead.

Trial Examiner Norwood: It seems to me the complaint mentioned white lead products, didn't it?

Mr. Wright: The complaint charges lead pigments, but it also mentions the lead pigments as being a principal product in white lead paint, for instance.

Mr. MacIntyre: It also alleges the effects of the activities of these respondents on the prices of white lead-in-oil paint.

Trial Examiner Norwood: Go ahead with your proffer, and I will read that some more.

Mr. Wood: I want my position clear, Your Honor. I have no objection to the Commission going into the paint line, if they choose, and if they do that is relevant. I just want to know the case we have to meet, and I am taking this occasion to determine it.

Trial Examiner Norwood: Yes. I want to read this and see if its relevance is brought out.

Mr. Wright: Your Honor, I want to offer in evidence Commission's Exhibit 709, for identification, which was identified at page 217 of the transcript. It is an original memorandum, or letter, from Mr. E. B. Pettee, secretary to Mr. Roosevelt, the vice-president of Eagle-Picher Company, to Mr. A. E. Bendelari, the president of the company.

Mr. Wood: The name is "Roosevelt."

691 Mr. Wright: Roosevelt. I will accept your correction.

Mr. Wood: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 709 was received in evidence.)

Mr. Wright: Your Honor, I offer in evidence Commission's Exhibit 711, which is likewise a memorandum from E. B. Pettee, secretary to Mr. Roosevelt, to Mr. A. E. Bendelari, under date of October 5, 1933, which was identified on page 217 of the record.

Mr. Wood: In view of Your Honor's previous rulings in respect of N.R.A. matters, I am not objecting to this, but it is an N.R.A. document.

Trial Examiner Norwood: Well, counsel may have the benefit of an objection there.

Mr. Wright: I don't agree that it is an N.R.A. document, Your Honor.

Trial Examiner Norwood: Received as marked.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 711, was received in evidence.)

Mr. Wright: I offer in evidence Commission's Exhibit
712-A through E, which was identified in the record
692 at pages 217 and 218, which is an original letter from
Mr. Willard E. Maston to Mr. A. E. Bendelari, presi-

dent of the Eagle-Picher Company, under date of September 14, 1933, and enclosures.

Mr. Wood: No objection.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 712-A, 712-B, 712-C, 712-D, and 712-E, were received in evidence.)

Trial Examiner Norwood: The ruling on this 708 and 710—I think it ist very clear that the complaint does allege a general plan here, a general plan to restrain trade, and so forth, just the same as if someone was indicted for something and where there was a general scheme and something outside of the complaint was brought in to show the general plan. I think it is good law to receive testimony like that under those circumstances.

I will overrule the objection and receive the Commission's Exhibits 708 and 710.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 708 and 710 were received in evidence.)

Mr. MacIntyre: May we go off the record before we start with this witness?

Trial Examiner Norwood: Off the record.

693 (Discussion off the record.)

Trial Examiner Norwood: Go ahead with your witness.

JAMES S. KELAHER was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Will you state your name and occupation?

A. My name is James S. Kelaher. I have been employed as an investigator for the Federal Trade Commission since 1935, as an accountant, and as an attorney.

Q. Have you had an occasion to make an investigation of the records of the Eagle-Picher Lead Company and the Eagle-Picher Sales Company?

A. Yes, in June and July of 1945 I made such an examination.

Q. Will you state briefly for the record with whom you talked at the Eagle-Picher Company and how you made your investigation?

A. When I arrived at the Eagle-Picher offices—White Lead Division offices, at 1030 Broadway, in Cincinnati, I conferred with Mr. W. H. Hayt, the general manager and vice-president of the Eagle-Picher Sales Company, and I presented him with a list of cities, delivery points in various sections of the United States, and asked him 694 to select the names of at least two customers in each class in each of those cities showing customers; that is, during the period from January 1, 1941, to November 25, 1944.

He then—he was unable to give me the customers in each of the towns, but in those towns in which he did have customers he presented me with such a list, and we then proceeded to the file room and pulled the invoices for those particular customers, and I worked from those invoices, and these are the results of the—that is, on the information, from 1941 to 1944.

Q. Were the invoices and records that you examined all there in the offices of the Eagle-Picher Company, or was it necessary for them to pull any records from other sources?

A. They were all there in the offices of the Eagle-Picher Company, White Lead Division.

Q. I show you an exhibit marked Commission's Exhibit, for identification 754-A through U, and ask you to describe what it is.

A. Well, this first group here consists of price and freight data on sales of white lead to selected distributors in selected towns and cities during the period January 1, 1941, to November 25, 1944. In order to clarify the tabulations, I segregated them into groups, and this first group consists of sales to distributors only.

Q. What page are you speaking of, 754-B?

695 A. I am speaking all the way through to 754-U.

Trial Examiner Norwood: Off the record just a minute.

(Discussion off the record.)

Trial Examiner Norwood: Go ahead.

The Witness: This tabulation here shows sales or billings to customers, for example, on sheet 754-B; in the first column it gives the customer and the address. In the second column it will show the class and zone. By "class" that refers to the class of customer. These, as I said before, are all distributor customers in this particular group.

In the next column we have the invoice number, and in the one next to that the invoice date.

Q. Is that the invoice number which appeared on the record of the Eagle-Picher Company from which you secured the information?

A. That is right. Then in the next column we have a heading "100 Pound Kegs Only." In order to facilitate the study we confined it to a tabulation of sales of 100 pound kegs only, because that is the base keg for the industry.

In this column here we have the pounds which appeared on that particular statement in the record, and the price.
This is the price paid by the customer named in the first
column to the Eagle-Picher Sales Company, and then
696 in the next column we have the total pounds of white
lead billed. This appeared on the invoice, and we used
that in order to arrive at a total amount of freight. It
was necessary for freight purposes.

Q. In that connection, I call your attention to the first line of sheet 754-B. On that invoice you have entered 100 pounds of white lead in hundred pound kegs.

A. That is correct.

Q. And in the column "Total Pounds White Lead Billed," there is 262½. Will you explain that difference?

A. The difference of 162½ pounds will consist of sales and other types, and sizes, rather, of containers or 12½ or 50-pound kegs, or 150-pound cans.

Then in the next column we have a description of the product. In this case it is white lead-in-oil. In the next column we have the origin of the shipment that was shipped from Cincinnati, and the destination, showing the point of delivery was Miami, Fla., in this particular instance.

In the next column we have the method of transportation. In this case it was by rail. The method of transportation was inserted, and, I might add, going back to the origin, the origin was included by an official of the Eagle-Picher Sales Company, Mr.—an employee of the Eagle-Picher Sales Company, Mr. W. F. Kelly.

Q. Are those initials, "WFK" at the bottom of
697 the column headed "Origin"?

A. That is correct.

Q. And they are also at the bottom of the column headed, "Via Rail or Truck"?

A. That is correct.

Q. And at the bottom of the column headed "Gross Weight of White Lead"?

A. That is right.

Q. What is the significance of those figures of gross weight of white lead?

A. In order to determine the amount of freight paid on that particular billing, it was necessary to include the gross weight; that is, the net weight of the white lead plus the weight of the container.

Then in the next column we have inserted by Mr. H. W. Dunbar, whose initials are "HWD," inserted at the bottom of the page, who was traffic manager of the Eagle-Picher Lead Company, and whose initials appear at the bottom of each page, together with the date on which he included this freight rate information. The rate was inserted by Mr. Dunbar and it was extended under Mr. Kelly's direction to the final column on the righthand side under "Amount," and that is initialed by Mr. Kelly.

Q. So, as I understand it, then, your work was checked by these employees, Mr. Kelly and Mr. Dunbar?

698 A. That is correct.

Q. And the figures were either checked by them or were supplied by them directly?

A. That is right. They worked with me in fullest cooperation, I might add, at all times, and were fully advised of the work I was doing there, and they received photostatic copies, in number about six or seven, before I left Cincinnati, of these statements.

Q. Now, does that explanation of the method of compiling and the significance of the figures on sheet 754-B also apply to sheets 754-C through U?

A. That is right. I might add there that these are records of the White Lead Division, which are concerned primarily with sales of white lead-in-oil, and they have sales of dry white lead, incidentally, and there are some sales of dry white lead in here.

Q. Now, I call your attention to note here on page 754-B, "Distributors were billed for shipments from consigned stocks during month, under unlimited consignment contract in effect during 1941, 1942, and 1943, on in-oil white lead. Dry white lead is not sold on consignment, but is sold direct." In other words, at any time dry white lead appears in here that was a direct sale and shipment rather than a billing on consignment?

A. That is right.

699 Q. I call your attention to the sheets marked Commission's Exhibits 754-V through Z-10, for identification, and ask you to describe that.

A. These are sales of white lead to paint manufacturers during the period January 1, 1941, to November 25, 1944.

Q. The information was secured in the same way?

A. The information was secured in the same way, but I would like to call attention to the fact that these were records obtained from the Pigment Division, which sells dry white lead only, and does not handle white lead-in-oil.

Q. Does that Pigment Division handle altogether dry white lead, or do they handle other lead pigments as well?

A. I am sorry. Just as distinguished between dry white lead and white lead in oil, they handle dry white lead. They do handle other products.

Q. Would you describe this sheet 754-W?

A. This set-up is similar, substantially, as those that I described before. I will be glad to go into detail, but it is almost the identical set-up with the exception that we are concerned here with dry white lead primarily, and they are actual sales to paint manufacturers. Each of these invoices represents a shipment to a paint manufacturer.

Q. Each is a single shipment?

A. Each is a single shipment; that is correct.

Q. I note the words "on contract" on sheet 754-W.
700 What is the significance of that?

A. During that period, as I understand it, paint manufacturers were able to buy dry white lead on contract, and their purchases were applied against that particular contract over a period of time.

For instance, they may enter into a 20-ton contract, which would be shipped over a period of weeks or months.

Q. And the initials "WFK" and "HWD," which appear on the sheets 754-V through Z-10 are the same employees of Eagle-Picher that initialed the sheets in 754-A through U?

A. That is right.

Q. I call your attention to sheets marked Commission's Exhibits 754-Z-11 through Z-20, for identification, and ask you to describe them.

A. This consists of price and freight data on sales of white lead to selected customers of various classes by the Pigment Division during the period January 1, 1941, to November 25, 1944. This includes a miscellaneous group of customers, and for our purposes they were all placed together here. It includes sales to industrial customers of various types, sales to painters, etc.

Q. In your second column from the left under "Class," for instance, on 754-Z-12, the first line, there is "Pottery Ceramics," the second one, "Enemeling Ceramics." Were those classifications supplied by the records of the
701 Eagle-Picher Company?

A. They appeared on the invoice under a code number, and the code symbols were given to me by the officials of the company, and I inserted them here.

Trial Examiner Norwood: Those were all consumers, weren't they, on that page?

The Witness: These may include some painters. They may include industrial accounts. It is just a miscellaneous group of customers, some of whom bought at consumer prices.

Trial Examiner Norwood: None of it was for resale; was it?

Mr. Wright: I don't believe, Your Honor, it appears in several of these things whether it was for resale or not, except for the general classification of the customer.

The Witness: That is right. For the most part, I will say that was not for resale in this particular group.

By Mr. Wright:

Q. The initials "WFK" and "HWD" again on these sheets are the initials of the employees of the Eagle-Picher Company who either checked your information or inserted it, themselves?

A. That is right.

I would like to state here in order to get quick freight information, Mr. Dunbar, together with Mr. Kelly, inserted, as I said before, the origin of the shipment, and also the mode of transportation. For instance, you
702 might have a shipment going by rail and truck. Where that was done separate rates were put in for rail and for truck shipments in order to arrive at the total freight.

Q. I call your attention to the sheets marked 754-Z-21 to Z-33, and ask you to describe what those sheets are.

A. These sheets are similar to those described immediately preceding, but represent sales to selected customers by the White Lead Division during the period January 1, 1941, to November 25, 1944, that is, the White Lead Division as distinguished from the Pigment Division.

Q. I call your attention now on sheet 754-Z-22 to the column marked "Freight Rates" here, which were entered, you say, by Mr.—

A. Dunbar.

Q. —H. W. Dunbar.

A. Except where they appeared on the invoice.

Q. Do you know where he obtained that freight information?

A. Yes. Mr. Dunbar checked his records very thoroughly, and he supplied freight rates which reflected the general freight policy of the company as of the invoice date. In some instances, the actual freight allowed the customer appeared on the invoice, and in those cases it was tabulated directly on this tabulation.

Q. And you have no way of knowing which ones actually
appeared on the invoices and which ones were actually
703- secured from the records by Mr. Dunbar?
704 A. Yes; I can tell by the handwriting, my handwriting. There is one right here. I can check it through.

Mr. Wright: Off the record here.

(Discussion off the record.)

By Mr. Wright:

Q. I call your attention to Commission's Exhibit 754-Z-34 to 52, and ask you to state what that is.

A. These are—reflect price and freight date on sales of white lead to customers of various classes during the period January 1, 1933, to March 31, 1934. These were obtained in a somewhat differenct manner than those for the 1941 to 1944 period, due to the fact that the sales records of the company were not available showing sales to customers during that period. It was necessary to examine the invoices directly, most of the invoices of the company, in order to get that information for that period.

Q. I call your attention to the sheet stapled to the top of page 754-Z-34, and ask you to state what that is.

A. That is a statement by Mr. H. W. Dunbar, traffic manager, describing the manner in which he inserted the freight rates on these tabulations.

Q. The initials which appear at the bottoms of the columns in here, "WFK" and "HWD" are the same employees of the Eagle-Picher Company who either in-705 serted that information or checked here?

A. That is right.

Q. I call your attention to Commission's Exhibit 754-Z-53 through 60, and ask you to state what that is.

A. These are sales of dry white lead to selected customers of various classes during the period January 1, 1933, to March 31, 1934.

Q. That was made up in the same manner from the same type of records, and shows the same information?

A. That is correct.

Mr. Wright: I have no further questions of the witness. Just a moment. I would like to ask just one more question.

By Mr. Wright:

Q. Are we correct in our understanding that it is your testimony that all of the information appearing on Commission's Exhibits 754-A through 754-Z-60, inclusive, is a statement of information appearing on the records of the Eagle-Picher Company, and is supplemented by statements of the officials of that company?

A. That is correct.

Mr. Wright: No further questions.

Trial Examiner Norwood: Do you offer this?

Mr. Wright: Yes. I wish to offer at this time 706 Commission's Exhibit 754-A through Z-60 in evidence.

Trial Examiner Norwood: Any objection?

Mr. Wood: Could we have a short recess before taking up the cross-examination?

Trial Examiner Norwood: We will have a 10-minute recess.

(There was a short recess taken.)

Trial Examiner Norwood: Come to order, gentlemen.

Mr. Wood: On these exhibits that you have produced, there is a column which at the top of the page is headed "Freight."

The Witness: Yes, sir.

Mr. Wood: Where did you get the figures that are filled in in that column?

The Witness: They were supplied by Mr. H. W. Dunbar, traffic manager for Eagle-Picher Lead Company, who initialed each statement and the date on which he inserted the figure, except in those instances where the rate appeared on the invoices, which case I tabulated it myself.

Mr. Wood: How can you tell those cases in which it appeared on the invoice?

The Witness: I can tell by my handwriting.

Mr. Wood: Can you give us an example? I am just trying to find out.

The Witness: Yes. I gave one example there when
707 I was going through.

Mr. Wood: I was not looking over your shoulder. I want to get the key to the interpretation of this.

The Witness: There are three appearing right here. You will notice the difference in handwriting. This is my handwriting.

Mr. Wood: You are referring to sheet 754-X. Is that right?

The Witness: That is correct. And invoices PD-7883, PD-6868, and PD-9169 covering shipments of dry white lead to Perry Paint & Glass Company, Washington and Brush Streets, Tampa, Fla., the amount of the freight appeared on the invoice, presumably being collect shipment with freight allowed.

Mr. Wood: The collect shipment with freight allowed presumably. I don't quite understand what you mean.

The Witness: By that I mean that if the buyer pays the freight under any delivered price system, he would be allowed the freight on the invoice as a deduction from the gross amount of the bill.

Mr. Wood: Is that your interpretation of it, or was that the fact of the transaction?

The Witness: That, of course, is my interpretation, but it would be the only instance where they would show freight on an invoice, according to officials of the company.

Trial Examiner Norwood: Does the invoice indi-
708 cate any freight would be allowed?

The Witness: It did indicate freight allowed.

Mr. Wood: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wood: I wonder if it would be possible for you, overnight, to go through these documents and make a list of all invoice numbers on which there was freight on the invoice; that is, that you filled out from the invoice, instead of getting the information from Mr. Dunbar?

The Witness: Yes, sir.

Mr. Wood: Is that all right with you, Mr. Wright?

Mr. Wright: I have no objection to it if he is willing to do it.

Mr. Wood: Now, on the other entries, not of the class to which you have just referred, you say Mr. Dunbar gave you the freight rate to the place?

The Witness: He inserted the freight rate to the place in his own handwriting.

Mr. Wood: Do you know whether or not the amount he inserted was the amount of the actual freight on that shipment, or was it the theoretical freight rate?

The Witness: It was not theoretical. It was the actual freight rate in effect as of the date of that invoice. It was not theoretical.

709 Mr. Wood: Was it the freight actually paid on that shipment?

The Witness: It was not taken from a freight bill for that particular shipment. It reflected the general freight rate policy of the company in effect as of the date of the invoice.

Mr. Wood: What freight rates did he fill in? Were they carload shipments, less-than-carload shipments, or what?

The Witness: If it was a carload shipment, he filled in the carload rate; if it was a truckload shipment he filled in the truckload rate; if it was less-than-carload, he filled in that rate; if it went partly by boat and partly by truck, he filled in the boat rate for the particular period covered, and the remainder of the distance was covered by the truck rate.

Trial Examiner Norwood: I think we had better dispose of objections, first, and then counsel may cross-examine on all those points.

Mr. Wood: I will not make any objection to the introduction of this exhibit in view of the fact that The National Lead exhibit was permitted to go in, but I do not acquiesce that this exhibit discloses anything contended for by the Trial Attorney for the Commission.

Trial Examiner Norwood: Counsel may cross-examine him.

710 I will receive Commission's Exhibit, for identification, 754A to Z-60.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 754-A, 754-B, 754-C, 754-D, 754-E, 754-F, 754-G, 754-H, 754-I, 754-J, 754-K, 754-L, 754-M, 754-N, 754-O, 754-P, 754-Q, 754-R, 754-S, 754-T, 754-U, 754-V, 754-X, 754-X, 754-Y, 754-Z, 754-Z-1, 754-Z-2, 754-Z-3, 754-Z-4, 754-Z-5, 754-Z-6, 754-Z-7, 754-Z-8, 754-Z-9, 754-Z-10, 754-Z-11, 754-Z-12, 754-Z-13, 754-Z-14, 754-Z-15, 754-Z-16, 754-Z-17, 754-Z-18, 754-Z-19, 754-Z-20, 754-Z-21, 754-Z-22, 754-Z-23, 754-Z-24, 754-Z-25, 754-Z-26, 754-Z-27, 754-Z-28, 754-Z-29, 754-Z-30, 754-Z-31, 754-Z-32, 754-Z-33, 754-Z-34, 754-Z-35, 754-Z-36, 754-Z-37, 754-Z-38, 754-Z-39, 754-Z-40, 754-Z-41, 754-Z-42, 754-Z-43, 754-Z-44, 754-Z-45, 754-Z-46, 754-Z-47, 754-Z-48, 754-Z-49, 754-Z-50, 754-Z-51, 754-Z-52, 754-Z-53, 754-Z-54, 754-Z-55, 754-Z-56, 754-Z-57, 754-Z-58, 754-Z-59, and 754-Z-60, were received in evidence.)

Trial Examiner Norwood: Now, if Mr. Wright wants to ask him any further questions, he may do so.

Mr. Wright: I have no further questions.

Trial Examiner Norwood: Now, you may cross-examine the witness.

711. *Cross-Examination by Mr. Wood.*

Q. Do you know whether or not Mr. Dunbar looked up the actual freight paid on each one of those shipments?

A. Which shipments are you referring to?

Q. Any of them that are noted on the exhibit.

A. In that connection, I think I would like to clarify that a little. The so-called shipments you mention on the first group of exhibits, 754-A to U, are billings as stated in the footnote, for shipments from consigned stock during the month, so that the invoice here—the applicable freight rate would have to be determined by the freight rate in effect as of the date of that invoice.

In other words, this is a billing showing the actual price paid by the customer, the distributor-customer, to Eagle-Picher Sales Company. There would be no freight rate billed on that invoice.

Do I make myself clear?

Q. Yes. But my question is whether or not Mr. Dunbar filled in the theoretical freight rate from Cincinnati to the destination, or whether he filled in the exact rate which the company paid on that specific order.

Mr. Wright: Your Honor, I think if counsel would explain his use of the word "theoretical," we would get further in this examination.

712 Mr. MacIntyre: Your Honor, I have a further objection, and that is this: The question I put to this

witness is whether or not the rate Mr. Dunbar gave to this witness, and filled in, is correct or not correct. The witness has not yet been qualified as a freight rate expert, nor, for that matter, has any foundation been laid to show that he knows what the rates were.

Trial Examiner Norwood: He knew what he wrote in.

Mr. MacIntyre: But whether or not Mr. Dunbar knew those were the correct rates—

Trial Examiner Norwood: I don't think that is the question.

Read the question, please.

(The Reporter read the last question.)

Trial Examiner Norwood: Objection overruled.

The Witness: He filled in what he felt very reasonably sure was the exact amount of freight paid by the company on that order.

By Mr. Wood:

Q. Referring to 754-B, the first entry there is a shipment to Gentry Brothers, Miami, Fla.

I am just taking this as an illustration. That was 26½ pounds, and the freight rate there is given as $1.48?

A. That is correct.

Q. And the total amount is given as $4.08. You,
713 yourself, know whether that 262½-pound shipment went
as an entity, itself, or was it a part of a larger shipment?

A. I think I should, if I may, answer your question, as I answered the last. I would like to make a distinction here. It is almost impossible to answer your question without the distinction.

These are billings for shipments from consigned stock during the month. You take this particular billing. It is dated January 31, 1941. This amount represents shipments from stock consigned to Gentry Brothers, Inc., for which they were billed at the price of $10.125 per hundredweight for 100-pound kegs.

That 262½ pounds wash shipped from merchandise on hand at Gentry Brothers, which was shipped to them prior to this date of January 31, 1941.

So in order to clarify it, I would like to say that it would be absolutely impossible to get an actual freight rate for this actual shipment because it is a billing from consigned stock.

I hope I have made that distinction clear.

Q. You mean that if you or I tried to send 262½ pounds of white lead in 100-pound kegs, or whatever they were, from Cincinnati to Miami, Fla., the railroad would charge us $4.08. Is that right?

A. As of January 31, 1941.

714 Q. But we wouldn't pay that if it were part of another shipment, part of a carload shipment, for instance?

A. That was taken into consideration in arriving at these rates.

We knew from available records whether or not the shipments were in carloads or less-than-carloads. This rate here apparently would be—this is a rail shipment, and would probably bear a carload rate.

Q. Do you know whether or not it was a carload rate?

A. No, I don't. You would have to ask Mr. Dunbar.

Q. The point I am trying to make is this: In how many instances in this document can you testify to your own knowledge that the amount appearing in the last column, the heading of which is "Amount" under "Freight"—in how many instances can you testify that that is the figure Eagle-Picher actually paid on that specific shipment?

A. Just on those on which the freight rate appeared on the invoices.

Q. How long did you spend in Cincinnati in compiling your data of your exhibit?

A. I have the sheets dated. The first day is June 5th.

Q. June 5, 1945?

A. June 5, 1945, to July 11, 1945, approximately.

Q. You spent that time in Cincinnati?

715 A. At the offices of the Eagle-Picher Lead Company, 1030 Broadway.

Q. Did you have any assistants with you from the Commission?

A. No, sir.

Q. Did anyone in the Eagle-Picher organization work with you?

A. They worked in cooperation with me.

Q. How many men in the Eagle-Picher organization worked with you?

A. Mr. Hayt, Mr. Hugh Connelly and Mr. Kelly, and they supplied some typed statements for me which were done by the clerical help.

Q. How about Mr. Dunbar?

A. Mr. Dunbar, too; I am sorry.

Q. Can you ~~give me~~ a rough estimate of how much time the personnel of the Eagle-Picher organization spent with you?

A. I would hesitate to say.

Q. You took up a good deal of time?

A. I am afraid that isn't correct—I wouldn't say a good deal.

Q. They did cooperate in all respects?

A. Very fully, and I tried to be as unostentatious as possible.

Q. What is your understanding of Mr. Dunbar's duties with the company?

A. It was my understanding he was their recognized expert on freight rates, according to a statement made
716 by other officials of the Company.

Q. What is an expert on freight rates?

A. One who is versed in the rates of freight on shipments of various types. In his case, it would be lead pigment, no doubt.

Q. Why is there any purpose in a freight rate expert?

Mr. MacIntyre: I did not hear that question.

Mr. Wood: I asked why there is any purpose in a freight rate expert.

Mr. Wright: I object to that. Where is this cross-examination leading?

Trial Examiner Norwood: I don't see that that is in the range of his expertness.

Mr. Wood: He testified he received certain information from Mr. Dunbar, and he relied on that information. I will withdraw that question and try to cover the subject very quickly in a slightly different form.

By Mr. Wood:

Q. Isn't it a fact that figuring freight rates is a very difficult job?

A. I understand so.

Q. And Mr. Dunbar makes a specialty of it for the Eagle-Picher Company and, to obtain this information which you desired, you had to go to an expert. Is that correct?

A. That is my understanding.

717 Q. In picking these various accounts that you have listed there, did you take into consideration whether or not any of them were in competition with one another?

Mr. MacIntyre: I object to that question. The testimony of this witness is to the effect that officials of the Eagle-Picher Company selected and submitted to him the names of at least two accounts in each class for each of the cities he specified, wherever they had them.

There is no testimony in the record that this witness selected those two accounts in each case in each of the cities where Eagle-Picher has offices.

In the light of that, may we have the question read?

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: I think he can tell us his considerations in making out these tabulations here.

Mr. MacIntyre: The question presupposes that he selected the accounts.

Trial Examiner Norwood: He didn't presuppose anything. He said, "Did you take into account this competitive situation in making the tabulations?"

Mr. MacIntyre: In selecting the accounts. He didn't select the accounts.

Trial Examiner Norwood: I overrule the objection. Answer the question.

718 The Witness: I would like to state the officials of Eagle-Picher did select the customers, with minor exceptions. In going through the file I may have selected a few, but the list for 1941 to 1944 was selected by officials of the company.

By Mr. Wood:

Q. How about 1933?

A. I attempted to select customers there, but due to the length of time that had passed it was necessary to examine a number of invoices to obtain the number desired.

Q. To the extent you had discretion in selecting the accounts, did you take into account whether or not the customers were competitors?

Trial Examiner Norwood: Did you select the accounts at all?

The Witness: I selected a few.

Trial Examiner Norwood: Answer his question.

The Witness: I would say that did not enter my mind at the time, because I had no way of checking or knowing if they were in competition with one another.

If they were in the same town, they might be competitive, but that would be the least of my considerations at that time.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

719 Trial Examiner Norwood: We will recess until 10 o'clock tomorrow morning.

(Whereupon, at 4:15 p. m., the hearing was adjourned until Wednesday, June 19, 1946, at 10 o'clock a. m.)

Room 332, Federal Trade
Commission Building,
Washington, D. C.,
June 19, 1946.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Everette MacIntyre, Esq., Paul R. Dixon, Esq., and Joseph S. Wright, Esq., apearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington, D. C.), and T. J. McDowell, Esq. (101 Prospect Avenue, Cleveland, Ohio), appearing for Sherwin-Williams Company.

Henry E. Gardiner, Esq. (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

Edmund P. Wood, Esq. (2801 Carew Tower, Cincinnati, Ohio), and Richard Serviss, Esq. (1100 American Building, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

James D. Ewing, Esq., W. R. McDermott, Esq., and E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

Roger Hinds, Esq. (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

722 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to the adjournment on yesterday, the hearing in Docket 5253 is now reconvened in Room 332, Office of the Federal Trade Commission, Washington, D. C., at 10 o'clock a. m., on the 19th day of June, 1946.

Please enter the appearances.

JAMES S. KELAHER, resumed the witness stand, and was examined and testified as follows:

Cross-Examination (Resumed).

Mr. Wood: Mr. Kelaher—excuse me, Your Honor.

Trial Examiner Norwood: Mr. Kelaher is recalled to the stand for further cross-examination.

Proceed, Mr. Wood.

By Mr. Wood:

Q. Mr. Kelaher, I asked you yesterday afternoon to make a list of the entries in your exhibit which you produced, a list of those where the freight appeared on the invoice. Have you done so?

A. Yes, sir.

Q. Can you produce that, please?

A. I have gone through here, and with a red mark
723 checked every entry I made, personally.

Mr. Wood: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wood: On the record.

Counsel for the Commission is preparing a list of the invoice numbers that the witness has checked with a red mark as entries made in his handwriting which he entered freight from the invoices.

Is that a correct statement?

Mr. MacIntyre: Yes.

The Witness: That is correct.

Mr. MacIntyre: I would like, though, that the witness' testimony be made a matter of record probably a little more clearly than it is as it stands at present, showing that he has made red check marks opposite the amounts of freight in each instance where he found it on the invoices. I am not sure that that has been developed.

Mr. Wood: That is my understanding of it.

By Mr. Wood:

Q. Would you reply to Mr. MacIntyre's statement as if it were a question from me?

A. I would say that Mr. MacIntyre was correct in his statement.

Q. Now, as I understand it, in those entries where 724 there are no red checks there was no freight on the invoice; is that correct?

A. That is correct.

Q. Now, why, where there was no freight on the invoice, did you enter freight on your exhibit?

A. I did not enter freight where there was no freight on the invoice.

Q. Who did enter it? It was done under your direction?

A. It was not done under my direction.

Q. How did it get there? Who asked for it?

A. It was placed there by—I asked for it, but the figures were inserted by the company.

Q. Now, what was your purpose in asking for it?

A. Why, principally, to insure the fairness and accuracy of the statements.

Mr. Wood: I haven't made myself quite clear.

Mr. Wright: Your Honor, I object to the question as to his purpose in asking for it.

Trial Examiner Norwood: You object to this last question asked?

Mr. Wright: Yes, sir.

Trial Examiner Norwood: Read the question.

(The Reporter read the last question.)

Trial Examiner Norwood: Objection overruled.

The Witness: I believe I answered.

725 (The Reporter read the last answer.)

By Mr. Wood:

Q. I haven't made myself clear there.

The freight entries on the exhibit were not taken from invoices, but were figures supplied to you by Mr. Dunbar, the traffic manager of Eagle-Picher. Now, why did you ask him for the information to constitute that entry in respect to each invoice where there was no such notation in the company's books?

A. Well, that was in order to determine the amount of freight applicable to that particular billing or shipment.

Q. And what was the purpose in making that theoretical determination of the freight applicable?

Mr. MacIntyre: I object. The record shows that it was not theoretical but actual, as it was developed yesterday afternoon; and, furthermore, as to why it is necessary to the case to develop it, the freight rate information, isn't something for this witness to testify, even if he should know it.

Trial Examiner Norwood: I think that he may show why he made these entries, if he knows why, either carrying out some instruction there which he is applying, himself, or which he is conforming to literally. He can show all about that. He made this. He can tell us all about it.

Mr. MacIntyre: I have no objection to that. We are
talking now about, under the question that is pending,
726 as to why freight rate information is necessary to
this case. This man didn't develop that freight information. He merely asked for it, and an official of the company inserted it on these sheets.

Trial Examiner Norwood: He is asking why it is necessary to the picture here which he has made of this case, how it fits in the picture. That is the way I understand the question.

Objection overruled.

The Witness: Well, my answer to that would be that I was carrying out my instructions.

By Mr. Wood:

Q. You were carrying out your instructions?

A. To get freight rate information.

Q. And you knew no purpose behind the instructions?

A. At that time I was—that was my first contact with the case. I did not know—had not studied the case. I was sent out in a hurry, and I think that is the best answer I can give.

Q. You were a lawyer?

A. Yes, sir.

Q. And an investigator for the Federal Trade Commission?

A. Yes, sir.

Q. And how long have you been an investigator for the Federal Trade Commission?

727 A. Since 1935.

Q. And I think you testified you spent approximately six weeks in Cincinnati?

A. That is correct.

Q. And three or more of the members of the Eagle-Picher organization cooperated with you in compiling this exhibit; is that correct?

A. That is correct.

Q. And you had the run of the plant, and examined a great many different invoices, a great many more than you used for your notations; didn't you?

A. I think that is incorrect; the latter part of the statement.

Q. What is correct?

A. I did not examine for the 1941-1944 information a great deal more invoices than I used.

Q. But you had access to all invoices; didn't you?

A. Yes; they were there if I wanted to look at them.

Q. Now, you testified yesterday that there were instances in which you used and exercised discretion in the selection of invoices. I believe; didn't you?

A. I was referring then, as I pointed out, to the time principally, to the 1933-1934 information when I had to use discretion because of a lack of sales records.

Q. Now, in utilizing your discretion in the selection
728 of material, what inference were you attempting to
establish?

Mr. MacIntyre: I object. It is not shown that this witness was attempting to establish any inference.

Trial Examiner Norwood: I think that he is assuming something there.

Mr. Wood: Well, I will not pursue the line of examination, but I do want this clear: I was very much taken by surprise yesterday when Mr. MacIntyre told us off of the record—

Trial Examiner Norwood: Wait a minute. Off the record is privileged absolutely.

Mr. Wood: Is what?

Trial Examiner Norwood: Is privileged. Off-the-record statements are privileged. We go off the record to see if we cannot come to agreement, and counsel are not committed by their statements in making propositions to compromise.

Mr. Wood: Then may I go off the record a minute, now?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Go ahead.

By Mr. Wood:

Q. Now, what were your instructions regarding the making of freight rate notations on your exhibit?

729 A. As I recall, I was instructed to obtain the information directly where possible from the invoices. Otherwise, to ask the assistance of the company in presenting them to us.

Q. Now, did you ask for any particular type of freight rate or just the freight rate rail or truck, or—

A. Why, we have it broken down, as you will notice by looking here, in sheets. All shipments are designated as to whether or not they went by rail, by truck, by boat, or by combination of any or all of those methods of transportation, and the freight rates were applied accordingly.

Q. As to what those would have been?

A. As to what they were.

Q. Well, you mean the prevailing rate that was set down in your column?

A. That is correct.

Mr. Wood: I think I have just one or two more questions.

Trial Examiner Norwood: Go ahead.

By Mr. Wood:

Q. Now, it would have been possible for you to obtain the prevailing freight rates between various points from sources other than Mr. Dunbar; would it not?

Mr. MacIntyre: May we have the question read?

Trial Examiner Norwood: Read it.

(The Reporter read the last question.)

730 Mr. MacIntyre: I object to the question.

Trial Examiner Norwood: Overruled.

Mr. MacIntyre: It is not relevant and material to the issues as to what he could have done there. We are talking about what he did do.

Trial Examiner Norwood: He is cross-examining on this thing here. I think he may ask him that.

Go ahead.

The Witness: In answer to that, all I can say is that I do not know what I could have done because I didn't try.

By Mr. Wood:

Q. Have you ever attempted to determine freight rates?

A. I have not.

Q. But you know that it could be determined some way or other as a matter of public information; don't you?

A. I will stay on my first answer.

Q. Is there any reason that you could not have filled in the theoretical or prevailing or hypothetical freight rates between two points from sources of public information rather than Mr. Dunbar?

A. I have no way of knowing. I am sorry.

Mr. Wood: That is all.

Mr. Wright: I would like to ask just a few questions here.

731 *Redirect Examination by Mr. Wright.*

Q. You stated in answer to a question on cross-examination that the prevailing rate is set down. Was it not the rate, so far as could be determined, that was actually used by the company that was set down?

A. That is correct.

Mr. Wood: That is a leading question.

Trial Examiner Norwood: I think it is, yes. Objection sustained.

Mr. Wright: I will withdraw the question.

By Mr. Wright:

Q. Will you please state what you meant by the use of the word "prevailing" in answer to that question?

A. Well, I would like to make myself perfectly clear on that point.

They were the rates which the company actually paid on those particular shipments, or which applied to those particular billings in so far as the company could determine.

Q. Now, in connection with the rates which were inserted in the sheets by Mr. Dunbar, in some instances they show a carload freight rate, in other instances they show a less-than-carload freight rate. Who made the distinction there?

A. Mr. Dunbar is responsible for every freight rate he put in there.

732 Q. What was the basis for his distinction, if you know it?

A. Why, that would be determined by the particular shipment in those cases where he had the available information.

Q. How is that answer limited to those entries which show a single sale and shipment, or does that apply also to the sheets which refer to the billings and consignment?

A. I think he would take that under consideration, and did take it under consideration in establishing his freight rates on all the sheets here.

Mr. Wright: I have no further questions.

Mr. Wood: I have just one or two more that have developed from that.

Recross-Examination by Mr. Wood.

Q. Do you know what Mr. Dunbar's mental processes were?

A. I do not.

Q. What were the instructions which you gave him, if any?

A. I asked him to insert the applicable freight rates to the invoices which I had previously transcribed onto these statements, and he was referred to as the most competent man in their organization who could give that information, and I relied, of course, upon his judgment in the matter.

Mr. Wood: That is all.

Mr. Wright: No further questions.

Trial Examiner Norwood: The witness is discharged.

733 (Witness excused.)

Trial Examiner Norwood: Call your next witness.

Mr. MacIntyre: If Your Honor please, I would like to proceed by offering some additional exhibits for the record.

Trial Examiner Norwood: Go ahead.

Mr. MacIntyre: These exhibits have to do with the respondent Glidden, and its manufacture, sale, and distribution of lead pigments.

I offer into the record a document heretofore marked for identification as Commission's Exhibit 593, and identified at page 285 of the transcript, and as a statement by respondent Glidden of premium zones and price differentials applicable thereto, under date of October 10, 1941.

Mr. Hinds: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Hinds: On the record.

No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 593, was received in evidence.)

Mr. MacIntyre: I now offer into the record a document heretofore marked for identification as Com-
734 mission's Exhibit 649-A, B, and C, heretofore identified at record page 286, and as a statement by respondent Glidden concerning its consignment proposition on lead pigments under date of July 17, 1939.

Mr. Hinds: Without adopting counsel's characterization, and disagreeing sharply with it as not being in accordance with the facts, I have no objection to the admission of the exhibit.

Trial Examiner Norwood: The exhibit is received as marked, and not necessarily as described by counsel.

Mr. Hinds: It will speak for itself, I assume?

Trial Examiner Norwood: Yes.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 649-A, 649-B, and 649-C was received in evidence.)

Mr. MacIntyre: I offer into the record Commission's Exhibit 650-A through C, heretofore identified at record page 286. This is offered as the original of an agreement between the respondent Glidden—as the original of a contract between respondent Glidden and one of its purported agents in St. Louis, Mo., under date of May 27, 1941.

Mr. Hinds: Does counsel, by using the word "purported" imply that this other party to the agreement was not in effect an agent, or was not exactly as stated to be?

Is that a contention that the Commission makes, or—

735 Mr. MacIntyre: We state that this contract was entered into with a provision set forth therein. As to the intentions of the parties, I contend that we will have to look to the entire record regarding those.

Trial Examiner Norwood: Off the record just a minute.

(Discussion off the record.)

Trial Examiner Norwood: Now, complete your statement, Mr. Hinds.

Mr. Hinds: We have no objection to that exhibit. Again, we do not adopt the characterization.

Trial Examiner Norwood: Well, that will be understood hereafter that the documents are received for what they show and what they have been identified to be by the witnesses.

Mr. Wright: Your Honor, in that connection I would like to call attention of counsel for Glidden Company to the fact that this particular document, Commission's Exhibit 650, was erroneously identified on page 286 of the transcript as Commission's Exhibit 658.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: It should have there been listed on line 1 of that page as 650 instead of 658. I think counsel will agree to that.

Mr. Hinds: Well, I have to take your word for 736 that because I haven't got it with me. That is all right. I don't question it. It will appear on the record.

Trial Examiner Norwood: Well, as presented now, it is Commission's Exhibit 650?

Mr. MacIntyre: Yes, sir.

Trial Examiner Norwood: What are the extra pages?

Mr. MacIntyre: 286, line 1.

Trial Examiner Norwood: No, I mean the extra pages there, 650-A to what?

Mr. MacIntyre: A to C.

Trial Examiner Norwood: It is received in evidence.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 650-A, 650-B, and 650-C, was received in evidence.)

Mr. MacIntyre: Now, if Your Honor please, in connection with the ruling, I have raised no objection to the ruling that it is not necessarily received as described by me.

Trial Examiner Norwood: That is right.

Mr. MacIntyre: But if it is not to be received as a contract between the parties that I have mentioned, and as it purports to be, we would, of course, like to know it. We don't want it just received as a paper. We want it received as evidence of a contract between those parties.

Trial Examiner Norwood: Your calling it a contract doesn't make it a contract. Now, you cannot add to 737 or subtract in any way whatsoever from the value of that exhibit.

Mr. MacIntyre: We don't want to.

Trial Examiner Norwood: You may describe it in any way you wish.

Mr. Hinds: To—

Trial Examiner Norwood: And you may offer it as so and so.

Suppose you say "I offer this as conclusive evidence of this, that, or the other." When I receive it, do I have to receive it as conclusive evidence of something?

Mr. MacIntyre: No; and that was the reason I said I appreciated your word "necessarily" there. I would like,—and I am not sure but what the statement I had made before I referred back to it had left the word "necessarily" out. So, if it is not received for what it is offered for, of course, I would like to know it because we are offering it as a contract and—

Trial Examiner Norwood: I am not receiving it as anything. I am receiving that exhibit in evidence.

Mr. MacIntyre: For whatever the whole record may show it to be?

Trial Examiner Norwood: That is right.

Mr. MacIntyre: That is all that we are offering it for.

Mr. Hinds: Let me assure counsel that my dissent
738 from his comment was not in regard to his calling this
a contract. If there is any question we will concede this is exactly what this purports to be, a contract. We object to the words "contract with a purported agent." We think this necessarily slurs the good faith of one of these respondents by assuming that something which it offers purports to be something which it was not. It is not a contract with a purported agent. It is a contract, exactly what it states on its face.

Trial Examiner Norwood: We don't want to go into that. I am receiving these exhibits for what they are. I am receiving it in the record.

Mr. MacIntyre: On the entire record?

Trial Examiner Norwood: Yes.

Mr. Hinds: We seem to be having a trial by slur and innuendo, and I think we should keep it as to facts.

Trial Examiner Norwood: We will not have any more of that.

Mr. Hinds: I hope not.

Mr. MacIntyre: I apologize to Mr. Hinds if he thinks that is a slur. I was merely protecting myself against Mr. Hinds' possible contention later on that I had admitted this was actually an agent.

Trial Examiner Norwood: Well, I am sure that counsel did not mean anything.

739 Mr. Hinds: It is not a slur on me. It is a slur on the respondent.

Mr. MacIntyre: My apology goes to you as well as to the respondent, Mr. Hinds.

Trial Examiner Norwood: Proceed.

Mr. MacIntyre: I now offer into evidence a document marked for identification as Commission's Exhibit 651, as a statement by respondent Glidden on the subject of its discontinuance of lead consignments, under date of July 10, 1942, identified at record page 286.

Mr. Hinds: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 651 was received in evidence.)

Trial Examiner Norwood: Now, is it necessary to make a further description of these as you offer them, any further reference to their contents? Because that is the object of placing a number for identification on the paper, so that you will not thereafter have to describe it any further. When it was marked it was described, and it speaks for itself when it gets in there, and the important thing is whether or not it is to be received or not received.

Mr. MacIntyre: Off the record.

Trial Examiner Norwood: I think we will get along

740 faster if we do that.

Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. MacIntyre: We now offer into the record documents heretofore marked for identification as Commission's Exhibit 663-A to K as a statement of price announcements made by respondent Glidden to its customers, and as heretofore identified at pages 283 to 285, inclusive.

Mr. Hinds: No objection.

I want to have it noted that it is not by implication conceded by not objecting that in all cases sales were made, because in some instances I understand in sparsely populated territories there were no sales, but other than that comment, I have no objection.

Trial Examiner Norwood: Received as marked.

Mr. Hinds: Also, I would like to perhaps note that in some cases the allowance of freight does not appear here, but appears in a separate document with which I think counsel is familiar.

Trial Examiner Norwood: Thank you.

(The documents heretofore marked for identification COMMISSION'S EXHIBIT NO. 663-A, 663-B, 663-C, 663-D, 663-E, ~~663-F~~, 663-G, 663-H, 663-I, 663-J, and 663-K were received in evidence.)

741 Mr. MacIntyre: I shall offer into the record a document marked for identification as Commission's Exhibit 728, as a statement by respondent Glidden of rail freight rates on white lead-in-oil applying from Scranton, Pa., to the destination shown thereon, on December 22, 1943, and as identified at page 287 of the record.

Mr. Hinds: Now, as to this document, we don't question its competency or its accuracy, but I do want to make this occasion of a very fundamental objection as to relevancy and materiality:

Believing as we do that there is from our standpoint nothing in this case at all except the expense of coming here and having our records examined, and so on, we have endeavored to cut down that expense, which is the substantial thing in this case, by making every conceivable concession in our answer. We see no relevancy whatsoever to freight rates, but if there be any we have conceded that our prices are uniform delivered prices. They are the same for the man who is a half a mile from the factory as they are for a man who is 250 miles away in the same zone.

If there be any God-given or Commission-given or Congress-given or MacIntyre-given right on the part of a man in our backyard to have a lower rate than a man 250 miles away, we have denied him that right. We admit that we have violated that rate, if it existed.

742 Furthermore, we admit that we have done it systematically, which Mr. MacIntyre has urged as a reason why he should pile on thousands and thousands of dollars worth of conducting this activity in various cities to prove something that we have already admitted. Now, if we can make our concession any clearer to avoid further proof of that which is already admitted, and not in issue, we will concede that we have done it systematically. How else could we have done it than systematically? Our prices are uniform at the delivery point within each zone, and if it were not systematic we would be in here defending ourselves under the Robinson-Patman Act.

For this reason, I object to this, and I shall make the same objection, and I shall urge it seriously from the only point of view on our side of the case, that it is not in issue. Freight rates are not in issue so far as the respondent Glidden is concerned.

Mr. MacIntyre: We accept that concession, and would say that if Mr. Hinds is willing to supplement it by saying that the systematic discriminations he has referred to are part and parcel of systematic discriminations made by others, as charged in paragraph 7 of the complaint, count 1, we won't need to offer any of this as against this company.

Mr. Hinds: In the first place, we say there is no dis-
crimination. We accept the United States Supreme
743 Court, which Mr. MacIntyre apparently overrules.

We say that when you charge a uniform delivered price there can be no discrimination. That is what we charge, a uniform delivered price.

Trial Examiner Norwood: That is right.

Mr. Hinds: If Mr. MacIntyre believes that Congress intended, as Congress said it did not intend—but if he thinks that nevertheless, despite Congress' own disclaimer that they intended that it is the mill net this arithmethical abstraction resulting from subtracting from the price some of the seller's cost of transportation, or some other cost, we admit that those are different, and if that be a discrimination he can call it that. We don't call it a discrimination.

Now, on the conspiracy charge, anything that we do by virtue of a collusion or agreement—even something perfectly legitimate, I suppose, might come in under the Sherman Act. I am not talking about that. I am talking about freight rates as against us. We admit we systematically charge the same delivered price even though the freight rates be very diverse.

Now, if I can enlarge that in any way to avoid future proof of that, which is already admitted, I will be very glad to do it, but it is very expensive to go to the various cities and spend all these weeks on this evidence which
we think is not in issue.

744 Mr. MacIntyre: Well, short of a complete admis-
sion on the part of Mr. Hinds, I don't see anything to do except to continue to offer this evidence as evidence of circumstances and of facts which go to prove the allegations of the complaint, and to supplement what he has admitted.

Mr. Hinds: Well, certainly, it is not charged that the respondents make the freight rates. Those are made by the Interstate Commerce Commission. We could not conspire to make freight rates. We admit we use freight.

Trial Examiner Norwood: Just a minute. I suggested that there are some facts here which I think maybe the parties may agree on and make the subject of stipulation, but there is involved here an issue of a purpose and this issue of law. I can't take the position that the learned counsel has for Glidden and rule out the evidence here. We have to put in something to talk about, see, and on which to base your arguments and your briefs and your contentions, and so on. We cannot assume that, in fact— they made these tabulations here in an effort to show that they do bear on purpose and effect, neither one of which you agreed on, and method, so I shall have to overrule the objection and receive Commission's Exhibit 728, and say that the points that the able counsel has made he can keep in mind and urge it before the Commission.

(The document heretofore marked for identification 745 COMMISSION'S EXHIBIT NO. 728, was received in evidence.)

Mr. Hinds: May I make one further observation? Surely the Commission takes judicial—

Trial Examiner Norwood: Well, I think—go ahead.

Mr. Hinds: Surely the Commission takes judicial notice that freight rates are different according to the distances from the point of origin, and it would have been possible if we could have agreed, if Mr. MacIntyre wanted to bring in the freight tariffs, and so on, we could concede, subject to correction, that these are the ones, so that if the Commission doesn't want to take judicial notice that freight rates are different at different points, or even that they are—

Trial Examiner Norwood: That is not the point. The point is what freight rates you are using. Go ahead.

Mr. Hinds: We don't use any freight rates in computing the price, because—

Trial Examiner Norwood: Off the record.

Mr. Hinds: —the freight rates are the same, regardless what the price is. That is one of our costs.

Trial Examiner Norwood: 728 is received.

Mr. MacIntyre: May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

746 Mr. MacIntyre: Back to the record.

Trial Examiner Norwood: Yes. Proceed.

Mr. MacIntyre: I now make reference to Commission's Exhibit, for identification, 729-A and B.

In that connection, I call Mr. Hinds' attention to line 11 of page 287 where that document was identified, and where it apparently was erroneously recorded as 792-A and B, and ask him if he will agree that line in which the figure 792 appears should be changed to read "729"?

Mr. Hinds: Certainly.

Will the Court bear with me a moment?

Trial Examiner Norwood: Yes. We will have a five-minute recess.

Mr. Wright: Off the record a second, Your Honor.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: We will take a short recess.

(There was a short recess taken.)

Trial Examiner Norwood: Proceed.

Mr. MacIntyre: I now offer into the record Commission's Exhibit, for identification, 729-A and B as a statement by respondent Glidden of rail freight rates on white lead-in-oil and dry white lead from Scranton, Pa., to the destinations listed thereon, and as handed by an official of that company to a representative of the Commission on December 31, 1943. 747

Mr. Hinds: I have already made by objection, I think.

Trial Examiner Norwood: Received as marked.

Mr. Hinds: No question on competency. My objection had to do with relevancy and materiality.

Trial Examiner Norwood: Received as marked.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 729-A AND 729-B was received in evidence.)

Mr. MacIntyre: That was identified at page 287 of the record.

Off the record.

(Discussion off the record.)

Mr. MacIntyre: Back to the record.

If your Honor please, I now ask that there be placed in the transcript a statement of a stipulation as to the facts dated September 14, 1945, and as signed by counsel for respondent Glidden.

Trial Examiner Norwood: And signed by the Federal Trade Commission's representative?

Mr. MacIntyre: No. It is a concession by counsel for Glidden.

Trial Examiner Norwood: Oh, I see.

Mr. Hinds: No objection.

748 Mr. MacIntyre: That is signed by both you and Mr. Duncan?

Mr. Hinds: That is right.

Trial Examiner Norwood: The stipulation is as follows:

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

STIPULATION AS TO FACTS.

The Glidden Company, one of the respondents herein by its counsel, hereby stipulates and concedes the following to be facts, but only for the purposes of this proceeding, and reserves such objections as it may have, as to any of said facts, that the same are not relevant or material.

1. Between January 1, 1941, and November 25, 1944, The Glidden Company sold white lead in oil to its many classes of customers through and at the location of its distributing warehouses in the United States, which conducted retail departments at the following places:

Atlanta, Georgia—82 Broad St., N. W.
Baltimore, Md.—21 No. Liberty St.
749 Birmingham, Alabama—2016 First Ave., No.
Boston, Massachusetts—650 Beacon Street.
Buffalo, New York—733-735 Main St.
Charlotte, N. C.—312 South Tryon St.
Cleveland, Ohio—13538 Euclid Ave.
Columbus, Ohio—131 E. Long St.
Dallas, Texas—1029 Elm St.
Detroit, Michigan—7502-7506 Woodward Ave.
El Paso, Texas—113 No. Stanton St.
Evansville, Indiana—10-16 Main St.
Fort Worth, Texas—605 Throckmorton St.
Houston, Texas—700-02 Travis St.
Huntington Park, Calif.—6350 Pacific Blvd.
Jacksonville, Florida—50 West Bay St.

Knoxville, Tennessee—319 Wall Ave.
Miami, Florida—55 N. W. First St.
Mobile, Alabama—77 Dauphin St.
Oklahoma City, Okla.—310 N. W. Second St.
Orlando, Florida—228 N. Orange Ave.
Richmond, Virginia—109 E. Grace St.
St. Petersburg, Florida—869 Central Ave.
San Antonio, Texas—216 W. Commerce St.
Scranton, Penna.—224 Wyoming Ave.
Tampa, Florida—815 Florida Ave.
Toledo, Ohio—201 Summit St.
750 West Palm Beach, Florida—300 S. Olive St.
Washington, D. C.—1013-12th St., N. W.

2. Between said period, it has been the practice (with some exceptions) of said respondent, when making sales of white lead in oil, through and at the location of its distributing warehouses listed above, to quote and charge prices therefor in accordance with its published prices then applicable to each such location.

Dated at Cleveland, Ohio, September 14, 1945.

(Signed) Roger Hinds,
(Signed) John A. Duncan,
Attorneys for The Glidden Company, respondent herein.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. MacIntyre: Mr. Wright now has some exhibits that he cares to take up.

Mr. Wright: I would like to call to the witness stand Mr. David R. Reel.

DAVID R. REEL was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

(Documents were thereupon marked for identification
751 tion Commission's Exhibits Nos. 755-A, 755-B, 755-C, 755-D, 755-E, 755-F, 755-G, 755-H, 755-I, 756-A, 756-B, 757; 758-A, 758-B, 758-C, 758-D 758-E, 758-F, 758-G, 758-H, 759-A, 759-B, 759-C, 759-D, 760, 761, 762-A, 762-B, 762-C, 762-D, 762-E, 762-F, 762-G, 763, 764, 765-A, 765-B, 765-C, 765-D, 765-E, 765-F, 765-G, 765-H, 765-I, 766-A, 766-B, 766-C, 766-D, 766-E, 766-F, 766-G, 766-H, 766-I,

766-J, 766-K, 766-L, 767-A, 767-B, 767-C, 767-D, 767-E, 767-F, 767-G, 767-H, 767-I, 767-J, 767-K, 767-L, 768-A, 768-B, 769-A, 769-B, 769-C, 770-A, 770-B, 770-C, 770-D, 771-A, 771-B, 771-C, 771-D, 771-E, 771-F, 771-G, and 771-H.)

Direct Examination by Mr. Wright.

Q. Will you state your full name, address, and occupation for the record, please?

A. David R. Reel, 7225 Bradley Boulevard, Bethesda, Md.

I have been, since 1943, an attorney with the Federal Trade Commission.

Q. Did you recently have occasion to investigate The Glidden Company?

A. I did.

Q. In that connection, did you consult with officials of The Glidden Company?

752 A. Yes.

Q. And secure from their records certain documents and information?

A. From their records and from their officials.

Q. Will you state approximately the time at which that investigation was made?

A. I believe it began on June 5, 1945, and continued on for six or seven weeks thereafter.

Q. In conducting that investigation, what officials of The Glidden Company did you contact?

A. I met, while there, various officials. The ones that supplied me with the information and exhibits I desired and requested were Mr. Clifton M. Kolb, who is secretary and house counsel, Mr. Coe, who is, I believe, manager of the—he is assistant secretary in charge of the accounting and cost department; Mr. Weeks, who is in charge of the cost department; Mr. Glauner, who is one of the cost accountants; Mr. Hysell, manager of the traffic manager; Mr. David Glasser, who is an employee or clerk in the freight department, and Mr. Howard Dignan, who is also a clerk or employee in the freight department, and Mr. Radloff, who, I believe, is manager of their specialty sales.

Q. Will you state for the record, briefly, the type of information that you sought from The Glidden Company in your investigation?

753 A. I sought to secure the names of customers in various cities of various classes and to secure in-

voices showing sales and delivery of white lead, lead-in-oil, and other pigments to the customers of those various classes, and also freight information relative to the shipment of white lead and other pigments to those customers.

Q. I show you a document marked as Commission's Exhibit 755-A through I, and ask you to state what that is.

A. This is a directory of divisions and stores of The Glidden Company furnished to me by Mr. Kolb on June 8, 1945.

Mr. Wright: Your Honor, I offer in evidence Commission's Exhibit 755-A through I.

Mr. Hinds: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Hinds: You offer this?

Mr. Wright: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBITS NOS. 755-A, 755-B, 755-C, 755-D, 755-E, 755-F, 755-G, 755-H, and 755-I, was received in evidence.)

By Mr. Wright:

Q. I show you a document marked for identification as Commissioner's Exhibit 756-A and B, and ask you to
754 state what it is.

A. This document sets forth the names and locations of the various factory offices and warehouses and retail paint stores owned—of The Glidden Company for the year 1945.

Mr. Hinds: May I ask him where he got it or how he got it?

The Witness: Given to me by Mr. Kolb on June 8, 1945.

Mr. Wright: Your Honor, I offer Commission's Exhibit 756-A and B in evidence.

Mr. Hinds: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NOS. 756-A and 756-B was received in evidence.)

By Mr. Wright:

Q. I show you a document marked as Commissioner's Exhibit 757, and ask you to state where it is, and where it was obtained?

A. This is a document setting forth the premium zones of The Glidden Company in the various price differentials applicable thereto with respect to Euston white lead-in-oil, furnished me by Mr. Kolb on June 8, 1945, at my request.

Q. Was that given to you as a statement of the method of quoting prices of white lead-in-oil by The Glidden Company as of that time?

755 A. It was furnished to me for that purpose, as indicating the various methods of pricing white lead.

Mr. Wright: Your Honor, I offer Commission's Exhibit 757 in evidence.

Mr. Hinds: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 757 was received in evidence.)

Mr. Hinds: I am glad to have confirmation from the Commission and its witness that the dividing of territories into so-called zones is a method. That is an argument and contention I have been making for some time, and it is very gratifying to have the Commission now recognize it.

Trial Examiner Norwood: I suggested some time ago that there are a great many things counsel may agree on that they have not yet.

By Mr. Wright:

Q. I show you a document marked for identification as Commission's Exhibit 758-A through H, and ask you to state what it is, and from whom you obtained it.

A. This is a document referred to as bulletin No. 42, dated May 7, 1946, setting forth—

Mr. McDermott: '46, is it?

The Witness: '41, I am sorry.

756 —setting forth quotations on sales of white lead to various classes of customers of The Glidden Company, which document was furnished me by Mr. Kolb on June 15, 1945.

By Mr. Wright:

Q. Did that document purport to set forth the prices of white lead only or other pigments, as well, when it was given to you?

A. White lead products and other pigments, as well.

Mr. Hinds: No objection.

Are you offering it?

Trial Examiner Norwood: Received.

Mr. Hinds: No objection.

Trial Examiner Norwood: Does the record show that it has been offered?

Mr. Wright: I offer Commission's Exhibit 758-A to H in evidence.

Trial Examiner Norwood: There was no objection. It has been received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NOS. 758-A, 758-B, 758-C, 758-D, 758-E, 758-F, 758-G, and 758-H, was received in evidence.)

By Mr. Wright:

Q. I show you a document marked Commission's Exhibit 759-A to D and ask you to state what it is and
757 where it was obtained.

A. These are documents referred to as bulletins of The Glidden Company with respect to prices and price changes in connection with lead and lead products, dated June 14, 1941, June 17, 1941, September 18, 1941, and September 19, 1941, furnished to me by Mr. Kolb on June 15, 1945.

Mr. Wright: Your Honor, I offer Commission's Exhibit 759-A to D into evidence.

Mr. Hinds: No objection.

Trial Examiner Norwood: Is that "C" or "D"?

Mr. Wright: It is "D." If I stated "C" in the original question I wish it would be changed.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification was marked COMMISSION'S EXHIBIT NOS. 759-A, 759-B, 759-C, and 759-D, and received in evidence.)

By Mr. Wright:

Q. I show you a document marked as Commission's Exhibit 760, and ask you to state what it is, and where it was obtained.

A. This is a copy of bulletin No. 45, dated October 10, 1941, with respect to sales of lead products to railroads, industrial trade, and public bids, furnished me by Mr. Kolb on June 15, 1945.

Q. Was that exhibit furnished to you as a statement of the quotations of The Glidden Company?

758 A. Yes, relative to price quotations.

Mr. Wright: Your Honor, I offer Commission's Exhibit 760 in evidence.

Mr. Hinds: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT No. 760 was received in evidence.)

By Mr. Wright:

Q. I show you a document marked Commission's Exhibit 761, for identification, and ask you to state what it is and where it was obtained.

A. This is a copy of bulletin No. 46 of The Glidden Company, dated December 23, 1941, with respect to price quotations on sales of lead products to railroads, industrial trade, and public bids, furnished to me by Mr. Kolb on June 15, 1945.

Q. Was that furnished to you as a quotation of prices by The Glidden?

A. Yes.

Mr. Wright: Your Honor, I offer Commission's Exhibit 761 into evidence.

Mr. Hinds: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT No. 761 was received in

759 evidence.)

By Mr. Wright:

Q. I show you a document marked Commission's Exhibit 762-A through G, for identification, and ask you to state what it is, and from where it was obtained.

A. This is a copy of bulletin No. 47 of The Glidden Company, dated January 29, 1942, with respect to price quotations in connection with sales of lead products and other pigments to various classes of customers of The Glidden Company. This document was furnished to me by Mr. Kolb on June 15, 1945.

Q. Was Commission's Exhibit 762-A through G furnished you in response to a request for quotations of Glidden Company—

A. Yes.

Q. —prices to its customers?

Mr. Wright: Your Honor, I offer in evidence Commission's Exhibit 762-A to G.

Mr. Hinds: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT No. 762-A, 762-B, 762-C, 762-D, 762-E, 762-F, and 762-G were received in evidence.)

By Mr. Wright:

Q. I show you a document marked Commission's Exhibit 763 and ask you to state what it is, and from whom it was obtained?

760 A. This is bulletin No. 48—I would like to change that.

This is a copy of bulletin No. 48 of The Glidden Company, dated March 25, 1942 relative to prices on sales of lead products to various classes of customers of The Glidden Company, furnished to me by Mr. Kolb on June 15, 1945.

Q. Was that furnished to you in response to a request for price quotations of The Glidden Company to its customers?

A. Yes.

Mr. Wright: Your Honor, I offer Commission's Exhibit 763 in evidence.

Mr. Hinds: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT 763 was received in evidence.)

By Mr. Wright:

Q. I hand you herewith a document marked Commission's Exhibit, for identification, 764, and ask you to state what it is and from whom it was obtained.

A. This is a copy of bulletin No. 49 of The Glidden Company, dated May 6, 1942, with respect to prices on sales of lead products to various classes of customers furnished to me by Mr. Kolb on January 15, 1945, in response to my request for price information relative to sale of white lead products and other pigments of The Glidden Company.

761 Mr. Wright: Your Honor, I offer Commission's Exhibit 764 in evidence.

Mr. Hinds: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 764, was received in evidence.)

By Mr. Wright:

Q. I hand you Commission's Exhibit 765-A through I, for identification, and ask you to state what they are and from whence they came?

A. These documents are bulletins and inter-office correspondence relative to the prices on sales of lead products to various classes of customers of The Glidden Company, furnished to me by Mr. Kolb June 15, 1945, at my request, with respect to prices of The Glidden Company on sales of lead products and other pigments.

Mr. Wright: Your Honor, I offer Commission's Exhibit 765-A through I into evidence.

Mr. Hinds: No objection.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 765-A, 765-B, 765-C, 765-D, 765-E, 765-F, 765-G, 765-H, and 765-I were received in evidence.)

762 By Mr. Wright:

Q. I hand you herewith Commission's Exhibit 766-A through K, and ask you to describe what that is and from whom you obtained it?

A. These are price lists regarding prices on white lead-in-oil of The Glidden Company for various classes of customers in various zones, furnished to me by Mr. Kolb on June 13, 1945, in response to my request for prices of The Glidden Company relative to the sale of white lead and other pigments.

Q. Calling your attention now to 766-A, 766-C, and 766-E, was any distinction made between those three cards by Mr. Kolb?

A. Yes, these prices set forth on the lists were discussed, and the following information was obtained: Card identified as 766-A governed prices on sales of white lead to distributors in the par zone. Card identified as 766-C were distributors' prices in the one-eighth-cent zone. The card identified as 766-E set forth distributors' prices in the quarter-cent zone.

Q. I call your attention to Commission's Exhibit 766-A, the symbol DA-14. Do you know the significance of that symbol appearing on that exhibit?

A. It is a card referring to the different zones to which these price lists apply.

Q. Can you explain that any further? Does the
763 letter "D" in the symbol have any significance?

A. The letter "D" means dealer, and "A" means "par zone."

Q. I call your attention to a symbol "DB-14," on Commission's Exhibit 766-C.

A. "D" means distributor, "B" is the code for one-eighth zone, and on Exhibit identified as 766-E, "D" is the symbol used by Glidden Company with respect to distributors. "C" has reference to the quarter-cent zone.

Q. I call your attention to the symbol on Commission's Exhibit 766-G, which appears at the upper righthand corner, A-13.

Do you know the significance of that symbol?

A. The "A" again, with reference to these price lists, has reference and is used by The Glidden Company to designate par zone prices quoted on sales of white lead.

Q. What is the source of your information regarding these symbols and the application of the price cards?

A. When these cards were given to me by Mr. Kolb, we discussed their method of identifying the various price lists, and at that time I wrote or made a notation on the card as to the various zones to which they applied.

Mr. Kolb at the time also had to secure information relative to this code. He was not certain about it, but he, through some source, found out the nature of their code symbols here and he explained it to me.

764 Mr. Wright: Your Honor, I offer Commission's Exhibit 766-A through K in evidence.

Mr. Hinds: No objection, except I do not want to have my failure to object imply that sales were in all cases made in these territories or that this states the story as to freight allowances as to which I think certain of the documents have to be consulted.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 766-A, 766-B, 766-C, 766-D, 766-E, 766-F, 766-G, 766-H, 766-I, 766-J, and 766-K were received in evidence.)

By Mr. Wright:

Q. I hand you herewith Commission's Exhibit 767-A through K, and ask you to state what that is, and from whom it was obtained.

A. These are price lists furnished to me by Mr. Kolb June 13, 1945, with respect to the prices quoted on sales of white lead-in-oil in the various zones or territories of The Glidden Company.

Q. I call your attention to the symbols on the upper right-hand corner of the various exhibits and ask you to state what the significance of those symbols is.

Mr. Hinds: May I suggest that it is the same story, and he will simply so state, and it will save time.

765 Mr. Wright: I have no objection to that, but I want the witness to carry through since there are more different symbols on this than there were on the last.

Trial Examiner Norwood: Go ahead.

The Witness: The symbol "B" refers to the one-eighth cent zone; the symbol "C" refers to the one-fourth-cent zone; the symbol "CC" refers to the three-eighths-cent zone; the symbol "D" refers to the one-half cent zone; the symbol "E" refers to the seven-eighths-cent zone; and the symbol "F" refers to the one-cent zone.

Mr. MacIntyre: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: Will you read the answer, please?

(The reporter read the last answer.)

By Mr. Wright:

Q. Will you examine Commission's Exhibit 767-I, and state again the significance of the symbol?

A. As I stated erroneous, the "E" refers to the five-eighths cent zone.

Trial Examiner Norwood: That is correct, then, the last explanation?

The Witness: Yes.

Mr. MacIntyre: May we go off the record?

Trial Examiner Norwood: Off the record.

766 (Discussion off the record.)

Trial Examiner Norwood: Proceed.

Mr. Hinds: Has it been offered, as yet?

Mr. Wright: Yes, sir.

Trial Examiner Norwood: Is there any objection to the proffer?

Mr. Hinds: No, sir, I make the same reservation as before.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 767-A, 767-B, 767-C, 767-D, 767-E, 767-F, 767-G, 767-H, 767-I, 767-J, and 767-K were received in evidence.)

By Mr. Wright:

Q. I show you Commission's Exhibit 768-A and B, and ask you to state what it is, and from whom it was obtained?

A. This is a contract dated January 1, 1941, by and between Heath & Milligan Manufacturing Company, a division of The Glidden Company, and Montgomery Ward Company, with respect to prices on sales of white lead-in-oil by The Glidden Company to Montgomery Ward Company.

This contract was furnished me by Mr. Kolb through the mails on October 5, 1945.

Q. Was that furnished to you as setting forth the terms of sale applicable to Montgomery Ward & Company
767 by The Glidden Company as of the date of that contract?

Mr. Hinds: I object on the ground that having stated that it is a copy of a contract furnished by the respondent, certainly any further identification of it is purely incompetent.

The document speaks for itself. When you once say it is a contract between the two parties, you look at the contract to find out what it is.

Trial Examiner Norwood: He can tell us what he asked for and what the officials who gave it to him stated it was.

The Witness: May I have the question read, please?

Trial Examiner Norwood: Read it.

(Question read.)

The Witness: Yes.

Mr. Wright: I again offer Commission's Exhibit 768-A and B in evidence.

Mr. Hinds: No objection.

Trial Examiner Norwood: Received.

(The document referred to was marked COMMISSION'S EXHIBIT NO. 768-A and 768-B and received in evidence.)

By Mr. Wright:

Q. I show you a document marked Commission's Ex-

hibit 769-A to C, for identification, and ask you to state
768 what it is, and where it was obtained.

A. This is a copy of a contract dated December 29, 1942, by and between Heath & Milligan Manufacturing Company, a division of The Glidden Company, and Montgomery Ward & Company with respect to prices on the sale of white lead-in-oil furnished to me by Mr. Kolb on October 5, 1945, in response to my request for prices with relation to the sale of such white lead-in-oil by The Glidden Company to Montgomery Ward & Company.

Q. I call your attention to the word "canceled" stamped on various sheets of that exhibit. Were those words on the exhibit when it was furnished to you?

A. Yes.

Q. Was any explanation made to you regarding those stamps by officials of The Glidden Company?

A. No.

Mr. Wright: Your Honor, I offer in evidence Commission's Exhibit 769-A to C in evidence.

Mr. Hinds: No objection.

Mr. Ewing: May we see it?

(Document handed to Mr. Ewing.)

Mr. Ewing: No objection.

The Witness: With reference to this contract, it was furnished me when I requested copies of contracts which had been entered into and executed by the parties involved.

769 Mr. Hinds: You mean performed?

The Witness: Performed.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 769-A, 769-B, and 769-C, was received in evidence.)

By Mr. Wright:

Q. I show you a document marked for identification Commission's Exhibit 770-A to C, and ask you to state what it is and from where it was obtained.

A. This is a copy of a contract entered into by Euston Lead Company, a Division of Glidden Company, with distributors of that company in the sale and distribution of white lead products, otherwise known as a distributor agreement.

Mr. Hinds: Don't you mean a form rather than a copy?

The Witness: It is a copy.

Mr. Wright: I offer Commission's Exhibit 77-A to C in evidence.

Mr. Hinds: No objection, except I call attention to the fact that it is a printed form. It is not a copy of anything.

Mr. Wright: I accept that.

Trial Examiner Norwood: Received.

(The document referred to heretofore marked for
770 identification COMMISSION'S EXHIBIT NO. 770-A, 770-B, and 770-C was received in evidence.)

Mr. Hinds: And I do not imply that there have been such contracts, or there have not. I don't happen to know if there were any transactions on that form.

By Mr. Wright:

Q. I hand you herewith documents marked for identification Commission's Exhibit 771-A to G, and ask you to state what those are, and where they came from.

A. These are copies of price lists setting forth prices governing the sale of white lead-in-oil, and other pigments; by The Glidden Company in the various zones in what is referred to as their West Coast area.

Q. Were any representations made to you as to the areas in which those price cards applied?

Mr. Hinds: Do you mean statements?

Mr. Wright: Were any statements made.

The Witness: They were discussed by Mr. Kolb and I. The price lists, themselves, set forth the various zones in which they apply. For example, the price list identified as 771-A states "par zone," and states that this zone includes sales in San Francisco south to San Jose, inclusive, Oakland, Berkley, Richmond to Haywood.

By Mr. Wright:

Q. Do other exhibits likewise set out the geographi-
771 cal areas to which they are applicable?

A. Yes, and the zone numbers applicable to those areas.

Mr. Wright: I offer Commission's Exhibit 771-A to G in evidence.

Mr. Hinds: No objection, but again I don't want to have it implied that we made sales in all of those zones, or that this tells the whole story in regard to freight allowances.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification

"COMMISSION'S EXHIBITS NOS. 771-A, 771-B, 771-C, 772-D, 772-E, 772-F, and 772-G," were received in evidence.)

Mr. Wright: May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: We will recess until 2 p. m.

(Thereupon, at 12:15 o'clock p. m., a recess was taken until 2 o'clock p. m. of the same day.)

772 Afternoon Session.

2 P. M.

Trial Examiner Norwood: The hearing will come to order, reconvened at 2 p. m.

The witness will resume the stand.

DAVID R. REEL resumed the witness stand and testified further as follows:

(Documents were thereupon marked for identification Commissions' Exhibits Nos. 772-A, 772-B, 772-C, 772-D, 772-E, 772-F, 772-G, 772-H, 772-I, 772-J, 772-K, 772-L, 772-M, 772-N, 772-O, 772-P, 772-Q, 772-R, 772-S, 772-T, 772-U, 772-V, 772-W, 772-X, 772-Y, 772-Z, 772-Z-1, 772-Z-2, 772-Z-3, 772-Z-4, 772-Z-5, 772-Z-6, 772-Z-7, 772-Z-8, 772-Z-9, 772-Z-10, 772-Z-11, 772-Z-12, 772-Z-13, 772-Z-14, 772-Z-15, 772-Z-16, 772-Z-17, 772-Z-18, 772-Z-19, 772-Z-20, 772-Z-21, 772-Z-22, 772-Z-23, 772-Z-24, 772-Z-25, 772-Z-26, 772-Z-27, 772-Z-28, 772-Z-29, 772-Z-30, and 772-Z-31.)

Mr. Wright: Your Honor, I would like to go back and ask the witness one question to clear up his testimony regarding an exhibit which was received in evidence this morning.

Trial Examiner Norwood: Yes. Go ahead.

773 *Direct Examination (Resumed) by Mr. Wright.*

Q. I call your attention to Commission's Exhibit 767-I, which is a price list effective January 26, 1942, marked "E-14" in the key number.

Did I understand you to state for the record that this exhibit was applicable to the zone seven-eights of a cent per pound above par?

A. I believe I originally stated that this was in the seven-eighths cent advance price zone, and then changed that testimony to read that it was in the five-eighths cent advance price zone, but upon looking it over that testimony was in error, and I find that that particular exhibit relates to prices in the three-fourths cent advance price zone.

Q. Mr. Reel, I understood you [illegible] state this morning that you examined numerous invoices of The Glidden Company in connection with your investigation?

A. That is true.

Q. Where were these invoices supplied to you from, and by whom?

A. The invoices with respect to the Cleveland branch, or Cleveland division, were supplied to me by and under the authority of Mr. Weeks after he was contacted and requested to supply this information by Mr. Kolb. The information and copies of invoices relating to the other divisions of The Glidden Company were supplied 774-775 directly in response to a letter of Mr. Kolb's to those divisions requesting copies of invoices relating to sales of white lead and white lead-in-oil.

With reference to these invoices supplied by the other divisions other than the Cleveland division of Glidden Company, the only item appearing on the copies of invoices was that showing white lead and white lead-in-oil. That was to facilitate the investigation and not cause too much hardship upon the part of the company.

Q. Did you make any notations or tabulation of the information from the invoice, and other material that was supplied you by The Glidden Company?

A. Yes, I did.

Q. I hand you a document marked Commission's Exhibit 772-A through Z-31, for identification, and ask you to describe that.

A. This document, consisting of numerous pages, contains a tabulation of price and freight data on sales of white lead to various customers of The Glidden Company in various parts of the United States.

Q. Did you prepare this exhibit, yourself?

A. I didn't prepare all of the pages of this exhibit for the reason that I had some assistance by Mr. Depue and Mr. Kelaher who took the copies of invoices as they were

supplied me by The Glidden Company and from those
776 invoices tabulated the data appearing thereon. All of
the entries in this tabulation made by Mr. Depue and Mr. Kelaher were later checked by me from the copies of the invoices, and I added to their tabulations the freight data which appears on these various sheets.

Q. I call your attention to Commission's Exhibit 772-B. With reference to the material appearing in the upper left-hand corner, will you explain those notations?

A. That was a code used in order to distinguish different classes of customers whose names appear in the left-hand column on this page, such as "DD" for "Direct Dealer," and so forth.

Trial Examiner Norwood: Are those the same symbols that are used on those cards?

The Witness: No. These have to do with the classification of customers, while the others have classification of zones or the differential.

Trial Examiner Norwood: I see.

By Mr. Wright:

Q. Who supplied the classification of those customers in that form? Was that done by you or was it done by The Glidden Company?

A. On the exhibits set forth as—identified as 772-B through 772-U the classification of customers was check-marked by Mr. Radloff, who is manager of the specialty sales department of The Glidden Company. The papers were handed him for that purpose.

777 Q. I call your attention to the columns marked "Shipping Orders," "Number," and "Date Shipped," and ask you to explain the information appearing under that?

A. The column—

Trial Examiner Norwood: Now, I don't think that we can go into the explanation of this exhibit. Let us identify it and you can testify about it if and when it is received in evidence. It is not in evidence yet. So I would just identify it and then you can go into those explanations and matters.

By Mr. Wright:

Q. Mr. Reel, are we correct in our understanding of your testimony that all of the information appearing on Commission's Exhibit 772-A through Z-31 is a statement of information appearing on the records of The Glidden Company and as supplemented by officials of that company?

A. Yes.

Mr. Wright: Your Honor, I offer Commission's Exhibit 772-A through Z-31 in evidence.

Trial Examiner Norwood: Any objection?

Mr. Hinds: I should probably want some preliminary cross-examination.

Trial Examiner Norwood: You may have any questions with respect to its identity only.

Mr. Hinds: First, I want to affirm the understanding
I had that we are to be furnished a copy of this. They
778 have courtesly allowed us to look at it overnight. I
am satisfied with that privilege, but we would like to have a copy as the other respondents have. I understood it will be furnished to us.

Now, before proceeding with my cross-examination within Your Honor's limitation, I would like to ask the purpose of this offer because my interest in it will depend somewhat on what the purpose is. I understand in part it will be on the freight rate question?

Mr. Wright: Your Honor, that exhibit is offered to show transactions of The Glidden Company with certain customers at certain times covering certain products, including all the details recorded there regarding such transactions.

Mr. Hinds: That doesn't help me very much because we have at least three issues in this case. We have conspiracy; we have the issue which, if I will be permitted, called the fantastic issue that uniform delivered prices are discrimination per se which I will dismiss, disposing of it as a question of law in accordance with the United States Supreme Court rulings; and then we have an important issue, apparently seriously urged, but up to date I haven't had any intimation that it is going to be pressed here, that there may have been discriminations under the Robinson-Patman Act with respect to individual sales, that is, a sales to Jones and a sale to Smith, inside of
the same zone. Now, it is the latter I am concerned
779 with because if we are to be confronted with that
sort of information our burden, of course, will be enormously increased.

Could you be helpful in that respect?

Mr. MacIntyre: I would like to answer that question.

Trial Examiner Norwood: Go ahead.

Mr. MacIntyre: To the extent that the evidence contained in this exhibit concerns prices charged by The Glidden Company, or that relates to any showing as to what the prices were that were quoted as well as those charged, we offer it for whatever it can show concerning differentials in those prices.

When considered in the light of other evidence, not only in the exhibit but which has heretofore been received in the case, and which we expect to offer bearing on the question of discrimination in price, as well as the other charges under count 1, to which Mr. Hinds has made reference—

Mr. Hinds: In other words, this is offered in part, at least, to support a charge that even as between one customer and another in a given zone we have been discriminating; is that right?

Mr. McIntyre: Under count 2 there is a charge that Glidden has through discounts given one customer and
not another; and through the use of regional discrim-
780 inations or discriminations of other types, unlaw-
fully discriminated between customers.

Mr. Hinds: Well, then, that will considerably add to the burden of our difficulties here. Had it been merely the freight rates, or these general charges, I think we could have relied on the law in the Supreme Court decisions rather than a detailed consideration of the facts.

Then, Mr. Reel, you have got the information in the lefthand column, customers, their addresses I suppose from the invoices?

The Witness: That is right.

Mr. Hinds: The four classifications were in each case given to you by some official and are their own notions of what these classifications are?

The Witness: That is right.

Mr. Hinds: Officials of The Glidden Company. Then I see a column "Shipping Orders," with numbers. Those are from the invoices or—

The Witness: That is right.

Mr. Hinds: From the orders?

The Witness: Those are from the—

Mr. Wright: Your Honor, I submit that counsel is going beyond cross-examination on identification of the document and into the contents of it. We still haven't established the contents of the document.

781 Mr. Hinds: I want to know what these things mean.

Trial Examiner Norwood: Confine yourself to the identification.

Mr. Hinds: I notice there is a cover on this thing. Is that part of the offer?

Mr. Wright: That has been marked by the reporter. We don't know if it is part of the offer.

Mr. Hinds: This cover describes what is contained therein as data as to sales during the first and last quarters of 1941 and first quarter of 1943. Then I notice that there are columns here on each of these pages as to dates shipped.

Now, in bringing these sales within the quarter, have you taken the date of shipment as the significant date, or have you taken some earlier date when the order was sent in and accepted, or a contract was made constituting the contract of sale?

The Witness: It was established—

Mr. Wright: Your Honor, I submit that goes to the contents of the document.

Mr. Hinds: If Your Honor please—

Trial Examiner Norwood: Well, you asked a few of those questions, but let him answer that, and then I will ask you to confine your examination to voir dire questions.

Mr. Hinds: I can't possibly make an examination until I can find—

782 Trial Examiner Norwood: You will get that if and when the document is admitted in evidence, then you may cross-examine him at length on all those things.

Mr. Hinds: Before it is admitted in evidence I want to be able to learn at least enough about it to see what if any objection I have to it at the threshold.

Trial Examiner Norwood: Go ahead.

Mr. Hinds: I think Your Honor will see that my questions will all be directly pertinent to the preliminary question solely as to admissibility.

Trial Examiner Norwood: I am sure counsel wants—

Mr. Hinds: Counsel has stated—

Trial Examiner Norwood: —to go into that thing very thoroughly, and for our convenience, if you will, just confine your questions there to matters pertaining to this identification, and to identification only just at this time. In a very few minutes you may go into cross-examination.

Mr. Hinds: Well, it isn't, I hope, going to be a matter of minutes. It is going to be a matter of logical—

Trial Examiner Norwood: The point about it is we want to keep the record clear here and we do not want questions going into the record concerning the contents of a paper which has not been received in evidence. We want to keep the record clear of any such thing.

Mr. Hinds: Have you grouped these according to
783 the date of the sale, or according to the date of the
invoice or shipment where the two have been different?

Trial Examiner Norwood: Answer that.

The Witness: The dates used in the column designated "Date Shipped" are dates taken from the face of the shipping orders as they appeared, and, as I understood, it is the policy of the company to invoice on the day of shipment.

Mr. Hinds: Move to strike out the answer as unresponsive. I am not making a distinction between the shipment date and the invoice date, which very likely would be the same date. I am making a distinction between the date of the sale and the determination of price, which may have been a day, a year, or six months before. That is what I am trying to find out.

Trial Examiner Norwood: I think he may give us some information on that subject.

Motion denied. You may clarify it.

Mr. Hinds: As an instance, on page 4, line 25, you have a purported sale to William Downey, with a date of shipment of December 31, 1940; is that right?

The Witness: That is what it shows.

Mr. Hinds: Now, does that come, according to your method of grouping these, within the first quarter of 1941 or the last quarter of 1941, or the first quarter of 1943?

The Witness: No. I can explain that.

784 Mr. Hinds: I will give you an opportunity in a
minute.

On page 5, lines 29 and 30, I find transactions dated respectively as to the date of shipment, December 5, 1940, and December 16, 1940. Does that come within any of those three quarters under your method?

The Witness: No.

Mr. Hinds: Well, then—if you want to explain that I will be glad to have you so I understand what you did here.

The Witness: The shipments of The Glidden Company contained far more items of other products and merchandise manufactured and sold by The Glidden Company than white lead or white lead-in-oil, or any other pigments, and in order to find invoices which would show the sale of white lead and the shipment of white lead, and in an endeavor to get various classes of customers in the same towns, it was necessary to either obtain invoices prior to or subsequent to the dates as set forth in the three quarters shown on the tabulated sheets.

Mr. Hinds: In other words, then, this is not precisely a tabulation with respect to sales during these named quarters but is a tabulation of sales which, for the most part, are within those three classes, but in some instances, so that you would get a more representative grouping, you have departed from this self-imposed selective basis; is that right?

785 The Witness: That is right.

Mr. Hinds: And gone into certain other quarters?

The Witness: That is right.

Mr. Hinds: To which, by the way, I make no objection. I just wanted to see what we have before us.

However, it is a fact, is it not, that you have not taken and have not set down here the date when the order was received or accepted, or in cases where there was a more formal contract of sale fixing the price, the date of that contract; is that right?

The Witness: That is right.

Mr. Hinds: You have only given us the date of either the shipment or the invoice?

The Witness: That is true.

Mr. Hinds: Have you in your possession information as to the dates of sale which I define as either order or acceptance, or a more formal contract? Have you any of those dates?

The Witness: Only with respect to sales under your distributor agreements. I believe there is a page in there that will show it.

Mr. Hinds: And in those instances, is that date set forth in this tabulation as well as the date of shipment or invoice?

Well, I will reframe the question.

786 Except in the case of what you have last referred to, distributor agreements, you have no information as to the dates when any of these sales became a matter of agreement between the parties?

The Witness: That is right.

Mr. Hinds: Does this cover dry white lead, or does it cover only white lead-in-oil?

The Witness: It is presumed to cover—it does cover both dry white—dry white lead and white lead-in-oil.

Mr. Hinds: Does it cover any other lead pigments?

The Witness: No.

Mr. Hinds: As to the freight data, you say you obtained that from Glidden's officials?

The Witness: That is true.

Mr. Hinds: In many cases the invoice which you examined covered other products than those that you have made the subject of this tabulation?

The Witness: In the majority of cases.

Mr. Hinds: In those cases, was it your understanding that the rate applicable to whatever quantities were shipped by The Glidden Company, including other products such, for example, as a carload rate, was taken, or was the rate taken and entered by you which would have been applicable only to a smaller quantity, say a hundred pounds, referred to in this tabulation, if you know?

787 The Witness: The instructions given to Mr. Hysell, who is the manager of the freight department, and his instructions to Mr. Glasser and Mr. Dignan were to figure the freight—or obtain the freight that applied to that amount of white lead contained in the shipment on the basis of whether that shipment was a carload, truckload, less-than-carload, or less-than-truckload.

Mr. Hinds: Then this purports to be, so far as you know is, a record of that portion of an actual total freight payment which could be prorated according to actual pounds to that portion which you have made the subject of your tabulation?

It is actual but prorated from a larger total; is that it?

The Witness: That is true.

Mr. Hinds: Now, I think there are some pages here called inter-company sales—billings. Can you refer to those? I don't remember the number of the pages. Refer to pages beginning 24-A, which has been marked here by the stenographer Z-11 and thereafter, Z-12, and so forth. Now, these are transactions for so-called billings between one arm or division of The Glidden Company and another; are they not?

The Witness: That is right.

Mr. Hinds: And, of course, they do not come
788 within your general characterization of sales, they were not sales and did not purport to be sales?

The Witness: It is a matter of debate there whether or not they are actual sales or charges made for white lead furnished.

Mr. Hinds: Well, in both cases if it was a sale the buyer and the seller was the same company, is that right?

The Witness: That is true. They can't sell to themselves.

Mr. Hinds: In other words, for some reason, which was or was not explained to you, The Glidden Company has a pretense, fiction, of invoicing at a figure from one department to another of the same company? That is what you are referring to?

The Witness: That is right.

Mr. Hinds: I think that completes my preliminary cross-examination.

I object to the document. I will first take up the relatively unimportant sheets, Z-11 and following, which have to do with so-called inter-company billings on the general ground that they are irrelevant. It is no question of competency, because these are not sales, they are not transactions with which the Commission can be concerned, neither under their conspiracy charge nor a Robinson-Patman charge because
they are mere fictional appearances of sales done for
789 some purpose which may or may not be explained, but
they are not sales.

Trial Examiner Norwood: You mean sales from the company to the company's agents?

Mr. Hinds: No. No. They are not even that. These are not sales under any theory. The Cleveland office, the Cleveland branch, may ship some stuff to the Chicago branch, and for some purposes of keeping the people in competition with one another, or something of that sort, inside of the company they go through the fiction of making out an invoice. I suppose it has to do with checking up volume of business, or something of that sort, on the part of the local managers. But at any rate it doesn't even purport to be a sale, nor do these things under any conceivable notion of the word "price"—even our opponents, I don't think, will claim they are prices.

That concludes my first objection.

Does Your Honor want to rule on that, or shall I go ahead?

Trial Examiner Norwood: No. Go ahead.

Mr. Hinds: Now, as to so much of the document as is with respect to freight rates, I renew the objection that I have heretofore made addressed to relevancy which Your Honor has overruled, and I will not argue that further.

As to the document in so far as it is to be offered 790 in support of a charge that we have discriminated between individual purchasers from us within a particular zone or between zone and zone as individuals, I object on the ground that the evidence is completely irrelevant in that without the relevant or significant date, no comparison Robinson-Patman wise can be made between one price and another. The law is not violated, nor is there even a presumption of violation by charging one man a price in December of 1942 and another one 20 years later.

Trial Examiner Norwood: That is right.

Mr. Hinds: In other words, the date of shipment, which is the only date here, which happens to be in most cases the date of invoice—the same thing usually is the date of shipment or invoice, in no way even suggests the vital or significant Robinson-Patman date because it may have been under a contract of sale, general or specific, made a year, six months before, or it may have been a mere order without formal contract fixing price accepted by the seller and shipment for some reason or other may have been requested, not shipped for three months because of difficulties in transport or materials, might not have been made for three months.

No presumption, I maintain, arises from the shipment date. The burden of proof certainly as to the date of the transaction is on the Government. So they cannot shift the burden of proof by us by coming in here with a 791 document which merely gives shipment dates, putting the burden on us to show that the sale had been a year before or six months before, or a week before.

So I say, lacking that, unless they promise to connect it up—not putting the burden upon us—unless they promise to connect it up, it is utterly irrelevant, has no relationship whatever to this case.

Trial Examiner Norwood: No proper basis for comparisons?

Mr. Hinds: No, sir. That is as vital a thing as the two prices, or the fact that the goods are similar. As to those points, by the way, I am not raising any point because I assume that those other factors will become apparent from this tabulation.

But, lacking the significant date, the thing fails utterly. That is the basis of my objection.

Mr. MacIntyre: If Your Honor please, I would like to make in part the reply to these objections.

Trial Examiner Norwood: Go ahead.

Mr. MacIntyre: And I address myself, first, to the portion of his objection relating to those pages marked Z-11 and following Z-11.

Mr. Hinds in his objection in that connection overlooked the fact that the freight applicable to the shipments made from the factory to distribution points is a factor that 792 he as well as counsel for the Commission are taken into account in determining the nature and extent of the net price discriminations involved, or at least some of the—

Mr. Hinds: You mean mill net—

Mr. MacIntyre: Or at least some of them.

Trial Examiner Norwood: Wait a minute.

Don't take down any remarks that are made until the counsel has the floor.

Mr. MacIntyre: Or at least some of the transactions entered into by The Glidden Company. It is only through that information that one is enabled to determine with respect to sales from warehouses how much freight was actually incurred from the factory.

In other words, these so-called inter-company—they, I think, should more appropriately be called intra-company—transactions, it is only through these that you can determine how much freight the company actually incurred as a cost, if it was actually a company cost, on freight, all the way along the line from its factory to the consumer. For that reason, if for no other, these pages of Z-11 and following are relevant to the issues here.

Mr. Hinds: Shall I answer that point?

Trial Examiner Norwood: No. No. You have had your time. I will hear from you later.

Was that data used for that purpose, Mr. MacIntyre?

793 Mr. MacIntyre: They are usable for that purpose. We offer them for that, and all other purposes for which they are found to be relevant when the record is closed.

Trial Examiner Norwood: Go ahead.

Mr. MacIntyre: Now, as to the other pages, as well as those, they go to the charge included in count 2, and particularly paragraph 11 of count 2, which charges that Glidden has been, and is now, classifying its customers to receive from Glidden quantity, trade, and regional discounts, and from the quoted prices that it makes, so that by virtue of such classifications and action that Glidden takes pursuant thereto, it charges, demands, accepts, and receives higher prices in connection with the sale of lead pigments in commerce from some of its customers than from ~~sales~~ to other customers.

And, further, the exhibit is relevant to the charges under count 1, which charges the unlawful course of conduct on the part of all of these respondents.

Trial Examiner Norwood: What do you say about the absence of any dates which would be reasonable basis of comparison as between sales to the vendees mentioned there, and others in the matter of determining discrepancies?

Mr. MacIntyre: Well, under the Robinson-Patman Act if you charge—that is, make a sale at different prices on "X" date that is actionable as a price discrimination if the
prices are different. It is also actionable if on "Y"
794 date you demand that customer "A" pay you more
for a shipment made to him than on that date customer "Z" is compelled to pay you on a shipment—unless you provided both with the opportunity of ordering on the same dates and under the same conditions, unless the discrimination is justified by differences in costs, and provided it has the effect specified in the statute.

Mr. Hinds: Now, as to the first point, namely, the intra-company billings, which I am told we call inter-house transfers, I will concede that if there is any merit whatsoever in Commission's contention about freight data, which is one of our costs—it has nothing to do with our prices; it is one of our costs—this is no more objectionable than any of the other barrels of material we have taken at such vast expense. It does not add anything. If that be the purpose, I suppose if they can look at our freight costs they can go back and see the costs whereby we transferred our goods from one of our own warehouses to another. I maintain none of that has any relevancy.

If we were charging different prices—which we are not. We are accused of charging the same price. If we were charging different prices then we would have the burden of coming in and justifying our differences in costs of not only freight but of selling, and other costs, but we are not doing that. We come in charging the same price, so, there-
fore, I see no relevancy—since we don't bring it up—
795 of our freight costs.

Now, as to the second part, which goes to the lack of the date, I think my opponent has impliedly conceded that it is not needed here at all because he hasn't attempted to show that the date of shipment or invoice has any relevancy, so he is arguing that without any showing of date at all you can—

Trial Examiner Norwood: The date of invoices has no relevancy in so far as indicating when that sale might be?

Mr. Hinds: That is true. So that if he came in here more humbly and said, "We admit that there is a vital thing lacking here, namely, the date, which we will undertake to supply," then Your Honor might well say, "Well, you can't prove all of your case at once, and we will take this under consideration, subject to your proving it later."

But I don't want to be in the position of having that burden upon us.

Trial Examiner Norwood: That has nothing to do with your burden here if you are going to admit some evidence here pursuant to the burden which is on him.

Mr. Hinds: Of course. But, as it stands it may lack relevancy. He may bring in the relevant dates, but until he does that it should be admitted only conditionally, if at all.

796 Trial Examiner Norwood: I think the dates of invoices mean a great deal.

Mr. Hinds: In what respect?

Trial Examiner Norwood: As to when goods were shipped, and at what price.

Mr. MacIntyre: Last summer when we undertook to secure information concerning the prices at which sales—

Mr. Hinds: Is this off the record?

Mr. MacIntyre: This is on the record.

Mr. Hinds: Then I object to counsel making a statement which necessarily is evidentiary. He is now stating facts. He is not under oath. Let him take the witness stand if he is competent.

Trial Examiner Norwood: Now, will counsel be seated and let me hear from counsel for the Commission?

Go ahead.

Mr. MacIntyre: Last summer when we undertook to secure information concerning the prices which had been quoted and charged by The Glidden Company, as well as other respondents in this case, we spared no effort to secure from those companies information that they could furnish us showing the dates on which they had made sales and shipments pursuant to such sales within certain

specified periods of time. Wherever the company could furnish a showing that it had made a shipment, but was
unable to show us whether or not the order was ac-
797 cepted on that day, or five days prior, we took the best
information that they said they had, and all of it that related to it, and the information that we have before you and in this offer is the information that we received from them, and particularly from the Glidden Company.

Now, we are finished on just what we did request.

The next exhibit to be marked for identification in this case, and which we propose to offer, will throw further light on just how far we went in an effort to secure price information, and just what we did ask the company to furnish us on this particular exhibit, and we would like therefore, if you care to, to hold the ruling on this until we can have another exhibit offered which relates to this, and have it considered along with it.

Trial Examiner Norwood: I am not going to withhold the ruling on this. I am not going to reject evidence here on the grounds that the dates of the invoices and the statements in the invoices are not evidence. I think that would be absurd.

Mr. Hinds: Do you think that would create a presumption as to what the date of the sale was?

Trial Examiner Norwood: I don't know the date of the sale. I haven't considered just where that comes in.

Mr. Hinds: One of them is nine months.

Trial Examiner Norwood: Let us let the evidence
798 unfold and let us see how material that is.

But here is some evidence here about your prices and about invoices, and about dates here, and it appears to me to be relevant and material, and it is the same class of information that we have already received here, and I am going to overrule the objection and receive Exhibit 772-A to Z-31, and if I can find any part thereof is not connected, and that there is no basis for comparisons whatsoever, why, I will strike it or utterly disregard it in making my findings and report on this thing.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS Nos. 772-A, 772-B, 772-C, 772-D, 772-E, 772-F, 772-G, 772-H, 772-I, 772-J, 772-K, 772-L, 772-M, 772-N, 772-O, 772-P, 772-Q, 772-R, 772-S, 772-T, 772-U, 772-V, 772-W, 772-X, 772-Y, 772-Z, 772-Z-1, 772-Z-2, 772-Z-3, 772-Z-4, 772-Z-5, 772-Z-6, 772-Z-7, 772-Z-8, 772-Z-9, 772-Z-10, 772-Z-11, 772-Z-12, 772-Z-13, 772-Z-14, 772-Z-15.

772-Z-16, 772-Z-17, 772-Z-18, 772-Z-19, 772-Z-20, 772-Z-21, 772-Z-22, 772-Z-23, 772-Z-24, 772-Z-25, 772-Z-26, 772-Z-27, 772-Z-28, 772-Z-29, 772-Z-30, and 772-Z-31 were received in evidence.)

Mr. Hinds: I will move to strike out, or suggest that Your Honor disregard, so much of my opponent's statement as was factual, particularly in so far as it was not 799 consistent with the actual testimony what we have had from the witness.

Trial Examiner Norwood: Well, now, I have been patient and heard both the counsel out in anything that they wanted to say, and there is nothing prejudicial there. Counsel's statements are not evidence and they are not taken as such by us, and there is no jury here to be prejudiced. When you start striking counsel's comments, you never know where to stop. It is very difficult.

Mr. Hinds: Then I would like to make a factual statement in reply.

Trial Examiner Norwood: And I don't think I will undertake it.

Mr. Hinds: And I will ask the same privilege of making a factual statement in response to my opponent's factual statement.

Trial Examiner Norwood: Certainly. Certainly.

Mr. Hinds: Namely, that we gave them courteously and cooperatively every bit of information that they asked us for, and they didn't have any relevant information with respect to these dates of sales. They asked us only for the dates of the invoices, which we gave them. I had no opportunity to prepare their case for them, and we assumed that they were going to use this for some other purpose. Had I known for a moment they were going to use this for 800 the purpose they now announce, I think I would have helped them prepare their case so I wouldn't waste my time.

Trial Examiner Norwood: Thank you. Go ahead.

Off the record.

(Discussion off the record.)

(Documents were thereupon marked for identification Commission's Exhibits Nos. 773 and 774.)

By Mr. Wright:

Q. I show you a document marked for identification as Commission's Exhibit 773, and ask you to state what it is, and if you recognize it.

A. This is a letter dated June 26, 1945, written by Clifton M. Kolb, to Mr. John C. Sparks, of the San Francisco office of Glidden Company, setting forth various requests made by the writer of Mr. Kolb for the purpose of securing the information desired in this investigation.

Q. Where did you obtain this, if you recognize it?

A. This was furnished to me by Mr. Kolb, or his secretary, Mrs. Christianson. The reason I can't recall whether it was directly by Mr. Kolb—furnished directly by Mr. Kolb or Mrs. Christianson is because these copies of letters were made up by Mrs. Christianson and given to Mr. Kolb to hand to me when I would come into the office, or if Mr. Kolb wasn't there she was instructed to and did hand them to me.

Q. Were you furnished copies of similar letters by
801 Mrs. Kolb to other branch managers, The Glidden
branches, requesting similar information?

A. Yes, I was furnished copies of all correspondence between Mr. Kolb and branch office personnel with respect to the investigation I endeavored to make.

Q. I show you a document marked Commission's Exhibit 774 and ask you to state what it is and what you know about its origin.

A. It is a copy of a letter dated July 6, 1945, from Mr. J. C. Sparks, of the San Francisco office, to Mr. Clifton M. Kolb of the Cleveland office, in answer to letter dated June 26, 1945, regarding certain information which we requested —or which was requested in the letter of June 26, 1945.

Q. And it was from such information—was it from such information as purports to have been transmitted by that document that entries were made in Commission's Exhibit 772-A to Z-31?

A. Yes. This letter was handed to me either by Mr. Kolb or by his secretary, Mrs. Christianson.

Q. I call your attention to the note in parentheses at the bottom of this sheet and ask you if that was on the bottom of the document when it came into your possession?

A. It was.

Mr. Wright: I offer Commission's Exhibits Nos. 773 and 774 into evidence.

Mr. Hinds: No objection. In fact, I think this
802 seems to confirm the pertinency of my objection.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification

COMMISSION'S EXHIBITS Nos. 773 and 774 were received in evidence.)

Trial Examiner Norwood: Do you want to cross-examine him any further on that exhibit we received?

Mr. Hinds: Sir?

Trial Examiner Norwood: You can go into the contents of that exhibit, now.

Mr. Wright: Of this exhibit?

Trial Examiner Norwood: Of that last one we received there.

Mr. Hinds: I thought there would be cross-examination later of the witness.

Trial Examiner Norwood: That is right.

Mr. Hinds: But if you will permit me, you mean to extend my cross-examination in the light of these letters?

Trial Examiner Norwood: That is right. You can wait.

Mr. Hinds: I am willing to defer until he has finished.

By Mr. Wright:

Q. Turning again to Commission's Exhibit 772, is it my understanding of your testimony that the names of the 803 customers involved appears in the column to the left?

A. Yes.

Q. And the classification in the second column?

A. That is right.

Q. To what do the columns under the "shipping orders," "Number," and "Date Shipped" refer, the information appearing under there? We are referring now to Exhibit 772-B.

A. Under the column "Shipping Orders" is two columns, one headed "Number" and the other "Date Shipped". The "Number" column sets forth the number of the shipping order, and the "Date" column is the date that the order was shipped.

Q. The numbers under the shipping orders appear, then, from the original documents of The Glidden Company?

A. Yes.

Q. I notice under the column "Gross Weight" of white lead billed, "Rate" and "Amount." Were those figures entered by you?

A. No, those figures were entered by Mr. Glasser and Mr. Dignan, of the traffic department.

Q. I call your attention to the fact that on some of the exhibits no freight rate applies—or there is no entry under the column on "Rate and amount of white lead billed." I will withdraw that question.

Trial Examiner Norwood: Strike it.

By Mr. Wright:

804 Q. I call your attention to Commission's Exhibit 772X and 772-Y, and ask you to state what you know about those documents?

A. These documents are both dated June 26, 1945. The document identified as 772-X is a statement made by David L. Glasser and Howard J. Dignan, to the effect that they did furnish and set forth on columnar sheets, originally identified as A through Q, and now identified as 772-B through 772-R. The other document—

Q. Will you complete that statement with reference to 772-X?

Mr. Hinds: Doesn't the document speak for itself? Is it necessary to read each one into the record again? It has been admitted in evidence, hasn't it?

Mr. Wright: I am perfectly willing to let the document stand for what it says on its face.

Trial Examiner Norwood: If there is any explanation you want to give about it you may do so, but I think the counsel's point is well taken.

Mr. Wright: I just want to—very well. I will withdraw the question.

I have no further examination with regard to the document.

Mr. Hinds: Are those in evidence, those two?

Mr. Wright: Yes, those are in evidence.

Trial Examiner Norwood: We will have a five-
805 minute recess.

(There was a short recess taken.)

Trial Examiner Norwood: Come to order, gentlemen.

Mr. Hinds: Did I understand you to say you were through with the direct examination, Mr. Wright?

Mr. Wright: Yes, sir.

Cross-Examination by Mr. Hinds.

Q. Mr. Reel, did you ask Glidden officials with respect to the date on which the price became determined as to each of these sales you have tabulated, or did you ask them merely for the invoices?

A. I asked them for the invoices, and also price lists for different periods.

Q. Did you discover in the course of your investigation that an order was received and accepted and the price becomes effective in many cases at a date other than the date of the invoices?

A. During this investigation no effort was made to check orders.

Q. So you cannot tell us one way or the other whether there is or not, or may or may not be a substantial difference in between the date when the price was determined between the buyer and the seller and the date when the goods are invoiced?

Mr. MacIntyre: I object to the use of the word

806 "substantial" in that question. It is too indefinite.

Mr. Hinds: Any that you would consider essential—

Mr. MacIntyre: Unless the witness specifies—

Trial Examiner Norwood: I think he can clarify that. The objection is overruled.

The Witness: Will you read the question, please?

(The Reporter read the last question.)

The Witness: Only with reference to the shipments made to distributors in conformity with the distributor agreements existing between the distributor and The Glidden Company.

By Mr. Hinds:

Q. Do you mean shipped on consignment to a consignee where the title remains in The Glidden Company? Is that the type you are referring to?

A. That is right.

Q. You don't regard that as a sale, do you, where The Glidden Company ships to its own consignee, retaining title?

Mr. MacIntyre: That is calling for a conclusion of the witness as to the nature of the transaction. It is obvious from the testimony he has given before that he does not have any knowledge.

Trial Examiner Norwood: Read the question, please.

(The Reporter read the last question.)

Trial Examiner Norwood: I think that is a matter

807 of argument.

Mr. Hinds: I want to find out what he is referring to.

Trial Examiner Norwood: The objection is sustained.

By Mr. Hinds:

Q. Do you regard those transactions, leaving open the question of whether they be sales, but have you regarded those as sales in making your tabulation?

A. Yes, I believe that shipments under a sales agreement are part of the sale.

Q. I am talking about the agreements that you have referred to where goods are shipped on consignment. Have you treated those as sales in your tabulation?

A. In the tabulation I have shown here are billings on goods sold by the distributor out of consigned stock and so reported to the company and billed accordingly.

Q. Are those earmarked so we can by examining the tabulation decide which is which?

A. Yes.

Q. All right.

A. They are marked BOSC stock, billed out of consigned stock.

Q. In each case where they have been billed out of consigned stock you have indicated it by those initial letters?

A. I have endeavored to do so.

Q. So far as you know, you have succeeded in that endeavor?

808 A. I have endeavored to do so.

Q. So far as you know, you have succeeded in that endeavor?

A. Yes.

Q. Let us take, for example, on page 9 at which we happen to be open, the sale to the Bennett Lumber Company, on line 2. The date of the invoice was November 6, 1941, the amount 500 pounds, and the price $10.25.

Then, let us take No. 5, which is Armstrong Hardware, invoiced only one day prior, November 5, 1941, where only 100 pounds was, to use your expression, sold, at $10.05.

Now, you have no means of telling on what date those prices were fixed between the buyer and the seller, or the shipper and the consignee, have you?

A. I would like to correct one thing that you stated—

Trial Examiner Norwood: Answer his question there, first.

The Witness: I can't without reference to the dates of the agreement, the distributor agreements.

By Mr. Hinds:

Q. Go ahead and satisfy your preliminary condition. Have you found it?

A. No. We have in this tabulation a list of distributor agreements which were made by Mr. Glauner.

Q. Were those described by you in your description of this tabulation before it was admitted in evidence?

809 A. No, but they were referred to.

Q. Referred to in what way?

A. As distinguishing between the invoice date and price and the date of the distributor agreement which goverened the price.

Q. Are there any other sheets in this tabulation which have not been described by you in your testimony prior to its admission in evidence, besides this one you have now turned to, page 19, SS2-T, listing so-called distributor agreements?

A. Yes, there are sheets in here which set forth the names of all the white lead customers of The Glidden Company to whom sales and shipments were made during the periods involved, so far as those names were furnished to me by the company.

Q. Have you now completed your description of what this tabulation consists of?

A. I believe so.

Q. I am not in any way suggesting it is anything but an inadvertence, but I assumed, in making my objection, that we had had it described.

You have now turned to 772-T. Do you find there the information which my earlier question calls for, namely, the dates when each of those two so-called sales became effective as to the determination of the price between the buyer and the seller?

A. On the sheet identified at 772-T under the left-
810 hand column designated "distributor" appears the
name of Bennett Lumber Company, Medina, Ohio.

Q. Line 22?

A. Line 22. The date of the contract or distributor agreement is set forth in the second column as April 7, 1941, under which agreement the price of $9.75 is set forth in the third column governing sales of hundred-pound kegs of white lead; in the fourth column the price of $10 on sales of 50-pound kegs; and the fifth column the price of $10.25 for 25-pound kegs; in the sixth column the price of $10.50 for 12½-pound kegs.

Q. Now, can you tell us in what size kegs the merchandise referred to on page 772-J, namely, 500 pounds—can you tell us in what size kegs that was sold?

A. Of the complete white lead billed under that invoice of 737½ pounds, 500 pounds of that amount was white lead shipped in 100-pound kegs only at the price of $10.25, which price appears to be 50 cents higher than the price set forth in the distributor agreement.

Q. In other words, the distributor received 50 cents per 100 pounds for his services. Is that right? Is that the way you interpret that?

Mr. Wright: I object to that, Your Honor. That calls for an obvious conclusion of the witness.

Mr. Hinds: We are confronted here with a tabulation which on the face seems to charge us with discrimina-
811 tion. Perhaps we should not be allowed to defend ourselves at all against this charge, not by any means.

Trial Examiner Norwood: If he can give us any more information about that item, he may do so.

Mr. Hinds: I once heard a man say he wouldn't permit F. D. R. to be defended in his presence.

Mr. Wright: May we have the question read?

Trial Examiner Norwood: Read the question.

(The reporter read the last question.)

The Witness: I don't know. The only thing I can point out is the difference between the prices for which 100-pound kegs were to be sold under the distributor agreement between Glidden Company and Bennett Lumber Company and the actual price charged the Bennett Lumber Company under the invoice dated seven months later at $10.25 a hundred pounds, or 50 cents more.

By Mr. Hinds:

Q. The charge to whom, did you say?

A. The charge to Bennett Company.

Q. But they were not the purchasers of this merchandise, were they. They were the consignee. They were representing The Glidden Company.

A. They were the purchasers so far as the billing was concerned.

Q. Do you know who purchased those goods?

812 A. I have no reason to know, but I know the Bennett Company was charged with the goods by virtue of that invoice.

Q. Under the column of "class" Bennett Company is classified as a direct dealer.

A. That is right.

Q. Certainly he did function as a direct dealer in this instance. He functioned as a consignee—

Mr. MacIntyre: I object to the argument with the witness.

Mr. Hinds: This is not argument—

Mr. MacIntyre: May we have the statement read? It is a statement of argument by counsel.

Trial Examiner Norwood: I think he intends it as a question.

Read the statement.

(The reporter read the record.)

Mr. MacIntyre: The witness has already testified that the classification appearing in the tabulation were supplied by The Glidden Company.

Trial Examiner Norwood: I will sustain the objection and let counsel reframe the question.

Mr. Hinds: I am not trying to trick the witness. I am just trying to get the facts.

By Mr. Hinds:

813 Q. You have opposite this company the classification "Direct Dealer," have you not? You also have after that ditto marks coming down from line, which are what?

A. Bosc stk.

Q. That means what?

A. Billing on shipments of consigned stock.

Q. You say this was by virtue of an agreement which this company, Bennett Lumber Company, has been classified as a direct dealer, the goods in question had been consigned—not sold but consigned—to Bennett Company, and that this represented the consignee's accounting or accountability for 500 pounds of Glidden's material? Is that the way you interpret that?

A. That is right.

Q. You say this was by virtue of an agreement which you find on page 772-T which had been entered into the previous April, this being November. Is that right?

A. I did not intend to say the shipment was by virtue of an agreement. I intended to show that this invoice covered a sale of this material—could I withdraw that answer?

Trial Examiner Norwood: You tabulated that as a sale, did you not, when it was covered by invoice?

The Witness: This was tabulated as a sale with the qualification showing that the sale was not a shipment but merely a billing on the consigned stock set-up.

Mr. MacIntyre: May we go off the record?

814 Trial Examiner Norwood: Off the record.

(Discussion off the record.)

By Mr. Hinds:

Q. About how many sales, or what you call sales, would you say are listed in this total tabular exhibit? Would you say a thousand or 2,500?

A. In the whole thing?

Q. Yes.

A. I wouldn't have any idea.

Q. Well, there are pages 1 to 40 of some sort of tabular material, aren't there?

A. About 1,600.

Q. And on some of the pages there are at least 40 items?

A. Yes.

Q. So it would be in the nature of four digits, over a thousand?

A. Yes.

Q. It seems that having selected a consignment transaction we have been unfortunate in not getting anywhere. Can you take any other pair which were not consignment but cases where The Glidden Company on approximately the same date of shipment itself made sales—I don't mean to a consignee—at prices to the same class of customer which are not exactly the same per hundred pounds, so that we may use those as an example in saying where the
815 price was fixed, what date?

A. These tabulations speak for themselves as to origin and as to other information contained therein. The other is merely a mechanical job which I don't think I can do any better than you.

Q. In other words—

Mr. MacIntyre: Your Honor, we will concede, in order to save time, that you cannot determine from this tabulation the precise date on which each of these transactions originated.

We contend that it does show the date on which the billing, the invoicing, and the shipment took place.

Now, we invite The Glidden Company to furnish us the information as to the precise dates on which each transaction arose, if they have the information. We have not been able to get it. If they think it is material we invite them to give it to us and we will have you and the Commission consider it, in so far as you think it is applicable, along with this tabulation.

Trial Examiner Norwood: I think counsel has certainly clarified the matter of just what is the basis of his entries there.

Mr. Hinds: Let us be frank: Are we expected to assume the burden of justifying, not only under the statute as we are obliged to—we have to assume differences in 816 price on a given date with respect to delivery, and so forth—but are we expected to take the burden of assuming the dates are different when, from your information, it would appear the dates are the same? Are we to take that burden of proof on over 1,000 items?

Mr. MacIntyre: We contend if the price cards we have showing the price periods on the dates of the changes along with this information, we have a sufficient amount of information from which conclusions can be drawn—and properly and fairly so—as to price discriminations involved, without the precise dates of each transaction being determined from this tabulation.

But again, if Glidden Company thinks that is necessary we invite them to bring it forward.

Mr. Hinds: We are trying to find out what they claim.

Trial Examiner Norwood: Let us not discuss the burden of proof here. Counsel can examine the witness here and get all the facts about these calculations and entries. Let us confine ourselves to that for the time being.

By Mr. Hinds:

Q. Have you in your possession here in Washington any information as to any one of these sales, as to the date when the price was arrived at between the buyer and seller?

A. No, not that I know of.

817 Q. And have you any information as to the range of possible time differences between the dates that you have furnished us, namely, invoice or shipment date, on the one hand, and the date when the price was arrived at between the buyer and the seller?

A. No, not that I know of.

Q. So far as you know, it may have been as much as a year?

A. As far as I know.

Q. Or it may have been as little as five minutes?

A. That is true.

Q. Did any Glidden official ever tell you that all of their sales are made on a published price list?

Mr. MacIntyre: I object because it is already a matter of record that all are not made—the word "all" means 100 per cent, and we concede that there are exceptions.

Mr. Hinds: I wish Your Honor would listen to my question and not objection.

Trial Examiner Norwood: Read it.

(The reporter read the last question.)

The Witness: No.

By Mr. Hinds:

Q. So that it is not a fact, is it, on the basis of your information that one can make a comparison of two sales, that prices were arrived at on a given date, getting the date from the tabulation of yours, the date of invoice
818 or shipment, and then consulting an invoice or price list?

Mr. MacIntyre: I object to that. It calls for a conclusion as to what can be done or cannot be done from the information here.

Trial Examiner Norwood: I think it is mostly argument.

Mr. Hinds: I am making an objection tenable on its face, that we are not furnished any dates. Counsel then says "That is true. These dates have no relevancy in our tabulation, but we have price lists."

Then I ask the witness if he has any information as to whether the sales are necessarily according to the price list, and he says, "No," so we are where we started.

By Mr. Hinds:

Q. Do you know where the information can be obtained, or is there any information in your possession as to the dates prices were arrived at between the buyer and the seller, except by going back to Cleveland and taking every one of these thousand or more cases and digging it out from the records?

A. I answered that.

Trial Examiner Norwood: I think he answered that two or three times.

Mr. Hinds: That is all.

I renew my motion, now, to strike this out. It seems
819 to me this cross-examination has demonstrated that
my original objection was not purely technical, that
there is a very important lack here when you don't furnish the dates when the prices were agreed upon.

The witness says it may have been a year or a minute. Unless it be a fact in a case under the Robinson-Patman Act, the respondent has not only to justify apparent differences on different dates, but he has to take cases with one date and show that they are on different dates, we are confronted with no date at all and we have to show the dates of the two contrasting transactions.

Trial Examiner Norwood: Motion denied.

Proceed with the further examination.

Mr. Hinds: No further examination.

Mr. Wright: We have no further questions of this witness.

Mr. MacIntyre: Your Honor, before the witness is discharged, however, and while Mr. Hinds is present, I would like to make this request on the record, and I want it to be considered as a notice to produce: That as soon as we furnish Mr. Hinds with a photostat of this Exhibit 772, he undertake on behalf of The Glidden Company to secure from that company for us, and to produce at hearings in this case, the list of the dates on which each of the transactions that are listed in Exhibit 772 arose, listing
820 beside each of the dates the invoice numbers and the
billing numbers that are listed in this exhibit.

Mr. Hinds: While I don't pretend to carry in my head the bookkeeping or recording practices of Glidden Company, I think I can state confidently there is no such record of The Glidden Company.

The Glidden Company does not maintain its records in that way. In order to get this information, if it be pertinent, you would have to dig out each of these transactions and make a research to find out what the date of the arriving at the price was.

Of course, the law does not place any such burden on us.

Trial Examiner Norwood: Counsel merely wanted to put this request on the record.

Mr. Hinds: If it did, the law would be unconstitutional, it being oppressive. Fortunately there is no such legal requirement.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Hinds: I refuse to accept such notice to produce, as being an illegal notice. The law does not entitle the Commission to demand the preparation of lists from the respondent's records by the respondents. The law permits them, so long as they are not oppressive, to demand
821 by the proper means—by subpoena, I believe—production of existing records, which we will comply with if served with it.

I am informed, although this is not official, that never has there been such a record as I am asked to produce, which would have to be prepared very laboriously, but the original data from which it could be prepared is not in existence.

Trial Examiner Norwood: Are the invoices the best evidence of what the practices were?

Mr. Hinds: The invoices are certainly the best evidence of what the prices were, but they contain no information whatsoever as to what the dates were.

Mr. MacIntyre: Your Honor, in further response to the reaction stated by Mr. Hinds, I want to state it is our information, and this is on the basis of information we secured from The Glidden Company, that the date of the order placed by each of its customers is entered on the invoices.

The invoices in these instances from which this tabulation 772 was made up were not submitted to us because they were invoices of much material in addition to lead, and officials of the Lead Company took from those invoices certain items involved in this tabulation and furnished them to us on invoice forms which did not carry all the information on the invoice itself in each instance.

We, therefore, believe that if the company cares to
822 check back in following through and complying with the notice to produce which has been made, that they will be able to get such information from their invoices and supply it to us, or supply us with the original invoices and we will make the list up.

Mr. Hinds: I haven't any doubt that we would comply with a demand to supply any documents in our possession, and I doubt that we would raise the question that the demand was oppressive, even if it were, but I don't think we are obliged to do any research or prepare any tabulation.

I have no recollection whether it is true or not, but I am inclined to take whatever Mr. MacIntyre says as true, but if it be true that these dates of order, which I think would have some relevance—they might not be conclusive—but I think we would have to say if they were there that that creates a presumption as to the date of sale.

If those were on the invoices and not tabulated, it was because we were not requested to do so. We gave them whatever they wanted and if we had not I am sure we would have heard very strenuously from them.

Trial Examiner Norwood: I am sure counsel will get that information if he can.

Mr. Wright: Your Honor, we had intended at this time to take up some of the matters of Sherwin-Williams Company. I am advised by one of the counsel for Sherwin-
823 Williams Company. I am advised by one of the counsel for Sherwin-Williams Company that he has an appointment this afternoon and wants to get away, and would like to delay the matter until tomorrow morning.

Trial Examiner Norwood: Will 10 o'clock suit you?

Mr. MacIntyre: Yes.

Trial Examiner Norwood: We will recess until 10 o'clock tomorrow morning.

(Whereupon, at 4:08 o'clock p. m., the hearing was adjourned until Thursday, June 20, 1946, at 10 o'clock a. m.)

824

Room 532, Federal Trade
Commission Building,
Washington, D. C.,
June 20, 1946.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Everette MacIntyre, Esq., Paul R. Dixon, Esq., and Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington, D. C.), and

T. J. McDowell, Esq. (101 Prospect Avenue, Cleveland, Ohio), appearing for Sherwin-Williams Company.

Henry E. Gardiner, Esq. (Chandbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

825 Edmund P. Wood, Esq. (2801 Carew Tower, Cincinnati, Ohio), and

Richard Serviss, Esq. (1100 American Building, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

James D. Ewing, Esq.,

W. R. McDermott, Esq., and

E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

Roger Hinds, Esq. (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

826 PROCEEDINGS.

Trial Examiner Norwood: Come to order, gentlemen.

Pursuant to adjournment on yesterday, the hearing in Docket 5253 is now reconvened at 10 o'clock a. m., on the 20th day of June, 1946, the location having been changed to the main hearing room, No. 532 of the offices of the Federal Trade Commission, due notice having been given to the parties.

Call your next witness.

Mr. Wright: Your Honor, I would like to offer in evidence Commission's Exhibit 654, which is a list of warehouses, of the Sherwin-Williams Company identified at page 276 of the record.

Trial Examiner Norwood: Was Mr. Reel discharged yesterday?

Mr. Wright: Yes, he was, sir.

Mr. Welch: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 654 was received in evidence.)

Mr. Wright: Your Honor, I wish to offer in evidence

Commission's Exhibit 652-A to L, for identification, which is identified at page 276 of the transcript as a roster of retail stores of the Sherwin-Williams Company as of June 1, 1943.

Mr. Welch: With reference to Commission's Ex-827 hibit 652-A to L, inclusive, we have no objection to the authenticity of the document as correctly stating the roster of the retail stores, but we do object to the offer in evidence for the reason that the location of the retail stores of this respondent is not material to this case in our view.

Trial Examiner Norwood: Is there any further objection?

(No response.)

Trial Examiner Norwood: The objection is overruled. Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBIT NO. 652-A, 652-B, 652-C, 652-D, 652-E, 652-F, 652-G, 652-H, 652-I, 652-J, 652-K, and 652-L were received in evidence.)

Mr. Wright: Your Honor, I wish to offer in evidence Commission's Exhibit, for identification, 653, which is identified at page 276 of the transcript, showing divisions of the Sherwin-Williams Company in the north central territory.

Mr. Welch: No objection.

Trial Examiner Norwood: Received.

(The document marked for identification COMMISSION'S EXHIBIT NO. 653 was received in evidence.)

Trial Examiner Norwood: With respect to the retail stores, I assume counsel is going to connect this up.
828 Is there some reason why he wants to put in the location of the retail stores?

Mr. Wright: Your Honor, I submit it is connected now. I am sure it will be connected before the record is closed because it is our contention that the Sherwin-Williams Company markets their lead pigments, as alleged in this complaint, through its retail stores in accordance with the system, in part at least, as alleged in the complaint.

Trial Examiner Norwood: You are going to show something concerning these stores?

Mr. Wright: Yes.

Trial Examiner Norwood: Received.

Mr. Welch: Received subject to connection, or without?

Trial Examiner Norwood: It is all subject to connection.

Mr. Wright: Your Honor, I wish to offer in evidence Commission's Exhibit, for identification, 504-A and B, which is identified at page 316 of the transcript, which shows delivered price differentials at various geographic locations of the Sherwin-Williams Company in the sale of lead pigments, under date of May 21, 1942.

Mr. Welch: Objection is made to Commission's Exhibit 594-A solely on the ground that it is a duplication of Commission's Exhibit 662-S, for identification, and I see
829 no point in duplicating these.

Mr. Wright: Your Honor, I submit that at any rate Commission's Exhibit 662-S, for identification, has not yet been offered into evidence, but, furthermore, the identification of 594-A and B distinguishes it from the identification of 662-S.

Mr. Welch: You mean distinguishes them as different documents?

Mr MacIntyre: As to the significance of the documents, the difference is set forth in connection with the record identification of the two.

Mr. Welch: In that event I want to look at the record. What is the page?

Mr. MacIntyre: 316.

May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Is there any further objection?

(No response.)

Trial Examiner Norwood: Received as marked. The objection is overruled.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 594-A and 594-B was received in evidence.)

830 Mr. Wright: Your Honor, I wish to offer in evidence Commission's Exhibit, for identification, 662-A through Z-26, identified in the transcript at pages 276 to 280 as statements by the Sherwin-Williams Company of their price quotations and terms and conditions of sale at various times.

Mr. Welch: Counsel for the respondent, of course, do not agree with the characterization of the documents. These documents were the subject of the stipulation entered into between counsel for the Commission and counsel for the respondent Sherwin-Williams Company, and read upon the record, and those documents are there described, and we do not subscribe to any description other than that.

We have no objection to any of the documents except Commission's Exhibit 662-S and T, which is a duplicate copy of Commission's Exhibit 594-A and B, which was just immediately preceding received in evidence. It is pure duplication, and nothing else.

Trial Examiner Norwood: Was that signed in the same place?

Mr. Welch: Both obtained from Sherwin-Williams Company.

Mr. MacIntyre: But from different people and under different circumstances, and there is a factual showing in the record that distinguishes them.

Trial Examiner Norwood: Is it these titles that you 831 object to?

Mr. Welch: No; the titles are in a statement that appears on the document, itself. I merely object to counsel's characterization.

Trial Examiner Norwood: These exhibits are received as marked, and not necessarily as described.

(The documents referred to were marked for identification COMMISSION'S EXHIBITS NOS. 662-A, 662-B, 662-C, 662-D, 662-E, 662-F, 662-G, 662-H, 662-I, 662-J, 662-K, 662-L, 662-M, 662-N, 662-O, 662-P, 662-Q, 662-R, 662-S, 662-T, 662-U, 662-V, 662-W, 662-X, 662-Y, 662-Z, 662-Z-1, 662-Z-2, 662-Z-3, 662-Z-4, 662-Z-5, 662-Z-6, 662-Z-7, 662-Z-8, 662-Z-9, 662-Z-10, 662-Z-11, 662-Z-12, 662-Z-13, 662-Z-14, 662-Z-15, 662-Z-16, 662-Z-17, 662-Z-18, 662-Z-19, 662-Z-20, 662-Z-21, 662-Z-22, 662-Z-23, 662-Z-24, 662-Z-25, 662-Z-26 and received in evidence.)

Mr. Welch: I do object to the duplication as indicated by 662-S and T, which is a photostatic copy of 594-A and B. They are identically the same document.

Trial Examiner Norwood: I will overrule that and receive it. Counsel has stated some reasons for it. I might strike it later if there is any reason for doing so.

Mr. Wright: Your Honor, I wish to offer Commis-
832 sion's Exhibit, for identification, 723, identified at page 336 of the transcript, which is a statement by the Sherwin-Williams Company of certain freight rates involved in the shipment of lead pigments.

Mr. Welch: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 723 was received in evidence.)

Mr. Wright: Your Honor, I wish to offer in evidence as Exhibit, for identification, 726, identified at page 337 of the record, which is a statement by Sherwin-Williams Company as to certain freight rates applicable to certain shipments of white lead.

Mr. Welch: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 726 was received in evidence.)

Mr. Wright: Your Honor, I wish to offer in evidence Commission's Exhibit 727, identified at page 337 of the transcript, as a statement of certain freight rates applicable on white lead-in-oil by the Sherwin-Williams Company.

Mr. Welch: As to Commission's Exhibits Nos. 723, 726,
and 727, those three as a group, we have no objection,
833 but we do not concede that the information thereon
stated as to freight rates is necessarily correct. It was
information furnished by our employees, and may or may
not be correct.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 727 was received in evidence.)

Mr. Wright: Your Honor, I wish to offer into evidence Commission's Exhibits 724 and 725, identified at pages 336 and 337 of the record as statements of freight rates by the Sherwin-Williams Company as applicable to white lead.

Mr. Welch: Sherwin-Williams Company does not deny that Commission's Exhibits 724 and 725 were written by its employees, but does not concede that the statements therein are necessarily correct as to the applicable rates.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 724 and 725 were received in evidence.)

Mr. Wright: I would like now to ask that certain documents be marked for identification.

May we take a five-minute recess while these are marked?

Trial Examiner Norwood: We will have a short recess.

(There was a short recess taken.)

834 (The documents referred to were marked for identification Commission's Exhibits Nos. 775-A, 775-B, 776-A, 776-B, 776-C, 776-D, 776-E, 776-F, 776-G, 776-H, 776-I, 776-J, 776-K, 776-L, 776-M, 776-N, 777, 778-A, 778-B, 779-A, 779-B, 779-C, 779-D, 780-A, 780-B, 781-A, 781-B, 781-C, 782-A, 782-B, 782-C, 782-D, 782-E, 782-F, 783, 784-A, 784-B, 784-C, 784-D, 784-E, 784-F, 785, 786, 787, 788, 789, 790, 791-A, 791-B, 791-C, 791-D, 791-E, 791-F, 791-G, 791-H, 791-I, 791-J, 792-A, 792-B, 792-C, 792-D, and 793.)

Trial Examiner Norwood: Proceed, gentlemen.

Mr. Wright: I would like to recall Mr. Reel.

DAVID R. REEL was thereupon called as a witness for the Federal Trade Commission, and, having been previously sworn, testified further as follows:

Mr. Wright: Your Honor, this witness has previously been sworn, and I believe his background is already in the record. He is now recalled as a Commission witness.

Trial Examiner Norwood: Very well.

Direct Examination by Mr. Wright.

Q. Mr. Reel, have you recently had occasion to make investigation of the Sherwin-Williams Company?

835 A. Yes, about a year ago.

Q. In connection with your investigation, did you examine the records of sales and distribution of lead pigments by the Sherwin-Williams Company?

A. I did.

Q. Did you consult with responsible officials of the Sherwin-Williams Company in connection with that investigation?

A. I did.

Q. Do you recall the names of the officials with whom you consulted, and their position with Sherwin-Williams?

A. The officials with whom I consulted and who furnished to me the information and exhibits I received were Mr. Thomas McDoweil, house counsel, and Mr. James E. Campbell.

Q. Will you describe, briefly, the type of investigation you made of the records of Sherwin-Williams Company?

A. The Sherwin-Williams Company have a main office in Cleveland, Ohio, and eight other divisional offices.

All the records of the divisional offices are located in separate locations. The only records of the company available to me originally were those dealing with the business of the Cleveland division, known as the North Central Division.

Mr. McDowell and I prepared a letter, a copy of which was forwarded to each of the separate branch or divisional offices, requesting copies of their invoices showing the
836 sale and delivery of white lead, with separate requests
in this letter asking for classification of customers and freight information pertaining to those shipments of white lead as shown on the house copies or invoices which we requested to be furnished to us.

Originally, we had asked to have them choose two customers of the same class in certain selected cities throughout the United States.

Shortly after the first letter was sent out we found that it was necessary to request that all invoices, or house copies, showing the sale and shipment of white lead be taken from the files of the divisional offices and sent to us as the white lead sales of the Sherwin-Williams Company were very insignificant as far as their total sales of other merchandise were concerned, and it was found also that very few sales of white lead were made by the company in these selected towns or cities in the various cases, so that a general over-all picture of the company could be drawn.

Q. In the course of your investigation, which you described, did you receive papers and documents and records from officials of the Sherwin-Williams Company?

A. Yes.

Q. I hand you herewith Commission's Exhibit, for identification 775-A and B, and ask you to state what it is.

A. This is a special circular letter, No. 1809, dated
837 June 20, 1945, setting forth a roster of stock papers
and addresses of offices, factories, and warehouses, consisting of two pages, which document was furnished to me by Mr. McDowell on July 18, 1945.

Q. Was any representation made to you as to what sort of record that is?

Mr. Welch: Objection.

Trial Examiner Norwood: Objection overruled.

The Witness: Yes. It was in response to a request made by me for such information.

Mr. Wright: Your Honor, I offer Commission's Exhibit 775-A and B in evidence.

Mr. Welch: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 775-A and 775-B was received in evidence.)

By Mr. Wright:

Q. I hand you a document marked Commission's Exhibit, for identification, 776-A to N, and ask you to state what it is.

A. This is a document setting forth the roster of retail stores, dated October 1, 1944, which was furnished to me by Mr. McDowell at my request for the information contained therein, on July 18, 1945.

It should be also noted that the additions and inter-
838 lineations appearing on the pages of this document
appeared thereon at the time it was furnished to me by Mr. McDowell.

Mr. Wright: Your Honor, I offer Commission's Exhibit 776-A to N in evidence.

Mr. Welch: Counsel for the respondent do not deny, but admit, the authenticity of the list as showing the retail stores, but do object to the introduction and reception of the document for the reason that it is not relevant or competent to the issues involved.

Trial Examiner Norwood: Received as marked.

(The documents heretofore marked for identification COMMISSION'S EXHIBIT NO. 776-A, 776-B, 776-C, 776-D, 776-E, 776-F, 776-G, 776-H, 776-I, 776-J, 776-K, 776-L, 776-M, and 776-N were received in evidence.)

By Mr. Wright:

Q. I hand you herewith a document marked for identification as Commission's Exhibit No. 777, and ask you to state what it is.

A. This is a pamphlet of the Sherwin-Williams Company describing its product known as Zilo, which was furnished to me by Mr. McDowell on July 18, 1945, upon specific request for information regarding this product.

839 Mr. Wright: Your Honor, I offer Commission's Exhibit No. 777, for identification, in evidence.

Mr. Welch: Counsel for Sherwin-Williams does not deny that the document identified as Commission's Exhibit 777 was issued by it, but takes the position that it deals with a product known as Zilo, not with one of the products involved in this proceeding, and objects on the ground of immateriality.

Mr. Wright: Your Honor, in that connection I would like to observe that the name of the product Zilo appears in the exhibit which have already been entered into evidence, price lists and quotations of the Sherwin-Williams Company, with no other description.

The pending exhibit shows that Zilo is composed of 75 per cent lead pigments, and it is offered for the purpose of tying the product Zilo into the allegations of the complaint.

Trial Examiner Norwood: You contend this was sold by the same methods as the other?

Mr. Wright: It appears on the face of documents which have been introduced that it is sold on the same basis.

Mr. Welch: There is no allegation in the complaint dealing with this product.

Mr. Wright: The complaint covers lead pigments and sets forth red sulphate and lead basic carbonate, and it is composed of 75 per cent of lead and lead basic carbonate.

Trial Examiner Norwood: It is an allied product, and the method of sale is involved.

840 It is received as marked. Counsel has his exception.

(The document heretofore marked for identification COMMISSION'S EXHIBIT 777 was received in evidence.)

By Mr. Wright:

Q. I show you documents marked Commission's Exhibit 77-A and B, and ask you to state what they are.

A. The two pages of this exhibit are photostatic copies of both sides of a pamphlet issued by Sherwin-Williams Company with respect to white lead and Zilo, and sets forth price lists to various customers of these products.

The pamphlet is dated April 25, 1941, and designates the town Dallas, Texas.

These were supplied to me by Mr. McDowell on August 9, 1941 in response to my request for such information.

Q. Was any representation made to you as to any geographic territory in which the prices set forth in that exhibit were applicable by the Sherwin-Williams Company?

Mr. Welch: Objection. The document speaks for itself.

Mr. Wright: Your Honor, I asked for a separate representation rather than a document.

Trial Examiner Norwood: Read the question.

(The reporter read the last question.)

841 Trial Examiner Norwood: Objection overruled.

By Mr. Wright:

Q. Anything outside of the paper—the paper makes its own representations—but were any statements made to you by the person who gave you this letter?

A. This document was furnished to me by Mr. McDowell in response to my request for price lists used and applicable in the Dallas, Texas, area.

Mr. Wright: Your Honor, I offer Commission's Exhibit 778-A and B into evidence.

Mr. Welch: No objection, Your Honor.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBIT NO. 778-A and 778-B were received in evidence.)

By Mr. Wright:

Q. I hand you herewith documents marked for identification Commission's Exhibit 779-A to C, and ask you to state what they are, if you know?

A. These documents represent bulletin No. 177, dated April 25, 1941; bulletin No. 37, dated May 21, 1942, and represent prices quoted on the sale of white lead and other pigments by the Sherwin-Williams Company to various classes of customers, and was furnished to me by Mr. McDowell on August 9, 1945. This document contains certain—

842 Q. May I ask you in that connection—I believe I referred to it as Commission's Exhibit 779-A to C—is your statement with regard to 779-A to C also refer to 779-D?

A. Yes.

Q. Were the handwritten notations which appear upon this exhibit, on the exhibit when it was furnished you?

A. Yes, and the notation at the bottom of these exhibits shown as "Dallas" is in my handwriting, and discloses that they were received with other material sent to the Cleveland office by the Dallas office of the Sherwin-Williams Company.

Mr. Wright: Your Honor, I offer Commission's Exhibit 779-A to D in evidence.

Mr. Welch: No objection.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBIT NO. 779-A, 779-B, 779-C, and 779-D were received in evidence.)

By Mr. Wright:

Q. I hand you herewith Commission's Exhibit 780-A and B, and ask you to state what it is, if you know?

A. This document, consisting of two pages, represents prices on price lead to the various classes of customers of the Sherwin-Williams Company, applicable to the eastern price zone, for the period from April, 1941, to June 27, 1942, and for a period May 21, 1942, to May 17, 1943.
843 These documents were furnished to me by Mr. McDowell on August 9, 1945, in response to my request for such information.

Q. I call your attention to the handwriting showing "Chicago" on the first page of Exhibit 780-A. Was that on the exhibit when received by you?

A. The word "Chicago" is in my handwriting, and was placed thereon at the time these papers were handed to me with other information on exhibits received from the Chicago office of the Sherwin-Williams Company.

Mr. Wright: I offer Commission's Exhibit 780-A and B in evidence.

Mr. Welch: No objection.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBIT NO. 780-A and 780-B were received in evidence.)

By Mr. Wright:

Q. I hand you herewith documents marked for identification Commission's Exhibit 781-A through C, and ask you to state what they are, if you know.

A. This document discloses the prices on white lead and other pigments, including the product known as Zilo, effective January 26, 1942, and was furnished to the wit-

ness by Mr. McDowell on August 9, 1945, in response
844 to a request for such information made by the witness.

The word "Portland" appearing on the bottom of each of these separate pages is in my handwriting, and discloses that these papers were furnished to me with other information received by Mr. McDowell from the Portland office of the Sherwin-Williams Company.

Q. I call your attention to the figure "1" in a circle, handwritten at the lower righthand corner of 781-A, and the figure "2" in a circle, handwritten, at the lower righthand corner of Exhibit 781-B, and the figure "3" handwritten in a circle at the lower righthand corner of Exhibit 781-C, and ask you to state whether those marks were on the exhibits when they were received by you?

A. I do not recall. The marks are photostated, and these papers were sent to us as photostatic copies of the originals.

Q. I call your attention to the fact that on Commission's Exhibit 781-A there is a quotation under "D," "Less than 500 pounds, $12.25," and on 781-B, the quotation "Less than 500 pounds, $12.50," and on 781-C, the quotation "Less than 500 pounds, $12.75."

Was any representation made to you by any official of Sherwin-Williams Company as to the distinction between those listings?

A. No discussion that I can recall was had regarding those prices.

845 Mr. Wright: Your Honor, I offer Commission's Exhibit 781-A through C into evidence.

Mr. Welch: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 781-A, 781-B, and 781-C, were received in evidence.)

By Mr. Wright:

Q. I call your attention to Commission's Exhibit 782-A through F, for identification, and ask you to state what those documents are, if you know.

A. These documents are known as bulletin No. 3, bulletin No. 4, bulletin No. 5, and bulletin No. 6 of the Sherwin-Williams Company, and set forth prices on white lead and other pigments to various classes of customers of Sherwin-Williams Company.

Q. Was any representation made to you as to any geographic area regarding which the information appearing on those documents is applicable?

Mr. Welch: Objection. The documents speak for themselves as to the territory covered.

Mr. Wright: Your Honor, I submit the question related to a separate representation rather than the document itself.

Trial Examiner Norwood: If he said anything out-
846 side the papers he can tell us that.
The objection is overruled.

The Witness: These documents were handed to me as coming from the Portland office of the Sherwin-Williams Company, with other material requested of that office.

By Mr. Wright:

Q. Is that Portland, Ore., or Portland, Me.

A. Portland, Ore. It was furnished to me by Mr. McDowell on August 9, 1945, upon my request for such information.

This document also sets forth the various zones established by the Sherwin-Williams Company in the western section of the United States.

Mr. Wright: I offer Commission's Exhibit 782-A through F in evidence.

Mr. Welch: No objection.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBIT NO. 782-A, 782-B, 782-C, 782-D, 782-E, and 782-F were received in evidence.)

By Mr. Wright:

Q. I hand you a document marked Commission's Exhibit 783, for identification, and ask you to state what it is.

A. This document sets forth the ocean rates from June 3, 1940, to January 7, 1942, and was furnished me by Mr.
McDowell on August 9, 1945. The document was sup-
847 plied by Mr. McDowell with other information and
exhibits sent to him by the Portland, Ore., office of the
Sherwin-Williams Company.

Mr. Wright: Your Honor, I offer Commission's Exhibit 783 into evidence.

Mr. Welch: No objection on the basis that Commission's Exhibit 783 is a document which was furnished by employees of Sherwin-Williams Company, but no concession is made that that is a correct representation of what the facts might have been.

Trial Examiner Norwood: Is that more than one sheet?

Mr. Wright: No, sir.

The Witness: Just one sheet.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 783 was received in evidence.)

By Mr. Wright:

Q. I hand you herewith documents marked Commission's Exhibit 784-A through F, and ask you to state, if you know, what they are?

A. These documents set forth prices on white lead and other pigments, as well as other products of the Sherwin-Williams Company, effective at various times, and were furnished to me by Mr. McDowell on August 9, 1945.
848 The documents were included with other information and exhibits furnished to me from—by the Oakland, Calif., office of the Sherwin-Williams Company, and the word "Oakland" appears in my handwriting at the bottom of each of these sheets.

Q. I call your attention to the notations appearing on Commission's Exhibit 784-B in hand at the bottom of the sheet and to the left of the classification of packages, and ask if those notations were on the document when it was furnished you?

A. Yes.

Q. I call your attention to similar notations appearing on 784-D and ask if they were likewise on the document when it was received by you?

A. They were.

Q. I call your attention to the large handwritten crosses on several of the exhibits, and ask if they were on the documents when they were handed to you?

A. Yes.

Q. I call your attention to the handwritten note on the bottom of Commission's Exhibit 784-F, and ask if that was on the document when it was handed you?

A. That was.

Mr. Wright: Your Honor, I offer Commission's Exhibit 784-A to F into evidence.

Mr. Welch: Objection is made to the reception of

849 Commission's Exhibit 784-A, which, according to its own face, deals with linseed oil, neatsfoot oil, pine tar, and turpentine.

According to my understanding, none of those products are involved in this proceeding.

The same is true so far as Commission's Exhibit 784-C is concerned, linseed oil, neatsfoot oil, pine tar, and turpentine. The same is true so far as Commission's Exhibit 784-E is concerned.

Mr. Wright: Your Honor, counsel is willing to concede that several of the sheets that are part of this exhibit do relate to products which are not within the terms of the complaint, but the whole exhibit is taken from the price record of the company which was furnished, and I see no reason for not allowing it in in its entirety.

Mr. Ewing: Well, I will join in Mr. Welch's objection, Your Honor. It seems to me that those products are entirely outside of this proceeding, and are not in any way involved in the charges, and are wholly irrelevant.

Trial Examiner Norwood: Well, are they in this same line of trade?

Mr. Wright: They are part of the general line of painters' material.

Mr. Welch: They are not competitive products in any sense of the word with the products involved. They
850 are products sold by the company.

Mr. Ewing: Your Honor, we start off in the complaint with lead pigments, and now it seems to me to encumber the record with respect to information as to other products that are in no way involved in the proceeding is wholly unnecessary.

Trial Examiner Norwood: Well, if it is in the same line of trade, and they are allied products, and were sold—it is shown here that they were sold by the same methods, the same pricing methods, do you make any charge as to the way they price this oil and allied products?

Mr. Wright: No, sir; we haven't.

Mr. Ewing: They make no charge with respect to—

Mr. MacIntyre: If Your Honor please, there is a charge in the complaint that National Lead Company, as set forth in paragraph 7 of count 1 of the complaint, embarked upon a plan and program to secure a monopoly control over the prices of these lead pigments.

Now, the counsel for the Commission stand ready to

show that in connection with that plan and program it moved to secure control over the products with which especially white lead and red lead were sold to the ultimate consumer, namely, linseed oil and turpentine, and went so far in that direction as to gain a substantial control through stockholders' interests into the American Linseed Oil
851 Trust, which controlled practically all the output of that product in the United States.

Mr. Welch: Which has nothing to do, of course, with Sherwin-Williams' sale of those products.

Mr. MacIntyre: No, but Sherwin-Williams assisted National Lead, maybe unwittingly, maybe not, in securing that monopoly control.

Mr. Ewing: I submit, Your Honor, that the complaint cannot be broadened by counsel's statements, and the fact of the matter is that there was reference in the complaint to linseed oil, and that was taken out in the amended complaint, and to say that neatsfoot oil or that turpentine has anything to do with the lead pigment situation involved in this case is perfectly preposterous, as I see it. If he is trying these other issues relating to these other pigments, they ought to be in the complaint, and to take the broad, general allegation which charges us with an attempt to monopolize lead pigments, and to say that that justifies the encumbering of the record with price information of Sherwin-Williams Company, and other companies relating to products that they disposed of, is no evidence that we did. I think it is going entirely too far.

Mr. MacIntyre: If Your Honor please—

Trial Examiner Norwood: The only thing I see in the amended complaint is just a little matter of description
852 thrown in here as to Bass-Huerter Paint Company being the second largest manufacturer of linseed paints and varnishes on the Pacific Coast, or something like that.

Mr. MacIntyre: But, if Your Honor please, before this record is closed counsel for the Commission will undertake to show you that the market for these lead pigments is affected in no small way by the market conditions which have been established on linseed oil and turpentine, and for which National Lead, the principal respondent here, is in no small way responsible.

Mr. Ewing: There is no such—

Trial Examiner Norwood: Wait a minute. One at a time.

Mr. MacIntyre: We are also prepared to, and will undertake to put into the record evidence that National, and as further supported by the other respondents here, have undertaken to establish for the sale of lead pigments pricing practices and methods such as those alleged in the complaint which they thought would be carrying out the intents and purposes and effects of the pricing practices established by the linseed oil people for the sale of linseed oil.

Mr. Ewing: I return to the point, Your Honor, that linseed oil is not in the complaint. It has been my understanding always—this may be wrong—that the pleadings determine the scope of the case, and if we are trying 853 this case on the pleadings I submit this testimony is wholly irrelevant. If we are trying it on what Mr. MacIntyre says the issues are, outside of the complaint, that is something else, but it seems to me to encumber the record under the present state of the proceedings is something wholly outside.

Mr. Wood: I would like to say, just on behalf of Eagle-Picher, that if we are going into the linseed oil industry I certainly would like to know it so that I can prepare properly in the case, and so that my client can be prepared properly in the case.

Mr. Wright: Your Honor, counsel is willing to withdraw those exhibits which refer only to linseed oil and neatsfoot oil. May I segregate them so that I can make a reoffer of the exhibits?

Mr. Wood: I think in spite of the withdrawal we should have just a little bit of light on the scope of the issues in this case.

Trial Examiner Norwood: Well, I must confess that I will have to study the complaint a little. It is pretty broad, but the complaint charges a method, and—

Mr. MacIntyre: If Your Honor please, we are concerned—

Trial Examiner Norwood: —and these allied things that are sold along with it and inseparable from the pigment business may be shown to be—linseed oil—may be 854 shown to be an inseparable ingredient to paint, and if you show that it was sold along with the paint by the same method evidence could be received, I think, to show the method.

Mr. Ewing: From that view, Your Honor, I submit we are helpless. We don't know from day to day what counsel for the Commission is going to introduce, and at his whim he can present documents to you, or offer them in evidence, and suggest, without a single supporting allegation in the complaint, that they should be received simply because on his statement they are connected with the pricing business. We can't possibly protect ourselves or prepare for trial.

Mr. Wright: Your Honor—

Trial Examiner Norwood: We are not going to do anything by whim here. There must be a good reason for everything.

Mr. Ewing: I submit that—

Trial Examiner Norwood: I attempted to state a reason there why I received a couple of letters here with respect to the sale of paint. I think we are perfectly correct; it is a very familiar rule of evidence; that it can be received to show a general plan or method.

Mr. Ewing: The charges are not that National Lead is selling linseed oil or turpentine in accordance with a general plan. The charges are that we are selling lead pigments in accordance with a general plan.

855 Mr. MacIntyre: We are not charging that, and, furthermore, we are not intending to prove all of that except in so far as it will go so far as the sale or purpose on some of these pigments.

Trial Examiner Norwood: And to the question of throwing some light on the way respondents sell the lead pigments. If there is no reasonable connection here it will not be received. We are not going to do anything arbitrary or capricious.

Mr. Ewing: Oh, I understand that, but I just want to make our position perfectly clear, that if we are defending a case involving neatsfoot oil, linseed oil, turpentine, I want to know it now.

Trial Examiner Norwood: I think the line must be drawn somewhere. I am just trying to see where to draw it. Counsel sees that.

Mr. Ewing: I am particularly concerned in view of the amendment to the complaint eliminating the charge.

Mr. Wright: Your Honor, I would like to reframe my offer of that exhibit.

I now offer into evidence Commission's Exhibits 784-B, 784-D, and 784-F.

Trial Examiner Norwood: Any objection to that?

Mr Welch: No objection.

Trial Examiner Norwood: Received.

856 (The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 784-B, 784-D, and 784-F were received in evidence.)

By Mr. Wright:

Q. I hand you documents marked Commission's Exhibits Nos. 785, 786, 787, 788, 789, and 790, for identification, and ask you to state what they are, if you know.

Mr. Welch: Your Honor, there is an objection to the witness stating what the documents are. The documents speak for themselves as to what they are.

Trial Examiner Norwood: Well, he will have to identify them some way.

Mr. Wright: Your Honor, the question was to state anything he knew as to what those documents were. Now, if he is going to identify them he must do it by stating what he knows about it.

Trial Examiner Norwood: He can tell what he thinks they are. He can't tell what he thinks they say.

Mr. Welch: All the witness can possibly know, Your Honor, is who he got them from. He doesn't know what they are.

Trial Examiner Norwood: Well, he can tell us what he asked for.

Mr. Welch: And what he got. That is all.

Trial Examiner Norwood: And what he got.

857 Mr Wright: And state any representatives which might have been made to him at the time he got them as to what the documents were.

Trial Examiner Norwood: Go ahead.

The Witness: These documents were furnished me by Mr. McDowell August 9, 1945, in request for price lists on white lead and other pigments, effective at various periods in the Los Angeles territory of the Sherwin-Williams Company. The markings, such as crosses and dates appearing on these documents were present at the time the documents were handed to me.

The writing setting the word forth "Los Angeles" was put on these documents by the writer at the time they were received, with other information and exhibits from Mr. McDowell.

By Mr. Wright:

Q. Did you mean "by the writer"?

A. By the witness.

Q. Was a representation made to you as to whether or not these documents represented the quotations and terms of sale?

Mr. Welch: Object to the form of the question, Your Honor.

Trial Examiner Norwood: Objection sustained.

By Mr. Wright:

Q. Were any representations made to you as to 858 the nature of these documents?

Mr. Welch: Object to that, Your Honor.

Trial Examiner Norwood: Objection overruled.

The Witness: These documents, as I originally said, were furnished me, upon my request for prices on the sale of white lead and other pigments in the Los Angeles, Calif., district of the Sherwin-Williams Company.

Mr. Wright: Off the record.

(Discussion off the record.)

Mr. Wright: Your Honor, I offer in evidence Commission's Exhibits 785, 786, 787, 788, 789, and 790.

Mr. Welch: No objection.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 785, 786, 787, 788, 789, and 790 were received in evidence.)

By Mr. Wright:

Q. I hand you herewith documents marked Commission's Exhibit, for identification, 791-A through J, and ask you to state what they are, if you know?

A. Commission's Exhibit No. 791-A is a letter received from me—by me from T. J. McDowell, general counsel, Sherwin-Williams Company. It was dated September 27, and refers to the attached documents known as—identified as Commission's Exhibit 791-B through 791-J, and were furnished to the writer at his request for certain 859 freight rates from various points of shipment, of the Sherwin-Williams Company, to stores of the company, as of January 15, 1941, and October 1, 1941, of dry white lead and white lead-in-oil.

Q. You referred to the writer's request, in your statement.

A. I meant the witness' request. Wherever I say "writer" I mean "witness."

Mr. Wright: Your Honor, I offer Commission's Exhibit 791-A through J into evidence.

Trial Examiner Norwood: Any objection?

Mr. Welch: Counsel for Sherwin-Williams state, first, that they concede that this information shown in Commission's Exhibit 791-B through J is freight information that was furnished to the witness by the company, but, of course, no concession is made that that represents the actual applicable freight rate to any of those destinations. Objection is made to the reception of the document into evidence for the reason that it shows freight rates solely between the company's plant in Chicago, Ill., to its own retail stores located in some—I don't know how many—towns throughout the United States, but this company operates a number of retail stores where it sells paint to a customer who comes in and buys a quart or a gallon, and this freight information is with respect to shipments to its own stores.

Mr. Wright: Your Honor, I submit that the exhibits
860 speak for themselves, and I will call your attention to
Commission's Exhibit 791-B, which is a statement "Existing l. c. l. and c. l. rates on dry white lead and white lead-in-oil on hundred pound drums from Chicago, Ill., to various points, as of January 15, 1941."

Trial Examiner Norwood: Well, I think if there are any discrepancies there between the rates between these stores and the rates between the cities, it can be shown.

Mr. Welch: Well, Your Honor, we take the position that the freight rates to our own store—that is an item of cost in connection with the purely retail sale and that that freight rate is of no consequence whatever in this proceeding, and we insist upon our objection.

Trial Examiner Norwood: What is your view of that?

Mr. Wright: Well, Your Honor, I am not ready to concede the validity of that objection, but certainly I think Your Honor could take judicial notice of the fact that the freight rate from Chicago, Ill., to, for instance, Scranton, Pa., would be the same whether or not it covered a sale to a Sherwin-Williams Company-owned store in Scranton or to an individual dealer who was purchasing from Sherwin-Williams.

Trial Examiner Norwood: Yes; but he says that the freight rates between those places are not relevant in this inquiry because it is to their own stores and I presume he means they are not reflected in any price.

861 Mr. Wright: Your Honor, we are prepared to show, and will show invoice material secured from the company, sales to various places upon this list to customers who were not company-owned stores of the Sherwin-Williams Company.

Trial Examiner Norwood: Well, subject to that—

Mr. Welch: Well, Your Honor, if I may reply to that statement, the sales to which counsel refers in cities other than company-owned stores are dealer customers. We here are selling in these retail stores to the retail user, and that is purely an intrastate transaction, if there ever could be one. We operate some several hundred retail stores.

Trial Examiner Norwood: Well, are prices to dealers involved here? Are they?

Mr. Wright: No, there is nothing about prices in this exhibit, but, yes, prices to dealers are involved—

Trial Examiner Norwood: Prices to consumers?

Mr. Wright: Yes, sir; prices to consumers, both by Sherwin-Williams' wholly-owned stores, and by dealers who purchase lead-in-oil, and other pigments from Sherwin-Williams Company are involved.

Trial Examiner Norwood: Well, there might be some things there that ~~might be~~ of use to us, and we can't use them if they are excluded.

Mr. Wright: As I wish to point out to Your Honor, the list itself does not purport to show freight rates to 862 company-owned stores. It shows freight rates from Chicago, Ill., to certain designated points.

Mr. Welch: What is the meaning of this "s-t-o-r-e-s"?

Mr. Wright: I don't know what it means. I am telling you what the document says and what the document itself clearly shows it to be.

Mr. Welch: The witness stated in his testimony that it involved freight rates to retail stores from Chicago, Ill.

Trial Examiner Norwood: I will overrule the objection and receive it, and if it appears to not meet our purpose we can strike it.

Mr. Welch: Note our exception, please.

(The documents heretofore marked for identification COMMISSIONER'S EXHIBITS NOS. 791-A, 791-B, 791-C, 791-D, 791-E, 791-F, 791-G, 791-H, 791-I, and 791-J were received in evidence.)

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. I wish to ask the witness: I call your attention to a document marked for identification as Commission's Exhibit 792-A through D, and ask you to state what it is, if you know.

Mr. Welch: Objection. The document speaks for itself.

The Witness: Commission—

Trial Examiner Norwood: That is something that
863 he wants to identify?

Mr. Wright: Yes, sir. I believe Your Honor ruled on a similar objection.

Trial Examiner Norwood: Objection overruled. You can identify that, what you understand it to be, where you got it, and so on.

The Witness: Commission's Exhibit 792-A is a letter received by me, dated August 3, 1945, from Mr. T. J. McDowell, general counsel for the Sherwin-Williams Company, and attached to the letter are the documents known as Commission's Exhibits 792-B through 792-D, and set forth the less-than-carload and carload rates on white lead and white lead-in-oil, from Chicago, Ill., to various points, as of June 22, 1945.

By Mr. Wright:

Q. Do you recall the request that you made of the person who supplied that to you?

A. These documents were furnished to the witness in response to a request for the information described and contained therein.

Mr. Wright: Your Honor, I offer Commission's Exhibits 792-A through D into evidence.

Mr. Welch: Objection, Your Honor, as to 792-B, C, and D. 792-B and C both show that those are freight rates from Chicago, Ill., to their stores in these various towns, and is the same objection that I had a moment ago.
864 792-D is in connection with shipments from Chicago, Ill., to warehouses, and I can't conceivably understand what the freight rate between our manufacturing point and our warehouses has to do with this lawsuit when it is shown by all the documents already in the record that we charge a certain price plus freight from certain distribution points which are not involved in the warehouse schedule; that is, the freight from Chicago to the warehouse. Freight is charged only from the warehouse out to the ultimate destination.

The Witness: I might add to my explanation of these documents—

Mr. Welch: Objection, please, to the witness answering further until there is a ruling on the objection.

Mr. Wright: Your Honor, in answer to the objection, I call your attention to Commission's Exhibit 792-A, which characterizes the information contained in the exhibit. I disagree with counsel's interpretation of the meaning of those exhibits and urge that they are relevant and material.

Trial Examiner Norwood: What about this shipment from the factory to their warehouses in another city?

Mr. Wright: Well, Your Honor, we went into this—the same question, I believe it was, yesterday or the day before, regarding the freight rates from the factories of the various respondents to their warehouses.

The complaint alleges price discrimination in the
865 failure to give customers of the respondents the benefit of their advantageous location to the factories and the discriminatory use of a zone system which deprives them to the benefit of their location by the amounts of the freight rates involved in shipping to the more distant customers of the respondents, and without the freight information which is involved in these shipments from the factories to the warehouses and from the warehouses to the customers where the sales are made, it cannot be determined in the record the amount of the discrimination alleged in the complaint, nor can it be determined whether or not the zone differentials alleged in the complaint to be discriminatory are, in fact, discriminatory when they purport to make due allowance for differences in cost of transportation.

Trial Examiner Norwood: In other words, you use this in figuring out the actual cost of delivery; is that right?

Mr. Wright: It shows on its face that that is what is involved.

Mr. Welch: Your Honor, I take it any further statement on my account would be futile.

Trial Examiner Norwood: It would be very difficult for me to draw a line on these freight things here. It appears to me that they will be of some use there, certainly, in figuring out the actual cost of delivery.

866 I shall overrule the objection—

Mr. Welch: Exception.

Trial Examiner Norwood: —and if I am wrong about that, why, I can strike it later.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 792-B, 792-B, 792-C, and 792-D were received in evidence.)

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Back to the record.

By Mr. Wright:

Q. I show you herewith a document marked for identification as Commission's Exhibit 793, and ask you to state what it is, if you know.

A. This is a map which was prepared by me from one which was found in the offices of Mr. James E. Campbell, who is the manager of the credit and accounting department of Sherwin-Williams, and is an extact duplicate thereof as prepared in his office, and sets forth the boundaries of the various zones—strike "zones"—various districts of the Sherwin-Williams Company throughout the United states.

Q. I call your attention to the words "N. P." on the upper lefthand corner, and "C. P." below it, and "S. P." Will you explain those remarks?

A. Those designations, "N. P.," according to Mr.
867 Campbell means "North Pacific." "C. P." stands for "Central Pacific." "S. P." is South Pacific. There is a district also set forth as western, "S.W.," meaning "southwestern"; "G.S.," meaning Gulf States; "N." meaning "northern"; "S.E.," "southeastern"; "S. A.," "South Atlantic"; "N.A.," "North Atlantic."

Q. I call your attention to the points on the map encircled in red, and ask you to state the significance of that, if you know it.

A. Those designate the towns or cities in which the district office of each of the above-described districts is located. This map was drawn or copied by me for the reason that the map—

Mr. Welch: Objection. This statement is not being made in response to any question, Your Honor.

Mr. Wright: Would you read the statement?

Mr. Welch: I think it is for counsel, himself, to describe his case rather than the witness.

Mr. Wright: We asked him to describe it.

Trial Examiner Norwood: Well, describe it and identify it in general terms without stating its contents.

The Witness: —for the reason that Mr. Campbell stated that he had no other copies of the map that he used in connection with the purpose for which his map was used.

Mr. Wright: Your Honor, I offer Commission's Exhibit 793 into evidence.

868 Trial Examiner Norwood: Any objection?

Mr. Welch: Objection? According to the statement of the witness this map merely describes certain districts of the company and its district offices, and is not by any stretch of the imagination to be construed as a pricing map, and is not a zone map, and does not conform to the zone system alleged in the complaint, or anything else. It is merely a map showing the location of their district offices and the divisions of these districts, and those are not in any way related to any alleged zone system.

I say it is entirely immaterial and incompetent.

Mr. Wright: Your Honor, there is no allegation on the part of the attorneys for the Commission that this is a zone map used in the pricing of lead pigments. However, it is a map which shows the set-up of the Sherwin-Williams Company for doing business in lead pigments, and will be of great benefit in determining the—in considering the material which will be in the next exhibit which we wish to mark, which consists of the invoice records of the Sherwin-Williams Company.

Trial Examiner Norwood: Now, you propose to connect that up with the pricing method?

Mr. Wright: We propose to connect that up with the method of the Sherwin-Williams Company of receiving orders and of shipping orders to customers, which we will show, the areas from which they ship and from 869 which they receive orders, and it is relevant and material as showing the method of doing business of the Sherwin-Williams Company in connection with the sale of lead pigments.

Trial Examiner Norwood: Received as marked. Objection overruled. Exception allowed.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 793 was received in evidence.)

Mr. MacIntyre: May we go off the record a minute?

Trial Examiner Norwood: Off the record.

That is; it is received subject to connection, which the counsel promises.

(Discussion off the record.)

Trial Examiner Norwood: Back to the record.

Mr. Welch: Counsel for Sherwin-Williams agrees that it effects sales of white lead at retail to its customers through and at the location of its retail stores as they are listed on Commission's Exhibit 652-A to L inclusive.

Off the record.

(Discussion off the record.)

Mr. Welch: And further states that it is and has been the regular practice of Sherwin-Williams Company in making sales of white lead through and at the location of
its above-referred-to retail stores to quote and charge
870 its published delivered prices as are shown, to have
been applicable at each such destination. The practice thus followed has been and is in accordance with the policy of Sherwin-Williams Company pursuant to the instructions of its manufacturing officials.

Now, while the statement above made is a statement as to the existence of certain facts, counsel for the respondent Sherwin-Williams Company objects to the inclusion of such statement in the record for the following reasons:

That the operation of the company's retail stores is purely an intrastate matter, and the method in which it sells white lead, or any other product, to retail customers in retail stores is of no concern to the Federal Trade Commission, and we object to the inclusion of the statement in the record, though I do not deny that those facts exist; in fact, I agree they do.

Mr. MacIntyre: We contend that they are relevant and material facts.

Trial Examiner Norwood: Yes. In other words, the counsel admits facts but controverts the—

Mr. Welch: Materiality and relevancy to this proceeding.

Trial Examiner Norwood: Yes. That is right.

Counsel's objection is overruled, and the statement may be entered on the record; that is, counsel's objection to the
relevancy of the statement is overruled, and it may
871 appear on the record.

Mr. Wright: As evidence of the facts?

Trial Examiner Norwood: Well, it may appear on the record. Period. That is evidence of the thing. That is an admission, a very high type of evidence.

Mr. Wright: Still off the record.

(Discussion off the record.)

Trial Examiner Norwood: We will recess until 1:30, when we will reconvene in Room 388, this building.

(Whereupon, at 12:10 o'clock p. m., a recess was taken in the hearing until 1:30 o'clock p. m. of the same day.)

872 **Afternoon Session.**

Room 388
1:30 P. M.

Trial Examiner Norwood: The hearing will come to order.

(Documents were thereupon marked for identification Commission's Exhibits Nos. 794-A, 794-B, 794-C, 794-D, 794-E, 794-F, 794-G, 794-H 794-I, 794-J, 794-K, 794-L, 794-M, 794-N, 794-O, 794-P, 794-Q, 794-R, 794-S, 794-T, 794-U, 794-V, 794-W, 794-X, 794-Y, 794-Z, 794-Z-1, 794-Z-2, 794-Z-3, 794-Z-4, 794-Z-5, 794-Z-6, 794-Z-7, 794-Z-8, 794-Z-9, 794-Z-10, 794-Z-11, 794-Z-12, 794-Z-13, 795-A, 795-B, 795-C, 795-D, 795-E, 795-F, 795-G, 795-H, 795-I, 795-K, 795-L, 795-M, 795-N, 795-O, 795-P, 795-Q, 795-R, 795-S, 795-T, 795-U, 795-V, 795-W, 795-X, 795-Y, 795-Z, 795-Z-1, 795-Z-2, 795-Z-3, 795-Z-4, 795-Z-5, 795-Z-6, 795-Z-7, 795-Z-8, 795-Z-9, 795-Z-10, 795-Z-11, 795-Z-12, 795-Z-13, and 795-Z-14.)

Mr. Wright: Mr. Reel, will you please resume the stand?

DAVID R. REEL resumed the witness stand and testified further as follows:

Direct Examination (Resumed) by Mr. Wright.

873 Q. Mr. Reel, is my understanding correct that you testified this morning that you made an investigation of invoices furnished you by Sherwin-Williams Company?

A. Invoices and other information, yes.

Q. I show you document marked for identification Commission's Exhibit 794-A through Z-13, and ask you if you recognize it.

A. Yes.

Q. Will you state briefly what the exhibit is?

A. The exhibit is a tabulation of price and freight data on sales of white lead to customers of the Sherwin-Williams Company in various towns and cities in the United States for different periods of time.

Q. Is that exhibit in your own handwriting?

A. Not all of it. Some is in the handwriting of Mr. Fred MacManus, an attorney of the Federal Trade Commission, and some of the figures set down have been posted by Mr. James S. Kelaher, an attorney of the Commission, all of which has been rechecked by me.

Q. Were the entries made by others than yourself done under your direction and supervision?

A. Yes.

Q. Is all the information contained in Commission's Exhibit 794-A through Z-13 information which was secured from the records of the Sherwin-Williams Company, or supplied by officials of the Sherwin-Williams Company?

874 A. It was.

Q. Does the information appearing in the exhibit accurately reflect the information in the records of the Sherwin-Williams Company?

A. Yes.

Mr. Wright: Your Honor, I offer Commission's Exhibit 794-A through Z-13 in evidence.

Mr. Welch: No objection.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 794-A, 794-B, 794-C, 794-D, 794-E, 794-F, 794-G, 794-H, 794-I, 794-J, 794-K, 794-L, 794-M, 794-N, 794-O, 794-P, 794-Q, 794-R, 794-S, 794-T, 794-U, 794-V, 794-W, 794-X, 794-Y, 794-Z, 794-Z-1, 794-Z-2, 794-Z-3, 794-Z-4, 794-Z-5, 794-Z-6, 794-Z-7, 794-Z-8, 794-Z-9, 794-Z-10, 794-Z-11, 794-Z-12, and 794-Z-13 were received in evidence.)

Mr. Welch: Your Honor, we do not want that failure to make an objection to be understood or considered as any admission on the part of the respondent that data therein contained is or is not correct in any respect.

Trial Examiner Norwood: Very well.

By Mr. Wright:

Q. I call your attention to Commission's Exhibit 875 794-C, the information appearing under the column "Freight Rates," and ask you the source of that information?

A. The freight rate information was furnished to me by Mr. McDowell as being freight information relative to the shipments set forth on this document prepared either by the Southwestern Division of the company or by the freight department in the Cleveland offices.

Q. Were officials of the Sherwin-Williams Company able to supply for the purpose of this exhibit actual freight rates which had been used in shipping the particular pigment involved in the particular transactions set forth?

Mr. Welch: Objection.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: Overruled.

Did you ask them to supply it?

The Witness: These figures were supplied to me upon my request for freight rates on the white lead shipments shown on this document.

By Mr. Wright:

Q. I call your attention to the column on Commission's Exhibit 794-C, headed "House Copies, Date Shipped," and ask you the significance of the information appearing in that column?

A. The column sets forth dates on which material 876 set forth in the invoice or house copies were shipped, and these dates were so set up on the various house copies or invoices, appearing on the face of them.

Q. Is there any information in this exhibit which shows as to each transaction listed the date on which the purchaser ordered the material from Sherwin-Williams?

Mr. Welch: Objection. The document speaks for itself as to what information it shows.

Trial Examiner Norwood: Read the question.

(The reporter read the last question.)

Trial Examiner Norwood: He may explain those entries up there to tell us what those dates refer to.

Mr. Welch: He has already told us what the dates do refer to. The question now is whether it shows something or doesn't show it, and that is something to be ascertained by an examination of the document. That is not a matter of any explanation.

Trial Examiner Norwood: If he has any further explanation he may give it.

The objection is overruled.

The Witness: These dates set forth in the column marked "House Copies, Date Shipped," as I stated before, were taken from the invoice, from the face of the invoice where a stamp is used by the company showing the date the order was shipped.
877 It does not set forth the date on which any order had been received by the particular customer. Nevertheless, the house copies, or invoices, did show the date that the material was ordered by the customer.

By Mr. Wright:

Q. In connection with your investigation and in making up this exhibit, did you examine invoices of the Sherwin-Williams Company?

A. Yes.

Q. Can you estimate the number, roughly, of invoices that you did examine?

A. I refreshed my memory as late as this morning to do that, and to do so I examined various original copies of these invoices or house copies, and found that in the numerous ones which were available that the shipments were made at a date after the same, or within three weeks of the date the material was shown as having been ordered by the customer.

Mr. Welch: I move that the answer be stricken as not responsive to the question.

Trial Examiner Norwood: Read the question and answer.

(The reporter read as follows:

"Q. Can you estimate the number, roughly, of invoices that you did examine?

"A. I refreshed my memory as late as this morning to do that, and to do so I examined various original
878 copies of these invoices or house copies, and found that in the numerous ones which were available"—)

Trial Examiner Norwood: The reporter will strike with the words "and found."

Now, you asked if he examined it, and he said he did.

Mr. Wright: I still don't think the witness understood the question. I asked if he could estimate the number of invoices, approximately, of Sherwin-Williams that he examined during the course of his investigation.

Trial Examiner Norwood: Answer the question, now, as last stated, if you can estimate it. I think you can answer it "yes" or "no."

Mr. Welch: Your Honor, we will stipulate several hundred were examined.

Mr. Wright: I would like to get the witness' answer, if he has one.

Trial Examiner Norwood: Very well.

The Witness: There were anywhere between 600 and —may we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: I think that could be answered "yes" or "no."

The Witness: Yes.

879 By Mr. Wright:

Q. Will you state the approximate number?

A. Around 25,000.

Q. Do you recall whether the invoices of the Sherwin-Williams Company which you examined contained on their face an entry of the date of the customer's order of the transaction involved?

Mr. Welch: Objection. The invoices, themselves, are the best evidence of what information is contained on them.

Trial Examiner Norwood: Read the question.

(The reporter read the last question.)

Trial Examiner Norwood: He is asking if you recall something, and you can tell him whether you recall that or whether you do not. Don't answer this question by saying what you recall. Just answer the question directly.

The Witness: Yes.

By Mr. Wright:

Q. Did they show the date of the customer's order?

A. Yes.

Mr. Welch: Objection.

Trial Examiner Norwood: Objection overruled.

By Mr. Wright:

Q. Can you state from your examination of the invoices of the Sherwin-Williams Company which you ex-
880 amined, whether or not there was any appreciate

length of time between the date of the order appearing on the invoices, and the date of shipment?

Mr. Welch: I object to the form of the question and also object to the witness being permitted—

Trial Examiner Norwood: Read the question.

(The reporter read the last question.)

Mr. Welch: The Commission itself has those invoices and the invoices, themselves, are the best evidence of the lapse of time between the date of the order and the date of the shipment, if that is material.

Trial Examiner Norwood: I permitted the witness to give a little information there.

Mr. Welch: And further than that, how can he generalize on some 25,000 invoices he said he examined.

Trial Examiner Norwood: I think counsel's point is well taken.

Mr. MacIntyre: Your honor, we do not have all these invoices, and, in the second place, we are trying to have the record show that this witness knows or what he can recall from what he saw in the invoices.

Even the invoices, themselves, are not more competent than what someone can show that the invoices show. The invoices are in the possession of the respondent.

Trial Examiner Norwood: That is head on as 881 against the best evidence rules.

Mr. MacIntyre: This is a general situation shown by 25,000 invoices.

Trial Examiner Norwood: That is some job, to show what that shows.

Mr. MacIntyre: We think we are doing it right now.

Trial Examiner Norwood: That would be a pretty good short-cut. If you can lay the grounds for that parol evidence, if they are lost or not available, or you gave notice and they did not produce—

Mr. Welch: Your Honor, that condition is certainly not true. We supplied every invoice requested, the Commission had them for months, and some they still have.

Trial Examiner Norwood: I was pointing out how he could lay the grounds; I was not making a statement about the situation.

Mr. MacIntyre: Your Honor, the invoices are in the custody of the respondent who is here making the objection.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: We have only a few samples of the invoices. We are here with a witness who has seen all of those invoices, the 25,000 in the possession of this respondent, has noted what they contain, and, through his sworn testimony, we are offering for the record a showing of the fact that is evidenced by all of these invoices. We con-
882 tend it is competent evidence, relevant, and material.

Trial Examiner Norwood: Not in the face of an objection, if the invoices can be obtained. You may show that after you lay the grounds for it, and show that the invoices cannot be obtained.

Mr. MacIntyre: Your Honor, we do not deny that the invoices are more difficult to obtain than all the freight rates would be over here at the I.C.C. Building, but we do contend that if we had a man who could factually testify on the rates which are on file at the I.C.C. it would be a matter of proper evidence for him to do so, as well as to bring the I.C.C. rates over here to put into evidence.

Mr. Welch: Your Honor, our position is simply this: We supplied the invoices, the Commission decided what information they wanted to take off of them, and they took it. They have now decided they want to use some other information which the attorney-examiner has testified has been on there, but they did not take off because at that time they did not think it important, and now they think it is. Now, they are trying to bring it in in a secondary roundabout way, and I cannot subscribe to it.

Mr. Wright: Your Honor, all of these tabulations are in a sense secondary because this type of information was so much easier to make—

Trial Examiner Norwood: And we have a right to
883 receive that under our administrative practice, but such tabulations purport to contain exact information. It is not just an estimate.

Mr. Welch: We are not raising any question at all that the tabulations, themselves, in so far as they go, are not a correct reflection, and we realize that is secondary evidence, and I advised Commission's counsel weeks ago that I would make no objection on the question of best evidence as to the tabulation itself.

Isn't that correct, Mr. Wright?

Mr. Wright: That is correct.

Trial Examiner Norwood: I think the Commission must get the other evidence just like they got this, and present it in the same way.

Mr. Wright: Your Honor, we have the man on the stand who prepared this information, and he has testified he does have a recollection of the invoices which he examined. He is willing to swear as to certain information which he saw in those exhibits.

Trial Examiner Norwood: It is carrying it just a point further than this other matter here which we have permitted, and I think that we must put everything on the same basis here, and that is you must give some information about it. You must get that information, like you did before, by a survey and a tabulation, and certainly you
884 may show exactly what the invoices show.

The objection is sustained.

Mr. MacIntyre: May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed with your examination of the witness.

Mr. Wright: No further questions.

Trial Examiner Norwood: Cross-examine.

Cross-Examination by Mr. Welch.

Q. Mr. Reel, you testified this morning that Commission's Exhibit 775-A and B was given to you by Mr. McDowell. I believe you were questioned as to what representations were made to you at the time the documents were delivered.

Were any representations, in fact, made, or was the document just supplied to you in response to a request for a list of warehouse points?

A. I believe that Mr. McDowell and I talked over the various questions I had regarding the material and information that I wanted, and this was obtained and presented to me upon my request for the information it contains.

Q. That is right, except there were no independent collateral representations made except such as appear on the document itself?

885 A. Not that I can directly and particularly recall.

Q. Now, 778-A and B: On direct examination this morning you were questioned as to representations made to you in connection with those two documents. Were any representations, in fact, made other than that the document was handed to you for the purpose of complying with the request you made for certain information?

A. Except the general conference that he and I had regarding the information.

Q. But there were not any independent representations as indicated by counsel for the Commission this morning, as to what that document is, other than what it purports to be on its face, was there?

A. I can't recall of any in particular regarding the specific exhibit.

Q. Now, with respect to Commission's Exhibit 792-B and C which involves freight rates between Chicago, Ill., and various points, and a list entitled "Stores," who designated those cities as being ones to which you wanted the freight rates?

A. May I see that?

Q. (Document handed to witness.) Did you make that selection?

A. No.

Q. Who did make it?

886 A. Apparently it was made by the Sherwin-Williams Company. It was done, however, upon my request.

Q. What was the specific nature of your request?

A. That I wanted the less-than-carload and carload rates on the shipments of white lead and white lead-in-oil from its point of origin or manufacture to the various towns and cities in which towns warehouses of the company may be located.

Q. And this was supplied to you in answer to that request?

A. Yes.

Trial Examiner Norwood: Some of those names are checked and some are not checked. What does that signify?

The Witness: I am unable to state. I don't know whether—

By Mr. Welch:

Q. You don't have any independent recollection at the present moment as to how those got on there?

A. No.

Q. Now, in connection with Commission's Exhibit 791-B to J, inclusive, I take it there that you asked for information as to freight rates from the point of manufacture, Chicago, Ill., to various cities in which the company owned and operated retail stores, and that is the information that was furnished in response to your request?

A. Retail stores and warehouses for the certain 887 period involved; that is right.

Q. Now, Mr. Reel, in connection with the preparation of Commission's Exhibit 794-A to Z-13, I believe you asked the company for all invoices containing shipments of white lead during three separate periods of time, from all the district offices?

A. That originally was done.

Q. And those were all submitted to you, everything, as far as you know?

A. Yes.

Q. Then, from that large group which you say you estimated to be around 25,000—is that correct?

A. I would not say that, no, because the invoices supplied me from the various divisions or division offices amounted to a very small—probably not over 500, 600, or 700 invoices—

Q. To what does the 25,000 figure apply?

A. To the numerous invoices I had to go through while in the Cleveland office to find a few white lead sales that were indicated in the file.

Q. I see. So there were not 25,000 invoices showing sales of white lead?

A. No. You asked me—

Q. I am not trying to trap you. I am just trying to understand the thing myself.

888 You examined a total of approximately 25,000 invoices to pick out about how many hundred that involved white lead?

A. I would say 600 or 700, approximately.

Q. Now, of the 600 or 700 that you—

A. Pardon me. I wish to correct that, because as I made these lists and these tabulation sheets, these were made from selected invoices of those presented to me, and these, I believe, amount to somewhere between 600 and 700.

The ones submitted by the divisional offices amounted in some cases to maybe 33 per cent more than I actually listed, and in other cases maybe just 10 per cent more than I actually listed.

Q. That is, they sent you in invoices containing white lead in excess of those you have listed in the exhibit, Commission's Exhibit 794-A to Z-13?

A. That is right.

Q. And the excess ranged from 33⅓ per cent down to 10 per cent?

A. I would say it is a fair estimate.

Q. Would it be fair to say that all the white lead invoices during the three periods of time amounted to not more than 1,000 invoices, based on your statement that there are 600 in the record, and that the excess would run at the maximum 33⅓ per cent, and taking that outside figure?

A. I meant to say that it ran from 33⅓ per cent to
889 90 per cent of the invoices I used out of those sent in by the divisional offices. When I said 10 per cent, I was deducting in my mind.

Q. So that the 600 that you have in the record represents the 33⅓ per cent to 90 per cent of the total number of invoices involving white lead?

A. Of the total number of invoices furnished me involving white lead, I would say that is correct.

Q. You requested all invoices involving white lead to those towns for those periods?

A. That is right.

Q. And, so far as you know, that is what was furnished?

A. That is right.

Q. All right. If you used from 33⅓ to 90 per cent, what would be your best judgment as to how many invoices were in your final selection before you reduced them to Commission's Exhibit 794-A to Z-13?

A. I hesitate to answer that question because of the fact that a large majority of the invoices which were presented to me, and which I selected from the files in Cleveland, contained only small quantities of one pound to five pounds of white lead, which were entirely disregarded in this investigation, and I am wholly unable to even estimate the number we did not use, including those I looked at in the Cleveland office.

890 Q. So, then, you are unable to state to what extent the information contained in the exhibit represents a sampling of the white lead invoices from a numerical standpoint?

A. Yes.

Q. Now, you were given the original invoices by the company?

A. Yes.

Q. And you took all of the information that you then wanted off of the invoices and tabulated it onto these sheets?

A. Yes.

Q. You had each of these invoices, didn't you?

A. Yes.

Q. The company sent them down to you?

A. Yes.

Q. And you kept some of them for months?

A. A lot of them were not sent to me here. A lot were used and tabulated in Cleveland.

Q. But the company gave you free access to the invoices. Is that correct?

A. In Cleveland and Washington.

Q. And you have a large number of invoices now?

A. Well, not a large number.

Q. You have a substantial number?

A. Yes.

Q. That you have had for a long time?

A. Yes.

891 Q. All of the information that appears on the tabular sheets was taken from the invoices except the freight rate information—is that correct—that came from a different source?

A. No. The way that was handled was: The invoices that I selected for each district—

Q. Just one second, Mr. Reel. Answer my question, first, and then we will try to make an explanation.

The freight rate information which you have tabulated in connection with these various invoices was not on the invoices originally, was it?

A. That is right; it was not on there.

Q. That was supplemental information that was furnished at the time of the investigation?

A. That is right.

Q. And was not information theretofore appearing on the invoices?

A. That's right.

Q. In connection with your investigation, you asked the company officials to give you the applicable freight rates for the various shipments. That is right, isn't it?

A. That is right.

Q. And they gave you these figures?

A. That is right.

Q. You don't know whether they are right or wrong?

892 A. I have no way of knowing.

Q. In cases where there is a mixed car shipment and the tonnage of lead is less than the whole amount, you don't know how the applicable freight rate where the lead was prorated, whether on a carload basis or less-than-carload basis, do you?

A. I have no actual knowledge. I would like to explain that, though.

Q. That is information that the company officials selected and gave?

A. Upon my request for freight information applicable to the white lead shipped in connection with that certain shipment or order.

Q. Is it your understanding that these notations as to freight, as they appear in those schedules, indicate actual freight paid by the company or by the purchaser in connection with that particular shipment of white lead?

Mr. MacIntyre: May we have the question read?

Trial Examiner Norwood: Read it.

(The reporter read the last question.)

The Witness: I assume that they do because that is what I requested.

Mr. Welch: I ask that the answer be stricken as being admittedly based on an assumption.

Trial Examiner Norwood: I think you asked for his understanding.

893 Mr. Welch: Not for an assumption, Your Honor.

Trial Exaimner Norwood: Motion denied.

By Mr. Welch:

Q. Do you have any knowledge as to whether these entries as to freight represent the actual amounts of money paid in connection with the shipments listed?

Mr. Wright: Your Honor, that question was answered a few moments ago.

Trial Examiner Norwood: This is cross-examination.

The Witness: May I have the question?

(The reporter read the last question.)

The Witness: The only knowledge that I have regarding them is that they do represent the freight on the shipments of white lead as shown by the house copy indicated in response to my request for such information.

By Mr. Welch:

Q. But you don't know whether those were the amounts actually paid in connection with the respective shipments?

A. I have no way of knowing that.

Q. Now, Mr. Reel, in connection with that information,

this exhibit, Respondents' Exhibit 794-A through 794-Z-13, in so far as it shows freight rates and total amounts paid, or total rates applicable per 100 pounds, and for the actual amount of the shipment, still does not show who ultimately paid the freight, does it, as between Sherwin-Williams
894 and the purchaser?

A. No.

Mr. Welch: That is all.

Trial Examiner Norwood: Any further examination?

Mr. Wright: No questions.

Mr. Hinds: May I ask one question there?

Trial Examiner Norwood: Yes.

By Mr. Hinds:

Q. Mr. Reel, have you any samples here of The Glidden invoices which you used as a basis of your tabulation?

A. No, I have not, except for the copies of the invoices which were furnished me by the various divisional offices outside of the Cleveland office of the company.

Q. Have you some of those here?

Mr. Wright: Your Honor, is counsel cross-examining him on this—

Trial Examiner Norwood: Yes, he is cross-examining. Let him answer the question.

The Witness: They are somewhere around here.

Mr. Hinds: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

By Mr. Hinds:

Q. Mr. Reel, do the original invoices of Glidden, concerning the transactions which are the subject of your
895 tabulation, show the date of the order?

A. The only original invoices of Glidden's that I saw were in the Cleveland offices of the company and they, as I recall, did show the date of the customer's order.

Q. In cases where there was a contract in a more formal shape than a mere order, did they show the date of that also, if you know?

A. I am not able to distinguish or recall whether or not they showed the date ordered or date of contract. I do recall that they did have the date of the order.

Mr. Hinds: That is all. Thank you.

Trial Examiner Norwood: Any further examination?

Mr. Wright: No further examination.

Trial Examiner Norwood: The witness is discharged.

(Witness excused.)

Trial Examiner Norwood: Call your next witness.

Mr. Wright: Your Honor, I would like to offer into evidence Commission's Exhibit 741, which is identified at page 387 of the record.

Mr. Gardiner: No objection, Your Honor, but there is no admission as to the correctness of the exhibit.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 741, was received in evidence.)

896 Mr. Wright: I now offer into evidence Commission's Exhibit 591, identified at pages 228 and 391 of the record as a zoning map used by Anaconda and International in the sale of white lead-in-oil throughout the country.

Mr. Gardiner: If Your Honor please, I object to the admission of this as a map showing any matter in which the respondent Anaconda Copper Mining Company sold or distributed any of the commodities covered by this complaint.

We admit that it was furnished by the International Smelting & Refining Company for zone application to the respondent Anaconda.

Mr. Wright: In answer to counsel's objection, the complaint alleges the relationship between the Anaconda Copper Mining Company and the International Smelting & Refining Company; that the International was a wholly-owned subsidiary of the Anaconda Copper Mining Company.

Trial Examiner Norwood: The exhibit will be received to show what the evidence indicates.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 591 was received in evidence.)

Mr. Wright: And I offer in evidence Commission's Exhibit No. 592, which was identified in the record at page 288 and 289, an explanation of the zone differentials of Anaconda and International in the sale of white lead 897 throughout the country.

Trial Examiner Norwood: We will have a five-minute recess to look this over.

(There was a short recess taken.)

Trial Examiner Norwood: Proceed.

Mr. Gardiner: If Your Honor please, we object to the introduction of Commission's Exhibit 592 as it applies to the Anaconda Copper Mining Company, admitting that it relates only to the operations of the respondent International Smelting & Refining Company.

Trial Examiner Norwood: The objection is overruled. Received.

That is, if the evidence shows that it applies in any way to Anaconda, why, it will have to be applied. That is just subject to what is shown.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 592 was received in evidence.)

Mr. Wright: Your Honor, has 592 been received?

Mr. Gardiner: 591 and 592 are in.

Mr. Wright: I now offer in evidence Commission's Exhibit No. 738-A through M, identified in the record at page 378, as quotations of prices and terms of sale for white lead-in-oil by Anaconda Copper Mining Company and its subsidiaries and affiliates, International Smelting & Refining Company.

898 Mr. Gardiner: If Your Honor please, I object to the introduction of this as any evidence against respondent Anaconda Copper Mining Company. On the face of it, it appears to be Anaconda Sales Company. There is no objection other than that.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 738-A, 738-B, 738-C, 738-D, 738-E, 738-F, 738-G, 738-H, 738-I, 738-J, 738-K, 738-L, and 738-M were received in evidence.)

Mr. Wright: Your Honor, I offer in evidence Commission's Exhibit 661-A through Z-194, which is identified in the record at pages 228 through page 238, and pages 376, 377, and 378 of the transcript, as quotations by the Anaconda Copper Mining Company and the International Smelting & Refining Company on white lead-in-oil and various dates and applicable to various territories.

Mr. Gardiner: If Your Honor please, the introduction of these exhibits is objected to on the grounds that they have no application to the respondent Anaconda Copper Mining Company. It is admitted that they do apply to International Smelting & Refining Company.

Trial Examiner Norwood: Received under the same ruling as before respecting Anaconda.

(The documents heretofore marked for identification
899 COMMISSION'S EXHIBITS NOS. 661-A,
661-B, 661-C, 661-D, 661-E, 661-F, 661-G, 661-H, 661-I,
661-J, 661-K, 661-L, 661-M, 661-N, 661-O, 661-P, 661-Q,
661-R, 661-S, 661-T, 661-U, 661-V, 661-W, 661-X, 661-Y,
661-Z, 661-Z-1, 661-Z-2, 661-Z-3, 661-Z-4, 661-Z-5, 661-Z-6,
661-Z-7, 661-Z-8, 661-Z-9, 661-Z-10, 661-Z-11, 661-Z-12,
661-Z-13, 661-Z-14, 661-Z-15, 661-Z-16, 661-Z-17, 661-Z-18,
661-Z-19, 661-Z-20, 661-Z-21, 661-Z-22, 661-Z-23, 661-Z-24,
661-Z-25, 661-Z-26, 661-Z-27, 661-Z-28, 661-Z-29, 661-Z-30,
661-Z-31, 661-Z-32, 661-Z-33, 661-Z-34, 661-Z-35, 661-Z-36,
661-Z-37, 661-Z-38, 661-Z-39, 661-Z-40, 661-Z-41, 661-Z-42,
661-Z-43, 661-Z-44, 661-Z-45, 661-Z-46, 661-Z-47, 661-Z-48,
661-Z-49, 661-Z-50, 661-Z-51, 661-Z-52, 661-Z-53, 661-Z-54,
661-Z-55, 661-Z-56, 661-Z-57, 661-Z-58, 661-Z-59, 661-Z-60,
661-Z-61, 661-Z-62, 661-Z-63, 661-Z-64, 661-Z-65, 661-Z-66,
661-Z-67, 661-Z-68, 661-Z-69, 661-Z-70, 661-Z-71, 661-Z-72,
661-Z-73, 661-Z-74, 661-Z-75, 661-Z-76, 661-Z-77, 661-Z-78,
661-Z-79, 661-Z-80, 661-Z-81, 661-Z-82, 661-Z-83, 661-Z-84,
661-Z-85, 661-Z-86, 661-Z-87, 661-Z-88, 661-Z-89, 661-Z-90,
661-Z-91, 661-Z-92, 661-Z-93, 661-Z-94, 661-Z-95, 661-Z-96,
661-Z-97, 661-Z-98, 661-Z-99, 661-Z-100, 661-Z-101,
900 661-Z-102, 661-Z-103, 661-Z-104, 661-Z-105, 661-Z-106,
661-Z-107, 661-Z-108, 661-Z-109, 661-Z-110, 661-Z-111,
661-Z-112, 661-Z-113, 661-Z-114, 661-Z-115, 661-Z-116,
661-Z-117, 661-Z-118, 661-Z-119, 661-Z-120, 661-Z-121,
661-Z-122, 661-Z-123, 661-Z-124, 661-Z-125, 661-Z-126,
661-Z-127, 661-Z-128, 661-Z-129, 661-Z-130, 661-Z-131,
661-Z-132, 661-Z-133, 661-Z-134, 661-Z-135, 661-Z-136,
661-Z-137, 661-Z-138, 661-Z-139, 661-Z-140, 661-Z-141,
661-Z-142, 661-Z-143, 661-Z-144, 661-Z-145, 661-Z-146, 661-Z-147,
661-Z-148, 661-Z-149, 661-Z-150, 661-Z-151, 661-Z-152,
661-Z-153, 661-Z-154, 661-Z-155, 661-Z-156, 661-Z-157,
661-Z-158, 661-Z-159, 661-Z-160, 661-Z-161, 661-Z-162,
661-Z-163, 661-Z-164, 661-Z-165, 661-Z-166, 661-Z-167,
661-Z-168, 661-Z-169, 661-Z-170, 661-Z-171, 661-Z-172,
661-Z-173, 661-Z-174, 661-Z-175, 661-Z-176, 661-Z-177,
661-Z-178, 661-Z-179, 661-Z-180, 661-Z-181, 661-Z-182,
661-Z-183, 661-Z-184, 661-Z-185, 661-Z-186, 661-Z-187,
661-Z-188, 661-Z-189, 661-Z-190, 661-Z-191, 661-Z-192,
661-Z-193, and 661-Z-194 were received in evidence.)

Mr. Wright: I might say that these exhibits are further identified at pages 240 and 241 of the transcript.

Trial Examiner Norwood: I don't thank that you need to look that up now. You have referred us to a couple of them.

Mr. Wright: Your Honor, I now offer in evidence Commission's Exhibit 739-B through S, identified in the
901 record at page 379, showing sales and shipments of white lead-in-oil by Anaconda Copper Mining Company and the International Smelting & Refining Company from East Chicago, Ind., to various points in the country.

Trial Examiner Norwood: What is that number, now?

Mr. Wright: 739-B through S.

Mr. Gardiner: If Your Honor please, these Exhibits 739-A—B through S, are objected to as not showing sales by the Anaconda Copper Mining Company; rather, sales of the International Smelting & Refining Company.

Trial Examiner Norwood: Received under the same ruling.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 739-B, 739-C, 739-D, 739-E, 739-F, 739-G, 739-H, 739-I, 739-J, 739-K, 739-L, 739-M, 739-N, 739-O, 739-P, 739-Q, 739-R, and 739-S were received in evidence.)

Mr. Wright: Your Honor, I now offer in evidence Commission's Exhibit 671 as a document published by the Lead Industries Association and distributed to the Anaconda Copper Mining Company and the International Smelting & Refining Company.

Trial Examiner Norwood: Isn't that two sheets there?

Mr. Wright: No. It is on a backing sheet.
902 Identified in the record at page 191.

Mr. Gardiner: If Your Honor please, the same objection lies to this exhibit as to the ones previously submitted by the Commission, in that the stipulation is by the International Smelting & Refining Company. The exhibit refers to the International Smelting & Refining Company and has no reference or application to the Anaconda Copper Mining Company, and is objected to.

Trial Examiner Norwood: Counsel may have that same objection—

Mr. Gardiner: All the way through?

Trial Examiner Norwood: —all the way through to this sales evidence furnished by International; that is, as in favor of Anaconda.

Mr. Gardiner: Yes.

Trial Examiner Norwood: Received as marked. Objection overruled.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 671 was received in evidence.)

Mr. Wright: Your Honor, I now offer Commission's Exhibit 672-A through P, as identified in the record at page 191, which is a letter from the Lead Industries Association to all the members of the Lead Industries Association by the secretary, enclosing draft of a code of fair
903 competition for the industry, as received by the International Smelting & Refining Company and the Anaconda Copper Mining Company.

Mr. Gardner: No further objection.

Trial Examiner Norwood: Received.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 672-A, 672-B, 672-C, 672-D, 672-E, 672-F, 672-G, 672-H, 672-I, 672-J, 672-K, 672-L, 672-M, 672-N, 672-O, and 672-P were received in evidence.)

Mr. Wright: I would like to call now as a witness Mr. Frederick McManus.

FREDERICK McMANUS was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Will you please state your full name and occupation for the record, please?

A. My name is Frederick McManus. I am an attorney-examiner for the Federal Trade Commission.

Q. How long have you been an attorney-examiner with the Federal Trade Commission?

A. With the exception of a period of about nine months, I have been an attorney-examiner for the Trade Com-
904 mission since April, 1934.

Q. Have you ever had an occasion to make an investigation of the records of the Anaconda Copper Mining Company and the International Smelting & Refining Company?

A. Yes, I have.

Q. Will you state for the record approximately when that was?

A. Well, to the best of my recollection, it was about the—it was in June, 1945.

Q. In connection with that investigation, did you consult with various officials of the International Smelting & Refining Company and Anaconda Copper Mining Company?

A. Yes. I conferred with Mr. Hurless, whom I understand is the general manager—or, pardon me, the sales manager of the International Smelting & Refining Company.

Q. Where did you consult with Mr. Hurless?

A. Well, at the office of the International Smelting & Refining Company in, I think it is—one of the suburbs of Chicago—I am trying to remember now—in Indiana.

Mr. Gardiner: East Chicago, Indiana.

The Witness: East Chicago; is that it?

Mr. Gardiner: East Chicago, Indiana.

The Witness: In East Chicago, Indiana, yes.

By Mr. Wright:

Q. Did I understand you to state that Mr. Hurless 905 was the general manager of the International Smelting & Refining Company at East Chicago?

A. Well, to the best of my recollection, sir, he is, yes.

Q. Do you recall any other officials with whom you consulted at that time?

A. Well, there is this other gentleman in the traffic department of the office of the company in Chicago, in the Civic Opera Building. I talked to him. I can't recall his name, however.

Q. Can you state, generally, for the record the purpose of your investigation?

A. Well, the purpose of the investigation was to examine invoices covering sales of white lead-in-oil and dry white lead for certain stated periods to certain stated points, and after that examination to take certain information and transpose them upon columnar sheets in tabulated form.

Q. I hand you herewith a document which is marked as Commission's Exhibit 795-A through Z-14, and ask you if you recognize it?

A. Yes, I recognize this document.

Q. Will you state what the document is?

A. The document is a tabulation of information obtained by myself from invoices, original invoices, of the International Smelting & Refining Company.

Q. Who prepared the document, if you know?

906 A. This particular document I have in my hand, I prepared it.

Q. Are the entries in that document in your own hand?

A. Yes, they are. They are in my own handwriting.

Q. Are the entries in that document matters which were taken from the records of the International Smelting & Refining Company?

A. They are.

Q. I call your attention to the fact that there are entries here purporting to list freight rates. Will you tell us from whom you secured that information, or the source of that information in the tabulation, rather?

A. Well, it is the best of my recollection—if I may digress and give you the background on where I got these freight rates.

Trial Examiner Norwood: Yes.

The Witness: After I compiled the general information relative to sales and prices, I was referred to the traffic department of the company in Chicago, and I took the invoices and the tabulations to Chicago and requested information as to the freight rates covering these shipments. I asked that the information be submitted in the form of freight bills. A number of the freight bills covering a number of the shipments were submitted, and I entered them in this tabulation.

By Mr. Wright:

Q. Were those freight bills covering the actual 907 shipments which had been made?

A. Yes, they covered actual shipments that had been made.

Mr. Wright: Your Honor, I offer Commission's Exhibit 795-A through Z-14 in evidence.

Trial Examiner Norwood: Any objection?

Mr. Gardiner: May we go off the record a minute?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Gardiner: On the record.

There is no further objection to the admission of this exhibit other than the one previously interposed to the other exhibits as affecting these two respondents, with the exception that there is no admission as to the correctness or accuracy of these records.

Trial Examiner Norwood: Yes. Received as marked.

(The documents heretofore marked for identification COMMISSION'S EXHIBITS NOS. 795-A, 795-B, 795-C, 795-D, 795-E, 795-F, 795-G, 795-H, 795-I, 795-J, 795-K, 795-L, 795-M, 795-N, 795-O, 795-P, 795-Q, 795-R, 795-S, 795-T, 795-U, 795-V, 795-W, 795-X, 795-Y, 795-Z, 795-Z-1, 795-Z-2, 795-Z-3, 795-Z-4, 795-Z-5, 795-Z-6, 795-Z-7, 795-Z-8, 795-Z-9, 795-Z-10, 795-Z-11, 795-Z-12, 795-Z-13, and 795-Z-14 were received in evidence.)

Mr. Wright: I would like another document marked
908-909 for identification.

(The document referred to was marked for identification Commission's Exhibit No. 796-A and 796-B.)

Mr. Wright: Your Honor, in connection with the exhibit which has just been received, 795-A through Z-14, I have herewith documents marked for identification Commission's Exhibit 796-A and B, which purport to be a letter to the Federal Trade Commission signed by Horace G. Hitchcock, under date of April 12, 1946, with an enclosure, which is Exhibit 796-B, and I would like to ask counsel for International if he is willing to make a statement for the record identifying that so that it can be received in evidence for consideration in connection with the prior exhibit.

Mr. Gardiner: If your Honor please, this letter, signed by Mr. Hitchcock, of Chadbourne, Wallace, Parke & Whiteside, counsel for respondents Anaconda Copper Mining Company and International Smelting & Refining Company, is a letter of transmittal directed to the Federal Trade Commission under date of April 12 by which certain information requested by the Commission in August 9, 1945, to Mr. Charles Preusse of Chadbourne, Wallace, Parke & Whiteside was furnished to the Commission.

Mr. Wright: Your Honor, I offer in evidence Commission's Exhibit 796-A and B.

910 Mr. Gardiner: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked for identification COMMISSION'S EXHIBIT NO. 796-A and 796-B was received in evidence.)

By Mr. Wright:

Q. I call your attention to Commission's Exhibit 795-M, to the fourth column from the left, under the heading "Date", and ask you to state what that represents.

A. That represents the date of the invoice from which the information was taken.

Q. Was that secured from the invoices, themselves?

A. Yes, sir.

Q. In all instances?

A. In all instances.

Q. Can you approximate the number of invoices of the International Smelting & Refining Company which you examined in connection with this investigation?

A. Well, it will be an approximation. Well, I have examined approximately five or six hundred invoices, but I didn't take the information from all of the invoices, for the reason that they covered shipments of lead in comparatively small quantities.

Q. I show you Commission's Exhibit 739-B and ask you if the invoices which you examined were in the same 911 form as Commission's Exhibit 739-B?

A. To the best of my recollection, they were.

Q. Do you recall whether the invoices you examined noted the date on which the order from the customer in the transaction involved was received?

A. I can answer that question by stating that I can recall that in some instances the invoices did show that. In some instances they did not.

Q. Do you recall noting from your examination of the invoices whether there was any appreciable time lag between the information of the receipt of the customer's order and the date of the shipment?

A. Well, to the best of my recollection, there was no appreciable—

Mr. Gardiner: May I have that question over, please?

(The reporter read the last question.)

Mr. Gardiner: If your Honor please, this line of examination is objected to on the grounds that this compilation from which this witness is testifying merely purports to show the dates of the invoices. Now, as to the dates of the sales, if the Commission desires to present that information we submit that the invoices are the best evidence of that fact, or a compilation drawn for that purpose. This

witness has testified that some of the invoices con-
912 tained that information, some did not, and if the Commission wishes to rely on information contained in these invoices it is submitted that that information should either be set forth in their compilation or the invoices produced for that purpose.

Mr. Wright: Your Honor, I submit again that we have on the stand a man who stated that he made a detailed examination of the business records of the company, and I believe he is competent to state whether or not he has any recollection of any such lag between those two dates which have clearly been established as appearing on the invoices which he examined.

Trial Examiner Norwood: He could answer "yes" or "no" as to his recollection, but he would not be permitted to give his recollection over objection. I will have to sustain that objection. The invoices are the best evidence of what they show.

Mr. Wright: Are you sustaining the objection to the question regarding the witness' recollection, as to whether he has any recollection?

Trial Examiner Norwood: Well, no. He may state that if you want—well, that is not relevant in view of the fact that he can't—well, I will let him answer that.

Have you any recollection of that?

The Witness: Yes, sir; I have.

By Mr. Wright:

913 Q. Will you state what your recollection is with regard to that?

Mr. Gardiner: I object to that, Your Honor, on the grounds already stated.

Trial Examiner Norwood: Yes. Objection sustained.

Mr. Wright: I have no further questions.

Trial Examiner Norwood: Cross-examine him.

Cross-Examination by Mr. Gardiner.

Q. Mr. McManus, referring to Commission's Exhibit No. 795-M, I direct your attention to the first column entitled "Class," in which you have inserted the letters "D", "A", "M", and "I". Will you kindly state what those refer to?

A. Yes, sir. "D" means "dealer". "A" is "agent".

"M" is "manufacturer", and "I" would be an industrial user.

Q. Now, Mr. McManus, again referring to Commission's Exhibit 795-M, in the column headed "Rate"; am I correct in my understanding that the rate there was taken by you from the freight bills covering the shipments as set forth in this compilation?

A. That is right, sir.

Trial Examiner Norwood: That is so much per hundred?

The Witness: That is rate per hundred; yes, sir.

By Mr. Gardiner:

914 Q. And the rate set forth in that column is the rate in cents per hundred?

A. That is right. It is taken from shipping documents, freight bills, to the best of my recollection.

Q. Mr. McManus, do you recall if any of these invoices were issued by the Anaconda Copper Mining Company?

A. No. To the best of my recollection now—it has been about a year since I have seen the invoices, but I think it was International Smelting & Refining Company.

Q. In selecting these invoices, what was the purpose in choosing those that you did, so far as the time covered was involved?

A. Well, I can't answer that, sir. That was agreed upon—I could only answer that by saying that that was agreed upon by members of the investigating staff and Mr. MacIntyre, in order to expedite the investigation, to narrow it down somewhat, to the best of my recollection.

Q. Were these invoices selected with regard to the destination of the shipments?

A. As I remember, certain particular points were selected.

Q. And did you make that selection, or was that part of the program outlined to you?

A. That was part of the program.

Q. Was I correct in my understanding that you stated that Mr. Hurless was an employee of the International 915 Smelting & Refining Company?

A. To the best of my memory; yes, sir.

Q. Do you know if he has any connection with the Anaconda Copper Mining Company?

A. I do not.

Q. This information that you prepared, with the excepception of the freight information, was all prepared at East Chicago, Ind.?

A. Yes, sir; the invoices were submitted to me there.

Q. And is that the plant of the International Smelting & Refining Company?

A. That is a plant of theirs, yes. I don't know whether they have any others, or not.

Q. Yes, that is a plant of theirs.

In selecting these invoices, Mr. McManus, was there any other criteria other than dates of shipments and destinations?

A. Yes, sir; the quantities of lead involved.

Q. The quantities?

A. Yes, the quantities of lead involved. That is to say, there was a number of shipments of lead in one-pound, five-pound, ten, 25-pound packages. The investigation was restricted to the shipments of lead, as I remember, in 100-pound bags, per hundredweight, 100-pound containers.

Q. Mr. McManus, in making your selection, was
916 there any program or thought given to the selection
of customers or destinations which might be considered as being competitive; that is, competitive to each other?

A. Well, I didn't at any time in the investigation try to pick customers in particular areas that I thought might be competitive with one another. I just picked them all.

Q. Well, now, it is my understanding that you didn't in your compilation here included all of the invoices you selected.

A. No. I included—in this particular company, sir, I included all the invoices covering shipments of lead-in-oil in hundred-pound containers, and I took all the shipments of dry lead.

Q. Regardless of destination?

A. No, within those—

Q. Within those particular destinations?

A. —particular points, and within the particular time selected.

Q. Then, within the period of this examination—or, rather, period covered, you set forth in these sheets all in quantities of a hundred pounds or more to certain given localities?

A. That is right.

Mr. Gardner: No further questions.

Trial Examiner Norwood: Anything further?

Mr. Wright: I have no further questions, Your
917 Honor.

Trial Examiner Norwood: Thank you, Mr. McManus.

(Witness excused.)

Mr. Wood: Your Honor please, I have been just a little bit confused by the proceedings yesterday and today as to the particular purpose of those documents produced by these witnesses.

Now, when Mr. Kelaher was testifying, I attempted to protect myself by asking Mr. Kelaher whether or not he selected Eagle-Picher invoices with relation to competition between the customers. And he replied that he did not. If he would have replied the other way, that he had, I would, of course, have asked him to particularize so that I would have been in the position to meet the Commission's case factually.

Now, I would like to make the request for the record, on behalf of Eagle-Picher, that if competition between customers listed on the exhibit is to be at any time alleged in the case, that we now be notified which instances.

Mr. MacIntyre: I want to say this: That I made a selection of these destinations in the case of Eagle-Picher, Anaconda, International, National, Sherwin-Williams, and Glidden, and they were selected in part because of information that through getting invoices to customers in those locations we would have invoices showing shipments to customers that were competitve, and we are going to
918 contend that in these instances they are in competition.

Mr. Wood: Then I would like to make the request to be notified in advance as to which instances the Commission will rely on competitive conditions.

Mr. Ewing: I think that request can certainly be made by counsel for all respondents.

Mr. Hinds: Yes, I join in that, too, in behalf of Glidden.

Trial Examiner Norwood: You wish the counsel to point out at this time just which of those customers are competitors?

Mr. Wright: Your Honor, the complaint charges that there were various forms of competition which were injured by the discriminations involved in the systematic pricing system used in this industry, and those allegations of competition between the various classes of customers are, it seems to me, set out with as much clarity as we can do it at this time.

Mr. Ewing: I am not going to ask counsel to do the impossible, but I think the subject is one that should receive reasonable, fair treatment. After all, this is not a game of blindman's bluff. We have got, I don't know how many, entries on these sheets that have been taken from all companies. If we are not notified and given a reasonable opportunity to examine into the particular situations that
will be charged against us as violations of law, then
919 we are in a helpless position of doing an enormous
amount of independent work without knowing exactly
what we are looking for and wasting everybody's time, so far as the respondents are concerned, and I just don't think it is fair if we don't get some reasonable opportunity.

I am not saying to Mr. Wright or to Mr. MacIntyre, "Give it to us this afternoon," because they very well might not have made up their own minds about it, but I think we should have the opportunity.

Mr. Wood: One moment, Mr. MacIntyre. My position goes beyond that.

Because Mr. Kelaher is a lawyer and an investigator, I asked him if the competitive angle was taken into account, and he said, "No". Now, I may have been misinformed.

Mr. Kelaher: I think you are misconstruing my answer.

Mr. Wood: Well, it may be I am.

Mr. Kelaher: You asked me what my considerations were. I said I had a special assignment, I was asked to go out and do a particular job, and I did it.

Mr. Wood: At any rate, I may have been misled, but certainly I am entitled to have the information which I would like to have.

Trial Examiner Norwood: Yes. Let us hear from Mr. MacIntyre.

920 Mr. MacIntyre: I want to say again that I made
the selection in connection with assistance of others on
the staff of the Commission, and it was done in part for determining what actual and potential—and I emphasize the last word—competition probably had been interfered with in the secondary line through price discriminations alleged in this case both in the delivered price quotations and the levels of delivered prices paid, as well as in the discriminations in net prices received by the respondents, and I do not propose to speculate today on what day a

customer in Cincinnati will actually be in competition next year with a customer in St. Louis. I say that in most of those instances there is potential competition between them where there has not actually been competition to date, and we are going to so argue it.

We are contending that now. They are paint manufacturers, they are dealings, they are paint contractors, and they are consumers who are buying, and who are injured, and, furthermore, the injury to competition is not only in the secondary line but in the primary line, and for that matter to price competition among the respondents to the injury of the public involved.

Mr. Hinds: I am going to ask also that counsel—

Trial Examiner Norwood: Stand, if the counsel is going to talk for the record.

Mr. Hinds: Pardon me.

921 I am going to ask also that counsel for the Commission notify Glidden as to which pairs of sales set forth in tabulation he claims there has been a price discrimination between the two customers involved in those pairs, so that we may be prepared to either show that the date is not comparable, if that be the fact, or to justify the difference in price if the dates be approximately the same. I am referring, of course, to the dates when the price was determined, not the date of the shipment, because we have to assume the burden of assuming any charges, each and every one of us. It is an oppressive burden, and an unreasonable one.

Trial Examiner Norwood: Well, I will say, gentlemen that your request has been recorded for the record, and in our procedure there is ample time to meet anything that comes out against you. It isn't like being in a trial that must be ended very quickly, and within a few days. The administrative procedure permits of exhaustive investigation and time to meet anything which appears on the record. Of course, counsel on both sides must be their own judge of just what appears on the record, and whether it is against them or not.

But investigations like this must necessarily be rather broad, and it will have to proceed, and we will gather up the threads later and see what it comes to.

Anything further?

922 Mr. Ewing: Might I say this.

Trial Examiner Norwood: Yes.

Mr. Ewing: I think it is conceivable that with these sheets in evidence as they are, it would not be necessary for counsel for the Commission to do anything in the way of producing additional proof under their theories, as I see it, with respect to any illustration that we might select, with the result that the testimony in this case could close, because I, as counsel, for National, might analyze my own situation and arrive at the conclusion that only certain ones needed attention, give them the attention to the extent that I could in the course of a proceeding, and then the time would come for briefs, and so on, and so forth; and I would be faced with a charge particularized in many other instances.

Now, as I see it, these price discrimination charges are very particularized. They are broad, it is true, because a wide territory is covered, but it is a specific charge with respect to certain specific situations, and I can't see how it is fair to allow us to be put in the position of never, perhaps, being able to know with any degree of certainty what the particular charge is going to be. We are accused of following unfair trade practices, but I think that is an unfair trade practice in another sense.

Trial Examiner Norwood: Well, it particularizes as to what practices?

923 Mr. MacIntyre: Well, if Your Honor please, this simply amounts, as I see it, to a request for us to specify to counsel for the respondents what we consider to be the precise effects of all of their discriminations all the way along the line. That we are not in a position of doing at this time.

Mr. Hinds: We didn't ask as to the effect. We wanted to know which ones are said to be discriminatory.

Trial Examiner Norwood: Have you anything further to present now?

Mr. Wright: No, sir; we have no further evidence to present here in Washington.

Mr. Welch: Mr. Examiner, I would like to ask Mr. Reel one or two more questions, if I might, with respect to our exhibit. We will call him for further cross for a question or two. I assume that is not objected to.

Trial Examiner Norwood: Will you permit him to be recalled for further cross-examination?

Mr. Wright: I have no objection.

Trial Examiner Norwood: Take the stand, Mr. Reel.

DAVID R. REEL resumed the witness stand and testified further as follows:

Cross-Examination by Mr. Welch.

924 Q. Mr. Reel, will you look at Commission's Exhibit 794-A to Z-13? I call your attention to Commission's Exhibit 794-H.

Can you tell me what the purpose of that page is?

A. As a part of the instructions which were given to us prior to the investigation and to be followed during the investigation of these respondent companies, we were asked to secure the names and addresses of white lead customers of the companies that we were assigned to examine, or investigate, and the addresses of those customers during the first quarter of 1943. I having to rely upon the invoices submitted by the branch offices of The Glidden Company and the Sherwin-Williams Company, could only take down the names and addresses of the white lead customers as shown by the invoices submitted by those particular offices.

Q. So, then, this really represents just a summary of the names of customers that appear on some of the other pages in the entire exhibit; is that correct?

A. That is true.

Q. Now, to which page or pages does 794-H relate?

A. 794-H, as indicated at the top of the page, "Los Angeles Office" relates to all of the pages in this tabulation with reference to—

Q. Shipments from the Los Angeles office?

A. Shipments from the Los Angeles office, and, in particular, to Commission's Exhibit 794-F and 794-G.

925 Q. Well, are all the names that appear on 794-H included in connection with particular invoices on the other pages in the exhibit?

A. No.

Q. So that we will find here on 794-H some customers' names in connection with whom you have used no specific invoice?

A. That is right.

Q. Now, I take it, then, you have the same explanation with respect to—

Trial Examiner Norwood: I find that one of the numbers in Commission's Exhibit 794 has been skipped and the number following the letter "J". Rather than remark a number of these exhibits here, I will instruct the reporter to mark the missing sheet "J-2" and mark the original "J" "J-1".

(The document referred to was marked COMMISSION's EXHIBIT 794-J-2 and the document previously marked COMMISSION'S EXHIBIT 794-J was re-marked Commission's Exhibit 794-J-1 and were received in evidence.)

By Mr. Welch:

Q. Now, Mr. Reel, I take it that the numbers of customers appearing on 794-J-1 involve a similar situation with respect to a different district?

A. That is correct.

Q. In other words, those are all the customers in that area whose invoices you examined?

A. That is right.

Q. Now, is there a similar compilation of customers
926 whose invoices were examined in other districts?

A. That is true.

Q. There is a similar page for each district?

A. There should be.

Q. Yes. And that statement of yours, then, would apply equally to all of them?

A. That is true.

Q. Now, Commission's Exhibit 794-Z-9 to 12, inclusive, contains freight information, tabulations of freight information, doesn't it?

A. That is true.

Q. From what source did you obtain that?

A. That was taken from the exhibits we have heretofore discussed containing the less-than-carload and carload freight rates on white lead-in-oil and dry white lead in hundred-pound drums from Chicago, Ill., to various points throughout the country.

Q. Now, which exhibits do you mean, Mr. Reel? Not the invoices that you examined in connection with preparing this stuff?

A. No.

Q. You mean some other exhibits?

A. These are exhibits known as Commissioner's Exhibits 791-A through—I should say 791-B through 791-J and Commission's Exhibits 792-B through 792-D.

927 Q. And you took the information from the two exhibits you have just referred to and transferred it to these four pages in Commission's Exhibit 794?

A. That is correct.

Q. And it is the same information?

A. Yes.

Mr. Welch: Mr. Examiner, we now move that these pages which are admitted by the witness as being a duplication be withdrawn from evidence.

Trial Examiner Norwood: Well, are they exact duplications, or just what is the situation there?

Mr. Welch: So I understand it from the witness.

Mr. MacIntyre: If Your Honor please, we submit that it is a tabulation of some of the information that is contained in some of those exhibits, according to the testimony just given by the witness.

Trial Examiner Norwood: Are those tabulations on the same basis, for the same purpose?

The Witness: The tabulations shown as Commission's Exhibit 794-Z-9 through 794-Z-12 appears to be a duplicate of the information contained in Commission's Exhibits 791-B through 791-J. There is no duplication appearing in the tabulations of Commission's Exhibits 792-A through 792-D.

Mr. Welch: Correct in that?

Mr. Wright: I will have to examine that before I
928 can say more specifically.

Mr. Welch: I will have to call Your Honor's attention to the fact that the four pages in question have been prepared by him from other documents which have already been introduced in evidence, and we respectfully urge that these four pages be withdrawn or deleted.

Trial Examiner Norwood: Well, are they identical tabulations or just—

Mr. Welch: Identical tabulations, as I understand it from the witness.

Trial Examiner Norwood: Are these by this same witness?

Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Now, what have you to say about that?

Mr. Wright: Your Honor, I state that while the information contained therein is similar, and that the information contained in 794-Z-9 through 13 was obtained apparently from 791-B through J, that it is so arranged in 794-Z-9 through 13 that it makes the record clearer and the information more accessible.

Trial Examiner Norwood: This Commission's Exhibit 791-A through J, and 792, is the basis for the tabulations; is it?

929 Mr. Wright: That is what the witness has testified to.

Trial Examiner Norwood: Well, I shall overrule the motion. Motion denied.

Anything further?

Mr. Welch: Yes, I have one or two more questions.

By Mr. Welch:

Q. Mr. Reel, when you examined Sherwin-Williams' invoices, the situation was different from the Glidden one, was it not, in that instead of having just a take-off of the amount of lead involved, you saw the original invoice and whatever shipment it included in each instance, did you not?

A. No. The investigation was very similar to that of Glidden's because of the fact the only original invoices available to me were those which appeared as the permanent records of the Cleveland offices of the two companies. In all other cases the invoices—in the Sherwin-Williams' cases the original invoices were chosen and supplied to me from the branch offices, or district offices, while in the Glidden case—

Q. Mr. Reel, I am afraid you misunderstood my question. From the branch offices you got the entire invoice?

A. From the branch office, yes.

Q. And in Cleveland you had the invoice?

A. Yes.

930 Q. So that you saw everything that was on the order in addition to lead?

A. That is true.

Q. Whereas that condition did not exist to some extent in the Glidden case?

A. So far as their branch office was concerned. That is what I was getting at.

Q. Yes, but for the Sherwin-Williams' branches, you saw the entire invoices?

A. Yes.

Q. And in a great majority of those cases it involved a substantial amount of other products; did it not?

Mr. Wright: Your Honor, I object. On direct examination of this witness he was not permitted to tell what was included in the invoices that was not included in the tabulation. I think on cross-examination the same restriction should still apply.

Trial Examiner Norwood: I think he is telling what is on the invoices. Isn't that what you are asking him there?

Mr. MacIntyre: If Your Honor please, that is what was asked him on direct examination, and on an objection made to it it was sustained. In other words, only the entries made on the tabulations here is all he was permitted to testify about.

Trial Examiner Norwood: Objection sustained.

931 Mr. Welch: I believe that is all.

Trial Examiner Norwood: Thank you, Mr. Reel.

Mr. Wright: No further examination.

(Witness excused.)

Mr. Welch: Your Honor, I have one question that I would like to bring up that I, through oversight, did not raise this morning.

I did not object to the introduction of certain exhibits, which I now would like to interpose an objection to for the record, as to their applicability to count II. That is, Commission's Exhibit 662-W, being a price card which was in effect January 6, 1933, Commission's Exhibit 662-Y, a price card in effect March 11, 1935, Commission's Exhibit 662-Z-1, being a price card which was in effect April 1, 1936, all of those dates being prior to the passage of the Robinson-Patman Act, which was the basis for count II of the complaint, and I request that the admissibility of those price cards and their admission in evidence be restricted to count I.

Trial Examiner Norwood: I will certainly condition my—

Mr. MacIntyre: May I answer that?

Trial Examiner Norwood: Yes.

Mr. MacIntyre: We have in count II, the amended complaint here, in paragraph 12, a charge that the discrimina-
tions practiced by Sherwin-Williams were for the pur-
932 pose and with the effect of enabling the respondents in
this case to exactly match their offers to sell lead pig-
ments in commerce to any given prospective purchaser at
any given destination.

Trial Examiner Norwood: That is count I.

Mr. MacIntyre: No; this is count II, and this goes to that charge even though—that is, to proving purpose of the discriminations practiced after June 19, 1936. While we do not, of course, think that it would go to anything other than purpose, that is, these discriminations prior to then, they would go to purpose as alleged there in paragraph 12 of count II.

Trial Examiner Norwood: Wait a minute. I think count II is confined entirely to the Robinson-Patman Act.

Mr. Welch: To the granting of the discriminations. Not the purpose of it.

Trial Examiner Norwood: Well, is there any purpose involved in the Robinson-Patman Act? I don't recall the whole Act. Prompt me on that.

Mr. MacIntyre: Well, if Your Honor will recall, the United States Circuit Court for the Seventh Circuit and the United States Supreme Court held that when price discriminations were practiced for the purposes alleged in this paragraph 12 of count II, there can be no invocation of the procedural defense of good faith.

Trial Examiner Norwood: But did it say the
933 purpose or effect? The effect?

Mr. MacIntyre: And if we—

Trial Examiner Norwood: That is the Corn Products case?

Mr. MacIntyre: Oh, yes, Corn Products and Staley cases are the cases I am referring to.

So that if we provide any basis for a finding to support the allegation in paragraph 12 of count II, then there is no defense on the matter of good faith within the meaning of the law as laid down in those two cases.

Mr. Hinds: How does that relate to the case?

Trial Examiner Norwood: I will say that I will condition my receipt of that exhibit, Commission's Exhibit 662-W, Y and Z-1 to what I find a fair construction of the Act requires. I am not going to apply it to something to which it could not properly be applied.

Mr. Welch: Well, Your Honor, that puts us in a rather awkward position if we don't know to what extent Your Honor is going to receive it in evidence and give it consideration, and we think we have a right to know that.

Trial Examiner Norwood: I will defer the ruling on that. I want to think through that, and counsel has raised a most interesting point there, and you are at the end of a tired day when you are likely to make errors.

Mr. Welch: All right, sir.

934 Mr. MacIntyre: If Your Honor please, sir, I would like to make our position clear that we are contending that it should remain in evidence for the showing of purpose under count II; that is, the particular exhibits that he has made reference to.

Trial Examiner Norwood: I am not clear about that.

Mr. MacIntyre: If for no other reason.

Trial Examiner Norwood: I am not clear about that at all, so I will just reserve that ruling.

Anything further?

Mr. Wright: Your Honor's reservation does not affect the admissibility of that document as to count I, I take it?

Trial Examiner Norwood: I retract that reservation. I am just reserving the ruling now.

Mr. Hinds: Off the record, now.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: After a consultation with counsel, it is offered that the hearing in this case be now adjourned to reconvene at 10 o'clock a.m., on June 24, 1946, in the Trial Room, No. 605, of the Bar Association Building, at 36 West 44th Street, New York, N. Y.

(Whereupon, at 3:53 o'clock p.m., the hearing was adjourned to Monday, June 24, 1946, at 10 o'clock a.m., in New York, N. Y.)

935 Room 605, Bar Association Bldg.,
New York City, N. Y.
June 24, 1946.

Met, pursuant to notice, at 9:00 a.m., E. S. T.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Everette MacIntyre, Esq., Paul R. Dixon, Esq., and Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington, D. C.), T. J. McDowell, Esq., (101 Prospect Avenue, Cleveland, Ohio), appearing for Sherwin Williams Company.

Henry E. Gardiner, Esq., (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.) appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

Edmund P. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, and Richard Serviss, Esq., 1100 American Building, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

936 James D. Ewing, Esq., W. R. McDermott, Esq., and E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

Roger Hinds, Esq., (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

937 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment in Washington, D. C. on June 20th, the hearing in Docket No. 5253 is now reconvened at 9:00 o'clock a.m., Eastern Standard Time, June 24, 1946, in the Trial Room, Bar Association Building, 36 West 44th Street, New York, N. Y.

The appearances are as follows:

Everette MacIntyre, Paul R. Dixon and Joseph S. Wright, appearing for the Federal Trade Commission.

J. T. Welch and T. J. McDowell, appearing for the Sherwin Williams Company.

Henry E. Gardiner, appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

Edmund P. Wood and Richard Serviss, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

James D. Ewing, W. R. McDermott and E. Z. DuBose, appearing for The National Lead Company.

Roger Hinds, appearing for The Glidden Company.

Are you ready to go ahead, Mr. MacIntyre?

Mr. MacIntyre: If Your Honor please, we had subpoenaed for appearance here this morning as a witness, at the instance of the Commission, Mr. William Richter of
the DuPont Company, Wilmington, Delaware. We were
938 informed that Mr. Richter desired to avoid appearing
here if we could work out with counsel for the Respondents matters of identification of some documents, and the production of them, so as to meet our minimum requirements.

We believe we have been able to arrive at an understanding with Mr. Ewing, representing National Lead, for the presentation of some matters which will meet our minimum quirement in so far as Mr. Richter is concerned this morning, so as to relieve him from his appearance here today.

May we go off the record?

I will discuss that with Mr. Ewing.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. MacIntyre: Will you mark these documents for identification as commission's Exhibits?

(The documents referred to were marked Commission's Exhibit 797-A, 797-B, 797-C, 797-D, 797-E, 797-F, 797-G. 797-H, 797-I, 797-J, 797-K, 797-L, 797-M, 797-N, 797-O, 797-P, 797-Q, 797-R, 797-S, 797-T, 797-U, 797-V, 797-W, 797-X, 797-Y, 797-Z, 797-Z-1, 797-Z-2, 797-Z-3, 797-Z-4, 797-Z-5, and 797-Z-6, for identification.)

Mr. MacIntyre: If Your Honor please, the subpoena which was served on Mr. Richter called for his production here this morning of documents, as well as his ap-
939 pearance to testify, and the documents listed in the subpoena was set up under four specifications: Specification No. 1, Specification No. 2, 3 and 4, as outlined in the document which is now marked for identification as Commission's Exhibit 797-A and -B.

I believe that Mr. Ewing is now prepared, on the basis of information which the DuPont Company has furnished him, to make some statement for the record concerning those documents.

Mr. Ewing: On Saturday, June 22nd, 1946, I received from E. I. DuPont de Nemours Company of Wilmington, Delaware, a letter dated June 21, 1946, of two pages which has been marked Commission's Exhibit 797-A and -B for identification, together with papers referred to therein and photostatic copies thereof. These papers consist of a document described in the letter as an original contract entered into on February 3rd, 1938, between DuPont and National Lead, a photostatic copy of which has been marked Commission's Exhibit 797-C and -D for identification, together with a copy of what is described in DuPont's letter to me as a letter agreement dated January 31, 1940, a photostatic copy of which has been marked Commission's Exhibit 797-E for Identification, and a letter agreement so described in DuPont's letter to me, dated June 26, 1942, consisting of three sheets, photostatic copies of which have been marked Commission's Exhibit 797-F, 797-H and 797-I for Identification, and what is de-
940 scribed as a letter agreement, dated June 26, 1944, a photostatic copy of which has been marked Commission's Exhibit 797-G for identification, and what the DuPont letter to me describes as a letter agreement dated May 4, 1945, a photostatic copy of which has been marked Commission's Exhibit 797-J for identification.

I also received from DuPont what they describe in their letter to me as carbon copies of the original memoranda and attachments concerning costs of producing white-lead-in-oil by National Lead Company under contract with DuPont, prepared by one W. F. Malloch. Photostatic copies of these documents were furnished to me by DuPont, consisting of a document dated January 6, 1938, headed "Memorandum White Lead Contracts National Lead Company", the four sheets which have been marked Commission's Exhibits 797-K, 797-L, 797-M, and 797-N. This memorandum is sent me by DuPont as an office record of its.

Under the heading "Introduction", after referring to certain negotiations between DuPont and National Lead, the memorandum states: "The purpose of this memorandum is to indicate the effect the proposed contract would have on our cost as compared with what would have resulted under the 1924 contract."

What are described as the attachments in DuPont's letter to me consist of a sheet headed "Detail 1 White Lead
Contracts National Lead Company Synopsis of Pro-
941 posed Contracts," bearing date January 6, 1938, photo-
static copy of which has been marked Commission's
Exhibit 797-O for identification; sheet headed "Detail 2 White Lead Contract National Lead Company Distribution of Takings", bearing date January 6, 1938, photostatic copy of which has been marked Commission's Exhibit 797-P for identification; sheet headed "Detail 3 White Lead Contracts National Lead Company Calculation of Cost Increases", with three additional pages numbered 2, 3 and 4, photostatic copies of which have been marked Commission's Exhibit 797-Q, R, S and T for identification, dated January 6, 1938; sheet headed "Detail 4 White Lead Contracts National Lead Company 1936 Average Prices Pig Lead, Dry Carbonate, CL Card Price and Differential", dated January 6, 1938, photostatic copy of which has been marked Commission's Exhibit 797-U for Identification;

Sheet headed "Detail 5 White Lead Contracts National Lead Company 1937 Average Prices Pig Lead, Dry Carbonate, CL Card Price and Differential", dated January 6, 1938, photostatic copy of which has been marked Commission's Exhibit 797-V for Identification;

Sheet headed "Detail 6 White Lead Contracts National Lead Company Permissible Increase in Corroding Charge to Limit Cost Increase to Twenty-Five Thousand," dated January 6, 1938, photostatic copy of which has been marked
Commission's Exhibit 797-W for Identification;

942 Sheets headed "Detail 7, "Consisting of Four Pages,
with the heading "White Lead Contracts National

Lead Company Derivation of Formulae For Determining Increased Costs Under Proposed Contracts vs. 1924 Contract", photostatic copies of the four sheets being marked Commission's Exhibit 797-X, Y, Z and Z-1 for Identification;

Two sheets headed "Detail 8, White Lead Contracts National Lead Company Derivation of Formulae for Increased Unit Costs Unnder Proposed Contracts vs. 1924 Contract", photostatic copies of the said sheet, being marked Commission's Exhibit 797-Z-2 and Z-3 for Identification;

Three sheets headed "Detail 9, White Lead Contracts National Lead Company, Examples of Application of the Formulae", photostatic copies of these three sheets having been marked Commission's Exhibit 797-Z-4, Z-5 and Z-6 for Identification.

Now the detail bears the date January 6, 1938, as do the other details.

Mr. MacIntyre: If Your Honor please, I would like to make reference to each of these documents and then after further statements to make offers of some of them at least into evidence, and I would like then to ask that any objections to the offers be withheld, if they have them, until the offers on all of these in this batch are made.

I refer to Commission's Exhibit for Identification 797-A
and -B. Are we correct in our understanding, Mr.
943 Ewing, that that is the original of the letter from Mr.
Provost of DuPont to you under date of June 21, 1946?

Mr. Ewing: That is correct.

Mr. MacIntyre: I offer into evidence a photostat of that letter which Mr. Ewing will supply the reporter.

I now refer to document marked for identification as Commission's Exhibit 797-C and D, and I ask Mr. Ewing if this is a photostat of the contract between DuPont and National Lead of February 3, 1938?

Mr. Ewing: That is a photostatic copy forwarded me by DuPont with Exhibit 797-A and -B for Identification, with the statement that they were forwarding me the original contracts of which this exhibit is a photostat. It is my understanding that that is a photostat of the original contract bearing that date.

Mr. MacIntyre: You concede it so to be for the purposes of this case?

Mr. Ewing: I do.

Mr. MacIntyre: I now make reference to document marked for identification as Commission's Exhibit 797-E, and I ask you, Mr. Ewing, if you will concede that that is a photostat of a copy of a letter from Mr. Rowe of National Lead to the DuPont Company of January 31, 1940?

Mr. Ewing: That is correct.

Mr. MacIntyre: I now make reference to document
944 marked as Commission's Exhibit for Identification
797-F, H and I, and I ask you, Mr. Ewing, if that is a photostat of a signed copy of a letter from Mr. Rowe of the National Lead Company to Mr. E. B. Melson of the DuPont Company under date of June 26, 1942?

Mr. Ewing: The document to which you have just referred is a photostat of the original letter from Mr. Rowe to Mr. E. B. Melson, signed by Mr. Rowe.

Mr. MacIntyre: I now refer to document marked for identification as Commission's Exhibit 797-G, and I ask you, Mr. Ewing, if that is a photostat of an original letter from Mr. Rowe of the National Lead, Mr. Harold Rowe of the National Lead Company, to Mr. E. B. Melson of the DuPont Company?

Mr. Ewing: That is correct.

Mr. MacIntyre: I now refer to Commission's Exhibit for Identification 797-J, and ask you, Mr. Ewing, whether that is a photostat of an original letter from Mr. Harold Rowe of the National Lead Company to Mr. E. B. Melson of the DuPont Company of May 4, 1945?

Mr. Ewing: That is correct.

Mr. MacIntyre: I now refer to documents marked for identification as Commission's Exhibit 797-K thru 797-Z-6, and I ask you, Mr. Ewing, if those documents are photostats of memoranda on which are recorded factors and
other considerations which entered into the negotia-
945 tions between the DuPont Company and the National
Lead Company, and which records were made by the DuPont Company?

Mr. Ewing: The exhibits to which reference has just been made were forwarded me by DuPont with its letter to me of June 21, 1946, as carbon copies of original memoranda and attachments described in the said letter as concerning "Costs of Producing White-Lead-In-Oil by National Lead Company under contract with E. I. DuPont de Nemours & Company, dated January 6, 1938, prepared by W. S. Malloch."

I concede that the documents are copies of records of DuPont, but as to the extent, if any, that their contents were communicated to National Lead, I can make no concession because I have no knowledge of the facts in connection therewith. As to the use, if any, to which they were put by DuPont, I think they speak for themselves.

946 Mr. MacIntyre: If Your Honor please, I now offer into evidence the documents which have been marked for identification as Commission's Exhibits 797-C through Z-6.

Mr. Ewing: I object to the receipt into evidence of those documents at this time upon the ground that there is no foundation which has been laid for them establishing their relevancy or competency; and I therefore object on the ground that they are irrelevant, incompetent and immaterial.

Trial Examiner Norwood: Are there any other objections?

Mr. MacIntyre: If Your Honor please, I would like to make this observation in connection with the objections made by Mr. Ewing.

These documents, with respect to relevancy, go directly to the charges contained in the amended complaint, in the mimeographed form on Page 7, sub-paragraph 7 of Paragraph 7, which is to the effect that the National Lead Company entered into contracts and understandings with E. I. DuPont, Incorporated, a large paint manufacturer, for the purpose and with the effect of promoting maintenance of the levels of price fixed by National and other producing and primary sellers of white lead.

Nothing could be more relevant than these documents that are now before you; and, not only relevant but
947 therefore material.

The competency: I think that has been established beyond question by the record made here this morning.

Mr. Ewing: I would only like to observe, Your Honor, it is true of course that the complaint contains the allegation referred to by Mr. MacIntyre. But there is nothing, either in those documents themselves, or anything in this record up to this point, which indicates that they themselves are any evidence in support of that allegation and complaint.

Trial Examiner Norwood: I shall reserve the ruling until I have had time to read the papers, which might be during the lunch hour or earlier.

Is there anything further?

Mr. MacIntyre: Off the record, please.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

As to Commission's Exhibits 797-A and B, which counsel for the Commission offered first, I will ask the Respondents' counsel if they have any objections to that.

Mr. Ewing: No objection.

Trial Examiner Norwood: They are received in evidence.

948 (The papers referred to, heretofore marked for identification "COMMISSION'S EXHIBITS 797-A and 797-B", were received in evidence).

Trial Examiner Norwood: And as to the others, from C through Z-6, I shall rule on those later.

Mr. MacIntyre: If Your Honor please, I now offer into evidence photostats of the documents which have heretofore been marked for identification as Commission's Exhibits 533, 534, 535, 577-A, B and C.

I refer to the record, Pages 145 and 146, and 154, as places in the record recording identification of these and statements made about them by Mr. Ewing, counsel for the National Lead Company.

I offer these as the records of correspondence between DuPont and National Lead Company concerning contracts and negotiations relating to such contracts, as are now marked for identification in the pending offer of Commission's Exhibit 797.

Mr. Ewing: We object to the receipt in evidence of the documents just offered, on the same grounds that were made with respect to Exhibits for identification 797-C to Z-6, inclusive.

Trial Examiner Norwood: I shall reserve the ruling on that until I can read them.

You may proceed.

949 Mr. Ewing: And also, I should say, as to the characterization of counsel's offer and statements with respect thereto.

Trial Examiner Norwood: If they are received they would be received as marked, and not necessarily as described.

Mr. Wright: Your Honor, we intended to call a witness to identify some material which relates primarily to The

Glidden Company next; but Mr. Hines, counsel for Glidden, is not here, so we thought we would defer that now. And at the present we have nothing more to present to the hearing today.

Trial Examiner Norwood: Off the record.

(Discussion of the record.)

Trial Examiner Norwood: On the record.

Mr. MacIntyre: If your Honor please, I now offer into the record Exhibits 3-A to 3-Y, inclusive, as the record of the Minutes of the first meeting of the Board of Directors of The National Lead Company. It is in photostatic form.

Trial Examiner Norwood: How is that marked?

Mr. Hines: 3-A to 3-Y, for identification.

Mr. MacIntyre: And in that connection, I refer your Honor to transcripts, Page 21, Lines 3 to 9, inclusive.

Mr. Ewing: Might I see this just a moment, your 950 Honor?

Trial Examiner Norwood: Yes, surely.

Mr. Ewing: The documents proffered, photostatic copies of the Minutes of the first meeting of the Board of Directors of The National Lead Company, held on the 8th day of December, 1891; we object to them on the ground that they are wholly irrelevant and immaterial in this case at this time. It is the organization meeting.

Trial Examiner Norwood: It is an ancient document.

Mr. Ewing: It is an ancient document. As far as The National Lead is concerned, it could not be any older.

Trial Examiner Norwood: What do you say, Mr. MacIntyre?

Mr. MacIntyre: In that connection, I refer your Honor to Paragraph 7 of the complaint, as set out on Page 4 of the mimeographed copy containing the charges as to how The National Lead embarked upon a plan and program to secure control over what competing interest then existed in the industry, and it is my contention that these Minutes, when taken with other parts of the record already made, constitute a substantial part of evidence as to how National Lead started off on the execution of that plan and program by swallowing up at that time, on December 8, 1891, some 16 competing enterprises and industries all at one fell swoop.

951 Mr. Wright: If your Honor please, the date, 1891, is specifically mentioned as the initiation of the monopolistic program.

Mr. Ewing: There is no question of course, your Honor, that National Lead was organized in 1891. There is no evidence in this record, and there will be no evidence in this record that I know of, to sustain the suggestion that these were competing interests that were swallowed up.

There is a further ground for objection, which is that the material facts are all admitted in our answer.

Trial Examiner Norwood: Well, that is what I started to ask you. National has admitted acquiring various selfsame concerns, have they not?

Mr. Ewing: I have not checked to see that every one is in the answer, but the fact is that we have admitted it.

Mr. MacIntyre: I think there is an admission to the names of the companies that were acquired; but we are concerned here with more than just the companies. We are concerned here with parties who engineered these acquisitions.

Trial Examiner Norwood: Well, they admit owning certain specified numbers of shares in these various companies.

Mr. MacIntyre: But, if your Honor please, they do
not admit that Thomas Fortune Ryan, one of the men
952 in the background of the history of the Anaconda Company, and that Daniel Guggenheim, one of the men in the background of the history of The National Lead Company and American Smelting and Refining Company, were personalities who got their heads together and formed these combinations, the start of which is this acquisition represented by the pending offer.

Mr. Ewing: Of course we do not admit any such thing. It was not the fact; and furthermore, the complaint does not allege that they did.

Trial Examiner Norwood: The complaint alleges a plan for a design.

Mr. Ewing: But it is not a plan by Messrs. Guggenheim and Thomas Fortune Ryan.

Trial Examiner Norwood: Well, it is broader than that, a plan by anybody that can be connected, if they can connect it.

I shall reserve the ruling on this.

Now, as I understand it, this document's identification is conceded.

Mr. Ewing: No question about that.

Trial Examiner Norwood: So we will take ~~that~~ and look it over, too.

You may proceed.

Mr. MacIntyre: I now offer into evidence document heretofore marked Commission's Exhibit No. 4, for

953 identification, being a photostatic record of the Minutes of the regular meeting of the Board of Directors of The National Lead Company held September 18, 1902.

Trial Examiner Norwood: Has that some lettered pages, or just one sheet?

Mr. Ewing: Just one page.

Mr. MacIntyre: In that connection, I refer Your Honor to Lines 16 through 23, on Page 21 of the record.

Mr. Ewing: If Your Honor please, I will object to this on the ground that it is wholly irrelevant and immaterial, as shown on its face.

Trial Examiner Norwood: How is that, Mr. Ewing?

Mr. Ewing: Well, it refers to certain material changes in connection with two plants, obviously of a minor nature. The reissuance of a dividend check and the appointment of an Executive Committee has nothing to do—

Mr. MacIntyre: But, if Your Honor please, the functions of that Executive Committee become all-important for The National Lead Company from that day on in its acquisitions of the other competing concerns.

Mr. Ewing: This particular exhibit has nothing to do with anything.

Trial Examiner Norwood: I will read it over. The ruling is reserved.

You may proceed.

954 Mr. MacIntyre: I now offer into evidence the documents heretofore marked for identification as the Commission's Exhibits 5-A through 5-F, inclusive, being photostats of ~~the records~~ of The National Lead Company, including agreements that it entered into and considered with Thomas Fortune Ryan and Daniel Guggenheim, and others.

Trial Examiner Norwood: Is there any objection?

Mr. MacIntyre: In that connection I will refer Your Honor to Lines 5 through 15 of Page 22 of the record.

Mr. Ewing: We object to it, Your Honor, on the ground that it is immaterial and irrelevant, and that so far as a hasty examination is concerned, there is no mention in this document of either of the gentlemen referred to by Mr. MacIntyre.

Trial Examiner Norwood: Do you have a duplicate of this?

Mr. Ewing: Yes, sir.

Trial Examiner Norwood: What about the paragraph that is struck out with red ink?

Mr. Ewing: That is out, as I understand it.

Mr. MacIntyre: That is not offered; but in the page—as you will note, that is in the upper third of the first page.

Trial Examiner Norwood: Yes.

Mr. Ewing: And there is a similar paragraph at
955 the very end that is out.

Trial Examiner Norwood: Well, I will read it.

Mr. MacIntyre: With reference to the statement just made by Mr. Ewing that there is no reference in this document to Thomas Fortune Ryan, and others that I have mentioned, I merely refer you to Line 4 of the page marked Commission's exhibit for identification 5-B.

Mr. Ewing: Well, I will withdraw my statement. I said that it was after a cursory examination, and I missed it.

Trial Examiner Norwood: Was this Anaconda Company connected with this matter?

Mr. Gardiner: If Your Honor please, there is no reference, on a cursory examination, to the Anaconda Mining Company, or any connection that Thomas Fortune Ryan might have had with that company. I do not wish to take the position of striking counsel's remarks; but we will object to the introduction of this, as having any relevancy, so far as the Anaconda Copper Mining Company, or the International Smelting and Refining Company is concerned, as Respondents in this case.

Mr. MacIntyre: We cannot connect everybody with one piece of evidence; but the record as a whole must be taken to do that.

If Your Honor please, I now offer into evidence a document heretofore marked for identification as Commission's
Exhibit 6-A through 6-Q; and in that connection, I
956 will refer you to the record beginning at Line 25, Page
22, through Line 10, on Page 23, and state that this includes a record of the Minutes of the adjourned regular meeting of the Board of Directors of The National Lead Company on January 22, 1903.

Trial Examiner Norwood: Do you have copies of this?

Mr. Ewing: Yes, sir.

If Your Honor please, I will object to it on the same grounds that I objected to the other Minutes.

Trial Examiner Norwood: Are there any other objections?

Ruling reserved.

We will take a five minutes' recess.

(Brief recess taken.)

Trial Examiner Norwood: Come to order.

Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Ewing: If Your Honor please, might I extend my objection on the record with respect to Commission's Exhibit for identification 5-A through F, and the reference therein to the proposed contract, by calling to Your Honor's attention Exhibit 6-C for identification, wherein there is a recital that the Resolution authorizing the execution
957 of that contract was rescinded at the meeting of the Board, the adjourned regular meeting of the Board of Directors of January 22, 1903.

Mr. MacIntyre: If Your Honor please, that is just the reason it is necessary to offer the number of documents that we are offering, which is to get the whole story, because there were negotiations and discussions going on for a period of years, as to just how all of these acquisitions were to take place; and it is true that some of the proposals, as originally made, were not executed but were modified, and then acquisitions made under the modified terms of the contract.

Trial Examiner Norwood: Well, you may make the rest of your offers.

Mr. MacIntyre: If your Honor please, I now offer into the record Commission's Exhibit 7 for identification, which includes a record of the Minutes of the adjourned meeting of the Board of Directors of The National Lead Company of July 22, 1904.

Mr. Ewing: If your Honor please, I will make the same objection.

Examiner Norwood: Ruling reserved.

You may proceed.

Mr. MacIntyre: If your Honor please, I now offer into the record documents, marked for identification as Commission's Exhibit 8-A and 8-B, which includes a record
958 of the Minutes of the adjourned meeting of the Board of Directors of the National Lead Company of November 10, 1904.

Mr. Ewing: If your Honor please, I will make the same objection and in that connection I will refer your Honor to Page 24 of the record, which concerns the identification and authentication.

Of course, your Honor, we object in no case to the identity of these documents.

Trial Examiner Norwood: Ruling reserved.

Mr. MacIntyre: If your Honor please, I now offer into evidence documents heretofore marked for identification as Commission's Exhibits 9-A through 9-G, which includes a record of the Minutes of a certain meeting of the Board of Directors of The National Lead Company of February 13, 1906.

The record includes a showing of identification of that exhibit on Page 25, Lines 4 through 8.

Mr. Ewing: I will make the same objection, your Honor.

Trial Examiner Norwood: Ruling reserved.

Do you have any remarks to make regarding the objection, Mr. MacIntyre? It was objected to as irrelevant.

Mr. MacIntyre: If your Honor please, this document shows that there was finally put through the purchase by The National Lead Company of the United Lead Company, which included about 17 additional competing and independent concerns. 959

Mr. Ewing: The answer concedes that in February, 1906, National Lead acquired all of the stock of the United Lead Company, which, as we say in the answer, is engaged principally in the manufacture, sale and distribution of metallic lead alloy products and is not a competitor.

Trial Examiner Norwood: Ruling reserved.

Mr. MacIntyre: If your Honor please, I now offer into the record documents heretofore marked for identification as Commission's Exhibits 10-A and 10-B, which includes a record of the regular meeting of the Board of Directors of The National Lead Company of March 15, 1906.

Mr. Ewing: If your Honor please, I will object to it on the same ground, and on the further ground that the answer concedes the acquisition of stock in that company.

Mr. MacIntyre: And in that connection I will refer your Honor to Pages 25 and 26, beginning at Lines 16 to 25, which contains a showing of the identification and authentication of that document.

Trial Examiner Norwood: Does this point out anything further than what the pleadings have admitted.

Mr. MacIntyre: I think so.

Mr. Ewing: It also authorizes the purchase of the entire outstanding capital stock of Carter White Lead Company for the stated consideration of $1,275,000 par
960 value of debentured bonds of United Lead Company.

Trial Examiner Norwood: Ruling reserved on that.

Mr. MacIntyre: If your Honor please, I will now offer into the record documents heretofore marked for identification as Commission's Exhibits 11-A through 11-D, which includes a record of the Minutes of the adjourned meeting of the Board of Directors of The National Lead Company of April 19, 1906.

Mr. Ewing: Off the record, please.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Ewing: If your Honor please, we objected to "A" on the ground that it is irrelevant; "B" on the ground that it appears on the face thereof that it is wholly irrelevant; and "C" and "D" on the same ground.

Trial Examiner Norwood: Ruling reserved.

Mr. MacIntyre: May we go off the record, please?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

You want to meet, then, by 10:00 o'clock, city time, tomorrow?

After discussion with counsel, the request of Commission's counsel is granted that an adjournment be taken until 9:00 o'clock tomorrow morning, standard time.

961 The hearing in this case will now stand adjourned until tomorrow morning at 9:00 o'clock, standard time, which is 10:00 o'clock city time.

(Whereupon, at 11:50 o'clock a. m., Monday, June 24, 1946, the hearing in the above-entitled matter was adjourned, to reconvene tomorrow morning, Tuesday, June 25, 1946, at 10:00 o'clock a. m.)

962 Room 605, Bar Association Bldg.,
New York City, New York,
June 25, 1946.

Met, pursuant to adjournment, at 9:00 a. m., E.S.T.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Everette MacIntyre, Esq., Paul R. Dixon, Esq., and Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N.W., Washington, D. C.), T. J. McDowell, Esq. (101 Prospect Avenue, Cleveland, Ohio), appearing for Sherwin Williams Company.

Dwight R. Collin, Esq. (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

Edmund P. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, and Richard Serviss, Esq., 1100 American Building, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

963 James D. Ewing, Esq., W. R. McDermott, Esq., and E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

Roger Hinds, Esq. (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

964 Proceedings.

Trial Examiner Norwood: Come to order. Pursuant to adjournment on yesterday, the hearing on docket 5253 is reconvened at 9 o'clock a. m. Eastern Standard Time on the 25th day of June, 1946 in the trial room of the Bar Association Building at 36 West 44th Street, New York, N. Y. Let the record show the following appearances:

Everette MacIntyre, Esq., Paul R. Dixon, Esq., and Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington, D. C.) appearing for Sherwin-Williams Company.

Dwight R. Collin, Esq. (Chadbourne, Wallace, Parks & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

Richard Serviss, Esq., 1100 American Building, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

James D. Ewing, Esq., and E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company. Roger Hinds, Esq. (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

Now on all these exhibits that were offered yester-
965 day, the ruling was reserved until I could study them:

Commission's exhibit for identification 797-A to Z-6 exhibit 533; 534; 535, 577-A, 577-B, 577-C; 3-A through 3-Y.

Commission's exhibit 4 for identification; 5-A to 5-F inclusive; 6-A to 6-Q; 7; 8-A, 8-B; 9-A to 9-G inclusive; 10-A, 10-B; and 11-A to 11-D.

The objection is overruled and they are received in evidence.

(The papers referred to, herefofore marked for identification "COMMISSION'S EXHIBIT NOS. 797-A, 797-B, 797-C, 797-D, 797-E, 797-F, 797-G, 797-H, 797-I, 797-J, 797-K, 797-L, 797-M, 797-N, 797-O, 797-P, 797-Q, 797-R, 797-S, 797-T, 797-U, 797-V, 797-W, 797-X, 797-Y, 797-Z, 797-Z-1, 797-Z-2, 797-Z-3, 797-Z-4, 797-Z-5, 797-Z-6; 533; 534; 535; 577-A, 577-B, 577-C; 3-A, 3-B, 3-C, 3-D, 3-E, 3-F, 3-G, 3-H, 3-I, 3-J, 3-K, 3-L, 3-M, 3-N, 3-O, 3-P, 3-Q, 3-R, 3-S, 3-T, 3-U, 3-V, 3-W, 3-X, 3-Y; 4; 5-A, 5-B, 5-C, 5-D, 5-E, 5-F; 6-A, 6-B, 6-C, 6-D, 6-E, 6-F, 6-G, 6-H, 6-I, 6-J, 6-K, 6-L, 6-M, 6-N, 6-O, 6-P, 6-Q; 7; 8-A, 8-B; 9-A, 9-B, 9-C, 9-D, 9-E, 9-F, 9-G; 10-A, 10-B; 11-A, 11-B, 11-C, 11-D" were received in evidence.)

Trial Examiner Norwood: There are some cost studies
there that these first exhibits tie up with and I imagine
966 that all these documents go to the purpose and that

they are additional information as to what has been admitted. And I believe the cost studies will be valuable to both sides and will be useful to both sides.

Mr. Ewing: I would like to say that they are not the cost studies of any respondent here.

Trial Examiner Norwood: Aren't they the studies of National Lead?

Mr. Ewing: No, sir.

Trial Examiner Norwood: What are they the studies of?

Mr. Ewing: The studies of DuPont.

Mr. MacIntyre: But they are studies of cost factors that were used as a basis for dealings with the respondent, National Lead Company.

Mr. Ewing: They weren't used by National lead though.

Mr. MacIntyre: They served as a basis for the dealings of the contracts which are included.

Mr. Ewing: They served as no basis whatever for anything.

Trial Examiner Norwood: Well, these are all subject to substantial connection. Of course, throughout this whole thing this must be the case. They are received in evidence. Proceed.

967 Mr. MacIntyre: If your Honor please, before going ahead with the witness this morning I want to offer in evidence a document heretofore marked for identification as Commission's exhibit 92 as a report to the stockholders of the American Smelting and Refining Company made by a stockholders committee investigation on May 10, 1922.

Mr. Ewing: I will object to that on the ground that there has been no background laid for it by which to determine whether it is relevant, material or competent.

The report of the stockholders of the American Smelting and Refining is not a party to this case and does not involve any respondents purely hearsay with respect to any respondents.

Mr. MacIntyre: If your Honor please, there is considerable background material in that document concerning the activities of the members of the Board of Directors of the National Lead Company; namely, Mr. Daniel Guggenheim and others of the Guggenheim family.

And it shows what their purpose was in moving as they did in making these acquisitions during the early years of this country as I disclosed by the exhibits you have just received in evidence.

I submit, your Honor, the document is wholly incompetent as far as each and every respondent is concerned and as far as anything that now appears in the
968 record is irrelevant. Certainly that is not proof by introducing hearsay material that is prepared by some other company's representatives. You might just as well prove it by a newspaper.

Mr. Collin: On behalf of the Anaconda Copper Company, I wish to join in Mr. Ewing's objection.

Trial Examiner Norwood: This Commission's exhibit—

Mr. MacIntyre: The Secretary of the American Smelting and Refining Company was on the stand and identified that through oral testimony subject to which he was subjected to cross-examination, his identification having taken place beginning at page 65 of the record.

It was Mr. Brockington, the Secretary of that corporation.

Mr. Ewing: Of course, we don't dispute that he identified it, your Honor, but still that doesn't make it competent evidence against us.

Mr. MacIntyre: It is a record that was made in the regular course of an investigation of that company and includes historical material of the background going back to 1891.

Mr. Ewing: How you can say that it is a record made in the regular course of the business of that company is more than I can see. It is entitled, "A Report to Stockholders of the American Smelting and Refining Company by the Stockholders Committee of Investigation."

Now the circumstances of the appointment of the
969 Committee and the background, none of these things appear. And I say we might just as well attempt to make proof of that material by offering newspapers.

I submit that it is going much too far.

Mr. MacIntyre: If your Honor please, I would just like to make this observation. The factual material set forth therein has been subjected to the tests of a review by the late Chief Justice Taft of the United States Supreme Court and other eminent people in the legal profession acting as judges for the benefit of not only the stockholders at large of the American Smelting and Refining Company, but of Mr. Daniel Guggenheim who was the moving spirit behind the organization of the National Lead Company, the respondent here.

Trial Examiner Norwood: I don't know that that would make it relevant in this case.

Mr. MacIntyre: The activities of the man who organized the principal respondent in this case and the purpose for which he organized it doesn't make it relevant.

Trial Examiner Norwood: I wouldn't think of ruling on this at this time until I examined it.

Mr. MacIntyre: I would ask you to take it under advisement.

Trial Examiner Norwood: I will have to reserve my ruling on that. Commission's exhibit 92 being securely bound and having 142 numbered pages and entitled,
970 "A Report to the Stockholders of the American Smelting and Refining Company" is offered in evidence and the ruling is reserved on it. Proceed.

Mr. MacIntyre: Now, if your Honor please, I offer into the record Commission's exhibit heretofore marked for identification as 22-A to Z-47 as a statement. 47—it is a historical statement of the organization and the operations, American Smelting and Refining Company and its subsidiaries and containing a showing of its connections with the formation and start of the respondent, National Lead Company.

That document was marked for identification in the record and identified by the Secretary of the American Smelting and Refining Company, Mr. Brockington.

Brockington, beginning at page 35 of the record. I want to call your Honor's attention to the fact that this is an ancient document and it therefore is entitled—we are entitled to have applied to all the rules of evidence that would apply to an ancient document of a historical nature.

Trial Examiner Norwood: It goes to identification.

Mr. MacIntyre: No, it goes beyond that. It was prepared as shown by oral testimony in 1912 by responsible officials of the American Smelting and Refining Company and as a statement of its history. I want to say that this offer as well as the immediately previous one are of-
971 fered in connection with the charges contained in subparagraph 8 of paragraph 7 as it appears on page 5 of the mimeographed copy of the complaint relating to the relationship of the National Lead Company and the American Smelting and Refining Company.

There is a charge of conspiracy in a sense and when you have competent evidence and especially of this form going back into the history of the relationship, there is nothing that can be more competent—that is unless we had the man who prepared this here to testify and that is something we can't do because he is dead.

Mr. Ewing: Might I just have a moment before making my objection?

Trial Examiner Norwood: Yes, certainly. Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Ewing: I object to the receipt in evidence of this document or series of papers which are marked Commission's exhibits 22-A to 22-Z inclusive and form part, as I understand it, Commission's exhibit 24.

Trial Examiner Norwood: That goes from A to Z 47?

Mr. Ewing: That's right. I think your Honor should be advised that these same exhibits were offered before
Judge Ballinger in Washington on May 16th and the
972 same arguments were urged by the Commission's at-
torney to support his argument that they should be
received and Judge Ballinger rejected it.

I direct your attention to pages 511—

Trial Examiner Norwood: (Interposing.) I shall examine it de novo.

Mr. Ewing: I just want to direct your attention to pages 511 and 522 inclusive in which the objection finally appeared. We object to these documents upon the ground that they are incompetent, irrelevant, and immaterial.

They are hearsay as to every one of the respondents. They are prepared by no one of the respondents and they have no connection with any of the respondents.

As a matter of fact, they are not an official record of the American Smelting and Refining Company but the record shows that they were prepared by a clerk or some one on his own responsibility in that office, all of these grounds having been stated before and in order not to encumber the record I would like to make reference generally to the objections which I stated on May 16th and which appear in pages 511 to 522 of the record.

Mr. MacIntyre: The clerk that Mr. Ewing refers to was Mr. Earl who held the position and his last position with the company was vice-president and general counsel.

Mr. Ewing: He wasn't that when he prepared the
973 statement.

Trial Examiner Norwood: There is nothing being offered here as evidence against American. The question is whether such a relation is shown between National and American as would justify the records of these transactions of American being used as evidence against National.

Mr. MacIntyre: That is right.

Mr. DuBose: May I say, your Honor, that there is no proof here that that record was a company record and prepared in the ordinary course of business. It was not a company record.

The testimony was that it was prepared for the man's own use.

Mr. MacIntyre: The testimony is that it was prepared for the use of the company in its organizations and it has been referred to for more than 30 years as such in the offices of that company. And, if your Honor please, I want to refer you to a manner in which it has been used.

I will refer you to exhibit 92—Mr. DuBose—

Mr. DuBose: (Interposing.) For identification?

Mr. MacIntyre: On page 48, there is a quotation.

Trial Examiner Norwood: Don't read it.

Mr. MacIntyre: I am not going to read it. There is a quotation from the record showing that all the stockholders of the company were informed that the company was 974 relying in part upon the information contained in Commission's exhibit for identification A to Z 47 for matters touching on the organization and history of the company.

Mr. Ewing: I think that insofar as counsel's statement—

Trial Examiner Norwood: (Interposing.) Commission's exhibits 22-A to Z-47 is what you meant to say; wasn't it?

Mr. MacIntyre: Yes.

Trial Examiner Norwood: You left out the number 22.

Mr. Ewing: I think insofar as counsel's last statement refers to exhibit 92 which is not in evidence should be stricken. I understand that we should not attack each other's statements but I think it is wholly improper to base his argument on an exhibit which is not in evidence.

Mr. MacIntyre: That is just one of the many connections that are contained in there.

Mr. Ewing: I want to call your Honor's attention to the fact that Mr. Brockington, the witness who was called and identified this document, when asked who had prepared the document testified that the man who prepared it, Earl, I think his name was, was a member of the legal department and was not an officer of the company.

And Mr. Brockington testified that he had not compared
it with the other record books of the company and this
975 document 22-A to Z-47 correctly set forth anything
from the official records of the company.

Mr. MacIntyre: That is one of the difficulties that we have run into in connection with ancient documents and that is the reason for the rules of evidence touching on ancient documents.

Mr. Ewing: You might just as well offer the newspapers.

Mr. MacIntyre: Ancient newspapers may be offered for the purpose of showing historical facts.

Trial Examiner Norwood: Well, I want to know, Mr. MacIntyre, what your opinion is to this one point. How are these transactions as stated here by and concerning American connected with National to such an extent that they may be used as evidence against National? Are you going to make the connection later or just what are you going to do?

Mr. MacIntyre: I would like to answer that question after I make the offer of the next two exhibits.

Trial Examiner Norwood: Well, go ahead and offer them because I am reserving the ruling on that one. Proceed.

Mr. MacIntyre: If your Honor please, I now offer into the record a document heretofore marked for identification as Commission's exhibit 93-A to 93-I inclusive and 94-A through 94-G inclusive, they being photostats of two con-
tracts which were entered into between American
976 Smelting and Refining Company and the respondents
National Lead Company; one of them on February
26, 1906 and the other on March 16, 1906, whereby those two companies with respect to their dealings fixed the price of pig lead for a period of 15 years.

The identification of these documents began on page 68 of the record having been produced from the office and identified by an officer of the American Smelting and Refining Company as contracts that the company had executed with respondent, National.

Now I want to say this that when you take this other background material in the pending offer as well as the

background material in the form of the minutes of the meetings of the Board of Directors of the respondent, National Lead Company, which are now in evidence and consider the pending contracts in the light of that it becomes somewhat clear. I don't say it is clear as it will be when closed here—that the Guggenheim family and the managers of the syndicate which controlled the National Lead trust up to 1891 when it became the National Lead Company, proceeded with a plan and purpose to eliminate competition in the production and sale of lead products and that these historical documents show that as a step in the execution of that plan they formed these combinations, the small group of men formed these combinations now represented by the American Smelting and Refining Company
and the respondent, the National Lead Company, and
977 then proceeded to have the two to enter into contracts
for the fixing of a price on pig lead in New York City
for a period that takes in a majority of the time between the time those corporations were formed and the present date.

When you consider all of those facts in the light of not the admission but the contention made here by representatives of the National Lead Company that the quotation in New York City on pig lead is an important and if not a controlling factor in fixing the price of the lead pigments which are in issue in this case when the relevance and the materiality of all these documents is certainly shown.

And in that connection I call your attention further to sub-paragraph D, of paragraph 8 of the complaint appearing on page 9 of the mimeographed form.

Trial Examiner Norwood: What does it state?

Mr. MacIntyre: The allegation that in offering for sale and selling dry red lead, litharge and other lead pigments, each respondent offers to sell red lead at $2.50 and litharge at $1.50 per 100 pounds over the American Smelting and Refining Company closing price of common pig lead at New York on the date the order is received.

Now you will find in documents now pending, 93 and 94, provisions which are in keeping with that charge of the complaint. Other exhibits have been received and they are
in keeping with the contentions made by counsel for
978 the National Lead that the price of pig lead is not only
influential and important if not controlling with respect to the fixing of the price on these lead pigments.

Mr. Ewing: I would like to make my own contentions without Mr. MacIntyre's help sometimes. I object to these documents on the grounds that they are irrelevant and immaterial.

They are contracts long since expired and not covering the greater part of the period between 1891 and today, and 15 years from 1906 to 1921 by which National purchased from the American Smelting and Refining Company.

They have nothing to do with litharge charges which are in the complaint. Litharge and red lead and not to be purchased by National of pig lead. As I say the contracts expired long ago and have no possible bearing on the situation.

Mr. MacIntyre: It is our contention that while the period specified in the contracts has passed, that the effectiveness of the agreement entered into and as expressed by the contract has continued with respect to the relationship of these two companies.

Mr. Ewing: Well, if that is the basis of the offer I suggest that he prove that fact first.

Mr. MacIntyre: We have to start first by showing how it arose.

Mr. Ewing: Start first by giving the competent back ground of the evidence.

979 Trial Examiner Norwood: I will have to reserve my ruling on that. Proceed.

Mr. MacIntyre: I want to say that we have quite a number of additional contracts which have been entered into between the respondent, National Lead Company, and the American Smelting and Refining Company pursuant to the terms of which the price of pig lead was fixed.

It covers a period running through the 30's and down into the 40's. Now we are not offering those at this time because we have witnesses waiting and it is going to take a long time to get through with the offers on those and I am going to withhold them for a later period in the hearings here and if Your Honor cares to do so, I certainly wouldn't urge you to do otherwise than to hold the pending offers until the additional ones can be included.

Trial Examiner Norwood: I am not going to rule on them until I know what they are.

Mr. Ewing: I take it that counsel's descriptions and characterizations both with respect to the offer of 93 and 94 and his last statement are in no way binding on the respondent?

Trial Examiner Norwood: Counsel's statement is not considered evidence.

Mr. Wright: Your Honor, we would like to recall to the stand Mr. Robert Dunn.

980 Mr. MacIntyre: If Your Honor please, before the witness is sworn, I would like to make this statement for the record and it is in response to a statement that Mr. Ewing made concerning rulings that Mr. Ballinger made on some of the pending exhibits.

My statement is this that Mr. Ballinger did not have before him as much of a record upon which to base his consideration of these exhibits as you now have and, in fact, you will have a better record before it is closed than you have today.

I just mention that as one possible factor that could enter into the consideration of the admissibility of the exhibits.

Trial Examiner Norwood: I am approaching the problem with an open mind and I shall give it a complete restudy.

ROBERT DUNN was recalled by the Commission and after having been duly sworn testified further as follows:

Direct Examination (Continued) by Mr. Wright.

Q. I believe you already testified, Mr. Dunn, in the record, that you made an investigation of various of the respondents in this matter?

A. I did.

Q. And in that connection, conferred with and went through the records of a number of responsible officials 981 of the respondents?

A. I did.

Q. I show you a document which is a photostat of Commission's exhibit 723 which has already been received into evidence (showing to witness); do you recognize that?

A. I do.

Q. I believe you testified on February 21, 1945 that that exhibit was handed you by Mr. Shindler of the Sherwin-Williams Company?

A. That's correct.

Q. Did you at the time of your former testimony state that that document was in the handwriting of Mr. Shindler?

Mr. Welch: I object, the record shows what he stated.

By Mr. Wright:

Q. Do you recall what you stated in your previous testimony?

A. It is marked the Shindler exhibit F and I probably stated—

Mr. MacIntyre: (Interposing) I move to strike the answer as not responsive.

Trial Examiner Norwood: This witness has testified heretofore?

Mr. Wright: Yes.

Trial Examiner Norwood: And he is asking him what he testified heretofore?

Mr. Wright: Yes.

982 Trial Examiner Norwood: I think he has the right to do that, certainly. The objection is overruled.

A. I testified that it was given to me by Mr. Shindler. If I said it was Mr. Shindler's handwriting that probably is not correct. It was handed to me by Mr. Shindler who had an assistant working with him.

I asked for freight rates and Mr. Shindler and the boy who was working with him cooperated and supplied me with the information I asked for. This photostatic copy of this handwriting—the handwriting appears to be of the assistant rather than of Mr. Shindler.

Q. Then if you testified prior to this time that it was in Mr. Shindler's handwriting, then it is incorrect?

A. That is incorrect. It is in the handwriting of the assistant who gave it to Mr. Shindler who gave it to me.

Q. Mr. Dunn, I show you a photostatic copy of Commission's exhibit 647 and I ask you to state if you have ever seen that before (handing to witness)?

A. I have.

Q. Where did you see it?

A. That is a photostatic copy of a copy of a letter which I obtained at the office of the National Lead Company. Mr. Harold Rowe had permitted me to see certain files and correspondence that I thought I might be interested in was
laid aside and I discussed it with Mr. Rowe to having
983 copies made to which he objected, but he said he would
be glad to have copies made.

This is a photostatic copy of a copy that he furnished me with.

Q. Was that paper found in the files of the National Lead Company?

A. It was found in the files of the National Lead Company and extracted from the folder by me, laid aside and discussed with Mr. Rowe later.

Q. Mr. Dunn, I show you a document marked for identification—

Trial Examiner Norwood: (Interposing.) Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Wright:

Q. I show you a document marked for identification as Commission's exhibit 614-A through Y, and I ask if you recognize it (showing to witness)?

A. I do.

Q. Where did you last see that document?

A. I probably last saw it when I prepared the files to send to Washington and I included it in the files then.

Q. It was in your possession then?

A. I was the one.

Q. Where did you obtain that document?

984 A. I called at the DuPont Company and talked with Mr. Richter of that company and discussed the various angles of this case and I asked if I could see correspondence between—

Q. (Interposing.) What is Mr. Richter's full name if you recall and what was his position with the DuPont Company?

A. I don't recall whether it was Harry.

Q. Do you recall what his position was with the company?

A. He was the manager or the general manager of a division—they have so many divisions down there—having to do with the paint division under whom was a Mr. Sintel who was in direct charge of paint and pigment I believe they call it.

Mr. Richter—I don't know if he was called a general manager of the division—but he was over Mr. Sintel who was in charge of the paint and pigment division.

Q. Do you recall about when it was when you called on Mr. Richter?

A. I would say it was in the summer. I would say probably July of 1943. It was July 16th I see by my identification marks when I talked to him. It was in 1943.

Q. I understood you to say that that document was handed you by Mr. Richter?

A. I asked Mr. Richter if I could see the files between his company and various other rollers of white lead and he took me into another room, a file room, and allowed me
to inspect any files there that I cared to. I saw this
985 paper and several other papers.

Some of them did not have extra copies and he had copies made for me. This one appears to have been one that was an extra copy and he said I could take it and it was extricated by me from the files of the DuPont Company.

Q. Will you tell us all you know about that document, any representations that were made to you at the time about it?

A. I have read it over but it says it is a white lead contract with the National Lead Company and it is a very detailed arrangement about how they would corrode the white lead and oil.

As I recall, the DuPont Company furnished the lead.

Mr. Ewing: I move to strike the answer on the ground that it is not responsive and on the further ground that the documents speak for themselves and the witness' comments is improper.

Trial Examiner Norwood: Read the question and the answer.

(The reporter read the question and answer as follows:

"Q. Will you tell us all you know about that document, any representations that were made to you at the time about it?"

"A. I have read it over but it says it is a white lead contract with the National Lead Company and it is a very
detailed arrangement about how they would corrode
986 the white lead and oil.")

Trial Examiner Norwood: He hasn't quoted from the paper.

Mr. Ewing: He made an effort.

Trial Examiner Norwood: He asked him what it was, didn't he?

Mr. Ewing: I submit that the document speaks for itself. As a matter of fact, my recollection of it is that there is nothing in it about having National corrode the lead.

Trial Examiner Norwood: The document does its own speaking about something else. It doesn't speak—

Mr. Ewing: (Interposing.) The witness was saying what it is.

Trial Examiner Norwood: The objection is overruled.

The Witness: The question was what representations were made to me about this paper?

Mr. Wright: Yes, that's right.

The Witness: I asked Mr. Richter about this paper and he gave no detailed explanation saying that this was a copy and I could have it for what it was worth to me. He did not give any detailed explanation to me as to what the paper was and what purpose it served.

Mr. Wright: Your Honor, I would now like to have some documents marked for identification by the
987 reporter. I believe the next number will be Commission's exhibit 798-A, through 798-Z-13.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Mark those as Commission's exhibits 798-A through 798-Z-13.

(The documents referred to were marked Commission's Exhibits 798-A, 798-B, 798-C, 798-D, 798-E, 798-F, 798-G, 798-H, 798-I, 798-J, 798-K, 798-L, 798-M, 798-N, 798-O, 798-P, 798-Q, 798-R, 798-S, 798-T, 798-U, 798-V, 798-W, 798-X, 798-Y, 798-Z, 798-Z-1, 798-Z-2, 798-Z-3, 798-Z-4, 798-Z-5, 798-Z-6, 798-Z-7, 789-Z-8, 798-Z-9, 798-Z-10, 798-Z-11, 798-Z-12, 798-Z-13 for identification.)

Trial Examiner Norwood: We will take a short recess.

(A short recess was taken.)

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. Mr. Dunn, I believe you testified before that you conducted an investigation of the Glidden Company?

A. That's right.

Q. Do you recall about at what time that occurred?

A. I called on Glidden twice. One time would probably be in the early summer of 1943 and I returned to Glidden in December—I know it was pretty close to just a few
988 days before Christmas of 1944 probably or 1945.

Q. On the occasion of those visits did you confer with responsible officials of the Glidden Company?

A. I did. I first contacted Mr. Sprague who is a vice-president of the company in his office downtown at the Union Trust Building at 19th and Euclid and he referred me to Mr. Radloff who is the sales manager and through Mr. Radloff, a Mr. Cole who I believe is the comptroller and a man in charge of the traffic department—I can't think of his name at the minute because it slips my mind right now.

Q. At the time of your investigation did you examine the files and the records of the Glidden Company?

A. I did.

Q. Did you secure certain documents from those files at that time?

A. Oh, a number of documents such as price cards and circulars and correspondence and invoices.

Q. I hand you herewith documents marked for identification Commission's exhibits 798 to Z-13 and I ask you if you can identify them (handing to witness)?

A. Yes. These are office copies of invoices from the Glidden Company which were obtained by me in the office of the Glidden Company in Cleveland and given to me by Mr. Cole. I assisted him in obtaining these invoices.

Q. Were these given to you as records of the Glid-
989 den Company of transactions covering lead pigments?

A. They were.

Mr. Wright: Your Honor, I offer Commissioner's exhibits 798-A through Z-13 in evidence.

Mr. Hinds: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Hinds: Rather than run the risk that Mr. MacIntyre will not be able to make good his hopes about it, we will ask the reporter to make copies of it at the Glidden Company's expense.

We think it is a very expensive thing but we can't safely do anything else. Will the reporter make photostatic copies of these and charge it to the Glidden Company's expense? I have no objection.

Trial Examiner Norwood: Is there any other objection?

Mr. Ewing: No objection.

Trial Examiner Norwood: They are received in evidence.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 798-A, 798-B, 798-C,

798-D, 798-E, 798-F, 798-G, 798-H, 798-I, 798-J, 798-K,
798-L, 798-M, 798-N, 798-O, 798-P, 798-Q, 798-R, 798-S,
990 798-T, 798-U, 798-V, 798-W, 798-X, 798-Y, 798-Z,
798-Z-1, 798-Z-2, 798-Z-3, 798-Z-4, 798-Z-5, 798-Z-6,
798-Z-7, 798-Z-8, 798-Z-9, 798-Z-10, 798-Z-11, 798-Z-12,
798-Z-13, were received in evidence.)

Mr. Wright: I have no further questions of this witness.

Trial Examiner Norwood: Is there any cross-examination?

Mr. Ewing: I have no cross-examination.

(Witness excused.)

991 Mr. MacIntyre: I will call Mr. Wormser.

FELIX E. WORMSER was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. MacIntyre.

Q. Will you give your name and address to the reporter?

A. Felix E. Wormser, 420 Lexington Avenue, New York City.

Mr. MacIntyre: Before we proceed further with questions of the witness, I would like to ask Mr. Ewing a question concerning Commission's Exhibit for Identification 506-D, E, and L.

Mr. Ewing, that is a photostat of a letter that was sent, the original of which was sent by Mr. Carter to Mr. Richter of the du Pont Company, with this signed copy going to Mr. Wormser, is that correct?

Mr. Ewing: That is the fact.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

You may proceed.

By Mr. MacIntyre:

Q. Mr. Wormser, you are the Secretary of the Lead Industries Association?

992 A. Yes, sir.

Q. And you are the same person who appeared and testified in this case on January 16, 1945, here in New York, is that correct?

A. I believe that was the date; yes, sir.

Q. You have received from the Commission, requiring you to produce here today, a subpoena duces tecum, in which there are certain specified documents called for?

A. I do not believe it called for any documents, sir—just a plain subpoena.

Q. I am talking about the white document, such as you produced the last time you were on the stand, a document similar to that, requiring you to produce certain documents.

A. That is all I have received, sir. It does not call for anything that I can see.

Trial Examiner Norwood: This is a simple subpoena.

Mr. MacIntyre: Yes, there were two subpoenas sent to Mr. Wormser. The first one was an ad testificandum, and that is the one your Honor holds. The second one was served from the Records Division in Washington, calling for a production of documents.

Mr. Ewing: Off the record, please.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

993 You may proceed.

By Mr. MacIntyre:

Q. Do you think that it is probable that some clerk in your office accepted service of the subpoena without notifying you, that is, the duces tecum?

A. I don't think that is true.

Q. It would have been by registered mail?

A. It would have been by registered mail, sir.

Q. Well, during the noon hour, will you inquire of your staff to determine whether that has been done?

A. I will be glad to do that, sir.

Mr. MacIntyre: Mark this as Commission's Exhibit No. 515-H2.

(The paper referred to was marked Commission's Exhibit 515-H2 for Identification.)

By Mr. MacIntyre:

Q. When you were on the stand the last time, Mr. Wormser, you produced a number of documents in response to a subpoena duces tecum which had been served on you, do you recall?

A. Yes, sir.

Q. One of those documents which you then identified, or one series of those documents which you then identified, had been marked for identification as Commission's Exhibits 515-A thru 515-K.

I now show you a document marked for identifica-
994 tion as Commission's Exhibit 515-H2, and I ask you if
that is one of the original documents which you submitted at that time, and which the reporter did not get marked in regular order?

Mr. Ewing: Would you mind clarifying what you mean by "did not get marked in regular order"?

Mr. MacIntyre: Well, the documents in the group were marked "A" thru "K", and this document followed "H".

Mr. Ewing: And it is given a numeral because it was omitted? I see.

Mr. Wright: It was not marked.

Mr. Ewing: I see.

The Witness: Mr. MacIntyre, this appears to be part of the files that I gave you on January 16th.

Mr. MacIntyre: Yes.

The Witness: That is all I can say about it, sir.

By Mr. MacIntyre:

Q. And in the group of letters which have heretofore been marked for identification as Commission's Exhibits 515?—

A. (Interposing.) That's right, sir.

Q. And being a part of the files, it was taken from the offices of the Lead Industries Association and brought to the hearing, in response to a subpoena duces tecum which had been served on you?

A. That is right, sir.

Q. Well, how can you account for a document of
995 that kind being in the files of the Lead Industries As-
sociation?

Mr. Ewing: I will object to the form of the question.

Trial Examiner Norwood: Can you account for it?

The Witness: I would like to refresh myself about this particular episode. This was back in 1933, and it is 13 years ago. I haven't seen this until this moment.

Trial Examiner Norwood: I will sustain the objection to the original question. You may ask him another one.

By Mr. MacIntyre:

Q. Can you account, then, for the presence of that document in the files of the Lead Industries Association.

Refresh your memory and recollect it, as far as you feel that it is necessary for you to do so.

Mr. Ewing: I will object to the form of the question again. The witness should not be called upon to account for anything. He can tell, if he knows, how it got into the files of the Lead Industries Association.

Trial Examiner Norwood: I think that is the substance of his query.

The objection is overruled.

The Witness: Well, apparently this all relates to code days, on the second draft of our Lead Code; but I would have to study this and try to refresh my memory as to what transpired back in 1933, before I could give you
996 an accurate answer, Mr. MacIntyre.

By Mr. McIntyre:

Q. Well, in so far as you can, will you do that?

The Witness: Your Honor, this appears to me to be a letter which Mr. Willard Maston, who was then Chairman of our Lead and Oil Division in the preparation of certain sections of the Lead Code, wrote to Mr. Case, in an effort to meet Mr. Case's objection to the draft as it was then drawn; and he sent me a copy of it, apparently, so that I would be upholstered with Mr. Case's objections.

By Mr. MacIntyre:

Q. And you, as a part of the conduct of your office, as Secretary of the Lead Industries Association, placed it in your files there?

A. That is correct, sir.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

You may proceed.

By Mr. MacIntyre:

Q. Mr. Wormser, I believe you testified, when you appeared before, that you have been with the Lead Industries Association since November 1928.

A. Correct, sir.

Q. And that was the date of its organization?

997 A. Right, sir.

Q. Could you tell us whether the Association is an incorporated or an unincorporated Association?

A. It is unincorporated.

Q. And as a trade association for those who produce, sell and distribute lead pigments?

A. I would say who mine, smelt, refine, and manufacture lead and lead products.

Q. Including lead pigments?

A. Including lead pigments.

Q. Throughout the period of time that you have been Secretary of the Association, has The National Lead Company been a member?

A. The entire period, sir.

Q. What representative of The National Lead Company, do you recall, as having represented that company in its membership in the Lead Pigments Division of your Association?

A. Going back to 1928, Mr. MacIntyre?

Q. Yes, any of them since that period, that you can recall.

A. As a matter of fact, Mr. MacIntyre, if memory serves me correctly, in the early days our white lead pigment end of it was rather dormant, and it was only in the code days that we had an active group of white lead companies, and at that time Mr. Carter, Fred M. Carter, Vice-President of The National Lead Company, rep-
998 resented the National Lead Company, as near as I can recall.

Q. Through what period of time, do you recall him as being a representative of The National Lead Company in your Lead Pigments Division?

A. I would say during the code years. I have forgotten just when that started, but I would say around '32, '33, and '34.

Q. Do you know to what date?

A. Oh, I would say that the day of the Schechter decision of the NRA days. After that, it became inactive. It was only in the last, I would say, around 1937 or '38, when we were doing some promotional work in the way of national advertising to stimulate the use of white lead, that our white lead people became active again.

Q. Did Mr. Carter continue to represent National?

A. Mr. Carter then had retired.

Q. Who replaced him, if you recall?

A. Mr. Harold Rowe became active at that time.

Q. And he has continued to represent them?

A. He has continued to represent the National Lead.

Q. That was from what date?

A. Oh, I would say it was in the late '30's, as near as I can judge.

Q. Well, it is since the date of the retirement of Mr. Carter?

A. Yes, except that we were very inactive during
999 that period, Mr. MacIntyre. As I recall, we had practically no meetings; and all we did at that time—well, we did meet—but all we did was to discuss promotional activities.

Q. Well, had such meetings as you had, and had such activities as National carried on with you, during all of those meetings and activities Mr. Carter represented National down to the date of his retirement, and from that date on it has been Mr. Rowe, is that correct?

A. I think that is a fair statement, Mr. MacIntyre.

Q. Now, from your recollection, will you state who represented Eagle-Picher, in the Lead Pigments Division of your Association?

Mr. Ewing: I do not want to interrupt the proceedings, but I think I will object to this line of inquiry on the ground that it is not the best evidence and that the records are in fact available and have been identified, which would show exactly what representation was in this company.

Trial Examiner Norwood: I do not think that is subject to the best evidence rule. He should tell what he knows about it, if he knows.

Mr. Ewing: I submit that what he knows is immaterial. The fact is what the records of the Association show, with respect to its membership.

Trial Examiner Norwood: No, he can testify as to who belonged to it. That is, during his tenure of office. I will overrule the objection.

1000 The Witness: As I recall, at the start back in '28 and '29, Mr. R. M. Roosevelt, Vice President of the Eagle-Picher Lead Company, then represented White Lead Pigment Industry, but during Code days, Mr. Willard Maston, of the Eagle-Picher Lead Company, represented his company; and subsequently Mr. Maston died.

By Mr. MacIntyre:

Q. I don't recall.

A. About what year?

Q. Just a guess, Mr. MacIntyre—it would be around

1935 or '36. I must confess I am dubious as to just what year it was.

Mr. Seryiss: I think around the spring of 1938.

The Witness: And thereafter, Mr. Hayt, Mr. William Hayt, one of the officers of the Eagle-Picher Lead Company, represented the white lead and oil activities of Eagle-Picher.

By Mr. MacIntyre:

Q. And replaced the representation of Mr. Maston, just as Mr. Rowe had Mr. Carter?

A. That is right.

Q. And has continued since that date?

A. And has continued since that date.

Q. I don't think I asked you this previously: Eagle-Picher has been a member of your Association since November, 1928; is that correct?

1001 A. Correct.

Q. Has Anaconda maintained a membership in your Association since November, 1928?

A. Not Anaconda, sir; it is the International Smelting & Refining Company.

Q. In other words, Anaconda's interest has been represented in the Association through that latter company?

Mr. Collin: I object to the characterization of counsel.

Trial Examiner Norwood: Objection sustained.

He can tell you any facts to show a connection between the activities of the Association and Anaconda; for instance, paid their dues, or something like that. He can show that; but you are just asking him for an opinion.

You may proceed.

By Mr. MacIntyre:

Q. To your knowledge, did Anaconda have any representative at any meetings of your Association?

A. During Code days, Mr. F. Q. Case represented the International Smelting & Refining Company.

Q. To your knowledge, did he represent any interests of Anaconda?

A. He represented Anaconda White Lead.

Q. And for what period of time?

A. That was also during Code days.

1002 Q. Do you recall whether anyone, in addition to Mr. Case, represented Anaconda Copper?

Mr. Collin: Your Honor, I would like to know whether

Mr. MacIntyre is referring to a product or to a company here, when he says "represented Anaconda". Does he mean the respondent Anaconda Company? Does he mean the product, Anaconda White Lead? Or what does he mean? I think the record should be a little clearer than it is now.

Trial Examiner Norwood: Well, he can testify to the general fact, if he knows it. Then that can be clarified.

Objection overruled.

By Mr. MacIntyre:

Q. Mr. Wormser, I show you documents heretofore marked for identification as Commission's Exhibits 498-A and 499-D; and I will ask you, if you need to, to refer to those documents to refresh your memory and recollection, and then state whether or not that Anaconda Sales Company was represented by anyone at your meetings, or in any capacity in your Association?

A. That's right, sir, the Anaconda Sales Company.

Q. And over what period of time?

A. 1935, 1936, 1940, 1941, 1942, '43, and '44.

Q. Who represented Anaconda during that period of time?

A. Well, on the Board of Directors of the Association, Mr. Clarence Glass.

Q. Of the Anaconda Company?

1003 A. Of the Anaconda Sales Company.

Q. Now, will you please help us, as much as you can, in giving us the period of time that Mr. F. O. Case represented the company in the Association?

Mr. Collin: What company, Your Honor?

Trial Examiner Norwood: Clarify that, please. Do you mean the Anaconda Company?

Mr. MacIntyre: I mean any interest of the Anaconda Mining Company, which is the respondent here, or any of its subsidiaries.

Mr. Ewing: Then I object to the form of the question.

Trial Examiner Norwood: Read the question, please.

(The reporter read the question, as follows:)

"Now, will you please help us, as much as you can, in giving us the period of time that Mr. F. O. Case represented the company in the Association?"

Trial Exaimner Norwood: I will ask the witness to answer that question as it was last read there, not as it was explained. I would permit the question, if you consider that it is amended by your explanation there, because, as was pointed out, it broadens it in a confusing way.

Mr. MacIntyre: It is acceptable to me for him to answer it either way.

Mr. Collin: I will object to the question in its original form, in that the company is completely unidenti-
1004 fied. We have mentioned a number of companies
here.

Trial Examiner Norwood: That can be straightened out. The objection is overruled.

Answer the question, as read.

The Witness: I would say that Mr. Case represented Anaconda White Lead during Code days, and for a few years thereafter.

By Mr. MacIntyre:

Q. To what period of years do you refer to, when you say "Code days"?

A. I would say at the time of the National Recovery Act, when the NRA was passed, until it's termination by the Schechter decision of the Supreme Court.

Q. You would include there, would you, a period before the approval of the Lead Industries Code?

A. Well, that would synchronize with that period.

Q. That is included?

A. That's right.

Q. In your reference to the period as "Code days"?

A. Yes, sir.

Q. Now, did the Anaconda Sales Company have a membership in your Association?

A. I would like to refresh my memory, by referring to my records, because at times it has been International
Smelting & Refining, and at other times it has been
1005 Anaconda Sales, and just how that came about, and
when that change was made, I would hesitate to trust my own memory.

Q. I show you documents, heretofore marked for identification as Commission's Exhibits 498-A, with sub-letters thereto, 499-A, and subsequent sub-letters, and 500-A, to 500-H, inclusive; and I will ask you to state whether or not those are the records which you just stated you would need to refresh your memory and recollection in making an answer to the pending question.

A. Mr. MacIntyre, are the years designated on these exhibits?

Q. I believe so, just as they were marked when you produced them.

A. That is right; this will help, sir.

Apparently, back in 1929, '30, and '31, it was the International Smelting Company, with United Metal Selling Company as agents. That continued through '32, '33, '34, '35 and '36. Then in '37 it became International Smelting & Refining Company, Anaconda Sales Company, Agents. That is '38, and '39, '40, '41, '42, '43, '44. That brings us almost up to date.

Q. During this latter period, then, that you have indicated for the two companies, they both maintained membership and were represented in the Association by officials?

A. Well, the International Smelting Company—may I ask a question as to whether by "representation,"
1006 you mean on the Board or on the Division activities, or just how specific do you wish me to answer this?

Mr. Collin: I object to the question as containing two questions. He asked did each company maintain a membership, and then was there representation. I suggest that the question should be broken up.

Mr. MacIntyre: I would be glad to amend the question and ask him to answer the membership part of it first.

The Witness; Well, so far as International Smelting is concerned, they have mining, smelting, refining, and fabricating activities, and the representation on the Board was through Mr. Clarence Glass.

Mr. Collin: I move to strike it as not being responsive to the question, which deals with membership in the Association.

Mr. MacIntyre: I think we can get along faster by taking information of that kind. I accept it.

Trial Examiner Norwood: I will sustain the objection to the previous question and strike this end, because the record is in a confused state about it.

Just go ahead and ask your questions singly, and let him answer them as to representation, if you want to ask him that, and as to membership, and just point by point.

By Mr. MacIntyre:

Q. Well, Mr. Wormser, for the period you have
1007 indicated, in which you referred to both Anaconda

Sales and the International, those two members maintained membership in your Association, is that correct?

A. Well, the question in my mind is as to whether you consider it two companies or one company, because on our membership list it is listed as International Smelting Company, Anaconda Sales Company, Agents.

1008 Q. But they both were listed on your membership list?

A. In the way I have described it, sir.

Q. Well, I believe you have already stated that Mr. Glass served your Association in an official capacity as a representative of the Anaconda Sales Company.

A. Of the Anaconda Sales as agents for the International Smelting Company, as the director of the Association.

Q. And in that connection, he attended meetings, did he, with other officials and directors of the Association?

A. Correct, sir.

Q. And some of those with whom he attended meetings were officials of The National Lead?

A. Yes, sir.

Q. Eagle-Picher?

A. Yes, sir.

Q. American Smelting & Refining?

A. Yes.

Q. The Glidden Company?

A. Yes, sir.

Q. The Sherwin-Williams Company?

Mr. Welch: Objection. There is not any showing that any officials of the Sherwin-Williams Company were represented at any time on the Board of Directors, and he has stated that the representative of International Smelting attended only the directors' meetings. That is as

1009 far as his testimony has gone.

Trial Examiner Norwood: Well, I think he is making a query there as to whether they were represented or not.

Will the stenographer read the question, please?

(The reporter read the question, as follows:

"Q. And some of those with whom he attended meetings were officials of The National Lead?")

Mr. Hinds: I object, as far as The Glidden Company is concerned, as calling for a conclusion, asking the witness to characterize, without stating facts, I think he should first state the physical fact.

Trial Examiner Norwood: Well, the objection is too late for that question. The objection is overruled.

Now as to this objection here, as to the Sherwin-Williams ~~Company~~, I will sustain that objection, because the question is somewhat confused there, being a continued series, and I think counsel may state it in a complete question.

Mr. Hinds: Your Honor, please, the reason that my objection was not timely was because these names came so quickly that I did not have an opportunity to object. Will your Honor relieve me, and strike out the answer, as far as The Glidden Company is concerned, on the ground that I stated, namely, that it calls for a conclusion as to facts.

Trial Examiner Norwood: I shall overrule it on that ground.

1010 You may proceed.

By Mr. MacIntyre:

Q. The Sherwin-Williams Company maintained a membership in ~~your~~ Association since you have been with it?

A. Yes, sir.

Q. Who represented that company in its membership?

A. Going back to the conception of the Association, Mr. MacIntyre?

Q. Yes.

A. Again, if my memory serves me correctly, Mr. Schaefer, represented the company in the early days of membership in the Lead Industries Association, and subsequently, Mr. Coolidge.

Q. Over what period of time did Mr. Coolidge represent his company in your Association?

A. Mr. Coolidge represented the company from code days on.

Q. You mean by that, from say the beginning of 1933 on down to date.

Mr. Welch: Objection. Let him ask the witness what he does mean.

Trial Examiner Norwood: I think the form of the question is objectionable, leading.

By Mr. MacIntyre:

Q. Well, will you please state, Mr. Wormser, just precisely what period of time, including months and 1011 years, that you took into account in your last answer.

A. I would say—

Mr. Welch: Objection. I think the records of the Association are the best evidence as to the period of time, and the man's memory about it may or may not be correct.

Trial Examiner Norwood: Objection overruled. Answer the question.

The Witness: May I have the question again, sir?

(The reporter read the question.)

The Witness: That would be from the time of the National Recovery Act to its termination.

By Mr. MacIntyre:

Q. Will you refer to Commission's Exhibits for Identification 498, 499, and 500, and see if you can clarify or supplement this last answer of yours, as to the period of time that Mr. Coolidge represented Sherwin-Williams in your Association.

A. Mr. MacIntyre, I am afraid this record does not help me, because it merely lists the directors, and Sherwin-Williams had never been on the Board of Directors of the Lead Industries Association.

Q. What about the Pigments Division records there in that group? Will that help you in refreshing your memory and recollection as to Mr. Coolidge?

A. I can't find that in 499, Mr. MacIntyre. It is 500, I guess—even 500 is not specific on that score, Mr.
1012 MacIntyre.

Q. Have you in testifying as to any period of time that Mr. Coolidge represented Sherwin-Williams?

A. Well, according to this record, in 1933, when our White Lead and Oil Committee become active, Sherwin-Williams Company was one of the members of the Committee. But it does not indicate whether Mr. Coolidge was active at the time, and I would like to have my memory refreshed on that score.

Q. Will Commission's Exhibit for Identification 502-A help you in that connection?

A. Yes, sir. That would indicate that about that time Mr. Coolidge became active.

Q. And are we correct in our understanding that he has since represented them from that date on?

A. Yes, sir.

Mr. Welch: May we have a five-minute recess, please?

Triel Examiner Norwood: We will hold a short recess.

(A short recess was taken.)

Trial Examiner Norwood: Come to order. You may proceed.

By Mr. MacIntyre:

Q. Mr. Wormser, will you state whether or not The Glidden Company has maintained membership in your Association since you have been with it?

A. That is correct, sir; they have.

1013 Q. And will you state what officials of that company have represented it in its membership referring, if necessary, to Commission's Exhibits 498 thru 500-8, and sub-letters thereof, if need be, to refresh your memory and recollection?

A. As I recall, Mr. MacIntyre, Mr. P. E. Sprague was the official representative of the Glidden Company.

Q. And through what period of time, if you can recall, did he represent that company in its membership and the activities of your Association?

A. From the inception of the Association until the last year, I believe, a year or two ago. He has since taken on other responsibilities in the company.

Q. Until about 1944?

A. But he is still on our Board.

Q. On your Board of Directors?

A. On our Board of Directors.

Q. Will you state for what period of time the Metals Refining Company of Hammond, Indiana, has maintained a membership in your Association?

Mr. Hinds: Objected to, on the ground that the record already shows there is no such corporation, that being a mere division of The Glidden Company. You do not contend that that is a corporation, do you, Mr. MacIntyre?

Mr. MacIntyre: I am making no contention about that.

Trial Examiner Norwood: The objection is overruled.

1014 Clarify that situation. The witness will answer the question.

The Witness: Well, the Metals Refining Company was one of the original companies comprising the membership of the Lead Industries Association.

By Mr. MacIntyre:

Q. Has it maintained its membership since?

Mr. Hinds: Objected to, as the question implies a continuity of existence of the corporation. It should be limited, as such, to the period when it continued to exist as a corporation.

Trial Examiner Norwood: The objection is overruled.

The Witness: And according to our records, it has maintained its membership as a part of the Glidden Company.

By Mr. MacIntyre:

Q. And who represented it in its membership during that period of time?

A. Back in '28 and '29, William Willkie. Subsequently, when taken over by the Glidden Company, it was Mr. Sprague.

Q. From the date it was taken over?

A. From the date it was taken over.

Q. And when was that, if you can state?

A. I would say about 1930, Mr. MacIntyre.

Q. Now, I ask you state whether these officials of these
companies, to which you have made reference, in
1015 representing the membership of their companies in
meetings and other activities of your association, to
your knowledge, met together in connection with those
activities? I refer you to Commission's Exhibit 502-A for
the purpose of refreshing your memory and recollection,
if you need to make reference to such document.

Mr. Ewing: I will object to the form of the question.

Trial Examiner Norwood: Read the question, please.

(The reporter read the question.)

Trial Examiner Norwood: Counsel will make us much happier if he will reframe that question.

By Mr. MacIntyre:

Q. Mr. Wormser, will you state whether or not the representatives of National, Eagle-Picher, Glidden, and Anaconda, Sherwin-Williams—that is, the representatives of those companies—met in connection with any activities carried on through their membership in your Association?

Mr. Ewing: I will object to that, not only on the question of form, but also on the ground that it is irrelevant and immaterial, and further on the ground that it is incompetent and not the best evidence.

Trial Examiner Norwood: Objection overruled.

The Witness: May I ask Your Honor whether Mr.
1016 MacIntyre refers to the entire period of the existence
of Lead Industries Association?

Mr. MacIntyre: On any occasion.

The Witness: On any occasion?

Mr. MacIntyre: Yes.

The Witness: The answer is yes.

By Mr. MacIntyre:

Q. And would you say that the Commission's Exhibit for Identification 502-A is a record of a meeting of such representatives?

Mr. Ewing: I will object to that, Your Honor, as referring to a document that is not in evidence and which has already been identified.

Trial Examiner Norwood: I think the document shows what it is.

Mr. Ewing: It is not in evidence.

Mr. MacIntyre: Will you read the question, please?

(The reporter read the question.)

Trial Examiner Norwood: You are going beyond showing the contents. You are showing the inference that may be drawn from the contents, if it were in evidence.

May we have the question read again? It goes to identification of the document.

(The reporter again read the question.)

Trial Examiner Norwood: I believe I was wrong about that. He can identify that as a record of one of those 1017 meetings, if he can.

Mr. Collin: I wonder if I might see the Exhibit before that question is passed.

Trial Examiner Norwood: Let him identify it first.

Mr. Collin: But there was more to the question than his identification.

Trial Examiner Norwood: The objection is overruled.

Mr. MacIntyre: I will admit that the question goes to the authenticity of the document, but I think I am entitled to get his answer to the question.

Trial Examiner Norwood: Answer the question.

The Witness: This is a meeting of the White Lead Oil Committee of September 6th.

Trial Examiner Norwood: Don't read from the document; just say whether or not that is a record of such a meeting, as you have just testified that these people entered into or attended.

The Witness: This is a meeting at which these companies were represented.

Trial Examiner Norwood: It is one of those meetings that we were talking about?

The Witness: Yes, sir.

Trial Examiner Norwood: Go ahead.

By Mr. MacIntyre:

Q. And can you state, from your knowledge, 1018 whether or not those same officials, in representing their companies, attended other meetings of that same division of your association during that period of time, and subsequent thereto?

A. They did, sir.

Mr. MacIntyre: May we go off the record, please?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

The hearing stands in recess until 1:30 p. m.

(Whereupon, at 12:25 p. m., a recess was taken until 1:30 p. m., this day.)

1019

Afternoon Session.

1:00 p. m.

Trial Examiner Norwood: Proceed.

Mr. Collin: I wonder if your Honor would indulge me for about two minutes?

Trial Examiner Norwood: All right. We will take a short recess.

(A short recess was taken.)

Trial Examiner Norwood: Let the record show that Mr. Gardiner is now present in place of Mr. Collin.

Proceed.

FELIX E. WORMSER resumed the stand and testified further as follows:

Direct Examination (continued) by Mr. MacIntyre.

Q. Mr. Wormser, at the conclusion of the forenoon session, there was a statement made that there was a subpoena duces tecum sent to you by the Commission. Have you received that?

A. It was received this morning, Mr. MacIntyre.

Q. And do you have it with you?

A. I procured it from my office in the noon recess, and I have it here.

Q. Have you produced the document called for in 1020 the subpoena?

A. I have them here, sir.

Mr. MacIntyre: I ask that the documents be marked for identification as Commission's Exhibits.

Trial Examiner Norwood: They will be marked as Commission's Exhibits 799, 800-A through C, 801-A and B, 802-A and B, 803, 804, 805-A, B and C for identification.

(The documents were marked Commission's Exhibits 799; 800-A, 800-B, 800-C, 801-A, 801-B; 802-A, 802-B; 803; 804; 805-A, 805-B and 805-C for identification.)

By Mr. MacIntyre:

Q. Mr. Wormser, I show you documents marked for identification as Commission's Exhibits 799, 800-A through C, 801 A and B, 802-A and B, 803, 804, 805-A, B and C, and I ask you to state whether or not those are the documents that you have produced here this afternoon in response to the subpoena duces tecum?

A. Those are the documents referred to, sir.

Q. Are those records of the Lead Industries Association?

A. Those are the original records of the Lead Industries Association.

Q. Has the Lead Industries Association kept these records in its regular course of business and affairs?

A. These records have been kept by the Lead Industries Association in its regular course of business.

1021 Q. And as records of the transactions which they purport to be?

Mr. Ewing: I object to that. They speak for themselves.

Trial Examiner Norwood: But he can tell how he kept them.

Mr. Ewing: I object to the form of the question.

Trial Examiner Norwood: Objection overruled.

Mr MacIntyre: Read the question to the witness, please.

(The reporter read the question as follows:

"Q. And as records of the transactions which they purport to be?")

By Mr. MacIntyre:

Q. Are we correct in our understanding, Mr. Wormser, that the documents have been kept by the Lead Industries Association in regular course as records of the transactions which they purport to be?

Mr. Ewing: I make the same objection.

Trial Examiner Norwood: You may answer. The objection is overruled.

The Witness: Yes.

By Mr. MacIntyre:

Q. And as having been prepared by the parties whose names appear thereon as purporting to have prepared them?

1022 Mr. Ewing: I will object to that.

Trial Examiner Norwood: Will you state your objection?

Mr. Ewing: The documents appear to be minutes presumably prepared by a secretary who acted as secretary at the particular meeting involved. There are lots of other names on the documents in question.

Trial Examiner Norwood: I think he can ask a few questions to make it clear that these are true records.

Mr. Ewing: There is no dispute about it. We will concede that they are true and correct and original minutes of the meetings as stated thereon.

Trial Examiner Norwood: I will sustain the objection to that question.

By Mr. MacIntyre:

Q. Did you prepare the documents, Mr. Wormser?

A. Yes, sir.

Mr. MacIntyre: If your Honor please, I now offer in evidence the documents in photostatic form with the understanding that as soon as we are able to have these photostated, the photostats will be stamped as received in evidence and these original papers of the Lead Industries Association then returned to Mr. Wormser.

Trial Examiner Norwood: All right. Is there any objection?

1023 Mr. Ewing: If your Honor please, we object to the receipt in evidence of these exhibits that have just been offered on the ground that they are irrelevant and immaterial and relate primarily to a formulation and adoption of the code for the Lead Pigments Division.

Trial Examiner Norwood: Is there any further objection?

Mr. Gardiner: If your Honor please, may we complete our examination of the documents?

Trial Examiner Norwood: Go ahead.

Mr. Gardiner: If your Honor please, on behalf of respondents, Anaconda Copper Mining Company and International Smelting and Refining Company, I object to the introduction of Exhibits 799, 800-A through 802-B inclusive in that there is no showing in any of these documents that they apply to either of those two respondents, neither company's name appearing in any of these exhibits nor any officers of those companies.

As to Exhibits 803 and 804, I object to their introduction in evidence in behalf of those two respondents on the ground that they are immaterial and irrelevant.

Trial Examiner Norwood: What have you to say, Mr. MacIntyre, or Mr. Wright, as to the relevancy of those papers?

Mr. MacIntyre: They show that these respondents
1024 in meeting through their representatives participated in activities that are relevant to the charges in the complaint, which activities were not sanctioned by law.

Mr. Gardiner: If your Honor please, as to Exhibits 799 and 800-A through 802-B, I should like again to point out that there is no reference to the two respondents, the Anaconda Copper Mining Company and the International Smelting and Refining Company, and no mention of any officials of those two respondents.

Trial Examiner Norwood: I think if the material here is of value that they can be used against clients on the basis as showing whether they are members and so forth. It has to be connected in that way.

Mr. Ewing: I would like to point out that the only activity that those documents show is a discussion and a consideration of various questions in connection with the adoption of a code and they do not show any of the activities that are referred to were indulged in other than they were discussed.

Mr. MacIntyre: We cannot put everything in at once.

Trial Examiner Norwood: Well, I see here there are some discussions about prices and terms.

Mr. Ewing: Certainly there was a discussion. But it might well be relevant if and when the adoption of 1025 the terms is shown. But this is simply another instance of the cart being put in before the horse.

Mr. MacIntyre: Again I would like to say that there has been quite a good deal of evidence put in about the activities and that was put in last week in Washington.

Trial Examiner Norwood: The price discussions here were during the time that they were formulating the code, is that correct?

The Witness: Yes, sir.

Trial Examiner Norwood: I have always received these papers to show background and for the purpose of explanation if anything has been shown in the way of similar activities before or after the code.

For that purpose I shall receive these and overrule the objections. They will be received as marked.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 799, 800-A, 800-B, 800-C, 801-A, 801-B; 802-A, 802-B; 803, 804, 805-A, 805-B, and 805-C, were received in evidence.)

Mr. Gardiner: If your Honor please, I would like to have the record show that the same objection was made on behalf of the respondents, Anaconda and International, to the introduction of Exhibits 805-A and 805-B as were made to Exhibits 803 and 804.

Trial Examiner Norwood: You have your exception, the ruling is the same. 1026

By Mr. MacIntyre:

Q. Mr. Wormser, I refer you to a document marked heretofore as Commission's Exhibit 507-M, one of the documents that you produced from your own files before, and I ask you to state what that is.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

The Witness: Your Honor, this is a letter dated December 13, 1934, or a copy of a letter, written by me to Mr. Sprague of the Euston Lead Company wherein I ask him whether he desires to—

Mr. Ewing: (Interposing.) I object to any statement with respect to any contents of the document.

Trial Examiner Norwood: Do not state anything that is contained in the letter.

The Witness: I thought he wanted me to describe what it was.

By Mr. MacIntyre:

Q. Now, I refer to Commission's Exhibit 507-L and I ask you to state what that is?

A. It is a telegram sent to me by the Metals Refining Company, dated September 15, 1934.

Q. Will you tell us, whether or not, Mr. Wormser,
1027 that the letter that is referred to in that telegram in
the word "relet" is Commission's Exhibit for identification 507-M?

A. I believe it is.

Q. I now show you a document marked for identification as Commission's Exhibit 508-A, and I ask you to state what that is?

A. It is a letter from me dated July 27—a copy of a letter from me dated July 27, 1933 to Mr. F. O. Case.

Q. And I now refer to Commission's Exhibit for identification 508-D, and I ask you to state what that is?

A. It is a copy of a letter from me to Mr. Case dated July 21, 1933 with copies to Mr. Bendelari, Roosevelt, Zappert, Evans, W. Parmer Fuller, Jr., William Wilke, Jr., P. E. Sprague, H. J. Hain and A. P. Wetherill.

Q. I now show you a document marked for identification as Commission's Exhibit 508-B and I ask you to state what that is?

A. It is a letter from Mr. Case dated July 24, 1933 to me.

Q. Will you state whether or not Commission's Exhibit 508-D is the letter referred to in Exhibit 508-B, the first line?

A. May I read them? I haven't seen them in 13 years.

Q. If you need to refresh your recollection, go right ahead.

A. It is.

Q. I now refer to Commission's Exhibit 508-C and
1028 I ask you to state what that is?

A. This is a bulletin or notice to the members of the Lead Pigments Division, dated July 25, 1933.

Q. From whom?

A. From me.

Q. And would you say that that was an attachment to any other correspondence either to you or from you?

A. I don't know what you mean, Mr. MacIntyre, by attachment.

Q. Is it enclosed with any other correspondence that is now connected with it in any way.

A. It probably had some relation to it.

Mr. Ewing: I move to strike the answer. The question asked was whether it enclosed any other correspondence, and that is quite different.

Trial Examiner Norwood: I think that is more or less speculative, isn't it? Read the question and the answer.

(The reporter read the question and answer as follows:

"Q. Is it enclosed with any other correspondence that is now connected with it in any way?

"A. It probably had some relation to it.")

Trial Examiner Norwood: I am going to allow the motion to strike that answer and you can bring out
1029 what you want to, but it is rather confusing.

Mr. Ewing: That is why I made the motion.

Trial Examiner Norwood: Proceed.

By Mr. MacIntyre:

Q. I ask you, Mr. Wormser, whether Commission's Exhibit for identification 508-C was enclosed with or had any relationship to any other document to which you make reference?

Mr. Ewing: I will object to that on the ground that there are two questions in one and that it is indefinite in its scope,

Trial Examiner Norwood: Let him answer of his own knowledge.

The Witness: Your Honor, it is rather difficult for me to give a precise answer to that question without reading the letter carefully. I notice, for example, that this document that I sent out on July 25 being attached to another letter here, July 24, apparently mailed from Chicago— I don't know whether I could have received it in time to send this other announcement, and I would like to study it to see whether it is connected with it.

Trial Examiner Norwood: If that document was enclosed with or had any relation to—

By Mr. MacIntyre:

Q. (Interposing.) —any documents to which you can now make reference?

1030 A. Well, both documents refer to pigments. This notice of mine of July 25 relates to lead pigments and this letter of Mr. Case's has some bearing on pigments.

But what the connection between the two is, I would have to study and reflect a bit before I can give an intelligent answer.

Trial Examiner Norwood: Well, you can answer the question as to the enclosure and that vague query to which you can make reference—that is not clear to me as to what that means. I will sustain the objection to the question as it now stands.

The Witness: As a matter of fact, your Honor, I see no reference to an enclosure in my notice here, so I don't think, Mr. MacIntyre, that it really was enclosed.

By Mr. MacIntyre:

Q. Now, I refer you to Commission's Exhibit 510-E for identification, and I ask you to state what that is?

A. This is a letter from Mr. Maston.

Q. Of the Eagle Picher Lead Company.

A. Dated August 21, 1933 to me.

Q. I now call your attention to Commission's Exhibit for identification 510-C and D and ask you to state what that is?

A. This is a letter dated August 23, 1933 to Mr. Maston. It is a copy of a letter from me to Mr. Maston dated August 23, 1933.

1031 Q. Now referring to Commission's Exhibit 510-B, I ask you to state what that is?

A. It is a copy of a telegram dated August 24 from me to Mr. Maston.

Q. And now refer to the document for identification, Commission's Exhibit 510-A, and I ask you to state what that is?

A. It is a telegram from me to Mr. Maston dated August 25, 1933.

Q. I now call your attention to Commission's Exhibit 511-A through D, and I ask you to state what that is?

A. It is a letter from Mr. Maston of the Eagle-Picher Lead Company dated August 5, 1933 to me.

Q. That is Exhibit 511-A, that you are referring to, is that correct?

A. That's correct.

Q. And the other sheets are what?

A. Exhibit 511-B is a copy of a memorandum from Mr. Maston to Mr. Roosevelt of the Eagle Picher Lead Company. And Exhibit 511-C is apparently a memorandum of Mr. Maston which is an attachment to his memorandum of August 5, 1933 to Mr. Roosevelt.

Q. Can you tell us whether or not that Exhibit 511-B, C and D were enclosed by Mr. Maston with his letter to you under date of August 5, 1933 as is represented by Commission's Exhibit for identification 511-A?

1032 A. May I read the letter?

Q. Yes.

A. Yes.

Q. I show you documents marked for identification as Commission's Exhibit 514-A through H, and I ask you to state what each of these documents is. And when you make a statement, please refer to them by the sub-numbers. That is, whether it is one document of one page or more.

A. Exhibit 514-A and 514-B is a two-page letter addressed to me by Mr. Case of Anaconda Lead Products Company and is dated September 27, 1933.

Exhibit 514-C is a copy of a letter to Mr. Case from me dated September 22, 1933. That is not my typewriting and it is not my typewriter, and I am not sure about that letter.

Mr. Ewing: Do you have reference to Exhibit 514-C?

The Witness: Yes.

Mr. Wright: May I have the answer read?

Trial Examiner Norwood: Read the answer.

(The reporter read the answer as follows:

"A. Exhibit 514-A and 514-B is a two-page letter addressed to me by Mr. Case of Anaconda Lead Products Company and is dated September 27, 1933. Exhibit 514-C is a copy of a letter to Mr. Case from me dated September 22, 1933. That is not my typewriting
1033 and it is not my typewriter, and I am not sure about that letter.")

The Witness: I am not sure about that letter, sir. Exhibit 514-D is a letter from Mr. Carter, president of the National Lead Company to me, dated September 21, 1933.

Exhibit 514-E is a copy of a letter from me to Mr. Case dated September 19, 1933.

Exhibit 514-F is the second page of that letter.

Exhibit 514-G and H is an original letter from Mr. Case to me dated September 15, 1933.

By Mr. MacIntyre:

Q. I now show you documents marked for identification as Commission's Exhibits 517-A, B and C, and I ask you to state what they are?

A. Exhibit 517-A is a copy of a letter from Mr. F. M. Carter to Mr. W. P. Fuller, Jr., president of the W. P. Fuller & Company, San Francisco, dated November 10, 1933.

Exhibit 517-B and C is an original letter from Mr. Case to me dated October 7, 1933 and Exhibit 517-D is an original letter from Mr. P. E. Sprague to me dated October 7, 1933.

Q. I now show you a document marked for identification as Commission's Exhibit 515-D and E, and I ask you to state what that is?

A. Exhibit 515-D and E is a letter from Mr. P. E. 1034 Sprague to me dated September 29, 1933.

Q. That is, Mr. Sprague who represented the Glidden and the Metals Company in your association?

A. The Metals Refining Company?

Q. Yes.

A. Yes, sir.

Q. And also the Glidden Company?

A. Yes, sir.

Q. I now show you a document marked for identification as Commission's Exhibit 516-B and C, and I ask you to state what that is?

A. Exhibit 516-B and C is an original letter from Mr. T. H. Zappert of the Euston Lead Comany to the Lead Industries Association to my attention, dated, September 29, 1933.

Q. Mr. Zappert represented the Euston Lead Company and the Glidden Company in its relation with the association at times, did he?

A. He represented the Euston Lead Company at times.

Q. Can you tell us what Commission's Exhibit 516-A is?

A. Exhibit 516-A is a copy of a letter from me to Mr. Zappert dated October 4, 1933.

Q. Is that in reply to Exhibits B and C?

A. May I read it?

Q. Yes.

A. It is.

1035 Q. I now show you Commission's Exhibit 518-A and B, and I ask you to state what that is?

A. It is a copy of a letter from Mr. F. M. Carter to Messrs. W. E. Maston of the Eagle Picher Lead Company, and Mr. Harold Rowe of the National Lead Company, dated January 18, 1934.

Q. Is this reference to you in the upper righthand corner of Exhibit 518-A in Mr. Carter's handwriting?

A. It looks very much like it, sir. I am not a handwriting expert.

Q. And he sent this copy to you?

A. Yes, sir.

Q. I now show you a document marked for identification as Commission's Exhibit 519-B, and I ask you to state what that is?

A. It is an original letter from Mr. W. E. Maston of the Eagle Picher Lead Company to me dated January 13, 1934.

Mr. Welch: What date?

Mr. MacIntyre: January 31, 1934.

By Mr. MacIntyre:

Q. And now refer to Commission's Exhibit for identification 519-A, and I ask you to state what that is?

A. It is a copy of a letter from me dated February 2, 1934 to Mr. W. E. Maston.

Q. Is that a reply to Mr. Maston's letter which is 1036 Exhibit 519-B?

A. It is.

Q. Can you tell us whether Mr. Maston enclosed a map with his letter to you?

A. He did.

Q. What became of that map, Mr. Wormser?

A. It was filed and remained buried in the files until Mr. Dunn walked into my office and asked me for a zone map, and I had completely forgotten about it and I incorrectly informed Mr. Dunn that we had no map. I had completely forgotten about it.

Then we brought up the record of the code days and Mr. Dunn found it there.

Q. So you gave the map to Mr. Dunn?

A. That's right, sir.

Q. The zone map that you gave Mr. Dunn is the zone map that Mr. Maston enclosed with his letter to you under date of January 31, 1934, which is now marked for identification as Commission's Exhibit 519-B?

A. Yes, sir.

Q. I now show you Commission's Exhibit 520-B for identification, and I ask you to state what that is?

A. It is an original letter from Mr. Zappert of the

Euston Lead Company and marked to my attention dated July 31, 1933.

1037 Q. Can you tell us what Exhibit 520-A is?

A. It is a letter from my secretary to Mr. Zappert dated August 1, 1933.

Q. Is that an acknowledgment of and a reply to Exhibit 520-B?

A. Yes, sir.

Q. I now show you a document marked for identification as Commission's Exhibit 521-A and B, and I ask you to state what that is?

A. Two pages of an original letter from Mr. P. E. Sprague of the Metals Refining Company to me dated September 14, 1933.

Q. I now show you document marked for identification as Commission's Exhibit 522-A through H, and I ask you to state what they are, and refer in each instance to the letters as well as the identifying numbers.

A. Exhibit 522-A is a copy of a telegram from me to Mr. F. M. Carter, Chicago, Illinois, dated October 30, 1933.

Exhibit 522-B is a copy of a letter from me to Mr. Carter, dated October 30, 1933.

Exhibit 522-C is an original letter from me dated October 30, 1933 to Mr. Carter.

Mr. Ewing: What date?

The Witness: October 30, 1933.

Exhibit 522-D and 522-E is a suggested outline of
1038 a uniform basis for the sale of lead oxides in carlots.

Exhibit 522-F and 522-G is a suggested outline of a uniform basis for the sale of lead oxide in less carload lots.

Exhibit 522-H is a carbon copy of a suggested outline of a uniform basis for the sale of lead oxides in less carload lots dated October 4, 1933.

By Mr. MacIntyre:

Q. Is Commission's Exhibit 522-i the second sheet of the document marked for identification as Commission's Exhibit 522-H?

A. Exhibit 522-i is apparently the second sheet of Exhibit 522-H.

Q. Now I show you Commission's Exhibit for identification 523-A and I ask you to state what that is?

A. Exhibit 523 is a copy of a letter from Mr. Carter to Mr. Sprague dated November 9, 1933.

Mr. Welch: What date?

The Witness: November 9, 1933.

By Mr. MacIntyre:

Q. Now, I show you a document marked for identification as Commission's Exhibit 524-A through F, and I ask you to state what that is?

A. Exhibit 524-A to E is a mimeographed copy of a draft of the supplementary code of fair competition 1039 for the Lead Pigments Division of the Lead Industries Association dated November 11, 1933 and identified in the upper right-hand corner as the Lead Pigments Code, Fourth Draft.

Exhibit 524 is merely a letterhead entitled "Specification No. 1 of Docket 5253."

Q. Mr. Wormser, does your office of the Lead Industries Association issue any regular publication to the paint and oil trade, setting forth purported current market quotations on lead pigments?

A. No, sir.

Q. Is there such a publication issued to the trade?

Mr. Ewing: I object to that. It might be issued by anybody.

Trial Examiner Norwood: Well, I think he might tell us that. The objection is overruled.

The Witness: The only thing I know of in that connection, Mr. MacIntyre, are the trade papers serving the paint industry.

By Mr. MacIntyre:

Q. What trade papers do you have reference to?

A. For example, the American Paint Journal, Oil, Paint and Drug Reporter, Oil, Paint and Chemical Review.

Q. Does the Oil Paint and Drug Reporter purport to carry any current market quotations on lead pigments?

A. Yes, sir. It has a market section giving the quotations.

1040 Q. Is it published regularly?

A. It is published every week, I believe.

Q. Does your office furnish any information on lead pigments to that publication?

A. None whatsoever.

Q. Do they solicit for you any information on quotations?

A. We have never been solicited since the history of the Lead Industries Association for any such information from the Oil, Paint and Drug Reporter, or any other trade journal in the United States.

Q. Your answer to those questions is based upon what you knew as to what has been done?

A. Yes.

Q. Do you speak for all representatives and members of your Association or attempt to do so when you answer such questions?

Mr. Hinds: I object, Your Honor. This witness has no authority to speak for anybody here, and I hereby repudiate any representation by this witness on behalf of my client.

Trial Examiner Norwood: The objection is overruled.

Mr. Hinds: Will you read the question, please?

(Whereupon, the reporter read the question as follows: "Do you speak for all representatives and members of your Association or attempt to do so when you answer such questions?")

Mr. Hinds: How could he speak for any of these 1041 respondents?

Trial Examiner Norwood: Well, he could tell us whether he does or not. The objection is overruled. Let him answer.

The Witness: I am speaking for myself.

By Mr. MacIntyre:

Q. You don't purport to state that you have any knowledge then as to what these others have done in furnishing information to the publication?

Mr. Ewing: I object to that.

Trial Examiner Norwood: The objection is sustained.

By Mr. MacIntyre:

Q. Do you have any knowledge, Mr. Wormser, as to what these representatives of your Association members have done toward furnishing information to that publication?

Mr. Ewing: I object to that. I don't know what these representatives means.

Trial Examiner Norwood: I will let him answer that. Objection overruled.

Mr. Ewing: I think Mr. MacIntyre should specify the people to whom reference is made.

Trial Examiner Norwood: Read the question.

(Whereupon the reporter read the question, as follows:

"Q. Do you have any knowledge, Mr. Wormser, as to what these representatives of your Association mem-
1042 bers have done toward furnishing information to that publication?")

Trial Examiner Norwood: I think that is perfectly clear.

Mr. Ewing: Might I amplify it to this extent—Mr. Wormser has his own employees up there, and that is the organization of lead industries. Now respondents here, or some of them, are members of the Lead Industries Association, and it seems to me that there are two entirely different groups that are involved in the question as raised.

Trial Examiner Norwood: He is asking whether these representatives have furnished this publication with any price information. I think he may answer that. The objection is overruled. Answer the question.

The Witness: I do not know what their practice is in that regard.

Trial Examiner Norwood: You don't know what they have done?

The Witness: I do not know what they have done.

Trial Examiner Norwood: We will take a 5-minute recess at this time.

(Thereupon a short recess was taken.)

By Mr. MacIntyre:

Q. Mr. Wormser, I show you documents marked
1043 for identification as Commission's Exhibit 519-A and 519-B, and I ask you to state whether you recall the fact that Mr. Dunn, of the Federal Trade Commission, returned that zone map that is referred to in those documents to you after he borrowed it from you?

A. Frankly, I don't know where it is, sir. I don't recall whether he returned it or not.

Q. You have no recollection of his return of that map to you?

A. No, sir. I may have it, but that was about two years ago, and I haven't the faintest idea where it is now, sir.

Q. Will you check your records and files to see if you can determine whether that map is in your files as returned by Mr. Dunn to you?

A. I will be very glad to, sir.

Q. And turn it over to Mr. Ewing with authority for him to state whether what you do turn over to him is a zone map such as was enclosed by Mr. Maston to you with this document, Exhibit 519-B? Will you do that?

A. I will be very glad to, sir.

Q. All right.

Mr. MacIntyre: And if he does that, you will so state on the record for us, will you, Mr. Ewing?

Mr. Ewing: I will state whatever he tells me, sir.

1044 Mr. MacIntyre: If Your Honor please, I believe that concludes our examination of Mr. Wormser, and we tender him for cross examination.

Mr. Ewing: No cross examination on behalf of respondents.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

Mr. MacIntyre: If Your Honor please, I will now offer into the record a number of documents, which have heretofore been marked for identification.

I now offer Commission's Exhibits for Identification 666, 667, 668, 669, and 670. These exhibits have heretofore been identified as statements of statistics of the Lead Pigments Division of the Lead Industries Association, and as being what they purport to be on their faces thereof. We offer them as such.

Mr. DuBose: May we go off the record, please?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

Mr. Ewing: With respect to the current proffer of Exhibits 666 through 670, inclusive, for identification, produced by Mr. Dunn, and identified by him heretofore in the record, the papers being obtained by him from Lead 1045 Industries Association, I submit that they are not binding on any of the respondents as such, coming from the files of an outside party. And with respect to Exhibit 669 for identification, I would object to the reception in evidence of the notations in pencil writing on it, which, according to Mr. Dunn's testimony, were placed there by him.

Other than that there is no objection.

Trial Examiner Norwood: They came from the files of the Association, did they?

Mr. Ewing: Yes, sir.

Trial Examiner Norwood: Is there any further objection?

Mr. Welch: It is our understanding that an objection on behalf of one respondent runs to all.

Trial Examiner Norwood: Yes; you have the benefit of the objection and any exception.

The exhibits will be received as marked.

(The papers referred to, heretofore marked for identification as COMMISSION'S EXHIBITS 666, 667, 668, 669, 670, were received in evidence.)

Trial Examiner Norwood: Let us have an understanding here on the record about this pencil writing.

Have you offered that?

I don't know if that is necessary, but because they might identify it later.

1046 Mr. Welch: He has already identified it, Your Honor.

Trial Examiner Norwood: Whose writing is it?

Mr. Welch: Mr. Dunn has already testified he put it on there after he got the papers.

Mr. MacIntyre: But, if Your Honor please, we can not have this taken off there now, because I attempted to question Mr. Dunn about the notes. I questioned Mr. Dunn, when he was on the stand in Cleveland; and counsel for respondents objected, and their objections were sustained, because they stated that I was restricted at that time under the Commission's to do nothing other than identify the documents.

Mr. Ewing: You questioned him about those notes without any objection at all.

Mr. MacIntyre: In any event, I do not want them taken off as yet. I can say that I am not offering the pencil notes as a part of the document. We are talking now about Document No. 667.

Trial Examiner Norwood: The document will be received in evidence, all of it, except the pencil notes which we have been discussing.

Mr. Wright: Your Honor, with reference to the pencil notes, the record on page 346 is clear as to those, that they
were pencil notes in explanation of the figures them-
1047 selves in the light of explanations which were made
by the man who prepared them.

Mr. Ewing: He made his explanation, to the extent that you pressed it there without any objection.

Trial Examiner Norwood: I think that will do about the notes.

You may proceed.

Mr. MacIntyre: If Your Honor please, I now offer into the record documents heretofore marked for identification as Commissioner's Exhibits 498-A through 498-K.

I offer these as listing names of members of the Lead Industries Association during the periods of time, from 1929 to 1944, as identified and testified to in page 99 of the record.

Trial Examiner Norwood: Is there any objection?

Mr. Ewing: No objection.

Trial Examiner Norwood: They will be received as marked.

(The documents heretofore marked for identification as COMMISSION'S EXHIBITS 498-A, 498-B, 498-C, 498-D, 498-E, 498-F, 498-G, 498-H, 498-I, 498-J, and 498-K, were received in evidence.)

Mr. MacIntyre: If Your Honor please, I now offer into the record documents heretofore marked for identification as Commission's Exhibits 499-A through H.

1048 I offer them as records containing the names of the directors of the Lead Industries Association, the names of the members of the Executive Committee of the Lead Industries Association, and as records of names of officers of the Lead Industries Association, for various years during the period from 1928 to 1944; and as identified and testified about on page 100 of the record.

Mr. Ewing: No objection.

Trial Examiner Norwood: Received as marked.

(The documents referred to, heretofore marked for identification as COMMISSION'S EXHIBITS 499-A, 499-B, 499-C, 499-D, 499-E, 499-F, 499-G, and 499-H, were received in evidence.)

Mr. MacIntyre: I now offer into the record documents heretofore marked for identification as Commission's Exhibit 500-A through H, inclusive.

I offer these as records showing the names and addresses of the officers, directors, and trustees of the Lead Industries Association, and the names of members of committees of that Association in each of a number of the divisions of the Association, as made and revised annually since the first such records were made and kept in the offices of the Association, and as identified on pages 100 and 101 of the record.

Mr. Ewing: We have no objection to the receipt
1049 into evidence of the documents proffered, but would
like to reserve a qualification with respect to charac-

terization, if that be the correct term, that they were revised annually. I am not sure that that is the fact in the case of this exhibit.

Trial Examiner Norwood: It will be received as marked.

(The documents referred to, heretofore marked for identification as COMMISSION'S EXHIBITS 500-A, 500-B, 500-C, 500-D, 500-E, 500-F, 500-G, and 500-H, were received in evidence.)

Mr. MacIntyre: If Your Honor please, I now offer into the record the documents heretofore marked for identification as Commission's Exhibit 501-A through D, inclusive, as identified on page 101 of the record, as being records of minutes of a meeting of the members of the Pigments Division of the White Lead-In-Oil Committee of the Lead Industries Association, organized in 1933.

Mr. Ewing: We object to this upon the same ground that objection was made to the receipt in evidence of the other minutes offered here this afternoon.

Trial Examiner Norwood: Objection overruled. They will be received as marked.

(The documents referred to, heretofore marked for identification as COMMISSION'S EXHIBITS 501-A,
1050 501-B, 501-C, and 501-D, were received in evidence.)

Mr. MacIntyre: If Your Honor please, I now offer into evidence documents heretofore marked for identification as COMMISSION'S EXHIBITS 502-A through C, inclusive, as identified on the record on page 104, and subsequently, as being records of meetings of representatives of members of the Pigments Division of the Lead Industries Association, September 6, 1933.

Mr. Ewing: The same objection.

Trial Examiner Norwood: Received. Same ruling.

(The documents referred to, heretofore marked for identification as COMMISSION'S EXHIBITS 502-A, 502-B, and 502-C, were received in evidence.)

Mr. MacIntyre: If Your Honor please, I now offer into the record documents heretofore marked for identification as Commission's Exhibits 504-A and 504-B, as identified on the record at page 111 and 112. It goes over into 114—from 111 to 114 of the record. They are minutes of a meeting of representatives of these respondents on October 27, 1953.

Mr. Ewing: The same objection.

Trial Examiner Norwood: They will be received as marked.

Objection overruled.

(The papers referred to, heretofore marked for
1051 identification as COMMISSION'S EXHIBITS 504-A, and 504-B, were received in evidence.)

Mr. MacIntyre: I now offer into the record documents heretofore marked for identification as Commission's Exhibits 505-A and B, as identified on the record, page 116, as being minutes of a meeting of representatives of these respondents on October 28, 1933.

Mr. Ewing: The same objection.

Trial Examiner Norwood: The same ruling. They will be received as marked.

(The papers referred to, heretofore marked for identification as COMMISSION'S EXHIBITS 505-A and 505-B were received in evidence.)

Mr. MacIntyre: If Your Honor please, I now offer into the record the documents heretofore marked for identification as Commission's Exhibits 506-A through F, inclusive, as identified on the record, beginning at page 118.

1052 Mr. Ewing: Same objection.

Trial Examiner Norwood: It will be received.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 506-A, 506-B, 506-C, 506-D, 506-E, 506-F, were received in evidence.)

Mr. MacIntyre: If Your Honor please, I now offer into the record the documents heretofore marked for identification Commission's Exhibits 507-A thru M, as identified on the record beginning on page 120 and as further identified by Mr. Wormser today.

Mr. Ewing: The same objection.

Trial Examiner Norwood: Received as marked.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 507-A, 507-B, 507-C, 507-D, 507-E, 507-F, 507-G, 507-H, 507-I, 507-J, 507-K, 507-L, 507-M, were received in evidence.)

Mr. MacIntyre: I now offer into the record the documents heretofore marked for identification as Commission's Exhibits 508-A thru D; 510-A through E; 511-A thru D, as produced and identified by Mr. Wormser on the occasion of his appearance as a witness in this case on January 16, 1945, and again today.

Mr. Ewing: Just to make sure that my recollection is correct, I believe that when I made objections to the first minutes proper, it was on the ground that they were 1053 irrelevant and immaterial, as concerning transactions during the code period. That is the objection that I have been repeating.

Trial Examiner Norwood: Counsel may have his exception on that basis.

You stated your objection to 508, 510 and 511.

Mr. Ewing: Yes.

Trial Examiner Norwood: Received, as marked. The objection is overruled.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 508-A, 508-B, 508-C, 508-D; 510-A, 510-B, 510-C, 510-D, 510-E; 511-A, 511-B, 511-C, 511-D, were received in evidence.)

Mr. MacIntyre: If Your Honor please, I will now offer into the record the documents heretofore marked for identification as Commission Exhibits Exhibit 513-B, as identified through the concession of Mr. Wood, line 12, on page 131 of the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

Mr. MacIntyre: In that connection, I will refer you to the identification appearing on line 12, page 131 of the record.

1054 At this time I also offer documents marked for identification as Commission's Exhibits 513-A through E as attachments to the letter from Mr. Maston to Mr. Wormser, namely, 513-B, and as is shown by the record to be such attachment as lines 1 to 4 of Page 131 of the record, and Mr. Wormser's reply to Mr. Maston's letter, namely, Commission's Exhibit for identification 513-A.

Mr. Du Bose: Has Exhibit 513-A been identified as a reply?

Mr. MacIntyre: Produced by Mr. Wormser, along with the other documents.

Mr. Ewing: The same objection.

Trial Examiner Norwood: What are they—minutes?

Mr. Ewing: No, this is the correspondence referred to before, between Mr. Maston and Mr. Wormser.

Trial Examiner Norwood: It will be received as marked.

Objection overruled.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 513-A, 513-B, 513-C, 513-D, 513-E, were received in evidence.)

Mr. MacIntyre: Was there an objection to that?

Mr. Ewing: Yes, I made the same objection.

Mr. MacIntyre: That is, it was in the code period?

Mr. Ewing: And irrelevant and immaterial.

1055 Mr. MacIntyre: If Your Honor please, I now offer into the record, documents heretofore marked for identification as Commission's Exhibits 514-A thru H, as identified January 16, 1945, by Mr. Wormser when he appeared as a witness and as further identified today.

Mr. Ewing: Where were they identified?

Mr. Welch: Those were introduced today.

Mr. Ewing: They were not ever identified before?

Mr. Wright: They were identified as having been produced in the records of the Lead Industries Association.

Mr. Welch: There is no detailed identification until today.

Mr. MacIntyre: I don't recall.

Mr. Ewing: I make the same objection, with respect to the exhibits just proffered, and in addition, with respect to 514-C, my recollection is that Mr. Wormser today testified, correcting himself, and stated that he didn't think that that was his letter.

Trial Examiner Norwood: He made some objection to the typing.

Mr. Ewing: That's right.

Mr. MacIntyre: He just merely stated that he had no recollection that it was his letter. He did not deny it being a copy of his letter, and he produced it from his files.

1056 Mr. Dixon: He said he didn't remember having a typewriter type like that.

Mr. Ewing: He said it wasn't his letter.

Mr. DuBose: He said he could not be sure; he could not identify it, in other words.

Trial Examiner Norwood: Well, I will receive that along with the others, subject to a motion to strike if we find out, after some study that it is not apparent on the face of it, that it does belong in there.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 514-A, 514-B, 514-C, 514-D, 514-E, 514-F, 514-G, 514-H, were received in evidence.)

Mr. MacIntyre: If Your Honor please, I now offer into the record documents heretofore marked for identification Commission's Exhibits 515-A thru K, as identified when produced January 16, 1945, by Mr. Wormser, from the files of the Lead Industries Association, and as that identification has been supplemented today.

Mr. Ewing: I make the same objection.

Mr. MacIntyre: And I want to point out that that offer includes 515-H-2—515-A thru K, and including 515-H-2.

Trial Examiner Norwood: Yes, this ruling includes 515-H and then 515-H-2.

1057 (The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 515-A, 515-B, 515-C, 515-D, 515-E, 515-F, 515-G, 515-H-1, 515-H-2, 515-i, 515-J, 515-K, were received in evidence.)

Mr. MacIntyre: If Your Honor please, I now offer into the record documents herefofore marked for identification as Commission's Exhibits 517-A thru -D, as identified when produced from the files of the Lead Industries Association on January 16, 1945, by Mr. Wormser, and as that identification was supplemented today.

Mr. Ewing: The same objection, Your Honor.

Trial Examiner Norwood: Received as marked.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 517-A, 517-B, 517-C, 517-D, were received in evidence.)

Mr. MacIntyre: If Your Honor please, I now offer into the record the documents heretofore marked for identification as Commission's Exhibits 516-A thru C, as identified when produced from the files of the Lead Industries Association by Mr. Wormser, on January 16, 1945, and as further identified today.

Mr. Ewing: The same objection.

Trial Examiner Norwood: Received as marked. Objection is overruled.

1058 (The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 516-A, 516-B, 516-C, were received in evidence.)

Mr. MacIntyre: I now offer into the record the documents heretofore marked for identification as Commission's Exhibits 518-A and B, as identified on January 16, 1945, and as that identification was supplemented today.

Mr. Ewing: The same objection.

Trial Examiner Norwood: Received. The same ruling.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 518-A and 518-B, were received in evidence.)

Mr. MacIntyre: If Your Honor please, I now offer into the record documents heretofore marked for identification as Commission's 519-A and B, as identified on the record of January 16, 1945, and as it was supplemented today.

Mr. Ewing: The same objection.

Trial Examiner Norwood: Received as marked.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 519-A and 519-B, were received in evidence.)

Mr. MacIntyre: If Your Honor please, I now offer into the record documents heretofore marked for identification as Commission's Exhibits 520-A and B, as identified on the record of January 16, 1945, and as iden-
1059 tification was supplemented today.

Mr. Ewing: The same objection.

Trial Examiner Norwood: Received as marked. Objection overruled.

(The documents referred to, heretofore marked for identification as COMMISSION'S EXHIBITS 520-A and 520-B, were received in evidence.)

Mr. MacIntyre: If Your Honor please, I now offer into the record documents heretofore marked for identification as Commission's Exhibits 521-A and B, as identified on January 16, 1945 and supplemented through the testimony today.

Mr. Ewing: The same objection.

Trial Examiner Norwood: Received as marked. The objection is overruled.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 521-A and 521-B, were received in evidence.)

Mr. MacIntyre: If Your Honor please, I offer into the record documents heretofore marked for identification as Commission's Exhibits 522-A thru I, as identified on the record of January 16, 1945, and as such identification was supplemented today.

Mr. Ewing: The same objection.

Trial Examiner Norwood: Received as marked. The same ruling.

1060 (The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 522-A, 522-B, 522-C, 522-D, 522-E, 522-F, 522-G, 522-H, 522-I, were received in evidence.)

Mr. MacIntyre: If Your Honor please, I offer into the record documents heretofore marked for identification as Commission's Exhibit No. 523, as identified January 16, 1945, on the record, and as the identification was supplemented today.

Mr. Ewing: The same objection.

Trial Examiner Norwood: Received as marked. The same ruling.

(The paper referred to, heretofore marked for identification COMMISSION'S EXHIBIT 523, was received in evidence.)

Mr. MacIntyre: If Your Honor please, I now offer into the record documents heretofore marked for identification as Commission's Exhibits 524-A thru F, as identified January 16, 1945, on the record, and as that identification was supplemented through the testimony of Mr. Wormser today.

Mr. Ewing: I will make the same objection, with respect to 524-A through F; and with respect to 524-F, standing alone, that is the document that was described as being the letterhead of Lead Industries Association, with the typed statement "Specification 1" on it, and I see he has testified that he produced them in response to the subpoena. It does not seem to me it is necessary to clutter the record with 524-F.

1061 Mr. MacIntyre: I will withdraw the offer on 524-F, because I don't think it is necessary.

Trial Examiner Norwood: "A" thru "E", then.

Do you have the same objection?

Mr. Ewing: The same objection.

Trial Examiner Norwood: Received as marked.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 524-A, 524-B, 524-C, 524-D, 524-E, were received in evidence.)

Mr. MacIntyre: May we take a few minutes for recess?

Trial Examiner Norwood: We will take a short recess.

(A short recess was taken.)

Trial Examiner Norwood: Come to order.

Mr. MacIntyre: If Your Honor please, I move that we adjourn until 9:00 o'clock tomorrow morning, Eastern Standard Time.

Trial Examiner Norwood: We will adjourn until tomorrow morning at 9:00 o'clock Eastern Standard Time, which is 10:00 o'clock, Eastern Daylight Saving Time.

(Whereupon, at 3:40 p. m., June 25, 1946, the hearing in the above entitled matter was adjourned.)

1062 Room 605, Bar Association Bldg.,
New York City, New York,
June 26, 1946.

Met pursuant to adjournment, at 9:00 a. m., E. S. T.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Everette MacIntyre, Esq., Paul R. Dixon, Esq., and Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq., (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington, D. C.), T. J. McDowell, Esq., (101 Prospect Avenue, Cleveland, Ohio), appearing for Sherwin Williams Company.

Henry E. Gardiner, Esq., (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.) appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

Edmund P. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, and Richard Serviss, Esq., 1100 American Building, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

1063 James D. Ewing, Esq., W. R. McDermott, Esq., and E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

Roger Hinds, Esq., (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

1064 PROCEEDINGS.

Trial Examiner Norwood: Come to order. Pursuant to adjournment on yesterday the hearing on Docket 5253 is reconvened at 9:30 o'clock a.m., E. S. T., on the 26th day of June, 1946, in the trial room of the Bar Association Building, at 36 West 44th Street, New York, N. Y. Let the record show the following appearances:

Everette MacIntyre, Esq., Paul R. Dixon, Esq., and Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq., (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington, D. C.) appearing for Sherwin-Williams Company.

Henry E. Gardiner, Esq., (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.) appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

Edmund P. Wood, Esq., 1100 American Building, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

James D. Ewing, Esq., and E. Z. Dubose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

Roger Hinds, Esq., (165 Broadway, New York) appearing for the Glidden Company.

1065 You may proceed.

Mr. Wright: Your Honor, there was a subpoena duces tecum on the National Lead Company, the Secretary of the National Lead Company, which was returnable this morning; and I wonder if Mr. Ewing had any statement to make with reference to that.

Mr. Ewing: Might I say, in connection with the subpoena, Your Honor: With respect to specification 1, which calls for the production of certain price cards, we have here and are able to produce all of the cards covering the periods called for.

With respect to Specification 2, which calls for the production of certain contracts, we have been unable to as yet locate any contracts, partly because of the effort inherently required to find them, and the subpoena was only served 2:30 the day before yesterday, and also because of the fact that the manager of the department involved is out of town. Now, as soon as they can be found, if there are any in existence of the dates called for, they will be produced.

Trial Examiner Norwood: Yes, that ought to be satisfactory.

Mr. Wright: Mr. Ewing, I call your attention to the fact that Specification 1, calls for price cards and price announcements.

Mr. Ewing: They are the same thing. That is all
1066 we have.

Mr. Wright: Can we have those marked now.

(The cards referred to were marked Commission's Exhibit 806-A, 806-B, 806-C, 806-D, 806-E, 806-F, 806-G, 806-H, 806-I, and 806-J, for identification.)

Mr. Ewing: Off the record, please.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

Mr. Wright: Mr. Ewing, are the documents marked Commission's Exhibit 806-A through J for identification, price cards and price announcements of the National Lead Company, which were returned on the subpoena duces tecum this morning?

Mr. Ewing: That's right.

Mr. Wright: A further question: I call your attention to the pencil notations on these exhibits. Do you know anything with reference to those?

Mr. Ewing: I don't think you should be asking me to answer those questions, as though I were a witness. You might as well bring it out from a witness. You know I don't know anything about it.

Trial Examiner Norwood: You may call your witness.

Mr. Wright: I want to call Mr. Fred McCarthy.

1067 FRED McCARTHY was thereupon called as a witness for the Commission, and having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Will you give your name and address to the reporter, please?

A. Fred McCarthy, 111 Broadway, New York City.

Q. Mr. McCarthy, what is your position with the National Lead Company?

A. Manager of trade sales, which applies to package products, white lead and other paint materials.

Q. What briefly are your responsibilities in that position?

A. Well, I am associated with the General Office of the National Lead Company, and we work with our branch organizations in the various parts of the United States, in developing merchandising and other sales technique to increase the sales of these products; also, the Dutch Boy brand.

Q. Do I understand you to say it was just the package products?

A. That's right.

Q. How long have you been in that position?

A. Since March of 1943.

Q. What has been your other service with the
1068 National Lead Company prior to that?

A. Prior to March '43, I was manager of the Cincinnati branch of National Lead Company.

Q. For how long was that?

A. Since '39; and prior to '39 I was assistant manager of that branch.

Q. What were your duties briefly, as manager of the branch of the National Lead Company in Cincinnati?

A. The Cincinnati branch is a metal manufacturing branch, with factories in Cincinnati and Atlanta, and it covers ten states in the middle west for the company, selling all products of the company; and the branch management entails supervision of sales, production, personnel, accounting and the usual operations of a rather autonomous branch.

Q. Mr. McCarthy, do you know the sources of supply of pig lead that are used in the manufacture of pigments by the National Lead Company?

A. We buy from St. Joe Lead Company, United States Smelting and Refining Company, American Smelting and Refining Company, Anaconda Sales Company, and probably three or four other sources of supply throughout the United States.

Q. Does the National Lead Company, or its affiliates or subsidiary companies, produce any of the lead which is used in the manufacture of pigments?

A. We have a subsidiary, the St. Louis Smelting
1069 and Refining Company, which operates from mines
in the supply state area; but their production is nil,

so far as our own requirements are concerned, and we are dependent upon the market for our supplies.

Q. Does that hold true over a period of years, say back to 1930 to 1935?

A. Yes, we have never been a factor, to my recollection, in the mining business.

Q. You mentioned several suppliers of pig lead, which is used in the manufacture of pigments. Could you list those in the order of importance; that is to say, in the order of the largest purchases that you make.

Mr. DuBose: That is, of percentages, Mr. Wright?

Mr. Wright: Yes, percentages.

The Witness: We keep the figures, Mr. Wright; and while I am not connected with the metal purchasing department, I don't know that I would be a competent witness on a ratio basis, because all I could say would be to approximate them. But I would say from the figures I have seen from time to time, that our largest single source of supply would be St. Joe; and of course, since Pearl Harbor, the metal reserve division of the Federal Government has more or less monopolized the distribution of pig lead. They buy, of course, from the field, and we in turn are allocated in our own pig lead requirements from Washington from them.

1070 Q. From the records that you have seen, and do you have any other knowledge, whether the prices at which pig lead is purchased from St. Joe, are the same at which pig lead is purchased from American Smelting and Refining?

A. The market on pig lead is uniform, yes.

Q. Can you state what lead pigments the National Lead Company produces at the present time?

A. We produce basic carbonate of white lead, which is known in the trade as dry white lead. We produce basic sulphate of lead, which is another type of white lead, and those are the two large articles of commerce in the paint industry. And then, in addition, we produce various grades of dry red lead, which are used in the manufacture of red lead paints, and those, in the phraseology of the trade, are the only pigments we produce—lead pigments, that is.

Q. Does the Company also produce litharge?

A. Yes. Litharge is an oxide, and we are also a producer of litharge.

Q. Does it produce Orange mineral?

A. That is a very minor article of commerce, and we have produced orange mineral, but frankly, I don't know how long ago it was.

Q. Are any other additional pigments that the National Lead Company sells purchased from others, not produced by National Lead?

1071 Mr. Ewing: You mean lead pigments?

Mr. Wright: Yes.

The Witness: There is a product known as lead acetate, which at one time we manufactured, but because of its very minor tonnage, it is my understanding that in recent years we have purchased it of another chemical company, because the tonnage is such a minor factor that it didn't pay us to maintain its production.

Q. Does National produce the so-called "Blue-Lead"?

A. No, blue lead is a by-product of the smelting process, and since we are not miners and smelters, we don't have access to that type of material.

Q. Does National sell, or have they ever sold it to your knowledge?

A. Occasionally, when specifications have favored blue lead, in order to be competitive, we have secured it in the outside market and we sold it just to keep our place in the picture.

Q. From whom do you recall National purchasing it?

A. I would assume it would be secured from Eagle-Picher, the only known manufacturer of the material.

Q. Am I correct in understanding that National maintains factories and plants in various parts of the United States for producing these various pigments?

A. We are in production of white lead products of five points, the New York area at Perth Amboy, New
1072 Jersey; Philadelphia, Chicago, St. Louis, and in the Oakland section of San Francisco.

Q. Can you state the percentage of production that is accounted for at each one of these points?

Mr. Ewing: You mean the percentage of National's production?

Mr. Wright: Yes, the percentage of National's production.

The Witness: I would say 40% at Chicago; 30% in New York; and 10% at each of the other three points, Philadelphia, St. Louis and San Francisco.

Q. At what points does National produce lead sulphate?

A. Only in St. Louis.

Q. Can you state briefly the process by which lead sulphate is produced?

A. Lead sulphate is a pigment that is chemically precipitated from lead oxide. In other words, the litharge of a proper grade and fineness is precipitated in the presence of sulphuric acid, and produced as lead sulphate.

Q. What processes of producing basic carbonate are employed by National?

A. We are using three processes at the present time: The Carter process, in which atomized lead or lead dust is treated in revolving cylinders in the presence of acetic acid and carbon dioxide. And we use a Thompson-
1073 Stewart process of our own development, in which
lead oxide is precipitated chemically in the presence of acetic acid. And at one point we use the Old Dutch process, in which lead buckles or is exposed in stacks in piles of tanbark, for a period of 120 days, developing a form of lead carbonate at the end of that time by a rather natural process.

Q. Can you state whether the resulting product is substantially the same thing?

A. All three products comply with Federal Specifications.

Q. Is there any difference in these three products, produced by the three?

A. Yes, their differences are primarily for the raw material customer who, for example, wants certain qualities in his product. A potter ceramic manufacturer will have a different requirement than a paint grinder; and the manufacturers of putty will use a different grade of lead than the manufacturers of dry colors, for example.

Q. With respect to the basic carbonate that is sold to paint manufacturers, is there any difference in quality as between the carbonate produced by any of these three processes?

A. In this respect only: That some of these pigments are the finer particle size, because of their method of manufacture, and therefore they have different characteristics for the paint manufacturer in point of color and paint consistency and tinting strength.

1074 Q. Are the basic carbonate products produced by these three different processes distinguished by the National Lead Company by a brand or trade name?

A. Oh, yes, they are all sold on the Dutch Boy label; but we advertise in the trade papers, having five types of dry white lead, the 111 and the 333 which are made by the Thompson-Stewart process, the HTS and the Carter, which are made by the Carter process, and the Old Dutch, which is made by the Dutch processes.

Q. Are those three products all sold on the same price basis?

A. Oh, yes.

Q. There is no price or discount differentiation?

A. No, you see, Federal specifications, I imagine, are established by the Bureau of Standards, creating the quality classification for all pigments; and since all these products comply with Federal specifications, they are interchangable qualitywise or cost-wise.

Q. Those are minimum specifications, are they not?

A. They are pretty exact; they don't allow much latitude.

Q. I mean you could exceed those specifications, if it were possible?

A. Not and fall within their limits. For example, the carbonate latitude is between approximately 65 and 72%, and a product in excess of 72% wouldn't be satisfactory, or one less than 65% wouldn't qualify.

1075 Q. At what manufacturing point is red lead produced by National?

A. Red lead is made at Philadelphia, Brooklyn, St. Louis, San Francisco, Dallas, Charleston, West Virigina. I think that is all.

Q. At what point is the principal production of National; that is, could you give a rough percentage of that?

A. It would probably be a tie between St. Louis and Brooklyn.

Q. Approximately what percentage, would you think?

A. I am not a qualified witness, inasmuch as I don't have much contact with the red lead part of it.

Q. What has been your observation?

A. Well, guessing, I would say that probably 30% at St. Louis, and probably 30% at Brooklyn, and about 15% at Philadelphia and Charleston and the balance at Dallas.

Q. That guess is based on your observation and experience in connection with your official business?

A. Yes.

Q. At what points does National produce litharge?

A. In Brooklyn, Philadelphia, Atlanta, Charleston, West Virginia; St. Louis, Dallas, Chicago, San Francisco.

Q. Again, do you have any idea where the bulk of that production is accounted for, amongst those producing points?

A. No, I frankly wouldn't even hazard a guess at that.

Q. Can you make any brief statement about the
1076 processes of red lead and litharge?

A. Well, metallic lead is calcined or roasted and produces first litharge. I am not a chemist, but the chemical symbol for metallic lead is PB; and the chemical symbol for oxygen is O. So that while metallic lead is PB, litharge is PBO; and since the metallic lead in the roasting process picks up oxygen and becomes litharge, and then litharge is subjected to additional calcining or roasting and absorbs additional oxygen, and becomes red lead, which is PBO^4 or 4 parts of oxygen and 3 parts of lead.

Q. Mr. McCarthy, can you state the tonnages of white lead—or dry basic carbonate, and basic sulphate, dry red lead, red lead in oil, and dry litharge, that were produced by National in say 1943, in round numbers?

A. Your Honor, competition is present, and we are rather jealous of such confidential information, in spite of the nature of the accusation. What are your instructions on this question.

Trial Examiner Norwood: Mr. Wright, what are your contentions?

Mr. Wright: Well, it seems to me, your Honor that it is clear that the very nature of the complaint makes this information relevant.

Trial Examiner Norwood: What date was that
1077 you specified?

Mr. Wright: I asked for the year 1943.

Mr. MacIntyre: If your Honor please, National apparently has no compunctions about furnishing figures to the Lead Industries Association for some of the years, with respect to white lead-in-oil sales as shown by the Commission's Exhibit 666. Its competitors didn't give it any concern in so doing there, and we don't think it should here.

1078 The Witness: If your Honor please, we also report to the Bureau of Mines by compulsion, as do all the other people.

Mr. Wright: Your Honor, is the witness counsel in this proceeding?

Trial Examiner Norwood: Well, he has a right to give his reason for not wanting to give this information, which he thinks his company would not want him to give, probably.

Mr. Wright: Well, your Honor, we charge in the complaint that National is the dominant monopolistic influence in this field, and it seems to me that that information is certainly relevant; and if this witness can testify to it, why, it is competent.

Trial Examiner Norwood: We cannot find, though, that that is true in this stage of the inquiry.

Mr. Ewing: In view of the witness's statement, with respect to his exact knowledge on the subject, and the fact that the figures are reported and published by the Bureau of Mines, it would seem to me that they could use the Bureau of Mines figures for any year they wanted to.

Mr. Wright: Your Honor, the Bureau of Mines figures are not available to us. They purport to show general statistics of the industry as a whole. We are asking him about figures of The National Lead Company.

1079 Trial Examiner Norwood: I think we have had stipulations heretofore, as between respondents, and so on, that the Bureau of Mines—will they do that by agreement of the people, that is, furnish the information?

Mr. MacIntyre: I think that if National, through Mr. Ewing, on the record cares to inform the Bureau of Mines to turn that information over to us, I think we will have no difficulty.

Trial Examiner Norwood: Well, it seems to me that this information is rather necessary. I shall instruct the witness to answer the question.

Do you want the question read?

The Witness: I recall the question.

Mr. Ewing: May we go off the record, please?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Proceed.

Mr. Ewing: If your Honor please, I think counsel for the Commission will agree that we have tried to put at their disposal throughout this case all information we were asked to provide them. In this particular case the data sought to be elicited fr[illegible]his witness is of a nature that has never been disclosed [illegible] this company to anybody, ex-

cept as it may be disclosed to an organization such as
1080 the Bureau of Mines, or to the Lead Industries Association; and with respect to Lead Industries Association, that information supplied it by individual companies, is never given out to the other companies, except in a total form. In other words, National's production in particular lines supplied to Lead Industries Association is never passed out to any other member as National's production in that line.

In view of the fact that it is made a practice not to disclose that information, and in view of the fact that it regards it as an important element of its business which should be kept confidential, I feel constrained to instruct the witness not to answer the question.

Mr. Wright: Well, your Honor, I would like to point out that there is already in the record Commission's Exhibit 664, which consists of a memorandum of the sales of white lead and white-lead-in-oil by The National Lead Company, the total sales, which has already been received in evidence in the case.

Mr. MacIntyre: That is one of the pigments involved here. The other pigments, of course, are, I would say, no more important to the position of National in its desire to withhold its disclosure than would be white lead; and the charges in the complaint are to the effect that the large percentages of the total business in each of these disclosed its monopolistic position that it holds. How else can
1081 you prove that fact, in answer to the allegations of the complaint, except by getting answers to the questions of the line such as represented by the pending one.

Trial Examiner Norwood: It will not be necessary to put anything further on the record, because the rest of the talk had to be to the District Judge. The counsel has advised, or rather instructed and advised this witness to refuse, and I take it that the witness does refuse on the advice of counsel.

The Witness: Yes, sir.

Trial Examiner Norwood: Now the Commission's counsel know they are limited. They may go to the District Court for an order to make him answer, if they show it is relevant—if they show its relevancy, materiality, and necessity for it. In that case the Court will instruct the witness to answer it.

By Mr. Wright:

Q. Mr. McCarthy, has The National Lead Company received from the Lead Industries Association statistics which show the proportion of the production or sales of lead pigments of The National Lead Company to the total production of such pigments for the industry?

A. We received from the Lead Industries Association
total industry figures, and knowing what our own figures
are, we can determine in our own organization by ratio
1082 what our competitive position is; but we don't know
what share of the balance belongs to any individual
competitor.

Q. My question was: Has The National Lead Company ever received such information compiled to show the percentage of The National Lead Company to the total from the industry?

A. Regularly on each month, we can tell what our share of the total is.

Mr. Ewing: I move to strike that as not responsive.

Trial Examiner Norwood: Read the question and answer, please.

Mr. Wright: Your Honor, I accept that answer.

(The question and answer were read.)

Trial Examiner Norwood: Your motion to strike the answer is denied.

By Mr. Wright:

Q. In what form are the statistics showing the production of the industry received by National Lead Company from Lead Industries Association?

A. A page headed by the type of product, showing the total industry's production, deliveries and inventories, as of the end of the month.

Q. Does that page, as it is received from Lead Industries Association by National Lead Company, have entered upon it the percentage of National Lead Company's producation and sales, inventories, and shipments to the total?

1083 Mr. DuBose: (Interposing.) I object to that
question, as involving two concepts. He said Does it
have entered on it. At what stage do you mean, Mr.
Wright? Do you mean the way it was originally?

Mr. Wright: When it was received by The National Lead Company. That was the question.

The Witness: No.

By Mr. Wright:

Q. Do you report to the Lead Industries Association your total production, sales, shipments, and inventories of these pigments?

A. Yes.

Q. At what intervals?

A. Each month.

Q. And is that information also reported to the Bureau of Mines?

A. I think the Bureau collects it quarterly.

Q. Quarterly?

A. Yes.

Trial Examiner Norwood: Now is it confidential when you send it to the Association?

The Witness: Yes, sir.

Trial Examiner Norwood: And confidential, when you send it to the Bureau of Mines?

The Witness: Yes.

1084 By Mr. Wright:

Q. Is such information disseminated by any other individual or agency?

A. Not to my knowledge.

Q. Mr. McCarthy, will you state, as to dry basic carbonate, dry lead sulfate, white-lead-in-oil, dry red lead, dry lead-in-oil, and litharge, the percentage of the sales of the National Lead Company during the year 1943 to the total of such sales by the industry?

Mr. Ewing: I object to that question. It is similar to the prior question, and I advise the witness not to answer it.

Trial Examiner Norwood: I instruct the witness to answer the question. His counsel advises that he need not answer it.

Proceed with the examination. The counsel know their remedy.

Mr. Ewing: I advise him not to answer.

By Mr. Wright:

Q. Will you answer the question, Mr. McCarthy?

A. No, the same reason because those total figures are known to other people in the industry, and my ratio figures then apply. It would give them the identical information that I prefer not to answer.

Mr. Wright: I move to strike that answer as not responsive to the question.

Trial Examiner Norwood: Read the question again.

(Question read by the reporter.)

1085 Mr. Wright: Your Honor I amend my motion to strike to make it strike all after the word "no."

Mr. Ewing: I think I am entitled to have his reason under the circumstances.

Trial Examiner Norwood: It might stand there for the information of the court.

Mr. Wright: I submit your Honor if that information is to be in the record I don't like it to be in response to a question of mine.

Trial Examiner Norwood: Read the answer again.

(The reporter again read the answer.)

Trial Examiner Norwood: I think he has a point there. I will allow the motion to strike everything after the word "reason" there. And the answer will be to stand to this effect, "No, for the same reason."

By Mr. Wright:

Q. Mr. McCarthy, do you recall supplying information concerning freight rates on various lead pigments to representatives of the Commission in connection with an investigation of the National Lead Company?

A. I do.

Q. Are you able to state whether the freight rates actually used in the shipment of lead pigments from the National Lead Company to destination of the customer would be the same on red lead-in-oil or dry red lead or 1086 litharge when packed in 100 pound steel kegs as the rates applicable to white lead-in-oil or dry white lead when packed in 100 pound steel kegs?

A. I believe they are in the same freight classification.

Q. In other words, they would be the same commodity classification for rate making purposes?

A. I am not a traffic man but I believe they would be.

Q. And would carry the same rate?

A. Yes, sir.

Q. Now as to lead pigments such as red lead or litharge when shipped in barrels or bags, both less than carload and carload, would the rates on those products be in the same commodity classification and be the same as the rates on white lead when shipped in barrels or bags in the same quantities to the same points?

A. I believe they would be.

Q. Mr. McCarthy, are you familiar with the invoicing practice of the various branches of the National Lead Company in connection with handling transportation in lead pigments?

A. Yes.

Q. In connection with invoices covering a sale and shipment of a lead pigment would such an invoice carry on its face the date of the customer's order?

A. On some products it would.

Q. What products would you say?

1087 A. In the main products other than white lead-in-oil.

Q. Do I understand your answer to be then that it would cover all other lead pigments other than white lead?

A. Normally.

Q. Would such invoices on such products also have entered upon them the date of shipment to the customer?

A. Yes.

Q. Will you state whether in normal times shipments of lead pigments are made within a few days of the time the order is received by National Lead Company?

Mr. DuBose: If your Honor please, we make the same objection that was made in Washington on behalf of counsel for the Sherwin-Williams Company, I believe, on the ground that this is not the best evidence.

The invoices themselves would show in the case that Mr. McCarthy has given of the sales other than white lead, the date of the customer's order, and I believe that this is on all fours with the same question as the witnesses were asked in Washington which your Honor sustained.

Mr. Wright: There we had an attorney-examiner for the Federal Trade Commission testifying, and we had the manager of the trade sales of the National Lead Company who has already stated that he is familiar with the invoicing and shipping practices of the National Lead Company and who was, prior to his present position, a branch

1088 manager of the Cincinnati branch.

Trial Examiner Norwood: That other question was directed to what the invoices show and this one is directed to what is the custom of his company and what is his custom in making the shipments.

Mr. DuBose: Could we have the question read again?

Trial Examiner Norwood: Read the question.

(Whereupon, the reporter read the question as follows:

"Q. Will you state whether in normal times shipments of lead pigments are made within a few days of the time the order is received by National Lead Company?")

Mr. DuBose: I again state that the best evidence would be the invoices themselves which would show the date of the order.

Trial Examiner Norwood: Objection overruled. Answer the question.

The Witness: During normal times, yes.

By Mr. Wright:

Q. Would you consider that, say, the first three months of 1941 were normal times as to which that answer would be yes?

Mr. DuBose: The same objection.

Trial Examiner Norwood: Overruled.

The Witness: That was a comparatively normal

1089 period.

By Mr. Wright:

Q. In other words, as I understand your answer it is to the effect that in the year 1941 if an order was received by the National Lead Company for pigments, it would be shipped as quickly as possible by the National Lead Company to the customer providing the customer wanted shipment that way?

A. Yes.

Q. And how long a time would you estimate that would be in the ordinary case?

Mr. DuBose: We have the same objection to this whole line of questioning, I take it?

Trial Examiner Norwood: Yes. Counsel has an automatic exception. The same ruling applies.

The Witness: I would say as soon as possible.

By Mr. Wright:

Q. Would that be several days, a week, two weeks, three weeks, a month? Can you give any estimate?

A. Normally for reasons of service to customers our people would try to get the order out the same day if possible.

Q. It wouldn't run over a week then as a general matter unless there were some unusual circumstances between the time the order was received and the time of shipment?

A. Not normally.

Q. Mr. McCarthy, will you state as briefly as you
1090 can the method of marketing white lead-in-oil, dry white lead, red lead-in-oil, dry red lead in 100 pound kegs or smaller packages through the San Francisco branch of the National Lead Company?

A. During what period, Mr. Wright?

Q. Well, say the year 1943. I mean by that to explain any zones within which there would be price differentials and describe as well as you can the territorial limit of those zones, the differentials that apply to them, the quantity discounts and the trade discounts that are applicable.

Mr. DuBose: That is a rather involved question, your Honor. It involves about six or seven ideas.

Mr. Wright: I am asking for a narrative answer here as much as we can get it.

Trial Examiner Norwood: Read the question.

(Whereupon, the reporter read the question as follows:
"Q. Mr. McCarthy, will you state as briefly as you can the method of marketing white lead-in-oil, dry white lead, red lead-in-oil, dry red lead in 100 pound kegs or smaller packages through the San Francisco branch of the National Lead Company?")

Trial Examiner Norwood: I overrule the objection and ask the witness to answer that if he feels that he can.

The Witness: All of those package products have
1091 always been sold outright and never consigned by the Pacific Coast branch of the National Lead Company which manufactures in San Francisco and has divisional sales offices in Seattle, San Francisco and Los Angeles with warehouses in conjunction with these divisional offices.

These products were priced on the basis of quantities taken in single deliveries, the differences in price reflecting the freight rates in effect. The par territory or base territory on the Coast is the San Francisco Bay area.

And from my limited knowledge of West Coast operations, I believe the Commission's exhibit of the map in the complaint shows the zone in effect on the Coast.

By Mr. Wright:

Q. You would say then that that map represents an accurate description of the territorial extent of those ones on the Pacific Coast?

A. To my knowledge, Mr. Wright.

Q. What trade discounts were in force on the Pacific Coast during 1943?

A. Frankly, I don't know. Our West Coast operation is somewhat different than our other branches because of the distance.

Q. In connection now with the sale of dry pigments which would be dry white, both carbonate and sul-
1092 phate, dry lead and litharge, is there any difference between the way such pigments are handled on the Pacific Coast and the way such pigments are handled throughout the rest of the country?

A. No, sir.

Mr. Wright: May we take a short recess, your Honor?

Trial Examiner Norwood: Yes. We will take a short recess at this time.

(Short recess.)

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. Mr. McCarthy, do you recall that Mr. Robert T. Dunn of the Federal Trade Commission conversed with you on a number of occasions during the past few years in connection with an inquiry in this case?

A. Yes.

Q. Do you recall that you furnished him with a number of documents in connection with his investigation?

A. Everything that he asked for.

Mr. Wright: Mark these for identification as Commission's exhibits 807-A through L.

(The papers referred to were marked Commission's Exhibits 807-A, 807-B, 807-C, 807-D, 807-E, 807-F, 807-G, 807-H, 807-I, 807-J, 807-K, 807-L, for identification.)

1093 By Mr. Wright:

Q. I show you documents marked for identifications as Commission's exhibits 807-A through L and ask you if you remember those documents?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed.

The Witness: This data is explanatory material showing the territorial boundaries in the white lead division between the branches of the National Lead Company.

By Mr. Wright:

Q. That was furnished to Mr. Dunn by yourself as being that information?

A. That is right.

Q. And can you state what period of time to which that is applicable?

A. I would say that it is currently in effect and has been in effect for at least the last 10 years.

Mr. Wright: Your Honor, I offer Commission's exhibits 807-A through L in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Ewing: Might I ask the witness one question with respect to a notation that appears on the documents marked as Commission's exhibit for identification 807-B, C, D, and E?

1094 Trial Examiner Norwood: Certainly.

Mr. Ewing: On the bottom of each, Mr. McCarthy, I notice the notation change 5/1/40 and in view of your last answer, will you tell us what that means?

The Witness: In May of 1940, there was a slight revision of common boundary between the Cleveland, Cincinnati and Pittsburgh branches.

Mr. Ewing: With respect to exhibit 807-L for identification, I call your attention to the notation "revised May 1, 1939". Does that apply to all of these documents constituting Commission's exhibit 807-A to L inclusive?

The Witness: Yes.

Mr. Ewing: No objection.

Trial Examiner Norwood: They will be received as Commission's exhibits 807-A through L.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 807-A, 807-B, 807-C, 807-D, 807-E, 807-F, 807-G, 807-H, 807-I, 807-J, 807-K, 807-L, were received in evidence.)

By Mr. Wright:

Q. Do I understand it then, Mr. McCarthy, that this is a description of the boundaries of the various branch offices of the National Lead Company showing the territories in which they handle business in white lead-in-oil?

1095 A. That is correct.

Q. In other words, an order which was received from a customer who would be within the territorial limits described on exhibit 807-A under St. Louis branch, that business would be handled through the St. Louis office?

A. That is right.

Q. Mr. McCarthy, do you recall any transactions between the National Lead Company and Diemont-Levy Company of 57 Portland Street, Boston, Massachusetts?

A. It is my understanding that that concern—

Mr. Ewing: (Interposing) I would like the question to be read again.

Trial Examiner Norwood: Read the question.

(Whereupon, the reporter read the question as follows:

"Q. Mr. McCarthy, do you recall any transactions between the National Lead Company and Diemont-Levy Company of 57 Portland Street, Boston, Massachusetts?")

Trial Examiner Norwood: Answer the question.

The Witness: It is my understanding that they were a white lead-in-oil agent of ours and a customer on other paint products for quite a period of time.

By Mr. Wright:

Q. You say they were a white lead-in-oil agent.
1096 You mean there was a contractual relationship between the National Lead Company and Diemont-Levy of agency consignment for the sale of white lead-in-oil?

A. That is correct.

Q. Mr. McCarthy, I hand you documents which were marked for identification as Commission's exhibit 806-A to J which were produced by Mr. Ewing this morning in response to a subpoena, and I ask you to state what those documents are if you can (handing to witness)?

A. These are cards issued by our Atlantic branch announcing changes in price on lead pigments and lead oxides over a period of the last 10 or 12 years.

Q. Do those represent quotations on such lead pigments by the National Lead Company as of the dates that they are marked?

A. Yes, they do.

Q. Can you state to what territories or destinations those cards are applicable?

A. Throughout the territory served by the Atlantic Branch.

Q. Are those all from the Atlantic branch?

A. Yes.

Mr. Wright: I offer Commission's exhibits 806-A to J in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Ewing: Might I ask a question concerning
1097 these documents?

Trial Examiner Norwood: Certainly.

Mr. Ewing: I show you the cards which have been marked Commission's exhibits for identification 806-B, C, E, F, and G, and I call your attention to the fact that on the back of exhibit 806-B and on the face of 806-C, E and F, and on the face of exhibit 806-G, certain notations in pencil appear and I ask you whether you know anything about the origin of those pencil notations or how they came to be upon the cards?

The Witness: Exhibit 806-E, C and F appear to bear in chronological order by date of change pig lead prices in effect on those dates shown.

Mr. Ewing: Do you know how those notations came to be on the cards?

The Witness: I assume that the person from whom they were secured —

Mr. Ewing: (Interposing) I move to strike the answer. Do you know how they came to be on the cards?

The Witness: No.

Trial Examiner Norwood: Strike that speculation in there. Read the answer.

(Whereupon, the reporter read the answer as follows:
"A. I assume that the person from whom they
1098 were secured—")

Trial Examiner Norwood: The motion is allowed to strike those words.

Mr. Ewing: I have no objection to the receipt of the cards marked Commission's exhibits 806-A to J inclusive in evidence except insofar as the pencil notations which appear on the cards I do object to.

Mr. MacIntyre: We contend that those should be received. They were on the cards when National produced them under subpoena. The witness has stated what the notations are.

Now as to who put them on there in the organization of National, I don't think that since that isn't shown that there is any basis for having the notations stricken.

Mr. Ewing: I believe the witness stated his belief as to what the notations were. But not knowing who put them on and how they got there, I submit that they should not be received.

Mr. Wright: Your Honor, I submit that they should be received as they have been identified in the record.

Trial Examiner Norwood: I shall overrule the objection and receive the exhibits as they are. But if it appears later that anything is wrong about those notations, why we can strike them later.

1099 (The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 806-A, 806-B, 806-C, 806-D, 806-E, 806-F, 806-G, 806-H, 806-I, 806-J, were received in evidence.)

By Mr. Wright:

Q. Mr. McCarthy, are the sales of lead pigments by the National Lead Company generally made at the published prices and announcements of the National Lead Company over the period of your experience with the company?

A. Definitely.

Mr. Wright: I have no further questions, your Honor.

Trial Examiner Norwood: Cross examination.

Mr. Ewing: No cross examination.

Trial Examiner Norwood: Thank you, Mr. McCarthy. The witness is discharged except as he may be recalled by the District Judge at a later date.

(Witness excused.)

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed. Call your next witness.

Mr. MacIntyre: We would now like to call on Mr. Harold Rowe of the National Lead Company as the next witness for the Commission.

1100 HAROLD ROWE was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. MacIntyre.

Q. Mr. Rowe, will you state your full name for the record.

A. Harold Rowe.

Q. What is your business, Mr. Rowe? What is the nature of your occupation in business?

A. I am with the National Lead Company.

Q. At what address?

A. 111 Broadway, New York City.

Q. That is the general office, is it, of the National Lead Company?

A. Yes.

Q. And what position do you hold with the National Lead Company?

A. I am one of five vice-presidents.

Q. What are your duties and responsibilities in your position as one of the vice-presidents of the National Lead Company?

A. They are varied. I am a member of the executive committee and a member of the Board of Directors, and more or less in a supervisory capacity in the paint end of the business, paint products, and to a lesser extent of all pigments.

1101 Q. That is, you include in your duties the supervision of the pigments divisions? That is, the sales of the pigments by the pigments division of the National Lead Company; is that correct?

A. It depends on what you mean by supervision. We don't operate the sales directly from our office for all of the branches as we operate through branches which are to a considerable extent independent of the main office.

Q. Nevertheless those that do handle those sales of pigments are subordinate to you; is that correct?

A. That's right.

Q. And as to policy making concerning methods used in those sales, you participate; is that correct?

A. Yes.

Q. How long have you held that position, Mr. Rowe?

A. Since March, 1933, I think. I beg your pardon. If you are speaking of vice-president, director and member of the executive committee that isn't true.

Q. Over what period then is it true that you have held such position?

A. I cannot give you the date, I am sorry.

Q. Well, approximately.

A. It is somewhere around 1938, I think. But I would have to check it, I am sorry.

Q. I show you a document heretofore marked for
1102 identification as Commission's Exhibit 538 and I ask
you to state what that is (handing to witness)?.

A. It is an answer to a letter from Mr. Reque to me. Mr. Reque who was assistant manager and is the assistant manager of our Chicago branch—it is an answer to a letter that he wrote me and it is my reply.

Q. And under what date?

A. April 8, 1941.

Q. In your making that reply to him, you did so in your official capacity which you have just described to us; is that correct?

A. Before I could answer the letter I would have to see a copy of his letter to me and previous correspondence.

Q. Your handling of this reply to him though was in your official capacity as one of the officials of the National Lead Company?

A. Yes.

Q. And in the capacities that you have already outlined to us that you filled at that time; is that correct?

A. Yes.

Q. And to Mr. Reque as it is in his official capacity as assistant manager of that branch?

A. Yes, that is correct.

Q. I note that—

Mr. MacIntyre: I want to offer this document 1103 into the record please.

Mr. Ewing: I will object on the ground that it is irrelevant and immaterial.

Trial Examiner Norwood: The objection is overruled and it is received as marked.

(The paper referred to, heretofore marked for identification COMMISSION'S EXHIBIT 538, was received in evidence.)

By Mr. MacIntyre:

Q. Mr. Rowe, I notice that in this document, Commission's exhibit 538, you state that you have noticed an article on page 4 of the Oil, Paint and Drug Reporter for the week of April 8, 1941 and in which the DuPont Company had announced a change in its policy to become effective on orders received after May 1st.

Is that the first information that you had concerning that announcement of that change in the policy of the DuPont Company on that item?

A. You mean the article in the Oil, Paint and Drug Reporter?

Q. Yes.

A. Yes.

Q. You are certain that that was your first information of that change?

A. Unless I was told of the article by someone else who had called it to my attention.

1104 Q. The article would have been your first information then?

A. Yes, sir.

Q. You are certain of that?

A. I am.

Q. Do you recall any other instances in which you advised officials subordinate to you in the same department of the National Lead Company concerning announcements of changes in policies by other sellers of products in which National Lead is interested and such announcements you noticed in the Oil, Paint and Drug Reporter?

Mr. Ewing: I object to it as irrelevant.

Trial Examiner Norwood: Objection overruled.

By Mr. MacIntyre:

Q. In other words, is this the only instance of its kind?

A. Well, I am not clear on what kind this is. This letter is in reply and refers to two previous letters and without seeing those and refreshing my mind on what was in them, I can't properly answer the question.

Q. Well, what is this Oil, Paint and Drug Reporter that is referred to in the letter by you?

A. A trade magazine which is published here in New York once a week, a market magazine, and has been published for, I think, 50 years or more.

It is a recognized magazine in the paint and
1105 chemical industry.

Q. Are you a subscriber to it?

A. Our company has been for years.

Q. And it comes to your desk in connection with that subscription?

A. Yes.

Q. For what purpose?

A. More than one copy of it. We get a number of copies.

Q. Why is it sent to your desk in connection with the subscription of your company?

Mr. Ewing: I will object to it.

The Witness: That is not a fact.

Trial Examiner Norwood: The objection is overruled. Explain that.

The Witness: We get a number of copies in our company and I get one of them.

By Mr. MacIntyre:

Q. Well, why does one copy come to your desk in connection with the subscription?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed.

A. The magazine contains trade news of all sorts and I read it, not regularly, but whenever I have time to keep up with the news of the industry.

1106 By Mr. MacIntyre:

Q. Have you noted a section of it under the title "Current Market Quotations on Lead Pigments?"

A. I have noted it?

Q. In your reading of it, have you noted a section devoted to purported current market quotations on lead pigments?

A. There is a section of several pages which covers quotations on chemicals and many, many items and I believe it has a section on lead pigments. I haven't looked at it for, I guess, a number of years.

Q. In addition to your subscription to and for a number of copies of this publication, is it a fact, Mr. Rowe, that your company has additional relationships with that publication?

Mr. Ewing: I will object to that. Is Mr. MacIntyre claiming that we own this trade magazine?

Trial Examiner Norwood: Read the question.

(Whereupon, the reporter read the question as follows:

"Q. In addition to your subscription to and for a number of copies of this publication, is it a fact, Mr. Rowe, that your company has additional relationship with that publication?")

Trial Examiner Norwood: He has a theory that this is used to pass around prices to the respondent and so on, isn't that correct; Mr. MacIntyre?

1107 Mr. MacIntyre: I haven't stated that as a theory of mine. I think the facts as thus stated by Mr. Rowe are clear now as a matter of record.

Trial Examiner Norwood: I think that the complaint charges that that is used as a medium, doesn't it?

Mr. MacIntyre: There is a charge in the complaint that these respondents disseminate price information.

Trial Examiner Norwood: I think he can bring out any facts with respect to that magazine.

Mr. Ewing: I object to the form of the question.

Trial Examiner Norwood: You mean it is leading and indefinite. Read the question again.

(The reporter again read the question.)

Mr. MacIntyre: I will withdraw that question.

Trial Examiner Norwood: All right, proceed.

By Mr. MacIntyre:

Q. Mr. Rowe, to your knowledge does your company buy considerable advertising space in this magazine?

Mr. Ewing: I will object to that, if your Honor please, as not being material.

Trial Examiner Norwood: Objection overruled.

Mr. Ewing: I will also object to the form of the question because it includes the word "considerable."

Trial Examiner Norwood: I think he can clarify that. Proceed.

1108 The Witness: Can I have the question please?

Trial Examiner Norwood: Read the question again.

(Whereupon, the reporter read the question as follows:

"Q. Mr. Rowe, to your knowledge does your company buy considerable advertising space in this magazine?")

The Witness: I will have to ask what you mean by considerable?

Mr. MacIntyre: Well, do you buy any space?

The Witness: Yes.

By Mr. MacIntyre:

Q. Do you buy it regularly?

A. I think we have an advertisement once a month in the weekly magazine.

Q. What products do you advertise in it?

A. I can't answer that. We advertise white lead in some of the advertisements, I know.

Q. That is the Dutch Boy White Lead?

A. More probably dry white lead because it is a magazine that goes to paint grinders.

Mr. MacIntyre: If your Honor please, I would like to ask that we recess until about 1:30 and I want to say that we have an understanding with Mr. Ewing that we may withdraw Mr. Rowe, for a witness who will be ready to take the stand at 1:30. That is for a few minutes, 1109 and then we will ask Mr. Rowe to take the stand and resume his testimony.

Trial Examiner Norwood: That may be done. We will recess until 1:30.

(Whereupon at 12:30 p. m., a recess was taken until 1:30, this day.)

1110 Afternoon Session.

1:45 P. M.

Trial Examiner Norwood: Come to order. You may proceed.

Mr. Wright: Your Honor, I would like to call Mr. Auchincloss as a witness for the Commission.

WILLIAM S. AUCHINCLOSS, was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Will you state your name and occupation?

A. William S. Auchincloss, president and treasurer of the Schnell Publishing Inc.

Q. What is the address of the Schnell Publishing Company?

A. 59 John Street, New York City.

Q. What is the business of the Schnell Publishing Company?

A. Publishing business publications.

Q. Does the Schnell Publishing Company publish the Oil, Paint and Drug Reporter?

A. It does.

Q. How long has the Oil, Paint and Drug Reporter been published by the Schnell Publishing Company?

A. Since April of 1941.

1111 Q. Prior to that time who published it?

A. It was published by the Oil, Paint and Drug Publishing Company. That was a part of the Estate of the founder of the publisher, William O. Allison.

Q. Who is the principal party in interest in the Oil, Paint and Drug Publishing Company?

A. The Estate of William O. Allison. Allison founded the paper in 1871. He died in 1925, and his estate operated the publication under Court order until such time as it could be profitably sold.

Q. Was the Schnell Publishing Company organized to take over that business in 1941?

A. Yes, Mr. Schnell bought the Oil, Paint and Drug Reporter from the Estate of William O. Allison, and formed the Schnell Publishing Company to operate the Oil, Paint and Drug Reporter, and the other magazine.

Q. Was Mr. Schnell connected with the Oil, Paint and Drug Publishing Company prior to that time?

A. Since 1890, when he went with Mr. Allison as a boy of fifteen.

Q. And is Mr. Schnell still connected with the Oil, Paint & Drug Reporter?

A. Mr. Schnell died November 29, 1942.

Q. How long have you been connected with the publication of the Oil, Paint and Drug Reporter?

1112 A. I first went with the company, the previous company in October of 1926, as I recall.

Q. Would you say then, that there has been a direct succession of ownership of the publishing of the paper for a great many years.

A. Pardon my laugh, the excess profits tax people won't admit that, but I would say so.

Q. Can you briefly describe what the Oil, Paint and Drug Reporter publication is?

A. It is a weekly magazine published on very close weekly schedule, to record prices, market conditions, and news of the industries that either produce, convert or compound in processes chemicals, oils and drugs. It quotes on three or four thousand prices of those materials weekly. That, we regard as its big function.

Q. Is the magazine circulated only to subscribers, or does it also have newsstand sales?

A. No, it has no newsstand sales. It is circulated exclusively to paid subscribers, and it is a member of the Audit Bureau of Circulation.

Q. Do you know generally who the subscribers are to the publication, such as general classes or groups?

A. No, because only about 22% of our subscriptions bear any individual names. The rest are company subscriptions.

1113 Q. Do you have any way of classifying roughly the companies as to their businesses, who are subscribers?

A. As to their industrial occupations?

Q. Yes.

A. We don't make any attempt to do that, because so many of them in the chemical field, particularly, engage in so many different industrial activities. Roughly you can classify them as the process industries. The rubber, pharmaceutical, paper, glass, paint, and what have you. It just runs through—fertilizers—

Q. (Interposing.) Would it be fair to state that the circulation is made up principally of people who purchase and use the products which are covered by the publication?

A. That is a hard one to answer, sir, because a good portion of our subscription is in the chemical field, and these chemical firms do buy these materials, and they also sell the materials.

Q. I see. Then it would also include producers, and I believe you have already stated that for the record?

A. Yes.

Q. Does the Oil, Paint and Drug Reporter publish such market information as you have described, with reference to pigment and paint materials generally?

A. Yes.

Q. Does it publish such information with regard to lead pigments such as white lead, red lead, litharge, lead sulphate?

1114 A. Yes.

Q. Is the National Lead Company, do you know, a regular advertiser in the Oil, Paint and Drug Reporter?

Mr. Ewing: I will object to that, if your Honor please.

Trial Examiner Norwood: Read the question please.

(Question read.)

Mr. Ewing: Your Honor, I object to it as irrelevant and immaterial.

Trial Examiner Norwood: Overruled. Let him answer. Answer the question.

The Witness: Yes, they are an advertiser.

By Mr. Wright:

Q. I ask you the same question with reference to the Eagle-Picher Company?

A. No, Eagle-Picher do not advertise in the Oil, Paint and Drug Reporter.

Q. I ask you the same question with reference to the Anaconda Copper Mining Company?

A. No, they do not advertise in the Oil, Paint and Drug Reporter.

Q. I believe you stated earlier that the Oil, Paint and Drug Reporter publishes weekly market information regarding prices and market conditions generally, as to these various products, including lead pigment?

1115 Q. Can you tell me how much information is secured by the Oil, Paint and Drug Reporter.

Mr. Ewing: I will object to that, if your Honor please. It makes no difference how they get it.

Trial Examiner Norwood: I think that would tend to connect it up with this case. It is dangling so far.

Mr. Hinds: I would like to add a ground to that objection, that this proceeding, as I undestand it, is not an investigation. That is a matter for investigators to trace. This witness is virtually being asked: Where can I get competent evidence on this subject matter? That is not a proper function of this tribunal, to find out where he can get competent evidence. Certainly, any evidence this witness could give couldn't conceivably have any competency, because it would be hearsay. And what he can tell us on how to get competent evidence should be whispered to the ear of the Commission's attorney, not brought out taking our time and expense in this proceeding.

Mr. Wright: Your Honor, I submit that the testimony of this witness, which the witness is bringing out, and which he will bring out, is competent and relevant, and that the information which we requested in the last question is competent and relevant, if he knows.

Trial Examiner Norwood: They are trying to cause it to transpire. The objection is overruled.

1116 The Witness: We have a staff today of seven men —a man just left us last week—who are engaged in reportorial activities in all the fields producing these materials. We have correspondents in Chicago, Atlanta, Baltimore and several other process centers, where certain of these materials are produced. The markets or products falling into various rough market classifications that we have made, somewhat empirically, and these are assigned to individual reporters. One man will cover a couple of markets or, in one case, three; and he will circulate among the more substantial producers of these materials to find out from them what they are quoting, their individual prices, and what their individual concept of market conditions will be.

Then, balancing the reports that he gets from various individuals, he writes his weekly comment and arranges his weekly range of prices.

Q. Now, is that statement you have just made applicable to, for instance, market quotations and market news, with reference to lead pigment?

A. Yes.

Q. Is there one man generally who handles collection and writing up of the market information on lead pigments?

A. Yes, that gentleman spends—although two of our fellows would have direct supervision over him, and 1117 the editor also would have his own copies and would be picking up things as well.

Q. Now, can you tell me who, if you know, what sources of information utilized by your staff in gathering market information on lead pigment—I mean by that the names of any companies or individuals from whom such information would be secured.

A. I understand that we check at present with St. Joseph Lead Company, International Lead Company, the American Smelting and Refining Company, I believe, and one or two others.

Q. Did you understand my question? I meant to limit that to lead pigments?

A. Lead pigments?

Q. Yes.

A. Yes, I believe that is all right. Lead pigments, of course, St. Joe wouldn't come in.

Q. Would American Smelting and Refining Company be a source?

A. That I don't know; I am classifying the whole lead —

Q. (Interposing.) Is such information ever secured from the Lead Industries Association?

A. Background information on the market would be secured from them, possibly some market developments.

A man up there would mention it to our men, and he would
check through. You see, whenever we get a price
1118 change, as a matter of policy, we always check up
with other suppliers to confirm the story.

Q. I believe you stated that this publication has been published since 1871?

A. That is correct.

Q. And it has been a trade paper in a sense since that time?

A. Yes.

Q. I suppose at times mistakes are made in market quotations that are published by the Oil, Paint and Drug Reporter?

A. Yes, compositors and reporters being what they are, we occasionally make mistakes.

Q. Does that happen very often?

A. No, we cover a broad field. I don't think it happens very often, but we do have mistakes there—we are bound to.

Q. Do you recall any mistakes that have been made in the reporting of market conditions and quotations in lead pigments?

Mr. Ewing: I will object, if your Honor please. It is wholly irrelevant and immaterial.

Mr. Hinds: I want to add to that objection the ground that it is no more competent for this gentleman to set up a standard by which he could compare his mistakes, than it would be to state the information originally; and obviously, it would be incompetent in either case.

1119 Trial Examiner Norwood: Objection overruled.

The Witness: May I have the question read, please?

Trial Examiner Norwood: Read the question.

(The reporter read the question.)

The Witness: I am not able to put my fingers on it at the moment, but I try to forget our errors as fast as I can.

By Mr. Wright:

Q. When such errors are made, they are usually called to your attention, are they not?

A. Yes.

Q. By subscribers or others?

A. Yes, quite frequently by subscribers. When we find it is the compositors who put the wrong price in the line, or something like that.

Q. Did the Oil, Paint and Drug Reporter have any connection official connection, with the Code Authority for the paint, varnish and lacquer industry during the period of the National Recovery Act?

Mr. Ewing: If your Honor please, I will object to that on the ground that the Code Authority for the paint, varnish and lacquer industry is not concerned here: we are here concerned with lead pigments.

Mr. Wright: Your Honor, I submit we are dealing with products here which are admitted to be the principal
1120 part of the production of paint, and some of the respondents are large producers of paint, sellers of paint; and this information is relevant.

Mr. Ewing: The charges here relate to lead pigments.

Trial Examiner Norwood: I think, though, that he might complete the picture to show how this journal, this trade journal works.

Mr. Ewing: My point is this, your Honor. All of these respondents, as shown by the evidence offered on behalf of the Commission were engaged in formulating a code relating to the lead pigments, and were not engaged, in so far as this case is concerned, in any way with the paint, lacquer, varnish code.

Now to step outside the field involved in this case, and to go into what may or may not have been the relationship, official or otherwise, between this trade paper, and the paint, varnish and lacquer code, seems to me not only irrelevant and incompetent but wholly immaterial to the issues.

Trial Examiner Norwood: I think that the method of this paper in securing this information, might throw some light on how it secured the information, respecting lead pigments, and so forth.

Mr. Hinds: If your Honor please, counsel for the
1121 Commission has made a statement here on the record that it is admitted that these lead pigments, which are the subject of this prosecution, are the principal ingredient in the manufacture of paint. That is not admitted by the Glidden Company. In fact, it is denied.

Trial Examiner Norwood: I saw it in some of the answers; but then we can take that up later.

The objection is overruled. Let him answer the question.

The Witness: May I have the question read, please?

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Did the Oil, Paint & Drug Reporter have any connection, official connection with the Code Authority for the paint, varnish and lacquer industry during the period of the National Recovery Act?")

The Witness: The connection is somewhat vague in my mind. There was a Section 22 in the Paint Code, necessitating the cost basis for the cost of replacement of materials, raw materials.

Now, I think the National Paint, Varnish & Lacquer Association was the collecting medium for things of that kind, and we printed a bulletin to them which was used by the paint industry for establishing the cost of replacement
in raw materials. Whether our connection was defini-
1122 tely with the Code Authority of that industry, I am
at little too dim on it.

By Mr. Wright:

Q. Do you recall whether that association acted with the Code Authority?

Mr. Ewing: If your Honor please, I will make the same objection.

Trial Examiner Norwood: Overruled.

The Witness: No, I don't recall whether they acted with the Code Authority.

By Mr. Wright:

Q. Mr. Auchincloss, did you produce certain documents here this morning under subpoena?

A. Yes.

Q. Do you have those documents with you?

A. I do.

Mr. Wright: I would like to have some exhibits marked for identification, if we may.

(The papers referred to were marked Commission's Exhibits 808-A, 808-B, 808-C, 808-D, 808-E, 808-F, 808-G, 808-H, 808-I, 808-J, 808-K, 808-L, 808-M and 808-N for identification.)

By Mr. Wright:

Q. Did you produce the original issue of the Oil, Paint & Drug Reporter for May 28, 1934?

1123 A. Yes, sir.

Q. For June 4, 1934?

A. Yes.

Q. For June 11, 1934?

A. Yes.

Q. For June 18, 1934?

A. Yes.

Q. And for August 27, 1934?

A. Yes.

Q. I hand you herewith documents which have been marked Commission's Exhibits 808-A through N, and ask you to state if you recognize that?

A. I recognize it somewhat.

Q. What do you recognize it as?

A. A page from the Oil, Paint & Drug Reporter in this case for May 28, 1934.

Q. I call your attention to the initial "A", appearing in the upper lefthand corner—

A. (Interposing.) That's correct, I put it there.

Q. You state that you put the initial there?

A. Yes.

Q. Did you compare that Exhibit 808-A with the original page in the Oil, Paint & Drug Reporter?

A. Yes.

Q. Of that date?

1124 A. Yes.

Q. I now call your attention to documents marked Commission's Exhibits for identification 808-B through N, and ask you to state with reference to those exhibits whether you recognize them as having been compared with the original pages of those dates in the Oil, Paint & Drug Reporter?

A. They have been so compared.

Q. And you found those, did you, to be true copies of the original pages of those dates?

A. Yes.

Mr. Wright: Your Honor, I offer Commission's Exhibits 808-A through N into evidence.

Mr. Ewing: May we go off the record, please?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Let Mr. Wright complete his proffer modified as he has suggested.

Mr. Wright: Your Honor, I am proffering these exhibits to show current market quotations and market information of the dates of the issues involved.

I might say, as to 808-A, that the purpose of that sheet, while it does not relate in particular to any lead pigment, or lead products, shows the heading under which the publication publishes these market prices, which gives
1125 meaning to the documents themselves, which are a part of that section.

Mr. Hinds: If your Honor please, I shall ask the privilege of preliminary cross-examination in order to adduce facts concerning these documents which should be the basis of further objection.

But at this time my objection in part, even as it is now disclosed, is that this is objectionable in that it does not purport to be evidence of market prices, and I don't think it possibly could. It purports to be only evidence of market quotations, or, as counsel has said, market information.

Market quotations, I think, have no legal significance whatsoever. Market information is at best hearsay. So on that ground alone, I think it is incompetent and inadmissible as hearsay.

Quotations are interested in market prices, value, which may be shown, as far as I know, only by two means: Either by the opinion of a qualified expert, or by actual sales or bids or offers. That is well-established.

Trial Examiner Norwood: Does counsel want to question the witness on matters only pertaining to this identification, as to whether those were the actual market prices or not; I don't think you may go into that at this time. You may ask him anything; but you have already
1126 stated your objection and I hardly think it is necessary to ask any more questions.

Mr. Hinds: Well, if it will be conceded by counsel, or even impliedly conceded, that this does not even hope for or expect to establish the market prices, then I will have accomplished by that concession what I would have hoped to accomplish by an examination.

Is that conceded? Is that the purpose here—not to establish the market prices, but merely what counsel has referred to as market quotations, or market information.

Mr. MacIntyre: It is the purpose of this, to show that through this publication there was disseminated this information concerning what purports to be current market quotations. And I want to call your Honor's attention to the charges in the complaint that are directed expressly to the matter of quotations as distinguished from prices.

Mr. Hinds: The Commission, of course, can't enlarge the rules of evidence, or make evidence which is irrelevant and incompetent into something relevant or competent by what they put in a complaint. I assume we are governed here by law, and not by charges.

Now, counsel, I have asked several times: Is this not for the purpose of showing market prices? If it is conceded that that is not its purpose, then I will be saved from
1127 the necessity of any preliminary cross-examination.
Your Honor, he has not answered my question. I don't know why he evades the question.

Trial Examiner Norwood: Is there any further objection?

Mr. Hinds: Your Honor, may I ask counsel whether this is to show market prices?

Trial Examiner Norwood: He has already stated what it shows. I think if you will look at the record, you will see it.

Mr. Hinds: Then am I to assume it does not disclose market prices? There not being any answer to that, I shall have to ask for preliminary cross-examination.

Trial Examiner Norwood: Counsel objects, does he?

Mr. Hinds: I don't know yet whether I will object on that question until I have had the opportunity of preliminary cross-examination. It may or may not disclose a basis for an objection on that ground. I have already made my objection on the other grounds that have already been evident.

Trial Examiner Norwood: Is there any further objection?

Mr. Hinds: Now you may ask a few preliminary questions, restricted to identification of these documents,
1128 not to the contents, but to the whole.

Mr. Wright: Your Honor, may we take a recess while the counsel are examining the papers?

Trial Examiner Norwood: We will take a short recess.

(A short recess was taken.)

Trial Examiner Norwood: Come to order. Proceed.

Cross-Examination by Mr. Hinds.

Q. I note that on certain pages, for example, pages 30 of the issue, June 4, 1934, there is set forth what purports to be prices, namely, lead prices, and zinc prices, is that right?

A. That is correct.

Q. And those purport to be card prices on actual sales of commodities at or about that day?

Mr. Wright: Your Honor, I object to the counsel going into the content of those documents, rather than identification.

Trial Examiner Norwood: Yes, I ask you to confine your voir dire questions to the matter of identification only.

Mr. Hinds: If your Honor please, I only want to find out what they purport to be, so that I can base my objection on it.

1129 Trial Examiner Norwood: You can read that and see what it purports to be.

By Mr. Hinds:

Q. Does this document purport to show any prices based on actual sales as distinguished from quotations with respect to lead pigments?

Trial Examiner Norwood: I don't think that I would adopt that as a voir dire question there, because the question was directed to what they purport to be. That is the very meaning of the word "purport." This witness cannot tell you that.

Mr. Hinds: If your Honor please, I have been handed a large number of sheets here—

Trial Examiner Norwood: (Interposing.) You may cross-examine him later on the contents; but not now.

Mr. Hinds: I will respectfully except to your Honor's overruling my further preliminary cross-examination; and I shall then be obliged to make my objection, as well as I can on the basis of the limited information I have been able to obtain.

Now I object to it on the ground that, that as I read this paper, it does not even purport to show anything that would be relevant, even if it were competent; namely, it purports to show these lead pigments, as distinguished
from lead and zinc, not to show prices based on
1130 actual sales, or even offers or bids in good faith, or
even to give expert opinion as to prices; but merely to show what is known as quotations which, of course, is mere hearsay, mere gossip, having no legal competency. I object on that ground.

Trial Examiner Norwood: Is there any further objection?

Mr. Ewing: We will object to it on the ground that the documents proffered are incompetent, irrelevant and immaterial, and particularly upon the ground that the witness has testified that the information of this character obtained by his organization was obtained by reporters employed in his organization, who went out and got that type of information, which was later sifted and edited, compiled and what not, and eventually reproduced to the extent the trade paper did in its publication. That being so, there is nothing whatever to connect any of the respondents with this in any way.

Trial Examiner Norwood: Are there any further objections?

What do you say to that, Mr. Wright?

Mr. Wright: Your Honor, we maintain that they are competent and relevant, and expressions of market conditions as to lead pigments at the times of the publication of the articles as published by what has been estab-
1131 lished to be a thoroughly reputable and reliable trade paper, which is held in high esteem in the industry.

Mr. Hinds: May I argue briefly in support of my objection?

I won't repeat the objection.

Trial Examiner Norwood: Well, the counsel has already stated his objection.

Mr. Hinds: I stated it, your Honor, but counsel for the commission has argued against my objection. I would like to add just a few words in support of my objection.

Trial Examiner Norwood: Mr. Wright, have you completed your statement?

Mr. Wright: Yes, sir.

Mr. Hinds: I would like to point out, sir, that this is to be distinguished from the stock market so-called prices or quotations which, when reported in reliable publications, are as they purport to be, records of actual sales made during that day. The courts have enlarged the hearsay rule there, so as to allow those as evidence of what prices goods were actually sold at.

My objection is not based on any lack of reliability of this publication, which I have no doubt is highly reliable; but because it does not even purport to be a record of anything that is actually done. It is only a record of

gossip, of information. It is strictly hearsay, because
1132 we don't either have the men who got this information, nor do we have the sources from which they got it.

Mr. MacIntyre: Well, the National Lead Company, of course, if it should have given any mis-information to this man on lead pigments and caused it to be published here, then, of course, it would have to accept the responsibility as a respondent here, for giving that misinformation.

Mr. Hinds: I haven't been given the opportunity of cross-examining this man.

Glidden stands here without any opportunity, either to cross-examine whatever man gave this information, or the man to whom he gave it.

Mr. MacIntyre: Of course, Mr. Hinds has heard of the rule of Admissions.

Mr. Ewing: There is nothing in the record other than the statement that I referred to, that I know of, to show, as to these particular exhibits, from whom any of the information set forth therein was obtained. And while I am not attempting to put words in Mr. Auchincloss's mouth, I have no doubt that if he were asked, where did this particular information come from, actually, he wouldn't know.

Trial Examiner Norwood: Well, I think that the same reasons that render the stock market reports, the newspaper reports that happen in the stock market, admissible, would render these admissible. Any differences
1133 would probably go to the weight. And so I shall overrule the objections and receive them as marked, Commission's Exhibits 808-A through N.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 808-A, 808-B, 808-C, 808-D, 808-E, 808-F, 808-G, 808-H, 808-i, 808-J, 808-K, 808-L, 808-M and 808-N, were received in evidence.)

Mr. Wright: No further questions, your Honor.

1134 *Cross-Examination by Mr. Hinds.*

Q. Mr. Auchincloss, is it possible for you to say from an examination of this exhibit, as to each of the reported quotations of lead pigments, from whom you got that information?

A. No, sir.

Q. So that you couldn't possibly describe it, as Commission's counsel has done, as an admission by any of these respondents, as far as you know?

A. No; purely a reportorial operation.

Q. Now, in my attempted preliminary examination, I tried to bring out that while you don't purport to show actual prices, based on actual sales on lead and zinc, you not purport to show, prices based on actual sales with respect to these lead pigments; is that right?

A. I think that there is a misunderstanding here. Our activities in St. Louis would be no different from our activities in New York. We may say "Spot prices in St. Louis"; but what we mean is spot quotations. But you have got an awful lot of stuff to get in a small area, and we use the prices synonymously.

Q. In other words, when on page 30, June 4, 1934, you used the expression "lead prices and zinc prices," you didn't intend to differentiate between what you gen-
1135 erally describe at the top of the exhibit as "Current market quotations"?

A. No, the current market quotations are our major service. The other is the supplementary.

Q. And both are based on what the people tell you their understanding of what the market is?

A. Correct.

Q. Do you make any investigation as to actual sales?

A. No, we don't go in for sales.

Q. Is there any public market for any commodities whose prices, quotations you report comparable, we will say, to the stock market or the produce market, or any other market?

A. We report some of the prices, of course.

Q. Where buyers and sellers get together on an exchange and publicly and openly make an offer and buy and sell—is there any such market with respect to—

A. (Interposing.) I am not aware of one. We do report, of course, certain materials that are on the produce exchange.

Q. And in those cases, you report the public prices which are publicly and openly arrived at; is that right?

A. Well, our operation is the same practically. You see, there are so many materials in this thing, it is almost impossible to generalize. But the main basis of our operation is simply to go around to talk to reputable suppliers of these materials and to report what each individual tells us.

1136 Mr. Hinds: Well, now, your Honor, I object. This is obviously hearsay and incompetent. We, being denied the opportunity of cross-examining the people who have told this gentleman's reporters the facts, it does not furnish any exception to the Hearsay Rule, such as the exception cited in the case of the Stock Exchange prices, which, as a matter of convenience, are accepted, because they are a fair substitute for what would be competent evidence, namely, bringing the buyers and the sellers into court.

In real estate, for example, there you get competent evidence of the actual price paid by the buyer and the seller. I submit this does not furnish a proper exception to the otherwise unqualified Hearsay Rule. I object to it on that ground.

Trial Examiner Norwood: Do you think that the newspaper couldn't reliably report the sale of what happened on the Stock Market, without being present when the sale was made?

Mr. Hinds: Your Honor, on the contrary, I have insisted on the distinction there. I say, in the first place, not one, but 500 newspapers throughout the country, and some in London and even in Madrid, report actual sales on the New York Stock Market or the New York Curb Market, or the both markets, each day; and the courts have indulgedly made that an exception to the Hearsay Rule, because
1137 experience shows that they check up on each other and they reliably report actual sales.

But this does not purport to report actual sales. It purports to report mere gossip, mere third hand information or beliefs.

Trial Examiner Norwood: The motion is denied. Proceed.

By Mr. Ewing:

Q. Mr. Auchincloss, am I right in my understanding that in settling the basic material which is later edited and reproduced in the trade paper, your representatives were reporters who go to their various sources of information and seek to obtain and do obtain information from those sources, which is later brought back to the offices and sifted and correlated and edited, and eventually published; so that the final published item may not be the information actually obtained by the reporter from any particular one of the sources he interviewed?

A. That is quite correct.

Mr. Ewing: No further questions.

Redirect Examination by Mr. Wright.

Q. Mr. Auchincloss, when such information is secured by the sources of information, is it not published substantially to reflect what was told you, or your reporters,
1138 by the sources of information?

A. No, it is difficult to answer, because the reporter might go to one company and get a price change. Let's take an isolated instance, if your Honor will bear with me. The reporter might go to one company and get a price change. It would be his duty immediately to contact any other suppliers of that material in his market, not with the question—is your price meeting the price of so and so—because we never reveal one supplier's name to another, do you see. But with the question "Have you had any changes in the price of this particular material?" Then, what we finally publish would be based on what he found out from all the markets.

Now, that is a perfectionate dream of what we try to do. I hope we do it most of the time.

Q. In other words, the information is to reflect accurately what is happening in the market for that period?

A. That is right.

Q. Now I call your attention to Exhibit 808-E, to the heading "Paint, Varnish, Lacquer Chemicals"; is that a regular department of the Oil, Paint & Drug Reporter, or was it at that time?

A. It was at that time.

Q. Did that same department appear each week?

A. Yes, it is a weekly appearance.

Q. Does the Oil, Paint & Drug Reporter, as pres-
1139 ently published carry a similar department?

A. Yes, "Protective Codings", we call it now.

Q. But it is substantially the same type of information?

A. Substantially the same.

Q. Now, is that intended to further particularize the general market information which appears under the price quotations in that field?

A. Yes, of course it is somewhat of a misnomer. Our market divisions have sort of grown up down through the years. The heading "Paint, Varnish, and Lacquer Materials and Chemicals" employed then, actually covers a statement of the conditions of materials that are used in practically every process industry. It isn't just applied to the paint trade alone.

Mr. Wright: I see. No further questions.

Trial Examiner Norwood: Does that paper affect the London market?

The Witness: Very much so, sir. It is the chemical field—plastics, pharmaceuticals, rubber, glass, printing—and what you will.

Trial Examiner Norwood: Are there any further questions?

Mr. Ewing: No further questions.

(Witness excused.)

1140 Trial Examiner Norwood: You may call your next witness.

Mr. MacIntyre: We would like to recall Mr. Harold Rowe.

HAROLD ROWE, resumed the stand and testified further as follows:

Direct Examination by Mr. MacIntyre.

Q. Mr. Rowe, before we adjourned for lunch you had related to us the fact that you are vice president of the National Lead Company since about 1938, and with certain duties and responsibilities; do you recall?

A. I said I was one of five vice presidents.

Q. Now, for the period prior to the period you have covered in your testimony, were you connected with the National Lead Company in any capacity?

A. Prior to 1928?

Q. Yes.

A. Yes.

Q. In what capacity?

A. You mean immediately before?

Q. Yes, immediately prior to the period you have been serving as vice president?

A. I think from March 1933, I was Assistant to the President.

1141 Q. And that ran down to the time you became vice president in '38?

A. Yes.

Q. And what were your duties and responsibilities?

A. Well, similar to the ones that I mentioned this morning other than being on the Executive Committee of the Board of Directors.

Q. In other words, your supervision over sales of lead pigments, has not changed—that is, your duties and responsibilities, with respect to the supervision over the sale of lead pigments has not changed since March, 1933; is that correct?

A. That is substantially correct. I mean it was always under the present company, of course.

Q. And in that respect, responsible only to him?

A. No, I don't think so.

Q. That is directly?

A. Well, responsible to the Executive Committee of the Board of Directors.

Q. Now, in carrying out your duties and responsibilities in that period of time, from March 1933 to 1938, who was your superior, as the president of the company?

A. Mr. Cornish. No, I guess I am correct in the statement that I was assistant to the president during all of that time. I have forgotten; but I think in March 1933—
I am not sure, Mr. Cornish was Chairman of the
1142 Board, and I don't remember whether Mr. Carter
was president in '33, but he became president shortly
afterwards. Mr. Carter was president, and Mr. Cornish was Chairman of the Board at that time, or approximately at that time.

Q. From about March '33 down to when?

A. I would have to check the record; I am sorry I can't remember.

Q. Well, Mr. Carter at some date ceased to be president, didn't he?

A. That is correct, yes.

Q. And about when was that?

A. It was somewhere from 1938 to 1940, I guess.

Q. In other words, he ceased to be president of the company on some date during the period from 1938 to '40?

A. That is not accurate. I mean that is as far as I can say at the moment, because I don't remember the date.

Q. But it would be approximately, it would be on a date within that period of time you think?

A. I think so.

Q. And during the period of time, from March 1933, until he had ceased to be president of the company, you acted in your capacity as his assistant, in carrying out certain policy matters with respect to methods of sale of lead pigments?

A. That is right.

Q. Prior to March 1933, what position did you 1143 hold with the National Lead Company, if any?

A. Well, for some period, I was assistant manager of the Atlantic branch.

Q. Immediately preceding March 1933?

A. Yes.

Q. For what period of time?

A. I would say for somewhere between two and five years; I don't remember.

Q. Then are we correct in our understanding of your testimony that you became the manager of the Atlantic branch of the National Lead Company on some date between 1928 and 1931.

Mr. Ewing: You mean assistant manager.

The Witness: No, you are not correct, because I didn't say that I was manager of the Atlantic branch.

By Mr. MacIntyre:

Q. Assistant manager, I mean.

A. Some date between——

Q. (Interposing) 1928 and 1931?

A. Somewhere approximately then; but I don't remember the date. I would be glad to find it out and let you know exactly.

Q. Were you connected with the National Lead Company in any capacity prior to your becoming Assistant Manager of the Atlantic Branch?

A. Yes.

1144 Q. In what capacity?

A. You mean immediately before that?

Q. Immediately preceding your becoming assistant manager of the Atlantic Branch?

A. I was, I think, assistant sales manager in the Atlantic Branch for a time.

Q. Over what period of time did you serve in that capacity?

A. I would guess about three or four years; I have forgotten.

Q. Would you say that your service in that capacity carried back to as far as 1928?

A. Yes.

Q. Approximately the same date as the organization of the Lead Industries Association, is that correct?

A. If it was organized then; I don't remember when it was organized.

Q. Prior to 1928, that is the date on which you became assistant sales manager of the Atlantic Branch—were you connected in any capacity with the National Lead Company?

A. Yes, perhaps I should make an addition there, that there were other assistant managers of the Atlantic Branch. I was one of them. Prior to 1928, I was a salesman for the Atlantic Branch.

Q. And for what period of time?

A. Oh, from 1920, I guess—well, late in 1919.

Q. During the period of time that you served as
1145 salesman of the Atlantic Branch, and later as one of the assistant sales managers of that branch, and then later as assistant manager of that branch, and then in the higher capacities in which you have served since, through all of that period of time you have been made acquainted with the sales policies of your company, have you?

A. Yes.

Q. And with respect to the terms and conditions of sale employed by your company in its sale of lead pigments?

A. Yes.

Q. Mr. Rowe, in evidence there is a document marked for identification as Commissioner's Exhibit 659-A thru C, inclusive, which is identified as a statement of your company of its terms and conditions of sale on pigments to various classes of customers, effective as of April 26, 1941; do you recall that document?

A. You mean all four pages, or three pages?

Q. Yes.

A. Yes.

Q. Does that set forth the terms and conditions and methods of sale by your company of lead pigments, as announced by your company of that date?

Mr. Ewing: If your Honor please, I object to the characterization included in the question.

Mr. MacIntyre: May we have the question read?

1146 Trial Examiner Norwood: Read the question, please.

(Question read.)

Mr. Ewing: There has been no proof that this exhibit has been "announced" by anybody. That is the basis of my objection.

Trial Examiner Norwood: I think the question takes in a little too much territory. Can the counsel—

Mr. MacIntyre: I would amend the question by striking out the word "announce" if that is the basis of the objection.

Trial Examiner Norwood: Will the reporter read the question as amended?

(The reporter read the question as follows;

"Q. Does that set forth the terms and conditions and methods of sale by your company of lead pigments as of that date"?)

Trial Examiner Norwood: Answer the question, as amended.

The Witness: I don't think there is anything here about methods. Terms and conditions—

By Mr. MacIntyre:

Q. (Interposing.) Under which you quote prices on lead pigments, is that correct?

A. Yes, that is correct.

Q. It does carry a statement of those?

1147 A. That's right.

Q. And for what period of time, Mr. Rowe, did the terms and conditions expressed therein to the effect that in some territories your price quotations on pigments were higher than in other territory?

A. I don't understand the question.

Q. Well, for what period of time, prior to this date that is shown on the document, has your company used the practice of quoting differentials on lead pigments in some territories over those quoted in other territories, as is shown by that document?

A. You mean on this basis?

Q. Yes, or during what period has the company quoted differentials in some territories, in the territories that are described thereon?

A. I would have to check it; but for a number of years—

Q. (Interposing.) In other words, you followed practice that is outlined there for a number of years, in quoting—

A. (Interposing.) In connection with quoting—

1148 Q. (Interposing.) Differentials in some territories higher than those you quoted in others.

Mr. Ewing: You don't mean the specific differentials, though, here involved?

The Witness: That is what is not clear to me.

Mr. MacIntyre: Let the witness answer the best he can.

Mr. Ewing: The reason I asked that is because I don't understand the question.

Trial Examiner Norwood: He means differentials and not the prices that are different. These same prices here.

Mr. MacIntyre: (Interposing.) Let me withdraw the question, and I will start over again.

By Mr. MacIntyre:

Q. I refer you, Mr. Rowe, to Commission's Exhibit 615-C, and calling your attention to the statement near the bottom of that page, concerning dry white lead, to the effect that in barrels, card prices here 100 lbs., with 1 per cent cash discount deducted, dropping any fraction of a cent, is to the effect that it is to apply in par territory, with 25-cent per 100 lbs. over par territory in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

How long have your company quoted that differential
1149 for those territories, on that product?

A. I would say for about 10 or 12 years—I mean, I don't know the exact time.

Q. For as long as 12 years you have followed that method of quoting a differential?

A. I would say 10 or 12 years; I am not sure of the exact date.

Q. I call your attention to a statement appearing on Commission's Exhibit 615-D, near the top of that page, under the heading "Dry Red Lead and Litharge" to the effect that your company quotes specified differentials in certain territories over the prices that are quoted in par territory.

Will you examine those differentials and tell us how long your company has used those differentials and that method of quoting on those products for the territories specified?

A. I am not sure of the exact figures; but the differentials, generally speaking, have been in effect for about the same time as the dry white lead.

Q. About 10 or 12 years?

A. Yes.

Q. Would you say the differentials for geographical territories, such as outlined in these last two instances that I

have called to your attention, wherever they now appear, in
use by your company on lead pigments, have been
1150 used by your company for the same period of time,
that is, ten or 12 years?

A. I don't get the question.

Q. That is, wherever your company is now quoting a differential in one geographical territory over the prices quoted in another, on any lead pigments, that it is a practice that has been followed by your company for 10 or 12 years?

A. You mean any single point?

Q. No, the practice of quoting differentials in certain territories over the quotations in par territory, such as is shown by the two exhibits that I called your attention to?

A. Well, have I answered your question regarding dry white lead and red lead and litharge?

Q. Yes.

A. And then you want to know if there is any other—

Q. (Interposing.) I am asking you if the practice has been any different with respect to the method—that is, in its application—as to other lead pigments?

A. I am not sure I understand your question. You mean, what other pigments do you have in mind? Maybe that would clear it up.

Q. Well, I will withdraw that question and start again. I am asking now, Mr. Rowe, that as to any lead pigment that your company sells, and with respect to which it has
quoted in territories other than a par territory a dif-
1151 ferential higher than the quotations for par terri-
tories, has the practice prevailed for ten or twelve
years, as it has, according to your testimony, with respect to red lead and white lead and litharge included in there?

A. Yes, I think it is. I don't know any lead pigments other than red lead and litharge and white lead.

Q. Well, there was a time, more than twelve years ago, when your company quoted prices differently, is that correct?

A. From this?

Q. Yes.

A. Yes.

Q. And that was more than 12 years ago?

A. That is correct.

Q. Would you say that the method, the different method that was used, was referred to be officials of your company, including yourself, as "quoting on freight differentials to specified points"?

A. When?

Q. Prior to the use of the specified differentials in geographical territories over the par territory?

A. No.

Q. What did you use at the time, in referring to your practice more than 12 years ago, if you did not use the freight differential method?

Mr. Ewing: If your Honor please, I object on the
1152 ground that it is irrelevant and immaterial as to what they called the method.

Trial Examiner Norwood: I think that is part of the explanation here, when he gets a ound to the meat of it. The objection is overruled.

The witness will answer the question.

The Witness: May I have the question read, please?

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. What did you use at the time, in referring to your practice more than 12 years ago, if you did not use the freight differential method?")

The Witness: Why they were called differential points; and there were, I don't know how many there were, but there were hundreds of them, I think.

By Mr. MacIntyre:

Q. And the prices quoted as applying at such differential points were destination quotations, is that correct?

A. At the differential points?

Q. Yes.

A. I think it was. I was not in that end of the business at the time, because we had no differential points in the Atlantic Branch. Oh, yes, I guess they had in some products, but I wasn't connected with that end of the business, so I am not really well enough informed to answer you on that.

1153 Q. Did that apply to all pigments, lead pigments sold by your company, that is, that method of quoting differentials?

A. I can't answer the question. You mean you are speaking of prior to 1933, is that right?

Q. Yes.

A. I don't know. It may or may not.

Q. Well, are we correct in our understanding from your testimony that about 12 years ago your company did change from the use of that method to the method that it presently uses in making its quotations?

A. That's correct.

Q. And that present method as shown by Commission's Exhibit 659, your price announcements show quotations by territorial zones, including par zones, and then each of a number of other territorial zones; do you recall those cards?

A. Well, I don't know the number of the exhibit. What was that exhibit you referred to? Was that the one that you just showed me?

Q. No. These are the price cards on Dutch White Lead and other lead pigments?

A. Yes.

Q. You are acquainted with those cards, aren't you?

A. Yes.

Q. And you do know there is a set of them that applied to par zones, a territorial Northeastern zone, is that correct?

1154 A. Yes.

Q. And you know that certain others apply to other territorial zones, is that correct?

A. Yes.

Q. Now, how long has it been that your company has been using cards applying to such territorial zones, as distinguished from quotations on differential points?

A. Somewhere around 10 or 12 years; I don't know the exact date.

Q. Is it your testimony that you do not know the exact period of time when your company made the change from the differential point method of quoting to the zone method of quoting that it is now using?

A. The exact date, did you say?

Q. Within 12 months of the date? When the announcement was first made of the change?

A. I would say it was somewhere between December or November of 1933, and June of 1934.

Q. Do you recall discussing those matters with Mr. H. M. Carter, of your company, do you?

A. Yes, sir.

Q. I now show you a document marked for identification in this case as Commission's Exhibit 575, and I will ask you to state what that is.

Mr. Ewing: Your Honor, I wonder if we might
1155 have a recess?

Trial Examiner Norwood: We will take a short recess.

(A short recess was taken.)

1156 Trial Examiner Norwood: Proceed.

By Mr. MacIntyre:

Q. What it your answer with respect to exhibit 595, Mr. Rowe?

A. I have forgotten the question.

Q. I asked you to state what that document is.

A. It is under the heading of the National Lead Company dated December 8, 1933 to all branch managers, office of vice-president in the corner, and signed by the president.

Trial Examiner Norwood: What is it? A bulletin or a sheet of instructions or what?

The Witness: It is a long letter which I do not recall. I may have seen it, but I may not. I don't recall it—in regard to adopting a system of agency selling to the branch managers.

By Mr. MacIntyre:

Q. Does that refresh your memory and recollection as to the date on which your company began to make a change in its method of quoting and changing its conditions of sale on white lead?

A. Well, the original change was made a year before that. You asked me about differential zones in the west?

Q. Yes.

A. But the agency method of selling was introduced, I think, in January of 1933.

1157 Q. Just a few months ahead of this bulletin?

A. Nine months.

Q. And was it discontinued after that?

A. Was the agency—

Q. (Interposing.) Was it temporarily discontinued after it was first put into use in January 1933?

A. Not that I recall.

Q. I show you a document marked for identification as Commission's exhibit 597, and I ask you to state what that is (showing to witness)?

A. What?

Mr. MacIntyre: Read the question.

Trial Examiner Norwood: Read the question.

(Whereupon, the reporter read the question as follows:

"Q. I show you a document marked for identification as Commission's exhibit 597 and I ask you to state what that is?")

The Witness: It is a mimeographed copy of a letter from Mr. McNair who is the assistant manager of the Atlantic branch quoting a telegram which he had sent, I assume, to our branches. It doesn't say and I have no business to imagine anything, I guess.

By Mr. MacIntyre:

1158 Q. Well, I call your attention to Commission's exhibit for identification 598 and I ask you to state if that is a copy of the telegram that is referred to in exhibit 597?

A. Yes.

Q. And which was sent to the branch managers whose names appear thereon at those locations?

A. Yes.

Q. And what can you say as to Commission's exhibit for identification 599?

A. That is a telegram—a copy of a telegram to Mr. Maston.

Q. From your superior, Mr. Carter?

A. That's right.

Q. On October 26, 1933?

A. That's right.

Q. Now do these documents, exhibits 597, 598 and 599 refresh your memory and recollection as to the time and manner in which your company made changes in its practice of selling white lead?

A. Yes. I think I said—what did I say?—December or something like that.

Mr. Dixon: January.

The Witness: Well, that apparently went in before January, but I would have to check further. These documents don't prove to me that it went in at this time.

By Mr. MacIntyre:

1159 Q. But they refresh your memory and recollection as to the practices of your company in making its changes in terms and conditions of sale?

A. I don't quite get the question.

Q. Well, I will withdraw the question. I now show you a document marked for identification as Commission's exhibit 596-A and B, and I ask you to state what it is (showing to witness).

A. That is a letter to our branches which I sent to them under date of October 21, 1933.

Q. I show you a document marked for identification as Commission's exhibit 601-A and B, and I ask you to state whether that is a multigraph of a letter from you to all branch managers under date of November 9, 1933 (showing to witness)?

A. What is the question?

Mr. MacIntyre: Read the question.

Trial Examiner Norwood: Read the question.

(Whereupon, the reporter read the question as follows: "Q. I show you a document marked for identification as Commission's exhibit 601-A and B, and I ask you to state whether that is a multigraph of a letter from you to all branch managers under date of November 9, 1933?")

The Witness: That's correct.

1160 By Mr. MacIntyre:

Q. I mean by that branch managers of the National Lead Company.

A. Right.

Q. I now show you a document marked for identification as Commission's exhibit 603 and I ask you to state what that is (showing to witness).

A. That is a similar letter which I sent to all of the National Lead Company branch managers on November 21, 1933.

Q. That is the branch managers of the National Lead Company?

A. That's right.

Q. I now show you documents marked for identification as Commission's exhibits 609 and 610, and I ask you to state what they are (showing to witness)?

A. They are cards sent out by the Atlantic branch of the National Lead Company headed "Quantity discounts" showing discounts for in one case 500 pound lots and 1,000 pound lots, and in the other case the same and 10,000 pounds and carload lots. No dates on either.

Q. I will ask you if you will please make reference to Commission's exhibit for identification 603 and after so doing tell us whether or not you can testify concerning the dates on which Commission's exhibits for identification 609 and 610 were published and distributed by your company?

A. The dates that these cards were sent out; is 1161 that the question?

Q. Commission's exhibit for identification 609 and 610—

A. (Interposing.) You want to know if I can say approximately what dates they were sent out?

Q. Yes.

A. I can't say that; I am sorry. But I don't know. I don't think that they refer or are connected with this letter. I think they were sent out prior to that time.

Q. Would you say that they were sent out prior to the summer of 1933?

A. They may have been.

Q. Well, would you say that they were sent out subsequent to the date of the letter, Commission's exhibit for identification 603, dated November 21, 1933?

A. No, I don't think they were.

Q. In other words, you think they went out prior to the date of that letter?

A. Yes.

Q. Well, would you say that they were issued and distributed by your company within a period of 12 months from the date of your letter? That is, November 21, 1933?

A. Prior to it, you mean?

Q. Yes. Within a period of 12 months prior thereto?

A. I would say they may have been within a period of 12 months or they may have been more than 12 months 1162 before the letter.

Q. Mr. Rowe, I now show you documents which are in evidence in this case as Commission's exhibits 581-A through 581-E, and I ask you to state what they are (showing to witness).

A. They are letters from our San Francisco office, Pacific Coast branch, specimen letters, they say, here under date of January 26.

Q. January 26 of what year?

A. I beg your pardon, of 1937, referring to a price change which became effective at that time and which was sent, I imagine to their branch divisions.

Q. That is, to the branch divisions of the National Lead Company?

A. Of the Pacific Coast branch, not of the National Lead Company.

Q. Well, would you say then that they represent claims and conditions of sale that were then being made effective by the Pacific Coast branch of your company as of that time?

A. Yes.

Q. To whom were those papers sent in your organization? To branch managers or agents?

A. Well, I can't say to whom these were sent other than by judging from their appearance where they would be sent and that would be to our division manager of the Pacific Coast branch at Los Angeles, Seattle and Portland. There must have been papers with it.

1163

Mr. MacIntyre: If your Honor please, I now offer into the record documents which have heretofore been marked for identification as Commission's exhibits 595, 596-A, and B, 597, 598, 599, 601-A and B, 603, 609, and 610 as identified by Mr. Rowe here today as papers of his company.

Trial Examiner Norwood: Is there any objection?

Mr. Ewing: No objection.

Trial Examiner Norwood: They will be received in evidence and marked.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 595, 596-A, 596-B, 597, 598, 59, 601-A, 601-B, 603, 609, 610, were received in evidence.)

Mr. MacIntyre: May I go off the record?

Trial Examiner Norwood: Yes. Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed.

By Mr. MacIntyre:

Q. Mr. Rowe, do you know of any one official of the National Lead Company associated with you in its general offices and who has been with the organization as long as you have presently available and who would be able to give us more precisely details concerning dates of changes in practices than you have been able to give us?

1164 A. Not without consulting the record. I mean I could give you more definite information if you give me time to get it, but I can't remember it.

Q. Well, would there be anybody else in your organization that would be more able to do it than you?

A. I don't believe so.

Q. I believe you told us that Mr. F. M. Carter left the company in 1938 or thereabout?

A. I think I said 1940, but I am not sure. It was somewhere in that time.

Q. Is he alive today?

A. I can make that more definite. It was prior to the Fall of 1939 that he left. He is alive, yes.

Q. But no longer associated with your company?

A. That's right.

Q. Is Mr. Cornish alive?

A. No.

Q. When did he die?

A. I think he died about 1938. I don't know the date, but I can get that accurately if you want it.

Q. Are you acquainted with a Mr. Albert Chatfield of Cincinnati, Ohio?

A. Not that I recall.

Q. Do you have any reason to believe that you would not recall him if you did know a broker in Cincinnati by that name? 1165

A. I don't understand the question. Would I have any reason to believe that I would not recall him?

Q. Would you recall a stock broker with whom you had any dealings?

A. I certainly would recall him.

Q. Do you know of the existence of any records of the United Lead Company at the offices of the National Lead Company?

A. No, I don't.

Q. Have you known of the existence of any such records during the course of your association with the National Lead Company? That is, from the period of the last 25 years.

A. I don't recall any record of theirs that I have ever seen or known of.

Mr. MacIntyre: That is all.

Trial Examiner Norwood: Is there any cross examination?

Mr. Ewing: Yes.

Cross-Examination by Mr. Ewing.

Q. Mr. Rowe, do you recall being asked by Mr. MacIntyre certain questions with respect to the documents which have been marked Commission's Exhibit 581-A to E for identification?

Mr. Ewing: Are they received in evidence?

1166 Mr. MacIntyre: They are in evidence.

By Mr. Ewing:

Q. I think you said that you supposed from the information appearing on them and contained in them that they had been probably sent to the division managers of National Lead's Pacific branch?

Mr. MacIntyre: I object. That does not state the condition of the record. In fact, it erroneously states what the record shows.

Mr. Ewing: I am perfectly willing to go back to the record.

Trial Examiner Norwood: Counsel's statement was, "I believe you said that." If he did not say, he can tell us so.

Mr. Ewing: There was testimony with respect to what disposition was made of them, and that was my recollection.

Trial Examiner Norwood: I think the matter is clear now.

Mr. MacIntyre: I object to the question and ask that the witness be asked to state now what his testimony was instead of counsel telling him what he thought it was.

Trial Examiner Norwood: He is cross examining him, but I might as well state here that the regular rule to leading questions on cross examination under the circumstances is not followed by us.

1167 Mr. Ewing: I understand that.

Trial Examiner Norwood: Objection overruled. Answer the question.

The Witness: I would want to know what the question was that was asked of me originally before I say what answer I will make to it. I don't want to say that I will answer a different question in the same way as I answered that one.

Mr. Ewing: I might make myself clear. What I am about to attempt to do is to simply clear up one situation for the purpose of making the record clear on the point. My recollection—and what I am interested in—was that

I understood the witness to have testified that this exhibit that I referred to was not of his own knowledge or that he knew but that he assumed that it had been sent to the division branches of the Pacific Coast branch.

Mr. MacIntyre: Now, if your Honor please, I object to statements of that kind by counsel to his client which—and I respectfully refer all of you to the record—erroneously misstates the record and does state what counsel wished that the record did show.

Mr. Ewing: It does not do anything of the kind.

Trial Examiner Norwood: I don't follow that. I will overrule the objection and ask the witness to answer the question.

Mr. Ewing: I would prefer if it would be appro-
1168 priate if the reporter could find that portion coming
at the close of the direct where the question was asked so that we would all know exactly what the facts are.

Trial Examiner Norwood: Let the witness tell us what he did say on the subject. What do you recall was said on the subject?

The Witness: As I recall, I said that the letters apparently were sent by our Pacific Coast branch under date of January 26. There is a note in the corner that indicates that they were sent to our division managers, Pacific Coast branch division managers, but that I couldn't say whether they were or not because I didn't know.

By Mr. Ewing:

Q. Would it affect your answer in any way if I called your attention to the fact that the record in this case on page 298, 299, in the course of Mr. MacIntyre's examination—

Mr. MacIntyre: (Interposing.) If your Honor please, I object to the counsel telling the witness what the record shows.

Trial Examiner Norwood: Wait a minute.

Mr. Ewing: I have to ask the question with reference to the record which bears directly on it.

Mr. MacIntyre: That is leading.

Trial Examiner Norwood: I am not certain that counsel
should bring this out in that way. You are cross
1169 examining him but, after all, he is your client and I
think you may bring out the facts there without reading the record.

Mr. Ewing: Well, I have to summarize the record to make my point.

Trial Examiner Norwood: What is that? If you want to talk about the record, I will ask the witness to go out of the room.

Mr. Ewing: I will come up to you and say exactly what it is so there won't be any question about it.

Trial Examiner Norwood: All right. Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. On your direct examination when you answered with respect to what you assumed had been the disposition of those documents, did you know that the exhibits which you were shown according to the testimony in this case of Mr. Dunn had been procured from the files of Eagle Picher?

Mr. MacIntyre: I object to the witness' testimony on direct is not as it is now characterized.

Mr. Ewing: I did not characterize it at all. I asked him did he know when he testified on direct—

Mr. MacIntyre: (Interposing.) That he assumed something. He did not assume something, but he stated facts.

1170 Trial Examiner Norwood: I am going to ask you to please be quiet until he finishes his question. Read the question.

(Whereupon, the reporter read the question as follows:

"Q. On your direct examination when you answered with respect to what you assumed had been the disposition of those documents, did you know that the exhibit which you were shown according to the testimony in this case of Mr. Dunn had been procured from the files of Eagle Picher?")

Trial Examiner Norwood: Objection overruled. You may answer that question.

The Witness: No.

By Mr. Ewing:

Q. Would that fact in any way change your testimony to the effect as I recall it that other copies of those documents were sent to the division branches of the Pacific Coast branch of National?

A. I don't recall testifying that they had been sent. I didn't say that they had been sent as I recall it.

I said I assumed from the notation on the corner of the letter that that was the purpose of it.

Q. Would the knowledge of this other fact change that assumption in any way?

1171 A. Yes, it would.

Q. In what way?

Mr. Wright: Your Honor, I object. I don't see the purpose of the question. How can the fact that if he had known that this was found in the Eagle Picher files make any difference in the witness' answer as to what the document is and use to which it was put.

Trial Examiner Norwood: We are going to have that all brought out and you will get a chance to ask questions on it. I want this thing straightened out. The objection is overruled.

The Witness: Well, I wouldn't know how such a letter would get into the Eagle Picher files.

By Mr. Ewing:

Q. Well, it is a fact, isn't it, Mr. Rowe, that you yourself have no personal knowledge as to what was done with the originals of which these documents are copies of?

Mr. MacIntyre: I object; it is leading the witness.

Trial Examiner Norwood: Objection overruled. Answer the question.

The Witness: I have no knowledge whatever of this letter or anything attached to it prior to sitting in the witness stand here today.

Mr. Ewing: I have no further cross-examination.

Trial Examiner Norwood: Is there any further 1172 examination?

Mr. MacIntyre: May we go off the record for a minute, your Honor?

Trial Examiner Norwood: Yes. Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed.

Redirect Examination by Mr. MacIntyre.

Q. Mr. Rowe, will you please state for the record just what about the fact that that document was found in the files of the Eagle Picher Lead Company would cause you to change any testimony that you gave on direct examination?

A. May I have that testimony reread? We have discussed it so many times here that I don't follow it.

Trial Examiner Norwood: I think you can answer that. He just made a statement there as to your changing your testimony. I think you can tell us the basis of the last testimony you gave without having the record read.

The Witness: If this correspondence came from the Eagle Picher Company's file, then my answer that I gave before is not correct.

By Mr. MacIntyre:

Q. You mean the answer that you gave on direct examination in response to my question?

A. Yes.

1173 Q. Why isn't it correct if this is found in the files of the Eagle Picher Lead Company?

A. That isn't the question. The question was if I knew that this was in the file of the Eagle Picher Lead Company, I wouldn't have answered as I did.

Trial Examiner Norwood: You have made the assumption that counsel understood you made that you knew the papers were sent out to the district office?

The Witness: That's right.

Trial Examiner Norwood: Now he is asking you to explain why your knowledge that these papers came from Eagle Picher's file would cause you to change that assumption as to the original purpose of those papers. Can you tell us that? That is, why that fact would cause you to change your assumption?

The Witness: Well, it wouldn't have been in the Eagle Picher's file if that had been what they were for.

By Mr. MacIntyre:

Q. Why couldn't they have?

A. Well, they wouldn't have gone to our branches, and they may have gotten it from somewhere, but I don't know where.

Trial Examiner Norwood: Well—

The Witness: (Interposing.) I haven't any idea where it came from.

By Mr. MacIntyre:

1174 Q. Is it your testimony that it would have been impossible for the Eagle Picher Lead Company to have secured this from your branches?

A. I wouldn't be able to say one way or the other.

Q. Well then, in the light of that answer, why is it that you feel that the fact that it is found in the Eagle Picher Lead Company's files necessarily leads you to change the testimony you gave on direct to the effect that your branch managers of the Pacific Coast branch sent it to their district offices?

A. I didn't say they sent it to their district offices. I said I assumed that that was the purpose.

Q. Why is it necessary for you to now change the testimony that you did give in that respect by virtue of the mere fact that this document was found in the files of the Eagle Picher Company?

A. I wouldn't assume that it was made up to be sent to our branch managers if it is in the Eagle Picher Company's file.

Q. Why wouldn't it have been made up then?

A. I wouldn't have any idea.

Q. Who in your company would know if you do not know?

A. I don't know who would know.

Q. Who was responsible in your company as of that date for the making up of such papers as a matter of policy?

A. The manager of the Pacific Coast branch.

1175 Q. And who is his superior as of that date?

A. He had no superior on this.

Q. Well, as of 1937 were not you his superior?

A. Not in matters of this sort. The Pacific Coast branch worked quite independently of New York and their method of pricing was entirely different from the rest of the country.

Q. But they were nevertheless subject to your direction at that time, weren't they?

A. Not on matters of this sort.

Q. But I mean in general as to matters of policy?

A. Very general matters of policy.

Q. They are certainly under the control of the National Lead offices in New York, aren't they?

A. They are, yes.

Q. Do you know to whom they send all papers that they mail?

A. No, I don't know.

Q. Is it a fact that at times you prepare papers in the

New York office which you send to them for them to use in connection with instructing salesmen in that branch?

A. No.

Q. Is it your testimony that you have never done that?

A. Instructing salesmen?

Q. No, Mr. Rowe.

A. I beg your pardon, that is what you said.

Q. No. My question is this: Is it your testimony
1176 that you have never prepared papers in the New York office of the National Lead Company to be used by the Pacific branch of that company in instructing its salesmen?

A. Instructing its salesmen in what way, I mean?

Q. In any way as to carrying out matters of policy of your company.

A. We have instructed them at the time of a price change that we are changing the price.

Q. Is it your testimony that you have never instructed them concerning changes of methods of doing business?

A. Are you referring to what is contained here? That is, Dutch Boy White Lead and White Lead Dry, red lead dry, litharge to dealers and so forth?

Q. I am not referring to any document. Will you please answer the pending question?

A. What is the question?

Trial Examiner Norwood: His question is a general question and would include the matters that you mentioned there and others.

The Witness: Would you repeat it please?

Trial Examiner Norwood: Read the question.

(Whereupon, the reporter read the question as follows:
"Q. Is it your testimony that you have never instructed them concerning changes of methods of doing busi-
1177 ness?")

The Witness: I don't recall, but I wouldn't want to answer that question yes or no that I never have. Methods of doing business is very broad. I mean on things of this sort the answer would be no.

By Mr. MacIntyre:

Q. In other words, it is your testimony that the Pacific branch of the National Lead Company is absolutely free of your control and the directions of the general officers of the National Lead Company in putting into effect methods of doing business?

A. I didn't say that.

Q. That is methods such as are represented by Commission's Exhibit 581 then? You would have no control over them in putting into effect such practices as those?

A. I didn't say we would have no control over them.

Q. Just what is the fact, Mr. Rowe? Do you have any control over them with respect to the inauguration of any such method as that or not?

A. We have control, but we leave matters of this sort up to them. They know their conditions on the West Coast far better than we do or ever will and their methods of doing business—they are different from what they are in the East in these items that are under discussion and have been for many years.

1178 Q. Is it your testimony that the Board of Directors of which you are a member of the National Lead Company does not act in ordering price changes not only for the Atlantic branch but also of the Pacific branch of the National Lead Company?

Mr. Ewing: I object to that, your Honor. I think he is going awfully afar afield from the limited point that I went.

Trial Examiner Norwood: I think he may inquire into that. Objection overruled. Read the question.

(Whereupon, the reporter read the question as follows:

"Q. Is it your testimony that the Board of Directors of which you are a member of the National Lead Company does not act in ordering price changes not only for the Atlantic Branch but also of the Pacific branch of the National Lead Company?")

The Witness: The Board of Directors doesn't act on changes of prices.

By Mr. MacIntyre:

Q. Is it your testimony that it has not done so?

A. Well, I wouldn't know. It hasn't in recent years on the matter we are discussing.

Q. You are a member of the Board of Directors, I believe you testified?

A. That's correct.

1179 Q. And it is your testimony that it does not act in ordering price changes by your company?

A. It has not done so for several years in the matter under discussion.

Q. Well, I am asking about price changes. That is the matter under discussion in the question, and do you limit your answer to that question as thus limited?

A. I don't think I understand that question.

Q. I will restate it. Is it your testimony that the Board of Directors of the National Lead Company of which you are a member has not acted in ordering price changes to be put into effect by your company?

A. At any time?

Q. Well, will you answer the question?

A. Well, I would have to know.

Q. Since you have been a member of it?

A. No, I can't recall any time that the Board of Directors has acted on a price change.

Q. Do you think that you would have remembered if such action had been taken with you being a member of the Board of Directors at the time?

A. I think I would, but I don't remember it.

Q. Do you think that you would remember any action of that kind any clearer than circumstances would permit
you to know about the distribution of the document
1180 marked for identification as Commission's exhibit
581?

A. I don't quite get that question, I am sorry.

Trial Examiner Norwood: Read the question.

(Whereupon, the reporter read the question as follows:

"Q. Do you think that you would remember any action of that kind any clearer than circumstances would permit you to know about the distribution of the document marked for identification as Commission's exhibit 581?")

The Witness: Yes, if I understand the question correctly. I would remember the Board of Directors acting on a price change at a meeting which I presumably would have attended better than I would remember documents mailed by our Pacific Coast branch.

By Mr. MacIntyre:

Q. And yet, even in the light of such fact, you have no recollection of the Board of Directors taking any action with respect to price changes since you have been a member of it?

A. No.

Mr. MacIntyre: That is all.

Trial Examiner Norwood: Is there any further examination?

Mr. Ewing: No further examination.

1181 Trial Examiner Norwood: Thank you, Mr. Rowe. You are excused.

(Witness excused.)

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. With respect to the ruling which I took under advisement yesterday as regards Commission's exhibits for identification 92 consisting of 142 numbered pages being a bound pamphlet and Commission's exhibit 93-A to I inclusive, and Commission's exhibit 94-A to G inclusive, Commission's exhibit 22-A to Z-47 inclusive, I shall overrule the objection and receive all this material in evidence. Full explanations of all these matters are in the possession of the respondents.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 92, 93-A, 93-B, 93-C, 93-D, 93-E, 93-F, 93-G, 93-H, 93-I, 94-A, 94-B, 94-C, 94-D, 94-E, 94-F, 94-G, 22-A, 22-B, 22-C, 22-D, 22-E, 22-F, 22-G, 22-H, 22-I, 22-J, 22-K, 22-L, 22-M, 22-N, 22-O, 22-P, 22-Q, 22-R, 22-S, 22-T, 22-U, 22-V, 22-W, 22-X, 22-Y, 22-Z, 22-Z-1, 22-Z-2, 22-Z-3, 22-Z-4, 22-Z-5, 22-Z-6, 22-Z-7, 22-Z-8, 22-Z-9, 22-Z-10, 22-Z-11, 22-Z-12, 22-Z-13, 22-Z-14, 22-Z-15, 22-Z-16, 22-Z-17, 22-Z-18, 22-Z-19, 22-Z-20, 22-Z-21, 22-Z-22, 22-Z-23, 22-Z-24, 22-Z-25, 22-Z-26, 22-Z-27, 22-Z-28, 22-Z-29,
1182 22-Z-30, 22-Z-31, 22-Z-32, 22-Z-33, 22-Z-34, 22-Z-35,
22-Z-36, 22-Z-37, 22-Z-38, 22-Z-39, 22-Z-40, 22-Z-41, 22-Z-42, 22-Z-43, 22-Z-44, 22-Z-45, 22-Z-46, 22-Z-47, were received in evidence.)

Mr. Ewing: On behalf of the respondents, I should like to state, if your Honor please, that they would like to appeal to the Commission from the ruling on the reception of these particular exhibits and we would proceed to prepare the appeal and apply for a hearing at as early a date as we can.

Trial Examiner Norwood: Well, I will advise counsel that I understand we are going to have a recess after tomorrow, and then we will be free for a couple of weeks, and I will be glad for them to go down there. I might say that the new rule of practice would prevent an old fashioned interlocutory appeal and I will state for the record to counsel that I will certify this question to the Commission so that it may be heard. I want to notify counsel that it must be filed directly with the secretary of the Commission and copies sent to the Commission's attorney, and I should be glad to have a copy.

Mr. Ewing: We will furnish that.

Trial Examiner Norwood: Is there anything further?

Mr. MacIntyre: We have no further witnesses this afternoon, if your Honor please, but we expect to 1183 have a witness tomorrow morning. We do not expect that the hearings will require sessions all day tomorrow but only for part of the morning.

Mr. Ewing: May I go off the record?

Trial Examiner Norwood: Yes. Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. At the request of counsel, the hearing is now adjourned until 9 o'clock tomorrow morning, Eastern Standard Time at the same place.

(Whereupon, at 4:20 p.m., June 26, 1946, the hearing in the above entitled matter was adjourned.)

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1184 Room 605, Bar Association Bldg.,
New York City, New York,
June 27, 1946.

Met pursuant to adjournment, at 9:00 a.m., E.S.T.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Everette MacIntyre, Esq., Paul R. Dixon, Esq., and Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq., (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington, D. C.)

T. J. McDowell, Esq., (101 Prospect Avenue, Cleveland, Ohio), appearing for Sherwin Williams Company.

Henry E. Gardiner, Esq., (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.) appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

Edmund P. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, and

Richard Serviss, Esq., 1100 American Building, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

1185 James D. Ewing, Esq., W. R. McDermott, Esq., and E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.) appearing for the National Lead Company.

Roger Hinds, Esq., (165 Broadway, New York, N. Y.) appearing for The Glidden Company.

1186 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on yesterday the hearing in the docket number 5253 in the matter of the National Lead

Company and others, is now convened in the trial room of the Bar Association Building at 36 West 44th Street, New York, N. Y. at 9 o'clock a.m., Eastern Standard Time on the 27th day of June 1946.

Let the record show the following appearances:

Everette MacIntyre, Esq., Joseph S. Wright, Esq., and Paul R. Dixon, appearing for the Federal Trade Commission.

J. T. Welch, Esq., (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington, D. C.) appearing for Sherwin-Williams Company.

Henry E. Gardiner, Esq., (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.) appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

Edmund P. Wood, Esq., 1100 American Building, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.) appearing for the National Lead Company.

Roger Hinds, Esq., (165 Broadway, New York) 1187 appearing for the Glidden Company.

Trial Examiner Norwood: Will you proceed, Mr. MacIntyre.

Mr. MacIntyre: May we go off the record a minute?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

Mr. MacIntyre: If your Honor please, I have just requested counsel for each of the respondents to submit to us for your further inspection each of the invoices listed in the tabulations which we have heretofore offered in evidence and it appears that they are inclined to comply with that request and I would like to ask them, therefore, on the record to state their reaction to it.

Mr. Gardiner: If your Honor please, on behalf of the respondent, International, I wish to state that we will cooperate to the fullest extent in supplying the requested evidence.

The only limitation on our ability to start on that right now is the fact that we are not at the moment in possession of copies of all of the invoices from which the Commission took this information.

On receipt of that, we will proceed to segregate these invoices and send them to the Commission at the earliest possible moment.

1188 Mr. MacIntyre: The 10-day period that I mentioned in that respect off the record, of course, I wouldn't consider as complying that it is the date until we get the photostatic sheets into the hands of Mr. Gardiner.

Mr. Wood: Mr. MacIntyre said that he thought that we were inclined to reply with the request and I do not think that my client, that Eagle-Picher would be inclined to comply with the request at all, but I think they will do it.

Mr. MacIntyre: You will undertake to cooperate with us on that?

Mr. Wood: I shall.

Mr. MacIntyre: Mr. Welch.

Mr. Welch: We will comply unless I notify Mr. MacIntyre to the contrary within the next 2 or 3 days in which event he, of course, will have his own oppositions for any further action to take.

I believe our people will comply but I am not making any guarantee that they will. But I will notify you within the next 2 or 3 days if they won't.

And if they will I will guarantee that it will be done as fast as possible but I am not guaranteeing that it will be done within any 10-day period.

Mr. DuBose: The respondent, National, will comply with the request as soon as practical.

Mr. MacIntyre: May we go off the record?

1189 Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed. Call your next witness, Mr. MacIntyre.

Mr. MacIntyre: I recall Mr. Robert T. Dunn.

ROBERT T. DUNN was recalled by the Commission and having previously been sworn testified further as follows:

Further Direct Examination by Mr. Wright.

Q. Mr. Dunn, you have previously been sworn in this matter, have you not?

A. I have.

Q. As I recall your testimony, Mr. Dunn, you stated that you had made an investigation in this matter in the office of the Lead Industry's Association and discussed the affairs of that Association with Mr. Werner's secretary?

A. I did.

Q. Were you in the hearing on the afternoon of June 25, 1946 during the testimony of Mr. Wormser?

A. I was.

Q. Do you recall a statement by Mr. Wormser regarding documents which were received in evidence marked as Commission's exhibit 519-A and B consisting of a letter from Mr. W. E. Maston of the Eagle-Picher Lead
1190 Company to Mr. Wormser under date of January 31, 1934 and a reply by Mr. Wormser to that letter?

A. Well, before I answer that, I don't associate that exhibit number with it. If you will tell me more what it is about—

Q. (Interposing.) I show you page 1036 of the transcript (showing to witness).

A. You are referring to the letter about the map?

Q. Yes.

A. Yes, I recall now and I heard him testify concerning that letter.

Q. Do you recall whether you received from Mr. Wormser the map which is referred to in that letter from Mr. Maston to Mr. Wormser?

A. I did. I found the letter and a map attached in the files and Mr. Wormser loaned it to me.

Q. Do you recall whether you returned that map to Mr. Wormser at the conclusion of your investigation?

A. I not only recall returning it but Mr. Wormser made a list of all papers, letters, everything that he gave me. The list was returned and the papers listed thereon were returned and Mr. Wormser informed me that the notations on the list in their office showed that everything was intact that I borrowed.

Mr. Wright: I ask that this document be marked
1191 for identification as Commission's exhibit 809.

Trial Examiner Norwood: It will be so marked.

(The paper referred to was marked Commission's Exhibit 809, for identification.)

By Mr. Wright:

Q. Mr. Dunn, do you recognize the document marked as Commission's exhibit 809 (showing to witness)?

A. I do.

Q. Will you please state what it is?

A. It is a pamphlet entitled, "National Recovery Administration, Code of Fair Competition for the Lead Industry." I believe that answers your question. You asked me to state what that is.

Q. Where did you receive that?

A. In the office of the Lead Industry's—discussing matters with Mr. Wormser the question of a code came up and it was mentioned in the course and minutes and Mr. Wormser has a copy and he then told me that he had an extra copy which he would be glad to give me and this is the extra copy which he gave me.

Q. Was this given to you by Mr. Wormser as a copy of the Code of Fair Competition for the Lead Industry?

A. That is right.

Mr. Wright: Your Honor, I offer Commission's exhibit 809 in evidence.

1192 Trial Examiner Norwood: Is there any objection?

Mr. MacIntyre: May we be off the record please?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed.

Mr. Hinds: I object, your Honor, as to its pertinency to Count 2, I raise the objection that it substantially antedates the enactment of the Robinson-Patman Act as to its pertinency to both Count 2 and Count 1. I object to its being hearsay and in no way constituting a declaration by them in or out of court or anything that is in any way binding upon them.

On its face it purports to be some governmental regulation that was apparently imposed on this industry and in no way affecting Glidden's responsibility in this action.

Trial Examiner Norwood: Counsel's point is well taken as far as any order for a violation of that act being based on something that was done under this code. But I can conceive it being offered and received for other purposes. Will you state your objection, Mr. Wood?

Mr. Wood: I have no objection to it whatsoever. I would like to know though whether for the purposes of this case that the notations appearing on the face of it as approved on May 24, 1934 may be accepted as

1193 proof of that fact.

Mr. MacIntyre: No, we can accept that as a date on which the proper officials in Washington gave consideration to the code. We will do that.

Trial Examiner Norwood: Well, does the paper say that it was accepted on that day?

Mr. Wood: It has the notation that it was approved on such and such a date.

Trial Examiner Norwood: Is that printed on it?

Mr. Wood: Yes.

Mr. Wright: Your Honor, that is an official document that was printed by the government printing office.

Mr. Wood: It may be accepted at its face value as having been printed on that day.

Trial Examiner Norwood: It is accepted as evidence of that. It may be shown to be an error but until it is shown to be an error, it would stand.

Mr. Wood: The only reason I raise the point is that when the witness was asked to describe it, he replied that it was a pamphlet containing certain printing on its face. That is why I raised the point.

Mr. DuBose: The respondent, National Lead, raises no objection subject to correction of any errors that may appear in the document. I assume that it is a correct copy.

1194 Trial Examiner Norwood: It is offered under Count 2?

Mr. MacIntyre: It is offered for all purposes to which it could apply.

Mr. Wright: It is offered as a copy of the Code of Fair Competition as promulgated for the lead industry as shown on its face and in its contents, your Honor.

We have had some documents already entered and admitted into evidence which show meetings of these respondents with reference to the drafts of a code of fair competition that the record would hardly be complete without having the code itself.

Trial Examiner Norwood: It will be received as marked. I will overrule the objection.

(The paper referred to, heretofore marked for identification COMMISSION'S EXHIBIT 809, was received in evidence.)

Mr. Wright: I have no further examination of this witness.

Trial Examiner Norwood: Is there any cross-examination?

Mr. DuBose: No cross-examination.

Trial Examiner Norwood: You are excused.

(Witness excused.)

Trial Examiner Norwood: Call your next witness.

1195 Mr. MacIntyre: If your Honor please, I would like for the record now to show what response Mr. Hinds has to the off the record request that I made of him as well as of other counsel to submit to us for your further inspection the invoices of the Glidden Company which are numbered on the tabulation of the Glidden invoices now in evidence.

Mr. Hinds: Well, I object to having requests for cooperation placed upon the record because then that puts us in the embarrassing position of setting forth what we will or will not do in those connections.

It seems to me that requests of that sort should be made entirely a matter of off the record until the answer has been given and then the result of the stipulation should be put on rather than the negotiation of it.

This is really in the course of negotiating and I don't think we should proceed in that manner. I could make various requests of the government that they do this, that or the other thing and put them in the record in the nature of argumentation and then exploit their refusal to agree on these things.

Trial Examiner Norwood: Counsel may do that.

Mr. Hinds: Specifically I have already stated that I would comply.

Mr. MacIntyre: If your Honor please, I thought our negotiations were completed satisfactorily and may 1196 we go off the record to continue them since it appears now that they are not complete.

Trial Examiner Norwood: Well, I think we have said enough about it. Counsel for the Commission makes a request on the record that these invoices should be produced and all the other respondents have replied to that on the record stating whether they will or will not or stating just what they will do about it, and counsel for Glidden is now asked what his reaction is to that request.

Mr. Hinds: I have already written a letter since the request was made to Cleveland recommending that we cooperate fully in that respect, because I understand that those matters have to be added to the tabulation.

I, of course, don't know what the physical difficulty will be because these originals I understand came from various branches and they may have been redistributed, which might handicap us, but we will cooperate, I am sure.

Trial Examiner Norwood: Thank you.

Mr. MacIntyre: Thank you, Mr. Hinds. May we have a five minute recess?

Trial Examiner Norwood: We will take a five minute recess.

(Short recess.)

Trial Examiner Norwood: Proceed.

Mr. MacIntyre: If your Honor please, I would 1197 like to call as the next witness for the Commission, Mr. E. A. Behr.

E. A. BEHR was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. MacIntyre.

Q. What is your full name?

A. E. A. Behr.

Q. Mr. Behr, will you please state the nature of your occupation?

A. Well, I was for many years assistant sales manager of the American Smelting and Refining Company, 120 Broadway.

Q. Are you now so employed?

A. I am not. I retired as of the end of 1945.

Q. You have been in retirement for the last six or seven months?

A. The last six months.

Q. And prior to your retirement you were assistant sales manager of American Smelting and Refining Company at 120 Broadway for what period of time?

A. For 38 years. Not all of that time as assistant sales manager. At first I was assistant sales agent and then assistant sales manager.

Q. And during that period of time, did you han-1198 dle any transactions between your company, the American Smelting and Refining Company, and the National Lead Company?

A. I did. I made practically all the sales of pig lead.

Q. And did National during that period of time purchase pig lead from the American Smelting and Refining Company?

A. It did.

Q. Will you please state the order of importance in which the National Lead Company came among your customers as customers of pig lead for the production of pigments?

Mr. DuBose: If your Honor please, the respondent, National, objects upon the ground that this is wholly irrelevant, immaterial as well as incompetent to the issues in this case.

Trial Examiner Norwood: Objection overruled. Answer the question.

The Witness: I should say they were No. 1, our most important customer in that line.

By Mr. MacIntyre:

Q. Will you explain your answer as to why you regarded them as being important and as so important as to be No. 1?

Mr. DuBose: I object to that as calling for a conclusion of the witness.

Trial Examiner Norwood: Well, now just in the form of the question, it appears so, but I think that his purpose is to elicit some facts as to the sales and volume
1199 of business which they are doing with this company.
I will ask the witness to answer that factually. If they are important, give us some data upon which you base your previous opinion that they were the most important. I will overrule the objection.

The Witness: They were our largest buyers of corroding quality pig lead.

Trial Examiner Norwood: What percentage did they buy of the total sales?

The Witness: I really couldn't tell you. I don't know at the moment.

Mr. MacIntyre: If your Honor please, I now make reference to a document marked for identification as Commission's exhibit 101 and I ask you, Mr. Behr, to state if you can what that is (showing to witness).

The Witness: Exhibit 101 is a letter from Mr. Hall of the National Lead Company in reference to their purchase of pig lead on the Pacific Coast.

By Mr. MacIntyre:

Q. From American Smelting and Refining? That is their purchase from American Smelting and Refining?

A. No. It is about their total purchase out there.

Q. And the date of the letter?

A. January 24, 1931.

Q. And to whom is the letter addressed?

A. It is addressed to me, American Smelting and
1200 Refining Company.

Q. You received the original of that letter?

A. Right.

Q. Mr. Behr, I now show you a document marked for identification as Commission's Exhibit 103 and I ask you to state what that is (showing to witness)?

A. Exhibit 103 is a letter from the American Smelting and Refining Company addressed to the National Lead Company in which the smelting company signifies its willingness to deliver metal under a certain contract either to St. Paul or Kansas City.

Q. And that letter is from whom?

A. From myself, I imagine. I dictated the letter.

Q. To the National Lead Company?

A. To Mr. Hall of the National Lead Company that is in 1932.

Q. I now show you a document marked for identification as Commission's Exhibit 104-A and 104-B and I ask you to state what that is (showing to witness)?

A. Exhibit 104-B is a letter written by myself for the smelting company and addressed to the National Lead Company and represents an understanding between Mr. Hall and myself as to the price differentials in force for various deliveries of pig lead.

Q. By your company to National?

1201 A. By our company to National.

Trial Examiner Norwood: Is that A and B?

The Witness: That is exhibit 104-B.

By Mr. MacIntyre:

Q. I now show you a document—

Trial Examiner Norwood: (Interposing) Your testimony was concerning exhibit 104-A and B, wasn't it? Both sheets and one letter there?

The Witness: Pardon me, I didn't see that. It is exhibit 104-A and 104-B.

By Mr. MacIntyre:

Q. And the date of the letter is what?

A. June 28, 1932.

Q. Mr. Behr, I now show you a document marked for identification as Commission's Exhibit 105 and I ask you to state what that is.

A. It is a letter from Mr. Hall of the National Lead Company addressed to me in which he calls my attention to the fact that one of our contracts was incorrectly made out and the price was a dollar per ton too high.

Q. I now show you a document marked for identification as Commission's Exhibit 107 and I ask you to state what that is (showing to witness).

A. It is a letter from the American Smelting and Refining Company addressed to Mr. Hall of the Na-
1202 tional Lead Company confirming receipt of the National Lead Company's instructions to ship during December 100 tons of corroding lead to the St. Louis Lead and Oil Works in St. Louis.

Q. Did you send that letter to the National Lead Company?

A. Yes. It was dictated by my assistant.

Q. This is a copy of the letter you sent?

A. Right.

Q. I now show you a document marked for identification as Commission's Exhibit 108 and I ask you to state what that is (showing to witness).

A. Exhibit 108 is a letter from Mr. Hall of the National Lead Company addressed to me confirming a telephone conversation in which the smelting company agreed to divert 100 tons of common desilverized lead.

Trial Examiner Norwood: You needn't tell us the contents of that. Just identify it.

The Witness: Giving us shipping instructions on 200 tons of lead.

By Mr. MacIntyre:

Q. You received that from the National Lead Company?

A. Yes.

Q. Now, Mr. Behr, I show you documents marked for identification as Commission's Exhibits 113, 118, 123, 136, 147, 158, 160, 173, 235, 238, 247, 270, 288, 309, 323, 336, 343, 365, 381, 388, 390, 393, 401, 409-A and B, 410, 411,
1203 425, 428 and 460, and I ask you to state whether or not you recognize those as records of memoranda

and contracts of agreements between the American Smelting and Refining Company and the National Lead Company concerning sales of pig lead, by the American Smelting and Refining Company to the National Lead Company on the dates thereon?

Mr. Welch: Objection as to the form of the question.

Trial Examiner Norwood: Objection overruled.

The Witness: I would like to ask whether I am supposed to identify every single contract separately?

Mr. MacIntyre: Yes, if you please. In other words, if you care to, go through them and satisfy yourself as to whether or not you can answer the question as to each and then give such answer as you care to give or feel justified.

Trial Examiner Norwood: See whether or not you recognize them as to what the lawyer stated them to be.

The Witness: Are these all average price contracts?

Mr. DuBose: I object to the question by the witness, if your Honor please, and I move to strike it from the record.

Trial Examiner Norwood: The objection is sustained. You were being asked what these are.

Mr. MacIntyre: May we help the witness by having
1204 the reporter read my question to him?

Trial Examiner Norwood: Yes. Read the question.

(Whereupon, the reporter read the question as follows:

"Q. Now, Mr. Behr, I show you documents marked for identification as Commission's Exhibits 113, 118, 123, 136, 147, 158, 160, 173, 235, 238, 247, 270, 288, 309, 323, 336, 343, 365, 381, 388, 390, 393, 40~~1, 409-A~~ and B, 410, 411, 425, 428 and 460, and I ask you to state whether or not you recognize those as records of memoranda and contracts of agreements between the American Smelting and Refining Company and the National Lead Company concerning sales of pig lead, by the American Smelting and Refining Company to the National Lead Company on the dates thereon?")

The Witness: I do so recognize them.

By Mr. MacIntyre:

Q. Mr. Behr, I now show you a document marked for identification as Commission's Exhibit 476-A and B, and I ask you to state whether you recognize that and if so as what (showing to witness)?

A. Exhibits 476-A and B is a request from the National

Lead Company to make certain shipments and to ship them as early as possible, shipments of pig lead.

Q. You recognize that as a request made by the 1205 National Lead Company to the American Smelting and Refinery Company?

A. Yes.

Q. On what date?

A. March 26, 1941.

Q. I now show you a document marked for identification as Commission's Exhibit 480, and I ask you to state what that is (showing to witness).

A. Exhibit 480 is a request from the National Lead Company to the American Smelting and Refining Company.

Mr. DuBose: I object to the witness going into the contents of the document.

Trial Examiner Norwood: Just enough to describe it for us and identify it.

The Witness: I believe this letter was received by the smelting company from the National Lead Company.

By Mr. MacIntyre:

Q. As of what date?

A. October 28, 1941.

Q. Mr. Behr, I now show you a document marked for identification as Commission's Exhibit 493-A through 493-G and I ask you to state whether or not you recognize the signatures of the officials of the American Smelting and Refining Company as they appear thereon? (Showing to witness).

A. I recognize and know both signatures very well. Do you want me to specify them?

1206 Q. Yes, if you please.

A. Mr. W. J. O'Connor.

Q. Who is he?

A. Manager of the Utah Department of the American Smelting and Refining Company.

Q. And the other?

A. Also the signature of Mr. George Brockington, secretary of the American Smelting and Refining Company.

Q. As of what date?

A. July 17, 1943.

Mr. MacIntyre: If your Honor please, I now offer in evidence all of these documents which have been identified by the witness here this morning. That is, by the witness, Behr.

Mr. DuBose: May we have a five minute recess to look these over?

Trial Examiner Norwood: Yes. We will take a five minute recess.

(Short recess.)

Trial Examiner Norwood: Proceed. Is there any objection?

Mr. DuBose: If your Honor please, as to all of the exhibits offered in evidence marked for identification as numbers 101 to 493 inclusive without the consecutive numbers being in there, we have the general objection that
1207 we made in connection with the contract which I believe has been marked as exhibit 93-A through H. They are completely immaterial and irrelevant to the issues in this case. As to the contracts of sale which are marked exhibits 113 through 460 for identification—

Trial Examiner Norwood: (Interposing.) Wait a minute now. Marked 113 through what?

Mr. DuBose: Through exhibit 460. We have the further objection that these contracts show nothing on their face that have any relation to any of the issues in this case. They provide for the sale of corroding lead by the American Smelting and Refining Company to the National Lead Company at a price which is the current market price. They show no discrimination and we submit that therefore they are irrelevant.

As to exhibits 158 and 476-A and B, I should like to have the privilege of a preliminary examination as to certain pencil notations, the same general objection applying also to those.

As to exhibit—

Mr. MacIntyre: (Interposing.) I want to say that I am not offering the pencil notations on any of these, so for that reason I see no need for a preliminary examination

1208 Mr. DuBose: With that statement, I withdraw my request for a preliminary examination.

Trial Examiner Norwood: That related to exhibit 476-A and B only?

Mr. DuBose: There may be others. I specifically noted exhibit 158 and 476-A and B.

Trial Examiner Norwood: Proceed.

Mr. DuBose: As to exhibit 493—what are the letters on that?

Mr. Dixon: A through G.

Mr. DuBose: We submit that this is wholly irrelevant since it concerns a contract between the Clayton Silver Mines and the American Smelting and Refining Company neither of whom is a respondent in this action and there has been no proof as far as I know that Clayton Silver Mines is connected with any of the respondents.

Mr. Wood: I would like to object to all the exhibits on the ground that they are incompetent, at least at this stage in relation to any of the allegations of the complaint or the issues of the case.

I am not objecting on authenticity or lack of proof of authenticity but on the ground that they haven't been connected with the issues of the case.

Trial Examiner Norwood: Is there any further objection?

1209 (No response.)

Mr. MacIntyre: If your Honor please, all of these papers except the ones marked for identification as Commission's Exhibit 493-A to G relate to the sale as the witness has testified, to the sale of pig lead by the National Lead Company to respondent, National Lead Company.

Trial Examiner Norwood: You mean sales by American?

Mr. MacIntyre: By the American Smelting and Refining Company to the National Lead Company and in that respect they show a continuation of the practice as between those two companies in making the price of pig lead as was shown yesterday through Commission's Exhibits 93 and 94 to have originated back about the turn of the century. This brings it down to date or practically so.

Trial Examiner Norwood: Now what about 493-A to G?

Mr. MacIntyre: 493-A to G has been authenticated both by Mr. Brockington, the secretary of the American Smelting and Refining Company when he produced it and it was marked for identification in this case, as he produced it then under subpoena duces tecum from the files of the American Smelting and Refining Company and it has been further authenticated today by this witness as a record of a contract between the American Smelting and Refining
Company and the parties shown thereon pursuant to
1210 the terms of which the American Smelting and Refining Company secured ores for the refining of the same into pig lead and other resultants.

It is for the purpose of showing the terms and conditions under which and through which this pig lead is purchased by the American Smelting and Refining Company and which it in turn as shown by the other documents sells to the National Lead Company.

Mr. DuBose: If your Honor please, we admit—

Trial Examiner Norwood: (Interposing.) —Just a second. What has the Clayton Silver Mine Company to do with this? Is it owned by National?

Mr. MacIntyre: No. But this contract discloses the terms and conditions under which the American Smelting and Refining Company secures the pig lead which it sells to National as disclosed by the other contracts in the pending offer and for that reason, it is important to show the terms and conditions that American Smelting and Refining Company and the National Lead Company impose all the way from the mines down to the time that this lead pigment in the form of white lead-in-oil and otherwise is sold to the purchaser.

Mr. DuBose: I submit that that contract has nothing to do and in no way proves any of those statements made by Mr. MacIntyre:

Trial Examiner Norwood: Let me ask him one
1211 more question.

Mr. DuBose: Certainly.

Trial Examiner Norwood: Do you claim that National in any way dictates the terms of these contracts as between American and these people from whom they buy? Is there any connection between National and these people?

Mr. MacIntyre: Yes.

Trial Examiner Norwood; How is that?

Mr. MacIntyre: The price that was shown yesterday to be the applicable price for pig lead in the contracts between American Smelting and Refining Company and National Lead is used by American Smelting and Refining Company as the basis for determining the price that will be paid for the lead content of the ores purchased from the Clayton Mine.

In other words, that all important formula of f. o. b. New York, pig lead-price, determines—and not only determines but absolutely controls the price that will be paid for the lead ores.

Mr. DuBose: If your Honor please, in the exhibits proffered in this group which have to do with contracts

between the National Lead Company and the American Smelting and Refining Company, the price is set forth as the average of the published quotations of the A. S. & R.
Company for common desilverized domestic lead for
1212 New York delivery for the several business days
during the month of February. I am just reading it from one of them. Now could that agreement as to what price was paid by National Lead have any influence on the Clayton Silver Mine Company in their negotiations with the American Smelting and Refining and even if they did, of what possible relevance is that in this case?

Mr. MacIntyre: If your Honor please, the answer to that question of Mr. DuBose is found in Commission's Exhibit for identification 493-B, in the paragraph entitled, "Lead" in which it is set forth the basis for determining the prices to be paid for the pig lead content of the ores purchased by the American Smelting and Refining Company.

Trial Examiner Norwood: Now are there any further objections?

Mr. DuBose: I think I have completed the statement of my objections.

Trial Examiner Norwood: I will overrule the objections and receive all of the exhibits mentioned except Commission's Exhibit for identification 493-A to G and I will reserve the ruling on that until I study not only this but some of the other contracts which were received here. I will reserve my ruling on that.

(The papers referred to, heretofore marked for identifi-
cation COMMISSION'S EXHIBITS 101, 103, 104-A,
1213 104-B, 105, 107, 108, 113, 118, 123, 136, 147, 158, 160,
173, 235, 238, 247, 270, 288, 309, 323, 336, 343, 365, 381, 388, 390, 393, 401, 409-A, 409-B, 410, 411, 425, 428, 460, 476-A, 476-B, 480, were received in evidence.)

Mr. MacIntyre: That is all I have for the witness.

Trial Examiner Norwood: Is there any cross-examination?

Mr. DuBose: Yes.

Trial Examiner Norwood: I will state for the record that I shall probably carry this over during our contemplated recess and if they want to hand me any citations on the question, I will be glad to have them and mail the Commission's attorney a duplicate.

Cross-Examination by Mr. DuBose.

Q. Mr. Behr, you stated, I believe, that you have been with the American Smelting and Refining Company for 38 years?

A. Yes.

Q. Until six months ago?

A. Yes.

Q. Now when did you become assistant sales manager?

A. Sometime early in the 1920's.

Q. Sometime in the early 20's?

A. Yes.

1214 Q. And in that connection what were your duties?

A. General executive assistant to the sales manager, H. M. Brush who was vice-president.

Q. H. M. Brush, vice-president and sales manager?

A. Yes.

Q. He was your superior?

A. Right.

Q. Now you stated, I believe, on direct examination that in your opinion National Lead Company was the number one customer for corroding pig lead?

A. Yes.

Q. Is that correct?

A. Of the smelting company.

Q. Of your company?

A. Of the American Smelting and Refining Company, yes.

Q. And they were the largest purchaser of corroding pig lead for white lead manufacture; is that right?

A. I don't know what it was used for. I assume so.

Q. How in addition to corroding pig lead, what other kinds of lead did the American Smelting and Refining Company sell?

A. Common desilverized lead and the chemical pig lead, that is about all. Occasionally we sold small lots of soft Missouri lead.

Q. How did your sales generally over the years 1215 during which you were connected with the company of corroding pig lead compare with the total lead production of your company?

Mr. MacIntyre: May we have that question read?

Trial Examiner Norwood: Read the question.

(Whereupon, the reporter read the question as follows:
"Q. How did your sales generally over the years during which you were connected with the company of corroding pig lead compare with the total lead production of your company?")

The Witness: The demand for corroding lead has varied very much during different periods. There were times when we couldn't sell any corroding lead. I think there was a month or two when the National Lead Company didn't buy one ton of corroding lead and perhaps 100 tons of common desilverized lead.

That was in the 1930's and you are asking about a normal situation, as I understand it, more or less normal, how our corroding lead sales compared with the total lead sales.

Mr. MacIntyre: Now, if your Honor please, I object to the question and any further answer to the question because we are attempting now to get into fields that will probably lead us to lead pipe and a lot of other fields not related to lead pigments.

1216 Trial Examiner Norwood: This is cross-examination. Objection overruled.

The Witness: Well, I should say that during the last 20 years that about 25 per cent of our production was corroding lead. I had better say 25 to 35 per cent.

Trial Examiner Norwood: Could you give an estimate of how much of that production was sold to National?

The Witness: I couldn't do that offhand, no. I would have to look up the records of the smelting company and I really couldn't say.

Trial Examiner Norwood: You couldn't give an estimate of that?

The Witness: I would rather not. I am afraid my figures would be off.

By Mr. DuBose:

Q. So you say that the corroding pig lead production of the American Smelting and Refining Company represented about 25 to 30 per cent of that company's total lead production over the years?

A. Yes, that is 25 to 35 per cent.

Q. 25 to 35 per cent?

A. Yes.

Q. Is it not true, Mr. Behr, that electrical manufacturing companies, cable companies, wire companies, are also large customers of the American Smelting and Refining Company?

1217 Mr. MacIntyre: I object. It is irrelevant and immaterial.

Trial Examiner Norwood: Overruled.

The Witness: Yes.

By Mr. DuBose:

Q. Prior to your becoming assistant sales manager in the early 1920's, what position did you hold with the American Smelting and Refining Company?

A. Frankly I sold the pig lead since December 1907 and practically nobody has ever interfered with me.

Q. During the handling of sales on behalf of the American Smelting and Refining Company since 1907, have you ever known of any other company other than the American Smelting and Refining Company that dictated to your company what prices you would get on your sales?

Mr. MacIntyre: I object. It calls for a conclusion and speculation, an interpretation of action.

Trial Examiner Norwood: I think he may answer that question. Objection overruled.

Mr. MacIntyre: May we have the question read?

Trial Examiner Norwood: Read the question.

(Whereupon, the reporter read the question as follows:

"Q. During the handling of sales on behalf of the American Smelting and Refining Company since 1218 1907, have you ever known of any other company other than the American Smelting and Refining Company that dictated to your company what prices you would get on your sales?")

Trial Examiner Norwood: I think that you haven't laid the grounds for that. You haven't shown that he would know whether or not some people dictate and I also think it is not within the range of the direct examination.

Mr. DuBose: If your Honor please, on the two questions your Honor raises, this man says he has handled sales of pig lead for the American Smelting and Refining Company since 1907.

He should certainly have some ideas of what the methods and practices were of that company in selling pig lead.

Trial Examiner Norwood: Well, I don't think that it would follow that he would know whether or not the prices that were given him at which he could sell these things were dictated or not dictated.

If you laid the grounds and showed that he sits in on the policy making and price making and can tell us that, why I would be glad to have that and I would overrule any objection.

But in the present state, I will sustain the objection to the question as it stands now unless there is some
1219 ground laid for it.

Mr. MacIntyre: If your Honor please, in this connection in addition to that question, I want to point out that there is in evidence already documents and the date 1907 and in fact the contracts of yesterday of 1906 showing that officials beyond this gentleman determined those prices and I want to say this that if this new matter should be gone into, it will lead us into an extended redirect and through it we will be able to show that these matters did arise even prior to 1906.

Trial Examiner Norwood: If counsel should lay the grounds for that question. Proceed.

By Mr. DuBose:

Q. Mr. Behr, during the course of your employment with the American Smelting and Refining Company, did you ever have occasion to know how prices were arrived at?

A. Yes.

Q. Will you tell us—

Mr. MacIntyre: (Interposing.) I object to the question on the ground that it is a new matter and was not gone into on direct.

Mr. DuBose: I submit, your Honor, that all of these documents were offered for the stated purpose stated by Mr. MacIntyre that National Lead Company controlled the price at which American Smelting and Refining would
1220 sell to them and in turn controlled others.

Trial Examiner Norwood: Yes, that is offered to support that contention. But this man is being cross-examined now on the evidence that was offered to support that contention and not on the contention itself.

When you combat the contention itself you will be putting in your case but there is a distinction there that I should like for us to avoid here on account of time considerations.

Mr. DuBose: I think he can tell us in a very few words the answer to the last question.

Trial Examiner Norwood: Read the question.

(Whereupon, the reporter read the question as follows: "Q. Mr. Behr, during the course of your employment with the American Smelting and Refining Company, did you ever have occasion to know how prices were arrived at?")

Trial Examiner Norwood: Objection overruled. Answer the question as to how they were arrived at.

The Witness: We have a small committee and the committee talks it over and the matters of sales and demand are gone into and other things and on the basis of that situation, we decide whether the price is too low or too high or we make our change as we think it should be made.

1221 By Mr. DuBose:

Q. When you say "we" to whom do you refer?

A. At times it has been myself alone. Then it has been the manager with myself and at other times, the chairman of the Board might be in on the meeting or the president if it was something particularly important when we wanted to consult him.

Q. And those are all officials of the American Smelting and Refining Company?

A. Yes, all officials of the American Smelting and Refining Company.

Q. Mr. Behr, your company, the American Smelting and Refining Company, was and is in the pig lead business; is that true?

A. Yes.

Q. You sell to any purchaser, do you not?

A. We do.

Q. Including National Lead?

A. Including National Lead.

Mr. DuBose: No further cross-examination.

Mr. MacIntyre: If your Honor please, I have some questions.

Redirect Examination by Mr. MacIntyre.

Q. Mr. Behr, in connection with this question of
1222 how you made the prices, I want to call your attention to Commission's Exhibit 104-A and B, and I ask you to state whether through any decision of yours the practice was originated by your company of setting up differentials such as are indicated by that exhibit.

I am talking about the original practice of your company now.

Mr. DuBose: I object upon the ground that there has been no proof of any practice of differentials or any other practice of the American Smelting and Refining Company.

Trial Examiner Norwood: Objection overruled.

Mr. DuBose: Exception.

The Witness: This manner of doing was in vogue when I went with the American Smelting and Refining Company. In other words, notice to the National Lead Company of the differentials.

By Mr. MacIntyre:

Q. And is your answer the same to the question that quotations were made on pig lead f.o.b. New York?

A. Will you repeat that?

Q. Well, were quotations on pig lead f.o.b. in New York being made by the American Smelting and Refining Company when you went with that company?

A. Yes.

Mr. MacIntyre: That is all.

1223 Trial Examiner Norwood: Is there anything further?

Mr. DuBose: Nothing further.

Trial Examiner Norwood: You are excused.

(Witness excused.)

Trial Examiner Norwood: Call your next witness.

Mr. Wright: Your Honor, we have no further witnesses at this time in New York. May we go off the record just a moment?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed.

Mr. Wright: It is the intention of counsel for the Commission to resume hearings on Wednesday, July 24th at Cleveland at 10 a. m. in the Federal Building, to continue on July 29th, Monday, in St. Louis and on August 1st in Philadelphia.

This is on the understanding that counsel for Eagle-Picher and for Anaconda can produce a witness each at the hearing in Cleveland.

Mr. Gardiner: If your Honor please, I have reason to believe that we can produce the witness that is desired on that date and if for any reason that is not possible I shall notify Mr. Wright within the next several days.

Mr. Wood: I am quite confident that I can produce the witness.

1224 Trial Examiner Norwood: Well, is there anything further?

Mr. Wright: Nothing further.

Trial Examiner Norwood: Well the schedule that the counsel has announced will be followed as far as practicable. We will now adjourn this hearing to reconvene in the City of Cleveland, Ohio, in the office of the Custodian in the Federal Building in that City, at 10 o'clock Standard Time on the 24th day of July 1946. We stand adjourned.

(Whereupon, at 12:10 o'clock p. m., the hearing was adjourned.)

1225

Room 410,
Federal Building,
Cleveland, Ohio,
July 24, 1946.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph Wright, and
Paul R. Dixon, Attorneys for the Federal Trade Commission.
J. T. Welch, (Davies, Richberg, Beebe, Busick & Richardson, 15th Street N. W., Washington, D. C.) and
T. J. McDowell, (101 Prospect Avenue, Cleveland, Ohio), Attorneys for Sherwin-Williams Company.
Henry E. Gardiner, (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, New York), for Anaconda Copper Mining Company and International Smelting & Refining Company.
Richard Serviss, and
Edmund P. Wood, Attorneys for Eagle-Picher Lead Company and the Eagle-Picher Sales Company.
Eugene Z. Du Bose, (Alexander & Green, 120 Broadway, New York, New York), for the National Lead Company.
1226 ~~John A. Duncan,~~ (1649 Union Commerce Building, Cleveland, Ohio), for the Glidden Company.

1227 PROCEEDINGS.

Trial Examiner Norwood: The meeting will come to order. Pursuant to adjournment on June 27th, hearing and docket 5253, in the Matter of National Lead Company et al., is now convened in Cleveland, Ohio, in Room 410 of the Federal Building, at 10 o'clock a. m., on the 24th day of July, 1946.

The appearances are as follows: Joseph Wright and Paul R. Dixon, Attorneys for the Federal Trade Commission.

J. T. Welch and T. J. McDowell, Attorneys for Sherwin-Williams Company.

Henry E. Gardiner, Attorney for Anaconda Copper Mining Company and International Smelting & Refining Company.

Richard Serviss and Edmund P. Wood, Attorneys for Eagle-Picher Lead Company and the Eagle-Picher Sales Company.

Eugene Z. Du Bose, Attorney for the National Lead Company.

John A. Duncan, Attorney for the Glidden Company.

Are counsel present and ready to proceed?

Mr. Wright: We are ready, your Honor. The witness is here.

Mr. Duncan: Step forward, Mr. Sprague.

Trial Examiner Norwood: Do you have the page number?

Mr. Wright: What is the page number?

Trial Examiner Norwood: The last number is 1224.
1228 Call your witnesses.

Mr. Wright: Paul Sprague.

Trial Examiner Norwood: Have you got a subpoena?

The Witness: Yes.

PAUL E. SPRAGUE was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Dixon.

Q. Please state your name, address, occupation for the record.

A. Paul E. Sprague, vice-president, Glidden Company, Cleveland.

Q. What are the duties and responsibilities of your present position?

Mr. Duncan: If your Honor please, just in order to make sure of the record, I want to make certain this fact: Is the Commission calling Mr. Sprague as their own witness?

Trial Examiner Norwood: Yes, as I understand it.

By Mr. Dixon:

Q. I believe the last question was what the duties and responsibilities of your present position are.

A. The Glidden Company is operated in several divi-
sions. I am in charge of the operation of the soy bean
1229 and the feed and the pea division.

Q. I didn't understand the last word.

A. Pea.

Q. How long have you been so employed at the Glidden Company?

A. Since July, 1945.

Q. Will you start at the beginning of your affiliation with the Glidden Company and give us a chronological story of your services with the company?

A. I started in the employ of the Glidden Company in the summer of 1916, and have been employed. I have been charged with a wide variety of responsibilities during that period. I would really have to sit down and figure it out to enumerate all of them in chronological order.

Q. What was your position prior to the one that you presently hold?

A. I was in charge of the sales of the chemical, pigment, lead, and metal divisions of the Company.

Q. For how long were you in that position?

A. For approximately 10 years, beginning in 1935.

Q. For how long a period in your service with Glidden have your duties concerned the production and marketing of lead pigments?

A. Since 1925.

Q. Will you tell me what lead pigments are pres-
1230 ently produced and sold by Glidden Company, or any
of its subsidiary or affiliated companies?

Mr. Duncan: I didn't hear the question.

Trial Examiner Norwood: Read it.

(Last question read.)

A. The Glidden Company has two subsidiary companies producing lead pigments. Metals Refining Company Division produces lead oxides and—Euston Lead Company—

Q. What is the relationships of Metal Refining Company to Glidden?

A. A division of the Glidden Company.

Q. Am I correct, my understanding, it is not a separate corporate entity?

A. At this time, no.

Q. Was it ever a separate corporate entity from the Glidden Company?

A. Yes, sir; each of the divisions cited were at one time corporate entities. They were businesses that were acquired by Glidden by purchase.

Q. When was the Metals Refining Company acquired by purchase?

A. I would guess the answer, if that is satisfactory.

Q. Give us your best information.

Mr. Duncan: I object to any answer—if your Honor please, I object to any answer that is based upon a guess.

1231 Trial Examiner Norwood: Yes, speak from your own knowledge.

A. I don't know the exact time.

By Mr. Dixon:

Q. Can you give us an approximate time?

A. I believe around 1928 or '29.

Q. Where are the plants or factories operated by the Metals Refining Division of Glidden located?

A. Hammond, Indiana.

Q. What lead pigments are produced in these factories?

A. I answered that just before.

Q. In that answer I believe you said oxides. Does that include dry red lead?

A. All of the oxides of lead. That embraces the litharges and the red leads; there are a number of grades.

Q. Over what area in the United States are the lead oxides produced by the Metals Refining Division of Glidden sold?

A. Wherever the Metals Refining sales organization can secure an order.

Q. Is that throughout the United States?

A. Yes, sir; or Europe, or anywhere else in the world.

Q. Are shipments from the Metals Refining Division of Glidden made direct to customers or are they warehoused?

A. They are made direct to customers. I cannot recall about warehousing. It is 11 years since I have been 1232 in charge of that operation and I cannot recall about the warehousing.

Q. What is the relationship of the Hammond Metal Products Company to Glidden?

A. You mean the Hammond Lead Products, don't you?

Q. Yes.

A. No relation to Glidden.

Q. When was the Euston Lead Company acquired by Glidden?

A. I do not recall the date.

Mr. Duncan: Your Honor please, may I interrupt for a second?

Trial Examiner Norwood: Yes.

Mr. Duncan: Two people are here in the room and I don't know whether they are to be used as witnesses. If they are, I would like to have an order of separation.

Trial Examiner Norwood: Yes, the motion is allowed. All who are summoned here to be witnesses will please wait on the outside; there is a bench out there for you.

Mr. Wright: No other witnesses have been subpoenaed to this hearing.

Trial Examiner Norwood: I consider it, as a matter of right, if you want the other witnesses to go out, you may have it.

Go ahead.

By Mr. Wright:

1233 Q. Can you give us the approximate date when the Euston Lead Company was acquired by Glidden?

A. I believe about 1923.

Q. Since the date of the acquisition, it has been operated, has it, as a division of Glidden Company?

A. Both as a separate corporation, taken over and absorbed and merged with the Glidden Company.

Q. Where is the plant operated by the Euston Lead Company located?

A. Scranton, Pennsylvania.

Q. That is the only factory operated by that division?

A. That is right.

Q. What is produced in the Scranton plant?

A. Basic carbonate, white lead, and white lead in oil.

Q. Is lead sulphate produced by Euston?

A. No, sir.

Q. Does the Glidden Company solicit the sale of the lead pigments which it produces throughout the entire United States?

A. Wherever the Glidden Paint Divisions have a sales representation, white lead is available for sale and is solicited.

Q. Mr. Sprague, will you state to us as briefly as you can the present method of quoting delivered prices on white lead and oil employed by the Glidden Company?

1234 Mr. Duncan: I object your Honor; the complaint is confined to a definite time. His question is in the present tense. It relates to the present time rather than the time in the amended complaint; therefore, I object to the question.

Mr. Wright: I will withdraw the question.

Trial Examiner Norwood: Question withdrawn.

By Mr. Wright:

Q. Will you state, Mr. Sprague, the method of quoting delivered prices, terms and conditions of sale for white lead in oil that was employed by the Glidden Company during 1942?

A. The method?

Mr. Duncan: I object to the question, your Honor; unless the question includes a definition of the terms. I don't believe it is a fair question to put to the witness.

Trial Examiner Norwood: Read the question.

(Last question read.)

Trial Examiner Norwood: Objection overruled. Counsel may clarify and call for definitions if it isn't perfectly clear. Off the record.

(Discussion, off the record.)

Trial Examiner Norwood: On the record.

Mr. Duncan: If your Honor please, of course, the question which was put assumes that they did have a 1235 method.

Trial Examiner Norwood: Yes. If counsel objects on that ground—

Mr. Duncan: I object.

Mr. Wright: Your Honor, it is perfectly possible to quote terms and prices and conditions of sales on this. All I am trying to get is how they quoted the prices, terms and conditions.

Trial Examiner Norwood: Read the question.

Mr. Duncan: I didn't ask it that way.

Trial Examiner Norwood: Read the question.

(Last question read.)

Trial Examiner Norwood: You may lay the ground for that as to whether they did quote delivered prices and terms. I will sustain the objection to the question as to the form of it.

By Mr. Wright:

Q. Mr. Sprague, will you state the terms and conditions of sale quoted by the Glidden Company for white lead in oil during the year 1942?

A. The sale of white lead in oil in 1942 by the Glidden Company was—the sales, rather, were handled in different ways. The bulk of the white lead in oil sold by the Glidden Company was sold by the Paint Division or the Paint Sales
organization. I was not in charge of that organiza-
1236 tion and I would have to consult them to be perfectly
certain about a detailed answer to your question. The white lead in oil was also sold during that period principally, not entirely, to different clients in the trade by the Euston/Lead Division.

I was in administrative charge of the sales of that division and I can answer your question, if I understand it correctly, by saying that white lead in oil was tendered for sale at a price, and if it was agreeable to the buyer, an order was entered and accepted and shipped.

Q. Are you familiar with the terms and conditions of sale quoted by the Glidden Company on dry white lead during the year 1942?

A. Yes, sir.

Q. Will you please state the terms and conditions of sale which were employed by the Glidden Company in offering for sale dry white lead in 1942?

Mr. Duncan: If your Honor please, I object to the question, inasmuch as I understand it, the OPA had—was in effect in 1942 and therefore it is not germane in this case what the terms or conditions were of sale.

Trial Examiner Norwood: Objection overruled. The witness may give us that information.

Answer the question.

A. Repeat the question, please.

1237 (Last question read.)

Trial Examiner Norwood: Answer the question.

A. The terms were net cash, 30 days, less one per cent for cash in 10 days. Conditions were delivered f.o.b. the plant at Scranton, Pennsylvania, with transportation charges as paid by the seller allowed to the buyer. Correction, transportation charges allowed by the seller to the buyer.

Q. Am I correct in my understanding, then, that the f.o.b.—of your testimony, that the f.o.b. Scranton price, with transportation paid by the seller was applicable throughout the entire United States?

A. All of the transportation charges that were paid by the seller—buyer, were allowed by the seller at the current public freight rates. If the seller paid the charges in a shipment, there was no allowance to the buyer.

Mr. Duncan: If your Honor please, we move the answer go out of the record on the theory that freight rates have nothing to do with this case. They are only a part of cost and are not a part of price and price is the term that is used in the statute.

Mr. Wright: Your Honor, we ask—I asked the witness the terms and conditions of sale. He gave a statement of those terms and conditions. Part of those terms and conditions were how the freight charges were to be handled, I think the answer is responsible.

1238 Trial Examiner Norwood: Objection overruled.

By Mr. Wright:

Q. Mr. Sprague, you mentioned that there was an f.o.b. Scranton price.

Mr. Duncan: If your Honor please, I don't mean to interrupt each time, but I would like to take objection—make an objection to each question which Mr. Wright asks and each answer that is given by this witness which in any way relates to freight.

Trial Examiner Norwood: Counsel may have objection to that entire line.

Mr. Duncan: Thank you.

Proceed.

By Mr. Wright:

Q. Will you please explain the f.o.b. Scranton price that you mentioned?

A. The intent of the Euston Lead Company in the sale of its dry white lead in 1942 was to pay only charges for delivery charges to the buyer wherever he might be located. In pricing goods with that intent, there always arises a question as to who shall pay the transportation charges actually, whether the buyer pays them and is allowed for them by the seller, or whether the seller pays them directly.

Since the payment by the seller of freight charges involves an outlay of cash, it is frequently desirable to 1239 sell at a delivered price, the understanding being that the charges will be paid by the buyer and deducted from the seller's invoice. I believe the latter practice is the one that was generally followed by the Euston Lead Company.

If the sale of white lead dry were made to a buyer in Scranton, he would pay the same price for the white lead as a similar amount of white lead sold at the same time to a buyer located in Chicago.

Q. Well now, would a buyer located in California, in the period of 1942, pay the same price as the buyer in Scranton?

Mr. Duncan: I object, your Honor, and for this reason: The question is on direct examination and it assumes a case, rather than referring to any actual case.

Mr. Wright: Your Honor, we have had testimony that the Glidden Company solicits and sells these pigments throughout the United States and the witness himself, in his answer, assumed a case of comparison with Chicago and Scranton. I am just clarifying it.

Trial Examiner Norwood: The scope of the investigation is not directed to the question of whether actual goods were sent to the west coast, but it is directed to the question of whether there is a price system and if there is a price system what that price system is.

He has a right to ask him that factual matter as to what was involved in the system with respect to mak- 1240 ing prices at this location.

Counsel has another question there about freight being no part of the price. There is a contention that the freight is a part of the price, and I think in order to determine whether or not that is correct or incorrect, we will have to let in this information about all the things which could reasonably be price factors. We shall have to let this in.

I will inform the counsel that our procedure is a little broader than jury cases.

Mr. Duncan: So I notice.

Trial Examiner Norwood: We must get the facts.

Go ahead. Off the record.

(Discussion, off the record.)

Trial Examiner Norwood: On the record.

Objection overruled.

The Witness: What is the question again, please?

(Last question read.)

A. It depends on the time of purchase.

By Mr. Wright:

Q. Just a minute, I will clarify that. Would two buyers with the same trade classification purchasing white lead at the same specifications and in the same types of containers and in the same quantities, on the same day, pay the same price, one located in Scranton and one located in San Francisco?

1241 Mr. Duncan: I object, your Honor. This again assumes a case, refers to no direct case. Furthermore, I don't know that the witness qualified himself to answer that as an expert.

Trial Examiner Norwood: I will overrule that. I conclude that he means that, according to this price method that is followed—that was followed at that time, would these prices be the same. The witness may answer from that standpoint.

Mr. Wright: Your Honor, I would like to add that this is a vice-president of Glidden Company who has been working in this position for a number of years. I don't know where we would find a man better qualified.

Mr. Duncan: The question is whether the record so shows, not what you stated.

Mr. Wright: It has been testified to that he was experienced in this field.

Trial Examiner Norwood: Go ahead.

The Witness: I don't recall whether the price prevalent on the part of the Euston Lead Company for dry white lead delivered in California, was the same as the price prevailing for delivery elsewhere. I believe there was a difference in prices. The answer to the question, then, would be under those conditions, the quotation made by the Euston Lead Company would be its California price to a California
1242 buyer, and the price to a buyer elsewhere, the price to a buyer elsewhere—

Q. Do I understand your testimony then, that you do not know whether there was a differential in price between the California buyer over the Scranton buyer?

Mr. Duncan: I object, your Honor. The witness has already testified and this is direct examination, as to what the Examiner—as to what the attorney for the Federal Trade Commission understands the answer to be, as showing that is not a part of this record. He asks it in such form.

Mr. Wright: Your Honor, I will submit that the answer to the last question wasn't entirely clear, and furthermore, that while the present witness is a witness called by the Commission, he could be hardly termed a friendly witness under the circumstances.

I believe I should have some latitude in questioning him.

Trial Examiner Norwood: Read the question.

(Last question read.)

Trial Examiner Norwood: I overrule the objection if counsel will substitute "should" for "do"—say "should I understand."

Mr. Wright: I will accept the substitution, your Honor.

The Witness: I do not recall for certain whether there was at that time a difference in the price in California
1243 and other buyers located elsewhere under similar conditions.

By Mr. Wright:

Q. Do you recall whether, in 1942, there were any geographical areas or zones anywhere in the United States to customers within which the Glidden Company charged a differential than customers in other zones in the sale of dry white lead?

Mr. Duncan: I object, your Honor.

Trial Examiner Norwood: Read it.

(Last question read.)

Trial Examiner Norwood: Overruled.

A. I would have to check back the price list records to answer that with certainty. I think there was a difference existing in the Pacific coast.

Mr. Duncan: I object to that part of the answer which relates to what he thinks. It is a question of what he knows.

Trial Examiner Norwood: Let him finish his answer and you may move to strike.

The Witness: That is the end of the answer.

Mr. Duncan: I move to strike the last part of the answer where he says "I think," so and so.

Mr. Wright: Your Honor, I submit that the vice-president of the Glidden Company, who has, by his own statement, been concerned with the production and sale 1244 of these pigments over a period of 20 years should be qualified to state what he thinks the practice of the company was at that time.

Trial Examiner Norwood: Then read the answer.

(Last answer read.)

Trial Examiner Norwood: I overrule the objection.

By Mr. Wright:

Q. Do you recall whether that difference applied to customers located in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, Wyoming?

Mr. Duncan: Objection, your Honor. I don't like to bob up all the time, but apparently he confines this to 1942, but he doesn't say four months, 12 months, in 1942, or any number of months.

Trial Examiner Norwood: That can be clarified.

Mr. Wright: I will amend the question by stating at any time during 1942.

Trial Examiner Norwood: Objection overruled.

Mr. Duncan: Withdraw the objection.

A. I do not recall the price relationships in the specific areas or states that you mentioned. Whatever the competitive price schedule was in those states, as well as any other parts of the United States, was recognized in the quotations of the Euston Lead Company.

Mr. Wright: Your Honor, I move to strike out 1245 the last part of that answer as not responsive to the question.

Mr. Duncan: Your Honor, I ask it stay in.

Mr. Wright: Entirely gratuitous and spontaneous.

Mr. Duncan: He is your witness.

(Last question and answer read.)

Mr. Wright: My objection goes to the statement beginning "Whatever."

Trial Examiner Norwood: Motion allowed.

Mr. Duncan: Exception.

Mr. DuBose: May we have an exception to that?

Trial Examiner Norwood: Yes.

You can bring that material out on your cross-examination. I think the counsel has a right to narrate answers to his questions.

By Mr. Wright:

Q. Mr. Sprague, when was the last time you were in actual charge and control of the marketing of pigments for the Glidden Company?

A. I was in administrative charge of the pigment sales until July, 1945.

Q. You were in that position over how long a period?

A. Approximately 10 years.

Q. That is, from 1935 to 1945?

A. Yes.

Q. Do you recall the method of quoting terms and
1246 conditions of sale by the Glidden Company on dry
white lead in 1935, at the time you assumed that
position?

Mr. Duncan: We object, your Honor, for the same reason given before. The same kind of question was asked.

Trial Examiner Norwood: On the grounds of leading, was it?

Mr. Duncan: Yes, your Honor, and on the ground that it assumes a suppositious case rather than an actual case.

The Witness: Yes, sir.

By Mr. Wright:

Q. Were there at that time any zones or territories within which—to customers within which the Glidden Company quoted a differential on account of their location, over other customers located in the eastern part of the United States?

Mr. Duncan: Objection on the ground that he uses the term zones or territories; he doesn't define the use. He doesn't define what he means by zone or territory.

Mr. Wright: The question itself included that, zone or territory within which prices were quoted to customers at a differential higher than to customers in the eastern part of the United States.

Trial Examiner Norwood: Overruled, answer the question.

Do you want it read?

1247 The Witness: No, sir.

I think it would—I may be able to clarify my answers to these questions if I explain that the position of the Euston Lead Company in the sale of dry white lead was that of a small factory in the industry, and it was necessary at all times for the Euston Lead Company to meet competition that it found in that business.

By Mr. Wright:

Q. Now, just a minute there.

I can see the answer the witness is about to give is not responsive to the question. I asked a specific question of conditions and terms of sale quoted by the Glidden Company at that time, not any reason for why he quoted them, but what they quoted.

Mr. Duncan: Your Honor, I—

Trial Examiner Norwood: I think that the able counsel for the Glidden Company will know how to bring out this witness' explanation of anything they want to bring out here, and I will instruct the witness not to take it upon himself to make the explanations such as he just made. You had better just answer the questions and then let your counsel bring out their side of it, any explanations that they deem wise, so I will ask the reporter to read that question and ask the witness to answer it, de novo.

(Last question read.)

1248 Trial Examiner Norwood: Answer as to that fact.

A. I do not recall.

By Mr. Wright:

Q. Do you recall whether there were such zones or territories taking a differential on dry white lead during 1936?

A. I do not recall.

Q. During 1937?

A. Ditto.

Q. 1938?

A. Ditto.

Q. 1939?

A. Ditto.

Q. 1940?

A. Ditto.

Q. 1941?

A. Ditto.

Mr. DuBose: May we have a five-minute recess, your Honor?

Trial Examiner Norwood: Five-minute recess. The witness will not discuss anything with anybody while he is on the stand.

(A short recess was taken.)

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. Mr. Sprague, will you state the terms and the
1249 conditions of sale which were quoted by the Glidden
Company at any time during the year 1942, on dry red lead in bags or barrels, in less than carload quantities?

A. The terms of sale were net cash, 30 days, one per cent cash discount for cash in 10 days. Those are the payment terms. Conditions of sale were that the price would be agreed upon by the buyer and the seller, and at that price, the goods were delivered to the seller and cost of delivery paid by the buyer—cost of delivery paid by the seller.

Q. In selling dry red lead in bags and barrels in that period, did the Glidden Company generally pre-pay the freight?

Mr. Duncan: I object, your Honor, to the question, inasmuch as it uses the word "generally," and certainly that question on direct examination is an improper question of the witness.

Trial Examiner Norwood: Read the question.

(Last question read.)

Trial Examiner Norwood: Objection overruled.

The Witness: What is the period?

By Mr. Wright:

Q. 1942.

A. I believe Glidden generally allowed the freight.

Trial Examiner Norwood: That means that the customer paid the freight and deducted it from the bill?

The Witness: Correct.

1250 By Mr. Wright:

Q. In quoting on dry red lead in bags or barrels in less than carload quantities during 1942, was the delivered quotation different to some customers on account of the destination or the place where the leads—

Mr. DuBose: If the Court please, I object to that on behalf of the Respondents, because of the use of the word quotation. I don't believe we are concerned with the quotation rather than the actual price paid.

Mr. Wright: I am asking about quotations.

Mr. DuBose: I object to the quotation. I don't think it has anything to do with this proceeding, quotation as distinguished from actual price paid.

Trial Examiner Norwood: Read the question.

(Last question read.)

Trial Examiner Norwood: Did you finish the question?

Mr. Wright: Yes, sir.

In answer to the objection which has been made, I will call your Honor's attention to paragraph 8 which charges the offering and quoting for sale of lead rather than the actual sale.

Mr. DuBose: We say that is irrelevant.

Trial Examiner Norwood: I don't see how I can separate that end of it. I can't discriminate that finely now,
because certainly quotations have something to do
1251 with price. It is some evidence of what this com-
modity was sold at in these places. I don't think I can allow that objection.

Objection overruled.

Will you answer the question?

The Witness: The only differences in price that were quoted by the Glidden Company were those involved in meeting competition.

Mr. Wright: Your Honor, I move to strike that.

Trial Examiner Norwood: Motion allowed.

Mr. Wright: As not responsive.

Mr. Duncan: Exception.

Trial Examiner Norwood: The witness is instructed to answer those questions factually and not argue. You had better leave that to the lawyers.

The Witness: I am under oath to testify to the whole truth and I am doing so. I beg your pardon, sir.

Trial Examiner Norwood: Well, you are not to testify to anything except concerning those matters which are asked of you. You answer the questions, the whole truth about the question factually. You are not on the stand to argue the case.

Mr. Duncan: Your Honor, just to make ourselves—so we understand one another—

Trial Examiner Norwood: Yes.

Mr. Duncan: In the event a witness is unable to
1252 answer a question in any other way, do I understand
that the Examiner in this proceeding feels that he has no right to answer?

Mr. Wright: Your Honor—

Trial Examiner Norwood: No, you are not to understand that. I think my instructions to the witness were very clear. He is on the stand here to swear to the facts and to answer these questions, and not ~~to~~ argue ~~the~~ case or give explanations when he is not asked to do so.

Mr. Duncan: I see. I just wondered.

Trial Examiner Norwood: I think—off the record.

(Discussion, off the record.)

Trial Examiner Norwood: On the record.

Mr. Duncan: Of course, in this case, your Honor, in the event the Commission establishes a case, then I assume—

Trial Examiner Norwood: Establishes what?

Mr. Duncan: Establishes its case by substantial evidence, then the burden is upon the Respondents to explain, possibly justify, if able, the price discriminations, if any, that have been established with reference to Count 2 in the amended complaint.

Trial Examiner Norwood: I think so, yes.

Mr. Duncan: That presupposes, I think, the burden of establishing, in the first instance, price discrimina-
1253 tions of Count 2 in the amended complaint.

That is right, is ~~it~~ not?

Trial Examiner Norwood: What do you mean?

Mr. Duncan: What I am getting at is this: The answer which Mr. Sprague gave to the question which Mr. Wright asked and which your Honor had stricken from the transcript, relates—

Trial Examiner Norwood: That whole question up here—counsel has the statutes there with respect to the burden of showing justification. We all know what that is. That is not involved here. The question is: What is the witness' answer in response to the question? Was it responsive to the question? That is what I am asking the witness to do, is to make his answers responsive to the questions.

Now, counsel may bring out all explanations—they will have abundant opportunity for anybody to bring out any explanation he wants to about anything that is established factually.

Let us proceed directly, without too much altercation, to bringing these facts out.

Mr. DuBose: May we have the question again, please?

Trial Examiner Norwood: Read the question.

(The reporter again read the last question.)

Mr. Wright: I will withdraw that question and rephrase it.

1254 By Mr. Wright:

Q. Mr. Sprague, during 1942, quoting on dry red lead, bags or barrels in less than carload quantities, was a differential quoted by the Glidden Company for delivery to customers located within certain geographical areas over the prices quoted to customers located at or near the factories of the Glidden Company?

Mr. Duncan: Objection, your Honor.

Trial Examiner Norwood: Overruled.

A. Yes, sir.

By Mr. Wright:

Q. Will you state what that differential was, if you recall?

A. Differential was whatever was established by competition.

Mr. Wright: Your Honor, I move to strike that answer.

Mr. DuBose: I submit, your Honor, that is a factual answer.

Trial Examiner Norwood: I think he has a right to make that answer. Objection overruled.

You may question him further on that.

By Mr. Wright:

Q. Mr. Sprague, did you, during 1942, publish price cards and price information on dry red lead in less than carload lots, bags or barrels?

A. Yes, sir.

1255 Q. Did, during that period, the Glidden Company generally sell in accordance with the terms and conditions of those price cards and price announcements?

Mr. Duncan: I object again.

Trial Examiner Norwood: Objection overruled.

A. Sales were made both in accordance therewith and not in accordance therewith.

Q. Did the price cards that were published for these products at that time by the Glidden Company quote a price, a delivered price which was applicable throughout the entire United States?

Mr. Duncan: I object to the question, your Honor.

It is immaterial and irrelevant.

Trial Examiner Norwood: Objection overruled.

Mr. DuBose: May I object on the ground that it is not the best evidence. I think we have the price cards in evidence. Whatever they show, they would speak for themselves.

Trial Examiner Norwood: No best evidence rule as to price cards, unless the issue is what the price card shows. If the price card itself were in issue, it would be the best evidence, but not as to what the prices were.

Mr. DuBose: Perhaps I am misinformed about the question. May I have the question again?

Trial Examiner Norwood: Read it.

1256 (Last question read.)

Trial Examiner Norwood: Objection overruled, answer the question.

A. All price cards quoted prices subject to confirmation. My recollection is that the cards did not cover the entire United States.

Mr. Duncan: If your Honor please, I understand that the subpoena issued by the Commission on Mr. Kolb, secretary of the Glidden Company, and who has been asked to bring in with him certain price cards which we now do not have available here, since they are over being photostated; but we will have them available. Apparently, if that is later introduced, ~~that is~~ those price cards, then they would be the best evidence, and whatever this witness would say with reference to them, as I see it, should be stricken from the record.

Mr. Wright: May we go off the record a moment?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Recess until one o'clock.

(Whereupon, at 11:30 a. m., a recess was taken until 1:00 p. m., this day.)

1257 Afternoon Session.

1:00 p. m.

Trial Examiner Norwood: A ruling which I made just a short time prior to our recess requires reconsideration because I didn't understand that the question asked by Mr. Wright was directed to what the price cards contained.

Mr. Wright's question is as follows: "Did the price cards that were published for these products at that time by the Glidden Company quote a price, a delivered price, which was throughout the entire United States?"

I didn't understand that the question was so worded when I overruled Mr. DuBose's objection there on the grounds that the cards were the best evidence. As the question is directed there, he is correct and my ruling is reversed, and the question is rejected.

Mr. Duncan: Then I assume, your Honor, that the answer given by the witness will also be stricken from the record?

Trial Examiner Norwood: Yes.

Mr. Wright: I would like to call Mr. Kolb.

Mr. Duncan: Do I understand, your Honor, that the Commission is now calling Mr. Kolb as its own witness?

Trial Examiner Norwood: Yes.

Mr. Wright: Your Honor, I would like to state for the record, I don't believe the record shows our agreement
1258 prior to lunch that Mr. Sprague would be withdrawn
temporarily while Mr. Kolb was called and made a return of the subpoena.

Trial Examiner Norwood: Mr. Sprague is withdrawn and you may proceed to examine Mr. Kolb.

CLIFTON M. KOLB was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Will you state your name and occupation for the record, Mr. Kolb?

A. My name is Clifton M. Kolb, I am secretary of the Glidden Company.

Q. Were you served with a subpoena duces tecum, issued on the 11th day of July, 1946, by the Federal Trade Commission?

A. I was.

Q. Are you prepared to make a return of that subpoena at this time?

A. Yes.

Q. Are you producing the documents called for under Sepcification 1?

A. I am producing the price cards covering Euston dry
white lead within the range of packages called for in
1259 the subpoena, and applying to our base territory. I
can give you the numbers of them.

I am also producing the cards in the same category covering red lead and litharge.

Mr. Wright: I would like to have these exhibits marked as Commission's Exhibits 810-A, B, C, D, E, F, G, H, I and J.

The Witness: I would like to explain that there is one of the Euston Lead cards—

Mr. Wright: Just a moment, while the reporter marks the exhibits, please.

(The documents referred to were marked Commission's Exhibits 810-A, B, C, D, E, F, G, H, I and J, for identification.)

By Mr. Wright:

Q. Did you also produce the documents called for under Specification 2?

A. I secured all the contracts that I could find in our offices relative to the sale of dry white lead in the City of St. Louis. I have been unable to locate any other contracts than the ones that I have.

Mr. Wright: Will you mark these as Commission's Exhibits 811-A and B, 812, 813, 814, 815, 816, 817, 818, 819-A and B, 820, 821 and 822?

Mr. DuBose: For identification?

1260 Mr. Wright: Yes.

(The documents referred to were marked Commission's Exhibits 811-A, 811-B; 812; 813; 814; 815; 816; 817; 818; 819-A and 819-B; 820; 821 and 822, for identification.)

By Mr. Wright:

Q. I show you Commission's Exhibit 822 for identification and ask you if that is the subpoena you received?

A. Yes, it is.

Q. I show you documents marked for identification Commission's Exhibits 810-A, B, C and D, for identification, and ask you to state what they are, Mr. Kolb.

A. These are price cards published by our division, Euston Lead Company, January 26, '42; January 1, '37; January 1, '34; and December 30, 1932. They cover dry white lead in less than carloads in our base territory.

Q. Can you state what the base territory—the extent of the base territory is to which you refer?

A. I am not familiar with the boundaries of this territory at this time. I will look it up, but it is the territory, as I understand, in the central and eastern part of the United States, but I don't know the exact boundaries of it.

Q. These cards, if I understand your testimony, quote a price that applies only to that central or home zone or territory.

1261 A. That is correct.

Q. Do you know whether there was a different price quoted in the other territories?

A. I do not. I would like to—pardon me.

Q. These then, I take it, are the only cards and announcements which could be produced in response to specification 1 with reference to dry white lead?

A. That is correct, those are the only ones I could find.

Q. I show you documents marked for identification as Commission's Exhibits 810-E, F, G, H, I and J, and ask you to state what those are.

A. These are price cards dated December 30, 1932; October 26, 1933; June 29, 1934; September 19, 1935; December 22, 1936; and January 15, 1942. They cover pure red lead and pure litharge in steel drums, 500 and 600 pounds, and they cover prices in our base territory. I am not sure as to the price on January 1, 1937, as indicated by the subpoena. The closest I could get to that was this card of December 22, 1936, Card No. 46. I doubt if there was a change in price between December 22nd and January 1st.

Q. Do you know the base territory, the extent of it, geographical limits of it?

A. I cannot give you the boundaries of it, but I understand it is the central and eastern part of the United States.

1262 Q. Do you know whether there was a differential added to those prices for delivery in other territories than the central—

A. I do not know.

Q. I show you a document marked for identification as Commission's Exhibit 811-A and B, and ask you to state what it is:

A. Contract between our division, Euston Lead Company, and Schulte Paint & Lacquer Company, St. Louis, Missouri, dated December 15, 1941, covering dry white lead.

Mr. Duncan: If your Honor please, I assume that the Commission's attorney will introduce these documents in evidence. I don't know whether he plans to ask the witness with respect to each of these contracts, what it purports to be. On the other hand, I do think if he does intend to do that, I want to object at this time because the best evidence is the document itself.

Trial Examiner Norwood: Counsel is correct. Counsel will please confine himself at this time to identifying the papers.

By Mr. Wright:

Q. I show you a document marked for identification as Commission's Exhibit 812 and ask you if you recognize that?

A. This exhibit is a contract between Euston Lead Company, Division of the Glidden Company, and Floor
1263 Shines Paint & Varnish Company, St. Louis, Missouri, dated February 5, 1931, covering the sale of dry white lead.

Q. I show you Commission's Exhibit for identification 813, and ask you to state what that is.

A. Contract between Euston Lead Company, Division of Glidden and Banner Supply Company, St. Louis, Missouri, dated May 13, 1941, covering dry white lead.

Q. I will show you Commission's Exhibit 814 for identification.

A. Contract between Euston Lead Company and P. D. George Company, St. Louis, Missouri, dated June 28, 1941, covering dry white lead.

Q. I show you Commission's Exhibit 815 for identification and ask you to state what it is.

A. Contract between Euston Lead Company, Division of Glidden Company, and Mar-Kac Manufacturing Company, St. Louis, Missouri, dated April 5, 1941, covering dry white lead.

Q. I show you Exhibit 816 and ask you to state what it is.

A. Contract between Euston Lead Company, Division of Glidden Company, and Mound City Paint & Color Company, St. Louis, Missouri, dated July 1, 1941, covering dry white lead.

Q. I show you Commission's Exhibit 17 for identification and ask you to state what it is.

A. Contract between Euston Lead Company, Di-
1264 vision of Glidden Company, and Robbins Varnish
Company, St. Louis, Missouri, dated June 30, 1941, covering dry white lead.

Q. Show you Commission's Exhibit 818 for identification and ask you to state what it is.

A. Contract between Euston Lead Company, Division of Glidden Company, and Republic Paint & Oil Company, St. Louis, Missouri, dated May 13, 1941, covering dry white lead.

Q. I show you Commission's Exhibit 819, A and B, and ask you to state what it is.

A. Contract between Euston Lead Company, Division of Glidden Company, and Mechanics Paint Company, St. Louis, Missouri, dated December 15, 1941, covering dry white lead; attached to it is a letter dated March 20th, addressed to Mechanics Paint Company, relative to a modification of the contract.

Q. I will show you Commission's Exhibit 820 and ask you to state what it is.

A. Contract between Euston Lead Company, Division of the Glidden Company, and Steelcote Manufacturing Company, St. Louis, Missouri, dated June 20, 1941, covering dry white lead.

Q. Show you Commission's Exhibit 821 for identification, and ask you to state what it is.

A. Contract between Euston Lead Company, Glidden
Company, and Cardinal Paint Corporation, St. Louis,
1265 Missouri, dated June 30, 1941, covering dry white
lead.

Q. Mr. Kolb, were you able to locate any contracts covering litharge during—effective on those dates?

A. I wrote to our division at Hammond, Indiana. Their records for that period have been destroyed and I was unable to secure any contracts or records.

Q. Were you able to secure any contracts covering the sale of dry red lead?

A. No, they were at Hammond, and they were destroyed.

Mr. Wright: I offer Commission's Exhibits 810-A through J, into evidence.

Mr. Duncan: We object, your Honor, and for this reason: With respect to the exhibits marked 810-A and exhibits marked 810-B, they relate to a period before 1936. Count 2 of the amended complaint is limited to the period beginning in 1936 and 1937. We object, then, to the Exhibits 810-A and B, being introduced in evidence.

r. Wright: The same objection might apply to E, F, G and H, too.

Mr. Duncan: That is right, we are making the same objection.

Mr. Wright: Your Honor, that objection has been raised in the past and I submit particularly with reference to Count I that this material is competent and relevant.

Mr. Duncan: Do I understand counsel for the
1266 Commission to say he is offering in evidence 810, A
and B; 810-E through H, inclusive, merely in support of Count I?

Mr. Wright: I am offering them as price quotations of the Glidden Company as of those dates.

Mr. Duncan: Then we object.

Mr. Welch: Mr. Examiner, I think the objection on the Robinson patent on Count 2 was originally made by me for Sherwin-Williams. I believe your Honor took that ruling under advisement and reserved a ruling and has never announced a ruling one way or the other.

Is my recollection correct?

Mr. Wright: I don't recall that there was any ruling hanging like that, Mr. Welch.

Mr. Welch: I understood there was.

Trial Examiner Norwood: I usually take those things subject to being applied as they may reasonably and legally be applied.

Now, in some aspects of the price discrimination issue, the nature of the method being employed might be relevant on that particular feature and I just have a hazy recollection that I made some such explanation in overruling your objections in this case.

Mr. DuBose: I don't know if my recollection is correct or not, but I think you took it subject to a motion to strike
or something like that.

1267 Trial Examiner Norwood: Yes, I might have
done that; yes.

Mr. Wright: I am only certain that there was no reservation of ruling on an exhibit.

Trial Examiner Norwood: On that situation now, it has so many different angles that we would have to stop and have quite a discussion, and I would have to ask you for authorities and study that thing before I would be perfectly satisfied to rule something out here that may have value to the Commission.

Mr. Duncan: Your Honor, my objection I believe referred to E through H, inclusive. I meant E through J, inclusive. I want the record to so state.

Trial Examiner Norwood: It may do so.

Mr. Duncan: As well as A and B of that same number.

Mr. Welch: Mr. Examiner, I found a place in the record —this may be off the record—

Trial Examiner Norwood: Yes.

Mr. Welch: I am quoting page 933.

Trial Examiner Norwood: Off the record.

(Discussion, off the record.)

Trial Examiner Norwood: On the record.

Any further objections to the exhibits?

Mr. DuBose: I would like to join in the objection
1268 made by Mr. Duncan. I think all the Respondents object.

Trial Examiner Norwood: Has it been called to my attention that this objection here which involves the application of these price cards to Count 2 has the same basis as the objection discussed in the record at page 933, and the pages following?

I will say that my ruling which I am about to make will apply to that situation also, and that is that the objections are overruled and these cards are received in evidence for all purposes except the fact of price discrimination under the Robinson-Patman Act.

Since these activities here all antedate the said act—

Mr. Wright: Will your Honor clarify the last statement? I am not sure I understand the reservation.

Trial Examiner Norwood: They are not received as factual evidence that they did sell to different people at different prices subsequent to the passage of the Robinson-Patman Act. They are received for all other purposes than that, and I think that reservation means very little because there is no power on earth that could apply those to proving that they sold at different prices.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 810-A, 810-B, 810-C, 810-D, 810-E, 810-F, 810-G, 810-H, 810-I, and 810-J,
1268a were received in evidence.)

Mr. Wright: Do I understand your Honor's ruling then that these exhibits could be used to show, along with other evidence, the purpose and intention of the Glidden Company—

Trial Examiner Norwood: I think so.

Mr. Wright: —at that time, for purposes of Count 2?

Trial Examiner Norwood: I think so. It may appear that they will be valuable in that respect. I don't say that they do at this time.

Mr. Welch: Do I understand that it will be your Honor's position that purpose is a factor in connection with violation of the Robinson-Patman Act?

Trial Examiner Norwood: The effect is.

Mr. Welch: And the effect of prices made on merchandise sold and paid for before June 16, 1936, is a factor in the violation charged in 1946 of the Robinson-Patman Act?

Trial Examiner Norwood: I think we had better go into that later.

Mr. Welch: Your Honor made some statements to the counsel for the Commission and I wanted to understand if that was your position.

Trial Examiner Norwood: Read the statement.

(Statement read.)

1269 Trial Examiner Norwood: It may be a factor to show the effects.

Mr. Welch: Exception on behalf of Sherwin-Williams.

Mr. Duncan: Your Honor, I note that the Respondent Sherwin-Williams takes exception to your ruling. I understood it is not necessary for any of the Respondents to take any exception to your ruling. It is implied.

Trial Examiner Norwood: That is right, you have all your exceptions taken care of.

Mr. DuBose: I would like to make a motion for the record that these exhibits just received be stricken from the record so far as they relate to Count 2 of the amended complaint.

Mr. Wright: Your Honor, you just already ruled on that.

Trial Examiner Norwood: I don't think that is in order. I just ruled on that and ruled that they can come in.

Mr. DuBose: I thought to protect our position, we might make a motion to strike as relates to Count 2.

Trial Examiner Norwood: Motion denied.

Mr. DuBose: Exception.

Mr. Wright: Your Honor, I offer in evidence Commission's Exhibits 811, A and B, 812, 813, 814, 815, 816, 817, 818, 819-A and B, 820 and 821.

Trial Examiner Norwood: Any objection? They 1270 are received in evidence.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 811-A, 811-B, 812, 813, 814, 815, 816, 817, 818, 819-A, 819-B, and 820 and 821, were received in evidence.)

Mr. Wright: I offer in evidence Commission's Exhibit for identification No. 822.

Trial Examiner Norwood: I suppose you offer this to show—

Mr. Wright: To show what was called for.

Trial Examiner Norwood: It may be received.

(The paper referred to, heretofore marked for identification COMMISSION'S EXHIBIT NO. 822, was received in evidence.)

Mr. Wright: I have no further questions of this witness.

Mr. Duncan: No questions.

I assume counsel for Respondents will have an opportunity to cross-examine him at some later time.

Trial Examiner Norwood: The cross-examination will have to be confined to this identification.

Mr. Duncan: We reserve the right to cross-examine him at some later time. I don't want to have to do it now.

Trial Examiner Norwood: Inasmuch as I recall—correct me if I am mistaken—this examination has been
1271 confined strictly to the identification of these papers
and the cross-examination would have to be within that scope, and it is necessary that it be at this time.

Mr. Welch: Your Honor, may we have a recess at this time?

Trial Examiner Norwood: Yes, short recess at this time.

(A short recess was had.)

Cross-Examination by Mr. Duncan.

Q. Mr. Kolb, you referred to your inability to—withdraw the question. On direct examination, Mr. Kolb, I understood you to testify that you were unable to bring in some records which were asked for by Specification in the subpoena duces tecum. Will you explain to the Commissioner just what happened to those records, when they were destroyed and so forth.

A. I knew that I would have to find the price cards and contracts covering red lead in our Hammond, Indiana, office. That is where they were kept. I got in touch with the manager of the Hammond, Indiana, office, asking for this information. I sent him a copy of the subpoena, and he relied, after investigating, that our general accounting department at Cleveland had sent a representative to Hammond early in 1946, and they had installed a new office system and he stated that when that was put into effect, all of the records prior to January 1, 1946, had been 1272 destroyed; and therefore, he could not furnish the information which I had requested.

Q. Your information related to what is in the complaint, red lead, litharge?

A. The information related to red lead, litharge, contracts, and the sale thereof in the City of St. Louis.

Q. When was the subpoena served on you, Mr. Kolb, that is Exhibit No. 822?

A. July 17, 1946. That is the date I wrote to the Hammond office and to the other offices.

1273 Mr. Duncan: Nothing further.

Mr. Wright: No further questions.

Trial Examiner Norwood: Thank you, Mr. Kolb.

Mr. Wright: I would like to recall Mr. Sprague to the stand, please.

Trial Examiner Norwood: All right.

PAUL E. SPRAGUE resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Wright.

Q. Mr. Sprague, do you recall a conversation with Mr. Robert Dunn of the Federal Trade Commission on or about May 28, 1943?

Mr. Duncan: I object, your Honor.

Trial Examiner Norwood: What ground?

Mr. Duncan: It is a leading question.

Trial Examiner Norwood: I think he may lead this witness.

Mr. Duncan: O. K.

Trial Examiner Norwood: It is not a case where the attorney asking the questions might influence the witness into following his thought.

A. I think I had—

Trial Examiner Norwood: Objection overruled.

A. (Continuing)—more than one conversation with 1274 Mr. Dunn, but I do not recall the date.

By Mr. Wright:

Q. Do you recall having conversations with him in approximately that period of time?

A. No, sir; I cannot allocate the date in my mind or an approximation thereof, except that it was prior to the time that Mr. Reels came to our office.

Q. Do you recall when you conversed with Mr. Dunn, you gave him a statement of the zones and differentials applicable thereto applying to the quotations on white lead and oil by the Glidden Company?

Mr. Duncan: Objection, your Honor.

Trial Examiner Norwood: On what ground?

Mr. Duncan: It is immaterial and irrelevant.

Mr. DuBose: I object further on the ground that it is apparently an attempt to impeach his own witness.

Mr. Wright: Your Honor, it is not an attempt to impeach my own witness. I am laying the groundwork for refreshing his memory.

Trial Examiner Norwood: I think counsel may do that. Objection overruled.

By Mr. Wright:

Q. Mr. Sprague, I show you a photostatic copy of Commission's Exhibit 593, which is in evidence, as a statement by the Glidden Company—

*1275 Mr. DuBose: What page of the record?

Mr. Wright: 285, I believe is the page of the record.

Mr. Duncan: I object to the part of the question where he says it is a statement of the Glidden Company. I think the document speaks for itself what it is.

Trial Examiner Norwood: He may describe it in his question to the witness.

Mr. Duncan: If it is an incorrect description, I think we have a right to object.

Trial Examiner Norwood: Yes, if he is assuming something that is not in evidence—

Mr. Dixon: 783 of the record, identified at page 285.

Mr. Wright: I will withdraw the question and start over.

By Mr. Wright:

Q. I show you a photostatic copy of Commission's Exhibit 593 and quote from the transcript at page 285, a statement by Mr. Duncan: "In behalf of the Glidden Company,

it is further stated that Commission's Exhibit No. 593 for
identification is a definition of the so-called power and dif-
ferential territories which were prepared by the Glidden
Company on or about October 10, 1941. That is, that par-
ticular exhibit was prepared by the Glidden Com-
1276 pany." Does that document refresh your recollection
as to the geographical zones and territories and the
differentiations applicable thereto which were quoted by
the Glidden Company during the period of 1941 and 1942?

A. My memory needs no refreshment with regard to this.

Q. Well, Mr. Sprague, I understand your testimony this morning that you did not recall the geographical zones and territories applicable to those quotations in 1942.

A. You are quite mistaken, Mr. Wright. You asked me this morning regarding the geographical zones and territories in prices relating to dry white lead in 1942. This has nothing to do with dry white lead at any time.

Q. I recall your testimony prior to our delving into the dry white lead regarding the method which was employed or the terms and quotations of sale which were employed by the Glidden Company in 1942, with reference to white lead in oil.

Mr. DuBose: I object to that question on the ground that it is argumentative.

Trial Examiner Norwood: Objection overruled.

By Mr. Wright:

Q. It is my recollection of your testimony that you did not recall those geographical zones and differentials. I will stand corrected if you say you do.

A. I will correct you by saying that I have no
1277 recollection that you asked me this morning at any
time anything about zones relating to white lead in
oil. The record would indicate what your question was and
I will be glad to correct my answer if I made a mistake.

Q. Commission's Exhibit 593, then, is a statement by the Glidden Company of the zones and differentials which applied on that date. Do you recall over what period of time prior to the fall of 1941 those particular zones and differentials were included in the quotations of the Glidden Company?

A. Do you mean now for white lead in oil?

Q. White lead in oil or for any other products for which those zones were applicable.

Mr. Duncan: I object to the question because it is—he applies it to everything. He should confine it—I object to the question on the ground that he doesn't confine it to white lead and oil, he includes everything else.

Mr. Wright: To which those zones applied.

Trial Examiner Norwood: Objection overruled.

A. Repeat your question, please.

By Mr. Wright:

Q. Will you state over what period of time prior to 1941 those zones and differentials applicable thereto were quoted by the Glidden Company in selling white lead in oil?

A. No, sir; I do not know what period of time prior to October 10, 1941—just a minute. I recognize this 1278 as a copy of a sheet that was part of a Glidden Pain Division sales bulletin or price bulletin which was effective October 10, 1941, or in effect on that date. I cannot tell you whether it was in effect prior to that date or not.

Q. Do I understand your statement that you recall having seen that, the original of that particular document before?

A. If this is the document that I gave to Mr. Dunn, I certainly did see it before, and I probably have seen this before.

Q. Well now, will you—withdraw that. Do I understand your testimony then that you do not know over what period of time prior to 1941 the zones set forth and the differentials set forth in that document were quoted by Glidden?

A. That is correct.

Q. Do you recall the zones and differentials which were in effect in June of 1935, applicable to white lead in oil?

A. No, sir; I do not.

Q. Can you state whether there were at that date, June of 1935, any differentials on account of the point of delivery as to white lead in oil?

A. Yes, whatever differentials the competition provided were in existence.

Q. Just a minute, just a minute. I asked you if you recalled whether there were any differentials.

A. In 1935?

1279 Q. In June of 1935.

A. On white lead in oil?

Q. Yes, sir.

A. I think there were.

Q. Do you recall what those differentials were?

A. I do not.

Q. How about in 1934, January 1, 1934, were such differentials then quoted by Glidden?

A. Let's see, January 1, 1934.

Q. Geographical differences.

Mr. Duncan: Your Honor, I would like to object to the question along the same line raised before. The Robinson-Patman Act didn't come into effect until June of 1936.

Trial Examiner Norwood: Objection overruled.

A. I am not certain, but I doubt if there were differentials quoted in January of 1934, in this form. It seems to me white lead in oil was sold at that time on freight equalization point adjustments.

Q. Will you explain freight equalization point adjustments?

Mr. Duncan: I object, your Honor. I don't believe this witness has set himself up as an expert on freight rates.

Trial Examiner Norwood: Objection overruled.

Mr. DuBose: I would like to object on the ground that
I believe it is irrelevant to this proceedings. I don't
1280 believe there is anything in the amended complaint
that deals with that subject.

Trial Examiner Norwood: Same ruling.

A. As I recall, the Glidden Company first sold white lead in oil around 1920. I was not in charge of it, nor directly concerned with it, but I was in the paint end of the business at that time. My recollection is that the price program—the pricing schedules that the Glidden Company adopted were taken bodily from the practices of the National Lead Company, and I believe, that the problem of pricing Glidden's white lead in oil had to be solved around the competitive custom of making deliveries of white lead in oil from numerous local warehouse points, and since the Glidden Company was attempting to place white lead in oil in the hands of this sales organization as a selling item, they had to provide some means of pricing it.

As rapidly as knowledge could be acquired concerning these competitive warehouse points, then Glidden, to compete, had to price its product from wherever it was shipped on the basis that would equalize the freight to the buyer from the nearest competitive warehouse point. That is what I meant.

Q. Your Honor—

A. Just a minute. That is what I meant by the term "freight equalization point method."

1281 Mr. DuBose: Could we have the answer read?

Trial Examiner Norwood: Yes.

(Last answer read.)

By Mr. Wright:

Q. Then, do I understand that back in that time, around 1920, there were differentials or warehouse points which took different prices?

A. The pricing of white lead in oil for Glidden was based—had to be based on a plan that would cost the buyer no more than buying directly than otherwise.

Q. Just a minute. I am not interested right now in why. What I want to know is, if you know, how the pricing system or the quotation of prices of white lead in oil by Glidden in that period was made. Was it different delivered prices to various geographical locations by name? You spoke of warehouse points or differential points. Was there a different price applicable to each of various cities?

Mr. Duncan: I object, your Honor; it is immaterial and irrelevant to this case.

Trial Examiner Norwood: What do you say?

Mr. Wright: Your Honor, it is relevant. What I am trying to do is elicit from the witness a statement of just how the Glidden Company made its quotations of lead in that period, to clarify his previous answer.

Trial Examiner Norwood: Read the question.

1282 Mr. Welch: I would like to make this observation, if I may. This case, according to the complaint, revolves about a zone system and not differential points.

Mr. DuBose: That was my point before, your Honor, on that same question. I don't see how it is relevant to this proceeding to go into the history of whatever system they might have had prior to the zone system which is the only so-called system mentioned in the amended complaint.

Trial Examiner Norwood: Now, let's have the question.

(Last question read.)

Trial Examiner Norwood: Objection overruled. Answer the question.

A. I can't respond in detail what Mr. Wright's question requires. I gave my general impression of what was done in those early years. It would be necessary to get—to find someone who was handling sales back in those years to be precise in the answer he wants.

Q. Is there anyone now with the Glidden Company who has any better knowledge than yourself of the methods of quoting prices on lead pigments?

A. We are not talking about lead pigments in this question. I think I am fairly well informed on the lead pigment phase. But when it comes to the white lead in oil, as
I explained this morning, at no time have I been in
1283 charge of the sales or responsible for the sales of the
large bulk of that commodity which was sold by Glidden which was sold through the paint division of the company.

Q. You spoke of the method of quoting to warehouse points back in the 1920's. I call your attention now to the method of quoting as set forth in Commission's Exhibit 593. Can you state when Glidden changed its method of quoting from that employed in the 1920's to that shown in the record to have been employed in 1941?

A. Yes. As soon as Glidden could learn accurately of its competitors' condition.

Trial Examiner Norwood: When was that?

The Witness: It would be necessary to review the sales bulletins to answer that.

By Mr. Wright:

Q. Would it be your testimony then that whenever your competitors adopted a zone system such as is outlined in Commission's Exhibit 593, that Glidden, at that same time—

Mr. DuBose: I object to the question on the ground that there is no proof in this case that any competitors ever adopted any system of any sort.

Trial Examiner Norwood: Read that question, please.

(Question read.)

Trial Examiner Norwood: I don't think he is as-
1284 suming anything there. He is asking if that is a fact.

Mr. DuBose: He said any of the competitors. If he wants to amend that by saying any one of your competitors.

Trial Examiner Norwood: If he knows that, he may tell us that.

Mr. DuBose: My objection is that there was no proof in this case of that.

Trial Examiner Norwood: He hasn't assumed that in his question. He is asking the witness—

Mr. Wright: I meant in the use of my word adopted, adopted individually rather than by collusion. I wasn't attempting to have this witness establish the fact that there was a conspiracy to adopt that.

Trial Examiner Norwood: I will overrule the objection. You may answer the question.

I beg counsel's pardon, there is an assumption there. The objection is sustained.

By Mr. Wright:

Q. Do I understand your testimony, Mr. Sprague, that when your competitors began selling on such a zone system which is outlined in Commission's Exhibit 593, that Glidden, on or about the same time, also sold on such a system?

Mr. Duncan: I object, your Honor. Again, I say it is immaterial and irrelevant.

Trial Examiner Norwood: Read the question.

1285 (Last question read.)

Trial Examiner Norwood: Answer the question, objection overruled.

A. Glidden Company, to my knowledge, has never sold a system of anybody's. They were obliged to meet competition of its principal competitors in the industry. As you know, this industry is not one of a group of equalized competitors. There are one or two large ones and the rest are small.

By Mr. Wright:

Q. Are you referring to the National Lead Company?

Mr. DuBose: I object to that; leading question, if your Honor please.

Trial Examiner Norwood: Objection overruled.

A. National Lead Company's cost of white lead in oil to consumers—

Q. Just a minute.

Mr. DuBose: I object to that and move to strike out the answer. This witness is certainly no expert, hasn't established himself as an expert in the lead industry. He is testifying about another company, a co-respondent in this case, and I move the entire answer be stricken.

Trial Examiner Norwood: Read the answer.

Mr. Wright: I agree with the motion that the answer be stricken. I don't think it was responsive.

Trial Examiner Norwood: The motion is allowed,
1286 by agreement.

By Mr. Wright:

Q. You referred, Mr. Sprague, to meeting your competitors—principal competitors. Were you referring then to the National Lead Company?

A. Yes, sir.

Q. Mr. Sprague, I show you Commission's Exhibits 810, A and B, C and D. Were you in the room when Mr. Kolb testified regarding these documents?

A. Yes, sir.

Q. Do you recall his statement that those prices were applicable to a central or base zone?

A. Yes, sir; I do.

Mr. Duncan: I object. Just a minute; I believe the record reads base territory and not base zone. We can later check the record.

Mr. Wright: I am willing to accept that correction, base territory.

Trial Examiner Norwood: Yes.

Mr. Duncan: I do object to the question on another ground, your Honor, and that is that apparently by this witness, he is attempting to impeach the veracity of his earlier witness, Mr. Kolb. I don't know, but I assume that.

Mr. Wright: Your Honor, I assume that on an objection of Mr. Duncan shortly prior to our adjournment,
1287 he refused to permit any question regarding these
price cards because he stated the cards themselves
were the best evidence.

Mr. Duncan: That is right.

Mr. Wright: Now, the question I asked before the adjournment to which you sustained an objection related to information which was not on these cards, which now appears in the record from the exhibits themselves. It is certainly relevant to question this witness about what these cards are, what they are applicable to, the extent to which they were used.

Trial Examiner Norwood: You framed your previous question about which we had the controversy on what the cards showed.

Now, if there is any other information not on the cards respecting the same matter that is covered by the card, you may—you are not limited at all in bringing that out.

Read the question and answer.

(Last question and answer read.)

Mr. Duncan: I objected first to the question containing the term base zone.

Mr. Dixon: That was corrected by consent.

Trial Examiner Norwood: Go ahead.

By Mr. Wright:

Q. With reference to Commission's Exhibit 810-D,
1288 which is dated January 26, 1942, will you state the
geographical areas of that base territory to which that
card applied?

A. This card is an announcement of current market prepared for the convenience of customers and subject to confirmation. It presumably represents the price at which Euston dry white lead would be sold and confirmed on January 26, 1942, and it would cover deliveries at any point where the Euston Lead Company confirmed an order for delivery to.

Q. Well now, you heard Mr. Kolb refer to a central or a base territory with reference to those cards. They have been identified as applicable to that territory by Mr. Kolb. My question was: What is that territory, what is the geographical extent of it?

A. I testified this morning, in answer to a similar question, that I could not recall whether there was any difference, current difference in prices of the Euston dry white lead for zones—by territories, particularly with reference to certain states that you mentioned and to California.

As far as I can recall, this price would apply—this card would apply to a sale confirmed on this date for delivery anywhere outside California.

Q. Just a moment, I asked if you could describe the geographical territory. I understand your answer to be
that you cannot describe that geographical territory
1289 which Mr. Kolb stated that card was applicable to?

A. That is correct.

Q. Can you give us any rough approximation of that geographical area? Would it, for instance—

A. If it applies to any territory at all, my impression is it would cover any part of the United States other than the Pacific coast states.

Q. Was there any differential at that time which applied to prices on the Pacific coast?

A. Whatever differential competition established would govern.

Q. I didn't ask you—

Mr. Wright: I move to strike that answer as not responsive.

Mr. DuBose: I maintain that is a factual answer.

Trial Examiner Norwood: The motion is allowed beginning with the words "whatever differential".

By Mr. Wright:

Q. My question was, do you know if there was a differential at that time?

A. I testified before, I cannot recall.

Q. Now, would your testimony be to the same effect as to the other documents, Commission's Exhibits A, B and C?

Mr. DuBose: What do you mean the same; the territories?

1290 Mr. Wright: Can you describe the geographical territories to which those cards apply?

The Witness: No, sir; I don't think any apply.

By Mr. Wright:

Q. At any time?

A. Unless it would be the Pacific coast.

Q. Now, I show you Commission's Exhibits 810-E, F, G, H, I and J, which purport to be price cards of the Glidden Company covering red lead, litharge, and orange mineral. Can you state whether there were any geographical—what the geographical territories were to which those cards applied?

A. These cards were made for the convenience of customers showing prices subject to confirmation.

Q. Just a minute. I asked you if you could recall the geographical territory to which those cards applied?

A. I replied to you—I will repeat the reply if you desire. These prices are subject to confirmation and they were intended to apply to the central or middle western and eastern areas of the United States.

Q. Are those in less than carload quantities?

A. They are in less than carload quantities.

Q. Do you know whether, on the dates of those cards, there was a differential added for delivery in less than carload lots of these products to the southern part of
1291 the United States, Alabama, Georgia, Tennessee, South Carolina?

A. These cards do not show the current prices effective outside of the middle country territory.

Q. Were there other prices that were effective?

A. Outside—

Trial Examiner Norwood: Wait a minute, let him answer.

Mr. Duncan: Let him finish his answer.

A. (Continuing.) Outside of that area, prices were higher as competition required.

Mr. Wright: I move that the last three words of that answer be stricken.

Trial Examiner Norwood: Motion allowed.

Mr. DuBose: Your Honor, I submit that that is a factual answer.

Trial Examiner Norwood: I think that he may answer more definitely.

Mr. Wright: The question is if there were differentials. I submit that is not an answer.

Trial Examiner Norwood: Counsel may bring that out by this witness or any other witness, but I think this counsel has a right to direct answers to this witness without argument.

By Mr. Wright:

Q. I call your attention to the note on Commis-
1292 sion's Exhibit 810-I, car lot prices quoted on inquiry.
In quoting prices in car lot quantities of dry red lead and litharge, did the Glidden Company in that period covered by that card quote prices on the basis of the price of pig lead, plus the differential?

A. If any prices were quoted on carload lots during that period, Glidden would quote a price arrived at by adding a figure in cents per pound to a governing pig lead market figure as agreed upon with the buyer.

Q. Where would the Glidden Company secure that governing pig lead market figure?

Mr. DuBose: I object to that, your Honor please, on the ground it is irrelevant and immaterial.

Trial Examiner Norwood: Overruled.

A. Governing lead market on any such sale would be determined as agreed upon with the buyer, usually the published quotations for coloring lead at New York as appearing in the American Metal Market or the Daily Metal Reporter or the Engineering and Mine Journal as having been in effect upon the governing date, or it might be the St. Louis lead market established in a similar manner. It might have been the average lead market over a period of time agreed upon with the buyer. It might have been a future date agreed upon with the buyer.

Q. Can you state with reference to delivery of dry 1293 red lead and litharge in carload quantities whether there was a similar central territory, or base territory, in which the lowest delivered prices applicable with a higher priced territory?

A. None is established by Glidden. Whatever competition had would govern in those cases.

Q. You did not quote or offer a differential above the central area price for delivery, say, to the Pacific coast on red lead and litharge?

A. Now, you asked me did we—what was that?

Q. Did you quote a higher price for delivery to the Pacific coast than for delivery in your central area?

Mr. Duncan: I object.

A. I do not recall that there was any difference quoted in the Pacific coast.

Q. Was a difference quoted for delivery to any other part of the country that you recall, simply on account of the man's location?

A. No, sir; prices or differentials were quoted on the competition that existed.

Mr. Wright: I move to strike everything after "No, sir."

Trial Examiner Norwood: Motion allowed.

The Witness: I beg your pardon, the answer to the question is incorrect without the rest of my answer.

Mr. Duncan: I move to have it stay in, your Honor.

1294 Trial Examiner Norwood: Read the question and I will ask you to make the correct answer.

(Last question read.)

A. The answer is no.

Mr. Wright: May we have a short recess.

Trial Examiner Norwood: A short recess may be taken.

(A short recess was had.)

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. Mr. Sprague, I show you a group of exhibits identified as 811 through 821 which are contracts entered into by the Euston Lead Company Division of Glidden and various purchasers of dry white lead in St. Louis, all of them apparently during the year 1941. I call your attention to the fact that that contract is a printed form which is filled in in the appropriate spaces. Can you state how long—over what period of time prior to 1941 contracts in that form were entered into by Glidden with purchasers of dry white lead?

A. No, sir; I can't. This form, I believe, has been modified some from time to time.

Q. Can you state when it was modified?

A. No.

Q. How often has it been modified?

A. I couldn't state how often it has been modi-
1295 fied, it seems to me this form or essentially this
form was used as far back as 1930.

Mr. Duncan: Your Honor, I object to that last part of the answer, "What seems to be," and ask it go out of the record. Either it was or it wasn't, and this witness either knows or doesn't know.

Trial Examiner Norwood: You may question him further about that.

By Mr. Wright:

Q. Were printed form contracts in use back as far as 1930?

A. Yes, sir.

Q. Were any significant changes made in those contracts between 1930 and 1935?

A. What do you mean by significant changes?

Q. Well, I mean any changes in the form of the contract as to the requirements on delivery and shipments, terms of sale?

A. I don't think so. Not what I would regard as significant.

Q. Has the Glidden Company used printed form contracts in the sale of red lead and litharge?

A. Yes, sir.

Q. Over how long a period of time have such printed form of contracts been used in the sale of those products?

A. I don't know. Many years.

1296 Q. How do the contracts on red lead and litharge
—the form contracts, differ from those on dry white
lead as shown by Commission's Exhibit 811?

A. There are many differences because the selling practices relating to carloads of white lead and less carloads were sufficiently similar to enable them to be covered on one contract. That wasn't possible in the case of red lead and litharge.

Q. In selling red lead in oil and dry red lead and dry white lead and litharge in steel kegs and cans of a hundred pounds, 50 pounds, 25 pounds, 12 and a half pounds, and in cans of five pounds and one pound, does the Glidden Company quote the same terms and conditions of sale as it does on white lead in oil in similar containers?

Mr. Duncan: I object, your Honor. The reason I object is this: He puts it in the present tense, and we are confined in this amended complaint to a certain period which does not include the present.

Mr. Wright: Your Honor, I am trying to establish the basis of present methods so that it can be traced back and we can get an intelligent picture.

Trial Examiner Norwood: I think he may answer.

A. Your question was as to the present conditions?

By Mr. Wright:

Q. Yes, sir.

1297 A. I cannot answer that.

Q. Can you answer it, say, on the basis of practices in 1942?

A. No, because the sale of those products which you have included in your question in those size packages were a part of the paint activities of the company in the main. To make a correct answer to that rather all-inclusive question, I would have to say that I can't do it.

Q. Mr. Sprague, did you represent the Glidden Company in the Lead Industries Association from time to time?

A. Yes, I represented the Metals Refining Company and the Eustone Lead Company more directly than Glidden because our activities were largely identified in those two directions.

Q. Over what period of time did you represent the Metals Refining and Euston Divisions of Glidden in the lead industries association?

A. Quite a number of years, beginning, I believe, during the period of the NRA activities.

Q. Does the Glidden Company, the Metal Refining and Euston Lead Divisions of Glidden report statistics on production inventories and shipments of pigments to the Lead Industries Association?

Mr. Duncan: I object, it is immaterial and irrelevant in this case, your Honor.

1298 Trial Examiner Norwood: Read the question.

(Last question read.)

Trial Examiner Norwood: I didn't understand that, will you read it a little slower?

(The reporter again read the question.)

Trial Examiner Norwood: Are you speaking generally or of the present time?

Mr. Wright: At the present time.

Mr. Duncan: I object.

Trial Examiner Norwood: He is not a—

Mr. Wright: He is a vice-president and I am asking if the Glidden Company reports those statistics.

Trial Examiner Norwood: Let him answer; objection overruled.

A. Yes, sir.

Trial Examiner Norwood: I am receiving these questions about present practices subject to connection.

Mr. Wright: Yes, sir.

Trial Examiner Norwood: Because they are not to be included as any evidence whatever of the charges unless they are connected up.

Mr. Wright: I appreciate that, your Honor.

Mr. Welch: I would like to observe for the record that there is no charge whatever that the activities of the
various respondents here in separately reporting in-
1299 ventories, production inventory and pigment shipments as an illegal practice.

Mr. Wright: I am sure it will appear from questions which are to follow that the information which I am seeking to obtain is relevant and material.

Trial Examiner Norwood: I will let it in subject to connection. Objection overruled.

By Mr. Wright:

Q. I believe the last question was on what time basis are such statistics reported?

A. Well, the statistics will show that. I do not recall.

Q. Do they report them monthly, do you recall?

A. No, I think not. I think they are annual.

Q. Over what period of time has the Glidden Company reported such statistics to the Lead Industries Association?

Mr. Duncan: I object, your Honor, on the ground that it is immaterial and irrelevant, and I would like to have a general objection then to each question that contains the same line of inquiry, rather than to have to interrupt all the time.

Mr. DuBose: I think all Respondents would like to join in that objection.

Trial Examiner Norwood: You may have an objection to this entire line. Read the question.

(Last question read.)

1300 Trial Examiner Norwood: Objection overruled.

A. That can be shown in the reports of the Association. I do not recall.

By Mr. Wright:

Q. Does it go back over a considerable period of years, do you recall?

A. Several years, yes. I think they started reporting at the same time to the American Bureau of Metal Statistics and the Bureau of Census in the Lead Industries Association.

Q. Would that be around 1932?

A. I can't recall.

Q. Does the Glidden Company receive from the Lead Industries Association statistics on the total production of lead pigments and total shipments of lead pigments by those who report to the institution?

A. They receive the published statistical reports; and whatever they contain, Glidden gets.

Q. Do those reports show the total shipments?

Mr. DuBose: I object, your Honor, on the ground that the best evidence is the reports themselves. We had in New York, the Lead Industries Association secretary there and he brought all records that were called for, and I submit that this indirect method violates the best evidence rule.

Trial Examiner Norwood: Did this evidence go 1301 to written reports?

Mr. Wright: I am inquiring generally about the type of statistics which the Glidden Company furnished to the Lead Industries Association and about the type of statistics which the Lead Industries Association furnished back to the Glidden Company; and I believe that is relevant and material and competent.

Trial Examiner Norwood: Well, I believe I would ask it then, in that way, and not base it on some sort of report which may or may not have been in writing.

Mr. Wright: May I have the question again?

(Last question read.)

Trial Examiner Norwood: Were those reports in writing?

The Witness: To the Lead Industries Association?

Trial Examiner Norwood: Yes.

The Witness: Certainly.

Mr. DuBose: And from the Lead Industries Association—

The Witness: My memory is a little fresher now, but it has been a long time since I was doing that; but I believe the reports were received from the Lead Industries monthly on the production and stocks and shipments of those items that are included in the Lead Industries scope.

By Mr. Wright:

1302 Q. That is total production and shipments for the industry that you received from Lead Industries?

A. Yes, sir.

Q. Are you able by comparing the total production inventories and shipments to your own inventories and shipments and production, to ascertain the proportion of the production inventories and shipments by the Glidden Company to the total of the industry?

Mr. DuBose: I object to that, if your Honor please, on the ground that these reports speak for themselves and they shouldn't have that presumptive, rather vague testimony.

Trial Examiner Norwood: I think he may show the general nature of these reports. He is not giving any figures here. He is not giving any percentages here which, of course, the reports would contain.

Mr. Wright: I am trying to lay a groundwork for this witness' knowledge.

Trial Examiner Norwood: I think he may ask that.

Mr. DuBose: I submit that his knowledge is not the best evidence.

Trial Examiner Norwood: He may state what the reports generally show.

Objection overruled.

1303 Trial Examiner Norwood: The reports were of such a nature that these percentages could be ascertained, is that right?

The Witness: If the basic reports were accurate, sure.

Mr. DuBose: I don't think there is any question on that, if each individual company knows its own production and gets the total, they can divide it and get a percentage and get their own particular percentage. I think we will concede that, but I don't think it is material.

Trial Examiner Norwood: Well—

Mr. DuBose: Their own particular percentage. The testimony is here that there was no—testimony in New York said it was only to the lead industry and no other company got its report nor did it go to any other company.

Mr. Wright: That testimony related to National Lead. Now we are taking up the question of Glidden.

Trial Examiner Norwood: Go ahead.

By Mr. Wright:

Q. Are you familiar with the position, the relative position of the Glidden Company to the rest of the industry in shipments of white lead in oil during the year 1943?

A. The relative position, yes. The relative position of the Glidden Company to the principal producers was that of a minor factor. The position of Glidden with re-
1304 spect to the other producers, we have no knowledge.

Q. Well, you have already stated that you received statistics showing the shipments by the industry as a whole of white lead in oil?

A. Yes.

Q. Can you state on a percentage basis the relation of Glidden shipments of white lead in oil to those of the entire industry for 1942?

A. No, I cannot.

Q. Can you make any estimation of the relative position?

A. I can guess at it.

Mr. Duncan: We object to any guessing.

Mr. DuBose: I object to a guess.

Trial Examiner Norwood: Sustained.

By Mr. Wright:

Q. Do you have any recollection of the shipments of white lead in oil by Glidden during 1943 on a tonnage basis, in round numbers?

A. No, sir.

Q. Can you state the position of Glidden relative to the entire industry on dry white lead during the year 1943?

A. No, sir; I cannot.

Q. Is Glidden a large factor in dry white lead as compared to the rest of the industry?

A. It was a larger factor in dry white lead than it
1305 was in the white lead in oil in a percentage factor.

Q. Do I understand your testimony that you cannot recall the shipments on a tonnage basis of dry white lead during 1943?

A. No, I cannot; I don't have those statistics in my mind at all.

Q. Can you state the relative position of Glidden to the rest of the industry during 1943 in shipments of dry red lead?

A. I can guess at it.

Mr. DuBose: I object to that.

By Mr. Wright:

Q. What would be the basis of your guess?

Mr. DuBose: I object to any guesses of the witness.

Trial Examiner Norwood: The question is—if he can show that he can make a reasonable estimate, I will let him make it.

Mr. DuBose: He said a guess. That is why I objected.

Trial Examiner Norwood: He is asking what the witness meant by a guess. Objection overruled.

Mr. Duncan: Your Honor, the objection by Mr. DuBose,
I understand, is for all respondents. It seems to me this
line of inquiry suggests a disclosure of information that
might be confidential and certainly shouldn't be given
1306 to competitors. On that score alone, I don't know
why this witness should be advised by the Examiner
to answer the question.

If he has knowledge of any specific percentages, I submit, that your Honor is compelling the witness—

Trial Examiner Norwood: 1943. Do you think that would be injurious to your client?

Mr. Duncan: It might be.

Mr. Wright: It has come up before in the record on that point. We have already in the evidence a number of exhibits which were given by officials of the respondents showing their exact tonnages and their relative position on a percentage basis on white lead and oil in 1940, 1941, 1942. At the time those were given voluntarily for the purpose of this proceeding, there was no question made of their being confidential in anyway and there was no objection to them.

Mr. DuBose: That was white lead in oil only.

Mr. Duncan: That was with reference to the complaint which excluded red lead and litharge and so forth.

Mr. Wright: Now the question goes to white lead in addition.

Mr. Duncan: I believe that your objection is well taken.

Trial Examiner Norwood: The pending question is: On what would your guess be based?

1307 I will overrule the objection and ask the witness to answer that question.

Mr. Duncan: Note an exception.

A. I carry in my mind irregular recollections of percentages of the Glidden Company's sales and shipments with regard to the entire industry, but I can't pull them out for you. There is no objection from the standpoint of the Glidden Company to giving you some figures, but I didn't come here prepared to answer questions of that sort. I can give you a general estimate which was about, on red lead in oil, perhaps six or 7 per cent of the total. That is my estimate. Red lead and litharge would be even less than that.

The main thing to me and the only thing that dominated my thinking was that Glidden was an inconspicuous factor in this industry. Now, when you ask me what was the percentage and what was the tonnage, I can only answer you that I do not recall.

Q. Now, your estimate upon the basis of percentage figures which have stuck in your mind was for 1943?

A. Yes.

Q. Was Glidden in approximately that same relative position back through 1940 and 1937?

A. I can recall that there were major ups and downs during the period that Glidden was engaged in the business. Just when they occurred, I don't remember. I think
1308 it is safe to say that Glidden never had more than eight or nine per cent of white lead in oil business at anytime.

Q. How about dry white lead?

A. There the percentage was larger, perhaps double.

Q. Does the Glidden Company maintain records from which it could be ascertained exactly the relative position over the period from 1935 to 1943?

A. Glidden's records on sales and shipments are usually destroyed in about two years, but statistical data of that kind could be obtained probably better from the agencies to which the reports were made and who published the aggregates that it could be obtained from Glidden.

Q. Mr. Sprague, with regard to freight rates, do you recall whether the commodity classifications and the rates themselves are the same on red lead and litharge in bags and barrels as on dry white lead?

Mr. Duncan: I object, your Honor, for the same reason announced this morning.

Trial Examiner Norwood: I think counsel has a general objection to this line, to everything that relates to freight.

Mr. Duncan: That is right.

Trial Examiner Norwood: Objection overruled.

A. I do not recall freight rates of any kind, on anything, but I do not believe Glidden shipped any red lead or 1309 litharge in bags.

Q. It did ship such commodities in barrels, however?

A. The term barrel, as I understand it, refers to a wooden package made with staffs and so on. Very rarely were such things used.

Q. Were steel kegs or barrels used?

A. Yes, steel.

Trial Examiner Norwood: Doesn't barrels in your industry refer to a certain number of sacks, or a certain number of pounds, as a unit?

The Witness: No, it is a description of a type of container.

Trial Examiner Norwood: Barrel really means barrel?

The Witness: Yes, sir, that is right.

Mr. Wright: No further questions.

Trial Examiner Norwood: You may examine him.

Mr. Duncan: No questions, your Honor.

Trial Examiner Norwood: Is there anything else this afternoon?

Mr. Wright: No, sir. Our next witness will be tomorrow morning.

Trial Examiner Norwood: Then we will recess until 10:00 o'clock tomorrow morning.

(Whereupon, at 3:26 p. m. a recess was taken until 10:00 a. m., Thursday, July 25, 1946.)

1310

Room 410,
Federal Building,
Cleveland, Ohio,
July 25, 1946.

Met, pursuant to adjournment at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph Wright, and Paul R. Dixon, Attorneys for the Federal Trade Commission.

J. T. Welch (Davies, Richberg, Beebe, Busick & Richardson, 15th Street N. W., Washington, D. C.) and T. J. McDowell (101 Prospect Avenue, Cleveland, Ohio), Attorneys for Sherwin-Williams Company.

Harry E. Gardiner (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, New York), for Anaconda Copper Mining Company and International Smelting & Refining Company.

Richard Serviss, and Edmund P. Wood, Attorneys for Eagle-Picher Lead Company and the Eagle-Picher Sales Company.

Eugene Z. DuBose (Alexander & Green, 120 Broadway, New York, New York), for the National Lead Company.

1310A John A. Duncon (1649 Union Commerce Building, Cleveland, Ohio), for the Glidden Company.

1311

PROCEEDINGS.

Trial Examiner Norwood: Pursuant to adjournment yesterday, hearing in Docket 5253 convened at 10 o'clock a. m., Room 410 Federal Building, Cleveland, Ohio, July 25, 1946.

Appearances are as follows: Joseph Wright and Paul R. Dixon, Attorneys for the Federal Trade Commission.

J. T. Welch and T. J. McDowell, Attorneys for Sherwin-Williams Company.

Henry E. Gardiner, Attorney for Anaconda Copper Mining Company and International Smelting & Refining Company.

Richard Serviss and Edmund P. Wood, Attorneys for Eagle-Picher Lead Company and the Eagle-Picher Sales Company.

Eugene Z. DuBose, Attorney for the National Lead Company.

John A. Duncan, Attorney for the Glidden Company.

Call your witness.

Mr. Wright: Call Mr. Coolidge.

SOLLACE B. COOLIDGE was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Mr. Coolidge, will you state your full name and 1312 address for the record, please?

A. Sollace B. Coolidge, Jr., Sherwin-Williams Company, Cleveland, Ohio.

Q. What is your present position with the Sherwin-Williams Company?

A. Vice-president and director.

Q. What are the duties and responsibilities of that position?

A. Largely manufacturing of raw materials.

Q. Your duties in that position—are your duties in that position concerned with lead pigments?

A. Yes, sir.

Q. How long have you been in your present position?

A. A year, approximately.

Q. Will you start at the time of your first employment by Sherwin-Williams and give us an account of your positions and responsibilities?

A. I started in October 24th, and then six months after that, was in the sales of linseed oil and meal. About 1926 I went into pigment sales in Chicago, later on New York; came back to Cleveland about 1929, at which time I was made manager of the auxiliaries department, held that position until December of last year.

Q. You referred to the auxiliaries department. What is that department?

1313 A. It is a manufacturing department of raw materials, primarily pigments, oils, cans.

Q. What lead pigments are presently produced by Sherwin-Williams?

A. White lead carbonate, litharge, red lead.

Q. Where are the factories of Sherwin-Williams located at which these pigments are produced?

A. Chicago.

Q. All manufacturing of lead pigments by Sherwin is at Chicago; is that right?

A. Yes, sir.

Q. Where does the Sherwin-Williams Company obtain the pig lead from which the pigments are produced?

A. Obtain it from practically all suppliers.

Q. Is it obtained in the open market?

A. Yes, sir.

Q. Does the Sherwin-Williams Company solicit business in lead pigments and sell lead pigments throughout the United States?

A. With the exception of the Pacific coast. You are talking of dry pigments, now?

Q. Well, I will confine the question to white lead in oil.

A. Throughout the United States, yes.

Q. Now, as to dry white lead?

A. Dry white lead, not the Pacific coast.

1314 Q. Red lead?

A. The same all the way through on both litharge and red lead; no sales are made on the Pacific coast.

Q. Dry red lead?

A. Litharge and dry red lead.

Q. Is red lead in oil sold throughout the United States?

A. Yes.

Q. Mr. Coolidge, I show you a document marked Commission's Exhibit 594, A and B, which is in evidence in this case. Do you recognize that as a price list of red lead in oil of the Sherwin-Williams Company?

Mr. Welch: Objection. As I recall, we have already stipulated in the record what the document was. My objection is solely that this additional testimony about the document is just surplus because we—

Trial Examiner Norwood: Surplusage?

Mr. Welch: I don't want to characterize it, but it is surplusage.

Mr. Wright: I want to find out from this witness if it recognizes it, and for what it recognizes it.

Trial Examiner Norwood: Let him describe it.

Tell us just what you recognize.

A. It is a list of differentials on white lead in oil and zilo which we sell at various points throughout the country.

Q. Are those differentials on account of the place
1315 where the white lead in oil is to be delivered?

A. Yes, sir.

Q. Now, I call your attention to the statement "lead in zilo price differentials for S-W warehouses and stores." Do you have either a warehouse or store in each of these places?

A. I couldn't answer that question.

Q. Does the Sherwin-Williams Company sell white lead in oil to other cities and towns than those appearing on that list?

A. Yes, sir.

Q. Can you tell me how differentials for delivery to other towns than those appearing on that list are worked out?

A. No differentials are added for the other towns, they pay the freight from these delivery points.

Q. I call your attention to the fact that Washington, D. C., does not appear on this list. Do I understand your answer, then, that a customer of Sherwin-Williams ordering white lead in oil for resale who is located in Washington, D. C., would pay some price with the addition of freight from another point on this list?

A. Yes, sir.

Q. Does that answer hold true, regardless of the quantity in which the order is made?

A. Yes sir.

1316 Q. Can you tell me from what point the customer in Washington, D. C., would pay freight?

A. Probably from Baltimore, where we have a warehouse.

Q. Is it my understanding of your testimony, then, that a purchaser of white lead in oil from Sherwin-Williams, located at any other city than those named on this list at that date would pay an addition of freight from some other point on that list?

Mr. Welch: Objection. The question has been asked and answered; exactly the same question before, and the witness has done his best to explain what the situation is.

Trial Examiner Norwood: I think he may answer that; objection overruled.

A. Will you state your question again?

Mr. Wright: Read the question.

(The reporter read the last question.)

A. Yes, sir.

By Mr. Wright:

Q. Will you tell me, Mr. Coolidge, for over what length of time the differentials and differential points appearing on Commission's Exhibit 594, A and B, has been in effect with the Sherwin-Williams Company?

A. Well, I couldn't say as far as the particular points listed here are concerned; but we have had a similar list of points ever since I have been with the Sherwin-
1317 Williams Company. Whether they correspond with this list over a period of time, I couldn't say, but we have always listed our prices on white lead in oil in this fashion.

Q. In selling red lead in oil and dry white lead and litharge in steel kegs of 50-pound, 25-pound, 12 and a half pounds, and cans of five pounds and one pound, does the Sherwin-Williams Company quote the same differentials and differential points as for white lead in oil?

Mr. Welch: Objection. There is no showing whatever that the Sherwin-Williams Company sells those products in the types of containers or size of containers mentioned in the question. I think the record should first be clarified to show what size containers and what kind of containers they do sell, and then ask the question as to the differentials.

Mr. Wright: Your Honor, there is already in evidence document 662-I, for one thing, which shows that the Sherwin-Williams Company does sell these products in those containers—offers them for sale, rather.

Trial Examiner Norwood: Objection overruled.

Mr. Welch: Mr. Examiner, I would like to point out that the document referred to does not refer to the types of containers mentioned in the question. It does refer to sizes, but as I recall the question, it comprehended several types of containers and I think that in so far as it
1318 does that, the question is improper.

Trial Examiner Norwood: Let me see that exhibit. Read the question, will you please.

(The reporter read the last question.)

Trial Examiner Norwood: Does the Sherwin-Williams

Company sell that product in the containers which the question refers to?

The Witness: Yes, sir.

Trial Examiner Norwood: Objection overruled.

The Witness: Yes, they do sell at the same schedule of differential points.

By Mr. Wright:

Q: I call your attention to Commission's Exhibit 662-I. Do the statements appearing thereon, "Consumers' prices, Eastern Zone"—will you explain the term eastern zone, as it appears on that exhibit?

Mr. Welch: If your Honor please, I object to that question. I don't think it is proper for this witness to explain. The exhibit speaks for itself.

Trial Examiner Norwood: Does it describe it?

Mr. Wright: No, it does not.

Trial Examiner Norwood: Objection overruled.

A. If you will notice in our list of differentials here, the Cities or towns with an "E" after them are the eastern zone.

1319 Q. Does eastern zone then describe a territory within which these cities with an "E" on Exhibit 594-I are located?

A. Not necessarily. We sell not by zone, but by cities.

Q. I didn't understand your answer to the first question regarding the meaning of that eastern zone, then.

A. All the cities in the eastern zone which are sold at this price basis are indicated on that sheet by an "E" after the town.

Q. But then not all—as I understand your testimony, then, not all cities which would be located within the territory in which these cities are located would take the eastern zone prices?

A. Exactly.

Mr. DuBose: Mr. Wright, I think the record should be clear; when you said this document, were you referring to 594, A and B?

Mr. Wright: Yes, sir.

By Mr. Wright:

Q. Mr. Coolidge, are you prepared to make a return of a subpoena duces tecum which was served on the Sherwin-Williams Company?

A. Yes, sir; in so far as possible.

Q. Do you have the documents which were called for by Specification 1?

A. Yes, sir; in part. I am not clear as to the
1320 specification. Yes, I have all those in Specification 1.

Q. Do you have the documents called for under Specification 2?

A. We have no contracts on white lead, litharge, or red lead in the City of St. Louis on the dates mentioned.

Mr. Wright: I ask that these documents be identified as Commission's Exhibits 823, A, B, C, D, E, F and G.

(The documents referred to were marked Commission's Exhibits 823-A, 823-B, 823-C, 823-D, 823-E, 823-F and 823-G for identification.)

By Mr. Wright:

Q. I show you a document marked for identification as Commission's Exhibit 823-A, Mr. Coolidge, and ask you to state what it is.

A. This is a bulletin sent to our sales department covering prices on litharge, red lead, in steel drums of 500 pounds or more, in effect December 30, 1932.

Q. I show you Commission's Exhibit 823-B and ask you to state what that is.

A. This is the same as the previous document, only the date being October 30, 1933.

Q. I show you Commission's Exhibit 823-C and ask you to state what that is.

A. This is the same, only the date being June 29, 1934.

Q. Show you Commission's Exhibit 823-D and
1321 ask you to state what that is.

A. Same, with the exception of the date being September 19, 1935.

Q. Commission's Exhibit 823-E, will you state what that is?

A. The same, except the date is December 21, 1936.

Q. And Commission's Exhibit 823-F, will you state what that is?

A. The same with the exception the date is January 14, 1942.

Q. I show you Commission's Exhibit 823-G and ask you to state what that is.

A. This is a bulletin sent to our sales department covering prices on dry white lead carbonate in effect as of January 28, 1942.

Mr. Wright: Your Honor, I wish to offer in evidence Commission's Exhibits 823-A to G, and in that connection state that I understand these are original documents of the Sherwin-Williams Company which they wish to have returned and that the reporter will have the documents photostated and the photostatic copies of same be marked as exhibits in the record, so that the originals may be returned to the Sherwin-Williams Company.

Will that be satisfactory, Mr. Welch?

Mr. Welch: Entirely satisfactory.

Trial Examiner Norwood: Any objection to the 1322 receipt of the documents in evidence?

Mr. Welch: None whatever.

Trial Examiner Norwood: Received as marked, with the understanding that the reporter will have them copied by photographic process and marked in evidence, and the originals be returned to the Sherwin-Williams Company.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 823-A to 823-G, inclusive, were received in evidence.)

Mr. Welch: Mr. Examiner, I want to withdraw the remark that I had no objection. I want to state that I have an objection to 823-A, B, C, D, in so far as their applicability to Count 2 of the complaint is concerned, because they were issued long prior to the enactment of the Robinson-Patman Act.

Trial Examiner Norwood: Yes.

Mr. Wright: Please mark this as Commission's Exhibit No. 824.

(The document referred to was marked Commission's Exhibit 824, for identification.)

Trial Examiner Norwood: The objection to Exhibit 823 is overruled and the exhibits are received as to Count 2. I think I explained that fully. I want to be understood here as simply refusing to place an arbitrary restriction on the legal or logical use that may be made of the exhibits on either count.

1323 If it lawfully or logically appears that they may be used, then they will have their proper and logical value. They are not going to be used for something that would be illogical and unreasonable, as I said yesterday. They will not be used to establish any particular overt act prior to the enactment of the Robinson-Patman Act.

Proceed.

By Mr. Wright:

Q. Mr. Coolidge, I show you a document marked for identification Commission's Exhibit No. 824, and ask you to state what that is?

A. Subpoena to the Sherwin-Williams Company, secretary of the Sherwin-Williams Company.

Q. Is that the subpoena to which you were making return this morning?

A. Yes, sir.

Mr. Wright: I offer Commission's Exhibit 824 in evidence.

Mr. Welch: Objection.

Trial Examiner Norwood: Received.

(The paper referred to, heretofore marked for identification COMMISSION'S EXHIBIT 824, was received in evidence.)

By Mr. Wright.

Q. Mr. Coolidge, I show you Commission's Exhibit 823-A.

1324 Is that your signature?

A. Yes, sir.

Q. Reproduced there?

A. Yes, sir.

Q. Will you state the geographical areas over which the prices set forth in that exhibit were applicable?

Mr. Welch: Wait just one minute before the witness answers, please.

A. This would apply to all points in the United States, with the exception of the Pacific coast where we did not sell it.

By Mr. Wright:

Q. In other words, in December 30, 1932, the Sherwin-Williams Company was offering red lead and litharge at a flat price in the whole eastern part of the United States, up to the Pacific coast?

A. That is correct.

Q. I call your attention to Commission's Exhibit 823-B, dated October 30, 1933, and ask you to state the geographical areas to which these price quotations were applicable?

A. The same as the preceding one.

Q. I call your attention to Commission's Exhibit 823-C and the statement of geographical differentials on red lead

and litharge contained therein. Are you able to state when
Sherwin-Williams made the change in quoting from
1325 that set forth in 823-B, to that set forth in 823-C?

A. I would assume that it was as of June 21, 1934, as there is no intervening bulletin between this and this (indicating).

Q. I call your attention to Commission's Exhibit 823-F, and the geographical differentials set forth thereon. Those appear to be the same as those on 823-C. Can you state whether those differentials—geographical differentials applied continuously from the date of 823-C to the date of 823-F?

A. Yes, sir.

Q. I show you Commission's Exhibit 823-G, and call your attention to the statement, "Pacific coast only," and the price quoted thereunder, which is apparently one-quarter of a cent higher than the price set forth immediately above. Do you recall the states which comprised the Pacific coast area, as referred to on that document?

A. It would be all states west of the Rocky Mountains.

Q. Please state the period of time over which that geographical differential as set forth in that exhibit has been quoted by Sherwin-Williams in offering dry white lead for sale.

A. I don't believe I could answer that question without referring to records.

Q. Do you recall whether such differentials were quoted in 1936?

1326 A. No, sir; I don't.

Q. Does the Sherwin-Williams Company enter into contracts with purchasers of dry white lead covering quarterly requirements?

A. Dry white lead?

Q. Yes.

A. Yes, sir.

Q. Are such contracts on a printed form?

A. Yes, sir.

Q. Over what period of time have such printed form contracts for dry white lead been employed by Sherwin-Williams Company?

A. Ever since I have been with the company; how long before that, I don't know.

Q. Does Sherwin-Williams enter into contracts with purchasers of dry red lead and litharge covering quarterly requirements?

A. No, sir.

Q. Have they ever?

A. Not to my knowledge.

Q. Does the Sherwin-Williams Company generally sell lead pigments in accordance with its published and announced prices and terms of sale?

Mr. Welch: Objection. Your Honor, the record in this case already shows the inspection of thousands of in-

1327 voices. They have all been analyzed and tabulated, and they certainly show what the general practice of the company is, as to whether it does or does not sell according to its published prices, which price list the Commission also has in evidence.

We say that is the best evidence of how the company does business.

Mr. Wright: I submit that while there is a record of thousands of Sherwin-Williams invoices in the record already, that doesn't purport to cover the undoubted millions of invoices that the Sherwin-Williams Company has covering transactions they have entered into over a period of years with which this complaint is concerned.

Trial Examiner Norwood: Read the question.

(The reporter read the last question.)

Trial Examiner Norwood: Overruled, answer the question.

Mr. Welch: Exception.

A. Yes, sir.

By Mr. Wright:

Q. Does Sherwin-Williams Company sell dry red lead and litharge in carload quantities?

A. Yes, sir.

Q. Will you state the method of quoting prices on carload quantities of dry red lead?

1328 A. It is done on a differential basis over the pig lead market then existing.

Q. Existing at what time?

A. At the time of quotation.

Q. At the time of the quotation?

A. Yes, sir.

Q. Will you explain the expression "Pig lead"? What market?

A. New York pig lead market.

Q. Now, is that an average pig lead market?

A. It could be either one. If it was a spot sale, it would be quoted on the pig lead market existing at the time of quotation. If it was covering requirements over a period of time, it could be done on either basis, either an average monthly pig lead quotation or on a spot basis.

Q. What quotation is used?

A. Either one.

Q. What quotation for pig lead, American Smelting & Refining Company quotation on pig lead?

A. No, sir; the New York market.

Q. Well, what sources of market information are used to determine?

A. Engineering Mining Journal is the official publication that we use for determining pig lead quotations.

Q. In shipping lead pigments to the customers,
1329 does the Sherwin-Williams Company in all instances
pre-pay the freight?

Mr. Welch: Objection. The document is already in evidence to show what the freight practices are and how it is handled. We don't think this witness has been qualified to show familiarity with freight rates.

Trial Examiner Norwood: I think he may tell us if he knows. Counsel may enlarge on this information.

The Witness: Will you read the question again?

Trial Examiner Norwood: Objection overruled. Read the question.

(The reporter read the last question.)

A. You mean by that actually prepaying it?

Q. Yes, sir.

A. We either prepay or allow the freight on the invoice.

Q. When you allow the freight on the invoice, the customer pays the freight?

A. Yes, sir.

Q. And it is deducted from the invoice?

A. Yes, sir.

Q. Do red lead in oil and litharge in steel kegs and cans generally carry the same freight classifications and freight rates as white lead in oil?

A. I couldn't answer that question offhand.

Q. Do dry red lead and litharge in bags and barrels or
drums carry the same freight classifications and
1330 freight rates as dry white lead in similar containers?

A. I believe so.

Q. Do you represent the Sherwin-Williams Company in the Lead Industries Association?

A. Exactly what do you mean by representation?

Q. Do you attend the meetings of the Lead Industries Association as a representative of Sherwin-Williams Company?

A. No, sir.

Q. Your answer refers to the present time?

A. Yes, sir.

Q. Have you ever represented Sherwin-Williams Company?

A. Yes, sir; during NRA days.

Q. Over what period of time was that, do you recall?

A. Not exactly; no.

Q. Does the Sherwin-Williams Company furnish statistics to the Lead Industries Association showing production, stocks and shipments of lead pigments?

A. Yes, sir.

Q. On what time basis are those statistics furnished; monthly, annually?

A. Monthly.

Q. Does Sherwin-Williams Company receive from the Lead Industries Association statistics on production, stocks and shipments of lead pigments?

A. In total by the industry, yes.

1331 Q. They show the total of the production, stocks and shipments for the industry?

A. Yes, sir.

Q. Do they show any percentage of the various companies?

A. No, sir.

Q. Are you able to ascertain your position with reference to the remainder of the industry by these statistics supplied to you by the Lead Industries Association?

A. Our percentage of the industry; yes, sir.

Q. Will you state on a percentage basis, as near as you can, the relative position of Sherwin-Williams in the shipment of white lead in oil to the rest of the industry during 1943?

A. Approximately five per cent.

Q. During 1944?

A. Approximately the same.

Q. Has that approximate five per cent position extended over any considerable period of time?

A. It has been around that figure for a great many years.

Q. Can you state the relative position of Sherwin-Williams on a percentage basis to the rest of the industry in shipments of dry white lead for 1943, say?

Mr. Welch: That is, shipments to customers?

Mr. Wright: Yes, sir.

A. Shipments to customers?

1332 By Mr. Wright:

Q. Yes, sir.

A. Practically nothing, less than one per cent.

Q. Would your answer be the same as to the year 1940?

A. Yes, sir; it would.

Q. Has that less than one per cent relation obtained over any considerable period of time?

A. In normal years, that is true.

Q. Will you state the relative position on a percentage basis as to shipments to customers of dry red lead during 1943?

A. Practically nil.

Q. Has that obtained over any considerable period of time?

A. Yes, sir.

Q. For how many years, would you say?

A. As long as I have been in the business.

Q. With reference to litharge?

A. It would be less than one per cent.

Q. Would that also apply over a great many years, or has it been—

A. Fifteen years, at least.

Q. How about red lead in oil?

A. Practically nil.

Mr. Wright: I have no further questions, your Honor.

1333 Mr. Welch: May we have a recess, your Honor?

Trial Examiner Norwood: Five minutes recess.

(A short recess was taken.)

Trial Examiner Norwood: The witness will resume the stand. Proceed.

Mr. Wright: I have no further questions, your Honor.

Mr. Welch: No questions, your Honor.

Trial Examiner Norwood: The witness is discharged.

(Witness excused.)

Trial Examiner Norwood: Commission's Exhibit 493-A to G, inclusive, the objection is overruled and the exhibit is received in evidence.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 493-A to G, inclusive, were received in evidence.)

Trial Examiner Norwood: Anything further?

Mr. Wright: No, sir; nothing further. I suggest that we adjourn to St. Louis on the 29th.

Trial Examiner Norwood: Anything further counsel wish to take up at this time?

The hearing is now adjourned to reconvene in the City of St. Louis, Missouri, in Room 425 of the U. S. Court House, at 10 o'clock a. m., on the 29th day of July, 1946. That means the standard time of that zone.

1334 (Whereupon, at 11:45 a. m., July 25, 1946, the hearing in the above-entitled matter was adjourned.)

1335

Room 516, U. S. Court
and Custom House,
St. Louis, Missouri,
July 29, 1946.

Met, pursuant to adjournment, at 10:00 a.m., Central Standard Time.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph Wright and Paul R. Dixon, Attorneys for the Federal Trade Commission.

J. T. Welch, (Davies, Richberg, Beebe, Busick & Richardson, 15th St., N. W., Washington, D. C.,) and T. J. McDowell, (101 Prospect Avenue, Cleveland, Ohio) attorneys for Sherwin Williams Company.

Henry E. Gardiner, (Chadbourne, Wallace, Parks & Whiteside, 25 Broadway, New York, N. Y.,) attorneys for Anaconda Copper Mining Company and International Smelting & Refining Company.

Richard Serviss and Edmund P. Wood, Attorneys for Eagle-Picher Lead Company and The Eagle-Picher Sales Company.

Eugene Z. DuBose and William R. McDermott, (Alexander & Green, 120 Broadway, New York, N. Y.) attorneys for the National Lead Company.

1336 John A. Duncan (1649 Union Commerce Building Cleveland, Ohio, for the Glidden Company.

1337

PROCEEDINGS.

Trial Examiner Norwood: Pursuant to adjournment at Cleveland, Ohio, on July 25, the hearing is now reconvened in Docket 5253, in Room 516 of the U. S. Court and Custom House, St. Louis, Missouri, at ten o'clock a.m., on the 29th day of July, 1946, due notice of change of hearing from Room 425 having been given.

The appearances are as follows:

Joseph Wright and Paul H. Dixon for the Federal Trade Commission.

J. T. Welch and T. J. McDowell for Sherwin Williams Company.

Henry E. Gardiner for Anaconda Copper Mining Company and International Smelting and Refining Company.

Richard Serviss and Edmund P. Wood for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Eugene Z. DuBose and William R. McDermott for National Lead Company.

John A. Duncan for the Glidden Company.

You may proceed, gentlemen.

Mr. Wright: Your Honor, I would like to call Mr. Casey to the stand.

Trial Examiner Norwood: Counsel may remove their coats.

Mr. Duncan: May we have separation of witnesses?

1338 Trial Examiner Norwood: Certainly. Is there somewhere the witnesses may wait outside there? You can excuse the witnesses for an hour, sir. Call your witness.

SYLVESTER R. CASEY was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Will you state your full name?

A. Sylvester R. Casey.

Q. Excuse me?

A. Sylvester R. Casey.

Q. What is your occupation, Mr. Casey?

A. Vice-president and general manager of Mound City Paint and Color Company.

Q. Where is the Mound City Paint and Color Company located?

A. 202 South Ninth Street, St. Louis, Missouri.

Q. What is the business of the Mound City Paint and Color Company?

A. Manufacturing paint.

Q. How long has the company been so engaged?

A. Since 1880.

Q. Do the paints manufactured by Mound City contain lead pigments?

1339 A. They do.

Q. Will you state how long a period you have been so employed with the Mound City Paint Company?

A. Since 1920.

Q. Will you please state the geographical areas over which Mound City distributes paint?

A. Well, we distribute east into Indiana, and we distribute to the entire southwest, Missouri, Arkansas, Louisiana, Oklahoma, Texas, Mississippi; that is our general trade area.

Q. Do you market paints in west of St. Louis?

A. Not very much; some.

Q. Do you sell in Omaha, Nebraska?

A. Well, we have and we do spasmodically.

Mr. McDermott: May I ask here that the witness keep his voice up a bit?

Trial Examiner Norwood: Yes, speak a little louder. Let us know if you don't hear.

Q. (By Mr. Wright) Do you endeavor to market paints north of St. Louis?

A. Very little.

Q. Does your answer refer to the present time to the geographical area?

A. No, that has always been.

Q. That has always been the general market area?

A. That is right.

1340 Q. Will you state what products produced by Mound City contain lead pigments?

A. House paints primarily, paste paints.

Q. What lead pigments do those paints contain?

A. Well, they might contain either lead carbonate or lead sulphate.

Q. Do you make a red lead paint?

A. Not very much.

Q. You do make—

A. (Interposing) Some, yes.

Q. From what companies do you purchase lead pigments for use in manufacturing paint?

A. Oh, we purchase from National Lead, Eagle Picher, Houston White Lead.

Q. Are you regularly solicited by all of those companies to purchase lead pigments?

A. Yes.

Q. Are you ever solicited by any other sellers of white lead?

A. Well, we probably have been, but not in the last few years.

Q. Who were those companies, if you recall?

A. Well, one in Chicago—I don't know the name of the company, but a fellow by the name of McGregor runs the company, or operates it.

Q. Can you think of any others?

A. No, I don't right now.

1341 Q. Has the Mound City Company ever entered into contracts with the suppliers of lead pigme covering their purchases?

A. Oh, yes.

Q. Are any such contracts presently in force?

A. I don't think so.

Q. Do you recall the terms of the contracts which have been entered into?

Mr. DuBose: That is objected to as not the best evidence, if your Honor please. I think the contracts should be produced.

Trial Examiner Norwood: I think he is trying to identify some contracts. You mean you recall the contents of the contract?

Mr. Wright: Your Honor, the witness referred to contracts generally with several producers. I was trying to elicit from him information generally on the provision of the contracts.

Trial Examiner Norwood: Well, you can't do that, but you can show the general nature of these contracts whether they were sealed contracts or something else. I sustain the objection. Proceed.

Q. (By Mr. Wright.) Mr. Casey, can you recall the amount of dry lead, both basic carbonate and basic sulphate, which Mound City purchased during 1943?

A. No. We have about 800 raw materials, and it
1342 would be impossible for any man to remember how
much of any item was bought.

Q. Can you give me an approximate figure as to your consumption in any recent year?

A. No, I couldn't without referring to the records.

Q. Do you recall whether it is a substantial amount.

Mr. DuBose: I object to that, if your Honor please, it is too indefinite.

Trial Examiner Norwood: Objection overruled.

The Witness: Will you state your question?

Q. (By Mr. Wright.) Do you recall whether you purchased a substantial amount of dry white lead during 1942?

A. What do you mean by "substantial amount"?

Q. Do you have any idea of the amount?

A. No, I said I didn't have an idea without referring to the records.

Q. You referred to house paint manufactured by Mound City as containing white lead; will you state the formula as closely as you can?

A. You mean the entire formula?

Q. No, the amount of pigment and the amount of vehicle contained in the house paints manufactured by Mound City.

A. Well, we make one house paint that contains 66 per
cent of pigment, 34 per cent of liquid. Of that pigment,
60 per cent is white lead, 40 per cent is zinc oxide.

1343 Q. What is the weight in pounds per gallon of
that paint?

A. The net weight is 16.9.

Q. Is that the only outside white house paint?

A. That is right.

Q. Over how long a period of years has Mound City produced paint of that formula?

A. Well, they were producing it when I came there and I assume that they have always produced it.

Mr. Duncan: I object and move that the last part of that answer be stricken out as being what he assumed.

Trial Examiner Norwood: You can cross-examine him on that. He may give us an estimate in there about this business that he has been following for a long time. Did you make a motion to strike?

Mr. Duncan: Yes, your Honor. I move that the last part of the answer, which is based upon the assumption—

Trial Examiner Norwood: (interposing) Read the entire answer.

(Reporter read the last answer.)

Trial Examiner Norwood: Motion allowed. Strike everything beginning with "I assume", the rest of the answer.

1344 Q. Mr. Casey, you referred to a red lead paint. Do you recall the formula of the red lead paint?

A. No, I don't.

Q. Can you give us an approximate number of pounds of lead pigment which would go into a red lead paint?

A. No, I didn't even look that up.

Q. Will you state the relation of the cost of the white lead to the total material costs of the white lead paint produced by Mound City?

A. I don't have those figures. The only figure I have is the number of pounds of lead in a gallon.

Q. Can you state what the material costs of producing a gallon of outside white paint are at the present time?

A. That would be pretty hard to do. Every day you get a market change on some raw material, I mean yesterday the cost was one thing and today it is another. Oil might change or some other pigment.

Q. Can you state what the price of oil was yesterday?

Mr. Welch: I object, Your Honor. I think we are going fairly far astray when we get into the price of oil.

Trial Examiner Norwood: What was that question?

(Reporter read the last question.)

Trial Examiner Norwood: I don't see any purpose of that.

Mr. Wright: Your Honor, I am trying to get a 1345 statement of the witness as to the costs of producing white lead paint and oil is one of the chief ingredients of that paint.

Trial Examiner Norwood: Objection overruled.

A. I couldn't state the cost of oil yesterday.

Q. Well, can you give me a round figure of approximately the cost of producing a gallon of outside white paint at any time within the past few years?

A. You mean material cost?

Q. Yes, ~~sir~~.

A. This is only a guess.

Mr. Duncan: Then I object, Your Honor.

By Mr. Wright:

Q. On what can you base a guess?

A. The only thing I can base a guess on is just from experience of seeing these formulas priced.

Trial Examiner Norwood: If this witness can give a fair estimate of something, why, he may, on something that relates to his business which he has been following for a number of years, he may do so.

Mr. Wright: Your Honor, Mr. Casey stated that he would base his guess on his experience in making up and pricing these lead paints. He has already testified that that goes back to 1920.

Trial Examiner Norwood: Well, if you can give
1346 us a fair estimate as an answer to that question, you may do so.

A. My estimate would be about a dollar and a half a gallon for raw material costs.

By Mr. Wright:

Q. Will you state the method of pricing outside white paint that is presently employed by Mound City?

Mr. Duncan: Objection.

Mr. Welch: I object.

A. Well, I don't quite understand the question.

By Mr. Wright:

Q. How do you sell outside white paint?

A. Well, we sell it list price which was established in 1941.

Q. Is that a price list which you publish?

A. That is right. That list is $2.65 a gallon less discounts as to different types of customers.

Trial Examiner Norwood: That is a ceiling price, is it?

The Witness: That is right, that is list ceiling price.

By Mr. Wright:

Q. Is that price list applicable for delivery in any area in which you sell?

A. Yes, sir.

Q. Are the same discounts given irrespective of
1347 the customer's location?

A. They are.

Q. Mr. Casey, you stated that the company does considerable business in the State of Texas in the sale of house paint. In selling in the State of Texas does the Mound City Company absorb the freight?

Mr. Duncan: Your Honor, I object. I don't believe the record is such that this witness testified as to the fact he did a considerable business in the State of Texas. He said they did business in Texas, but I don't think he said considerable, therefore, I object to the question.

Trial Examiner Norwood: I think it may be an assumption that wasn't shown. How about that?

Mr. Wright: I am willing to withdraw the question, Your Honor.

By Mr. Wright:

Q. Mr. Casey, you stated, as I recall it, that your Company did business in the State of Texas?

A. That is right.

Q. Will you state how much of its business approximately is in the State of Texas?

A. About forty or forty-four per cent.

Q. Now, has that always been true?

A. That is since I have been there.

Q. Is any port of that business in the sale of out-
1348 side white paint?

A. Oh, yes, lots of outside white paint is sold in Texas.

Q. In selling outside white paint to Texas does Mound City allow freight to the customer?

A. They do.

Q. Can you give me an approximation of the freight rates either per hundred or per gallon involved in selling in Houston, Texas from St. Louis?

Mr. Duncan: Objection, Your Honor. I would like to renew the objection which we made in previous hearings as to any testimony relating to freight rates. I ask that the objection to the question and answer that involves that be implied each time so we won't have to get up and object each time.

Trial Examiner Norwood: Counsel may have his objection and I will overrule the same.

(To the witness.) Do you want the question read?

The Witness: Yes.

(Reporter read the last question.)

A. I think the freight rate from St. Louis to Houston is around a dollar and twenty-five cents.

By Mr. Wright:

Q. Is that per hundred?

A. Per hundred.

Q. Do you recall the freight rate which is ap-
1349 plicable to Dallas, Texas?

A. Ninety-five cents in truckloads.

Q. Does Mound City sell outside white paint in Fort Worth?

A. Well, I imagine they do. I don't keep track of all the accounts that they sell, but we sell the entire area of Texas.

Q. Mr. Duncan: I object to that, Your Honor, and ask that the answer be stricken from the record. It is based upon his imagination; it falls into the category of a guess.

Mr. Wright: Your Honor, he explained his answer, and I submit his answer is relevant and competent. He said that the Company sells over the entire area so he assumed they would sell in Fort Worth.

Trial Examiner Norwood: Read the question and answer.

(Reporter read the last question and answer.)

Trial Examiner Norwood: Objection overruled. Off the record.

(Discussion off the record.)

By Mr. Wright:

Q. Will you state the freight rate applicable to outside white paint for Fort Worth?

A. I don't know.

Q. Do you recall the rate to Amarillo?

A. No, I don't.

Q. Is the factor of the freight rate absorbed by Mound City to markets in Texas and the Southwest im-
1350 portant in determining whether Mound City can
compete from those markets?

Mr. Welch: Your Honor, we can't see from respondents' standpoint that difficulties this particular company may incur in connection with their sale of outsde white paints, even though they contain lead pigments, is any factor in this case as to what these respondents have been charged with doing.

Mr. Wright: Well, Your Honor, the complaint alleges that as a direct result of the pricing system engaged in by the producers of lead pigments there is an injury to the secondary line of competition, the purchasers from these companies, an injury to their competition is a direct result of their pricing methods, and this testimony goes toward establishing that injury and difficulties that might be incurred by paint manufacturers in St. Louis competing in distant markets as a result of the pricing system of lead pigments certainly are relevant.

Trial Examiner Norwood: I think the situation in this line of commerce, the circumstances of this line of commerce are involved here.

Mr. Welch: Your Honor, he is asking this witness, as to this witness, this witness' company's absorption of freight, not National Lead or Sherwin Williams or Eagle-Picher's freight and pricing practices, but his own pricing practices.

Trial Examiner Norwood: That is a line of commerce that is involved here.

1351 Mr. Wright: Your Honor, the record already shows transactions by some of these respondents with the Mound City Paint and Color Works and also with other competing producers in that area.

Trial Examiner Norwood: I think you can show that. Objection overruled.

Mr. McDermott: I should like to object to the form of the question, sir. He has asked if it is important.

Trial Examiner Norwood: Read the question.

(Reporter read the last question.)

Trial Examiner Norwood: Objection overruled. Counsel may cross-examine him. Answer the question.

A. Well, freight rates or any other cost is a determining factor where you can do business. As the freight rates increase you naturally draw in your sphere of doing business around your home office or your place of producing.

By Mr. Wright:

Q. Do you know, Mr. Casey, whether there are paint manufacturers located in the State of Texas who do business there in competition with Mound City?

A. There are.

Q. Do those competitors produce outside white paints?

A. I couldn't answer that question because I don't know anything about their business.

Q. Does Mound City compete in Atlanta, Georgia?

1352 A. No.

Q. Does Mound City compete in Cedar Rapids, Iowa?
A. No.
Q. Does Mound City compete in Nashville, Tennessee?

Mr. DeBose: I object to this line of questions, if Your Honor please. The witness has already stated where they do business and I don't see the necessity of picking out particular towns. I submit that it is irrelevant and immaterial.

Trial Examiner Norwood: I don't know his object in bringing out the towns, but he may have—what do you say, Mr. Wright?

Mr. Wright: Your Honor, I am trying to establish with a little more particularity exactly the communities in which the company competes in order to ascertain the exact nature of that competition.

Trial Examiner Norwood: He has shown it generally but I think he may show particularly too.

Mr. DeBose: Your Honor, Cedar Rapids, Iowa, I believe the question was, isn't even in the states that were mentioned by the witness, I mean, there are forty-eight states.

Trial Examiner Norwood: Maybe that is the reason he wanted to ask him about that. Objection overruled.

By Mr. Wright:

Q. Do you recognize the name of the Kuhn Paint and Varnish Works, Houston, Texas?

1353 A. Yes, I do.

Q. Is the Kuhn Paint and Varnish Works at Houston, Texas a competitor of Mound City in the Texas area?

A. They are.

Q. Do you know the Hunsley Manufacturing Company of Amarillo, Texas?

A. I do.

Q. Is that concern a competitor of Mound City in the Texas area?

A. They are.

Q. Do you know the Pratt Paint and Varnish Company at Dallas, Texas?

A. I do.

Q. Is that concern a competitor of Mound City in the Texas area?

A. They are.

Q. Do you know Negley and Company of San Antonio, Texas?

A. I do.

Q. Is that company a competitor of Mound City in the sale of paints in the State of Texas?

A. They are.

Q. Do you know the Collins-Davoust Paint Manufacturing Company of Dallas, Texas?

A. I do.

1354 Q. Is that concern a competitor of Mound City in the sale of paint in the State of Texas?

A. They are.

Q. Do you know the Fort Worth Paint Company of Fort Worth, Texas?

A. No, I don't. I never heard of them.

Q. Do you know the Great Western Paint Manufacturing Company of Kansas City, Missouri?

A. I do.

Q. Is that concern a competitor of Mound City in the sale of paint in the area around Kansas City?

A. We don't go in the Kansas City area.

Q. Are you a competitor of that concern in any area?

A. I don't know what their trade area is.

Q. Do you know the Seidlitz Paint and Varnish Company of Kansas City?

A. I do.

Q. Is that concern a competitor of Mound City in the sale of paint?

A. They are.

Q. Do you know the Grand Island Paint Mills, Grand Island, Nebraska?

A. No, I don't.

Q. Do you know the S. E. B. Paint and Varnish Manufacturing Company of Oklahoma City, Oklahoma?

A. Never heard of them.

1355 Q. Do you know the Midcontinent Paint & Lacquer Manufacturing Company of Kansas City, Missouri?

A. No, I don't.

Q. Do you know the DeSoto Paint and Varnish Company of Memphis, Tennesse?

A. I do.

Q. Is that concern a competitor of the Mound City Company in the sale of Paint?

A. They are.

Q. Do you know the Waggner Paint Company of North Kansas City, Missouri?

A. I do.

Q. Do you recognize that as a competitor of the Mound City Company in the sale of paint?

A. I do.

Q. Do you know the Sewell Paint and Varnish Company of Dallas, Texas?

A. I do.

Q. Is that concern a competitor of Mound City in the sale of paint?

A. They are.

Q. Do you know the Reifschneider Paint and Glass Company of Omaha, Nebraska?

A. I do not.

1356 Q. Do you know the R. H. Thorpe Paint Company of Omaha, Nebraska?

A. I do not.

Q. Do you know the Nelson Paint Company of Sioux City, Iowa?

A. I do not.

Q. Do you know the Napko Paint and Varnish Company of Houston, Texas?

A. I do not, never heard of them.

Q. Do you know the Paint Products Company of Houston, Texas?

Mr. DeBose: What was that?

Mr. Wright: Paint Products Company.

A. I do not.

Q. Do you know the Missouri Valley Paint Manufacturing Company of Kansas City?

A. No.

Q. Do you know the Sewall Paint and Varnish Company of Kansas City?

A. I do.

Q. Is that concern a competitor of Mound City in the sale of paint?

A. They are.

Q. Do you know the Anthony Manufacturing Company of Kansas City, Missouri?

A. I do not.

1357 Q. Do you know the Hanley Paint Company of El Paso, Texas?

A. No, I do not.

Q. Do you know the Rio Grande Lumber and Fuel Company of El Paso, Texas?

A. No.

Q. Do you know the A. C. Horn Company ~~of Houston~~, Texas?

A. I do.

Q. Is that concern a competitor of Mound City in the sale of paint?

A. They are.

Q. Do you know the Paragon Paint Company of Houston, Texas?

A. Yes.

Q. Is that concern a competitor of Mound City in the sale of paint?

A. They are.

Q. Mr. Casey, would a saving to your company of five cents per gallon on its material cost of white lead paint over the material costs of some of the competitors, particularly those located in Texas, strengthen the competitive condition of Mound City in that market area?

A. Mr. DeBose: If Your Honor please, I object to that question, it is hypothetical. This man is not qualified as an expert. I understand he is a practical witness.

Mr. Wood: I object to the question likewise, because the question strengthen the competitive situation is com-
1358 pletely indefinite.

Trial Examiner Norwood: Well, he may ask him, certainly if five cents more or less would make any difference in his ability to sell in that territory. I think we would all be happier if counsel would reform the question, but he may bring out that information.

Mr. DeBose: Could we have our memory refreshed as to the exact wording of the question?

Trial Examiner Norwood: Read the question.

(Reporter read the last question.)

Mr. Wright: I will withdraw the question.

By Mr. Wright:

Q. Mr. Casey, do the paint manufacturers located in the State of Texas with whom you are in competition at the present time, quote substantially the same prices on white lead paint as are quoted by Mound City to markets in the State of Texas?

Mr. Duncan: Your Honor, I object on the grounds it is not material, irrelevant, and anyway, the question is put in the present tense. As I understand it this is a complaint over a certain period, the amended complaint I think was filed as of March of this year. When he puts it in the present tense, meaning now, I think it is highly objectionable.

Trial Examiner Norwood: I think he directed it to what the custom has been.

Mr. Duncan: He didn't so state.

Mr. Wright: Your Honor, I will state now that I am
1359 prepared to carry that question back as far as Mr.
Casey's memory will go.

Trial Examiner Norwood: Objection overruled. Answer the question at the present time.

A. So far as I know, most paint houses quote on or about the same list.

Q. Now, has that always been true with reference to the State of Texas?

A. No. Prior to 1932 we got fifteen cents more a gallon for paint in Texas than we got in St. Louis.

Q. Do I understand your answer, then, that since 1932 you have gotten approximately the same as the Texas manufacturers?

A. That is right.

Q. And as you get in St. Louis?

A. That is right.

Q. Would a saving to Mound City of five cents per gallon on material costs of outside white paint over the material costs of outside white paints to competing manufacturers located in the State of Texas enable Mound City to compete more freely in the Texas area?

Mr. Wood: I object to that.

Mr. DeBose: I object to that on the same grounds.

Trial Examiner Norwood: Objections overruled. Let's see what this situation is.

A. Well, a five cent saving on material costs is al-
1360 ways welcome. On some items you don't make much
more profit than five cents on material cost, so any saving would be welcome, whether it was five cents or two cents.

Q. Mr. Casey, are there any markets which Mound City is kept out of by the amount of freight which they must absorb to sell in those markets?

Mr. Welch: Your Honor, I think that is entirely too general.

Trial Examiner Norwood: Overruled, ~~go ahead.~~

A. Well, if you are talking about the present time, I would say no, because we don't have enough material to go around to our present customers, so we couldn't go out and take on new customers.

Q. Under normal conditions when you could secure all the lead pigments and other materials you wanted.

A. Yes, I think if there was a saving we would go farther from St. Louis or farther from the point of manufacture.

Q. Then would a saving in material cost over the material costs of competitors located at a distance from you enable you to extend your markets?

A. They would.

Trial Examiner Norwood: Well, a differential of five cents against you, would that affect your business adversely?

The Witness: Yes, sir.

1361 Trial Examiner Norwood: To what extent, do you have an idea of that?

The Witness: Well, we try to sell in markets where we can make some profit. You have always got a line of the farthest line you can go; if you get a saving you go over that line. If you get another charge against your material, you have to draw back on that line.

By Mr. Wright:

Q. Mr. Casey, you have been purchasing lead pigments, have you not, continuously since 1933?

A. I have.

Q. I believe you have stated that you were solicited by approximately three lead pigments manufacturers?

A. That is right.

Q. Are you ever offered a more favorable price or term or condition of sale by anyone of these producers than any of the others?

Mr. Duncan: I object to that, "are you ever offered". It is too general.

Mr. Wright: The question referred to the period since 1933.

Trial Examiner Norwood: Objection overruled.

A. No, we are not.

By Mr. Wright:

Q. Do you recall the Carter-White Lead Company 1362 of Omaha, Nebraska?

A. No.

Mr. Wright: No further questions, Your Honor.

Mr. DeBose: May we have a short recess?

Trial Examiner Norwood: We will take a short recess.

(A short recess was taken.)

1363 Trial Examiner Norwood: Come to order, Gentlemen. You may proceed.

Mr. Wright: I would like to ask Mr. Casey another question.

By Mr. Wright:

Q. Mr. Casey, do you recall stating that you knew of the competition of a number of companies about which I asked you in the State of Texas?

A. I do.

Q. Are those companies generally full line paint companies?

A. They are.

Q. Do you meet in the State of Texas competition in the sale of outside white paint from those companies and others?

A. We do.

Mr. Wright: No further questions.

Trial Examiner Norwood: You may examine.

Mr. McDermott: No cross-examination.

Trial Examiner Norwood: You are excused.

(Witness excused.)

Trial Examiner Norwood: Call your next witness.

Mr. Wright: Your Honor, I had anticipated we would take a little longer with this witness, and the next witness will not be back until two o'clock, that is St. Louis time. I suggest we adjourn to one o'clock, Central Standard Time.

Trial Examiner Norwood: We will recess until one 1364 o'clock, Central Standard Time.

(Whereupon, at 11:20 a. m., a recess was taken until 1:00 p. m., this day.)

1365 Afternoon Session.

1:00 p. m., Central Standard Time.

Trial Examiner Norwood: The hearing will come to order. Call your witness.

Mr. Wright: I would like to call Mr. Haddock to the stand.

J. P. HADDOCK was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Mr. Haddock, will you please state your full name and address for the record?

A. Business address?

Q. Yes, sir.

A. Joseph P. Haddock, H-a-d-d-o-c-k, Vane Calvert Paint Company—that is V-a-n-e, second word, C-a-l-v-e-r-t, Paint Company, 1601 North Broadway, St. Louis.

Q. What is your official position with the Vane Calvert Company?

A. Secretary and Treasurer.

Q. Over what period of time have you been in that position?

A. Since the first of this past year.

1366 Q. How long have you been connected with Vane Calvert?

A. Twenty-five years; a little over twenty-five.

Q. What is the business of the Vane Calvert Company?

A. Manufacturers of ready mixed paint.

Q. Over what period of time has Vane Calvert been so engaged?

A. Since 1867.

Q. Is that a long time in the paint industry?

A. It is the oldest mixed paint house in America.

Q. Does Vane Calvert sell a full line of paints?

A. A full line for the dealer, but we don't go into the industrial line, if that is what you mean.

Q. Does Vane Calvert produce and sell paints containing lead pigments?

A. Yes.

Q. What paints containing lead pigments?

A. Well, particularly of outside house paints.

Q. What lead pigments are contained in the outside white paints of Vane Calvert?

A. Well, we have lead carbonate—our formulas vary, depending on what we can get right now, but of an ordinary formula would be lead carbonate, lead sulphate, and possibly some leaded zinc.

Q. Do you recall the formulas for your outside white paints in normal business period?

1367 A. Well, it would be just about like I told you there.

Q. Can you state how many pounds of lead carbonate and lead phosphate would be included in a gallon of best quality outside white paint?

A. Six or eight pounds.

Q. Does Vane Calvert make a red lead paint?

A. Only on rare occasions.

Q. Can you state approximately the formula for the red lead paint?

A. Well, that would depend upon—a red lead paint would be something that would be sold to an industrial account, and we don't go after them very much, but I think red lead paint, it would depend upon that particular firm, as to how much red lead he wanted in the paint. It might vary anywhere, oh, I will say, from ten to twelve or fourteen pounds, of red lead.

Mr. Wright: Your Honor, may I have a short recess?

Trial Examiner Norwood: Five minute recess.

(A short recess was taken.)

Q. (By Mr. Wright.) Over what geographical areas does the Vane Calvert Paint Company solicit business and sell white lead paint, or outside white paint?

A. Well, our principal business is done in Missouri, Illinois, Arkansas, Louisiana, and Mississippi. We cover other States; that is, we sell in other States; but that is the principal business.

1368 Q. Is any considerable business done in the State of Texas?

A. We do some business in Texas, but I couldn't tell you how much, because that is done through a jobber; that is, shipment is done through a jobber; we sell some direct.

Q. Are those paints, when sold in those areas, customarily shipped from Vane Calvert to the customer, or do you maintain warehouses or jobbers?

A. Well, we ship direct to the customer, and in some cases, why, we may ship by carload to a distributor and he in turn sells it to dealers.

Q. Are the prices you quote on these pigments in these areas delivered prices?

A. Yes.

Q. Are the delivered prices which you quote for these products the same as to all geographical areas in which you quote?

A. I didn't quite understand what you meant by that.

Q. Do you quote the same delivered prices over the whole area in which you do business?

A. No.

Q. Will you state how you price such products in the St. Louis area?

A. Well, in St. Louis we have a list price and we give our dealer a discount of 12½%.

Q. How do you quote on white lead paint in Texas?

A. The material is delivered and the price is 18¢
1369 a gallon higher than what it is here in St. Louis.

Q. Do you either prepay the freight or allow it, in shipping into Texas?

A. We allow it on the invoice.

Q. Allow it on the invoice?

A. That is right.

Q. From whom does Vane Calvert purchase lead pigments, from what suppliers?

A. We buy them from nearly all lead corroders; that is, we buy them from National Lead, Eagle Picher, I guess those are probably our two biggest sources.

Q. Do you buy from Glidden, Euston Division of Glidden?

A. Not that I recall.

Q. Do you purchase from Sherwin Williams?

A. We buy some things from Sherwin Williams, but whether we buy lead or not I don't know, but I don't think we do.

Q. Are you solicited for business by all the corroders of lead?

A. No.

Q. Can you state in round numbers the amounts of basic carbonate and basic sulphate that Vane Calvert Company purchases annually?

A. No, I could not.

Q. Does Vane Calvert enter into contracts with corroders of lead covering purchases of basic carbonate and basic sulphate?

1370 A. Well, I don't know whether there are any contracts existing now, but prior to the time I left for the service we did have, we did contract, but it may be just bought on the open market now; I wouldn't be sure of that, unless I checked it.

Q. Mr. Haddock, can you state roughly the relation of the cost of the lead pigments contained in your outside paint to your total outside white paint cost, per gallon?

A. Well, would that be figured on today's price of lead?

Q. Well, if you can do it on today's price?

A. I think I would have to take a minute and do a little figuring. I could probably tell you.

Q. Well, will you try to recall them?

Mr. Duncan: Your Honor, I object on behalf of Respondents, inasmuch as we contend that has nothing to do with price, as we have formerly maintained. We therefore ask that the objection be sustained.

Trial Examiner Norwood: Objection overruled. Approaching the subject, they expect to connect it up, as they said this morning. It is a similar matter. Of course, if it is not connected up, it will not be considered at all.

A. From the information I have it would only be guesswork. I would have to figure it out at the plant.

By Mr. Wright:

Q. Do you have any idea of what the relation of the white lead cost to the total material cost per gallon

1371 of that paint would be in 1940?

A. Well, assuming that we had about 8 pounds of white lead in a gallon of paint in 1940, at 8¢ a pound, that was 64¢; oh, that would be around may be a third of the entire cost; but I don't believe we had 8 pounds. I had better figure that about 6 pounds.

Q. Well, would it be a substantial portion of the total material cost?

Mr. DuBose: I object to the use of the word "substantial."

Trial Examiner Norwood: Objection overruled.

By Mr. Wright:

Q. Would it be a substantial portion of the material cost, cost of the lead pigments?

A. Cost of the entire paint, or cost of the pigments only?

Q. Would the cost of the pigments in the paint be substantial as compared to the total cost of materials in the paint?

Mr. Welch: Does that question mean lead pigments?

Mr. Wright: Yes.

A. You are talking about the cost of the lead pigments in the paint in relation to the total cost of the paint?

Q. Yes, sir.

A. Oh, it would probably be in the neighborhood of 25% to possibly a third.

Q. Is the factor of freight rates and charges in-
1372 volved in shipping mixed paint to the markets in which
Vane Calvert competes an important factor in determining where Vane Calvert can compete?

Mr. Duncan: We object to the question; it is immaterial, your Honor.

Trial Examiner Norwood: Overruled.

A. Yes.

By Mr. Wright:

Q. Do you recall the freight rate from St. Louis to San Antonio on white lead paint?

A. $1.67.

Mr. Duncan: Your Honor, on behalf of the Respondents, we have an objection, the same objection concerning rates.

By Mr. Wright:

Q. Do you recall the freight rates applicable on shipments of white lead paint to New Orleans?

A. No, I don't.

Q. Do you recall whether they are substantial?

Mr. DuBose: Same objection.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wood: I would like to object to the question with
respect to New Orleans, because it didn't specify
1373 whether it is rail or boat, and a great deal of shipping
down the river is done by boat. I think it should be specific.

Trial Examiner Norwood: Read the question again.

(Question read by reporter.)

Trial Examiner Norwood: Well, that last question standing by itself doesn't mean anything. It doesn't compare it to anything else. If counsel will reframe that question, I think we will all be happier.

Mr. Wright: I will withdraw that question, your Honor.

By Mr. Wright:

Q. Mr. Haddock, does the Vane Calvert Company solicit business in Minneapolis and St. Paul, Minnesota?

A. No, we do not.

Q. Have they ever, to your knowledge?

A. Yes, at one time; it has been years ago.

Q. Does the Vane Calvert Company compete in the area around DesMoines, Iowa?

A. No.

Q. Around Sioux City, Iowa?

A. No.

Q. Around Lincoln, Nebraska?

A. No.

Q. Omaha, Nebraska?

A. No.

1374 Q. Do you know the Collins Davaust Paint Company of Dallas, Texas?

A. No, I do not.

Q. Do you know the Sewell Paint and Varnish Company of Dallas?

A. I know of them, yes.

Q. Is that company in competition with the Vane Calvert Company?

A. Yes.

Q. Do you know the A. C. Horn Company of Texas, of Houston, Texas?

A. No. I always thought Horn was north, Detroit.

Q. Excuse me, I didn't get that?

A. I thought Horn was in Detroit. I didn't know they had a place in Texas.

Q. You don't know whether the A. C. Horn Company at Dallas is in competition with Vane Calvert?

A. No, I do not.

Q. Does the Vane Calvert Company compete in any area with Kohler McList Company of Denver, Colorado, or the Floorman Manufacturing Company of Pueblo, Colorado?

A. No.

Q. Do you know the Sewell Paint & Varnish Company of Kansas City, Missouri?

A. Yes.

1375 Q. Is Vane Calvert Company in competition with that company on outside white paint in Kansas City and in that territory?

A. Well, not in Kansas City. We are probably in competition with them in the vicinity of, say, St. Joe, Missouri, because that is probably where we would meet, outside of the city.

Q. Are you acquainted with the Anthony Manufacturing Company of Kansas City?

A. No.

Q. Are you acquainted with the McMurtry Manufacturing Company of Denver, Colorado?

A. No.

Q. Are you acquainted with the Pratt Paint & Varnish Company of Dallas, Texas?

A. No.

Q. Are you acquainted with the Hanley Paint Company of El Paso, Texas?

A. No.

Q. Are you acquainted with Paint Products Company of Houston, Texas?

A. I have heard of them, but that is all.

Q. Are you acquainted with Paragon Paint Company of Houston, Texas?

A. No.

1376 A. Are you acquainted with the Cune Paint and Varnish Company of Houston, Texas?

A. I have heard of them, but I do not know that we are in competition with them.

Q. Are you acquainted with the National Paint and Varnish Company?

A. No.

Q. Of Houston, Texas. Does Vane-Calvert compete in Georgia?

A. Yes, we sell them in Georgia.

Q. Do you know the Arlington Paint and Varnish Company of Atlanta?

A. No.

Q. Do you know the Merchants and Manufacturers Paint Company of Louisville, Kentucky?

A. I have heard of them, yes.

Q. Do you know whether they are in competition with you in any area?

A. We don't sell anything in Kentucky to talk about.

Q. Are you acquainted with the Hunsley Paint Manufacturing Company of Amarillo, Texas?

A. No.

Q. Mr. Haddock, in all of the areas in which you state Vane-Calvert competes, do you meet competition on outside white paints of manufacturers who are located in those areas?

A. I would say that our principal competition in
1377 the areas we sell are competing with St. Louis manufacturers.

Q. Well, now, does that apply in the State of Texas, too?

A. No, probably in Texas our competitors would be Sewell, Pittsburgh and probably Sherwin Williams.

Mr. Wood: Did the witness state what he means by "Pittsburgh"?

Trial Examiner Norwood: Pennsylvania. Counsel may cross-examine him on that later. I think that would be better.

By Mr. Wright:

Q. Mr. Haddock, is the factor of the freight charges which must be paid by Vane-Calvert important in determining the limits of the areas in which it can compete?

A. Yes.

Mr. DuBose: Same objection, I suppose, to that.

Trial Examiner Norwood: Yes. Overruled.

By Mr. Wright:

Q. Is price important in determining whether you can sell paint in any of these areas?

Mr. Duncan: Same objection.

Trial Examiner Norwood: Overruled.

A. Yes.

By Mr. Wright:

Q. Would the difference of a few cents, say ten cents per gallon, in the price of outside white paint in Texas determine business as between you and one of your competitors?

1378 Mr. Wood: Objected to as leading.

Trial Examiner Norwood: Overruled.

A. I believe it might take more than ten cents a gallon to get the business. It would have to be—the entire line would be considered.

By Mr. Wright:

Q. Assuming now that you and your competitor were selling identical paints so far as the pigment and vehicle is concerned?

A. I don't believe—well, in today's market that ten cents a gallon would mean that much.

Q. In ordinary times, when paint can be secured readily?

A. It might be a factor.

Q. Mr. Haddock, would a saving to you of five cents a gallon on your material costs over the material costs of your competitors located in Texas, say, assist you in competing in that area?

A. I would say no.

Q. Will you explain your answer?

A. Well, I don't believe five cents a gallon is enough, enough difference between the two.

Q. Approximately how much freight per gallon do you pay in selling in Texas?

A. Well, figuring an average of about a dollar and a half a hundred, it would be about twenty-two cents a
1379 gallon, twenty cents.

Q. Which you absorb when you do business down there?

A. Well, no, we add eighteen cents to our local price and then absorb the freight.

Mr. Duncan: If Your Honor please, I ask the answer go out inasmuch as this witness said the principal business was done in states other than Texas. He said Missouri, Illinois, Arkansas, Louisiana, Mississippi. The only business they did was through a jobber.

Mr. Wright: Your Honor, I submit the witness testified as to the extent of the business in Texas.

Trial Examiner Norwood: Objection overruled. Let him tell us exactly how this is.

By Mr. Wright:

Q. Mr. Haddock, speaking now of the period in 1933 to the present, were you ever offered any more favorable prices for terms of sale by any one of the lead corroders over any of the others on dry white lead or dry red lead?

A. To my knowledge, no.

Mr. Wright: I have no further question, your Honor.

Trial Examiner Norwood: Cross-examination.

Mr. Welch: May we have a recess now?

Trial Examiner Norwood: Five-minute recess.

(A short recess was taken.)

1380 *Cross-Examination by Mr. McDermott.*

Q. We will have just a few questions on cross-examination, sir. In describing the formula, Mr. Haddock, of your paint, I believe you estimated that there were about six pounds of pigment in the paint?

A. No, it was a question on six to eight pounds of white lead in the paint.

Q. Well, now what form is that white lead in your paint?

A. It would be in the form of lead carbonate, lead sulphate and leaded zinc, all three forms.

Q. All three. Can you give us the proportions or the poundage of the three categories?

A. No, our formulas, they vary from time to time, depending upon what we can get the most of.

Q. Well, would that also vary the amount of lead in the paint?

A. Well, we try to maintain possibly the same amount of lead in the paint, but in its various forms.

Q. Well, now in leaded zinc, for instance, there is a lesser quantity of lead, isn't there?

A. That is right, there are two types made.

Q. Will you describe those?

A. Well, one is a 35, what they call a 35 per cent leaded zinc, in which 35 per cent of the pigment is lead, and then there is another one called 50 per cent leaded zinc, in
1381 which half of it is lead.

Q. What proportion of the paint of the pigment in the paint is leaded zinc?

A. I don't know whether I could answer that without looking at the formula.

Q. Well, now, would it be fair to say that the amount of lead in the paint might vary from three to four to six pounds per gallon?

A. Well, you mean white lead, has white lead, or a particular lead, like lead sulphate or lead carbonate?

Q. The lead, including carbonate, sulphate and leaded zinc.

A. Would vary, you say, from four to six pounds?

Q. Three to four to six pounds.

A. Yes.

Q. When you referred before to Pittsburgh as being one of your competitors, did you mean Pittsburgh Plate Glass Company?

A. Yes.

Q. In referring to that company as being a competitor, did you mean in the area, entire area in which you sold, or just in Texas?

A. Well, I believe the question was about Texas, but we could consider them a competitor in our entire area, because they are national.

Mr. McDermott: That is all. Thank you.

Trial Examiner Norwood: Any further questions?

1382 Mr. Wright: No further questions.

(Witness excused.)

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: Your Honor, I would like to state at the outset that there is a gentleman at the counsel for respondents' table that I have reason to believe is the manager of the St. Louis branch of the National Lead Company, and I have reason to believe that he is intimidating the witnesses, and I would like to ask that he be excluded from the hearing while the next witness is on the stand.

Mr. McDermott: May I ask if Mr. Wright has any foundation for that statement that our man is intimidating witnesses?

Mr. DuBose: I really think Mr. Wright—

Mr. McDermott: (interposing) Just a minute.

Mr. Wright: The circumstances are such at the present time that these witnesses who are customers of the National Lead Company, who are having a very difficult time in securing lead pigments, are afraid of the National Lead Company, and the presence of this gentleman in the room acts as a deterrent to them on the stand.

Trial Examiner Norwood: Is he one of the respondents?

Mr. Wright: He is an employee of the respondent.

1383 Trial Examiner Norwood: I will ask him to withdraw.

Mr. McDermott: Before proceeding, sir, I should like either one, to have Mr. Wright withdraw the statement that we are intimidating witnesses, or else be given the opportunity of recalling those witnesses and letting them say from the witness stand whether they have been intimidated or not.

Mr. Wright: Well, your Honor, I am not going to say that there has been any deliberate effort on the part of this gentleman to intimidate the witnesses, but the circumstances are such that his presence here is a deterrent to them and I know that for a fact.

Mr. DuBose: We would be glad to ask him to go back—I am sure he would be glad to. I would like to make this motion—I think Mr. Wright will think it over—that this whole colloquy go off the record, be stricken bodily from the record.

Trial Examiner Norwood: Whatever you say about that.

Mr. Wright: I am perfectly willing to have the colloquy stricken from the record, but I wish—

Mr. McDermott: Just a minute.

Mr. DuBose: Just a minute.

Mr. McDermott: Now wait. We are entitled, sir, as I see it, to have a representative here who knows the business and who can advise us with respect to the facts, are we not?

1384 Trial Examiner Norwood: He can advise you without being here, while his customers are witnesses here. I think that should be done. We have had a great deal of experience in these cases.

Mr. McDermott: Then we shall have to ask to be given an opportunity to prepare for cross-examination after the witnesses testify.

Trial Examiner Norwood: I have always given you that opportunity.

Mr. McDermott: And we shall have to have an opportunity, or have to ask for an opportunity to confer with a representative of the Lead Company.

Trial Examiner Norwood: You can have what has been given here.

Mr. McDermott: Beg pardon?

Trial Examiner Norwood: You may have the time you have been having. I have been giving you a recess. I think that is all that is necessary. Now, call your next witness.

Mr. Wright: Yes, Mr. George Niedt.

Trial Examiner Norwood: Has the gentleman you mentioned withdrawn? I don't know which one he is.

Mr. Wright: Yes.

Mr. DuBose: I will have to make a motion to withdraw my motion to strike from the record; as long as they have gone this far, it is probably better this way.

1385 Trial Examiner Norwood: All right. I will ask you not to consult any counsel in this case at all until you have finished your testimony.

Mr. Niedt: Do I know any of them? I didn't understand.

Trial Examiner Norwood: You know what you know, but not consult with any counsel in this case with these gentlemen you see here.

Mr. Niedt: Yes, sir.

Trial Examiner Norwood: Until after you have been discharged as a witness.

Mr. Niedt: Yes, sir.

Trial Examiner Norwood: Proceed.

Mr. McDermott: May I say something, sir, before proceeding?

Trial Examiner Norwood: Yes.

Mr. McDermott: I think you may be under a misapprehension. You cautioned the witness not to consult with any counsel for the respondent, and if your Honor has the impression that we have talked to or consulted with any witness who has testified here today, you are mistaken.

Trial Examiner Norwood: No, I will say now I haven't the slightest suspicion that counsel has discussed that at all. It is an instruction that we usually give at the opening of the hearing in every case, and I 1386 omitted it. Inasmuch as this came up, I thought I would mention it, too, for this reason: A great many of your witnesses are either respondents themselves or they are employees, and I have had respondents accuse Commission Attorneys of sharp practice for summoning or subpoenaing those witnesses without consulting them or giving them time to talk to the witness. I can show you that on one record particularly, more than once, so I want to clarify our thought on that. These respondents, until they complete their testimony, are the government's witness and shouldn't be consulted.

Mr. McDermott: I would like to say for the record here on behalf of myself and all other counsel that I know that no one of us has talked with any one of the witnesses who have testified today, either before or after their testimony.

Trial Examiner Norwood: Yes.

Mr. Wright: In case there is any doubt, I will be glad to state that I am not meaning to accuse any counsel for the respondent of any wrongdoing in this situation.

Mr. McDermott: Why did you use the word "intimidate"?

Mr. Wright: Because I think it accurately reflects the situation.

Trial Examiner Norwood: He explained that and I don't question the counsel's statement here about that. Possibly I gave my instructions at the wrong time.

1387 Mr. Wood: I would like the instructions clarified a little bit for my own information and that of the other counsel. I have been in the habit of talking freely during the proceedings of cases, trust cases and others, so have all other lawyers as far as I know; if the Commission's practice is different, I think we should be very specifically instructed so we can use due care.

Trial Examiner Norwood: The witnesses are instructed not to confer with counsel until they have completed their testimony and especially with counsel on the opposite side.

Mr. Wood: Does that include our own witnesses, for instance, if an Eagle-Picher man is called, would he be precluded from talking to me during the recess?

Trial Examiner Norwood: Well, I don't go so far as that, but I have had instances where you have written questions and answers, a long list of written questions and answers, and where in cases I have known the witness during a recess to go and read his answers from that list that has been made during consultation to see what is coming up next. I have requested them not to do that, and not to discuss the matter with their own counsel until they complete their testimony.

Mr. Wood: I just want instructions where in any case, in every respect the Federal Trade practice varies from the ordinary Federal Court practice.

1388 Mr. Welch: Does your Honor mean from the time they receive a subpoena they can't talk to their own counsel or from the time they take the stand?

Trial Examiner Norwood: From the time they receive the subpoena they shouldn't be consulted by counsel from the opposite side.

Mr. Welch: If a Sherwin Williams employee is subpoenaed to testify in this case, he cannot talk to me at any time before he goes on the stand about what his testimony is to be?

Trial Examiner Norwood: After he is subpoenaed.

Mr. Welch: That is not the way I understood the practice to be.

Trial Examiner Norwood: Proceed.

GEORGE E. NIEDT was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Will you state your full name and address for the record, Mr. Niedt?

A. George E. Niedt, (spelling) N-i-e-d-t, president of Steelcote Manufacturing Company, 3418 Gratiot Street, St. Louis, Missouri.

1389 Mr. Welch: I didn't hear that.

(Reporter read the last answer.)

Mr. Welch: Will you spell that name?

The Witness: (Spelling) S-t-e-e-l-c-o-t-e, Steelcote; it is one word.

By Mr. Wright:

Q. How long have you been in that position with the Steelcote Company?

A. My brother and I organized the business thirty-one years ago.

Q. Your services have been connected with his ever since?

A. Yes.

Q. What is the business of the Steelcote Manufacturing Company?

A. Manufacturing of paint, varnishes, enamels, lacquers, waterproofing, putty, caulking compounds, various and sundry items affiliated with the business.

Mr. Duncan: May we have the witness raise his voice a little bit? I can hardly hear him.

Trial Examiner Norwood: Yes, speak a little louder.

By Mr. Wright:

Q. Over what areas does the Steelcote Company sell and distribute these products?

A. Well, our general line, which is known as the—which would come under the category of house 1390 paints and such items, are sold in a rather restricted area, within an area, I would say, of about 600 miles of St. Louis, but we make many specialty items on which we do a national business, and in fact ship to many foreign countries.

Q. Do any of the products on which you do national business contain lead pigments in any appreciable amount?

A. Yes, some of the products that we manufacture for national distribution, particularly one, contains lead, but I wouldn't say in any great appreciable amount.

Q. What product is that that you were referring to?

A. Well, our rubber enamel primer.

Q. What lead pigment does that contain?

A. By percentage or by weight per gallon?

Q. What type?

A. We use lead carbonate in there to some extent.

Q. How many pounds of lead carbonate per gallon?

A. The total lead content in that is 4.25 pounds to a gallon.

Q. Do you make any metal protective finishes which contain lead pigments?

A. Well, this is a metal protective finish.

Q. Do you make red lead paint?

A. Very little, very little red lead paint.

Q. Has the Steelcote Company ever made any great amount of red lead paint?

A. No, we have never gone after the structural 1391 iron trade to any extent.

Q. In connection with your general line of house paints, you stated those were marketed within an area of 600 miles of St. Louis?

A. I would say approximately, yes.

Q. Why don't you have national distribution on those products?

A. Well, you can't very well compete on freight to points because in the first place those heavy products are close margin goods, and in order to compete in the distant points, of course, the freight would enter into it, which would bring the cost up to that point that your price would be out of line.

Mr. Duncan: For the sake of the record, I would like to object to that line of inquiry relating to freight, as we have to other witnesses.

Trial Examiner Norwood: Objection overruled.

Mr. Wright: Would you read the last answer, please?

(Reporter read last answer.)

By Mr. Wright:

Q. You referred to "close margin" there; will you explain that?

A. Well, house paints and the general line of products are highly competitive in all areas, and you don't receive the margin of profit in those lines as you would in items that we referred to as specialties.

Q. Now, in your house paints, do any of those
1392 paints contain lead pigments?

A. Yes.

Q. Do you recall the formula of any of them?

A. I can tell you the percentage of lead and zinc in them and the approximate percentage.

Q. Will you do that, please?

A. Well, we make one that is known as the 101-X extra heavy house paint white.

Mr. McDermott: May we ask the witness to keep his voice up a bit, sir?

Trial Examiner Norwood: Just a minute, speak a little louder.

A. We make one product, 101-X extra heavy outside white house paint. That product contains 7.76 pounds of lead to the gallon.

Q. In what form is that lead mixed in the paint? Is that carbonate, basic carbonate?

A. In that particular case, we use some 50 per cent leaded zinc, of which we use 400 pounds, 200 pounds of which is lead, and then we use 575 pounds of lead carbonate in a hundred gallons of paint, making the average lead content 7.75 pounds to the gallon—

Mr. Duncan: (Interposing.) Your Honor—

A. (Continuing.)—in that grade of paint.

Mr. Duncan: I don't mean to interrupt until you
1393 are through. Are you through?

The Witness: Yes.

Mr. Duncan: I notice the witness is reading these figures from a paper which he has in his hands. Until it is shown that he is unable to give the statistics without the aid of that paper, I ask that the answers which he has given based upon which he has read from the paper go out of the record.

Trial Examiner Norwood: Well, I cannot do that, but counsel may see this, and we may go into this matter of the paper at this time, since you have raised an objection. What is that paper, is that something you made up?

The Witness: The attorney for the Federal Trade Commission asked me to secure—have information on the content of lead in various paints that we manufacture that contain lead. He wanted to know the approximate material cost of those items. He wanted to know in which territories they were sold, and he also asked that I know the approximate percentage of lead in each gallon.

Trial Examiner Norwood: And these are the figures, the data you have?

The Witness: Yes, I wouldn't be able to commit from memory.

Trial Examiner Norwood: Where did you get those figures?

1394 The Witness: I had our technical staff get them for me.

Trial Examiner Norwood: Did you verify them?

The Witness: I saw the formulas and I checked with our chemist.

Trial Examiner Norwood: You are testifying to the truth of what you have been saying in regard to the figures, I suppose?

The Witness: Yes, sir.

Mr. McDermott: Sir, the witness' preceding answer I didn't catch; he dropped his voice at the end.

(Reporter read the preceding answer.)

Trial Examiner Norwood: The witness is refreshing his memory from this. Counsel may see it if he wants to.

Mr. Duncan: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Duncan: On the record.

Trial Examiner Norwood: Yes.

Mr. Duncan: I looked at this paper which the witness first gave you and that you turned over to counsel for respondents, and I notice that a column on the right-hand side is in entirely a different hand than that appearing on the balance of the paper.

The Witness: That is right.

1395 Mr. Duncan: May I ask the witness some questions?

Trial Examiner Norwood: Ask the witness all about it.

Mr. Duncan: This paper you have had in your hands here, you say it was prepared by your chemist?

The Witness: My chemist gave the figures and the information to my office manager, and that is his handwriting that you see all over the paper, but he gave me only the percentages of lead, and I told him that wouldn't enable me to arrive at the amount of lead and zinc, so I had him get the formulas down and those figures are mine on the right hand that I copied from the formulas indicating the lead and zinc content of those paints.

Mr. Duncan: Then the data upon which you base your percentages was gathered by someone else, is that right?

The Witness: The data on percentages was gathered by my chemist, who is familiar with the formulas.

Mr. Duncan: I see. We renew our motion at this time and ask that the two answers based upon the paper which he had in his hand be stricken from the record.

By Mr. Wright:

Q. Well, Mr. Niedt, were the answers which you have given based on your own knowledge?

A. Yes, the amount of lead content is based on my own knowledge because I copied off the formulas as indi-
1396 cated on the figures on the right-hand side of the paper.

Q. Mr. Niedt, you are president of Steelcote Company, I believe you testified?

A. Yes.

Q. Are you thoroughly familiar with the affairs of the company?

A. Yes, I started from the ground up.

Q. And are you familiar with the information which appears on that paper of your own knowledge?

A. Yes, I am.

Mr. Wright: Your Honor, I submit on the basis of those answers that the motion should be denied.

Trial Examiner Norwood: I think the paper was made to refresh his recollection from. He is swearing independently to the truth of these statements he is making and motion to strike is denied. You may cross-examine him further on all of it. You may use the paper.

Mr. Wright:—Where were we?

(Reporter read answer preceding objections.)

By Mr. Wright:

Q. Do you make other house paints containing white lead?

A. Yes, we make one we call our standard Steelcote.

Q. Will you state the percentage of lead carbonate and other lead pigments contained in that?

A. Well, it contains a total percentage of 33.66 per
1397 cent of white lead—of lead, that is carbonate and the
lead in the leaded zinc combined.

Q. Can you state how many pounds of lead carbonate per hundred gallons go into that paint as lead carbonate?

A. Yes, there's 200 pounds of lead carbonate and 160 pounds of lead that was combined with the 50 per cent leaded zinc, making a total of 360 pounds of all lead, 3.6 pounds of lead in one gallon.

Q. Do you have the formula for any red lead paint?

A. Yes, we make what we call a red lead paint, but we make so little of it, it is a hundred per cent red lead, the pigment portion of it.

Q. How many pounds of red lead per hundred gallons are used in manufacturing?

A. 2,000 pounds.

Q. 2,000 pounds per hundred gallons?

A. That is right.

Q. That would mean 20 pounds of lead per gallon?

A. That is right.

Q. Do you solicit business in red lead paint of that formula?

A. No, we do not. We don't go out of our way to get it, but occasionally when we contact an industry and they require a little red lead, we sell it along with the job. We make no special effort to get red lead business.

Q. Does Steelcote compete in Texas for this gen-
1398 eral line of house paints?

A. Well, we have a few dealers in Texas, but we don't ~~do~~ any considerable volume there.

Q. But you do some business there?

A. Yes, we have a few accounts there.

Q. Do you do business in Louisiana on your general line?

A. Yes, we do.

Q. Do you do business in Arkansas?

A. Yes, some in Arkansas.

Q. Do you do business in Georgia?

A. Well, we don't have much in Georgia, but we have sold some paint in Georgia, in the vicinity of Rome, Georgia, I believe.

Q. Can you state what other states within that 600 mile zone, so to speak, that you compete for business in?

A. Well, it hasn't really been necessary in the last few years to compete; it is a question of having goods, but in the normal years—

Q. (Interposing.) In normal years when there is sufficient supply.

A. Yes, in normal years we were never permitted—able to go much further south than Texas.

Mr. Du Bose: I can't hear.

Mr. McDermott: We can't hear.

The Witness: In normal years we were never able
1399 to go much further south than Texas in competing
on the general line of goods.

By Mr. Wright:

Q. You go north, Mr. Niedt?

A. Well, we hit Iowa points, and in Minnesota, Wisconsin.

Q. Do you sell in the Twin Cities, Minnesota?

A. Yes, we don't sell much house paint there; we sell more specialties, our business is so mixed.

Q. You do solicit business in house paints there?

A. No, we don't go after it when it gets too far from home. Now we do sell some along with specialties we happen to be selling. We have one jobber there.

Q. Are you able to compete for business in house paints in Minneapolis and St. Paul against the local producers on house paints?

A. Well, I am not in a position to say that we could or couldn't, because we have never made any real effort to sell that distance from home, that is, the general line.

Q. I understand from your testimony that was because of the freight angle?

Mr. Duncan: I object to the question. I think he has already answered it.

Trial Examiner Norwood: Objection overruled.

A. Well, the freight to the Twin Cities at the present time is 98 cents a hundred, which seems to me would
1400 put us out of the running with large concerns like Minnesota Linseed Company and similar concerns located to the north.

By Mr. Wright:

Q. Do you know the Frost Paint and Oil Corporation of Minneapolis?

A. No, I don't know them.

Q. Do you know the Midwest Paint Manufacturing Company of Minneapolis?

A. I know them by name only. I don't know them.

Q. Do you know the Power Beam Paint Manufacturing Company of Minneapolis?

A. No, I do not.

Q. Do you know Farwell-Osman-Curf of St. Paul?

A. I know of the company.

Q. Are you in competition with that company in that area?

A. Well, we don't have, as I say; we don't sell much general line and on our specialties, we don't have much competition in that area. We make items that are remote from the general line and contain specific things and do specific things that are not accomplished by some of these other items; therefore, we don't run into the Osman-Curf and other paint manufacturers who do not make that trademark item.

Q. In offering your general line of house paints for sale, how do you price them?

A. Well, we price them f. o. b. St. Louis.

1401 Q. You add freight from St. Louis to—

A. (Interposing.) Yes, the general lines comes under the category of heavy goods line; that is all f. o. b. St. Louis, no matter where we sell it.

Q. Do you ever absorb freight?

A. I think in some points, in Texas, we have absorbed fifty cents a hundredweight freight in order to be in a position to compete more favorably with the local competition.

Q. You mean by "local competition", you mean paint manufacturers located in the State of Texas?

A. Yes, we might do that in other areas as well. I know we did do it in Cleveland at one time.

Q. In Cleveland, did I understand you to say?

A. Yes.

Q. Would a saving to Steelcote of five cents per gallon on the outside house paint containing lead pigments in material costs over the costs of competitors located in the State of Texas be important to Steelcote in meeting the competition in Texas?

Mr. Du Bose: Same objection.

A. I think that—

Trial Examiner Norwood: (Interposing.) Wait a minute. Read the question.

(Reporter read the last question.)

Trial Examiner Norwood: Objection overruled.
1402 Answer that question.

A. Well, in order to arrive at five cents on the general line of house paint, the lead would have to be sold to us at about a cent and a half a pound less than what we are paying for it now, or then we were paying for it at any time.

Mr. McDermott: I move to strike the answer as not responsive.

Trial Examiner Norwood: Let him complete it, then I will consider that.

Mr. Wright: I will withdraw that motion.

Trial Examiner Norwood: Motion allowed, and is struck by agreement, you might say. Now read the question and let him answer it, answer the part that is material.

(Reporter read the question.)

A. Well, of course, that wouldn't be a great saving, five cents a gallon.

Trial Examiner Norwood: Would it affect the trade?

The Witness: I don't think five cents a gallon would make a great difference.

By Mr. Wright:

Q. Would ten cents a gallon make much difference?

A. Well, the higher you get, of course, the more difference it is going to make, but I doubt they would pay any attention to five cents a gallon difference in the purchase of a gallon of paint.

1403 Q. Mr. Niedt, you stated, I believe, that you had been with Steelcote for 31 years?

A. That is right.

Q. Speaking now of the period from 1933 to the present, have any of the lead corroders offered you any more favorable prices or terms or conditions of sale than any of the other lead corroders at any time?

A. Yes, I believe that was true in that intervening period; at some time there was a new company started, they were selling their lead for a quarter of a cent a pound under National Lead Company.

Q. What company was that, do you recall?

A. I think it was known as the Southern White Lead or Houston White Lead; I don't remember which.

Q. Is that the only exception you can think of?

A. Well, there were short spaces of time when you might find a little difference between National Lead and some competitors; National Lead might have been a little lower, but eventually when the price cards came out, they seemed to be quite equal all around in their prices.

Q. Does Steelcote ever enter into any contracts for purchase of lead pigments with corroders?

A. We did before the war. That was common practice then.

Mr. Wright: No further examination.

Mr. Du Bose: May we have a five-minute recess?

1404 Trial Examiner Norwood: You may have a five-minute recess.

(A short recess was taken.)

1405 Trial Examiner Norwood: Come to order, gentlemen.

Proceed with the cross-examination.

Cross Examination.

By Mr. McDermott:

Q. Mr. Niedt, you have described in your testimony two of your outside house paints. The first one you referred to as the 101-X, I believe?

A. That is right.

Q. Can you tell me whether the figure of 7.76 pounds of lead to the gallon of that paint is 7.76 pounds of pure lead?

A. No, it is not. It is 7.76 of total lead content of which 5.76 is lead carbonate and the other 200 pounds is the lead that was contained in the 50 per cent lead and zinc that we purchase.

Q. You said 200 pounds?

A. Yes. See, we use 400 pounds of lead zinc in 200 pounds, half of which is lead.

Q. So that when you speak of 200 pounds that is per 100 gallons?

A. Per 100 gallons, yes.

Q. Now, referring again to the standard quality, I think you said it was?

A. Yes.

Q. What is the amount of poundage of pure lead per gallon of paint or per 100 gallons, whichever is more convenient for you?

1406 A. Well, it would be 200 pounds of lead carbonate in 100 gallons of paint and 320 pounds of 50 per cent lead zinc, half of which must be lead, must be added to that making a total of 360 pounds of lead.

Q. So that would be 3.6 pounds per gallon?

A. That is right.

Q. Of pure lead?

A. That is right. And I might add that that is the one that we would not sell in great quantity, the first one, extra heavy outside white, we do not sell a lot of it; that is a premium piece of goods.

Q. And I assume that it is sold at a premium price?

A. That is right.

Q. Just to clarify my own state of mind on that standard brand of paint, the 3.6 pounds of lead per gallon is the pure lead?

Mr. Wright: Your Honor, I object to that question. I do not believe the witness referred to a standard brand.

Mr. McDermott: If I remember his testimony correctly, he said that one was called the 101-X, and the other was the standard. I base my question upon my recollection of the witness's testimony. If I am in error I would like to have the witness clear it up.

Mr. Wright: Your Honor, I think it would be perfectly easy to refer to that paint by the number by which it has been referred to heretofore.

1407 Trial Examiner Norwood: Can counsel recall his question there so as to meet this suggestion? I think that would be the shortest way.

By Mr. McDermott:

Q. Mr. Witness, you gave us one brand of paint and said it was the 101-X?

A. That is right.

Q. And that is your premium paint that sells at a premium price?

A. That is right.

Q. The other type of outside house paint that you testified about is what you call the standard?

A. That is known as Standard 101—does not have the X.

Q. Standard 101?

A. Yes, and that is a lighter body paint.

Q. Now, that paint you said, if I recall your testimony correctly, contained 3.6 pounds of lead per gallon?

A. Correct.

Q. Is that 3.6 pounds of pure lead?

A. It is made up of 20 pounds of lead carbonate in the gallon and the other 1.6 pounds of lead is made up of the lead content of the 50 per cent leaded zinc we use. I do not know whether you would call that pure lead, whether you would call lead sulphate the pure lead or not, but it would be in the sulphate class.

1408 Q. On your 101-X paint, Mr. Niedt, what is the weight of that per gallon?

A. It weighs approximately 18 pounds to the gallon.

Q. And the weight of your 101 Standard, what is that per gallon?

A. About 14½ pounds, if I remember correctly, 14 or 14½.

Q. So that the relative weight of the lead in each gallon of paint is a very small part of the total weight per gallon?

Mr. Wright: Your Honor, I object to that. I think the record shows plainly what the relation is.

Trial Examiner Norwood: Well, if the witness can tell us again, it is cross-examination.

A. In the later years as you know, the formulations of paint have changed. There was a time years back when we used very heavy quantities of lead in paint, and zinc, that was the basis of paint, it usually contained say approximately 60 or 65 per cent lead, or 70 per cent lead, 10 per cent zinc and 10 per cent extendor, and those were very heavy body paints, and naturally cost a good deal to produce; and in later years titanium dioxide and titanium pigments made their appearance on the market, changed our formulations to where it required less and less lead; and the amount of lead being used in paint today is gradually being decreased as time goes on, as they improve the possibilities of titanium dioxide, and they are making strides in that direction, and the titanium dioxide that 1409 we get today of the routine type is the whitest pigment has ever been known and from the hiding standpoint of the pigment per pound it is the cheapest pigment you can buy. That accounts for the low percentage of lead in these paints today.

Mr. Wright: Your Honor, I move to strike the answer as not responsive to the question.

Mr. McDermott: I think it is very responsive and I think it is directly at issue.

Mr. Wright: Well, the question was as to whether there was a substantial amount of lead in the paint, and I do not believe that the dissertation on why that is the case is at all responsive to the question.

Trial Examiner Norwood: It goes to the direct examination, further explanation of it. Motion denied.

By Mr. Mc Dermott:

Q. Now, sir, can you tell us over how many years this gradual decrease in the percentages of lead in paint has been going on to your best recollection?

A. I think it goes back about ten or eleven years ago, when titanium pigment became in vogue. It started out first with titanium bearing pigments and titanium calcium pigments, and later on developments proceeded to where they made the titanium dioxide and sold it in separate form because they got it down to a price where you could afford to buy it. Originally it was very expensive, and as the price declined, the use increased.

1410 Q. You spoke before of leaded zinc?

A. Yes.

Q. What is that, sir?

A. Well, leaded zinc is—you can buy it in various percentages, you can buy 35 per cent leaded zinc, you can buy 50 per cent leaded zinc, and you can buy as much as 70 per cent; some of the makers of that, I understand, even blend lead with which to produce that percentage of lead. The 70 per cent and 35 per cent and 50 per cent referred to, that is supposed to be the lead content of that mixture.

Q. That is what I was coming to; lead zinc is a mixture, is it not?

A. A mixture of zinc and lead.

Q. And the lead in it is the form of what?

A. I would say lead sulphate more so than lead carbonate.

Mr. McDermott: That is all.

Trial Examiner Norwood: Any further questions?

Mr. Wright: Yes.

Redirect Examination by Mr. Wright.

Q. Mr. Niedt, as I recall, you stated that approximately ten or eleven years ago a reduction began in the amount of lead pigments in outside paints?

A. Yes.

Q. You mentioned titanium dioxide, the appear-
1411 ance of that on the market as one of the reasons for
the reduction?

A. That is right.

Q. Has the difficulty of obtaining lead pigments also contributed to that reduction?

A. No, because it is more difficult to obtain titanium pigments than it is to obtain lead.

Q. Who produces and sells titanium pigments in this area?

Mr. McDermott: Objected to.

Mr. DuBose: Objected to on the grounds it is immaterial. This man is not put up here to testify about any other company but his own.

Mr. Wright: Your Honor, it was brought out on cross that titanium dioxide was a pigment which was replacing lead in these outside white paints.

Trial Examiner Norwood: I think you have a right to go into that. Objection overruled.

Mr. DuBose: It is not within the amended complaint.

A. Well, it is being produced by the United Color and Pigment Company, DuPont and Titanium Pigment Corporation; and here locally it is being produced by the Titanium Pigment Corporation; but there are three factories to my knowledge that produce titanium pigment.

Q. Has the relative cost of titanium pigments and lead pigments had anything to do with the substitution?

A. Yes, that is why we made the change, because
1412 we got more hiding units per dollar by the use of
titanium than we could get with lead.

Mr. Wright: No further questions.

Trial Examiner Norwood: Is there anything further?

Mr. McDermott: That is all.

Trial Examiner Norwood: You are excused.

(Witness excused.)

Trial Examiner Norwood: Is there anything else?

Mr. Wright: No sir.

Trial Examiner Norwood: Well, what is your pleasure?

Mr. Wright: I would suggest that we recess until ten o'clock tomorrow morning, city time. That would be nine o'clock Central Standard Time.

Trial Examiner Norwood: We will recess until 10 o'clock tomorrow morning, city time.

(Whereupon, at 2:15 p. m., July 29, 1946, the hearing was recessed until 10:00 o'clock a. m., July 30, 1946.)

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1413 Room 516, U. S. Court
and Custom House,
St. Louis, Missouri.
July 30, 1946.

Met, pursuant to adjournment, at 10:00 a.m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph Wright and

Paul R. Dixon, Attorneys for the Federal Trade Commission.

J. T. Welch, (Davies, Richberg, Beebe, Busick & Richardson, 15th St., N.W., Washington, D. C.), and

T. J. McDowell, (101 Prospect Avenue, Cleveland, Ohio), attorneys for Sherwin Williams Company.

Henry E. Gardiner, (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N.Y.), attorneys for Anaconda Copper Mining Company and International Smelting & Refining Company.

Richard Serviss and Edmund P. Wood, Attorneys for Eagle-Picher Lead Company and The Eagle Picher Sales Company.

Eugene Z. DuBose and William R. McDermott, (Alexander & Green, 120 Broadway, New York, N.Y.), attorneys for the National Lead Company.

1414 John A. Duncan (1649 Union Commerce Building, Cleveland, Ohio), for the Glidden Company.

1415 PROCEEDINGS.

Trial Examiner Norwood: Pursuant to adjournment yesterday, the hearing in Docket 5253 reconvened for taking further testimony at 10:00 a.m., City time, at 9:00 o'clock standard time, July 30, 1946, in Room 516, the Federal Court House Building, St. Louis, Missouri.

Appearances are as follows:

Joseph Wright and Paul H. Dixon appearing for the Federal Trade Commission.

J. T. Welch and T. J. McDowell for Sherwin Williams Company.

Henry E. Gardiner appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

Richard Serviss and Edmund P. Wood appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Eugene Z. DuBose and William R. McDermott appearing for National Lead Company.

John A. Duncan appearing for the Glidden Company.

Call your witness, Mr. Wright.

Mr. Wright: Mr. Waters, will you take the stand?

Trial Examiner Norwood: This is D. E. Waters.

D. E. WATERS was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

1416 By Mr. Wright:

Q. Mr. Waters, will you state your full name, and address?

A. Dudley E. Waters, 508 West Drive, University City.

Q. What is your business occupation, Mr. Waters?

A. I am Vice-President of St. Louis Surfacer and Paint Company and manager of the operations.

Q. How long have you been in that position with the St. Louis Surfacer?

A. Two years.

Q. What was your occupation prior to that?

A. I was with the government for a year, the War Food Administration prior to that.

Mr. McDermott: We are having difficulty hearing the witness.

Trial Examiner Norwood: Speak a little louder.

A. Then thirteen years with Benjamin Moore and Company in the sales department, five years with the DuPont Company prior to that.

Q. What was your occupation with the Benjamin Moore Company?

A. Salesman.

Q. Selling what?

A. Paints and varnishes.

Q. Were you also connected with the paint business in your service with DuPont?

1417 A. Yes.

Q. Will you describe the business of the St. Louis Surfacer Company?

A. We manufacture a complete line of trade sales paints and a number of industrial products.

Q. How long has the company been engaged in that business, do you know?

A. Forty-three years.

Q. What paints now sold by the St. Louis Surfacer Company contain lead pigments?

A. Principally our outside white paint and interior primers.

Q. Will you state the formula, if you recall it, of the outside white paint?

A. You mean as it is being made today or prior to the war?

Q. Well, will you state how it is being made today?

A. At the present time it is being made with leaded zinc and titanium and asbestos.

Q. Has the formula of St. Louis Surfacer for outside white paint contained within the last few years, say since 1940, any appreciable amount of lead carbonate?

Mr. McDermott: That is objected to on the ground that this witness was not with the St. Louis Surfacer Company at that time. He is therefore not in a position to know; anything he testifies to is absolutely hearsay.

Mr. Wright: I will withdraw that.

1418 Trial Examiner Norwood: This witness may testify of his own knowledge about this matter. He doesn't have to belong to any particular company in order to know that if he is in this business and was in this business at the time he found it out.

Mr. McDermott: I believe, sir, the question was directed to what this particular company did in years gone by.

Trial Examiner Norwood: Oh, well, wait a minute.

Mr. McDermott: If I understood the question correctly.

Trial Examiner Norwood: That is a different question.

Mr. Wright: I will withdraw the question, Your Honor. I want to lay a little further basis for it.

Trial Examiner Norwood: All right.

By Mr. Wright:

Q. Mr. Waters, did you say you are Vice-President and General Manager of the operations of the St. Louis Surfacer?

A. Yes, sir.

Q. And you have been for two years, did you say?

A. Yes, sir.

Q. In that time have you become familiar with the affairs of the St. Louis Surfacer?

A. Yes.

Q. Over what period of years?

A. I have analyzed their operations in the past
1419 fifteen years to a great extent.

Q. Do you know the formulae of the various paints which St. Louis Surfacer has produced over that period of time?

A. Yes.

Mr. McDermott: That is objected to on the ground that the witness cannot know.

Trial Examiner Norwood: He can certainly ask him if he knows it.

Mr. Wright: Your Honor, I did ask him if he knew it and he answered yes.

Mr. McDermott: May I cross-examine the witness on that, sir?

Trial Examiner Norwood: Yes, when the time comes. Objection overruled. He simply asked him if he knows.

Mr. McDermott: And the answer—

Trial Examiner Norwood: (interposing) and the answer was yes. You can cross-examine, that is what cross-examination is for.

Mr. McDermott: I think we all realize that there is going to be another question immediately.

Trial Examiner Norwood: Yes, that is right.

Mr. McDermott: As to what the formula is. Now, I think if we can demonstrate that this witness is saying he knows is mistaken and that he cannot possibly know, that then that answer to the subsequent question will be rendered valueless.

Mr. Wright: Your Honor, this is obviously a matter
1420 for cross-examination.

Trial Examiner Norwood: That is true, that is right. Proceed. Objection overruled.

Mr. McDermott: Exception.

By Mr. Wright:

Q. Mr. Waters, are the various formulae for paints of the St. Louis Surfacer Company a matter of record with that company?

A. Yes.

Q. Does the company maintain records showing what those formulas have been?

A. Yes.

Q. Have you examined those records?

A. Yes.

Q. Are you familiar with those records?

A. Yes.

Q. Will you state the formula of the outside white paint that was marketed by St. Louis Surfacer in a period around 1940?

Mr. McDermott: That is objected to on the ground that the witness is testifying as to what his recollection is of a particular record he has examined. His recollection is not the best evidence.

Trial Examiner Norwood: The witness may not answer that question unless he can answer it from some
1421 knowledge that he has obtained outside of the record, until you show the nonavailability of the records themselves. If it is a matter of record you will have to bring the record in. Objection sustained.

By Mr. Wright:

Q. Mr. Waters, you stated that the present formula of the St. Louis Surfacer Company contained as a pigment zinc oxide and titanium oxide?

A. Yes, sir.

Q. During the period of your service with the company, has it produced or marketed an outside white paint containing lead carbonate?

A. Yes, sir.

Q. What was the formula of that paint?

Mr. McDermott: Just a moment. I object unless it be shown that the witness knows the formula of his own knowledge and not from examination of the records.

Mr. Wright: Your Honor, he is the Vice-President and General Manager of the operations.

Trial Examiner Norwood: He may answer, the question isn't directed to his knowledge. Objection overruled.

A. I can't give you the exact formula. I can give you an approximate percentage of the white lead pigment.

Q. Will you give us that approximate percentage, then?

A. About 45%.

1422 Q. 45% is the weight of the paint, to the weight of the paint?

A. 45% of the pigment by weight.

Q. Well, what was the percentage of the pigment to the vehicle, approximately?

A. Approximately 60%.

Q. Do you recall how many pounds of basic carbonated lead would go into a gallon of that paint? Approximately?

A. Approximately 300 pounds, —oh, I mean in a batch. I am speaking of a 60 gallon batch.

Q. In a 60 gallon batch?

A. Yes. It would be about five pounds to the gallon.

Q. You stated that the present outside white paint does not contain lead carbonate. What is the reason you do not presently produce an outside white paint containing lead carbonate?

Mr. McDermott: That is objected to on the ground it is immaterial, irrelevant and incompetent, a conclusion of the witness.

Trial Examiner Norwood: Objection overruled.

A. The supply is not adequate.

Q. Does the St. Louis Surfacer and Paint Company have any plan for marketing an outside white paint containing lead carbonate?

A. Yes.

1423 Q. Will you state over what areas, geographical areas St. Louis Surfacer markets its outside white paint?

A. Principally the states south of St. Louis; Arkansas, Louisiana, Tennessee, Kentucky, Mississippi, Texas, Oklahoma, and Kansas. Did I mention Arkansas?

Q. On what price basis do you sell these outside white paints?

A. F.o.b. St. Louis.

Q. Is freight added?

A. No.

Q. From St. Louis?

A. No.

Q. Do you allow the freight on the invoice to the customer?

A. No.

Q. Does the customer pay the freight?

A. That is right.

Q. Is that all sold on the same price basis, the same list price?

A. Yes.

Q. From what suppliers does St. Louis Surfacer purchase lead carbonate when it can purchase it?

A. National Lead Company, Houston Lead Company, Eagle-Picher.

Q. Is St. Louis Surfacer solicited by all three of those producers for its business?

A. Yes.

Q. Has St. Louis Surfacer entered into contracts
1424 with these producers of lead pigments covering their
purchases of lead pigments?

A. Yes.

Q. Will you estimate the annual amount of dry white lead both basic sulphate, basic carbonate which are normally purchased by St. Louis Surfacer?

Mr. McDermott: That is objected to on the ground the witness has already stated that they are not now putting out a white lead paint.

Mr. Wright: Your Honor, I asked if he knew how much is normally purchased on an annual basis by St. Louis Surfacer. If he knows I think he should be permitted to answer.

Mr. Wood: I object to that question, Your Honor, as indefinite in this sense, normal purchase doesn't mean anything. He should specify the period.

Trial Examiner Norwood: I shall overrule the objection and ask the witness to answer that as based on his own knowledge and experience.

A. Approximately 40,000 pounds.

By Mr. Wright:

Q. Is that on an annual basis?

A. Yes.

Q. It is my understanding, then, that your outside white paint is sold on an f.o.b. St. Louis basis?

A. That is right.

1425 Q. With the customer paying the freight to the market. Is the factor of freight rates involved in shipping such paints to these markets in Arkansas, Louisiana, Kansas, Kentucky, Mississippi, Texas and Oklahoma important in determining whether you can compete in those markets?

Mr. Du Bose: I object to that as immaterial.

Trial Examiner Norwood: Overruled. Answer the question.

A. Yes.

By Mr. Wright:

Q. In those markets do you meet competition from paint manufacturers who are located in those markets?

A. Yes.

Q. Do you sell outside white paint in Fort Worth, Texas?

A. Yes.

Q. Are you familiar with the Fort Worth Paint Company?

A. In a general way.

Q. Is that a competitor of St. Louis Surfacer in that market?

A. Yes.

Q. As to that paint?

A. Yes.

Q. Do you compete in the Kansas City area?

A. Yes.

Mr. McDermott: Will you keep your voice up, 1426 please. We can't hear you.

Trial Examiner Norwood: Yes, speak a little louder.

By Mr. Wright:

Q. Are you familiar with the Missouri Valley Paint Manufacturing Company of Kansas City?

A. Yes.

Q. Are you familiar with the Sewall Paint and Varnish Company of Kansas City?

A. Yes.

Q. Are you familiar with the Anthony Manufacturing Company of Kansas City?

A. No.

Q. Are Missouri Valley and Sewall competitors of yours in the Kansas City area?

A. Yes.

Q. Do you compete in the Omaha area?

A. No.

Q. I believe you stated you competed in the New Orleans area?

A. Yes.

Q. Are you familiar with the Mississippi Valley Paint Company in New Orleans?

A. Yes.

Q. Is that company in competition with you in that area?

A. Yes.

1427 Q. Are you familiar with the True Tag Paint Company of Memphis?

A. Yes.

Q. Do you sell in the Memphis area?

A. Yes.

Q. Is that company a competitor of yours in that area?

A. Yes.

Q. Now, Mr. Waters, you stated that you were in competition with these various concerns in these distant areas. Is the matter of price that you charge for your outside white paint in these markets in normal times of importance in determining whether you get the business or your competitor?

Mr. McDermott: I object, first, to the question on the ground that the use of the expression "in normal times" is too indefinite. I think that there should be some year or years to eliminate that objection to the question. I also object on the ground that this witness has not been with the St. Louis Surfacer Company more than two years and it is a matter of common knowledge that we have not had normal times during these two years and that the witness is therefore incapable of answering.

Trial Examiner Norwood: If this witness has a background in this business that would familiarize him with the methods of pricing and methods of competition he might answer it, but I don't believe you laid the grounds:
1428 have you laid the grounds for that?

Mr. Wright: I think perhaps I can lay the grounds for that in one or two more questions.

Trial Examiner Norwood: Go ahead.

Mr. Wright: I will withdraw the pending question.

Trial Examiner Norwood: All right.

By Mr. Wright:

Q. You stated that you had been with the Benjamin Moore Company and with the DuPont Company for thirteen or fourteen years?

A. A total of approximately eighteen years in selling paint.

Q. Eighteen years. Now, in what market areas were you engaged as a salesman of paint?

A. In the Kansas City area and the St. Louis area.

Q. Now, on the basis of your experience as a salesman in those areas, is the price quoted in normal competitive times on outside white lead paint important in determining who gets the business?

A. Very much so.

Q. Would a differential of a few cents per gallon in comparable outside white paints determine the business?

Mr. DuBose: I object to the question on the ground it is indefinite, "a few cents".

Mr. McDermott: And also on the ground it is a 1429 matter of opinion. He hasn't been asked as a matter of opinion. This is an expert now.

Trial Examiner Norwood: Well, I think this man, it is a matter of competition based on his extended experience here.

Mr. Wright: The question related to his experience and was followed by a—

Trial Examiner Norwood: (Interposing.) Objection overruled.

Mr. DuBose: Both objections?

Trial Examiner Norwood: Yes, both objections overruled. Answer the question.

The Witness: Will you repeat the question?

Mr. Wright: She will read it for you.

(Reporter read the last question.)

A. Yes, in many instances.

By Mr. Wright:

Q. You stated that the matter of the freight rates paid in shipping outside white paint to the markets, more distant markets in which St. Louis Surfacer sells is important in determining whether it can compete. If St. Louis Surfacer Company could obtain basic carbonate of lead on a basis of five cents per gallon of paint in material cost cheaper than the competitors located in Texas, in Memphis and in New Orleans, would that affect the ability of St. Louis Surfacer to compete in those markets?

1430 Mr. McDermott: Just a moment, may I have that question read, sir?

Trial Examiner Norwood: Yes, read the question.

(Reporter read the last question.)

Mr. DuBose: Same objection as we made yesterday on the ground that it is a factual—the witness is not expert.

Mr. Duncan: We move that the first part, the statement of Mr. Wright go off the record. That is not a question. We object to the latter part of the question on the ground of immateriality and irrelevancy.

Trial Examiner Norwood: The objection is overruled and the motion denied. Answer the question. Do you want it read again?

The Witness: I believe I do.

Mr. Wright: I will withdraw the question.

By Mr. Wright:

Q. Would a saving of five to ten cents per gallon in material costs result in St. Louis Surfacer extending its competitive position in distant markets?

A. Yes.

Q. Mr. Waters, in your experience with St. Louis Surfacer, has any corroder of lead at any time offered your company any more favorable prices or terms and conditions of sale than any other corroder of lead at the same time?

A. No, sir.

1431 Mr. Wright: No further questions.

Trial Examiner Norwood: Cross-examination.

Mr. DuBose: May we have a short recess?

Trial Examiner Norwood: We will take a short recess.

(A short recess was taken.)

1432 Mr. McDermott: Shall we proceed.

Trial Examiner Norwood: Yes.

Cross-Examination by Mr. McDermott.

Q. With what agency of the government did you say you were, sir?

A. War Food Administration, fats and oil branch.

Q. What was your position with them?

A. In charge of the allocation of the drying oils.

Q. Now, you spoke before about the content of lead carbonate in a gallon of paint?

A. Yes.

Q. When was the last time your company manufactured such a paint with lead carbonate in it?

A. With the percentage that I gave or—

Q. (Interposing.) Well, the last time that they made a paint with lead carbonate.

A. Within the last year.

Q. You say it was about a year ago?

A. No, I would say it was within six months.

Q. Now, did I understand you correctly to say that there were five pounds per gallon of lead carbonate in that paint?

A. Yes.

Q. How much leaded zinc was in it?

A. None in the one I was speaking of.

1433 Q. When was that particular paint made by your company?

A. '43.

Q. That was before your connection with the company?

A. Yes.

Q. And upon what did you base that testimony with respect to the content of that particular paint?

A. Our master formula and our production slip.

Q. In other words, you based it on a record which you saw?

A. That is right.

Mr. McDermott: I move to strike out, sir, that portion of the witness' testimony upon the grounds that it is not the best evidence. It is clearly hearsay, based upon records which are in existence and which are the best evidence.

Mr. Wright: Your Honor, I submit that the motion should not be granted. In the first place the question that has been asked related only to the production. It had nothing to do with the marketing or the handling or the billing of that paint.

Trial Examiner Norwood: Well, this formula you are talking about, did you work with that formula and follow it? And verify these—

Mr. McDermott: The witness has said, sir—

Trial Examiner Norwood: (Interposing.) Let me see what his statement was based on.

The Witness: Based on our records of our master 1434 formula that was followed, and the production slips of production at that period.

Trial Examiner Norwood: Well, what do you know about whether or not it was followed, about the result that they procured from the formula?

The Witness: Well, all of our production slips and master formulas, of course, are a matter that we have on all products and our production department follows those formulas till some change is made, then we make a different master formula.

Trial Examiner Norwood: Can you testify of your own knowledge that this paint was made according to the formula?

The Witness: Could I testify that it was?

Trial Examiner Norwood: Yes.

The Witness: Yes.

Mr. Wright: Your Honor, this witness has stated already on direct examination that the reason that formula is not followed now is simply because they can't get the lead carbonate to produce that paint and that the company at this time plans to market that whenever such lead carbonate is available to them. He is the manager of the company; certainly he should be permitted to testify as to the business of the company.

Mr. McDermott: Is there some mystery about this formula that you won't produce it? Why don't you 1435 produce the formula? It is only a slip of paper. Maybe it isn't five pounds to the gallon.

Mr. Wright: Your Honor, this is an executive of the company that is in charge of the operations of the company. Certainly his sworn testimony as to those operations should be good evidence, competent evidence.

Trial Examiner Norwood: I shall deny the motion. Go ahead.

Mr. Wright: May I state I believe your ruling first went to a question which related to the contents of documents?

Trial Examiner Norwood: I understand that. That is correct.

Mr. McDermott: I should like to enlarge a bit, sir, on what I was about to say.

Trial Examiner Norwood: Yes.

Mr. McDermott: That was exactly what you ruled on, the contents of records. Now, this man has said this paint was last made in 1943. He was not with the company then. The formula is something that he looked at this morning or yesterday, and he is testifying here today upon what that formula contains. Now, sir, if we are to be consistent, and if this record is to present a logical scheme with respect to the admissibility of this type of evidence, I think that your Honor should rule likewise with respect to this formula.

Trial Examiner Norwood: Here is a formula which 1436 this man has used.

Mr. McDermott: No, sir, he didn't. It was made last in 1943. He wasn't with the company. He couldn't have used it. That is my point.

Mr. Dixon: Your Honor, this witness said in answer to cross-examination that the formula that was formulated in '43 was being sold as late as six months ago, and that was his answer.

Mr. McDermott: He wasn't asked the question and he didn't say.

Mr. Dixon: That was his inference.

Trial Examiner Norwood: As I understand it, he is testifying about formulae that he has used or superintended the use of since he has been with this company, am I correct?

The Witness: Part of it was. I said we had used some carbonate lead within the last six months. The question was asked, whether this five pounds to the gallon, when was it last used.

Trial Examiner Norwood: Yes.

The Witness: I was not with the company at the time that was used.

Trial Examiner Norwood: Yes. Well, I think I will sustain the objection on that ground.

Mr. McDermott: It was a motion to strike, sir.

Mr. Wright: Your Honor, may I state that we are 1437 not talking here about the contents of a document; we are talking about an integral part of a company's paint business. This is not a contents of a document. This is about a product which this company, this witness has stated, sold up to 1943 and which it has not since been able to sell for the simple reason that it has not been able to procure the materials, and the witness has stated that the company presently plans to market exactly that formula whenever it can obtain the materials. In other words, the document itself isn't important. It is the formula.

Mr. McDermott: Why don't you bring the document here? What is the mystery about it?

Trial Examiner Norwood: Now, it is this way: If he is directing the question to showing the contents of those documents, I should not permit the question to be answered, but if the question is directed to his practice in the formula that he follows and has followed with this company, and which he recollects, why, I should let him state that regardless of the fact that it is in writing somewhere. I think there is the line that we draw. Now, this situation here is rather hazy and I don't think that the Commission should base its case on statements like this when it can get better evidence.

Mr. Wright: Well, your Honor, we are not talking now about a contract or a deed. We are talking about a business practice of this company. The word "record"
1438 was never brought into it until he stated that there
were records of the company which also contain this information.

Mr. McDermott: We are talking about a formula.

Mr. Wright: We are talking about a type of paint which this man testifies he knew the company, he is now chief executive of marketed up to 1943, which it would now be marketing if it could obtain the materials, and which it intends to market as soon as those materials are available, and it doesn't seem to me the best evidence ruling referring to documents should be applicable to that point. Now, if this question were—

Trial Examiner Norwood: (Interposing.) Wait a minute, now. If you can have your witness to speak of his own knowledge, based on his experience about these things as to this paint ~~being made~~ according to certain formulae, and he knows what that mixture is independently of the formulae, why, you have him tell it. But I think the matter is in a satisfactory condition.

Mr. McDermott: If your Honor please, to straighten the record—

Trial Examiner Norwood: (Interposing.) Yes.

Mr. McDermott: (Continuing.) —perhaps Mr. Wright and I can agree to the facts upon which we feel your ruling should be based to eliminate any haziness.

Trial Examiner Norwood: Do you think we can
1439 do that, Mr. Wright?

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: May we go back on the record?

Trial Examiner Norwood: Yes.

Mr. Wright: Your Honor, in view of the objection, I have discovered that the witness has the original formula in his possession, and I would like to ask that it be read into the record.

Trial Examiner Norwood: You identify your paper there.

Mr. Wright: Yes. Mr. Waters, do you have the original business records showing the formula of the outside white paint about which you were testifying?

The Witness: Yes.

Mr. Wright: Is this the paper?

The Witness: Yes, that is the master formula.

Mr. Wright: By agreement of counsel, I would like this formula read into the record showing the formula of the outside white paint about which you have been testifying. Is that satisfactory with counsel for the respondents?

Mr. McDermott: Yes, and if there is anything in the way of a trade secret in connection with it, we don't expect you to disclose it.

1440 The Witness: As long as we give the pigment content, we don't need to worry about it.

Mr. McDermott: And give us the amount of oil.

Mr. Wright: Mr. Waters, may I ask you, under this column headed "Pounds", the figures .07½, then at the end the figures 1.31, what does that figure 1.31 represent?

The Witness: Raw material cost.

Mr. Wright: Raw material cost. Now, on the column headed "Pounds" at the extreme right, there is the figure 1.64.

The Witness: That is raw material cost.

Mr. Wright: Is that in dollars, $1.64?

The Witness: Yes, that is right.

Mr. Wright: And $1.31?

The Witness: January, 1944.

Mr. Wright: And that is based on the seven and a half price of lead and the eight and a half price of lead carbonate?

The Witness: Sixty gallon batch formula of outside white lead and zinc paint, 397 pounds of carbonate of white lead, 99 pounds of sulphate white lead, 264 pounds of zinc oxide, 7 and 9/16 pounds inert pigment—do you want the liquid portion?

Mr. McDermott: Generally, yes.

The Witness: Sixteen gallons raw oil, 22 gallons of 1441 bodied linseed oil, approximately 6 gallons of—approximately 10 gallons of dryers and mineral spirits. Is that all right?

Mr. Wright: Mr. Waters, may I ask one more question? The figure .06¾ on the line L 103, does that represent the price of basic sulphate?

The Witness: That is right.

Mr. Wright: And the figure .07½ on the same line, the later price of lead sulphate?

The Witness: Yes, sir, that is right.

Mr. Wright: Thank you.

By Mr. McDermott:

Q. In connection with the dryers and mineral spirits, did you intend to convey that there were two items of six gallons and ten gallons or a total of ten?

A. Total of ten.

Q. What is the weight of that paint per gallon, Mr. Waters?

A. Approximately seventeen pounds.

Q. Who are your competitors in the sale of outside white paint, your chief competitors?

A. Chief competitors in outside white paint, you are considering our whole trade area that we are operating it?

Q. Yes.

A. True Tag in Memphis, Peasley Gulbert in Louisville, Sewell in Texas, Cook in Texas, Cook in Kansas City, Sewell in Kansas City, Wagner Paint Company in Kansas City.

1442 Q. Do you compete with the Mound City Paint Company?

A. Yes, sir.

Q. In those places, in the general trade area that you sell in?

A. Yes.

Q. That is the company that Mr. Casey is connected with, is that correct?

A. Yes, sir.

Q. Do you know Mr. Casey?

A. Yes, sir.

Q. Do you compete with the Vane-Calvert Paint Company?

A. Yes, sir.

Q. In your general trade area?

A. Yes, sir.

Q. And that is the firm that Mr. Haddock is connected with?

A. I don't know Mr. Haddock.

Q. Does your company compete with the Steelcote Paint Company?

A. To a certain extent.

Q. That is the firm that Mr. Niedt is with. Do you know him?

A. Yes.

Q. Now, did I understand you correctly to say that you sold your paint f. o. b. St. Louis?

A. Yes.

1443 Q. Do you know how the Vane-Calvert Company sells its paint?

A. No.

Q. Don't you know how your competitors sell their paints?

A. You say how they sell it? I don't know what you are talking about.

Q. Well, do you know whether Vane-Calvert—

Mr. Wright: (Interposing.) Your Honor, I don't see the purpose of this question. I don't see its relevancy.

Mr. McDermott: You will.

Trial Examiner Norwood: This is cross-examination. He can ask questions to test the witness' knowledge, and that is what this question was directed to. Did he answer that?

Mr. McDermott: Not yet, sir.

The Witness: I would like to have it clarified.

Mr. McDermott: Very well, I will clarify it for you.

By Mr. McDermott:

Q. Do you know that the Vane-Calvert Company sells its paints on a delivery price basis?

A. No.

Q. Do you deny it to be a fact that Vane-Calvert Company sells its paints on a delivery price basis?

Mr. Wright: Your Honor, I object. Whether the witness denies it or not is of no importance. He has already stated he doesn't know how Vane-Calvert sells its

1444 paint. It is an improper question.

Mr. McDermott: I will reframe the question.

By Mr. McDermott:

Q. Have you ever been informed that Vane-Calvert Company sells its paint on a delivery price basis?

A. No.

Q. Have you ever made it your business to ascertain upon what basis that company sells its paint?

Mr. Wright: Your Honor, I object to that question.

Trial Examiner Norwood: Wait a minute.

Mr. Wright: It is vague and indefinite and meaningless, "Have you ever made it your business to ascertain". The witness has already stated that he doesn't know, and that—

The Witness: Could I—

Trial Examiner Norwood: (Interposing.) Wait a minute. Objection overruled.

By Mr. McDermott:

Q. You were about to say something, Mr. Witness?

A. Could I make a statement regarding the question of competition in the paint business in the last two years as to why you would know the prices—

Trial Examiner Norwood: (Interposing.) The other side will give you a chance to do it, but just now answer his question.

1445 By Mr. McDermott:

Q. I am not asking the prices.

A. Oh, you are not asking about prices?

Q. I am asking about you sell f.o.b. St. Louis?

A. That is right.

Q. Now, as distinguished from the method by which you sell f.o.b., do you know that Vane-Calvert doesn't use that system of selling?

A. No, I didn't know that they didn't.

Q. Did you know that the Steelcote Company sells on a delivery price basis?

A. No.

Q. Did you know that the Mound City Paint Company sells on a delivery price basis?

A. Yes.

Q. You did know that?

A. Yes.

Q. Now, Mound City sells in the same general area in which you sell your paint, is that correct?

A. Yes, I would say it does.

Q. And Mound City absorbs the freight, correct?

A. To my understanding they do, yes.

Q. Do you know or have you any information as to the difference in the list price of your paint, your outside white paint, and the price of the Mound City outside white?

1446 A. In a general way only. I couldn't give you their prices, if that is what you mean.

Q. No, I don't expect you to be able to give us their prices.

(At the request of Trial Examiner Norwood, a remark made by counsel as part of the foregoing question was deleted.)

By Mr. McDermott:

Q. Being in competition with another paint manufacturer and seller, you have to make it your business to have some general idea of what your competitor is doing, don't you?

A. Yes, in normal times.

Q. Yes, and, of course, today it is not what we call normal times?

A. That is right.

Q. It is a seller's market, is it not, if you had the product to sell?

A. That is why I am not as familiar with the competitive situation because it isn't necessary that you be familiar with it. The important thing is getting the material to them.

Q. Right. Well, generally speaking, what is the distinction in the list pricing of your product, your outside white, and the Mound City?

Mr. Wright: May I have that question read, please?

Trial Examiner Norwood: Read the question.

(Reporter read the last question.)

1447 Mr. Wright: Your ~~Honor~~, generally speaking, that is a very vague and indefinite question.

Trial Examiner Norwood: I think it calls for a very general answer. Let him answer.

A. List pricing don't mean anything in the paint business.

By Mr. McDermott:

Q. Will you enlarge on that?

A. It is net prices that count. There are a lot of discounts given from time to time that you can't necessarily go by a list price as being a competitor's selling price.

Q. You mean there are price cutters in the—

A. (Interposing.) In the paint business, oh, yes.

Trial Examiner Norwood: Go ahead.

By Mr. McDermott:

Q. Is there a general elevation in the price of the Mound City outside white sold on a delivery price basis over the price of your outside white which is sold on an f.o.b. St. Louis basis?

A. I would like for you to clarify that question. You say is there a general elevation?

Q. Yes. Is there price, their list price higher than yours?

A. I don't know.

Q. You don't even know generally speaking?

A. I wouldn't know what their price list was generally speaking.

1448 Q. Well, now, you sell your paints, I believe you said, in Arkansas, Louisiana, Tennessee, Kentucky, Mississippi, Texas, Oklahoma and Kansas, is that correct?

A. I didn't mention Missouri, did I?

Q. Well, no, you didn't, and I assume you sell in Missouri also?

A. Yes.

Q. And on your sales to all of those destination points, you sell f.o.b. St. Louis?

A. That is right.

Q. And in what quantities do you sell your paint, per hundred gallons or—

A. (Interposing.) Sometimes in carloads; sometimes in whatever quantity they care to buy. There is no definite, fixed amount schedules.

Q. Well, isn't there some unit that you generally regard as the sales unit, whether it be ten or fifty or a hundred gallons as a—

A. (Interposing.) No.

Q. Now, you also testified, did you not, Mr. Waters, that a difference of five to ten cents in your production costs per gallon would enable you to extend your competitive area?

A. That is right.

Q. Is that correct?

A. Yes.

1449 And by production costs, I assume you meant the cost of your container, the cost of your labor, the cost of your raw materials, is that correct?

A. It is all considered your cost of your product, your finished product.

Q. Would a saving of two cents per gallon enable you to extend your competitive market area?

A. Well, that would depend a great deal on the competitive situation existing at the time.

Q. I assume you had those factors in mind when you answered Mr. Wright's question, is that not so?

A. Yes.

Q. Well, keep the same factors in mind in answering my questions, if you will.

A. I would say that it would make a difference.

Q. A two cents a gallon saving would make a difference?

A. Yes.

Q. And when you say that that such a saving would enable you to extend your competitive market area, exactly what do you mean by that?

A. I mean by that that outside white paint is the most highly competitive item in the paint line; your margin of profit is less in that product than any product you have. As a result, a difference of two cents would make a difference of a profit or loss in the number of cases in
1450 selling a gallon of the paint at a distant point.

Q. Do you mean to convey by your answer that two cents' difference would enable you to go seeking new customers at more distant points?

A. It would keep us from getting business if we weren't competitive at those points.

Mr. McDermott: Will you read that question, please?

Trial Examiner Norwood: Read the question.

The Witness: Frankly, I don't understand the question.

Trial Examiner Norwood: Would the two cents enable you to be competitive at some points, the two cents' margin, where you would otherwise not be able to compete?

The Witness: Yes, it would.

By Mr. McDermott:

Q. And it would enable you to do that because it would mean the difference between a profit and a loss, is that correct?

A. Yes.

Q. Now, in other words, you would offer your paint to the customer at a price two cents below the price you had previously offered it at?

A. Could I get that question clarified? You mean in order to get more distant market would we have to offer a price lower by two cents in order to get into that market?

1451 Q. I am trying, sir, by asking that question to obtain a clarification of your preceding answer.

Mr. Dixon: Would you read the question again?

The Witness: Will you read it again, please?

(The reporter read the question.)

Trial Examiner Norwood: Can you answer that?

The Witness: I can't answer that.

By Mr. McDermott:

Q. Now, I am going to put it to you concretely, Mr. Waters. Let's assume that up to today you have been manufacturing a gallon of your outside white paint at a production cost of $1.65. Let us assume that you have been offering that paint to your customers at $2.00 per gallon, but it is also assumed that as of today you achieve a saving in production costs that brings your production cost per gallon down to $1.63; now, what effects will that have on your business, and I want you to enumerate them for me and go into detail?

A. You want that at present conditions?

Q. No, never mind present conditions, give it to me in normal times.

A. Normal times. The question of saving two cents a gallon on the raw material cost of a gallon of paint, a gallon of outside white paint, you are talking about?

Q. Yes, sir, that is what we are talking about.

A. Would represent—

1452 Q. (Interposing.) Now, please, Mr. Waters.

Trial Examiner Norwood: Let him answer.

Mr. McDermott: I don't want him to theorize, sir.

Mr. Wright: He asked for all the effects of the business, your Honor. Now, he gets a narrative answer.

Mr. McDermott: The effects on his business.

Trial Examiner Norwood: Let him answer.

A. Would represent the difference between a profit and a loss on a gallon of paint.

By Mr. McDermott:

Q. Is that your answer?

A. It would—yes, that is my answer.

Q. I am going to ask the reporter to read my question to you again and ask you to please answer it.

(Reporter read the question.)

A. Well, the first effect, I mentioned it was a question of profit and loss; that is relevant, isn't it?

Trial Examiner Norwood: Well, yes, that is all right, but he asked you for the details of the effects of this production.

The Witness: It is the only effect.

Trial Examiner Norwood: You might tell us how that would change the price and then how that would enable you to go into a little further territory, might bring in the freight—you asked him for the details; that is not
1453 satisfactory to the counsel?

Mr. McDermott: Oh, sure it is.

The Witness: Well, after all, we are operating a business for a profit and the first effect is the question of whether he is going to make a profit or loss in the operation of a business. If we are losing money on a product, we certainly aren't going to cut a price if we save two cents.

1454 Q. Mister, please; I gave you concrete figures.
Now, you testified in response to an earlier question of mine on whether the saving on production costs would enable you to extend your market area. Now, I have given you an illustration. Now, please state more in detail exactly what effect that 2¢ saving is going to have.

A. It would put us in a more competitive position with the price of our merchandise.

Q. Never mind the economics books; give us facts; give us some business practice, and forget the theory.

Trial Examiner Norwood: Well, I think he has answered that question clearly. His answer has been responsive.

Mr. Wright: Your Honor, the question related to a whole business, spread out over his whole territory, and didn't relate to any particular market or any particular time. I think it called for a vague answer.

Trial Examiner Norwood: Well, you will have to amend that question. I think that question is apparently superfluous.

By Mr. McDermott:

Q. Is that, sir, the best answer you can give me to my question?

A. As you have put it to me, yes.

Q. Well, what would be the effect of that 2¢ saving in production costs from \$1.65 to \$1.63 upon your competitive market price? 1455

Mr. Wright: Your Honor, just a moment, now. Counsel is putting "production costs" in the witness's mouth by that question. He hasn't established there was any \$1.65 cost at any normal competitive time.

Trial Examiner Norwood: I think it is his privilege to put that conception in the witness's mind and seek his reaction on it. Objection overruled.

A. With the lower cost, we would more aggressively sell an item that showed us a better margin of profit, and we could go into markets that we were not able to go in with a higher cost

By Mr. McDermott:

Q. In other words, sir, you would regard that 2¢ saving in production costs as a profit? Right?

A. Yes.

Q. And you would not lower your price?

A. That, again, depends upon the situation existing.

Q. I have given you the situation.

A. All right, we would lower the price if you say it is in normal times.

Q. I told you that. I asked you to assume that.

A. All right.

Q. So, you would lower your price?

A. Yes.

1456 Q. How much would you lower your price?

A. I would say we would lower it the 2¢.

Q. So, you wouldn't have any profit?

A. Other than increasing our volume, which would represent profit.

Q. All right; so that now you have eliminated that 2¢ as a profit as such and you have cut down your price from \$2.00 to \$1.98; right?

A. Yes.

Q. All right; now, what is the effect of that?

A. It is going to cause us to get increased volume of business.

Q. Where are you going to get the increased volume of business?

A. Well, that is in our trade territory.

Q. In what trade territory?

A. The one that we have mentioned, the States in which we do business.

Q. You would not go to any new territory?

A. There are a lot of points in those States which we do not reach at the present time.

Q. And what is the reason for your not reaching them at the present time?

A. At the present time it is due to the lack of materials. We haven't sufficient production.

1457 Q. So that your saving in production costs wouldn't have anything to do with that?

A. If you are dealing with present times, no.

Q. Well, will you forget present times?

A. I can't.

Q. Well, I don't blame you for that.

A. Well, it is such an important thing in answering any question regarding competitive conditions that we just can't consider it from any other angle.

Q. Well, the only competition today is the competition in the manufacture of raw materials?

A. That is right.

Q. Now, we have settled that; let's try and regard this as the normal times proposition entirely and forget the unusual and abnormal today situation.

A. You did ask me, though, at the present time what would we do.

Q. Well, when I am asking you those questions I don't mean today, I mean normally. Now, having reduced your price 2¢, what is the effect of the price reduction on the trade area?

A. It would put us in a position to be more competitive with the manufacturers located at those distant points.

Q. What would be the factors that would enable you to compete with manufacturers located at more distant points?

A. One important thing is price. The other is 1458 quality of merchandise. Service is another.

Q. Now, is it your concept that for a 2¢ per gallon saving in price a distributor or a retailer is going to switch from one product to another?

A. No, I wouldn't say he would switch for 2¢ a gallon, but he wouldn't be able to get some business if he was higher priced than his competitors in that area.

Q. And you are not selling to the public, are you, you are selling to retailers and distributors?

A. Distributors, yes.

Q. So that the retailer or distributor wouldn't switch from one line of paint to yours for a 2¢ a gallon saving?

A. I couldn't answer that.

Q. Well, you have already said "no"?

A. Well, normally I would say "no", that is right.

Q. Would a 3¢ per gallon savings cause a retailer or distributor to switch from one line of outside white to another?

A. No.

Q. Would 4¢?

A. It would get him thinking, and at 4¢, possibly he would be on the fence at 4.

Q. At 5¢?

A. I would say that 5¢ would be the difference of getting it and not getting it.

Q. 5¢ per gallon?

1459 A. Yes.

Q. Now, would 3¢ make that difference if it were a saving just in outside white and wouldn't affect the whole line of the manufacturer?

A. It would have quite a bearing on it, in view of the fact that outside white paint is the main item in any paint line and you must be competitive in that field in order to sell the rest of your line. It is the first thing that a customer wants to know, is how much is your outside white, what is the formula; and that oftentimes makes the difference of whether you sell him your complete line or not.

Trial Examiner Norwood: Is that used as the basis for price comparison between different lines?

The Witness: Yes.

By Mr. McDermott:

Q. Now, are you familiar with freight rates, generally, in the are in which you sell your products?

A. Not very much so, no; just in a rough way is all.

Q. Yes. But, you are generally or roughly familiar with them?

A. Very roughly.

Q. Are there substantial differences in the freight which your various customers have to pay for your products?

A. Yes.

Q. What is the greatest difference, we will say, 1460 between a customer located 25 miles from St. Louis and a customer located in Kansas, what is the difference in freight costs between those two customers?

A. This would have to be just a rough estimate on my part.

Q. Yes, and I haven't anything to check you with, so you are safe.

A. You are talking per gallon, then?

Q. Per gallon, or per hundred gallons, whichever way you are most familiar with.

A. I would say it would be a difference of about ten cents a gallon.

Q. Ten cents, a gallon?

A. Yes; it is the average line of paints, of our paints.

Q. So that the customer in Kansas pays ten cents more freight?

A. Yes.

Q. Now, for the company, the Mound City Paint Company, that sells its paints on a delivered price basis, are you able to compete with them in Kansas?

A. We have for years.

Q. And yet there is a ten cent saving per gallon, or more, as between you and Mound City?

A. I couldn't say whether there was definitely or not. They may adjust their prices.

Q. They sell on a delivered price basis?

1461 A. Do they not have a zoning proposition where after so many miles they raise the price? A lot of companies do have that.

Q. A zone delivered price system?

A. Yes.

Mr. Wright: Your Honor, may I suggest a two minute recess?

Trial Examiner Norwood: Yes, two minute recess.

(A short recess was had.)

Trial Examiner Norwood: Did you complete your cross?

Mr. McDermott: Mr. Wood has a few questions, sir.

Mr. Wood: I want to look at the formula, please.

(Witness hands paper to counsel.)

By Mr. Wood:

Q. Mr. Waters, I believe you testified this was a master formula, is that right?

A. That is right.

Q. And I know that you read into the record certain of the proportions of materials, but I can't remember those, and I will ask you to state again for me the amount of lead pigments in a gallon of your house paint.

A. 396 pounds.

Q. In how many gallons?

A. In sixty gallon batch.

Q. And how many is that per gallon, can you make a calculation?

1462 A. That is the carbonate lead and sulphate lead combined. You said lead pigment this time. That would be over 6 pounds to the gallon.

Q. Of sulphate and carbonate?

A. Yes.

Q. And what percent is sulphate and what percent is carbonate?

A. 99 pounds of sulphate and 297 of carbonate.

Q. Now, you mentioned an inert pigment in there?

A. Yes.

Q. How much of that?

A. Approximately 8 pounds.

Q. Per gallon?

A. Per 60 gallon.

Q. 8 pounds?

A. Yes.

Q. Which was that you said 8 pounds of?

A. That is asbestin.

Q. Is there any other inert material in there?

A. What there is, there is 7-9/16 and I say approximately 8 pounds. I don't know what this 9/16 is. I know 7 pounds is asbestin and this 9/16 is an extender.

Q. Now, what is the 297?

A. That is a carbonate lead.

Q. What is the 264?

1463 A. Zinc oxide.

Q. Now, you call that a master formula?

A. Yes.

Q. Do they ever vary from that formula for individual batches?

A. When the materials were available it was made according to the formula.

Q. At all times, or did they vary it for different purposes?

A. Not this formula, no. We have another formula, if we were going to make a different type.

Q. In other words, you would have other formulae?

A. Yes.

Q. For house paints?

A. No, not for house paint. This was our standard formula for outside white paint.

Q. Did the company sell any other formulae for outside house paint?

A. They had second grade house paints.

Q. Did any of those contain lead?

A. Very little.

Q. Were they sold under the same name as to brand?

A. No.

Q. How were they distinguished?

A. They were sold under the Arlington label.

Q. And what were these sold under?

1464 A. Surfacer.

Q. What was the Arlington label?

A. What do you mean, what was it?

Q. I mean, was it a brand owned by the company, or private brand manufactured?

A. Brand owned by the company.

Q. Now, what percent of your business in this outside white house paint do you do in the St. Louis area?

A. What percent of our total volume of business we received in outside white house paint?

Q. Yes, in the St. Louis Area.

A. In the St. Louis area. When you say St. Louis area, do you mean metropolitan St. Louis?

Q. Yes. In other words, I am getting at this: In your total business in outside white house paint what percent is done in the St. Louis area?

A. What percent of our white house paint is done in the St. Louis area?

Q. That is right.

A. I would say about 40%.

Q. About 40%?

A. Yes.

Q. And 60% is done beyond the limits of the St. Louis metropolitan area?

A. Yes.

1465 Q. What are the farthest points to which you sell this outside white house paint?

A. Alexandria, Louisiana.

Q. To the south?

A. Yes.

Q. And do you ship by river?

A. No, by rail.

Q. How far west do you go?

A. Kansas. Do you want it in miles?

Q. Approximately.

A. Say 500 miles.

Q. And approximately how far north do you go?

A. Practically none at all.

Q. Not at all?

A. Yes.

Q. How far east do you go?

A. A couple of hundred miles.

Q. A couple of hundred miles?

A. Yes.

Q. Is that in Illinois and Indiana, or is it in Kentucky?

A. Oh, let's see; I forgot, that is southeast; I was thinking directly east. It would be considerably further if we took in Tennessee and Kentucky. It would be 600 or 700 miles.

Q. Six or seven hundred miles in Tennessee or Kentucky?

A. That is my guess.

1466 Q. Now, you testified on direct examination that a lowering of material costs would enable you to extend your competitive area, and I would like you to estimate just how far, let's say at 5¢ lowering of material cost would enable you to extend your competitive area, north, south, east and west?

A. That would be a difficult thing. 5¢, how much further? I would say that you would go about 300 miles at 5¢.

Q. In all directions?

A. I wouldn't know that. I am only trying to figure out what the freight would be on a gallon of paint for a given number of miles. That is something I am not in a position to compute right here.

Q. Well, you say you don't sell to the north anyhow?

A. That is right.

Q. Would 5¢ help you in selling to the north, where you don't go anywhere?

A. It wouldn't have any bearing on our situation, no.

Q. Why not?

A. Because the reason we are not going to the north is because we haven't worked the north.

Q. Why haven't you worked the north?

A. Because we have had all we could take care of at the other points. I might say this about the distant points, we are in points now we would pull out if we couldn't get more money under this OPA.

1467 Q. Explain that?

A. We wouldn't be able to sell at some of the points we are selling now when the bars are down and competition is normal.

Q. You wouldn't be able to?

A. No, we wouldn't be able to sell in Alexandria, Louisiana. They wouldn't buy f. o. b. St. Louis and pay that freight clear down there.

Q. Well, do I understand, then, that these material costs are not the sole factor affecting how far you can go with your product?

A. Sure; that is what I am getting at. It would cost them more money and I wouldn't be competitive in Alexandria, Louisiana.

Q. In other words, you mean, if the costs of production were lowered, regardless of whether they were material costs or whether they were processing and labor costs, or whether they were selling costs, you wouldn't be able to go farther if the costs were lower?

A. That is right.

Q. In relation to your competitors?

A. That is right.

Q. That is normal in all business?

A. That is right.

Q. And there is no difference whether the saving is in pigment or labor costs?

1468 A. It doesn't matter where it is.

Q. Or if there would be a lowering in the freight rate structure to the south?

A. That would help also.

Q. These constant factors are general?

A. One of other costs; there are items that enter into the cost:

Q. I just want, I think, one or two more questions. Now, do you charge the same price f.o.b. St. Louis for the St. Louis metropolitan area that you charge for, let's say Alexandria, Louisiana?

A. No.

Q. You don't? What is the difference in your price?

A. Do I have to answer that?

Q. I ask that you answer.

Mr. Wright: Your Honor, may we have it read again?

The Witness: It isn't that it isn't clear to me.

(Question read by reporter.)

Mr. Wright: Your Honor, I believe he should be privileged if because of a competitive situation he doesn't want to disclose some concession or discount he gives to get business, say in Alexandria, Louisiana. He stated that there was a difference.

Mr. McDermott: Well, we don't know what his prices are. Maybe if he told us the amount of the difference

1469 Trial Examiner Norwood: How does that bear on the issues?

Mr. Wood: It is the implication in the record that this man sells f.o.b. St. Louis at a uniform price. I want to show that he does not sell at anything approximating a uniform price f.o.b. St. Louis.

Mr. Wright: I believe the witness's testimony was he sold f.o.b. St. Louis with the addition of freight to whatever market he was selling, and he stated the price from St. Louis to Alexandria, Louisiana, is not the same. It is obvious he is embarrassed by having to disclose a differential to a customer in Alexandria, Louisiana.

Mr. Wood: I am not particular about Alexandria, Louisiana. I am perfectly willing to generalize.

Trial Examiner Norwood: Let him do that.

By Mr. Wood:

Q. Can you generalize and tell us just what your pricing system is in selling the 40% in the metropolitan area in St. Louis and the 60% outside of the metropolitan area in St. Louis? Will you please generalize in respect to your pricing practices in regard to each.

A. Our pricing is based practically uniform as f.o.b. St. Louis price. In 90% of our business the same price f.o.b. St. Louis for St. Louis customer or a customer at a distant point.

1470 Q. At a distant point?

A. Yes.

Q. You sell at the same price f.o.b. to a customer in St. Louis as you do say in East Tennessee?

A. Yes.

Q. And the customer pays the freight.

A. That is right.

Q. Can you explain how you compete with a concern such as Mound City which absorbs the freight?

A. Well, we have got quite a proposition there. In the first place, most of our business is through distributors. The business in Tennessee goes through a distributor of ours in Memphis, whom we make all drop shipments to at the present time. Our price of the material is not a matter of our concern as to what the customer is paying, it is what we are charging the distributor in Memphis. He is paying f.o.b. St. Louis price. He is a distributor.

Q. Does he purchase outright from you?

A. Yes, that is right. At the present time it is all handled in drop shipments.

Q. What is drop shipments?

A. I mean, we ship it all for him; he doesn't stock it.

Q. Who pays the freight?

A. The customer pays the freight.

1471 Q. Does he make any freight allowance to the customer, or do you know whether he does or not?

A. I don't know whether he does or not.

Q. You don't know whether he does or not?

A. No. It depends on—

Q. So far as you know, he may absorb whatever freight there is from Memphis to destination?

A. He may, yes.

Q. How many other situations of that type do you have?

A. That is the only one we have of that type. I don't care to go into the operations of our business too closely as to how we price and what one customer pays and what another pays.

Q. I don't care for the names of the customers there.

A. If I mention points, they in themselves reveal the customer.

Mr. Wright: Your Honor, the witness has already stated this business is a highly competitive business.

Trial Examiner Norwood: You may explain your process in general terms.

The Witness: I am trying to get this point straight,

too, and that is, I have been criticized for this, but the conditions today are such that you can't use them as a general condition, and what they are going to be tomorrow I don't know. I don't know what our competitors are going to do, but we are going to have to be competitive in those points, and whatever it takes, we are going to have to be competitive to sell paint in those points. How
1472 we will set up our pricing schedule I couldn't say.

By Mr. Wood:

Q. Well, will you please outline for us broadly and without revealing anything confidential just how your actual pricing system varies from the pricing now which you make known to the public?

A. Let me say this, to start out we only had a distributor's price. We have some line lumber yards that are purchasing from us that are buying at a distributor's price. We have large paint store accounts in St. Louis that are buying at distributors' prices. Those prices are uniform. As a result, any business that we have taken on since the freezing of prices has been accounts that would qualify for that price, because we haven't got a higher price that we could charge a small account that wouldn't be rated at that price.

1473 By Mr. Wood:

Q. I don't think I am making myself clear, Mr. Waters. As I understand your position, you have expressed reluctance to reveal your company's pricing practices in general?

A. That is right.

Mr. Wright: Well, Your Honor—

Mr. Wood: Just a minute, please, Mr. Wright. May I finish my question?

Mr. Wright: I would like right at this time to state that this gentleman has stated that the policy of his company was to sell on an f.o.b. St. Louis price, but that they met competition in any market that they were in at what ever price they had to meet it. Now, it is a highly competitive business. I do not think he should be forced to disclose anything which he might consider to be a discrimination from one customer to another.

Trial Examiner Norwood: I am not going to force him to disclose a trade secret. He can use some other point where he does not sell to illustrate that method, but he may cross-examine him on the method. Go ahead.

By Mr. Wood:

Q. Now, what is the nature of the sales policy data which you consider confidential?

A. That is where it is necessary to give an extra discount to a distant point to be competitive in that area.

1474 Q. But you do give extra discounts at distant points to be competitive, is that correct?

A. That is right.

Q. And it is the detail of that pricing structure that you do not wish to make public, is that correct?

A. Yes.

Mr. Wood: That is all.

Mr. Wright: Your Honor, I have just one or two questions I want to ask.

Trial Examiner Norwood: Go ahead.

Redirect Examination by Mr. Wright.

Q. Mr. Waters, what is the date that appears on that formula?

A. 1938.

Q. January 1?

A. January 1, 1938.

Q. Now, the first set of cost figures there, can you state at what period of time those cost figures were applicable, those starting with 7½ cents a pound for basic carbonate?

A. They were applicable 1938.

Q. For how long, do you know?

A. I could not tell you exactly. There has been a change, January, 1944, so I would presume that the prices were the same up to 1944.

Trial Examiner Norwood: Now, are you questioning him with respect to something that is already in evidence? 1475

Mr. Wright: No sir, I am questioning him on redirect examination with reference to a matter which was brought up on cross-examination.

Mr. McDermott: As a matter of fact, sir, I think Mr. Waters only knows what is on the card, and if you want to read in whatever is on the card, Mr. Wright?

Mr. Wright: I believe the record already shows what I want to bring in except the date on the card. The purpose of the question was, Mr. McDermott stated the cost of this paint to be $1.65.

Trial Examiner Norwood: I just want it to be clear on the record what we are talking about. Go ahead.

By Mr. Wright:

Q. Mr. Waters, you stated the formula of outside white paint was important in competition?

A. Yes.

Q. Is the inclusion of basic carbonate of lead a desirable thing on the formula to be competitive?

A. A very important factor.

Q. Is the outside white lead paint which shows a substantial quantity of basic carbonate of lead considered desirable in the trade?

A. Yes.

Q. Now, in the event that you were in a competi-
1476 tive situation in which you were receiving no profit on
your sales of outside white lead paint, and you could receive a 2-cent per gallon saving over your competitors on the material costs of that paint, and you felt that by continuing the prices then in effect you could still maintain your volume of sales of that paint, would you then reduce your price by two cents?

A. No.

Q. In the event you felt it necessary to secure business at any market by reducing your price at that market by two cents to secure the volume in that market, would you then reduce your price by two cents in that market?

A. Yes.

Q. Would you necessarily reduce your price over the entire trade area in which you sell?

A. No.

Q. You referred to a zone system in mixed paints?

A. Yes.

Q. Are you familiar with the use of those systems in this area?

Mr. Duncan: Your Honor, I object. The paint companies are not involved in this proceeding, and the question how they sell the paints, as I understand it, is not attacked in this amended complaint. For that reason I object to the question.

Trial Examiner Norwood: Overruled.

1477 Mr. Wright: On cross-examination Mr. McDermott went into this matter of zones on paint.

By Mr. Wright:

Q. Are you generally familiar with the operation of those zones?

A. To some extent. When I was with Benjamin Moore they practiced that system of pricing.

Q. Are those zones which are used in this area from St. Louis based on the amount of freight to the customer; does that determine the zone in which he is located?

A. Yes.

Q. Do these zones reflect the freight difference between them?

A. Yes.

Q. Now, you stated that the paint business in the area in which you are located is highly competitive?

A. Yes.

Q. Is the business of supplying lead pigments to paint manufacturers in this area highly competitive?

Mr. DuBose: We object to that on the ground this gentleman is no expert.

Mr. Wright: I will withdraw the question.

Trial Examiner Norwood: You are going outside the range of the previous examination.

Mr. Wright: I will withdraw the question.

Trial Examiner Norwood: Sustained.

1478 Mr. Wright: No further questions.

Mr. McDermott: I have a few questions.

Trial Examiner Norwood: Go ahead.

Recross Examination by Mr. McDermott.

Q. In connection with your answer to Mr. Wright's question on redirect examination, you said at the distant points you might reduce the price when you had a 2-cent saving in material costs in order to be competitive, is that correct?

A. That is right.

Q. Now, in order to be competitive at the distant points you also make additional discounts; you have testified to that?

A. Yes.

Q. Right?

A. That is right.

Q. So that at these distant points wherever you want to be competitive and you do not have an instant saving you make an additional discount?

A. If we feel that we want the business.

Q. When you want the business?

A. Yes.

Mr. McDermott: That is all.

Trial Examiner Norwood: Thank you. You are excused.

(Witness excused.)

Mr. Wright: Your Honor, I would like to suggest 1479 that we now recess until the 16th of September in Washington; and I want to state now that I consider that the Commission's case is substantially complete, we may have some more witnesses, but that the respondents' counsel should in the interim be considering the matter of their own defense so that we won't unduly delay it after that time.

Trial Examiner Norwood: Does that date and place suit counsel? Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Well, that date will be satisfactory, gentlemen. And I hope that inasmuch as the Commission's counsel stated that he has very little more evidence to put in that counsel for respondents will do the best they can to prepare to go ahead with their case at a reasonable time after the resting of the Commission's case; and that also, if they will refer to the Rules of Practice respecting the corrections to the record; that they may be made to cover what record we have made at the resting of the Commission's case. Unless counsel insist on that, it can go over the close of the evidence, but I should think that if there are any real vital corrections to be made, I think respondents have a right to know what they are going to meet; so you will see the Rules of Practice there respecting the method of making those; and you make triplicate lists and furnish the Trial Examiner 1480 with lists of suggested corrections and furnish the other side with lists. Most of this is done by agreement.

Mr. Wright: I believe counsel for the Commission will be prepared to make a list of corrections to the record at the time of closing the Commission's case.

Mr. McDermott: We will try to do that, too.

Mr. Welch: Is that done at the close of the Commission's case or close of the case?

Mr. Wright: I believe it is at the close of the Commission's case so if there is any serious error which may affect your defense it may be corrected.

Mr. Welch: I see.

Trial Examiner Norwood: It may be done at either place. It may be done when the Commission rests, otherwise it usually does go to the end. The rule was made in order to prevent corrections to the record being scattered through the entire record, because that took a great deal of time to search for corrections; and then I started the practice and sold some of the other trial examiners on it of making corrections at the opening of each hearing, then you didn't have to look through the whole booklet. Now, I think this other is better.

The hearing is now adjourned to reconvene in Washington, D. C., in Room 332, Office of the Federal Trade Commission, at 10 o'clock a. m., Standard Time, on September 16, 1946.

(Whereupon, at 12:15 p. m., July 30, 1946, the hearing in the above-entitled matter was adjourned to reconvene on September 16, 1946, in Washington, D. C.

1481 Room 332, Federal Trade Commission Bldg.,
Washington, D. C.,
September 16, 1946.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph Wright, Attorney for the Federal Trade Commission.

1482 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment in this case in St. Louis, Missouri, on the 30th day of July, 1946, the hearing in Docket No. 5253 is now reconvened in Room 332, Federal Trade Commission Building, Washington, D. C., at 10 o'clock a. m., on the 16th day of September, 1946.

Mr. Wright appears in support of the complaint and there are no appearances for any of the respondents.

Mr. Wright: Your Honor, I advised counsel by letter last week that the only matter to be presented this morning would be a request for an adjournment until October 1, 1946 here in Washington—and counsel thereupon waived their appearance here today. I would now like to suggest that an adjournment be granted until 10 a m., October 1, 1946, in Room 332 in the Federal Trade Commission Building in Washington.

Trial Examiner Norwood: You say that counsel have been advised of date to which you request adjournment?

Mr. Wright: Yes, and I figured that the record this morning would serve as official notice of the setting of that date.

Trial Examiner Norwood: The motion is granted and the hearing is adjourned until 10 o'clock a. m. on October 1, 1946, in Room 332, offices of the Federal Trade
1483 Commission, Washington, D. C.

(Whereupon, at 10:03 a. m., September 16, 1946, the hearing in the above entitled matter was adjourned to October 1, 1946, at 10:00 a. m.)

1484 Room 332, Federal Trade Commission Bldg.,
Washington, D. C.,
Wednesday, October 2, 1946.

Met, pursuant to adjournment and subsequent notice, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., attorney for the Federal Trade Commission.

James T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 15th St., N. W., Washington, D. C.), attorney for Sherwin-Williams Company.

Henry E. Gardiner, Esq. (Chadbourne, Wallace, Paorke & Whiteside, 25 Broadway, New York, N. Y.), attorney for Anaconda Copper Mining Company and International Smelting & Refining Company.

Richard Serviss, Esq. and Edmund P. Wood, Esq., attorneys for Eagle-Picher Lead Company and The Eagle-Picher Sales Company.

James D. Ewing, Esq. and E. Z. Du Bose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for National Lead Company.

Roger Hinds, Esq (165 Broadway, New York, N. Y.), attorney for The Glidden Company.

1485 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment at Washington, D. C., on September 16, 1946, and the postponement on yesterday by agreement of counsel, the hearing in Docket 5253 is now reconvened in room 332, offices of the Federal Trade Commission, Washington, D. C., at 10 o'clock a. m., on the 2nd day of October, 1946.

Enter the appearances.

(Appearances, as indicated on title page, were entered.)

Trial Examiner Norwood: Go ahead, Mr. Wright.

Mr. Wright: Your Honor, the witness who was called for 10 o'clock might be delayed on account of an appointment.

There are a number of subpoenaes duces tecum which were returnable today. I wonder if counsel for Glidden is prepared to make a return?

Mr. Hinds: Yes, sir, we have responses to the subpoenaes in our possession, consisting of copies of invoices, price cards and shipping lists. Those not produced within the description of the subpoenaes are not produced for reason of the fact that they are not in existence, having been destroyed in the ordinary course of business 1486 procedure.

Mr. Wright: I would like to ask that these documents be marked for identification as Commission's Exhibits 829, 830, 83-A through 831-Z-61, and 832.

(The documents referred to were marked Commission's Exhibits 829; 830; 831-A, 831-B, 831-C, 831-D, 831-E, 831-F, 831-G, 831-H, 831-I, 831-J, 831-K, 831-L, 831-M, 831-N, 831-O, 831-P, 831-Q, 831-R, 831-S, 831-T, 831-U, 831-V, 831-W, 831-X, 831-Y, 831-Z, 831-Z-1, 831-Z-2, 831-Z-3, 831-Z-4, 831-Z-5, 831-Z-6, 831-Z-7, 831-Z-8, 831-Z-9, 831-Z-10, 831-Z-11, 831-Z-12, 831-Z-13, 731-Z-14, 831-Z-15, 831-Z-16, 831-Z-17, 831-Z-18, 83-Z-19, 831-Z-20, 831-Z-21, 831-Z-22, 831-Z-23, 831-Z-24, 831-Z-25, 831-Z-26, 831-Z-27, 831-Z-28, 831-Z-29, 831-Z-30, 831-Z-31, 831-Z-32, 831-Z-33, 831-Z-34, 831-Z-35, 831-Z-36, 831-Z-37, 831-Z-38, 831-Z-39, 831-Z-40, 831-Z-41, 831-Z-42, 831-Z-43, 831-Z-44, 831-Z-45, 831-Z-46, 831-Z-47, 831-Z-48, 831-Z-49, 831-Z-50, 831-Z-51, 831-Z-52, 831-Z-53, 831-Z-54, 831-Z-55, 831-Z-56, 831-Z-57, 831-Z-58, 831-Z-59, 831-Z-60, 831-Z-61, and 832, for identification.)

Mr. Wright: Mr. Hinds, is the document marked as Commission's Exhibit 832 the certificate of The 1487 Glidden Company?

Mr. Hinds: Yes, sir, that is signed by the secretary, Mr. Kolb.

Mr. Wright: I now offer in evidence Commission's Exhibits 829 and 830, consisting of price cards which were returned under a subpoena.

Mr. Hinds: No objection.

Trial Examiner Norwood: Commission's Exhibits 829 and 830 are received in evidence.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 829 and 830, were received in evidence.)

Mr. Wright: I now offer in evidence Commission's Exhibits 831-A through 831-Z-49, consisting of invoices and shipping memoranda produced under subpoena for the four months' period of September, October, November and December, 1941.

Mr. Hinds: No objection.

Trial Examiner Norwood: Commission's Exhibits 831-A through 831-Z-49 are received in evidence.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 831-A, 831-B, 831-C, 831-D, 831-E, 831-F, 831-G, 831-H, 831-I, 831-J, 831-K, 831-L, 831-M, 831-N, 831-O, 831-P, 831-Q, 831-R, 831-S, 831-T, 831-U, 831-V, 831-W, 831-X, 831-Y, 831-Z, 831-Z-1, 831-Z-2, 831-Z-3, 831-Z-4, 831-Z-5, 831-Z-6,
1488 831-Z-7, 831-Z-8, 831-Z-9, 831-Z-10, 831-Z-11, 831-Z-12, 831-Z-13, 831-Z-14, 831-Z-15, 831-Z-16, 831-Z-17, 831-Z-18, 831-Z-19, 831-Z-20, 831-Z-21, 831-Z-22, 831-Z-23, 831-Z-24, 831-Z-25, 831-Z-26, 831-Z-27, 831-Z-28, 831-Z-29, 831-Z-30, 831-Z-31, 831-Z-32, 831-Z-33, 831-Z-34, 831-Z-35, 831-Z-36, 831-Z-37, 831-Z-38, 831-Z-39, 831-Z-40, 831-Z-41, 831-Z-42, 831-Z-43, 831-Z-44, 831-Z-45, 831-Z-46, 831-Z-47, 831-Z-48 and 831-Z49, were received in evidence.)

Mr. Wright: I now offer in evidence Commission's Exhibit 832.

Mr. Hinds: No objection.

Trial Examiner Norwood: Commission's Exhibit 832 is received in evidence.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT 832, was received in evidence.)

Mr. Wright: Your Honor, I would like to call Mr. Depue to the stand.

CARL H. DEPUE was thereupon called as a witness for the Commission and, having been previously duly sworn, testified as follows:

1489 *Direct Examination by Mr. Wright.*

Q. Your name is Carl H. Depue?

A. Yes, sir.

Mr. Wright: I believe Mr. Depue has already been qualified on the record.

Trial Examiner Norwood: Yes.

Mr. Wright: I ask to have these marked Commission's Exhibits 825-A through 825-Z-10.

(The documents referred to were marked COMMISSION'S EXHIBITS 825-A, 825-B, 825-C, 825-D, 825-E, 825-F, 825-G, 825-H, 825-I, 825-J, 825-K, 825-L, 825-M, 825-N, 825-O, 825-P, 825-Q, 825-R, 825-S, 825-T, 825-U, 825-V, 825-W, 825-X, 825-Y, 825-Z, 825-Z-1, 825-Z-2, 825-Z-3, 825-Z-4, 825-Z-5, 825-Z-6, 825-Z-7, 825-Z-8, 825-Z-9, 825-Z-10 for identification.)

By Mr. Wright:

Q. Mr. Depue, I hand you herewith documents marked for identification as Commission's Exhibits 825-A through 825-Z-10 and ask you to identify them.

A. Why, they all contain supplemental information obtained from the invoices of Eagle-Picher Sales Company.

Q. Were those documents prepared by you?

A. Yes, or under my direction.

Q. I call your attention to the initials CHD appearing on the corner of a number of sheets. Will you state
1490 what they are?

A. Those are my initials.

Q. Mr. Depue, was the information that appears in there secured from the records of the Eagle-Picher Company?

A. Yes.

Q. Just what things did you take off the record of the Eagle-Picher Company in preparing those sheets?

A. Well, they first show the invoices by number and date to which reference is made, and then they go further and show the order number and date, the date shipped, if that is revealed by the invoices, and also any references to contracts which may have appeared on those invoices.

Q. I direct your attention to the extreme left-hand column on Commission's Exhibit 825-A, the figures 754-D, G, J, Q, and S. What do those indicate?

A. Those are the exhibits previously put into the record to which of these sheets pertains. That first sheet happens to refer to several exhibits, but most of these sheets are limited to some one exhibit.

Q. Does the information appearing opposite these exhibit numbers relate to the same transactions which appear on those exhibits, in Exhibit 754-D, for instance?

A. I did not quite follow the question.

Q. I call your attention to the column marked "Invoice No." and to the figure "NY-785", which is opposite
1491 the notation "754-D". Does that relate to the same transaction as appears on Exhibit 754-D of the Commission?

A. Well, that particular invoice, NY-785, does appear on the previous exhibit 754-D; and likewise with respect to each of these other invoices which appear on the exhibits shown in the first column. The reason there are so few invoices listed here is that most of the invoices on these exhibits are covered by the explanatory note below, which covers consignment sales.

Q. I direct your attention to the explanatory note appearing on the bottom of Commission's Exhibit 825-A and ask if you will read that, please.

A. (Reading.) "All other invoices listed in Com. Exh. 754-B to U, inclusive, covered sales of white lead in-oil described of these invoices as 'Consignment Sales', 'Cons. Stock' or 'Dist. Stock', and all of these invoices read 'as per contract,' but none of them show the dates of the contracts referred to; and none of these invoices show number or date of customer's orders. Some of these invoices show a date in the space provided for date of shipment but the date thus shown is generally the 25th of the month, the same date as the invoice or a date near
1492 the end of the month for which the bill was rendered. Each of the bills refers to a particular month and appears to cover a monthly settlement.

"Explanatory footnote on Com. Exh. 754-B states that 'Distributors were billed for shipments from consigned stocks during the month, under unlimited consignment contract in effect during 1941, 1942 and 1943 on white lead in-oil.' "

Q. Mr. Depue, did you enter on these sheets all the information appearing on the invoices of the Eagle-Picher Company which would show the dates on which the goods were ordered by the customer or any contractual arrangements that might have been existing between that customer and Eagle-Picher?

A. Yes, everything that appeared on the invoices, that was pertinent to that question.

Q. I direct your attention now to Commission's Exhibit 825-M, and in lines 13 through 18 I note that there is no information regarding the date of the customer's order.

A. Well, then, none appeared on the invoice.

Mr. Wright: I have no further questions on the identification of the documents.

Mr. Wood: Are you introducing them?

Mr. Wright: I plan to, yes.

Mr. Wood: When?

1493 Mr. Wright: I believe you can cross on the identification now.

Trial Examiner Norwood: What is the proffer here? Commission's Exhibits for identification 825-A through 825-Z-10?

Mr. Wright: Yes.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: May we go off the record a moment?

1494 Trial Examiner Norwood: Yes.

(Discussion off the record.)

Mr. Wright: Your Honor, I offer Commission's Exhibits 825-A through 825-Z-10 in evidence.

Mr. Wood: I object to the offer, because there is no connection of the exhibits with the case. There is no explanation of the data on the exhibits. The longhand notes of the witness, particularly characterizing consignment sales, this, that, and the other thing, are entirely his own interpretation.

Trial Examiner Norwood: Yes.

Mr. Wood: The evidence is not ponderable evidence. At the present time, the evidence is not ponderable for anything connected with the case.

Further, I want to renew the objection I made last June in respect to all these invoices; that the Federal Trade Commission should tell us here and now each pair of prices which are different, each pair that they are going to contend constitutes an illegal discrimination; otherwise, we are going to be taking testimony from here to the end of time, if we try to justify every possible pair of prices.

Mr. Hinds: Your Honor, I have already written to the Commission requesting that that be done. Obviously, it would be a very punitive imposition on the respondents to make them speculate in advance as to which of the
1495 thousands of transactions are contended by the Government to represent discriminatory pairs. We know whether or not they are discriminatory, but we do not know what this Commission will contend in that respect. We should not be required to speculate as to what their contentions are, because obviously it is admitted that many, if not most of them, are innocent.

We want to know which they claim are discriminatory.

Mr. Wood: Furthermore, Mr. Examiner, Mr. Woodman, in public statements and public addresses, has said that the Commission was a little bit loath to take full advantage of the decision of the Circuit Court of Appeals in the Moss case. But if you will apply that particular law to the situation in hand, where you have among the various respondents thousands and thousands of prices, and if the burden shifts and we have to try and justify every one of those things without knowing the Commission's contentions, you can see the impossible situation we are up against.

So I object to these exhibits, unless the Commission is specific in relation to its case, and unless more is shown about the exhibits to make them ponderable and substantial evidence in the case.

Mr. Wright: Your Honor, to begin with, this exhibit adds nothing to Commission's Exhibit 754.

Mr. Wood: Then I move—

Trial Examiner Norwood: Wait a minute.

1496 Mr. Wright: Commission's Exhibit 754 is a tabulation of the transactions of the Eagle-Picher Company at certain localities and over certain periods of time, and is expected to bring out all information regarding the date of the customer's order and everything that appeared on the invoice regarding the date, or any contractual relations that the Eagle-Picher Company and customers in the invoices were engaged in.

Now, as to the point that Mr. Hinds and Mr. Wood have raised about the Commission giving a statement of the transactions one by one, that they contend constitute price discrimination under Section 2 of the Clayton Act, I submit that there is no place in the present argument about the admissibility of this exhibit for that. I will say for the benefit of counsel that I intend, at the time the Commission rests its case, to make as complete a statement as I can make of what I consider the ~~issues to be in the~~ matter, and what I consider the Commission has proved in those issues.

I do not think it is any part of this case to be making any such general statements before we have the case in.

Mr. Wood: On the contrary, your Honor, I think the statement should be made now, because here we have the witness on the stand—

Trial Examiner Norwood: Now, wait a minute: It is

very clear just what a proponent has to state in fair-
1497 ness to the other side, and so forth. He has to state
his case, and state the contention of particulars there, and then he produces evidence, and then the other side has an opportunity to meet all that evidence. But he does not have to put all these little bits of evidence in the pleading, and he does not have to advance it at any particular time in the case. I do not think there is much point to that.

Now, as to this other thing, as to the papers containing conclusions of this witness as to what those papers contain, I will say that of course the invoices show what they contain. If there are any conclusions there that really are not very plain and that do amount to strained interpretations, I shall not consider them.

Mr. Wright: Your Honor, may I say right there, it is not my intention to probe the nature of any consignment relations or contractual relations through this exhibit or through any notes that appear on it. I can assure counsel that the proffer is not for that purpose.

Trial Examiner Norwood: As I understand it, this was to meet an objection that was made as to the nature of the sales, as to whether or not the sales price there was made at the time of the order, was named at the time of the shipment, and whether or not that was the price. To meet that objection, and to clarify that question, this expert has
been asked to accumulate the data which appear on
1498 these invoices. In doing so, he had to classify them
to a certain extent, and I do not see any objection to it.

Mr. Wood: If your Honor please, the objection was not my objection at the last hearing, that was Mr. Hinds' objection. I had an objection, but it was not on that particular ground, if you remember.

Trial Examiner Norwood. That is right.

Mr. Wood: Here is this set of documents, all in very clear, legible longhand. They are a compilation of the witness, and they are argumentative exhibits. I mean, they are not a duplicate of anything in the world, they are the witness' compilation of something, and I want to know their purpose in the case before they are admitted in evidence, whatever it is.

Mr. Wright: Your Honor, it was the testimony of the witness that the figures and facts appearing in there were taken directly from the records of the Eagle-Picher Company.

Mr. Wood: The Eagle-Picher Company has stacks of records that high (indicating) and storerooms full of records. I want to know what this supposed evidence has to do with the case, if anything. I think the witness should testify, or you should make the statement, as to what the connection is.

Trial Examiner Norwood: I will overrule the objection and receive these exhibits, because I think they will be
1499 helpful to both sides here, in that I think it is a classification of the data there, and if there appears to be anything objectionable in them, or any wrong conclusions in the papers, why, after a study and after we know what we are doing, we will strike them, if they are to be stricken.

Mr. Wood: I want to know what we are doing right now.

Trial Examiner Norwood: We are receiving those in evidence. Objection overruled.

Mr. Wood: My objection, for the record, is they are argumentative exhibits, compiled by an expert witness for purposes we do not know. We are not disputing the absolute facts taken from the invoices, but it is an argumentative interpretation, the purposes of which we do not know, and I object to them as not being ponderable evidence or anything having to do with this case.

Mr. Wright: Your Honor, I am willing to qualify the offer on that. I offer them only to show the dates of shipments and the dates of orders in the transactions covered in that tabulation, as related to Commission's Exhibit 754 and subnumbers.

Trial Examiner Norwood: I do not see anything argumentative on here.

Mr. Wood: If your Honor please, that has just been put on the table this morning. I have not read it. If
1500 I spent several hours or days studying that, I might have no objection whatsoever, but there is all that longhand there of the witness, and I do not know what it says.

Trial Examiner Norwood: As a matter of fact, I do not see that longhand but on one sheet.

Mr. Wood: I mean all those pages of handwritten tabulations that I have never seen before. I have no question on the honesty of this witness.

Trial Examiner Norwood: The counsel has an objection and an automatic exception, and we shall receive these. Go ahead.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 825-A, 825-B, 825-C, 825-D, 825-E, 825-F, 825-G, 825-H, 825-I, 825-J, 825-K, 825-L, 825-M, 825-N, 825-O, 825-P, 825-Q, 825-R, 825-S, 825-T, 825-U, 825-V, 825-W, 825-X, 825-Y, 825-Z, 825-Z-1, 825-Z-2, 825-Z-3, 825-Z-4, 825-Z-5, 825-Z-6, 825-Z-7, 825-Z-8, 825-Z-9, and 825-Z-10, were received in evidence.)

Mr. Wright: I would like to ask a few more questions of this witness.

Trial Examiner Norwood: All right.

By Mr. Wright:

Q. Mr. Depue, from what records of the Eagle-Picher Company did you secure the information appearing in these exhibits?

1501 A. From the invoices, as stated right there on each of those sheets.

Trial Examiner Norwood: It shows that on every item, does it?

The Witness: Yes.

By Mr. Wright:

Q. Were those invoices secured from The Eagle-Picher Company as invoices covering the transactions?

A. They were.

Mr. Wright: I have no further questions.

Trial Examiner Norwood: Cross-examine.

Mr. Hinds: No cross.

Mr. Wood: I would like a short recess to look at those exhibits, to see if I have any objections.

Mr. Wright: Your Honor, in that connection, I have no objection to recessing for that purpose, but I furnished counsel for Eagle-Picher a copy of this yesterday morning.

Mr. Wood: No cross-examination, your Honor. My objection stands in the record.

Trial Examiner Norwood: Yes. Well, as long as we are going right ahead with this witness with some other documents, we will have a recess at the regular time here, at 11 o'clock. We will return to this exhibit here in the general cross-examination of the witness. I think that
1502 will be satisfactory to everybody. Proceed.

Mr. Wright: I ask to have these marked for identification as Commission's Exhibits 826-A through 826-Y.

(The documents referred to were marked Commission's Exhibits 826-A, 826-B, 826-C, 826-D, 826-E, 826-F, 826-G, 826-H, 826-I, 826-J, 826-K, 826-L, 826-M, 826-N, 826-O, 826-P, 826-Q, 826-R, 826-S, 826-T, 826-U, 826-V, 826-W, 826-X, and 826-Y, for identification.)

By Mr. Wright:

Q. Mr. Depue, I show you documents marked for identification as Commission's Exhibits 826-A through 826-Y, and ask you to state what they are.

A. Each of these sheets sets forth supplemental information obtained from the invoices referred to, and likewise referred to on each of the original exhibits previously entered in the record, which is shown at the top of each of these sheets, and the supplemental information—

Mr. Hinds: (Interposing.) Pardon me, what company is he referring to?

Mr. Wright: Sherwin-Williams.

The Witness: Sherwin-Williams. This supplemental information shows the order number and the date, or the date that the orders were entered by the company, or the date on which the goods were shipped, and also shows any references on these invoices to contracts, by number or date.

1503 Each of these sheets covers a particular exhibit, referred to at the top.

By Mr. Wright:

Q. In other words, this Commission's exhibit for identification, 826-B, refers to the transactions on Commission's Exhibit 794-C?

A. That is right.

Q. And that applies to all the other sheets in the exhibit?

A. Yes. Each of them mentions the previous exhibit, for convenience of reference.

Q. Did you enter on these sheets, Mr. Depue, all of the information which appeared on the invoices of Sherwin-Williams, listed there, regarding the dates of orders and shipments and regarding any contracts that it might have obtained?

A. Yes, that is true.

Mr. Wright: Your Honor, I offer Commission's Exhibits 826-A through 826-Y in evidence.

Trial Examiner Norwood: Any objection?

Mr. Welch: Your Honor, we assume that the offer of these exhibits is limited to the same purpose as the exhibits with which they are connected, to wit, Commission's Exhibit 794, and so on?

Mr. Wright: That is true.

Mr. Welch: That being true, we have only the same
objection that we have always had to the basic exhibit,
1504 to which this is a supplement.

Trial Examiner Norwood: Yes.

Mr. Welch: We have no different objection, other than that.

Mr. Wright: I would like to say right now, I do not mean to modify or limit in any way the basic exhibit to which these refer, in this instance, Commission's Exhibit 794, by my limitation of the offer of these exhibits.

Mr. Welch: It was my understanding that Exhibit 794 was offered for the purpose of proving certain specific things, and that this is offered in continuation and supplemental of that, and for no other purpose.

Mr. Wright: That is true.

Mr. Welch: Off the record, if you please.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: Your Honor, I will temporarily withdraw my offer of these exhibits in evidence.

Trial Examiner Norwood: Yes.

Mr. Wright: I want to have these marked Commission's Exhibits 827-A through 827-Z.

(The documents referred to were marked Commission's
Exhibits 827-A, 827-B, 827-C, 827-D, 827-E, 827-F, 827-G,
827-H, 827-I, 827-J, 827-K, 827-L, 827-M, 827-N, 827-O,
1505 827-P, 827-Q, 827-R, 827-S, 827-T, 827-U, 827-V, 827-W,
827-X, 827-Y, and 827-Z, for identification.)

By Mr. Wright:

Q. Mr. Depue, I show you documents marked for identification as Commission's Exhibits 827-A through 827-Z, and ask you to state what they are.

Mr. Hinds: Will you please state what respondents it refers to?

Mr. Wright: Anaconda.

The Witness: These sheets contain supplemental information obtained from the invoices of the International Smelting & Refining Company, listed on the previous exhibits, which are referred to on the top of each of these sheets, and the supplemental information includes the order number and date, if they appeared on the invoices; likewise, the date shipped, if they appeared, and any references to contracts by number or date, which appeared on the invoices listed on each of these sheets.

It all pertains to the order of shipments.

By Mr. Wright:

Q. Was all this information obtained from the records of the International Smelting & Refining Company?

A. Yes, from their invoices referred to on each of these sheets.

Q. I call your attention to the initials on sheets
1506 827-U, 827-V, and 827-W, "F. McM."

A. Those are Mr. McManus' initials. Where it says "CHD" they are mine. That indicates which one of us elicited this information from the invoices.

Q. Was all of the tabulated material listed in there either compiled directly by you or under your direction?

A. Yes.

Mr. Wright: Your Honor, I offer Commission's Exhibits 827-A through 827-Z in evidence.

Trial Examiner Norwood: Any objection?

Mr. Gardiner: Your Honor, there is no objection to the admission of these, with the exception I should like the record to show that the objection made to the offer of the original exhibits to which these refer applies to these as well.

Trial Examiner Norwood: Yes. Any further objection? If not, objection overruled. The exhibits are received for the purposes stated.

(The documents referred to, heretofore marked for identification Commission's Exhibits 827-A, 827-B, 827-C, 827-D, 827-E, 827-F, 827-G, 827-H, 827-I, 827-J, 827-K, 827-L, 827-M, 827-N, 827-O, 827-P, 827-Q, 827-R, 827-S, 827-T, 827-U, 827-V, 827-W, 827-X, 827-Y, and 827-Z, were received in evidence.

Mr. Wright: I want to have these marked Com-
1507 mission's Exhibits 828-A through 828-Z-143, for
identification.

(The documents referred to were marked Commission's Exhibits 828-A, 828-B, 828-C, 828-D, 828-E, 828-F, 828-G, 828-H, 828-I, 828-J, 828-K, 828-L, 828-M, 828-N, 828-O, 828-P, 828-Q, 828-R, 828-S, 828-T, 828-U, 828-V, 828-W,

828-X, 828-Y, 828-Z, 828-Z-1, 828-Z-2, 828-Z-3, 828-Z-4, 828-Z-5, 828-Z-6, 828-Z-7, 828-Z-8, 828-Z-9, 828-Z-10, 828-Z-11, 828-Z-12, 828-Z-13, 828-Z-14, 828-Z-15, 828-Z-16, 828-Z-17, 828-Z-18, 828-Z-19, 828-Z-20, 828-Z-21, 828-Z-22, 828-Z-23, 828-Z-24, 828-Z-25, 828-Z-26, 828-Z-27, 828-Z-28, 828-Z-29, 828-Z-30, 828-Z-31, 828-Z-32, 828-Z-33, 828-Z-34, 828-Z-35, 828-Z-36, 828-Z-37, 828-Z-38, 828-Z-39, 828-Z-40, 828-Z-41, 828-Z-42, 828-Z-43, 828-Z-44, 828-Z-45, 828-Z-46, 828-Z-47, 828-Z-48, 828-Z-49, 828-Z-50, 828-Z-51, 828-Z-52, 828-Z-53, 828-Z-54, 828-Z-55, 828-Z-56, 828-Z-57, 828-Z-58, 828-Z-59, 828-Z-60, 828-Z-61, 828-Z-62, 828-Z-63, 828-Z-64, 828-Z-65, 828-Z-66, 828-Z-67, 828-Z-68, 828-Z-69, 828-Z-70, 828-Z-71, 828-Z-72, 828-Z-73, 828-Z-74, 828-Z-75, 828-Z-76, 828-Z-77, 828-Z-78, 828-Z-79, 828-Z-80, 828-Z-81, 828-Z-82, 828-Z-83, 828-Z-84, 828-Z-85, 828-Z-86, 828-Z-87, 828-Z-88, 828-Z-89, 828-Z-90, 828-Z-91, 828-Z-92, 828-Z-93, 828-Z-94, 828-Z-95, 828-Z-96, 828-Z-97, 828-Z-98, 828-Z-99, 828-Z-100, 828-Z-101, 828-Z-102, 828-Z-103, 828-Z-104, 828-Z-105, 828-Z-106, 828-Z-107, 828-Z-108, 828-Z-109, 828-Z-110, 828-Z-111, 828-Z-112, 828-Z-113, 828-Z-114, 828-Z-115, 828-Z-116,
1508 828-Z-117, 828-Z-118, 828-Z-119, 828-Z-120, 828-Z-121,
828-Z-122, 828-Z-123, 828-Z-124, 828-Z-125, 828-Z-126, 828-Z-127, 828-Z-128, 828-Z-129, 828-Z-130, 828-Z-131, 828-Z-132, 828-Z-133, 828-Z-134, 828-Z-135, 828-Z-136, 828-Z-137, 828-Z-138, 828-Z-139, 828-Z-140, 828-Z-141, 828-Z-142, 828-Z-143 for identification.)

By Mr. Wright:

Q. Mr. Depue, I hand you herewith Commission's Exhibits for identification 828-A through 828-Z-143, and ask you to identify them.

Mr. Hinds: Please state what respondent you refer to in each case.

Mr. Wright: National Lead Company.

The Witness: These sheets contain supplemental information obtained from invoices of the National Lead Company, which appeared on the exhibits referred to at the top of each sheet. This supplemental information pertains to the order number, the date, or the date of shipment; or to contracts, as such information appeared on the invoices.

By Mr. Wright:

Q. Was this exhibit prepared entirely by you or under your direction, Mr. Depue?

A. Yes.

Q. I call your attention to the initials, "JSK" on
1509 sheet 828-Z-131.

A. Well, those are the initials of Mr. Keller, but it was all done under my direction.

Q. Were the invoices from which you filed this information furnished you by the National Lead Company?

A. Yes.

Q. And the transactions listed on the pages of this exhibit refer to corresponding transactions listed on the pages of Commission's Exhibit 752, is that correct?

A. Precisely. One sheet for each previous exhibit.

Mr. Wright: Your Honor, I offer Commission's Exhibits 828-A through 828-Z-143 in evidence.

Trial Examiner Norwood: Any objection?

Mr. Ewing: I would like the record to show an objection to the offer of these exhibits on all of the grounds heretofore entered in connection with the exhibits to which these refer, and I would also like to ask counsel for the Commission if my understanding is correct that this offer is for the limited purposes heretofore indicated in connection with similar exhibits introduced this morning.

Mr. Wright: It is so limited.

Mr. Ewing: And I would further object to the extent that the exhibits, or any portion thereof, appear to contain a characterization of the witness; as, for example, the
second sheet, which has apparently a photostat
1510 numbered 90 on it. There is a note at the bottom
stating,

"The above invoices purport to cover shipments from consigned stocks during the months in which billed, though the invoices are dated before the end of the month."

My objection is to any conclusion or characterization that appears on these exhibits.

Trial Examiner Norwood: Would not that be the avoidance of an ultimate conclusion there?

Mr. Ewing: Well, it could be interpreted either way. It might be expressing a doubt as to whether it was a shipment from consigned stock, or it might be a careful attempt not to commit themselves one way or the other.

Trial Examiner Norwood: That would be a conclusion, wouldn't you say?

Mr. Wright: Your Honor, in view of the limited purpose for which the offer is made, I do not believe the objection should be given any weight. The offer is for the purpose of showing as much information as is possible about the order dates, and the shipping dates, and any prior arrangements that might have been referred to on the invoices. I certainly am not going to rely on any notes on there to prove anything regarding the nature and function of consignment contracts.

Trial Examiner Norwood: Objection overruled, 1511 and the exhibits are received for the purposes stated.

(The documents referred to, heretofore marked for identification as COMMISSION'S EXHIBITS 828-A, 828-B 828-C, 828-D, 828-E, 828-F, 828-G, 828-H, 828-I, 828-J, 828-K, 828-L, 828-M, 828-N, 828-O, 828-P, 828-Q, 828-R, 828-S, 828-T, 828-U, 828-V, 828-W, 828-X, 828-Y, 828-Z, 828-Z-1, 828-Z-2, 828-Z-3, 828-Z-4, 828-Z-5, 828-Z-6, 828-Z-7, 828-Z-8, 828-Z-9, 828-Z-10, 828-Z-11, 828-Z-12, 828-Z-13, 828-Z-14, 828-Z-15, 828-Z-16, 828-Z-17, 828-Z-18, 828-Z-19, 828-Z-20, 828-Z-21, 828-Z-22, 828-Z-23, 828-Z-24, 828-Z-25, 828-Z-26, 828-Z-27, 828-Z-28, 828-Z-29, 828-Z-30, 828-Z-31, 828-Z-32, 828-Z-33, 828-Z-34, 828-Z-35, 828-Z-36, 828-Z-37, 828-Z-38, 828-Z-39, 828-Z-40, 828-Z-41, 828-Z-42, 828-Z-43, 838-Z-44, 828-Z-45, 828-Z-46, 828-Z-47, 828-Z-48, 828-Z-49, 828-Z-50, 828-Z-51, 828-Z-52, 828-Z-53, 828-Z-54, 828-Z-55, 828-Z-56, 828-Z-57, 828-Z-58, 828-Z-59, 828-Z-60, 828-Z-61, 828-Z-62, 828-Z-63, 828-Z-64, 828-Z-65, 828-Z-66, 828-Z-67, 828-Z-68, 828-Z-69, 828-Z-70, 828-Z-71, 828-Z-72, 828-Z-73, 828-Z-74, 828-Z-75, 828-Z-76, 828-Z-77, 828-Z-78, 828-Z-79 828-Z-80, 828-Z-81, 828-Z-82- 828-Z-83, 828-Z-84, 828-Z-85, 828-Z-86, 828-Z-87, 828-Z-88, 828-Z-89, 828-Z-90, 828-Z-91, 828-Z-92, 828-Z-93, 828-Z-94, 828-Z-95, 828-Z-96, 1512 828-Z-97, 828-Z-98, 828-Z-99, 828-Z-100, 828-Z-101, 828-Z-102, 828-Z-103, 828-Z-104, 828-Z-105, 828-Z-106, 828-Z-107, 828-Z-108, 828-Z-109, 828-Z-110, 828-Z-111, 828-Z-112, 828-Z-113, 828-Z-114, 828-Z-115, 828-Z-116, 828-Z-117, 828-Z-118, 828-Z-119, 828-Z-120, 828-Z-121, 828-Z-122, 828-Z-123, 828-Z-124, 828-Z-125, 828-Z-126, 828-Z-127, 828-Z-128, 828-Z-129, 828-Z-130, 828-Z-131, 828-Z-132, 828-Z-133, 828-Z-134, 828-Z-135, 828-Z-136, 828-Z-137, 828-Z-138, 828-Z-139, 828-Z-140, 828-Z-141, 828-Z-142, 828-Z-143, were received in evidence.)

Mr. Wright: Your Honor, I would like to have these documents marked for identification as Commission's Exhibits 835-A through 835-Z-21.

(The documents referred to were marked as Commission's Exhibits 835-A, 835-B, 835-C, 835-D, 835-E, 835-F, 835-G, 835-H, 835-I, 835-J, 835-K, 835-L, 835-M, 835-N, 835-O, 835-P, 835-Q, 835-R, 835-S, 835-T, 835-U, 835-V, 835-W, 835-X, 835-Y, 835-Z, 835-Z-1, 835-Z-2, 835-Z-3, 835-Z-4, 835-Z-5, 835-Z-6, 835-Z-7, 835-Z-8, 835-Z-9, 835-Z-10, 835-Z-11, 835-Z-12, 835-Z-13, 835-Z-14, 835-Z-15, 835-Z-16, 835-Z-17, 835-Z-18, 835-Z-19, 835-Z-20, and 835-Z-21, for identification.)

Trial Examiner Norwood: We will take a five-minute recess.

1513 (Whereupon, a short recess was taken.)

Trial Examiner Norwood: Go ahead.

By Mr. Wright:

Q. Mr. Depue, I show you documents marked Commission's Exhibits 835-A through 835-Z-21, and ask you to state what they are.

A. Well, these sheets contain supplemental information with respect to the date of the order or the number of the order, or the date it was entered, or the date the goods were shipped, and any references which appeared on the contracts, the number or date of any contract. Each of these sheets refers to the invoices which appeared on certain previous exhibits, which are shown at the top of each of these sheets.

The information was all obtained from the invoices of The Glidden Company, or information of this nature which was furnished by them with respect to the invoices and orders.

Q. Now, I show you Commission's Exhibit 835-B, and the information which appears under the columns headed, "Date," and "Entered," and "Shipped," with reference to the customer's order. Who filled in that information?

A. Well, I did, or one of the men working under my direction. Not all the sheets were initialed.

Q. I call your attention to the fact that the sheets under Commission's Exhibits 835-B through 835-S relate
1514 to transactions from the Cleveland branch of The Glidden Company. Did you enter the material under those three columns as to the sheets from the Cleveland branch, and also the information appearing under "Contracts and other references," on those sheets?

A. I do not see the words "Cleveland branch." Where are they?

Q. It is under this heading (indicating).

A. Well, if my memory serves me right, these references were to previous Exhibits 772 to 772-S, did show information which indicated they emanated from the Cleveland branch.

Q. Mr. Depue, were the invoices from the Cleveland branch ever supplied to you for the purpose of entering or information?

Mr. Welch: You mean the supplemental evidence?

Mr. Wright: The supplemental evidence, data or information, appearing through 835-B through 835-S.

The Witness: Now, if my memory serves me right, we were furnished with excerpts of the invoices instead of the invoices themselves.

By Mr. Wright:

Q. Was that true as to the Cleveland branch?

A. No, I think as far as the Cleveland branch is concerned, we were furnished the invoices, and so far as— well, we haven't come to that yet. Is this part of the exhibit?

Q. This is part of the exhibit, the portion from T through.

A. Well, to the best of my memory, those which
1515 purport to emanate from the Cleveland branch, we
had invoices for, and as for those which came from the Houston lead company, I think we were furnished with excerpts of invoices. We were furnished with either invoices or excerpts therefrom by the companies, or any of them. I think one batch was not sent in here, because they did not want to remove them from their files, and they sent us copies containing the pertinent information.

Mr. Wright: May we go off the record for a moment? I would like to confer with counsel.

Trial Examiner Norwood: Certainly. Off the record.

(Discussion off the record.)

Mr. Hinds: Inasmuch as Glidden does not question that the data has been correctly prepared, subject, of course, to correction if we find any errors, and since we do ~~not~~ question the competency of this document, will concede that it does show what it purports to show; namely, this supplemental information to supplement the original tabulation, tending to overcome to a considerable extent the original objection that I made, that it lacked the pertinent data.

Does that help you any?

Mr. Wright: Yes, sir.

By Mr. Wright:

Q. Mr. Depue, with reference to the sheets relating to the Cleveland office of Glidden, do you recall how 1516 that information was secured? Well, I withdraw the question.

Mr. Wright: In view of the statement of Mr. Hinds, I will now offer Commission's Exhibits 835-A through 835-Z-21 in evidence.

Mr. Hinds: I want to ask one or two questions.

Trial Examiner Norwood: Yes, go ahead.

Mr. Hinds: I notice that on sheets 27 and 37, and perhaps other title page sheets, you use the expression, "Houston Lead Sub. of Glidden." You understand that Houston Lead is a division of the Glidden Company, and not a subsidiary, do you not? I just want to have that corrected. You concede that, don't you?

Mr. Wright: I will concede that.

The Witness: The Houston Lead—

Mr. Hinds: (Interposing.) Never mind, he has conceded it.

I also note in the far right-hand column in many of these sheets there is a special consignment billing. Does that refer to a billing by Glidden to a consignee, or a billing by the consignee out of the consignment stock?

The Witness: It is a billing by the company to the consignee.

Mr. Hinds: In view of that statement, while not making any objection to the competency of the document, to the limited extent that it includes billings from 1517 Glidden to its own consignee, I object on the ground that the document obviously has no relevancy. Now, I believe it is not claimed as to each one of them that it constitutes an individual discrimination, and therefore, to the extent that it lists transactions which are not claimed to be discriminatory, I object on the ground of materiality. But, I shall not press that objection, if I can be assured that, in good season, so we could prepare our case, we shall be advised by the counsel for the Commission as to which items their claim is made on of discrimination.

Other than that, I have no objection to the offer.

Trial Examiner Norwood: Any further objection? What do you say, Mr. Wright?

Mr. Wright: We have been over the ground of Mr. Hinds' objection before, on numerous occasions. I submit this is supplementary information on a competent exhibit which is already in the record, and that it should be admitted on the limited proffer, which I might say is the same as that which related to the other previous exhibits of this same sort.

Mr. Hinds: This is the first opportunity I have had since the time when the tabulation was completed, to call for what a court of law would call a bill of particulars, so we would know what the issues are. I hereby make that request. I assume it will be complied with by the counsel. We have already made the request in writing several days ago.

1518 Trial Examiner Norwood: Objection overruled. The exhibits are received for the purposes mentioned. Commission's Exhibits 835-A through 835-Z-21, are received in evidence.

(The documents referred to, heretofore marked for identification as COMMISSION'S EXHIBITS 835-A, 835-B, 835-C, 835-D, 835-E, 835-F, 835,G, 835-H, 835-I, 836-J, 835-K, 835-L, 835-M, 835-N, 835-O, 835-P, 835-Q, 835-R, 835-S, 835-T, 835-U, 835-V, 835-W, 835-X, 835-Y, 835-Z, 835-Z-1, 835-Z-2, 835-Z-3, 835-Z-4, 835-Z-5, 835-Z-6, 835-Z-7, 835-Z-8, 835-Z-9, 835-Z-10, 835-Z-11, 835-Z-12, 835-Z-13, 835-Z-14, 835-Z-15, 835-Z-16, 835-Z-17, 835-Z-18, 835-Z-19, 835-Z-20, and 835-Z-21, were received in evidence.)

Mr. Wright: At this time, your Honor, I have no further questions of this witness. I would like to have him recalled later in the day.

Trial Examiner Norwood: Any cross-examination on anything up to this time?

Mr. Ewing: No cross.

Mr. Hinds: I will not have any cross.

Trial Examiner Norwood: Then you may be discharged, and you can call him again if you want to. Call your next witness.

Mr. Hinds: I would like to ask a question. Is it conceded that those items which are marked "Memo
1519 billings", that those are also billings to a consignee and not billings by the consignee? I should have included that in my other question.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Hinds: If and to the extent that "Memo billings" refers to a billing to an agent or consignee of The Glidden Company, I make the same objection as I did with respect to consignment billing.

Trial Examiner Norwood: The ruling will be the same.

Mr. Ewing: Counsel for the Commission has called my attention to the subpoena dated, I believe, June 26, 1946, or returnable on that date, in New York, served on National Lead Company, comprising, among other things, two specifications, and with respect to Specification 2 which relates to certain contracts referred to therein, I produce the original letter from Alexander and Green to Mr. Wright, dated July 26, 1946, which he has just handed to me, which relates to compliance by National Lead with Specification 2 of that subpoena. I also produce photostatic copies of the records and other papers referred to in that letter and submitted by National Lead in compliance with Specification 2 of that subpoena.

1520 I further produce a letter from Alexander and Green to Mr. Wright dated September 17, 1946 which has further reference to our letter of July 26, 1946, which letter of September 17, 1946 has just been handed to me by Mr. Wright.

Mr. Wright: Your Honor, I ask that the records produced under Specification 2 of the subpoena be marked for identification as Commission's Exhibits 834-A through 834-Z-14.

(The documents referred to were marked Commission's Exhibits 834-A, 834-B, 834-C, 834-D, 834-E, 834-F, 834-G, 834-H, 834-I, 834-J, 834-K, 834-L, 834-M, 834-N, 834-O, 834-P, 834-Q, 834-R, 834-S, 834-T, 834-U, 834-V, 834-W, 834-X, 834-Y, 834-Z, 834-Z-1, 834-Z-2, 834-Z-3, 834-Z-4, 834-Z-5, 834-Z-6, 834-Z-7, 834-Z-8, 834-Z-9, 834-Z-10, 834-Z-11, 834-Z-12, 834-Z-13 and 834-Z-14 for identification.)

Mr. Wright: I offer Commission's Exhibit 834-A through 834-Z-14 in evidence.

Trial Examiner Norwood: Any objection?

Now, what are these, Mr. Wright?

Mr. Wright: I might say that the purpose of the offer is to show the transactions by the National Lead Company and the records of transactions in lead pigments over the periods of time specified in those documents.

1521 Tral Examiner Norwood: Are these customer cards or account sheets?

Mr. Wright: Your Honor, at that point, I am not able to identify absolutely those documents. The subpoena does call for contracts. These were submitted by the National Lead Company in response to Specification 2 of the subpoena as contracts with those customers.

Mr. Ewing: They were submitted, if I might make a slight correction, as copies of records of the National Lead Company relating to contracts.

Trial Examiner Norwood: I see.

Mr. Ewing: The contracts either having been destroyed or being not found, with the exception of three which are on printed forms headed "Dry Pigment Contract." They are, all three, headed "Dry Pigment Contract", which may or may not be, as far as their form is concerned, contracts. In any event they are records.

We object to them on the ground that they are cumulative, irrelevant and immaterial, and because they relate to the years 1936 and 1937 or prior thereto, with the exception of one which appears to have been entered into January 2, 1942.

Mr. Wright: In that connection, your Honor, I will state that the complaint contains allegations regarding contracts for dry pigment entered into by these re-
1522 spondents, and since these documents were produced by the National Lead Company either as contracts or as records relating to contracts covering lead pigment during the period of time covered by the complaint, they certainly would be relevant and competent. I assume that counsel does not mean to object because of the fact that they are copies rather than original documents.

Mr. Ewing: Oh, no.

Trial Examiner Norwood: Well, what do you want to show by these?

Mr. Wright: For one thing, I want to show the return that was made on the subpoena calling for contracts by the National Lead Company over these periods of time. Secondly, I want to show what appears on those documents regarding the transactions in the sale and shipment of lead pigment and prices and arrangements so far as they appear on those records.

Mr. Ewing: Of course, the documents show whatever information appears on them, but there is nothing either in the documents themselves or in the offer or in counsel's statement just made to indicate for what purpose they are offered.

Mr. Wright: The purpose for which they are offered
is to show the contractual relationship which existed be-
tween those customers and the National Lead Com-
1523 pany at those times, and insofar as it appears on the
documents, the shipments that were made under those
contracts and the prices that were charged.

Mr. Ewing: The existence of a contractual relationship or the existence of any particular price is wholly immaterial and irrelevant, unless it is related to some particular charge made by the Commission here.

Mr. Wright: Certainly the complaint covers the quoting and charging of uniform delivered prices.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: I shall overrule the objection and receive the exhibits marked 834-A to 834-Z-14.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 834-A, 834-B, 834-C, 834-D, 834-E, 834-F, 834-G, 834-H, 834-I, 834-J, 834-K, 834-L, 834-M, 834-N, 834-O, 834-P, 834-Q, 834-R, 834-S, 834-T, 834-U, 834-V, 834-W, 834-X, 834-Y, 834-Z, 834-Z-1, 834-Z-2, 834-Z-3, 834-Z-4, 834-Z-5, 834-Z-6, 834-Z-7, 834-Z-8, 834-Z-9, 834-Z-10, 834-Z-11, 834-Z-12, 834-Z-13, and 834-Z-14, were received in evidence.)

Mr. Wright: Your Honor, counsel for Anaconda Cop-
per Mining Company and International Smelting and Re-
fining Company has, I believe, a statement that he wishes
to make regarding the business of the Anaconda Com-
1524 pany and International Smelting and Refining.

Trial Examiner Norwood: Go ahead.

Mr. Gardiner: If your Honor please—

Trial Examiner Norwood: Mr. Gardiner.

Mr. Gardiner: At the time of the Cleveland hearing respondents were requested to produce certain witnesses. They were not to be produced at this particular time. At the discretion of the attorney for the Commission it was agreed if we would make a statement as to the information that they expected to receive from these witnesses when they testified, that we would be excused from producing them. Such a statement was agreed upon. The attorney for the Commission outlined the material, or outlined the series of questions the answers to which would give them the desired information. A memorandum was worked up answering those questions, submitted to the attorney for the Commission, and following suggestions certain revisions were made, and the final draft of that memorandum has been prepared. Now, I have that here. This memorandum is on the facts covering the production of lead pigments at East Chicago, Indiana, by the International Smelting and Refining Company and its predecessors. It could be read into the record, if that is the pleasure of the Examiner.

Trial Examiner Norwood: Or make it an exhibit.

Mr. Wright: Off the record.

1525 (Discussion off the record.)

Trial Examiner Norwood: Will it appear there that you stipulate that the witnesses would swear to that if produced?

Mr. Wright: As I understand it, this is a statement of facts by the Anaconda Company and the International Smelting and Refining Company regarding their business.

Mr. Gardiner: That is correct.

Trial Examiner Norwood: That is a stipulation of facts?

Mr. Gardiner: Yes.

Mr. Wright: It is a unilateral statement, your Honor.

Trial Examiner Norwood: I think exhibits are just as safe as the other, and it would save the respondents some money.

Mr. Gardiner: Well, we are certainly agreeable to its being introduced in any manner desired, but that would seem to be the way to do it.

Trial Examiner Norwood: The document just described, consisting of the statement of facts, which is agreed to by counsel, as produced and described by him, may be received as Commission's Exhibits 836-A through 836-N.

(The document referred to was marked as COMMISSION'S EXHIBIT 836-A, 836-B, 836-C, 836-D, 836-E,
1526 836-F, 836-G, 836-H, 836-I, 836-J, 836-K, 836-L, 836-M
and 836-N, and received in evidence.)

Mr. Wright: Mr. Gardiner, am I correct in my understanding that Exhibit 836-A through 836-N comprises a statement of facts by the Anaconda Copper Mining Company and International Smelting and Refining Company for the purpose of this proceeding?

Mr. Gardiner: Yes, that is correct.

Mr. Wright: And if witnesses were called from among the officials of those respondents they would testify to this effect, if they had appeared on the stand?

Mr. Gardiner: That is correct.

Mr. Wright: May we have a short recess?

Trial Examiner Norwood: Yes.

(A short recess was taken.)

Mr. Wright: Your Honor, I would like to request that
these documents be marked for identification as Commis-
sion's Exhibits 833-A through 833-Z-100. These documents
are photostatic copies of the first page of various invoices
of the Sherwin-Williams Company which are listed in the
tabulation which is Commission's Exhibit 794, with sub-
numbers. In some instances, such as Commission's Ex-
hibit (for identification) 833-Z-25-A, the documents are
photostatic copies of slips prepared by the Sherwin-
Williams Company and attached to the invoices show-
1527 ing the gross weight of the lead pigments involved in
this transaction, the freight rate applicable to the lead
pigments and the carrier:

(The documents referred to were marked Commission's Exhibit 833-A, 833-B, 833-C, 833-D, 833-E, 833-F, 833-G, 833-H, 833-I, 833-J, 833-K, 833-L, 833-M, 833-N, 833-O, 833-P, 833-Q, 833-R, 833-S, 833-T, 833-U, 833-V, 833-W, 833-X, 833-Y, 833-Z, 833-Z-1, 833-Z-2, 833-Z-3, 833-Z-4, 833-Z-5, 833-Z-6, 833-Z-7, 833-Z-8, 833-Z-9, 833-Z-10, 833-Z-11, 833-Z-12, 833-Z-13, 833-Z-14, 833-Z-15, 833-Z-16, 833-Z-17, 833-Z-18, 833-Z-19, 833-Z-20, 833-Z-21, 833-Z-22, 833-Z-23, 833-Z-24, 833-Z-25, 833-Z-26, 833-Z-27, 833-Z-28, 833-Z-29, 833-Z-30, 833-Z-31, 833-Z-32, 833-Z-33, 833-Z-34, 833-Z-35, 833-Z-36, 833-Z-37, 833-Z-38, 833-Z-39, 833-Z-40, 833-Z-41, 833-Z-42, 833-Z-43, 833-Z-44, 833-Z-45, 833-Z-46, 833-Z-47, 833-Z-48, 833-Z-49, 833-Z-50, 833-Z-51, 833-Z-52, 833-Z-53, 833-Z-54, 833-Z-55, 833-Z-56, 833-Z-57, 833-Z-58, 833-Z-59, 833-Z-60, 833-Z-61, 833-Z-62, 833-Z-63, 833-Z-64, 833-Z-65, 833-Z-66, 833-Z-67, 833-Z-68, 833-Z-69, 833-Z-70, 833-Z-71, 833-Z-72, 833-Z-73, 833-Z-74, 833-Z-75, 833-Z-76, 833-Z-77, 833-Z-78, 833-Z-79, 833-Z-80, 833-Z-81, 833-Z-82, 833-Z-83, 833-Z-84, 833-Z-85, 833-Z-86, 833-Z-87, 833-Z-88, 833-Z-89, 833-Z-90, 833-Z-91, 833-Z-92, 833-Z-93, 833-Z-94, 833-Z-95, 833-Z-96, 833-Z-97, 833-Z-98, 833-Z-99, 833-Z-100, for identification.)

1528 Mr. Wright: I would also like to have marked for
identification a document as Commission's Exhibit

837, which is a rough index prepared by me showing the invoice numbers of the documents comprising Commission's Exhibit 833, with subnumbers, keying them wherever possible with the page number of Commission's Exhibit 794 in which the transactions are recorded.

Also on Commission's Exhibit 837 for identification is a list of the number of pages comprising the entire invoice, since the document in Commission's Exhibit 833 with subnumbers consists only of the first sheet of an invoice of, in many instances, more than one sheet.

(The document referred to was marked Commission's Exhibit 837 for identification.)

Mr. Wright: I would like to ask counsel for the Sherwin-Williams Company if he will stipulate that the document comprising Commission's Exhibits 833 with subnumbers are reproductions of the original records of the Sherwin-Williams Company, original invoices, and also as to the identity of Commission's Exhibit 837 which was prepared by Commission's counsel merely to serve as an index to the document in Commission's Exhibit 833 with subnumbers?

Mr. Welch: Counsel for Sherwin-Williams is willing to so stipulate, and in connection with the offer of these exhibits wishes to make an additional statement.

1529 Counsel for Sherwin-Williams states that the policy of the company with respect to freight is as was stated by the witness S. B. Coolidge at pages 1314 to 1332, inclusive, of the transcript in this case, but that upon further investigation by the witness Coolidge and other officials of the company, it has been ascertained that various divisions of the company have in fact sold and shipped various lead pigments to customers located at destinations other than those listed on Commission's Exhibits 594-A and -B, upon a freight prepaid, freight allowed or freight equalized basis, so that some customers located at points other than those listed on said Commission's Exhibit 594-A and -B have not in fact been sold at a delivered price derived by adding to the card price the freight from one of the listed points on Commission's Exhibit 594-A and -B to the destination, and consequently the witness Coolidge has requested that his testimony be corrected to conform to the foregoing statement.

It is further stated that these practices were not known to the witness Coolidge or to other executive officers of

the Sherwin-Williams Company at the time of his testimony in this matter on July 25, 1946, and that such practices have been at variance with the executive policy of the company, as evidenced by copies of price cards nad price announcements, which have been introduced in evi-
1530 dence as Commission's exhibits.

It is further stated that the photostatic copies of the invoices which are now identified as Commission's Exhibits 833-A to 833-Z-100 are genuine, authentic reproductions of invoices or of one or more pages of invoices consisting of a number of pages, which have been retained by the Sherwin-Williams Company as records of the transactions to which they relate.

Counsel for the Sherwin-Williams Company waives objection, therefore, to the offer in evidence of Commission's Exhibits 833-A through 833-Z-100, and Commission's Exhibit 837.

Mr. Wright: I offer the documents marked Commission's Exhibits for identification 833-A through 833-Z-100 and Commission's Exhibit 837 in evidence.

Mr. Welch: I take it, Mr. Wright, that it is understood between counsel for the Sherwin-Williams Company and counsel for the Commission that in the event some of the invoices in Commission's Exhibit 833-A through 833-Z-100 should show on their face that the shipment was not on an f. o. b basis, or not on a freight allowed basis or equalized basis, that that exhibit will not be so considered.

Mr. Wright: Off the record.

(Discussion off the record.)

Mr. Wright: Of course, the invoices in the exhibit could only show what they do show.

1531 Mr. Welch: That is right.

Mr. Wright: I haven't made any statement other than that.

Trial Examiner Norwood: Off the record just a minute.

(Discussion off the record.)

Trial Examiner Norwood: The objection is overruled and Commission's Exhibits 833-A through 833-Z-100 are received in evidence.

Mr. Welch: Your Honor, there was no objection to those exhibits. I would appreciate the record being corrected to that effect.

Trial Examiner Norwood: I think there was some sort of basic objection to all this material relating back to the receipt of the original invoices, or something.

Mr. Welch: I think there is a blanket objection to all, the same as the prior Exhibit 794—or whatever it was.

Trial Examiner Norwood: That is clear. Exhibits 833-A through 833-Z-100 are received in evidence.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 833-A, 833-B, 833-C, 833-D, 833-E, 833-F, 833-G, 833-H, 833-I, 833-J, 833-K, 833-L, 833-M, 833-N, 833-O, 833-P, 833-Q, 833-R, 833-S, 833-T, 833-U, 833-V, 833-W, 833-X, 833-Y,
1532 833-Z, 833-Z-1, 833-Z-2, 833-Z-3, 833-Z-4, 833-Z-5, 833-Z-6, 833-Z-7, 833-Z-8, 833-Z-9, 833-Z-10, 833-Z-11, 833-Z-12, 833-Z-13, 833-Z-14, 833-Z-15, 833-Z-16, 833-Z-17, 833-Z-18, 833-Z-19, 833-Z-20, 833-Z-21, 833-Z-22, 833-Z-23, 833-Z-24, 833-Z-25, 833-Z-26, 833-Z-27, 833-Z-28, 833-Z-29, 833-Z-30, 833-Z-31, 833-Z-32, 833-Z-33, 833-Z-34, 833-Z-35, 833-Z-36, 833-Z-37, 833-Z-38, 833-Z-39, 833-Z-40, 833-Z-41, 833-Z-42, 833-Z-43, 833-Z-44, 833-Z-45, 833-Z-46, 833-Z-47, 833-Z-48, 833-Z-49, 833-Z-50, 833-Z-51, 833-Z-52, 833-Z-53, 833-Z-54, 833-Z-55, 833-Z-56, 833-Z-57, 833-Z-58, 833-Z-59, 833-Z-60, 833-Z-61, 833-Z-62, 833-Z-63, 833-Z-64, 833-Z-65, 833-Z-66, 833-Z-67, 833-Z-68, 833-Z-69, 833-Z-70, 833-Z-71, 833-Z-72, 833-Z-73, 833-Z-74, 833-Z-75, 833-Z-76, 833-Z-77, 833-Z-78, 833-Z-79, 833-Z-80, 833-Z-81, 833-Z-82, 833-Z-83, 833-Z-84, 833-Z-85, 833-Z-86, 833-Z-87, 833-Z-88, 833-Z-89, 833-Z-90, 833-Z-91, 833-Z-92, 833-Z-93, 833-Z-94, 833-Z-95, 833-Z-96, 833-Z-97, 833-Z-98, 833-Z-99 and 833-Z-100, were received in evidence.)

Mr. Wright: Your Honor, was Exhibit 837 received?

Trial Examiner Norwood: Yes, it is now received.

Commission's Exhibit 837 is also received.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT 837, was received in evidence.)

Mr. Wright: Your Honor, the next witness was
1533 called for 2 o'clock.

I suggest we take a recess now until that hour.

Trial Examiner Norwood: Is there any objection? If not, we will recess until 2 o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p. m., of the same day.)

1534 Afternoon Session.

2:00 p. m.

Trial Examiner Norwood: Come to order, please.
Mr. Wright: I will call Miss Meyer.

HELENA MEYER was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Miss Meyer, will you state your name and position?

A. I am Helena Meyer, Mineral Economist of the Bureau of Mines, United States Department of Interior.

Q. What are your duties in that position, Miss Meyer, generally?

A. In connection with lead and zinc pigments and other things, too. We compile figures from individual companies, confidential figures, which we summarize and distribute publicly.

Q. Miss Meyer, you say you receive these figures. Do they come from the producers?

A. They come directly from the producers.

Q. Lead and zinc pigments. Do you check the statistics on a monthly basis or an annual basis?

A. In connection with lead pigments, on an annual basis only.

Q. I see. Are reports made of production?

1535 A. Production.

Q. Shipments?

A. Yes, sir, and distribution.

Q. Do they show the value of products?

A. Yes.

Q. Does the Bureau make any publication of reports based on these statistics?

A. Yes. The principal publication is Minerals Yearbook.

Q. Does that book have a chapter devoted to lead and zinc pigments?

A. Yes, that is right.

Q. Does that chapter outline all the statistics and information concerning that industry?

A. Well, we try to have it do that.

Q. I show you a document and ask you if you recognize that as the Minerals Yearbook for 1942.

A. That looks like it all right.

Q. I call your attention to page 205 reading "Lead and zinc pigments and zinc salts", by H. M. Meyer and A. W. Mitchell. Are you the H. M. Meyer whose name appears there?

A. Yes.

Q. Miss Meyer, how long has the Bureau of Mines been collecting such statistics from the producers?

A. I think it is 1880. However, we have some figures earlier than that that were compiled from the best sources available.

1536 The Bureau of Mines has been in existence since 1910. The predecessor was the U. S. Geological Survey, as far as this information was concerned.

Q. There has been a continuous collection by one agency over that period of time?

A. That is right.

Q. I direct your attention to this document and ask you if you recognize that as a copy of the 1931 Minerals Resources of the United States, Part 1, Metals?

A. Yes, that is the predecessor of the Minerals Yearbook.

Q. I direct your attention to pages 220 and 221 of that volume at the section headed "Producers and Plants". Under the heading "White Lead" there is a list of companies. Under "Lead Sulphate" there is another list, and under "Red Lead" there is another list, and under "Orange Mineral" there is another list, and under "Litharge" there is another list.

Does the Bureau have records showing what companies have reported over a considerable period of time?

A. Yes, it does.

Q. Are you thoroughly familiar with those records yourself?

A. I think I am.

Q. Miss Meyer, do you recognize the Carter White Lead Company as having reported production or shipment of white lead?

Mr. Ewing: I object to that. Individual reports are
1537 confidential, as I understand it.

Trial Examiner Norwood: Well, he just asked if they did report.

Mr. Wright: Yes, sir, Your Honor. I wasn't intending by that question or do not intend by any subsequent questions to bring out any confidential statistics reported by any producers.

Trial Examiner Norwood: I don't believe this witness would tell you, anyway.

Mr. Wright: This witness has already identified a list of producers as published in Minerals Resources.

Trial Examiner Norwood: Objection overruled.

The Witness: Carter White Lead Company, I think, was the name of the company sending in reports.

By Mr. Wright:

Q. Do the records show when that company started sending reports?

A. I don't know when they started. Our records show them as having reported in 1903.

Q. When was your last report from that company?

A. The last report was 1920.

Q. Do you recall what plants that company reported?

A. We have the location only of Chicago, Illinois.

Q. Do the records of the Bureau indicate that Wetherill & Bros. of Philadelphia reported production or ship-
1538 ment of lead pigments?

A. Yes, they have, too.

Q. When did that company start reporting?

A. This may not be the original. Our records show only back to 1903 in each case.

Q. They did report in 1903?

A. Yes, over the period of 1903 to 1933.

Q. What pigments were reported as having been produced?

A. These pigments may not have been reported for each year, but over the period there was reported white lead, litharge, and orange mineral.

Q. Now, going back to Carter—what pigments were reported?

A. White lead.

Q. Your records show the reporting of production of lead pigment by Evans Lead Company?

A. Yes, beginning with 1922.

Q. And going over what period of time?

A. As Evans Lead only to 1927, and then Evans-Wallower, and that covered 1930.

Q. Up through 1930?

A. Yes.

Q. Now, have any of those companies reported as separate individual entities since those dates?

A. No, they have not.

Q. What pigments did Evans and Evans-Wallower report?

1539 A. Over the period, red lead, litharge, and orange mineral. It is possible in some of these years there was no production reported or maybe only purchases, but the record covers that period.

Q. In the chapter on Lead and Zinc Pigments and Zinc Salts, appearing in the Minerals Yearbook for various years, is it customary for the Bureau to include a section on prices of lead pigment for the year?

A. Yes.

Q. From what source does the Bureau get the price data on lead pigments?

A. I don't know that the list goes all the way back, but for a number of years we have been using Oil, Paint and Drug Reporter.

Q. That is the trade magazine, Oil, Paint and Drug Reporter of New York?

A. Yes.

Q. Now, Miss Meyer, have you also worked at times on the sections of the Minerals Yearbook and Minerals Resources regarding pig lead?

A. Yes, I have.

Q. Do they show similar statistics on production and prices of pig lead?

A. Yes.

Q. I believe you already referred to this Minerals
1540 Yearbook for 1942. I call your attention to the section on Lead on page 173 entitled "Average Monthly and Yearly Quoted Prices of Lead at St. Louis, New York, and London, 1938 to 1942 in Cents per Pound".

Will you state what figures are reported continuously for each month from April through December of 1941 on page 173 of that book?

A. St. Louis or New York?

Q. New York.

A. You want me to read them all?

Q. From April on through to December, 1941.

A. April, 5.07.

Q. No, 1941.

A. I am sorry. April, 1941, 5.85 through December, 1941.

Q. That same price obtained?

A. Yes.

Q. How about the price at St. Louis in that period?

A. That is unchanged at 5.70.

Q. That is in cents per pound?

A. In cents per pound.

Mr. Wright: I have no further questions.

Trial Examiner Norwood: Cross-examine.

Mr. Ewing: No cross-examination.

Cross-Examination by Mr. Wood.

1541 Q. In respect to these reports in respect to which you have been testifying, do you have any reason to know that any of them are accurate?

A. That what?

Q. Do you have any reason to know that any of these reports in respect to which you have been testifying, that any of them are accurate?

A. That would depend on the companies, of course. We think that most of the reports we get are accurate.

Q. You think so?

A. Yes.

Q. But do you know whether any of them are accurate yourself?

A. I don't guess I do, no.

Mr. Wood: That is all.

Mr. Ewing: Your Honor, I move to strike all the testimony on the ground that the witness testified that she doesn't know whether they are accurate, and on the further ground that they are irrelevant and immaterial.

Mr. Wright: Your Honor, we have here an official of the Bureau of Mines who compiled statistics which were furnished on, I believe it was testified to, a purely voluntary basis, by the Respondents and other producers in this field; and no attempt was made to bring out the accuracy of any of the reports as to production.

The only testimony was as to the receipt of the 1542 reports by certain of the Respondents and how certain of the information was complied, and the effect of certain information on pig lead prices.

Trial Examiner Norwood: Well, Miss Meyer, could you verify any of these or does your department or division verify any of these or can you state that they are fairly reliable?

The Witness: We make every effort to check the information we receive on the basis of the best information we can get. We have every reason to think through much correspondence that the reports are accurate.

Mr. Wood: The witness has testified that she didn't know whether they are accurate or not. Her state of mind, whether she trusts people or believes people—that has nothing to do with the case.

Trial Examiner Norwood: Motion denied.

Mr. Wright: I have nothing further of this witness, Your Honor.

Trial Examiner Norwood: Is there anything further of this witness? If not, you are excused, Miss Meyer.

(Witness excused.)

Mr. Wright: May we take a five-minute recess, Your Honor?

Trial Examiner Norwood: Five-minute recess.

(A short recess was taken.)

1543. Mr. Wright: I would like to recall Mr. Depue to the stand.

Trial Examiner Norwood: Carl H. Depue recalled.

CARL DEPUE resumed the stand and testified further as follows:

Direct Examination by Mr. Wright.

Q. Mr. Depue, I believe we had reached a point in your testimony this morning where we were discussing Commission's Exhibit 826-A through Y. I believe it was discovered that there were one or two references to the corresponding pages of Exhibit 794, which had been omitted. Have you subsequently filled in the reference to Commission's Exhibit 794 in Commission's Exhibit 826?

A. Yes. One sheet refers to 794-K and another to 794-T. The 794-K is 826-I. 794-T is 826-P.

In those instances the letter following the 794 was missing.

Q. Now, as I uderstand your testimony, that exhibit comprises information taken off the original invoice records of the Sherwin-Williams Company about the transactions listed in Commission's Exhibit 794. Is that correct?

A. That is correct.

1544 Q. And if shows, does it, as far as it was able to be ascertained from those invoices, the date of the customer's order and whether or not the transaction related to any contract or special arrangement?

A. Yes, and if it showed the date of shipment, that is shown on these sheets.

Mr. Wright: Your Honor, I offer Commission's Exhibit 826-A through Y into evidence.

Trial Examiner Norwood: Any objection?

Mr. Welch: Your Honor, we have the same general objection that was had to 794 itself, but no further objection.

Trial Examiner Norwood: Received as marked. Objection overruled.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT 826-A, 826-B, 826-C, 826-D, 826-E, 826-F, 826-G, 826-H, 826-I, 826-J, 826-K, 826-L, 826-M, 826-N, 826-O, 826-P, 826-Q, 826-R, 826-S, 826-T, 826-U, 826-V, 826-W, 826-X and 826-Y was received in evidence.)

Mr. Wright: I have no further questions of this witness.

Mr. Welch: No questions.

Trial Examiner Norwood: You are excused.

(Witness excused.)

1545 Mr. Wright: I would like to ask counsel for Eagle-Picher if he is prepared to make a return to these subpoena duces tecum, which is returnable today.

Mr. Wood: Mr. Hayt and Mr. Zoller of the Eagle-Picher Company have come to Washington in order to save the whole group the trouble of coming to Cincinnati. They are offered as witnesses of Mr. Wright by his request and by agreement.

Mr. Wright: Your Honor, I would like to request that these documents be marked for identification as Commission's Exhibit 838-A through I.

Am I correct in my understanding, Mr. Wood, that these are the price cards which are returned in accordance with the subppena?

Mr. Wood: Yes, that is my understanding. Mr. Serviss produced those from the company records.

Trial Examiner Norwood: The exhibit will be marked for identification as requested.

(The documents referred to were marked COMMISSION'S EXHIBIT 838-A, 838-B, 838-C, 838-D, 838-E, 838-F, 838-G, 838-H and 838-I, for identification.)

Mr. Wright: Off the record, please.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: We will recess until 10:00 o'clock tomorrow morning.

(Whereupon, at 2:35 o'clock p. m., a recess was taken until 10:00 o'clock a. m. Thursday, October 3, 1946.)

1546 Room 332, Federal Trade Commission Bldg.,
Washington, D. C.,
Thursday, October 3, 1946.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., attorney for the Federal Trade Commission.

James T. Welch, Esq., (Davies, Richberg, Beebe, Busick & Richardson, 15th St., N. W., Washington, D. C.), attorney for Sherwin-Williams Company.

Henry E. Gardiner, Esq., (Chadbourne, Wallace, Park & Whiteside, 25 Broadway, New York, N. Y.,) attorney for Anaconda Copper Mining Company and International Smelting & Refining Company.

Richard Serviss, Esq., and Edmund P. Wood, Esq., attorneys for Eagle-Picher Lead Company and The Eagle-Picher Sales Company.

James D. Ewing, Esq. and E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), attorneys for National Lead Company.

Roger Hinds, Esq. (165 Broadway, New York, N. Y.), attorney for The Glidden Company.

1547 **PROCEEDINGS.**

Trial Examiner Norwood: Pursuant to adjournment on yesterday, the hearing in Docket 5253 is now reconvened; at 10 o'clock a. m., the 3rd day of October, 1946, in Room 332, Federal Trade Commission Building, Washington, D. C.

Enter the appearances.

(The appearances are as noted at the title page.)

Trial Examiner Norwood: Proceed.

Mr. Wright: I want to call Mr. Hayt.

WILLIAM H. HAYT, was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. State your name, please.

A. William H. Hayt.

Q. Mr. Hayt, what is your present occupation?

A. I am the general manager of the White Lead Division of the Eagle-Picher Company.

Q. When was your first employment with Eagle-Picher? Will you state that, and then give chronologically your services with the company up to the present time?

A. I was first employed by them in November, 1914. That was by the predecessor of the present company, 1548 the Picher Lead Company. I was originally salesman, and then a division sales manager, and then subsequently a division manager.

Q. Over what period of time were you division manager or division sales manager?

A. I was division sales manager from 1931 to about 1937, and division manager from 1937 up to the present time.

Q. Now, as division sales manager, what were your duties?

A. Well, I was responsible for the sales of certain of the products in what they call the Western Sales Division at that time.

Q. What products were those?

A. They consisted of white lead in oil and lead pigments and metal products.

Q. What did that Western Division consist of?

A. Roughly, the territory from Detroit to the Pacific Coast, and from Minneapolis to Kansas City.

Q. I take it, then, that you are thoroughly familiar with the practices in the lead pigment business, particularly white lead in oil, over a considerable period of time.

A. That is right.

Q. Mr. Hayt, I show you Commission's Exhibit 586, which has been identified as a map, showing zone boundaries of white lead in oil differentials supplied by you to Mr. Dunn, of the Federal Trade Commission, under date of January 1, 1937. Will you state what products 1549 have been sold by Eagle-Picher on the basis of that map?

A. Principally white lead in-oil and what we term dry products in kegs, which covers pigments such as red lead and litharge in packages, from 100 pounds down.

Q. In other words, keg products?

A. That is right.

Q. That would be pigments that you sell in 100-pound kegs, or 50-pound kegs, or 25-pound kegs?

A. 100-pound kegs or less.

Q. That would include red lead in-oil and dry red lead?

A. Yes.

Q. And litharge, that is always dry, is it not?

A. That is right.

Q. Does that include basic sulphate of lead?

A. Basic sulphate of lead was never sold.

Q. Basic carbonate, both dry and in-oil?

A. Basic carbonate.

Q. And was this zone map and differentials that are set forth on it; used by Eagle-Picher from 1937, January 1, 1937, on?

A. You mean was 1937 the beginning?

Q. Let me withdraw that question. Do you presently sell these products on the basis of similar zones and differentials?

Mr. Wood: I object to the question on the ground that the word "similar" makes the question indefinite.

1550 Mr. Wright: I will amend the question by substituting "same" for similar.

The Witness: Will you repeat the question, please?

By Mr. Wright:

Q. Do you now sell these products on the basis of the same zones and the same differentials?

A. Substantially so, yes.

Q. What differences are there?

A. At times the zones may be modified at borderlines, in order to meet the competitive situations.

Q. Will you state what modifications have been made since January 1, 1937?

A. No, I cannot, nor can I say definitely that there have been any since that period, but the zone map was always in more or less a state of flux.

Q. But you do not recall any since January 1, 1937?

A. I do not recall whether there have been any specific ones since then, no.

Q. Then it would be fair to state you sold on substantially that division of territories, and those differentials since that time?

A. With possibly some minor exceptions.

Q. Which you do not recall?

A. That is right.

1551 Q. Now, Mr. Hayt, for how long a time, prior to January 1, 1937, were those particular zones and those differentials employed by Eagle-Picher?

A. I think the zone system was established about 1933, but I am not sure of that.

Q. Do you recall what time in 1933?

A. No, I do not.

Q. Was it late in 1933?

A. No, I could not tell you. I was in Chicago at the time and was not responsible for the installation of the zone setup.

Q. Well, now, do you recall the zones and differentials that were employed in 1934?

A. Well, I can only say that I think they were substantially the same as this (indicating).

Q. There might have been some modifications?

A. The borderline points of certain towns would be in one zone at one time and another zone at another time.

Q. You stated that the zone system was first employed during 1933. What method of quoting did Eagle-Picher employ prior to 1933?

A. They had a rather elaborate system of what we called jobbing, and equalization points.

Q. How did you quote prices on those?

A. The jobbing points were set up where Eagle-Picher
had a jobber, and sales to any point other than that
1552 were equalized with the jobbing point. That is to say,
the distributor paid the freight from the jobbing
point, regardless of where the shipment might have
originated.

Q. And there were numerous jobbing points, were there?

A. That is right.

Trial Examiner Norwood: Were they credited to the jobber?

The Witness: Sometimes. It would all depend on whether at the jobbing point there was one jobber or more.

By Mr. Wright:

Q. Mr. Hayt, where does Eagle-Picher produce the white lead?

A. At Cincinnati, Ohio.

Q. That is the only production point of white lead?

A. Of the basic carbonate white lead.

Q. You stated you were in charge of white lead sales. Did that include basic carbonate, or does that also include lead sulphate?

A. I said I was general manager of the white lead division, and I was responsible for the production of all of the basic carbonate, but the sale of only the white lead in oil and products in kegs from 100 pounds down. The sale of the bulk basic carbonate is handled in another division of the company.

Q. I see. In the keg products which are under your
supervision, red lead and litharge are produced at
1553 other points than Cincinnati, is that correct, sir?

A. Oh, yes.

Q. When you conduct business in these keg products, in red lead and litharge, are those products ordinarily shipped direct from the producing plants to the customer?

A. They may be shipped either way. Sometimes direct from the producing plant, sometimes combined with other products and shipped from an equalizing point, or at times together with products made at Cincinnati.

Q. At what points does Eagle-Picher maintain warehouses for handling that business?

A. That has varied considerably. Under present conditions, there are relatively few warehouses, and most of those are empty, but normally about 14 warehouses.

Q. Do you recall the points at which they are located?

A. Well, I cannot name all of them, perhaps, but Buffalo, Newark, New Jersey, Boston, Baltimore, Pittsburgh, Detroit, Chicago, Minneapolis, St. Louis, Kansas City, and New Orleans.

Q. Does Eagle-Picher do any business in keg products on the West Coast?

A. No.

Q. At no place on the West Coast?

A. No, I do not believe so.

Q. It has no commission agents to handle the business for them?

1554 A. No.

Q. Mr. Hayt, in selling keg products on the basis of this zone map, how do you handle the freight charge where there is an element of transportation by the carrier involved? Is customarily the freight paid by Eagle-Picher, or does the customer pay it, and an allowance made for it?

A. Generally speaking, the customer pays the freight, and an allowance is made for it.

Q. Mr. Hayt, what brands are your white lead in-oil sold under?

A. The Eagle Branch, and Hammer Brand.

Q. Is the Hammer Brand sold to dealers at the same price as the Eagle Brand?

A. No, the Hammer Brand has been consistently, I believe, sold at a quarter of a cent a pound less than the Eagle Brand.

Q. How do the resale prices suggested by Eagle-Picher Company compare on the two brands?

Mr. Wood: I object to the question. There is no evidence in the record that Eagle-Picher has any policy of controlling resale prices.

Mr. Wright: I withdraw the question, your Honor.

Trial Examiner Norwood: All right, go ahead.

By Mr. Wright:

Q. Mr. Hayt, has the Eagle-Picher Company, in the period from 1937 to 1943, suggested to dealers the resale prices at which they sell Hammer and Eagle brands of white lead in-oil? 1555

A. That is right.

Mr. Hinds: I object, your Honor, on the ground it is immaterial. It has been repeatedly held there is nothing illegal about suggesting retail prices, as long as there is no agreement.

Mr. Wright: Your Honor, the only purpose of the question is to lay the foundation for the question which was objected to.

Trial Examiner Norwood: Objection overruled. Read the question and answer.

(Question and answer read by the reporter.)

By Mr. Wright:

Q. In other words, they have suggested the resale price?

A. Yes.

Q. Was there a similar differential between the suggested resale prices as to the two brands?

A. No.

Q. In other words, the dealer was requested to resell the Hammer brand at the same price?

A. He was not requested.

Q. Required?

A. He was not required.

Q. Was it suggested by Eagle-Picher that he resell at the same prices?

1556 A. That is right.

Q. Mr. Hayt, does the Eagle-Picher Company supply statistics on production and shipments of lead pigment to the Lead Industries Association?

A. Yes.

Q. Do they receive from the Lead Industries Association statistics compiled as to the whole industry showing total shipments and sales?

A. A summarized report.

1557 Q. So you were able to ascertain your exact position with reference to the remainder of the industry?

A. That is right.

Q. I call your attention to Commission's Exhibit 669, which has been identified as statistics showing the percentage of production by the various lead producers of both dry white lead and white lead in-oil for the years 1938, 1939, 1940 and 1941, produced by Mr. Wormser of the Lead Industries Association. The figures in the column under "Eagle-Picher" appear to be combined figures of dry and in-oil percentages.

Can you state the approximate percentage of production of the Eagle-Picher Company of white lead in-oil for those four years?

A. You mean our percentage of the total business?

Q. Yes, sir.

A. Well, I feel, as has been said before in this case, that that is confidential information in the presence of competitors. I would just as soon state it without the competitors present.

Trial Examiner Norwood: I think he asked you if, from those figures, you could compute that percentage?

The Witness: I could compute it, yes, sir.

By Mr. Wright:

Q. Mr. Hayt, I call your attention to Commis-
1558 sion's Exhibit 665 and ask you if you recognize that document, which has been identified as being obtained by Mr. Dunn of the Federal Trade Commission from you, showing your dollar volume of sales of both white lead in-oil and dry white lead in 1940.

A. Yes, that is my handwriting.

Q. At that time you apparently had no reluctance to state these figures...

A. To whom.

Q. To the representative of the Federal Trade Commission.

A. I still have no reluctance to state it to the Federal Trade Commission.

Trial Examiner Norwood: You do not want to tell the world about it?

The Witness: That is right.

By Mr. Wright:

Q. Do I understand then that you refuse to state the percentage of production of Eagle-Picher during those years to the total of the industry?

A. Not to you.

Mr. Wood: If the witness is requested by the Trial Examiner to give the information he is instructed by counsel to answer the question.

Mr. Wright: Your Honor, I request that the witness be instructed to answer the question. Certainly it is
1559 relevant material and competent to the issues in this case, which involve specific charges relating to the percentages of production of the various respondents.

Trial Examiner Norwood: Read the question.

(The question was read by the reporter.)

Trial Examiner Norwood: I will ask the counsel to reframe the question now that he wants to ask, that is, the question that elicits this information that he wants to ask about, so as to be clear.

By Mr. Wright:

Q. Mr. Hayt, will you please state the percentage of the production and sales of the Eagle-Picher Company of white lead in-oil to the total for the industry during 1938?

Trial Examiner Norwood: Now, that is the question that the witness expresses a reluctance to answer. I will hear from the counsel as to its relevancy.

Mr. Wright: Well, your Honor, the complaint in this matter charges the National Lead Company specifically with monopolizing the industry and charges the respondents as a group with a combination in restraint of trade. The complaint makes positive allegations as to the percentages of control by each of these various respondents. It is apparent that we cannot get at the heart of the issue raised by that portion of the complaint without obtaining this information from these respondents.

1560 Trial Examiner Norwood: I see.

Mr. Wright: As was testified yesterday by a representative of the Bureau of Mines these statistics have been turned over to that Bureau as confidential and they refuse to disclose them without the consent of the respondents.

Trial Examiner Norwood: I will instruct the witness to answer the question.

The Witness: What was the year involved?

Mr. Wright: 1938.

Mr. Wood: The product was white lead in-oil?

Mr. Wright: The product was white lead in-oil.

The Witness: I do not know that I can answer specifically for that year, but I can tell you approximately.

By Mr. Wright:

Q. That will be sufficient.

A. It was probably about 15 or 16 percent of the total.

Q. What about the year 1937?

A. You are drawing fine lines, as far as my memory is concerned. I would say approximately the same.

Q. Would it be fair to say, Mr. Hayt, that it has been approximately that percentage?

A. Yes.

Q. Over what period of time?

A. I would say it varied probably from between 15 and 20 percent over a period perhaps from 1930 to the present time.

1561 Q. I see.

What about with reference to dry white lead, basic carbonate?

A. About 10 percent plus or minus 2 percent either way.

Q. Would that be over the same period?

A. Yes.

Q. From 1930 on?

A. Yes.

Q. Would you know those figures in the same way with reference to basic sulphate?

A. I have nothing to do with the sale of basic sulphate.

Q. Would you know those approximate percentages as to dry red lead and red lead in-oil and keg products?

A. They are such minor factors in our total sales that it would be pretty difficult to give you any figures on those.

Q. Does Eagle-Picher also produce blue lead?

A. Yes.

Q. Is it the only producer of blue lead?

A. I believe at the present time they are the only producer. They have not always been.

Q. Is orange mineral sold as a keg product?

A. There is no sale for orange mineral in small packages.

Q. Where does the Eagle-Picher Company obtain the corroding lead that it uses in its white lead production in Cincinnati?

A. Most of it comes from the U. S. Smelting and
1562 Refining at East Chicago, Indiana.

Q. In other words, Eagle acquires its corroding lead on the open market, is that correct?

A. That is correct.

Q. Eagle is also a large producer of pig lead, is it not?

A. I would not say a large producer in relation to the general field.

Q. Its production of lead is in the dry state field, is it?

A. That is right.

Q. In and around Joplin?

A. Yes, in the Tri-state District of Missouri, Kansas and Oklahoma.

Q. Mr. Hayt, you mentioned that prior to the inauguration of the zone method you sold on warehouse and differential or equalization points. I show you Commission's Exhibits 513-C and -D which are headed "List of Differentials and Points to which They Apply in Territory East of the Mississippi"; and D, "in Territory West of the Mississippi."

Is that the type of point differential that was employed prior to the use of the zone method of Eagle-Picher?

A. I do not recall ever seeing that document before. When the job and equalization point system was in effect I was not in the white lead division, so I know about that only by hearsay, but my recollection is that the set-up was very much more involved than is indicated there.

1563 Mr. Wright: I have no further questions of this witness, your Honor.

Trial Examiner Norwood: Cross-examine.

Mr. Wood: No cross-examination.

Trial Examiner Norwood: Thank you.

(Witness excused.)

Mr. Wright: Your Honor, may we take a short recess?

Trial Examiner Norwood: We will take 5 minutes' recess.

(A short recess was taken.)

Mr. Wright: I will call Mr. Zoller.

MILES M. ZOLLER was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. State your name, please.

A. Miles M. Zoller.

Q. Mr. Zoller, will you state your official position?

A. I am manager of the Pigment Division of the Eagle-Picher Company and also a director of the company.

Q. How long have you been in that position?

A. Since 1937.

Q. What was your employment with Eagle-Picher
1564 prior to that, if you were employed by them?

A. I started with Eagle-Picher in 1921; as salesman up until 1931. I was assistant sales manager of the Pigment Division, dry product sales, until 1935, and then sales manager of the pigment dry product sales until 1937.

Q. Since 1937 you had charge of production as well as sales in the dry pigment division?

A. That is correct.

Q. At what factories or plants does Eagle-Picher produce red lead?

A. At their Joplin, Missouri plant and Newark, New Jersey.

Q. How about litharge?

A. The same places.

Q. Basic sulphate of lead?

A. That is produced at their Galena, Kansas plant.

Q. How about orange mineral?

A. That is produced at Joplin and Newark.

Q. Does the Eagle-Picher Company produce a variety of grades of red lead?

A. It does, yes, sir.

Q. Will you state what those grades and qualities are?

A. It produces a series of red lead for use in the battery industry, bearing varying percentages of red lead content. It produces a series of red leads for the paint
industry, also varying in red lead content. In the
1565 paint grinders they are classified 95, 97, and 98 per-
cent.

Q. Do those same percentages apply to the battery grades?

A. No, they do not.

Q. In what percentages do you make them for the battery grades?

A. That varies from about 65 to 80 percent.

Q. Do you make a number of litharges?

A. We do, yes, sir.

Q. Will you state the different grades and types of litharges that are produced and sold?

A. Litharge is classified by the particle size, gram weight, premetallic lead content.

Q. Do you make a number of stock grades, let us say, that you generally offer for sale under a brand or trade name or description as to litharge?

A. Yes, we do. Do you want our trade classification for that?

Q. Yes, sir, if you please.

A. Mechanical oxides— Do you want our grade number? I do not exactly know what you are after, Mr. Wright.

Q. Do you have any name by which you sell them in the trade?

A. We have grade numbers.

Q. How many of those are there?

A. They approximate between 10 and 15.

1566 Q. Do you make a product called Zerox?

A. That is right, yes, sir.

Q. What is the composition of that product?

A. That contains mostly litharge. It has in it a small percentage of carbon black, black fix, and organic matter.

Mr. Wood: I would like to instruct the witness that if any of these questions call for secret information the witness should state that the information is secret. We have no desire to hold anything back.

Trial Examiner Norwood: Yes.

Mr. Wright: I will be glad to state I am not asking him for any technical definition of the exact percentages.

Trial Examiner Norwood: He can make the claim to me that the information requested is a trade secret.

By Mr. Wright:

Q. Is the product Zerox substantially composed of litharge?

A. That is correct.

Q. Do you make a product called Perox?

A. That is correct, yes, sir.

Q. Of what generally is that composed?

A. Litharge and red lead.

Q. Litharge and red lead?

A. That is right.

Q. In, roughly, what percentages?

1567 A. The red lead content is usually around 25 percent.

Q. And the remainder is made up of what?

A. Litharge.

Q. Litharge. To what classes of customers are those two products marketed generally?

A. To the battery manufacturer.

Q. Is there any difference between litharge and sublime litharge?

A. Chemically, no, but physically, yes.

Q. What is that difference, briefly?

A. Sublime litharge is a much smaller particle size product than regular litharge.

Q. In other words, it is a further processing of red litharge?

A. No, it is made by a different process.

Q. Are all of these oxides made by roasting or calcining, or do you employ a variety of processes?

A. Sublime litharge is made by a sublimination process, atomization and sublimination direct. The other oxides are produced, as you classified, by roasting and oxidizing.

Q. Do you make a product called Plumbarge?

A. No, we do not.

Q. Now, do the products we have mentioned, Zerox, Perox, litharge, sublime litharge, and the red lead for the battery industry and red lead for the paint-grinding 1568 industry, do those comprise the bulk of your sales of the so-called oxides?

A. They do, yes, sir.

Q. In the production at Joplin and Galena, from what sources does the Eagle-Picher Company secure the pig lead?

A. The great percentage of it is secured on the open market.

Q. Do you also use in your production lead which is mined and refined by Eagle-Picher?

A. To some extent.

Mr. Wood: Over what period of time?

Mr. Wright: I will state that now most of these questions I am asking refer to the period, say, from 1933 to 1943.

The Witness: Yes.

Mr. Wright: If there is any time in there that your answer would not apply to the whole period, I wish you would state it and we will get it down to the proper time.

The Witness: Yes.

Mr. Wright: Read the question, please.

(The question was read by the reporter.)

By Mr. Wright:

Q. Well, now, over that period from 1933 to 1943, what percentage of the lead used in the Joplin plant roughly was pig lead produced by Eagle-Picher?

A. That has been a descending curve since 1933
1569 up to the present time. In other words, the percent-
age of pig lead used at the Joplin plant from 1933 to
1943 has been decreasing yearly.

Mr. Wood: The pig lead?

The Witness: Eagle-Picher's production.

By Mr. Wright:

Q. Eagle-Picher's production?

A. Yes.

Q. About what was it in 1933, at the start of that decrease, roughly, in percentage?

A. I do not have the figures. It would have to be an approximation.

Q. Would it be as much as a half?

A. Yes, sir, at least a half.

Q. Would it be two-thirds?

A. My guess would be it would be around two-thirds, that is correct.

Q. You say that gradually descended, up to 1943?

A. That is right.

Q. About what would you say it would be in 1943?

A. Somewhere between 10 and 15 percent.

Q. Now, in purchasing pig lead on the open market for your Joplin plant, do you buy pig lead at the St. Louis market or at the Joplin market?

A. At the present time?

1570 Q. Yes, sir.

A. It is bought at the St. Louis market, plus the charge.

Q. What charge?

A. I think a dollar a ton.

Q. Is that charge for transportation?

A. That is the charge of the seller; that is what it is based on.

Q. That is the charge over St. Louis?

A. That is the charge from the seller, that is right.

Q. The price of St. Louis pig lead is customarily 15 cents a hundred under the New York price; is that correct?

A. Ordinarily, yes, sir.

Q. Is there a Chicago market on pig lead?

A. I think there is, yes. It is 5 cents over.

Q. It is 5 cents over the St. Louis pig lead price?

A. That is right.

Q. That would be 10 cents under the New York price?

A. Under the New York price.

Q. Now, in your Newark plant where is the pig lead obtained?

A. That is obtained 100 percent from producers of pig lead.

Q. Other producers than Eagle-Picher?

A. Other producers than Eagle-Picher, that is right.

Q. Is that bought on the New York market?

A. It is, yes, sir.

1571 Q. Mr. Zoller, I show you a number of documents which are marked for identification as Commission's Exhibits 838-A through I, which Mr. Wood produced yesterday, pursuant to subpoena.

A. Yes, sir.

Q. You recognize those documents?

A. I do.

Q. Will you state what they are, please? Start with this 838-A, -B, and -C.

A. They are price cards on the items listed thereon, white lead, lead oxide, and lead silicates.

Q. I call your attention to Exhibit 838-C. Down in the lower right-hand corner there is a small zero.

A. Yes, sir.

Q. What is the significance of that symbol?

A. That signifies that that is our prices in our par territory.

Q. Can you state what that par territory consists of, geographically?

A. All those states in the eastern part of the United States, east of the Mississippi, except Florida, Georgia, Alabama, and Mississippi, and those west of the Mississippi except Texas, Oklahoma and Arkansas.

Q. Let us get at it in a different way.

Trial Examiner Norwood: Off the record just a 1572 minute.

(Discussion off the record.)

Trial Examiner Norwood: Go ahead.

By Mr. Wright:

Q. I call your attention to the symbol on Exhibit 838-B, in the lower-right-hand corner, there is ¼. Will you tell me the significance of that symbol?

A. That is the price list on certain states in the Union, whereby the prices of litharge and white lead and white silicate are a quarter of a cent higher than this territory. That territory consists of Florida, Georgia, Alabama, Mississippi, Louisiana, Texas, Oklahoma, and Arkansas.

Q. I show you Commission's Exhibit 758-F, which has been identified as the zones and price differentials of The Glidden Company, on oxides, lithards, and red lead, and the statement, "¼ cent per pound in Alabama, Arkansas, California, Florida, Louisiana, Georgia, Mississippi, Oklahoma, Texas, and West of the Cascades in Oregon and Washington."

Does that coincide with the geographical territory to which this one-quarter-cent differential in Exhibit 838-B applies?

A. Not precisely, no.

Q. Wherein does it differ?

A. This particular card is issued to the trade in the states that I have listed previously.

1573 Trial Examiner Norwood: Which card is that?

Mr. Wright: Exhibit 838-B. They are Florida, Georgia, Alabama, Mississippi, Louisiana, Texas, Oklahoma, and Arkansas.

By Mr. Wright:

Q. I call your attention now to Exhibit 838-A.

A. Yes, sir.

Q. And ask you to take the territories in which that applies.

A. That covers California and the western half of Oregon and Washington.

Q. That represents a differential, does it, above the price set forth in 838-B?

A. It does, yes, sir.

Q. Of a quarter of a cent?

A. A quarter of a cent on lead oxides and a quarter of a cent on the basic sulphate of lead.

Q. I see.

A. And also on lead silicate.

Q. Exhibit 838-B quotes the same price, then, on these products, as Exhibit 838-C?

A. On white leads only.

Q. On white leads only. As to the others, there is a quarter of a cent differential?

A. That is right.

Q. Now, I call your attention to documents marked 1574 838-D, -E, and -F. Will you state what those documents are?

A. These are documents that are comparable to these (indicating) with the exception you will note that they have zinc oxides listed along with the others. This is a different price basis than that (indicating). That is July 2nd and this is June 7th.

Q. That represents a different date. Now, the documents marked for identification as 838-H, -I, and -J.

A. They are on identically the same basis as 838-A.

Q. In other words, those differences in price are applicable to the same geographical territory?

A. That is right.

Q. And all of these documents, then, represent price quotations by the Eagle-Picher Company on these products?

A. That is correct.

Q. As of those dates?

A. Yes.

Q. Now, the quotations that you were referring to on these exhibits, 838, are those commonly known in the trade as card prices?

A. They are, yes, sir.

Q. Has the Eagle-Picher Company, over the period from 1930 to 1943, made and published similar quotations on cards?

A. Yes, sir.

Q. Which were known as card prices?

1575 A. Yes, sir.

Q. To what quantities of these lead pigments do the card prices apply?

A. You are referring to lead oxides, now?

Q. Yes, in particular.

A. On lead oxides, they apply to the five-ton quantities, and less than five ton quantities.

Q. Do those prices all refer to less-than-carload orders?

A. Yes.

Q. Any less-than-carload orders, then, would be quoted on the basis of the cards, is that correct?

A. Generally, yes, sir.

Mr. Wood: I did not understand that.

By Mr. Wright:

Q. In less-than-carload orders, they would be quoted on the card prices?

A. Generally, yes sir.

Q. Does the Eagle-Picher Company have in its possession a series of price cards on the oxides and on dry white lead from 1933 to 1943?

A. I cannot say for certain whether they do or not, Mr. Wright.

Mr. Wright: May we go off the record for just a minute?

Trial Examiner Norwood: Off the record.

1576 (Discussion off the record.)

By Mr. Wright:

Q. Mr. Zoller, would you undertake to ascertain whether or not those cards, or copies of them, rather, can be produced here?

Mr. Wood: I have offered to try to obtain the information which counsel wants. I will stipulate its correctness and forward it in due course.

Mr. Wright: Thank you very much, Mr. Wood.

By Mr. Wright:

Q. Mr. Zoller, it is my understanding of your testimony as regards the applicability of these cards to geographical territories, that in selling dry white lead, you quote on the basis of two zones, a par zone, which goes up to the Rocky Mountains, approximately, and a quarter of a cent higher zone, comprising the Pacific Coast States?

A. That would be true if we sold dry carbonate west of the Rockies, but it has been our policy not to sell west of the Rockies.

Q. Have you sold any in the past, in a considerable amount, in the period, say, from 1933 to 1943?

A. No.

Q. On the Pacific Coast?

A. There might have been occasional sales, but they are very insignificant.

1577 Q. Now, as to the oxides, on the card prices, there appear to be four zones, is that correct?

A. The cards that we have listed are three zones, the par zone, the Southern States zone, and the West Coast. Those are the only cards that we put out.

Q. Is there another zone that requires a higher differential than the West Coast zone?

A. We do not put out any price lists for the States of Montana, Wyoming, Colorado, and New Mexico.

Q. If you did business in those states, what differential, if any, over par, would be added?

A. You would add 50 cents.

Q. That would be a half a cent a pound in those states?

A. That is right.

Q. You do business in those states on occasion, do you not?

A. Very rarely.

Q. In doing business in Arizona, Idaho, Nevada, Utah, and east of the Cascades, in Oregon and Washington, on the oxides in less-than-carload quantities, what differential would be added to the par price?

A. 75 cents.

Q. And there is a quarter of a cent differential, then, added in Alabama, Arkansas, Florida, Louisiana, Georgia, Mississippi, Oklahoma, Texas, and also in California and in the western half of Oregon and Washington?

1578 A. That is right.

Q. That is correct, is it?

A. Yes, sir.

Q. Will you state over what period of time Eagle-Picher has quoted red lead and litharge oxides on the basis of those four zones, and the differentials that are quoted on them?

Mr. Wood: That question was not clear to me. It was my understanding of the witness' testimony that there was no uniformity, that the four zones were not applicable to all products. Am I wrong on that?

Mr. Wright: I asked the last question in regard to the oxides.

Mr. Wood: I thought you were including litharge.

Mr. Wright: Red lead I meant to include, yes, sir.

Mr. Wood: Let the witness answer.

Trial Examiner Norwood: Do you want the question read?

The Witness: No. I am afraid I cannot tell you accurately just how long that has been.

Trial Examiner Norwood: Read the question, Mr. Reporter.

(Question read by reporter.)

Trial Examiner Norwood: Now, you may make your answer.

The Witness: I would have to make a guess. I am
1579 not accurate on that.

By Mr. Wright:

Q. Well, what is your best recollection?

A. I would guess it has probably been for the last 10 years.

Q. I show you a document marked for identification as Commission's Exhibit 808-H, which has been identified as a page of the Oil, Paint, and Drug Reporter, page 33, for June 11, 1934, and I call your attention to the statement appearing thereon:

"Following the inauguration of the Lead Industries Code, corroders of white lead and lead oxides revised price schedules last week,"

and the following information:

Mr. Wood: Just a moment. I want to make an objection to the question on the ground that the cement case decided that activities during the NRA period were not competent evidence in relation to conspiracy.

Trial Examiner Norwood: Read the question.

Mr. Wright: Your Honor, there is no question pending. I am calling the witness' attention to an exhibit that is already in evidence in the case. My purpose is to refresh his recollection as to the time when the Eagle-Picher Company began using the four zones in the oxide business.

Mr. Wood: I apologize if I am premature with my objection.

1580 Trial Examiner Norwood: Counsel may make his objection if and when the question is asked. I would like to rule on it.

By Mr. Wright:

Q. I also call your attention to the statements under the subheading, "Red Lead" (indicating).

A. Yes.

Q. It follows over onto Exhibit 808-I, I believe it is. Mr. Zoller, does that document refresh your recollection as to about the time when the Eagle-Picher Company commenced quoting on the basis of those zones for lead oxides?

Mr. Wood: I think the witness can properly state whether or not his recollection is refreshed. I want my objection to apply on the next question.

Trial Examiner Norwood: Go ahead.

The Witness: It does, yes sir.

By Mr. Wright:

Q. What is your recollection of the date on which Eagle-Picher Company commenced quoting those four zones and differentials on the oxides?

A. I stated previously, 10 years, and that recollects the fact that it might have been a little bit longer than that.

Q. Is it correct, then, to say that it was right in that period, in the early part of June, 1934?

A. That is possible, yes, sir. It is also possible 1581 that some of those zones had been established previous to that time. I am not certain on that point.

Q. Do you recall the method of quoting on less-than-carload lots of red lead and litharge and the oxides prior to June, 1934, say, during 1932?

A. No, I do not.

Q. You do not recall the basis on which you made quotations?

A. I do not quite understand that, Mr. Wright.

Q. Yes. Did you employ a zone system in 1934?

Mr. Hinds: I object to the use of the word "system," if your Honor please. That is one of the issues, I believe, that this Commission is to decide. The Commission has been criticized recently, as your Honor knows, judicially, for using such words as "color" or "quoting," even specifically criticizing the use of the word "system," in a case of this sort. That is a fact. That is one of the ultimate issues to be decided by this Commission.

Trial Examiner Norwood: The word "matching" instead of "meeting" prices.

Mr. Hinds: That was another example.

Trial Examiner Norwood: Yes.

Mr. Hinds: The question here is whether there is a system. Glidden has specifically denied employing any system that may possibly be found against our contention.

Trial Examiner Norwood: Yes.

1582 Mr. Hinds: That is the issue to be tried here.

Trial Examiner Norwood: If we found it material to deny it, then certainly it may be the subject of evidence. Objection overruled.

Off the record.

(Discussion off the record.)

Mr. Wright: Your Honor, with regard to these exhibit, there was a mistake made in marking them, so that the only side of the exhibit that was marked was the reverse side, which did not contain the price quotations. We have subsequently remarked the insides of the exhibits theretofore identified as 838-D, -E, -F, -G, -H, and -I, to give the inside sheet numbers D-1, E-1, F-1, G-1, H-1 and I-1.

Trial Examiner Norwood: Very well.

By Mr. Wright:

Q. Mr. Zoller, going back again to these price cards, which I called your attention to as D, E, F, G, H, and I, your testimony with regard to them by that number would also be applicable as to the subnumbers, D-1, E-1, and so forth, through I-1, would it not?

A. Let me see.

Mr. Wood: I think the question is indefinite, your Honor.

The Witness: Just the inside.

1583 Mr. Wood: The question is: "Is your testimony applicable?" What part of his testimony?

Mr. Wright: I will amend the question, or I will withdraw it, rather.

Trial Examiner Norwood: He just wants to adopt a new number there in his answer.

Mr. Wood: That is clear. The documents are genuine, there is no possible objection to them. I just do not want them hooked up with completely indefinite testimony. I mean, I do not want the scope of the connection indefinite.

Mr. Wright: The only purpose in my asking the question was so that we would not later be met with an objection that we identified the outside of a document rather than the inside of it, so that the price quotations themselves, which are the only important part of the exhibit, would not be in evidence and not be identified.

Trial Examiner Norwood: Yes.

Mr. Wright: Am I correct in my understanding that you have no objection to taking the previous testimony with regard to these cards as applicable to the sub-numbers, E-1, F-1, and so forth?

Mr. Wood: In other words, your question goes only to genuineness, and I have no objection at all.

Mr. Wright: The question goes to more than that, because the witness identified these cards as applicable to certain geographical territory.

1584 Mr. Wood: Well, certainly he has explained them in his testimony, and that stands. If any more identification is required, I think you should go through them. I mean, the cards are Eagle-Picher cards which he testified are applicable, and were used as he has shown. That is all that is meant.

Mr. Wright: In view of that statement, Mr. Examiner, I do not think there is any more confusion in the record now about it. I now offer Exhibits 838-A, 838-B, 838-C, 838-D, 838-D-1, 838-D-2, 838-E, 838-E-1, 838-E-2, 838-F, 838-F-1, 838-F-2, 838-G, 838-G-1, 838-G-2, 838-H, 838-H-1 838-H-2, 838-I, 838-I-1, and 838-I-2.

Trial Examiner Norwood: Any objection? If not, they are received as marked.

(The documents referred to, heretofore marked for identification as Commission's Exhibits 838-A, 838-B, 838-C, 838-D, 838-D-1 838-D-2, 838-E, 838-E-1, 838-E-2, 838-F, 838-F-1, 838-F-2, 838-G, 838-G-1, 838-G-2, 838-H, 838-H-1, 838-H-2, 838-I, 838-I-1, and 838-I-2, were received in evidence.)

By Mr. Wright:

Q. Now, Mr. Zoller, I recall that I asked you if you knew what method of quoting has been employed by Eagle-Picher on the oxide in less-than-carload quantities in 1932. What geographical considerations entered into it?

1585 A. I cannot answer the question. I do not recall; I do not remember.

Q. Were zones employed?

A. I am not sure of that. I know that there were higher prices in certain localities, but as far as zones are concerned, I cannot answer with authority at all.

Q. Now, with regard to the dry white lead in less-than-carload quantities, over how long a period of time has Eagle quoted on the basis of those zones?

A. As I explained before, there is no zone price on dry white lead except on the Pacific Coast, and it has not been our policy to sell on the Pacific Coast.

Q. So in all the territory in which you sold in less-than-carload lots of dry white lead, it is a flat delivery price irrespective of the location of the customer?

A. That is right, on dry carbonate.

Q. Yes. Whether it be in Maine or Florida, or in Cincinnati?

A. That is right.

Q. Can you state over what period of time there has been that flat price in all the territory quoted by Eagle-Picher for dry white?

A. No, I cannot. You mean, how far back?

Q. Yes, sir. What is your latest recollection of it?

A. I cannot recall when it was otherwise, but that does not make it certain.

1586 Q. In other words, you do not recall that there were ever any places east of the Rockies that took higher delivered prices on dry white than the lowest delivered prices?

A. I do not recall at this minute, no sir.

Q. There could have been, though, but you just do not recall?

A. That is a possibility.

Q. I call your attention to Commission's Exhibit 754-Z-54, which has been identified as a tabulation of invoices on dry white lead by Eagle-Picher during the period from January 1, 1933, to March 31, 1934. The first transaction there, invoice to the Armstrong Company of Detroit, Michigan, which has a note, "Price basis $3.00 New York, plus card difference." Does that refresh your memory as to the basis of quoting?

A. Was that 1934 or 1933?

Q. 1933. I believe that was on January 10, 1933. Then on September 21, 1933, to the same customer, an order was quoted apparently at $4.50 plus card difference, I assume.

A. That does not jell with me.

Mr. Wood: I would like to object to that line of questioning. I think that the witness is being confronted with a document that he has never seen before. I think you should bring out whether or not he knows anything about any of those invoices. I do not think they came from his department.

1587 Mr. Wright: I do not know whether he knows anything about these particular invoices, but he has already testified that he has been connected with the dry products division of Eagle-Picher over a great many years, and these obviously refer on their face to 600-pound barrel containers, so I assume they would come within his knowledge.

I am not picking isolated invoices, I am showing him that this kind of price basis of some arbitrary figure plus card differences appears on practically all the invoices listed on this exhibit.

Mr. Wood: You said you assume he knows. I think he should be told what they are and asked what he knows. Maybe the answer is "yes", and maybe it is "no". I do not care which way it is, except that the witness, as a matter of fair chance, should be told what he is shown and asked about.

Mr. Wright: Whether or not it is from his department.

Trial Examiner Norwood: I think counsel is right.

By Mr. Wright:

Q. Were you, in the period 1933 and 1934, connected with the sales of dry white lead in other than keg quantities?

A. That was handled by the white lead division in those days. That was before the present organizational setup. Whereas we had to do with the solicitation of business, I do not think we had anything to do with the billing at that time.

1588 Q. Then you have no idea as to the significance of those statements? For instance, I call your attention to the statement on Exhibit 754-Z-57, note 1, which refers to an invoice to the Chicago Pottery Company, Chicago, Illinois. On January 10, 1933, it says, "Price basis $2.875 (St. Louis open) plus card difference."

Mr. Wood: I object to that type of questioning. This document is in Mr. Kelaher's handwriting. I do not know whether that is an argumentative notation of Mr. Kelaher or whether it is something literally quoted from an invoice, or what it is.

Mr. Wright: The testimony was that it was copied literally from the records of the Eagle-Picher Company.

Mr. Wood: In what form? In general Mr. Kelaher testified that most of his information was taken from the records of the Eagle-Picher Company, that he got certain additional information from the Traffic Department, and that he put this together as an argumentative exhibit.

Here is a man that did not hear Mr. Kelaher testify. He is being shown a document and asked questions about it without having it explained to him as to what it is.

Trial Examiner Norwood: It is not claimed to be a document that is used to refresh his memory?

Mr. Wright: No, sir. I do not make any contention that he has ever seen this document.

1589 Trial Examiner Norwood: You are using that to illustrate your question?

Mr. Wright: Your Honor, he has already qualified as having been with the Eagle-Picher Company since, I believe it was, 1920, and has had considerable responsibility in the handling of these pigments. Now, there are notations on the tabulation, which has already been identified as having been made up from the invoice records of the Eagle-Picher Company, and that these notes, which appeared on those invoices—

Mr. Wood: You say, "apparently appeared on the invoices"?

Mr. Wright: Well, that can easily be obtained. I see Mr. Kellaher in the room. I am perfectly willing to recall him to the stand and establish it.

Trial Examiner Norwood: You may refer to all those entries there and ask him if they mean anything to him, if he knows what they mean, and if he does, what do they mean. I think you can do that either by reference to the paper or without it.

By Mr. Wright:

Q. I believe you have already testified Mr. Zoller, that those references do not mean anything to you, is that correct?

A. I do not understand them, no sir.

Q. You also do not recall the basis of quotation in that period?

1590 A. No, sir, I do not.

Q. Mr. Zoller, how did the Eagle-Picher Company quote on dry white lead, say, during 1943, in carload quantities?

A. You mean the price?

Q. Yes sir. Was that on the same basis as the card prices?

A. Yes, sir.

Q. In other words, I believe you stated that there was a five-point break.

A. No, not on dry carbonate of lead.

Q. What kind of discounts were offered on dry carbonate?

A. A quarter of a cent a pound on dry carbonate.

Q. That is not customarily offered at a differential above the price of pig lead?

A. No sir, it is not.

Q. It is sold on a card basis irrespective of quantity?

A. That is right.

Q. As to red leads and oxides in quantities of a carload and over, how are they customarily sold, say, to the battery industry?

A. Customarily sold at $150 over the price of New York pig lead.

Q. That is the litharge that is at the $1.50 over the price of New York pig lead?

A. That is right.

Q. Would that include Zerox?

1591 A. Yes.

Q. That is $1.50 over?

A. Yes.

Q. How about Perox?

A. That is $1.75.

Q. In other words, it is a quarter of a cent higher on the Perox than the Zerox and litharge?

A. That is correct.

Q. How about sub-lime litharge?

A. That is the same, $1.50.

Q. How about red lead?

A. That is $2.50.

Q. Does that include all grades, or is that just the 95 percent limit?

A. That includes all grades up to 95 percent.

Q. How about the 97 percent?

A. 97 percent is $2.75, and 98 percent, $3.00.

Q. Above the New York prices?

A. That is right.

Q. Now, on those carload quantities, are zones employed? Is there any portion of the country where customers pay a higher price than in other portions of the country?

A. In Zone 2, that is Florida, Georgia, Mississippi, Alabama, and so forth, 25 cents on carload quantities, except in Oklahoma and Arkansas.

1592 Q. When did that exception of Oklahoma and Arkansas first appear in your quotations?

A. I cannot recall the exact date. It seems to me it was about four or five years ago.

Q. Was it some time during 1941?

A. I cannot answer that. I am not sure myself.

Q. How about carload quantities of the oxides on the Pacific Coast? Are they also at a differential above?

A. No.

Q. They are at par?

A. Yes.

Q. So zone 2 just covers the Southern States that you have listed?

A. That is correct.

Q. Can you recall over what period of time that zoning as to the carloads has been applicable to those products as quoted by Eagle-Picher?

A. Approximately the same period of time that they have been on the less-than-carload lots.

Q. Now, going back to the exception as to Oklahoma and Arkansas, will you say it is fairly certain that that was made after 1940? You said four or five years ago.

A. Yes. I am fairly certain that is the case.

Q. Was it made prior to the imposition of ceilings by the Office of Price Administration?

1593 A. Yes, it was. That dates it back.

Q. Before January, 1942?

A. Yes.

Q. So it would be somewhere, probably, between 1941 and 1942?

A. Yes.

Q. Mr. Zoller, I show you a group of documents marked for identification as Commission's Exhibits 840-A to 840-Z-262. Do you recognize these documents?

A. They certainly appear to be duplicate copies of invoices of Eagle-Picher Company.

Mr. Wright: They were produced by Mr. Wood yesterday in response to the subpoena of the Commission. Is that correct, Mr. Wood?

Mr. Wood: If that is the same pile of documents that I handed you yesterday, that is the case. I do not think that it is going to be very profitable to try to have the witness identify the whole group by looking at the one on top.

Mr. Wright: May I ask, then, if you are willing to stipulate that these are genuine and authentic invoice records of the Eagle-Picher Company?

Mr. Wood: Surely.

Mr. Wright: All right, sir.

Trial Examiner Norwood: Very well.

1594 Mr. Wright: Your Honor, I now offer in evidence Commission's Exhibits 840-A to 840-Z-262 as invoices showing the transactions and prices and terms of sale employed by the Eagle-Picher Company in the period September through December, 1941.

Trial Examiner Norwood: Any objection? If not, they may be received as marked.

(The documents referred to, herefore marked for identification as COMMISSION'S EXHIBITS 840-A, 840-B, 840-C, 840-D, 840-E, 840-F, 840-G, 840-H, 840-I, 840-J, 840-K, 840-L, 840-M, 840-N, 840-O, 840-P, 840-Q, 840-R, 840-S, 840-T, 840-U, 840-V, 840-W, 840-X, 840-Y, 840-Z, 840-Z-1, 840-Z-2, 840-Z-3, 840-Z-4, 840-Z-5, 840-Z-6, 840-Z-7, 840-Z-8, 840-Z-9, 840-Z-10, 840-Z-11, 840-Z-12, 840-Z-13, 840-Z-14, 840-Z-15, 840-Z-16, 840-Z-17, 840-Z-18, 840-Z-19, 840-Z-20, 840-Z-21, 840-Z-22, 840-Z-23, 840-Z-24, 840-Z-25, 840-Z-26, 840-Z-27, 840-Z-28, 840-Z-29, 840-Z-30, 840-Z-31, 840-Z-32, 840-Z-33, 840-Z-34, 840-Z-35, 840-Z-36, 840-Z-37, 840-Z-38, 840-Z-39, 840-Z-40, 840-Z-41, 840-Z-42, 840-Z-43, 840-Z-44, 840-Z-45, 840-Z-46, 840-Z-47, 840-Z-48, 840-Z-49, 840-Z-50, 840-Z-51; 840-Z-52, 840-Z-53, 840-Z-54, 840-Z-55, 840-Z-56, 840-Z-57, 840-Z-58, 840-Z-59, 840-Z-60, 840-Z-61, 840-Z-62, 840-Z-63, 840-Z-64, 840-Z-65, 840-Z-66, 840-Z-67, 1595 840-Z-68, 840-Z-69, 840-Z-70, 840-Z-71, 840-Z-72, 840-Z-73, 840-Z-74, 840-Z-75, 840-Z-76, 840-Z-77, 840-Z-78, 840-Z-79, 840-Z-80, 840-Z-81, 840-Z-82, 840-Z-83, 840-Z-84, 840-Z-85, 840-Z-86, 840-Z-87, 840-Z-88, 840-Z-89, 840-Z-90, 840-Z-91, 840-Z-92, 840-Z-93, 840-Z-94, 840-Z-95, 840-Z-96, 840-Z-97, 840-Z-98, 840-Z-99, 840-Z-100, 840-Z-101, 840-Z-102, 840-Z-103, 840-Z-104, 840-Z-105, 840-Z-106, 840-Z-107, 840-Z-108, 840-Z-109, 840-Z-110, 840-Z-111, 840-Z-112, 840-Z-113, 840-Z-114, 840-Z-115, 840-Z-116, 840-Z-117, 840-Z-118, 840-Z-119, 840-Z-120, 840-Z-121, 840-Z-122; 840-Z-123, 840-Z-124, 840-Z-125, 840-Z-126, 840-Z-127, 840-Z-128, 840-Z-129, 840-Z-130, 840-Z-153, 840-Z-154, 840-Z-155, 840-Z-156, 840-Z-157, 840-Z-136, 840-Z-137, 840-Z-138, 840-Z-139, 840-Z-140, 840-Z-141, 840-Z-142, 840-Z-143, 840-Z-144, 840-Z-145, 840-Z-146, 840-Z-147, 840-Z-148; 840-Z-149, 840-Z-150, 840-Z-151, 840-Z-152, 840-Z-153, 840-Z-154, 840-Z-155, 840-Z-156, 840-Z-157, 840-Z-158, 840-Z-159, 840-Z-160, 840-Z-161, 840-Z-162, 840-Z-163 840-Z-164, 840-Z-165, 840-Z-166, 840-Z-167, 840-Z-168, 840-Z-169, 840-Z-170, 840-Z-171, 840-Z-172, 840-Z-173, 840-Z-174, 840-Z-175, 840-Z-176, 840-Z-177, 840-Z-178, 840-Z-179, 840-Z-180, 840-Z-181, 840-Z-182, 840-Z-183, 840-Z-184, 840-Z-185, 840-Z-186, 840-Z-187, 840-Z-188, 840-Z-189, 840-Z-190, 1596 840-Z-191, 840-Z-192, 840-Z-193, 840-Z-194, 840-Z-195, 840-Z-196, 840-Z-197, 840-Z-198, 840-Z-199, 840-Z-200, 840-Z-201, 840-Z-202, 840-Z-203, 840-Z-204, 840-Z-205, 840-Z-206, 840-Z-207, 840-Z-208, 840-Z-209, 840-Z-210, 840-Z-211, 840-Z-212, 840-Z-213, 840-Z-214, 840-Z-215, 840-Z-216, 840-Z-217, 840-Z-218, 840-Z-219, 840-Z-220, 840-Z-221, 840-Z-222, 840-Z-223, 840-Z-224, 840-Z-225, 840-Z-226, 840-Z-227, 840-Z-228, 840-Z-229, 840-Z-230, 840-Z-231, 840-Z-232, 840-Z-233, 840-Z-234, 840-Z-235, 840-Z-236, 840-Z-237, 840-Z-238, 840-Z-239, 840-Z-240, 840-Z-241, 840-Z-242, 840-Z-243, 840-Z-244, 840-Z-245, 840-Z-246, 840-Z-247, 840-Z-248, 840-Z-249, 840-Z-250, 840-Z-251, 840-Z-252, 840-Z-253, 840-Z-254, 840-Z-255, 840-Z-256, 840-Z-257, 840-Z-258, 840-Z-259, 840-Z-260, 840-Z-261, 840-Z-262, were received in evidence.)

By Mr. Wright:

Q. Mr. Zoller, I call your attention to the information appearing along the bottom of the page, the various columns, "Checked by," "Industry," "Salesman," "Shipt. Point," and "Doc." What does that mean?

A. "Document," I guess. I do not know.

Q. And "Prod."?

A. "Product."

Q. And "Prod. Plt."?

A. That is "Product plant."

1597 Q. And then in the column headed "Market," there is one item, 5.75, and another item 5.85, on this Exhibit 840-A. Do you recall that?

A. In my judgment, that is the pigment price in effect at that time.

Q. I believe it was testified yesterday by a representative of the Bureau of Mines that their statistics indicated that pig lead, during September of 1941, was quoted at $5.85 a hundred, New York. What is the significance of the 5.75? Would that be the Chicago price of pig lead?

A. That would be the Joplin price.

Q. 5.75 is the Joplin price?

A. New York, 5.85, yes, sir.

Q. Is the Joplin price higher than the St. Louis price?

A. Yes.

Q. By a dollar a ton, I believe you said?

A. Yes, sir.

Q. In this column, "Diff." what is the significance of that term?

A. That is the differential on carload sales of pig lead, or the card price.

Q. Where it appears as "C", that would mean card price?

A. That is right.

Q. That ~~would apply also to Exhibit 840-C~~?

A. That is right.

1598 Q. That is the card price?

A. Yes.

Q. In other words, you apparently enter on each of these invoices whether or not it is an order requiring a price made up of a differential over the pig lead price, the prevailing pig lead price, either at Joplin or New York?

A. That is for our own records, that is right.

Q. Would it be fair to state, then, that the pig lead price is a very important consideration in your quoting of these products?

A. Yes, sir.

Q. On Exhibit 840-R, we find in that column headed "Diff."—by the way what does that mean? Differential?

A. Yes.

Q. The figures $1.50.

A. That is right.

Q. And under "Market," $5.85. That would be the New York pig lead price?

A. That would be the New York pig lead price, that is right.

Q. $1.50 a hundred differential?

A. That is right.

Q. In other words, even though you are dealing in the Chicago market, with the customer there, you get a differential on the basis of the New York market?

A. That is correct.

1599 Q. When you buy on the Joplin market?

A. That is correct.

Q. Mr. Zoller, to what industries do you sell the greater part of your oxide production?

A. The storage battery industry, the paint industry, ceramics, oil refining.

Q. Is your listing in approximately the order of importance as to customers?

A. The storage battery is the most important, and ceramics is probably the second.

Q. Are you familiar with the battery industry generally?

A. In general, yes, sir.

Q. You have been selling to them, I take it, for a good many years?

A. Quite a few.

Q. Is there a considerable number of battery manufacturers in the United States?

A. There are quite a few. I do not know what you mean by "considerable".

Q. Are there more than 100?

A. I would say there are, yes, sir.

Q. Are there more than 200?

A. No, my guess would be some place between 100 and 200.

Q. Are they located in widely scattered places?

A. Yes, sir.

1600 Q. Do all the battery manufacturers with whom you do business buy on the carload basis, or do you have a considerable business in the battery industry on a less-than-carload basis?

A. We have business on both the carload and less-than-carload basis.

Q. Are there many battery manufacturers, to your knowledge, who are of a size that would not permit their purchasing these oxides on a carload basis?

A. Numerically, I would estimate that there are more in that classification than the carloads.

Q. Is that correct?

A. Yes.

Q. Are they located at widely scattered places in the United States?

A. In my opinion, yes, sir.

Q. In almost every locality in the United States?

A. That is right.

Q. Do you have customers in the battery industry throughout the entire United States?

A. They are fairly widely distributed, yes, sir.

Q. Do you know to what use they put these lead oxides in the battery industry?

A. Well, lead oxides are the active material of the battery.

1601 Q. Do they form the plates of the battery?

A. That is right.

Q. Do you know about how many pounds of lead oxides would go into a standard automobile battery?

A. That varies somewhat between 10 and 12 pounds.

Q. Are there also automotive batteries with as much as 20 pounds of lead oxide in them?

A. I am not sure what the larger size batteries weigh.

Q. Do you know what the gross weight of a battery containing 12 to 16 pounds of lead oxides would be?

A. Somewhere between 40 and 50 pounds.

Mr. Wood: You mean dry weight?

Mr. Wright: Dry weight, yes, sir.

The Witness: That is the over-all weight of the battery ready to use in an automobile?

By Mr. Wright:

Q. No. The dry weight without the electrolytic element.

A. I cannot answer that. I think it is around 40 pounds.

Q. Well, ready to use in an automobile, what would you estimate?

A. How is that?

Q. Ready to use in an automobile, what would you estimate the weight of that battery?

A. Between 40 and 50 pounds.

1602 Q. So the lead oxides would represent approximately one third of the weight of the finished battery, is that correct?

Mr. DuBose: He said 10 or 12 pounds.

The Witness: 10 or 12 pounds as against 40 or 50, somewhere around 20 or 25 percent.

By Mr. Wright:

Q. Over the period from 1933 to 1943 was the battery business a highly competitive business, to your knowledge?

A. Yes, sir.

Q. Were the prices quoted on automotive batteries widely varying, do you recall, or were they pretty well standardized?

A. I cannot answer with authority. I would say that they varied.

Q. Now, in your carload transactions, are those customarily by contract?

A. No.

Q. Those are spot quotations?

A. Yes, sir.

Q. So that on a spot quotation what pig lead price would be taken? As of what time?

A. At the present time the pig lead is as of the date of shipment.

Q. How about in the period from, say, 1934 to 1943?

A. Customarily, at that time the closing price of pig lead as of the date the order was accepted.

Q. When was the practice changed on that if you recall?

1603 A. Within the last two years—two or three years.

Q. Have you also had contracts covering the requirements of oxide purchases over a period of time?

A. Yes.

Q. What is the usual duration of those contracts? Is there any customary practices with regard to their duration?

I am speaking now of the period prior to 1943.

A. No specific time. They are six months to a year.

Q. Six months to a year. How do those contracts establish the pig lead price from which the differential is to be taken? Was there any customary practice about that?

A. That was at the buyer's option, to specify the pig lead as to the date he placed his order and it was accepted, or the average monthly price of pig lead in the month in which it was shipped.

Q. It could have been either way?

A. It could have been either way.

1604 Q. Mr. Zoller, I show you herewith Commission's Exhibit 809, which has been identified as a copy of the Code of Fair Competition for the Lead Industry, as approved on May 24, 1934. Do you recall the provisions of Schedule A as shown in that Code?

Mr. Wood: I object to any question in regard to the lead code on the ground, as previously stated, that it is now the law that the NRA proceedings cannot be used as evidence of conspiracy.

Trial Examiner Norwood: Objection overruled.

The Witness: I recall this, yes, sir. I do not recall all that is in it.

By Mr. Wright:

Q. Do you recall the provisions of the schedule of conditions of sale for lead oxide in lots of less than 20 tons?

A. Yes.

Q. I assume when the code was in force the Eagle-Picher Company abided by the terms and provisions of the code, is that correct?

Mr. Wood: My objection goes to this whole line of questioning. I do not want to be interrupting all the time.

Trial Examiner Norwood: That is right.

The Witness: Yes, sir.

By Mr. Wright:

Q. What changes did the provisions of Article I 1605 of Schedule A of the Code require in the business of the Eagle-Picher Company in these products, do you recall?

A. When it was put into effect?

Q. Yes, sir.

A. I do not recall. That is 12 years ago.

Q. Yes. Could you glance at that briefly and see if your memory is refreshed about it?

A. I frankly cannot give an answer as to what changes this entailed in the practices in effect previous to the time this went into effect, but I am sure there were some.

Q. There were some changes?

A. Yes.

Q. You do not recall specifically what they were?

A. I do not recall what they were.

Q. Now, the terms and conditions that are set forth in this Article I of Schedule A, were they used for any considerable length of time by the Eagle-Picher Company, or over what time were they used?

A. I would say they were used during the time that NRA was in effect.

Q. At the time NRA was invalidated, did the Eagle-Picher Company continue to use the terms and conditions as set forth there, or were some changes made?

A. I haven't read this and refreshed my memory entirely on it.

1606 Q. Go ahead.

A. I think there are probably some things that were kept in practice and some left out.

Mr. Wright: Off the record, if your Honor please.

(Discussion off the record.)

Trial Examiner Norwood: Let us take a 5 minutes' recess.

(A short recess was taken.)

Trial Examiner Norwood: You may proceed.

Mr. Wood: I would like, your Honor, to renew and repeat my objection to the line of questioning which goes to a comparison of the practices under the NRA Code and present practices. I concede, of course, that counsel may interrogate in respect to present practices, and then in his brief or his argument make whatever contrasts or comparisons he sees fit, but in view of the Cement Decision and the place where that put the NRA Code practice I submit it is an improper line of examination at this time.

Mr. Wright: Your Honor, I submit that there are several decisions relating to that point at variance to the court's statement in the Cement Case. Under the circumstances, it seems to me that the testimony should be admitted.

Trial Examiner Norwood: I think so. We have received this evidence heretofore in this case.

1607 Mr. Wright: That is correct.

Trial Examiner Norwood: I think we better keep the practice in this one case uniform and then you can stand or fall by the result, whichever it may be. We have heretofore, in all the cases, received the NRA Code in evidence, and have received evidence of what was done under the NRA Code in order to throw light upon what was previously or subsequently done, where there was any connection with it. I have yet to see a case where a respondent had been proceed against for practices under the Code, performed during the Code period, provided it had not continued thereafter. I feel pretty sure that that is the policy of the Commission. I have admitted this testimony for the purpose of showing what was done before or after, and if there is no evidence to show that they were done before or after the Code period the matter will be struck or disregarded from the testimony.

Mr. Wright: I just wanted to say that that was my sole purpose in this line of questioning.

Trial Examiner Norwood: Yes. Counsel's objection is overruled, with that explanation. You may have your objection to any further testimony along this line. Go ahead.

By Mr. Wright:

Q. With regard to Schedule A, Article I, relating to lead oxides in lots of less than 20 tons, that would be
1608 in less than carload quantity, would it not?

Mr. DuBose: Has this been identified as an exhibit and given an exhibit number?

Mr. Wright: Commission's Exhibit 109. The bound volume is one exhibit number. This is page 378 of the exhibit.

By Mr. Wright:

Q. In the heading under "Price" subheading "A-1" appears "not more than ½-cent per pound for minimum shipment of 5 tons for one buyer at one time to one destination."

Did your quoted terms of sales of oxides in those quantities carry that differential after the NRA Code was ineffective?

A. In general, yes, sir.

Q. Was that ½-cent per pound for quantity discount for 5-ton shipments carried through from the Code period up through 1943?

A. In general, yes, sir.

Q. Now, with regard to the subparagraph (b) of Paragraph 4 of Article I, has the Eagle-Picher Company made it a practice, in the period from the NRA Code, say, through 1943 to grant the 5-ton price on partial shipments of an order as set forth in that paragraph (b)?

Mr. Wood: Objection, your Honor. It should be understood, I think, that the testimony is limited, and that
1609 showings of differences in price before 1936 have
nothing to do with this case. In other words, that was the passage of the Robinson-Patman Act in 1936. The mere fact there was a difference in quantity discounts in 1933 is not properly admissible in evidence.

Trial Examiner Norwood: We are not under the particular Robinson-Patman count, I should not say.

Mr. Wood: I thought the question he was putting was on Count 2.

Mr. Wright: The question related to the period from the time of the elimination of the NRA Code to 1943, which would cover all that time, including the period from 1936 to 1943.

Trial Examiner Norwood: Yes. I will overrule the objection.

The Witness: That was the practice in general, yes.

By Mr. Wright:

Q. I see. How about the provisions of paragraph (c) which provided that they should be no protection against a decline in seller's price? Was that quoted by Eagle-Picher in the period from the end of NRA to 1943?

A. That was not quoted.

Q. Was that a general policy of the company?

A. It was a general practice of the company, yes.

Q. I see. I call your attention to subparagraph
1610 (d), "Red lead containing 97 percent or 98 percent
of Pb_3O_4 shall be so marked on the package and shall

be sold at not less than ¼-cent and ½-cent per pound respectively over seller's price for grades of lower Pb_3O_4 content."

Were those differentials employed generally from the end of NRA to 1943?

A. They were in general, except where it became necessary to deviate because of competitive conditions.

Q. I notice that this schedule applies to the less-than-carload lots. As I recall your testimony you published card prices for those quantities.

A. That is right.

Q. Did the published cards over that period ever have a different differential for those grades than appears in this?

A. Not to my recollection, no.

Q. In other words, you may have deviated from that in particular transactions but your published quotations did not?

A. That is correct, yes.

Q. Thank you. Now, under paragraph 5 of Article I, "delivery f.o.b. car seller shipping plant or point or by truck f.o.b. buyer's premises." As I understand, your prices have been delivered prices on that basis over the whole period.

A. Yes, sir.

1611 Q. So that would also apply to paragraph 6 regarding transportation allowance in the period subsequent to this Code?

A. In general, yes, sir.

Q. Now, I call your attention to the provisions of paragraphs 7, 8 and 9 of Article I regarding requirements for shipping within 30 days and the cash discount and net dates, and imposition of taxes on the transaction. Have the quotations and policies of the Eagle-Picher Company embodied those provisions in the period since the NRA to 1943?

A. On shipments there has been no stipulation that the order should be delivered in 30 days. It may be delivered in one day or two days or 60 days, depending upon the ability of ourselves to make shipment.

Q. You are speaking now of the present time?

A. Yes sir.

Q. How about the period say in 1941?

A. That also applied in 1941.

Q. Do you recall when that change in policy was made after NRA?

A. Not precisely, no, I do not.

Q. Now, how about the terms of sale and discounts and taxes?

A. The terms of sale have been followed. That did not appear in any of ~~our~~ sales schedules, the matter of taxes.

Q. Did ~~the~~ policy of the company follow the provisions of that paragraph 9?

A. In general, yes.

1612 Q. In handling the sales of lead oxides?

A. In general, yes.

Q. In other words, then, the only difference in the practice from the end of NRA to 1943 would be in connection with subparagraph 7 regarding the shipping date?

Mr. DuBose: You are speaking generally?

Mr. Wright: Yes.

The Witness: That is right, in general.

Mr. Wright: At least that is the policy of the company.

By Mr. Wright:

Q. I understand there may have been deviations at times.

A. Yes. In general, that has been the policy.

Q. Now, with regard to Article II, "Conditions for sale of lead oxides in lots of at least 20 tons", and under (b)(2), "Quantity", it states, "Provided that each order or release shall be in an amount not less than 20 tons for destination for the account of not more than one buyer." Has that been your policy with reference to the 20-ton lot orders in general since NRA?

A. Our general policy, yes, sir.

Q. I believe you have already testified that it was your policy as to paragraph 5 of Article II to add to a differential to the price of common lead, New York, to arrive at a large quotation.

1613 A. That is right.

Q. In carload orders?

A. Yes.

Q. Now, I call your attention to the three alternative provisions under 5.

A. Yes, sir.

Q. "Either the American Smelting and Refining Company's quotation at the close of the market day the order is received or the A. S. & R. quotation at the close of market on a definitely agreed future date, or the average market as reported in American Metal Market and Engineering and Mining Journal."

Has the Eagle-Picher Company, in the period since NRA, generally followed those three alternatives in quoting on carload quantities of oxides?

A. In general, yes, sir.

Mr. Wood: I object to the form of the question. He is asking the witness whether the company has followed alternatives.

Mr. Wright: I will rephrase the question—and withdraw it.

Trial Examiner Norwood: All right.

By Mr. Wright:

Q. Has the Eagle-Picher Company offered purchasers, in the period from the end of NRA through 1943, 1614 alternative forms of contract embodying these three provisions that appear in section 5?

A. Not in all cases, no.

Q. In other words, to some buyers just one basis is offered?

A. That is right.

Q. And to other buyers another basis?

A. That is correct.

Q. But you have solicited business on one or all of these three bases?

A. Yes, sir.

Q. Since that period?

A. Yes, sir.

Q. Now, with reference to subparagraph (b), "Emergency Shipments of Less Than 20-Ton Quantity to a Customer Who Has on Hand an Order for More Than 20 Tons", has that provision been a policy of Eagle-Picher Company in the period since NRA?

A. It has in general, yes, sir.

Q. How about subparagraph (c), that no protection against decline in seller's price may be given, has it been the policy of Eagle-Picher to give protection against decline in price in these transactions since NRA?

A. No.

Q. I call your attention to subparagraph (d) providing for the one-quarter and one-half cent differentials 1615 for 97 and 98 percent red lead content, which is similiar to the provision in Article I. Have those differentials been quoted by Eagle-Picher for those different grades in that period since NRA?

A. They have been quoted and they have been deviated from.

Q. Has it been the general policy of the company to quote on that basis?

A. Yes.

Q. Now, will you explain the practice since NRA with reference to the shipping allowances in 7(a) and (b)? Has that been followed by the Eagle-Picher Company?

A. (a) has been followed in general and (b) I would say has not been followed.

Q. Do you customarily sell to buyers who operate their own steamships?

A. We do on occasion, yes, sir.

Q. You do on occasion?

A. Yes, sir.

Q. What has been your practice in the period, say, from 1936 to 1943, with regard to allowances of transportation to such customers?

A. We have not made allowances. In general, we have not made allowances to customers transporting materials in their own boats.

1616 Q. Now, with reference to the alternatives appearing in paragraph (a), "shipment shall be made at least within 60 days from (a) the date on which the price of pig lead governs the sale, or (b) beginning of the period during which the average price of pig lead governs the sale," has the practice of the Eagle-Picher conformed to those provisions in the period from 1936 to 1943?

A. Insofar as it has been practical, yes.

Q. Well, during that period was it very often impractical to do so?

A. Occasionally.

Q. Just occasionally?

A. Yes.

Q. With reference to provisions 9 and 10 on terms and taxes, have the practices of Eagle-Picher been in conformance with them from the end of NRA to 1943?

A. Yes.

Q. Now, are you familiar with the provisions that are in Article III regarding dry white, basic carbonate of lead?

A. I have read them, yes, sir.

Q. Have the practices of the Eagle-Picher Company been in conformance with these provisions in the period from 1936 to 1943?

A. Not in entirety, no.

Q. Can you point out where they have varied?

A. Under "Contract Sales" (b), item 1 and item 2.

1617 Q. Now, what was the practice, say, in 1941?

A. The practice in 1941 was in general in line with these items.

Q. It was in line with these items?

A. In 1941.

Q. Were the contract sales provisions?

A. Yes.

Q. Had they extended from the period of NRA through to 1941?

A. In general, yes, sir.

Q. When was the change made in those contract provisions?

A. About two years ago.

Q. Was there any other item or are there any other items on there in which changes have occurred since NRA?

A. No, in general we have followed the policies outlined.

Q. Mr. Zoller, I believe I asked you before the recess if you could recall what changes those provisions of the NRA Code required in the manner in which you were doing business prior to the Code.

A. I said I could not answer that.

Q. You could not answer that. But you recall there were some changes?

A. My memory indicates that there were some. Whether they were minor or major, I could not say.

Q. They could have been either?

A. Right.

1618 Q. Do you not recall the circumstances or the time?

A. No, I do not.

Q. Has Eagle-Picher sold dry white on the basis of printed form contracts which embodied the provisions substantially of Article III of that Code, that is, up to the time you made the change in 1941, two years ago, I think you said?

A. They have sold on printed form contracts, yes, sir. I do not recall whether the forms embody all of the features in the Code or not.

Q. Mr. Zoller, you mentioned it has been the policy of Eagle-Picher to quote on litharge and Zerox on the basis of $1.50 per 100 pounds over the New York quotation on pig lead.

A. Yes.

Q. Over how long a period of time has that differential been the going price?

A. I cannot recall precisely.

Q. Has it been over a considerable period of time? Has it been several years?

A. It has been 15 years probably.

Q. In other words, on that quoted price the only thing that affects the price is the movement of the price on pig lead?

A. That is right.

Q. In what units does the price of pig lead customarily move? Is it in hundredths of a cent?

A. I would say the smallest unit would be 5 cents a hundredweight.

1619 Q. When the price of pig lead goes up 5 cents a hundredweight, the price quoted then on the differential product in carloads automatically moves up or down 5 cents, as the case may be?

A. That is correct.

Q. On your card prices for the oxides, is there any differential that you hold to, on those card prices?

A. Our practice has been to move the card prices when pig leads hit an even ¼ up or down.

Q. Up or down?

A. Yes.

Q. If the price of pig lead was, say, 5.85 and it moved up to 5.95, the carload prices would move up 10 cents but the card prices would not?

A. That is correct.

Q. Then, if it moved back down to 5.75?

A. There would be a change.

Q. There would be a charge?

A. That is right.

Q. Or if it moved up to 6.05, there would be a change?

A. Yes.

Q. But in all cases the carload price is tied directly to the price of pig lead?

A. That is right.

Q. So is the card price, except it moves in quarters?

1620 A. That is right.

Q. Has that been the practice over that period of time? 15 years, did you say?

A. It has been the practice for quite a while. I do not know whether it is 15 years or 10 years.

Q. Mr. Zoller, are quotations of white lead on that same basis, dry white?

Mr. Hinds: If your Honor please, I object to the alternative use of card prices and quotations as though they were two separate things. It has already been shown that the card price is not a price, it is a quotation. I think we should have uniform terminology there, otherwise we will have confusion. I understand the so-called card price has been defined as not being a price but a quotation which you hope to get but you do not always get, and to have it introduced here as a price I think may lead us to some misconceptions.

Mr. Wright: I am only adopting the terminology that the companies themselves have used. In referring to these as card prices, I am perfectly willing to stipulate that they are quotations.

Trial Examiner Norwood: Well, terms must be considered in the meaning which has been established by the evidence. Proceed.

By Mr. Wright:

Q. Are the card prices or quotations of dry white

1621 similarly tied to the price of pig lead?

A. No, they are not.

Q. So that the price of pig lead might move up or down a good many times and perhaps more than a quarter and no revised price would be offered on dry white?

A. That is possible, yes, sir.

Q. That would also apply, would it, to the keg product?

A. I cannot answer that. I am not familiar with that.

Mr. Wright: I have no further questions, your Honor.

Trial Examiner Norwood: You may examine him.

Mr. Wood: No cross-examination.

Mr. Welch: No cross-examination.

Trial Examiner Norwood: You may be excused.

(Witness excused.)

Mr. Wright: Mr. Examiner, I have no other witnesses called for today. I believe Mr. Ewing has produced a good many documents in compliance with the subpoena, and if he is willing to agree that we can go ahead and give those identification numbers overnight we can adjourn then until 10 o'clock in the morning.

Trial Examiner Norwood: All right. Is that agreeable to all of you gentlemen? If so, we will recess until 10 o'clock tomorrow morning.

(Whereupon, at 12:55 p.m., an adjournment was taken until 10:00 a.m., Friday, October 4, 1946.)

1622 Room 332, Federal Trade Commission Bldg.,
Washington, D. C.,
Friday, October 4, 1946.

Met, pursuant to adjournment, at 10:00 a.m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., attorney for the Federal Trade Commission.

James T. Welch, Esq., (Davies, Richberg, Beebe, Busick & Richardson, 15th St., N.W., Washington, D. C.), attorney for Sherwin-Williams Company.

Henry E. Gardiner, Esq., (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.), attorney for Anaconda Copper Mining Company and International Smelting & Refining Company.

Richard Serviss, Esq. and Edmund P. Wood, Esq., attorneys for Eagle-Picher Lead Company and The Eagle-Picher Sales Company.

James D. Ewing, Esq. and E. Z. Du Bose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), attorneys for National Lead Company.

Roger Hinds, Esq., (165 Broadway, New York, N. Y.), attorneys for The Glidden Company.

1623

Proceedings.

Trial Examiner Norwood: Pursuant to adjournment on yesterday, the hearing in Docket 5253 is now reconvened for the purpose of taking further testimony at 10 a.m. on October 4, 1946.

Enter the appearances.

(Appearances, as heretofore noted on title page, entered.)

Trial Examiner Norwood: You may proceed.

Mr. Wright: Before we start, your Honor, the National Lead Company produced a large number of invoices and shipping memoranda on yesterday, pursuant to subpoena. I had thought that we could have them identified and offered today, but I find that that will be impossible, and I trust it will be all right with Mr. Ewing if we retain custody of these without having them further identified at this time, and take them up at a later date.

Mr. Ewing: That is perfectly satisfactory.

Mr. Wright: I will call Mr. Merson.

DAVID A. MERSON was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

1624 Q. Mr. Merson, will you state your full name and position with the National Lead Company, for the record?

A. David A. Merson; manager of oxide sales, National ~~Lead.~~

Q. How long have you been in that position, Mr. Merson?

A. Since 1938.

Q. Will you start with your first employment with National Lead Company and give us a resume of your duties and responsibilities?

A. I entered the employ of the National Lead Company in 1923 as a chemist in the research laboratories. Later I became a technical representative, working out of the laboratories for the company, and in 1938 was appointed to my present position.

Q. In your technical duties there, prior to assuming this position, did you work on technical problems with customers of National Lead or in the National Lead plants?

A. I worked with customers and in the laboratories, both.

Q. In other words, working out products which would suit their needs?

A. That is right, sir.

Q. So you are then thoroughly familiar with the sales policies of the National Lead Company, at least from 1938, on the oxides or dry pigments, is that correct?

A. Yes.

Q. That would include the red leads and litharges?

1625 A. Yes, sir.

Q. Mr. Merson, where does the National Lead Company produce oxides?

A. We have nine plants at which we produce oxides.

Q. Will you tell me where they are located?

A. Brooklyn, Philadelphia, Charleston, West Virginia, St. Louis, Chicago, Dallas, Atlanta, Los Angeles, and San Francisco.

Q. When did the National Lead Company acquire its Dallas plant?

A. They built the plant—I would have to guess.

Q. Approximately the date.

A. Around 1940 or 1941. That is a guess.

Q. In other words, they built the plant themselves?

A. We have another operation down there, and we simply added an oxide plant to the operation.

Q. When did the Atlanta operation start?

A. I would have to guess about that, also; about 1942.

Q. Was that a plant that National constructed?

A. Well, there, we also had another operation and simply added an oxide plant to an existing operation.

Q. How about the Charleston, West Virginia plant?

A. That was formerly, and still is, the Evans Lead Company which we purchased.

1626 Q. What was the date of that acquisition?

A. I would have to guess.

Q. Well, approximately.

A. I believe between 1931 and 1933, thereabouts.

Q. I see. You say that was a purchase. Was that a previously independent concern?

A. Yes, sir.

Q. What products did they produce prior to acquisition by the National?

A. Litharge and red lead.

Q. And it has been since operated as a division of National Lead, or is it a subsidiary corporation?

A. No, it is a division of National Lead.

Q. A division of National Lead?

A. Yes, sir.

Q. About what is the production of that plant, in percentage to the production of National, of red lead and litharge?

A. I would have to guess.

Q. Well, a rough percentage.

A. Around 10 percent.

Q. Around 10 percent of National's production. Do you recall the Carter White Lead Company?

A. Yes, sir.

Q. Was that company acquired by National Lead Company?

A. I am not familiar with that.

1627 Q. What is your recollection of the Carter White Lead Company?

A. Well, all that I know is that which I have heard since my employment with the company.

Q. You mean from other company officials?

A. That is right, sir. I heard that Carter White Lead Company was an independent white lead company which was acquired by the National Lead Company.

Q. Did that plant produce white lead or did it also produce oxides, or do you know?

A. No oxides.

Q. No oxides.

Do you know where the plants of that company were prior to its acquisition by National?

A. I am not certain. I know that one plant was in Chicago, at West Pullman.

Q. Do you recall if they had a plant at Omaha?

A. I believe they had the original plant in Omaha. Whether that was in existence when the company acquired Carter or not, I do not know.

Q. Do you recall the Wetherill Company in Philadelphia?

A. I have heard of them.

Q. Was that an operation that was acquired by National?

A. I do not know, sir.

Q. Now, Mr. Merson, am I correct in my under-
1628 standing that the National Lead Company makes a great many different grades and qualities and types of oxides?

A. Yes, sir.

Q. Will you state what a few of the most important of them are? And what trade designations and names the National Lead Company applies to them in their sales?

A. The storage battery oxides are described as storage battery litharge, storage battery red lead, Grenox.

Q. What is the Grenox?

A. It is a litharge used for storage battery purposes having a metallic lead content, free lead content.

Q. Do you also produce and sell a product called Zerox?

A. No, sir, we do not produce Zerox.

Q. Do you at times sell Zerox?

A. We have at times sold Zerox.

Q. Where do you obtain Zerox?

A. Where we would sell it we would obtain it from the Eagle-Picher Company.

Q. Is that the only company which produces that product?

A. It is the only which produces that product under that name that I know of.

Q. Do you have a comparable product?

A. Yes, sir.

Q. What do you designate your comparable product?

A. 111. There we have several letters after the
1629 111. In other ~~words, we have several products com~~parable to Zerox, and they might be 111-B, 111-M, 111-R.

Q. And those are all then a compounded litharge that is produced especially for the battery trade, is that correct?

A. Yes, sir.

Q. What would 25-R oxide be?

A. That would be a blend, or rather a furnace color red lead containing about 25 percent of red lead and 75 percent of litharge.

~~Q. What is the~~ No. 1 battery red lead?

A. I do not recall the ~~characteristics of that~~.

Q. What would a 25-S oxide be?

A. That would be the same as 25-R, except that the particle size is different.

Q. In other words, it is screened differently; is that correct?

A. It is ground or screened differently.

Q. I see.

What is the special B litharge?

A. I believe that is a storage battery litharge, but I do not recall the characteristics.

Q. What is the cement litharge?

A. That is a litharge which is used for preparing a cement by mixing it with glycerin.

Q. When you say "cement", do you mean cement 1630 in the sense of Portland cement, or what?

A. No, sir, cement in the sense of sealing two dissimilar or similar articles together.

Q. In what industries?

A. Well, in the paper industry which maybe use them, and digesters for the sealing of joints.

Q. What is the Barton calcined litharge?

A. That is a litharge made by the Barton process and subsequently calcined in a mechanical furnace.

Q. What is the Barton process, briefly?

A. Well, it is a process in which you feed in molten lead to a chamber. The molten lead is agitated by means of a stirrer and at the same time is oxidized by an inflow of air containing oxygen and lead to form litharge.

Q. What processes are used for producing litharge and red lead at the Evans plant in Charleston?

A. They employ fume units for making fume litharge, and mechanical furnaces in which there are arms which travel around stirring the molten metal and exposing it to the oxygen of the air and thereby forming litharge.

Q. Is that latter method a more or less unique production process?

A. No, sir.

Q. Is the fume method a more or less unique process?

A. Well, it is unique in that we developed it our-1631 selves. That is our method.

Q. Prior to acquisition by National was the Evans Lead Company employing any processes of production of oxides which were unique?

A. I do not recall that.

Q. In the sense of not being employed by other units in the industry?

A. I do not recall that.

Q. Do you recall what processes they were employing prior to your acquisition of them?

A. Well, as far as I can recollect they had the mechanical furnace and they had the fume units.

Q. Was anyone else at that time employing the mechanical furnaces?

A. Yes, sir.

Q. And the fume units, too?

A. Yes, sir.

Q. What is the product P-21, special litharge?

A. I am afraid I do not know, sir.

Q. What is 111-M negative oxide?

A. That is a compounded negative material containing litharge and carbon black blank fix and an organic expander, an organic substance.

Q. Is that comparable with the product Perox sold by Eagle-Picher Company?

1632 A. No, sir.

Q. Is it comparable to any of the Eagle-Picher varieties?

A. Zerox.

Q. Do you recall what 30-W oxide is?

A. Yes, sir.

Q. What is that?

A. That is a Barton process litharge containing free lead which is used in the storage battery industry.

Q. Do you recall hearing of an Evans process of oxides?

A. Evans process?

Q. Yes, sir.

A. I do not believe I recall hearing of an Evans process.

Q. Mr. Merson, I call your attention to Commission's Exhibit 806-B, -C, -D, -E, -F, -G, -H, and -i, which have been identified as price cards for various lead pigments by the Atlantic branch of the National Lead Company. I believe they were produced by National under subpoena. Do you recognize those cards as price quotations of National?

A. Why, they are cards similar to those that we have put out on occasion.

Q. Take 806-i which is effective January 14, 1942 and supersedes a list which apparently had been in effect since March 3, 1941, and represents an advance of three quarters of a cent per pound. Can you tell the geographical territory to which these quotations would apply?

1633 A. Why, I would have to refer to that territory which is allocated to the Atlantic branch. We have such maps which delineate the territories of the various branches, but I am not familiar with those boundaries.

Q. Do I understand your answer to be that the quotations which appear there would only be applicable in the Atlantic branch?

A. Well, each branch issues its own price cards for its territory.

Q. Well, I call your attention now to a photostatic copy of Commission's Exhibit 615-D, which has been identified as a document produced by the National Lead Company, and under "Prices and Terms", under "Dry Red Lead", it refers to prices for delivery on less than 20 tons in one lot as the card price. It further sets forth a differential over the card price of 25 cents per hundred in the following states: In Alabama, Arkansas, all the way through to west of the Cascade Mountains in Oregon and Washington. Do you recall that as being the terms and conditions of sale on red lead by National at that time?

A. Yes, sir.

Q. In other words, those zone differentials were in effect at that time?

A. Yes, sir.

Q. Are they still in effect?

1634 A. As far as I can recall at the moment they are still in effect. There may be some difference today from what it was in 1941.

Q. Does the National Lead Company still quote a differential over par in Arkansas and Oklahoma?

A. I do not believe they do.

Q. Do you recall when that change was made?

A. No, sir.

Q. Some time between the date of this (indicating) and the present time?

A. Well, I would not say that. It has been made since 1938, when I was appointed to my present position. What year it was I do not know.

Q. Was it prior to the effective date of OPA ceilings?

A. I would say yes.

Q. Well, since this document, dated April 26, 1941, shows a differential applicable to those two states it apparently was sometime between that date and the effective date of OPA ceilings; is that correct?

A. That is apparent.

Q. Were the same zones followed for sales of litharge in less than carload lots, in barrels?

A. Yes, sir.

Q. And the same differentials?

A. Yes, sir.

1635 Q. Were those same zones and differentials followed for similar quantities of the special oxides which you detailed here this morning?

A. Yes, sir.

Q. Can you state over what period of time those zones and differentials have been employed by National?

A. No, sir, I cannot.

Q. Were they employed when you assumed your duties in 1938?

A. They were in effect then.

Q. You were employed with National I believe in 1932.

A. 1923, sir.

Q. In 1932, you were in their employ?

A. Yes, sir.

Q. Do you recall whether these zones were in effect at that time?

A. I do not know, sir.

Q. I direct your attention to the material under (b) in Exhibit 615-D, quotations for deliveries of 20 tons or over in one lot. In par territory a flat price of $2.50 per hundred pounds over A. S. & R. price of common lead in New York in effect at the close of the market on the fifth day prior to the date of opening. I believe this is a government schedule here, so this applies to government business; is that correct?

A. Yes, sir.

1636 Q. And the statement that litharge is priced at $1.50 per hundred pounds over the A. S. & R. price of common lead. In the period from 1938, when you came into the executive office, and 1943, was it the practice of the National Lead Company, in quoting on carload lots, to quote on a differential of $2.50 per hundred pounds for red lead, and $1.50 for litharge over the A. S. & R. price of common lead in New York?

A. Generally.

Q. Do you recall over how long a period that practice obtained?

A. No, sir.

Q. You say "generally". Does that mean that that was your regular policy, to accept business at that price?

A. Yes, sir.

Q. So that when you did not it was an exception to your general terms of sale that you quoted?

A. Yes, sir.

Q. Now, I call your attention to the zones in effect under (b) on the carload business, where 25 cents per hundred pounds is added for deliveries in that series of states. Has that geographical division and differential applicable thereto applied to those offerings in the period of 1938 to 1943?

A. Generally.

Q. It has?

1637 A. The same exceptions might be true here as in the l. c. l. with regard to your question concerning Oklahoma and Arkansas.

Q. There may not have been that differential since sometime in 1941 or 1942?

A. Whenever it occurred.

Q. Yes. As I understand it then, these carload prices are at par then on the Pacific Coast, with the exception of territory east of the Cascades in Oregon and Washington?

A. Yes, sir.

Q. In other words, western Oregon, Washington and California are at the par territory.

Mr. Merson, these carload prices then which are tied directly to the A. S. & R. New York price of pig lead, how do they move, or in what units do they move?

Do they move in nickels or in quarters per hundredweight?

A. Carloads move generally in units of a dollar a ton or 5 cents a hundredweight.

Q. I see. So anytime the quotation on American Smelting & Refining Company at New York moves up or down a nickel your quotations on litharge and red lead in carload quantities automatically move up or down by that amount?

A. Yes, sir.

Q. What is the relation between the price of pig lead and the so-called card prices for the oxides?

A. They move with the nearest quarter.

1638 Q. In the nearest quarter?

A. Yes, sir.

Q. In other words, if the price of pig lead was $5.80 New York, it could go up to $5.95 and back down again to

$5.80 and there would still be no change in the quotations for card prices, is that correct?

A. That is correct, yes.

Q. But if it went up to $6, then the card would move up 25 cents a hundred?

A. That is correct, sir.

Q. Mr. Merson, is there any substantial difference in the quotations of prices and terms of sale on comparable products by the National Lead Company from those offered by the Eagle-Picher Company?

Mr. Wood: I object to that, your Honor.

Mr. Ewing: I object to the form of the question, "is there any substantial difference".

Mr. Wright: I will withdraw the question.

By Mr. Wright:

Q. Is there any difference?

Mr. Wood: I object to the question. It has not been shown that the witness knows the policies of the Eagle-Picher or that he knows any more about it than he has heard in this courtroom yesterday.

Trial Examiner Norwood: If he answers this question, we will know whether he does or not.

1639 Mr. Wood: I think the witness should be qualified before he attempts to answer.

Trial Examiner Norwood: I will let him answer. Objection overruled. If you do not know, you can say so.

The Witness: May I have the question, sir?

(The question was read by the reporter.)

The Witness: I cannot say that I know. The information which we receive is from prospects and customers.

By Mr. Wright:

Q. Mr. Merson, you heard Mr. Zoller testify yesterday, did you not?

A. Yes, sir.

Q. On the basis of his testimony yesterday, can you recall any differences in the quotations and terms of sale offered by the National Lead Company on these oxides?

A. Not generally.

Q. Can you particularize any differences?

A. No, sir.

Q. You cannot?

A. No.

Q. When the New York price of lead goes up 15 cents, as I understand it, your quotations are automatically raised then 15 cents on your carload quantities of oxides.

A. Yes, sir.

Q. You do not attempt to ascertain what any of
1640 your competitors might be offering as the result of that?

A. That is our policy.

Q. That is your policy?

A. Yes, sir.

Q. You offer that regardless of anything that your competitors might do?

A. Yes, sir.

Q. Mr. Merson, you are familiar generally with the operations of your principal customers in these products, are you not?

A. To some extent.

Q. In other words, I believe, if I recall your testimony, that you worked with them on their technical problems in utilizing these materials.

A. Yes, sir.

Q. Are you familiar with the battery industry?

A. To some extent.

Q. Are they large consumers of oxides?

A. Yes, sir.

Q. Do you have any idea of how many battery manufacturers there are in the United States?

A. I can guess.

Q. Well, can you give us your guess, and we will find out what it is based on.

A. Well, about 200 to 225, maybe.

1641 Q. Are they located all over the country at various points?

A. Yes, sir.

Q. From Maine to California?

A. Yes.

Q. And from Florida to Oregon?

A. Yes, sir.

Q. Are some of these companies very large consumers of oxides, these battery companies?

A. Yes, sir.

Q. Who purchase on the carload basis?

A. Yes, sir.

Q. Is there any substantial number of these battery companies whose operations are so small that they purchase at the card price rather than the carload price?

A. Quite a few.

Q. Would you say the majority?

A. I would not say, I would not guess.

Q. A substantial number, at any rate?

A. Yes, sir.

Q. Do you recall how many pounds of oxides would go into an ordinary standard automobile battery?

A. It runs around 10 pounds. It may run 11, 12 or 13 pounds. The average might be between 10 and 11 pounds.

Q. Would the weight of the oxides in those batteries constitute a substantial portion of the weight of the
1642 finished battery?

A. I would say about around 25 per cent.

Q. Is the cost of the oxide substantial as compared to the cost of the finished battery?

A. If I knew exactly what the cost of the finished battery was I could give you a fair answer.

Q. Well, you recall observing the retail prices in the newspapers on storage batteries, do you not, automotive storage batteries?

A. Yes.

Q. Ranging somewhere from $9 to $15 and $17, isn't that true, somewhere in there?

A. Yes, sir.

Q. So that the cost to the manufacturer must be considerably less than that?

A. I would guess that, yes, sir.

Q. And 10 or 12 pounds of red lead on a card price would probably amount at least to a dollar, wouldn't it?

A. I expect so.

Mr. Ewing: I object. It is pure speculation. The witness has testified he does not know the cost of a battery to the battery manufacturer. To attempt to have him say what the cost of the oxide ingredient in the battery is as compared to the total is wholly indefinite.

Mr. Hinds: I have an additional objection which
1643 goes to the logic and relevancy of the question. It is patently not in the witness' knowledge. The factor which would be relevant at all would be the relative amount of oxide with respect to the weight of the battery, to establish the relative amount of conceivable differential of price of oxide to the total cost of the battery. That is the only relevant factor.

Trial Examiner Norwood: Read the question.

(The question was read by the reporter.)

Trial Examiner Norwood: He can tell us what that would amount to.

Mr. Ewing: He does not know.

Mr. Wright: I am willing to withdraw the last question. The record shows what 10 or 12 pounds of red lead or litharge would cost at any one of the different periods.

Mr. Ewing: My objection is that it is purely a speculation to say how much the cost of the oxide was as compared to the cost of the battery.

Trial Examiner Norwood: Objection sustained.

Mr. Wright: My sole purpose was to find what the witness knew about the business.

Trial Examiner Norwood: Go ahead.

Mr. Wright: It has been testified that is a very important consuming branch of the industry.

1644 Trial Examiner Norwood: Go ahead.

By Mr. Wright:

Q. Mr. Merson, how many pounds of ordinary litharge is produced with 100 pounds of pig lead?

A. We average about 5 percent gain in weight, which would make it about 105 pounds.

Q. Does that apply also to red lead?

A. Red lead would run around 9 to 10 percent.

Q. Gain?

A. Gain.

Q. In the process of manufacture?

A. Yes, sir.

Q. Do you know the gain on basic carbonate?

A. No, sir.

Q. Basic sulphate?

A. No, sir.

Q. Mr. Merson, can you state the percentage, roughly now, I do not mean by any precise figure of tonnage or dollars,—the percentage of production of oxide, including red lead, accounted for by National as compared with the total for the industry, say, in 1943?

Mr. Hinds: I would like to ask whether that includes those manufacturers who manufacture their own oxides or merely those such as these respondents that were selling it to others?

1645 Trial Examiner Norwood: Read the question.

(The question was read by the reporter.)

Mr. Wright: Do I understand there is an objection to the question or Mr. Hinds is helping me ask the question?

Mr. Hinds: I think I implied an objection, and I now express one. The objection is on the ground that the question is ambiguous in that it fails to define what he means by "total production".

Mr. Wright: Well, your Honor—

Mr. Hinds: (Interposing.) Pardon me. I am in the middle of a statement.

Trial Examiner Norwood: The objection is overruled. That is something that can be stated. Answer the question, if you can.

Mr. Ewing: I think the basis for it, your Honor, is the fact that oxides are produced not only by companies that are in the business of producing oxides, such as National Lead and Eagle-Picher, but also by users who make their own oxides.

Trial Examiner Norwood: He confined his question to National.

Mr. Ewing: No, he did not.

Mr. Wright: I would in any case have had to qualify the answer that way, so I am willing to qualify the answer that way.

1646 Trial Examiner Norwood: I understood you had confined your question to National.

Mr. Ewing: To National's production as it relates to the total industry. My point is we do not know what the total industry is without further qualification.

Mr. Wright: I withdraw the question.

Trial Examiner Norwood: Well, the question is withdrawn.

By Mr. Wright:

Q. I believe it has been already testified to by another witness that the National Lead Company does report statistics on production and shipment to the Lead Industries Association.

A. Yes, sir.

Q. And that the Lead Industries Association reports back the total industry figures.

A. Yes, sir.

Q. Do you know whether those figures include the production of those people who produce and consume their own oxides?

A. No, sir, I do not believe they do.

Q. That just includes the figures of those who produce oxides for resale?

A. Yes, sir.
Q. Is that true?
A. Yes, sir.
1647 Q. Can you state roughly the percentage of the production and shipment of oxides by National as compared to the total of those who report to Lead Industries Association?
A. Yes, sir.
Q. In 1943?
A. Yes.
Q. What is that production?
A. I can give you a figure of 50 percent, plus or minus 5 percent.
Q. Would that apply over a period of years?
A. Yes, sir.
Q. Say since 1930 on?
A. Since 1938.
Q. Since 1938?
A. Yes.
Q. You do not know what it might have been prior to that time; is that correct?
A. No, sir, I do not know.
Q. Who are your principal competitors in these oxides?
A. Eagle-Picher—You mean by name?
Q. Yes, sir.
A. Eagle-Picher, Metals Refining, Hammond Lead, Fuller.
Q. Fuller is on the West Coast?
A. Yes, sir. Plus those people who manufacture oxides for their own use.
1648 Q. Is Sherwin-Williams—
A. (Interposing.) Mr. Wright, I should like to add another name, if I may.
Q. Yes, sir.
A. That is Sherwin-Williams.
Q. Is the Sherwin-Williams Company an important factor in the sale of oxides?
A. I would not say they were an important factor.
Q. You would not say they were?
A. No, sir.
Q. Would they produce as much as 5 percent, would you suppose?
A. Well, they may produce 5 percent. My interpretation of "important" is a good deal greater percentage than 5 percent.

Q. Do you find them as competitors in soliciting business for oxides from battery manufacturers?

A. No, sir.

Q. In what lines do you find them as competitors?

A. Chiefly in the paint line.

Q. In the paint line?

A. Yes.

Q. Red lead for paint?

A. Yes.

Q. Litharge for varnish?

1649 A. Not so much litharge as red lead for paint.

Q. Red lead for paint?

A. Yes, sir.

Q. Is the production of Hammond Lead products important in the industry?

A. I consider them important.

Q. What percentage would you surmise they account for?

A. I could not surmise.

Q. Would they be as important as Metals Refining? Would their production be that large?

A. Yes, sir.

Q. It would?

A. In my opinion.

Q. How about Fuller on the West Coast?

A. I do not know what their percentage would be.

Q. That is the only other lead plant on the West Coast outside of National's, is it not?

A. Right now, yes, sir.

Mr. Wright: Your Honor, may we have a 10-minute recess?

Trial Examiner Norwood: We will take a 10-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: You may proceed.

By Mr. Wright:

1650 Q. Mr. Merson, I direct your attention to pages 378, 379 and 380 of Commission's Exhibit 809, which is the code for the lead industry, and schedule A, articles I, II and III. I would like for you to state for me as we go over these provisions whether the practices of National Lead Company, in the period from 1938 to 1943, were in conformance with the provisions that appear in this schedule, and if not in what respect they differ.

A. I see.

Q. Now, under 4 of Article I(b), under "Price", the provision for allowance of not more than one-half cent per pound for minimum shipments of five tons for one buyer at one time to one destination. This refers to the less-than-20-ton orders, the card price orders.

A. Yes, sir.

Q. Has that been the practice of National?

A. Yes, sir.

Q. It has?

A. Yes.

Q. How about with reference to (c), the provision on protection against decline in seller's price?

A. Yes.

Q. That has been followed?

A. Yes, sir.

Trial Examiner Norwood: Answer a little louder, 1651 please.

The Witness: Yes, sir.

By Mr. Wright;

Q. The provisions of (d) which set out the differentials between the grades of red lead?

A. Yes, sir.

Q. Those have been followed?

A. Yes, sir.

Q. And also the terms for delivery and transportation allowance?

A. Yes, sir.

Q. Now, I call your attention to No. 8 there, the provision for net 30-day terms or 1 percent cash discount for payment in 10 days.

A. Yes, sir.

Q. And that has been followed?

A. Yes, sir.

Q. How about the provision under "9" for taxes?

A. As far as I know they have been.

Q. They have been?

A. As far as I know.

Q. Now, we come to Article II, the provisions regarding sales of oxides in lots of at least 20 tons. Those are your carload quotations?

A. Generally, yes, sir.

1652 Q. Now, under "5", the price, where it states, "Price shall be determined by adding a differential as agreed upon by buyer and seller to the price of common lead at New York. The lead prices applying at each order to be specified by buyer at the time the order is placed as"—and then there are three alternatives, (1) the American Smelting & Refining Company's quotation at the close of the market on the day the order is received, and (2) the quotation of American Smelting & Refining at a future date agreed upon, or (3) the average quotation.

A. We have followed that generally.

Q. You followed one of the three of those in quoting on those carload orders?

A. Generally, yes, sir.

Q. How about (c) under "5", the provision against decline in seller's price?

You followed that, too?

A. Yes.

Q. Is it also true you followed the provision for differential between grades of red lead?

A. Yes, sir.

Q. How about the provisions under "Transportation Allowance" and under "A", the allowance of freight paid by the buyer?

A. Generally, we have followed that.

1653 Q. In that connection, in selling oxides at carloads, does National Lead generally prepay the freight, or is the freight paid by the buyer and allowance made?

A. Well, it can be either, and it has been either.

Q. It has been either?

A. I do not mean we give them the option, but we have done both.

Q. What would you say, in the period between 1938 and 1943, was the more common practice?

A. I would not say. I think we have done them both, and I would have to refer to the various branches and their shipping papers and invoices to determine that.

Q. Could that fact be ascertained without considerable trouble to you, as a matter of finding what the policy was?

A. I believe so, yes, sir.

Q. Now, how about under "8", under "shipments", where it states, "shipment shall be made at least within 60 days from (a) the date on which the price of pig lead governs the sale or (b) the beginning of the period during which the average price of pig lead governs the sale"?

A. Generally, we have followed that.

Q. You have followed that. And the terms, "net 30 days with no cash discount", has that been your practice?

A. Yes.

Q. How ~~about the provision under~~ "10" for taxes?

A. As far as I know.

1654 Q. You have followed that?

A. Yes, sir.

Q. Are you qualified to state with reference to Article II on the sale of dry white lead?

A. No, sir.

Q. Mr. Merson, in quoting on these various grades and mixtures of oxides, Grenox, 25-S, 25-R, and 111 with the various subnumbers, are there card differentials as between those various products?

A. Are there card differentials?

Q. In other words, assuming now your card prices of litharge in par territory are $7.25, would your card prices of these other products be at a differential from that?

A. They would be considered litharges.

Q. They would all take that same price?

A. That is, the litharges would.

Q. The litharges would?

A. Yes, but the red lead would take the red lead price.

Q. I think you stated some of these products had as much as 25 percent red lead in them.

A. Yes.

Q. Would they be at a differential over the litharge price?

A. Yes, sir.

Q. Which products would those be?

A. The 25-B or S, or ST, or SC.

1655 Q. All those oxides with the 25 in the designation—that would indicate 25 percent red lead?

A. Generally, yes, sir, about 25 percent.

Q. What differential do you ordinarily quote those over the litharge price?

A. 25 cents.

Q. 25 cents a hundred?

A. Yes, sir.

Q. Are there other combinations of those oxides that take a differential above the litharge price?

A. Not unless they are red lead.

Q. Yes.

A. Which takes a differential over the litharge.

Q. Would you make a combination of half litharge and half red lead?

A. We do not make those. We may have, but it was not the common practice, or in any volume.

Q. In your carload contract on red lead, I believe you stated it was customary to quote $2.50 over the A. S. & R. New York price.

A. I did not say so, but that generally is our practice.

Q. Is that the 95 percent and less grade of red lead?

A. Yes, sir.

Q. And if it were 97 percent it would be a differential above that $2.50, is that correct?

1656 A. Yes.

Q. And 98 percent, it would be above that?

A. Yes, sir.

Q. What is the differential on 97 over 95?

A. 25 cents.

Q. And on 98 over 97?

A. Another 25 cents.

Q. So there would be a $3 differential over pig lead for the 98 percent grade?

A. Generally.

Q. Generally?

A. Yes, sir.

Mr. Wright: I have no further questions of this witness.

Trial Examiner Norwood: You may examine him.

Mr. Ewing: No cross-examination.

Trial Examiner Norwood: Thank you, Mr. Merson.

(Witness excused.)

Mr. Wright: I would like to recall Mr. McCarthy.

FRED K. McCARTHY was thereupon recalled as a witness for the Commission and, having previously been duly sworn, testified as follows:

Direct Examination.

Trial Examiner Norwood: You testified previously?

1657 The Witness: I testified in June.

Trial Examiner Norwood: You have been sworn then?

The Witness: Yes.

By Mr. Wright:

Q. Mr. McCarthy, are you conversant with the practices of National Lead Company in connection with the sale of basic carbonates of lead?

A. Yes, sir.

Q. Over what period of time?

A. Since about 1935.

Q. Are you familiar with Article III of the code provision as it appears in Commission's Exhibit 809?

A. I have seen it before, but it was non-operative at the time I was connected in this business.

Q. At what time was that?

A. Well, as I remember, the NRA sort of desisted after the Schechter case.

Q. In other words, the provisions of this article have not been followed by National Lead since the Schechter decision?

A. I would say instead there was no governmental compulsion.

Q. I did not ask you that. I asked you whether or not the National Lead Company had utilized the terms and conditions of sale in accordance with the provisions of Article III in the period from the Schechter decision to
1943. I refer you specifically to (b) on page 380, in
1658 line 5, "Contract Sales", paragraph 1.

A. That has not been followed for several years.

Q. Can you be more specific as to the time in which it has not been followed?

A. We have had no such contracts since shortly after Pearl Harbor, in 1942.

Q. Since 1942?

A. That is right.

Q. From the period 1933 to 1942 did you employ such contracts?

A. I can only say with certainty that we did have such contracts from 1935 to 1942.

Q. I see. Were those contracts in accordance with paragraphs 1 and 2, under "Contract Sales"?

A. Not as stated in this paragraph, no, sir.

Q. How did they differ from the way it is stated in those paragraphs?

A. On occasion undelivered balances from the previous quarter would be carried over into a succeeding quarter where it had not been physically possible to effect delivery before the expiration date of the quarterly contract.

Q. That was in the event of a physical impossibility on your part?

A. That is right.

Q. That was not a general policy of the company, though, was it, as to undelivered balances which had 1659 not been delivered for some other reason?

A. No, no.

Q. And did they carry protection against advance or decline?

A. That is right.

Q. On the undelivered portion to the end of the calendar quarter?

A. That is right.

Q. Under (c) on page 380, the price for carloads to one buyer, one destination, shall be not more than one-quarter cent per pound less than that charged for smaller quantities.

A. That is correct.

Q. Was that followed in those transactions from that period in 1935 to 1943?

A. Yes, sir.

Q. Did the National Lead Company in that period quote or offer generally any basic carbonates on the basis of a differential over the price of pig lead?

A. No, sir, not to my knowledge.

Q. So that in basic carbonates the largest quantity discount was a quarter of a cent for orders of 20 tons or more?

A. That is right.

Q. Irrespective of quantities beyond that?

A. That is right.

Q. I believe you heard the testimony of Mr. Mer- 1660 son regarding the relationship which has existed between the price of pig lead at New York and the card and contract prices of the oxides.

A. Yes.

Q. Has any such relationship existed as to basic carbonate in the period 1935 to 1943?

A. The relationship is fundamentally similar but it is not nearly as flexible. Card prices on pigments, that is, dry white lead and basic lead sulphate, do not normally change as frequently as those for oxides, because the pig lead market would have to move further and show signs of staying at the new position in order to warrant an increase or decline in dry white lead prices.

Q. The pig lead that is used in corroding basic carbonate also carries a differential above the common pig lead price, is that correct?

A. That is true. There is a 10-cent differential for the corroding grade.

Q. 10 cents a hundred pounds?

A. That is right.

Q. Is that true relative to the lead from which lead sulphate is produced? Is that common pig lead or corroding lead?

A. It is my understanding that our price of sulphate manufacture stemming as it does from an oxide, is
1661 not dependent upon the refined or corroding grade of pig lead.

Q. So you can use common pig lead in producing the sulphate?

A. Yes.

Q. Would it be fair to state that the National Lead Company is the leader in pricing basic carbonate?

A. We establish our prices on the basis of our cost without reference—

Q. (Interposing) Without reference to your competitors in any way?

A. Within the industry that is, but we are competitive with other pigments.

Q. So you sometimes change prices with regard to that?

A. Well, we would hold back sometimes because of very low priced competitive pigments.

Q. Can you recall, in the period 1935 to 1943, whether any of your competitors announced a price change in white lead, either carbonate or sulphate, prior to the National Lead Company?

A. Yes.

Q. Before any word had gotten into the trade that the National Lead Company was considering such a move?

A. On occasion we have learned of increases in prices of a number of other people, through consumers.

Q. Do you recall any instance of that?

A. Yes.

1662 Q. Will you state what it was?

A. It was in December of 1941, I think, when there was quite a lot of activity in the pig lead market.

Q. That was shortly prior to the time the OPA ceilings were on?

A. That is right.

Q. The price of pig lead had gone up sharply in that period?

A. Several times within the period of a month.

Q. Who announced the change prior to you at that time?

A. At this time I was in Cincinnati and Eagle-Picher had announced a change before we had been advised by New York.

Q. They had announced it generally to their customers?

A. Yes.

Q. What date was that, do you recall?

A. It was during the month of December but I am not sure just what date.

Q. Do you recall whether the announcement was effective as of that time or whether it had a future effective date?

A. When I learned of it, it was already in effect.

Q. It was already in effect. Do you recall the Carter White Lead Company, Mr. McCarthy?

A. Carter was an integrated part of National Lead at the time I came with the National Lead Company.

Q. Do you have any knowledge of the plants or 1663 facilities that the Carter Company had prior to its acquisition by National?

A. Carter was originally an Omaha firm, but years ago, probably before the last war, they transferred their operations to Chicago, and I think at the time National acquired Carter it was purely a Chicago operation.

Q. In other words, the Omaha plant had been closed prior to acquisition by National?

A. Yes.

Q. Do you recall when National acquired Carter?

A. It was before my time with the company, but I think it was in the 20s.

Q. Was Mr. F. M. Carter, who was later president of the National Lead Company, connected with the Carter White Lead Company?

A. Yes.

Q. He had been the principal party in that company?

A. It is my understanding Mr. E. J. Cornish came from Carter, too.

Q. Both Mr. Carter and Mr. Cornish came from Carter?

A. Yes.

Q. Do you recall Wetherill in Philadelphia?

A. Back in the 30s we were packing lead under the Wetherill brand as well as under the brand of Dutch Boy, and also John T. Lewis in Philadelphia.

1664 Q. Do you recall the acquisition of Wetherill by National?

A. No, sir, I do not. We discontinued the use of the brand back in the 30s.

Q. Would you be able to ascertain from the records of National when that acquisition was made?

A. I assume the minutes of the Board would show. That information could be developed.

Mr. Wright: No further examination.

Mr. Ewing: Just a second. I assumed, perhaps erroneously, with respect to the testimony adduced this morning from Mr. Merson and Mr. McCarthy, with respect to the provisions of the code and relationship between those provisions and the continuance of business since, that the objection to that general line of testimony made yesterday in connection with Mr. Zoller's examination would apply here, without the interruptions to make the objection now. I would like to have the record show that.

Trial Examiner Norwood: That was our understanding.

Mr. Wright: That was my understanding, that the objection to all the NRA stuff was preserved for all counsel all the way through.

Mr. Ewing: At the hearing in New York, Mr. McCarthy was questioned with respect to the tonnage of white lead or dry basic carbonate and basic sulphate produced by National in 1943 in round figures. At that time he felt 1665 that was a matter of such a nature that he would regard it as confidential and would not disclose it, and, accordingly, refused to testify on that point. It now appears in this case that similar testimony has been received from all the other respondents who produce those products, and under the circumstances I would like to have Mr. Wright, if he would, reput that question to Mr. McCarthy and he would be permitted to answer it.

Trial Examiner Norwood: He may do so.

By Mr. Wright:

Q. Mr. McCarthy, are you prepared to state the approximate percentages of the production of National Lead Company to the total industry production in 1943?

A. Of which product?

Q. Of dry white.

A. About 30 percent.

Q. How ~~about~~ 1942?

A. About the same.

Q. 1933?

A. It has been in the neighborhood of 25 to 30 percent for years.

Q. In other words, somewhere around 30 percent would be correct over that whole period back of 1943 for 10 or more years?

A. That is right.

Q. Will you state the percentage in 1943 of white lead in-oil?

1666 A. Approximately 60 percent.

Q. Would you answer the same as to the relative proportion over a period from, say, 1932 to 1943, as to white lead in-oil?

A. That has varied on a downward trend.

Q. In other words, it would have been higher in 1932 than it was in 1943; is that correct?

A. I would imagine, from what I heard, that the proportion was slightly larger then and has declined since.

Q. So it might have been as much as 70 percent in 1932?

A. I could not state with accuracy. That was before my time with the company.

Q. I see. Mr. McCarthy, going back to the price change that you mentioned, that you learned of with reference to Eagle-Picher, was that for dry basic carbonate or white lead in-oil?

A. That was for sulphate and carbonate, dry.

Q. That was for dry sulphate and carbonate?

A. That is right.

Q. That did not affect white lead in-oil?

A. Not at that time.

Mr. Wright: No further examination.

Mr. Ewing: No cross-examination.

Trial Examiner Norwood: Thank you, Mr. McCarthy.

(Witness excused.)

Mr. Wright: May we go off the record a minute?

166[illegible] Trial Examiner Norwood: Off the record.

(Discussion was had outside the record.)

Mr. Wright: Your Honor, I suggest we now adjourn over until October 17 here in Washington. I will try to advise counsel in the interim of my plan, so if it is possible to save them a trip to the hearing I will make every effort to do so.

Mr. Wood: I want to make this statement on the record, that I am very much surprised by the fact that the Commission's case is as nearly closed as Mr. Wright has stated. I have not been objecting to certain lines of testimony because I did not want to encumber the record or slow down the proceedings. The type of testimony which I have in mind is exemplified by the testimony of Mr. Zoller yesterday and Mr. Merson this morning in respect to differences between carload and card prices on litharge. I think that testimony has no point in the case unless it is supplemented by other testimony in respect to what it means in the industry, if anything. Now, I frankly do not know whether Mr. Wright is going to try this case as a freight rate case or whether he is going to make a point of that type of thing. Now, if it is the latter, I want to reserve my right to move that that type of testimony be stricken, if it is to stand alone.

Trial Examiner Norwood: Counsel can move to strike it anytime he wants to.

1668 Mr. Wood: I haven't objected, your Honor, I just wanted the statement on the record that it is my position that that testimony is incompetent.

Trial Examiner Norwood: The testimony would have been ruled on at the time it was offered if counsel had objected.

Mr. Wood: It might have become pertinent if backed up by other testimony later.

Trial Examiner Norwood: I always lean against having the failure to object work to the prejudice of any counsel.

Mr. Wright: What Mr. Wood is really objecting to is the manner in which the case is handled. I think he has got a legal question there regarding the insufficiency of the evidence, rather than anything which goes to the admissibility or competency of the evidence in the first place.

Trial Examiner Norwood: Well, gentlemen, that matter can go over. The motion will be allowed, to recess. After consultation with counsel on both sides I find it will be convenient for us to meet here on the 17th. So the motion is allowed and the hearing is adjourned until 10 o'clock a. m. on October 17 in this hearing room, 332, office of the Federal Trade Commission, Washington, D. C.

(Whereupon, at 12:15 p. m., October 4, 1946, an adjournment was taken until 10:00 a. m., Thursday, October 17, 1946.)

1669 Room 332, Federal Trade Commission
Building,
Washington, D. C.,
Thursday, October 17, 1946.

Met, pursuant to adjournment, at 10:00 a. m.

Before:
John W. Norwood, Trial Examiner.

Appearances:
Joseph S. Wright, Esq., attorney for the Federal Trade Commission.

1670 PROCEEDINGS.

Trial Examiner Norwood: The hearing will be in order.

Pursuant to adjournment on October 4, the hearing in Docket 5253 is now convened in room 332, offices of the Federal Trade Commission, Washington, D. C., at 10:00 o'clock a. m., on the 17th day of October, 1946.

Enter Mr. Wright for the Commission.

There appear to be no other attorneys here, for the respondents.

Mr. Wright: May I say, your Honor, I advised the respondents by telegram on Monday of this week that we would be unable to hold to the schedule we made for a hearing here today, and that I would merely request an adjournment of the hearing to a later date. In that connection, I advised counsel that I was moving for an adjournment to October 29, but in order to avoid running too close on that date I now would like to suggest that we adjourn to November 6 here in Washington.

Trial Examiner Norwood: Do you think counsel for the respondents would be satisfied with that?

Mr. Wright: There has been no opportunity to consult with them about that later date.

Trial Examiner Norwood: Will you advise them immediately, so that they will not make other arrangements?

Mr. Wright: Yes, sir.

1671 Trial Examiner Norwood: The motion is granted to postpone the hearing to November 6, 1946, in room 332, offices of the Federal Trade Commission, Washington, D. C., at 10:00 o'clock a. m.

The hearing will stand adjourned until that date.

(Whereupon, at 10:06 a. m., an adjournment was taken until 10:00 a. m., November 6, 1946, in room 332, offices of the Federal Trade Commission, Washington, D. C.)

1672

Room 1123, New Post Office Bldg.,
Chicago, Illinois,
November 13, 1946.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 815—15th St., N. W., Washington, D. C.), appearing for Sherwin-Williams Company.

Edmund P. Wood, Esq. (2801 Carew Tower, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

Roger Hinds, Esq. (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

1673

PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to agreement of counsel and due notice, the hearing in Docket 5253 is now convened in Room 1123, New Post Office Building, Chicago, Illinois, at 10 o'clock a. m., November 13, 1946.

Mr. Reporter, you will enter the appearances.

I might say one thing, so that counsel may make their arrangements. We had scheduled here a hearing for Washington on November 6—

Mr. Wright: (Interposing.) Your Honor, pardon me for interrupting, but I have a witness here who is very anxious to catch a 12 o'clock train. I wonder if we could call him now, and then we have several things to discuss with counsel after we have finished with this witness; we can take up the matter of the schedule of the other hearings at that time.

Trial Examiner Norwood: Call your witness.

Mr. Wright: Mr. Chamberlain.

J. B. CHAMBERLAIN was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

1674 Q. Mr. Chamberlain, will you state your full name and address for the reporter?

A. J. B. Chamberlain, Commander Battery Manufacturing Company, 4221 West Kinzie Street, Chicago.

Q. Is the Commander Battery Manufacturing Company a corporation?

A. Yes, sir.

Q. Are you an officer of the corporation?

A. President.

Q. You are President?

A. Yes, sir.

Q. What is the business of the Commander Battery Manufacturing Company?

A. Manufacturing automotive starting and lighting batteries.

Q. For how long a time has this company been engaged in that business?

A. It was incorporated in 1937.

Q. Has it been engaged in the business continuously since that time?

A. Yes, sir.

Q. How long have you been with the company, Mr. Chamberlain?

A. Since its start.

Q. Over how long a period of time have you been in the battery business? Were you connected with it prior to that time?

A. I have been in the battery business since 1921.

1675 Q. What is the normal average annual output of batteries by the Commander Battery Manufacturing Company?

A. An average of about 50,000.

Q. Fifty thousand batteries, that is per year?

A. Yes.

Q. Did I understand you to say that these were automotive starting and lighting and ignition batteries?

A. That is right.

Q. What are your normal market areas for these batteries?

A. Within a radius of 300 miles of Chicago.

Q. In every direction, is that?

A. Well, we go up north as far as Duluth; west as far as Des Moines, well, we have one exception, we do go as far as Yankton, South Dakota; and Evansville on the south; and Cleveland on the east.

Q. To what type or class of customers do you usually sell?

A. Automotive jobbers.

Q. Automotive jobbers?

A. Yes, sir.

Q. Do you do any business with fleet operators?

A. No, we don't.

Q. And your customers all purchase for resale, then?

A. That is right.

Q. Under what brand or trade names are the batteries you manufacture sold?

1676 A. We have two brands, the Combat and the Interstate.

Q. Do you make any private brand batteries?

A. We make some, yes.

Q. For whom do you make those?

A. For the last few years we have made some for Sears, Roebuck, and the Harrison Wholesale here in Chicago.

Q. From whom do you purchase lead oxides?

A. From Hammond Metal Products and Eagle-Picher.

Q. On what price basis do you purchase from those companies?

A. We buy in carload quantities.

Q. Carload quantities?

A. Yes.

Q. Is that price figured on a differential over the price of pig lead, do you know?

A. Yes, it is.

Q. About how many sizes and types of batteries do you manufacture?

A. Seventeen sizes are stocked.

Q. What are your principal items, the ones that account for the largest part of your production?

A. Well, there are about 6 sizes that constitute 80 percent of the volume.

Q. Do you make a 3-cell, 15-plate, 100-hour amp. battery?

A. Yes, we do.

Q. Is that one of your principal items?

1677 A. Yes.

Q. Do you know how many pounds of lead oxides go into the manufacture of that particular battery?

A. Offhand, I couldn't give you the exact amount in oxides, but there are around 23.7 total lead in that battery, and say roughly about 11 pounds would be oxides.

Q. Eleven pounds would be oxides?

A. Approximately.

Q. And they would be both positive and negative oxides?

A. That is correct.

Q. Would that quantity relation obtain over the whole period of time from 1937, on, that your company has been in business?

A. Oh, there have been a few changes in thicknesses of plates, and so forth, but that would be approximate, yes.

Q. Are you familiar with your costs, material costs of production on that 3-cell, 15-plate, 100-hour amp. battery, Mr. Chamberlain?

A. Well, I haven't got the figures with me; I couldn't give you that as to the material costs, no.

Q. Can you give us an approximate material cost?

A. You mean our factory cost, material cost?

Q. Yes, sir.

Mr. Welch: Mr. Examiner, we object to an approximation when the figures are available. We think as far as we can, we should proceed on an exact situation rather
1678 than approximations.

Trial Examiner Norwood: Can you show the exact figures?

Mr. Wright: Your Honor, I am trying to develop just what the witness is prepared to testify to here. I think that if his testimony is so vague and unreliable that it doesn't have any probative value, it is subject to a motion to strike on that particular ground.

Trial Examiner Norwood: I think the witness may go ahead and give us the best information he can on it.

Mr. DuBose: Just a moment. I don't understand the question. Does that include labor costs, or are you trying to pin it down just to material costs?

Mr. Wright: We haven't gotten an answer on it yet, Mr. DuBose. I am trying to ascertain how much Mr. Chamberlain is prepared to testify to.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Can you give us an approximate material cost?

"A. You mean our factory cost, material cost?

"Q. Yes, sir.")

Trial Examiner Norwood: Objection overruled. Answer the question.

Mr. Wood: I object to the question, Your Honor.
1679 Material cost might include a great many different things.

Trial Examiner Norwood: You can cross-examine him on that.

Mr. Wood: It seems to me it ought to be directed to lead oxide. We are perfectly willing to have him state what his cost of lead oxide is, but material cost might include the battery case and all sorts of things extraneous to this inquiry.

Trial Examiner Norwood: Objection overruled. We can get to that later.

Mr. Wright: I will withdraw the question, Your Honor.

By Mr. Wright:

Q. Mr. Chamberlain, what is your cost on a case for the battery about which we were speaking?

A. Well, in the Group 1, the composition case I believe now is 51 cents.

Q. What is the cost of separators that go into that?

A. They are $6.65 a thousand, and there are 42 used, so I would have to figure it out for you.

Q. Well, that won't be necessary. Forty-two are used at the price of $6.65 a thousand?

A. That is correct. That is in the ordinary wooden separator battery. Also fiber glass is used in the better grade battery.

Q. How much do those fiber glass separators cost per thousand?

1680 A. They run around $4.00 a thousand.

Q. What other materials than metallic lead, lead oxides, case and separators go into the manufacture of a battery?

Mr. Welch: Will you read the question, please?

Trial Examiner Norwood: Read the question.

(The reporter read the question.)

A. Well, the principal parts are the case, covers and vent caps, separators, and then your lead oxide and pig metal. I don't know whether I mentioned sulphuric acid or not, but that covers it.

By Mr. Wright:

Q. You use sulphuric acid as your electrolytic agent that you add to the battery to make it operative?

A. That is right.

Q. Is the cost of the lead oxides, then, a very substantial part of the material costs that go into the battery?

Mr. Welch: Objection. Let him state what the cost is.

Trial Examiner Norwood: Objection overruled.

A. Well, the lead in its various forms is the principal cost of a battery.

Trial Examiner Norwood: Off the record just a minute.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

1681 By Mr. Wright:

Q. Mr. Chamberlain, you mentioned that they used 42 separators in a battery, and that they cost $6.65 a thousand; that the case of the battery cost 51 cents per battery. You also mentioned covers and caps as a material that went into the battery.

A. That is correct.

Q. What is the cost of those, do you recall that?

A. Well, the vent caps are $1.30, I believe, a thousand. I am not sure of the definite figure.

Mr. DuBose: Is that the cost to you, just to keep the record straight?

The Witness: That is correct.

By Mr. Wright:

Q. How many vent caps are used on that battery?

A. Three.

Q. What is the cost to you of the covers?

A. Around 12 cents for a battery, I believe.

Q. You mentioned the vent caps, the covers, the case, the separators, and the oxide and the metallic lead. Is there any other material, now, as distinguished from labor cost, that goes into a battery?

A. Sulphuric acid.

Q. Approximately what is the cost, per battery, of sulphuric acid?

A. Around 6 cents a battery.

1682 Q. Mr. Chamberlain, in the market areas that you have mentioned, do you compete with the National Battery Company?

A. Yes, we do.

Mr. DuBose: I object to this whole line of questioning as immaterial and irrelevant.

Trial Examiner Norwood: Objection overruled.

By Mr. Wright:

Q. Willard?

A. Yes.

Q. Exide?

A. Yes.

Q. Auto-Lite?

A. Yes.

Q. Gould?

A. Yes.

Q. Firestone?

A. Yes.

Q. The Western Auto Supply?

A. Well, we don't sell in the Western stores, and they have their own brand, but their stores compete with our dealers.

Q. They compete with your dealers?

A. Yes.

Q. Sears Roebuck?

A. Well, yes, naturally we have got competition from their stores.

1683 Q. All over the market area which you mentioned?

A. That is correct.

Q. Montgomery Ward?

A. Yes.

Q. Atlas?

A. That is the Standard Oil?

A. Yes.

Q. Do you know who makes that battery?

A. No, I don't.

Q. Do you know who makes the bulk of the Sears Roebuck batteries?

A. Yes.

Q. Who is that?

A. Globe Union.

Q. Do you know who makes the bulk of the Montgomery Ward batteries?

Mr. DuBose: I renew my objection, if Your Honor please.

I think he is going far afield. I don't see the relevancy of this to our case, of any of this testimony.

Mr. Welch: I would like to add a further objection. There has been no testimony at all that the Commander Battery Company is a retail seller of batteries, and obviously the competition afforded by Western Auto Supply, Sears Roebuck and Montgomery Ward is at the retail level.

Mr. Wright: The witness just testified a moment 1684 ago that he knew that those companies competed with the dealers to whom he sells.

Mr. Welch: He hasn't shown any basis for such knowledge.

Trial Examiner Norwood: The objections are overruled.

By Mr. Wright:

Q. Do you compete with Delco?

A. Yes, sir.

Q. As to Delco, National, Willard, Exide, Auto-Lite, and Gould, are they direct competitors with you for the business of distributors?

A. Certain ones of those are, yes. National is; Auto Lite is; and also Delco.

Mr. DuBose: That is National Battery Company?

The Witness: National Battery Company, yes.

Mr. DuBose: Just to keep the record straight.

By Mr. Wright:

Q. As to Firestone, Sears Roebuck, Montgomery Ward, Western Auto Supply and Atlas, do they compete with you for dealer business?

A. Very little.

Q. Do they compete with your customers, to your knowledge?

A. They have their assured outlets through their standard stations.

1685 Q. Do you compete with Coliseum?

A. Yes.

Q. Volta?

A. Yes.

Q. Monark?

A. Yes.

Q. Bowers?

A. Yes.

Q. Reading?

A. No, we have very little competition from Reading.

We don't get into their territory, and they don't get into ours.

Q. American in Kansas City?

A. Very little.

Q. Federal Battery here in Chicago?

A. Yes.

Q. Goodyear?

A. Indirectly.

Q. How do you mean, indirectly?

A. Well, as I said, on the same basis as I did before, their stores are competing with our dealers.

Q. Globe Union?

A. Yes.

Q. Mr. Chamberlain, is the present market situation in the battery business a normal one, would you say?

A. A very abnormal one right now.

1686 Q. Is there a distinct shortage of batteries at the present time?

A. Yes, there is.

Q. Would you say that the period of time from 19[illegible] to 1941 was a more normal competitive time?

A. Well, it was far more normal—.

Mr. DuBose: (Interposing) I object to this line of questioning. The witness hasn't been qualified as an expert.

Mr. Wright: I will withdraw the question.

By Mr. Wright:

Q. Mr. Chamberlain, what was your margin of profit during the period from 1937 to 1941 on your standard Group 1 SLI batteries?

A. Around 25 per cent.

Q. Around 25 per cent?

A. Yes.

Q. Was that a closer margin than you presently make?

A. Yes, we weren't making that same margin before the change now. I don't know what the devil the prices are.

Q. Did you figure to make that 25 per cent on your full line of batteries, on each item?

A. No, we didn't.

Q. Were there some items where you made less than 25 per cent?

A. That is correct.

1687 Q. What items were those?

A. The most competitive battery in the Group 1 was down to where there was no margin of profit.

Q. That was a—

A. (Interposing) 13-plate battery, 60 ampere hour.

Q. What was your selling price on that battery in that period?

Mr. DuBose: What period is this?

Mr. Wright: We are talking about the period from 1937 to 1941.

A. During that time the jobber price got down as low as $2.45.

By Mr. Wright:

Q. That is $2.45 a battery?

A. That is right.

Q. Did you make any profit on selling that battery at that price?

A. As I said, there was no margin of profit; actually if you took the proportion of overhead it was sold at a loss.

Q. So you had to sell a higher profit battery in order to make up your loss on that?

A. That is right.

Q. Were any of the companies that we named a few moments ago as competitors of yours, leaders in driving the prices of that battery down to that point?

Mr. Welch: I object.

1688 Mr. DuBose: I object to that.

Trial Examiner Norwood: I think that you had better bring out the facts—

Mr. Wright: (Interposing) I withdraw the question, Your Honor.

By Mr. Wright:

Q. Do you recall the price at which the Bowers Battery Company was selling that 13-plate battery in the Chicago area during that period from 1937 to 1941?

Mr. DuBose: I object, Your Honor, and if it is relevant, let's have the actual figures and not this witness' hearsay recollection.

Mr. Wright: This witness is the President of a battery company which has been in business since 1937, and obviously is very familiar with it. If he knows the price of his competitors during that period, I think it is competent for him to testify to it.

Trial Examiner Norwood: Let's read the question, and I—

Mr. DuBose: I think it is irrelevant; but if it be relevant, then let's get the actual figures.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Do you recall the price at which Bowers Battery Company was selling that 13-plate battery in the
1689 Chicago area during that period from 1937 to 1941?")

Mr. Hinds: I object to that. Let's have—

Trial Examiner Norwood: (Interposing). Objection overruled.

Tell us whether you recall that price or not.

Mr. Wood: Let him say whether it was 1937 or 1941.

Trial Examiner Norwood: Answer yes or no.

The Witness: I couldn't state definitely, no. I know that we were competitive, and we had to be down to that level to compete, but I can't say definitely what they did sell at.

By Mr. Wright:

Q. Do you recall any quotations of Sears Roebuck at retail for batteries during that period, that 13-plate battery?

1690 Mr. DuBose: The same objection, if Your Honor pleases.

Trial Examiner Norwood: Do you say that he can't tell what those prices were at that time, if he recalls them?

Mr. DuBose: No. I think in the first place it is irrelevant, and in the second place, if it is relevant, let's have the exact figures.

Trial Examiner Norwood: I think this is relevant; it goes to the conditions in the lead trade, and numerous things.

Mr. Welch: This testimony is not the best evidence as to what some other store's price on batteries was.

Mr. Wood: If Your Honor please, I am perfectly willing to have go into the record the price of any concern in the United States at any specific time, if it is an accurate price and an accurate time. But I can't see the point of just—

Trial Examiner Norwood (Interposing): Do you think the price can only be shown by some written document?

Mr. Wood: No; if this man knows the price of a given company's product at a given time, he can certainly testify to that.

Mr. Wright: That is all he is being asked.

Mr. Wood: No, he is being asked to testify generally over a five year period.

Mr. Hinds: Will Your Honor hear me on that objection?

1691 Trial Examiner Norwood: Yes.

Mr. Hinds: I would like to point out that the effect of allowing a competitor to come in and tell of his so-called knowledge or information as to the prices of these other competitors would necessarily be to put us, who are not expected to have the burden of proof on this subject, to the burden of bringing in the true prices. In other words we have nothing reliable here whatever, not even prima facie accuracy, and we then have the burden of coming in and disproving that this hearsay is actually the price. I say that even though the strict rules of evidence don't apply—

Trial Examiner Norwood (Interposing): There is no hearsay elicited by that question. He asked him if he knew what the price was.

Mr. Hinds: That is pure hearsay in this case unless he was actually present and heard the transaction, or saw the documents.

Trial Examiner Norwood: Objection overruled.

By Mr. Wright:

Q. Do you recall any price quotation of Sears Roebuck & Company over the period from 1937 to 1941 on the 13-plate battery?

A. No, I don't.

Q. The type of battery we are discussing.

A. No.

Q. Mr. Chamberlain, you stated that your price 1692 to dealers got as low as $2.45—

A. (Interposing): That is to the jobber, not to the dealer.

Q. Yes—and that you were suffering a loss on that battery at that price?

A. Yes, it wouldn't carry its full proportion of overhead.

Mr. Wood: I object to the phrasing of the question, "suffering a loss". Obviously that was a loss leader in the industry and it was a voluntary loss that was taken to promote the sale of other batteries, and the term "suffering a loss" I think is inappropriate.

Trial Examiner Norwood: I can't follow that Mr. Wood; the objection is overruled.

By Mr. Wright:

Q. What was your normal list price on that battery to distributors?

Mr. DuBose: During what period, Mr. Wright?

Mr. Wright: During the period in which he sold it for $2.45.

The Witness: May I have that question again?

By Mr. Wright:

Q. What was your normal list price on that 13-plate battery to distributors?

Mr. DuBose: I won't object to that question if we can have the term "normal" defined.

Mr. Wright: I will examine him further on that if I can get his answer to this question.

1693 The Witness: $5.95.

By Mr. Wright:

Q. At what time was that?

A. August, 1941, in a published sheet.

Q. That was a sheet in which you published your list prices?

A. I don't have the price sheet for the lowest time. At that time the jobber price was $2.98, in August of 1941.

Q. What was the $5.95 price? Was that the consumer price, the list price?

A. The consumer price.

Trial Examiner Norwood: What do you mean by "normal" price?

The Witness: I don't recall using the word "normal".

Mr. Wright: He stated what his list price was.

Trial Examiner Norwood: You didn't use that word in your answer?

Mr. Wright: No, he did not.

By Mr. Wright:

Q. Were there, to your knowledge, batteries which were offered to the trade at a lesser price than yours during that period?

A. Well, it would be only hearsay—yes—

Mr. DuBose: I object to any hearsay and move to strike the answer.

1694 By Mr. Wright:

Q. Were you informed?

A. I was informed by our salesmen—

Mr. DuBose (Interposing): I again object, please.

Trial Examiner Norwood: Read the record, please.

(The reporter read the record as requested.)

Trial Examiner Norwood: Were these prices reported to you during the regular course of business?

The Witness: Yes sir.

Trial Examiner Norwood: In the regular course of your business?

The Witness: Yes.

Trial Examiner Norwood: I am going to overrule the objections because that is not inadmissible hearsay.

By Mr. Wright:

Q. Mr. Chamberlain, you stated that at the time the price of that battery was $2.45 you incurred a loss as the result of selling at that price?

A. That is right.

Q. When you set that price at that point did you do so because of the competitive prices you encountered in the market area?

Mr. DuBose: That is objected to.

Mr. Welch: Objection—leading.

Trial Examiner Norwood: Sustained.

1695. Mr. Wright: Your Honor, did I understand you to say that you sustained that objection?

Trial Examiner Norwood: Yes, as leading. Ask the witness, don't tell him.

By Mr. Wright:

Q. Why did you set your price at that point, Mr. Chamberlain?

A. To be competitive.

Q. To be competitive?

A. Yes.

Q. It was not your intention, then, to use that battery as a loss leader to attract business?

Mr. Welch: Objection.

Trial Examiner Norwood: The objection will be sustained. Ask him why he made that price.

Mr. Wright: I will withdraw the question, Your Honor.

By Mr. Wright:

Q. During the period from 1937 to 1941 was the storage battery business a highly competitive one?

A. Very highly competitive.

Mr. Wright: I have no further questions.

Trial Examiner Norwood: Cross examine.

Mr. Welch: May we have a few minutes' recess?

Mr. Wood: Five minutes?

Trial Examiner Norwood: We will have a five 1696 minute recess.

(A short recess was taken.)

Trial Examiner Norwood: All right, proceed.

Cross Examination by Mr. Wood.

Q. Did you say that you bought lead oxide from the Hammond Lead Company?

A. That is right, of Hammond, Indiana.

Q. Why do you buy from them?

A. Well, when I took over the company in 1937 they were already purchasing from them, and we just continued.

Mr. DuBose: Pardon me, you discontinued?

The Witness: Just continued to buy from them.

By Mr. Wood:

Q. Are their products of equal quality with the products of other lead manufacturers?

A. Our tests indicate that we can get just as good results from their oxides as from others.

Q. Are their prices competitive?

A. We have a better price, a lower price from Hammond than we do from Eagle-Picher.

Q. Why do you buy from Eagle-Picher?

A. Well, I can't say definitely why. We like their oxides.

Q. Is there anything individual about Eagle-Picher oxides?

Mr. Wright: I object—

1697 The Witness: (Interposing): We are using Eagle-Picher lead for our negative plate and we get a satisfactory plate and like it.

Trial Examiner Norwood: What was the ground of your objection, Mr. Wright?

Mr. Wright: There was nothing in the direct examination about this line of questioning, and it seems to me it is improper on cross, and I object to it.

Mr. DuBose: The whole line of questioning on direct was about the competitive situation, and certainly this line of testimony is perfectly relevant to that.

Trial Examiner Norwood: The objection is overruled.

By Mr. Wood:

Q. Do you get good technical service from Eagle-Picher?

A. Yes, we do.

Q. And good consulting service?

A. Yes.

Q. And that you value?

A. Greatly.

Q. When was your company organized?

A. It was incorporated in 1937.

Q. Before 1937 what was your occupation?

A. Manufacturing storage batteries. I was employed by the Amplus Storage Battery Company.

1698 Q. So that in 1937, when your company was organized, you were very familiar with the battery business?

A. That is right.

Q. And you knew it was a very highly competitive business at that time?

A. That is right.

Q. And you saw an opportunity to make money in it?

A. That is right.

Q. And you were highly familiar with all of the prevailing practices relating to the sale of lead oxides and lead products at the time?

A. That is right.

Q. And you still thought that your company could go into that competitive situation and make money?

A. That is right.

Mr. Wood: That is all.

Redirect Examination by Mr. Wright.

Q. Did you appear here as the result of a subpoena?

A. Yes, I did.

Q. Did anyone connected with this case, or the Federal Trade Commission, advise you or consult with you regarding your appearance as a witness here prior to the receipt of that subpoena?

A. No sir.

Mr. Wright: That is all.

1699 *Recross Examination by Mr. DuBose.*

Q. You did receive a letter from the Federal Trade Commission?

A. Yes, I did.

Q. And it asked you certain questions?

A. Pardon?

Q. Did that ask you certain questions?

A. Yes.

Q. So you were familiar with the type of questions the Federal Trade Commission would ask you today, were you not?

A. No, I was really surprised to hear the questions that have been asked because I was not at all prepared to answer the questions that have been asked.

Mr. Wright: Did you receive that letter prior or subsequent to the time you received the subpoena?

The Witness: After the subpoena.

Mr. Wright: No further questions.

Mr. DuBose: No further questions.

Trial Examiner Norwood: Off the record.

(Discussion off the record.).

Trial Examiner Norwood: On the record. The witness is excused.

(Witness excused.)

Trial Examiner Norwood: Call your next witness.

1700 Trial Examiner Norwood: Call the next witness.

Mr. Wright: Off the record.

(Discussion off the record.)

Mr. Wright: On the record.

Trial Examiner Norwood: On the record.

Have you a subpoena?

Mr. Arnst: I did not bring it with me. I left it home.

Trial Examiner Norwood: Mail it to me, if you want the fee. Are you from Chicago?

Mr. Arnst: Yes.

Trial Examiner Norwood: Give your full name to the reporter.

Mr. Arnst: Emil Arnst—A-r-n-s-t.

EMIL ARNST was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Mr. Du Bose: Your Honor, I do not recall whether the prior witness was sworn in.

Mr. Wright: I believe he was.

Trial Examiner Norwood: I recollect that.

Direct Examination by Mr. Wright.

Q. Mr. Arnst, what is your address and business affiliation?

1701 A. I am the vice president and production manager of the Universal Battery Company.

Q. Where is that company located?

A. 3410 South LaSalle, Chicago, Illinois.

Q. Is that a corporation?

A. Yes.

Q. How long has it been engaged in business?

A. About 47 years.

Q. All that time, here in Chicago?

A. In Chicago.

Q. How long have you been connected with the company?

A. Since 1939.

Q. Since 1939?

A. Yes.

Q. What is the principal business of the company?

A. We manufacture starting and lighting batteries, automobile batteries.

Q. Were you connected with the battery business prior to the time you went with the Universal?

A. Yes.

Q. Over how long a period of time?

A. Since 1922.

Q. Since 1922?

A. That is right.

Q. And have you been production manager and 1702 vice president since 1939, of Universal?

A. Since 1939.

Q. I see. From what sources does Universal purchase lead oxides?

A. At the present time and in the past, since 1939, to my knowledge, National Lead Company.

Q. You do not know who they purchased it from prior to that time?

A. We have purchased some oxides from, or we have purchased some oxides from Hammond Lead Company in Hammond, Indiana.

Mr. DuBose: Is that since 1939?

The Witness: Yes.

By Mr. Wright:

Q. Have you purchased from Metals Refining Company?

A. Not since 1939.

Q. Of Eagle-Picher Lead Company?

A. No.

Q. On what price basis do you purchase oxides from the National Lead Company?

A. We purchased oxides at $1.50 over the published lead price.

Q. What lead price is that, do you know?

A. New York.

Q. New York lead price?

1703 A. Yes.

Q. Do you also purchase antimonial lead?

A. Yes.

Q. Is that used in the production of storage batteries?

A. Yes.

Q. From whom do you purchase that?

A. National Lead Company.

Q. On what price basis do you purchase that?

A. The cost of metals.

Q. Will you explain that answer?

A. We purchase pig lead in the form of antimonial pig lead. In other words, the price of lead, plus the cost of antimonial pig lead, pardon me, plus the cost of antimony.

Q. I see. Well now, what pig lead price is that that you purchase on?

A. Generally, St. Louis.

Q. St. Louis lead price?

A. That is right. St. Louis lead price.

Q. And that is delivered to you here in Chicago?

A. Yes.

Q. On that price?

A. Yes.

Q. What is the normal average annual output of the batteries by Universal?

A. The annual?

Q. Yes.

1704 A. Approximately about 200,000.

Q. That is 200,000 batteries per year?

A. Yes.

Q. Over what market area does Universal sell those batteries?

A. About a radius of 500 miles.

Q. Of Chicago?

A. Yes.

Q. How far west do you go?

Mr. Welch: May I ask a question? Is the gentleman who just came in the room a witness?

Mr. Wright: Excuse me.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Wright:

Q. How far west do you go?

A. Approximately 250 miles.

Q. Do you go as far as the Twin Cities?

A. No, we do not.

Q. Well, at what points do you sell, in 250 miles or less?

A. Well, we go as far as points in Nebraska.

Q. Yes. Do you sell in Kansas City?

A. No, we do not get into Kansas City.

Q. St. Louis?

1705 A. St. Louis.

Q. How far south do you go?

A. We go as far as Indianapolis, and as far as Cleveland. We have shipped batteries into Buffalo.

Q. Do you have travel salesmen in those territories?

A. We travel, yes, we have had travel salesmen. At the present time we do not travel salesmen.

Q. Prior to 1941, did you travel salesmen?

A. We did.

Q. In those areas?

A. Yes.

Q. Soliciting business?

A. That is right.

Q. What types of accounts do you solicit in those areas?

A. Jobbers.

Q. That is for resale?

A. That is automotive jobbers that sells to a dealer.

Q. I see. Where is the substantial bulk of your distribution?

A. Well, the substantial bulk is in I would say, within 50 miles of the Chicago area.

Q. What brands do you sell; what trade names do you sell your batteries under?

A. We have the Universal trade name, and then we have a considerable amount of private brand business.

1706 Q. For what companies do you supply private brand batteries?

A. We supply batteries to the Gebhardt Stores in Decatur, Illinois; Western Tire and Supply, in Chicago; Goldblatt Brothers, in Chicago, Blue Star Stores in Chicago.

Q. Are those all retailers principally?

A. They are all chain stores.

Q. Chain retail stores?

A. Yes.

Q. And do you make these batteries under their private brand?

A. Under their private name, under their own name.

Q. I see. Over this market area that you have described, do you compete with a National Battery Company?

A. Yes.

Q. With Willard and Exide?

A. Willard, Exide, all.

Mr. Du Bose: If your Honor please, I make the same objection as we made to the other witnesses testimony along this line.

In other words, it is irrelevant. I made an objection on the grounds that this testimony about competition among battery manufacturers, is purely irrelevant to this proceeding.

Trial Examiner Norwood: Well, I think it is very
1707 clear that these particulars as to this trade here may be shown in bearing on effects.

Mr. Wright: I think it is obvious, the relevancy of this information, to this proceeding.

Mr. Du Bose: There is nothing in the complaint so far as I know. Of course, the complaint started out with white lead and was amended to include lead pigments. There is not a word, as I remember, about battery manufacturers.

Mr. Wright: Well, I think that it is obvious, when we speak of oxides in connection with the battery, storage battery business, that we are mentioning litharge, and litharge and red lead combined, which are certainly within the category of lead pigments as stated in the complaint.

Mr. Du Bose: I will grant you, but there is nothing in the complaint about the competitive situation in batteries.

Mr. Wright: No, but the complaint alleges the competitive effects of the respondent on secondary lines.

Mr. Du Bose: In other words, this testimony then is directed to Count 2 of the amended complaint solely.

Mr. Wright: No. I am not going to make such a restriction as directed solely to Count 2.

Mr. Du Bose: That would be the only relevancy.

Trial Examiner Norwood: I think, gentlemen, 1708 clearly, it is admissible.

Mr. Wood: Well, I think we should have some sort of a statement from counsel at least as to the position of the Federal Trade Commission, because I think the bill of complaint is absolutely void of any specific allegations as to the effect of the practices complained of in the battery industry.

I will agree, if counsel will just help us with the statement, what it is all about, it may be admissible, but that complaint is very general.

Trial Examiner Norwood: I think it is sufficiently broad to include this information now offered.

Mr. Wright: This information which is now offered is squarely within subparagraph two.

Mr. Du Bose: Of Count 2.

Mr. Wright: Of Count 2, but I am certainly not going to exceed any restriction that this testimony applies only to that paragraph.

Mr. DuBose: Then I move, if your Honor please—

Trial Examiner Norwood: Let me rule on the objection. The objection is overruled.

Mr. Du Bose: I object insofar as any of this is relevant, that any of this testimony relates to Count 1 of the amended complaint and move to strike it so far as it may be related under Count 1 of the amended complaint.

Trial Examiner Norwood: Objection overruled.
1709 Proceed.

By Mr. Wright:

Q. You stated in your last answer, I believe, that you did compete with the National Battery Company, or over it?

A. We compete with all manufacturers of storage batteries within the vicinity of the ground we cover.

Q. Well now, are there also competitors in the grounds that you cover who ship in from outside which are not located within this area?

A. Oh yes.

Q. Who are those competitors; do you recall them by name?

A. Exide Storage Battery for one; Willard in Cleveland; they ship in here.

Q. How about Grant?

A. Grant, Minneapolis ship in here. Grant is Willard at the present time. It is under a different name.

Q. How about Bowers and Reading?

A. Bowers shipped into the Chicago area.

Q. Are you also in competition with the very small battery manufacturers?

A. Oh yes.

Q. In this area?

A. Oh yes.

Q. Do you know whether there is any considerable number of them located here?

1710 A. There is a considerable number over an area, a radius of 300 miles.

Q. Do you encounter Monarch in your trading area?

A. Monarch.

Q. And do you encounter competition from Sears Roebuck?

Mr. DuBose: I object to this as being purely cumulative and irrelevant. The witness has stated that he is in competition with all battery manufacturers within this area. Now, I do not see the purpose in naming particular manufacturers.

Mr. Wright: It is not established that Sears Roebuck is a battery manufacturer at the present time.

Trial Examiner Norwood: Objection overruled.

Mr. Welch: I have another objection. The witness has stated that he sells to jobbers and Sears Roebuck sales, I think we can take general judicial notice, that their sales are at retail, so certainly Sears Roebuck would not be competitive with this man's company.

Trial Examiner Norwood: Objection overruled.

By Mr. Wright:

Q. I believe the last question related to whether or not you competed with Sears Roebuck in the area?

A. Well, we do not sell retail. We only sell wholesale, and I do not think Sears Roebuck sell wholesale.

Q. Do the prices and practices of the Sears Roe- 1711 buck Company in that area affect your relations with your jobbers?

Mr. DuBose: Objection.

Mr. Welch: Objection, as there is no showing of any knowledge of what their practices were.

Mr. Wright: Well, that is inherent in the question.

Trial Examiner Norwood: Objection overruled. He may answer. He may bring that out.

The Witness: Do you want me to answer that question?

Trial Examiner Norwood: Yes.

Mr. Wright: Yes.

The Witness: Can I get the question.

Mr. Wright: Read the question.

(The reporter read the question as follows:

"Q. Do the prices and practices of the Sears Roebuck Company in that area affect your relations with your jobbers?")

Mr. DuBose: Your Honor, I cannot, for the life of me, see where that is relevant in this proceeding. The prices and practices.

Trial Examiner Norwood: I think he may show how this competition touches, whether there is any competition between this business and Sears Roebuck and just what is the nature of that competition.

1712 Mr. DuBose: Suppose there is; what has that got to do with our complaint?

Mr. Wright: Well, your Honor, the sole purpose of calling, my purpose in calling these witnesses is to show a competitive picture in the storage battery industry, and I think that there is already information in the record which sufficiently ties up these respondents with that industry, so that that is relevant.

Mr. DuBose: Well, just what the prices and practices of Sears Roebuck has to do under the amended complaint, escapes me for the moment.

Trial Examiner Norwood: Well, the objection is overruled. Answer the question.

A. Sears Roebuck and there are others, possibly, in the same category of Sears Roebuck, have very—are very competitive.

By Mr. Wright:

Q. What, how do you mean "competitive"—in prices?

A. Prices. You don't necessarily have to point out Sears Roebuck. There are others just as competitive as Sears Roebuck.

Q. You mean by that very low prices?

A. Very low.

Q. At retail?

A. Yes.

1713 Trial Examiner Norwood: Well now, how does that affect your business?

The Witness: Well, I don't just quite know how to answer it. You mean, as to competitive, we might compete with, is that you have in mind?

Trial Examiner Norwood: How do you feel the effects of that competition; that competition is with retailers, is it not?

The Witness: Well, the competition is very severe at times.

Trial Examiner Norwood: I know.

Mr. Wright: What—

Trial Examiner Norwood: I understand you sell to jobbers?

The Witness: Yes.

Trial Examiner Norwood: How does this competition in the retail trade affect you; how does it get to you?

The Witness: There are times that Sears Roebuck sells for less than we sell the jobbers.

By Mr. Wright:

Q. What products are you referring to now?

A. Storage batteries.

Q. What particular battery do you have in mind?

A. Your automobile batteries.

Q. Is that standard 15 plate three steel?

1714 A. Yes.

Q. Mr. Arnst, are you familiar, I believe you stated you were production manager. Are you familiar with your material costs and labor costs involved in the production of storage batteries?

A. Yes, fairly well. It depends upon the price of material you are working with. I have varied schedules of the different prices of materials.

Q. Yes. Now, during the 1941 period, can you state the material cost now, just the cost of materials, of a group one, fifteen plate, three seal, hundred ampere hour storage battery?

A. Well—

Mr. DuBose: Excluding labor cost?

Mr. Wright: Yes.

Mr. Wood: One hundred ampere hour or—

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

A. Well, I haven't that information right at hand.

By Mr. Wright:

Q. Well, do you have it at hand for the present time?

A. Not the material cost alone. I have—

Q. Do you have it with labor figured in?

A. I have it with my labor figured in. I can give you production and material cost.

1715 Q. Well, as definite as you can, will you give us the production cost and then specify what goes into that, if you can?

Mr. DuBose: What period, Mr. Wright?

Mr. Wright: Well, I am trying to find out what period he has in mind.

A. Well, the present time—

Mr. DuBose: Well, the question was two periods and I want to identify—

Trial Examiner Norwood: Well, I think he will straighten that out.

A. Well, the present period?

By Mr. Wright:

Q. Yes.

A. Well, we will take ampere hour battery, that is the socalled 15 plate hundred ampere hour battery. The entire cost of that battery as far as our factory is concerned will run around $4.05.

Q. Now, does that include your factory cost?

A. That includes factory overhead, direct labor, material cost.

Q. That does not include any shipping costs?

A. No, it does not include shipping costs.

Q. Sales costs?

A. No sales costs, no administrative costs.

1716 Q. No overhead?

A. No. Factory overhead only.

Q. I see. How does that compare with your factory cost in 1941, on that same product?

A. That factory cost in 1941, that factory cost was approximately about $3.20.

Q. What was your selling price to jobbers on that product in 1941, do you recall that?

A. I have that here.

Q. Will you state it please?

A. (Referring to list.) The selling price to jobbers, was $5.30.

Q. That was the battery that cost you, what was it?

A: $3.20.

Q. That is your factory cost?

A. Yes.

Q. So that then your administrative overhead and sales, shipping and taxes, and profit, came out of the difference between those two figures?

A. Yes.

Q. In 1941, did you make a battery which sold at a cheaper price to jobbers than that?

A. Oh yes.

Q. What was the cheapest battery you made at that time, selling price?

1717 A. $3.15.

Q. That was the selling price?

A. Yes, to the jobber.

Q. What was your factory cost on that battery, do you recall?

A. Well, the factory cost does not vary too much on any type of a battery. In other words, let me explain it in this way: You manufacture plates, and you still have the box and covers and the parts, and everything in the battery outside of the actual lead contents in there. The only—the lead content is the only difference in the battery.

Q. How would those very as to lead content? How much lead would be in that cheaper—

A. I would say in the ampere hour battery, there would be approximately 23 pounds of lead. In the cheaper battery it would be possibly as low as 17 pounds.

Q. How would those vary as to lead content? How much lead would be in that cheaper—

A. What?

Q. What would it be; a third, a quarter, a half?

A. The oxide in my factory is approximately 42 per cent of the lead content.

Q. So that in that hundred ampere hour, it would be 42 per cent of 23 pounds?

1718 A. That is right.

Q. Now, on this battery you stated that you sold for $3.15, your factory cost would be as much as your selling price?

Mr. Welch: Objection.

Trial Examiner Norwood: Sustained.

By Mr. Wright:

Q. Did I understand your answer to be with reference to my question about the cost of that cheaper battery; that it would cost approximately as much as—

A. A little less.

Q. A little less?

A. Yes.

Q. How much?

A. Not in proportion to, not in proportion in the two prices.

Q. Now, the hundred ampere hour battery, cost you $3.25; was that your answer?

A. Yes.

Q. So that the cost of the cheaper battery would be a few cents less?

A. About two dollars—

Mr. Welch: Objection, your Honor. I think he should ask him what the price was, the cost of his cheaper battery.

Mr. Wright: Well, he has stated—

Mr. Welch: We are going all the way around the 1719 barn to—

Trial Examiner Norwood: He is simply recapitulating and asking him something about what he has testified to.

Mr. Welch: The witness has not testified about what it, what the cost was, and he had showed a readiness and ability to testify to every other item.

Mr. Wright: I believe the witness has answered the question in two or three ways.

Mr. Welch: Except the straight way.

Trial Examiner Norwood: Well, I think it would be the safe thing not to lead the witness.

By Mr. Wright:

Q. Do you know what the cost would be of the cheaper battery to which you refer?

A. I haven't the exact figures. I can give you an approximate cost.

Q. What is the approximate cost?

A. The approximate cost on that battery would be approximately about $2.60.

Q. $2.60?

A. Yes.

Mr. DuBose: Just to keep the record straight, are we talking about 1941?

The Witness: Yes.

1720 Mr. Wright: Yes.

By Mr. Wright:

Q. Now, what size battery is that that you are referring to?

A. That was a sixty ampere hour battery.

Q. How many plates did it have?

A. Thirteen plates.

Mr. Wood: Excuse me a bit. I am confused; that is the price of the whole battery and the price of the lead oxide that goes—

The Witness: The whole—

Mr. Wood: The cost, not the price?

The Witness: That is right.

By Mr. Wright:

Q. What was your margin of profit on that sixty ampere battery?

A. I worked on a very small margin of profit, on that.

Q. How many different types of batteries did you produce in 1941, do you recall offhand?

A. In the particular group, for instance, the group one, or the whole line?

Q. The whole line?

Mr. Wood: I would like to ask that the question and answer, as to what was the margin of profit and the reply, of a very small margin of profit, I would like to
1721 move that that be stricken unless the margin of profit is stated, simply and succinctly.

Trial Examiner Norwood: I would say he may—

Mr. Wright: I would be glad to have the witness amplify that answer but I think it can stand in the record the way it is.

Mr. Wood: That is the type of thing the Court of Appeals likes to say, it is a thing in which the profits are small; how much are we to say? The witness stating it is small is simply a conclusion.

Mr. Wright: We are going further into this question Mr. Wood. I am not going to let that—

Trial Examiner Norwood: Read the question and answer.

(The reporter read the question and answer as follows:

"Q. What was your margin of profit on that sixty ampere battery?"

"A. I worked on a very small margin of profit, on that.")

Mr. Wood: That is the answer I object to.

Mr. DuBose: It is not responsive.

Mr. Wood: It is a conclusion.

Mr. DuBose: The direct question: "What was your margin of profit—

Trial Examiner Norwood: I think he can give it
1722 to us, if he can.

Mr. DuBose: Is the answer stricken?

Trial Examiner Norwood: I have no objection to his comparing that, with using comparative terms, with respect to two different profits on two different numbers. He might do that, but I will sustain the objection and let the counsel—

Mr. DuBose: Is the answer stricken. I move to strike the answer.

Trial Examiner Norwood: Motion is allowed.

By Mr. Wright:

Q. Mr. Arnst, I understand you to state the approximate cost of sixty ampere hour battery was two dollars and sixty some cents?

A. Approximate, yes.

Q. And the selling price was three dollars and—

A. Three dollars and fifteen cents.

Q. $3.15?

A. Yes.

Q. Do you know what the sales and shipping costs were during that period?

A. I do not have those figures at hand.

Q. You stated that you did business within a radius of 500 miles of Chicago?

A. Yes.

Q. Do you ship those batteries by rail?

1723 A. Mostly by truck.

Q. Mostly by truck?

A. Yes.

Q. Do you recall the freight, the truck freight rate on batteries from here to Cleveland?

A. I know the truck rate rates from here to St. Louis.

Q. What were they?

A. Twenty-five cents a hundred at that time.

Q. What?

A. Twenty-five cents a hundred at that time.

Q. And a battery weighs on an average how much?

A. From 30 to 40 pounds, depending upon the battery itself.

Q. I see. Do you know what the average shipping cost was in that period?

Mr. DuBose: Over what period?

Mr. Wright: We are speaking of the 1941 period.

Mr. DuBose: Over what area?

Mr. Wright: Over the entire area.

Mr. DuBose: You mean the average?

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. DuBose: I object to the question as being indefinite.

1724 Trial Examiner Norwood: Had you finished the question?

Mr. Wright: I had finished the question. The question was: Can you state what the shipping charges were on the average during that period, and that period we were referring to is 1941. It is the year 1941.

Mr. DuBose: I object on the ground that the question is too indefinite.

It is too inconclusive and it does not specify whether it is the average freight of all his products or what area it covers or anything else and therefore the answer would not be worth anything in this record.

Mr. Wright: Your Honor, I asked for a general average.

Mr. Welch: We have been dealing with specific prices, specific batteries, and they have very substantial variations in the margins and I cannot see how an average freight cost, irrespective of the type of battery involved and the quantities that the item would be chargeable to—it is such a variable factor, that I do not think an average has any weight at all.

Mr. Wright: Well, the whole thing has been on an average basis. Certainly no one particular battery has the same cost characteristics of any other battery, and the only way we can get this information is on a general basis.

1725 Mr. Welch: Further than that, the witness has not shown any knowledge of the freight charges. He is production manager—

Mr. Wright: He is vice president of the corporation too.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Do you know what the average shipping cost was in that period?")

Trial Examiner Norwood: I think a little more definite information would be more satisfactory.

Mr. Wright: Well, your Honor, he is the vice president of the company. He is obviously familiar with—at least, we are trying to ascertain how familiar he is with these things. If it develops that the information he has got is not satisfactory or competent, why certainly I will be the first to be willing to entertain the motion to strike it.

Trial Examiner Norwood: Do you want the average shipping price per battery there?

Mr. Wright: Your Honor, an objection was sustained to the answer that was given to the question regarding the margin of profit on this battery because it was so general. Now, the only way the margin of profit can possibly be determined now, is by taking out of the difference be-
1726 tween the cost, the factory cost, and the selling price, the various items which go in there.

Now, I am trying to find out the average shipping cost on his batteries. If we can't have general statements as—

Trial Examiner Norwood: Well, have you got an average price there?

Mr. Wright: He has given what the specific and definite cost is. Now we are trying to determine, since the objection was sustained to a general statement on his margin of profit on that battery, we have got to ascertain by this backwards method, what that margin might have been.

Mr. Welch: Your Honor, I think there is a short way to get this: Ask the witness to answer the question specifically that he was asked some 15 minutes ago.

Trial Examiner Norwood: What was that?

Mr. Welch: That is the question of what his margin was. Then break down on all these other factors and averages, and the other does not make any difference. We simply want to know what the margin was.

Trial Examiner Norwood: I think counsel is correct.

Mr. Wood: My objection to the question did not go to that. I am perfectly willing for the witness to state what his percentage, what his margin of profit was. It was his indefinite answer that I objected to.

1727 By Mr. Wright:

Q. Do you know what your margin of profit was on that battery in 1941?

A. We did not have a definite margin. We worked as low as ten per cent.

Q. Is that ten per cent of the selling price or ten per cent of your cost?

A. Ten per cent of our cost.

Q. Of your factory cost?

A. Yes.

Q. Would that represent your margin of profit on that particular battery?

A. What would represent it?

Q. That would represent the margin of profit, would it?

A. Yes.

Mr. Wood: All right.

By Mr. Wright:

Q. You stated that you were in competition with a large number of the battery companies over your market area?

A. Yes.

Q. Was there, from the period from 1939 to 1941, price competition in that area?

Mr. DuBose: I object to the question upon the grounds that it is too general. It does not specify—what industry.

1728 Mr. Wright: I will withdraw the question.

By Mr. Wright:

Q. Were batteries sold by your competitors in that period, 1939 to 1941, in that market area, at prices lower than those which you offered on a comparable battery, comparable batteries?

A. Yes, there was prices lower than ours, and we were lower than some others.

Q. Did you at that time enjoy a margin of profit as large as that which you now have?

Mr. DuBose: I object to that on the grounds that it is purely irrelevant.

Trial Examiner Norwood: Objection overruled.

Mr. DuBose: And incompetent.

Trial Examiner Norwood: Overruled.

Mr. Wood: I object, your Honor, to the general employment of terms ~~such~~ as "enjoy" and "suffer." That is not necessary. They made profit or they lost money. Enjoy and suffer are not proper words in a question directed to this whole subject matter.

Trial Examiner Norwood: I think the meaning of those words are very clear.

Mr. Wood: Well, I think there is a little overtone that is completely unnecessary.

Trial Examiner Norwood: Objection overruled.

1729 The Witness: Do you want me to answer that?

Mr. Wright: Yes.

A. In 1939, we made a profit.

By Mr. Wright:

Q. What—your profit at that time, how did your profit at that time compare to your present profit rate?

Mr. Welch: Objection, your Honor. There isn't anything to show in the record at this ~~time~~ that any change in the profit, either up or down from 1939 to now, is attributable to any of the practices of these respondents.

Trial Examiner Norwood: Isn't he attempting to cure that by this question?

Mr. Welch: I do not think so, your Honor. I do not think this has anything to do with it.

Let him ask if these people to whom these practices are charged, how that has changed his profit picture in that period of time.

Trial Examiner Norwood: Let him answer. Objection overruled.

Answer the question. Do you want the question read?

The Witness: Please.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. How did your profit at that time compare
1730 to your present profit rate?")

A. Our profit in 1939 in, compared to today's profit was a little smaller than it was today: Now, on account of possibly we have to increase production today over 1939, might have something to do with increased profit today.

By Mr. Wright:

Q. I believe you stated Mr. Arnst, that you figured on that sixty ampere hour battery, that it cost you somewhere in the neighborhood of $2.60, that you made ten per cent?

A. Yes.

Q. You figured to make ten per cent?

A. Yes.

Q. Profit?

A. Yes.

Q. Did you always make your ten per cent profit on costs on that battery during the period from 1939 to 1941?

Mr. DuBose: I object.

Mr. Welch: Your Honor, he has already answered that question by saying they made down to ten per cent.

Mr. Wright: No, I do not believe that is what the witness answered to that question.

Mr. Welch: I think if you read the question you will find—

Trial Examiner Norwood: I will overrule the objection and let him elucidate.

1931 A. Well, the batteries we sold, we made ten per cent on them.

Mr. Wright: I see.

Trial Examiner Norwood: Did you enjoy that?

By Mr. Wright:

Q. During the period from 1939 to 1941, was the battery business in your area highly competitive as to prices?

A. Well, the battery business has always been competitive as far back to my knowledge, as I can remember.

Q. I see. Now, would a savings to you of five to ten cents per battery on your cost of materials going into the production of those batteries, affect your ability to compete in that market area in normal competitive times?

A. I think—

Mr. DuBose: I object on the same ground that we objected to a similar line of questioning. The witnesses in St. Louis on July 29 and 30, 1946, were asked similar questions as to white, dry lead, and I think we made a series of objections on the grounds of irrelevancy, and incompetent and immaterial, and on the further grounds, some of which I cannot remember.

Mr. Wood: And I will add, that it is leading.

Trial Examiner Norwood: What was my ruling?

Mr. DuBose: You overruled them.

Mr. Wood: My objection to the question is to its
1732 leading form.

I have no objection to the general substance being brought in in the proper way but it is very leading.

Trial Examiner Norwood: It did not impress me as being leading.

Read the question.

The reporter read the question:

"Q. Now, would a savings to you of five to ten cents per battery on your cost of materials going into the production of those batteries, affect your ability to compete in that market area in normal competitive times?")

Trial Examiner Norwood: Objection overruled. Answer the question.

Mr. Wright: I believe the question is answered.

Mr. DuBose: No, he has not.

A. Most certainly it would help us meet cheaper competition.

By Mr. Wright:

Q When you say cheaper competition, whom do you mean by that?

A. Well, the competition that has been bothering us in the territory that we have not been able to compete with.

Q. What concerns do you mean when you say that?

A. It would possibly help our dealers compete with the large chain stores there that have to pay the same

1733 price that large chain-stores are retailing the batteries at.

Q. Well, now, do you know who makes the batteries in this competition you referred to?

A. There is two large companies.

Q. What companies?

A. National Battery and Globe Union.

Q. Well, would Willard or Exide or Grant be in that category?

A. Up to recently Exide and Grant have never been too severe competition.

Q. They have not made the cheaper batteries?

A. They have not.

Q. They have been in competition with you nevertheless in those areas?

A. They have been in competition.

Mr. Wright: I have no further questions.

Trial Examiner Norwood: We will take a five minute recess.

(Short recess.)

Trial Examiner Norwood: On the record.

Mr. Wright: I would like to ask one question before submitting for cross.

Trial Examiner Norwood: Yes.

By Mr. Wright:

Q. Mr. Arnst, did you receive a subpoena requir-
1734 ing your attendance at this hearing?

A. I did.

Q. Did you discuss being a witness at a hearing in this matter with anyone prior to receiving that subpoena?

A. No.

Mr. Wright: No further questions.

Trial Examiner Norwood: Cross-examination.

Cross-Examination by Mr. DuBose.

Q. Now, Mr. Arnst, I notice on direct examination you referred to some written matter that you brought out of your pocket; were those your office records?

A. Those are printed price lists.

Q. Your printed price lists?

A. Yes, that I dug out of the files.

Q. That does not contain the battery costs?

A. No.

Q. Breakdowns?

A. No, just the selling prices.

Q. Now, Mr. Arnst, from whom does Universal Battery Company receive the largest competition in the battery field?

A. Who do we receive the largest competition from?

Q. Yes, who are your chief competitors?

A. Do you want to specify names?

1735 Q. Yes, and where located.

A. Well, we receive our greatest competition from National Battery Company.

Q. Where are they located?

A. They have plants in various parts of the country, particularly in Chicago Heights.

Q. Chicago Heights?

A. Yes.

Q. Do you receive large competition from Willard Battery Company?

A. Willard is in competition with us but they are clean competition.

Q. They are competitors of yours?

A. Yes.

Q. Where are they located?

A. Their plant is in Cleveland, Ohio.

Q. And did you say, did you also receive competition from Grant?

A. Also from Grant.

Q. And where are they located?

A. They are in Minneapolis, I think.

Q. And how far is that from Chicago?

A. About 320 miles.

Q. How far is Cleveland from Chicago?

A. About 320 miles.

1736 By Mr. Wood:

Q. Are you familiar with the Eagle-Picher battery oxides?

A. Yes.

Q. Have you experimented with them?

A. Yes.

Q. Why don't you use any of them?

A. Why don't I use Eagle-Picher?

Q. Yes.

A. Because I think National Lead is superior to Eagle-Picher.

Q. You do?

A. Yes.

Mr. Wood: That is all.

Trial Examiner Norwood: Anything further?

By Mr. DuBose:

Q. Do you get technical advice from National Leads?

A. I do.

Q. And do you believe that their service and their oxides are better than other oxides?

A. That is right. I wouldn't be using National Lead—

Mr. Wood: One more question:

By Mr. Wood:

Q. Do you recognize, don't you, that the opinion, your opinion as expressed that National Lead oxides, is superior to Eagle-Picher oxides, is a controversial matter, and
1737 that other people have different opinions on it?

A. That is my opinion.

Q. But you recognized there are different opinions on that question?

A. I know people prefer Eagle-Picher to—

Mr. Wood: That is all.

Trial Examiner Norwood: Do you pay them more, the National more, for its commodity which you consider superior?

The Witness: I would not know Eagle-Picher's prices.

Redirect Examination by Mr. Wright.

Q. Mr. Arnst, what are the differences, for instance, in negative oxide that cause you to prefer those of the National over Eagle-Picher?

A. The reason I prefer National's oxides, they are, in my opinion and from various tests that I have made in my own laboratory, that National Lead has a far superior negative oxide, and cold test—

Q. Cold tests?

A. Yes.

Q. What is the cold test?

A. For the ability of a battery to start under cold temperatures.

Q. In other words, your testimony refers not to 1738 the difference between the two oxides, but between two batteries made from—

A. From National Lead and Eagle-Picher.

Q. You mentioned your laboratory, that you made chemical examinations of these two oxides?

A. Merely testing the batteries themselves.

Q. You have made no chemical analysis to determine whether there is any difference organically, in the two products?

A. I am not interested in that. What I am primarily interested in is in the results of the battery after the battery is built.

Q. Yes. Then it is not as a physical comparison between the two oxides. It is just your opinion that the oxides that National produce is a better product than Eagle-Picher produces?

A. Over a period of years of practical experience, that has been my experience.

Q. Do you know, if you wanted to use Eagle-Picher's oxides, whether you could procure them through the National Lead Company?

Mr. DuBose: I object to that.

It is a leading question and has nothing to do with this proceeding. It is irrelevant.

Trial Examiner Norwood: I think the question is leading.

1739 Mr. Wright: Your Honor, I was just asking him if he had that knowledge.

Trial Examiner Norwood: Read the question.

Mr. DuBose: I don't think it makes any difference what knowledge he has.

(The reporter read the question:

"Q. Do you know, if you wanted to use Eagle-Picher oxides, whether you could procure them through the National Lead Company?")

Mr. DuBose: I do not see its relevancy, if your Honor please. It does not make any difference one way or the other.

Mr. Wright: Well, it has already been established that—

Trial Examiner Norwood: Well, there are evidences here comparing the two and I do not see clearly its relevancy either, to tell you the truth.

Mr. Wright: Well, I think the answer to that question will become relevant later and I wish to request that it be admissible at this time, subject to further connection.

Trial Examiner Norwood: He may answer. Objection overruled.

A. No, I do not buy Eagle-Picher oxides through National Lead Company.

By Mr. Wright:

1740 Q. So far as you know?

A. That is right.

Mr. Wright: No further examination.

Mr. Wood: I would like to add just one more question.

Recross Examination by Mr. Wood.

Q. You recognize, don't you, Mr. Arnst, that the lead oxides offered by National and Eagle-Picher, for use in batteries are different, that is sufficiently different, to require you to run a comparative test, and experiments on them?

A. Well yes, they are considerably different.

Mr. Wood: That is all.

Redirect Examination (continued) by Mr. Wright.

Q. What are those differences, Mr. Arnst?

A. From a factory man, and a man that is in the production, the quality of the battery is very much superior with the battery of the National Lead oxides, as Eagle-Picher's oxides.

Q. In other words, you did not mean then that there were any physical differences between the two products, so far as you know?

A. That I don't know.

1741 Mr. Wright: No further questions.

Mr. Wood: Just a minute. I want that clear. Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Recross Examination (continued) by Mr. Wood.

Q. Mr. Arnst, between the National and the Eagle-Picher oxides, do you recognize from the point of view of a battery manufacturer that there are physical and or chemical differences between the two products?

A. Oh yes, there ~~are~~ chemical differences.

Q. Well, on what do you base your answer?

A. I base my answer that there must be the difference of chemical differences on account of the results I get in the battery.

Redirect Examination (continued), by Mr. Wright.

Q. But you do not yourself know of any physical or chemical difference between the two products?

A. It is evidently a trade secret.

Q. Do you know of any physical differences between the two?

A. I don't think National publishes the differences.

1742 Trial Examiner Norwood: He asked ~~you~~ as to your knowledge; do you know it or do you not?

The Witness: No, I do not know of any physical differences.

Mr. Wright: No further examination.

Recross Examination (continued) by Mr. Hinds.

Q. I think I heard you say that Willard gives clean competition. What did you mean by that? Do you mean to imply that some of the others gave a different kind of competition from clean?

A. Selling possibly below cost.

Q. Do you mean that some of the others sell below cost and Willard makes a profit on its sales?

A. I think, that is my impression, that I have received, out in the territory.

By Mr. DuBose:

Q. You mean, in other words, sometimes in the battery business some manufacturers sell on a so-called "loss leader"?

A. That is right.

Trial Examiner Norwood: Anything further?

Mr. Wright: Nothing further.

Mr. Hinds: If your Honor please, I move to strike out
the entire testimony of this witness and of the previ-
1743 ous witness, in that it cannot be brought at all within
the pleadings under either the first count or second
count, which deals with lead pigments.

As I understand the term pigment, it does not refer to the physical or chemical nature of the substance. The identical lead oxide, when used for some purpose other than a pigment is no longer a pigment. It is not a pigment.

The whole contents of these pleadings show that they are referring to pigments in the true sense of the word, as an ingredient used in paint or coloring. All the context shows that.

There are frequent references and I have marked them here, if you care to hear it, showing in every case that they are referring to pigments in the accurate meaning, and the only meaning that I know it can be given, is a substance used for coloring.

Now, I might say, for example, the word lubricant; suppose an oil can be used as a food, like salad oil, and it can also be used as a lubricant, and it is not a liquid when it is used as a salad oil, and when you put lead in the batteries, they are lead pigments, and hence not within the subject matter of this complaint, even though they may be chemically and physically the same, and even though they may be produced and sold by the same process and companies.

Mr. Wright: Well, in answer to that, your Honor,
1744 the expression of lead pigments, that appears and is
defined in sub-section five of paragraph four of the
complaint was drawn to include all of these various prod-
ucts; litharge, and red lead and the others, and the adop-
tion of the language there is the same which is the industry
usage.

Now, in the lead industry—

Mr. Hinds: Are you testifying or arguing?

Mr. Wright: I am answering your objection.

Mr. Hinds: You are giving testimony. I am giving legal argument.

Mr. Wright: I am making statements about what already appears in the record, I believe.

Trial Examiner Norwood: I think—

Mr. Wright: Exhibit 509, which is the copy of the Code of Fair Competition for the lead industry—

Mr. DuBose: 809.

Mr. Wright: —uses the term lead pigments covering all those industry products and certainly that was the usage from all the documents from the lead industries association produced under subpoena.

It shows litharge and red lead pigments. The respondents brought in, in response to the subpoenas, on litharge and red lead invoices and other documents relating to what are also called lead oxides, which to me, is a sub-classification of the general classification of lead pigments.

1745 Mr. Hinds: Well now, if your Honor please, he certainly cannot—

Trial Examiner Norwood: Are you through?

Mr. Wright; Yes.

Mr. Hinds: He cannot extract from us admission as to the meaning of the term that has a question of universal meaning by showing that in response to a subpoena, which subpoena might have called for entire irrelevant, immaterial matters, we obeyed the subpoena. The subpoenas referred to oxides. We had to bring in the material on those oxides, whether they were used as pigments or not.

Trial Examiner Norwood: Well, I think the contentions are very clear now on each side.

Mr. Wright: Mr. Marson and Ozler testified that these various green oxides, perox and zerox and other things in the sub-classification battery oxides, were litharge, or litharge and red lead combinations, and that was in substance what they were.

Mr. Hinds: The physical nature—there are no pigments. An oil is a lubricant, but if it is not used as a lubricant is not a lubricant.

Trial Examiner Norwood: Does counsel contend that the effects in the trade of the sale of lead derivatives applied to any other use than that of paint would not be covered in this complaint, is that right?

1746 Mr. Hinds: That is right.

Trial Examiner Norwood: Is that a clear statement?

Mr. Hinds: That is right. Even if it is the same chemically, if it is not used as a pigment, it is not a pigment, any more than oil not used as a lubricant is not a lubricant. You use sugar in glue, but it is not a sweetening.

Mr. Wright: In paragraph five of the complaint on page three, after delineating the uses of these products, as pigments, in other words, as a component of paint~~, or~~ as paint, it then states that such pigments have other important commercial uses too numerous to mention.

Mr. Hinds: That can be construed under the Latin maxim of ejusdem generis. You have to read that in the sense of other uses of the same general type, for example, as being used in varnishes or in lacquers, or enamels. That does not mean it refers to those same substances that were used in some remotely different thing like batteries.

1747 Mr. Wood: If Your Honor please, as I interpret the Robinson-Patman Act it refers entirely to conduct that upsets the competition among customers primarily, and I think the whole complaint, that is Count II of it, is directed to the charge that these companies have upset the normal competition in the paint industry, that is in the pigment industry, and there is no reference to the battery industry whatsoever.

Trial Examiner Norwood: I shall deny the motions to strike the evidence, and counsel may renew such motions at the close of the evidence, and probably the Commission will hear them on that.

The witness is excused.

(Witness excused).

Trial Examiner Norwood: Off the record.

(Discussion off the record).

Trial Examiner Norwood: On the record. We will recess until 2:00 o'clock.

(Whereupon, at 12:10 p.m., a recess was taken until 2:00 p.m., this day.)

1748 Afternoon Session.

2:00 p.m.

Trial Examiner Norwood: The hearing will come to order.

Call your witness.

Mr. Wright: I want to call Mr. Sweet.

BERNARD SWEET was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Will you state your full name and address, Mr. Sweet?

A. Bernard Sweet, 424 Aldine Avenue, Chicago 13, Illinois.

Q. What is your business occupation, Mr. Sweet?

A. We are manufacturers of automotive storage batteries.

Q. Are you with a company?

A. Yes, sir, the Apex Battery Manufacturing Company here in Chicago.

Q. What is the street address of that company?

A. 4714 West Kinzie Street.

Q. Is that a corporation?

A. No, it is a partnership.

Q. Are you one of the partners?

A. Yes, sir, I am.

1749 Q. For how long a period of time has that company been engaged in business?

A. It will be 10 years, now, under the name of Apex Battery Manufacturing Company for the last 10 years.

Q. How did it operate prior to that time?

A. We were another company, the Commander Battery Manufacturing Company, but we sold that out and went into the Apex Battery Company.

Q. Did you sell the Commander Battery Company to the present Commander Battery Corporation?

A. That is right.

Q. And you say that was about 10 years ago. Would that be in 1936, then?

A. About 1937.

Q. About 1937?

A. Yes, I am pretty sure I am right on that.

Q. What products are made by Apex?

A. Automotive and truck type storage batteries.

Q. Are they replacement type batteries?

A. Yes, sir.

Q. About what is your normal average annual output of batteries?

A. I should say, depending on what we all consider normal, I would say about 35,000 or 40,000—let me correct
that. Prior to the war we made about 25,000 batteries
1750 a year. During the war, both for the Government and
our own accounts, we ran as high as 42,000 or 45,000,
so I would say roughly our normal production would be somewhere between 30,000 to 40,000 a year.

Q. In what market areas do you sell those batteries?

A. The immediate middle west. We have sold as far as, we have shipped our batteries, rather, as far as New Orleans and as far as California, and the State of Washington, but that is on special orders. Most of our business is in the immediate middle west.

Q. Over what territory do you actively solicit business?

A. In Illinois, Indiana, Michigan, Wisconsin, the near side of Ohio, the near side of Missouri, the near side of Iowa.

Q. Would that include Kansas City?

A. No, we don't go as far as that. We have at times, but it is not our regular territory. It is a little too far.

Q. All right.

A. I would put it this way. For a company of our size, about a 300 mile radius would be just about the limit of our shipping area for profitable shipping.

Q. Do you get into Minnesota?

A. Occasionally, but not much; the near part, close to.

Q. Do you sell to dealers for resale?

A. We sell to dealers, and we sell to jobbers, and we sell to distributors, automobile agencies, all those types of people, all for resale purposes, of course.

1751 Q. Do you have any accounts with fleet operators?

A. No, not to my knowledge. Our distributors may have some accounts with fleet operators, but we ourselves haven't.

Q. Under what brands and trade names are your batteries sold?

A. Today we sell nothing but Apex. We formerly, in years gone by when cases were plentiful, had different names, but you just can't get them today so we are using the one.

Q. In the market areas in which you compete, who are your principal competitors among the other battery manufacturers?

A. Well, you mean by name?

Q. Yes, sir.

A. Well, I can state that roughly, and say that all the companies are our competitors, all battery manufacturers in this area are our competitors.

Q. That would include the very large ones and the very small ones?

A. Large and small.

Q. Would that include the National Battery Company?

A. Yes, surely.

Q. And Willard?

A. Willard, Exide, Delco, Auto-Lite, Universal, Solar, all of them in this area, Globe.

Q. How about Grant?

A. Strangely enough, we don't see Grant a lot in our
Chicago area, although we do run across their bat-
1752 teries in the outlying towns. I don't know whether
they have come into Chicago or not, but we haven't
seen them here. We do get into competition with them in
such places as Grand Rapids, for example, Milwaukee,
Southern Illinois, Peoria, and all through that area.

Q. Are you in competition with Sears Roebuck or Montgomery Ward?

A. Well, that competition would enter, of course, on the retail end of it. As far as wholesale selling, no. Their prices are low on their retail in normal times, so that they sometimes sell to the public, to the consumer, almost as cheaply as we are able to sell our dealers. Their retail price, in other words—

Q. (Interposing.) Is that true of both Sears Roebuck and Montgomery Ward?

A. Yes.

Q. Do you encounter the same sort of competition from Atlas and Firestone?

A. No; I don't know about Atlas, I don't know too much about them, although I know their batteries are made by National Battery Company. But with Firestone, the competition we encounter is not in the retail as much as it is in the wholesale, but their prices are fair. By the word "fair", I mean they are not too cheap or too high; it is a good competitive fight as to who has got the best product, they will get the order.

1753 Q. Who produces the Sears Roebuck Batteries, if you know?

A. Yes. Well, there are many companies producing batteries for Sears today, but under normal conditions and times it was one exclusive company, the Globe Battery Company.

Q. How about Montgomery Ward?

A. National Battery Company, under normal times, has been their sole source of supply, to our knowledge.

Q. Have you encountered Bowers Battery Company?

A. Yes. Before the war they started a lot of price fighting in this area—"price", not "prize"—which made a lot of trouble, quite a bit of trouble in this area.

Q. What do you mean by "trouble"?

A. They sold batteries so ridiculously cheap that it was actually a loss to meet their competition. We actually had to lose money on one battery and sell another battery at a profit in order to equalize both batteries. In other words, this is a very good example of what the business used to be. It actually involved, out of 100 batteries, approximately 66 batteries sold on a break-even basis before you could make money on the last 33 or 34 batteries.

Q. Was that as a result of this competition that you have been referring to from Bowers and Sears Roebuck?

A. Bowers, Sears, yes. And the major companies—and by the "major" companies I mean the big five—they didn't have batteries that cheap. We ran across
1754 competition from Universal at those prices, Commander Battery. We ourselves, of course, were in the same thing. I am not painting ourselves as a lily. We got into this fight ourselves, we couldn't help ourselves.

Q. You did meet that competition wherever you found it?

A. We had to or otherwise we wouldn't have had any business, although we did not start that.

Q. To what period are you referring now?

A. That would be the 1938-1940 period, about; probably early in 1941.

Q. It held over into 1941?

A. I think it held over quite well into '41. In fact, when the war first hit us, the first year after the war, it was very bad. There were no batteries, everybody was scared about buying anything for anything, and there was just no business at all.

Q. Mr. Sweet, in a 100 amp.-hour 15-plate, 3-cell battery—do you make that sort of battery?

A. Yes, sir, we do.

Q. How much lead is used in the manufacture of that battery?

A. I will have to give that approximately, because we, like every other battery manufacturer—or at least I think like every other battery manufacturer—have adopted the so-called normal weights, which is more or less standard through the industry, approximately 25 pounds for every type battery we make. In other words, some batteries 1755 might be 23½, some might be 27.

Q. They all are within that range?

A. Yes, sir.

Q. Of that 25 pounds of lead, how much is accounted for by the oxides?

A. You mean in our own company?

Q. Yes, sir.

A. I would say between 10 to 12 pounds.

Q. You referred a moment ago to batteries which you either broke even on or sold at a loss. What specific types of batteries were you referring to there?

A. They were a very cheap battery, made very cheaply, 13-plate battery, is what they were called.

Q. What was their amp.-hour output?

A. Very poor, I can assure you that. I think they were listed at that time—prior to the war we discontinued that altogether—frankly, I looked for that sheet to try to bring it along with me, but I couldn't find one. If I remember, they would run roughly somewhere between 60 to 70 amps., maximum.

Q. Can you state what your material cost of production of that type of battery was in 1941?

A. I can't give it to you correctly, but I can give it to you closely, I believe.

Q. Will you state what you believe it to be, and 1756 then we will find out what you are basing your answer on?

A. All right.

Mr. Welch: Objection on the basis of it being an approximation.

Mr. Wright: Your Honor, I don't know what is in the witness' mind. I believe he should be allowed to answer the question, and if it appears that he is only guessing, the thing is subject to a motion to strike.

Trial Examiner Norwood: Can you give a close approximation?

The Witness: I believe I can.

Trial Examiner Norwood: Objection overruled.

A. I would say that our cheapest battery cost us about $2.75 to $3.00 to manufacture at that time.

By Mr. Wright:

Q. Just what items of material went into the maunfacture of that battery?

A. The battery case; the separators, wooden separators; the vent covers; the vent plugs; the acid; the lead, of course, both the antimonial lead and the oxides; and then the charging of the battery and the labor.

Q. Then your figure there would include your manufacturing cost rather than just the cost of your materials?

A. Yes, sir.

Q. Can you state what your battery cases cost you
1757 in that period?

A. They ran about 42½ cents apiece.

Q. Do you know what your separators were at that time?

A. Separators were about $6.00 a thousand. There would be approximately about 20 separators in that battery.

Q. At about $6.00 a thousand?

A. That is right.

Q. Do you recall what your covers and vent plugs cost?

A. We always had a set figure for that, we figured approximately 12 cents for a set of covers and vents.

Q. So, then, the separators, 20 of them, at approximately $6.00 a thousand, and your case at 42½ cents, and 12 cents for your covers and vent plugs—

A. (Interposing.) Yes. The acid and charging we always figured at about, between, depending on how many batteries were charging on the line, between 6 to 8 cents.

Q. On the charging and acid?

A. Yes.

Q. Do you recall what your antimonial lead was costing you at that time?

A. I tried to find that. This is for 1941?

Q. Yes, sir.

A. I tried to find that in our records, and unfortunately
I couldn't, but I believe this will be correct. There was no
price change in lead after the war started, other than
1758 that permitted by the Government just recently. Ap-
proximately—this is antimonial lead—approximately
about between 7 to 7½ cents a pound, and oxides were prob-
ably running roughly a penny more per pound.

1759 Q. Do you recall what your selling price was for that battery in 1941?

A. We had various prices on that battery. This is on our cheapest battery?

Q. Yes.

A. I think we discontinued the manufacture of that battery in 1940, but I can give you the one that compared with that. Our selling price of that battery at that time was as low as—well, let's see, I have got to get this right. May I give it for the two batteries because I don't recall when we stopped making one. There was one we were making in 1941—

Q. (Interposing.) Go ahead and give us your prices and then explain your answer so that we will know the product to which it applies.

A. I don't know for certain as to when we stopped manufacturing one type. I tried to locate that too but couldn't, it is so long back. We made a battery that we sold, this real cheap one, at as low at $2.35. We sold it that cheap.

Q. When was that, do you recall?

A. That is what I am not quite clear in my mind on. I don't know whether we were selling it in 1941 or whether we had stopped that in 1941 already, frankly. The next battery which we were selling at that time, which was our cheapest then too, we sold that for $3.75.

Q. That was in 1941?

1760 A: Yes, sir, I am pretty sure of that.

Q. Did you sell this battery that you referred to as being sold at as low as $2.35, at that price in 1940?

A. I believe we did.

Q. Did you incur a loss in selling that battery at that price at that time?

A. Yes, sir.

Q. From what companies have you purchased lead oxides, Mr. Sweet?

A. From the Metals Refining Company, in Hammond, Indiana, and from the Hammond Lead Company at Hammond, Indiana.

Q. Does that apply over this whole period of time?

A. I believe we have bought our lead from them since we have been in business.

Q. You referred to the highly competitive time during 1938 to 1940, I believe you said?

A. Yes, sir.

Q. In that period, and in times of normal competition, would a saving to you of from five to ten cents per battery in the cost of materials going into those batteries be important in your ability to compete successfully?

Mr. DuBose: The same objection, Your Honor.

Trial Examiner Norwood: Objection overruled.

The Witness: Can I answer that?

Trial Examiner Norwood: Yes.

1761 The Witness: Yes, it would have been very important to us.

By Mr. Wright:

Q. How would a saving of from five to ten cents per battery in the period from 1938 to 1940 or 1941 compare with your net profit on your average battery business?

A. Well, putting it that way, from a financial viewpoint and that angle it wouldn't mean a lot. Let's say our production at that time would be about 12,000—am guessing, and when I say I am guessing, I am pretty sure I am close to right—12,000 cheap batteries, and if there were 12,000 nickels that would be $600.

Q. You mean 12,000 cheap batteries?

A. Yes.

Q. I am asking you now with reference to your entire business?

A. Well, it would mean, if it was ten cents—it would mean as much difference to us at that time as between two to three thousand dollars for the year.

Trial Examiner Norwood: If the materials that went into a single battery were increased by ten cents in cost, how much of an increase would that require in the retail price? It would be much more than ten cents, wouldn't it?

The Witness: Under normal conditions, yes. Before price control that would depend entirely on the dealer

1762 or the wholesaler involved. Some would absorb it. I am talking from actual experience. As a normal mark-up where you have a ten cent increase in cost you would probably have about a 14 cent increase, on the ratio of 33%, you would have a 14 cent price added to the retail.

By Mr. Wright:

Q. Take 1938 now as a time basis for this. If you were able in 1938, or in a comparable period, to purchase the materials going into your batteries at ten cents less per battery then the present relation of your costs and your competitors' costs, would that have any effect on your business as far as your ability to compete?

Mr. Hinds: I object. The question doesn't include all the possible factors. It seems to me he would have to ask him also whether his competitors would be similarly affected by such a reduction; also whether his price would be determined by his cost or by his competition. A manufacturer's price isn't necessarily determined by his cost. He may have to sell at a loss to meet competition. There are too many false implications in that question.

Trial Examiner Norwood: If he asked him all that wouldn't you object?

Mr. Hinds: Not on that ground. I probably would have other objections, but I wouldn't object on the ground that the question contained false implications.

1763 Trial Examiner Norwood: Read the question.

(The reporter read the question.)

Trial Examiner Norwood: Objection overruled; answer the question.

The Witness: Yes, it would help us considerably. Let me say it this way. It would have helped us if we had had a ten cent lower cost, there is no question about that.

Mr. Wright: I have no further questions.

Trial Examiner Norwood: Cross-examine.

Mr. Hinds: Could we have just a minute or two?

Trial Examiner Norwood: Yes, we will take a five minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Proceed.

Mr. Wright: I do have one other question that I would like to ask the witness, Your Honor.

Trial Examiner Norwood: All right.

By Mr. Wright:

Q. Is the Federal Storage Battery Company of Chicago a competitor of yours, Mr. Sweet?

A. Yes, although they have had a lot of trouble. They had a fire here sometime back and I understand that they are having their batteries made for them by some other company, or several other companies. I don't know who they all are.

Q. Were they in competition with you on the bat-
1764 teries they made in the period 1936 to 1941?

A. Yes, at that time they were in competition. Today there isn't any competition.

Q. Did you appear in response to a subpoena?

A. Yes.

Q. Prior to the time you received that subpoena was the question of your appearing as a witness in this proceeding—did that ever come to your attention?

A. No, sir.

Mr. Wright: No further questions.

Trial Examiner Norwood: Cross-examine.

Cross-Examination by Mr. Hinds.

Q. Mr. Sweet, you say you have purchased your battery oxides from Metals Refining and Hammond, both of Hammond, Indiana?

A. I believe they are both in Hammond.

Q. And from no other producers of oxides?

A. Very honestly I don't know if they are the only two sources. If we have bought lead oxides from any other source it would be such a small amount that it didn't mean anything.

Q. It would be unimportant?

A. That is right.

Q. Did you pay about the same price from those two or did you pay different prices?

A. I believe they were both approximately the
1765 same. There were published prices that were put out
by the lead companies on what they called a blue card, they had different colors. Each one sent out a card through the mail and those are the prices we paid.

Q. Did you find any differences between the Metals Refining oxides and the Hammond Company's oxides?

A. You mean in price?

Q. No, in quality or physical characteristics.

A. No, I believe they were equally good.

Trial Examiner Hammond: Was there any difference in price?

The Witness: I don't believe there was any difference in price.

By Mr. Hinds:

Q. Did you find any difference in price between what they were charging and the prices that were available to you from other producers?

A. I don't know. We didn't check that at the time. Those were our sources and we were purchasing from them.

Q. Did you shop around or make any inquiry into purchasing from other possible sources?

A. I didn't, no sir.

Q. Did your company?

A. Yes, I believe Mr. Jaffee, who is my partner, did. My job was selling.

1766 Q. Can you tell us why you purchased almost exclusively, if not exclusively, from those two companies and not from others?

A. Surely. They helped us when we started in the business. Like any other small company we started on a shoestring, and those companies were helpful to us in getting started, and they gave us credit and we felt that in loyalty to them we should not buy from others.

Q. In other words, it was because of the peculiar and exceptional credit facilities—

A. (Interposing.) I wouldn't say "exceptional" credit, but good credit.

Q. But it was credit that was not extended to you by competing producers of oxides?

A. I wouldn't say that they wouldn't be extended to us by others. It so happened that we knew these people and they extended it to us. I wouldn't say that others wouldn't do it because we didn't try.

Q. It was because they had given you, during your company's infancy, satisfactory credit, that out of loyalty you continued to buy from them?

A. Yes, sir.

Q. Did you find that their prices were competitive with others?

~~A.~~ You mean on oxides?

1767 Q. Yes. Were they as low as the prices of other producers of oxides?

A. I don't know.

Q. Well, would this gratitude have induced you to continue to buy from them had their prices been substantially higher than those of other producers?

A. No. I don't think we would have paid them, frankly, a lot more than we would pay somebody else, because of course that would hurt us tremendously. After all, gratitude can only go so far.

Q. Your gratitude would be effective, other things being equal?

A. That is right. In other words, if you were a salesman and the gentleman next to you were a salesman, if you had helped us we would naturally feel inclined to buy from you rather than from the other party.

Q. Apart from price, can you say how the quality or physical characteristics of what you bought from these two companies compared with the physical characteristics of oxides from other producers?

A. Well, that question will have to be answered this way, sir. Different battery companies use different formulas for oxides. Other companies may not have wanted to use what we were using. However, what we purchased from them was very satisfactory for what we wanted.

1768 Q. In other words, battery oxides are not a uniform and standard commodity, but vary from producer to producer, is that what you mean?

A. That is right. They are fairly uniform. They are so close that it actually doesn't make a lot of difference. But Willard, for example, may have a different type of porosity that they may require in their oxide. We, in our type of manufacture, not having the control over our production that Willard may have, would want a different type of porosity.

Q. You have told us that you sold one battery at as low as $2.35, and that it was sold at a loss.

A. Right.

Q. Can you tell us roughly what that battery cost you at the time you sold it at $2.35, including charging and labor and all the materials that went into it?

A. I will leave overhead out.

Q. All right. I am including the materials, the oxides, the separators, the antimonial lead and the case and the labor and so on.

A. I believe I gave that before, between $2.75 and $3.00. I think I answered that.

Q. And it was at the time it was costing you, exclusive of overhead, from $2.75 to $3.00 that you were selling them for as low as $2.35?

A. Yes, sir.

1769 Q. So that you were taking a loss there on each battery of from 40 cents to 65 cents.

A. That is right, sir.

Q. I assume, then, that when you were charging as low as $2.35 your price was not determined by your cost and what you call a normal mark-up, but that it was determined by competition?

A. Right, sir.

Q. Now you have said that five or ten cents difference in your total costs would be important in enabling you to compete successfully. That didn't apply to the case where your cost, exclusive of overhead, was as high as $3.00, and your selling price was as low as $2.35, did it?

A. Well, as that question was put to me it covered all our batteries, and therefore if we wouldn't have to lower our prices on our better batteries we would have all that extra money thrown in, this extra money that we would save, against the lower price batteries, which would help us.

Q. But you did compete successfully when you were selling some of the batteries at a loss of 65 cents, at the price of $2.35?

A. I don't know how successful we were, but we competed.

Q. You were successfully meeting the competition?

A. Yes, sir.

1770 Q. And you said you could continue to do that only because you were making a profit on some of your other batteries?

A. Actually we would up a couple of those years in the red because of the low price at which we were selling these cheap batteries.

Q. So that when you say that five or ten cents would be important in competing successfully, you mean in order to meet competition and yet not go into the red; is that what you mean?

A. That is right, sir.

Q. Now isn't it a fact that the principal competition that you were confronted with from other concerns in your business was from concerns in the Chicago district?

A. Pardon me, I didn't follow you there.

Q. You were asked to tell what your principal competition was. Isn't it a fact that most of your competition was from other concerns in the Chicago district?

A. I would say surrounding Chicago district because there are other battery firms such as Wisco in Racine, Wisconsin, which was competition. You are pretty right on what you have said, it was Chicago and vicinity.

Q. Now you have mentioned as materials which go to make up your battery, the case, the separators, the vent covers and vent plugs, the acid, antimonial lead, the lead oxides, and then the charging, which isn't of course so much a material as it is—

1771 A. (Interposing.) That is right.

Q. You didn't say anything about pigments. Do you use pigments in your batteries? You are not familiar with that term?

A. If you are referring to pigments that is part of the oxides, pigments are in oxides if I am not mistaken.

Q. Your understanding is that a pigment is an ingredient of the oxide?

A. I believe so.

Q. Is that term used in your business at all—pigments?

A. It is used by chemical engineers when they are talking between themselves, but not between the laymen.

Q. You never heard the word "pigments" used as synonymous with the term "battery oxides," did you?

A. No, sir, I haven't ever used it in that connection.

Q. And when you refer to battery oxides you say—

Mr. Wright: (Interposing.) I object to this full line, this whole line of testimony. Certainly none of this was brought up on direct examination and it is going very far afield. I realize that counsel for the—

Mr. Hinds: (Interposing.) Counsel heretofore undertook to tell us what a certain term means in the trade. Would you like to go on the stand and have me cross-examine you? I understand you were testifying.

Mr. Wright: Do I understand that counsel is attempting to prove by this witness what the term "lead pigments" means legally? 1772

Trial Examiner Norwood: I think that probably he is asking a question or two bearing on his own connections and his own case, but I see no harm in his doing that. You may cross-examine this witness on it. I will overrule the objection.

By Mr. Hinds:

Q. At any rate, what is known to the chemists as lead oxides so far as used in your business, are called battery oxides?

A. That is right.

Q. They are not called pigments, in your business?

A. Not to my knowledge. I don't know. They are referred to as litharge, as one type; red lead is another—all referring to oxides.

Q. Now you spoke of a normal mark-up. That is merely an ideal or a hope in your business, isn't it? It isn't something that you can use as a basis for quoting your prices? Your prices have to be determined by competition, don't they, not by a normal mark-up, if you want to stay in business?

A: Depending on what condition the country as a whole is in, yes, sir.

Q. Well, during the condition that existed from 1937, when you went into this business, to, say, 1940, your price was determined by competition that you had to meet, wasn't it; not by a normal mark-up from your cost?

1773 A. Yes, price was determined by competition. You can only meet competition so far, though. If you keep on incurring a loss—

Q. (Interposing.) So long as you stay in business, your price is determined by competition and not by a normal mark-up?

A: At ~~that~~ time.

Q. That is what I mean, at that time.

Mr. Hinds: That is all.

Mr. Wood: I have a couple of questions.

Trial Examiner Norwood: All right.

Cross-Examination by Mr. Wood.

Q. On this battery you sold at $2.35, did the size of the order have anything to do with the price you set? I mean was it a big order?

A. From some accounts, from new accounts, yes. From old accounts who already were doing business with us,—let me say fairly, yes, the size would affect the price definitely, the size of the order would affect the price very definitely.

Q. Now on the cost of that battery, I believe you testified that it was between $2.75 and $3.00, is that right?

A. Somewheres in there.

Q. Now aren't you able to place it a little bit closer than that? What was the cost?

A. Unfortunately I can't, because I tried to find 1774 out from the lead companies that we had done business with, the cost of lead at that time. If we could get that, I could tell it to you pretty close.

Q. As a partner in the business, don't you carry in your head the figures that you lose on each battery?

A. Not in '41, I don't go back that far, that is past.

Q. In other words, from the point of view of selling your batteries, do you carry no cost figure in mind closer than a quarter a battery?

A. Now or then?

Q. Now.

A. No, I can come closer today than I can then; I can come within a nickel or probably two or three cents.

Q. We are talking about this battery that sold for $2.35.

A. Yes, sir.

Q. You do not remember the exact cost of that battery?

A. No, sir. Frankly, not because I don't want to. I just can't get the information.

Trial Examiner Norwood: Did it vary at different times?

The Witness: Yes, it would be affected. That is why I say from $2.75 to $3.00, sir, because lead was an open commodity at that time, and sometimes that was bought cheaper and sometimes for more money, depending on the market fluctuation.

1775 Mr. Hinds: Your Honor, I found I overlooked one of my sheets, so I would like to follow Mr. Wood.

Trial Examiner Norwood: All right.

By Mr. Wood:

Q. Do you remember that the price of lead was the same from April to December, 1941?

A. I don't remember, no, sir.

Mr. Wright: I might be able to help counsel out. I believe it was testified to in Washington by a representative of the Bureau of Mines that the price of common pig lead at New York was $5.85 a hundred from the period from April through the end of 1941.

By Mr. Wood:

Q. The point I am trying to make, Mr. Sweet, is this, that you have testified on your direct-examination that a saving in cost of materials of 5 to 10 cents would help you competitively; and you have also testified that on this battery on which you lost money, you didn't even remember the cost closer than a quarter. Now in what sense do you say that 5 or 10 cents a battery would be helpful competitively, as far as price is concerned, when you don't think in terms of closer than a quarter on cost? Do you understand my question?

A. Yes, I understand quite well. I think I do, anyway. That 5 to 10 cents, remember, is a saving on all of our batteries, not only on our cheap batteries, and we did
1776 not run across so much competitive trouble when we started getting into better batteries. They didn't quibble with you for, let's say, a difference of a quarter in price. So that difference there of 5 to 10 cents, when taken over-all, throughout our entire production, would help us offset considerably this loss that we were suffering in the cheaper batteries. When I say I can't give it to you exactly, that it was from $2.75 to $3.00, I frankly can't; but I think we should bear this in mind, that lead was an open commodity at that time and was subject to the fluctuation of the market, and we might buy lead one time at one price and the next time we bought lead it might be at a lower price. So therefore, there would be a difference in the price that we would be paying for our raw material. Therefore, it might run between $2.75 to $3.00; it might go to $2.65 or $3.10.

Q. Your $2.35 price was not determined by the price of the commodity?

A. No, sir, it was determined by competition.

Mr. Wood: That is all.

Cross-Examination by Mr. Hinds.

Q. You say that these costs of your lead fluctuated with the market. Is it a fact that the costs of the lead oxides fluctuated along with the prices of the metallic lead, almost parallel?

1777 A. I would say so.

Q. Now you said that the reason that you bought from either Hammond or Metals Refining and not from other lead oxide producers was because of your gratitude with respect to their credit accommodations in the early part of your history. What factor determined, at any time, any particular time, whether you bought from Hammond or whether you bought from Metals Refining? Was it price or quality, or what was it?

A. No, sir, each company made a different type of material. Metals Refining, as I recall it, made both litharge and red lead, made them both. And also we bought hard lead, incidentally. In other words, from Metals we bought that, that is the antimonial lead. We bought one type of lead primarily from Hammond, and one type of lead from Metals.

Q. So far as you were concerned, so far as your purchases of these materials was concerned, Hammond and Metals Refining were not in competition with each other?

A. No, as far as we were concerned. I don't know about anybody else.

Q. I am limiting it to you. As far as you were concerned, they were not competitors, because one sold one type of product and the other sold another?

A. That is right, Metals was also selling the same type product as Hammond, and did solicit our business on several times, but we didn't give them that particular type of business. 1778

Q. Was that also because of factors other than competitive factors, because of some personal relationship?

A. That is right.

Q. So, then, can we safely say or accurately say that so far as concerned products which you bought from Metals Refining Company throughout that period, they were your sole supplier of those materials, with these very unimportant exceptions that you mentioned?

A. Yes.

Q. They were the sole supplier of those materials, and that you did not buy or seek to buy from any others?

A. I wouldn't say we didn't seek to buy. I will say we did not buy from others, that is, as to oxides. We bought pig lead in many places.

Q. I am talking about oxides. Then it is, I assume, true that you did not buy first from Hammond and then from Metals Refining, but that you bought from both at the same time, only different products?

A. Right, sir.

Mr. Hinds: I think that is all. Thank you very much. I hope you keep on buying from Metals.

The Witness: We are very happy to. They have been nice to us.

1779 *Redirect Examination by Mr. Wright.*

Q. You stated, in answer to Mr. Hinds, that you bought one product from Metals Refining and another product from Hammond. Do you know whether the Metals Refining Company was prepared to supply you, if you wished it, with the same type of material that you were buying from Hammond?

Mr. Hinds: I object, because he has already negatived the condition which is implicit in that question. He said that he didn't wish it. So what he would have done if he had wished it would be purely speculative and subjective and therefore objectionable.

Trial Examiner Norwood: Read the question.

(The reporter read the question.)

Trial Examiner Norwood: The objection is overruled. Answer the question.

A. I don't know, no, sir.

By Mr. Wright:

Q. Do you recall which one of the products you bought from Metals Refining and which one from Hammond?

A. No.

Q. I direct your attention to the fact that Commission's Exhibit 831-T, U and V are invoices supplied under subpoena by the Metals Refining Company, showing transactions to the Apex Battery Manufacturing Company in September, October and November, 1941, of a
1780 product called Plumbage 95-X. What is that product?

A. I believe the Plumbage was the red lead, the positive oxide of a battery. Something just occurred to me in connection with this that this gentleman's questioning reminded me of: As I said before, I am in charge of the selling of our product which, thank God, I don't have to work too hard today to sell, but under normal conditions I was out doing the selling, and my partner's headaches were in the purchasing of the raw materials. I remember some difficulty we got into, but I didn't pay so much attention to it because he handled it successfully, and that was that all of a sudden, several years ago, exactly when I don't know, but Metals Refining stopped, without any warning at all, they stopped oxide sales. I am pretty sure that what I am saying is correct. I think for some reason in connection with the war they went into some other work or were giving the Government the oxides.

Q. That was since the war?

A. I believe it was.

Q. Do you recall now whether the negative oxide or the positive oxide is the one that commands the higher price?

A. I don't know.

Q. You are not familiar enough with that?

A. No.

Q. You are not sure that the Plumbage No. 95-X is the positive?

1781 A. I am quite sure that it is the positive lead, but I don't know whether it commanded a higher price. I am quite sure that Plumbage 95-X was our red lead, our oxide.

Mr. Wright: I have no further questions.

Mr. DuBose: No further questions.

Trial Examiner Norwood: The witness is excused.

(Witness excused.)

Trial Examiner Norwood: We will have a five minute recess.

(A short recess was taken.)

1782 Trial Examiner Norwood: Call your witness.

Mr. Wright: Mr. Baracree, please.

Trial Examiner Norwood: Do you have a subpoena?

The Witness: Is this what you want (indicating)?

Trial Examiner Norwood: Is that name and address correct?

The Witness: Yes.

ARTHUR J. BARACREE was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Mr. Hinds: Your name, please?
The Witness: Arthur J. Baracree.
Mr. Hinds: How do you spell it?
The Witness: B-a-r-a-c-r-e-e.
Mr. Hinds: Thank you.

Direct Examination by Mr. Wright.

Q. What is your business connection and address, Mr. Baracree?

A. I am connected with the Am-plus Storage Battery Company, 429 West Superior Street, here in Chicago.

Q. What is your position with that company, sir?

A. President.

Q. What is the business of the Am-plus Storage
1783 Battery Company?

A. We manufacture starting and lighting automobile batteries.

Q. Over how long a period of time has the company been in that business?

A. Twenty-seven years.

Q. What is the normal average output of batteries by that company?

A. Our normal output would be fifty thousand per year.

Q. Fifty thousand per year?

A. Yes.

Q. Can you state over what territory you solicit business?

A. Within a radius of 250 miles of Chicago.

Q. You go as far west as Minneapolis?

A. No.

Q. Do you have travelling salesmen in those areas?

A. Yes.

Q. To what classes of customers do you generally sell?

A. Well, we sell to what we term as distributors. They would possibly be called large dealers by some of our competitors. We take a large dealer and build him up into a distributor.

Q. Do most of your customers resell at retail or do they resell to dealers for resale?

Mr. DuBose: I object on the ground that anything this witness might know would be purely hearsay as to
1784 what his customers do.

Mr. Welch: I object on the second ground that it is leading.

Trial Examiner Norwood: I will overrule the objection and instruct the witness to answer from his own knowledge. Do you know directly or in the due course of business as reported to you by your salesmen.

The Witness: Will you please repeat the question?

Mr. Hinds: Read the question.

(The reporter read the question as follows:

"Q. Do most of your customers resell at retail or do they resell to dealers for resale?")

A. Well, strange to say right at the present time I could answer that question two ways. Am I allowed that latitude?

By Mr. Wright:

Q. Yes, sir.

Trial Examiner Norwood: Yes, sir.

By Mr. Wright:

Q. You can make an answer and then explain it.

A. At the present time I would say most of them are selling at retail.

Q. Are selling at retail?

A. Yes.

Q. Now, what about the period, say, from 1936 to 1941? Would that same situation be true?

1785 A. Some of them would resell.

Q. At retail?

A. Yes.

Q. Now, are your batteries the replacement type?

A. Yes.

Q. Do you manufacture any as original equipment?

A. No.

Q. Do you do any business with fleet operators and industrial concerns?

A. Yes.

Q. On what basis do you do business with those customers?

Mr. DuBose: I object to "on what basis". I do not think that is relevant and competent in this proceeding.

Trial Examiner Norwood: Objection overruled. You can clarify that, if you will.

By Mr. Wright:

Q. Do you lease them or sell them or what is your arrangement with those customers?

A. Well, we do nothing but sell. We do not lease any batteries.

Q. I see. Now, in the market area which you have described what is your principal competition with other battery manufacturers?

A. Our principal competition is mail order source.

Q. Mail order source?

1786 A. Yes.

Q. Does that include—

A. Our chain stores. I would say large chain operators.

Q. Can you name some of those?

A. Well, I would refer to such chain operators as Western Auto Supply Company, Sears Roebuck Company, Montgomery Ward & Company, Solar—wait a minute, I will take that back—Gamble Stores. They use the battery. And there is another firm in Chicago here that operates in adjacent towns, called Western Tire & Supply, I think is the title of the firm.

Q. Do you know from whom those organizations purchase their batteries or do they make them themselves?

Mr. DuBose: I object again on the ground it would be purely hearsay what this witness would know.

Trial Examiner Norwood: Well, he asked him if he knows. Now, you answer yes or no, whether you know or not. Objection overruled.

A. I know who manufactures some of the batteries.

By Mr. Wright:

Q. Will you state, please, the extent of your knowledge?

A. Well, if you had asked me a particular chain I could probably tell you.

Q. Western Auto Supply.

A. Well, their batteries are made by—some of them are
made by the National Battery Company, at St. Paul,
1787 Minnesota. Some of them are made by Price in Hamburg, Pennsylvania.

Q. Now, do those batteries originating in Minneapolis and Hamburg, Pennsylvania, come into this market?

A. That, I do not know.

Q. Do you meet the competition—

Mr. Welch: May I ask what the answer to that last question was?

(The reporter read the answer as follows:

"A. That I do not know.")

By Mr. Wright:

Q. Who makes the batteries of the Western Tire & Supply Company? Was that the company you mentioned?

A. Universal Battery Company in Chicago.

Q. Who makes the batteries of Sears Roebuck?

Mr. DuBose: May we have a definite objection to this whole line of questioning? We maintain it is purely irrelevant.

Trial Examiner Norwood: Yes. You can have it on that ground. Answer the question. Will you read the question to the witness?

(The reporter read the question as follows:

"Q. Who makes the batteries of Sears Roebuck?")

A. Globe Union Company.

By Mr. Wright:

Q. Where are they located?

1788 A. Milwaukee, Wisconsin.

Q. Do you, in your market area—say in the period now from 1936 to 1941—have competition from Bowers Battery Company of Reading, Pennsylvania?

A. Yes.

Q. Monarch?

A. Yes.

Q. Where are they located?

A. Bowers Battery Company have a plant in Harvey, Illinois, some time during that period.

Q. Where is Monarch located?

A. Monarch is located in Dayton, Ohio now. They were located in Chicago, then, I believe.

Q. Are you in competition with Willard, Exide and Gran?

A. Yes.

Q. What was the competitive situation in the storage battery industry in your market area in the period from 1936 to 1941?

Mr. DuBose: The same objection, if your Honor please.

Trial Examiner Norwood: Objection overruled.

A. Well, I do not know. Your question is so broad there, it would be rather difficult to answer that specifically.

Q. Well—

A. From what angle?

Q. From the standpoint of price.

A. In the period of 1938 to 1941?

1789 Q. That is right.

A. There were a considerable number of batteries made at low prices and used as, I would say, leaders in chain stores.

Q. Did you find it necessary to meet that competition in that period?

A. We did.

Q. What was your profit margin in that period on the batteries that you sold in meeting that competition?

Mr. Hinds: I object. It has already been indicated they sell some at a loss and make money on others. So the question is completely without any definition. It means nothing unless he first states that he makes the same profit on all. If he states that, why then the question is material; but unless he does that it has to be split up in particular batteries.

Trial Examiner Norwood: I think the question indicates certain transactions there.

Mr. Wright: As a matter of fact the question comprehended the batteries with which he met the competition that he spoke of. He spoke of cheap batteries sold as loss leaders. Then it was stated that he did beat that competition.

I will be glad, after we get this answer, to specify the type of batteries and go into it in further detail.

1790 The Witness: I may interject a thought here,—

Mr. Hinds: What is the ruling?

Trial Examiner Norwood: Wait a minute.

By Mr. Wright:

Q. You confine that then to one battery?

Mr. Hinds: Wait a minute. There is an objection. The Court has not ruled on that.

Trial Examiner Norwood: We are trying to elucidate something here. I am going to rule on it.

By Mr. Wright:

Q. In other words, you had one battery, then, did you, with which you attempt to meet that competition?

A. Yes.

Q. What was that battery, what size?

A. It was a 13 low plate battery in Group 1 size.

Q. Was that a 60 amp-hour or 100 amp-hour, or what was the output?

A. It referred to all over the lot from 50 amperes to 66 by different manufacturers, depending on how they gauge their average.

Q. But it was a 13 plate group 1 automotive battery?

A. That is right.

Q. What was your cost of manufacturing that battery, to which you refer, in 194—

Mr. DuBose: I object.

1791 Mr. Wright: May I complete the question?

Mr. DuBose: Yes, I am sorry.

By Mr. Wright:

Q. —either material cost alone or your material and labor cost.

Mr. DuBose: I withdraw the objection.

A. You asked me for information on 1941 and the following years and we did not make that battery in 1941. I doubt if we made that battery after 1938, that I can recall. I have no figures here to substantiate that. Anything I would say would be a rough guess.

Q. What was your lowest priced battery in 1941?

A. Our lowest priced battery in 1941?

Q. Yes. What construction was that battery? Did you make a 13 plate battery at that time?

A. Yes. We made a 13 plate 75 ampere battery in 1941.

Q. Was that in any way comparable to this battery you were speaking of?

A. No, it was a standard size plate battery.

Mr. DuBose: May the record show that the witness is either reading or refreshing his recollection from a paper?

The Witness: I am referring to a price sheet.

Trial Examiner Norwood: Counsel may examine it.

Mr. DuBose: Yes.

The Witness: They are all here for your inspection. I just have them here because I cannot remember all these types on here.

1792

By Mr. Wright:

Q. Do you know the cost of that 13 plate 75 ampere battery in 1941?

A. No, I do not.

Q. Now, going back to this battery that you used to meet competition, the 60 amp-hour, you do not have any idea of your costs—I believe you said the last time you sold it was 1938—of manufacturing that battery?

A. That is right, as near as my memory serves me.

Q. Now, Mr. Baracree, in the period in which you manufactured that competitive battery, what was your profit margin on that particular item? Do you know?

A. The profit item on it was never considered. We manufactured that battery because others manufactured it.

Q. Did you make a profit on it in that period?

A. We did not, no.

Q. Did you have a loss in handling that battery?

A. That would be difficult to say because we never made —applied a charge on costs against each individual line of batteries.

For instance, we would run, say, through 120 batteries in one day. The 120 batteries cost us so much labor and a certain amount of labor was apportioned against
1793 every product we made.

Q. Do you have your costs during 1941 for any particular battery?

A. The only costs I have here was material costs.

Q. Material costs?

A. Yes.

Q. Could you give us the material costs on one of your batteries in 1941?

A. No, I can just give you the materials that entered the batteries.

Q. Will you state those, then?

A. Well, 1941, for instance, we were paying 8 cents for positive oxide—negative oxide; 8¼ for positive oxide; $7.21 for 8 per cent pig lead, meaning 8 per cent antimonial pig lead.

Q. That is metallic lead?

A. Yes. $6.91 a hundred for 4 per cent antimonial pig lead; containers—do you want the rest?

Q. Yes, sir.

A. Containers, we were paying for the Group 1 container, 39½ cents. That is 10-B—that is a Group 2 container;

42 cents, and that is 10-E, that is, the long narrow container end to end, 48 cents; coppers, we were paying, per set—meaning three coppers for a battery—11 and a tenth
cents apiece or 11 and a tenth cents a set, pardon me;
1794 and for the S-10, 12 and a tenth cent per set. The
same would hold for the S-10-E. Lead cans we were paying 8½ a thousand; separators $4.45 a thousand.

Q. How many separators would be used in an ordinary battery?

A. Pardon?

Q. How many separators would be used in an ordinary battery?

A. Well, in the 13 plate battery you use 36, 12 separations to a seal.

Q. In a 15 plate battery?

A. Three times 14, 42.

Q. In 3-vent cans, was that?

A. That is right. Acid was $1.30 a hundred.

Q. About how much acid would be used in a Group 1 battery?

A. It is something I cannot answer. It is mixed with water and I never did know the positive acid content.

Q. Would it be somewhat less than ten cents per battery?

A. Considerably less than that, possibly four cents. Sealing compound, $1.90 a hundred pounds. Please do not ask me how much of that we used.

Q. You used a very small amount of that on each battery?

A. That is right.

Mr. DuBose: What was that?

Mr. Wright: Sealing compound.

The Witness: What we seal the covers in with.

1795 By Mr. Wright:

Q. Now, does that cover the range of materials?

A. Lacquer, $2.70 a gallon; cartons, packing cartons, $2.70 a thousand; number 2 cartons—that is number 1 cartons I just referred to—number 2 cartons, $2.49.

Q. Does that cover the range of materials that go into your production?

A. That is right, sir.

Q. Now, about how many pounds of lead in total are used in your 13 plate batteries?

Mr. DuBose: I object to that unless it is broken down into either lead oxide or other types of lead.

Trial Examiner Norwood: Read the question.

(The question was read by the reporter as follows:

"Q. Now, about how many pounds of lead in total are used in your 13 plate batteries?")

Mr. DuBose: I think it is meaningless.

Mr. Wright: I will withdraw the question.

By Mr. Wright:

Q. How many pounds of lead oxide go into that battery, Mr. Baracree?

A. Into what battery are you referring to?

Q. I am talking about your 13 plate battery that you referred to.

A. That we were manufacturing at that time?

1796 Q. Yes.

A. Not the low competitive 13 plate battery?

Q. Give us as to both of them if you are able.

A. This 13-plate battery I have listed here that I referred to would be now—you asked me the oxide content in that battery?

Q. Yes.

A. Between 8 and 9 pounds.

Q. Now, as to the later, better battery, how many pounds would be in it?

A. The battery we manufacture today, you mean?

Q. Yes.

A. The 15 plate, 100 amperes.

Q. There are two 13 plate batteries?

A. We do not manufacture a 13 plate battery today.

Q. I understood in 1941 you were manufacturing a 13-plate battery?

A. Yes.

Q. And in 1938—

A. In 1941 we did, yes.

Q. All right. Do you know how many pounds of oxide were in that 13 plate battery in 1941?

A. The 13 plate battery in 1941 would be a standard size plate, would be about 9 pounds.

Q. Now, how about that battery you were man-
1797 ufacturing back in 1938 that so-called competitive battery?

A. Six pounds.

Q. Now, how many pounds of oxide go into your present 15 plate battery?

A. 10 pounds.

Q. Now, were you making that 15 plate battery back in that period of 1938 and 1941, too, or a similar product, rather?

A. Yes.

Q. How many pounds of antimonial lead would go into that 15 plate battery that you are now making?

A. A 13 plate battery, did you say?

Q. Well, 13 plate, yes.

A. You can figure it out—say for the questioning you can figure it out 50-50.

Q. About 50-50. In other words, it would be an equal amount of antimonial lead and lead oxides in the battery?

A. Yes.

Q. In the competitive perod of 1936 to 1941, would a saving to you of five cents a battery in material costs have any effect on your competitive ability?

Mr. DuBose: The same objection.

Trial Examiner Norwood: Objection overruled.

A. A difference of five cents you asked whether that would affect our competitive—

Q. Yes. In other words, if your material costs
1798 could have been reduced in a period like the period
from 1936 to 1941 by five cents a battery, how would that have affected your ability to compete?

A. Well, I could not say that we could project that into any competitive advantage or disadvantage.

Q. Well, how would that relate to your profit margin in that period of time?

Mr. Hinds: Does this question imply that this same production would not be available to his competitors; available only to this one producer?

Mr. Wright: I am assuming that his competitors would remain the same and that he would have a five cent saving over his principal competitors in material costs.

The Witness: It would not be substantial enough.

Mr. Welch: May I ask Mr. Wright a question? You mean a saving to him alone that the other competitors do not have?

Trial Examiner Norwood: Yes, that is what he said.

Mr. Welch: All right.

A. I do not believe it would be substantial enough, Mr. Wright to affect our selling price.

By Mr. Wright:

Q. Now, I believe you stated before that on your cheaper batteries in that period you not only made no profit; you suffered a loss?

1799 A. Yes.

Mr. DuBose: I object to that. I do not think that was his testimony. His testimony was there is no way in his mind to allocate whether or not he could charge a loss to this so-called loss leader competition.

Trial Examiner Norwood: Just what made you say that?

Mr. Wright: I believe we should question the witness further about what his testimony was.

Mr. DuBose: I object to the question upon the ground that the assumption had no basis in the testimony.

Mr. Welch: It is my recollection that he said he made the batteries to meet a competitive situation. The profit and loss was not the primary consideration.

Mr. DuBose: That is right.

Mr. Hinds: Yes, and then he said he made around twenty batteries in a given day and they would figure it all in and see whether they made a profit or loss.

Trial Examiner Norwood: You might ask the witness what he said.

The Witness: The remark that this last gentleman started was what I said, that we had no way of breaking down a profit and loss on any particular line of batteries because of the fact that we made a line of 120 batteries a day.

We would not know whether 20 of them cost us so 1800 and twenty more cost us so much. We knew that the 120 cost us $50; divided by 120, that was our cost.

By Mr. Wright:

Q. That was your cost per battery, allocated that way?

A. Yes.

Q. Did you, in that period, have a selling price of any of your line of 120 batteries which was less than the cost per battery that you allocated that way?

A. (No response.)

Q. What was your lowest selling price on this competitive battery during that period?

A. Our lowest selling price, as I recall, was $2.45.

Q. Well, now, was your unit cost of batteries, computed the way you have stated it, ever lower than $2.45 a battery?

A. I would not be clear enough on that to answer it without seeing the figures.

Q. Well, now, when was your lowest price of $2.45? Can you give us a date on that?

A. In 1938.

Q. In 1938?

A. That was the last that I can recall.

Q. What was your lowest price that you can recall in 1940?

A. $3.95.

Q. How about 1941?

A. $3.95.

1801 Q. I see. Can you state what your margin was over costs on that battery that you sold for $3.95 in 1941?

Mr. DuBose: I object to the question unless cost is defined. In other words, we have been talking about material costs, but we have not been talking about labor costs or overhead or sales costs or anything like that.

Mr. Wright: Let's find out what the witness knows.

The Witness: Well, I would have to—if you want costs of a product I would have to have something definite on which to answer your question.

For instance, my production cost is one figure. My total cost naturally is another figure, and the total cost is overhead and advertising, if any, and sales expense.

By Mr. Wright:

Q. What was that battery, that $3.95 battery? Was that that 13 plate?

A At that time we were fortunate if we had a gross profit of 20 per cent.

Q. 20 per cent?

A. It would range between 20 and 25 per cent, determined in a large measure by how the help worked during that particular period.

Q. Now, what do you mean by gross profit?

A. Gross profit means before our rent and advertising and sales expense and my salary.

1802 Q. Shipping expense?

A. Shipping expense is always charged up in costs.

Q. I see. Advertising and sales expense and salaries and executive overhead came out of that 20 per cent, 20 to 25 per cent?

A. Yes.

Q. So that then your net profit margin was probably less than 10 per cent?

A. Considerably.

Q. Considerably less than 10 per cent?

A. Yes.

Q. So that on a battery that you sold for $3.95, if your net was less than 10 per cent, would it then have been less than 39 cents per battery? Is that correct?

A. That is right.

Q. Could it have been less than 25 cents per battery?

A. (No response.)

Q. Was it ever in that period that you recall?

Mr. DuBose: Are you speaking of 1941, Mr. Wright?

Mr. Wright: The period 1936 to 1941, if he can recall that time when it was below 25 cents.

Mr. DuBose: Well, I object to that upon the ground that the question, to say the least, is ambiguous. We have been talking about the loss in 1938 when it sold for $2.45 and now he is talking about this $3.95 battery which 1803 may or may not have been sold for that price during that whole period. I do not know.

Mr. Wright: Well, I will amend the question then to make it apply to the period 1940 to 1941 since those were the years he testified it sold for $3.95.

The Witness: May I have the question again?

Trial Examiner Norwood: Can't you restate that question?

Mr. Wright: Yes. I believe that would be simpler, to restate it.

By Mr. Wright:

Q. On that basis then, of something less than 10 per cent, could your net profit have been less than 25 cents per battery on that $3.95 battery during 1940 and 1941?

A. At times during the period it could have been and at other times it could have been more. I am talking on an over-all picture for the year.

Q. For your entire range of batteries?

A. That is right. For me to remember back monthly, I could not say.

Q. Do you make the same profit margins on all the batteries that you offer for sale?

A. No.

Q. Are some of them considerably lower than others or how do they vary? Let me ask you that.

1804 A. Well, we take a greater markup on types that are more troublesome to make and we have to stop the lines and make fewer batteries on that particular day. Does that answer your question?

Q. Yes. Now, are some batteries priced at a lower margin in that period because of competitive conditions?

Mr. Welch: Objection, your Honor. The question is leading.

Mr. DuBose: I want to object upon the ground it is ambiguous: a lower margin. I do not know what he is referring to there. Lower than what?

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Yes. Now, are some batteries priced at a lower margin in that period because of competitive conditions?")

Trial Examiner Norwood: I do not think that it is leading. Objection overruled.

Mr. DuBose: Both objections?

Trial Examiner Norwood: Yes.

A. Yes, they are.

By Mr. Wright:

Q. In other words, you operate at a closer margin on some batteries than on others?

A. We operate on a closer margin on all Group 1 1805 batteries, because that constitutes 85 per cent of the line.

Q. You have a closer margin on those?

A. Yes.

Q. Because of competition?

A. No, because it constitutes a larger proportion of the line.

Mr. Wright: I see. I have no further questions.

Trial Examiner Norwood: Cross examine.

Mr. DuBose: May we have a few minutes?

Trial Examiner Norwood: We will take a three-minute recess.

Mr. Hinds: I move to strike out all the testimony of this witness inasmuch as it has not been connected with this case or with any other respondents.

It does not appear that he purchased any of these oxides or any products from any of these respondents. Therefore there is not even the remotest connection between this testimony and any issue in this case.

Mr. Welch: I join in the motion.

Mr. Wright: May I say, in response to that, that there have been identified but not yet offered in evidence a great

batch of invoices which were submitted by the National
Lead Company under subpoena, and due to technical diffi-
culties involved in a mass of those invoices, I have not yet
been prepared to offer them all in evidence, but I
1806 assure your Honor when those invoices are offered
they will sufficiently identify this witness with the
respondents so that—

Mr. Hinds: I suppose we will have the burden of bringing this witness back to Chicago for examination and we will then be enabled to see whether we want to cross examine him. At the present moment I have no basis. I do not know whether I want to cross examine. I do not know whether my client is involved.

That, by the way, was the difficulty this morning. It was not until recess when I had an off-the-record talk with my opponent that I had the remotest idea what the pertinency of the evidence was.

By the way, I would like to have Mr. Sweet brought back here. I do not think we should be put to that burden. You will remember that I have been trying for many, many sessions to find out from my opponent what this case is about, which sales he claims not to be discriminatory.

Now he is bringing in witnesses in connection with certain sales. He has not even got the evidence of these sales in the record as yet. He says he has some documents identified. They are not even yet in evidence, and especially has he not indicated which one of them he claims to be discriminatory. So how can we successfully or intelligently cross examine these witnesses?

Mr. Wright: Your Honor, in partial answer at
1807 least to Mr. Hinds, I want to call his attention to the
fact that the Apex Battery Manufacturing Company
—Mr. Sweet, the witness to whom he last referred—or,
rather, that invoices submitted by the Glidden Company
under subpoena duces tecum and which were admitted into
evidence as Commission's Exhibit 831-T, U and V show
transactions of sales of lead pigments by Glidden to the
Apex Battery Manufacturing Company.

Now, that material is already in evidence.

Mr. Hinds: What objection was there then to your telling us this morning? What was the purpose of the testimony? We are not clairvoyants. We are not magicians. We cannot possibly know what the purpose of the examination is unless counsel aids us.

1808 Now we are in the embarrassing position of having to ask the Court to issue a subpoena so that we can bring this gentleman back here during this session. Otherwise we will have to either subpoena him from Chicago to wherever we are going to be sitting on our case. It seems to me unfair.

Trial Examiner Norwood: I will say this: The relevancy of this material here is apparent to me without examining any invoices.

Now, those invoices may throw some further light on it. I do not know. But, in any view of the case, if it appears to me just and fair or in the interest of respondents to bring some other witnesses up here or to recall some of their witnesses, I assure you, you may do so and you will have ample time to do so and I will not take any more time to examine him at some future time when we have further information and when it will be of greater advantage to you than it will to cross examine him now.

Mr. Wright: Before your Honor rules on this pending motion—

Mr. Hinds: Are we going to sit here in Chicago until it comes time for our rebuttal? I would like to have the opportunity while we are here in Chicago.

Trial Examiner Norwood: I do not see how you can do that.

Mr. Hinds: All of us counsel—we may be peculi-
1809 arly dense—in good faith we tried, to satisfy ourselves, to guess what the purpose of this proof was this morning and we all thought it was a conspiracy charge. We all said it cannot possibly be on Count 2.

Mr. Wright: It was stated in answer to an objection to that was relevant to Count 2.

Trial Examiner Norwood: It certainly was relevant to show the effects in this industry of lead prices. It certainly appeared to me to be part of the necessary information that had to be received under this complaint, and I will say to the counsel that all of the evidence cannot be produced at one time. We have to take it witness by witness, and you will have ample time to do so.

Mr. Hinds: It would be very helpful—and one of the Commissioners said: "This is not a punishment or persecution but it is an effort to get at facts"—if counsel would help us a little more and tell us what the purpose, what the logic, the pertinency of the testimony is.

Now, he refuses, apparently, to tell us from which respondents this witness buys his supplies. I do not know whether I should cross examine him or not. If he does not buy his goods from Metals Refining Company perhaps I will have no reason to cross examine him.

I do not like to have to speculate here nor do I like to have to take a lot of cross examination which may 1810 prove to be a waste of all of our time.

Mr. Wright: Before your Honor rules on this pending motion, I would like to ask the witness two or three more questions which would, in a large part, satisfy Mr. Hinds, although certainly he could bring that same matter out in a similar short time by asking one question on cross examination. But as to the matter of the issues, certainly Mr. Hinds and counsel generally, in this matter, are able lawyers and there is nothing obscure about the complaint and the issues that were drawn by the complaint and the answers.

Now, with reference to all of this testimony that has been taken today, and which we will continue to take, I am not at this point ready to make a formal statement about the issues in the case but I will say that it is the contention of counsel for the Commission that the prices set up for litharge and red lead by the respondents, as we contend by collusion, are unfair and discriminatory; that they discriminate against the small purchaser on the card prices in favor of the carload buyer; that they discriminate against the buyer who is located freightwise close to the factories of the respondents, and in favor of those who are located at a distance.

Now, I do not think there has ever been any question or doubt in the minds of counsel that those things were issue in this case.

1811 Mr. Hinds: I would like to ask whether it is his contention that these card prices represent sales or are in accordance with actual sales so that you thereby discern and allege discrimination under the Robinson-Patman Act. If it is not sales under that certainly it cannot be discriminatory.

Mr. Wright: Mr. Hinds, we have already in the record a great many invoices from the Metals Refining Company, which show on their face actual transactions of sale and delivery of these products to customers.

Mr. Hinds: Obviously. I say do you contend that the prices on the cards are concurrent with actual sales?

Mr. Wright: I do not think I should be required to answer that question.

Mr. Hinds: Then obviously all that counsel has said is that certain actual sales by Metals Refining Company show a discrimination with what? With some prices on some cards, quotations. Counsel says he does not think he should be required to say whether or not he contends that the latter involved any actual sales. So that makes it even clearer than before that we do not know with what issue we are being confronted.

Certainly the Robinson-Patman Act does not denounce a difference between a price charged to Mr. A and a quotation put on a card under which there are no sales.

Mr. Wright: Well, if that came within the Robinson-Patman Act there cannot be any issue. 1812

Mr. Hinds: I am trying to find out if there is any issue.

Trial Examiner Norwood: You contend these cards are in issue that are in evidence now?

Mr. Wright: Yes, sir.

Trial Examiner Norwood: Do you contend there is no evidence in there as to what these prices were?

Mr. Hinds: We have already made it clear that on many of these cards there have been no sales.

Trial Examiner Norwood: That is right.

Mr. Hinds: The Commission is the one that is making out a case. We want to know which pair of sales he claims are, as between one and the other, discriminatory. Now he tells us that one of the pair—I know only for the first time this afternoon that one of the pair will be certain sales made by Metals Refining to this Mr. Sweet's company.

Now I ask, what is the other of the pair? And all I can get from counsel is a refusal to tell me whether or not these prices on the cards correspond to any actual sales, and if so, to whom. We do not know whether they would be the same type of customer. We do not know anything about them.

That is why I did not intelligently cross-examine Mr. Sweet. I find now there are many questions I should have asked him.

1813 Now I cannot intelligently cross-examine this gentleman. I do not even know whether he is one of our customers.

Trial Examiner Norwood: Didn't you hear his direct examination?

Mr. Hinds: What is that, sir?

Trial Examiner Norwood: Didn't you hear the direct examination of this witness?

Mr. Hinds: I thought I did and I asked my colleague here.

Trial Examiner Norwood: You can cross-examine him on that.

Mr. Hinds: Not knowing what the issue is, whether it would affect my client—

Mr. Wright: There is a motion pending, I believe.

Trial Examiner Norwood: I think that the pleadings are in. At least it should be clear to counsel, and I think that counsel, who is a layman here in the development of his case, has made sufficient explanation at this time.

Mr. Hinds: If this were a court of law we would file a bill of particulars here. We would clarify these issues because, to my mind, it is very oppressive to have to guess whether a certain witness' testimony affects our clients, and if so, in what respect.

Trial Examiner Norwood: Well, I think you are
1814 going to have to deal with this evidence as it comes
out, whether it affects you or not.

Mr. Hinds: I enter my most urgent and sincere protest. I think the whole thing is unfair. I will have to cross-examine him limping along as well as I can without the aid of counsel for enlightenment.

Mr. Wright: Before your Honor rules on the motion that was made by Mr. DuBose to strike the testimony of this witness, I would like to ask him one or two more questions.

Trial Examiner Norwood: Go right ahead.

Direct Examination (Continued) by Mr. Wright.

Q. Mr. Baracree, from what company or companies does your concern purchase lead oxide?

A. National Lead Company.

Q. You purchase exclusively from the National Lead Company?

A. Pig lead and oxide.

Q. On what price basis do you purchase? Are you a carload purchaser?

A. Yes.

Q. Do you know how the price is computed? Is it a differential over the pig lead price?

A. Yes.

Q. Do you know what that differential is?

Mr. DuBose: I object upon the grounds the com-
1815 plaint was certified. The amended complaint was served in May of 1946 and he apparently is asking about the present time, which admittedly is under abnormal conditions.

Mr. Wright: It is a technical objection, your Honor. I am willing to reframe the question. I was fully intending to carry the witness back over it.

Trial Examiner Norwood: Question withdrawn.

Mr. DuBose: All I meant was to have an accurate question and accurate answer.

Trial Examiner Norwood: All right.

By Mr. Wright:

Q. Do you know what the differential over the pig lead price was used in computing your purchases during 1945?

A. Well, I do not recall what the positive differential was. These figures will not tell me here because I have antimonial lead, but the antimonial figure I do not know. I haven't got the price on antimonial lead.

Q. Do I understand your testimony is that you do not know what that differential was?

A. No, I do not. I did know at one time definitely, but I do not know now.

Mr. Wright: No further examination.

Mr. DuBose: May we have our recess?

Trial Examiner Norwood: Motion is denied. We will have a five-minute recess.

1816 (Whereupon a brief recess was taken.)

Trial Examiner Norwood: Proceed. Cross-examine.

Cross-Examination by Mr. DuBose.

Q. Mr. Baracree, I believe you stated that among your competitors were Sears Roebuck, Montgomery Ward and certain other large chains, shall we say?

A. I should probably make a broader statement than that: among the competitors of our dealers or our outlets; they would not be direct competitors with us, no.

Q. In other words, that is an indirect sort of competition that your dealers get primarily from Sears Roebuck and Montgomery Ward?

A. That is right.

Q. Now, Mr. Baracree, how long have you been in the storage battery business?

A. We will take eleven away from forty-six—thirty-five years.

Q. About thirty-five years?

A. That is right.

Q. And over the course of the years, to your knowledge, have oxides been improved by the producers of oxides?

A. Definitely.

Q. And in your selection among the possible producers from whom you buy do you look at the quality of the
1817 oxides produced by particular producers?

A. Without a doubt.

Q. And in selecting National Lead to purchase from, and lead oxides, do you take into consideration the technical help or advice that you might get from National Lead?

A. Positively.

By Mr. Wood:

Q. Are the battery oxides offered by National Lead different from the battery oxides offered by Eagle-Picher?

A. Yes.

Q. In what way are they different; just generally?

A. The manner in which we handle them in our process of manufacturing.

Q. And you prefer the National Lead?

A. We do.

Q. Have you discussed the relative merits with other battery manufacturers who buy from Eagle-Picher?

A. We have.

Q. And there is a difference of opinion in the industry as to which is the best?

A. Yes.

Mr. Wood: That is all.

Redirect Examination by Mr. Wright:

Q. Mr. Baracree, do you know whether Eagle-
1818 Picher Company and Metals Refining Company offer
technical help and assistance to battery manufacturers in connection with selling them oxides?

A. Yes.

Q. Is that comparable help and assistance to that offered by the National Lead Company?

A. That I could not say because we have never drawn on their resources.

Q. But you know that such facilities are available from the other suppliers of lead oxides?

A. I do, yes.

Q. You spoke of the National oxides being your preference. Can you enumerate the differences between the oxides of National and those of Eagle-Picher?

A. I am not a technical man even though I have been in the business thirty-five years. I suppose thirty-four and three-quarters of those years have been spent in selling and I am not a technical man.

Our main reason, I would say, for using National Lead oxides has been due to the fact that I experienced, in the use of this particular oxide, that it has placed us among one of possibly six of the leading manufacturers in the country as to the type of battery or quality of battery that we have been able to produce from those oxides.

1819 Q. In other words, you believe there may be differences from the Eagle-Picher oxides but you do not know what those differences are?

A. Those differences are only due to opinions I have formed from the use of their particular product, and from the tests I have seen of batteries made with other products.

Q. In other words, you don't know of any physical differences in the products themselves?

A. Other than the workabality of them in the factory.

Q. You know of no chemical differences or differences in—

A. (Interposing.) In the present-day oxides there is considerable difference.

Q. In normal times?

A. Well, that would have nothing to do with the times, the oxides we are using now. National Lead has recently perfected a plate that they call—I don't know just what the type of that is called now—it is what we call a dehydrated plate, and we save several man-hours in the handling of it.

Q. Did you say that had been developed by you?

A. No, that has been developed by the National Lead Laboratories in Brooklyn.

Q. Is that a method of manufacturing a plate, or is that an oxide?

A. That is an oxide that we use in manufacturing the plate.

Q. I see. Do you know whether National Lead 1820 Company makes a large variety of different oxides suited to different processes?

A. Yes.

Q. Do you know whether or not Eagle-Picher and Metals Refining also have a variety of oxide?

A. I assume they do.

Q. And you prefer certain of the oxides made by National Lead Company over certain other oxides that are made by them?

A. Well, some of the oxides made by the National Lead, for instance, would only be adaptable for paint uses or heavy duty batteries, let us say for submarine batteries, heavy duty batteries, truck batteries, but for a starting and lighting battery, which is the only line we make, their particular oxide is more adaptable for what we attempt to accomplish of a technical nature in the battery we produce.

Mr. Wright: No further questions.

Mr. Hinds: I have some questions.

Trial Examiner Norwood: Go ahead.

Recross Examination by Mr. Hinds.

Q. On direct examination you said that Metals Refining Company offers technical assistance to battery manufacturers. Has it offered such technical assistance to your company?

A. Yes.

Q. You say you have not purchased any oxides from Metals Refining Company, is that right?

1821 A. That is right.

Q. What is the reason for excluding their oxides in your purchases?

A. I wouldn't say that "excluding" is the word. I don't exclude them.

Q. What is the reason why you have not purchased their oxides before but have purchased them from National Lead?

A. Because, as previously stated, our experience has been so satisfactory with National Lead, and we have no laboratory of our own to test the relative merits of the Metals Refining oxides with other oxides.

Q. Has it been a question of relative price?

A. No.

Q. In other words, entirely apart from price competition your company has decided to buy National Lead's oxides and not Metals Refining Company's oxides, and other people's oxides?

A. That is right.

Q. Have you at any time considered the question of purchasing oxides from Metals Refining?

A. No.

Q. So that so far as your concern goes, such competition or alleged lack of competition as there may be between Metals Refining Company and National Lead has not been in any way a factor in your selection of the oxides for your use?

A. No.

1822 Q. You have told us of some of the materials that you use in your batteries. Do you use pigments?

A. No.

Mr. Hinds: That is all.

Mr. Wood: I have one more question.

Recross Examination by Mr. Wood.

Q. Does the National Lead Company put out a single leady oxide that is adapted to be used on both plates of a battery, that is on the positive and negative plates?

A. Not to my knowledge.

Q. Do they put out different oxides for the different plates?

A. That is right.

Q. Has there been any change in National Lead's negative oxide during the past few years?

A. Not during the past few years.

Q. Has there been an improvement, let us say since 1936?

A. In the negative oxide?

Q. Yes.

A. I don't believe so since 1936, no.

Q. There have been changes, though, in the oxides in general?

A. In the positive oxides, but not in the negative.

Q. And is your understanding that Eagle-Picher's recommendations to battery manufacturers are different from those of National?

1823 A. That I couldn't say.

Q. You aren't familiar with Eagle-Picher's recommendations?

A. That is right.

Q. Have you ever tested any of Eagle-Picher's products?

A. Years ago.

Q. Just years ago?

A. That is right.

Mr. Wood: That is all.

Mr. Hinds: I move to strike out the entire testimony of this witness on the same grounds of the motion which Your Honor denied, but now with a much more unmistakable factual basis to support my motion, namely that he has not only failed to show that pigments are used by this battery producer, as was the case with the other two witnesses, but here the witness has definitely stated that his company does not use pigments at all in their battery production, and this case has to do solely with pigments.

Mr. Wright: May I ask the witness one question before Your Honor rules on that?

Trial Examiner Norwood: Yes.

Mr. Wright: Do you purchase litharge from the National Lead Company?

The Witness: No.

Mr. Wright: Do you know what the negative oxide that you purchase from National Lead is composed of?

1824 The Witness: I have always assumed that it was a mixture of red lead and litharge.

Mr. Wright: Are both the negative and positive oxides that you have been referring to composed wholly or substantially of red lead and litharge?

The Witness: I understand that that is the base.

Mr. Wright: Your Honor, on the basis of the statements that the witness has just made, that the oxides that he purchases are composed of litharge and red lead, it seems obvious that Mr. Hind's motion should be denied. He is resting on the technical use of the term "pigments", which as I pointed out earlier in the day, in answer to the same objection, is a term that the respondents themselves have used constantly to describe these products generally—lead pigments—and the term is defined in the complaint specifically, to include litharge and red lead.

Trial Examiner Norwood: The motion is denied. Have you another witness for tonight?

Mr. Wright: No, sir. I want on redirect to ask one question of the witness.

Redirect Examination by Mr. Wright.

Q. You stated that price was not a factor in your purchase of oxides from the National Lead Company.

A. I don't believe I made that statement.

1825 Q. What was your statement?

Mr. Hinds: That price was not a factor in his not buying from Metals Refining—that is what he said.

By Mr. Wright:

Q. Have you ever been offered a better price by either Metals Refining Company or Eagle-Picher for comparable oxides, than you were offered by National Lead in the period from 1936 to date?

Mr. Wood: I object to that question on the ground that he is putting the statement in the mouth of the witness that the oxides are comparable, whereas the witness has testified that the oxides were decidedly different.

Trial Examiner Norwood: Read the question.

(The reporter read the question.)

Trial Examiner Norwood: The objection is overruled. If those offers were made to you on comparable products, you may answer.

The Witness: The question is was I ever offered a better price—

By Mr. Wright:

Q. (Interposing.): Yes, sir.

A. No.

Q. If you were offered, let us say, negative oxides, by the Eagle-Picher Company or the Glidden Company, at a half cent per pound cheaper than you could buy them
1826 from the National Lead Company, would you do business with either Eagle-Picher or Glidden?

Mr. DuBose: I object on the ground that it is purely hypothetical, and argumentative.

Mr. Hinds: I object on the further ground that these respondents can't be condemned by testimony as to what a certain purchaser would do under certain circumstances not shown to exist. We can't be condemned by subjective speculation as to what people would do.

Mr. Wright: The cross examination by Mr. Hinds along this line was very obviously for the purpose of bringing out from the witness that price was not a factor in his purchase of these products.

Mr. Hinds: Oh, no.

Mr. Wright: And the questions were very pointed to that effect; and I am just now testing the witness to find out whether price would be a factor.

Mr. Hinds: My cross examination had for its purpose, and was successful in said purpose, the showing that in not buying from Metals Refining Company price was not a factor.

Trial Examiner Norwood: I will overrule the objection and ask the witness to answer the question. Do you want it read?

The Witness: Yes.

1827 Trial Examiner Norwood: Read the question.

(The reporter read the question.)

The Witness: We naturally would do business with them if the oxides they were able to produce for us would meet with the specifications we had found satisfactory in our product as produced by the National Lead Company.

Mr. Wright: No further questions.

Mr. Hinds: This is cross on the further questions of Government counsel.

Recross Examination by Mr. Hinds.

Q. You say that in no instance the prices offered you by the Metals Refining have been lower than those offered to you by National Lead?

A. I don't recall Metals Refining ever having quoted us a price.

Q. Perhaps I misunderstood your testimony. I understood counsel to ask you whether or not Metals Refining had offered you any prices lower, and you said no. Did you mean they hadn't offered you any prices at all?

A. That is right.

Mr. Hinds: That is all.

Mr. Wood: I have just one more question.

Recross Examination by Mr. Wood.

1828 Q. Do you know of any source, other than National Lead Company, for the particular lead oxides you purchase from National Lead Company?

A. I do not.

Mr. Wood: That is all.

Recross Examination by Mr. Hinds.

Q. I think you said that Metals Refining did offer you technical services?

A. Yes.

Q. Well, did they make you that offer unaccompanied by any solicitation of your business?

A. That offer was made by a chemist and not a salesman.

Q. I see. But you say they did not ever offer to sell you any oxides?

A. They did not offer us the services; they merely told me that the services were available.

Trial Examiner Norwood: In case you became a customer?

The Witness: That would be assumed.

By Mr. Hinds:

Q. Did they ever solicit business from you?

A. Yes.

Q. Did they name the price at which they would sell?

A. No.

1829 Mr. Hinds: That is all.

Mr. DuBose: No further questions.

Mr. Wright: No further questions.

Trial Examiner Norwood: You may be excused.

(Witness excused.)

Trial Examiner Norwood: Off the recor

(Discussion off the record.)

Trial Examiner Norwood: On the record. We will recess until ten o'clock tomorrow morning.

(Whereupon, at 4:25 p.m., November 13, 1946, the hearing in the above-entitled matter was recessed until 10:00 a.m., November 14, 1946.)

In the

United States Court of Appeals

For the Seventh Circuit

NATIONAL LEAD COMPANY,
Petitioner,
No. 10839 *vs.*
FEDERAL TRADE COMMISSION,
Respondent.

THE SHERWIN-WILLIAMS COMPANY,
Petitioner
No. 10840 *vs.*
FEDERAL TRADE COMMISSION,
Respondent.

THE EAGLE-PICHER COMPANY, ET AL.,
Petitioners,
No. 10841 *vs.*
FEDERAL TRADE COMMISSION,
Respondent.

ANACONDA COPPER MINING COMPANY, ET AL.,
Petitioners,
No. 10842 *vs.*
FEDERAL TRADE COMMISSION,
Respondent.

Petitions for Review of Order of the Federal Trade Commission.

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1830 Room 1123, New Post Office Bldg.,
Chicago, Illinois,
November 14, 1946.

Met, pursuant to adjournment, at 10:00 a.m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 815—15th Street, N. W., Washington, D. C.), appearing for Sherwin-Williams Company.

Edmund P. Wood, Esq. (2801 Carew Tower, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

Roger Hinds, Esq. (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

1831 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on yesterday, the hearing is now convened in Room 1123, New Post Office Building, Chicago, Illinois, at 10 o'clock a. m., on November 14, 1946.

Kindly enter the appearances.

With regard to the hearings that have been arranged for and tentatively agreed on by counsel, I will read this program into the record, including the postponement of the Washington hearing which we discussed yesterday.

It is our intention, then, to follow the following schedule so far as it may be found practicable:

November 18, 1946, at 10 a. m. cst, 1 day, Room 527, U. S. Court House, Kansas City, Missouri.

November 19, 1946, at 10 a. m. cst, 1 day, Room 313, Federal Building, St. Louis, Missouri.

November 21, 1946, at 10 a. m. cst, 1 day, Room 245, U. S. Court House, Nashville, Tennessee.

November 22, 1946, at 10 a. m. cst, 1 day, Room 210, Jefferson County Court House, Birmingham, Alabama.

December 11, 1946, at 10 a. m. est, 2 days, in the Trial Examiner's Hearing Room, Room 332, Office of the Federal Trade Commission, Washington, D. C.

Mr. Wright: Off the record.

1832 Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

We will take a five-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Proceed. Call your witness.

Mr. Wright: I will call Mr. Lazar.

SOL LAZAR was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Will you state your full name and address, Mr. Lazar?

A. Sol Lazar, 1446 South Wabash Street, that is the factory.

Q. What is your business?

A. Battery manufacturing.

Q. Battery manufacturing?

A. Yes.

Q. What is the name of your business?

A. The Excel Battery Company.

Q. And that is located at 1446 South Wabash Street?

A. Right.

Q. Is that a corporation?

A. No.

1833 Q. Is it a partnership?

A. I am the owner.

Q. You are the owner?

A. Yes.

Q. For how long a period of time have you been in that business?

A. About 25 years.

Q. At that same place?

A. Yes.

Q. And under that same name?

A. Right.

Q. What type of storage batteries do you manufacture?

A. The Excel Battery, that is mostly for automobiles.

Q. Automotive batteries?

A. Yes.

Q. Are they replacement batteries?

A. Call them that way if you want.

Q. About how many batteries do you make in a normal year?

A. Approximately between 75 and 125 a day.

Q. Between 75 and 125 a day?

A. Yes.

Q. Where do you sell those batteries that you produce?

A. Mostly in Chicago and surrounding territory.

Q. Well, how much territory around Chicago do you include?

A. Let's say 25, 30, let's say 50 miles around.

1834 Q. Is it principally in the metropolitan Chicago area?

A. Metropolitan Chicago principally.

Q. What are your principal competitors in that area, Mr. Lazar?

A. Anybody that manufactures batteries.

Q. Would that include National Battery Company?

A. Well, are they manufacturing batteries?

Q. Well, now, I am asking you if you recognize them as a competitor?

A. They used to be in the olden days, but now they claim they are separated from the National Battery Company in the other places.

Q. In the period from 1936 to 1941, was National Battery Company a competitor of yours in this area?

A. No.

Q. They were not?

A. That is, not that I know of.

Q. Would your competitors in that period include Willard and Exide?

A. Yes.

Q. Bowers?

A. Not in Chicago.

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A. Yes.

Q. Bowers?

A. Not in Chicago.

Q. Not in the Chicago area?

A. That is right.

Q. To what type of customer do you sell?

1835 A. Garages and service stations.

Q. Do most of your customers resell the batteries to the general public?

A. Yes. We are catering to the smaller people, no department stores, no chain stores; we don't sell to them at all.

Q. Under what trade names are your batteries sold?

A. Excel.

Q. Excel?

A. Yes.

Q. You make no other brands?

A. No.

Q. Are you in competition with Sears Roebuck and Montgomery Ward in the battery business in normal times?

A. Well, we can't compete with them.

Q. Are they selling in competition with you?

A. They are.

Q. Would you explain your answer that you can't compete with them?

A. I mean they are selling a line of merchandise that is way under our price, for less money.

Q. How does that affect your business?

Mr. Welch: Objection.

A. Well, it certainly does. A man will go and buy merchandise wherever he can save a dollar, two or five.

By Mr. Wright:

1836 Q. How many different types of batteries do you manufacture?

A. Types? What do you mean, brands?

Q. No, sizes and kinds.

A. Various, about 8 or 9, a battery to fit any car, different sizes and types.

Q. About how many sizes and types does that include?

A. About nine, I believe.

Q. About nine sizes and types?

A. Yes.

Q. Do those sell at various prices?

A. Various prices.

1837 Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Wright:

Q. When you stated a minute ago that you can't compete with Sears Roebuck in this area did you mean on your whole line of batteries?

A. Yes.

Q. On all of them?

A. Well, especially on the lower grades, on the lower-priced batteries.

Q. What batteries are those; the lower-priced ones?

A. Well, batteries,

Q. Of what construction? Are they 15-plate or 13-plate batteries?

A. We make nothing less than 15-plate; 15-plate is the lowest we make, no 13-plate.

Q. On a 15-plate, 3-cell battery in Group 1, what was your selling price in 1941?

A. The selling price to the service station?

Q. Yes, sir.

A. Approximately $7.00—$7.25 or thereabouts.

Q. That was in 1941?

A. Yes, that is right.

Q. What did you sell your cheapest battery for at that time?

1838 A. At that time we also made a battery to sell for $4.85. That was a 13-plate battery but we don't make them any more.

Q. That sold at $4.85?

A. Yes, at the store.

Q. Do you recall your costs of production on that 13-plate battery?

A. I couldn't give it to you exactly, I don't know.

Q. Can you give us an estimate of your costs at that time?

A. Approximately between $3.00 and $3.25, or rather between $3.00 and $3.50.

Q. Between $3.00 and $3.50?

A. Yes.

Q. What does that include; does that include the labor of making the battery?

A. Yes, everything.

Q. And all the materials?

A. Yes.

Q. And your overhead?

A. Well, yes. That battery sold practically at cost in order to get the line in with the customer.

Q. In other words you sold that at a lower margin than your other batteries?

A. Away lower.

Q. Why did you do that?

A. To be with the customer, not to fall away entirely.

1839 Q. Did the prices at which your competitors were selling batteries in this area influence your making of that battery?

A. Naturally, of course. Otherwise I wouldn't have to.

Q. Can you tell me about how many pounds of lead oxides went into the manufacture of that battery?

A. That is a question I cannot answer. We never figured it. We made them and sold them and got our money for them, and that is as far as we went.

Q. Can you tell us how much lead altogether went into the battery?

A. A battery will usually take around between 40 and 45 pounds of lead.

Q. A 13-plate battery?

A. No; we haven't been making the 13-plate for a long time, not since 1941. That is the battery of today; at that time it took approximately 10 pounds less.

Q. You are talking about oxides or lead altogether?

A. Altogether; we never separated them.

Q. From whom do you purchase oxides, Mr. Lazar?

A. National Lead.

Q. Have you ever purchased from any other company?

A. No.

Q. On what price basis do you purchase?

A. Well, they usually issue prices every so often, they
used to. During the war time there was no issue
1840 of prices whatever. We paid whatever the price
was and had confidence in them that they were
right.

Q. Were your purchases on the carload basis?

A. Not during the war, we couldn't get it. There wasn't any to be gotten at carload prices. Previous to the war, yes.

Q. Did you always buy at carload prices before the war?

A. No, it was what we called twenty ton.

Q. That is a carload, 20 tons. Did you ever buy in five ton quantities?

A. Yes, continually during the war.

Q. Did you buy in five ton quantities prior to the war?

A. No, very seldom.

Q. Very seldom?

A. Only in an emergency, to fill in.

Q. You have never at less than a five ton price?

A. No.

Q. Going back to the period of time now from 1936 to 1941, you stated, I believe, that the 13-plate battery carried a very narrow margin at the price at which you sold it?

A. Right.

Q. If you had at that time, Mr. Lazar, been able to save on your material costs five cents per battery through being able to purchase lead oxides at, say, half a cent lower than you were able to, what effect would that have had on your business?

1841 Mr. DuBose: The same objection, Your Honor.

Trial Examiner Norwood: Which was—

Mr. DuBose: The one we have continually made to this line of questioning.

Mr. Wright: It is the objection that your Honor has ruled on several times in the past.

Mr. DuBose: The same objection, yes.

Trial Examiner Norwood: Objection overruled.

Mr. Wright: Will you read the question, please, Mr. Reporter?

(The reporter read the question.)

The Witness: A half a cent on a pound would mean a lot of money, considering our profit in those days.

Mr. Wright: No further questions.

Mr. DuBose: May we have just a short recess?

Trial Examiner Norwood: Certainly; we will have a short recess.

(A short recess was taken.)

1842 Trial Examiner Norwood: On the record.

By Mr. Wright:

Q. Mr. Lazar, did you receive a subpoena telling you you had to come here?

A. Yes.

Q. You did not volunteer to be a witness here?

A. No.

Mr. Wright: No further questions.

Mr. DuBose: No cross-examination.

Trial Examiner Norwood: Thank you, Mr. Lazar. You may go now.

(Witness excused.)

Trial Examiner Norwood: Let us proceed, gentlemen.

Mr. Wright: I will call Mr. Perry.

Trial Examiner Norwood: Your name is—

Mr. Perry: Mr. Ward S. Perry.

WARD S. PERRY was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Mr. Perry, will you state your business and business address?

1843 A. We are located at the present at 1000 East 87th Street, Chicago, Illinois. We manufacture automotive storage batteries.

Mr. Hinds: I did not hear the name of the company.

By Mr. Wright:

Q. What company is that that you are affiliated with?

A. The Volta Battery Company.

Q. How long has that corporation been engaged in the battery business?

A. We originally incorporated the Volta Battery Corporation in 1939. We some time later changed to a partnership, and changed back to a corporation the first of January, 1946.

Q. Were you an officer of the first corporation?

A. Yes.

Q. What was your position?

A. President.

Q. Were you a partner when it was a partnership?

A. I was the major partner.

Q. Are you presently an officer of the present corporation?

A. I am president of the present corporation.

Q. Was the Volta Battery Corporation a new enterprise in 1939?

A. Yes.

Q. It entered the battery business at that time?

A. Yes.

1844 Q. What was your output of storage batteries in 1939, do you recall?

A. It was between six and seven thousand batteries.

Q. In 1940 what was your output?

A. About eleven thousand.

Q. In 1941?

A. About fourteen thousand.

Q. Now, did you make a complete line during those years of—

A. Full line.

Q. —of automotive replacement batteries?

A. Yes.

Q. What was your market area; where do you sell batteries?

A. Mainly in the area of 300 miles radius.

Q. Of Chicago?

A. With the major part going right into the immediate Chicago territory.

Q. I see. Now, what was the principal competition that you have encountered in this market area?

A. Well, all companies serving the trade in this area.

Q. That would include would it, all the larger companies that sell in this area?

A. All the national concerns that sell batteries in the national way of course, in this territory.

Q. And you are also in competition with the 1845 smaller manufacturers located here in Chicago?

A. Yes.

Q. Now, to what type of customer do you sell generally?

A. We sell jobbers, automobile dealers, service stations, and garages.

Q. In other words, by what proportion of your business do you estimate as to those who resell at retail direct?

A. I do not know the figures. I would have to guess.

Q. A rough approximation?

A. I am just trying to figure. I would say that we sell retail or those who sell to the car owner, about seventy-five to probably eighty per cent of our batteries.

Q. Now, under what trade name or names are your batteries sold?

A. Volta Battery Corporation only, Volta.

Q. You do not make any private brands?

A. There is one concern we made a few batteries for, under the name of Mohawk, but that is a very small portion of our output. Those batteries are the name that this particular concern uses to sell, mainly to the city of Chicago, the police department, fire department, so forth.

Q. Now, during the period of 1939, 1940 and 1941, did you make a 13 plate battery?

A. Yes.

Q. What was your selling price of that battery
1846 at that time, do you recall?

A. We made two 13 plate batteries; one costs more than the other, but I suppose you are referring to the cheap one.

Q. Give us both if you will, if you can recall, the prices.

A. I do not recall the prices but they were pretty low.

Q. Were they both—

A. They were both under capacity batteries, and we do not recommend the use of an under capacity battery for an automobile.

Q. Now, what do you mean by under capacity?

A. The capacity that is smaller than the original battery that came equipped with the car.

Q. Do you recall the lowest price at which you sold the cheapest of those during that three year period?

A. It think it was about $2.85.

Q. That was your price to the dealer or distributor?

A. Our lowest price. That would be the jobber price.

Q. Yes. Now, do you recall how many pounds of lead went into that cheapest battery?

A. No, I do not.

Q. Can you give us an approximation?

A. I will have to do a little checking without having my figures. (After checking.) I would say roughly, without checking my exact plates, of about 15 pounds.

1847 Q. Does that include both the oxides and metallic leads?

A. Yes.

Q. What proportion would the oxides be in that?

A. About 45 per cent.

Q. About 45 per cent?

A. Yes.

Q. Do you recall what your cost of production was on that battery in that period?

A. It was just about what we were selling at.

Q. Approximately your selling price?

A. Yes. When you say cost what do you mean by cost?

Q. I mean your cost of materials and the labor of putting the battery together.

A. Material, labor and shop expense?

Q. Yes.

A. Yes.

Q. So that when you sold at that price, then you incurred the loss by the amount of your executive overhead—

Mr. Welch: I object. It is leading.

Trial Examiner Norwood: Sustained.

Mr. Wright: I withdraw the question.

By Mr. Wright:

Q. Was your selling price on that particular battery lower than the prices on your other items?

A. Very much lower.

1948 Q. Why was that?

A. To meet competition. This only represented five per cent of our sales.

Q. Just this one particular battery?

A. Yes. We went after quality business. We only did that to help out some of our customers who might want a few of those cheap batteries and we sold it under protest.

Q. In other words, you did not enjoy being in that particular line?

A. No, we did not like to sell it. As soon as we could we quit making it.

Q. Do you recall what competition it was that required in that area, the selling of a battery such as that?

A. Mostly the small, gyp, cheap battery companies.

Q. Do you recall Powers Battery Company, Reading, Pennsylvania, selling in that market, selling at that time?

A. I do not believe at that time they were selling in this market.

Q. Have they been in this market, to your knowledge?

A. No. Wait a minute. They did establish a plant, I guess, shortly after we started the Volta Company, and their plant was located in Harvey.

Q. Illinois?

A. Yes.

Q. Do you recall the prices at which Sears Roebuck 1849 was selling comparable batteries in that period of time?

A. No, I do not.

Q. During the period of time 1939, 1940 and 1941, on what price basis did you purchase lead oxides?

A. I really do not know.

Q. Do you recall the quantities in which you purchased?

A. Small, less than carload lots.

Q. Less than carload lots?

A. Yes.

Q. In that period of time in which we have been discussing now, what was your over-all margin of profit? What was your margin, your over-all margin of profit in 1939, 1940 and 1941, on the per battery basis, if you can state it that way?

A. You mean our markup above costs to our lower price?

Q. No, your profit, your net profit on your operations?

A. Well, in the first year, in the first sixteen months, we suffered a loss.

Q. Now that would bring you up to what time?

A. July 1, 1940.

Q. July 1, 1940?

A. Yes.

Q. Now, in the period from July 1, 1940 to the end of 1941, can you state what your—

A. The end of 1941—

Q. —your profits were?

1850 A. Oh, I think that we were about one thousand, twelve hundred dollars ahead, which I could have wiped out by certain writeoffs which I later did.

Q. That is after paying salaries, taxes, and all expenses?

A. Yes. We had certain installation expenses, that we carried as an asset on our books when we first started and we wrote those off gradually, as the years came on, because it did not really represent as asset, on liquidation.

Q. From what companies have you purchased lead oxides over the period?

A. Only from the National Lead.

Mr. Wright: I have no further questions.

Trial Examiner Norwood: Cross-examine.

Q. Mr. Perry, in what business were you prior to 1940—prior to 1939?

A. I was, from about 1929, at that time, in the security business, and prior to that—

Q. Securities?

A. Yes, and prior to that I was in the battery business, going back to 1902.

Q. So you were familiar with batteries and the market conditions in the batteries?

1851 A. Yes.

Q. When you incorporated the Volta in 1939?

A. Yes. I had two of my men with me who started with me in the old Vesta Company in 1911 and 1912.

Q. And you knew in 1939 when you went back into batteries, that it was a highly competitive field?

A. Sure.

Q. And you went in with your eyes open, hoping to make a profit?

A. Yes.

Q. And you are still in the battery business?

A. Yes.

By Mr. Wood:

Q. Have you ever purchased lead oxides from the Eagle-Picher Company?

A. Not with the Volta battery.

Q. What?

A. Not as the Volta Battery.

Q. Are you familiar with their products?

A. We, in the old days, in the Vesta, when I was head of the Vesta Battery Company, bought lead and oxides from the Eagle-Picher at times; both National Lead and Eagle-Picher.

Q. Now, between the time you were with the Vesta Company and in the old days, 1939, when you went into the
battery business, was there any particular technical
1852 improvement in the manufacture of batteries?

A. You mean in just what way—in the matter of assembling batteries?

Q. All the way through. I mean, in the products going into them, the manner of assembling, the quality of the finished product. Did the battery art advance in that period?

A. I think the battery art has advanced right along. In that period I would say one of the major improvements was in the use of fiber glass insulation.

Q. How about the lead oxides; weren't they given surface, greater surface area and things of that sort?

A. Oh sure, I am quite sure there was.

Q. Now, when you went back in the battery business in 1939, did you have any assistance or instruction in respect to the best technique for making battery plates?

A. Well, I went to the National Lead Company and took their recommendation on the type of oxides that we should buy.

Q. Did they also help you in telling you how battery plates were economically produced in quantity?

A. Yes.

Q. That is, they gave you certain technical assistance in the manufacture of storage batteries?

A. Yes, and have right along.

1853 By Mr. Hinds:

Q. Have you been solicited by Hammond Company of Hammond, Indiana, about their oxides?

A. I think most all of the oxide companies have solicited our business.

Q. Have you been solicited by Metal Refining Company of Hammond, Indiana?

A. I think so, yes.

Q. And do you recall whether the prices at which they solicited your business were different from those of National Lead?

A. No, I never checked prices because I preferred to do business with National Lead Company.

Q. And whether the prices were higher or lower or the same that was not a factor in your dealing with National Lead Company as distinguished from—

A. It was not.

Q. Is that right?

A. Yes. I think we could have bought lead a little cheaper from the Hammond Company. I heard other concerns talk about that.

Q. Is it not a fact that you could have bought lead considerably cheaper from the Metal Refining Company?

A. I do not know, but I think that Hammond were selling oxides about a quarter of a cent under. You
1854 see, when we started in the business, we were old

battery men and we made up our minds that we were going to build the best battery we knew how to and get a fair price for it.

Q. Do you find that there are differences in official characteristics and results being obtained between lead oxide of one producer and lead oxide from another producer?

A. Yes, there is a difference. Now, for instance, the National Lead Company developed what we term their hydro-set process, about over a period of a good many years, and offered it to us, I think it was in September, two years ago.

Q. Would you say that these different lead oxide producers offer identical products, or offer products giving substantially the same, or differing substantially in quality and utility?

A. I do not think that anyone is offering similar oxide to the National Lead at the present time.

Q. Well, can you make that same statement with respect to others differing among one another?

A. I do not know. I have not had any recent experience. I could not tell you.

Q. You say that National Lead differs from all of the others. You do not know whether the others differ among others?

A. I will tell you what that difference is now: In manufacturing lead oxide, you take the pig of lead and
1855 you burn it in a furnace. They use, they carry the
oxidation in the red lead to a full oxidation, with no metallic content. You first have to make litharge, which is a lower oxide than the red lead.

Now, in this new process, or I might say, in the old method, you would mix that with your sulfuric acid and place it in your plates and dry them completely.

Now, in the handling of those plates, completely dried, caused considerable more dust than is now the case, so that your hazard of lead poisoning to your men was considerable if you did not take the necessary precautions. In this new development that the National developed, and which we were the first ones to use in Chicago, they call it the hydro-set process, they carry the oxidation only partway, leaving a certain amount of metallic content in the oxide. Presumably about thirty per cent of your oxide is metallic content.

That is true with your positive acting material. The result was that they reduced their price on the litharge, on the red leads, to the same price as litharge, which was before added, one quarter of a cent differential.

Now, you mix that oxide with your paste, as you formerly used to, and you would paste that into your grids, instead of drying out completely, you would just dry the surface of the plates, so that they would not stick together.

1856 The oxygen in the water, remaining in the plate, and the oxygen in the air, started to oxidate that metallic content that was left in the oxide, as we bought it, and you reduced that or oxidated it down, leaving only about one to two per cent of the metallic content, so you carried on the oxidation of your oxide, while it was, after it was pasted into the plate, so you were continuing the process of forming oxide in your plate, where the old method, you did not do that.

Q. Then you say in the new method—

Mr. Wright: Your Honor, just a minute, please. I move to strike so much of that answer as related to the technical processes of the manufacture of the pigment, because it is obviously is incompetent. It is obviously hearsay, because this witness by his own testimony has never been connected with one of the producers of pigments.

Now, my objection goes only to so much of that answer as relates to the actual production of the pigment. I will not object to the inclusion of the statement of the method of making plates.

Mr. Hinds: I understand he was describing what was happening in his own battery.

Trial Examiner Norwood: You answered from your own knowledge?

The Witness: Yes.

1857-1858 Mr. Wright: May I examine him briefly on that?

Trial Examiner Norwood: Well, you may examine him on his knowledge.

The Witness: I am just trying to give you a picture—

Mr. Hinds: Would it not be better to wait for the finish to the answer and my cross?

Trial Examiner Norwood: Motion denied. I want to ask you off the record—

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Trial Examiner Norwood: Does that condition make for longer life in the battery?

The Witness: I consider it does.

By Mr. Hinds:

Q. Now, have you finished your answer to my previous question?

A. Well, what was your previous question? I was trying to give you—.

Q. I think my previous question, to save time—

Trial Examiner Norwood: He was explaining the difference between this lead situation.

By Mr. Hinds:

Q. I asked whether it was a fact that there are substantial differences, in physical characteristics and in
1859 results between one oxide and another as offered by producers?

A. That is—

Q. And your answer was "yes" and you undertook to tell some of the differences?

A. Yes.

Q. Now, these differences that you have described are something you regard as advantages in favor of the new method, is that right?

A. Yes.

Q. Do the other competing producers offer these advantages in their oxides?

A. To my knowledge, I do not think they do because I have asked whether there is any metallic lead—for instance, in the oxide, as furnished by Eagle-Picher, and I have been told that this is not metallic oxide, no metal, no metallic content in the oxide.

Q. Now, you say that Hammond Company of Hammond, Indiana, has offered you lower prices?

A. No, they did not. I have been told by other battery manufacturers that the prices they were paying were—

Q. Lower?

A. Yes.

Q. Do you know of any other producers that have offered prices lower than those of National Lead?

A. Well, I have never attempted to get the other
1860 fellow's prices, so I do not know.

Q. You do not know what they are?

A. No.

Q. Have others solicited you through salesmen coming to your premises?

A. Oh yes, they have come around and called on us with the hopes that we might give them some business.

Q. Have any of them mentioned price?

A. No, never got to that point.

Mr. Hinds: That is all.

By Mr. DuBose:

Q. Mr. Perry, you have been dealing with National Lead since 1939?

A. Yes, and before in the old company.

Q. And in the old days?

A. Yes.

Q. And they gave you technical advice and assistance in—

A. Yes.

Q. And you are satisfied with the National Lead Company services?

A. Perfectly.

By Mr. Wood:

Q. What was the name of this new process that you mentioned before?

1861 A. They call it hydro-set process.

Q. Hydro-set?

A. Yes.

Q. Is it your understanding that is a patented process?

A. Yes.

Q. You spoke of these lead oxides. The oxide, that is a combination of lead oxide, and metallic lead. I believe you mentioned that?

A. It is not a combination. It is in the manufacturing of the oxide. There is a certain amount of lead left in, metallic lead.

Q. Would you consider that product a pigment?

A. Well, I do not know just enough about what you mean by pigment to define it. I do not know the definition of that.

Q. You understand, do you not, that it is a product that is made specifically for the battery plates and for no other purpose?

A. It is made specifically for battery plates. Whether it can be used for anything else I do not know.

Q. You do not know that it could be?

A. Well, I would not know. I could not possibly judge that.

Q. You never heard of it being used for any other purpose?

A. I will put it that way, yes.

Q. And it was represented to you as a product especially designed and compounded for use in battery plates?

1862 A. For making a better plate, yes.

Redirect Examination by Mr. Wright.

Q. Mr. Perry, when did you state that you began using this hydro-set method?

A. I believe it was two years ago last September.

Q. Do you know when that process was finally made available to the battery manufacturers?

A. It was made available to the small manufacturer like ourselves at that time.

Q. At that time?

A. Yes. I think they experimented over a period of some years with some other battery manufacturers when they thought it was necessary to control the temperature in the drying and that the amount of heat should, that should be applied to the plates.

Q. Now, prior to the time that this process ~~was~~ made available to you, say in 1941, do you know of any physical differences between the negative oxides offered for sale by National Lead Company and those of Eagle-Picher or Metal Refining Company?

A. As far as I know, red lead is red lead and litharge is litharge.

Q. Now—

A. I will say this now—may I explain this?

1863 Q. Sure.

A. In the negative plate you have to put an expander on; otherwise the oxide would shrink away from your metallic grid, and you get poor contact and you do not get the give-up, so that in the early days we used to put in this expander in our negative plates ourselves. Later, the lead companies developed their own type of expander and you were able to purchase the oxide with the expander in it, to save you that much trouble.

Q. Do you know what that expander material was?

A. Some of it. One of the main ingredients I have been given to understand, is lamp-black. That is a very finely divided carbon.

Q. Now, were similar expander materials introduced into the oxides by the National Lead, Eagle-Picher and Metal Refining?

A. They each developed their own expanders, the proportions of which were probably different.

Q. All for the same purpose, to accomplish the same purpose?

A. Yes.

Q. Other than the expanders, do you know of any differences that might have existed in the batteries? Do you know of any other physical differences that might have existed in oxides of a comparable—

A. One man—

Q. —grid?

1864 A. One man would process a manufacturing, would develop a different shape particle of the oxide. I know in the early days there was quite a bit of difference. One was a flaky type of oxide.

Q. You speak of the early days; what do you mean by that?

A. What?

Q. You speak of the early days; what do you mean by that?

A. Oh, in the days of, I would say, from the time I started in the battery business, 1902, up to in the twenties.

Q. Mr. Perry, you stated I believe on cross-examination, that at the time you began purchasing from National Lead Company that the price made no difference to you, that you were purchasing on the basis of the service and—

A. I do not think I said it made no difference.

Q. Well, if you said—suppose in 1940 or 1941, you had been able to purchase a comparable oxide from Eagle-Picher or Metal Refining, at half a cent per pound lower than that offered to you by National Lead Company, would you have considered giving your business on that basis—

Mr. DuBose: I object to that upon the ground that the word "comparable" is in there. The testimony is that the National Lead Company oxides were different.

Mr. Wright: Well, now, just a minute. I made that specifically back to 1941, and the testimony was that, I

believe, by this witness, that there were no differences
1865 except possibly in the filler compound or expander compound of the oxides, at that time. At least, he knew of no difference.

Trial Examiner Norwood: He may show that this witness' economic reaction would be under those circumstances, I think, show the modifications in the trade and so forth.

Objection overruled.

Mr. Hinds: Read the question again.

Trial Examiner Norwood. Answer the question.

The Witness: Read the question.

Mr. Wright: Read the question.

(The reporter read the question:

"Q. Well, if you said—suppose in 1940 or 1941, you had been able to purchase a comparable oxide from Eagle-Picher or Metal Refining, at half a cent per pound lower than that offered to you by National Lead Company, would you have considered giving your business on that basis—")

Mr. Wood: In rereading the question I want to object on the ground that the word "comparable" makes the question indefinite.

Trial Examiner Norwood: I think he may answer, and you may clarify that.

Mr. Wright: On the contrary, omission of the word "comparable" would have—

1866 Trial Examiner Norwood: You may answer the question.

A. As I told you, we started out to make the best battery we knew how and if we should consider any other manufacturer of oxide, we would conduct some very careful tests.

Trial Examiner Norwood: Well, in case you had conducted those tests and you found that the articles were the same, then you can answer the question with that consideration.

The Witness: Well, I know we certainly would give it consideration. I would contact National and ask: "Why can't we buy lead from you just as cheap as from the other company"?

By Mr. Wright:

Q. In the event National Lead would not sell you as cheap as the other fellow would you have considered switching your business?

A. How could I tell you that now?

Q. Let me ask: Is the price at which you buy oxides an important thing to you?

A. A small difference would not make much difference.

Q. What do you mean by a small difference?

A. Well, there is about eleven and a half pounds, or say, eleven pounds of oxide in a battery. Say it is a half a cent per pound. That would mean about a nickel a
1867 battery. Now, we do not believe in buying and I
have never believed in buying on a price basis. We like the Eagle-Picher Company and I have bought a lot of oxide from them in years gone by, and here is something that would come into play:

When I started in the battery business I was "busted," in 1939. I had six hundred dollars between me and the wolf, so I went to the National Lead Company here in town. I knew them from years gone by, and I said to Mr. Carrol down there: "I am going back in the battery business." He said: "That is fine."

By Mr. Wright:

Q. Mr. Perry, will you answer my question?

A. I am answering it and I will tell you another factor that comes into play because it is not all price or a nickel a battery.

Trial Examiner Norwood: Proceed.

The Witness: I said: "I am going back in the battery business. Now, I have handled hundreds of thousands of dollars in the past and you always got your money. I would like to buy lead from you and pay you fifty per cent of my current account, on the 24, 25th box, and the balance in 30 days." I said that I needed help and how about it?

He laughed and he said it was all right. He did not even take it up with the auditor. I said, "I am going to
do the same thing with the case manufacturers, and
1868 the same with the separator manufacturers, and that
represents 90 per cent of our purchases."

They all agreed to it, very nicely. In fact, the separator man who taught us how to treat separators, said: "Ward, any way you want to pay your bills is okay with me" and when I established my credit relations then I went out and borrowed eight thousand dollars to get started in the battery business.

Now, when a fellow plays ball with you like that, you do not let a nickel a battery stand in your way. I would not. That is not the way I do business. It is not price.

By Mr. Wright:

Q. Now, Mr. Perry, back in that period that you spoke of, I believe you said you ran in the red up until July of 1940, and then until the end of 1941, you made approximately twelve hundred dollars: Wasn't a nickel a battery on your production over that three year period a pretty important matter to you at that time?

A. Well, it would have made a nickel a battery difference.

Mr. Wright: I have no further questions.

Mr. Hinds: I would like to ask a question.

Recross Examination by Mr. Hinds.

Q. I would like to ask: Would you regard it as 1869 important in comparison with these other factors that led to your dealing with National Lead?

A. I did not think I would let a nickel in the price of a battery stand in my way.

Q. Even under the circumstances?

A. Even today.

Q. Even under the circumstances you have related?

A. That is right.

Mr. Wood: I want to ask one question about the 1939 to early 1940 period, that is, before the new National Lead process came in:

By Mr. Wood:

Q. Was it your understanding over that period of time that the Eagle-Picher and the National Lead battery oxides were identical?

A. I assume they were.

Q. You assumed they were or not?

A. I assumed they were the same.

Q. The same?

A. Yes.

Q. And were the processes the same recommended by the two companies at that time or do you know?

A. I do not know what their processes were. I have never been in Eagle-Picher's plant. I do not know what their processes are.

Q. You do know that Eagle-Picher offers a battery
1870 plate making process, don't you?

A. Yes, I do.

Q. And that National offers one too, that they are competitive?

A. The process?

Q. Yes.

A. One has a different process now than the other.

Q. Well, whether or not the processes are slightly different as to technique, and so on?

A. Well, there was not anything comparable to this situation that has been in existence for the last two years, I don't think.

Q. You did not investigate the Eagle-Picher process back in 1939 or 1940, or their products?

A. No.

Mr. Wood: All right.

By Mr. DuBose:

Q. Mr. Perry, you were interested in making a quality product, the best battery you could?

A. Absolutely, and we still are.

Q. And you also wanted to get the best oxides for that purpose?

A. And as soon as I can get enough leads, I am going to get a better battery and get more money for it. I don't let a darned nickel bother me. That is not the extent
1871 of my worries.

Mr. Wright: Mr. Perry, you received a subpoena requiring your attendance here?

The Witness: Yes.

Mr. Wright: You are not a voluntary witness here?

The Witness: No, I am not.

Mr. DuBose: We will take judicial notice of that.

Mr. Wright: I have no further examination.

Trial Examiner Norwood: You are discharged. Thank you, Mr. Perry.

(Witness excused.)

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

We will recess for lunch. Be back at two o'clock.

(Whereupon, at 11:40 a. m., a recess was taken until 2:00 p. m. this day.)

1872 **Afternoon Session.**

2:00 p. m.

Trial Examiner Norwood: The hearing will be in order. Call your witness, Mr. Wright.

Mr. Wright: Mr. Lunkes, will you take the stand.

JOHN W. LUNKES was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Mr. Lunkes, will you state your full name and address, please?

A. John W. Lunkes.

Q. And what is your address?

A. 2453 Irving Park Boulevard.

Q. What is your business, Mr. Lunkes?

A. I am in the battery manufacturing business.

Q. What is the name of the firm or concern that you are with?

A. Illinois Battery Company.

Q. Is that the Illinois Battery & Electric Company?

A. Yes, sir.

Q. Is that a corporation?

A. No, individual.

1873 Q. Are you the owner of that business?

A. Yes, sir.

Q. How long have you been engaged in that business, Mr. Lunkes?

A. About 25 years.

Q. At that same address?

A. No, I was located at 2050 Irving Park Boulevard.

Q. You have been located in Chicago, have you, that entire time?

A. That is right.

Q. What is the normal daily output of your business?

A. Well, at the present time, which I think is our highest production, it would be about 60 to 70 batteries a day.

Q. Sixty to seven[illegible] batteries a day?

A. Yes.

Q. About how many did you produce, say in 1941?

A. Oh, in 1941 somewhere around that number, probably 40 to 50 a day.

Q. What sort of batteries are these that you produce?

A. These are for automobiles.

Q. They are automobile batteries?

A. Starting batteries.

Q. Where do you sell them?

A. To the filling stations and truck people, that is, transportation and trucking concerns.

1874 Q. Do you make any direct retail sales to consumers?

A. That is right.

Q. How many types of automotive batteries do you make?

A. In all the different sizes, is that what you mean?

Q. Yes.

A. And also the number in one particular size?

Q. Yes, if you can give us a rough number.

A. Well, according to the Federal set-up we were making about 18 different sizes. Previous to that we made more.

Q. Now over what market area do you sell your batteries?

A. Well, we have been just in, I dare say, the City of Chicago, until this year.

Q. What is your principal competition that you meet?

A. Well, competition is really controlled between what a man would buy, the same as we are controlled on the materials we buy.

Q. What companies are your principal competitors?

A. In the battery manufacturing?

Q. Yes.

A. Willard, Exide, Auto-Lite.

Q. Are you also in competition with Sears Roebuck?

A. Yes.

Q. And Western Auto Supply?

A. Yes.

Q. Bowers Battery?

1875 A. Yes.

Q. Monark?

A. Monark.

Q. Grant?

A. Grant.

Q. National Battery Company?

A. Yes, sir.

Q. Am Plus?

A. Yes, sir.

Q. Universal?

A. That is right.

Q. Federal?

A. That is right.

Q. In the period from 1936 to 1941, what was your profit margin on storage batteries?

A. Well, we had a period there where they dropped down quite a bit. I would say at one period during that time there was probably a 25% profit.

Q. You mean on your costs or on your selling price?

A. The selling price.

Q. That was as low as it got, was it, in that period?

A. That is right.

Q. At what point in that period did your margin reach that level?

A. I wouldn't want to say exactly. I should have 1876 looked. I would say it would run around 1937 or 1936, in there.

Q. Did you, in that period from '36 to '41, make a 13-plate battery?

A. That is right.

Q. Of very low amp.-hour output?

A. Yes. It was around 75 amps., I believe, that sold for $1.95.

Q. That was your selling price?

A. Yes, that was our selling price.

Q. What was your cost of materials in 1941 in producing that battery?

A. I would have liked to have gone through some of those figures, and brought them down here. I really didn't know that you were going to question me on those points. I understood it was just a matter of the material we were purchasing at that time.

Q. Well, if you can state how much the materials cost that went into that battery, that would be satisfactory.

A. Well, here is one from Hammond Lead, and I also brought a bill along showing what we paid for it. This was 11-15-40, and it was 8 cents a pound for the oxides.

Q. What is that paper that you are reading from?

A. That is a paid bill from the Metals Refining Company.

Q. You say this is a paid bill?

A. I believe so, isn't it? That is what I asked for 1877 anyway. Well, it is an invoice.

Q. It is an invoice covering your purchase of oxides from Metals Refining.

A. Yes.

Q. Did you receive the shipment that is noted on there?

A. Yes. This (indicating) is the kind of information that we received from Metals Refining Company; this (indicating) is the way we were quoted. This is what I buy, and being a small user I paid generally a cent higher than shown on that card.

Q. Can you state what your margin of profit was on that battery that you sold for $1.95?

A. Well, we generally based it around 25%. I wouldn't want to say exactly. I would rather go back and give you the exact figures.

Mr. Wright: I would like to ask that this document be marked as Commission's Exhibit 841 for identification.

Trial Examiner Norwood: It may be so marked.

(The paper referred to was marked Commission's Exhibit 841 for identification.)

By Mr. Wright:

Q. As I understand you to say, this is an original invoice of the Metals Refining Company covering a shipment of oxides billed to you on November 15, 1940?

A. Yes.

Mr. Wright: Your Honor, I offer Commission's 1878 Exhibit No. 841 for identification in evidence.

Trial Examiner Norwood: Show it to counsel.

(Commission's Exhibit No. 841 for identification was shown to counsel.)

Mr. Hinds: Will you furnish us with a photostat of this?

Mr. Wright: I will furnish you with it as soon as I have an opportunity to have one made.

Mr. Hinds: We have no objection.

Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Are there any objections to that exhibit? It is received as marked.

(The paper referred to, heretofore marked for identification COMMISSION'S EXHIBIT 841, was received in evidence.)

By Mr. Wright:

Q. Mr. Lunkes, I note that Commission's Exhibit 841 shows the purchase of 9100 pounds of the oxides. Was that at the so-called card price which was then in effect?

A. Yes.

Q. Did you customarily purchase oxides, in the period from 1936 to 1941, at the less-than-five-ton price?

A. Yes, I believe we did.

1879 Q. Did you ever purchase in carloads?

A. No, sir.

Q. Do you make a standard 15-plate, 100 amp.-hour battery?

A. Yes.

Q. Did you make such a battery in 1940 and 1941?

A. Yes, sir.

Q. Can you state how many pounds of oxides were used in manufacturing that battery?

A. About 10½.

Q. Ten and a half pounds?

A. Yes.

Q. Now it has been testified here that the carload price is between three-quarters and one cent per pound less than the card price for quantities of less than five tons.

A. That is between—

Q. (Interposing.) The carload price and the less-than-five-ton price.

A. No, I would say it was more than the difference of one cent between less-than-five-ton and the five-ton price.

Q. I believe it has been testified that the difference between the five-ton and the less-than-five-ton price is a half cent per pound. Now would a difference in price to you of the materials going into your batteries of 10 or 11 cents a battery affect your ability to compete in a normal competitive time like the period from 1936 to 1941?

1880 A. Yes.

Mr. DuBose: The same objection, if Your Honor please, and I believe there is a further objection to that on the ground that you used the figures 10 or 11 cents. I believe this witness testified that he used only 10 pounds of oxides in a battery, and if that is on the assumption that there is a half a cent difference, I think it is a little confusing; it is to me.

Mr. Wright: I believe the statement was that there were 10 and a half pounds, that is why I used the figures 10 or 11.

Mr. DuBose: Ten or eleven cents?

Mr. Wright: Yes.

Mr. DuBose: We have that same general objection.

Trial Examiner Norwood: Overruled.

By Mr. Wright:

Q. Do you understand the question?

A. If there be a half a cent difference between the less-than-five-ton and the five-ton—

Mr. Wright: (Interposing.) Will you read the question?

(The reporter read the question and answer as follows:

"Q. I believe it has been testified that the difference between the five-ton and the less-than-five-ton price is a half cent per pound. Now would a difference
1881 in price to you of the materials going into your batteries of 10 or 11 cents a battery affect your ability to compete in a normal competitive time like the period from 1936 to 1941?"

"A. Yes.")

By Mr. Wright:

Q. From what company or companies have you purchased oxides?

A. From the Metals Refining Company and one at Hammond, Indiana, another one at Hammond.

Q. The Hammond Lead Products?

A. Yes, Hammond Lead Products, and Metals Refining Company.

Mr. Wright: I have no further questions.

Trial Examiner Norwood: Cross examine.

Cross-Examination by Mr. Hinds.

Q. What is Metrox R M Oxides #2?

A. That is a special brand that they compound themselves, I believe. That is the way they list it.

Q. Is it compounded for use in batteries?

A. That is right.

Q. Does any other company have that same compound, do you know?

A. Yes, Eagle-Picher Lead Company does.

Q. The same thing?

A. They call it by a different name, though.

1882 Q. But it is the same thing?

A. It is the same thing.

Q. How do the prices compare between Metals Refining and Eagle-Picher on that same product?

A. They are the same.

Q. What about Metrox Plumbarge 95 X, what is that?

A. That is lead oxide, also.

Q. Is that a special preparation?

A. No, it is one that goes into a negative plate.

Q. Do you buy the same materials or similar materials from Eagle-Picher as you buy from Metals Refining?

A. I have, but I don't know just how long ago it has been since I bought from them. It is years back.

Q. This invoice is back in 1940. Did you buy the same products from one that you did from the other at that time, or did you buy one from one and one from the other?

A. I am not buying any from either one of those companies now. I am buying from the Hammond Lead Company.

Q. I am talking about 1940.

A. Since 1940 I have been purchasing mine from Hammond Lead Company.

Q. But Commission's Exhibit 841 is dated November 15, 1940, and it is an invoice to you from Metals Refining. Does that refresh your recollection?

A. That is right.

1883 Q. At that time were you also buying the same thing from Eagle Picher?

A. I haven't really checked into the years to find Eagle-Picher's bills. I probably could go through my records and find some.

Q. Didn't you compare prices from various companies before you made your purchases?

A. Oh, yes.

Q. And did you buy entirely on the basis of price?

A. No, I couldn't, because their prices were all the same. I got these cards, and I would call them and they would verify the price on the card, and that was the way I done business.

Q. Did they always charge you the price that was on the card?

A. That is right.

Q. Were your purchases usually in quantities of ten drums or 6 drums or around that, or did you buy in larger quantities?

A. Not at that time. At that time it was up to five ton.

Q. Usually in smaller amounts than five tons?

A. Usually, yes.

Q. How small amounts would you buy?

A. I would say from two to five tons, but never that I actually got to five tons; that is, two to four tons.

Q. When did you start buying from Hammond Lead Products Company?

A. When the Metals Refining Company started 1884 making oxides for the Government they refused our orders.

Q. Was that because you could no longer get the material from Metals Refining?

A. That is right.

1885 Q. How did you find Hammond's prices compared with those of Metals Refining?

A. We found them cheaper.

Q. Do you know whether or not they were lower prior to the time that you started buying from Hammond?

A. I couldn't say.

Q. You don't know?

A. No.

Q. But the fact is that when Metals Refining started selling to the Government and no longer could supply you, you then went to Hammond and found that their prices were lower than those you had been paying to Metals Refining?

A. Yes.

Q. But you don't know whether they had been lower previously?

A. That is right.

Q. Now do you know how much lower the Hammond price was than that of Metals Refining?

A. Now?

Q. No, at the time you started buying from Hammond?

A. A differential of about a penny.

Q. About a cent?

A. About a cent—a half a cent, rather.

Q. Now I notice on this particular invoice, Commission's Exhibit 841, that there was a total of 9100 pounds, which is only 900 pounds short of five tons. Will you

1886 explain why you didn't buy the slight additional amount and get the five-ton rate?

A. Yes. I paid cash on delivery and that is the dough I had to pay for it.

Mr. Hinds: That is all.

Mr. Wood: I have a couple of questions.

Trial Examiner Norwood: Go ahead.

Cross-Examination by Mr. Wood.

Q. Do you do any rebuilding of batteries?

A. Not at the present time. We did at one time.

Q. What was the nature of that business? I mean what is meant by rebuilding a battery?

A. Well, I can tell you what we did to the battery, if that is what you would like to know.

Q. Tell us that.

A. In rebuilding a battery we took out the positive plates and threw them away and put in a new set of positive plates and sent the battery through in the regular course as a new battery.

Q. What about the negative plates?

A. We used the negative plates.

Q. Is it possible to re-use the grids by refilling them with oxides, with paste?

A. I have never tried that, I couldn't say.

1887 Q. What per cent of your batteries would you say were rebuilt batteries?

A. At the present time none.

Q. Back in 1940 and 1941?

A. I don't know, I would say about a third.

Q. Did you at any time have any service from any of the lead producing companies; that is, did you get any advice from them on manufacturing technique or anything of that sort?

A. No. The only information you would get is when their materials didn't work out you could have their man come down and try and show you why, and what was wrong.

Q. And did you ever receive that type of service?

A. No, I don't believe I have.

Q. You didn't require it?

A. No.

Q. But you knew that that type of service was available?

A. Well, yes, I believe they say so. I have never had it.

Q. You didn't ask for it?

A. That is right.

Mr. DuBose: No questions.

Mr. Wright: No further questions.

Trial Examiner Norwood: The witness is excused.

(Witness excused).

Mr. Wright: May we have a five minute recess?

Trial Examiner Norwood: Yes.

(A five minute recess was had).

1888 Trial Examiner Norwood: Proceed, Mr. Wright. Call your next witness.

Mr. Wright: Mr. Kita.

JOSEPH J. KITA was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Mr. Kita, will you state your full name, address and occupation?

A. Joseph J. Kita, manager of the Franklin Storage Battery Company at 2901 W. Jackson Boulevard, Chicago, Illinois.

Q. Is that a corporation, Mr. Kita?

A. That is a corporation.

Q. Are you an officer of that corporation?

A. Just the manager, not an officer.

Q. Are you the production manager?

A. Yes, sir.

Q. Are you also the sales manager?

A. Yes, sir.

Q. How long have you been with that company?

A. Ten years.

Q. In that same capacity?

A. Not in the same capacity. I have been in the
1889 same capacity for the past four years. I was sales
manager prior to that time.

Q. How many batteries a day does Franklin produce in normal times?

A. Fifty.

Q. Fifty batteries a day?

A. Yes.

Q. What type of batteries are those?

A. What types—starting and lighting, commercial, specials, motorcycle; farm light batteries.

Q. Over what market area do you sell those batteries?

A. Coast to coast.

Q. Does that include your automotive batteries?

A. Yes.

Q. Where is the bulk of your business?

A. Local, in the Chicago area.

Q. Do you sell batteries in Chicago?

A. Yes, to a certain extent. We ship a man at Santa Rosa battery plates which are turned into batteries.

Q. I am speaking now only of batteries themselves.

A. To my knowledge we never ship individual batteries to California.

Q. From what company or companies do you purchase lead oxides?

A. National Lead Company.

1890 Q. Has that been exclusively from National over that period?

A. For the past four years, yes.

Q. Prior to that time from whom did the company purchase?

A. Federated Metals; Division Lead, and one more. Who is that outfit down on Campbell Avenue? The Gardiner Metals.

Q. Did you purchase oxides from those companies?

A. No, just metal, antimonial lead. Oxides from the National Lead Company for the past four years.

Q. Prior to the past four years did you purchase oxides from any one other than National?

A. From Federated.

Q. Where is Federated located?

A. In Hammond, I believe.

Q. Is that concern still in business?

A. Oh, sure.

Q. In what quantities did you purchase in the period from 1936 to 1941, that is as to oxides?

A. What do you mean?

Q. Did you purchase in quantities of less than five tons, or what?

A. Drop shipments of five tons were made, but we tried to purchase in carload lots.

Q. Did you purchase in carload lots at carload prices from 1936 to 1941?

1891 A. No.

Q. On what price basis did you purchase during that period?

A. Who knows. I can give you some figures here, I can give you an idea. The National Lead Company in 1941 billed us red lead at $8.75 less one per cent. In 1946 they are billing us at $9.00, $9.75, $10.75 and $11.00. Eleven dollars is the current price I understand.

Q. You said red lead?

A. That is oxide.

Q. Do you mean 95 per cent straight red lead?

A. One hundred per cent straight red lead as far as we are concerned. We are ordering No. 1 Red Lead, which is their best grade. I understand it contains about 93 per cent lead.

Q. Do you know what price you paid for litharge in 1941?

A. $7.75 in 1941. In 1946, $8.00 and $8.75. $9.75 is the current price.

Q. Did you purchase any other oxides at that time?

A. Yes.

Q. What other oxides?

A. One called the 111 Mixture in 1941 at $7.75, and $8.00 in 1946. The 25 R Oxide at $8.00 in 1941 and at $10.00 in 1946. Those prices are per hundred pounds.

Q. Do you make battery plates for other manufacturers?

A. Yes.

Q. Over what period of time have you been in that business?

A. Ever since they started in business in 1915.

1892 Q. Is that business located mainly in Chicago?

A. Oh, no. No, we ship plates practically to all points.

Q. How many customers for plates do you regularly supply in the City of Chicago?

A. At least fifteen regulars.

Q. Do you know whether these companies are large, small, or medium-sized battery companies?

A. They are medium-sized battery companies.

Q. About how many bateries would they produce in a day?

A. I wouldn't know. I don't know their business. I know that some of them buy 200,000 plates a year; others buy a hundred thousand plates a year. We spread about a million battery plates among those customers every year.

Q. On what price basis do you sell those plates?

A. What price basis?

Q. Yes, sir.

A. The cost of material, labor, overhead, and a small profit.

Q. What percentage of that price is accounted for by the cost of materials?

A. I don't know.

Q. Is it more than half?

A. Oh, no. You figure it out yourself. We were selling a particular type plate here up to June 30th at $71.50 a thousand. The lead content of that plate is approximately 600 pounds per thousand plates. You try to figure
1893 out how much money we are making.

Q. When you say lead, what do you mean?

A. Lead, that means antimonial lead and oxide, by weight, the plate cost is around 600 pounds of material per 1,000 plates. They are selling those plates at $71.50.

Q. Is that at the present time, do you mean?

A. Up to June 30th, and we raised it, with the lead increase that was granted at that time to $83 a thousand.

Trial Examiner Norwood: What does your lead cost you a pound for the 600 pounds?

The Witness: The lead costs a cent a pound or $60, so there was $11.50 in it.

The story behind it is the prices were set for so many years, and our customers wouldn't take a raise, and when the O. P. A. comes in we couldn't do anything.

By Mr. Wright:

Q. What was your price of those plates in 1941?

A. $71.50, and up to June 30, 1946, it was $71.50.

Q. Now, you spoke of six hundred and some odd pounds of lead content per thousand plates.

A. Yes, sir.

Q. How much of that is accounted for by oxides?

A. Fifty per cent of it.

Q. Fifty per cent?

A. Yes.

1894 Q. Now, of the oxide weight, about how much by weight is positive and how much negative?

A. There is no sense to that question. We make a plate which is called a neutral plate. It is our own trade formula.

We sell you a plate and you can do what you please, make it positive or negative.

Q. It requies further processing to make it positive or negative?

A. The plate we make will make either positive or negative with the same material. The other manufacturers use a loaded negative; we don't.

Q. What kind of oxides do you put into that plate?

A. No. 1 battery red lead from National Lead, and special battery litharge.

Q. In what proportions are those put in?

A. That is something I wouldn't want to answer, because that is our little secret. We are making about the best plate in the business today and I don't se why we should pass it on to the other manufacturers.

Q. I was not attempting to go into any trade secrets.

A. We have competitors here, and while they are in the room I don't think the question is fair.

Q. All I am trying to do is find out how important the cost of these materials is to you and what relation it has to your selling price.

1895 A. If we didn't have any batery men here, I wouldn't mind telling you.

Q. May I warn you that this is a public record so that anyone would have access to it. I just wanted to tell you of that.

A. We are a little manufacturer and the reputation we have for making a quality plate seems to keep us in business, where other companies come and go. You have seen the size of our plant. It is very small. We do a nice plate business. You cannot name a large trucking company that does not use the plate in their batteries in this district. One of the largest bus companies uses them exclusively, and they can buy plates elsewhere for less money, but they don't stay put. If I build you a battery it stays five or six years. If you buy something else you buy one every year. That is the difference.

If this doesn't have to go on the record I don't want it on. We buy the powders and mix our ore.

Q. That is perfectly all right.

Now, Mr. Kita, I understood you to state that the finished storage batteries you sell are principally sold in and around Chicago, is that correct?

A. That is right. I could name you a few instances where they go out of town. We made a shipment to South

Carolina a while ago, but it is mostly local here. Some
1896 goes to Elgin. Some goes to dealers that are out of
town through agents. We don't know.

Q. What is your principal competition in this area, or what was it in the period from 1936 to 1941?

A. Practically every battery company in Chicago. Price competition, you mean?

Q. Yes.

A. Well, you could name Apex; you could name Commander; you could name Sears-Roebuck Company,—that is Globe Union.

Those fellows sell at a price. We sell our batteries at premium prices, but we have a premium battery.

Q. Do their prices affect the prices that you charge, or did they in that period of 1936 to 1941?

A. Not necessarily, because the man that will buy a ten dollar hat would not go out and buy a three dollar hat. When they buy a quality battery they pay for it.

Q. Did you in that period make a thirteen plate battery?

A. In 1936, no.

Q. Well, anywhere over that period of five years?

A. No.

Q. What was the selling price on the cheapest battery you made?

A. A fifteen plate battery at $7.53 to the dealer.

Q. That was your lowest price at which you sold?

A. Yes.

1897 Q. What was your net profit on a battery like that in, say, 1938 and 1939?

A. Well, in 1938 we didn't make that type of battery.

Q. Well, what was your cheapest battery that you made at that time?

A. In 1938, about $4.50, a fifteen plate battery, which would probably average about 40 cents for us.

Q. That would be your net, 40 cents over your manufacturing cost and overhead?

A. That is right. That is figuring labor at the time was very low. Our labor cost is very high, our labor costs have increased almost three times.

Q. How does that profit margin compare with your present day profit, or your present day profit margin?

A. Today I would say we clear about $1.25 on the $7.50 battery.

Q. In that period you were operating on a much closer margin?

A. Sure. Competition was keen. There were thousands of manufacturers with $2.59 batteries on the street, so the only way you could get into a dealer with no advertising was to come in with a half dozen batteries at $3.39, hoping he would buy some of the better ones later.

Q. You were buying at a five-ton price,—I believe you stated, at that time?

1898 A. I believe we were.

Q. Are you aware of what the carload price was at that time?

A. I understand it was half cent a pound less, because I got the lead company to give me that price about two years ago.

Q. How would it have affected your ability to compete if you had been able to purchase it at the carload price in that period?

A. It wouldn't affect it.

Mr. DuBose: The same objection.

Trial Examiner Norwood: Overruled.

The Witness: It wouldn't affect us. I don't see how it would affect us.

By Mr. Wright:

Q. Now, how many pounds of lead oxides do you use in that battery you stated you sold for four dollars and something?

A. About sixteen pounds.

Q. Of oxides or lead?

A. No, oxide and lead.

Q. Half of that would be oxide?

A. That is right.

Q. A half cent a pound would have been four cents on that battery?

A. That is right. It wouldn't have made much difference. It was just a drop in the bucket.

1899 Q. How would it affect your business of manufacturing and selling plates?

A. Well, in a year's time it would make a lot of difference.

Q. Would it make considerable difference in your overall operations?

A. So far as cost is concerned?

Q. So far as cost and profits?

A. Well, it would make a difference so far as profits, because the operations are the same, whether we pay one price or another, but if we can buy it for less then we make more money.

You see, plates are a funny business. We are individual in that line. We sell a plate to a small manufacturer and that man has to take the cost into consideration, because he buys the plate and he has to supply the rest of the material himself and build the battery. When he builds that battery he is building it for the competitive market, and if the plate cost is too high he just can't come in, so our assemblers are in the business because we sold them plates pretty close to cost. In fact, some of them were below cost.

We are a little outfit, we have no expert accountants, or these guys that are specialists. We just make them and sell them, as the saying goes. You can never set a cost in a small shop because you have not got such a thing as piece workers. You have a man you pay $1.25 an hour for,
1900 and if he doesn't feel right to doesn't do anything.
If you fire him you have not got the man and you cannot replace him.

At the present time we have got six men over there, and if I fire one I break up the whole combination, so even though he doesn't do anything sometimes for a day, you just don't fire him. You hope he feels better and that he will produce the next day.

I will show you what that really means. I have tried putting a man on piece work, a good battery man that has been with us for about four or five years, on a piece work basis, and he produced ninety-eight storage batteries in forty hours, completely finished, ready for sale. That same man working by the day will make twenty or thirty in forty-eight hours. Now, you figure it out.

Q. Does it require much capital or equipment to get into the battery business in a small way?

A. No. Right now I would say for ten thousand dollars you could have a nice shop,—a nice shop.

Mr. Wright: I have no further questions.

Trial Examiner Norwood: Gentlemen, do you have any questions?

Mr. DuBose: No cross.

Mr. Hinds: No cross.

Trial Examiner Norwood: Thank you, Mr. Kita.

(Witness excused.)

1901 (Discussion off the record.)

Trial Examiner Norwood: We are ready for your statement about your evidence. Do you have any more witnesses, Mr. Wright?

Mr. Wright: No, sir. I have no more witnesses in Chicago. Two that I thought would be here tomorrow will not be available, so now I would suggest that we adjourn to Kansas City.

Mr. DuBose: Where do we go there?

Mr. Wright: I believe Mr. Norwood has that information.

Trial Examiner Norwood: Do counsel for the respondents have anything further?

(No response.)

Trial Examiner Norwood: Well then, we will adjourn to reconvene in Kansas City, Missouri, Room 527, U. S. Court House, at ten o'clock, Central Standard Time, November 18, 1946.

(Whereupon, at 3:05 o'clock p. m., Thursday, November 14, 1946, the hearing in the above-entitled matter was adjourned to 10:00 o'clock a. m., Monday, November 18, 1946, in Room 527, U. S. Court House, Kansas City, Missouri.)

1902 Room 527, U. S. Court House,
Kansas City, Missouri,
November 18, 1946.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 815—15th Street, N. W., Washington, D. C.), appearing for Sherwin-Williams Company.

James W. Pearce, Esq. (2801 Carew Tower, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

1903

PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment in Chicago on November 14, the hearing in Docket No. 5253 is now convened in Kansas City, Missouri, Room 527, U. S. Court House, at 10 o'clock a. m., on November 18, 1946.

The reporter may enter the appearances.

In further explanation of previous rulings in this case and as a matter for our future consideration, I will state for the record that the Trial Examiner will be guided in the reception of evidence at these hearings by the requirements of Section 7, Subsection (c) of the Administrative Procedure Act. This permits of the reception of "any oral or documentary evidence", and requires the exclusion, as a matter of policy, of "irrelevant, immaterial or unduly repetitious evidence". The subsection further provides that no sanctions shall be imposed or rule or order be issued except as supported by and in accordance with the reliable, probative and substantial evidence.

The measure thus provided for the reception of material is that of value as evidence, and it is clear that it may be received without regard to technical considerations if it does not appear to be irrelevant, immaterial or unduly repetitious. And if material is received which is
1904 thereafter shown by additional information or further analysis to be unreliable, non-probative or insubstantial, the same shall be disregarded and cannot be taken as the basis for any part of the Trial Examiner's recommendations or for any order of the Commission.

These measures should and will be applied with due regard for fairness as affected by the nature of the evidence and the circumstances of its production, proffer and receipt.

Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Call your witness, Mr. Wright.

Mr. Wright: Mr. Fred Florence.

FRED FLORENCE was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Mr. Florence, will you state your full name and address for the record, your business address, that is?

A. My name is Fred Florence, and my business address is 1615 Oak Street, Kansas City, Missouri.

Q. What is that business?

1905 A. Automotive electric service and repair business, and battery manufacturing.

Q. Under what name is it carried on?

A. Automotive electric, Becker-Florence Electric Company.

Q. Is that a corporation?

A. A partnership.

Q. Are you a partner in that business?

A. That is right.

Q. Over how long a period of time has that business included the manufacture of batteries?

A. Since 1931.

Q. What type of batteries are manufactured there?

A. Automotive batteries exclusively.

Q. They are all replacement batteries, are they?

A. That is right, replacement batteries.

Q. Approximately what is your average daily output of batteries normally, in normal times?

A. In normal times, when materials are available, it is 28 a day.

Q. Over what market area are those sold, Mr. Florence?

A. A radius of a hundred miles of Kansas City.

Q. To what type of customer are they sold?

A. Well, I can answer that in two ways. Prior to the war they were sold practically exclusively to trucking concerns.

Q. Do you also sell to retail outlets for resale?

A. Very seldom.

1906 Q. What was your principal competition in this market area in the period from 1936 to 1941, Mr. Florence?

A. The principal competition?

Q. Yes.

A. Well, we had many competitors in the sale of batteries—factory outlets and chain stores and wholesale distributors.

Q. Were you in competition, in this area, with National Battery Company?

A. Naturally.

Q. And Willard and Exide?

A. Naturally.

Q. Auto-Lite?

A. Yes, sir.

Q. Globe-Union?

A. Yes, sir.

Q. Sears Roebuck?

A. Yes, sir.

Q. Western Auto Supply?

A. Yes, sir.

Q. Montgomery Ward?

A. Yes, sir.

Q. Firestone?

A. Yes, sir.

Q. How many different sizes and types of batteries do you make, Mr. Florence?

1907 A. We make five groups, five sizes.

Q. Is that five sizes in each group?

A. No, that is five groups. I beg your pardon, that would be six groups.

~~Q. About how many types in each group?~~

A. In the olden days, I mean in the time prior to the war, we made five in Group 1, and two of each of the other groups.

Q. In the period from 1936 to 1941, did you make a 13-plate, low-amp. battery?

A. Yes, we did.

Q. Can you tell me, or do you recall what your selling price of that battery was in 1940 and 1941?

A. I can recall the wholesale price on it. That was $4.95.

Q. Was that the lowest price at which you sold it?

A. That was the lowest price battery we had.

Q. Do you recall what your material and labor costs of producing that battery were?

A. I didn't bring those cost sheets on that, but as near as I can remember the cost was about $3.95 to $3.98.

Q. What do you mean by cost there? Does that include your factory costs?

A. Labor and overhead and materials for the completed unit. We run rent costs and all operative costs of all kinds into that.

Q. Was that battery comparable in uality and per-
1908 formance with other batteries that were being offered in this area?

A. We figured we gave more for that amount of money than the chain stores did in the same price bracket.

Q. In that period, say 1940 to 1941, do you recall what a comparable battery was being offered for by your competition in this area?

A. Not specifically, no, but they had batteries that sold for less money, I would suggest $3.50 or $3.75 on exchange. Their old battery had a value, a cash value, of around 50 cents, so that made them sell the batteries around $4.00 or $4.25.

Q. What was your profit margin in that period on that 13-plate battery?

A. We tried to keep it around a dollar profit.

Q. Was that a net profit that you are speaking of?

A. No, that was gross profit.

Q. Do you recall what your net would be on that?

A. No, I don't.

Q. In 1940 and 1941?

A. No.

Q. How did your gross margin compare, on that battery, as against the other batteries you made at that time?

A. Well, it was about, I would say, 30 percent less profit than we made on the other types of batteries.

Q. From what companies have you purchased lead
1909 oxides, Mr. Florence?

A. We have purchased some from the Eagle-Picher Lead Company back in the early days of our manufacture of batteries, and in later years we have been purchasing it from the National Lead Company at St. Louis.

Q. Do you recall the times at which you purchased from the Eagle-Picher?

A. No, I really don't. We turned that over to a man that had charge of that department, and he ran it on his own initiative.

Q. I see. Mr. Florence, in the period about which you have been speaking, 1936 to 1941, would a difference in costs to you, a saving I mean, of 10 cents per battery have been important in affecting your competition with other concerns selling batteries in this area?

Mr. DuBose: The same objection, if Your Honor please.

Trial Examiner Norwood: Overruled.

A. Naturally. We were working on very small profits and a very small output, and every dollar would have been of value to us.

Mr. Wright: No further questions.

Trial Examiner Norwood: What would your average profit be on those batteries?

The Witness: The average profit on the general line, or just that one?

1910 Trial Examiner Norwood: That one, the one you are speaking of.

The Witness: The better quality batteries?

Trial Examiner Norwood: Yes.

The Witness: We tried to make a 30 or 50 percent gross profit or 33⅓ net profit on everything we sold.

Trial Examiner Norwood: Cross-examination.

Mr. DuBose: No cross-examination.

Trial Examiner Norwood: Does anyone else have any questions?

(No response.)

Trial Examiner Norwood: Thank you, Mr. Florence.

(Witness excused.)

Trial Examiner Norwood: Call your next witness, Mr. Wright.

Mr. Wright: May we go off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: Your Honor, we had two other witnesses that we intended to call here, but due to unforeseen developments they will not be available, so we have no further witnesses to offer at this time, and I suggest that we adjourn to St. Louis to convene there at 10 o'clock tomorrow morning.

Trial Examiner Norwood: Is there any objection
1911 from counsel?

Mr. DuBose: No, sir.

Trial Examiner Norwood: The hearing stands adjourned to reconvene tomorrow morning, November 19, 1946, at 10 o'clock, in Room 313, Federal Building, St. Louis, Missouri.

(Whereupon, at 10:30 a. m., November 18, 1946, the hearing in the above-entitled matter was adjourned to St. Louis, Missouri, at 10:00 a. m., November 19, 1946.)

1912 Room 313, Federal Building,
St. Louis, Missouri,
November 19, 1946.

Met, pursuant to adjournment, at 10:00 a.m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 815 - 15th Street, N. W., Washington, D. C.), appearing for Sherwin-Williams Company.

James W. Pearce, Esq., (2801 Carew Tower, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

1913 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on November 18, 1946, in Kansas City, Missouri, the hearing in Docket 5253 is now convened at 10 o'clock a.m. on November 19, 1946, in Room 313, Federal Building, St. Louis, Missouri.

The reporter will please enter the appearances of counsel present.

Call your witness, Mr. Wright.

Mr. Wright: Mr. Rhoades, will you take the stand?

W. C. RHOADES was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Will you please state your full name for the reporter?

A. W. C. Rhoades.

Q. Mr. Rhoades, will you state your business address and occupation?

A. It is located at 4818 Fyler Avenue, St. Louis.

Q. What business are you engaged in?

A. Battery manufacturing.

Q. Under what name is that business operated?

1914 A. Shur Start Battery Company.

Q. Is that a corporation?

A. Yes, sir.

Q. What is your position with the corporation?

A. President.

Q. How long have you been President of the company?

A. Since December 20th of last year.

Q. Were you with the company prior to that time?

A. Yes, sir.

Q. For how long a period?

A. Twelve years.

Q. And in what capacity were you employed?

A. Shop manager.

Q. Just what batteries is your company engaged in manufacturing, Mr. Rhoades?

A. Mostly all replacement batteries for automobiles and trucks.

Q. What is the capacity of your plant?

A. At the present time it is about 35 a day.

Q. Thirty-five a day?

A. That is right.

Q. What was it back in 1940?

A. It was about 75 a day.

Q. Now is the operation at St. Louis the only manufacturing operation of Shur Start?

1915 A. That is right.

Q. Was there any connection between that company and the Shur Start Battery Company of Chicago?

A. None whatever.

Q. In what market areas do you sell your batteries?

A. In the State of Missouri and some parts of Illinois.

Q. Where are the bulk of them sold?

A. In St. Louis.

Q. In the St. Louis area?

A. Yes.

Q. To what type of customer do you sell?

A. Service stations and trucking companies.

Q. Do the service stations resell those batteries?

A. Yes, they do.

Q. The trucking companies use them themselves?

A. Correct, yes.

Q. In what quantities does your company purchase oxides and litharge, red lead?

A. Well, it has never been over five or ten tons at any one time. At the present time we are only allotted a certain amount from the Government, which never runs over 3 tons.

Q. From what companies have you purchased these materials in the past?

A. In the past, this past year, it has been the Hammond Lead Company.

1916 Q. Prior to that, from what companies did you purchase?

A. Back in '38 and '37, it was National Lead and Eagle-Picher.

Q. Mr. Rhoades, what competition did you meet in the sale of batteries in your market area in the period of time from 1936 to 1941?

Mr. Welch: Objection. It is shown that this gentleman was the Shop Manager, and not that he knows anything about the selling end of it, which would naturally be that governing the competition angle.

Trial Examiner Norwood: I think he might lay the ground for that.

By Mr. Wright:

Q. Mr. Rhoades, prior to the time you became President of the company, just what were your duties?

A. Well, I had taken care of customers, too, but I was in the front end of the shop most of the time. I did do the selling too, if a customer came to the door, but I never went out to solicit any business.

Q. How many people were employed as officers of the company in that period from 1936 to 1941?

A. There were three.

Q. And how many were employed in the factory?

A. Five to seven. At different periods of the year we had more.

Q. How many employees altogether were there 1917 in ordinary times, then?

A. Well, back in '38 it would run around 8.

Q. Are you familiar with the business of the company in that period of time?

A. Yes, sir, I am.

Mr. Wright: Your Honor, it seems to me that on the basis of these last questions, the objection is not well taken.

Trial Examiner Norwood: The objection was well taken at the time, but I think you have laid the groundwork. You may restate the question.

By Mr. Wright:

Q. Mr. Rhoades, what competition did Shur Start meet in the period from 1936 to 1941 in the St. Louis area?

A. Well, most of the largest competition was out of Chicago.

Q. What companies were those, do you recall?

A. The one that I remember very well was the Commander. That was the name of the battery. I don't know who manufactured it.

Q. Do you recall the names of any others in that category?

A. Federal.

Q. Is that a Chicago concern?

A. I believe so, I am not sure.

Q. Were you in competition at that time with National Battery Company?

A. Not that I can recall.

Q. Willard and Exide?

1918 A. They always have been competition in batteries for us.

Q. Were you in competition with Sears Roebuck and Montgomery Ward?

A. Not to any great amount.

Q. Western Auto Supply?

A. About the same as Sears Roebuck. We ran as close to their price as we possibly could. It was the competitor that we ran our prices by.

Q. What was the competitive situation in the St. Louis market in that period of time?

A. You mean price?

Q. Yes, sir.

A. Well, on a 13-plate battery at that time it was around $5.10.

Q. Was that the wholesale price?

A. Retail price.

Q. Was that your retail price?

A. Ours was $5.45.

Q. $5.45?

A. That is right.

Q. What company quoted the $5.10 price, do you recall?

A. I think that was J&R and Western Auto.

Q. Now the battery that you spoke of, the $5.45 battery, was that a 13-plate battery?

A. Yes.

1919 Q. Do you recall what your margin of profit was on that battery in that period of time?

A. It was very small. I can't recall in dollars and cents what it was.

Q. Was your margin in that period generally smaller than it is today?

A. Yes, it was.

Q. Do you know the Acme Battery Manufacturing Company of 2007 South 7th Street, St. Louis?

A. Yes.

Q. Is that a large or a small battery concern?

A. I believe it is about the same size as we are.

Q. Do you know the market area in which they sell?

A. No, I couldn't say. I believe it is in St. Louis—

Mr. DuBose (Interposing.) I object to what he might believe, not of his personal knowledge. He said he didn't know but he "believed". I move to strike out the answer beginning with the words "I believe".

Trial Examiner Norwood: Read the question and answer.

(The reporter read the question and answer.)

Mr. Wright: I submit I should be able to examine him about the basis for his belief.

Trial Examiner Norwood: Well, you may do that.

By Mr. Wright:

Q. Have you encountered the Acme Battery Manu-
1920 facturing Company as a competitor in the St. Louis area?

A. No.

Q. Do you know the Power Plus Battery & Supply Company, 4928 Natural Bridge, St. Louis?

A. Yes.

Q. Are they competitors of yours in this St. Louis area?

A. Yes, they are.

Q. Do they sell the same type of battery that you do, generally?

A. In the general run, I would say yes.

Q. Mr. Rhoades, would a saving to you of from 5 to 10 cents per battery in material costs during the competitive period, say from 1936 to 1941, be of importance to you in your ability to compete in the battery business?

Mr. Welch: Objection. Your Honor, this question is directed to a witness who does not buy lead from any of the respondents in this proceeding, and I don't believe that a Federal Trade Commission order can have any effect on this man's price that he is paying to some producer who is not a defendant in this lawsuit.

Mr. DuBose: I also want to state my objection along the general lines that I have had to all this type of testimony, with the added objection in connection with this gentleman upon the ground that he was a shop manager
in the manufacturing end, and didn't go out to sell,
1921 and wouldn't be familiar with the business.

Trial Examiner Norwood: I think that he has shown that this knowledge came to him in the due course of business. He didn't say so in so many words, but you may cross-examine, and if he didn't, I will strike it.

Mr. DuBose: Mr. Welch's objection, too, is on the ground that this concern purchases its material from the Hammond Lead Company.

Mr. Wright: The witness has already testified that the witness has in the past, within the period of time covered by this complaint, purchased both from the Eagle-Picher and National Lead.

Mr. DuBose: I believe he said during 1937 and 1938.

Trial Examiner Norwood: I think in this testimony to show effects of these prices, it isn't important that he should have bought from one of the respondents. He is attempting to get some evidence here on the competitive situation generally.

Mr. Wright: Your Honor, I would like to direct your attention to the fact that Commission's Exhibit 840-Z-109, which is already admitted into evidence, shows a purchase by the Shur Start Battery Company of St. Louis, Missouri, on September 26, 1941, of 10,200 pounds of litharge from the Eagle-Picher Company.

Mr. DuBose: Then I renew my objection upon
1922 the ground that this gentleman, by his previous tes-
timony, has shown that obviously he doesn't know from whom he has been purchasing lead, and is in no position to give this testimony required by the question.

Mr. Wright: Your Honor, as I recall the witness' testimony, it was that the company is now purchasing from the

Hammond Lead Company. Prior to that time, and he mentioned specifically 1937 and 1938 but didn't restrict it to those times, he said they had purchased from the Eagle-Picher and the National Lead Company.

Trial Examiner Norwood: Read the pending question.

(The reporter read the question as follows:

"Q. Mr. Rhoades, would a saving to you of from 5 to 10 cents per battery in material costs during the competitive period, say, from 1936 to 1941, be of importance to you in your ability to compete in the battery business?")

Trial Examiner Norwood: Can you answer that from your own knowledge and business experience?

Trial Examiner Norwood: (Interposing.) I asked you if you can answer that from your own knowledge and business experience.

The Witness: Yes, I can.

Trial Examiner Norwood: The objections are over-
1923 ruled, and you may answer the original question.

A. We figure anything from 2 cents to 10 cents is a great saving on batteries.

Mr. Wright: No further questions.

Trial Examiner Norwood: Cross-examine.

Mr. DuBose: No cross-examination.

Trial Examiner Norwood: Thank you, Mr. Rhoades.

(Witness excused.)

Mr. Wright: Off the record, please.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

We will recess until 11 o'clock, gentlemen, for the reason that the next witness is subpoenaed to appear at 11 o'clock.

(Short recess.)

Trial Examiner Norwood: The hearing will come to order.

Call your witness, Mr. Wright.

Mr. Wright: Mr. Eagan.

PATRICK JOSEPH EAGAN was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

1924 *Direct Examination by Mr. Wright.*

Q. Mr. Eagan, will you state your full name and address?
A. Patrick Joseph Eagan, 4474 Chippewa.
Q. What is your occupation, Mr. Eagan?
A. I run a battery manufacturing place.
Q. Under what name?
A. Sidney Battery Company.
Q. Is it located at that address on Chippewa Street?
A. Yes, sir.
Q. Is that a corporation?
A. No, it is just my place, I call it a company. My brother used to be in with me, although he works for me yet, today.
Q. You operate the business yourself?
A. Yes, sir.
Q. Did I understand you to say you manufactured storage batteries?
A. Yes, sir.
Q. About how many batteries do you produce per day?
A. Well, right now about 60 or 70, something like that.
Q. What is the capacity of your plant, how many can you produce?
A. About 135 a day.
Q. How long have you been engaged in that business, Mr. Eagan?
A. Well, I have been in the battery business since
1925 1922. I originally started being a distributor for Willard, a retailer, then for Exide batteries, and then competition got so bad that later on I couldn't make a living so I had to start manufacturing my own batteries.
Q. When was that that you started manufacturing?
A. I think around 12 or 15 years ago.
Q. Were you manufacturing batteries completely in your shop?
A. Yes, sir.
Q. Did you manufacture the plates, also?
A. Yes, I made the plates and pasted them by hand,

and charged the batteries and everything, there at the plant.

Q. In what area do you sell your batteries, Mr. Eagan?

A. Well, just in the City up until 1945.

Q. In the City of St. Louis, that is?

A. Yes, sir.

Q. To what class of customers do you sell?

A. Well, I originally sold mostly retail and to a few fleet owners, trucking companies, but mostly retail up until 1945.

Q. You had no jobber accounts or wholesalers up to that time?

A. No, sir.

Q. Did you advertise?

A. No, I never did.

Q. Did you have salesmen?

A. No, sir, I used to go out myself half a day,
1926 and then work half a day, go out in the mornings and work in the afternoons.

Q. That is, work in the production of batteries?

A. Yes, sir.

Q. Now at the time you started your business, in what quantities did you buy lead oxides?

A. Well, when we just started, we were buying one barrel of litharge and making the negative plate, and also the positive plate, too, out of that, by mixing a small quantity of red lead; in fact I would have to have two barrels to start with.

Q. Over how long a period of time did you purchase in quantities of one or two barrels?

A. Well, I don't know for sure, but I guess it was maybe a year or two, something like that.

Q. In what quantities did you later purchase after that time?

A. Five-ton lots.

Q. From what companies have you purchased oxides?

A. National Lead Company.

Q. Mr. Eagan, what was the competitive situation in the storage battery business in the period from 1936 to 1941 in St. Louis?

A. Well, it was so bad that the only way we could get by and make a living was to use the old battery cases over again, the old rubber cases, and put new plates in there. Most of our batteries were like that, but there

1927 were some all new, but not all of them. The biggest majority of our business was used cases with new plates in them. The rubber cases, you see, don't wear out, and we could use them over again. In that way there was a saving of about 45 or 50 cents on each battery, and it didn't affect the use of the battery or the service of it.

Q. Now was that saving of real importance to you in competing in that period of time?

Mr. DuBose: The same objection, if Your Honor please.

Trial Examiner Norwood: Objection overruled.

A. Oh, yes, it was.

By Mr. Wright:

Q. What companies were your principal competition in that period of time, Mr. Eagan?

A. Well, at that time Grant Storage Battery, and for a while I think Majestic and Monark, who were in Chicago. Both those companies were in and out at different times. I think they were the same company, only they had a reorganization and changed names.

Q. Where were they located then?

A. I think they were in Chicago.

Q. Were you in competition at that time with Sears Roebuck and Montgomery Ward?

A. Well, when Sears came in that ruined us com-
1928 pletely. We went completely broke and lost everything we had.

Q. When was that, if you recall?

A. Well, I think it was about 13 or 14 years ago.

Q. That would make it 1933 or thereabouts?

A. Something like that.

Q. You say that ruined you and you went out of business?

A. Yes, sir.

Q. You later resumed business, did you?

A. Yes, they took the building away from us, and we moved out to where we are now. We were at 2600 South 7th Street at that time, and we had that building partly paid for, and we lost the whole thing.

Q. Were you able, in that period of time from 1933 to 1943, to offer comparable batteries for sale at prices as low as those offered by the Sears Roebuck?

A. Oh, no; no, sir, we couldn't.

Q. Mr. Eagan, do you know of the Acme Battery Manufacturing Company at 2007 South 7th Street here in St. Louis?

A. Yes, sir, I know him personally, a good many years. I have been in his place once or twice, but it has been 10 years or more since I have been in there.

Q. Does that concern manufacture storage batteries here in St. Louis?

A. He does, I understand.

Q. Is he in competition in the same line as you?

1929 A. Yes, sir.

Q. How about the Power Plus Battery & Supply Company of 4928 Natural Bridge?

A. They make batteries too, they are a competitor.

Q. In this same line?

A. Yes, sir.

Mr. Wright: I have no further questions, Your Honor.

Trial Examiner Norwood: Cross-examine.

Mr. DuBose: No cross-examination.

Trial Examiner Norwood: The witness is excused.

(Witness excused.)

Mr. Wright: Your Honor, I have no further witnesses until 2 o'clock this afternoon, so I suggest that we adjourn until that time.

Trial Examiner Norwood: Is that satisfactory to you gentlemen?

Mr. DuBose: Yes, sir.

Trial Examiner Norwood: We will recess until 2 o'clock.

(Whereupon, at 11:15 a.m., a recess was taken until 2:00 p.m. this day.)

1930 Afternoon Session

2:00 p.m.

Trial Examiner Norwood: The hearing will come to order.

Are you ready to proceed, gentlemen?

Mr. Wright: Your Honor, the witnesses that were scheduled for this afternoon cannot be produced, and I suggest we recess over to the hearing scheduled at Nashville on the 21st of November.

Trial Examiner Norwood: Did you issue a subpoena for these witnesses?

Mr. Wright: For one of them, and I am advised by his secretary that the man had left St. Louis prior to the time the subpoena came to the office, and that it has never been served on him, but I have had no opportunity of ascertaining whether or not those facts are true and correct at this time.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

In view of counsel's statement, the hearing in St. Louis is now adjourned to reconvene in Room 245, U. S. Court House, Nashville, Tennessee, at 10 o'clock a.m. Central Standard Time, November 21, 1946.

(Whereupon, at 2:03 p.m., November 19, 1946, the 1931 hearing in the above-entitled matter was adjourned, to reconvene at 10:00 a.m., November 21, 1946.)

1932 Room 245, U. S. Court House,
Nashville, Tennessee,
November 21, 1946.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., Appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 815—15th Street, N. W., Washington, D. C.), appearing for Sherwin-Williams Company.

James W. Pearce, Esq., (2801 Carew Tower, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

1933 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment in St. Louis, Missouri, on the 19th of November, 1946, the hearing in Docket 5253 is now convened in Room 245, U. S. Court House, Nashville, Tennessee, at 10 o'clock a. m., November 21, 1946.

Please note the appearances of counsel present, Mr. Reporter.

Call your witness, Mr. Wright.

Mr. Wright: Mr. Taylor, will you take the stand?

GILP WASHINGTON TAYLOR was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Will you state your name, Mr. Taylor?
A. Gilp Washington Taylor.
Q. What is your occupation, Mr. Taylor?
A. Battery manufacturer.
Q. With what company?
A. American Battery Company.
Q. Where is that located?
A. 1520 McGavock Street, Nashville, Tennessee.
1934 Q. Mr. Taylor, did you receive a subpoena requiring your attendance at this hearing?
A. Yes, sir, I did.
Q. You are not a volunteer witness, then?
A. No, sir.
Q. Just what products does the American Battery Company produce, Mr. Taylor?
A. We produce all the lead parts that go into a battery, a storage battery.
Q. Do you produce finished storage batteries?
A. Yes, sir.
Q. You manufacture them in their entirety?
A. Yes, sir.
Q. What is your position with the company, Mr. Taylor?
A. I don't know. I work from one end of the shop to the other, you might say, and do the buying—
Q. (Interposing.) Is that a corporation?
A. No, sir.
Q. Is it an individual—
A. (Interposing.) It is a partnership, my wife and myself.
Q. Your wife and yourself are the only partners in the business?
A. That is right.
Q. How long have you been engaged in that business, Mr. Taylor?
1935 A. I have been engaged since 1935 with the American Battery Company.

Q. Prior to that time what was your occupation?

A. I was with the Hester Battery Company.

Q. Where is that company located?

A. That company was located at that time at 301 Second Avenue South. They have moved since then, and I don't know their address.

Q. Is that in Nashville?

A. Yes.

Q. For how long a time have you been in the battery business?

A. Since 1922.

Q. All that time here in Nashville?

A. Yes, sir.

Q. What is the normal daily battery production of American Battery Company in normal times when you can secure sufficient materials?

A. The normal daily production, I would say, is approximately 100 batteries per day.

Q. Would that be your normal production in 1941, say?

A. In 1941 it wouldn't be, because I was building and moving from another address, which cut my production considerably. I would say in 1941 probably the average production would be 75 batteries a day.

Q. Just what type of batteries are these that are produced by you?

1936 A. Mostly SLI type batteries.

Q. Is that starting-lighting-ignition?

A. That is right.

Q. Are those automotive batteries?

A. Yes, sir.

Q. Approximately how many different sizes and types do you manufacture?

A. Twenty-six.

Q. Twenty-six?

A. Yes.

Q. What is your normal market area for these batteries?

A. We cover approximately 200 miles in any direction—East, West, North and South.

Q. About how far North do you go?

A. We go as far as Evansville, Indiana.

Q. How far South?

A. Birmingham.

Q. Do you go as far as Memphis on the West?

A. We stop off just before Memphis. I couldn't say exactly how far, but I would say Jackson, Tennessee.

Q. How far East do you go?

A. As far as Knoxville.

Q. Do you travel salesmen in that area?

A. Yes, I travel truck salesmen. They deliver and sell off the truck.

1937 Q. To what class of customers do you sell, generally?

A. Garages and filling stations.

Q. Do you have any accounts for jobbers or distributors?

A. No, sir, we don't have a jobber set-up.

Q. Then all your customers resell directly to the public?

A. That is right.

Q. Do you deliver all your batteries to your customers?

A. Not all of them. We ship some.

Q. How are those shipments made?

A. Mostly by truck, by common carriers.

Q. About what proportion of your business, roughly, is handled by common carriers?

A. Approximately 10 percent.

Q. As to the remainder, you deliver in your own truck?

A. That is right.

Q. Who are your principal competitors in this market area you have described, in normal times?

A. In normal times, our competitors mostly are chain hookups, such as oil companies that have their own stations, operate their own stations and require their dealers to handle their products.

Q. Can you—

A. (Interposing.) Such as Gulf Refining Company, Standard Oil Company, and people of that type.

Q. Do you know who makes the batteries that Gulf handles?

1938 Mr. DuBose: I object to that on the ground that it will be purely hearsay.

Trial Examiner Norwood: He asked him if he knew that. He can say whether he knows or does not.

Just answer that "yes" or "no".

A. Well, I wouldn't want to answer that question, because I really don't know for sure. I have my ideas about who makes them, but I wouldn't want to say that I knew.

By Mr. Wright:

Q. What are your ideas based on?

Trial Examiner Norwood: Did you receive information from salesmen or anybody in connection, direct connection, with your business in the due course of same? Did you receive any information on this point in that manner?

The Witness: You mean as to the manufacturer that manufactures the batteries?

Trial Examiner Norwood: Yes.

The Witness: Well, from the dealers. They tell me who makes their batteries, but I don't know for sure that they are the ones.

Trial Examiner Norwood: Well, you can tell us what they have told you.

Mr. DuBose: If Your Honor please, that would be exactly hearsay, what someone told him, not of his own knowledge.

1939 Mr. Wright: He stated that it was from dealers in the course of his business, and it is obviously information which was gathered in the regular course of his business, and I submit—

Mr. DuBose: (Interposing.) I submit that under Section 7(c) of the New Administrative Procedure Act, it is purely hearsay.

Trial Examiner Norwood: Under the strict rules applied in jury trials, information may be given by anyone where that information comes to him in the due course of his business.

Mr. DuBose: Not under my understanding of it.

Mr. Welch: May I make an observation? I think there is probably a slight misconception of the use of the word "dealer". I think the witness, in referring to information coming to him from dealers, was referring to information coming to him from dealers of these big hook-ups who were required to handle the batteries furnished to them by their suppliers of gasoline and tires and other accessories, and not dealers with whom this witness was having any business relationship. I think that is probably something that has confused our thinking, and I think that under no procedure can a man who has a conversation with a man with whom he has no business relationship, relate something that has been told to that first man by somebody with 1940 whom he was not dealing in business. I think it is entirely too remote.

Trial Examiner Norwood: I think the counsel is right about that.

Mr. Wright: I will agree with counsel to this extent, that I believe we should have further questions regarding exactly how this information was ascertained.

I wish to further examine the witness on this point before Your Honor makes any ruling on it.

Trial Examiner Norwood: If you will examine him to have him give us the information that comes to him in the due course of business.

By Mr. Wright:

Q. We are referring now, Mr. Taylor, to Gulf. Have you ever been advised by any dealer as to what battery companies supply Gulf with their batteries?

Mr. Welch: Objection. I think there should be a qualification, when he uses the word "dealer", whether he means a dealer with whom this witness is dealing, or a dealer operating for Gulf to whom this witness does not sell.

Mr. Wright: The question went solely to whether this witness had any knowledge in his mind. If he has such knowledge, then he could be examined further, and—

Trial Examiner Norwood: (Interposing.) Read the question.

(The reporter read the question as follows:

1941 "Q. We are referring now, Mr. Taylor, to Gulf. Have you ever been advised by any dealer as to what battery companies supply Gulf with their batteries?")

Trial Examiner Norwood: When you use the words "any dealer", if it is any of his dealers—this man sells wholesale, doesn't he?

Mr. Wright: If the witness has no knowledge of any sort, it is useless to examine him further. I am trying to ascertain now if he has such knowledge. If he does have such knowledge, then I intend to ask him further.

Trial Examiner Norwood: I overrule the objection; and answer that question, whether or not you have such knowledge.

A. I don't have any direct knowledge.

By Mr. Wright:

Q. Do you have any knowledge?

A. No, I will say no.

Q. With reference to the batteries handled by the

Standard Oil Company, do you have any knowledge from any dealer as to the supplier of batteries to Standard Oil?

Mr. DuBose: The same objection.

Trial Examiner Norwood: I think that "any dealer"—
I wish you would make it clear, if he does give us this information, that it is information that comes to him in the
due course of his business in his contact with the
1942 dealers to whom he sells or through reports of his
salesmen, and things like that. But I think it should
appear clearly before this information is received.

Mr. Wright: I have no knowledge that this witness has any knowledge of that sort. I am trying to ascertain that. First of all, I want to establish whether he has such knowledge, on a question requiring a "yes" or "no" answer.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. With reference to the batteries handled by the Standard Oil Company, do you have any knowledge from any dealer as to the supplier of batteries to Standard Oil?")

Trial Examiner Norwood: Answer that question "yes" or "no", whether you have such knowledge or not.

A. Yes, I have been told—

By Mr. Wright:

Q. (Interposing.) Now will you state—

Trial Examiner Norwood: (Interposing.) Who told you?

Mr. Welch: Mr. Examiner, may I request that the Examiner at this time interpose a question to the witness that I think may solve some of our problems, and that is as to whether any of these people from whom he has secured any of this information purchase from any of these large
suppliers and from this witness.

1943 Mr. Wright: Now, Mr. Welch, I am examining this
witness, and I believe I should be permitted to conduct the examination.

Trial Examiner Norwood: You may go into that on cross-examination.

Mr. Welch: I think that is a vital question that has to be answered before any testimony can be given on this subject.

Mr. Wright: The next few questions will clear this whole matter up beyond the objection of any counsel.

By Mr. Wright:

Q. Will you state from whom such knowledge was obtained by you, Mr. Taylor?

A. Ottenville Tire Company.

Q. Have you ever had business relations with the Ottenville Tire Company?

A. Just a little, not too much.

Q. Have you sold them batteries?

A. A few.

Q. Have you solicited their business in the sale of batteries?

A. No, sir, I haven't. The only dealings I had with them
is that he wanted to buy a few batteries from me lately,
and I just more or less tried to favor him by letting him
have a few batteries, and asked him a question if there
1944 was a possibility of me selling him after the battery
shortage was over, and he advised me that he was
handling a nationally known battery and that he couldn't
buy batteries from me when he could get materials or batteries from the Standard Oil Company.

Mr. Welch: I move that the answer be stricken as not responsive.

Mr. DuBose: Also, I move to strike the answer on the ground that it is purely hearsay.

Mr. Wright: Your Honor, the answer itself establishes the circumstances under which this information was obtained, and that it was obtained in the course of business dealings between Mr. Taylor and the Ottenville Tire Company, and certainly that answer establishes this whole line of testimony to be within the well-recognized exception to the hearsay rule.

Trial Examiner Norwood: Let's have the question and answer read.

(The reporter read the question and answer as follows:

"Q. Have you solicited their business in the sale of batteries?

"A. No, sir, I haven't. The only dealings I had with
them is that he wanted to buy a few batteries from me
lately, and I just more or less tried to favor him by letting
him have a few batteries, and asked him a question if
there was a possibility of me selling him after
1945 the battery shortage was over, and he advised me that
he was handling a nationally known battery and that
he couldn't buy batteries from me when he could get materials or batteries from the Standard Oil Company.")

Mr. Welch: It is obvious that the entire answer after the words "No, sir, I haven't" should be stricken.

Mr. Wright: The part of that answer to which Mr. Welch and Mr. DuBose are objecting is responsive to the prior question, which I don't believe the witness understood. I asked him if he had solicited this company's business, and the latter part of the answer which is now objected to makes it plain that he did solicit business.

Trial Examiner Norwood: Gentlemen, I think that it is just in the interest of time here—there has been a good deal of argument and discussion—that this question be allowed to stand, and the answer. Several questions have borne on the subject, and the witness has clarified the entire situation. So I will overrule the objections, or rather, deny the motion to strike.

By Mr. Wright:

Q. Mr. Taylor, is Ottenville a Standard dealer?

A. A Standard Oil Company dealer.

Q. Did he advise you that he was required to buy batteries from Standard Oil?

Mr. Welch: Objection as leading.

1946 Mr. DuBose: I object on the ground that it will be hearsay.

Mr. Wright: I will withdraw the question.

By Mr. Wright:

Q. In your previous answer you stated that he had to buy nationally known batteries. Will you explain that?

Mr. Welch: I object to the form of the question. He should ask the witness as to what he stated before, rather than tell the witness.

Trial Examiner Norwood: Objection sustained.

By Mr. Wright:

Q. Will you state what Mr. Ottenville said regarding his relations with Standard Oil Company?

Mr. DuBose: I object to that on the ground that it would be purely hearsay under any rule.

By Mr. Wright:

Q. In connection with the purchase from them of batteries?

Mr. DuBose: I beg your pardon if I interrupted your question, but I renew my objection on the same ground.

Trial Examiner Norwood: Objection overruled. Read the question.

(The reporter read the question as follows:

"Q. Will you state what Mr. Ottenville said regarding his relations with Standard Oil Company—in connection with the purchase from them of batteries?")

1947 Trial Examiner Norwood: "From you", you mean.

Mr. Wright: No, "from them", from Standard Oil.

Mr. DuBose: That is the basis of my objection. The question goes to what Ottenville told this witness as to Ottenville's relationship with a third company. If that isn't remote hearsay, then I have been misinformed on the law.

Mr. Wright: Your Honor, it has already been stated that that statement was made to Mr. Taylor in connection with Mr. Taylor's request that he buy batteries from him, and was given as a reason why he couldn't buy batteries from him. I say at this point that there have been objections made to two previous questions on the ground that they were leading. I have now asked the witness a question which requires a narrative answer, and is not leading. Now it is objected to on another ground.

Trial Examiner Norwood: Your statement is rather broad as to what his relations were. Now you may bring out—and this goes back to the Danbury Hatter case—you can bring out from this man the reasons that his customer gave him for not buying from him.

Mr. Wright: That is the sole purpose of this question.

Mr. Welch: Your Honor, that type of situation is not presented here, because the man was not this witness'
customer. It isn't a question of where there had been
1948 a buyer-seller relationship existing between the two
theretofore which was broken off by reason of some
third party, which was the situation in the Danbury Hatter case.

Mr. Wright: This came about concurrently with the competition of the transaction of purchase from this witness.

Trial Examiner Norwood: I think you are correct there. I am going to ask the witness to confine his answer to the reason why he says he will not continue to buy from you. You can tell us that, but any other details about his relations with the people from whom he buys are not to be made a part of the record.

Mr. DuBose: I have the same objection.

Trial Examiner Norwood: I will overrule the objection, and if the witness doesn't confine himself to that subject I will entertain a motion to strike the answer.

A. The reason that he gave me for not buying in the future from me was that he had a Standard Oil hook-up or contract that wouldn't permit him to purchase batteries from me.

Mr. Welch: I move that the answer be stricken. I can't conceive that even under the Federal Trade Commission's liberal interpretation, that hearsay can be given as to what the terms of a written contract are.

Trial Examiner Norwood: The motion is denied.

By Mr. Wright:

Q. In connection with this conversation, were you
1949 advised as to the source from which the Standard Oil
Company procures its storage batteries?

A. No, sir.

Mr. DuBose: The same objection, if Your Honor please.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Wright:

Q. Did you state previously that you were advised by a dealer as to the source of batteries of the Standard Oil Company?

A. I was advised where he purchased his batteries from, the Standard Oil Company.

Q. But you did not state, then, that you had knowledge of where the Standard Oil Company procured the batteries?

A. I didn't say that. He didn't say who the manufacturer was that made the batteries for the Standard Oil Company.

Q. Are you in competition, over that market area you have described, with Montgomery Ward, and Sears Roebuck, and Western Auto Supply?

Mr. Welch: I object to that as leading. Ask him who his competitors are.

Trial Examiner Norwood: Objection sustained.

By Mr. Wright:

Q. Mr. Taylor, will you state who your other prin-
1950 cipal competitors are in your market area?
A. Well, we have a number of them during normal
times.

Q. Well, that is what I am referring to, normal times, say the period from 1936 to 1941.

A. Of course, the larger manufacturers are our greatest competitors, our biggest competitors, because of their hook-ups with the oil companies and the chain stores and places like that, that we can't get into, due to the price situation, we can't manufacture batteries at the price that Montgomery Ward and Sears Roebuck and those people sell them for.

Q. Do you recall any of the prices at which those concerns that you named, offered batteries during the period from 1936 to 1941?

Mr. DuBose: Objection on the ground that it will be purely hearsay.

Trial Examiner Norwood: Read the question.

(The reporter read the pending question.)

Trial Examiner Norwood: Objection overruled.

A. No, sir.

By Mr. Wright:

Q. During that period from 1936 to 1941, what was the price of the batteries, the lowest price at which you offered batteries, Mr. Taylor?

A. I think we sold batteries down as low as possibly $3.75.

Q. That is the dealer price, now?

1951 A. That is right.

Q. At what time did that price occur?

A. I can't say at what time. Batteries were sold from 1932 to possibly 1939 at those prices.

Q. Will you state what battery it was, or what type of battery it was that you offered at that price?

A. We had an off-brand battery we called Amerigo.

Q. How many plates did that battery have, do you recall?

A. Thirteen.

Q. Do you recall what your cost of production was on that battery during that period?

A. The cost was approximately $3.96, I believe. I lost money on the battery.

Q. You lost money on the battery?

A. Yes, it was a strictly competitive battery.

Q. Was that battery sold at as low a price as the batteries offered by your competitors?

A. No, sir, I don't think it was. I think they were cheaper than that.

Q. In other words, there were other batteries on the market at a lower price than that?

A. Yes, a lot of batteries lower than that.

Q. What did you consider in 1938, 1939 and 1940, as your normal net profit per battery?

Mr. Welch: Objection, Your Honor, to the form 1952 of the question, what he considered as normal net profit. I think we are entitled to know what it was.

Mr. Wright: I will withdraw the question.

By Mr. Wright:

Q. What was your profit per battery during 1938, 1939 and 1940, Mr. Taylor?

Q. I don't remember what our profits were, but they were very small.

Q. Did you ever allocate them as to each battery so that you could say how much per battery the profit was during any of those years?

A. No, sir, we didn't have a breakdown like that.

Q. Do you recall what your net profit was in 1938 on the battery end of your business.

A. No, sir, I don't.

Q. During 1939?

A. No, sir, I really can't tell you what my net profit is, because I handle other merchandise along with my batteries, and I don't keep it separate.

Q. From what company or companies do you purchase lead oxides, Mr. Taylor?

A. I have been purchasing lead oxides mostly from National Lead Company.

Q. Over what period of time?

A. Well, since 1935, that is when I purchased the 1953 American Battery Company, with the exception of one year when I bought oxide from the Eagle-Picher one year.

Q. In what quantities did you purchase, customarily?

A. Carload lots.

Q. Do you have any invoices showing such transactions with the National Lead Company or the Eagle-Picher Company?

A. I have some invoices. I don't know the dates on them, I just gathered them up, what invoices I had. There are some other papers there that don't belong with those invoices at all. I just picked up the file.

Mr. Wright: May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. DuBose: I would like to ask some preliminary questions on these.

Trial Examiner Norwood: Yes.

Mr. DuBose: Mr. Taylor, did the subpoena that was served on you require you to produce these records?

The Witness: No, sir. I got a letter separate from the subpoena requesting me to bring these records.

Mr. DuBose: But no subpoena was served on you for these records?

The Witness: No, sir.

Mr. DuBose: In addition to the letter, did anyone
1954 from the Federal Trade Commission come around
and examine your records?

The Witness: No, sir, they didn't examine my records I don't believe. I got the records out for them, but I don't believe they went over the records. They asked me if I had them, and I had them in my file. The reason they happened to be there was on account of I had taken them down to Atlanta for some over-usage that I had on lead. I carried them down there to let them check my purchases.

Mr. DuBose: How did you happen to produce these particular records here today?

The Witness: You mean why did I bring them?

Mr. DuBose: Yes.

The Witness: On the request of this letter that I got from, I don't know who signed the letter, but it was someone that followed the subpoena up.

Trial Examiner Norwood: Someone from the Federal Trade Commission?

The Witness: Yes, sir.

Mr. DuBose: And are these all the records?

The Witness: Those are all the records for 1945, I am pretty sure.

Mr. DuBose: I object upon the ground that these records concern 1945, after the issuance of the complaint in this action.

1955 Mr. Wright: Before Your Honor rules on this
objection, I would like to ask a further question.

By Mr. Wright:

Q. Do you recall whether the letter from the Federal Trade Commission asking you to bring invoices requested invoices for 1945?

A. I am sorry, but I don't remember what the letter stated any more than it just told me to bring them. I wouldn't say that it said invoices, but it said to bring my information.

Q. Mr. Taylor, do you recall being requested, either in a letter or by a representative of the Federal Trade Commission, to produce invoices showing transactions in the year 1941?

A. Yes, sir.

Q. Were you able to discover any invoices for the year 1941?

A. No, sir, I couldn't find any for 1941.

Mr. Wright: Your Honor, in the first place, counsel's objection is not well taken because the complaint was amended in the spring of 1946, and these invoices relate to transactions which antedate the amended complaint. Furthermore, counsel made every effort to have invoices for the year 1941, and they were simply not available.

Mr. DuBose: If Your Honor please, I think the testimony in this record has established that there were not normal conditions during the war, and that there are not even normal conditions today due to restricted output
1956 of lead from the mines, and everything else, and I
don't think it gives a fair picture of the situation to have these records for 1945.

Mr. Wright: Well—

Mr. DuBose: I don't think they mean anything. All the other invoices, except the recent group of invoices that we delivered in Washington at the last hearing and which have not been introduced into evidence—and we are going to object on that same ground when they are offered—dealt with this so-called normal period 1936 to 1941, and I don't see what value this evidence would be in the record.

Mr. Wright: Your Honor, in that connection, the method of computing prices and the price basis that was in use in 1945, the record shows was in use in 1941 and for a considerable time prior to that.

Mr. DuBose: Without refreshing my recollection from the record, I don't want to accede to that. I won't say he is wrong.

Trial Examiner Norwood: I wouldn't feel justified in excluding evidence of these transactions. You may explain that they were calculated on a different basis, you may cross-examine this witness about that very thing, but to throw a blanket over everything that happened during the war would make us never able to complete any investigation.

I don't think there is a question pending, is there?

Mr. Wright: No, sir. We were off the record with 1957 counsel, and I asked counsel to consider the matter of acceding to the copying of the first four of these invoices into the record. I believe Mr. DuBose made some preliminary examination of the witness before we further discussed that.

Mr. Welch: On behalf of Sherwin-Willioms, we certainly would have no objection to the copying in of the invoices rather than their identification as exhibits, in the event Your Honor overrules our objection to these as to competency.

Mr. DuBose: We have no doubt that those are valid invoices.

Trial Examiner Norwood: Mr. Wright can go ahead, then, and make the proper statements, and have those copied into the record.

Mr. Welch: I take it Your Honor has overruled our objections as to the competency of these invoices.

Trial Examiner Norwood: Yes.

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: I will have the witness identify these.

By Mr. Wright:

Q. I hand you herewith four documents, Mr. Taylor. Will you state to me what they are?

1958 A. They are invoices for lead received February 3, 1945—8/600# barrels of red lead and 25/600# barrels of litharge, from the National Lead Company; on February 28, 1945,—13/600# barrels of oxide 25-R and 20/600# barrels of 111-M battery oxide, from the National Lead Company; February 28, 1945—17/600# barrels of 25-R oxide, and 16/600# barrels of 111-M oxide, from the National Lead Company; and on April 17, 1945—30 barrels of 25-R and 35 barrels of 111-M battery oxide, from the National Lead Company.

Mr. Wright: Your Honor, I would like to ask that these four invoices that have been identified by the witness be copied into the record.

Trial Examiner Norwood: The invoices may be copied at this point in the record.

(The invoices are as follows:

National Lead Company
Cincinnati Branch
Manufacturers of Dutch Boy Products
641-659 Freeman Avenue
Cincinnati 3, Ohio.

Campbell.

Customer's
Order No. Invoice Date Feb. 13, 1945
Requisition No. Shipped To

Sold American Battery Company
To 1520 McGavock St. Date Shipped 2/3/45
Nashville, Tennessee

Terms: Net 30 Days Shipped from St. Louis
F.O.B. St. Louis Car No. Via Truck.

1959 Quantity	Description	Weight	Price	Total
8/600# Bbl.	Barton Battery Red Lead	4800	9.00	432.00
25/600# Bbls.	Ditto Litharge	15000	8.00	1200.00
		19800		
				1632.00
	Less Frt. on 20427# at .51 Cwt.		104.18	
	Plus 3% Fed. Frt. Tax		3.13	
				107.31
AA 2X				1524.69

National Lead Company
Cincinnati, Ohio
Manufacturers of Dutch Boy Products
641-659 Freeman Avenue
Cincinnati 3, Ohio

Campbell.

Customer's
Order No. Invoice Date Feb. 28, 1945
Requisition No. Shipped To

Sold American Battery Company
To 1520-22 McGavock St. Date Shipped 2/26/45
Nashville, Tennessee

Terms Net 30 Days Shipped From St. Louis
F.O.B. St. Louis Car No. Via Truck Prepaid & Allowed

Quantity	Description	Weight	Price	Total
13/600#	Woods Bbls. Battery Oxide 25-R	7800	8.25	643.50
20/600#	Wood Bbls. 111-M Battery Oxide	12000	8.00	960.00
		19800		1603.50

Part of Carload Order
AA 2X

1960 National Lead Company
Cincinnati, Ohio
Manufacturers of Dutch Boy Products
641-659 Freeman Avenue
Cincinnati 3, Ohio

Campbell.

Customer's
Order No. Invoice Date Feb. 28, 1945
Requisition No. Shipped To

Sold American Battery Company
To 1520-22 McGavock Street Date Shipped 2/22/45
Nashville, Tennessee

Terms Net 30 Days Shipped From St. Louis
F.O.B. St. Louis Car No. Via Truck Prepaid & Allowed

Quantity	Description	Weight	Price	Total
17/600#	Wood Bbls. Battery Oxide 25-R	10200	8.25	841.50
16/600#	Wood Bbls. Battery 111-M Oxide	9600	8.00	768.00
		19800		1609.50
				1603.50
				3213.50

19 800
19 800

39 600
19 800

59 400

AA 2X

National Lead Company
Cincinnati 3, Ohio
Manufacturers of Dutch Boy Products
641-659 Freeman Avenue
Cincinnati 3, Ohio

Campbell.

Customer's Order No. Invoice Date April 17, 1945
1961 Requisition No. Shipped To
Sold American Battery Company Date Shipped 4/10/45
To 1520-22 McGavock St.
Nashville, Tenn. Shipped From St. Louis

Terms Net 30 Days
F.O.B. St. Louis Car No. Via Truck

Quantity Description	Weight	Price	Total
30 Wood Bbls. Battery Oxide—25-R	18000	8.25	1485.00
35 Wood Bbls. 111-M Battery Oxide	21000	8.00	1680.00
5 Steel Drums Bartons Battery Litharge	3000	8.00	240.00
	42000		3405.00
Less Frt. on 43325# at .43 Cwt.		186.30	
Plus 3% Fed. Frt. Tax		5.59	
			191.89
			3213.11

By Mr. Wright:

Q. Are these invoices records of transactions of purchases of these products by you from the National Lead Company?

A. Yes, sir.

Q. In the year 1941 did you purchase similar products from the National Lead Company on a carload lot basis?

A. I don't think I purchased the same kind of oxide at that time. I think I was buying litharge and red lead, I am not positive.

Q. In 1941?

A. Yes.

1962 Q. Do you recall the price basis, the method of computing the price that existed as to those transactions in 1941?

A. In 1941 I believe litharge was $1.50 above New York market.

Q. New York market for what?

A. Lead. The litharge was $1.50 above the New York market. I am not positive about that.

Q. As to red lead, do you recall what the differential was?

Mr. DuBose: I object, Your Honor, and move to strike out the last answer also, upon the ground that this witness is not speaking of his own knowledge. He is giving an estimate, and in this situation it is not a general business condition; we are dealing with exact figures, and I think those exact figures ought to be produced rather than a witness' admittedly hazy recollection.

Mr. Wright: In that connection, Your Honor, we have made every effort to ascertain the exact invoices from this witness. He doesn't have them. Presumably the records of the National Lead Company which are in the possession of the National Lead Company will either bear out or make incorrect this witness' statement. Now I haven't got those records, and I know of no way of obtaining them.

Mr. DuBose: I will at this moment offer to the Federal Trade Commission or to any of their representatives all the invoices in the Cincinnati office, the New York
1963 office, the Chicago office, the Cleveland office, the St. Louis office, the Atlanta office, or any other offices in this country or any other country, for exact information as to any customer at any time covered by this proceeding.

Mr. Wright: Relating to this specific question, there is absolutely nothing to show and I am sure Mr. DuBose does not know whether these records are in the possession of any office of the National Lead Company. They may be, but we have no knowledge at this time. This witness is the proprietor of this business. He recalls his dealings over this period of years. Certainly he can testify as to his recollection of the price basis at which he purchased these products in 1941.

Mr. DuBose: If Your Honor please, there has been this testimony on two cents difference, five cents difference, not per pound but per battery. Now if that be pertinent—we say it isn't, in line with our objection—if it be pertinent, however, the exact figures, then, are tremendously important, and that is the basis of my objection.

Trial Examiner Norwood: I hope the exact figures will be put in later, provided they can be secured, but in the meantime I can't exclude some evidence from the manufacturers on these prices if they do recollect them.

Now you referred to a hazy recollection of this thing. I don't want this witness to give any hazy recollec-
1964 tion, but if he is fairly well convinced that such and such was the price, if that is his best recollection and he feels he can recall it with reasonable clearness, I am going to let him give it to us, subject to a check from these accurate figures which you can produce later.

Mr. Wright: Now, Your Honor, in view of the statement made by Mr. DuBose, I now request that the National Lead Company produce their invoice records of transactions with the American Battery Company during the year 1941; and in the event that production is made, I will be perfectly willing to agree to a motion to strike this previous answer.

Mr. DuBose: We will be glad to furnish any such invoices, but we can't furnish them today.

Mr. Wright: I appreciate that.

Mr. DuBose: And this is not the best evidence, in line with Your Honor's ruling in Washington. This man's recollection as to what the records will show is certainly not the best evidence.

Trial Examiner Norwood: I don't think I ever in my life ruled that some particular paper was the best evidence of prevailing prices. It may be more satisfactory evidence, but it would not be the best evidence in the sense that it excluded parol evidence.

Mr. DuBose: I don't know why it wouldn't.

Mr. Wright: This is a tempest in a teapot that
1965 we have now. Certainly there is no question that the witness' answer wasn't in line with what the officials of the National Lead Company, and everyone else, has said was the going price of the products in 1941. I fail to see the significance of the contention.

Mr. DuBose: There were various prices, quantity discounts and so on. If this whole line of questioning be pertinent, then I think we ought to have the exact figures. I say it is not pertinent.

Trial Examiner Norwood: Will you, Mr. Reporter, please read the pending question?

(The reporter read the question as follows:

"Q. As to red lead, do you recall what the differential was?")

Trial Examiner Norwood: I will ask the witness to state that, if he knows it, if he is fairly satisfied that he recollects what that was.

Mr. Welch: I would like to make a different objection to the one that has been raised. I think the question is improper. It assumes that it is on a differential basis. I think he should ask what the price of red lead was. I don't like the implication of the quetsion as to a differential.

Mr. Wright: The question was based on a differential because in answer to a previous question the witness stated the differential as to litharge.

1966 Trial Examiner Norwood: I think he may answer, and if there was no differential the witness may tell us so.

If you are fairly well convinced that you remember what that differential was, tell us about it; and if not, say that you don't know, that you are not certain.

A. I don't think I could answer anything as to that positively, and I am not positive of the differential on red lead.

By Mr. Wright:

Q. Mr. Taylor, in this market area that you have described, within a radius of 200 miles of Nashville—I will withdraw the question.

Mr. Wright: No further questions.

Trial Examiner Norwood: We will have a short recess.

(A short recess was taken.)

Trial Examiner Norwood: Proceed.

Cross-Examination by Mr. Pearce.

Q. One question that I would like to ask. I believe you said you purchased oxides from Eagle-Picher. In what year did you purchase oxides from them?

A: I don't remember what year. Sometime between 1940 and 1945, but I don't remember the year.

Mr. Pearce: That is all.

Mr. DuBose: No cross-examination.

Mr. Welch: No cross-examination.

1967 Mr. Wright: Just one more question—

Mr. Welch: (Interposing) We object to any additional questions that don't lead to the rebuttal of the cross-examination.

Trial Examiner Norwood: He may ask it, and you may cross-examine him on anything you wish to.

Redirect Examination by Mr. Wright.

Q. You stated that you purchased from Eagle-Picher sometime between 1940 to 1945. In what quantities did you purchase from them?

A. Carload lots.

Q. Do you recall the price basis on which you purchased from Eagle-Picher?

A. I don't remember the prices. They were based on the lead market price.

Q. Were you at the same time—did the National Lead Company, at the same time you were purchasing from Eagle-Picher, offer to sell you oxides?

A. They didn't make me any prices on the oxide. Their salesman called on me, but he was more or less wanting the business back, but I don't remember him ever making me any prices.

Q. And you don't recall whether the prices at which you were purchasing from Eagle-Picher were the
1968 same as the prices at which National was quoting you at that time?

A. No, sir, I don't think that National quoted me at the time I was buying from Eagle-Picher.

Mr. Wright: No further examination.

Mr. DuBose: No further questions.

Trial Examiner Norwood: You are excused, Mr. Taylor.

(Witness excused.)

Mr. Wright: I would like at this time to request counsel for the Eagle-Picher Company to produce invoice records of transactions with the American Battery Company represented by this witness.

Mr. DuBose: May I make an objection to that request at this time. Mr. Pearce is in this case for the first time this week, and Mr. Wood has for the most part been handling it, and Mr. Wood asked me to give all the help

I could to Mr. Pearce; and I think that that request should be made by letter to Mr. Wood, if you don't mind, Mr. Wright.

Mr. Wright: I would be glad also to take it up with Mr. Wood by letter, but I assume that my request—

Mr. Pearce: (Interposing) I will pass that request on to Mr. Wood, and he will be back in the case very shortly and I am sure that he will answer the request.

Mr. Wright: That is entirely satisfactory.

Trial Examiner Norwood: He is making the request on the record, and Mr. Wood will see it. He is not
1969 requesting that [illegible] be produced now.

Mr. Welch: Off the record, please.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Call your next witness.

Mr. Wright: I will call Mr. Steiner.

PERRY STEINER was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Mr. Steiner, will you state your full name, address, and occupation for the record.

A. My name is Perry Steiner, a partner in the Cumberland Battery Manufacturing Company, 201 First Avenue South, Nashville, Tennessee.

Q. What is the business of the Cumberland Battery Company?

A. We manufacture storage batteries.

Q. Over how long a period has that company been so engaged?

A. Since 1932.

Q. How long have you been affiliated with it, Mr. Steiner?

A. Since 1932.

Q. As a partner for that whole time?

1970 A. Yes.

Q. What type of batteries are manufactured by the company?

A. Lead-acid.

Q. Are they automotive replacement batteries or industrial batteries, or what type?

A. Automotive replacement.

Q. Do you manufacture a complete line of replacement batteries?

A. Yes.

Q. About how many sizes and types are there in your line, roughly?

A. Approximately 35.

Q. Over what market areas do you sell batteries?

A. Offhand, about 17 States.

Q. How far North of Nashville do you sell?

A. Three hundred miles North.

Q. That would be at what localities?

A. The Southern part of Missouri.

Q. Do you sell in Kentucky and Indiana?

A. In Kentucky, but not Indiana.

Q. Can you state what those 17 States are in which you sell?

A. Not offhand. They are mostly Southern States.

Q. Do you sell throughout the States of Georgia and Alabama?

A. Yes.

Q. And do you get into Louisiana?

1971 A. Yes, the Northern part of Louisiana.

Q. Do you sell in Mississippi?

A. Yes.

Q. Throughout the State?

A. Yes.

Q. About how far East do you go?

A. We go into North and South Carolina, approximately 350 or 400 miles from Nashville.

Q. Do you have any business in Florida?

A. In the Northern part of Florida, yes.

Q. Where are your accounts in Northern Florida?

A. We go down to Palatka.

Q. Do you do business in Jacksonville?

A. Yes.

Q. Panama City?

A. Yes.

Q. Approximately how many batteries do you manufacture a day, in normal times?

A. Well, we have a capacity output of approximately a thousand batteries a day, under normal circumstances.

Q. To what class or classes of trade do you sell?

A. We sell to dealers.

Q. For resale?

A. Yes.

Q. To the public?

1972 A. Yes.

Q. Do you have any accounts who are jobbers or distributors?

A. The jobbing and distributing accounts we have represent about 5% of our total volume.

Q. Now in normal competitive times, let's say in the period from 1936 to 1941, who were your principal competitors in the market area you have described?

A. The principal competitors were those companies which were tied in with national distribution, primarily the oil companies, the chain and mail order houses.

Q. Can you name some of those who fall within that category and represented your principal competition?

A. Western Auto Supply, Sears Roebuck, Montgomery Ward, Standard Oil, and several others, I don't recall the names off-hand.

Q. Were you in competition with the National Battery Company in that area?

A. Yes, we were in competition with them.

Q. With Globe Union Battery?

A. Yes.

Q. With Willard and Exide?

A. Yes.

Q. With the Grant Storage Battery Company?

A. I couldn't say, because they make probably private brands that we might run into, but I don't know.

1973 Q. You don't know of any private brands, for sure, that they make?

A. No.

Q. Bowers Battery Company of Reading, Pennsylvania?

A. You are speaking of 1941?

Q. Yes, from 1936 to 1941.

A. We did run into competition from Bowers, yes, from 1936 to 1941.

Q. Are you also in competition with the smaller battery manufacturers located throughout that area?

A. Well, it is natural that we would be in competition in any areas that we go into, that is obvious.

Q. Now can you give us a statement of the competitive situation in this area in the storage battery business during 1936 to 1941 with regard to price competition?

Mr. DuBose: I object as not being within the scope of the pleadings.

Trial Examiner Norwood: Objection overruled.

The Witness: Would you state that question again?

Mr. Wright: Will you read it?

(The reporter read the question as follows:

"Q. Now can you give us a statement of the competitive situation in this area in the storage battery business during 1936 to 1941 with regard to price competition?")

1974 A. Well, as I see it personally, it was competitive where there was a normal flow of business. We used the practices that were prevalent in that day, of having batteries of all prices ranging from $3 on up to the better grades that we made. We were in a fairly competitive position because we were making all types.

By Mr Wright:

Q. Did you, in that period, sell batteries as low as $3?

A. Yes, we did.

Q. What type of battery was that? Was that a 13-plate battery?

A. That was known as a short-plate battery.

Q. Were there batteries of the same type offered by any of your competitors at lower prices in that area during that period?

A. Yes, there were.

Q. Do you recall which competitors offered them at lower prices, and what those prices were?

A. It is rather difficult to recall back that many years ago. I don't recall the exact prices, except that I remember that they were below the prices that we quoted. As a matter of fact, they were sold to the general public at the same price that we were selling to the dealer trade.

Q. Do you recall what your margin of profit was on the batteries which you sold for $3 at that time?

1975 Mr. Welch: Your Honor, I take it that we may have a continuing objection to this line of questioning, based on the same objections, that we had with respect to the previous witness?

Trial Examiner Norwood: Yes.

A. I don't recall the profit on the competitive batteries at that time.

By Mr. Wright:

Q. Do you recall your costs of production on that battery at that time?

. Well, the cost varied from year to year, according he change in prices of the materials. I couldn't give definite figure for any specific year. I don't recall.

. From what company or companies does Cumberland chase lead oxides?

. During 1932 to 1941, is that the question?

. Yes.

. We purchased from Eagle-Picher Lead Company the National Lead Company.

. In the period from 1936 to 1941, in what quantities you purchase? Did you purchase in carload lots or 5- lots—

. (Interposing.) We purchased in carload lots.

. During the year 1941, from what companies did you chase?

. We purchased lead from Eagle-Picher Lead Company and the National Lead Company.

Q. From both companies?

A. Yes.

. Do you recall the total quantity that you purchased each of those companies during that year?

. Yes, I have the figures here. Thirteen carloads each company, a total of 26 cars for that year.

. Can you state the price basis on which you chased?

. The price basis that we paid these lead companies based on their differential charge of $1.50 and $1.75.

. What was that differential—

. (Interposing.) Plus the cost of the lead. In other ds, we bought on the quoted lead market plus $1.50 $1.75 per thousand pounds.

. The $1.50 differential was for what product?

. For the negative mix, the negative oxide.

. Is that litharge?

. Yes.

. What was the $1.75 differential?

. For the red lead, or positive mix.

. You say that that differential was over the cost of lead, is that correct?

. Yes, that is correct.

. At what market, do you know?

. It was based on the current lead market.

Q. At what point?

A. We normally purchased on the East St. Louis lead market.

Q. Was your purchase, then of the negative mix at $1.50 over the St. Louis lead market?

A. That is right.

Q. Do you know the points of origin of the shipments of oxides to you from Eagle-Picher?

A. As I recall it, before 1941 I know their plant was in Joplin. I am not sure whether it came out of St. Louis or Joplin.

Q. Can you state where the oxides you purchased from National Lead Company were shipped from?

A. Some came from St. Louis, and I think some came out of Cincinnati.

Q. Lead shipped out of Cincinnati?

A. I don't recall where National has been shipping from, because I don't handle the purchases and am not too familiar with the shipping point.

Q. Were you requested to furnish invoices showing your transactions in oxides during 1941, and to bring them to the hearing?

A. Yes.

Q. Were you able to locate such invoices?

A. No, we were not. I brought a transcript of our book records showing the amounts that were purchased.

Mr. Wright: No further examination.

1978 Trial Examiner Norwood: Cross examine.

Mr. Welch: Your Honor, may we have a minute or two recess?

Trial Examiner Norwood: Yes—a five minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Proceed.

Mr. Wright: Your Honor, I would like to ask the witness one more question before tendering him for cross examination, if there is no objection by counsel.

Trial Examiner Norwood: Go ahead.

By Mr. Wright:

Q. Do you recall your statement of the price basis at which you purchased lead oxides, Mr. Steiner?

A. Yes, and I am sure I was wrong on it. I was thinking of pig lead that we purchased on the East St. Louis market. The oxides were purchased on the New York market lead price.

Q. At a differential over new York?

A. Yes.

Mr. Wright: No further questions.

Trial Examiner Norwood: Cross examine.

Cross Examination by Mr. DuBose.

Q. Mr. Steiner, was that at a differential over the New York pig lead market?

A. Yes.

1979 Q. I believe you said, Mr. Steiner, that you or your company was in competition with Sears Roebuck, Montgomery Ward, and other large chains?

A. Yes.

Q. Was that direct competition with you or competition between their customers and your dealers?

A. Between their customers and our dealers, yes.

Mr. DuBose: No further questions.

Trial Examiner Norwood: You are excused.

(Witness excused.)

Trial Examiner Norwood: Call your next witness.

Mr. Wright: I will call Mr. Hester.

EUGENE NELSON HESTER was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Mr. Hester, will you state your full name, occupation and business address for the reporter?

A. My name is Eugene Nelson Hester; I am connected with the Hester Battery Manufacturing Company of 418 Second Avenue, South, Nashville.

Q. What is your connection with that company?

A. I am vice president.

1980 Q. Over how long a period of time have you been connected with the company?

A. Practically all my life. During that time I served in the Army and have gone to school, naturally.

Q. Who are the other officers of the company, Mr. Hester?

A. My father, C. A. Hester; and my mother, Mrs. C. A. Hester.

Q. How long has the company been in business?

A. Since 1928.

Q. What products are manufactured by the company?

A. Batteries and batteries only.

Q. What type of batteries?

A. Automotive, primarily, truck, bus, radio, a certain amount of industrial batteries, and farm light.

Q. Do you make a complete line of automotive replacement batteries?

A. Yes, sir, we do.

Q. Over what market area does Hester normally sell its batteries?

A. Approximately five states. Of course that is partial because we don't cover all of those states. In certain cities it isn't feasible for us to go there.

Q. What are those states?

A. Kentucky; Tennessee; Alabama; part of Georgia; and North Carolina and South Carolina.

Q. Do you travel salesmen over those states?

1981 A. Yes sir, we do.

Q. Are there any of those States that you cover completely?

A. None of them that we absolutely cover completely.

Q. Do you sell in Atlanta?

A. We have one account in Atlanta.

Q. Do you sell in Memphis?

A. To one account there.

Q. Do you sell in Birmingham?

A. Yes sir, we have three accounts in Birmingham.

Q. What is the approximate average daily output of batteries of your plant in normal times?

A. Around 150 a day.

Q. From what company or company or companies does Hester purchase oxides?

A. The National Lead Company. We have dealt with the Eagle-Picher and also Hammond Lead Works.

Q. Over what period of time have you dealt with The National Lead Company?

A. For approximately ten years we have used their products almost exclusively.

Q. In what quantities do you purchase?

A. We purchase in carload rates, although they ship it by truck due to the fact that we don't have a siding.

Q. They ship it by trucks?

A. Yes.

Q. From what shipping points do they send it?

1982 A. It generally comes from St. Louis if they have the oxides, if they don't we get it out of Atlanta, Georgia.

Q. Over what period have you purchased from Eagle-Picher?

A. Well, only a short period of time. At one time, although I can't give you the definite dates, we did buy quite a bit of oxide from Eagle-Picher.

Q. Can you give us the approximate dates?

A. Probably in 1937 or 1938.

Q. Did you bring with you any invoices showing transactions with National Lead Company?

A. In 1941, which I was requested to.

Q. Do you have those invoices with you at the present time?

A. Yes, sir.

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: I would like to ask that these documents be marked as Commission's exhibits.

Mr. DuBose: In evidence, or for identification?

Mr. Wright: For identification at this time.

Trial Examiner Norwood: They will be marked as Commission's Exhibits 842-A to 842-I, inclusive, for identification.

1983 (The documents referred to were marked Commission's Exhibits 842-A, 842-B, 842-C, 842-D, 842-E, 842-F, 842-G, 842-H, and 842-I for identification.)

By Mr. Wright:

Q. Mr. Hester, I show you these documents which have been marked for identification as Commission's Exhibits 842-A to 842-I, inclusive, and ask you to state what they are?

A. The first is dated March 6, 1941, covering 60 drums of Bartons Battery Litharge, 36,000 pounds, and the price is $7.15 per—

Trial Examiner Norwood: (Interposing.) Don't read from the invoices if they are to be offered in evidence; just identify them. Just state what they are.

Mr. DuBose: May I look at them?

(The documents were handed to Mr. DuBose for examination.)

Mr. DuBose: Mr. Wright, I will concede, subject to correction, that these are invoices and shipping memoranda attached thereto, from the Cincinnati office of The National Lead Company and the St. Louis Branch, as indicated on the respective invoice or memoranda, for the dates thereon shown, showing sales of various oxides as named thereon by the National Lead Company to Hester Battery Manufacturing Company, Nashville, Tennessee, and I have no objection to them going into evidence.

By Mr. Wright:

Q. Mr. Hester, do these papers, Commission's Ex-
1984 hibits 842-A to 842-I, inclusive, represent records of
transactions of purchase of the products named thereon by your company from The National Lead Company?

A. They do.

Mr. Wright: Your Honor, I offer these in evidence.

Mr. DuBose: No objection.

Trial Examiner Norwood: Received as marked.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 842-A through 842-I, were received in evidence.)

By Mr. Wright:

Q. Mr. Hester, what is your principal competition in the market area which you described, in normal competitive times?

A. Our main competition is the large manufacturers of products that have tie-in sales with batteries. For example, the Ford Motor Company has its own battery and they require the Ford dealers to sell that battery. General Motors has the same thing. Gulf Oil Products has the same thing, and also Pure Oil Company. There are a number of those concerns.

Mr. Welch: I assume that as to this witness, as well as the immediately preceding one, we continue to have a continuing exception to this type of testimony as to relationships between third and fourth parties that have no connection with this witness?

Trial Examiner Norwood: Counsel may have such
1985 a con— objection and exception to that type of testi-
mony just described.

By Mr. Wright:

Q. Mr. Hester, to what class of customer do you sell your battery?

A. Generally to garages and motor car companies and filling stations.

Q. Who in turn resell them?

A. Yes, to the consumer.

Q. Have you been advised by such customers regarding the competition which they encounter in this market area?

A. I don't follow your question.

Q. What is the source of your information regarding competition from the companies that you named, Ford, and General Motors, and Standard Oil?

A. Naturally I have gotten out and sold on the road myself, as well as the fact that I hear other salesmen speak of the competition they have encountered.

Q. Have you been advised of this competition by the dealers to whom you sell?

A. Certainly.

Q. And whom you solicit?

A. Certainly. Quite frequently a small concern like ours will go in to solicit the business of, say, a Chevrolet dealer, and he will tell us, "Gentlemen, I am sorry,
1986 I would like to buy your batteries, you are local people and you have got a good product, but we can't buy them, we have to sell what General Motors says for us to sell."

Q. Do you know what battery is handled on that basis by General Motors?

A. They have the Delco battery; that is their own plant.

Q. Do you know what battery is handled on that basis by the Ford Motor Company?

A. They have a Ford battery, but it is built by other organizations.

Q. Do you know what other organizations build that battery?

A. One concern that I know does have a contract with them is the Globe Union Corporation.

Q. Do you know what battery is handled on that basis by the Standard Oil Company?

A. The Standard Oil Company has the Atlas battery, they have a complete line of Atlas products, but who manufactures that battery I don't know. I don't think that Standard manufactures them themselves.

Q. Are you in competition, or are your dealers in competition, with Sears Roebuck?

A. Certainly, our dealers are.

Q. Do you know who manufactures the battery for Sears Roebuck?

A. The Globe Union Corporation. I understand that
quite frequently batteries will be manufactured by
1987 more than one concern, that they might have contracts with several different battery manufacturing companies at the same time, supplying the same brand name.

Q. Mr. Hester, will you tell us what the situation was in your market area in the period say from 1938 to 1941 as to price competition on batteries?

A. Yes. That is rather a wide field. In our particular case a battery at that time that we would sell, a standard 15-plate, 18 months guarantee battery, we would sell that battery at that time for around $5.95 to the dealer. The dealer in turn would sell it for around $9.50 to $9.60. Of course I don't know the exact figures at that time. We have old price lists if you should want them. Other concerns sold at approximately the same figures on that size of battery, but the competition that we encountered then other than with respect to these tie-in sales, would be the fact that quite a few of the companies would have highly competitive batteries, lightweight batteries, batteries say with a six months' guarantee, which they would sell for $3.10 and $2.85, and in some cases I have even heard it rumored that they would get down as low as $2.18.

Q. Can you state what firms were offering these low-powered batteries at $3.10 and $2.85?

A. Yes sir. I understand that the Bowers Battery Man-
ufacturing Company had a battery at that price, and
1988 so did Royal. I understand that most all concerns did
have a competitive battery.

Q. Did you manufacture a battery in that price range?

A. We manufactured a battery that we sold for $3.50 to the dealer, guaranteed for six months.

Q. These prices that you referred to of $3.10 and $2.85 were the prices to the dealer, or the retail prices?

A. The prices to the dealer.

Q. Do you recall the prices in that period at which Sears Roebuck was offering these cheap batteries for sale at retail?

A. They were offering an 18 months, 15-plate, Group 1 battery for about $4.45 and your old battery. Of course we would find that a Sears Roebuck store in one community would offer a battery at a different price than in another community.

Q. Was that substantially the same battery as the one you sold to dealers at $5.95?

A. It was approximately the same battery. It had about the same thickness of plates and the same type of case and so forth.

Q. At what period of time was it that you were offering this battery with the six months' guarantee at $3.50?

A. Do you mean how long a length of time we offered it for sale?

Q. Yes sir.

A. From about 1932 up until the first of the war, 1941.

Q. Do you know what your profit margin was on that battery?

A. I am of the opinion that we lost slightly on a 1989 battery of that capacity at that price. The reason I can't tell you exactly is because we don't have elaborate cost accounting systems; we have more of an overall picture.

Q. In purchasing oxides from the National Lead Company do you know the basis on which the prices were computed?

A. I was told that those prices were computed on the market price of pig lead, and a certain addition added for converting it from the metallic form over to the oxide.

Mr. DuBose: I move to strike out the answer on the ground that it is hearsay—"I was told."

By Mr. Wright:

Q. Who told you that?

A. Representatives of the lead companies.

Trial Examiner Norwood: Motion denied.

By Mr. Wright:

Q. Do you recall the price basis on which you purchased from the Eagle-Picher Company, as to oxides?

A. It was approximately the same basis as the National Lead Company.

Q. Do you know what that differential was, or on what market it was based?

A. Do you mean whether it was based on the New York or St. Louis market?

Q. Yes.

A. I understood that it was the New York market.

1990 Q. Do you know what the differential was on litharge or negative oxide?

A. Do you mean the amount of mark-up?

Q. Yes.

A. I was of the opinion that it was $1.50 per thousand.

Mr. DuBose: I move to strike the answer on the ground that it is an opinion statement, and he is not being asked as an expert.

Mr. Wright: I will withdraw the question.

Trial Examiner Norwood: Strike the answer.

Mr. Wright: I have no further questions, Your Honor.

Trial Examiner Norwood: Cross-examine.

Mr. DuBose: No questions.

Mr. Wright: May I ask one question?

Trial Examiner Norwood: Counsel may ask another question.

By Mr. Wright:

Q. Did you appear here, Mr. Hester, as the result of a subpoena requiring your attendance at this hearing?

A. Yes sir, I did.

Q. You didn't volunteer to be a witness in this proceeding?

A. No sir, I didn't.

Cross-Examination by Mr. Welch.

1991 Q. Mr. Hester, you did have some interviews with representatives of the Federal Trade Commission prior to the time you were subpoenaed?

A. Yes sir, I did.

Q. Was one of them named Mr. Dixon?

A. I don't recall the name.

Q. Did he have a Southern-sounding voice?

A. That would be hard for me to say. I don't know what a Southern-sounding voice is.

Q. Did you know that he was a Nashville man?

A. I understood him to state that he had previously lived at Nashville.

Q. And had gone to school at Vanderbilt?
A. Yes, sir.
Mr. Welch: That is all.

Redirect Examination by Mr. Wright.

Q. Did he inquire if you would be willing to appear as a witness in a proceeding before the Federal Trade Commission?

A. He asked me if I was willing and I told him that if I was subpoenaed I would have to appear.

Mr. Wright: No further questions.

Mr. DuBose: No further questions.

Trial Examiner Norwood: You are excused.

(Witness excused.)

Trial Examiner Norwood: Call your next witness, 1992 Mr. Wright.

Mr. Wright: Your Honor, I have no more witnesses at this time and suggest that we recess until ten o'clock tomorrow morning at Birmingham.

Trial Examiner Norwood: Is that agreeable to counsel?

Mr. DuBose: Yes sir.

Trial Examiner Norwood: The motion is allowed and the hearing is now adjourned to reconvene in the City of Birmingham, Alabama, at 10 o'clock a. m., Central Standard Time, November 22, 1946, in Room 210, Jefferson County Court House in said city.

(Whereupon, at 12:10 p. m., November 21, 1946, the hearing in the above-entitled matter was adjourned to Birmingham, Alabama, at 10 o'clock a. m., CST, November 22, 1946.)

1993

Room 210, Jefferson County
Court House,
Birmingham, Alabama,
November 22, 1946.

Met, pursuant to adjournment, at 10:00 a.m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., Appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 815—15th Street, N. W., Washington, D. C.), appearing for Sherwin-Williams Company.

James W. Pearce, Esq., (2801 Carew Tower, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

1994

PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment in Nashville, Tennessee, on November 21, 1946, the hearing in Docket 5253 is now convened at 10 o'clock, a.m., on November 22, 1946, in Room 210, Jefferson County Court House, Birmingham, Alabama.

The reporter will please enter the appearances.

Call your witness.

Mr. Wright: I will call Mr. McKinley.

FRANK F. McKINLEY was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Mr. McKinley, will you state your full name, occupation and address for the record, please?

A. Frank F. McKinley, 2011 Second Avenue, South, Birmingham, Alabama.

Q. What is your occupation, Mr McKinley?

A. Battery manufacturing.

Q. Do you manufacture batteries at that address which you just gave?

A. Yes, sir.

1995 Q. Under what trade name do you operate?

A. We use the name of Liberty.

Q. Is the enterprise a corporation, a partnership, or what?

A. It is a partnership.

Q. And what is the name of the partnership?

A. We operate under the name of Alabama Electric Battery Company.

Q. Are you a partner in that business?

A. Yes, sir.

Q. How long have you been engaged in the manufacture of batteries?

A. About 25 years.

Q. Here in Birmingham for that entire length of time?

A. About 20 years in Birmingham and 5 years in Chicago.

Q. How long have you operated as the Alabama Electric Battery Company?

A. About ten years.

Q. What type of batteries do you manufacture?

A. Automobile replacement batteries.

Q. Do you manufacture a complete line of replacement batteries?

A. Yes, sir.

Q. What is the average daily output of batteries by your concern?

A. Right now about between fifteen and twenty.

Q. In what market areas do you sell those batteries?

1996 A. Just here in Birmingham at the present.

Q. To what types of customers do you sell?

A. Well, partly retail, and right now we are selling to some dealers that retail them.

Q. About what percentage of your business, roughly, is at retail?

A. At the present about 25 per cent.

Q. What was that percentage in 1941, do you recall?

A. Well, at that time it was practically all what you would call retail. We had some customers that were fleet owners or car dealers where we sold them at a discount, but it was practically retail entirely at that time.

Q. Did the fleet owners use the batteries themselves?

A. Yes, they weren't for resale, but for their own use.

Q. Who were your principal competitors in the battery business in your market area in the period from 1936 to 1941?

A. Our main competition was from mail order houses, such as Sears, Roebuck and Western Auto Supply. We had some competition from Nashville, and there was another manufacturer here in town that sold some to dealers and didn't sell any retail, but we could meet that competition easily enough.

Q. You mentioned competition from Nashville, what competition was that?

A. From the Cumberland Battery Company which did quite a lot of business here, and the American Battery
1997 Company did some, and there were some Hester batteries here.

Q. Does the National Battery compete in this area?

A. Well, they ship some in. You mean the National Battery Company?

Q. Yes.

A. As I understand it they make batteries for several different companies under different names—.

Mr. DuBose: I move to strike the answer as not responsive.

Trial Examiner Norwood: Read the question and answer, Mr. Reporter.

Mr. Wright: Your Honor, he hadn't finished his answer. He was explaining it. I assume we will know more when he finishes as to just how the National Battery Company does compete in this area if it competes.

Trial Examiner Norwood: Read the question and the portion of the answer that he had given.

(The Reporter read the record as follows:

"Q. Does the National Battery compete in this area?

"A. Well, they ship some in. You mean the National Battery Company?

"Q. Yes.

"A. As I understand it they make batteries for several different companies under different names—")

1998 Trial Examiner Norwood: Motion denied; finish your answer.

The Witness: They sell batteries here, and that is competition.

By Mr. Wright:

Q. Are Willard and Exide competitive with you in this area?

A. Yes.

Q. How about the Bowers Battery Company?

A. At different times they ship batteries in here. They haven't had a regular dealer here all the time but they have at several times shipped batteries in here.

Q. How about Grant?

A. No, I haven't seen any of those here.

Q. How about Auto-Lite?

A. Yes, Auto-Lite.

Q. Will you state what the competitive conditions were in this market area in the storage battery business in the period from 1936 to 1941?

A. Well, the competition was pretty keen. There was quite a lot of price cutting; prices were low and those conditions were pretty bad. It was pretty hard for us to compete due to the fact that we were a small company and buying in small quantities.

Q. Were you able to meet the prices that existed in this area in that period which were quoted by Sears Roebuck?

1999 A. No sir, we didn't sell at that low a price.

Q. Do you recall the prices which were quoted in this area in that period by Sears Roebuck and some of the other concerns that you have named as competitors?

Mr. DuBose: I object upon the same ground as I did yesterday, to this whole line of questioning.

Trial Examiner Norwood: Objection overruled.

The Witness: The answer is no.

By Mr. Wright:

Q. Did you, in the period 1936 to 1941, make a 13-plate battery?

A. Yes, sir.

Q. What was your selling ~~price~~ on that battery in 1941, do you recall?

A. As near as I recall it was $7.50.

Q. Was that the retail selling price?

A. Yes.

Q. Was that the cheapest battery in your line?

A. Yes; we built some that sold for less than that but as to completely new batteries that was the cheapest one we made.

Q. Do you recall what your selling price on that battery was in the period prior to 1941, say back to 1936, 1937 or 1938?

A. About the same, as near as I can remember.

Q. From what company or companies have you purchased lead oxides?

2000 A. Eagle-Picher Sales Company.

Q. Is that true over the whole period of your operations?

A. Yes, sir.

Q. In what quantities have you purchased the oxides?

A. Well, back in 1941 we only used from 600 to 1200 pounds a month. At the present we are buying about 3000, which is the limit that we are allowed to buy.

Q. In what quantities did you order in that period of time from Eagle-Picher?

A. We usually ordered two drums—1200 pounds.

Q. Were you requested to bring with you invoices showing purchases from Eagle-Picher during 1941?

A. Yes, sir, but I couldn't find an invoice dated that far back.

Q. Do you know the prices which you paid for oxides from the Eagle-Picher Company in 1941?

Mr. DuBose: The same objection, if Your Honor please.

Trial Examiner Norwood: Objection overruled.

The Witness: From our ledger records it was $8.50 on what they call Zerox, and $8.75 on Perox.

By Mr. Wright:

Q. Mr. McKinley, can you state what your profit was on a per battery basis in the period from 1936 to 1941?

2001 Mr. DuBose: I object upon the ground that this wouldn't be the best evidence. I think, if this be pertinent, that the books of the company would be the best evidence.

Trial Examiner Norwood: Read the question.

(The reporter read the question.)

Mr. Wright: Your Honor, it is obvious in this type of testimony that if we were required to produce the books and records of every witness on this point that we would be here endlessly. Certainly what a partner in the business states his profit was, is competent evidence of that fact.

Trial Examiner Norwood: I think so; the objection is overruled.

The Witness: Well, the profit during that period was —in fact there was no profit, figuring a reasonable compensation for ourselves. We were small operators and if we figured reasonable salaries for ourselves there would be no profit in that quantity. In fact you would figure a loss if you figured on a fair compensation.

By Mr. Wright:

Q. Mr. McKinley, if you were able to save, on your cost of materials, ten cents per battery, how would that have affected your competitive ability in 1936-1941?

Mr. DuBose: The same objection, and on the additional ground that it is purely hypothetical. There is no evidence in the record that anyone could have saved ten cents
2002 per battery.

Mr. Wright: Your Honor, that goes to the very issue of the case. One of the principal issues is discrimination and I believe from other parts of the record it is obvious that the discrimination that is at issue would amount to at least ten cents per battery, and the question of the effect of that discrimination is at issue here.

Trial Examiner Norwood: Isn't there some evidence in the record from which it could be determined that some dealers whould save as much as ten cents on a battery?

Mr. DuBose: I don't believe so.

Mr. Wright: It has been testified to by this witness, Your Honor, that he makes a full line of batteries, and by numerous other witnesses that an ordinary 15-plate battery requires about 23 pounds of lead, 40 percent of which is oxides—

Mr. DuBose: I would like to move to exclude the witness if we are going to have this sort of argument. I think it is a little leading. I don't think that that is in Mr. Wright's mind but I believe that it is a little leading, if I may put it that way.

Trial Examiner Norwood: I think his answering my question is not informing the witness of anything, because he is answering as to what is already in the record.

Mr. DuBose: I don't think we have gone that far
2003 yet, but I didn't want him to go into certain details

that might put words in the mouths of the witness, that is all.

Trial Examiner Norwood: I shall overrule the objection and let us stop the discussion. The witness will answer the question.

Mr. Wright: Perhaps the question had better be read.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Mr. McKinley, if you were able to save on your cost of materials, ten cents per battery, how would that have affected your competitive ability in 1936-1941?")

Mr. Welch: I object to the question as being incomplete in that it is necessary, for his ability to compete to be improved, for the question to include the condition that he save five to ten cents per battery and his competitors to not have a similar saving. Otherwise the question is incomplete.

Mr. Wright: I am perfectly willing to accept that amendment to the question, Your Honor, and will ask the witness to answer with that condition added.

Trial Examiner Norwood: The witness will answer it from a standpoint of the savings which he would have received which his competitors would not have received. Can you answer that question?

2004 The Witness: Well, on the quantity of batteries which we were making it would amount to about ten dollars a month, which with us might have made the difference between profit and loss. Of course we are small operators.

Mr. Wright: No further questions.

Trial Examiner Norwood: Cross examine.

Cross Examination by Mr. DuBose.

Q. Mr. McKinley, you say your company is a partnership?

A. Yes sir.

Q. And you have been in business how long?

A. With the present company, about ten years.

Q. Have you been able to live?

A. I have managed to live.

Q. And you have stayed in the business?

A. Yes sir.

Q. And when you say that you made no profit over a certain number of years you were taking into account what you thought you, as a partner, ought to get as reasonable compensation, is that correct?

A. That is correct.

Mr. DuBose: No further questions.

Redirect Examination by Mr. Wright.

Q. Mr. McKinley, what do you figure is a reasonable compensation to you for your services in that partnership? 2005

A. Well, at the time you mentioned, back in 1941, up to that period I was making about $35.00 a week.

Mr. Wright: No further questions.

The Witness: That was 12 hours a day for a six-day week.

Mr. Wright: No further questions.

Trial Examiner Norwood: Thank you, Mr. McKinley. You are excused.

(Witness excused.)

Trial Examiner Norwood: Are you ready with your next witness, Mr. Wright?

Mr. Wright: Yes sir. I will call Mr. Burke.

W. A. BURKE was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Mr. Burke, will you state your full name and address for the record, please?

A. W. A. Burke. Four First Avenue, North, is the business address; 1113 Woodland Avenue is my home address.

Q. What is your occupation, Mr. Burke?

A. I am a manufacturer of batteries.

2006 Q. Under what trade name?

A. Truxton.

Q. What is the full name of that company?

A. Truxton Battery Manufacturing Company. However, I would like to state that I was operating under Burke's Battery Hospital up until the first of October of last year.

Q. Is that an individual enterprise, a partnership, or a corporation?

A. We started back into it the first of last October as a partnership, and operated for three months like that. Then I bought my partner out and I am operating as an individual.

Q. How long have you been connected with that business?

A. I have been making my own batteries since 1932, October 1, 1932.

Q. And have you been manufacturing batteries over that period?

A. I have been manufacturing batteries since that time with the exception of the fact that we closed down during the war. They took my help away from me, the Army got two of my skilled men in the same month and I had to close down on account of labor.

Q. What type of batteries do you manufacture, Mr. Burke?

A. Replacement batteries for automobiles.

Q. Do you make a complete line of replacement batteries?

A. For all popular makes of cars. I don't go into bus and special batteries, just passenger automobile and truck batteries.

2007 Q. What is your average daily production of batteries?

A. We run about 30 a day now, on the average.

Q. About what was your production of batteries in 1941?

A. Well, we weren't running but about 300 a month, then, two to three hundred a month.

Q. In what market area do you sell these batteries?

A. Principally in Birmingham and Jefferson County.

Q. To what type of customer do you sell?

A. Well, I sell retail. I have a filling station connected with me and I sell retail, and sell some dealer accounts too.

Q. About what percentage of your production is sold at retail?

A. About twenty per cent.

Q. Was that also true in 1941?

A. Yes.

Q. The same relation?

A. Yes.

Q. Mr. Burke, will you state who your competitors were in that market area during the period, say from 1936 to 1941?

A. Well, if you are speaking of retail competition, Western Auto and Sears Roebuck have always been our hardest competitors; and in the wholesale sales I would say Cumberland out of Nashville, that is on price, according to price. They are the only price competitors I have that bother me much, Cumberland. Of course Willard and Exide are
2008 well established, but their prices range up higher than ours.

Q. Are you also in competition with Delco?

A. Well, Delco took the largest account I had away from me in about 1934, not on price but because of the fact that the Birmingham Electric Battery Company was selling my batteries—I was building batteries for them at that time—and Delco put the pressure on them on account of the other lines of merchandise—United Motor Service was their sales organization.

Q. Did that account tell you why they were discontinuing buying from you?

A. Yes.

Mr. DuBose: May I have the same objection to this line of questioning?

Trial Examiner Norwood: The same ruling.

By Mr. Wright:

Q. What was that reason?

A. Mr. Curry stated that United Motors had threatened to take the Delco Remy account and other accounts that they controlled, away from Birmingham Electric, if they didn't handle the Delco battery.

Q. Were you in competition at that time with the batteries sold by the various oil companies?

A. At that time I don't remember of any oil company having batteries. I don't think there were any oil
2009 companies in the battery business at that time. Atlas, which is the Standard Oil battery, have come into the business since; and Pure Oil has come into the picture since then; and of course all these others followed. I think Standard and Pure were the first two to get in the market with batteries.

Q. When was that, do you recall?

A. I can't recall exactly the date, but it was somewhere around 1935 or 1936.

Q. We were speaking of the 1936-1941 period.

A. Well, it was somewhere around that time, 1936, that they came into the picture. I don't remember offhand the exact date. I have been handling Pure Oil products in the station there since Jnuary, 1932, and I remember when I first went in the station they didn't like the idea of me handling these different lines of merchandise because they said it would interfere with my gasoline sales, that I would put too much time on batteries and tires and things like that. But less than two or three years later they were in it in a big way themselves, with the same line of thought that you had to have other merchandise to supplement your gas and oil sales.

Q. Mr. Burke, what prices did you quote on your standard batteries, leading standard batteries, during 1941?

A. Do you mean wholesale or retail?

Q. Both.

A. The wholesale price, if I remember right, was
2010 around $4.85 with the old battery exchanged. We
used to trade in retail and wholesale on old batteries,
and still do.

Q. What type of battery was that?

A. That was the Group 1 and low-type Ford. Group 2 low types, some of them term it.

Q. Were those 15-plate batteries?

A. The low-type is 15-plate and the Group 1 is 13-plate. My plates are heavier than those of the average manufacturer; I make a heavier plate.

Q. Do you recall the prices at which your competitors were offering similar batteries at wholesale and at retail in this area at that time?

A. I can't recall about the wholesale prices, because I didn't keep up with them very well, but my prices and Cumberland Battery Manufacturing Company's prices were close together, I had to compete with them to stay in business.

Q. Can you state what your margin of profit was on that battery on which you competed with Cumberland at that time?

A. On a wholesale basis it would run about 75 cents to a dollar a battery.

Q. Is that net profit that you are speaking of?

A. No, that is gross profit above material and labor.

Q. In other words, that didn't include any compensation for yourself?

A. No.

2011 Q. From what company or companies have you purchased lead oxides, Mr. Burke?

A. When I first got into it I had an agreement with Birmingham Electric Battery Company. They bought in carload lots and they sold to me—I built their batteries—on a cost-plus basis, and they furnished me with all the materials, cases, oxides and lead, acid and everything, and gave me a close price on it, and I in turn built batteries for them on that basis, on a cost-plus basis. It made me get the materials that I used in my own batteries much cheaper than I could have gotten them anywhere else.

Q. Over what period of time did that relationship exist?

A. 1932 to 1934.

Q. From whom did you purchase oxides subsequent to 1934?

A. I bought some direct from National Lead Company, and I bought through Aero Battery Company.

Q. In what quantities did you purchase, Mr. Burke?

A. At that time we just picked it up as we needed it because it was right here in town, maybe one or two drums at a time.

Q. When you purchased direct from National Lead Company, in what quantities did you purchase?

A. Small quantities; there weren't any large quantities?

Q. Was it as much as five tons at any time?

A. No sir, less than five.

Q. Do you recall the price basis that you were on

2012 in purchasing from National at that time?

A. I had price quotations all along from them; I still have them in my files. It varied. Say in 1938 I think it varied anywhere from about, as I recall, 6¼ to 8 cents a pound. That was the card price; they sent out a card every month.

Q. You bought on a card price basis?

Mr. DuBose: I move to strike out the last answer on the ground that the witness has stated that he has the exact figures in his records; therefore his testimony is not the best evidence.

Mr. Wright: Your Honor, before you rule on that may I ask the witness one more question?

Trial Examiner Norwood: Yes.

By Mr. Wright:

Q. Do you recall whether the prices you paid National Lead Company at that time were the prices which appeared on their cards?

A. Oh yes, sure.

Q. And you purchased in less than five ton quantities?

A. That is right.

Mr. Wright: Your Honor, the price cards of National Lead Company on this material are already in the record, and the witness has stated that he purchased at those card prices.

Trial Examiner Norwood: Well, do you want him
2013 to try to give any further information about that?

Mr. Wright: No, sir. I am not trying to prove what the price was at that particular time. I will admit that the best evidence as to what the prices were would be the cards themselves. All I am attempting to establish is what was the price basis on which this company was quoted and sold.

Trial Examiner Norwood: I think that the price marked on the card is the best evidence of what the card showed, but not necessarily the best evidence as to what the price was. The price may have been different, above or below the card price. I will rule on this when you read the answer, Mr. Reporter.

(The reporter read the answer as follows:

"A. I had price quotations all along from them; I still have them in my files. It varied. Say in 1938 I think it varied anywhere from about, as I recall, 6¼ to 8 cents a pound. That was the card price; they sent out a card every month.")

Trial Examiner Norwood: The motion is denied in view of the fact that the exact figures are in the record.

By Mr Wright:

Q. Have you purchased oxides from any other suppliers, Mr. Burke?

A. This year I have purchased some from Metals Refining Company, Hammond, Indiana.

2014 Q. Had you purchased from them prior to this year, before this?

A. I don't recall of any purchases from them before May, I believe, or June, of this year.

Q. Mr. Burke, going back now to this period of 1936 to 1941, if you had been able to purchase the materials that went into the manufacture of your batteries, at five cents per battery cheaper than you did, and provided that your competitors had paid what they did, would that have affected your ability to compete in your market area?

Mr. DuBose: If your Honor please, I have the same objection, and in addition, with respect to this witness I have the further objection that this witness has already stated, as I recall it, that the majority of his oxides were purchased not from any one of the respondents but from the Aero Battery Company.

Mr. Wright: Your Honor, he has also testified that he did purchase from the National Lead Company during this period, and I believe he mentioned the year 1938.

Trial Examiner Norwood: I think he may be permitted to answer; the objection is overruled.

The Witness: That question was if I could have purchased at a lower price would I have been able to meet competition better?

Mr. Wright: Yes sir.

2015 Trial Examiner Norwood: At a saving of five cents on a battery.

The Witness: Of course in that period five cents meant a whole lot more than five cents does now, and the ability to buy at a lower price, of course, even at five or ten cents a battery, would make the difference between staying in the business and not staying in it.

Mr. Wright: No further questions, Your Honor.

Trial Examiner Norwood: Cross-examine.

Cross-Examination by Mr. DuBose.

Q. Mr. Burke, you stated that you purchased oxides prior to 1934 from the Birmingham Electric Battery Company?

A. Yes.

Q. And after 1934 from Aero Battery Company and National Lead, is that correct?

A. Yes, that is right.

Q. Do you recall over the years from 1934 say up through 1941, what percentage of your needs were supplied by Aero Battery Company and what percentage you bought from National Lead?

A. Well, the major part of it was bought through Aero Battery Company.

Q. Through them?

A. Yes; they bought in carload lots and I bought it as I needed it.

2016 Mr. DuBose: No further questions.

Mr. Welch: No questions.

Redirect Examination by Mr. Wright.

Q. Mr. Burke, do you know who supplied the oxides to Aero that you purchased?

Mr. DuBose: I object to that upon the ground that it will be hearsay.

Trial Examiner Norwood: He asked if he knew. He can answer that yes or no.

The Witness: Oh yes, it is marked on the cans. You can identify that, there is no question.

Mr. Welch: I object on the further ground that it isn't proper redirect.

Trial Examiner Norwood: Strike that answer.

Mr. Wright: It is just going a step farther than the cross-examination along the same line.

Trial Examiner Norwood: Mr. Burke, he asked you whether or not you knew that.

The Witness: Yes, I know.

By Mr. Wright:

Q. How do you know that, Mr. Burke?

A. Well, your cans are stamped with the name of the company on the cans. They are metal drums, they come around 600 pounds to the drum. They vary a little
2017 bit. Some companies use one weight and some another.

Q. What company produced those oxides?

A. Well, Aero bought not from one company, but they bought from National Lead and Eagle-Picher Lead, if I recall. I have used some of both.

Q. You say that they bought in carload quantities?

A. That is right.

Q. What price was quoted to you by Aero?

A. They sold me on the same basis as I could order in less than five ton lots direct from the lead companies, the lead manufacturers.

Q. In other words, you paid the same prices that you would have paid had you purchased from National Lead Company?

A. That is right. In other words he changed his prices as they changed their prices, and sold me on the same basis as I could have bought direct.

Mr. Wright: No further questions.

Mr. DuBose: No further questions.

Trial Examiner Norwood: The witness is excused. Thank you, Mr. Burke.

(Witness excused.)

Mr. Wright: May we have a short recess?

Trial Examiner Norwood: We will have a five minute recess.

(A short recess was taken.)

2018 Trial Examiner Norwood: Call your next witness, Mr. Wright.

Mr. Wright: Your Honor, the other witness we had scheduled here today will not be called at this time, and I suggest that we now adjourn to the hearing scheduled in Washington on December 11, 1946, at 10 a. m.

Trial Examiner Norwood: Is that satisfactory to counsel?

Mr. Welch: Yes.

Mr. DuBose: Yes, Your Honor.

Trial Examiner Norwood: The motion is allowed and the hearing is now adjourned to reconvene in Washington, D. C., in the office of the Federal Trade Commission, in the Trial Examiners' Hearing Room, Room 332, at 10 o'clock, a. m., est., December 11, 1946.

(Whereupon, at 11:35 a. m., November 22, 1946, the hearing in the above-entitled matter was adjourned to Washington, D. C., in the offices of the Federal Trade Commission, at 10 o'clock a. m., e. s. t., December 11, 1946.)

2019 Room 332, Federal Trade Commission Bldg.,
Washington, D. C.,
January 7, 1947.

Met, pursuant to postponement, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq. and Paul R. Dixon, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 815—15th Street, Northwest, Washington, D. C.), appearing for Sherwin-Williams Company.

James D. Ewing, Esq. and E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

H. E. Gardiner, Esq. and R. H. Ecker, Esq., of the firm of Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York City, appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

Richard Serviss, Esq., American Building, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

2020 Roger Hinds, Esq., 165 Broadway, New York City, appearing for the Glidden Company.

2021 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to postponement agreed to by counsel, the hearing in Docket 5253 is now reconvened for the taking of further testimony at 10 o'clock a. m., on January 7, 1947, in room 332, Office of the Federal Trade Commission, Washington, D. C. The last hearing was at Birmingham, Alabama, on the 22nd of November, 1946. Various appointments for additional hearings in Washington have been postponed by agreement to this date. The reporter will please enter the appearances on both sides.

Mr. Wright: Your Honor, may we go off the record for a moment?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: I suggest, Your Honor, that we take a short recess to permit counsel to confer about a number of matters which are pending.

Trial Examiner Norwood: Very well; we will recess until 10:45.

(Short recess.)

Trial Examiner Norwood: Proceed.

Mr. Wright: Your Honor, after conference with counsel, a stipulation has been agreed upon covering certain facts, which I would like to read into the record.

2022 Trial Examiner Norwood: Proceed.

Mr. Wright: (Reading.) "It is hereby stipulated between counsel in the above matter that C. H. Allen, Vice-President, Vitalic Battery Company, Inc., 2040 Amelia Street, Dallas, Texas, if called as a witness in support of the complaint in the instant proceeding and questioned as set out below, would testify as follows:

"Question: State the name of the company, state of incorporation and names of the officers.

"Answer: Vitalic Battery Company, Inc., a Delaware Corporation, with office and factory at 2040 Amelia Street, Dallas, Texas; G. U. Pickering, President, Omar Powers, Vice-President, C. H. Allen, Vice-President, D. L. Casso, Assistant Secretary.

"Question: Over how long a period has Vitalic been engaged in the manufacture of storage batteries and what general types of batteries are manufactured?

"Answer: In the business of manufacturing storage batteries for 13 years; automotive replacement S. L. I. types.

"Question: From what company or companies have lead oxides been purchased during the past 10 years?

"Answer: Oxides have been purchased for the past 10 years from Hammond Lead Products Company, Eagle-Picher Lead Company, National Lead Company.

2023 "Question: In what quantities have purchases been made and upon what price bases?

"Answer: Purchases made in 20-ton quantities at published carload prices for delivery at Dallas.

"Question: In what market areas does Vitalic solicit sales of storage batteries?

"Answer: The market areas are Texas, Oklahoma, Missouri, Kansas, Arkansas, Louisiana and New Mexico.

"Question: In normal times, say, for instance, in the period from 1937 to 1941, was the battery business highly competitive in your market areas?

"Answer: In normal times battery business is highly competitive in our market areas.

"Question: Who are your principal competitors in this area?

"Answer: Our competitors in this area are as follows: Willard Storage Battery Company, Exide Storage Battery Company, National Battery Company, Sears Roebuck & Company (Globe Union), Montgomery Ward, Western Auto Supply, Auto-Lite, Continental & Lyle.

"Question: What percentage does the total cost of the lead oxides bear to the total material cost of this product?

"Answer: The cost of lead oxides averages approximately 33 percent of total material cost.

2024 "Question: In times of normal competition—for instance, from 1937 to 1941—would a saving to you of 5 to 10 cents on the cost of manufacturing a standard storage battery be important to you competitively in your market area?

"Answer: A saving in material cost of 5 to 10 cents per battery would be an important saving to us in times of normal competition."

Now, I understand that counsel for National Lead Company and Eagle-Picher Company agree that this statement may be taken for the record to the same extent and effect as if the said C. H. Allen had appeared as a witness and so testified.

Is that correct?

Mr. Ewing: That is correct, subject, Your Honor, to an objection similar to the objections made to similar lines of testimony heretofore offered in this case, and in particular, to the similar objections made with respect to questions similar to the last question relating to competition.

Trial Examiner Norwood: Yes, counsel may have that exception.

Mr. Wright: Is that correct, Mr. Serviss?

Mr. Serviss: That is correct so far as Eagle-Picher is concerned.

Mr. Wright: Any objection on the part of other
2025 counsel?

Mr. Gardiner: No, sir.

Mr. Ewing: I understand there is not.

Mr. Wright: At the hearing in Washington on October 4, 1946, in return to a subpoena duces tecum the National Lead Company produced certain documents, which I now ask to have marked for identification as Commission's Exhibits 843-A thru D, 844-A thru D, 845-A thru Z-7, 846-A thru Z-47½, 846-Z-48 thru 846-Z-294, 847-A thru Z-284, 848-A thru Z-5, 849-A thru Z-43, 850-A thru M.

Trial Examiner Norwood: They will be so marked for identification.

(The documents referred to were marked Commission's Exhibits 843-A thru D, 844-A thru D, 845-A thru Z-7; 846-A thru Z-47½, 846-Z-48 thru 846-Z-294, 847-A thru Z-284, 848-A thru Z-5, 849-A thru Z-43, 850-A thru M for identification.)

Mr. Wright: Your Honor, I believe Mr. Ewing has a statement to make with reference to these.

Trial Examiner Norwood: Are these offered in evidence now?

Mr. Wright: Not yet.

Mr. Ewing: The exhibits which Mr. Wright just listed consist of photostatic copies of invoices and other documents produced by Respondent National Lead, pursuant to subpoena, and delivered to Mr. Wright at the
2026 last hearing in Washington back in October; and these copies are copies of the original records.

Trial Examiner Norwood: Yes.

Mr. Wright: Your Honor, I will offer into evidence Commission's Exhibits 843-A to D, 844-A to D, 845-A to Z-7, 846-A to Z-294, 847-A to Z-284, 848-A to Z-5, 849-A to Z-43, and 850-A to M.

Trial Examiner Norwood: Does your statement apply to that 850-A to M?

Mr. Wright: These are offered as invoices, price cards, shipping memoranda, and bills of lading relating to transactions in litharge and red lead by the National Lead Company.

Trial Examiner Norwood: As I understand, Mr.

Ewing made his statement before that Exhibit No. 850-A to M had been mentioned in the record. Does your statement apply to that?

Mr. Ewing: It applies to 850-A to M as well as the other exhibits.

Objection is made on all the grounds on which objection has heretofore been made to the introduction of other invoices and similar documents, without going into the detail of those objections.

Trial Examiner Norwood: Very well. In other words, you object to them on the ground that they are cumulative?

2027 Mr. Ewing: Cumulative and also—

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Ewing: At earlier stages in this case various invoices, price cards, and other documents have been offered in evidence by the Trial Attorney for the Commission; and from time to time objection on behalf of the Respondent has been made thereto on various grounds.

At times, if my recollection is correct, the Court has extended blanket objection to the line of inquiry under questioning. This time I wish to object to the offer of these documents, consisting of invoices, price cards, and so on, as stated by Mr. Wright, upon all the grounds upon which objection has heretofore been made to other similar documents, without attempting a detailed restatement of those objections at this point in the record.

Mr. Wright: Your Honor, I submit that the documents are admissible for all purposes of the complaint. We have an allegation of fixing of prices, monopolistic pricing; also the allegation of price discrimination.

Without evidence of this sort, the facts cannot be ascertained.

Trial Examiner Norwood: Were those documents brought in pursuant to a subpoena or notice?

2028 Mr. Wright: They were, sir. They were brought in pursuant to a subpoena, which was returned on the 3rd of October, 1946, here in Washington.

I direct your attention to page 1623 of the transcript—

Mr. Ewing: (Interposing.) There is no question about it. I brought them in.

Trial Examiner Norwood: What was required there?

Mr. Wright: Mr. Ewing, correct me if I am wrong. They were returned pursuant to a subpoena, which requested invoices showing sales and shipments of red lead and litharge during the last quarter of 1941 at certain specified destinations; also shipping memoranda and bills of lading showing the transportation charges incurred in the shipments; and some of the material consisting of price cards and price announcements was returned pursuant to a specification of the subpoena requesting price announcements and price cards of the National Lead Company on the dates designated.

Is that correct, Mr. Ewing?

Mr. Ewing: That is, I think, the substance of my recollection. You haven't attempted to cover the detail.

Trial Examiner Norwood: Well, now, I don't know whether the nature of your objection requires me to inspect those documents or not.

Mr. Ewing: I didn't anticipate that it would, be-
2029 cause all similar material has been received in evi-
dence; and I was simply making my objection for the record, as I anticipated you would again receive it.

Trial Examiner Norwood: I understand that when there is to be a study and a compilation of these to show trends in prices and so on, the more invoices you have and the more sales data you have, the more correct will your survey be; so in a case of that kind, you would have to have a good many in order to reasonably judge them cumulative.

We will take a five-minute recess.

(Short recess.)

Trial Examiner Norwood: The documents heretofore referred to and variously marked as Commission's Exhibits for identification from 843 to 850 are received in evidence. Objection is overruled. Counsel will have their exceptions.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 843-A through 843-D; 844-A through 844-D; 845-A through 845-Z-7; 846-Z-7; 846-A through 846-Z-46, 846-Z-47, 846-Z-47½, 846-Z-48 through 846-Z-294; 847-A through 847-Z-284; 848-A through 848-Z-5; 849-A through 849-Z-43 and 850-A through 850-M, were received in evidence.)

Mr. Wright: Your Honor, I request that these docu-

ments be marked as Commission's Exhibits 851-A to B. These documents are photostatic copies of pages 40, 41, 42 and 43 of the Year Book of the American Bureau
2030 of Metal Statistics, 23rd annual issue, 1942-43.

Now, I have asked counsel to stipulate the identification of these documents as genuine copies of the statistics appearing in the document mentioned; and I understand that they are in agreement to so stipulate.

Mr. Ewing: That is correct.

Trial Examiner Norwood: They will be so marked for identification.

(The documents referred to were marked Commission's Exhibits 851-A and 851-B for identification.)

Mr. Wright: Your Honor, I offer Commission's Exhibits marked for identification as Number 851-A and B into evidence as statistics showing uses of lead for various purposes and to show the location of the lead smelting and refining capacity of the United States.

Trial Examiner Norwood: Any objection?

Mr. Ewing: Objection is made on the ground that all or part of the material contained in the exhibits is irrelevant or immaterial. There is no objection from the standpoint of competency.

Trial Examiner Norwood: Anything further?

Mr. Hinds: We have no objection as to competency, but we object on the ground that if the statistics should be accepted as reliable on their face, they don't purport to show facts relevant to this case. It doesn't appear
2031 whether or not oxides that are manufactured by the storage battery manufacturers or others for their own use are included, and it doesn't purport to show in the storage battery industry—which seems to be from these statistics the largest industry using lead products—how much of the products involved in this lead pigment or lead oxide case is included.

The third item there at the top of the second page is "storage batteries, 163,000" in 1934. It is up to 257,000 tons in 1943. Obviously, that is the largest single item, and yet it is not analyzed in the product which is relevant to this case and the product which is entirely irrelevant to this case.

Mr. Wright: Your Honor, I will agree with Mr. Hinds that the figure to which he has called particular attention there under "storage batteries" does not give a breakdown of the specific poundage or tonnage of so-called oxides which go into storage batteries, because that figure obviously includes metallic lead or antimonial lead, which goes into it, but we know that a substantial portion of that is accounted for by oxides in view of the testimony of numerous witnesses that somewhere between 40 and 50 percent of the lead in a battery is accounted for by oxides.

On the other items, though, it is obvious that there is no such confusion of terms. It gives specific tonnage of white lead and of red lead and litharge used for other purposes than storage batteries.

2032 Mr. Hinds: Is it contended that this includes lead products which are manufactured by the user and, therefore, not the subject of sale in commerce?

Mr. Wright: Well, Mr. Hinds, I can make no contentions other than those which are included in the explanatory notes, which appear on the documents themselves.

Mr. Hinds: Well, are you asking us to stipulate that this document, of which we have stipulated these are copies, has any reliability or any authenticity or is up to date? That doesn't appear in the record.

You have only asked us to stipulate that these are copies of some other documents.

Mr. Wright: I will go further and request a stipulation that the American Bureau of Metal Statistics is a well-known and reliable source of statistics in this field.

Mr. Hinds: We are willing to stipulate that with the qualification that we understand that it does not include the production of black oxides or litharge or other oxides that are manufactured by the users, and that it does not analyze total lead products used in storage battery industry into metallic lead, on the one hand, and its chemical compounds on the other hand.

Mr. Wright: I am willing to accept the agreement with that reservation.

Mr. Ewing: I suggest, Your Honor, that these two
2033 documents have been offered in evidence, and objection has been made to their receipt in evidence; and as far as I understood until the last colloquy between Mr. Wright and Mr. Hinds, we were not asked to stipulate anything except as to the fact that these are correct copies of pages of this particular book. I think that that is all that is before Your Honor at this time, and that is, namely, the objection to the documents.

Mr. Wright: Mr. Ewing, I realize full well that these documents are inadmissible unless there is some concession or some evidence offered that that is a usually reliable source of such information.

Mr. Ewing: I don't think any of us can say whether it is usually reliable or not. I think everybody would be willing to say that is a well-known statistical publication. It is used in the various trades to which it relates. I think everybody would go that far.

Mr. Wright: If that concession will be made by counsel, I am willing to stand on that. Obviously, unless some such concession is made, we will have to prove by testimony that fact. It was implied in my request for agreement, although I inadvertently omitted it.

Mr. Ewing: I think nobody would quarrel with that.

Trial Examiner Norwood: Is it agreed that these papers may come in subject to those qualifications?

Mr. Ewing: No, sir.

2034 Mr. Wright: No, sir. I believe the statement Mr. Ewing made, and to which we have not yet had an agreement, was that this is a well-known publication of the American Bureau of Metal Statistics, which is used in the industry to which it applies.

Now, are counsel willing to agree to that statement?

Mr. Hinds: Yes.

Mr. Gardiner: Yes.

Mr. Ewing: Yes.

Mr. Wright: Counsel indicated their assent.

Trial Examiner Norwood: Received.

Mr. DuBose: Is the objection overruled, Your Honor?

Mr. Ewing: I had an objection that either all or part of the documents in question are irrelevant or immaterial.

Trial Examiner Norwood: Is the objection based on their relevancy entirely?

Mr. Ewing: Relevancy or materiality.

Mr. Hinds: That is my objection.

Trial Examiner Norwood: I will overrule that objection and receive the documents.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 851-A and 851-B, were received in evidence.)

Mr. Wright: Your Honor, there has appeared in the record a statement that the International Smelting &
2035 Refining Company and the Anaconda Copper Mining

Company have gone out of the business of producing lead pigments, and I would like to ask Mr. Serviss, the counsel for Eagle-Picher Company, if he will concede for the record that the plant and appurtenances of the International Smelting & Refining Company in Chicago for the production of white lead have been acquired by the Eagle-Picher Company since that time.

Mr. Serviss: As counsel for Eagle-Picher, we admit that the Eagle-Picher Company acquired the assets, the physical assets of the International Smelting & Refining Company's plant at East Chicago, Indiana. We admit that as a fact, however, we object to the admission of this in evidence on the ground that it is irrelevant.

Mr. Ewing: And on the further ground that it is immaterial, this acquisition having occurred—

Mr. Serviss: On or about October 1, 1946.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. I will ask Mr. Wright to comment on the relevancy of that statement.

Mr. Wright: Well, Your Honor, as was stated, I believe by Mr. Gardiner—was that statement on the record or off?

Mr. Gardiner: That was off the record.

Mr. Wright: At any rate, there is a statement 2036 in the record by the International Smelting & Refining Company and the Anaconda Copper Mining Company to the effect that the plant in East Chicago, Indiana theretofore producing white lead, had been disposed of, and that the company was no longer in business. That is the state of the record.

Now, the fact appears that that plant was acquired by the Eagle-Picher Company, another respondent in this case. Certainly that is a pertinent fact in view of the discontinuance by International. It is an important fact in any consideration of problems of competition and monopoly or price discrimination in this case. It is a fact which the Commission should have before it when they are considering this matter.

Mr. Gardiner: If Your Honor please, I think Mr. Wright is somewhat in error as to his statement as to what the record shows.

Mr. Wright: I will stand corrected.

Mr. Gardiner: In that I believe you said that the record shows that the International is out of this business and the property has been disposed of; is that correct?

Mr. Wright: Isn't that what I said?

Mr. Gardiner: Yes.

Mr. Wright: Yes, I said that.

Mr. Gardiner: I don't believe the record shows that. It only shows discontinuance.

2037 May we go off the record, Your Honor?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: I will be glad to stand corrected as to my statement. The record shows that the International Smelting & Refining Company discontinued the business; but I don't see that that alters my point on it, the fact that they have discontinued the business and that the plant and assets have been acquired by the Eagle-Picher Company.

Mr. Ewing: It is true that the acquisition of the plant by the Eagle-Picher Company in a general sense may have been of interest to the Commission from the standpoint of competition or monopoly or whatnot, but certainly has no bearing whatever on the issues raised by the amended complaint served in April, 1946, and the answers thereto served shortly thereafter; at which time the amended complaint did not relate and could not relate to any disposition of the assets of International.

Mr. Gardiner: If Your Honor please, as a further objection on the part of the International, there is an implication here, it seems to me, that the Commission is raising certainly some implication that this acquisition was for some purpose material to the Commission's case.

If there is any question as to the disposition of
2038 that property, I think that should be gone into rather
than by a mere inference to the fact that a competitor purchased this property. It seems to me that all the facts are pertinent to this, if any.

Certainly from the standpoint of International we object to the admission of any such statement as is attempted to put on the record here now, because it doesn't give the full picture.

Trial Examiner Norwood: I will overrule the pending objection. You may move to strike if it becomes clearer that it has no connection with the other evidence.

Mr. Wright: I would like to have these documents marked for identification as Commission's Exhibits 852-A, B, and C; and 853-A through W.

Trial Examiner Norwood: They will be so marked for identification.

(The documents referred to were marked Commission's Exhibits 852-A, 852-B and 852-C; and 853-A, 853-B, 853-C, 853-D, 853-E, 853-F, 853-G, 853-G-1, 853-H, 853-I, 853-J, 853-K, 853-L, 853-M, 853-N, 853-O, 853-P, 853-Q, 853-R, 853-S, 853-T, 853-U, 853-V and 853-W, for identification.)

Mr. Wright: Your Honor, you requested of certain counsel in this matter that there be prepared and furnished the Commission: One, a list of the manufacturers of storage batteries who purchased lead oxides during the last quarter of 1941, designated by plant or warehouse from which shipped, and whether customer purchased on
2039 less than 5-ton, 5-ton, or carload price basis, and including the destination of shipment; and two, freight rate, truck or rail, carload, or less than carload, applicable to each designation included in "one" above during the last quarter of 1941.

Commission's Exhibits 852-A through C are the exhibits received from counsel for the Glidden Company.

Mr. Hinds: I am willing to let that go in. The letter which counsel has referred to will constitute Glidden's statement with respect to those documents.

Mr. Wright: In view of Mr. Hinds' statement that Commission's Exhibit 852-A, which is the letter addressed to me from Mr. Hinds, will constitute a statement of what the exhibit is I offer same in evidence.

Mr. Hinds: No objection.

Trial Examiner Norwood: Received.

(The documents referred to, heretofore marked Commission's Exhibits 852-A, 852-B and 852-C for identification, were received in evidence.)

Mr. Ewing: Commission's Exhibit 853-A to W for identification consists of certain lists or letters or telegrams representing data compiled by National Lead Company from its records, at the request of the Commission's Trial Attorney, and produced here and delivered to him pursuant to that request.

Mr. Wright: That was a similar request to the one
2040 which I read.

I offer Commission's Exhibit 853-A through W in evidence.

Trial Examiner Norwood: Any objection?

Mr. Ewing: No objection.

Trial Examiner Norwood: Received.

(The document referred to, heretofore marked Commission's Exhibit 853-A, 853-B, 853-C, 853-D, 853-E, 853-F, 853-G, 853-G-1, 853-H, 853-I, 853-J, 853-K, 853-L, 853-M, 853-N, 853-O, 853-P, 853-Q, 853-R, 853-S, 853-T, 853-U, 853-V and 853-W for identification, was received in evidence.)

Mr. DuBose: Your Honor, may we go off the record just a moment?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: Your Honor, with reference to Commission's Exhibit 481-A and B, the transcript of testimony shows that these documents were produced by the secretary of the American Smelting & Refining Company on January 16, 1945, in New York—transcript page 85—pursuant to specification number 7 on page 5 of that subpoena duces tecum.

At that time counsel for National Lead Company was asked to agree that these records, that this document was that described in the specification of the subpoena, and no such agreement was made.

2041 I would like to ask Mr. Ewing if he will state that that is a copy of an original letter from an official of the National Lead Company to the American Smelting & Refining Company.

Mr. Ewing: These two papers, which have been marked Commission's Exhibits 481-A and B for identification, comprise a letter from National Lead Company to American Smelting & Refining Company, bearing date of October 31, 1941. It should be noted that the two pages of the letter contain a number of ink or pencil notations. I know nothing about those and make no confession whatever with respect to them, except that I am prepared to say they were not on the letter as originally sent by National Lead.

Mr. Wright: Your Honor, I offer Commission's Exhibit 481-A and B into evidence.

Trial Examiner Norwood: Any objection?

Mr. Ewing: I object on the ground that it is irrelevant and immaterial.

Mr. Wright: Your Honor, with respect to that, the letter sets forth the delivery point to which National was requesting American Smelting & Refining Company to deliver pig lead on their allocation by the Metals Reserve Company. It sets out the delivered price on pig lead at these various destinations, and as the record shows that prices of these lead pigments are based directly upon the prices of pig lead, it certainly becomes relevant and material.

2042 Trial Examiner Norwood: Objection overruled. Received.

(The document referred to, heretofore marked COMMISSION'S EXHIBIT 481-A and 481-B for identification, was received in evidence.)

Mr. Wright: I now offer into evidence Commission's Exhibits No. 482, 483 and 489, which are documents produced by the American Smelting & Refining Company as contracts and correspondence with Eagle-Picher Company, which were identified on pages 87 and 88 of the record.

Trial Examiner Norwood: We will take a five-minute recess.

(Short recess.)

Trial Examiner Norwood: Proceed. Is there any objection to the proffer?

Mr. Serviss: We merely reiterate the objections we made at the time they were introduced for identification, and further on the ground that it is irrelevant to the case.

Mr. Wright: With respect to the identification—

Mr. Serviss: With respect to the identification, we admit those are the documents specified by Mr. Wright.

Mr. Wright: I believe Mr. Wood made a similar admission at the time they were produced by the secretary of the American Smelting & Refining Company as copies of the contracts and correspondence with the Eagle-
2043 Picher Company concerning the purchase of pig lead.
Now, as to the relevancy—

Trial Examiner Norwood: (Interposing.) I don't recall those conditions that were made previously.

Mr. Wright: These were documents brought in very early in the case when we were operating under a rule that no testimony could be taken on anything but identification, and they were never offered; so there really was no objection on identification at the time, that I recall.

Mr. DuBose: There were objections last June in the New York hearings as to similar documents relating to similar contracts made with the National Lead Company on the ground that this is totally irrelevant to the issues in the complaint, which deal with lead pigments; and what these contracts are, I presume, are pig lead purchases.

Trial Examiner Norwood: Yes.

Mr. DuBose: From A. S. & R. by Eagle-Picher, which seems to us totally irrelevant to any of the issues in the complaint or the amended complaint.

Trial Examiner Norwood: I will overrule the objection and receive the document as marked.

(The documents referred to, heretofore marked COMMISSION'S EXHIBITS 482, 483 and 489 for identification, were received in evidence.)

Mr. Wright: Your Honor, I now offer in evidence
2044 Commission's Exhibits No. 490, 491 and 492, which
are in that order two contracts of the Sherwin-Williams Company with American Smelting & Refining Company, and a letter from the Director of Purchases of the Sherwin-Williams Company to the American Smelting & Refining Company regarding the purchase of pig lead. These were identified on pages 90 and 92, and were produced by the secretary of the American Smelting & Refining Company under subpoena duces tecum.

Mr. Welch: Sherwin-Williams objects to the admission of Exhibits No. 490 and 491 on the same basis as the objection made by counsel for the other respondents, being entirely irrelevant and immaterial to the issues in this proceeding.

Mr. Wright: Your Honor, for the same reasons that the contracts of American Smelting & Refining Company with the other respondents were relevant and material, likewise the contracts with Sherwin-Williams Company; and this case is very obviously tied up with pig lead prices and terms, and the relations of various respondents with the suppliers of pig lead are important to determine the issues.

Mr. Welch: With respect to the Commission's Exhibit No. 492 for identification it is a photostatic copy of a letter from Sherwin-Williams Company addressed to American Smelting & Refining Company under date of September 9,
1941, and is in no way connected with Commission's
2045 Exhibit No. 490. No. 491 refers to certain other cor-
respondence, which has not been produced, and we submit that it is a totally incomplete segment of some transaction on which we have no details.

I think it is preposterous to try to put in a letter that refers to other correspondence and to a course of dealing and to pick out one letter out of that entire group and introduce it—we submit it is unfair.

Mr. Wright: Your Honor, in answer to that, the subpoena directed to the American Smelting & Refining Company directed them to produce the correspondence with Sherwin-Williams Company relating to their purchases of pig lead. That letter was produced. Now, certainly, the remainder of the correspondence is in the possession of Sherwin-Williams Company. Presumably it isn't in the possession of the American Smelting & Refining Company, since it wasn't returned on the subpoena. It certainly isn't in the possession of the Commission.

Trial Examiner Norwood: Objection overruled. Received.

(The documents referred to, heretofore marked COMMISSION'S EXHIBITS 490, 491 and 492 for identification, were received in evidence.)

Mr. Welch: Your Honor, I would like to state for the record that the Respondent Sherwin-Williams Company has never been requested to produce the correspond-
2046 ence and resents the implications that they have been and have failed to do so. It is absolutely meaningless.

Trial Examiner Norwood: It is something in your possession.

Mr. Welch: Not in our possession, no, sir, not in the Respondent's possession.

Trial Examiner Norwood: The remainder of the correspondence?

Mr. Welch: No, sir. There is no showing, no proof whatever, that it is; and we have never been requested to produce anything, and we still object.

Mr. Wright: Your Honor, it is obviously part of correspondence which has been back and forth between the American Smelting & Refining Company and the Sherwin-Williams Company.

Mr. Welch: So what?

Trial Examiner Norwood: Maybe I haven't stated my position sufficiently clearly. Now, if the remainder of the correspondence were in the possession of the counsel offering it, then I would sustain an objection to taking a piecemeal bit of evidence when he could offer the remainder: but inasmuch as the remainder is in the possession of the other parties here, or as a matter of fact, is in your possession, I see no hardship in taking in a single letter there.

Mr. Welch: Your Honor, it has not been shown
2047 that that correspondence is in our possession or anybody's possession or even in existence.

Mr. DuBose: Nor any request direct to any respondent in this case to produce that correspondence.

Trial Examiner Norwood: Respondents don't have to have a request to produce that if they want to explain a bit of correspondence here.

Mr. Ewing: But as against respondents other than—

Trial Examiner Norwood: (Interposing) And addressed to another.

Mr. Ewing: (Continuing.) —as against respondents other than Sherwin-Williams, who obviously have no possession of any of the correspondence. It is certainly inadmissible unless all correspondence is brought before Your Honor.

Trial Examiner Norwood: Well, I think—

Mr. Wright: (Interposing) My purpose in offering that is to show a course of dealing between Sherwin-Williams Company and the American Smelting & Refining Company in the purchase of pig lead. That letter in and of itself shows such a course of dealing. It needs no other correspondence. If there is other correspondence, it is in the possession of Sherwin-Williams Company.

Trial Examiner Norwood: It is received as marked. Objection overruled.

Mr. Hinds: May I see that? I haven't had an
2048 opportunity to look at it yet.

(Hands paper to counsel.)

Trial Examiner Norwood: Counsel may have their exceptions. Counsel may enter further objection if he wants to.

Mr. Hinds: I don't see that it concerns us and I have no comment.

Trial Examiner Norwood: Proceed.

Mr. Wright: Your Honor, I would like to offer into evidence Commission's Exhibits No. 25, 27, 28, and 29, which were identified as correspondence from the files of American Smelting & Refining Company, produced under subpoena *duces tecum*.

Trial Examiner Norwood: Any objection?

Mr. Ewing: With respect to Commission's Exhibit No. 25 for identification, it appears that this is a photostatic copy produced by American Smelting & Refining from its files of a letter dated February 27, 1906, to the Morton Trust Company, 38 Nassau Street, New York, relating to some stock transactions. There is no signature on the letter, nothing to identify it.

I submit that as far as Respondent National is concerned, it is irrelevant and immaterial under the issues raised by the amended complaint and the amended answers, that it is purely hearsay and not binding on us or any other respondent.

Trial Examiner Norwood: There is a charge in the complaint about National acquiring certain proper-
2049 ties beginning back in 1891.

Mr. Wright: Your Honor, all of these documents relate to the acquisition of the United Lead Company and the properties of the United Lead Company back in 1906; and they also relate to the close cooperation which existed between the American Smelting & Refining Company in that period— One of these documents is initialed by a man who was then an official of the American Smelting & Refining Company, and then, later, an official of National Lead Company.

Mr. Ewing: As far as the acquisition by National Lead Company of the United Lead Company is concerned, that is covered by an admission in the amended answers, also by an admission in the answer, and to that extent these documents would be purely cumulative.

However, to continue, Exhibit 27 for identification is a letter dated March 23, 1946, again produced from the files of A. S. R., again purporting to be a copy of a letter to the Morton Trust Company with no identification with respect to signature, with no identification as to whether it was ever sent or received, purely hearsay as far as the respondents in this case are concerned, and relating, according to its face, to certain stock transactions in which apparently Messrs. Thomas F. Ryan and Daniel Guggenheim were interested.

Commission's Exhibit No. 28 for identification is a
2050 letter on the letterhead of Morton Trust Company dated March 24, 1906, addressed to the Secretary of the American Smelting & Refining Company, relating to certain stock transactions.

Again, it is purely hearsay as far as the respondents are concerned, and wholly incompetent and irrelevant.

The final exhibit, No. 29 for identification, is a photostatic copy of a carbon of a memorandum, apparently, bearing the numerals "3-28" but with no date to indicate a year, bearing typewritten initials, produced from the files of American Smelting & Refining; but again wholly hearsay as far as any of the respondents in this case are concerned.

I submit that these unrelated or isolated documents relating to transactions over 40 years ago, and incompetent as hearsay, should not be received in evidence in this proceeding.

Mr. DuBose: If your Honor please, no respondent can be bound by the statement made over 40 years ago by someone not a respondent in this proceeding, not addressed to any of the respondents in this proceeding.

Mr. Hinds: And someone who is not produced here for cross-examination.

Mr. DuBose: And not produced by any of the respondents.

Mr. Wright: These documents are not isolated, as
2051 counsel has stated. They fit into other documents
which are in the record. They fit into minutes of the meetings of the board of directors of the National Lead Company in that time period, when the United Lead properties were being secured.

These documents were produced as having been in the files of the American Smelting & Refining Company over that period of time and were produced pursuant to the subpoena of the Commission requesting correspondence and memoranda relating to the transfer of the United Lead properties to National Lead Company.

They are ancient documents. We are dealing with a period 40 years ago. The significance of that document is that it ties up Messrs. Guggenheim and Ryan and other parties to that whole transaction, and who also were in large part in control of the American Smelting & Refining Company and who later sat on the board of directors and had a large part in the affairs of the National Lead Company.

Mr. DuBose: If your Honor please, suppose for instance there were produced today a letter from Hammond Lead Company to W. P. Fuller & Sons in San Francisco saying that the five respondents and their subsidiaries in this case were a conspiracy and a monopoly. Would that be admissible? This is on the same ground.

Mr. Hinds: Only worse, because this is 40 years
2052 ago, and we couldn't even bring these people in for
cross-examination if we wanted to.

Trial Examiner Norwood: Would it inconvenience you for me to reserve the ruling on this over the lunch hour?

Mr. Wright: No, sir. I believe those documents should be read in the light of the other exhibits which are in the file; namely, the minutes of the meetings of the board of directors of the National Lead Company in that period just prior and just subsequent to those dates of that correspondence. That is a part of the agreement or conspiracy —call it what you will—that was going on at that time between Messrs. Ryan and Guggenheim and officials of the American Smelting & Refining Company and of the National Lead Company to monopolize the entire lead industry, as charged in the complaint.

Mr. Ewing: Your Honor, that is hearsay.

Trial Examiner Norwood: Exhibit No. 25 to the Morton Trust Company— Have you shown who wrote that?

Mr. Wright: The discussion as to these exhibits is contained in the record on pages 58 through 65 when they were produced by the Secretary of the American Smelting & Refining Company pursuant to subpoena.

Trial Examiner Norwood: I will reserve the ruling on this. I have the record in my office and will look at it during the lunch hour.

2053 Mr. Wright: May we go off the record, your Honor?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Hinds: On September 17, 1946, complying with the request for certain data as to certain transactions, we noted that it wasn't intended by the Commission that all of these transactions—over a thousand or two thousand in number—were contended to involve anything illegal and any discriminations.

They were admitted to have been selected on some other criterion such as time or location, and we noted in a schedule attached to the letter that many of these had involved price changes between the date of the invoice and the fixing of the price; so that they would seem on their face not to have any relevancy, although there was the difference in price.

Then, we asked if there were any others of these numerous transactions which they contend involve price discrimination, and if so, what. So that before we started to prepare our evidence, we would know what case we were being asked to rebut.

I would say that failure to apprise us of that, putting us under the burden of guessing which of so many thousand transactions are contended to be illegal, would de-
2054 prive us of the fair hearing that we are entitled to by statute.

Even though the rules do not provide specifically for a bill of particulars, the definition of fair play and fair hearing certainly requires that respondent shouldn't be put to any such speculation.

Mr. Wright: Mr. Hinds, is your difficulty now with regard to the shifting of the burden to the respondent under section 2-B of the Clayton Act when a price difference is shown? It that the point you are making?

Mr. Hinds: No, where the proof has to do with ascertaining what your claim is. This hasn't anything to do with evidence or information or knowledge. We presumably have evidence, information, and knowledge available to us. It is not in the nature of discovery. The burden of proof is to find out what your claim is so we can meet it. Certainly you can't put in evidence a hundred thousand transactions and ask us to guess which 12 of those 100,000 involve illegality. That is not within the bounds of a fair hearing, a fair trial.

You admit that you have not selected these with reference to their alleged illegality and that you have selected them with respect to some other criterion.

Were you to have the temerity to say that you claim each and every one of these involves an individual
2055 price discrimination, then logically we wouldn't have any complaint, although we might question your sincerity. However, you don't make any such contention. You admit that only a portion, maybe only a small portion, of these are contended to be illegal. You leave it to us to guess which ones are.

That is not fair. That deprives us of our constitutional rights and certainly our statutory rights.

Mr. Ewing: I think what we all have in mind and what Mr. Wright had in mind back in October was that with this tremendous mass of documentary evidence, which is the backbone certainly of the Commission's case, with respect to which none of us have made any real analysis or been in a position to do so up to now, because no one knew what use would be made of it, we have the Commission's case closing.

It seems to us that we are all entitled to know—not maybe to the last dotted "i" or crossed "t" — what charges the Commission now claims at the close of its case it has proved, so as to permit us to meet those charges rather than to come in here at some future date prepared to bring in everything we have got to meet everything we can possibly think of, which would take longer probably than the youngest of us would live.

Then, too, with respect to certain portions of the case as presented against us, you have, as I understand it, a
general claim that the system—if you want to call
2056 them systems—or methods, or whatever you want to
call them, of selling, constitute in and of themselves
on the part of each respondent separate and distinguished from other Robinson-Patman violations.

You have also literally thousands of transactions which may or may not be the subject of Robinson-Patman violation claims.

Now, at this time I can see how it would be asking a great deal of Mr. Wright today or tomorrow or even within the relatively near future to specify each and every alleged Robinson-Patman violation based upon a specific discriminatory situation; but he might be able to outline in a more general way what any such claims are based on, if he is going to make them.

Of course, we don't know, but I think—I know he would like to, but to the extent possible we should be advised, because otherwise, the burden is going to be something terrific.

Mr. Hinds: I would like to put my letter in evidence if the request is to be denied so as to form a basis for objection that we are being deprived of our statutory rights because this letter was dated September 17, 1946, and we did not request that there be any particularization of the general contention that all prices which are the same by
their very sameness violate the Robinson-Patman
2057 Act.

We only ask because we will have no difficulty of disposing of that as a matter of law, but in so far as it is contended that differences in prices involve us in the Robinson-Patman Act, that we want to know which differences he relies on.

I would like to offer that in evidence. Do you have the original?

Mr. Wright: Yes, I have the original, but I don't think it is the proper time to discuss that.

Mr. Hinds: I now offer that original that you have, please.

Trial Examiner Norwood: If counsel will hold that to see what statement the Commission's counsel makes, and if it isn't satisfactory to him, he may put the letter in the record.

Mr. Ewing: Let's see what he can do for us.

Trial Examiner Norwood: Yes.

Mr. Wright: With respect to this whole question, I appreciate that respondents would be assisted very greatly by a statement in great detail as to my contentions at this point. I have a problem, too, of course, in that in the first place I have no authority to alter any allegations that are in the complaint, and I don't intend to alter those allegations that are in the complaint and I don't want to be
2058 in the position of making a statement here which would so circumscribe me that my hands would be tied later.

However, I do intend to make a statement with reference to Count 2. I believe that is the count which bothers counsel; is it not?

Mr. Ewing: Yes.

Mr. Wright: Counsel are all very able gentlemen and they have an appreciation of the issues in this matter. A casual reading of the answers is all that is necessary to determine that. Is there any confusion among counsel as to the issues?

Mr. Hinds: We do not make any claim of clairvoyance. If there is any particular transaction that you say violates the Robinson-Patman Act, we say we have not only the ability, but the information and the evidence to meet it, but we are not good guessers and should not be asked to guess about these thousands of transactions.

Mr. DuBose: Your Honor, I think that all of us are agreed that on Count 1 we more or less have a general idea of what you are trying to prove, but we are all worried about Count 2; and if you are worried about being bound by any statement you make, I don't see why if you want to change that statement in the future, I don't see why anyone would object to it. In other words, if you felt that it limited you too much.

2059 However, we want just some general idea of what we are driving at.

Mr. Hinds: May I point out that if this were an ordinary lawsuit—

Trial Examiner Norwood: Wait a minute. Mr. Wright?

Mr. Wright: I see there is a possibility of construction of Count 2 of that complaint so it would be inconsistent, so that the respondents would be caught on the horns of a dilemma where a defense to one aspect of it would be an admission to another aspect; and I hope to clear that up.

Mr. Hinds: That is not what is troubling me. It is which claims we are supposed to meet.

Mr. Wright: Mr. Hinds, I stated this to you before, I believe—once on the record and several times off the record. I have no intention of listing all of the transactions of each of the respondents and saying, for instance, the transaction with John Jones at Cleveland is discriminatory as against certain other specified transactions.

I believe I will be able to describe the transactions by class so that it will be obvious to you exactly what I have in mind.

Mr. Ewing: That is what I meant.

Mr. Wright: I don't know if that will satisfy Mr. 2060 Hinds. His request goes much further than that.

Mr. Hinds: What we want to be relieved of is the necessity of looking over each pair of transactions to see whether there is any possibility of there being any difference in price; that we can't see any difference in price in our cursory view stated specifically in this letter, excepting those that we list in a schedule, which we have gone to the work of preparing, where there is an apparent difference, but which is explained by a price change between the date the price was made and the date goods were delivered.

We want to know if there are any others that they claim are individually discriminatory. If there are to be no such claims, that is perfectly satisfactory for the meeting of our request.

Trial Examiner Norwood: I think, gentlemen, that may go over, and we will see what sort of a statement Mr. Wright is going to make. We will see whether this is satisfactory to you, and then we may discuss it further.

As I understand it, you will have no witness for this afternoon; is that right?

Mr. Wright: We have no witness for this afternoon.

Trial Examiner Norwood: Is there any further business we have to transact here with regard to exhibits?

Mr. Wright: No sir; I have nothing further until tomorrow morning.

2061 Trial Examiner Norwood: Pursuant to request of counsel, then, the hearing is recessed until 10 o'clock tomorrow morning.

(Whereupon, at 12:30 p. m., January 7, 1947, the hearing in the above-entitled matter was recessed until 10:00 a. m., Wednesday, January 8, 1947.)

2062 Room 332, Federal Trade Commission.
Building, Washington, D. C.,
January 8, 1947.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq., (Davies, Richberg, Beebe, Busick & Richardson, 815 15th Street, Northwest, Washington, D. C.), appearing for Sherwin-Williams Company.

James D. Ewing, Esq. and E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

H. E. Gardiner, Esq. and R. H. Ecker, Esq., of the firm of Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York City, appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

Richard Serviss, Esq., American Building, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

2063 John A. Duncan, 165 Broadway, New York City, appearing for the Glidden Company.

2064 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment as of yesterday, the hearing in Docket 5253 is now reconvened for the taking of testimony at 10 o'clock a. m., on January 8, 1947, in room 332, Office of the Federal Trade Commission, Washington, D. C. Please enter the appearances.

Mr. Wright: I request that this document be marked Commission's Exhibit for identification 854-A through D.

(The documents referred to were marked COMMISSION'S EXHIBIT 854-A through 854-D for identification.)

Mr. Wright: Request is made on counsel for the Eagle-Picher Company for the list of customers engaged in manufacturing storage batteries, to whom the Eagle-Picher Company had sold oxides during the last quarter of 1941, the destination to which they were shipped and shipping point from which they were shipped, the price basis on which they were sold and the freight rates involved in the shipments.

Commission's Exhibit 854-A, -B, -C, and -D is a document submitted by the Eagle-Picher Company in response to that request.

Is that correct, Mr. Serviss?

Mr. Serviss: That is correct.

Mr. Wright: I offer Commission's Exhibit 854-A, -B, -C and -D in evidence.

2065 Trial Examiner Norwood: Is there any objection?

Mr. Serviss: No objection.

Trial Examiner Norwood: Received.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBIT 854-A through 854-D were received in evidence.)

Mr. Wright: A request was made for certain information from counsel for the Sherwin-Williams Company. Mr. Welch, are you prepared to make a statement in that respect?

Mr. Welch: In behalf of Sherwin-Williams Company, I would like to read a statement into the record.

"It is hereby stated on behalf of the Sherwin-Williams Company that it has been the practice of the Sherwin-Williams Company to offer for sale and sell litharge and red lead in carload quantities, 40,000 and over, on the following basis:

"Litharge, $1.50 per hundred over the New York price of pig lead;

"95 per cent red lead, $2.50 per hundred over the New York price of pig lead;

"97 per cent red lead, $2.75 per hundred over the New York price of pig lead;

"98 per cent red lead, $3.00 per hundred over the New York price of pig lead.

"In selling upon this basis it has been the practice
2066 of the Sherwin-Williams Company to allow or pre-
pay freight to destination.

"The differentials shown on Commission's Exhibit 823-F are for LCL shipments; on carload shipments, if any, of red lead and litharge, the differential is only 25 cents in all differential territories.

"Sherwin-Williams does not do business in these products on the Pacific Coast. Company officials do not now have any information that carload shipments of red lead or litharge are made to any point in differential territories except shipments to Sherwin-Williams' own plants.

"Sales of litharge are confined almost entirely to points in the Chicago area, with a few isolated shipments to Kentucky and Ohio.

"If any carload shipments of red lead or litharge are made into differential territories, they would be scattered sales in those territories shown on Commission's Exhibit 823-F, as the 25-cent differential territories, with no shipments in the 50-cent and 75-cent territories.

"The above statement represents the general practice of the Sherwin-Williams Company over the period of time between the date of Commission's Exhibit 823-C and 823-F."

Mr. Wright: I stated to counsel yesterday that I would make a statement regarding the issues in this matter, and
I pointed out at that time I have no authority to amend
2067 the complaint. So that when I speak on this subject,
all I can say is what I intend myself to urge in this proceeding as the issues, and I wish counsel would bear that in mind.

I believe it was agreed by counsel yesterday that as to Count 1 there is no confusion with respect to the issues which are involved.

When we come to Count 2, involving the charges of violation of Section 2 (a) of the Clayton Act, paragraph 6 contains a general allegation of violation of Section 2 (a), and I will agree that under that paragraph, conceivably, almost any violation of Section 2 (a) could be found by the Commission.

To a more limited extent, the same is true of paragraph 11, which refers to classification of customers, quantity, trade and regional discounts. However, as to paragraphs 7, 8, 9 and 10 of Count 2, I believe it is clear as to exactly the nature of the allegations. In other words, these allegations relate solely to the discriminations which flow from the use of the zone systems as to these various products, and I don't believe the issues raised by paragraphs 7, 8, 9 and 10 could be more clearly stated than they are in the complaint.

I assume that the confusion which has been stated relates particularly to paragraphs 6 and 11, and that under the provisions of Section 2 (b) of the Clayton Act, and the decision of the Circuit Court in the Moss Case, that
counsel may feel that it is necessary that an affirma-
2068 tive defense be submitted as to each of the many,
many, many transactions appearing in the record where a price difference is shown. I am aware that the record contains a good many instances of departure from the announced terms and conditions of sale in the customary quotations of the respondents, and of the prices, terms and conditions which I contend were adopted by collusion and agreement. Many of these transactions may involve a violation of Section 2 (a), and may be subject to corrective action by the Commission; however, it is my idea that this case is essentially a price-fixing and monopoly case and that that is the essential charge. And I believe it would be unfair to the respondents and to the Commission, too, to encompass within this proceeding a hundred or more unrelated, really, individual price discrimination cases. Hence, I will state that I do not intend to urge to the Examiner and the Commission that these individual instances of discrimination which do not follow the method and the system of the pattern of the announced prices and terms and conditions of sale of the respondents should be considered within this proceeding.

Now I will state that I consider the discriminations which are alleged in Count 2 to have the effect of eliminating and suppressing competition between and among the respondents and that certain of the discriminations also have the effect of injuring and suppressing competition in the secondary lines in which customers of the respondent are engaged.

2069 I have no more evidence to offer in support of the complaint and rest the case in support thereof.

I had hoped at this time to be able to submit a complete list of corrections to the record, but I have just not been able to get it prepared. I do not know of any errors which would be prejudicial in any sense to the defense of the case.

Mr. DuBose: I think there are one or two. We can get a list of them. I think perhaps we can agree.

Mr. Wright: I think perhaps in the interim we can work up a list before the respondents offer their evidence.

Mr. Ewing: We can agree and submit our joint corrections.

Mr. Wright: That will be entirely satisfactory to me.

Mr. DuBose: May we have a short recess?

Trial Examiner Norwood: Yes, a ten minute recess.

(Short recess.)

Trial Examiner Norwood: I have studied the record here with respect to this pending proffer, Commission's Exhibits 25, 27, 28, and 29, for identification. I think they might as well be received. The objections are overruled and they are received in evidence.

Mr. DuBose: Is that subject to correction?

Trial Examiner Norwood: Yes, all of them are. 2070 absolutely.

Mr. Wright: In that connection, I submit it has already been corrected.

Trial Examiner Norwood: Yes, the counsel are privileged to include that at the close of the testimony in their motion to reverse rulings, and so on, then it will be much clearer if it is inadmissible.

(The documents referred to marked COMMISSION'S EXHIBITS 25, 27, 28, 29, for identification were received in evidence.)

Mr. Ewing: Your Honor, please, on behalf of all the respondents, except Anaconda and International, we should like to reserve the making of such motions as may seem advisable to us to a later date, say February 25, which will give us opportunity to make them in a considered form; also an opportunity to determine what corrections we think, if any, should be made to the record, and to take them up with Mr. Wright; and further opportunities to schedule in our own minds a program from the procedural standpoint as to how we can expect to present the defense in this case; and, at the same time, we would propose to make such motions, make the corrections for the record if any, and to present our suggestions with respect to future procedure as far as the presentation of the defense is concerned, if that is agreeable to you.

2071 Trial Examiner Norwood: I think if you are going to make a motion to dismiss, that will delay it still further. If we postpone it to February 27, then you should make a motion to dismiss, that would postpone it another thirty days or so. How about that?

Mr. Ewing: I think during that interim we would need that much time to get ready to actually start with our first hearing—

Trial Examiner Norwood: To find out whether you want to make a motion to dismiss?

Mr. Ewing: Partially that, and partially to collect ourselves. After all, while we had hoped prior to this to have Mr. Wright conclude his case, and he had hoped to, today is the first time that we know it is concluded. And, also, it is the first time that he has been in a position to give us some idea as to what broad general position it is that he will take. We haven't really thought much about it before, because it would have been idle speculation to have tried to determine what was going to happen, what was in his mind, or program. It was my thought, if we had say until—arbitrarily, we selected February 27, as the date, it would give us an opportunity to do all these other things in the meantime, then at that time we could fix a date when we start with our hearings. The two spaces of time should give us ample time to make such preparation as is necessary.

2072 Of course, to go over this record and really arrive at a considered conclusion as to how we should present our defenses in the light of the tremendous mass of documents is a substantial undertaking.

Mr. Wright: Do I understand then, Mr. Ewing, that you would want until that date in February to determine whether or not you were going to make a motion to dismiss to the Commission, and that then following such a motion, if you had that in mind, there would then be another interval before going ahead?

Mr. Ewing: Following such a motion there would necessarily be an interval of some sort. My thought was that it would really take us, to be in a position to go ahead with an effectiveness, until about April to coordinate what we have and find out what we have got to do. I know you appreciate that because you ran into it yourself when you started to develop the Oxide end of the business and found you couldn't do it right away.

Mr. Wright: I appreciate I am not in any position—

Mr. Ewing: That wasn't a criticism.

Trial Examiner Norwood: I don't know that you can do much of this groundwork between now and the twenty-seventh of February.

Mr. Ewing: We will be doing it.

Trial Examiner Norwood: So that further delays
2073 will be obviated.

Mr. Ewing: We will be doing it. How fast it can be done I am not really in position to say.

Mr. DuBose: After all, Your Honor, the Commission itself, of course, for various reasons had a hiatus in the hearings between May 19, 1945, and June 1946, which was thirteen months.

Trial Examiner Norwood: That makes me all the more anxious to expedite matters so far as I can.

Mr. Ewing: I appreciate that. I also have some appreciation of the magnitude of the task that confronts us. Unfortunately all of us, I can say without contradiction I am sure, can't devote all of our time to this one matter. While we want to be as expeditious as we can, I didn't want to be in the position—that was why we had our discussion—I didn't want to be in the position of standing up today and saying we would like a date, then coming around two weeks from now, three weeks from now, and saying that we couldn't do it. We want to try and determine what we can reasonably expect to do and then be able to stick to it.

Trial Examiner Norwood: Counsel recommends then that we adjourn to February 27?

Mr. DuBose: Why don't we make it the twenty-sixth, Your Honor? The twenty-sixth is Wednesday.

Trial Examiner Norwood: Make it any day counsel wants. I thought the twenty-fifth was the first date you mentioned.

Mr. Ewing: That is what I intended to mention.

Mr. DuBose: Tuesday, the twenty-fifth.

2074 Mr. Ewing: Before taking that adjournment, if your Honor is going to allow it, Mr. Gardiner, on behalf of Anaconda and International has a motion to make, being a different position.

Mr. Wright: Before that motion is made, I want to say I had no objection to Mr. Ewing's statement. I did want counsel to bear in mind that after that date of the 25th, as expeditiously as possible we get started with whatever evidence respondents planned to introduce.

Mr. Gardiner: If your Honor please, the record shows in Commission's Exhibit 836-A, -B, -C and -L, that the Respondent International Smelting and Refining Company has permanently gone out of the business of the manufacture and sale of lead pigments.

It further shows, rather these Exhibits further show that Respondent Anaconda Copper Mining Company has never been engaged in the business of the manufacture of lead pigments or the sale of lead pigments.

Yesterday, a statement was made on the record to the effect that all of the assets and property of the Respondent International Smelting and Refining Company used in the manufacture of lead pigments had been sold to another Respondent in this matter.

In view of the fact that the Respondent International Smelting and Refining Company has discontinued 2075 the business, has sold its plant, the only plant where it manufactured that pigment, has permanently discontinued this business, has no intention of re-entering it, there doesn't seem to be any purpose why it should be retained as a Respondent in this case, why the company should be placed or charged with the burden of defending the case further, and there seems to be no reason why the interests of the Commission should be furthered by continuing it as a Respondent.

So far as the Respondent Anaconda Copper Mining Company is concerned, it never has been engaged in that business; it has never sold lead pigments; there would seem to be no point in continuing it, assuming that the Commission finds that a cease and desist order should be issued—there is no point in issuing a cease and desist order against respondents who are being told to do something or not to do something, or do it in a certain manner, that they are no longer doing.

My understanding of the procedure in such matters is that a motion to dismiss is directed to the Commission, the requisite number of copies filed with the Commission, and a copy furnished to the Trial Examiner in the case. That is what we propose to do, if we are correct in our understanding and that is agreeable with your Honor.

I have a motion to dismiss the amended complaint in both cases, rather as to both respondents. These motions are supported by affidavits of officers of the 2076 respective Respondents, reciting the pertinent facts so far as the sale, discontinuance of the business, sale of the plant in the case of the International Smelting and Refining Company, reciting as far as the Anaconda Copper Mining Company is concerned, that it was never engaged in this business.

Trial Examiner Norwood: As to Anaconda and International?

Mr. Gardiner: Yes, sir, as to whether your Honor would like to have a copy of this incorporated in the record—

Mr. Wright: It will be incorporated if it is filed with the Commission.

Trial Examiner Norwood: Yes, it will be filed with the Commission.

Mr. Gardiner: I should like to further say we are filing with the Commission these motions to dismiss the amended complaint as to the International Smelting and Refining Company and Anaconda Copper Mining Company, without prejudice to those two Respondents, that no action will be taken in preparation for the defense of the case as to those two Respondents, until the Commission rules upon those motions. Here are copies for your Honor.

(The said copies are filed with the Trial Examiner.)

Trial Examiner Norwood: Counsel, that last remark there would indicate that counsel was going to want some more time in case his motions weren't allowed. 2077 I think we should have an understanding.

Mr. Gardiner: We will be prepared to move with the rest of the respondents. I meant to say by that, that we would certainly not be expected to put in any defense until this is ruled on.

Mr. Wright: May I ask counsel, do you intend to request oral argument before the Commission?

Mr. Gardiner: No. No request will be made for that.

Trial Examiner Norwood: Then counsel will file these motions with the Secretary?

Mr. Gardiner: These motions will be filed this morning.

Trial Examiner Norwood: I will retain these two copies.

Mr. Gardiner: Yes.

Trial Examiner Norwood: Is there anything further?

Mr. Ewing: No, sir.

Trial Examiner Norwood: Pursuant to request of counsel, the hearing is now adjourned to reconvene in the Office of the Federal Trade Commission, Room 332, Washington, D. C., at ten a. m., February 25, 1947.

(Whereupon, at 11:04 a. m. an adjournment was taken until 10 a. m. February 25, 1947, Federal Trade Commission, Washington, D. C.)

2078

Room 332,
Federal Trade Commission Building,
Washington, D. C.,
February 25, 1947.

Met, pursuant to adjournment, at 1:30 p. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., and Everette MacIntyre, Esq., Assistant Chief Trial Attorney, appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 815-15th Street, N. W., Washington, D. C.), appearing for Sherwin-Williams Company.

James D. Ewing, Esq., and E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

Edmund P. Wood, Esq., (2801 Carew Tower, Cincinnati, Ohio), and Richard Serviss, Esq., (American Building, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

2079

PROCEEDINGS.

Trial Examiner Norwood: Pursuant to adjournment on January 8, 1947, and postponement to this hour by agreement, the hearing in Docket 5253 is now convened at 1:30 p. m., Eastern Standard Time, February 25, 1947, in Room 332, Office of the Federal Trade Commission, Washington, D. C.

The reporter will note the appearance of counsel present.

I will say that I have made a new study, and I am delivering to counsel a copy of the synopsis which includes my study of the pleadings. I am going to ask each counsel to criticize it and to give me his written notes on any parts thereof which he thinks do not sufficiently reflect his answer or do not truly reflect the charge as put down here. In this I have followed the order of the complaint, and used the same denotation except that, of course, those first four paragraphs are simply taken care of in one short paragraph, and the synopsis of the pleadings which would appear in any report or decision that I may hereafter make would be much shorter than this. But I would appreciate your calling my attention to any deviations from what I have indicated here, and also your submitting the issues, what you consider the issues are, raised by this.

Mr. Welch: Do you have a copy for all counsel?

Trial Examiner Norwood: Yes.

2080 If counsel will do that, it would be very helpful in our study of the case, and it will be helpful in taking further evidence, if any is to be taken.

Proceed.

Mr. Ewing: You will recall, Judge, that before we adjourned, I asked the adjournment to this date in order that we might consider what motions, if any, we thought we should make; consider the corrections to the record that we thought should be made; and consider what, in the way of a program with respect to the presentation of the defense, we could work out by this time.

At that time the respondents Anaconda and International Smelting had filed a motion to dismiss on specific grounds, but no other respondent filed any such motion.

After consideration, we have all come to the conclusion that the state of the record required us to make a motion to dismiss on the general ground that there had been a failure of proof, and we will file today with the Commission's Secretary such a motion, with supporting brief and statement, in the requisite number of copies; and in that connection we are asking for oral argument before the Commission.

I am prepared now to supply you with a copy, and supply counsel for the Commission with a copy, and I will supply him with such additional copies as he would 2081 like to have. At the moment, apparently I am down to about the last one.

I should say this, that this motion which I have just handed you, in brief is the motion of the respondent National Lead. The respondent Glidden is filing a similar motion, and I understand is writing the Commission stating in effect, that as far as a brief is concerned, they are relying upon our brief in order not to add to the Commission's burden. And I understand further that the respondent Sherwin-Williams is doing the same thing, in substance; whereas, the respondent Eagle-Picher is filing a motion and a separate brief, about which Mr. Wood will no doubt have a statement to make.

With respect to the corrections to the record, I have received from counsel for the other respondents a tabulation of their various corrections, which I have put into a composite form. I might say that for all practical purposes they are of relatively little importance; they are typographical errors, obvious mistakes, and so on, and of no serious importance.

I gave Mr. Wright, a few days ago, a copy of some of those. Before we left yesterday our stenographer had not quite finished, and if it is agreeable to Mr. Wright and to you, I would say that I will mail down tomorrow a completed list of both, and subject to approval they
2082 could be filed with the record. Is that agreeable?

Mr. Wright: That is perfectly satisfactory, and I might say that I intend to have a similar list on my part within the next few days.

Mr. Ewing: I am sure that there is no possible chance of disagreement over them.

Mr. Wright: I have discovered none which would alter or affect in any way the proof. They all seem to be very obvious on their face in the record.

Mr. Ewing: The only reason I think it is worth doing is so that at any future time we won't have to make any explanation as to some mistake.

Mr. BuBose: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Ewing: My recollection is that at the last hearing I suggested that assuming we made such a motion as we are making, that we would plan tentatively, on the assumption that the motion should be denied, that we would commence putting in our defense in April. Our thought with respect to that is true. Mr. Wright will undoubtedly, I believe, wish to brief a response to these motions; and at some date, over which I certainly have no control, the

Commission, I hope, will grant us oral argument;
2083 and in the belief that those events will occur at a reasonable time prior to the date I am about to mention, it is my suggestion that our hearings be adjourned to April 21, which I believe is on a Monday. If, in the meantime, the motions are decided and denied, and when I say "decided", I mean not just the day before, but within a few days before so as to permit us to go ahead,—we will be prepared to go ahead on that date with testimony, which I contemplate will take about a week at that time.

As we know, the Commission's counsel, for a reason that I suspect—I may be wrong, and don't want to put words into his mouth—has had a series of disconnected, if you want to call it that, hearings, which has meant that he has been able to prepare for his hearings as they came up after greater or shorter adjournments; and I would say that made the presentation of his case simpler from his standpoint, and enabled him to present it in a more concise and better form than otherwise.

We feel that a similar presentation will be of benefit to all concerned in this case, that is, if we had hearings, say, for a week in April, and then a reasonable delay to prepare the next,—I don't mean to string it out, but reduce it and get it in proper form for presentation,—and then go on again, subject to your convenience and the convenience of other counsel. In that way I think that we will be able to reduce the testimony required of us to within a rea-
2084 sonable compass and to a large extent keep the record down.

As I add it up, I would say that since the hearings were commenced in June, which was the first real affirmative presentation of the Commission's case, there have been some 23 days of hearings. I think we might run a little more than that, but that is a pretty good approximation of the time we all think it would take to put in our case, over all; that is, hearing days.

Therefore, I suggest—and, of course, what action the Commission may take with respect to these motions might have an influence, and if it required any further agreement I have no doubt that we could arrive at it—but it would be my suggestion that because the testimony we would plan to offer first would come principally from New York witnesses, with records in New York, that we adjourn subject to the disposition made of the motions, to April 21 in New York, at which time, assuming the motions are denied, we will be prepared to proceed for, as I say, approximately a week with the first part of the defense testimony.

Mr. Wright: Was counsel for Eagle-Picher going to make any statement—

Mr. Wood: (Interposing.) Yes, unless you want to pass on the question of time first.

Mr. Wright: I would rather have some idea about these motions before we come to that point.

2085 Trial Examiner Norwood: Proceed, Mr. Wood.

Mr. Wood: I have three matters, your Honor. In the first place, I would like to renew the motion which I made at the hearings here in Washington last June, that the Commission supply counsel for the respondents with a list of the discriminations, the alleged discriminations, on which the Commission will rely as violative of Count II.

Now I appreciate the fact that Mr. Wright made a statement on the record at the January hearing, and I do not doubt that he went as far as he could and did as well as he could. But in my opinion it falls short of what is necessary for the respondents to have in order properly to prepare their defense to this very substantial record, which includes over 2,000 pages of testimony and I think 6000 or 8000 pages of exhibits, something of that nature.

I think that I made my position clear before, and I am simply renewing this motion at this time for your Honor to pass on it at this time. That is my first motion.

The second motion has to do with Paragraph Seven-B of the complaint. I was looking this morning at your Honor's first outline of the charges of the complaint as you conceived them, and I find that Paragraph Seven-B of the outline which you gave us just a few minutes ago is a little bit different from the first outline. Frankly, I have been puzzled myself as to the correct meaning of Paragraph Seven-B, but my motion is this, that the Com-
2086 mission particularize as to the date on which the
Eagle-Picher respondents commenced the practices charged in Seven-B.

On that Seven-B, your Honor, I think it fairly important from the point of view of the defense to know whether or not Seven-B charges that National cooperated or collaborated with each respondent individually, or whether we are charged with a group conspiracy. As I read Seven-B, the only charge is that National, whose monopoly is charged in Seven-A, collaborated with each respondent individually. In other words, I read it a little differently from the way your Honor reads it, and I think the difference is of some importance from the point of view of—

Trial Examiner Norwood: (Interposing.) What subsection is that?

Mr. Wood: Seven-B.

Trial Examiner Norwood: "Respondent National agreed with duPont"—

Mr. Wood: (Interposing.) That is Seven.

Trial Examiner Norwood: Oh, yes, I see it.

Mr. Wood: It is right at the bottom of page 2 of your outline.

So I would like to make the motion that the Commission be required to furnish us with a statement as to when the Eagle-Picher respondents commenced the course
2087 therein identified, and also what specific acts Eagle-Picher respondents are alleged to have done.

Those motions are directed to the court.

Trial Examiner Norwood: Is that all with respect to statements required?

Mr. Wood: Yes, your Honor.

Trial Examiner Norwood: Now I will ask Mr. Wright to make any statement he wishes to with respect to those.

Mr. Wright: Your Honor, the matter of the particular transactions, which is the subject of Mr. Wood's first motion, is one that has been discussed at great length by counsel in this matter, both on and off the record, and I don't believe that I can add anything to the statement I made at the last hearing here in January with regard to that subject, as to particular transactions. Certainly the complaint and the answers, and my statement, show an understanding by counsel of the type of transaction which is challenged under Count II, and it is an easy matter, I am sure, for counsel to determine the records of particular transactions that appear in the record involving his client, Eagle-Picher, which fall within those categories.

That motion has been made a number of times before, and I don't think Mr. Wood has added anything to the statements that were made before, and I submit that it should be denied.

2088 Now with reference to Paragraph Seven-B of the complaint, I think the key to that paragraph occurs in the first sentence of the complaint where it says, "Respondent National has also combined and conspired with" the remaining sellers of lead pigments in the United States. In other words, that paragraph charges a combination and a conspiracy between and among the various respondents, not individual conspiracies each with National.

Mr. Ewing: Might I interrupt you there, Mr. Wright? The language of the amended complaint—this needn't be on the record. I want to direct his attention to it so he may clarify it if he cares to.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: In further connection with the meaning of Paragraph Seven-B, of Count I, the combination and conspiracy charged in the first sentence thereof is by and between National and the other respondents in this matter.

Now as to the specific dates and acts, I believe it is plain from the proof which has been offered in this case exactly the period of the conspiracy which is covered by it. Certainly the evidence introduced in the form of documentary evidence covering the activities of the respondents shows the conspiracy which is the subject of this complaint
2089 to be one which was initiated sometime around the
year 1933, and which we contend has been in existence from that time until the present.

Now as to specific acts which might go to make up the proof of that conspiracy, there are so many pieces of evidence which must be fitted together to make up the picture and pattern of the conspiracy that to describe the particular acts would be like briefing the case on the merits, and I don't believe I am required to undertake that at this point.

Mr. Wood: I think I made my question unduly hard. I really wanted to know whether the Eagle-Picher respondents are charged merely with collaborating with National, or whether we are also charged with collaborating with Glidden, with Sherwin-Williams, and Anaconda, each.

Mr. Wright: It is my theory of this case that all of the respondents were engaged in a conspiracy to do the acts which are set forth in Paragraph Seven-B of Count I, and it was a conspiracy by and with each other and for the benefit of all of the alleged conspirators.

Mr. Wood: I would like to say on the record, your Honor, that the statements of Mr. Wright entirely clear the second point I made in my request for information. That leaves the first question of the information in respect to the discriminations.

Now I didn't try to go beyond what had been pre-
2090 viously said because it has been argued very sub-
stantially, and of course we know that the delivered price system in itself is charged to be a discrimination; that the zone system is charged to be a discrimination. I take it that quantity discounts, or at least some of them, are charged to be discriminations, but I don't know how many of them are in respect to how many products. I think there are some functional discounts with respect to white lead in oil. I do not know whether those are charged to be discriminations.

Then there is that tremendous tabulation that was made over a period of several weeks, from the Eagle-Picher invoices.

You see, everything that I have mentioned could have been charged rather simply, but I do not know the significance of that complex tabulation or what that adds to the fairly simple issues that Mr. Wright says I already know. I assume that that complex tabulation has some purpose, and that it wasn't put in simply to make the case look tough, but that the Government has something in mind, and frankly I don't know what it is. And what is more, when I examined the man who made it, he said he didn't know why it was made that way. So I have done everything I can to find out.

Mr. Wright: With regard to the tabulation, I am sure if Mr. Wood will recall the circumstances that attended
making it in the first place, it was intended to substi-
2091 tute for the having of thousands of invoices and
original records, showing transactions in these products, in the record. It was thought that that would be a much simpler way of having the information at hand.

Now certainly the records of transactions in these products are good evidence of a number of facts that are inextricably bound up in this proceeding, the most important of which are to show the identity of prices by the respondents; and furthermore, to show transactions in which discriminations, as alleged in the complaint, occurred.

May we go off the record a minute?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wood: I would like to state on the record that our reference to the invoices and tabulations of invoices, and our request for specific information in respect to which sets of transactions constitute discriminations, is related solely to Count II, and whatever burden may be on the respondents to defend in relation to Count II; that we are not looking at these documents from the point of view of Count I or charges of conspiracy or charges of collusive action, but merely from the point of view of price discrimination.

I would also like to state on the record that the answers in general admit delivered price selling; they admit zone selling particularly of white lead in oil; they admit
2092 certain quantity discounts.

Now it seems to us that with those admissions in the pleadings, there must be some specific purpose of all of this detailed data if it relates to Count II.

Now if it relates only to Count I, I still think we are entitled to know specifically what discriminations we are charged with, but perhaps we need not be so concerned with the details of the invoices if they relate solely to Count I.

Trial Examiner Norwood: I really think that the statement he made heretofore covers your point there, but let's see what else he has to say.

Mr. Wood: Well, I brought out specifically, for instance, that we do not know whether or not the functional discounts, when utilized, are charged to constitute illegal price discrimination. That is just an example.

Mr. Wright: We have covered this a number of times. I hoped I had cut down on the objection that has been raised to this thing.

Actually, the tabulations themselves are in no way different than the actual invoices. In some instances we have the actual invoices in the record, so that the considerations that would apply to the tabulations would apply to the invoices, and vice versa. The tabulations were solely a time and trouble-saving device that we adopted.

2093 In view of my statement that I made at the last hearing, that we were not going to try numerous price discrimination cases involving deviations by the respondents from what we consider were their regular prices and terms and conditions of sale, as we also consider were agreed on under Count I, I can't point to a transaction in the record with a customer in Zanesville, Ohio, and another one somewhere in Indiana and state, "Well, that is a discrimination"; whereas, another one is not. Those must be compared, for the purposes of Count II, by the category or class of transaction that is involved, in accordance with the allegations of the complaint.

Mr. Wood: It seems to me that an infinite number of those comparisons is necessary if the respondents are to prepare their defense, and that we ought to have at least sample transactions to crystallize issues in the case.

Trial Examiner Norwood: Wasn't the statement made that there were no price discriminations to be urged against respondents that were not involved in this zone system?

Mr. Wright: No, sir. I consider that the quantity discounts of the respondents are discriminatory, and we have offered evidence, I believe, in the record, showing the injury to competition in the secondary line as a result of those discriminations.

Now the complaint also alleges specifically that the functional discounts are discriminations.

2094 Mr. DuBose: As I get it, Mr. Wright, isn't this true, that your contention is that these invoice tabulations are not primarily going to be used to show individual discriminatory transactions between two individuals located, say, in towns that may be contiguous, in so far as they might not be illustrative of a general system, in other words, of delivered price throughout a zone, of zone pricing, of trade or functional discounts, of regional discounts, and of quantity discounts, all of which are alleged in Count II?

Mr. Wright: That is my feeling in the matter, yes, and I thought that was made clear the last time we met in January.

Trial Examiner Norwood: I thought it was.

Mr. Wood: If your Honor please, we are bound to be confused by this type of situation. Now in respect to the sale of litharge in the battery industry, a great number of days' testimony was taken investigating competitive conditions throughout the Middle Western area. So from that, naturally we know that we are under attack for quantity discounts in respect to that product in that general area.

Now no similar testimony was taken in respect to white lead in oil or in regard to many other products that are mentioned in the complaint. That is bound to leave us in some confusion to know just how many differentials or how many different differentials we are called upon to attempt to justify. 2095

We are dealing with lead in oil, dry white lead, litharge, red lead, and I think a couple of other minor pigments, all those different products. We have the issue first of all, whether or not the delivered price system itself, let's say, within a zone, is legal; whether the zone system is legal, that is, charging differentials between zones, at least on some of these products. Third, we have the question of quantity discounts, and there are different quantity discounts in respect to all of these different products. Then there is the question of functional discounts. Now you can see the great number of issues that are possible in the case, and the only testimony relating to conditions in the industry, that is, the effect on competition, was in respect to the battery industry and in respect to the paint manufacturing industry in St. Louis, those two alone. Are we to assume from that, that those are the two sole issues on the effect of discrimination, or are we to defend on everything I have mentioned?

2096 Mr. Wright: Well, I don't believe Mr. Wood can safely make that assumption. I believe it sounds a little more complicated, the way he says it, than it actually is. Actually we only have three categories of products involved in this case. They are the keg products, as I understand it, and whatever lead pigment is sold in kegs is sold generally under the keg product method of selling. Another is the dry white method of selling; and the third is the oxide method of selling. So that actually there are only three general categories of goods involved in the thing. So that saying there are a great many different functional discounts and quantity discounts involved I believe is making it overly complicated. Now it is my contention that the functional and quantity discounts involved in those methods are discriminatory.

Mr. Wood: I am sorry to make it complicated, but all I ask is for Mr. Wright to make it simple.

Mr. Wright: As Mr. Wood has said, there has been actual evidence of injury to competition in the secondary line only in paint and in the battery field. That is the only direct evidence that there is in the record, that is direct evidence of injury in the secondary line flowing from these

discriminations. However, there is the overall allegation in Count II that all of these discriminations, the functional and the quantity and the regional or zone discriminations,
were engaged in by the respondents for the purpose
2097 and with the effect of eliminating competition be-
tween and among themselves; and I believe the record is plain, from the invoices and the tabulations and the testimony heretofore taken, on the extent to which competition has been suppressed through the medium of these discriminations.

Mr. DuBose: Mr. Wright, is it your understanding that regional discounts referred to in Paragraph Eleven, refer back to the zone method? Is that the regional discount?

Mr. Wright: Where are you reading?

Mr. DuBose: Paragraph Eleven has a sort of omnibus allegation with respect to discriminations resulting from quantity, trade and regional discounts, whereas Paragraphs Nine and Ten talk about the zone delivered price method and practice.

Mr. Wright: I believe that "regional," as it used there, has a larger meaning such as a discount or price difference because of the customer's location.

Mr. DuBose: I see. Which applies both to a uniform delivered price and to the zone method itself?

Mr. Wright: That is right.

Mr. Ewing: Might I ask one question? I understand that when Mr. Wright has made his statements with respect to this Count II problem, he has been saying to us in effect—and we appreciate it—that we don't have to go
through these many thousands of transactions with a
2098 view to finding, if we can, what appear to be cases
of individual price discrimination, and justify them, because certainly if we had to do that we would probably be here until 1960. As I understand it he is directing his charges there, generally speaking, against the functional discounts employed by the respondents, or any of them, in the particular lines of products that are sold, and against the quantity discounts. Now I can see how I can make justification for our functional discounts, shall we say, generally, or our quantity discounts generally, and yet in that I will be perhaps giving no adequate answer to a countercharge based upon a specific transaction. That is a problem, along with these other things that we have mentioned,

that concerns me. I can offer testimony to show why we adopt our functional discounts, or why we adopt our quantity discounts, overall, but that is not to say that in some particular case there might not be a situation which would make my explanation, as I gave it, inadequate. My question of Mr. Wright would be—would he expect us to do more than just attempt to justify the system generally, and are we to anticipate an argument based upon the relatively small amount of testimony offered with respect to the dry white lead and the oxides, as proof of injury to the secondary line? Are we to assume—I won't say assume—are we to take it that only do we have to meet the claim
that injury to the secondary line has been proved in
2099 the cases where the testimony has been offered, or
do we have to go through the whole field to meet the assumption that the proof in these few instances is proof of injury to the secondary line in all transactions? I don't know whether I make myself clear.

Trial Examiner Norwood: As I read the complaint, what is charged here is the employment of methods and of course these specific instances are evidence as to the methods. There may be two or three of them, there may be just one, or there may be a thousand, but let us not lose sight of the fact that it is the method that is being attacked.

Mr. Wright: That is right. Now I don't want Mr. Ewing to get the idea that an abstract defense to all transactions, for instance, of one respondent, would be an adequate defense in my opinion to particular transactions that are in the record which illustrate the discriminations which are charged in the complaint.

Mr. Ewing: I don't mean to interrupt you, but since you mention it, it brings to my mind difficulty. You say "particular transactions that are in the record which illustrate." Now there may be many thousands of particular transactions in the record, as evidenced by the invoices, to which no attention has been called. I know you don't want us to comb the invoices because everything you have said is to the contrary, but it seems to me that once we can
thrash this out as to, generally speaking, what we
2100 have to meet, it is going to save everybody a tremendous amount of work and trouble.

Mr. Wright: May we go off the record a minute?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: May we have a five minute recess, Your Honor?

Trial Examiner Norwood: We will have a five minute recess.

(A short recess was taken.)

Trial Examiner Norwood: The hearing will be in order.

Mr. Wood: I would like to ask a ruling on my motion and I would like to point out more clearly the purpose of my motion. Now Mr. Wright stated that the charges are general as to certain systems of pricing, but that the justifications must be specific and individual to the transaction. He admitted in his statement in January that the number of transactions which might be involved all told, is tremendous. Now if the generalized defense of the differentials is inadequate as a matter of law, if it is as he states, then we have the burden of specifically defending as many different transactions as the trial attorneys for the Commission may choose to individualize, and certainly under those conditions we have the right to know what individual transactions are in the record which require
2101 individual defense.

Trial Examiner Norwood: Do you have any further statement, Mr. Wright?

Mr. Wright: No, Your Honor. I would like to state that while I said that the charges were general, they do charge particular discriminations of a general category. We have been over this same ground a number of times, both with Mr. Wood and with Mr. Hinds, on similar motions, and I hope that the statements I have made in the past regarding my position as to the allegations of the complaint, and those that we have made today, have sufficiently taken care of the situation.

Trial Examiner Norwood: Well, I think counsel have gone a considerable way towards coming to an understanding of these points at issue, and if they have not been rendered entirely clear I trust that they will become increasingly clear as we proceed, and I feel that it is to the best interests of this proceeding for me to deny the motion at this time.

Mr. DuBose: That is if we proceed after the motions are heard and determined by the Commission?

Trial Examiner Norwood: Yes.

Mr. Wood: Now I will finish my end of it. On behalf of the Eagle-Picher respondents I am filing a motion to dismiss. I have copies of the brief and will file the proper number with the Secretary.

2102 Trial Examiner Norwood: Do you have anything further, Mr. Wright?

Mr. Wright: Not at this point. I would like to ask if any other counsel have any other motions?

Mr. Welch: Counsel for Sherwin-Williams is going to file with the Commission today its motion to dismiss, not supported by a brief or statement.

Mr. Wright: I have never seen these briefs or motions up to this point, so it is difficult for me to discuss this subject without knowing more about the scope of the motions. Is my understanding correct, Mr. Ewing, that your motion is based on the failure of the proof in support of the complaint to make out a case?

Mr. Ewing: That is correct.

Mr. Wright: Is that true of yours, Mr. Wood?

Mr. Wood: Yes. My brief does not particularly overlap National's brief, but is directed to the same general grounds.

Mr. Wright: Do these motions also raise the principal legal questions involved as to the significance of the evidence to constitute collusion, and the significance of the evidence to establish discrimination under Count II?

Mr. DuBose: Yes, I would say so.

Mr. Ewing: Yes.

Mr. Wood: Yes.

2103 Mr. Wright: May I ask counsel if they are willing to proceed to a final determination of this matter on the basis of the record as it now stands?

Mr. Ewing: Oh no. These motions are based, just as stated, on the position that there has been a failure of proof so far as the Commission's case is concerned. Now if we are held to be wrong in that we have plenty by way of defense that we want to put in.

Mr. Wright: Then am I right in assuming that they stand on the same relative footing as would a motion for a directed verdict?

Mr. Ewing: Not as a motion for a directed verdict, but as a motion to dismiss at the close of the plaintiff's case.

Mr. DuBose: But they are seriously made.

Mr. Wright: Well, Your Honor, in connection with these motions, which of course are directed to the Commission itself rather than to the Examiner, in accordance with the Rules of Practice, there is nothing we can determine here with respect to these motions, so that the only question that is presented here is whether or not the respondents' request for adjournment until such time as the Commission disposes of these motions, or April 21st, should be granted.

Mr. Ewing: I picked April 21st of course out of my head, in a sense, but I had indicated in January that as-
suming we made the motions, and assuming that they
2104 were denied, we would be ready to proceed with our
case sometime in April.

Trial Examiner Norwood: I was rather shocked at the April 21st request. That is sixty days from now, practically.

Mr. Ewing: Well, my basis for that is this—

Trial Examiner Norwood: (Interposing.) I see that counsel have done a great deal of work in preparing their motions and briefs, and it seems to me that all they have to do is to get the Commission to hear them.

Mr. Ewing: That is correct.

Trial Examiner Norwood: I don't see that it is going to require sixty days.

Mr. Ewing: I have no control over when the Commission is going to hear me, if they are going to hear me. I certainly have no desire to restrict Mr. Wright in the time that he will need to put in whatever answer to us he sees fit, and I have no control over the date, of course, upon which the Commission will decide these motions. It may be that in deciding the motions, whatever the decision may be, the Commission will say something that might affect the nature of the evidence, if a defense has to be presented. As you say, we have put in a lot of work on this; we have put in a considerable amount of groundwork in connection with the defense. But we honestly need that time, and the
reason I picked that date is because it seemed to me
2105 likely—and I may be entirely wrong—that not too
far in advance of it there would be a decision, and that we then would be in a position to proceed, having properly prepared to proceed, expeditiously and with a view to keeping the record down to a minimum, so to speak. The date in April is not because I have any notion that I am biting off another sixty days, I am not interested

in that, particularly, and I think Mr. Wright knows that we are not going to try to stall him around.

Mr. Wright: It seems to me that there are really almost two separate proceedings here. One is the motions before the Commission to dismiss the complaint; and the other is the trial of this case on the merits. I believe that it is improper at this time to require the Commission to make a complete determination on the merits of this matter by way of an interlocutory decree, which would require a complete analysis of all the facts and of all the legal considerations in this case, which after all can only be a full-dress rehearsal to a final decision on the matter, unless there has been some grave error in the presentation of the Commission's case. Now this is similar to a motion which is made in court to the judge who is hearing the case. He has heard the evidence, he is familiar with the issues, he is familiar with the proof, he has seen the testimony. In that event it does not require the judge to determine that there has been a prima facie case, or that
there has not been, and he can make a summary rul-
2106 ing on it. The procedure which the respondents are
following in this matter requires for the Commission
a complete trial of this case on the merits, now, and then again later.

Mr. Ewing: No it doesn't.

Mr. Wright: Now I have no objection to the motions, I properly could not have, but I do object to conditioning the resumption of the case against the complaint by the respondents on the disposition of those motions by the Commission. I think the end result of that will be to unduly delay the final determination of this case, and that is a consummation that I devoutly wish, the final determination of the issues in this case, and I hope that counsel are with me in that. I want to say right now that I appreciate very much the cooperation that we have had up to this point by counsel in aiding me in presenting this case. We got the amended complaint out in April; the answers were filed in May; we had our first hearings in June; we had substantially completed the case in November and would have wound it up, wound up the few tag ends, in the early part of December but they were postponed until January. Now back then I advised counsel that we were about to rest the case and requested them to be thinking of their plans for putting on their case in

opposition to the complaint. That has been a good many months ago. I want to say that I stand ready to cooperate
with counsel for the respondents in the same way
2107 they have cooperated with me, and if there is any-
thing we can agree on now which will help to speed up the final determination of this case, I wish they would let me know what it is so that we can get together on it if it is at all possible.

Mr. Ewing: As I said before, we are not making these motions with the idea that we are simply playing for time. If we had been playing for time—and Mr. Wright suggested in his remarks that we had cooperated with him—we could have done very differently from what we did, and we would not—as we all did—have gone to thousands of dollars of expense literally to supply the papers that we have and to get them as promptly as we have. These motions are made in the belief that they have substance. Certainly we are entitled to ask the Commission to dismiss a case on the ground of failure of proof, and we are entitled to have a ruling on that, and because we make such a motion it should not be suggested that we are trying to unduly delay the proceedings.

Trial Examiner Norwood: I don't believe counsel said that the delay was intentional. All he said was that that would be the net result.

Mr. Wright: That is correct, Your Honor.

Mr. Ewing: That may be, but we certainly should not be asked to proceed until there has been a ruling, and until
we know exactly what form that ruling takes.

2108 Trial Examiner Norwood: I think counsel is right
about that and I am going to allow the motion to adjourn until such time as these motions may be heard by the Commission and disposed of. In case the Commission grants the motions and dismisses the case, there will be no further proceedings. But I think that probably the first week in April would be sufficient on this matter and I will simply say that if we find that you need to have more time after that we will be guided by the necessities of the case. It is contemplated here that you are only holding for a week and that you may have to have a little more time after that.

Mr. Ewing: That I don't think is unreasonble because nobody asked or expected or in any way—and I am not saying this by way of criticizing—suggested that Mr.

Wright should have poured through his series of hearings throughout the country day after day and in succession. I said before, I believe, that I think he probably presented his case in more concise form because he didn't do that or attempt to do that. I think that applies also to us and we, too, may have to return the compliment to him by taking a tour of the Middle West and possibly the Pacific Coast.

Mr. Wright: May I ask Mr. Ewing if he is prepared to give me any estimate of the time that will be required in presenting his defense?

Mr. Ewing: I can give you this sort of estimate.
2109 I believe that with a month of hearings—and I am not saying a day to day succession amounting to a month—but I think that with, say, thirty days of hearings we can put in our case as we see it now, but that is just my horseback opinion. As I say, I don't want anybody to think that I am suggesting that we will start on the first of May and sit until the 31st of May and do it, because I couldn't do it that way.

Trial Examiner Norwood: Gentlemen, I will say that I have made all other engagements subject to this case. I want to go into the matter thoroughly here and try to do a good job on it, and I don't want to put it off until late in the Spring. Let's make a beginning the first week in April, and then if you have to have some further time of course you know you are going to get it if it is reasonable for you to have it.

Mr. MacIntyre: If Your Honor please, in addition to the statements that have been made by Mr. Wright concerning his position as trial counsel here in opposing the delays in connection with the taking of evidence on behalf of the respondents pending the disposition of their motions, I desire, on behalf of the Chief Trial Counsel's Division, to voice on the record opposition to any delay in the case based on the pendency of these motions before the Commission, for the Commission's disposition of them.

We think that such delay would not be in keeping
2110 with the present Rules of Practice of the Commission.

Trial Examiner Norwood: Well, they may have the time I said, and if they show a positive necessity for a longer time I will consider such a request.

Mr. Ewing: Mr. Examiner, I haven't a calendar with me but that date you suggested is subject to a prior determination by the Commission, is it?

Trial Examiner Norwood: That is right.

Mr. Wright: May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

I want to ask counsel, before ruling on this, if these motions have now been filed?

Mr. Ewing: They will be filed today.

Mr. Welch: They are ready for filing.

Trial Examiner Norwood: Have counsel applied for oral argument at an early date?

Mr. Ewing: We are asking for oral hearing at such time as may be convenient to the Commission.

Mr. Wood: I have one point in advance of adjournment, Your Honor, and that is this. I think that counsel for the Commission and counsel for the respondents all agree that the motion which I made with respect to the identification of discriminations, which motion Your 2111 Honor denied, is of substantial importance, that is, both in relation to the defense of this case, and possibly as a precedent in relation to other cases. I would like very much to have that certified to the Commission for hearing at the same time we argue this motion to dismiss.

Trial Examiner Norwood: I don't think it is necessary to do that. We have been elucidating these matters all the way through and to be candid with you I think that Commission counsel has made all the statement that he should be required to make. Counsel have the evidence here, they can study the evidence and read the charges. This charge is against a method and here is certain evidence or certain fragments of evidence, a great many, which will have to be studied. I will have to study them and everybody else will have to study them, and I think counsel should go into that for themselves.

Mr. Wood: As I say, there is a difference between the statements of individual trial attorneys for the Commission and a statement binding on the Commission. Now as I interpret it there is a difference between the opinion or the view of Mr. MacIntyre and Mr. Wright. Maybe I am wrong in that respect. But my point is that the statement of the individual trial attorney is in no wise binding on the Commission, according to Mr. Wright's statement in January. I think it should be.

Trial Examiner Norwood: I don't think it should
2112 be. Now if counsel wants to file his motion with the Commission that is all right, but I do not think that I should certify that question to the Commission. I think that we have made every effort to elucidate on the subject here, and will probably do something further along that line as the case proceeds. The administrative process isn't the same as the court process, and we clarify these matters as we go along, and the next time we meet to take further evidence there will probably be further clarification.

Mr. Wright: May I say to Mr. Wood in answer to his statement that I can't bind the Commission by my statements that that is probably true as far as it goes. However, I can assure Mr. Wood—and I believe Your Honor will bear me out in this—that any statement I make about the issues in this case the Commission would, I am sure, consider binding on itself until it had given the respondents an opportunity to come back or introduce evidence against any other interpretation of the issues of the case.

Mr. Wood: Thank you.

Trial Examiner Norwood: The motion is now for adjournment to the 21st of April. After discussion it has been decided to convene at an earlier date and accordingly this hearing is now adjourned to reconvene on Tuesday, April 8, 1947, at 10 o'clock a. m., Eastern Standard Time, in the Bar Association Hearing Room, 36 W. 44th Street, New York City.

2113 (Whereupon, at 3:25 p. m., February 25, 1947, the hearing was adjourned to April 8, 1947, at New York, N. Y.)

2114

Trial Room,
Bar Association Building,
36 West 44th Street,
New York, N. Y.,
April 22, 1947.

Met, pursuant to notice, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., Attorney for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington, D. C.) appearing for Sherwin Williams Company.

Edmund P. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Robert H. Ecker, (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

Roger Hinds, Union Commerce Bldg., Cleveland, Ohio, appearing for The Glidden Company.

2115 James D. Ewing, Esq., E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

2116 PROCEEDINGS.

Trial Examiner Norwood: The hearing will be in order. Pursuant to postponement and due notice served upon counsel, the hearing in Docket No. 5253 is now convened at 10 o'clock, a. m., Eastern Standard Time, in the Trial Room of the Bar Association Building at 36 West 44th Street.

Mr. Welch: Your Honor, may I make a statement off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

The appearances are as follows: Joseph S. Wright, appearing for the Federal Trade Commission.

J. T. Welch, appearing for the Sherwin Williams Company.

Edmund P. Wood, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Robert H. Ecker, appearing for Anaconda Copper Mining Company and International Smelting and Refining Company.

James D. Ewing and E. Z DuBose, appearing for the National Lead Company..

We are now ready to receive evidence from the Respondents.

2117 Mr. Ewing: I will call Felix Wormser.

Trial Examiner Norwood: Now, the motions filed for dismissal have been denied by the Commission and that is a matter of record in the case. I suppose there is no necessity for discussing it further.

Mr. Wood: May I be off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed, please.

FELIX E. WORMSER was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Ewing.

Q. Will you again state for the record your name and address, Mr. Wormser?

A. My name is Felix Edgar Wormser. I live at 1 Acorn Lane, Larchmont, New York and my business address is 420 Lexington Avenue, New York City.

Q. At the present time what is your business?

A. I am secretary-treasurer of the Lead Industries Association.

Q. And how long have you occupied that position?

A. Ever since its inception in 1928.

2118 Q. Prior to 1928, in what business were you engaged?

A. I was a consulting mining engineer.

Q. And how long have you been one?

A. I am a mining engineer by profession. As a matter of fact I am a registered professional engineer in the State of New York. I was educated at the Columbia School of Mines and received my degree there and prior to my position with the Lead Industries Association, I spent practically all my time connected with mining activities or in the Army of the United States.

Q. When did you graduate from the School of Mines?

A. In 1916.

Q. Are you connected with any technical society?

A. Yes, sir. I am connected with quite a few technical societies.

Q. Will you give us their names?

A. I am a member and former director of the American Institute of Mining and Metallurgical Engineers and counsellor to the Mining and Metallurgic Society of America; a member of the Institute of Metals of London; a Fellow of the American Association for the Advancement of Science; a Fellow of the American Public Health Association; a member of the American Academy of Political and Social Science; the American Economic Association; the American Institute for Economic Research; the American
2119 Marketing Association; a member of the Society of American Military Engineers; American Society of Agricultural Engineers; American Society for Metals; American Society for Testing Materials; American Statistical Association; Society of Automotive Engineers as an associate member.

I am also a member of the Electro-Chemical Society and the Academy of Political Science. There are a few others but I don't think it is necessary to put those in the record.

Q. Are you the author of any works or books with respect to mining and engineering?

A. Yes. I am the co-author with Mr. J. E. Spurr of the text "Marketing of Metals and Minerals."

Q. Mr. Wormser, I show you a printed copy of Commission's Exhibit 495 for identification and ask you what it is (showing same to witness)?

A. This is a copy of the original constitution and bylaws of the Lead Industries Association dated as of November 14, 1928, the day on which it was organized.

Q. Did you heretofore produce pursuant to subpoena a copy of that constitution and by-laws?

A. Yes, sir.

Mr. Ewing: I offer the exhibit for identification, Commission's Exhibit 495, as Respondent's Exhibit No. 1 in evidence.

2120 Trial Examiner Norwood: Is there any objection to the proffer of the exhibit?

Mr. Wright: I have no objection.

Trial Examiner Norwood: It will be received in evidence as Respondent's Exhibit No. 1.

(The paper referred to, heretofore marked for identification as Commission's Exhibit 495, was received in evidence as RESPONDENT'S EXHIBIT NO. 1.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing: Q. Mr. Wormser, I show you a printed copy of the document which has heretofore been marked as Commission's Exhibit 496 for identification, and ask you what that is (handing same to witness)?

A. This is a revision of our constitution and by-laws revised as of January 19, 1934.

Q. And did you heretofore produce pursuant to subpoena the document which was marked heretofore Commission's Exhibit 496 for identification?

A. Yes, sir.

Mr. Ewing: I offer this in evidence as Respondent's Exhibit No. 2.

Mr. Wright: While I did not object to the previous exhibit, I will object to Exhibit 496 and say that they are irrelevant to the issues in this matter. The Lead Industries Association is not a party to the case and by no
2121 stretch of the imagination can I see that the constitution and by-laws of the association affect any of the issues involved.

Trial Examiner Norwood: They received honorable mention in here.

Mr. Ewing: They certainly did. The Lead Industries Association is charged with at least one of the mediums through which the conspiracy was carried out and it seems to me that we are entitled to show what the association was and how it operated.

Trial Examiner Norwood: It will be received as Respondent's Exhibit No. 2. Objection overruled.

(The paper referred to, heretofore marked for identification as Commission's Exhibit No. 496, was received in evidence as RESPONDENT'S EXHIBIT NO. 2.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. I show you a printed copy of a document heretofore marked as Commission's Exhibit 497 for identification, and ask you what it is (showing same to witness)?

A. This is a revision of our constitution and by-laws as of September 10, 1941.

Q. Was the document heretofore marked Commission's Exhibit 497 for identification produced by you pursuant to subpoena in this proceeding?

2122 A. Yes, sir.

Mr. Ewing: I offer the document Exhibit 497 for identification in evidence as Respondent's Exhibit No. 3.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: The same objection as to lack of materiality and relevancy.

Trial Examiner Norwood: It will be received as Respondent's Exhibit No. 3. Objection overruled.

(The paper referred to, heretofore marked for identification as Commission's Exhibit No. 497, was received in evidence as RESPONDENT'S EXHIBIT NO. 3.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. I hand you the document which has been marked as Respondent's Exhibit No. 3 and direct your attention to article 6 relating to membership. Have you read the section?

A. Yes, sir.

Q. Will you state whether membership in the association includes individuals or companies engaged in the business of mining lead?

A. Yes, sir.

Q. Does it include companies or individuals engaged in smelting or refining lead?

A. Yes, sir.

2123 Q. Does it include companies or individuals engaged in the manufacture or production of various lead products?

A. Yes, sir.

Q. I notice that article 6-A refers to lead ore and lead concentrates. Will you state the differences between lead ore and lead concentrates?

A. Well, lead ore and lead concentrates are distinguished by the fact that lead ore is a mineral or a material which contains lead in sufficient quantity to make it commercial. Now, the ore may be rich enough to be smelted directly such as the specimen I have here (illustrating) which you can see is rich enough for the purpose, or it may be so low grade that it has to be concentrated in order to provide a product that is rich enough for smelting.

So that lead concentrates I would really consider a material that is an ore that has been mechanically treated so as to make it rich enough for smelting.

Q. Who produces lead concentrates?

A. Lead concentrates are produced by mining companies all over the United States.

Q. Will you tell us what the term "lead smelting" means?

A. Lead smelting is the art of extracting metallic lead from ores or concentrates.

Q. ~~And~~ how is that done?

A. That ~~is done~~ generally by fire methods which is a
rather interesting procedure. An ore such as this
2124 would be a direct smelting ore, but in any event the
sulphur is removed generally by roasting operations and then the sintered product is put in the blast furnace and by appropriate fluxing and the mixture of fuels, you get a crude bullion which it tapped from the blast furnace.

Mr. Wright: I would like to inquire if counsel for the Respondents are calling Mr. Wormser as a mining engineer and expert to testify with regard to these products?

Mr. Ewing: Yes, in this connection. Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Complete your answer, Mr. Witness.

The Witness: Well, that briefly is the smelting operation.

By Mr. Ewing:

Q. Now, will you tell us what is the operation of refining?

A. Well, the product derived from blast furnace operations is used. It contains silver and perhaps some antimony and gold and other metals. And, of course, these impurities have to be removed and refining is the art of removing the impurities so as to leave a residual commercial pig lead.

Q. What is lead bearing scrap?

2125 A. Lead bearing scrap may be any kind of waste material derived from the use of a lead product such as a storage battery which furnishes the largest single source of scrap in the United States.

Q. You mean worn-out storage batteries?

A. Yes, worn-out storage batteries.

Q. What are extruded lead products?

A. The term "extruded lead products," applies to items such as lead pipe which are extruded in a machine more or less like spaghetti is made.

Q. What is antimonial lead?

A. Antimonial lead is an alloy of lead plus varying amounts of antimony.

Q. What is metallic antimony?

A. Metallic antimony is an element of nature.

Q. When you speak of metallic lead products, what do you mean?

A. By that I mean any lead product, pure or alloyed with other material that is commercially used today in industry such as lead pipe or solder or lead sheet or grid metal in storage batteries or type metal.

Q. Will you tell us, Mr. Wormser, generally how the lead industry operates from the mine to the ultimate consumer?

A. Yes, sir. The lead industry is fundamentally dependent upon mining operations in the United States 2126 and other parts of the world. The ore has to be found, in the first place, which involves a high degree of risk; the mines have to be developed and the ore then has to be produced and concentrated in the concentrating mill generally or sometimes, as I stated before, it may be rich enough to ship to a smelter.

It has to be shipped to the smelter where it is converted to a crude boullion and then it has to be shipped to the refinery to be refined and then the refined lead, which may be one of several commercial grades, is shipped to the various users. Each user in turn specifying what every grade may suit his own particular requirements.

The grades are of varying commercial purity and pigment producers, for example, demand a lead of very high impurity. Capable companies demand an impurity in it. Now, the battery companies require a pure lead in some cases but in other cases they may actually have an antimonial lead made for them.

So that in the final analysis, the refiners attempt to provide the industry with the kind of lead which would best serve their requirements. That is a brief description.

Q. Mr. Wormser, will you give us the geographical location of the principal lead mines in the United States?

A. Well, the largest source of lead in the United States is in Missouri where the ores are of a very low grade, but very important. The entire Rocky Mountain area
2127 from Colorado west contains lead mines. That applies to Colorado, Nevada, Utah, Idaho, California, Oregon, Washington and there is hardly a state in the west that doesn't have some lead mines.

The three largest sources of supply are Missouri, Utah and Idaho. Just offhand I would say that perhaps 75 per cent or 80 per cent of our domestic lead supply comes from those three states.

Q. Where does the principal production come from in Missouri?

A. The principal production from Missouri comes from Southern Missouri, in the so-called lead belt which is just south of St. Louis. They have derived some lead from the Joplin area which is the southwestern area, but essentially that entire southwestern belt is a zinc producing area; it is known as the tri-state zinc area and the lead recovered there is known as a by-product. In fact it takes eight tons of zinc to recover one ton of lead.

Q. Will you give us the geographical location of the principal smelters and refineries?

A. The principal smelters are—lead smelters, that is—are located from coast to coast. There are two, as a matter of fact, in Jersey. There is one in San Francisco which covers the far coast and there is one in Northern Idaho and there is another one in East Helena, Montana.
2128 There is one, or there was one in Chicago. There are—would you like them segregated into refineries and smelters?

Q. All right.

A. In some cases both operations are conducted in one spot but in other cases they are separated. I can give it to you either way you prefer.

Q. Well, you might state the refineries separately.

A. Well, to continue, there are three smelters in the Salt Lake Valley and I didn't indicate those. There is another lead smelter in Texas and also there is a refinery there. There is a refinery in Omaha. I think I have covered all—I am sorry—I have omitted one of the largest ones at East Alton, Illinois. There is a large one there, as well as at Herculaneum, Missouri. There is another one at Helena, Kansas. I think that covers them all.

Q. Have you covered the refineries?

A. Yes, sir.

Q. Is there a smelter in Chicago, do you know?

A. There is a smelter at East Chicago, Indiana.

Q. Is there a refinery in Chicago?

A. There is a refinery or two refineries, as a matter of fact, at East Chicago.

Trial Examiner Norwood: Do those two refineries belong to different companies?

The Witness: Yes, sir; they belong to two different companies. 2129

Trial Examiner Norwood: What are they, do you know?

The Witness: One is the Eagle-Picher Company and the other is the United States Smelting, Refining and Mining Company.

By Mr. Ewing:

Q. Do you know, and if so will you so state, the location of the principal producers of lead pigments?

A. The location of their plants I presume; is that right?

Q. Yes.

A. The plants are located in Newark, Newark and Perth Amboy, in Scranton, Pennsylvania—

Mr. Wright: Your Honor, I object to that testimony from this witness. He is testifying as an expert here on the location of the plants operated by these Respondents who are represented here.

Mr. Ewing: He is testifying as to the fact because I asked him if he knew the physical location.

Trial Examiner Norwood: Let him finish.

Mr. Ewing: Excuse me, I thought he had.

Mr. Wright: I don't think it is proper to bring out that evidence through this witness since there has been no proper foundation laid for his knowledge.

Mr. Ewing: If he knows where plants are phys-
2130 ically located—

Trial Examiner Norwood: He can state anything he knows. Testify from your own knowledge and if you are refreshing your memory from something, we want to know what that is and counsel, in support of the complaint, should be permitted to examine that.

Mr. Wright: Were you reading from something to refresh your memory?

The Witness: Just before the hearing I put down the locations that I had remembered with little pencil notations. Would you like to see this?

Trial Examiner Norwood: You made that yourself?

The Witness: Yes, that is my own writing. You are welcome to it.

Mr. Wright: What was the source of the information, Mr. Wormser?

The Witness: My own memory. I didn't want to rely entirely on my own memory on the stand so I put it down on a little piece of paper.

Trial Examiner Norwood: Proceed. Objection overruled.

The Witness: I believe I mentioned Jersey, Pennsylvania, Philadelphia and Scranton. In Illinois, there is Chicago and then at Hammond, Indiana and St. Louis, Cincinnati, Oakland, California. I think that about
2131 covers them all.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

By Mr. Ewing:

Q. In your answer as to the location of these plants producing lead pigments, you were not attempting to give us the complete list; is that right?

A. No, sir.

Q. You have heretofore produced, and there has been marked as Commission's Exhibit 498-A, a list of the members of the Lead Industries Association in the years 1929, 1930 and 1931, of which I show you a copy and I ask you in reading this—simply the names of the companies—to identify each member company by the type of business that it is in.

Trial Examiner Norwood: Is that already in evidence?

Mr. Ewing: That is already in evidence.

Trial Examiner Norwood: What is the exhibit number?

Mr. Ewing: Commission's Exhibit 497-A.

The Witness: The Humada Lead Company was a lead company which I believe is now defunct, which formerly mined lead in the State of New Mexico. The American Metal Company is a lead mining company, a lead smelting and refining company and makes a few manufactured lead products.

Mr. Wright: May I inquire as to whether the witness is testifying as to the dates of that exhibit at 2132 the time these companies were members, or as of the present time?

Mr. Ewing: As of the date of the exhibit. Some of these companies, of course, have been members continuously, and we are going to bring the membership down to date.

The Witness: The American Smelting and Refining Company operates mines, smelters, refineries and manufacturing operations. Anaconda Lead Products Company is a producer of lead pigments. Andrews Lead Company is a manufacturer of lead products, both metallic and pigments. The Bond Manufacturing Company is a producer of collapsible tubes. Bunker Hill and Sullivan Mining and Concentrating Company is a mining company, smelting and refining.

Cerro de Caspo Company is a lead mining, smelting and refining company, operating in South America. Chief Consolidated Mining Company is a lead mining company in Utah. The Eagle-Picher Lead Company is a lead mining, smelting, refining and manufacturing company.

El Potsi Mining Company is a mining company operating in Mexico. The Houston Lead Company, producing white lead in Scranton, Pennsylvania. Evans Lead Company of Charleston, West Virginia, producing lead oxides. Federal Mining and Smelting Company operating a lead mine in Northern Idaho. Federated Metals Corporation is a producer of various metallic lead products. Fleck 2133 Brothers Company, of Philadelphia, are producers of plumbing goods made of lead. W. P. Fuller and Company is a manufacturer of paints and various lead pigments.

General Lead Manufacturing Company of Denver, Colorado, producing metallic lead products and mainly going into plumbing. Hecla Mining Company of Idaho is a lead company. International Smelting Company and United Metals Selling Company Agents, operating a smelter in Idaho and a refinery in East Chicago, Indiana. The Lewin Metals Corporation of St. Louis, a smelter of secondary or scrap lead. Metals Refining Company of Hammond, Indiana, producing lead pigments and metallic lead products.

The National Lead Company, engaging in mining to a limited degree, smelting and refining and the manufacture of lead products, both metallic and in pigment form. North West Lead Company, producing manufactured metallic lead products in Seattle, Washington. Park-Utah Consolidated Mines Company is a lead mining company in the State of Utah.

The Remington Arms Company of Connecticut is a manufacturer of ammunition. The Rochester Lead Works is a manufacturer of lead plumbing goods. The St. Joseph Lead Company, operating lead mines, a smelter and refinery in Missouri. Sherwin Williams Company is a paint company, manufacturing also lead pigments. Silver
2134 King Coalition Mines Company is a lead mining company in Utah.

Tintic Standard Mining Company, that is another mining company in Utah. United States Smelting, Refining and Mining Company has leased mining operations in the western part of the United States and also operating a smelter and refinery. U. S. L. Battery Company, operating a storage battery plant in Niagara Falls. Winchester Repeating Arms Company, a manufacturer of small arms and ammunition in Connecticut.

Trial Examiner Norwood: Do they produce any of the lead?

The Witness: No, sir. They have to buy it in the open market, sir.

Trial Examiner Norwood: Do they do any refining or anything like that?

The Witness: They do no refining, sir.

Trial Examiner Norwood: All right, proceed.

By Mr. Ewing:

Q. I show you a copy of Commission's Exhibit 498-B, which is a list of the members of the Lead Industries Association in 1932, and direct your attention to those names noted by a pencil cross and ask you to give us the nature of the business of those companies (showing same to witness).

A. The Crown Metal Company of Milwaukee, Wis-
2135 consin, is a manufacturer of lead products. The
Globe Metal Company manufactures various metallic lead products. The Hudson Smelting and Refining Company is a smelter and refiner of scrap lead. Nathan Trotter and Company are merchants in pig lead and lead alloys. The National Bearing Metals Company are manufacturers of railway and other bearings made of lead.

Q. What is the United American Metals Corporation?

A. The United American Metals Corporation is a producer of various metallic lead products such as type metal and tube metal and various items.

Mr. Wright: May I inquire at this point of counsel whether these questions are being asked of the witness as an expert or as facts of his own knowledge?

Mr. Ewing: Facts of his own knowledge.

Mr. DuBose: As secretary of the Lead Industries Association for 19 years.

Mr. Wright: Thank you.

By Mr. Ewing:

Q. I show you copies of Commission's Exhibit 498-C and D covering membership in the association for 1933, and direct your attention to those names noted by the cross and ask you to tell us the business of those companies (showing same to witness).

A. The Alpha Metal and Rolling Mills manufac-
2136 tures various metallic lead products in Brooklyn,
New York. The Balbach Smelting and Refining Company was a smelter and a refiner of lead. The Cambridge Smelting Company manufactures metallic lead products in Cambridge, Massachusetts. The Columbia Smelting and Refining Company manufactures metallic lead products in Brooklyn, New York.

The Dayrock Mining Company is a mining company in Wallace, Idaho. The Division Lead Company of Chicago, Illinois, manufactures metallic lead products. The Flemm Lead Company manufactures metallic lead products in Long Island City. The Gardiner Metal Company of Chicago, Illinois, manufactures metallic lead products. The Girard Smelting and Refining Company was a smelter of secondary or scrap lead.

Goldsmith Brothers Smelting and Refining Company of Chicago, Illinois, operate a secondary lead smelter and refinery.

Mr. Wright: Your Honor, I object to so much of this testimony as is in the present tense. It is irrelevant and immaterial that these various people operate at the present time.

Mr. Ewing: He may be answering it in the present tense, but as I understand it, his testimony is giving the business of these companies as of the year.

Mr. Wright: The witness has not so testified.

2137 Mr. Ewing: When you raised that before, I thought he made it clear.

Mr. Wright: When I raised it before, counsel answered it but the witness has not made that clear.

Trial Examiner Norwood: I will ask the witness if he is answering it as of the time of the exhibit there?

The Witness: That is what I am trying to do, sir.

Trial Examiner Norwood: You may do that. Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Complete your answer.

The Witness: Hammond Lead Products, producing oxides in Hammond, Indiana. Hercules Mining Company, a lead mining company in Idaho. Imperial Type Metal Company, producing type metals in Philadelphia, Pennsylvania. The Johnston Tin Foil and Metal Company, producing lead foil in St. Louis. Marks, Lissberger and Son, producing various metallic lead products in Long Island.

Nassau Smelting and Refining Company, operating a secondary smelter in Staten Island. North-Western Metal Manufacturing Company, operating a secondary smelter and producing various metallic lead products in Minneapolis.

By Mr. Ewing:

Q. I show you a copy of a document which has 2138 been marked Commission's Exhibit 498-E, being a list of the members of the Lead Industries Association in 1934, and ask you to state the business of the two companies marked with the pencil mark of "x" on that list as of 1934 (showing same to witness).

A. In 1934 the Dickson Weatherproof Nail Company manufactured lead covered nails. In 1934 Kahn Brothers Smelting and Refining Works produced some lead from scrap operations and some metallic lead products.

Q. I show you a copy of Commission's Exhibit 498-G, listing members of the Lead Industries Association in the years 1937, 1938 and 1939, and I direct your attention to the five noted by crosses and ask you to state the business of those five companies (showing same to witness).

A. In 1937, 1938 and 1939, the Baker Lead Manufacturing Company manufactured lead plumbing goods in Worcester, Massachusetts. The Division Lead Company manufactured metallic lead products in Chicago, Illinois. The Electric Auto-Light Company manufactured storage batteries in Toledo, Ohio. The General Lead Manufacturing Company manufactured metallic lead products in Denver, Colorado. The Kansas City Smelting Company manufactured metallic lead products in Kansas City, Missouri.

Q. I show you a copy of Commission's Exhibit 498-H,
listing membership in the Lead Industries Associa-
2139 tion in 1940 and 1941, and direct your attention to
the three marked by crosses and ask you the nature
of the business of those three companies (handing same
to witness).

A. In 1940 and 1941, John R. MacGregor Lead Company manufactured white lead in Chicago, Illinois. The Vulcan Lead Products Company manufactured metallic lead products in Milwaukee, Wisconsin. And the Wensley Metal Products Company manufactured metallic lead products in Denver, Colorado.

Q. I show you a copy of Commission's Exhibit 498-I, listing the membership in the Lead Industries Association in May 1942 and ask you to give us the nature of the business of the three companies on the list marked by "x".

A. In 1942 the Ethyl Gasoline Company manufactured Ethyl lead in Newark and Louisiana. The Pittsburgh White Metal Company of Brooklyn, New York, manufactured type metal and other alloys.

Q. I show you a copy of Commission's Exhibit 498-J, listing membership in the association in May 1943, and ask you to give us the nature of the business of the one company identified by the "x".

A. In 1943 the Lewin-Mathes Corporation produced pig lead from scrap metal.

Q. I show you a copy of Commission's Exhibit 498-K,
listing membership in the association in May 1944,
2140 and ask you to give us the nature of the business of
the five companies marked on the list with an "x"
(showing same to witness).

A. The Firestone Tire and Rubber Company is a manufacturer of lead storage batteries and, of course, an important manufacturer of tires and automobile accessories. The Mike Horse Mining and Milling Company is a lead mining operation in Montana.

The New Park Mining Company is a mining company in Utah. The Shattuck Den Mining Corporation operates lead mines in Arizona. The Western Electric Company is a manufacturer of lead covered cable among other telephone appliances, and has various plants in the United States.

Q. I notice that on a number of these lists of membership there is the notation "associate member." Will you tell us the distinction, if any, between regular members and associate members in the association?

A. The only distinction between associate and regular membership is that the associate members do not have a vote. That was brought about by the fact that in NRA days we were requested by the NRA to amend our constitution and by-laws so as to limit our regular membership to certain industries. That excluded some industries who were greatly interested in the work that we were doing, for example, storage batteries or cable manufacturers.
But they were eligible to become associate members
2141-2142 and they were granted associate membership on
that occasion.

Mr. Ewing: May I suggest a short recess, your Honor?

Trial Examiner Norwood: We will take a five-minute recess at this time.

(Whereupon, a short recess was taken.)

2143 Trial Examiner Norwood: Come to order, please.
Proceed.

By Mr. Ewing:

Q. I show you copies of Commission's Exhibits 499-A to H inclusive listing members of the Board of Directors of the Lead Industries Association in certain years and of the Executive Committee and officers, and ask you to identify from the standpoint of the principal business of the company the various representatives (showing to witness) by name?

A. Mr. Zimmer, mining, smelting and refining of lead; Mr. F. H. Brownell, mining, smelting, refining of lead and the manufacture of lead products; Mr. Glass, the sale of pig lead; Mr. Easton, mining, smelting and refining of lead; Mr. Bendealari, mining, smelting, refining of lead and the manufacture of lead pigments and metallic lead products; Mr. Schaefer, manufacturer of tetra-ethyl lead; Mr. Newhouser, a manufacturer of metallic lead products and a smelter and refiner of secondary lead; Mr. Hanley, mining of lead in Idaho; Mr. Sprague, manufacturer of paint and a producer of lead pigments; Mr. Rockwell, smelter and refiner of lead and a producer of metallic lead products and lead pigments; Mr. Friendly, mining of lead; Mr. Crane, mining, smelting and refining of lead; Mr. Ivers, mining of lead; Mr. Wade, mining of lead; Mr. Colcord, mining and smelting of lead.

Q. What was the principal business in which Mr. 2144 Reitler, Mr. Ivan Reitler was engaged?

A. The conversion of secondary lead into pig lead and the manufacture of various metallic lead products.

Mr. Wright: Your Honor, I object to further testimony on these exhibits along this line. It is all cumulative. These companies were all in the lists that were described heretofore in the testimony regarding exhibit 498.

It is simply cumulative as far as I can see.

Mr. Ewing: I want to show the representation on the Board and the Executive Committee at any particular time as shown by these exhibits. It is true that you may be able to get the information if you search around through other parts of the record but I would like to have it in an exact form.

Mr. Wright: Your Honor, it has just been testified to under the membership. Now all of these people who were directors were presumably members of the association and the business of all the members has been described in full here this morning.

Now we are apparently going ahead and redescribing the business of those people who are already in the record shown to be or have been directors of the association at that time. It is simply cumulative.

Trial Examiner Norwood: I think he is giving us 2145 some further particulars there. In a general way it is understood that everyone on that membership list has something to do with the production and sale of lead or lead products.

But, as I understand it, he is bringing out those who manufacture or produce or mine lead as distinguished from some of these battery manufacturers or some of these ammunition sellers or others who are on the list.

Mr. Wright: This same testimony about these same companies has been given not ten minutes ago.

Trial Examiner Norwood: What have you to say?

Mr. Ewing: My point is that you have this list of names of particular individuals. Now if you go to the list of companies and then go to his testimony you can tie up eventually what business these particular men were in.

The purpose of my questions now is to identify Mr. Brownell specifically as being a representative of a producer, smelter and refiner serving on the Board of the Lead Industries Association for clarification.

Mr. Wright: The exhibit itself shows, for instance, that Mr. Brownell is the chairman of the Board of the American Smelting and Refining Company. I assume that the witness' testimony is not what Mr. Brownell does but what the American Smelting and Refining Company does, and he has just testified within the last hour what the
2146 American Smelting and Refining Company's principal business is.

Trial Examiner Norwood: I will ask the counsel to confine himself to the additional information that would broaden the information that we already have. I think he should have some latitude as to what he wants to show here. I will overrule the objection here.

Mr. Ewing: It is simply to have a ready way of picking these things out and putting them together.

Trial Examiner Norwood: It may save us some work in searching the record. Objection overruled.

By Mr. Ewing:

Q. You answered the question with respect to Mr. Reitler?

A. Yes, sir.

Q. What was the principal business represented by Mr. J. F. McCarthy?

A. The mining of lead.

Q. What was the principal business represented by Mr. P. E. Sprague?

A. The production of paint and the manufacture of lead pigments.

Q. What was the business represented by Mr. F. N. Carter?

A. The principal business would be the manufacture of metallic lead products and lead pigments, I would say.

Q. What was the principal business represented by Mr. B. Montferry?

2147 A. The mining of lead.

Q. What was the principal business represented by Mr. R. S. Reynolds?

A. The manufacture of foil.

Q. What was the principal business represented by Mr. F. Y. Robertson?

A. The mining, smelting and refining of lead.

Q. What was the principal business represented by Mr. B. Y. Hunt?

A. The manufacture of lead foil.

Q. What was the principal business represented by Mr. R. M. Roosevelt?

A. Mining, smelting, refining of lead and the manufacture of lead pigments and metallic lead products.

Q. What was the principal business represented by Mr. G. W. Lambourne?

A. The mining of lead.

Q. What was the principal business represented by Mr. H. M. Brush?

A. The mining and smelting and refining of lead.

Q. What was the principal business represented by Mr. F. A. Easton?

A. The mining, smelting and refining of lead.

Q. What was the principal business represented by Mr. E. J. Cornish?

2148 A. The manufacture of metallic lead products and lead pigments.

Q. What was the principal business represented by Mr. A. A. MacLean?

A. The manufacture of storage batteries.

Q. What was the principal business represented by Mr. R. C. Swanson?

A. The manufacture of ammunition.

Q. What was the principal business represented by Mr. W. E. Chollar?

A. The manufacture of small-arms ammunition.

Q. What was the principal business represented by Mr. M. J. Dailey?

A. The mining of lead.

Q. What was the principal business represented by Mr. G. M. Loeb?

A. Mining, smelting and refining of lead.

Q. What was the principal business represented by Mr. R. M. Evans?

A. The manufacture of lead oxides.

Trial Examiner Norwood: Now those names appear on what exhibits?

Mr. Ewing: On Exhibits 499-A to H inclusive.

Trial Examiner Norwood: Thank you. That is Commission's Exhibit 499-A to H; is that right?

2149 Mr. Ewing: Yes, Your Honor.

By Mr. Ewing:

Q. I show you a copy of Commission's Exhibit 799, the minutes of a meeting of the Lead Pigments Division of the Lead Industries Association of July 20, 1933, and ask you whether you acted as secretary at that meeting (showing to witness)?

A. I did.

Q. For what purpose was that meeting of the Lead Pigments Division called, if you know?

A. This meeting was called to develop suitable trade practices to incorporate in a supplemental code of fair competition for the Lead Pigments Division.

Q. I call your attention to the paragraph stating three subjects as being presented for discussion and ask you to state with respect to each subject the purpose for which they were brought up for discussion?

Mr. Wright: Your Honor, I object. There has been no showing here that this witness is in possession of the knowledge of the purpose for which these things were called.

Mr. Ewing: He was their secretary. He was there as secretary of the committee. Of course, if he doesn't know, he can say so.

Trial Examiner Norwood: I will ask him to answer of his own knowledge. Did you issue the call for that meeting?

2150 The Witness: Yes, sir.

Trial Examiner Norwood: Objection overruled, the witness may answer.

The Witness: Some of the subjects presented at this meeting, according to the record here which goes back fourteen years, were three in number. The first was a discussion on the practice of mailing contracts for lead oxide signed by the seller but not subject to immediate acceptance. (2) To accepting contracts for delivery of oxides beyond thirty days after the acceptance of the order or beyond the period in which orders might be covered in the pig lead market.

(3) The selling at old prices on the date of advance in the pig lead market. According to this record no action was taken on any of these items.

By Mr. Ewing:

Q. What was the purpose, if you know, Mr. Wormser, of bringing those up for discussion?

A. The purpose of bringing those up was to decide whether or not they should be made recommendations for inclusion in the supplemental code of fair competition for the lead industry.

Q. And that proposed supplemental code was under consideration at that time; is that correct?

A. That supplemental code was under considera-
2151 tion at that time at the insistence of the NRA.

Q. I show you Commission's Exhibit 800-A to C inclusive, the minutes of the Dry Products Committee of the Lead Pigments Division of August 8, 1933, and ask you whether you acted as secretary at that meeting (showing to witness)?

A. I did, sir.

Q. You will not the reference to a summary of suggestions in the paragraph immediately following the listing of the attendance, and I ask you whether you have that summary of suggestions (showing to witness)?

You might read the minutes to yourself.

A. Yes. I would like to refresh my memory.

Q. All right. Have you the summary of suggestions referred to?

A. Yes, sir. They are incorporated in these minutes of August 8, 1933.

Q. For what purpose was the summary offered for the consideration of the meeting?

Mr. Wright: Your Honor, I object to that question. There is no showing on the face of the exhibit that this was a summary and counsel is putting words in the witness' mouth by his characterization of it in that fashion. I object to it.

Mr. Ewing: The exhibit states specifically that it was a summary. A summary of suggestions previously 2152 offered by members for consideration and a tentative draft of a code of fair competition for dry pigments compiled by Mr. Sprague was submitted for consideration.

Mr. Wright: I would like to point out, however, that the other suggestions were then considered in detail in the following paragraphs to be included in the code of fair competition and were tentatively adopted to apply to lead oxides. So that the material under that paragraph is not characterized as a summary on the face of the exhibit.

Mr. Ewing: I am not referring to that yet, I haven't gotten that far.

Trial Examiner Norwood: Now the purpose is a sort of a hidden thing and the question arises as to whose purpose. Now this witness may tell his purpose.

Mr. Ewing: He was acting as secretary of this committee.

Trial Examiner Norwood: And he can tell what somebody else said was the purpose that came to him in the course of his official action. But I don't think he can just say offhand what the general purpose of everything was.

Mr. Ewing: Well, I can withdraw the question, amend it and present it in slightly different form.

Trial Examiner Norwood: Yes, that would make it more satisfactory.

2153 By Mr. Ewing:

Q. I will ask Mr. Wormser to tell, if he knows, what brought up for the consideration of the Dry Products Committee of the Lead Pigments Division, the summary of suggestions referred to in the paragraph immediately following the attendance listing?

A. Recollecting what happened in the NRA days, this was an effort to meet the wishes of the NRA officials. I might state that our entire industry was very loath and very reluctant to enter into these NRA code formations and, as a matter of fact, as the code was first developed the code had practically no fair trade practices in it.

But at the insistence of NRA officials we were asked to provide some supplemental trade practices, and the industries which lent themselves or expressed themselves as being in a position to formulate a supplemental code along the lines of the NRA were the pigment industries.

And they agreed to endeavor to try to formulate a supplemental code. And this is one of the meetings at which this effort to develop a supplemental code satisfactory to the NRA authorities was considered.

Mr. Wright: Your Honor, I object and I move that that answer be stricken. In the first place, the witness has referred to the NRA as asking and they were asked and we did. There has been no characterization there from 2154 whom the request might have been made.

The NRA, you can take judicial notice, was a large governmental body. When the witness speaks of "we" and "they," there is no characterization of whom he is speaking and the whole statement was indefinite and improper.

Mr. Ewing: I will bring out whom Mr. Wormser means by we and they.

Trial Examiner Norwood: All right.

By Mr. Ewing:

Q. Who asked you?

A. Mr. Walter Jannsen, deputy administrator of the NRA.

Q. And you were the person asked?

A. I was the person asked repeatedly.

Mr. Wright: Your Honor, I still object to that. There has been no statement of what he was asked specifically.

Trial Examiner Norwood: Well, all that may come out.

Mr. DuBose: He stated what he was asked.

Mr. Wright: Now he doesn't speak of any request that might have been made by a governmental agency to the Lead Association for consideration of these matters.

Trial Examiner Norwood: Now you have put these minutes in here and they have a right to explain it.

Mr. Wright: I am not questioning their right to explain it but when he says the NRA asked us to do this 2155 without any indication as to who us is, it is obviously an improper statement.

Trial Examiner Norwood: He is telling about it. I will have to overrule your objection on that. Make it specific. Go ahead.

By Mr. Ewing:

Q. I direct your attention to that portion of the minutes which refers to a suggestion by Mr. Roosevelt and ask you whether at that time there was any decision on the point with respect to the inclusion of such matter in the proposed code?

A. "Mr. Roosevelt suggested—'reading from the minutes'—the simplest method would be to formulate a code requiring that each member file a price list of his selling practices with the secretary of the Lead Industries Association to be effective ten days after filing and immediately published to all members by the secretary, allowing other members to file a new list immediately, effective at the same time, if they so desired, and providing that any deviation from the filed list be violations from the code."

No action was taken on that nor at any time with regard to the activities of the Lead Industries Association was any price list gathered.

Mr. Wright: I object to the last part of that statement,
"No action was taken." It was a volunteer state-
2156 ment that was not responsive to the question.

Mr. Ewing: I will consent that that part will be stricken.

Trial Examiner Norwood: Strike that. Proceed.

By Mr. Ewing:

Q. The minutes recited a consideration of the suggestions made in connection with the sale of lead oxides listing by number some 19 matters. Was the consideration given these matters at that meeting directed at a decision as to whether such matters should be covered in the proposed code?

A. Those matters were considered for inclusion in the supplemental code of fair competition for the dry products producers.

Q. Now with respect to the recital in the minutes of a discussion of consignment accounts, was or did that discussion take place in connection with a consideration of that subject under the proposed code?

A. That was also one of the items that related to the drafting of a supplemental code of fair competition for the dry pigment producers.

Q. On the third page, Exhibit 800-C, there is also a reference to allowance on returnable packages and to off-grade material. Were those subjects considered in connection with the proposed code?

Mr. Wright: Your Honor, I object to these questions
as leading. After all, this witness is a representative
2157 of the respondents here and certainly he should not
be asked questions which merely ratify or don't ratify
counsel's questions on these things.

He may have some independent recollection of these matters and if he has they ought to be brought out by questions which are not leading.

Mr. Hinds: I would like to ask counsel in what respect that last question is proving. How can you possibly prove a negative without asking him if such a thing was done. By its very nature it couldn't possibly be leading. If a man is charged with doing something and you as did you do it, that is not leading.

Mr. Wright: The answer is suggestive. Yes, of course this was considered in connection with the proposed code.

Mr. Hinds: How can we negative a charge without asking him a question of that sort?

Mr. Wright: May I ask that the question be read?

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. On the third page, Exhibit 800-C, there is also a reference to allowance on returnable packages and to off-grade material. Were those subjects considered in connection with the proposed code?")

Trial Examiner Norwood: Objection overruled.
2158 Answer the question.

The Witness: They were considered in connection with the drafting of a supplemental code of fair competition for the dry pigments producers.

By Mr. Ewing:

Q. Will you state whether the balance of the subjects considered at that meeting as set forth on Exhibit 800-C were subjects of discussion generally in connection with the consideration of the proposed supplementary code?

Mr. Wright: May I have that question again?

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Will you state whether the balance of the subjects considered at that meeting as set forth on Exhibit 800-C were subjects of discussion generally in connection with the consideration of the proposed supplementary code?")

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: I object to the question, Your Honor. These minutes are detailed and they state exactly what occurred and what subjects were under consideration. And it has not been shown that this witness has any independent recollection of what occurred there.

2159 He has been constantly referring in his answers, "Well, the minutes show that."

Trial Examiner Norwood: I am going to ask this witness not to answer with regard to what the minutes showed but you may answer that question and I will overrule the objection, and ask you to answer that question from your own recollection of it.

Now if you don't recollect it, just say so because the minutes of that speak for themselves.

Mr. Ewing: But he may refresh his recollection from the minutes.

Trial Examiner Norwood: Yes.

The Witness: I recollect vividly that all of those items at this meeting here were all for the purpose of drafting a supplemental code of fair competition for the pigment industry.

By Mr. Ewing:

Q. I show you photostatic copies of Commission's Exhibits 501-A to D, minutes of a meeting of the white lead in oil committee of the Lead Pigments Division of August 9, 1933, and ask you whether you acted as secretary at that meeting?

Trial Examiner Norwood: Is that exhibit in evidence?

Mr. Ewing: Yes, sir.

The Witness: No, sir; I did not act as secretary of that meeting.

2160 By Mr. Ewing:

Q. Will you tell us for what purpose the white lead in oil committee of the Lead Pigments Division was organized, if you know?

A. The white lead in oil committee was organized to draft a supplemental code of fair competition for white lead in oil.

Q. Will you tell us for what purpose the Dry Products

Committee of the Lead Pigments Division was organized, if you know?

A. The Dry Products Committee was also organized for the purpose of drafting a supplemental code of fair competition for dry products.

Q. You have stated that you were not present at this meeting. Will you state whether you, at that time, were familiar with the subjects discussed and actually informed yourself as to the subjects discussed at that meeting?

A. I did.

Q. I direct your attention to that portion of the minutes relating to the item of "reports" and ask you whether you know to what the item stated in the minutes refers to (showing to witness)?

A. I believe the item of "reports" referred to the statistics of the Lead Industries Association relating to white lead in oil.

2161 Mr. Wright: I object, Your Honor. By the answer he obviously doesn't know of his own knowledge.

By Mr. Ewing:

Q. Do you know?

A. I don't know exactly, but I think—

Trial Examiner Norwood: (Interposing.) The objection is sustained. The answer will be stricken.

By Mr. Ewing:

Q. Prior to this meeting of August 9, 1933, and prior to the passage of the National Recovery Act, was it the practice of the members of the Lead Industries Association to file with you individual reports of their respective production, stocks, shipments or sales?

A. Yes, sir.

Q. Were the reports of the individual members filed with you ever distributed by you to other individual members?

A. Never.

Q. You will note the suggestion which appears in that portion of the minutes relating to the item of "reports". Were individual reports of production, stocks and shipments or sales ever made available to other members of the white lead in oil group at periodic meetings?

A. Never.

Q. I direct your attention to that portion of the min-

2162 utes relating to price lists and ask you to read it (showing to witness).

A. Out loud?

Q. No, just to yourself.

A. I have read it (handing back to counsel).

Q. I also ask you to read the present membership of the white lead in oil group as indicated by the minutes?

A. I have read it.

Q. I now ask you to state whether members of the white lead in oil committee ever filed with you their price lists with terms and conditions of sale?

A. They never did.

Q. Did any of the companies represented in this group at any time ever file with you their price lists with terms or conditions of sale?

A. Never since the history of the founding of the Lead Industries Association to this very minute.

Q. State whether the individuals representing the companies in the white lead in oil group ever filed with you any change in price lists or terms to the trade?

A. Never.

Q. State whether the company members of the white lead in oil group or committee ever filed with you any change in price lists or terms of trade?

A. They never did.

2163 Q. Were there filed with you by either the company members or their representatives variances from price lists or terms of sale?

A. No, sir.

Mr. Wright: Your Honor, I object to any further testimony along this line. The complaint doesn't charge any price filing under that section. It has never made an issue of it in the case.

Mr. Ewing: The complaint charges that Lead Industries was one of the mediums through which the conspiracy and what not was effected and I propose to show that it was not.

Trial Examiner Norwood: Well, it does charge price fixing against all of these people.

Mr. DuBose: Certainly it does.

Trial Examiner Norwood: Proceed.

Mr. Ewing: It specifically charges that we exchanged directly and through the office of Lead Industries Association and with the cooperation of the officials of that Association price factors and information concerning price factors.

Trial Examiner Norwood: Objection overruled. Proceed.

By Mr. Ewing:

Q. I show you photostatic copies of Commission's Exhibit 502-A to C inclusive, the minutes of the white 2164 lead in oil committee, Pigments Division, of September, 6, 1933, and ask you whether you acted as secretary at that meeting?

A. Yes, sir; I did.

Q. State, if you know, in what connection the paragraphs in the proposed paint code referred to in these minutes were considered?

A. These paragraphs were considered for the preparation of a supplemental code of fair competition for the white lead in oil industry.

Q. You prepared these minutes?

A. Yes, sir.

Q. When you referred to those paragraphs in the proposed paint code as being adopted, for what purpose were they adopted?

A. They were adopted for incorporation in the proposed supplemental code for fair competition in the white lead in oil industry for submission to the administrator in Washington.

Q. Do you know whether these paragraphs were, in fact, ever included in a supplementary code?

A. I have to refresh my memory, sir, about that because it is a long time ago.

Q. I show you a copy of Commission's Exhibit 809, a printed copy of the code of fair competition for the lead industry, and direct your attention to Article 7, Sec-2165 tions 1, 2 and 3 thereto.

A. Yes, sir.

Q. And I ask you to compare the paragraphs referred to in the minutes of the September 6, 1933 meeting with Article 7 of the code and state which of the proposed paragraphs were in substance included in the code?

Mr. Wright: Your Honor, I object. The code as it was finally adopted is not reported in this copy. These minutes are in the record and it is a simple matter of comparison and that, in fact, is all that counsel is asking the witness to do.

His testimony can add nothing nor retract nothing.

Mr. Ewing: My point is that there may be a misinterpretation of the word "adopted" in these particular minutes.

Trial Examiner Norwood: It would appear in the code itself and they can be prepared. If there is any other matter that doesn't appear in the two exhibits that you may want to bring out you may do so, but in the face of an objection, I think that the objection should be sustained.

Mr. DuBose: May I make this statement before you make your ruling?

Trial Examiner Norwood: Yes.

Mr. DuBose: We object to all NRA documents, particularly at the hearings last June when most of these
2166 documents were introduced on the ground that they
were code documents and on the further ground that they were irrelevant.

You asked counsel for the Commission how they were relevant and his answer was that these meetings showed activities not sanctioned by the law. And that by engaging in these activities we were acting in violation of the law.

We know of no law which prohibited members from meeting to consider supplemental codes when such was required by the National Industrial Recovery Act. We are, therefore, led to the possible conclusion that what trial counsel has in mind is using these minutes in an attempt to prove agreements outside of the NRA activities or the code.

To that extent we must go into every one of these items mentioned in these minutes to see for what purpose those particular paragraphs were discussed.

Trial Examiner Norwood: You can bring out the purpose there. He is asking him what is the difference between two exhibits.

Mr. Wright: And that is obvious upon an examination of them by anyone connected with the case. The testimony of this witness as to the difference isn't going to establish any more than it is already established in the record.

Trial Examiner Norwood: Counsel may make his
2167 own statement about those differences and he can go
on the record right now if he wants to inasmuch as there is an objection to this witness testifying to it. I think I will have to sustain the objection in that regard.

Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

By Mr. Ewing:

Q. In what connection did the committee adopt the paragraph on taxes referred to in these minutes?

A. That was also, I believe, a part of the supplemental code of fair competition for the white lead in oil industry.

Mr. Wright: I move to strike the answer because he doesn't know from his own knowledge.

Trial Examiner Norwood: Read the question and answer.

(The reporter read the question and answer as follows:

"Q. In what connection did the committee adopt the paragraph on taxes referred to in these minutes?

"A. That was also, I believe, a part of the supplemental code of fair competition for the white lead in oil industry.")

Trial Examiner Norwood: What is your question directed to?

2168 Mr. Ewing: Well, it is not exactly—

Mr. Wright: (Interposing.) By the terms of the answer, it was a conclusion on the witness' part, a belief that he had.

Trial Examiner Norwood: Read the answer again.

(The reporter read the answer again as follows:

"A. That was also, I believe, a part of the supplemental code of fair competition for the white lead in oil industry.")

Trial Examiner Norwood: I think that counsel should be allowed some latitude about explaining this thing.

Mr. Wright: I have no objection to some latitude, Your Honor, but when it was obviously a conclusion of the witness, I mean he is testifying about things now that occurred some fourteen years ago.

Trial Examiner Norwood: Yes. Read the answer again.

(The reporter read the answer again as follows:

"A. That was also, I believe, a part of the supplemental code of fair competition for the white lead in oil industry.")

Trial Examiner Norwood: Objection sustained, the answer will be stricken.

By Mr. Ewing:

Q. I will ask you, Mr. Wormser, to refresh your 2169 recollection by reading the portion of the minutes referring to the paragraph on taxes (showing to witness)?

A. Yes.

Q. Having read that portion of the minutes, Mr. Wormser, will you state, if you know, in what connection the committee considered and took action on that paragraph?

Trial Examiner Norwood: Answer that from your own knowledge.

Mr. Wright: Before the witness answers that, Your Honor, I would like to examine him briefly on his recollection and refresh him by that document if I may.

Trial Examiner Norwood: I don't think that is necessary. You can cross-examine him on it.

Mr. Wright: I think I have a right to determine the extent of his independent recollection of this meeting and of what occurred there and to examine him.

Trial Examiner Norwood: I am going to ask him that now. You have examined that document and if you now have an independent recollection of it after examining the document, you can answer the question, and if you do not, then say so. I will overrule the objection.

The Witness: The minutes have refreshed my recollection, sir, and the paragraph on taxes was adopted as a part of the proposed supplemental code of fair competition for the white lead in oil industry.

2170 By Mr. Ewing:

Q. I direct your attention to the first paragraph of Exhibit 502-C and ask you to read it.

A. I have read it.

Q. Will you state, if you know, in what connection the resolution set forth in that paragraph was adopted?

A. That was a resolution to act upon a suggestion—again, specifically of Mr. Walter Jannsen, deputy administrator of the NRA—who wanted us to include in our supplemental code of fair competition a paragraph referring to a price listing or an exchange of price information. This was an attempt to meet his views.

Q. In what connection was the final paragraph of the minutes, appearing on Exhibit 502-C, adopted (showing to witness)?

A. This final paragraph was adopted for inclusion in the proposed supplemental code of fair competition for the white lead in oil industry.

Mr. Ewing: I believe, in accordance with Mr. Hinds' arrangement, that we recess at this time.

Trial Examiner Norwood: Is that all right with you?

Mr. Wright: Yes, Your Honor.

Trial Examiner Norwood: We will recess at this time until 2 o'clock.

2171 (Whereupon, at 12:25 p.m., a recess was taken until 2:00 p.m., this day.)

2172-2173 Afternoon Session.

Trial Examiner Norwood: Come to order. Let us proceed.

FELIX E. WORMSER, a witness called on behalf of the Respondent, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination (continued) by Mr. Ewing.

Q. Mr. Wormser, I show you a photostatic copy of Commission's Exhibit 801-A and B, minutes of the Dry Products Committee of the Lead Pigments Division of September 7, 1933, and ask you if you acted as secretary at that meeting (showing same to witness)?

A. I did, sir.

Q. Was that the first meeting of the White Lead In Oil Committee of the Lead Pigments Division?

A. This is the Dry Products Committee, I believe.

Q. You are right, I withdraw that question. You will notice the reference to the dry lead group in the minutes. Will you tell us what the dry lead group was?

A. That referred to the producers of dry white lead who sold their product to the prepared paint companies.

Mr. Wright: Where is that reference?

Mr. DuBose: It is Exhibit 801-A and B.

Mr. Ewing: It is the third paragraph after the attendance.

2174 Mr. Wright: I see it.

The Witness: I might also add that that was to distinguish it from White Lead In Oil.

By Mr. Ewing:

Q. Were the members of the dry white lead group the members of the Dry Products Committee of the Lead Pigments Division?

A. Yes, sir.

Q. You will note the reference in these minutes to the request that you as secretary read the price list paragraph adopted by the dry lead group. In what connection was that paragraph adopted?

A. The paragraph was adopted to be incorporated in a supplemental code of fair competition for the lead in oil industry and then adopted by the dry products group.

Q. You will note the reference in these same minutes that this same paragraph be adopted for the lead oxide group of the Dry Products Committee. Will you tell us what the lead oxide group of the Dry Products Committee was?

A. That oxide group of the Dry Products Committee referred to the producers of red lead and litharge which are oxides of lead in dry form.

Q. Am I correct in my understanding that the Dry Products Committee consisted of two groups, the dry white lead group and the dry oxide group?

2175 A. That is correct, sir.

Mr. Wright: I object to the form of the question, your Honor. It is counsel's conclusion and whether or not he is correct in it is irrelevant and immaterial.

Trial Examiner Norwood: Objection sustained.

By Mr. Ewing:

Q. Of what groups was the Dry Products Committee comprised?

A. It was comprised of the producers or manufacturers of lead pigments in dry form. That is, white lead dry and red lead and litharge dry. The white lead group, as I recall, were the dry white lead group and the red lead and litharge section were the oxide group.

Q. I call your attention to the reference in these minutes to certain unfair trade practices accepted by the Dry Products Committee in earlier session and ask you in what connection they were adopted as applicable to oxide manufacturers?

A. They were adopted as being part of a supplemental code of fair competition to be submitted to the NRA.

Q. I call your attention to the reference in these minutes to a discussion with respect to uniform sales contracts and ask in what connection the resolution referred to was adopted?

A. This resolution was also adopted to provide another part of the supplemental code of fair competition for
2176 this industry, the Dry Products Division.

Q. State whether the resolutions and agreements referred to in those minutes related solely to the development of the supplementary code of fair competition.

A. They related solely to the development of a code, a supplemental code of fair competition for the Dry Products Committee or Dry Products Division.

Q. I show you a photostatic copy of Commission's Exhibit 802-A and B, bearing the date of September 26, 1933, headed "Second Draft Supplementary Code of Fair Competition for the Lead Pigments Division of the Lead Industries Association," and ask you if you are familiar with that draft at that time?

A. I am.

Q. Does the provision which was the subject of the resolution relating to uniform sales contracts referred to in Commission's Exhibits 801-A and B appear in that second draft in substance?

Mr. Wright: May I have the question read?

Trial Examiner Norwood: Read the question, Mr. Reporter.

(The reporter read the question.)

The Witness: It does.

By Mr. Ewing:

Q. I show you photostatic copies of Commission's
2177 Exhibits 504-A and B, minutes of Dry Products Committee, Lead Pigments Division of October 27, 1933, and ask you whether you acted as secretary at that meeting?

A. I did.

Q. You will note in the minutes the reference on page 2 thereof, namely, Exhibit 504-B, to existing statistics in the third from the last full paragraph.

A. Yes.

Q. To what statistics, if you know, did the minutes there refer?

A. That referred to the anti-trust laws.

Q. In the preceding paragraph in the same exhibit, I call your attention to the outlines referred to. State, if you know, what those outlines were.

A. Those outlines were again bases for developing, as a code, provisions to be embodied in a supplemental code of fair competition for the lead oxide and dry white lead groups.

Q. State, if you know, what the committee at that time concluded with respect to the inclusion in any proposed uniform contract relating to the sale of oxides and dry white lead of provisions relating to price fixing as to what determination there should be in regard to the question of price.

Mr. Wright: I object, your Honor. That obvi-
2178 ously calls for a number of conclusions on the part of
the witness so—

Mr. Ewing: It doesn't call for a conclusion at all.

Trial Examiner Norwood: Read the question.

(The reporter read the question.)

Trial Examiner Norwood: Did the committee take any action that would indicate to you what their conclusions were?

The Witness: You mean at that particular meeting, sir?

Trial Examiner Norwood: At any meeting. Would it throw any light upon this question that has been asked?

The Witness: Yes, sir.

Trial Examiner Norwood: I will sustain the objection and let him give the evidentiary facts about what they concluded. You tell what they said and did that would indicate to you their conclusions were with respect to that matter. Ask the question over again.

By Mr. Ewing:

Q. I call your attention to the third from the last full paragraph on the second page of the minutes which is Exhibit 504-B, and ask you whether that will refresh your recollection as to what conclusion the committee then
reached with respect to the inclusion in any proposed
2179 uniform contract of the sale of oxides and dry white
lead of price fixing provisions?

A. It does refresh my mind.

Q. What conclusion did the committee reach at that time?

A. It was agreed, the minutes read, in deference to existing statistics—

Trial Examiner Norwood: Wait a minute, don't read that.

Mr. Wright: I object, your Honor, if the only refreshment is what answer in the minutes themselves, this witness has nothing to add to what is already in the record.

Trial Examiner Norwood: Tell us anything else about it except what is in there.

The Witness: Well, by personal conversation with the members of this group, they told me they were against incorporating anything in the code which had any relation to price fixing or the exchange of price information and this merely expresses their former point of view.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Ewing:

Q. I show you a photostatic copy of Commission's Exhibits 505-A and B, minutes of the White Lead in Oil Committee of the Lead Pigments Division of October 28,
2180 1933, and ask you if you acted as secretary at that meeting.

A. I did.

Q. Would you read those minutes, please, to yourself?

A. Yes. I have read them.

Q. You will note the reference in the minutes to the statement by Mr. Carter concerning National Lead's new agency system. Will you state whether the members of the White Lead in Oil Committee reached any agreement at that meeting to use any agency or consignment system?

A. They did not.

Q. You will note also in those minutes the reference to the discussion of the freight and zoning problems. Please state whether there was any understanding or agreement reached at that meeting on those subjects by the members of that committee.

A. No understanding or agreement was reached by the members at that meeting.

Mr. Wright: I object to that, your Honor. Obviously both of the last questions call for a conclusion on the part of the witness as to what is an agreement or what is an understanding and there has been no groundwork laid to show that he knew everything that went on at those meetings unless he heard every conversation that was made.

By Mr. Ewing:

Q. You attended but that meeting, did you not, Mr. Wormser?

2181 Trial Examiner Norwood: Read the question.

(The reporter read the question.)

Trial Examiner Norwood: I think that it would be more satisfactory if you bring it out like you did in the case of the other exhibit there. Just state what they said about it or give the evidentiary facts which would indicate to him what they concluded or what they agreed on.

Mr. Ewing: I will reframe the question.

By Mr. Ewing:

Q. What, if anything, was said about the members representing the white lead in oil committee at that meeting with respect to the agreement on freight and zoning problems?

A. Very little was said at that meeting about either freight or zoning problems. It was a matter of little significance to the group. So that as the minutes faithfully report here, no understanding was reached on the subject.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

By Mr. Ewing:

Q. I show you a photostatic copy of Commission's Exhibit 803, the minutes of the meeting of the Lead Pigments Division of January 23, 1934, and ask you whether you acted as secretary at that meeting?

2182 A. I did.

Q. Will you please read the minutes of that meeting?

A. To myself?

Q. Yes.

A. I have read them.

Q. In what connection did the meeting agree to submit the price schedule paragraph quoted in these minutes?

A. This is in connection with the drafting of a supplemental code of fair competition for the White Lead in Oil Division.

Q. I show you a photostatic copy of Commission's Exhibit 518-A and B, which is a copy of a letter dated January 18, 1934 from M. F. Carter to W. M. [illegible]aston and Harold Rowe, and call your attention to the paragraph headed

"Schedules" and to the first full paragraph following the quotation at the top of page 2. Will you state whether the price schedule paragraph referred to in the letter, Exhibit 518-A and B, was the previously drafted price schedule paragraph—that is, drafted by the code administration in Washington—schedule referred to in the minutes, Exhibit 803?

A. The one in Exhibit 518-B is the one that appears in Exhibit 803.

Q. I am referring now to this paragraph which is Exhibit 518-A under the heading "Schedules" and am asking
you whether that paragraph on schedules appearing
2183 on Exhibit 518-A, is the price scheduled paragraph
described in Exhibit 803 as having been previously
drafted in Washington by the administration?

A. This is different.

Q. You still don't understand my question. Exhibit 803 of the minutes refers to and quotes a paragraph to be submitted to the administration in lieu of a price schedule paragraph previously drafted in Washington by the administration.

A. Yes.

Q. Now, my question is, is the first paragraph headed "Schedules" on Exhibit 518-A the paragraph on schedules previously drafted in Washington?

A. Well, this one here, Exhibit 518-A is the one that was drafted in Washington.

Q. And this draft in Washington which appears on Exhibit 518-A, as to that, state whether that met with the approval of the Lead Pigments Division of the White Lead in Oil Committee.

A. That did not meet with the approval of the White Lead in Oil Committee of the Lead Pigments Division.

Q. And the paragraph quoted in the minutes of January 23rd, Commission's Exhibit 803, was the paragraph drafted by the White Lead in Oil Committee to be submitted in lieu of the administration's draft?

A. That's correct, sir.

2184 Q. In what connection did the committee propose to submit the price schedule paragraph quoted in the minutes, Exhibit 803?

A. It proposed to submit it in preparation of a supplemental code of fair competition for the white lead in oil industry.

Q. Now, I show you a photostatic copy of Commission's

Exhibit 804, bearing the date of January 27, 1934, and headed "Schedule A," and ask you to read it (handing same to witness.)

A. I have read it.

Q. Was that Schedule A drafted for inclusion in the proposed supplementary code?

A. It was.

Q. I show you photostatic copies of Commission's Exhibit 805-A, B and C, and ask you whether you acted as secretary at the meeting of the Dry Products Committee of the Lead Pigments Division of January 24, 1934?

A. I did.

Q. Will you read the minutes, please, to yourself?

A. Yes.

Q. State in what connection the price schedules previously adopted at the white lead in oil meeting were agreed upon at that meeting.

A. They were adopted in connection with prepara-
2185 tion of a supplemental code of fair competition for
the Dry Products Committee of the Lead Pigments
Division.

Q. State whether Schedule A annexed consisting of Exhibits 805-B and C was drafted for inclusion as a schedule in the proposed code.

A. It was also to be made part of the proposed code.

Q. I show you photostatic copies of Commission's Exhibits 524-A to E inclusive, headed "Supplementary Code of Fair Competition for the Lead Pigments Division of the Lead Industries Association Fourth Draft," and ask you whether prior to the date borne by that exhibit, November 11, 1933, there had been filed with the NRA, a master code covering the lead industry?

A. Yes.

Q. To what did the master code theretofore filed relate in the main, if you know?

A. It was mainly a labor code.

Q. State what you mean by labor code.

A. I mean it was a code designed to follow the wishes of the administration in creating more employment somewhat along the lines of the President's re-employment agreement which was the first general code promulgated by the administration.

Q. Did it relate to wages and hours?

A. Yes, it related to wages and hours.

2186 Q. I show you a photostatic copy of Commission's Exhibit 670 and ask you what it is (handing same to witness)?

A. This is a sample of the statistical reports issued by the Lead Industries Association. This one is dated February 16, 1943 and covering the domestic shipments, production in stocks in white lead by months for the years 1941, 1942 and the first month of 1943.

Q. State whether the Lead Industries Association receives from its membership producing white lead, reports relating to the domestic shipments, production and sales of each?

A. Shipments, production and stocks.

Q. Shipments, production and stocks of each?

A. It does with regard to production, shipments and stocks.

Q. State whether the information contained in the reports which you received from individual members is ever transmitted by you to other individual members.

Mr. Wright: Your Honor, I object to the leading character of these questions by counsel. After all, his witness stands in a very close relationship to him and certainly it seems to me that the questions could more properly be brought out by asking for the evidentiary facts. I object to that.

Trial Examiner Norwood: I think that is true.

2187 Mr. Ewing: I don't think that is a leading question, your Honor.

Mr. Wright: He was describing the kind of reports that the industry—counsel was describing the reports that the industry made to the Lead Industries Association and which in turn the association sent out to the members.

Trial Examiner Norwood: He told us this morning about some of that procedure there.

Mr. Wright: It has been testified to a number of times already in the case.

Trial Examiner Norwood: Read the last question.

(The reporter read the question.)

Trial Examiner Norwood: I think he could answer that either way. I don't think he is suggesting an answer there. He has specified very particularly the subject of the desired answer. I think he can do that. You can't get away from that in a question like that.

Mr. Ewing: And as you say, he can answer either way.

Trial Examiner Norwood: Objection overruled.

The Witness: The answer is never.

By Mr. Ewing:

Q. State whether the Lead Industries Association has ever collected from its individual members their prices on any commodity.

2188 A. It has never collected any price information from covering any product represented in the Lead Industries Association from mined to finished metal or the finished manufactured product.

Q. Has it ever collected from any of its members historical price information, historical in the sense of information relating to prices in the past?

A. It has never collected any historical price information from its members.

Q. Are the statistical reports which the Lead Industries Association issues to its members furnished to any persons or organizations outside of the membership?

A. The statistics—

Q. Just answer yes or no.

A. They are.

Q. Will you state in such detail as you may be able to, to what persons or organizations other than the members of the association your statistical reports are furnished?

A. Our statistical reports are furnished to various departments of the United States Government.

Q. For example.

A. The Department of Justice, the Federal Trade Commission, the Bureau of Mines, the Geological Survey, the United States Tariff Commission, the Bureau of Foreign and Domestic Commerce—there are some others

2189 that escape me for the moment.

Q. The reports to which you refer are reports similar in form to this Exhibit 770?

A. Yes, sir.

Q. How long have you been furnishing your statistical reports to the Federal Trade Commission?

A. Ever since the founding of the Lead Industries Association.

Q. How long did you furnish your statistical reports to the Department of Justice?

A. From the founding of the Lead Industries Association until a few years ago when we were specifically requested by the Department of Justice to cease sending them to them.

Q. You said, I believe, that you furnished statistical reports to the Bureau of Mines?

A. Yes, sir.

Q. Does the Bureau of Mines issue monthly statements of a similar nature?

A. On lead pigments?

Q. Yes.

A. Annually, sir; they are not monthly.

Q. They are not monthly?

A. That's right.

Q. For what reason, if you know, does the Bureau of Mines not issue monthly statistical statements of a
2190 similar nature?

A. They have come to us and told us they were so satisfied with the coverage of our reports and the public service that we are rendering, that they thought it would be in the interest to save the taxpayers money not to duplicate that service. So they have never duplicated it.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

By Mr. Ewing:

Q. I show you a photostatic copy of Commission's Exhibit 666 and ask you what it is (handing same to witness)?

A. This is a record of the shipments of white lead pigments comprising white dry lead, white lead in oil, basic lead sulphate and leaded zinc oxide from the period 1930 to 1940 plus eight months of 1941.

Trial Examiner Norwood: That is a composite picture?

The Witness: That is the total by years; yes, sir.

By Mr. Ewing:

Q. Under what circumstances, if you know, was that prepared?

A. I believe this was prepared at the request of
2191 the Federal Trade Commission.

Q. At whose request?

A. I think it was by Mr. Dunn or Mr. MacIntyre. I have forgotten who asked for this special compilation.

Q. I show you a photostatic copy of Commission's Exhibit 667 and ask you what it is?

A. This is a tabular statement of the volume of white lead pigments comprising dry lead, lead in oil, lead sulphate with the grand totals for the years 1930 to 1941 inclusive giving the annual price and the total values for each of those years. These figures were obtained from the Bureau of Mines' mineral yearbook.

2192 Mr. Ewing: Might we take a short recess, Your Honor?

Trial Examiner Norwood: We will take a short recess at this time.

(A short recess was taken.)

Trial Examiner Norwood: Come to order. Proceed.

By Mr. Ewing:

Q. I show you a photostatic copy of Commission's Exhibit 668 and ask you to state what that is?

A. This is a table showing the total sales of paint, varnish and lacquers and fillers as reported to the Bureau of Census, Department of Commerce, by 579 companies representing 87 per cent by volume of the industry from the years 1930 to 1941, only the first eight months of 1941 are included.

Q. Is that a statistical report prepared in the regular course of its business by the Association?

A. No, sir.

Q. Under what circumstances was it prepared?

A. I believe we were requested by the Commission to furnish this information.

Q. You didn't prepare it yourself, did you?

A. These are not our figures, sir.

Q. Well, I meant you yourself did not compile this information?

A. No, sir.

2193 Q. But it was prepared in your office; is that right?

A. It was prepared in our office.

Q. Referring back for the moment to Exhibit 666, I think you said that the figures there came from the Bureau of Mines; is that correct?

A. This is a combination report. Part of the date is from our own statistics—that is, the statistics of the Lead Industries Association and partly from the Bureau of Mines' statistics.

Q. And that was prepared by your office?

A. That was prepared by our office.

Q. I show you a photostatic copy of Commission's Exhibit 669 and ask you what it is?

A. This is a table showing the shipments of white lead, dry in oil by percentages for the years 1938, 1939, 1940 and 1941 of the National, Eagle Picher, the National Smelting and Refining, Fuller & McGregor and other companies. The others including Houston and Sherwin.

Q. Is that a regular statistical report prepared by your Association in the usual course of its business?

A. No, sir; it is not.

Q. Under what circumstances was it prepared?

A. Again, I believe this is a report which we were requested to make by the Federal Trade Commission.

Q. I show you Commission's Exhibits 507-A to M
2194 inclusive and ask you to read them over yourself
(handing to witness).

A. I have read them.

Q. I call your attention to your letters to Messrs. Carter and Roosevelt, Exhibits 507-A and B and ask you to state whether Mr. Carter and Mr. Roosevelt did, in fact, telephone you in response to your letters?

A. They did.

Q. What instructions did they give you with respect to your application for a proposed extension relating to the applicability of the price filing provisions?

A. They approved the move I made to request a continuation of the exemption of that particular paragraph from the administrator.

Q. Mr. Wormser--

Mr. Ewing: You have the original exhibits 519-A and B?

Mr. Wright: Yes, sir (handing to counsel).

By Mr. Ewing:

Q. Mr. Wormser, I show you Commission's Exhibits 519-A and B directing your attention first to 519-B and ask you to read them to yourself (handing to witness).

A. I have read them.

Q. Do you recall testifying with respect to those exhibits in June 1946?

A. I do.

2195 Q. I show you a transcript of your testimony appearing at page 1036 of the transcript and ask you
to read it insofar as it relates to Exhibit 519-B.

A. Yes.

Q. I show you pages 1189 and 1190 of the transcript giving a portion of Mr. Dunn's testimony with respect to Exhibits 519-A and B and ask you to read them.

A. I have read them.

Q. Have you had a list made of all the papers, letters and other documents which your office gave to Mr. Dunn at the time he called in the course of his investigation?

A. Yes, sir.

Q. I show you a document consisting of two sheets which I would like marked Respondent's Exhibit 4-A and B for identification.

Trial Examiner Norwood: It will be marked Respondents' Exhibit 4-A and B for identification.

(The document referred to was marked Respondents' Exhibit 4-A and 4-B for identification.)

By Mr. Ewing:

Q. And I ask you what that is (handing to witness)?

A. This is a list of the memoranda, correspondence records, data, documents of various description lifted from our files and given to Mr. Dunn.

Q. Was that list returned to you by Mr. Dunn?
2196 I will withdraw that. Were those documents returned to you by Mr. Dunn subsequent to the delivery thereof to him or by someone acting for the Federal Trade Commission?

A. They were returned by the Commission and checked off.

Mr. Ewing: Mark this Respondents' Exhibit 5 for identification.

Trial Examiner Norwood: It will be so marked as Respondents' Exhibit 5 for identification.

(The document referred to was marked Respondents' Exhibit 5 for identification.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. I show you a letter which has been marked Respondents' Exhibit 5 for identification and ask you whether that was received by you?

A. It was.

Q. At the same ~~time~~ did you receive from the Commission various documents theretofore furnished to Mr. Dunn?

A. Yes, sir.

Q. What examination, if any, did you cause to be made with respect to those documents upon their return to you?

A. We carefully checked on this list the items that had been submitted to the Federal Trade Commission to see whether they were all covered in the list we had made of the documents as they were originally given to the
2197 Commission and the checkmarks are shown here on this list.

Q. Indicating Respondents' Exhibit 4-A for identification?

A. That's right.

Q. Were all the documents that you had supplied Mr. Dunn returned to you on or about the date of Respondents' Exhibit 5 for identification, September 8, 1943?

A. Yes, sir.

Q. Will you examine Respondents' Exhibit 4-A and B for identification and ascertain what reference or references there are in it to any map furnished by you to Mr. Dunn?

Mr. Wright: Are you going to offer those in evidence?

Mr. Ewing: Yes, sir.

Mr. Wright: I submit that the list itself is the best evidence of what it contains.

Mr. Ewing: I offer Respondents' Exhibit 4-A and B for identification in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: May I cross-examine the witness on the identification of this?

Trial Examiner Norwood: You may ask him voir dire questions on it.

Mr. Wright: Who prepared Respondents' Exhibit 4-A and B?

The Witness: That is the list you have there?

2198 Mr. Wright: Yes.

The Witness: My secretary, Mrs. Mayer.

Mr. Wright: At your request?

The Witness: Yes.

Mr. Wright: What was the approximate date that this list was prepared?

The Witness: Shortly after Mr. Dunn's first examination of our files.

Mr. Wright: Does this list purport to cover only the things that Mr. Dunn got from you the first time that he called on you?

The Witness: He made several visits to us. When you say the first time, I don't know whether you mean specifically the one day or the whole series of visits that he made.

Mr. Wright: Does this list purport to cover all of the documents that he got from you on the several times that he called on you?

The Witness: It does.

Mr. Wright: I have no objection.

Trial Examiner Norwood: Respondents' Exhibit 4-A and B for identification will be received in evidence.

(The documents referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 4-A and 4-B were received in evidence.)

2199 Mr. Ewing: I offer in evidence Respondents' Exhibit 5 for identification.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: Mr. Wormser, I direct your attention to the pencilled notes in the lower right-hand corner of Respondents' Exhibit 5. Do you know who put those on there?

The Witness: I do.

Mr. Wright: Will you state who it was?

The Witness: My secretary, Mrs. Mayer.

Mr. Wright: Are those her initials?

The Witness: Yes.

Mr. Wright: I have no objection.

Trial Examiner Norwood: It will be received in evidence as Respondents' Exhibit 5.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 5, was received in evidence.)

By Mr. Ewing:

Q. I direct your attention to Commission's Exhibit 513-A to E inclusive and I also direct your attention to Respondents' Exhibit 4-B and ask whether the list of differentials, Exhibit 513-C and D and the map, Commission's Exhibit 513-E were among the papers supplied by you to Mr. Dunn and later returned to you?

2200 A. Yes, sir.

Q. State, if you know, whether you furnished Mr. Dunn with the map referred to in Commission's Exhibit 519-B and 519-A?

A. No, sir.

Trial Examiner Norwood: What is the map marked?

Mr. Ewing: That map is not marked, sir. I am trying to clear up a confusion.

Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Ewing:

Q. I ask you whether the map or any map such as that referred to in Mr. Mason's letter, Commission's Exhibit 519-B is in your possession?

A. No, sir.

Q. Have you had a search made for such a map?

A. Yes, sir.

Q. What did the search disclose?

A. No map.

Q. You only delivered one map then to Mr. Dunn?

A. Yes, sir.

Q. And that is the map which you have identified as Exhibit 513-E?

A. Correct.

2201 Q. Then I take it that you were in error in your testimony at page 1036 of the transcript when you said that the map referred to in Exhibit 519-B and 519-A had been delivered to Mr. Dunn?

A. Yes, sir; I was in error.

Mr. DuBose: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Ewing: When photostats have been obtained, I take it that Mr. Wright will have no objection to our substituting photostats of the Respondents' Exhibit 4-A and B and Respondents' Exhibit 5 so that the original exhibits may be returned to the files of the lead industries.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Respondents may have leave to substitute photostatic copies and withdraw the originals in the case of Respondents' Exhibit 4-A and B and Respondents' Exhibit 5.

By Mr. Ewing:

Q. Mr. Wormser, I direct your attention to the second paragraph of the letter, Commission's Exhibit 519-B and ask you whether new differential points were ever set up and passed through your office?

2202 A. No, sir.

Q. Were any suggested changes in the differential referred to in Exhibit 519-B passed through your office?

A. No, sir.

Q. Was there built up through your office an official freight arrangement for the white lead in oil industry?

A. No, sir.

Q. I show you photostatic copies of Commission's Exhibits 696 and 697 and ask you to read them.

A. Yes.

Q. Who was W. R. Dice?

A. Executive vice-president of the Eagle Picher Lead Company.

Q. Do you know yourself with what branch of Eagle Picher's business he was connected?

A. I don't recall in 1937 what branch he was connected with.

Q. Who was Mr. Wilson referred to in those exhibits?

A. Mr. Wilson was the sales manager of the Metallic Lead Products Division of the National Lead Company.

Q. And who was Mr. Martino?

A. Mr. Martino was in the comptroller's office of the National Lead Company at that time to the best of my knowledge. It was ten years ago.

Q. Do you recall the subject of the conversation referred to in Commission's Exhibits 696 and 697?

2203 A. No, sir.

Q. Had that conversation related to price fixing or production control or allocation of markets would you have recalled it?

Mr. Wright: I object to that question, Your Honor. He has already stated that he doesn't know what the conversation was. Now he is being asked for a conclusion that if it had related to some particular subject would he have recalled it.

Trial Examiner Norwood: I think that objection must be sustained.

By Mr. Ewing:

Q. At any time have you heard conversations relating to those subjects between representatives of Eagle Picher and National?

Mr. Wright: What subjects?

Mr. Ewing: The ones referred to in the preceding question.

The Witness: That is, price fixing and the agreements and so forth?

Mr. Ewing: Yes.

The Witness: The answer is no.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. At any time have you heard conversations 2204 relating to those subjects between representatives of Eagle Picher and National?")

Trial Examiner Norwood: I think he may answer that.

Mr. Wright: I object to that, Your Honor.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Objection overruled.

The Witness: No.

Trial Examiner Norwood: We will recess at this time until tomorrow morning at 10:00 o'clock, a. m.

(Whereupon, at 3:30 o'clock, p. m., the hearing in the above-entitled matter was adjourned.)

2205

Trial Room,
Bar Association Building,
36 West 44th Street,
New York, N. Y.,
April 23, 1947.

Met, pursuant to notice, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington, D. C.), appearing for Sherwin Williams Company.

Edmund P. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Robert H. Ecker (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James D. Ewing, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

2205-A E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

Roger Hinds, Union Commerce Building, Cleveland, Ohio, appearing for The Glidden Company.

2206

PROCEEDINGS.

Trial Examiner Norwood: Come to order.

Pursuant to adjournment on yesterday, the hearing in Docket No. 5253 is now convened for the taking of further evidence. I want to explain in a ruling I made yesterday that although I have not seen the record, as I recall it I stated that the question objected to was not leading because it could be answered either way. I merely said half of what I had in mind.

I meant it to be answered either way so far as any suggestions contained in the question would indicate.

Let the record show the following appearances:

J. T. Welch, appearing for the Sherwin Williams Company.

Edmund P. Wood, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Robert H. Ecker, appearing for Anaconda Copper Mining Company and International Smelting and Refining Company.

James D. Ewing and E. Z. DuBose, appearing for the National Lead Company.

Proceed.

FELIX E. WORMSER was thereupon recalled as a witness for the Respondent, and having been previously sworn, testified further as follows:

2207 *Direct Examination (Continued) by Mr. Ewing.*

Q. Mr. Wormser, under the NRA, was there a Code Authority established for the lead industry?

A. Yes, sir.

Q. Will you tell us what the Code Authority was?

A. The Code Authority acted as the body organized to carry out the provisions of the code of fair competition for the lead industry.

Q. Without refreshing your recollection, are you able to state who the members of the Code Authority were, not by name, necessarily?

A. The members of the Code Authority of the lead industry were, I believe, mainly the directors of the Lead Industries Association.

Q. I show you this book and ask you to tell us what it is (handing same to witness)?

A. This is the minutes of the meetings of the Code Authority for the lead industry.

Q. Were you the secretary of the Code Authority?

A. Yes, sir.

Q. And did you act as secretary at some, if not all, of the meetings of the Code Authority?

A. Yes, sir.

Q. Will you turn to the minutes of the third meet-
2208 ing of the Code Authority which was held on July 27, 1934?

Mr. DuBose: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Ewing:

Q. Who acted as secretary at that meeting?

A. I did.

Q. Am I correct, Mr. Wormser, in stating that the minutes of this meeting of July 27, 1934, appear on eight pages and that in addition there is an exhibit "B" on a separate page which is incorporated in those minutes?

A. Yes, sir.

Mr. Ewing: Your Honor, I have photostatic copies of the minutes and I propose to ask that the copies be marked for identification and I understand Mr. Wright will have no objection to that and that will permit Mr. Wormser to keep his records.

Mr. Wright: Providing Mr. Wormser will testify that the photostats are exact copies.

Mr. Ewing: I will ask him that.

By Mr. Ewing:

Q. I show you what purports to be photostatic copies of the minutes of that meeting and of Exhibit "B" and ask you to look at them and see whether they are in
2209 fact such (handing same to witness)?

A. They are.

Mr. Ewing: I ask that the photostatic copies be marked Respondent's Exhibit 6-A to I inclusive.

Trial Examiner Norwood: They will be so identified as Respondent's Exhibit 6-A to I inclusive.

(The documents referred to were marked Respondent's Exhibits 6-A, 6-B, 6-C, 6-D, 6-E, 6-F, 6-G, and 6-H and 6-I, for identification.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Were these minutes prepared by you, Mr. Wormser, which have been marked Respondent's Exhibits 6-A to I for identification?

A. Yes, sir.

Q. Do they correctly state what transpired at the meeting of the Code Authority held on July 27, 1934?

A. Yes, sir.

Mr. Ewing: I offer that in evidence as Respondent's Exhibit 6-A to I.

Mr. Wright: I object to the receipt of Respondent's Exhibit 6-A to I in evidence, your Honor, on the ground that it is immaterial and irrelevant and doesn't relate to any issue in this matter. As it is obviously on the face
2210 of these minutes, they relate to a Code Authority for the entire lead industry and that at least 95 per cent of the material in it relates to metallic lead and metallic lead products which are entirely out of the scope of this proceeding or at least the matters contained in the minutes here are. Furthermore, what the Code Authority under the NRA and the NRA itself did is irrelevant to this proceeding. The charge in this case—off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: The charge in this case is that these Respondents combined and conspired between and among themselves to fix and maintain prices. Now, there is no allegation that this was done through the NRA. Only a very small portion of the combination in conspiracy of the practices which we allege were adopted by a conspiracy ever found their way into any NRA code or were subject to any jurisdiction of the Code Authority and as to those practices, namely, the prices which finally appeared as schedule A and schedule B of the Code which are in the record, our allegation of conspiracy is without reference to the NRA and as to the adoption of these things prior to the time the NRA code became effective and the continuation of them after the time the NRA became in-
2211 operative. So that what the Code Authority of the NRA did is entirely irrelevant to this proceeding.

Mr. Wood: If your Honor please, I am a little bit confused here because at the last session which we held in Washington, I asked directly for a clarification of the record as to when this conspiracy commenced according to the government's position. I haven't a transcript with me but as I remember it, Mr. Wright replied that it commenced under the NRA.

Now, that was my understanding and I am rather confused by Mr. Wright's statement now.

Mr. Wright: I will say in answer to that that I believe Mr. Wood misunderstood what I said. If he didn't misunderstand what I said at that time, I certainly want to make it clear at this time. I believe I stated then that we allege the principal part of this conspiracy, the one relating to the setting of these zone plans and various other matters to have occurred in the period of 1933 and 1934 when these Respondents were engaged in ostensibly drafting an NRA code. But as I said then, and I will repeat it now, most of those agreements never found their way into any NRA code.

Mr. Ewing: If your Honor please, we have been charged with conspiracy and one of the mediums of conspiracy is alleged to be the Lead Industries Association. The
2212 situation in this case is, we believe, quite different from what is contained in similar cases and we propose to show as nearly as may be, and without unduly encumbering the record, the activities of these Respondents in and of themselves and as members of the Lead Industries Association and through members of the Code Authority so that this Court will know exactly what we did and will not be compelled to draw inferences.

Counsel for the Commission has introduced such documents as he has seen fit taken from the records of the Lead Industries Association having had access to all that, and I think we should be allowed to introduce that.

Mr. Wright: I would like to have a short voir dire examination with regard to these documents.

Mr. Ewing: I object to it.

Trial Examiner Norwood: It goes to the identification only.

Mr. Ewing: He has identified them.

Trial Examiner Norwood: The voir dire questioning will be confined to the identification. I guess he can make the examination a little broader than that. It goes to its admissibility. You may do that. I see your point now.

Mr. Wright: Mr. Wormser, I call your attention to the list on Respondent's Exhibit 6-A of members and alternates present. What were the company affiliations
2213 of Clinton H. Crane, chairman?

The Witness: Chairman and president of the St. Joseph Lead Company.

Mr. Wright: Do you know whether that company produces lead pigments in any form?

The Witness: They do not.

Mr. Wright: What was the business connection of F. M. Carter?

The Witness: President of the National Lead Company.

Mr. Wright: What was the business connection of W. W. C. Hunt?

The Witness: Vice-president of the Reynolds Metals Company.

Mr. Wright: Does that company produce lead pigments?

The Witness: No, sir.

Mr. Wright: What was the company affiliation of F. Y. Robertson?

The Witness: Vice-president of the United States Smelting, Refining and Mining Company.

Mr. Wright: And P. E. Sprague is connected with the Glidden Company?

The Witness: Correct.

Mr. Wright: Who is Mr. H. M. Brush?

2214 The Witness: Vice-president of the American Smelting and Refining Company.

Mr. Wright: Does that company produce lead pigments?

The Witness: No, sir.

Mr. Wright: Who is Mr. D. A. Callahan?

The Witness: A mine operator from Northern Idaho.

Mr. Wright: Has he anything to do with the production and sale of lead pigments?

The Witness: No, sir.

Mr. Wright: Who is Mr. I. H. Cornell?

The Witness: Vice-president of the St. Joseph Lead Company.

Mr. Wright: Does that company have any connection with the sale or distribution of lead pigments?

The Witness: No, sir.

Mr. Wright: Who is Mr. Clarence Glass?

The Witness: Vice-president of Anaconda Sales Company.

Mr. Wright: Was that company at that time in the production and sale of lead pigments?

The Witness: Strictly speaking, The Anaconda Sales Company is a subsidiary of either the International Smelt-d

ing or the Anaconda Company, I don't know which.
2215 So that strictly speaking the sales company does not
have anything to do with it but broadly speaking, it is part of the Anaconda organization.

Trial Examiner Norwood: Let me ask just one question.

Mr. Wright: Yes, your Honor.

Trial Examiner Norwood: Some of these people that are mentioned in these minutes are representatives of lead producers, are they not?

The Witness: Yes, sir.

Trial Examiner Norwood: Are they connected with these Respondents?

The Witness: Some of them ~~are~~, sir; yes, sir.

Trial Examiner Norwood: The matter is simpler than we are making it out here because the issue is whether or not ~~a~~ method was employed, not whether it was employed on this or that, just so that it is shown that it was employed in some of these things which these companies were producing or selling. It is the method that we are after, and the Commission has introduced some of these minutes here showing these activities and these papers are admissible if they contain anything that reflects the attitude of these respondents towards any of these methods or practices alleged.

Inasmuch as the Commission has put in part of the
2216 story, the Respondents will be permitted to put in the
other part according to our practice.

Mr. Wright: Mr. Wormser, at this meeting at which this exhibit purports to be the minutes, were trade practices in the lead pigments industry discussed and considered?

Mr. Ewing: I object, your Honor. The document is offered for identification. It is not in evidence and this is no proper examination by the Commission's counsel.

Trial Examiner Norwood: I have already ruled. I will overrule the objection to this. You may cross-examine him on that, Mr. Wright. Respondent's Exhibit 6-A to I inclusive are received in evidence.

(The documents referred to, heretofore marked for identification as RESPONDENT'S EXHIBITS 6-A, 6-B, 6-C, 6-D, 6-E, 6-F, 6-G, 6-H, and 6-I, were received in evidence.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Mr. Wormser—

Trial Examiner Norwood: On that point I can cite you two or three cases that go to that point of the Commission prohibiting a method and that the order may be broader than simply the mention of the means indicated in the complaint.

Mr. Wright: Your Honor, in that connection I say 2217 that I carefully avoided putting in any documents relating to the actual operation of the Code Authority into evidence as part of the Commission's case for the simple reason that I don't consider that that had anything to do with the conspiracy.

Mr. Ewing: That is slightly different from my view as to the reason why it was avoided.

Trial Examiner Norwood: I will cite the case of Dietzon against the Federal Trade Commission (142 Fed. 2nd 341) and the recent Muller case in the same volume, page 511, and the case there cited. Proceed.

By Mr. Ewing:

Q. Mr. Wormser—

Mr. Wright: I would like to note an exception to the ruling, your Honor.

Trial Examiner Norwood: Exception noted. Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

By Mr. Ewing:

Q. Will you examine the minutes of this meeting, Mr. Wormser, of July 27, 1934 and tell us whether you find anything therein relating to formal notification from the National Recovery Administration with respect to the by-laws of the Code Authority. I think you will find it 2218 on the second page.

A. I see it, yes.

Q. Was the statement in the minutes with respect to formal notification inserted therein by you pursuant to instructions given you at that meeting?

A. Yes, sir.

Q. Did you receive from the members of the Code Authority at that meeting any instructions with respect to formal notification from the National Recovery Administration in connection with Section II of Article 7 and Schedule "A" of the Code. You will find that on the same page immediately above that.

A. Yes, I have it.

Q. Well, did you receive any instructions? Just answer yes or no.

A. We did, yes.

Q. What instruction was given you by the members of the Code Authority?

A. By the members of the Code Authority?

Q. Yes, with respect to the formal notification from the National Recovery Administration.

A. The secretary was instructed to insert in the record the formal notification from the National Recovery Administration granting temporary exemption from Section II of Article 7 and Schedule "A" of the Lead Code.

2219 Q. Now, will you turn to Exhibit "B" in evidence as Respondent's Exhibit 6-I, and tell us what that is?

A. That is an order granting temporary exemptions from the trade and marketing provisions for the Lead Pigments Division of the lead industry.

Q. When you said "order," you mean a copy of an order?

A. Signed by Mr. C. E. Adams, Division Administrator.

Q. I show you a letter on the letterhead of the National Recovery Administration dated July 16, 1934 addressed to the Lead Industry Code Authority and attached documents and ask you whether you as secretary of the Lead Industry Code Authority received that letter and the attached documents (handing same to witness)?

A. I did.

Mr. Ewing: I will ask that the letter and the documents be marked Respondent's Exhibit 7-A, B and C for identification.

Trial Examiner Norwood: They will be so identified as Respondent's Exhibit 7-A, B and C.

(The documents referred to were marked Respondent's Exhibits 7-A, 7-B, and 7-C for identification.)

Trial Examiner Norwood: Proceed.

Mr. Ewing: I offer Respondent's Exhibits 7-A, B and C for identification in evidence.

Trial Examiner Norwood: Any objection?

2220 Mr. Wright: Mr. Wormser, what is Section II of Article 7, Schedule "A" of the Code?

Mr. Ewing: I object, your Honor. This is offered in evidence and this is no time for him to cross-examine as to what the section is.

Mr. Wright: He is identifying the document.

Mr. Ewing: He says it was received.

Trial Examiner Norwood: He has not said anything about the contents.

Mr. Wright: As I recall his testimony, he testified that this was a letter received from the National Recovery Administration with a certificate covering an exemption from that section of schedules.

Mr. Ewing: With documents attached. I didn't say what they were, they speak for themselves. I told you over there what they were.

Mr. Wright: Well—

Trial Examiner Norwood: Are they related documents?

Mr. Ewing: They were forwarded with the letter, your Honor. They were enclosures and that is all I asked him, as I recall.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

Mr. Wright: I object to the offer of Respondent's
2221 Exhibit 7-A, B and C, on the ground that it is imma-
terial and irrelevant. There is absolutely no issue with regard to the exemption under Section II of Article 7 of the Code. I stated on the record yesterday that there was no contention that the price filing provisions of the Code were ever actually put into operation through the Lead Industries Association, and that is what this section relates to.

Mr. Ewing; It also exempts Schedule "A" which was the contract form of terms and conditions of sale upon which Mr. Wright relies. Our position is the same with respect to this as with the other records at the time.

Trial Examiner Norwood: I think this is just as relevant as the other testimony we have received here. You may enlarge on it a little and you may cross-examine him on it, but I shall overrule the objection and receive Respondent's Exhibit 7-A, B and C in evidence.

(The documents referred to, heretofore marked RESPONDENT'S EXHIBITS 7-A, 7-B and 7-C for identification, were received in evidence.)

Mr. Ewing: We would like to have permission to have that photostated at the same time as we have the other exhibits photostated.

Trial Examiner Norwood: Is that agreeable, Mr. Wright?

Mr. Wright: Yes, your Honor: That is agreeable.

2222 Trial Examiner Norwood: You will have that photostated and they will be substituted and given to the reporter here.

Mr. Ewing: Yes, sir.

Trial Examiner Norwood: You may have permission to do that. Is that to be your procedure with respect to Respondent's Exhibits 4-A and 4-B and Exhibit 5, because if they are to be withdrawn here, I will have to write a memorandum about it?

Mr. Du Bose: We will have Exhibits 4-A and B and Exhibit 5 photostated today.

Trial Examiner Norwood: If you do that then they can go in as original exhibits by agreement.

By Mr. Ewing:

Q. Mr. Wormser, I show you a document consisting of—

Mr. Ewing: I will ask that these two pages be marked Respondent's Exhibit 8-A and 8-B for identification.

Trial Examiner Norwood: They will be so marked as Respondent's Exhibit 8-A and 8-B for identification.

(The documents referred to were marked Respondent's Exhibits 8-A and 8-B for identification.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. I show you the two pages which have been marked Respondent's Exhibits 8-A and 8-B for identifica-

2223 tion, and ask you whether you prepared Exhibit 8-A (handing same to witness)?

A. I did.

Q. What disposition, if any, did you make of Exhibit 8-A and 8-B?

A. This was circulated to the members of the Code Authority.

Q. When you say members of the Code Authority, whom do you mean?

A. Well, I mean the personnel who composed the Code Authority.

Q. That is, representatives of certain of the members of Lead Industries Association; is that right?

A. That's correct.

Mr. Ewing: I offer Respondent's Exhibits 8-A and 8-B for identification, in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: I object, your Honor. This is the third straight exhibit containing the certificate dated June 27, 1934 by Janssen, and it is accumulative.

Mr. Ewing: It shows when the exemption was applied for and when it was distributed.

Trial Examiner Norwood: Objection overruled, and the exhibit will be received as Respondent's Exhibit 8-A and B.

(The documents above referred to, heretofore 2224 marked for identification as RESPONDENT'S EXHIBITS 8-A and 8-B, were received in evidence.)

Mr. Ewing: If we may, we would like to have this photostated too. You have no objection to that, have you, Mr. Wright?

Mr. Wright: No, sir.

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Mr. Wormser, will you look at your minute book and turn to the minutes of the meeting of the Code Authority of September 25, 1934?

A. Yes, sir.

Q. Have you found those minutes?

A. Yes, sir.

Q. I direct your attention to that portion of the minutes commencing on the second page which relates to a petition for exemption from certain provisions of the Code and ask you to state—I will withdraw that question. I ask that you examine these six photostats and state whether they are correct copies of the minutes of the meeting of September 25, 1934 (handing same to witness)?

A. They are.

Mr. Ewing: I ask that the six photostats be marked Respondent's Exhibits 9-A to F inclusive.

2225 Trial Examiner Norwood: They will be so marked as Respondent's Exhibits 9-A to 9-F inclusive for identification.

(The documents referred to were marked Respondent's Exhibits 9-A, 9-B, 9-C, 9-D, 9-E, and 9-F, for identification.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Did you act as secretary at that meeting of September 25, 1934 of the Code Authority?

A. Yes, sir.

Mr. Ewing: I offer Respondent's Exhibits 9-A to F inclusive for identification, in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: I object, your Honor. They are incompetent and irrelevant.

Mr. Ewing: I call your attention, your Honor, specifically to the second page where reference is made to the further application for exemption from the provisions of the Code.

Trial Examiner Norwood: It will be received in evidence as Respondent's Exhibits 9-A to F inclusive. The objection is overruled.

(The documents referred to, heretofore marked for identification as RESPONDENT'S EXHIBITS 9-A,
2226 9-B, 9-C, 9-D, 9-E, and 9-F for identification, were
received in evidence.)

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: I have an exception on all this.

Mr. Ewing: My understanding is that we all have an automatic exception to any adverse rulings.

Trial Examiner Norwood: That's correct. Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

By Mr. Ewing:

Q. I direct your attention, Mr. Wormser, to that portion of these minutes headed "Petition for Exemption Lead Pigments Division," appearing on Respondent's Exhibit 9-B and C, and ask you to read it.

A. I have read it.

Q. Did you write the National Recovery Administration on September 18, 1934, the letter quoted in those minutes?

A. I did write such a letter.

Q. Was that letter which you wrote the National Recovery Administration the letter approved by telephone by Mr. F. M. Carter and Mr. Roosevelt, a draft of which
is in evidence as Commission's Exhibit 507-C which I
2227 show you and which, I believe, you saw yesterday?

Mr. Du Bose: That is Exhibit 507-C.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Was that letter which you wrote the National Recovery Administration the letter approved by telephone by Mr. F. M. Carter and Mr. Roosevelt, a draft of which is in evidence as Commission's Exhibit 507-C which I show you and which, I believe, you saw yesterday?")

Mr. Wright: I object to that question, your Honor. It puts words in the witness' mouth about telephone conversations and so forth.

Mr. Ewing: It doesn't put any words in his mouth at all. He testified yesterday that a letter to the Recovery Administration had been approved over the telephone.

Trial Examiner Norwood: Objection sustained. That is as leading as a question could be.

Mr. Du Bose: How could it be, your Honor? All we are trying to do is to find out whether this draft which he identified yesterday is the draft of the letter that is quoted in the minutes. It is a simple factual question.

Mr. Wright: I don't object to the factual question part as much as I do the characterization of Commission's Exhibit 507-C which is contained in the question.

2228 Mr. Ewing: If you only object to the characterization, then I won't characterize any of it.

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. I will ask you, Mr. Wormser, whether the letter set forth in Respondent's Exhibits 9-B and 9-C, in the minutes of the meeting of September 25, 1934, was the subject of your letter to Mr. Carter and your letter to Mr. Roosevelt, both dated September 17, 1934, in evidence as Commission's Exhibit 507-A and B which I show you (handing same to witness)?

A. Yes, sir; it was.

Q. Will you state whether the National Recovery Administration responded formally to your letter of Septemper 18th, if you know?

A. I don't recall, sir. I believe it did, though.

Mr. Wright: I move that the last part of the answer be stricken.

Trial Examiner Norwood: Motion allowed.

By Mr. Ewing:

Q. Did the provisions of Section II of Article 7 of the Code, Commission's Exhibit 809 and Schedule "A" ever become effective during the existence of the Code Authority?

A. No, sir.

Mr. Wright: I object to that. I think the question is
indefinite and that it is not susceptible to a yes or
2229 no answer in the form in which it is asked. It calls
for a conclusion on the part of the witness as to what
"effective" means.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Did the provisions of Section II of Article 7 of the Code, Commission's Exhibit 809 and Schedule "A" ever become effective during the existence of the Code Authority?")

Mr. Wright: Your Honor, it has already been testified to by Mr. Zoller and Mr. Merson that the trade practices covered by that Schedule "A" have been employed by the National Lead Company and the Eagle Picher Company over a period of time starting back in that time. Well, now, obviously—

Trial Examiner Norwood: You mean the practices are described?

Mr. Wright: Yes.

Trial Examiner Norwood: He is not asking about that.

Mr. Ewing: That is quite a different question.

Mr. Wright: I don't think the witness should be permitted to state yes or no to a question which so obviously calls for a conclusion on his part as to what "effective" means.

2230 Trial Examiner Norwood: He is asking him
whether or not—you see, they have got a code here,
and immediately this company here—I would like to know
the answer to that question myself—they had it suspended
with respect to them and while they had the suspension
continued—and he wants to ask this witness as an official
in this organization here who would know whether or
not at any time that code was effective with respect to
these people.

Mr. Wright: No, sir. It isn't a question as to whether that provision became operative as far as the Code Authority was concerned. The word "effective" is much broader than that. His answer might comprehend there and possibly be construed or Respondent's attempt to take an inference from it that no one of the Respondents ever put into practice the practices covered by that schedule.

Mr. Ewing: I am not asking him that question. I restricted it to the Code Authority.

Trial Examiner Norwood: Objection overruled. Answer the question. You may cross-examine him on it.

The Witness: No, sir.

By Mr. Ewing:

Q. Was the Code Authority charged with the duty of administering the provisions of the Code for the lead industry?

2231 A. Yes, sir.

Q. In the absence of permission from the administrator, would the Code Authority have been required to enforce the full provisions of the Code?

A. Yes, sir.

Q. And it is for that reason, is it, that the request for exemption was made?

Mr. Wright: I object to it as a leading question, your Honor.

Mr. Ewing: I will withdraw the question.

Trial Examiner Norwood: You are asking for somebody else's reason.

Mr. Ewing: Well, he made the request.

Mr. Wright: Counsel is testifying—

Mr. Ewing: I said I would withdraw the question.

Trial Examiner Norwood: The question is withdrawn. Proceed.

By Mr. Ewing:

Q. State your reason, Mr. Wormser, for requesting the exemption from the provisions of the Code in regard to Section II of Article 7 and Schedule "A".

Mr. Wright: I object to that question. It has not been shown that this witness ever did object to those provisions.

Mr. Ewing: I said asking for the exemption, Mr. 2232 Wright. He wrote the letter.

Mr. Wright: It has never been established that he has.

Mr. Ewing: He certainly has, he wrote the letter.

Trial Examiner Norwood: Objection overruled. Your own reason is what he is asking for now.

The Witness: May I have the question read to me?

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows: "State your reason, Mr. Wormser, for requesting the exception from the provisions of the Code in regard to Section II of Article 7 and Schedule 'A'.")

The Witness: The reason was there was a general aversion to incorporating in the Code of fair competition for the lead industry, and that refers to all the divisions of it, anything that had any relation to monopolistic practices or trade restrictions or other practices that might be considered normally reprehensible.

Mr. Wright: I object to that and move that it be stricken, your Honor, as a self-serving hearsay declaration which is obviously not responsive to the question.

Trial Examiner Norwood: This witness may give us the facts on which he bases that conclusion. It is a very
2233 broad conclusion and goes to the heart of the issues
in this case and I am going to allow the motion to strike it.

Mr. Ewing: I will note an exception. I submit that this witness is not in a position to make any self-serving statement in the literal sense. He is not a respondent, the association is the Respondent. So that when he gives the reason Mr. Wright may regard it as self-serving.

Trial Examiner Norwood: He can't confine it to his reason.

Mr. Wright: This gentleman is an agent and employee of the Respondent.

Trial Examiner Norwood: He has attempted to give the reasons of the entire industry and I think it is a too serious matter to just treat it in that way.

Mr. Ewing: I will repeat the question limiting it to Mr. Wormser's own reasons for writing the letter.

Trial Examiner Norwood: Answer it from that point.

The Witness: I don't quite understand.

Mr. Ewing: I will rephrase the question.

By Mr. Ewing:

Q. Will you give us your own reason for writing the letter of September 18, 1934, requesting the National Recovery Administration to continue the exemption with

respect to Section II of Article 7 and Schedule "A"
2234 of the Lead Industry Code?

Q. I was instructed to do so by the pigment division, subject to the approval of our Code Authority members.

Q. Were you present at any discussion among the members of the Pigment Division at which that instruction was given to you?

A. Yes, sir.

Q. Did you hear what the representatives of the members said at that discussion?

A. Yes, sir.

Q. Will you state in words or in substance what was said in connection with the instruction?

A. Do you refer to the conversation leading up to the decision to instruct me to write this letter?

Q. That's correct, if you know.

A. I know this much—of course, what transpired 14 years ago—but the members were—

Trial Examiner Norwood: Now wait a minute. He just asked you to state what you remembered.

The Witness: I don't remember specifically.

Mr. Wright: May we take a short recess, your Honor?

Trial Examiner Norwood: We will take a short recess.

(Whereupon, a short recess was taken.)

2235 Trial Examiner Norwood: Come to order. Proceed.

Mr. Ewing: I will ask that these two sheets be marked Respondents' Exhibit 10-A and B for identification.

Trial Examiner Norwood: They will be so marked as Respondents' Exhibit 10-A and B.

(The documents referred to were marked Respondents' Exhibits 10-A and 10-B for identification.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. I show you the documents which have been marked 'Respondents' Exhibits 10-A and B for identification and ask you whether the originals thereof were received by you as secretary of the Code Authority?

A. Yes, sir; they were.

Mr. Ewing: I offer the two documents which have been marked Respondents' Exhibit 10-A and B for identification in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: I object, Your Honor, on the ground that they are irrelevant and immaterial.

Trial Examiner Norwood: Objection overruled. They will be received in evidence as Respondents' Exhibits 10-A and B. Do you wish to substitute photostats for that?

Mr. Ewing: Yes, sir.

Trial Examiner Norwood: You may.

2236 (The documents referred to, heretofore marked RESPONDENTS' EXHIBITS 10-A AND 10-B for identification were received in evidence.)

By Mr. Ewing:

Q. I wish to direct your attention to that portion of the minutes of the meeting of September 25, 1934, of Respondents' Exhibit 9-E, and ask you to read to yourself the matter in the minutes under the heading "Executive order No. 6767.

A. Yes, sir.

Q. Did you advise Mr. Henderson as instructed by the Code Authority at that meeting in accordance with the statement in the minutes appearing under the heading "Executive order No. 6767"?

A. I did.

Q. I ask you to examine your minute book and see if it contains minutes of a meeting of the Code Authority held on November 16, 1934?

A. It does.

Q. I show seven photostats and ask you to examine them and state whether they are true copies of the minutes of that meeting (handing to witness)?

A. They are.

Mr. Ewing: I ask that they be marked Respondents' Exhibit 11-A to G for identification.

Trial Examiner Norwood: They will be marked
2237 Respondents' Exhibit 11-A to G for identification.

(The document referred to was marked Respondents' Exhibit 11-A, 11-B, 11-C, 11-D, 11-E, 11-F and 11-G for identification.)

Trial Examiner Norwood: Proceed.

Mr. Ewing: I offer Respondents' Exhibit 11-A to G for identification in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: I object, your Honor. It is immaterial and irrelevant.

Mr. Ewing: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Objection overruled. They will be received in evidence as Respondents' Exhibit 11-A to G.

(The document referred to, heretofore marked for identification Respondents' Exhibit 11-A, 11-B, 11-C, 11-D, 11-E, 11-F and 11-G, was received in evidence.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. I show you a bound pamphlet issued by the Government Printing Office and ask you—I will withdraw that question.

Mr. Ewing: I will ask that this bound pamphlet be marked Respondents' Exhibit 12 for identification.

2238 Trial Examiner Norwood: It will be marked for identification as Respondents' Exhibit 12.

(The document referred to was marked Respondents' Exhibit 12 for identification.)

Trial Examiner Norwood: Proceed.

Mr. Ewing: I offer this pamphlet which is entitled "National Recovery Administration code of fair competition for the paint, varnish and lacquer manufacturing industry" in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: I object on the ground that it is irrelevant and immaterial.

Trial Examiner Norwood: Objection overruled. It will be received in evidence as Respondents' Exhibit No. 12.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 12, was received in evidence.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Now I direct your attention, Mr. Wormser, to that portion of the minutes of the meeting of November 16, 1934, of the Code Authority appearing on Respondents' Exhibit 11-C, 11-D, 11-E and 11-F headed "Consideration of action of Paint Recovery Board to procure transfer of lead 2239 in oil to paint code" and ask you to read to yourself those minutes.

A. I have read it.

Q. Directing your attention to that portion of the minutes which recites the authorization to you to write a letter to the National Recovery Administration, I ask you whether you wrote the letter so authorized?

A. I did.

Q. Was it sent to the National Recovery Administration?

A. Yes, sir.

Q. Directing your attention to the recital in the minutes to the effect that you stated that you had notified Mr. Janssen to the Paint Recovery Board's action quoting it, did you write such a letter to Mr. Janssen?

A. I did.

Q. Who was Mr. Janssen?

A. Deputy administrator of the National Recovery Administration and in charge of the lead code activities.

Q. When in your letter to the National Recovery Administration of November 19, 1934, appearing on Respondents' Exhibit 11-D and 11-E, you referred to "selling below cost provision" of the paint code, will you state whether Article 22 appearing on page 182 of Respondents' Exhibit 12 is the provision to which you referred (handing to witness)?

A. It is.

Q. Had the lead in oil industry been brought under
2240 the cost provisions of the paint code, what effect
would that have had, if any, in your opinion on the
price of white lead in oil?

Mr. Wright: I object to that question, Your Honor. It obviously calls for a conclusion on the part of the witness and he has not been established as a sufficient expert on the price of white lead in oil at that period to be able to make an intelligent answer to that question.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Had the lead in oil industry been brought under the cost provisions of the paint code, what effect would that have had, if any, in your opinion on the price of white lead in oil?")

Mr. Wright: It obviously calls for an opinion and there has been no qualification of this witness as an expert.

Mr. Ewing: I submit there has been. He qualified himself yesterday as an expert.

Mr. Wright: He qualified himself yesterday as an expert engineer.

Mr. Ewing: Also as an expert in marketing and as the author of one of the outstanding texts on marketing.

Mr. Wright: He has not been qualified as an expert with regard to the conditions prevalent in the industry as of this period.

2241 Trial Examiner Norwood: I think he is an expert.

Mr. Wright: On prices?

Trial Examiner Norwood: Yes. Objection overruled. Answer the question.

The Witness: It would have raised the price of white lead.

Mr. Wright: I move that that answer be stricken, Your Honor, as an unsupported conclusion for which there is no foundation in the record.

Trial Examiner Norwood: Motion denied. He will ask him further about that.

By Mr. Ewing:

Q. Why would that have been the effect, in your opinion?

A. It would have brought the white lead in oil industry under the much stricter costing provisions of the paint code.

Mr. Wright: I move to strike that answer as not responsive.

Mr. Ewing: I think it is incomplete but it is certainly responsive.

Trial Examiner Norwood: Read the question and the answer.

(The reporter read the question and answer as follows:
"Q. Why would that have been the effect, in your
2242 opinion?"
"A. It would have brought the white lead in oil industry under the much stricter costing provisions of the paint code.")

Trial Examiner Norwood: Motion denied.

By Mr. Ewing:

Q. Are the provisions of Article 22 of the paint code, Respondents' Exhibit 12, those to which you have just referred (handing to witness)?

A. Yes, sir.

Q. Tell us how the application of those provisions to the white lead in oil industry would have increased the price of white lead in oil, in your opinion?

A. This particular provision of the paint code stipulated the specific inclusion of a great many items in the cost of selling those items that come under the paint code such as all direct costs, power and labor depreciation, figured in accordance with the provisions of the Federal income tax laws plus the proper proportion of all factory expenses and so on and so forth, quite a list of items here, all designed to increase the maximum price of paint.

White lead in oil is distinctly competitive with mixed paint and always has been. It was quite obvious to us in the white lead industry that if the paint people had been
successful in bringing white lead in oil under their
2243 own provisions they could have forced up the price
of white lead and thereby made their competitive position more secure.

Mr. Wright: I object and move that the last part of that answer be stricken as not responsive in a volunteer statement as to what the paint code authority might have had and as to the competitive situation between paint and white lead in oil.

Mr. Ewing: I have no objection to striking out the final reference to the competitive situation but the rest of the answer is perfectly responsive.

Trial Examiner Norwood: You agree that it may be stricken?

Mr. Ewing: The final reference to the competitive situation of the paint industry as distinguished from the white lead in oil.

Mr. Wright: Read the answer.

(The reporter read the answer as follows:

"A. This particular provision of the paint code stipulated the specific inclusion of a great many items in the cost of selling those items that come under the paint code such as all direct costs, power and labor depreciation, figured in accordance with the provisions of the Federal income tax laws plus the proper proportion of all factory expenses
and so on and so forth, quite a list of items here, all
2244 designed to increase the maximum price of paint.

"White lead in oil is distinctly competitive with mixed paint and always has been. It was quite obvious to us in the white lead industry that if the paint people had been successful in bringing white lead in oil under their own provisions they could have forced up the price of white lead and thereby made their competitive position more secure.")

Mr. Ewing: I have no objection to striking out "and thereby making their competitive position," etc.

Mr. Wright: It was beyond the scope of the question and it was a volunteer conclusion on the part of the witness for which there has been no proper basis laid.

Mr. Ewing: He was giving the reasons to what the effect would be.

Mr. Wright: He was stating what was in the minds of other people in his opinion.

Mr. Ewing: In his mind, it was his opinion.

Mr. Wright: It was his opinion as to what the paint people had in mind for the white lead people.

Mr. Ewing: It was the effect of the conclusion—

Trial Examiner Norwood: (Interposing) I think it can go in as this expert's opinion.

Mr. Wright: It isn't opinion evidence. That was a statement of fact of what was in the minds of people 2245 who are not involved in this case.

Trial Examiner Norwood: It is his reasons, as I understand it.

The Witness: Yes, sir.

Mr. Wright: It is obviously just a belief he had about a situation of facts according to his own answer on it.

Trial Examiner Norwood: I will deny the motion. This is received as his belief. This is his opinion about the situation.

By Mr. Ewing:

Q. Is there any other reason why bringing white lead in oil under the paint code would force the price up?

A. You mean outside—

Q. (Interposing) Of what you have just stated.

A. Well, there was another inclusion here of a sentence that I should like to read to you—

Q. (Interposing) You are reading from what?

A. I am reading from Article 22 of selling below the cost provision of the paint code.

Q. Which is Respondents' Exhibit 12.

A. "There shall also be included in the cost a proportion of the general and administrative expenses, such proportion to be determined and to be recommended by the Paint Industry Recovery Board to the administrator for approval."

2246 Mr. Ewing: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

By Mr. Ewing:

Q. Will you look at the minute book, Mr. Wormser, and tell us whether there was any meeting of the Code Authority held after the Supreme Court declared the NRA unconstitutional?

A. What day, Mr. Ewing?

Q. May or early June 1935.

A. We had an informal meeting on June 11, 1935.

Q. Have you the minutes of that informal meeting?

A. Yes, sir.

Mr. Ewing: I ask that these photostats be marked Respondents' Exhibit 13-A to D for identification.

Trial Examiner Norwood: They will be marked for identification as Respondents' Exhibit 13-A to D for identification.

(The photostats referred to were marked Respondents' Exhibits 13-A, 13-B, 13-C and 13-D for identification.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. I show you these papers which have been marked Respondents' Exhibits 13-A to D inclusive for identification and ask you whether they are correct copies of the
minutes of the informal meeting of June 11, 1935
2247 and of the attached two letters (handing to witness)?

A. Yes, sir.

Mr. Ewing: I offer Respondents' Exhibits 13-A to D for identification in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: I object, Your Honor, on the ground that they are immaterial and irrelevant. They contain nothing related even remotely to the issues in this matter.

Mr. Ewing: It is directly relevant on the charge that we commenced certain practices during code days and continued them afterwards.

Mr. Wright: If offered for that purpose then it is incompetent as well.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood. On the record. What have you to say?

Mr. Du Bose: It shows that they agreed to wind up the affairs of the Code Authority and return the statistics theretofore that had been gathered. It certainly shows how they regarded the NRA as distinguished from the respondents in some of these other cases.

Mr. Wright: How does the fact that they sent back the documents to the Code Authority have any bearing
2248 on the issue as to whether or not the conspiracy was continued after the NRA? This doesn't mention anything about the NRA continuance or a non-continuance.

It has absolutely no bearing on the subject.

Mr. Du Bose: All of the documents tending to show conspiracy according to the Commission's allegations and contentions deal with meetings of committees which were called to consider the code. This shows that the Code Authority was wound up bang when the Schecter decision came down.

Mr. Wright: Your Honor, there is not one scintilla of evidence that I can recall at any rate on the conspiracy here which relates to the activities of the Code Authority. Now this is the Code Authority and the evidence of conspiracy relates to meetings of the various divisions of the Lead Industries Association.

There is no indication that the Lead Industries Association—

Trial Examiner Norwood: (Interposing) Does this substantially wind up this NRA angle?

Mr. Ewing: Yes, Your Honor.

Trial Examiner Norwood: I will overrule the objection and receive Respondents' Exhibit 13-A to D in evidence.

2249 (The photostats referred to, heretofore marked for identification RESPONDENTS' EXHIBITS 13-A, 13-B, 13-C and 13-D, were received in evidence.)

Trial Examiner Norwood: That was on June 27th?

Mr. Du Bose: May 27th.

By Mr. Ewing:

Q. I show you Respondents' Exhibit 13-C and ask you whether you received the original thereof (handing to witness)?

A. I did.

Q. I direct your attention to the last paragraph of the minutes appearing on Respondents' Exhibit 13-A and B and I ask you whether you did return to each member of the industry, the labor statistics furnished it, if any, from time to time at the request of the Code Authority?

A. I did.

Q. Other than the statistical matter about which you have already testified, what statistics or reports, if any, did the Code Authority require of its membership?

A. None other than labor statistics.

Q. Was the Code Authority liquidated subsequent to June 11, 1935?

A. Yes, sir.

Q. As far as you know was there at any time after June 11, 1935, any attempt made by members of the Lead Industries Association to continue any of the activities authorized by the code? 2250

A. None whatsoever.

Q. That is as far as you know?

A. As far as I know, yes.

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

Mr. Ewing: I ask that this be marked Respondents' Exhibit 14 for identification.

Trial Examiner Norwood: It will be so marked as Respondents' Exhibit 14 for identification.

(The document referred to was marked Respondents' Exhibit 14 for identification.)

Mr. Ewing: I ask that you mark this as Respondents' Exhibit 15-A and B for identification.

Trial Examiner Norwood: It will be marked as Respondents' Exhibit 15-A and B for identification.

(The document referred to was marked Respondents' Exhibit 15-A and 15-B for identification.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. I show you this document marked Respondents' Exhibit 14 for identification and ask you if you received that (handing to witness)?

2251 A. Yes, sir.

Mr. Ewing: I offer Respondents' Exhibit 14 for identification in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: I object to that, Your Honor. It is absolutely irrelevant and immaterial and incompetent. It can't prove anything that has anything to do with this case. On its face it is a letter.

Mr. Ewing: It is a letter from the Department of Justice with respect to the organization of the lead industries.

Mr. Wright: What the Department of Justice might have thought of the Lead Industries Association from 1928 or at any other time has no bearing with regard to a conspiracy in this matter.

Trial Examiner Norwood: Will this be connected up?

Mr. Ewing: Yes.

Mr. Wright: How can it possibly be connected up and made material?

Trial Examiner Norwood: I will overrule the objection and receive Respondents' Exhibit 14 for identification in evidence.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 14, was re- 2252 ceived in evidence.)

Mr. Wright: Is that subject to connection, Your Honor?

Trial Examiner Norwood: Yes.

By Mr. Ewing:

Q. Did you reply to the letter, Respondents' Exhibit 14 in evidence?

A. Yes, sir; I did.

Q. I show you Respondents' Exhibit 15-A and B for identification and ask you if that is a copy of your reply (handing to witness)?

A. It is.

Mr. Ewing: I offer Respondents' Exhibit 15-A and B for identification in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: I made the same objection to this. It is a self-serving statement in the form of a letter which can have absolutely no materiality or relevancy to the issues in this case.

It is incompetent as proof relating to any issue in the matter. We already have in the record the constitution and by-laws of the Lead Industries Association.

Trial Examiner Norwood: Does this witness say anything here that he couldn't tell us directly?

Mr. DuBose: If Your Honor please, the complaint 2253 in count No. 1, paragraph 7, subdivision "B" says that these respondents used the Lead Industries Association as a medium to agree on certain practices which are in restraint of trade.

We believe that these documents as well as others that we will offer later show the complete background and activities of the Lead Industries Association, how it was organized, how from the beginning the facts were revealed to everybody in all governmental agencies, how it operated, and how it could not have been used by these respondents or any other group as a medium to engage in practices in restraint of trade.

There is a broad allegation in the complaint and we feel we are entitled to cut off any possible inference that might be drawn by our failure to show the complete record of the Lead Industries Association.

Trial Examiner Norwood: Is it necessary to show every activity of the Lead Industries in order to negative the charge as to one of its activities?

Mr. DuBose: No, sir. But this is a request from the Department of Justice which is engaged in prosecuting trade associations which foster restraint of trade. They asked us, "What are your purposes?"

We wrote them back and had a meeting with them. We sent them a statistical report and they gave us a reserve carte blanche.

2254 Mr. Wright: Your Honor, how in the world could a reserve carte blanche or any correspondence between this Association and the Department of Justice in 1928 relating to the general objectives of the Association have any effect or any bearing by any stretch of the imagination on a conspiracy which occurred in 1933 and 1934?

Trial Examiner Norwood: I think you are going too far along this line.

Mr. DuBose: If Your Honor please, there is in evidence by the Commission an Exhibit No. 92 which is a report of the Stockholders Committee of the American Smelting and Refining Company and which is not a respondent in this case, admitted for the purpose of showing background.

It was a majority report. There is also in evidence Commission's Exhibit 24 which is a history of the American Smelting and Refining Company that goes back—purports to be a history—as far as 1906 or 1900 which purports also to show some background. I say if those two documents are admissible all of this material is admissible on the ground of showing purpose of these respondents as well as others on the formation of the Lead Industries Association.

Mr. Wright: Your Honor, I don't really have any serious objection to this correspondence because I don't believe it proves anything. But if we are going to permit this record to be burdened with letters and statements
2255 from all the people who might say that they know of
no purpose on the part of these respondents or the Lead Industries Association to engage in any combination or conspiracy, it is going to be an endless proposition. It has no probative value and it has no relevance.

Trial Examiner Norwood: I don't see that this adds anything to what you have already put in with respect to the background.

Mr. Wright: I might say that the same considerations apply to Respondents' Exhibit 14.

Trial Examiner Norwood: I think I will reverse my ruling on Exhibit 14 and sustain the objection on this for the time being. If it appears to be relevant later on, we can take it in.

Mr. DuBose: Your Honor, in admitting Exhibit 24 and 92, Your Honor ruled that they were to be admitted subject to connection; that if they were not connected they would be subject to a motion to strike.

Trial Examiner Norwood: That is right.

Mr. DuBose: All we ask for is the same treatment with respect to these exhibits.

Trial Examiner Norwood: I think I will sustain the objection to that for the time being.

Mr. DuBose: Exception.

2256 Trial Examiner Norwood: And I will reverse the
ruling on Exhibit 14 which was merely a connecting paper here and leave that out now.

Mr. Ewing: I suggest a recess at this time until 2:00 o'clock, Your Honor.

Trial Examiner Norwood: We will recess at this time until 2:00 o'clock.

(Whereupon, at 12:20 o'clock p. m., a recess was taken until 2:00 p. m., this day.)

2257 Afternoon Session.

2:00 p. m.

Trial Examiner Norwood: Come to order. Proceed.

Mr. DuBose: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed.

Mr. DuBose: I ask that this be marked Respondent's Exhibit 16 for identification.

Trial Examiner Norwood: It will be so marked.

(The document referred to was marked Respondent's Exhibit No. 16 for identification.)

Mr. DuBose: I ask that this document be marked Respondent's Exhibit 17 for identification.

Trial Examiner Norwood: It will be so marked for identification.

(The document referred to was marked Respondent's Exhibit 17 for identification.)

Mr. DuBose: And that these others be marked respectively Respondents' Exhibits 18, 19, 20, 21, 22 and 23 for identification.

Trial Examiner Norwood: They will be so marked.

(The documents above referred to were marked Respondents' Exhibits 18, 19, 20, 21, 22 and 23, for identification.)

Trial Examiner Norwood: Proceed.

2258 **FELIX E. WORMSER**, a witness called on behalf of the Respondent, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. DuBose.

Q. Mr. Wormser, I show you Respondent's Exhibit 16 for identification and ask you what it is? Just identify it (handing same to witness).

A. It is a letter to me from the assistant to the Attorney General, Mr. William J. Donovan, dated October 2, 1928.

Q. I show you Respondent's Exhibit 17 for identification and ask you what that is (handing same to witness)?

A. It is a letter from me to Col. Donovan, Assistant

Attorney General of the United States, dated December 6, 1928.

Q. Is it a copy of a letter?

A. A copy of a letter, I am sorry.

Q. I show you Respondent's Exhibit 18 for identification and ask you what that is (handing same to witness)?

A. A letter from Col. Donovan to me dated December 8, 1928.

Q. I show you Respondent's Exhibit 19 for identification and ask you what that is?

A. A letter to me from Col. Donovan dated December 15, 1928.

Q. I show you Respondent's Exhibit 20 for identification and ask you what that is?

2259 A. This is a copy of a letter from me to Col. Donovan, Assistant to the Attorney General, dated December 20, 1928.

Q. I show you a document marked Respondent's Exhibit 21 for identification and ask you what that is?

A. This is a copy of a letter to Col. Donovan, Assistant to the Attorney General, from me dated January 18, 1929.

Q. I show you a document marked Respondent's Exhibit 22 for identification and ask you what that is?

A. This is a letter from Col. Donovan, Assistant to the Attorney General, to me, dated January 26, 1929.

Q. I show you a document marked Respondent's Exhibit 23 for identification and ask you what that is?

A. This is a copy of a letter from me to Col. Donovan, Assistant to the Attorney General, dated February 2, 1929.

Mr. DuBose: I offer in evidence Respondent's Exhibits for identification 16, 17, 18, 19, 20, 21, 22 and 23 and, at the same time, I reoffer Exhibits which were ruled upon prior to the noon recess, Respondent's Exhibit 14 for identification and 15-A and B for identification as being all part of the same general line of correspondence with the Department of Justice at or about the time of the formation of the Lead Industries Association.

In that connection, or rather, in connection with the reoffer of exhibits for identification 14 and 15-A and
2260 B, I should like to call your Honor's attention to the
second paragraph of Respondent's Exhibit 15-A for identification. May I ask one more question of the witness on these documents?

Trial Examiner Norwood: Yes.

By Mr. DuBose:

Q. Mr. Wormser, in connection with this correspondence of the Department of Justice which has been marked Respondent's Exhibits for identification 14 through 23 inclusive, are these records kept in the regular course of business by the Lead Industries Association?

A. They are.

Mr. DuBose: I now reoffer them along the same lines that I did before.

Mr. Wright: Your Honor, all of these exhibits are in the same category and I renew my objection to them on the same grounds that I stated before. I would like to call your attention to a statement which appears in Respondent's Exhibit 19 for identification, namely, in the letter which has been identified as being received by Mr. Wormser from the Assistant to the Attorney General William J. Donovan, dated December 15, 1928, where it is stated that the Department's—

Mr. DuBose: I don't think there should be any statement about what the exhibit shows until it is in
2261 evidence.

Mr. Wright: I submit that you are calling the attention of the Examiner to paragraphs in those earlier exhibits and I should have the same right. I am calling your Honor's attention to the third paragraph of Respondent's Exhibit 19, particularly which illustrates that these papers have absolutely no relevancy as to the question of whether or not there was at that time, or has ever been subsequently, any combination or conspiracy or unlawful purpose on the part of the Lead Industries Association or any member of it. It simply has no probative value and it is a waste of our time to receive it in the record.

Mr. DuBose: In connection with Mr. Wright's statement that these exhibits do not contravene any purpose that the Lead Industries Association might have had, I again call your Honor's attention to the second paragraph in Respondent's Exhibit 15-A.

Mr. Wright: I might say that the fact that the Lead Industries Association may have written letters to 130,000,000 people at the time of its organization stating what their purpose were, would have no probative value in the question that we have presented here, namely, as to what has been done by the association in subsequent years.

Mr. DuBose: Well, this, your Honor, is a con-
2262 temporaneous document kept in the regular course of business and for that purpose may be employed to show purpose of the minds of the members of the Lead Industries Association at the time of the formation of that association.

Mr. Wright: It is not a part of the res gestae. It doesn't qualify in that way at all if that is what counsel's intention is.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

I will reserve the ruling on the last exhibits proffered here, Respondent's Exhibits 14 to 23 inclusive, until tomorrow morning and in the meantime I will study the papers and see if I can see any points of relevancy.

Mr. DuBose: May I state on the record that in the Sugar Institute case, the Respondents were permitted to prove the circumstances surrounding the formation and organization of the Sugar Institute where there it was claimed that the Institute was formed at the instigation of the Department of Justice.

Trial Examiner Norwood: How did they prove that? What kind of evidence did they use?

Mr. DuBose: I don't know. I never studied the record, but I know they were allowed to prove it.

2263 Trial Examiner Norwood: Well, you should be allowed to prove that here, certainly you should.

This goes to the character of this evidence.

Mr. Wright: There is a statement of the purposes of the organization in the constitution and by-laws which are already contained in the record.

Trial Examiner Norwood: Proceed with your exhibits.

Mr. DuBose: We have no other exhibits to offer at this time and I request that we go off the record as to the future procedure here.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. DuBose: Your Honor, while the reporter is marking various documents at the request of counsel for the Respondent, National, for identification, I should like to make a motion to adjourn until 10 o'clock tomorrow morning.

Trial Examiner Norwood: The motion is allowed. We will now adjourn until 10 o'clock tomorrow morning.

(Whereupon, at 2:30 o'clock, p. m., a recess was taken until April 24, 1947, at 10:00 o'clock, a. m.)

2264

Trial Room,
Bar Association Building,
36 West 44th Street,
New York, N. Y.,
April 24, 1947.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq., (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington, D. C.), appearing for Sherwin Williams Company.

Edmund P. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, appearing for Eagle Picher Lead Company, and Eagle Picher Sales Company.

Robert H. Ecker, (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James D. Ewing, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

2264-A E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

Roger Hinds, Union Commerce Building, Cleveland, Ohio, appearing for the Glidden Company.

2265

PROCEEDINGS.

Trial Examiner Norwood: Come to order.

Pursuant to adjournment of yesterday, the hearing in Docket No. 5253 is now convened in Room 605, Bar Association Building, 38 West 44th Street, New York, N. Y., at 10 o'clock, a. m., April 24, 1947.

The appearances are as follows:

J. T. Welch, appearing for the Sherwin Williams Company.

Edmund P. Wood, appearing for Eagle Picher Lead Company and Eagle Picher Sales Company.

Robert H. Ecker, appearing for Anaconda Copper Mining Company and International Smelting and Refining Company.

James D. Ewing and E. Z. DuBose, appearing for the National Lead Company.

I have read these Respondent exhibits 14 to 23, and while I have not changed my opinion as to its relevancy to the vital issues in the case, I think in an investigation of this kind that counsel for the Respondents, if they insist, might be permitted to put that in. So I am overruling the objection and receiving those exhibits in evidence without setting any precedent for myself in case I think that the investigation is getting too broad.

Mr. Wright: Exception.

2266 Trial Examiner Norwood: Let the record show that Respondent's Exhibits 15-A and B, 16 to 23 inclusive are received in evidence.

(The documents referred to, heretofore marked RESPONDENT'S EXHIBITS 15-A, 15-B, 16, 17, 18, 19, 20, 21, 22, and 23 for identification, were received in evidence.)

Trial Examiner Norwood: Proceed.

FELIX E. WORMSER was thereupon recalled as a witness for the Respondent, and having been previously sworn, resumed the stand and testified further as follows:

Mr. Ewing: Mark this for identification as Respondent's Exhibits 24-A to 69-B inclusive.

Trial Examiner Norwood: They will be so marked.

(The documents referred to were marked RESPONDENT'S EXHIBITS 24-A, 24-B, 24-C; 25-A, 25-B, 25-C;

26-A, 26-B, 26-C, 26-D; 27-A, 27-B, 27-C, 27-D, 27-E; 28-A,
28-B, 28-C, 28-D; 29-A, 29-B; 30-A, 30-B, 30-C, 30-D, 30-E,
30-F, 30-G, 30-H, 30-I, 30-J; 31-A, 31-B, 31-C, 31-D,
31-E; 32; 33-A, 33-B, 33-C, 33-D, 33-E, 33-F, 33-G; 34-A,
34-B, 34-C, 34-D, 34-E, 34-F, 34-G, 34-H, 34-I; 35-A, 35-B,
35-C, 35-D, 35-E, 35-F, 35-G; 36; 37-A, 37-B; 38-A, 38-B,
38-C, 38-D, 38-E, 38-F, 38-G, 38-H, 38-I, 38-J, 38-K,
2267 38-L, 38-M, 38-N, 38-O, 38-P, 38-Q; 39-A, 39-B, 39-C,
39-D, 39-E, 39-F, 39-G, 39-H, 39-I, 39-J; 40-A, 40-B,
40-C, 40-D, 40-E, 40-F, 40-G, 40-H; 41-A, 41-B, 41-C;
42-A, 42-B, 42-C, 42-D, 42-E, 42-F, 42-G, 42-H, 42-I, 42-J,
42-K, 42-L; 43-A, 43-B, 43-C, 43-D; 44-A, 44-B, 44-C, 44-D,
44-E, 44-F; 45-A, 45-B, 45-C, 45-D, 45-E, 45-F, 45-G, 45-H,
45-I, 45-J; 46-A, 46-B; 47-A, 47-B, 47-C, 47-D, 47-E, 47-F,
47-G; 48-A, 48-B, 48-C, 48-D, 48-E; 49-A, 49-B, 49-C, 49-D,
49-E; 50-A, 50-B, 50-C, 50-D, 50-E, 50-F, 50-G, 50-H, 50-I,
50-J, 50-K, 50-L, 50-M, 50-N, 50-O, 50-P; 51-A, 51-B;
52-A, 52-B, 52-C, 52-D, 52-E, 52-F, 52-G, 52-H, 52-I,
52-J, 52-K, 52-L, 52-M, 52-N, 52-O; 53-A, 53-B; 54-A, 54-B,
54-C, 54-D, 54-E, 54-F, 54-G; 55; 56-A, 56-B, 56-C, 56-D,
56-E, 56-F, 56-G; 57-A, 57-B, 57-C, 57-D, 57-E, 57-F; 58-A,
58-B, 58-C, 58-D, 58-E, 58-F, 58-G, 58-H, 58-I, 58-J, 58-K,
58-L, 58-M, 58-N, 58-O; 59-A, 59-B, 59-C, 59-D, 59-E, 59-F,
59-G; 60-A, 60-B, 60-C, 60-D, 60-E, 60-F, 60-G, 60-H, 60-I,
60-J, 60-K; 61-A, 61-B, 61-C, 61-D, 61-E, 61-F, 61-G, 61-H,
61-I; 62-A, 62-B, 62-C, 62-D, 62-E, 62-F, 62-G, 62-H, 62-I,
62-J, 62-K, 62-L, 62-M, 62-N; 63-A, 63-B, 63-C, 63-D, 63-E,
63-F, 63-G, 63-H, 63-I, 63-J; 64-A, 64-B, 64-C, 64-D, 64-E,
64-F, 64-G, 64-H; 65-A, 65-B, 65-C, 65-D, 65-E, 65-F, 65-G,
65-H, 65-I, 65-J, 65-K, 65-L, 65-M, 65-N, 65-O; 66-A, 66-B,
66-C, 66-D, 66-E, 66-F; 67-A, 67-B, 67-C, 67-D, 67-E,
2268 67-F, 67-G; 68-A, 68-B, 68-C, 68-D, 68-E, 68-F, 68-G,
68-H, 68-I, 68-J; 69-A, 69-B for identification.)

Direct Examination (Continued) by Mr. Ewing.

Q. Mr. Wormser, I show you Respondent's Exhibit 15-A, and direct your attention to the second paragraph (handing same to witness).

A. Yes, sir.

Q. Were you present at any meeting leading up to the organization of the Lead Industries Association?

A. Yes, sir.

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

By Mr. Ewing:

Q. Do you know of your own knowledge what the feeling among producers and consumers of lead was with respect to the matters referred to in the second paragraph of Respondent's Exhibit 15-A? That will call for a yes or no answer.

A. Yes.

Mr. Wright: I object to that, your Honor, and move that it may be stricken. What the producers of lead might have had in mind about the objectives of the association
has nothing to do with respect to these Respondents
2269 insofar as one of them, I believe, is also a producer
of lead.

Trial Examiner Norwood: The objection came after the answer and he is merely stating that he has that knowledge. I think that the question and the answer may stand. Now, what seems to be coming up is another question which we will consider when it does come. Proceed.

By Mr. Ewing:

Q. Is your answer still the same? That is, yes? If in using the word "producers" in my question I use it in the broad sense so as to include the miners, smelters and makers of lead products.

A. My answer still stands as yes.

Q. Will you state what the feeling was with respect to the matters referred to in the second paragraph of Respondent's Exhibit 15-A?

A. The feeling of producers with respect to the contents of the second paragraph of this letter was that the objectives outlined here were along their own personal ideas.

Q. I hand you the minute book of the Board of Directors' meeting of the Lead Industries Association, Mr. Wormser, and ask you to examine Respondent's Exhibit 24-A to C and state whether it is a correct copy of the minutes of the directors' meeting of the association held on November 14, 1928?

Mr. Wright; I object, y Honor. That has not been identified as the minute book 't except by counsel.

2270 Mr. Ewing: Do you want me to ask him if that is the minute book—I will be happy to do that.

Trial Examiner Norwood: The question is, are those the minutes?

Mr. Ewing: I understood that he wanted me to ask Mr. Wormser what this book is so that these would be a basis for comparison.

Mr. Wright: Your Honor, my purpose was that the minutes should be identified before there was testimony as to whether or not this was a true copy of the same. That is, those particular minutes.

By Mr. Ewing:

Q. Will you look at the minute book and state whether there was a directors' meeting on November 14, 1928 and if so, whether you have the minutes?

A. Yes, sir; there was a meeting of the directors on November 14, 1928. I have the minutes here.

Q. Will you compare the photostats, Respondent's Exhibit 24-A to C for identification with the original minutes of November 14, 1928 and state whether the photostats are correct copies?

A. They are.

Q. Who acted as secretary at that meeting?

A. I did.

Mr. Ewing: I offer Respondent's Exhibit 24-A to
2271 C for identification in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: Your Honor, I object to the introduction of this exhibit into evidence since it is wholly irrelevant and immaterial to any issue involved in the case.

Mr. Ewing: Our position is the same with respect to these minutes as it was with regard to the Code Authority minutes. We wish to show, and I think we are entitled to show, the nature of the activities of the Lead Industries Association in some detail so as to indicate what it did and what its directors were trying to have it do.

Trial Examiner Norwood: It will be received in evidence as Respondent's Exhibit 24-A to C. Objection overruled.

(The documents referred to, heretofore marked RESPONDENT'S EXHIBIT 24-A, 24-B and 24-C for identification, was received in evidence.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Will you state whether in determining the membership of the Board of Directors of the Lead Industries Association any consideration was given to geographic and product representation?

A. Yes, sir.

Q. What consideration was given to the question 2272 of representation?

A. Consideration was given to the wide scope of the membership so that all products represented in it would find representation on the board and also so that the geographical areas, inasmuch as we were a nation-wide organization, would have representation.

Q. Now, I ask you to look at the minute book and see if you have the minutes of the meeting of the Board of Directors of February 20, 1929?

A. Yes, sir.

Q. I show you three documents which have been marked Respondent's Exhibit 25-A to C for identification, and ask you whether they are correct copies of the minutes of that meeting?

A. They are.

Q. Who acted as secretary at that meeting?

A. I did.

Mr. Ewing: I offer Respondent's Exhibit 25-A to C for identification, in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: I object, your Honor. There is absolutely nothing in this document in any way related to any issue in this case. There is no action by that association that is even remotely related to any issue in the case.

2273 Trial Examiner Norwood: What do you want to show by this?

Mr. Ewing: The same as before. We were faced with the problem in a sense of proving a negative and to establish the character of this association and what it did. We propose to show exactly what it did do.

Mr. Wright: Mr. Ewing, is it your intention to put in evidence the complete minutes of the Lead Industries Association from the date of its organization down to now?

Mr. Ewing: I propose to offer all the directors' minutes and the executive committee minutes and the annual meeting minutes. No, in some cases, as it appears on the face of this, they are blank as far as the direct bearing on the issues here are concerned but—

Mr. Wright: I object to that on the ground that it clutters the record. I am sure that the activities that we are talking about never did appear in the minutes of the whole organization which was not primarily concerned with pigments.

Mr. Ewing: You have put in certain minutes of pigments meetings and other meetings, and we have put in so far the meetings under the Code Authority. Your very statement just now suggests the kind of contention that we are going to have to meet that there were other minutes and
other meetings. Now, I say that a showing of the
2274 records of the association of its executive committee,
its Board of Directors and its annual meeting taken
with the meetings of the Code Authority and the offers made by the Commission at least enables us to meet, as far as possible as we can, the innuendo and inference which he has drawn.

As far as cluttering the record is concerned, the Commission has already put in thousands of papers and we are not going to have any substantial documentation as compared with theirs.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

Mr. Hinds: If your Honor please, on an issue of conspiracy where both the proponent and those having the negative necessarily are going to rely on inferences, although we shall also have definite negative testimony, it seems to me that we want to find out what sort of people these conspirators were.

As Mr. Du Bose says, you want to show that as far as there is any record, their acts show they are innocent of these charges and they show constructive purposes to show what type of men they are. Now, very fine men may rob a bank. Now, it renders this less probable and under that theory it seems to me that a negative showing is pertinent.

Mr. Wright: If it is the witness' intention or if
2275 it is counsel's intention to identify the whole minute
book and offer it in evidence, I would have no serious objection to that.

Mr. Ewing: I intend to identify all of the directors' minutes in this book from the first meeting, which is in already, to April 1946. We have photostats of all of them and we will have a complete set for Mr. Wright. Some of them will be the subject of comparatively few specific questions as far as I am concerned.

Trial Examiner Norwood: This proffer is pending here with regard to Respondent's Exhibit 25-A to C. The objection is overruled and they will be received in evidence.

(The documents referred to, ~~heretofore marked~~ RESPONDENT'S EXHIBITS 25-A, 25-B, and 25-C for identification, was received in evidence.)

Trial Examiner Norwood: Proceed.

By Mr. Du Bose:

Q. Mr. Wormser, I ~~show~~ you Respondent's Exhibit 26-A to 69-B inclusive for identification and I ask you to take these photostatic copies of the minutes and compare them with the minutes in the original minute book that you have and state first whether all of the minutes of all of the meetings are contained in this list of exhibits for identification which I have just referred to of the directors' meetings.

2276 Mr. Ewing: May we have a short recess, your Honor, to permit the witness to examine the exhibits?

Trial Examiner Norwood: We will take a short recess in order to permit the witness to examine the exhibits.

(Whereupon, a short recess was taken.)

Trial Examiner Norwood: On the record. Answer the question.

The Witness: They are.

By Mr. Du Bose:

Q. I offer in evidence Respondent's Exhibits for identification 26-A to D, 27-A to E, 28-A to D, 29-A and B, 30-A to J, 31-A to E, 32, 33-A to G, 34-A to I, 35-A to G, 37-A and B, 38-A to Q, 39-A to J, 40-A to H, 41-A to C, 42-A to L, 43-A to D, 44-A to F, 45-A to J, 46-A and B, 47-A to G, 48-A to E, 49-A to E, 50-A to P, 51-A and B, 52-A to O, 53-A and B, 54-A to G, 56-A to G, 57-A to F, 58-A to O, 59-A to G, 60-A to K, 61-A to I, 62-A to N, 63-A to J, 64-A to H, 65-A to O, 66-A to F, 67-A to G, 68-A to J, 69-A and B, which are photostatic copies of all of the minutes of the meetings of the Board of Directors of the Lead Industries Association from May 29, 1929 to and including April 26, 1946.

May I on the record amend the offer to eliminate Respondent's Exhibit 45-A to J for identification since that is already in the record.

Trial Examiner Norwood: It may be considered
2277 withdrawn but the other exhibit numbers will still retain the numbers as originally given to them. Proceed.

Mr. Wright: I would like to ask the witness one or two questions on the voir dire.

Trial Examiner Norwood: Proceed.

Mr. Wright: Did I understand you to state that these were all of the minutes of the Lead Industries Association from May 29, 1929 to April 26, 1946?

The Witness: Of the Board of Directors.

Mr. Wright: There were other organizations or divisions of the Lead Industries Association which kept minutes?

The Witness: Yes, sir.

Trial Examiner Norwood: That is exclusive of the one that was withdrawn there?

Mr. Du Bose: That is on the record, I believe, your Honor.

Mr. Wright: That was not one of the minutes.

Mr. Du Bose: That was annexed to one of the minutes.

Mr. Wright: Your Honor, I object to these exhibits on the ground that they are incompetent and immaterial and on the further ground that it is obvious from the face of them, by examining them, that they are not the best evidence of the activities of these Respondents in the Lead Industries Association.

2278 Now, I direct your attention to the minutes of the Board of Directors in the period from 1933 to 1934, which are barren of any of the activities which are shown to have been engaged in by the two committees of the Pigments Division during that period. In other words, these documents are a source of information which don't have any bearing on the issues. They are not the best evidence as to what was being done.

Mr. Du Bose: You mean they are not the best evidence of what you claim is being done.

Mr. Wright: Of what was being done by the association.

Mr. Hinds: It is the best evidence of what was not done.

Mr. Wright: They are good evidence of what was not done.

Mr. Hinds: Splendid evidence.

Trial Examiner Norwood: They are evidence of what was done with regard to these committees at these meetings.

Mr. Wright: No, sir. These are minutes of the Board of Directors, the governing body of the whole Lead Industries Association which has been testified here covers the mining and smelting and processing of lead in all its phases and not just the activities of the producers and sellers of pigments.

2279 The producers and sellers of pigments' activities are covered in the minutes of the Pigments Division and the sub-committees.

Trial Examiner Norwood: Counsel has the privilege to get those minutes and put them in evidence if he wants to. I said these minutes, in connection with my previous remarks, these are evidence of what happened at these meetings and I think they are as good evidence as you can get.

Mr. Wright: If your Honor please, if you will examine the minutes there of 1933 and 1934, it will appear obvious that it doesn't reflect what the pigments producers were doing at that time since we already have some minutes of that period of the Pigments Division. The minutes of the Board of Directors in that period are barren of any activities of the Pigments Division.

Trial Examiner Norwood: What have you to say to that, Mr. Ewing?

Mr. Ewing: I say in answer to that that it is true, of course, that there was a Pigments Division and that Mr. Wright has offered evidence in the form of minutes of meetings of the dry white lead group and the white lead in oil sub-committee. But it is also true that the Pigments Division is represented and the Board of Directors, as Mr. Wright says, is the governing body of the

2280 association and to show the nature of the association's work and its activities generally, I say as I have said before, that these minutes are pertinent.

Trial Examiner Norwood: Objection overruled. The exhibits will be received as marked. That is, Respondent's Exhibits for identification 26-A to 69-B, with the exception of Respondent's Exhibit 36, 45-A to J and Respondent's Exhibit 55.

(The documents above referred to, heretofore marked RESPONDENT'S EXHIBITS 26-A, 26-B, 26-C, 26-D;

27-A, 27-B, 27-C, 27-D, 27-E; 28-A, 28-B, 28-C, 28-D;
29-A, 29-B; 30-A, 30-B, 30-C, 30-D, 30-E, 30-F, 30-G,
30-H, 30-I, 30-J; 31-A, 31-B, 31-C, 31-D. 31-E; 32;
33-A, 33-B, 33-C, 33-D, 33-E, 33-F, 33-G; 34-A, 34-B,
34-C, 34-D, 34-E, 34-F, 34-G, 34-H, 34-I; 35-A, 35-B,
35-C, 35-D, 35-E, 35-F, 35-G; 37-A, 37-B; 38-A, 38-B,
38-C, 38-D, 38-E, 38-F, 38-G, 38-H, 38-I, 38-J, 38-K,
38-L, 38-M, 38-N, 38-O, 38-P, 38-Q; 39-A, 39-B, 39-C,
39-D, 39-E, 39-F, 39-G, 39-H, 39-I, 39-J; 40-A, 40-B,
40-C, 40-D, 40-E, 40-F, 40-G, 40-H; 41-A, 41-B, 41-C; 42-A,
42-B, 42-C, 42-D, 42-E, 42-F, 42-G, 42-H, 42-I, 42-J, 42-K,
42-L; 43-A, 43-B, 43-C, 43-D; 44-A, 44-B, 44-C, 44-D, 44-E,
44-F; 46-A, 46-B; 47-A, 47-B, 47-C, 47-D, 47-E, 47-F, 47-G;
48-A, 48-B, 48-C, 48-D, 48-E; 49-A, 49-B, 49-C, 49-D,
2281 49-E; 50-A, 50-B, 50-C, 50-D, 50-E, 50-F, 50-G, 50-H,
50-I, 50-J, 50-K, 50-L, 50-M, 50-N, 50-O, 50-P; 51-A,
51-B; 52-A, 52-B, 52-C, 52-D, 52-E, 52-F, 52-G, 52-H, 52-I,
52-J, 52-K, 52-L, 52-M, 52-N, 52-O; 53-A, 53-B; 54-A, 54-B,
54-C, 54-D, 54-E, 54-F, 54-G; 56-A, 56-B, 56-C, 56-D, 56-E,
56-F, 56-G; 57-A, 57-B, 57-C, 57-D, 57-E, 57-F; 58-A, 58-B,
58-C, 58-D, 58-E, 58-F, 58-G, 58-H, 58-I, 58-J, 58-K, 58-L,
58-M, 58-N, 58-O; 59-A, 59-B, 59-C, 59-D, 59-E, 59-F, 59-G;
60-A, 60-B, 60-C, 60-D, 60-E, 60-F, 60-G, 60-H, 60-I, 60-J,
60-K; 61-A, 61-B, 61-C, 61-D, 61-E, 61-F, 61-G, 61-H, 61-I;
62-A, 62-B, 62-C, 62-D, 62-E, 62-F, 62-G, 62-H, 62-I, 62-J,
62-K, 62-L, 62-M, 62-N; 63-A, 63-B, 63-C, 63-D, 63-E, 63-F,
63-G, 63-H, 63-I, 63-J; 64-A, 64-B, 64-C, 64-D, 64-E, 64-F,
64-G, 64-H; 65-A, 65-B, 65-C, 65-D, 65-E, 65-F, 65-G,
65-H, 65-I, 65-J, 65-K; 65-L, 65-M, 65-N, 65-O; 66-A, 66-B,
66-C, 66-D, 66-E, 66-F; 67-A, 67-B, 67-C, 67-D, 67-E, 67-F,
67-G; 68-A, 68-B, 68-C, 68-D, 68-E, 68-F, 68-G, 68-H, 68-I,
68-J; 69-A, 69-B, for identification, were received in
evidence.)

2282 Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Mr. Wormser, I ask you to turn to the minutes of the directors' meeting of October 1, 1930, photostatic copies of which are in evidence as Respondents' Exhibit 31-A to E inclusive.

A. I have it.

Q. And I ask you to state whether you acted as secretary at that meeting?

A. I did.

Q. I direct your attention to sub-paragraph 5 of your report as set forth in these minutes which appears on Respondents' Exhibit 31-C.

A. I have it.

Q. And ask you to read it to yourself.

A. I have read it.

Q. Where did you obtain the figures referred to in that paragraph?

A. From the statistics of the U. S. Bureau of Mines.

Q. I call your attention to the statement in that paragraph to the effect that the white lead business is an important outlet for lead, and ask you to explain what you meant by that statement?

A. I meant by that that the manufacture of white lead at this particular time was one of the most important
2283 outlets for the lead miner in the United States in the sale of pig lead.

At times it was the principal outlet. But during this period I think it was ranked second or third. But at any rate, it was and still is, as a matter of fact, one of the major outlets for the lead miners of the United States.

Q. I call your attention to your reference in that paragraph to the statement to the effect—I will withdraw the question.

I call your attention to the statement in that paragraph to the effect that one of the principal objects for which the Association was organized was to combat substitution of inferior articles for lead. What inferior articles were substituted for white lead in the manufacture of paint?

A. Inerts were generally the substitutes for white lead and by that I mean such materials as calcium carbonate or chalk or magnesium silicate which is a transparent material when mixed with linseed oil, and we have found from our survey that paint manufacturers in the United States were using vast amounts of material as that to, frankly speaking, adulterate their paints.

And I can just illustrate what I mean by citing some analyses from the North Dakota Regulatory Department which is an office in the State of North Dakota. In
2284 fact, this condition that I describe of the sale of inferior paints reached such a point in the State of North Dakota that the citizens of North Dakota passed strict paint laws which required the manufacturers to print the labels on the cans so the farmer would at least know what he was purchasing.

And the State of North Dakota periodically publishes an analysis of the paints that are made in their state. Now here is one of their bulletins and I should just like to quote this; Here is a paint that is made in Chicago, Illinois. It contains 25-7/10 per cent water which shouldn't belong in any paint because it evaporates the minute it is applied. It contains 4/6 per cent of lithopone; it contains 1/10 of a per cent of zinc oxide which is a fine pigment.

It does, however, contain 28-9/10 per cent of calcium carbonate which is perfectly transparent when mixed with linseed oil and brushed on a wall, and it contains 23.7 per cent of siliceous material.

Q. What is siliceous material?

A. Siliceous material is a material containing Sio$_2$ which is the chemical designation for silicate. It might be magnesium silicate of potassium silicate.

That happens to be an illustration of a paint that has no lead in it, and I would like to give you another one to show you what we were up against as lead producers in the
United States. Here is an exterior paint made by one
2285 of the largest companies in the United States.

This only contains 3.19 per cent water but let's skip that. It also contains lithopone, 31.06 per cent; zinc oxide, 8.95 per cent; titanium barium, 7 per cent; it contains 1.54—that is a little over ½ of 1 per cent of white lead presumably so that they could say they had some white lead in it.

And then they loaded the can with magnesium carbonate, 9.64 per cent and, again, insoluble siliceous material, 39 or 40 per cent.

Mr. Wright: May I inquire if the companies are designated in that document from which you are reading?

The Witness: This is the S. S. Kresge Company of Detroit, Michigan.

Trial Examiner Norwood: Is that the so-called dollar paint?

The Witness: No price is mentioned there. It is a very poor quality paint and the name is of no matter here, but to illustrate my point that that was going all over the United States. White lead happens to be one of the most expensive pigments that you can put in paint and naturally if a paint manufacturer can get away with using a cheaper material and an adulterant in excess of the amount of inerts and cheapening his product there is a great temptation to do so.

2286 By Mr. Ewing:

Q. Will you explain to us the difference between ready mixed paint and white lead in oil?

A. Ready-mixed paint is paint that is sold in cans and contains enough linseed oil and turpentine which are generally the two vehicles that are used to make it suitable for immediate application to the surface. White lead in oil, however, is sold in concentrated form.

It has to be diluted by the addition of linseed oil or turpentine before it can be made of the proper consistency to be applied to the surface.

Q. Ready-mixed paint is subject to application by a person having no particular technical skill, does that not hold true?

A. That is correct, sir.

Q. Whereas, the contrary is the case with the white lead in oil?

A. It requires some skill in the formulation of white lead in oil for whatever surface you happen to plan to use it upon or other factors such as exposure.

Q. I direct your attention to the minutes of the directors of December 7, 1931 which have been marked Respondents' Exhibit 35-A to G inclusive in evidence.

A. Yes, sir.

Q. And ask you whether you acted as secretary 2287 at that meeting?

A. I did.

Q. Will you look at item 3 of the secretary's report included in the minutes which appears on Respondents' Exhibit 35-C?

A. I have read it.

Trial Examiner Norwood: ~~Off the~~ record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Ewing:

Q. What was the purpose of adopting specifications for lead pipe, Mr. Wormser?

A. The purpose was to restore some semblance or some order out of the chaos which existed and the fact that there were several specifications in use throughout the U. S. The specifications had no uniformity.

In fact, they were a bit misleading. Unless a person was thoroughly aware of what he was buying because the thicknesses did not allow for varying pressures in the pipe

we decided that we would so adopt a standard so that anybody in the United States buying pipe, if he bought it of a certain "A" classification, would always stand 50 pounds pressure, and if he bought it double "A" it would stand 75, and if he bought it triple "A" it would stand 100
2288 pounds.

And the reason for ~~that~~ was that people not being familiar with the varying standards would very often buy a pipe which was not designed for their pressure and the home owner might have a failure in his line which would be very expensive.

So we established these standards of our own as the Lead Industries Association standards and subsequently at the suggestion of the Bureau of Standards established it as a commercial standard of the Bureau of Standards.

Q. Did the Department of Commerce approve for promulgation this standard adopted by the Lead Industries Association?

A. Yes, sir.

Q. Do you know when?

A. I don't recall the date.

Q. I direct your attention to the minutes of the meeting of the Board of Directors of June 15, 1933.

A. I have it.

Q. Did you act as secretary at that meeting?

A. Yes, sir.

Q. I direct your attention to the report made by you which appears in the minutes and in particular to item No. 1 which appears on Respondents' Exhibit 42-A and B.

A. Yes, sir.

2289 Q. I then call your attention to the resolutions—I will withdraw that.

I then call your attention to that portion of the minutes which appears in two paragraphs at the top of Respondents' Exhibit 42-F and ask you whether you yourself attended conferences and hearings in Washington in connection with the submission and subsequent approval of the proposed Lead Industry Code?

A. Yes, sir.

Q. I ask you to direct your attention at the minutes of the meeting of the Board of Directors of June 15, 1934.

A. Yes, sir.

Q. Did you act as secretary at that meeting?

A. Yes, sir.

Mr. Wright: What exhibit is that?

Mr. Ewing: Respondents' Exhibit 46-A and B.

By Mr. Ewing:

Q. I direct your attention to the paragraph which appears on Respondents' Exhibit 46-A immediately preceding the nominations for membership on the Executive Committee.

A. Yes, sir.

Q. You will note the reference to division chairmen.

A. Yes, sir.

Q. What divisions were represented on the Code Authority?

A. I recall the Mining Division, the Smelting and
2290 Refining Division, the Lead Pigments Division and the Metallic Lead Products Division.

Q. And the representatives of those divisions plus the Executive Committee together constituted the Code Authority; is that right?

Mr. Wright: I object to that as a leading question.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. And the representatives of those divisions plus the Executive Committee constituted the Code Authority; is that right?")

Mr. Ewing: I will withdraw the question.

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. I call to your attention the minutes of the Board meeting of January 9, 1934, Respondents' Exhibits 43-A to D inclusive and ask you whether you acted as secretary at that meeting?

A. I did.

Q. I direct your attention to the last page of the minutes where it sets forth the representation on the Code Authority by divisions and ask you whether a reading of that refreshes your recollection as to the divisions included?

A. It does.

Q. Will you now state the divisions represented
2291 on the Code Authority?

A. Mining Division, Smelting and Refining Division, Pigments Division, Metallic Lead Products Division and Foil Division. I forgot the Foil Division.

Q. I direct your attention to the minutes of the meeting of the Board of Directors of October 1, 1935.

A. Yes, sir.

Q. That is Respondents' Exhibit 50-A to P inclusive. I ask you whether you acted as secretary at that meeting?

A. I did.

Q. I ask you to read to yourself paragraph 1 of your report which appears on the second page of the minutes, Respondents' Exhibit 50-B.

A. Yes, sir. I have read it.

Q. Were you in charge of the activities referred to therein?

A. Yes, sir.

Q. To what is the reference to statistical reports to be returned to members?

A. That referred to labor records gathered by the Code Authority.

Q. I call your attention to pages 5 and 6 of the minutes, Respondents' Exhibit 50-E and F, and ask you to read the matter under the heading "Correspondence division of review NRA."

Mr. Wright: Your Sonor, I object to the witness
2292 simply reading so much material into the record which already appears in these exhibits.

Mr. Ewing: I can't ask him questions about it unless he familiarizes himself with it.

Trial Examiner Norwood: I don't think he should read from the minutes.

Mr. Ewing: I am just simply asking him to read to himself.

Trial Examiner Norwood: Go ahead.

The Witness: I have read it.

By Mr. Ewing:

Q. Was the letter from Dr. Marshall which appears as Respondent's Exhibit 50-F, the subject of discussion at that meeting?

A. Yes, sir.

Q. And did the members of the Board of Directors of the Association who were present at that meeting direct you to reply to Dr. Marshall?

A. They did.

Mr. Wright: I object, Your Honor, to this line of questioning. The minutes themselves show what was under discussion at the meeting and what the directions were to the secretary. This is simply a rehash of what is in the minutes.

Trial Examiner Norwood: He may give us any
2293 further information about those matters.

Mr. Wright: That is the point of my objection, Your Honor, that it isn't further information.

Trial Examiner Norwood: Objection overruled. Go ahead.

By Mr. Ewing:

Q. Did you send to Dr. Marshall the letter quoted in the minutes at page 7 and 8? That is, Respondents' Exhibit 50-K and L.

A. I did.

Q. Does that letter correctly set forth the statements and opinions expressed by the members of the Board of Directors of the Lead Industries Association present at that meeting?

A. Absolutely.

Q. I direct your attention to the statement which appears in the fourth paragraph of that letter.

A. I have it.

Q. To the effect that steps were being taken to draft a code for the industry pursuant to urgent representations by National Recovery Administration officials and ask you whether you know that statement to be correct of your own knowledge?

A. It is an absolutely true statement.

Q. State whether the opinion stated in the sixth paragraph of that letter which appears on page 8 of the
2294 minutes and on Respondents' Exhibit 50-L, was the
opinion expressed by the members of the Board of Directors of the Lead Industries Association present at that meeting?

A. It was.

Q. Was the feeling set forth in the last paragraph of the letter on page 8 of the minutes, Respondents' Exhibit 50-L, the feeling expressed and stated by the members of the Board of Directors of the Association present at that meeting?

A. It was distinctly their feeling.

Q. I direct your attention to page 10 of the minutes under the heading "Correspondence," Respondents' Exhibit 50-N.

A. I have it.

Q. Did you, in fact, receive the telephone request referred to in that portion of the minutes?

Mr. Wright: I object, Your Honor. The letter itself says so.

Mr. Ewing: The minutes reported that he received a telephonic request and I want him to testify here whether he did.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Did you, in fact, receive the telephone request referred to in that portion of the minutes?")

2295 Mr. Wright: The exhibit that is in evidence already shows that he reported that he received a telephonic request.

Mr. Ewing: If you raise no question about that I will withdraw the question.

Trial Examiner Norwood: Objection overruled. Let him answer the question.

The Witness: I did.

By Mr. Ewing:

Q. Did you send to Mr. Janssen the letter set forth on page 11 of the minutes, Respondents' Exhibit 50-O?

A. I did.

Q. I direct your attention to the minutes of the meeting of December 23, 1936.

A. I have it.

Q. Did you act as secretary at that meeting?

A. I did.

Q. I direct your attention to your report, Exhibit A annexed to the minutes of the meeting, Respondents' Exhibit 52-G, and in particular to paragraph 2.

A. I have two paragraphs marked 2. To what page do you refer, Mr. Ewing?

Q. Page 4 of Exhibit A.

A. I have it.

Q. Will you tell us what the paint company referred to therein was?

2296 A. That was a company which was developed with the cooperation of the Principal Lumber Industries of the United States designed to do all we could mutually to correct this situation which I have previously described of the sale of paint which wasn't doing the public any good, wasn't doing the lumber industry any good, and wasn't doing us any good.

So we worked with the West Coast Lumbermen's Association, the Red Cedar Shingle Bureau, the Southern Pine Association, the Western Pine Association and numerous other lumber associations, even the Retail Lumber Associations, we all banded together to do what we could to correct this situation.

Q. I refer you to the minutes of the Board of Directors meeting of January 24, 1939, Respondents' Exhibit 58-A to O.

A. I have it.

Q. And I ask you whether you acted as secretary at that meeting?

A. I did.

Q. I direct your attention to Respondents' Exhibit 58-E, the first page of Exhibit A annexed to the minutes of the meeting.

A. I believe I have it.

Q. And ask you to read to yourself the second paragraph of paragraph 2.

2297 A. Yes.

Q. In what form, if you know, was the recommendation of the Federal Trade Commission referred to therein made?

Mr. Wright: I object, Your Honor. I don't see what materiality or relevancy the subject of that question has to this case.

Mr. Ewing: It appears to be a quotation.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. In what form, if you know, was the recommendation of the Federal Trade Commission referred to therein made?")

Mr. Wright: I might add that the exhibit refers to some statistical report which is not further identified in the exhibit.

Trial Examiner Norwood: He can tell what form it is in, can't he?

Mr. Wright: It has nothing to do with the issues in this case, Your Honor. That is the point of my objection. It is entirely unrelated.

Trial Examiner Norwood: Objection overruled. Go ahead.

The Witness: May I answer it?

Mr. Ewing: Yes.

The Witness: This was a public announcement of 2298 the Federal Trade Commission.

By Mr. Ewing:

Q. Do you know in what form?

A. I don't recall the exact form in which it was made.

Q. I direct your attention to the minutes of the meeting of May 16, 1939, Respondents' Exhibit 59-A to G and ask you whether you acted as secretary at that meeting?

A. I did.

Q. I call your attention to the first page of Exhibit A, Respondents' Exhibit 59-C to the matter under the heading "White lead promotion program" and ask you to state briefly what that program was?

A. That program was a joint cooperative effort sponsored by the mining companies and the white lead in oil companies to promote the use of white lead throughout the United States by pointing out its virtues to the American public by means of an advertising campaign, literature and through other means.

Mr. DuBose: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

Mr. DuBose: Mark this for identification.

Trial Examiner Norwood: They will be marked with the appropriate numbers for identification.

2299 The documents referred to were marked Respondents' Exhibits 70-A, 70-B, 71-A, 71-B, 71-C, 72-A, 72-B, 72-C, 72-D, 73-A, 73-B, 73-C, 74-A, 74-B, 74-C, 75-A, 75-B, 75-C, 76-A, 76-B, 77-A, 77-B, 77-C, 77-D, 77-E, 77-F, 77-G, 77-H, 77-I, 77-J, 77-K, 77-L, 78-A, 78-B, 78-C, 78-D, 78-E, 79-A, 79-B, 79-C, 79-D, 80-A, 80-B, 80-C, 80-D, 80-E, 80-F, 80-G, 80-H, 80-I, 80-J, 80-K, 80-L, 80-M, 80-N, 80-O, 80-P, 81-A, 81-B, 81-C, 82-A, 82-B, 82-C, 82-D, 82-E, 83-A, 83-B, 83-C, 83-D, 83-E, 83-F, 83-G, 83-H, 83-I, 83-J, 83-K, 83-L, 83-M, 83-N, 83-O, 83-P, 83-Q, 83-R, 83-S, 83-T, 83-U, 83-V, 83-W, 83-X, 83-Y, 83-Z, 83-Z-1, 83-Z-2, 83-Z-3, 84-A, 84-B, 84-C, 84-D, 84-E, 84-F, 84-G, 84-H, 84-I, 84-J, 84-K, 84-L, 84-M, 84-N, 84-O, 84-P, 84-Q, 84-R, 84-S, 84-T, 84-U, 84-V, 84-W, 84-X, 84-Y, 84-Z, 84-Z-1, 84-Z-2, 84-Z-3, 84-Z-4, 84-Z-5, 84-Z-6, 84-Z-7, 84-Z-8, 84-Z-9, 84-Z-10, 84-Z-11, 84-Z-12, 85-A, 85-B, 85-C, 85-D, 85-E, 85-F, 85-G, 85-H, 85-I, 85-J, 85-K, 85-L, 85-M, 85-N, 85-O, 85-P, 85-Q, 85-R, 85-S, 85-T, 85-U, 85-V, 85-W, 85-X, 85-Y, 85-Z, 85-Z-1, 85-Z-2, 85-Z-3, 85-Z-4, 85-Z-5, 85-Z-6, 85-Z-7, 85-Z-8, 85-Z-9, 85-Z-10, 85-Z-11, 85-Z-12, 85-Z-13, 86-A, 86-B, 86-C, 86-D, 87-A, 87-B, 87-C, 87-D, 88, 89-A, 89-B, 89-C, 89-D, 89-E, 89-F, 89-G, 89-H, 89-I, 89-J, 89-K, 90, 91-A, 91-B, 91-C, 91-D, 91-E, 91-F, 91-G, 91-H, 91-I, 91-J, 91-K, 91-L, 91-M, 91-N, 2300 91-O, 91-P, 91-Q, 91-R, 91-S, 91-T, 91-U, 91-V, 92-A, 92-B, 92-C; 93; 94-A, 94-B, 94-C; 95-A, 95-B; 96-A, 96-B; 97-A, 97-B, 97-C, 97-D, 97-E, 97-F, 97-G, 97-H, 97-I; 98-A, 98-B, 98-C, 98-D, 98-E, 98-F, 98-G, 98-H, 98-I, 98-J, 98-K, 98-L, 98-M; 99-A, 99-B, 99-C, 99-D, 99-E, 99-F, 99-G, 99-H, 99-I, 99-J, 99-K, 99-L, 99-M, 99-N, 99-O, 99-P; 100-A, 100-B, 100-C, 100-D, 100-E, 100-F, 100-G, 100-H; 101; 102-A, 102-B, 102-C, 102-D, 102-E, 102-F, 102-G, 102-H, 102-I, 102-J; 103-A, 103-B, 103-C, 103-D, 103-E, 103-F, 103-G, 103-H, 103-I, 103-J, 103-K, 103-L, 103-M, 103-N, 103-O, 103-P, 103-Q, 103-R; 104-A, 104-B, 104-C, 104-D, 104-E, 104-F, 104-G, 104-H, 104-I, 104-J, 104-K, 104-L; 105-A, 105-B; 106-A, 106-B, 106-C, 106-D, 106-E, 106-F, 106-G, 106-H, 106-I, 106-J, 106-K, 106-L, 106-M, 106-N, 106-O, 106-P, 106-Q, 106-R, 106-S, 106-T, 106-U; 107-A, 107-B, 107-C, 107-D, 107-E, 107-F, 107-G, 107-H, 107-I, 107-J, 107-K, 107-L, 107-M, 107-N, 107-O, 107-P, 107-Q and 107-R for identification.

Trial Examiner Norwood: Proceed.

By Mr. DuBose:

Q. Mr. Wormser, I show you Respondents' Exhibits for identification marked 70-A to 107-R inclusive and I ask you to take the original Executive Committee minutes and compare those minutes with these photostatic copies 2301 and tell us whether all of the minutes of the Executive Committee of the Lead Industries Association from January 7, 1929 to and including April 16, 1946, are included therein?

Trial Examiner Norwood: We will take a short recess at this time to allow the witness to look over the exhibits.

(A short recess was taken.)

Trial Examiner Norwood: On the record. We will recess at this time until 1:45 p.m.

(Whereupon, at 12:10 p.m., a recess was taken until 1:45 p.m., this day.)

2302 Afternoon Session.

1:45 P. M.

Trial Examiner Norwood: Come to order. Proceed.

FELIX E. WORMSER, a witness called on behalf of the Respondent, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination (continued) by Mr. Ewing.

Q. Have you examined the photostats marked Respondents' Exhibits 70-A and B, 71-A to C, 72-A to D, 73-A to C, 74-A to C, 75-A to C, 76-A to B, 77-A to I,—

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Ewing:

Q. Have you examined these to Respondent's Exhibit 107-R, and compared them with the original minutes of meetings of the Lead Industries Association from January 7, 1929 to April 16, 1946?

A. Yes, sir.

Q. Will you state whether the photostats are correct copies of the original minutes?

A. They are.

Mr. Ewing: I offer them in evidence.

Mr. Wright: Mr. Wormser, those are the complete minutes over that period of time of the executive committee?

2303 The Witness: Yes, sir.

Mr. Wright: Your Honor, I object to this unlimited offer of all these documents. In the first place, they contain a great deal of hearsay material and the reception of them in evidence will deprive me from the right of cross examination of the sources of the information which appear there. They don't come under any exceptions to the rule. They are papers which were prepared by parties having an interest in this proceeding and show on their face that a good many of them were prepared after the parties had notice of the Commission's interest in the practices which are the subject of this matter.

At least 99-9/10ths per cent of the information contained in the exhibits is wholly irrelevant and immaterial to any issue in this case. As illustrations of the highly irrelevant and immaterial information, I direct your Honor's attention to the document marked for identification as Respondent's Exhibit 73-A, Exhibit 106-A through various sub numbers, 104-G, which contains a great deal of material that has absolutely no part in this record.

Mr. Ewing: I don't think I have to add to what I have said before except to comment upon the fact that these are the minutes of the association showing what the association did, and that while it is true that some meetings were held and the minutes written after the Commission 2304 proceeding, and the proceeding may have been known from investigation earlier or later to any particular member; I think that is neither here nor there about them. They will show on their face what the parties were doing and intended to do and will show the attitude of the mind and the attempt of the association and the membership.

Mr. Wright: I might also state that at least one of the minutes appears on its face to be incomplete since it refers to exhibits which are not attached thereto. I am referring now to Respondent's Exhibit 94 for identification.

Trial Examiner Norwood: I want to say that with respect to these exhibits and also these other minutes that we received this morning and at other times, and minutes that we have received for the Commission, that they are conditioned in this respect that they are not to be considered as proving the truth of any of the hearsay statements which they contain. They are being received for the purpose of showing attitude and purpose. But if there are matters contained in those hearsay statements that you want to be considered on the issues in this case, you will have to furnish further evidence about them. So with that condition, I am overruling the objection and receiving Respondent's Exhibits 70-A to 107-R as variously lettered and shown in the reporter's list.

2305 (The documents referred to, heretofore marked RESPONDENTS' EXHIBITS 70-A, 70-B, 71-A, 71-B, 71-C, 72-A, 72-B, 72-C, 72-D, 73-A, 73-B, 73-C, 74-A, 74-B, 74-C, 75-A, 75-B, 75-C, 76-A, 76-B, 77-A, 77-B, 77-C, 77-D, 77-E, 77-F, 77-G, 77-H, 77-I, 77-J, 77-K, 77-L, 78-A, 78-B, 78-C, 78-D, 78-E, 79-A, 79-B, 79-C, 79-D, 80-A, 80-B, 80-C, 80-D, 80-E, 80-F, 80-G, 80-H, 80-I, 80-J, 80-K, 80-L, 80-M, 80-N, 80-O, 80-P,

81-A, 81-B, 81-C, 82-A, 82-B, 82-C, 82-D, 82-E, 83-A,
83-B, 83-C, 83-D, 83-E, 83-F, 83-G, 83-H, 83-I, 83-J,
83-K, 83-L, 83-M, 83-N; 83-O, 83-P, 83-Q, 83-R, 83-S, 83-T,
83-U, 83-V, 83-W, 83-X, 83-Y, 83-Z, 83-Z-1, 83-Z-2, 83-Z-3,
84-A, 84-B, 84-C, 84-D, 84-E, 84-F, 84-G, 84-H, 84-I, 84-J,
84-K, 84-L, 84-M, 84-N, 84-O, 84-P, 84-Q, 84-R, 84-S, 84-T,
84-U, 84-V, 84-W, 84-X, 84-Y, 84-Z, 84-Z-1, 84-Z-2, 84-Z-3,
84-Z-4, 84-Z-5, 84-Z-6, 84-Z-7, 84-Z-8, 84-Z-9, 84-Z-10, 84-Z-11,
84-Z-12, 85-A, 85-B, 85-C, 85-D, 85-E, 85-F, 85-G, 85-H,
85-I, 85-J, 85-K, 85-L, 85-M, 85-N, 85-O, 85-P, 85-Q, 85-R,
85-S, 85-T, 85-U, 85-V, 85-W, 85-X, 85-Y, 85-Z, 85-Z-1, 85-Z-2,
85-Z-3, 85-Z-4, 85-Z-5, 85-Z-6, 85-Z-7, 85-Z-8, 85-Z-9, 85-Z-10,
85-Z-11, 85-Z-12, 85-Z-13, 86-A, 86-B, 86-C, 86-D, 87-A, 87-B,
87-C, 87-D, 88, 89-A, 89-B, 89-C, 89-D, 89-E, 89-F, 89-G,
89-H, 89-I, 89-J, 89-K, 90, 91-A, 91-B, 91-C, 91-D, 91-E,
91-F, 91-G, 91-H, 91-I, 91-J, 91-K, 91-L, 91-M, 91-N,
2306 91-O, 91-P, 91-Q, 91-R, 91-S, 91-T, 91-U, 91-V, 92-A,
92-B, 92-C; 93; 94-A, 94-B, 94-C; 95-A, 95-B; 96-A,
96-B; 97-A, 97-B, 97-C, 97-D, 97-E, 97-F, 97-G, 97-H, 97-I;
98-A, 98-B, 98-C, 98-D, 98-E, 98-F, 98-G, 98-H, 98-I, 98-J,
98-K, 98-L, 98-M; 99-A, 99-B, 99-C, 99-D, 99-E, 99-F, 99-G,
99-H; 99-I, 99-J, 99-K, 99-L, 99-M, 99-N, 99-[illegible] 99-P; 100-A,
100-B, 100-C, 100-D, 100-E, 100-F, 100-G, 100-H; 101; 102-A,
102-B, 102-C, 102-D, 102-E, 102-F, 102-G, 102-H, 102-I,
102-J; 103-A, 103-B, 103-C, 103-D, 103-E, 103-F, 103-G,
103-H, 103-I, 103-J, 103-K, 103-L, 103-M, 103-N, 103-O,
103-P, 103-Q, 103-R; 104-A, 104-B, 104-C, 104-D, 104-E,
104-F, 104-G, 104-H, 104-I, 104-J, 104-K, 104-L; 105-A,
105-B; 106-A, 106-B, 106-C, 106-D, 106-E, 106-F, 106-G,
106-H, 106-I, 106-J, 106-K, 106-L, 106-M, 106-N, 106-O,
106-P, 106-Q, 106R, 106-S, 106-T, 106-U; 107-A, 107-B,
107-C, 107-D, 107-E, 107-F, 107-G, 107-H, 107-I, 107-J,
107-K, 107-L, 107-M, 107-N, 107-O, 107-P, 107-Q, 107-R,
were received in evidence.

Mr. Ewing: That is a perfectly reasonable condition and, as a matter of fact, that is why I have asked certain questions with respect to certain of the exhibits.

Trial Examiner Norwood: It would show what the association received and acted on, but it is not to show the truth of any of those hearsay statements.

2307 By Mr. Ewing:

Q. Mr. Wormser, will you turn to the minutes of the meeting of June 30, 1933, in evidence as Respondent's

Exhibit 75-A to C and tell us whether you acted as secretary at that meeting?

A. I did.

Q. I call your attention to the last paragraph on the first page being Respondent's Exhibit 75-A and ask you whether the divisions which you listed this morning were the divisions contemplated in that statement in the minutes?

A. They were.

Mr. Wright: I would like to request your Honor to make a short statement there since you mentioned the minutes which had heretofore been received in support of the complaint. Now, it is my contention that those minutes insofar as they may contain hearsay statements which are directly related to what we consider acts of conspiracy are within the well recognized exceptions to the hearsay rule and that they were so received in that they were admissions by the parties themselves.

Trial Examiner Norwood: Well, that is different. I said as proving the truth of said statements. They do prove maybe that the statements were made but I said they were not received to prove the truth of the statements. We are not lifting ourselves up by our own boot straps because of that.

2308 Proceed.

By Mr. Ewing:

Q. I direct your attention, Mr. Wormser, to the minutes of the executive committee meeting of July 24, 1933, Respondent's Exhibit 76-A and B, and in particular to the telegram quoted—set forth at the bottom of Exhibit 76-A and the top of Exhibit 76-B and ask you to state whether that telegram was sent to the members of the association?

A. It was.

Q. I direct your attention to the minutes of the meeting of the executive committee of July 28, 1933, Respondent's Exhibit 77-A to L. I specifically direct your attention to Respondent's Exhibits 77-C, D, E and F, and ask you to state what they represent.

A. They represent the proposed code of fair competition for the lead industry as submitted on August 31, 1933.

Q. And when you say "proposed code," do you mean the proposed master code or the proposed supplementary code?

A. The proposed master code.

Q. Was the proposed code to which reference has just been made, submitted to the National Recovery Administration?

A. Yes.

Q. I ask you to look at the minutes of the executive committee meeting of August 3, 1933, Respondent's Ex-
hibit 78-A to E, and direct your attention particu-
2309 larly to the so-called President's re-employment
agreement referred to in those minutes, Respondent's Exhibit 78-D and E, and I ask you to state whether that so-called re-employment agreement was the agreement referred to in the minutes of the executive committee meetings of July 24 and 28, 1933?

A. It was.

Q. Directing your attention to the second page, Respondent's Exhibit 78-B, will you state whether the telegram there set forth was sent?

A. It was sent.

Q. I direct your attention to the third page of the minutes, Respondent's Exhibit 70-C and in particular to the matter under the heading "Article IX, President's Code," and ask you to read it to yourself.

A. I have read it.

Q. Was the letter of which the portion of the minutes just indicated formed a part, sent to the National Recovery Administration?

A. Yes, sir.

Q. Will you explain the statement in the letter to the effect that the price of lead is established by the open world market?

A. Well, lead is a world commodity just like wheat, corn and cotton; just like a great many other staple prod-
ucts, and at that time there was a free and open mar-
2310 ket in London and the London price was really the
governing price all over the world. The New York market here generally reflected the London price plus the influence of the tariff.

Q. In the reference in that portion of the minutes which you have just referred to, Article IX of the President's code, is the President's code the President's re-employment agreement?

A. It is synonymous.

Q. I call your attention to the fact that in the re-employment agreement the article is described not as Article IX, but as Section IX.

A. Section IX, yes.

Q. But that is the provision of the re-employment agreement to which this letter has reference?

A. Yes, sir.

Q. I direct your attention to the minutes of the meeting of August 17, 1933, Respondent's Exhibit 80-A to P inclusive, and ask whether you acted as secretary at that meeting?

A. I did.

Q. You will note the notice referred to on the first page, Respondent's Exhibit 80-A.

A. Yes.

Q. After the receipt of formal order signifying approval of the petition of the Lead Industries Association for substitution under the President's re-employ-
2311 ment agreement, was that notice issued?

A. Yes, sir.

Q. Directing your attention to the third page of the minutes, Respondent's Exhibit 80-C and the next page, Exhibit 80-D, was the telegram referred to there sent?

A. Yes, sir.

Q. Referring to the bottom of the fourth page, Respondent's Exhibit 80-D, and the fifth page, Exhibit 80-E, did you send the letter there set forth?

A. Yes, sir.

Q. I direct your attention to the meeting of the executive committee of November 6, 1933, Respondent's Exhibit 82-A to E.

A. Yes, sir.

Q. Did you act as secretary at this meeting?

A. Yes, sir.

Q. I direct your attention to the preceding meeting of September 21, 1933, Respondent's Exhibit 81-A to C, and ask you whether you acted as secretary at that meeting?

A. I did.

Q. Referring to the bottom of the first page and the top of the second page, Exhibit 81-A and B, was that letter sent?

A. Yes, sir; it was sent.

Q. Prior to that, had the letter quoted on the
2312 first page been received by the association from the Recovery Administration?

A. It had been received.

Q. Referring back to the meeting of November 6, 1933, was the third draft of the supplementary code of fair competition for the lead pigments division approved at that meeting? The supplementary code referred to by the Recovery Administration in its letter quoted in the minutes of the meeting of September 21, 1933, and in the reply quoted in the same minutes.

A. Yes, sir.

Q. I call your attention to the reference on page 2 of the minutes of the meeting of September 21, 1933, Respondent's Exhibits 81-B, to Mr. Carter's outline of the serious conflict of interest between the paint code and the position of the white lead in oil industry. In that controversy or conflict of interest the conflict of interest about which you testified yesterday?

A. Yes, sir.

Q. I direct your attention to the minutes of the executive committee meeting of November 22, 1933, Respondent's Exhibit 83-A to 83-Z-3 and, in particular, to Exhibit "A" thereto annexed, Respondent's Exhibit 83-C to 83-Q inclusive, and ask you whether that is the code or draft of the code—I will withdraw that question.

2313 I call your attention to the fact that annexed to the minutes of this meeting are Exhibit "A," Respondent's Exhibits 83-C to Q inclusive and Exhibit "B" and Respondent's Exhibit 83-R to Z-3 inclusive, the former being designated as Code "D" and the latter, Code "E," and ask you to state which code was the code discussed by you with Mr. Janssen in Washington as recited by the minutes on the first page?

A. Code "A" was the one I discussed.

Q. When you say "Code 'A'"—

A. I mean Code "D" of Exhibit "A," that is what I meant.

Q. And what does Code "E," Exhibit "B" represent?

A. That represents some of the changes suggested by Deputy Administrator Janssen.

Q. In other words, it is a revision of Code "D"?

A. Yes, a revision of Code "D."

Q. I direct your attention to the minutes of the meeting of the executive committee of February 6, 1934.

A. Yes, sir.

Q. It consists of Respondent's Exhibits 85-A to 85-Z-13 inclusive. I ask you whether Code "H" annexed thereto, consisting of Respondent's Exhibits "D" to Z-1-3 inclusive, was the code finally submitted for approval? I will withdraw the question.

2314 I direct your attention to Respondent's Exhibits "D" to "U" designated as Code "H" and Respondent's Exhibits "V" to "Z-13" designated as Code "I," and ask you which code was the one submitted for approval?

A. Code "I."

Q. I direct your attention to Article 7, Section 3, of Code "I," Respondent's Exhibit Z-6, page 11, Code "I."

A. I have it. What is the question?

Q. Are the reports referred to in that section the industrial reports furnished the Lead Industries Association by its members from its inception?

A. Yes, sir.

Q. I direct your attention to the executive committee meeting of February 8, 1934, Respondent's Exhibit 86-A to C.

A. Yes, sir.

Q. I direct your attention to page 3, Respondent's Exhibit 86-C, and page 4 of the minutes, Exhibit 86-D, and ask you whether the letter there set forth was written by you?

A. It was.

Q. And was it sent?

A. It was sent to Mr. Janssen.

Q. Was it prepared and sent to him at his solicitation?

A. Yes, sir.

2315 Q. Upon what facts did you base your statement appearing in the second paragraph on the last page of the minutes, Respondent's Exhibit 86-D, to the effect that employment had been increased 21 per cent in the manufacturing groups?

A. That was based upon the receipt of questionnaires from the manufacturers requesting their labor records and indicating specifically the increase in employment brought about by their cooperation with the National Recovery Administration.

Q. Is that the basis for the other statements in that same paragraph?

A. Yes, sir.

Q. Upon what facts did you base your statement or estimate that code wage increases would cost the members of the association a million and a half a year?

A. That statement was also based upon the results of a questionnaire circulated to the members of interest, specifically requesting that type of information.

Q. I direct your attention to the minutes of the meeting of March 14, 1934, Respondent's Exhibit 91-A to V inclusive.

A. Is that March 14, 1934?

Q. Yes, sir. And ask you when after March 14, 1934, the executive committee next met?

A. November 22, 1935.

Q. Do you know why the executive committee of the Lead Industries Association had no meetings during that interval?

A. Well, the meeting of March 14, 1934 was essen-
2316 tially in connection with NRA activities. In the inter-
val, the NRA had been terminated by action of the Supreme Court and there was no occasion for the executive committee to meet to transact any other business.

Q. The Supreme Court's decision in the Schechter case came down in late May or early June 1935, and up to that time after the code was adopted and until November 1935, there was no meeting of the executive committee?

A. That is right.

Q. During the interim period, the Code Authority up until the Supreme Court's decision supervised the members of the lead industry, did it not?

Mr. Wright: I object to that.

Mr. Ewing: It is in anyway.

Trial Examiner Norwood: Did you finish your question?

Mr. Ewing: Yes.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"During the interim period, the Code Authority up until the Supreme Court's decision supervised the members of the lead industry, did it not?")

Mr. Ewing: I confess it is leading but it is in anyway. That is, the minutes of the Code Authority.

Trial Examiner Norwood: Do you insist on your
2317 objection?

Mr. Wright: Yes. I was not objecting so much to that phase of it. I know the minutes of the Code Authority meeting were in, but I still object to that question as leading. I think counsel can get at that information by a perfectly proper means.

Mr. Hinds: As a guidance for further Respondent's testimony, there cannot be an objection in an administrative hearing like when a man is examining his own informed witness and there is no jury that the question is leading. Isn't it a great advantage to have all the questions leading?

Trial Examiner Norwood: That is the one time that he cannot lead.

Mr. Hinds: Certainly in the judicial system they encourage leading questions. It helps to save time. That is the only reason not to lead a witness because you don't want to have mendacious testimony before a jury.

Trial Examiner Norwood: Read the question, please.

(Whereupon, the reporter repeated the question.)

Trial Examiner Norwood: Objection sustained. Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

By Mr. Ewing:

Q. I direct your attention, Mr. Wormser, to the
2318 minutes of the executive committee meeting of November 22, 1935.

A. Yes, sir.

Q. Did you act as secretary at that meeting?

A. I did.

Q. At the time of that meeting, did you know of the contents of the letter from Mr. George L. Berry dated November 7, 1935, referred to in the first paragraph of the minutes following the attendance listing?

A. Yes, sir.

Q. Does the statement in that first paragraph of the minutes of the meeting correctly set forth the substance of Mr. Berry's letter?

Mr. Wright: Your Honor, I object to questioning along this line. This is part of the material which I indicated before was wholly irrelevant and immaterial to the issues in this matter. It doesn't relate to the National Recovery Administration nor the issues in this case.

Mr. Ewing: In this particular instance, the question is directed at the letter which the association received from Mr. Berry advising of a conference scheduled in Washington designed to set up machinery to put the lead industry in

a position where it might sponsor in substance a continu-
ance unofficially of the NRA. I wanted to ask the witness
whether that statement here was a correct summary of
the substance of that letter and then bring out what
2319 attitude the association took with respect to such a
suggestion.

Mr. Du Bose: It is very pertinent.

Trial Examiner Norwood: And this was a letter that was written by whom?

Mr. Ewing: Mr. George L. Berry.

Trial Examiner Norwood: I think he can answer that.

Mr. Wright: It is a pious declaration of innocence by the parties involved.

Mr. Ewing: Not at all.

Trial Examiner Norwood: He is putting on his witness here to substantiate declarations of innocence. Objection overruled. Does that correctly state the situation?

The Witness: It does.

By Mr. Ewing:

Q. Who, if you now know, is Mr. George L. Berry?

A. As I recalled, he had an official capacity as the National Coordinator—was intimately involved with NRA activities.

Q. Was he coordinator for industrial cooperation?

A. I believe that was the title that he possessed.

Q. Now, I direct your attention to the preamble and
resolution following that first paragraph and ask you
2320 to read them to yourself over to the middle of the
next page.

A. I have read it.

Q. You were present at the executive committee's deliberations in connection with that resolution?

A. I was.

Q. Does the recital contained in the third paragraph of page 2 of the minutes, Respondent's Exhibit 92-B, correctly state the sentiments of the members of the executive committee as expressed by them at that meeting?

A. It does.

Q. Does the fourth paragraph on page 2 of the minutes, Respondent's Exhibit 92-B, correctly state the views of the members of the executive committee present at that meeting?

A. It does.

Q. Does the resolution immediately following, correctly state the views of the members of the executive committee present at that meeting?

Trial Examiner Norwood: I think he should confine this to the views they expressed. He can't read their minds.

Mr. Ewing: I intended to include that in subsequent questions. I had that in the first question.

The Witness: May I answer it?

Trial Examiner Norwood: Have you amended the question?

2321 Mr. Ewing: I amended the question accordingly.

Trial Examiner Norwood: You may answer it.

The Witness: It does.

By Mr. Ewing:

Q. I direct your attention to the minutes of the executive committee meeting of June 22, 1936, and ask you whether you acted as secretary at that meeting?

A. I did.

Q. Now, I direct your attention to page 2 of the minutes, being Respondent's Exhibit 94-B, and in particular, to the matter under the heading "Wheeler Anti-basing Point Brief" and ask you to read it.

A. I have read it.

Q. Was the brief which the minutes recited as attached as Exhibit "A" ever presented to Congress?

A. No, sir.

Mr. Ewing: I might say that while referred to in the minutes as Exhibit "A," we did not photostat it because it was not used.

Mr. Du Bose: May we take a short recess, your Honor?

Trial Examiner Norwood: We will take a short recess.

(Whereupon, a short recess was taken.)

2322 Trial Examiner Norwood: Come to order. Proceed.

By Mr. Ewing:

Q. I direct your attention to the meeting of the Executive Committee of May 11, 1942, Respondents' Exhibit 98-A to M and, in particular, to the seventh page of the document designated as Exhibit A.

A. I have it.

Q. Will you tell us where you obtained the statistical information setting forth the comparative prices of lead and other commodities?

A. Partly from the Bureau of Labor Statistics and partly from the statistics of the Engineering and Mining Journal.

Q. I direct your attention to the meeting of the Executive Committee of April 16, 1946, Respondents' Exhibit 107-A to R, and ask you to look at Exhibit A annexed and, in particular, to the appendix which is Respondents' Exhibit 107-N, and ask you to read to yourself sub-paragraphs A and C.

A. I have.

Q. With respect to sub-paragraph A, what is the basis for the statement that the average weight of the lead in a storage battery is 22 pounds?

A. That is based on statistics gathered by the American Bureau of Metal Statistics surveying the storage battery industry.

Q. And when you say "lead," to what do you refer?

2323 A. In that paragraph I refer to both pig lead plus the oxide lead, the total lead content of the storage battery.

Q. With respect to sub-paragraph C, what is the basis for your statement that the average exterior prepared paint contains about one and a half pounds of lead per gallon?

A. That is a statement based upon the expert opinion of laboratory men in our industry who deal with or who serve the prepared paint industry in paint formulation matters.

Q. From whom was the estimate obtained?

A. It was obtained from technicians in the National Lead Company and the Eagle Picher and the Glidden Company—I think that is about all.

Q. Is the same source or sources the basis for the statement in that sub-paragraph that pure white lead paint contains about 15 pounds of lead per gallon?

A. Yes, sir.

Mr. Du Bose: Your Honor, pursuant to the arrangement we made yesterday, I now substitute for the original of these exhibits, the photostatic copies which were made downstairs in the Photostatic Department of the City Bar Association.

These are Respondents' Exhibits 4-A and B, 5, 7-A, B and C, 8-A and B, 10-A and B.

Trial Examiner Norwood: They may be substituted and you may withdraw the originals by agreement with counsel.

Mr. Wright: I have no objection to that.

2324 Trial Examiner Norwood: Very well. Proceed.

By Mr. Du Bose:

Q. Mr. Wormser, I show you a bound volume and I ask you what that is (handing to witness)?

A. That is a record of the annual meeting, minutes of the Lead Industries Association from its beginning to date.

Mr. Du Bose: Mark this for identification Respondents' Exhibits 108-A to 126-L.

(The documents referred to were marked for identification Respondents' Exhibits 108-A, 108-B, 108-C, 108-D,
108-E, 108-F, 108-G, 108-H, 108-I, 108-J, 108-K, 108-L,
108-M, 108-N, 109-A, 109-B, 109-C, 109-D, 109-E,
109-F, 109-G, 109-H, 109-I, 109-J, 109-K, 109-L, 109-M,
109-N, 109-O, 109-P, 110-A, 110-B, 111-A, 111-B, 111-C,
111-D, 111-E, 111-F, 111-G, 111-H, 111-I, 111-J, 111-K,
111-L, 112-A, 112-B, 112-C, 112-D, 112-E, 112-F, 112-G,
112-H, 112-I, 112-J, 112-K, 112-L, 113-A, 113-B, 113-C,
113-D, 113-E, 113-F, 113-G, 113-H, 113-I, 113-J, 113-K,
113-L, 113-M, 113-N, 113-O, 113-P, 113-Q, 114-A, 114-B,
114-C, 114-D, 114-E, 114-F, 114-G, 114-H, 114-I, 114-J,
114-K, 114-L, 114-M, 114-N, 115-A, 115-B, 115-C, 115-D,
115-E, 115-F, 115-G, 115-H, 115-I, 115-J, 115-K, 115-L,
115-M, 115-N, 115-O, 115-P, 115-Q, 115-R, 115-S, 116-A,
116-B, 116-C, 116-D, 116-E, 116-F, 116-G, 116-H, 116-I,
116-J, 116-K, 116-L, 116-M, 116-N, 117-A, 117-B, 117-C,
2325 117-D, 117-E, 117-F, 117-G, 117-H, 117-I, 117-J, 117-K,
117-L, 117-M, 118-A, 118-B, 118-C, 118-D, 118-E, 118-F,
118-G, 118-H, 118-I, 118-J, 118-K, 119-A, 119-B, 119-C,
119-D, 119-E, 119-F, 119-G, 119-H, 120-A, 120-B, 120-C,
120-D, 120-E, 120-F, 120-G, 120-H, 120-I, 120-J, 120-K,
120-L, 120-M, 120-N, 120-O, 120-P, 121-A, 121-B, 121-C,
121-D, 121-E, 121-F, 121-G, 121-H, 121-I, 121-J, 121-K,
121-L, 122-A, 122-B, 122-C, 122-D, 122-E, 122-F, 122-G,
122-H, 122-I, 122-J, 122-K, 122-L, 123-A, 123-B, 123-C,
123-D, 123-E, 123-F, 123-G, 123-H, 123-I, 123-J, 123-K,
123-L, 123-M, 123-N, 124-A, 124-B, 124-C, 124-D, 124-E,
124-F, 124-G, 124-H, 124-I, 124-J, 124-K, 124-L, 125-A,
125-B, 125-C, 125-D, 125-E, 125-F, 125-G, 125-H, 125-I,
125-J, 125-K, 125-L, 125-M, 126-A, 126-B, 126-C, 126-D,
126-E, 126-F, 126-G, 126-H, 126-I, 126-J, 126-K and
126-L.)

By Mr. Du Bose:

Q. Mr. Wormser, I show you Respondents' Exhibits for identification marked 108-A to 126-L, and I ask you to compare these exhibits for identification with the minutes of the annual meetings in the bound volume. By the way, let me ask you one more question.

These are the minutes of the annual meetings of the Lead Industries Association; is that correct?

A. That is correct.

2326 Trial Examiner Norwood: Do you wish to have a short recess to allow him to do that?

Mr. Du Bose: Yes, sir.

Trial Examiner Norwood: We will take a five-minute recess to allow the witness to examine the documents.

(A short recess was taken.)

Trial Examiner Norwood. Come to order. Proceed.

Mr. Wright: Mr. Wormser, do those exhibits which have been marked constitute a complete set of all the minutes of the general annual meetings of the Lead Industries Association?

The Witness: Yes, sir.

Mr. Wright: From the time of its inception down to date?

The Witness: Yes, sir.

Mr. Wright: There are no omissions from that?

The Witness: No omissions.

Mr. Wood: Is this cross-examination of the witness?

Mr. Wright: No, sir; it was examination on the voir dire.

Mr. Wood: Very well.

Trial Examiner Norwood: Proceed.

By Mr. Du Bose:

Q. Mr. Wormser, have you compared Respondents' 2327 Exhibits for identification 108-A to 126-L inclusive with the minutes of the annual meetings in the bound volume?

A. I have.

Q. And are they correct copies of the minutes of all of the annual meetings?

A. They are.

Mr. Du Bose: I offer in evidence Respondents' Exhibits 108-A to 126-L inclusive being the minutes of the annual meetings of the members of the Lead Industries Association from November 14, 1928 to and including April 26, 1946.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: Your Honor, I make the same objection to the offer of these that I made to the previous exhibits consisting of minutes of the Executive Committee and the Board of Directors of the Lead Industries Association for the reason that they contain a great many gratuitous and self-serving declarations which were made in contemplation of this proceeding and because of the Commission's investigation of the industry, and furthermore on the ground that they contain a great deal of hearsay material which is inadmissible on that ground.

For the most part it is irrelevant and immaterial.

Mr. Du Bose: If your Honor please, this is a supplement to the minutes of the meetings of the Executive
2328 Committee and the Board of Directors. It shows
what occurred at the annual meetings, which, of course, took place every year.

Trial Examiner Norwood: I shall receive them under the same condition as to the hearsay evidence that is contained in them. I will overrule the objection and receive Respondents' Exhibits 108-A to 126-L inclusive.

(The documents referred to, heretofore marked for identification RESPONDENTS' EXHIBITS 108-A, 108-B, 108-C,
108-D, 108-E, 108-F, 108-G, 108-H, 108-I, 108-J, 108-K,
108-L, 108-M, 108-N, 109-A, 109-B, 109-C, 109-D, 109-E,
109-F, 109-G, 109-H, 109-I, 109-J, 109-K, 109-L, 109-M,
109-N, 109-O, 109-P, 110-A, 110-B, 111-A, 111-B, 111-C,
111-D, 111-E, 111-F, 111-G, 111-H, 111-I, 111-J, 111-K,
111-L, 112-A, 112-B, 112-C, 112-D, 112-E, 112-F, 112-G,
112-H, 112-I, 112-J, 112-K, 112-L, 113-A, 113-B, 113-C,
113-D, 113-E, 113-F, 113-G, 113-H, 113-I, 113-J, 113-K,
113-L, 113-M, 113-N, 113-O, 113-P, 113-Q, 114-A, 114-B,
114-C, 114-D, 114-E, 114-F, 114-G, 114-H, 114-I, 114-J,
114-K, 114-L, 114-M, 114-N, 115-A, 115-B, 115-C, 115-D,
115-E, 115-F, 115-G, 115-H, 115-I, 115-J, 115-K, 115-L,
115-M, 115-N, 115-O, 115-P, 115-Q, 115-R, 115-S, 116-A,
116-B, 116-C, 116-D, 116-E, 116-F, 116-G, 116-H, 116-I,
116-J, 116-K, 116-L, 116-M, 116-N, 117-A, 117-B, 117-C,
117-D, 117-E, 117-F, 117-G, 117-H, 117-I, 117-J, 117-K,
2329 117-L, 117-M, 118-A, 118-B, 118-C, 118-D, 118-E, 118-F,
118-G, 118-H, 118-I, 118-J, 118-K, 119-A, 119-B, 119-C,
119-D, 119-E, 119-F, 119-G, 119-H, 120-A, 120-B, 120-C,
120-D, 120-E, 120-F, 120-G, 120-H, 120-I, 120-J, 120-K,
120-L, 120-M, 120-N, 120-O, 120-P, 121-A, 121-B, 121-C,
121-D, 121-E, 121-F, 121-G, 121-H, 121-I, 121-J, 121-K,
121-L, 122-A, 122-B, 122-C, 122-D, 122-E, 122-F, 122-G,
122-H, 122-I, 122-J, 122-K, 122-L, 123-A, 123-B, 123-C,

123-D, 123-E, 123-F, 123-G, 123-H, 123-I, 123-J, 123-K, 123-L, 123-M, 123-N, 124-A, 124-B, 124-C, 124-D, 124-E, 124-F, 124-G, 124-H, 124-I, 124-J, 124-K, 124-L, 125-A, 125-B, 125-C, 125-D, 125-E, 125-F, 125-G, 125-H, 125-I, 125-J, 125-K, 125-L, 125-M, 126-A, 126-B, 126-C, 126-D, 126-E, 126-F, 126-G, 126-H, 126-I, 126-J, 126-K and 126-L, were received in evidence.)

Trial Examiner Norwood: Proceed.

By Mr. Wood:

Q. Mr. Wormser, you are familiar with the Eagle Picher Company?

A. Yes, sir.

Q. For how long have you been familiar with the Eagle Picher Company as a corporation?

A. Oh, since my mining days back in 1916.

Q. Now going back to the NRA period, what persons were acting on behalf of the Eagle Picher Company to your knowledge?

2330 A. Mr. Maston and Mr. Zoller, I believe—I think Mr. Bendelari.

Q. As a practical matter of dealing with them, what was your understanding of their authority?

A. Well, their authority was never made really clear to me, Mr. Wood. I don't know just how their authority stood.

In fact, at times there seemed to me that there was a little bit of divided authority if I may say so or a confusion of authority.

Q. Take Mr. Zoller, and again I direct your attention to the NRA days. What was Mr. Zoller's authority as you understood it at that time?

A. Mr. Zoller had charge of matters relating to the production of dry pigments as produced by the Eagle Picher Company and acted for the Eagle Picher Company, I believe, in the interests of those dry products.

Q. What was Mr. Zoller's age at that time, if you know?

A. I would say he must have been about forty years or thirty-five probably. It is just a guess.

Q. Was he an executive of the company at the time, do you know?

A. I think he was the manager of the Dry Products Division at the time.

Mr. Wright: Your Honor, I object. It is obvious that this witness is not fully informed of exactly the relationship that these men had to the company. He is being asked now by counsel for that company questions which he is obviously not in the proper position to testify to. 2331

The last answer showed on its face that it was a conclusion and a guess on his part and I move that it be stricken.

Trial Examiner Norwood: Were you answering that from your memory or your own knowledge?

The Witness: Yes, sir.

Trial Examiner Norwood: Motion denied. This witness may state as a secretary of these meetings and this Association what was represented to him as the basis of the authority of these members. He may state if he knows if it came to him in the course of his duty what positions they occupied in this company, and counsel may show that by this witness.

Mr. Wood: Obviously, Your Honor, this witness' opinion of these people is not the best evidence and I have that well in mind. I am not asking that in order to prove his opinion. I am trying to get how it appeared to him at the time.

Trial Examiner Norwood: You may do that.

By Mr. Wood:

Q. Who today in the Eagle Picher Company are you dealing with in your capacity as secretary of the Lead Industries Association? 2332

A. Mr. Wood, to answer that, I would have to ask you with what particular activity of it—to what particular activity of the company you refer. If it is the activities on the Board of Directors, Mr. Bendelari is the man I communicate with.

He has been appointed by your company to serve on the Board. If it is in connection with pigment activities it would be Mr. Zoller or Mr. Hayt. If it is in connection with the metallic lead products activities, it would be Mr. Murdock.

Q. Do you know Mr. Bowlby?

A. I do, yes, sir.

Q. How active is he in connection with Lead Industries?

A. I would say he is inactive.

Q. What is Mr. Bowlby's position as you understand it?

A. Mr. Bowlby is the president of the Eagle Picher Company.

Q. What is the position of Mr. Zoller and Mr. Hayt in relation to the position of Mr. Bowlby as you understand it?

A. Mr. Zoller, I believe, is a vice-president of the Eagle Picher Company and manager of their Dry Products Division. Mr. Hayt is the manager of the Lead in Oil Division.

Q. Now what was Mr. Zoller's position with the company, if you know, in 1933 and 1934?

2333 A. As I recall, he was manager of the Dry Products Division of the Eagle Picher operation.

Q. And what was Mr. Hayt's position in 1933 and 1934, if you know?

A. Manager of the white lead in oil activities of the Eagle Picher company.

Q. Are you sure of that?

A. Fairly sure, sir.

Q. What was Mr. Maston's position?

A. He was also connected with white lead in oil activities, I believe, as general sales manager.

Q. For how long a period did you know Mr. Maston?

A. From 1928 until his death.

Q. When was his death?

A. In 1939, I believe, or 1938, I am not quite certain about that.

Q. What was his position at the time of his death as you understood it?

A. I believe he was the sales manager of the White Lead in Oil Division.

Q. Are you sure of that?

A. Not positively.

Q. Or was he the New York representative?

A. He made his headquarters in New York and it might very well have been that he was the New York representative.

2334 Q. During the period in which you knew Mr. Maston, what was your impression of his authorization to speak for the company?

A. It was my belief that he had full authority to speak on those subjects on which he dealt with us in relation to Association activities and Code Authority activities.

Q. Did you recognize any diminution of authority during the period in which you knew him?

A. I believe before he died that there was some diminishment in his authority, but I can't say just what it amounted to, I can't recall.

Q. But you are under the impression that there was some change in his position in the company?

A. That is the impression I have, Mr. Wood, yes, sir.

Q. Were you ever told that he had been repudiated by the company?

A. No, sir.

Q. Now Mr. Maston wrote you a letter enclosing a map; is that correct?

A. Yes, sir.

Q. And do you know where that map is?

A. No, sir; I do not.

Mr. Ewing: There are two letters that refer to two maps. We know where one is.

Mr. Du Bose: One of them is in evidence as Exhibit 513-E.

2335 The Witness: All I recall is that he came to my office during Code Authority days and he said, "Felix, I think it would be wise for you to become acquainted with the manner in which white lead in oil is sold and how other pigments are sold, and I want to help you. Here is a zone map which should serve to help to educate you."

I received the map, I put it in my files and that was the end of it until the time that Mr. Dunn walked into my office and asked if I had a map and I told Mr. Dunn I had no map because it had completely escaped my memory, there having been no activity whatsoever in connection with a map.

I think I have already apologized to Mr. Dunn because I was mistaken. Mr. Dunn unearthed a map but I don't even know if that is the map that Mr. Maston supplied me with. It is so vague and so inconsequential that it seemed to me at that time and even today, so that is the complete history of the map until it was unearthed by Mr. Dunn or if it is the map.

I say the map although I don't really know whether it is the map that you refer to or whether it is the one that was attached to Mr. Maston's letter or what happened to, I don't know.

By Mr. Wood:

Q. What did Mr. Maston tell you about that map?
2336 Did he say that it was his own creation or what did he tell you about the map?

A. All I recall is that it was his map.

Q. His map?

A. It was his map.

Q. And you are familiar with the fact that the manufacturers of white lead in oil sell their products on a zone basis? Are you familiar with that?

A. I am familiar with that.

Q. To what extent did that map reflect the zone basis of the respondents?

A. Mr. Wood, I didn't even examine the map carefully. I just put it in the files and made just a blanket acknowledgment as I do most things that come to the office. I acknowledged it and thanked him for it.

That was the end of it because I had absolutely no use for it at that time. I was so immersed in so many other activities that I didn't want to take the time.

Q. Didn't Mr. Maston ask you to try to get the industry to adopt that map?

A. No, sir.

Q. He didn't?

A. No, sir.

Q. What was his purpose? What purpose did he state as his purpose in giving you the map?

2337 A. Merely to acquaint me with the customs of the trade, you might say.

Q. Well, what was his representation as to what the map was supposed to portray? Was it a new scheme or was it a codification of the way business was done?

A. I would say it was a codification of the way business was done at that time in the pigments industry.

Q. Did Mr. Maston make any effort to get that zone map incorporated in the NRA code?

A. No, sir.

Q. Was that map ever adopted?

A. No, sir.

Q. Well, I will ask this rather broadly: What was the connection, if any, between that map and the way the lead companies are doing business today as far as selling is concerned?

A. I haven't any idea.

Q. Well, as a matter of fact, wasn't Mr. Maston more or less carrying a torch trying to get the industry to adopt a particular system of zone selling?

Mr. Wright: I object.

Trial Examiner Norwood: Sustained. It is leading.

By Mr. Wood:

Q. Do you know, Mr. Wormser, of any agreement made on behalf of the Eagle Picher Company to do business in
any particular way as to the selling of white lead in
2338 oil? I mean as far as the zone system is concerned
during the NRA days?

A. I know nothing about it, sir.

Q. Do you know of anyone connected with the Eagle Picher Company at the present time with whom you discussed the zone selling system during NRA days?

A. The only one I ever discussed it with, sir, is Mr. Maston. I haven't discussed it with anybody else in the Eagle Picher Company outside of discussing it with you here.

Mr. Wood: That is all.

By Mr. Ecker:

Q. Mr. Wormser, you have been secretary and treasurer of the Lead Industries Association since its formation?

A. Yes, sir.

Q. Would you know whether or not a given company or corporation is or has been a member of the Lead Industries Association?

A. I would.

Q. Will you state whether or not Anaconda Copper Mining Company has ever been a member of the Lead Industries Association?

A. They never have.

Mr. Ecker: That is all.

Mr. Ewing: We have some more documents and a little
more oral testimony but is won't amount to very
2339 much. It was my thought that perhaps now is as
good a time as any to adjourn to the morning because
I am quite sure that Mr. Wright would like all the time he can to look at these papers that we have swamped him with, and I don't think that is an unfair statement, do you?

Mr. Wright: No, sir.

Mr. Ewing: So if I might make such a motion, I will.

Mr. Wright: Before we get into that, I had understood that counsel were going to give us some statement—

Mr. Ewing: (Interposing.) I thought I would talk to you about that now off the record.

Trial Examiner Norwood: Is it your idea to adjourn now and reconvene tomorrow morning?

Mr. Ewing: Yes, sir.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. We will adjourn at this time and reconvene at 10:00 o'clock tomorrow morning.

(Whereupon, at 3:50 p. m., the hearing in the above-entitled matter was adjourned to reconvene at 10:00 a. m., April 25, 1947.)

2340

Trial Room,
Bar Association Building,
36 West 44th Street,
New York, N. Y.,
April 25, 1947.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington D. C.), appearing for Sherwin Williams Company.

Edmund P. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, appearing for Eagle Picher Lead Company and Eagle Picher Sales Company.

Robert H. Ecker (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James D. Ewing, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

2340-A E. Z. Du Bose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

Roger Hinds, Union Commerce Building, Cleveland, Ohio, appearing for The Glidden Company.

2341 PROCEEDINGS.

Trial Examiner Norwood: Pursuant to adjournment on yesterday, the hearing in Docket 5253 is now convened at 10 o'clock a. m. on the 25th day of April, 1947 in room 605 of the Bar Association Building, 38 West 44th Street, New York City. The appearances are as follows:

J. T. Welch, appearing for the Sherwin Williams Company.

Edmund P. Wood, appearing for Eagle Picher Lead Company and Eagle Picher Sales Company.

Robert H. Ecker, appearing for Anaconda Copper Mining Company and International Smelting and Refining Company.

James D. Ewing and E. Z. Du Bose, appearing for the National Lead Company.

Proceed.

FELIX E. WORMSER, a witness called by the Respondent having been previously sworn, resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Ewing.

Q. Mr. Wormser, you have already testified this week and identified the minutes of meetings of the Code Authority which took place on the 27th of July, 1934, the 25th of September 1934, the 16th of November, 1934, and
2342 the informal meeting of June 11, 1935.

Mr. Du Bose: Which are respectively Respondent's Exhibits 6-A to I, 9-A to F, 11-A to G and 13-A to D in evidence.

By Mr. Ewing:

Q. I now hand you herewith the minute book and direct your attention to the minutes of the first, second, fourth, sixth eight, ninth and tenth meetings and ask you to check against them the photostats which I also hand you (handing same to witnesss).

A. I have done so.

Mr. Ewing: I ask that the photostats be marked for identification as Respondent's Exhibits 127-A to 133-Z-7 inclusive.

Trial Examiner Norwood: They will be so marked for identification as Respondent's Exhibits 127-A through 133-Z-7.

(The documents referred to were marked Respondent's Exhibits 127-A, 127-B, 127-C, 127-D, 127-E, 127-F, 127-G; 128-A, 128-B, 128-C, 128-D, 128-E; 129-A, 129-B, 129-C, 129-D, 129-E, 129-F, 129-G, 129-H; 130-A, 130-B, 130-C, 130-D, 130-E, 130-F, 130-G, 130-H; 131-A, 131-B, 131-C, 131-D, 131-E, 131-F, 31-G; 132-A, 132-B, 132-C, 132-D, 132-E, 132-F, 132-G, 132-H, 132-I, 132-J, 132-K, 132-L, 132-M, 132-N, 132-O, 132-P, 132-Q, 132-R, 132-S, 132-T;
2343 133-A, 133-B, 133-C, 133-D, 133-E, 133-F. 133-G, 133-H, 133-I, 133-J, 133-K, 133-L, 133-M, 133-N, 133-O, 133-P, 133-Q, 133-R, 133-S, 133-T, 133-U, 133-V, 133-W, 133-X, 133-Y, 133-Z, 133-Z-1, 133-Z-2, 133-Z-3, 133-Z-4, 133-Z-5, 133-Z-6, 133-Z-7, for identification.)

Trial Examiner Norwood: Proceed.

Mr. Ewing: I now offer Respondent's Exhibits 127-A to 133-Z-7 for identification, in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: I object, your Honor, on the same grounds that I made yesterday. They contain much that is hearsay and they are self-serving. And practically all of the exhibits are irrelevant and immaterial.

Mr. Ewing: Our position, of course, is the same as we have stated before.

Trial Examiner Norwood: What minutes are these?

Mr. Ewing: These are the balance of the minutes of the Code Authority with the exception that I will mention and which I will supply.

Mr. Wright: Furthermore, your Honor, some of the exhibits are obviously incomplete in that exhibits referred to in the main parts of the minutes which are not—

Mr. Ewing: One is and that is what we are going to complete.

Trial Examiner Norwood: You will complete that
2344 on another number later on?

Mr. Ewing: Right away. They skipped photostating it for some reason.

Trial Examiner Norwood: It may be included in our numbering here and you will supply it before we leave today.

Mr. DuBose: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. I shall overrule the objection. I am allowing it so far as the hearsay is contained in the same manner that the other exhibits were conditioned. With that understanding, we will receive Respondent's Exhibits 127-A to 133-Z-7, inclusive.

(The documents referred to, heretofore marked RESPONDENT'S EXHIBITS 127-A, 127-B, 127-C, 127-D, 127-E, 127-F, 127-G; 128-A, 128-B, 128-C, 128-D, 128-E; 129-A, 129-B, 129-C, 129-D, 129-E, 129-F, 129-G, 129-H; 130-A, 130-B, 130-C, 130-D, 130-E, 130-F, 130-G, 130-H; 131-A, 131-B, 131-C, 131-D, 131-E, 131-F, 131-G; 132-A, 132-B, 132-C, 132-D, 132-E, 132-F, 132-G, 132-H, 132-I, 132-J, 132-K, 132-L, 132-M, 132-N, 132-O, 132-P, 132-Q, 132-R, 132-S, 132-T; 133-A, 133-B, 133-C, 133-D, 133-E, 133-F, 133-G, 133-H, 133-I, 133-J, 133-K, 133-L, 133-M, 133-N, 133-O, 133-P, 133-Q, 133-R, 133-S, 133-T, 133-U,
133-V, 133-W, 133-X, 133-Y, 133-Z, ~~133-Z-1,~~ 133-Z-2,
2345 133-Z-3, 133-Z-4, 133-Z-5, 133-Z-6, 133-Z-7 for identi-
fication were received in evidence.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Mr. Wormser, I show you your minute book again and direct your attention to the minutes of the fourth meeting of August 20, 1934 (handing same to witness). I ask you whether you acted as secretary at that meeting?

A. I did.

Q. Now, following the minutes proper, there are a number of papers with exhibit headings.

A. Yes, sir.

Q. And these have been marked Respondent's Exhibits 129-I to X for identification. I ask you whether those documents were filed with the Code Authority, the fourth meeting minutes?

A. They were.

Mr. Ewing: I offer them in evidence and request permission to substitute photostats.

Mr. Wright: May I see them?

Mr. Ewing: Certainly.

Trial Examiner Norwood: Those are the missing exhibits that were mentioned a while ago in connection with Exhibit 129?

Mr. Ewing: Yes, your Honor.

2346 Mr. Wright: The same objection applies to these, but since the original exhibits have been received in evidence, I see no reason to object for that would make it incomplete.

Trial Examiner Norwood: Objection overruled. They will be received in evidence as Respondent's Exhibits 129-I to X.

(The documents referred to, heretofore marked for identification as RESPONDENT'S EXHIBITS 129-I, 129-J, 129-K, 129-L, 129-M, 129-N, 129-O, 129-P, 129-Q, 129-R, 129-S, 129-T, 129-U, 129-V, 129-W, 129-X, were received in evidence.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Mr. Wormser, I show you the minute book entitled "Minutes of Divisions," and ask you whether therein contained you find the minutes of meetings of the lead pigments division of the Lead Industries Association (handing same to witness)?

A. Yes, sir.

Mr. Ewing: I ask that the minutes of the meeting of July 19, 1933, be marked Respondent's Exhibit 134-A to -E inclusive, and that the minutes of the meeting of the dry products committee of the lead pigments division of August 9, 1933, be marked Respondent's Exhibit 135-A and -B, and that the minutes of the dry products
2347 committee of the lead pigments division of December 6, 1933, be marked Respondent's Exhibit 136-A and -B for identification.

Trial Examiner Norwood: They will be so marked.

(The documents referred to were marked Respondent's Exhibits 134-A, 134-B, 134-C, 134-D, 134-E; 135-A, 135-B; 136-A, 136-B, for identification.)

Trial Examiner Norwood: Proceed.

Mr. Ewing: Mark the minutes of the meeting of the lead oxide committee of the lead pigments division, December 14-15, 1933 as Respondent's Exhibit 137-A and B for identification, and the minutes of the lead oxide committee, lead pigments division of December 27-28, 1933, should be marked Respondent's Exhibit 138-A and B for identification. That is with Exhibit "A" annexed thereto. Mark the minutes of the lead pigments division of the meeting of June 5, 1934, Respondent's Exhibit 139 for identification.

Trial Examiner Norwood: They will be so marked as Respondent's Exhibits 137-A to 139 for identification.

(The documents referred to were marked Respondent's Exhibits 137-A, 137-B, 138-A, 138-B, 139, for identification.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. I show you your minute book containing the
2348 minutes of the lead pigments division and its committees, and ask you to note as you go through the minutes those which have just been marked as Respondent's Exhibits for identification 134-A to 139. When you come to any meeting which has not been so marked, see if you find a photostatic copy of that meeting in this bunch of photostats and thereby determine all of the minutes are either in evidence or have been marked for identification (handing same to witness).

A. It is complete.

Q. State whether the documents which have been marked as Respondent's Exhibits 134-A to 139 inclusive are minutes of the lead pigments division meetings of its committees.

A. Yes, sir.

Mr. Ewing: I offer Respondent's Exhibits 134-A to 139 for identification in evidence subject to the same condition with which your Honor has received the other similar documents.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: Providing these minutes are received under the same restrictions as the previous ones, I have no objection. I believe that these minutes are more closely related to the matters in issue than those which have been previously offered as Respondent's Exhibits.

Trial Examiner Norwood: They are offered subject to that condition. They will be received in evidence as
2349 Respondent's Exhibits 134-A to 139 inclusive.

(The documents referred to, heretofore marked RESPONDENT'S EXHIBITS 134-A, 134-B, 134-C, 134-D, 134-E; 135-A, 135-B; 136-A, 136-B; 137-A, 137-B; 138-A, 138-B; 139 for identification, were received in evidence.)

Mr. Ewing: I take it that we may substitute photostatic copies for the originals?

Mr. Wright: I have no objection to that procedure.

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Now, in connection with the minutes of the Code Authority which have been received this morning as Respondent's Exhibits 127-A to 133-Z-7, will you state, Mr. Wormser, in what connection the discussions at those meetings took place and in what connection the action taken by the Code Authority at those meetings took place, generally?

A. The minutes of the Code Authority meetings reported the progress in drafting a code for the—I would like to just change that if I may.

Mr. Wright: Your Honor, I object to an answer to that question which states what the minutes report. The minutes on their face show what they report. Unless this can be added to from the witness' own knowledge—

Trial Examiner Norwood: Yes.

Mr. Ewing: I didn't mean him to paraphrase the 2350 contents. I was asking him, rather, in what connection or for what purpose these discussions took place and action was taken.

Trial Examiner Norwood: I will overrule the objection and ask him to answer it from that standpoint.

The Witness: These minutes were taken to cover the transactions of the Code Authority which had the responsibility of administering the code of fair competition for the lead industry.

By Mr. Ewing:

Q. Now, with respect to Respondent's Exhibits 134-A to 139 inclusive, representing minutes of meetings of the lead pigments division or its committees from July 1933 to and including June 5, 1934, will you state in what connection the subjects shown as being discussed by those minutes were discussed?

A. They were all discussed to draft a supplemental code of fair competition for the lead pigments division.

Q. And in what connection were the actions taken by those committees at their meetings during the same period, in evidence as Respondent's Exhibits 134-A to 139 inclusive, taken?

A. Did you say in what connection, Mr. Ewing?

Q. In what connection the actions taken by those committees—

A. They were all actions taken in connection with

2351 the code of fair competition for the lead industry plus the supplemental code of fair competition for the pigments division.

Mr. Ewing: I now offer in evidence—before I do that, Mr. Reporter, mark this for identification as Respondent's Exhibit 140.

Trial Examiner Norwood: It will be so marked.

(The document referred to was marked Respondent's Exhibit 140 for identification.)

Trial Examiner Norwood: Proceed.

Mr. Ewing: I offer in evidence page 4 of a pamphlet issued by the United States Department of Commerce, Census of Manufacturers in 1931, which is Respondent's Exhibit 140 for identification.

Mr. Wright: I would like to ask counsel the purpose for which that document is being offered. It doesn't appear to be relevant on its face.

Mr. Ewing: I am offering it to show the statistics as set forth with regard to the paint industry as a whole, showing the relative amount in this particular year of various forms of paint. The minutes of the executive committee which have been received show that the white lead use was decreasing and this shows the Department of Commerce figures in this particular year or years, I should say.

Trial Examiner Norwood: Is there any objection?
2352 Mr. Wright: I have no objection.
Trial Examiner Norwood: It will be received in evidence as Respondent's Exhibit 140.

(The document referred to, heretofore marked RESPONDENT'S EXHIBIT 140 for identification, was received in evidence.)

Mr. Ewing: Again we would like to substitute a photostatic copy of that.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: No objection.

Trial Examiner Norwood: All right, then. Proceed.

By Mr. Ewing:

Q. I show you, Mr. Wormser, the constitution and by-laws of the Lead Industries Association revised as of January 19, 1934, and ask you to read to yourself Article 2 thereof (handing same to witness).

A. I have read it.

Q. Did the Lead Industries Association collect and publish statistical information relating to the production, distribution, marketing, consumption and use of lead and lead products?

A. Yes, sir.

Q. And did the association disseminate accurate information regarding lead products and how they may best be used?

A. Yes, sir.

2353 Q. Did it develop methods for the improvement of the welfare of those engaged in the lead industry or in the use of its product?

A Yes, sir.

Q. Was it operated so as in general to promote the serviceability of the lead industry to the community at large?

A. Yes, sir.

Q. Now, I direct your attention to Article 3 of the constitution and ask you to read it to yourself.

A. I have read it.

Q. As far as you know, did the Lead Industries Association permit any agreement, understanding, combination or arrangement or any other form of concerted action to curtail production except as such action may have been taken during the NRA days?

Mr. Wright: Read the question, please.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"As far as you know, did the Lead Industries Association permit any agreement, understanding, combination or arrangement or any other form of concerted action to curtail production except as such action may have been taken during the NRA days?")

Trial Examiner Norwood: Answer the question.

The Witness: It never did.

2354 By Mr. Ewing:

Q. Did the Lead Industries Association, as far as you know, permit any agreement, understanding, combination or arrangement or any other form of concerted action to fix prices except as such action might have been taken during NRA days?

A. It never did.

Q. I ask you the same question with respect to the suppression of competition.

A. My answer is the same, it never did.

Q. I ask you the same question in connection with any attempt to restrain trade or commerce.

A. It never did anything of that description.

Q. I ask you the same question with respect to monopolization or attempts at monopolization.

A. It never did anything of that characterization.

Q. Will you state whether the objectives of the association as set forth in the constitution have, as far as you know, been followed by the association since its inception?

A. They have been religiously followed by the association ever since its inception.

Q. In your capacity as secretary of the Lead Industries Association having the duty under the by-laws of representing the executive committee as an administrative official, what action, if any, would you have taken had
2355 your attention been called to any attempt upon the
part of any line of the lead industry to fix and control prices?

A. I would have opposed it personally. I would have reported it to the executive committee. I would have called the attention to any party attempting that to Article 3 of our constitution which strictly forbids any such activity.

Q. I ask you the same question with respect to the curtailment of production with a view to attempted monopoly.

A. My answer is the same, I would have opposed it personally as against my own scruples and I would have reported it to the executive committee. As a matter of fact, I think I would have resigned from the association if anything like that had been attempted.

Q. I should have, in asking you, excluded from the question anything done during the NRA days.

A. Yes, sir; that is a reservation that I would also like to reserve to modify my statement to the extent that even in NRA days my executive committee was of the same mind. They wanted open competition and they have always had that stand. I personally have had that strong feeling.

Q. I ask you the same question with respect to the adoption of uniform terms and conditions of sale with the same qualification in regard to the NRA days.

A. My answer is the same on that; we would have resisted it.

2356 Q. Can you state of your own knowledge the attitude of the miners, smelters and refiners in the lead industry, with respect to any effort on the part of their consuming customers of lead products to secure a monopoly in any particular line of the business?

A. It would have meant—

Q. Just yes or no. Can you state of your own knowledge the attitude?

A. Yes, sir.

Q. Please state their attitude.

A. They would have raised violent objections to it for the obvious reason that they are dependent upon as broad a market as possible for the sale of their own production.

Mr. Wright: Your Honor, I move that that answer be stricken as so vague and indefinite as not to have any value.

Trial Examiner Norwood: Read the question and the answer.

(The reporter read the question and answer as follows:

Q. "Please state their attitude."

A. "They would have raised violent objections to it for the obvious reason that they are dependent upon as broad a market as possible for the sale of their own production.")

2357 Trial Examiner Norwood: I don't think—

Mr. Ewing: He answered the first question by saying that he could state of his own knowledge.

Mr. Wright: This answer wasn't a statement.

Trial Examiner Norwood: He can give us the facts relating to this policy or their actions and everything, but that is merely just speculation. I am going to allow the motion to strike that answer.

Mr. DuBose: Exception.

Mr. Ewing: Exception.

By Mr. Ewing:

Q. Were there a monopoly in the white lead or lead pigments industry, what would be the effect thereof on the lead outlets of the miners, smelters and refiners?

A. It would diminish the outlets for the lead miners, smelters and refiners.

Q. What, if you know, of your own knowledge, would be the attitude of miners, smelters and refiners in the lead industry with respect to a diminishing of their outlets?

Trial Examiner Norwood: I don't think that he can say what it would be.

Mr. Wright: I am not objecting to the question, but I am going to object to any answer which isn't based on evidentiary facts, however. I don't think that question could be answered by some broad general conclusion
2358 with the use of the word in such broad terms as "they."

Trial Examiner Norwood: Now, I will have to let it go by, but I am interested in maintaining a little consistency here.

Mr. Wright: Well, your Honor, then I will object to the question as calling for a broad conclusion.

Trial Examiner Norwood: I will sustain the objection.

By Mr. Ewing:

Q. What was the attitude of the lead miners, smelters and refiners in the lead industry with respect to any attempt to restrain trade on the part of their customers?

Mr. Wright: Objection.

Mr. Ewing: That is calling for a fact, what was their attitude, if he knows, of course.

Trial Examiner Norwood: I think that is a conclusion. He can state what they did or what they said that would indicate to him what their attitude was. After all, you are using the word "attitude" in the sense of their opinion, and I don't see how he can tell us what the other fellow thought.

Mr. DuBose: If he knows of his own knowledge.

Trial Examiner Norwood: How could he know of his own knowledge?

Mr. DuBose: If he knows of his own knowledge.
2359 These questions are predicated upon that. It is a question of fact.

Trial Examiner Norwood: I will sustain the objection. He can say as to what the policy of his association is as he knows it, and tell us why he knows it and give us any facts with regard to what their attitude would be.

By Mr. Ewing:

Q. What was the policy in your association of the miners, smelters and refiners in regard to practices in restraint of trade?

Mr. Wright: I object, your Honor. This question also calls for a broad general conclusion. I think that this subject is one that we can get to by getting at the evidentiary facts. I think it is susceptible of being proved in that way and since it can be proved in that way, one way or another, I don't think it should be proved by these broad general sweeping questions.

Trial Examiner Norwood: As secretary of this association—

Mr. Wright: He has already testified as to what the policy of the association was and I didn't object to those questions.

Trial Examiner Norwood: They are controlled all the time by their policy.

2360 Mr. Wright: This question goes to the attitude of individual smelters and miners and refiners and processors of lead.

Mr. Hinds: If your Honor please—

Trial Examiner Norwood: They are members of his association?

Mr. Ewing: That's right.

Mr. Hinds: If your Honor please, having in mind that this involves a charge of a conspiracy and that we are before an administrative tribunal, it occurs to me that even if this question should be the subject of some technical consideration, a little more latitude should be given to the people charged with conspiracy and the Court will not be properly influenced that is not evidentiary that has some probative value. But I bespeak a more broad view on the rules of evidence than is applied by our apponent's objection here.

Trial Examiner Norwood: Now, I think these matters come inside of the realm of opinion evidence, and I think we will have to confine this to the expressed policy of this organization.

Mr. Ewing: I confined this question following one of your suggestions, in part, to the expressed attitude of a certain portion of the membership of this association, and I submit that that is perfectly proper.

2361 Mr. Wright: I call your attention, your Honor, that this question goes to the attitude of individual companies and individual members, not to the collective attitude and policies of the association. That has already been testified to and I made no objections to this witness' testifying as to the policy of the association. But now we are getting into another realm which is the realm of the individual policies of a number of members who are all listed here and whose attitude, if it were pertinent to this issue, could certainly be proven—

Mr. Ewing: As expressed in their meetings which directed Mr. Wormser, in operating the association—

Trial Examiner Norwood: I was not sufficiently specific in my remarks a while ago. I didn't use the word "expressed," but counsel have clarified the thing in the discussion, and you must confine it to the expressed policy. I will allow that and overrule the objection with that understanding.

Mr. Wright: Do I understand, your Honor, that the policy as expressed in their activities to the Lead Industries Association—

Trial Examiner Norwood: Yes, expressed to him any time. He can tell what their policies are, if he knows.

Mr. Ewing: That is what my question asked for.

Trial Examiner Norwood: But he must base it on 2362 facts and not mere conclusions.

Mr. Ewing: I have forgotten my question actually, but my question was intended to call for a statement by Mr. Wormser, if he knows if there was any such thing showing the expressed attitude or position taken by miners, smelters and refiners in the Lead Industries Association with respect to the practices of any kind in restraint of trade.

Trial Examiner Norwood: If you will put in these expressions themselves and the factual matters on which he bases that, I think it would be more satisfactory to everybody including yourself.

Mr. DuBose: We have various expressions in the executive committee minutes and in the directors' minutes and this question would be in part based upon those.

Trial Examiner Norwood: I will permit him to answer this question but please don't take it as a precedent.

Mr. Wright: Exception.

Trial Examiner Norwood: Answer the question.

The Witness: May I have the question read?

By Mr. Ewing:

Q. I will rephrase the question and see if I can bring it within the confines.

Will you state the attitude of miners, smelters and 2363 refiners, members of the Lead Industries Association as expressed to you or in your presence with respect to any practices in restraint of trade?

Mr. Wright: The same objection, your Honor.

Trial Examiner Norwood: Overruled.

The Witness: Your Honor, may I go a little bit into the history of the association to answer that question?

Trial Examiner Norwood: Certainly.

The Witness: Well, from its very inception, being an organization comprised of lead mining, smelting, refining and manufacturing companies, the principle was always put to me that we must expand our markets to develop the national resources of the United States in lead to the utmost. It is quite obvious, therefore, that if the lead miners were to subscribe to any monopolistic practice of any of the consumers represented in their association, their own feelings, their own principles, would be distinctly violated and the association would disintegrate. By the same token, the manufacturers have a distinct interest in seeing that the price of lead is kept at as low a value as possible so as to keep their competitive position strong. And they would naturally be adverse to seeing any monopolistic practice among the miners or the smelters and refiners. And that very setup that we have had from the very start makes me walk a chalk line. The association cannot 2364 possibly engage in any monopolistic activity on any side of the fence without disintegrating.

Mr. Wright: I move to strike the answer as not responsive. It is the witness' own conclusion as to what the attitude of the members might have been.

Mr. Ewing: I would like to ask him one more question before your Honor rules.

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Does what you have just stated, Mr. Wormser, represent actual expressions of the views of the miners, smelters and refiners made to you from time to time?

Mr. Wright: I object, your Honor. The witness has just stated that those are his own opinions.

Trial Examiner Norwood: I think that the previous answer was pure argument.

Mr. Wright: It was an expression by the witness himself.

Trial Examiner Norwood: Yes. I will allow the motion to strike it.

Mr. Ewing: May I have the question read to Mr. Wormser again and see if he can respond to it?

Trial Examiner Norwood: Yes. If you can answer that
in a factual way, do so. Let the Commission's counsel and
the rest of us try to put these facts together and see
2365 the reasons on it. We are asking you to give the facts
on which we can base our reasons. Read the question.

(The reporter read the question as follows:

Q. "Does what you have just stated, Mr. Wormser, represent actual expressions of the views of the miners, smelters and refiners made to you from time to time?")

The Witness: I don't know whether the factual statement I recently made before the Committee on Public Lands of the House might serve your purpose, your Honor, but in that I clearly stated that our association wants free, fair and open competition, or words to that effect. And I think that expresses the policy of the association.

Mr. Wright: I move to strike it as not responsive. Again it is a statement of the witness' own opinion as to what the association stands for and the policy of the association. The question went to what the individual members—

Trial Examiner Norwood: Motion denied. Go ahead.

By Mr. Ewing:

Q. Mr. Wormser, is the development of efficiency in production and distribution through technical research, technical advisory service, market and merchandising research, an objective of the Lead Industries Association?

Mr. Wright: I object.

2366 Trial Examiner Norwood: Sustained.

Mr. DuBose: Upon what ground, your Honor?

Trial Examiner Norwood: It is leading.

Mr. Wright: Presumably this witness knows what the objective of the Lead Industries Association are. I don't want the record to show him either ratifying or failing to ratify Respondent's statements.

By Mr. Ewing:

Q. What, in your opinion, was the principal objective of the Lead Industries Association?

A. The principal objective of the association was to promote a wider use of lead in all its forms throughout the United States.

Mr. Ewing: That concludes our cross examination.

Trial Examiner Norwood: Cross examine.

Mr. Wright: First of all, I want to make inquiry of counsel. Was Mr. Wormser called as a witness of the Respondent's as a whole or was he called as a witness of the National Lead Company?

Mr. Ewing: I don't know what the answer to that is. I called Mr. Wormser. Certainly he was called as my witness and I would take it that the evidence that he gives to the extent that it is in the record is binding on everybody.

Trial Examiner Norwood: Yes. That is binding as
2367 it may be connected by the whole record.

Mr. Ewing: That's right.

Mr. DuBose: As it may be connected against the other Respondents.

Mr. Ewing: For or against, or however it is.

Trial Examiner Norwood: He is the witness for the association to which all the Respondents belong.

Mr. Ewing: Well, that is not quite true because the association isn't a party here and neither is Mr. Wormser. And while we are represented in the association, there are as you know a great many others represented in the association, too. So that he is not here testifying for the association. He is here testifying as to the facts that he has known with respect to the association and what the association did except where he testified as an expert.

Trial Examiner Norwood: I think it is clear now. We will have a five-minute recess at this time.

(Whereupon, a five-minute recess was taken.)

Trial Examiner Norwood: Come to order. Proceed.

Cross-Examination by Mr. Wright.

Q. Mr. Wormser, will you state again for me the various divisions and sub-organizations of the Lead Industries Association?

2368 A. Yes, sir. We have a mining division, a smelting and refining division, a lead pigment division and a metallic lead products division.

Q. And then you have the executive committee and the Board of Directors?

A. Yes, sir.

Q. Now, these exhibits that we have received comprise all of the minutes, do they not, of the executive committee, the Board of Directors and the pigments division?

A. Yes, sir.

Q. What sub-divisions are there under the pigments division or other sub-organizations which would have anything to do with lead pigments?

A. Well, under the pigments division we had a white lead in oil section, if you will, and then—

Q. Those minutes of the white lead in oil section are all in; is that right?

A. Yes, sir; and also the dry products section which would cover dry white lead and the lead oxides.

Q. Well, now, on these minutes which have been received this morning, Respondent's Exhibits 135 and 136 and their sub-numbers, they were the dry products division, as I recall it?

Mr. DuBose: Not all of them, I don't think.

2369 By Mr. Wright:

Q. These two particular ones, whereas Exhibit 137 and 138 were the lead oxides.

A. I will have to refresh my memory on that.

Q. Yes. I am referring now to the meeting of July 19th. It was received as Respondent's Exhibit 135-A and B.

Mr. DuBose: Exhibit 134, I think it is.

By Mr. Wright:

Q. I am talking about July 9th. Excuse me, August 9th. August 9th and September 6th, those were the dry products sections?

A. August 6th was dry products—

Mr. DuBose: August 9th.

The Witness: August 9th was dry products but September 6th was white lead in oil. There were two for September 6th. There was also a dry products meeting on September 6th.

By Mr. Wright:

Q. Will you refer to the meeting on December 14th and 15th, 1933, which is in evidence as Respondent's Exhibit 137-A and B?

A. Yes, sir.

Q. What sub-divisions were those meetings?

A. That was the lead oxide committee of the lead pigments division.

2370 Q. Well, now; is that a sub-division of the dry products section?

A. Yes, sir; because we had dry white lead and dry oxides which had different problems.

Q. Well, now, the dry products committee then handled dry white lead; is that correct?

A. And also the dry oxides.

Q. And also the dry oxides?

A. Yes, sir.

Q. But there was a separate sub-division for dry oxides?

A. Yes, sir.

Q. And for dry white lead?

A. Yes, sir.

Q. All of the minutes of the meetings of those various sub-divisions are all in evidence?

A. Yes.

Q. Were there any other organizations in the period of time from the beginning of the Lead Industries Association to the present, which had anything to do with lead pigments?

A. When you say, "had anything to do," sir, I don't know whether you mean—for example, there was a paint industry and, of course, they have something to do. There is the National Paint, Varnish and Lacquer Association.

Q. I am talking about in the Lead Industries Association.

2371 A. I see what you mean, no, sir.

Q. Was there a red lead committee?

A. I would have to refresh my memory because we had red lead and litharge as part of the oxide activities of the association. And, of course, the litharge problems were different from the red lead problems. So I believe we set up both a red lead committee covering paint, and litharge for, say, storage batteries which was the largest outlet for litharge.

Q. Well, now, would the lead oxides committee cover the red lead activities of the association?

Mr. DuBose: What period are you talking about?

Mr. Wright: I am talking now about the period back in 1933 and 1934.

Mr. DuBose: You are referring to the code period then?

Mr. Wright: To the code period, but I want to bring it up to day.

The Witness: They were all, Mr. Wright, under the Lead Oxide activities of the association.

By Mr. Wright:

Q. Was there any separate organization dealing with red lead or litharge which met in that day?

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A. No, sir.

Q. Has there been since any organization?

2372 A. We have a red lead technical committee but
that has no bearing on this matter at all.

Q. What was the function of that red lead technical committee?

A. That red lead technical committee is a committee composed of laboratory technicians designed to improve the formulation of red lead in metal protective paints.

Q. Has the Lead Industries Association had any red lead program as such?

A. When you say a "red lead program," do you mean a promotional program?

Q. Any sort of a program known as a red lead program.

A. During code days, or are you referring to any time in our history?

Q. No, sir. I am referring to any time in your history.

A. Yes, sir. We have a program under way right now which is designed to promote the use of red lead in paint.

Q. What is that program known as, or how is it carried on your records?

A. It is our red lead research program.

Q. How does that differ from your red lead technical committee? Are those activities combined?

A. It is the same; it is synonymous.

Q. When was that program initiated?

A. During the war. I would say 1943, without re-
2373 freshing my memory, but I think that is about the
time. It was designed to strengthen our competitive position against competitive materials made out of zinc chromate and aluminum and iron oxide and other competitive products.

Q. I direct your attention to a document which has heretofore been marked as Respondent's Exhibit 102-I, which purports to be a financial statement for the red lead division, 1943.

A. Yes, sir.

Q. Will you state what that red lead division was?

A. That is again the technical program in which our red lead division, with the assistance of the lead mining companies, has engaged in for this period January 1st to November 30th.

Q. When was that red lead division represented by that financial statement, started?

A. If I could refresh my memory on my annual report

—it is distinctly in the reports. I would say offhand, Mr. Wright, without it being held against me, that it must be 1943 or possibly 1942. It was during the war. It was no earlier than the war, I will put it that way, perhaps no earlier than 1942.

Q. Now, I understood your testimony, Mr. Wormser, to be that you were thoroughly conversant and familiar with the business of the various concerns listed in Com-
2374 mission's Exhibit 498, 499 about which you testified earlier in the week, namely, a list of members of the Lead Industries Association at various times and the directors and officers of the Lead Industries Association.

A. Did I say thoroughly conversant?

Q. That was my understanding of your testimony.

Mr. DuBose: He was just asked to identify them, Mr. Wright.

By Mr. Wright:

Q. As I recall your testimony, you identified them as members and also stated what their principal business was.

A. I correct that.

Q. And you also stated as to where a number of their plants were located.

A. Yes, sir.

Q. Now, I call your attention to 498-A, the evidence shows the Evans Lead Company of Charleston, West Virginia.

A. Yes, sir.

Q. What was the principal business of that company?

A. The manufacture of lead oxides.

Q. Where was that plant?

A. In Charleston, West Virginia.

Q. Do you know what the production in that plant was in that period, say, in 1933 and 1934?

A. I don't recall, Mr. Wright.

2375 Q. I notice that the Evans Lead Company is still carried as a member of the Lead Industries Association; is it not?

A. Evans Lead Division.

Q. I call your attention to the Evans Lead Division, National Lead Company, in Commission's Exhibit 498-Z. When did the change in that member's status occur?

Mr. DuBose: Mr. Wright, that is already in evidence. Last year Mr. Merson testified with respect to that. I don't see the purpose of this cross-examination. I object to the question.

Trial Examiner Norwood: Wait a minute, let him go ahead.

Mr. DuBose: I object to the question.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows: "Q. I call your attention to the Evans Lead Division, National Lead Company, in Commission's Exhibit 498-Z. When did the change in that member's status occur?")

Trial Examiner Norwood: Objection overruled. Answer that, if you know it.

The Witness: From our records it appears that it occurred in 1944.

By Mr. Wright:

Q. Do you know when the National Lead Company 2376 acquired the Evans Lead Company?

A. I don't recall.

Q. I call your attention to the Andrews Lead Company, Inc., of Long Island City, New York, on Commission's Exhibit 498-F and I see it does not appear on Commission's Exhibit 498-H. What happened to that company; can you tell us?

A. I think the Andrews Lead Company was absorbed by the American Smelting and Refining Company.

Q. What was the business of the Andrews Lead Company?

A. The Andrews Lead Company made metallic lead products and also some lead oxides.

Q. I call your attention in Commission's Exhibit 498-D, to Wetherill and Brother, Philadelphia, Pennsylvania. What was the business of that concern?

A. Manufacturers of white lead.

Q. Did they manufacture white lead in oil or dry white lead or both?

A. I believe they manufactured both.

Q. I call your attention to the subsequent list of members of the Lead Industries Association on which Wetherill and Brother does not appear. What happened to that company, do you know?

A. I think it was taken over by the National Lead Company.

Q. Do you know about when it was taken over?

2377 A. I would have to refresh my memory through a search of the records, Mr. Wright. I don't recall the exact year. It is quite a few years ago. There is not enough data here for me to indicate what it was.

Q. Mr. Wormser, in the past few days you testified as to a good many statements of facts regarding these meetings of the various divisions of the Lead Industries Association during the period 1933 and 1934. Just how clear is your recollection of those meetings?

A. None too clear, I am frank to confess, Mr. Wright, but clear enough to get a pretty good idea of what transpired during that period.

Q. Can you recall any specific conversations as to these meetings? Has your recollection been sufficiently refreshed by reading these minutes to picture those minutes and to have independent recollection of who was there and what went on?

A. I can't answer yes to that, Mr. Wright.

Q. In other words, the answer would be no?

A. Well, I have certain episodes that stand out vividly in my memory and also will stand out and others that are very vague indeed.

Q. Well, now, as to specific meetings that occurred back in that time, could you, without consulting the minutes,
tell where they were held and who was there and the
2378 subjects that were discussed?

A. No, sir; I could not.

Q. In other words, most of your information comes from reading the minutes; is that correct?

A. Yes, sir.

Q. And not from any independent recollection of what occurred?

A. Oh, vague as it may be, I have recollections of what went on refreshed by a perusal of the minutes.

Mr. Wright: May we go off the record, your Honor?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: Your Honor, we have run practically four days here and received a mass of documents, quite a good many of which I would like to examine with respect to this witness, and I respectfully request that the cross examination be deferred until May 7th and 8th in Washington, I believe was the time suggested by the counsel, and it would be convenient to them and the witnesses.

Mr. Ewing: That is quite satisfactory subject to the acts of God and so forth.

Trial Examiner Norwood: It is out tentative plans, then, to go ahead with the reception of further evidence with the Respondents beginning in Washington on 2379 the 13th of May.

Mr. Ewing: That's correct.

Trial Examiner Norwood: And that we will make plans at that time for future activities. The motion is allowed and by agreement of counsel we will now adjourn to reconvene in Washington, D. C. in Room 332, Office of the Federal Trade Commission at 10 o'clock a.m., whatever time is prevailing in the City, on the 7th day of May.

It is understood that the witness is now excused and directed to appear in Washington to give further testimony.

(Witness excused.)

(Whereupon, at 2:10 o'clock p.m., the hearing was adjourned to May 7, 1947 at 10 o'clock, a.m. in Washington, D. C.)

2380

Room 532, Federal Trade
Commission Building,
Washington, D. C.,
Wednesday, May 7, 1947.

Met, pursuant to adjournment, at 10:00 a.m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

Edmund P. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, appearing for Eagle Picher Lead Company and Eagle Picher Sales Company.

Robert H. Ecker, (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.) appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James D. Ewing, Esq., and E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

John A. Duncan, 1649 Union Commercial Building, Cleveland 14, Ohio, appearing for the Glidden Company.

2381 PROCEEDINGS.

Trial Examiner Norwood: Pursuant to adjournment in New York on the 25th of April, the hearing in Docket 5253 is now convened in Room 532 of the Federal Trade Commission Building, Washington, D. C., at ten o'clock a.m., on the 7th day of May, 1947.

The appearances are as follows:

Joseph S. Wright, appearing for the Federal Trade Commission.

Edmund P. Wood, appearing for Eagle Picher Lead Company and Eagle Picher Sales Company.

Robert H. Ecker, appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James D. Ewing and E. Z. DuBose, appearing for the National Lead Company.

John A. Duncan, appearing for the Glidden Company.

Mr. Felix E. Wormser will resume the stand for cross-examination.

Mr. Duncan: If your Honor please, may I say, on behalf of the Glidden Company and the other respondents, we are making an application to the Examiner at this time to change the schedule for the May 13 hearing which was to begin in Washington, so that it will begin in Cleveland rather than Washington, for this reason:

The testimony to be offered at the May 13 hearing
2382 will be testimony, I believe, on behalf of the Glidden Company, and it really would be a great accommodation to those witnesses if the hearings were to be held in Cleveland rather than in Washington, starting May 13th. I realize that today, being the 7th of May, this is pretty short notice to counsel representing the Federal Trade Commission and to you, but I do feel that in as much as your Honor came to Cleveland when the government was putting on its case that, in the circumstances, if May 13 is too short a notice, I suggest then that the date be put off say until the following week, say May 20, in order to accommodate the witnesses who will testify on behalf of Glidden.

I realize that this is a discretionary matter on the part of the Examiner, but I do feel that in the circumstances it would be a great accommodation to the witnesses.

Trial Examiner Norwood: How many witnesses do you have there?

Mr. Duncan: I don't want to say exactly because I don't know at this time, but I know that there will be more than two witnesses, and I feel that, with the exhibits which have been made up, and which will be offered, and the fact that Cleveland is the home office for the Glidden Company, that, frankly, it would really be of great benefit to us if you would have the May 13 hearing in Cleveland rather than here in Washington.

Mr. Wright: I have no objection, your Honor, to 2383 that. I appreciate it would be a convenience to respondents in the matter. I also have no objection to going ahead on the 13th rather than postponing it to the 20th. As a matter of fact, I would rather have it on the 13th than the 20th, so far as my personal plans are concerned.

Trial Examiner Norwood: We have come to an understanding about this hearing and it is absolutely impossible for me to go to Cleveland on the 13th and I don't want to postpone the case any further. Inasmuch as you have only three or four witnesses it will be much less expensive to the other respondents and to the government people to have the hearing in Washington as appointed. I don't want to change our arrangements on that.

Mr. Duncan: I see.

Trial Examiner Norwood: I don't think it is necessary to go over there for two or three witnesses and to move the whole hearing over there. Now, it is different when we arranged a series of hearings outside of Washington and stopped in Cleveland a couple of days on the way to Chicago, and so on, as we did before. That is a different matter.

Mr. Duncan: Of course, I realize it is discretionary with you, but I feel—we are not trying to stall the matter.

Trial Examiner Norwood: I understand. It is a matter of your coming to Washington or our taking the lawyers and reporters, and everybody, over there to Cleveland 2384 to hear two or three witnesses.

Mr. Duncan: We have Attorney Ed Wood who comes from Cincinnati. Cleveland is nearer for him than Washington. From the standpoint of Mr. Ewing and Mr. DuBose, who come from New York, I frankly don't think it makes a particle of difference to them.

Trial Examiner Norwood: I cannot accede to counsel's request.

Mr. Duncan: Am I to understand that May 13 is the date and that you will proceed in Washington?

Trial Examiner Norwood: In Washington, D. C., unless we come to some further arrangement about it. We will talk about it off the record.

Mr. Wormser, will you resume the stand.

Proceed wit the cross examination.

FELIX E. WORMSER, a witness called by the respondents, having been previously sworn, resumed the stand and testified further as follows:

Cross-Examination by Mr. Wright.

Q. Mr. Wormser, you testified on direct examination regarding the location of the smelters and refiners of pig lead in the United States. You mentioned a plant at Galena, Kansas, as I recall. What is that plant at Galena?

A. That is a lead smelter owned by the Eagle
2385 Picher Company for handling the local concentrates
from the tri-state and surrounding mining areas.

Q. What is the tri-state area?

A. The tri-state area is essentially a zinc producing area, comprising—comprised of the corners of three states, Missouri, Oklahoma, and Kansas, coming together. That happens to be the largest single source of zinc in the United States and they get some lead as by-product.

Q. The area falls into the corners of those three states?

A. That is correct, sir.

Q. Does the National Lead Company have any processing plant at Galena?

A. No, sir.

Q. Are any pigments produced at Galena?

A. Yes. Some sublime pigments are produced there. That is sulphates from treating the concentrates, the lead concentrates, directly in specially designed furnaces to produce a lead sulphate.

Q. That is basic lead sulphate?

A. Yes.

Q. Who produces the pigments?

A. Eagle Picher.

Q. Will you tell us how pig lead is priced in the United States?

A. Well, I think I can explain it best to you by
2386 stating that it is a world,—it is a commodity that is produced in various parts of the world.

Q. May I interrupt there? I don't think you understand what I have in mind. How are prices for pig lead at different localities in the United States calculated?

A. Well, I think even to—we have two markets in the United States, two major markets, New York and St. Louis, but then there are many other markets which reflect the principal consuming centers of pig lead, particularly along the eastern seaboard, where the greatest amount of lead in the United States is used, so that I might also say there is a market in the Philadelphia area, in Cleveland, Buffalo, dozens of points all over the United States.

Q. You say there is a market. What do you mean by that?

A. Well, I mean that there is a price of lead which represents today, for example, what it would cost to buy lead in that particular point.

Q. What is the price of lead in St. Louis today?

A. The price of lead in St. Louis today would be 14.80 cents per pound.

Q. What is the price of lead in New York?

A. Fifteen cents per pound.

Q. Then there is a 20-cent spread at the present time?

A. Yes, sir.

Q. What is the corresponding quotation in Chicago?
2387 A. I think it is 14.85 or ninety, I am not certain. It varies a bit. I say 14.80. Probably if you picked up trade papers today you would find several quotations reflecting the St. Louis market.

Q. Several quotations?

A. Yes, sir, several different quotations. I would say in Chicago it is five to ten points higher, although Chicago also has its market.

Q. Five or ten cents higher than St. Louis?

A. That is right.

Q. But below New York?

A. Yes, sir, below New York.

Q. What is the present relation between the market in Philadelphia and New York?

A. I think Philadelphia and New York are about on parity.

Q. Has that been the case over a considerable period of years?

A. For quite some time, I should say, because Philadelphia and New York, and Baltimore and Boston, and other points along the seaboard, are ports of entry for foreign lead, that is, Mexican lead, Peruvian lead, Australian lead, and other foreign lead coming into the United States.

Q. Back in the period say from 1933 to 1936, what was the relation between those ports and New York?

2388 A. Well, I would say they were very close together, Mr. Wright. I would hate to rely on my memory to give you exact figures.

Q. In that period was there any considerable amount of Peruvian or Mexican lead coming into the United States for consumption here?

A. No, in those days a comparatively moderate amount compared with the tonnage we have to import now.

Q. Was that ordinary pig lead consumed from foreign sources in those times, or was that a special variety?

A. No, sir, that was commercial pig lead, mainly from Mexico.

Q. What are the different common grades of pig lead?

A. We have a common desilverized lead which I would say would be the lead that was quoted in these markets that we are discussing.

Q. Is that the base lead?

A. Yes, that is the base lead, because the other grades generally command a premium of maybe a dollar or $2 a ton. We have a corroding grade of lead which is a very pure form of lead and does command a premium over common lead.

Q. What is that premium customarily?

A. Two dollars a ton, I would say on the average. Then we have chemical lead, which is a natural copper-bearing lead. That comes from Missouri, and is very popular where high corrosion resistance is demanded. Wherever sulfuric acid, for example, is used.

2389 Q. Does that command a premium?

A. Yes, sir, of $1 to $2 a ton. Then we have synthetic copper-bearing lead corresponding to the chemical grade and which commands a premium. Of course, we have antimonial lead, but we need not consider that, that is more or less a specialty. I would say common lead, corroding and chemical are the there great leads.

Q. On the antimonial lead, how are prices quoted?

A. That varies, Mr. Wright. I would say it depends on the market, how strong a demand there is for it. Currently, with antimony so scarce, it is difficult to obtain antimonial ~~lead,~~ and it commands a price reflecting the cost of the lead in the antimonial lead plus the antimony, but there have been times in the past when antimonial lead has been a drug on the market and has been sold at a price equal to lead and I believe at times even lower.

Q. What times are you referring to?

A. Well, I would say back in around the thirties, early thirties. At the time of the depression in 1931 to 1934, thereabouts.

Q. Well, was the customary way of selling antimonial lead in the period subsequent to 1934 to compute the price by taking the price of the pig lead contained in the alloy plus ~~the price~~ of the antimony?

A. That is the way the seller would prefer to sell
2390 it if he could get that price, ~~but the~~ market will often not permit him to do that and he has to sell it substantially below that.

Q. Now, in the period from 1934 to 1941, what was the customary differential between New York and St. Louis on pig lead?

A. I would say it was about 15 points. $3 a ton, Mr Wright.

Q. That would mean 15 cents a hundred pounds?

A. Yes, sir. .15 cents per pound.

Q. Is there is a market in Dallas, Texas?

A. Yes, sir.

Q. What is the relation of that market to the St. Louis market?

A. Well, I can't trust my memory to that. I think I can answer in just a moment, referring to a paper, some records I have here.

Dallas, Texas, takes the New York market.

Q. What is the Atlanta, Georgia, market?

A. Atlanta, Georgia, .05 cents per pound above New York.

What is that document to which you are referring?

A. This is the official order of the Office of Price Administration issued on June 3, 1946, covering its revised price schedule 69 on primary lead.

Q. Is that order still in effect?

A. No, sir.

Q. Over what period of time was it in effect?

A. Well, this particular order is a revision of an

earlier order that was in effect on the establishment
2391 of the OPA in the early days of the war, I would say
1942 to 1946, say four years, and this order reflected an increase in price granted by the OPA raising the official ceiling from six and a half cents to eight and a quarter cents.

Q. Now, under that order, what was the differential between New York and St. Louis?

A. Fifteen points, I believe. Fifteen points.

Q. What was the differential at Chicago over St. Louis?

A. Five points.

Q. When you speak of five points, do you mean five cents per hundredweight?

A. I mean .05 cents per pound.

Q. .05 cents?

A. Yes.

Q. What was the market in Cincinnati?

A. In Cincinnati—it took the New York market.

Q. How about Scranton?

A. Scranton took the New York market.

Q. What was the market at San Francisco?

A. As I recall it was also—no. Yes, also New York.

Q. Well, then, am I correct in my understanding that St. Louis has the lowest price customarily for lead in the country?

A. Well, when you say the lowest price you mean the lowest price of the refined metal?

Q. Yes, sir.

2392 A. I think that is correct, although theoretically,
sir, there are refineries in the west who might be shipping to the eastern points and if you figure their net price it would still be less than St. Louis, but for all practical purposes the St. Louis price is the lowest.

Q. What is the market price in Great Falls, Montana?

A. The market price a Black Eagle, which is close to Great Falls, that is also New York.

Q. Are there any markets in Idaho?

A. Idaho, at Bradley, where the Bunker Hill Smelter is located, that also is the New York price; eight and a quarter.

Q. When they ship back to the eastern refineries their net would be considerably less—or to the eastern processors, their net would be considerably less on the refined lead than the market price at that point?

A. If they deduct this cost of delivering and consider that they sell on that market, that is true.

Q. Do you know what the freight rates are on pig lead per hundredweight from St. Louis to New York?

A. I think it is about 35 points. I am not certain of that, though, I haven't looked it up recently.

Q. Thirty-five points of a cent per pound?

A. Thirty-five one-hundredths of a cent per pound.

Q. Or 35 cents per hundredweight?

A. Yes; 35 one-hundredths. But there again I
2393 would hate to trust to my memory. I could easily
verify that for you, sir, if you would like to have it.

Q. On this 15-cent differential between St. Louis and New York, was that a customary differential over a long period of time prior to the maximum price order?

A. It has been rather uniform, Mr. Wright, yes.

Q. Back to what period?

A. There again I would hate to trust to my memory, Mr. Wright. I would say at least in the late twenties.

Q. It has obtained since approximately that time?

A. That is my feeling.

Q. You mentioned in your direct testimony, I believe, either a smelter or refinery in Houston, Texas. Am I correct in my recollection of that?

A. I don't think I did, Mr. Wright. There is a secondary refinery there working on scrap lead. No primary refinery.

Q. I see.

A. There is a primary refinery at El Paso. Perhaps that is what you had in mind.

Q. Mr. Wormser, I recall that you testified on direct regarding the London market on pig lead and the American market. I call your attention to a document appearing as Respondents' Exhibit 28-D, which is part of a directors meeting of the Lead Industries Association on November 26, 1929, indicating that the Association exchanged statistics with the Lead Producers' Reporting Asso-
2394 ciation in London. Did the Associations exchange
data?

A. No, sir; that was never put into effect.

Q. Were you familiar with the market in London on pig lead?

A. I was familiar with the fluctuations in the market, yes, sir, and the forces acting on the London market.

Q. Are you familiar with the quotations of prices on the London market that appear from time to time in the Engineering and Mining Journal?

A. Yes, sir.

Q. Is that a reputable and reliable source of information on market prices for metal products?

A. It is.

Q. Do you recall the characteristics of the quotations in the period from 1933 to 1939 on—spot quotations—on the London Exchange on pig lead?

A. Mr. Wright, I don't without refreshing my memory.

Q. Mr. Wormser, I show you some photostats of some documents and ask you if those will refresh your recollection of those matters.

During the year 1936 was the London market, spot market for pig lead, one which fluctuated up and down from day to day?

A. Yes, sir.

Q. So that very seldom there would be a price which would hold for more than two or three days?

2395 A. That is correct, sir.

Q. During that same period what was the characteristic of the New York and St. Louis market on pig lead?

A. They were very steady according to these figures. In fact, it looks from the record here that in February there was a little fluctuation up and down from a 4.50 New York price to a 4.60 price, which held until September.

Q. Of 1936?

A. Yes.

Q. Without any further fluctuation?

A. Without any further fluctuations.

Q. Do I understand you to state that pig lead was sold on a highly competitive market both in the United States and on the world market?

A. Yes, sir.

Q. Is it your idea of competition that a spot quotation price on basic commodities should stay without change over a long period of time?

A. Well—

Mr. Ewing: I will object to that, if your Honor please.

Mr. Wright: On what ground?

Mr. Ewing: His "idea of competition."

Mr. Wright: Your Honor, this witness has been qualified as an expert in the marketing of all of these 2396 products and has testified about competitive conditions generally and has expressed his opinion. I believe on cross-examination I should have equal latitude.

Mr. Du Bose: The form of the question is hardly asking for his opinion. It asks for his "idea."

Trial Examiner Norwood: I think that is pretty good. Overruled.

Do you want the question read?

The Witness: Yes, sir.

Trial Examiner Norwood: Read the question.

(The question was read as follows:

"Is it your idea of competition that a spot quotation price on basic commodities should stay without change over a long period of time?")

Mr. Du Bose: That is argumentative, if your Honor please.

Trial Examiner Norwood: Let him answer.

The Witness: I still think you can have a highly competitive market, even under those conditions.

By Mr. Wright:

Q. Now, wasn't the year 1936 one of general economic distress?

A. It was.

Q. Were conditions the same throughout the whole year?

A. That I wouldn't be able to answer offhand, Mr. Wright.

2397 Q. You would consider it competition if a price be maintained without fluctuation over a period of months in time of economic distress?

A. Well, Mr. Wright, to get behind that question, if you are asking for my opinion, talking about distress, I have in mind the distress of miners in the west, who operated all sorts of properties, little properties, medium-sized properties, and so forth. With men thrown out of work, that was distress. These men wanted to get as much as they could for their lead. To ask them to go down, up and down, on a fluctuating market, would be just chaotic.

Q. That lead then was mined under many different types of operation?

A. Yes, sir.

Q. And the costs of the mining were widely different, too?

A. Very widely fluctuating.

Q. Mr. Wormser, at the hearing on April 22nd in New York, you testified according to the record at page 2153. I direct your attention to your answer that appears from line 7 through line 21 on that page. (Handing transcript to the witness.)

A. I have read it, Mr. Wright.

Q. What was the basis of your answer to the effect that the industry was very loath and reluctant to enter into a NRA Code and that you were asked by the officials of the NRA to provide some supplemental trade practices?

A. Simply that my Executive Committee and
2398 Board of Directors entered with no enthusiasm what-
soever into the whole NRA idea. We were one of the last industries I believe that even considered the idea of formulating a Code. After we had gotten under way it looked as if we should only have a labor code. Thereupon Mr. Janssen, then the Deputy Administrator, and Mr. McFarland of the legal department, came to me and talked to some of the board members and insisted that we have some trade practices.

Q. Who insisted that?

A. Mr. Janssen and Mr. McFarland of the legal department at that time. They were quite insistent that we have some trade practice or some supplementary code, put it that way, which would, presumably, give us something in return for our going along with this labor idea of the Administration.

Q. What do you mean, "give you something in return"?

A. Well, it was quite obvious in those days that industry was by acceding to the desires of the Administration to limit hours in order to spread work, and to have other labor privileges recognized by code, that industry in return should have an opportunity to do things which normally would be frowned upon by the authorities, in the way of getting together for, if you will, putting it brutally, price fixing, or devising trade practices that would stabilize industry, and so forth.

Q. When did the matter of possible NRA code first come up in any division of the lead industries association?

2399 A. Mr. Wright, I would have to look through the records to answer that question, sir. I don't recall offhand.

Q. I direct your attention to Respondents' Exhibit 42-A, directors meeting minutes of June 15, 1933, paragraph headed, "1. National Industrial Recovery Act." Do you recall that meeting?

A. Yes, sir.

Q. It appears from the minutes that the National Industrial Recovery Act had not yet been enacted into law at the time of that meeting.

A. That is right.

Q. Yet the board of directors was at that time contemplating the drafting of a code.

A. Well, it was quite obvious that we as an industry, if Congress choosed to pass the National Recovery Act, would be expected to do our part, and of course, one of the first things that was promulgated was this, as I recall it, President's Reemployment Agreement, which involved the accumulation of labor, hours worked, and wages paid, and so forth, under the theory that the Recovery Act would spread employment. So that was our effort to go along with the wishes of Congress.

Q. At that meeting you were directed to contact the officials in Washington for the purpose of discussing a program which the Lead Industries Association might adopt as appears in the minutes of that meeting?

2400 A. Yes, sir.

Q. Exhibit 42-F.

A. Yes.

Q. You went to Washington, did you, in response to that direction?

A. Yes, sir.

Q. Who prepared the first draft of the NRA Code, Mr. Wormser?

Mr. Du Bose: Are you talking about the supplemental code?

Mr. Wright: The supplemental code, yes.

The Witness: I don't recall, Mr. Wright. I think a group of us sat down to draft it at one of those meetings that we had.

By Mr. Wright:

Q. When was that, in the summer or was it in the fall?

A. That I wouldn't be able to help you on either without referring to the records. It is all in our records, whatever it was that we did.

Q. Then there is a complete story in here of what was done in regard to the various drafts?

A. Yes, sir; that is a complete record.

Q. Including the insistence of NRA officials that you adopt supplemental provisions?

A. I think you will find that may be indirectly referred
to in the letter that we wrote to one of the—I think
2401 it was a Major Barry, who, after the NRA was de-
clared illegal, wanted to revive interest in it and asked
for our opinion, and we wrote him quite frankly how we
felt about it.

Q. Was Mr. Barry connected with the NRA at that time?

Trial Examiner Norwood: We will take a five-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Proceed.

Mr. Wright: May we have the last question read?

(Question read.)

The Witness: I believe he was.

By Mr. Wright:

Q. At the time he wrote you?

A. Yes, sir.

Q. Hadn't the NRA been terminated by the Schecter decision at that time?

A. I believe he had some status, however, that enabled him to speak with some authority.

Q. You don't know what that authority might have been?

A. No, sir.

Q. But it was after the decision?

A. Yes, sir.

Q. So that wouldn't have anything to do with the Code period?

A. No, it was an effort on his part, presumably because
there was some sentiment by industry in the United
2402 States, to revive the NRA. He acted as the spear-
head for that movement.

Q. Now, on the mechanics of the operation of the Lead Industries Association in that NRA and pre-NRA period, were drafts of supplemental codes submitted to the Executive Committee from the various subdivisions?

A. For final approval?

Q. For final approval.

A. Prior to submission to the Washington authorities.

Q. And the Executive Committee then had the final approval of the Association on this?

A. Yes.

Q. There was no further action necessary?

A. No, sir.

Q. Beyond that?

A. No, sir.

Q. Do I recall your testimony on direct examination correctly to the effect that Schedule A of the Code as finally adopted was never made operative officially?

A. That is correct. That is the Schedule A was the one of the supplemental code, as I recall,

Q. Yes, sir.

A. That was never made operative.

Q. Then the only portion of the code which actually was operative was the code without the schedule except for Section 2 of Article 7 relating to price violations?

2403 A. I look back upon it as merely a labor code, that is all we had, all the rest of the verbiage was out the window, as it were.

Q. I see. Now, I direct your attention to Respondents' Exhibit 82-D and E, which appears to be attached o the minutes of the Executive Committee meeting on November 6, 1933. Would you refresh your recollection on that? (Handing document to the witness.)

A. Yes.

Q. Now, did that draft of that code represent the work of the Pigments Division up to that date, October 5, 1933?

A. Yes, sir.

Q. And that includes all that was adopted for submission to NRA up to that point?

A. Up to that point, that is correct, sir.

Q. When was the final draft of the code submitted to NRA?

A. You mean the master code with the supplement?

Q. The supplement code, when was that finally submitted?

A. I would again have to refer to the record, Mr. Wright; I don't recall when that was.

Q. It was after the 1st of January, wasn't it, 1934?

A. I believe so, because this was November 6, 1933.

Q. Now, you testified that all of the matters which were taken up at these meetings of the Pigments Division, and various sub-organizations during the fall of 1933 and 2404 early part of 1934, were for discussing subjects for adoption and inclusion in the supplemental code; is that correct?

A. Yes.

Q. So that whenever the minutes show that the matter was adopted that was adopted for inclusion in a proposed code, so far as you know?

A. So far as I know, that is correct.

Q. How do you account for the fact that some of these things are shown by the minutes to have been adopted when comparison of drafts of the codes which were prepared do not contain any reference to them?

Mr. DuBose: I object, if your Honor please. He doesn't have to account for anything. The form of the question is bad.

Trial Examiner Norwood: I take it he is asking him to explain it, if he knows the explanation.

Mr. Wright: That is correct, and I will so amend the question.

The Witness: May I have the question?

(Question read.)

The Witness: My feeling, Mr. Wright, is that in between these episodes that you describe there were frequent conferences in Washington with the NRA officials or there were telephone calls to us repeatedly prodding us to get the job done, and I dare say it was a conflict of viewpoint
2405 as to what should go in and what should not go in.

By Mr. Wright:

Q. Then were there conferences between the respondents and pigments producers which were not reported in these minutes?

A. Oh, no, sir. I refer to conversations between myself and Mr. Janssen and his counsel in the NRA:

Q. Did you have authority to change the drafts of the code on consultation with Mr. Janssen without taking that matter up again with the Division?

A. No, sir. Whenever changes were suggested I would submit it to the people at interest and let them pass on the advisability.

Q. Were some changes made in the drafts by that means, by your contacting individual producers?

A. I think, Mr. Wright, various drafts speak for themselves. In our minutes we had several drafts of the code before they were satisfactory for submission to Washington. I think we have all the drafts, as a matter of fact, in the record.

Q. Did any reference to any zone system or zone differential ever appear in any draft of a code in that period?

A. No, sir; to the best of my knowledge nothing was ever done on a zone system.

Q. In so far as the code—

A. So far as the code is concerned.

Q. Now, with reference to adoption of consign-
2406 ment contracts, was anything ever in any draft of a
code relating to either selling or not selling on consignment—of the lead code I am speaking now.

A. I believe there is some stipulation about it, Mr. Wright, but again my memory would have to be refreshed by reference to these minutes because the white lead people were very desirous of selling—

Q. Who do you mean by the white lead people?

A. The white lead-in-oil producers.

Q. Does that include all of the white lead-in-oil producers?

A. Not all because some didn't care to sell on consignment and there was some division of opinion there, but the paint industry wanted to prohibit the sale of merchandise on consignment, and there—

Q. Who do you mean, the paint industry?

A. I mean the prepared paint industry, as represented by the National Paint, Varnish and Lacquer Association.

Q. Mr. Wormser, I take it that all of your testimony relating to agreements and understandings as to what should go into the code—or, it is limited as to what should go in code. I believe that was your testimony, that all of these discussions related to what should go in the code?

A. Exclusively to code provisions, yes, sir.

Q. Are you familiar with the marketing practices of each of the individual producers of pigments?

2407 A. No, sir.

Q. Were you at that time familiar?

A. Only sufficiently to be aware of a service I could be in the drafting of their supplemental codes. I tried to become familiar with it.

Q. In other words, you wouldn't know at any particular time whether the National Lead Company was quoting an lcl differential on dry white lead or not?

A. No, sir.

Q. In these discussions that we have been speaking of as to what should go in the code, did they involve discussions of industry practices in connection with marketing and sale of lead pigments that had applied in the past?

A. Well, they involved discussions which are indicated right in the minutes themselves.

Q. In other words, they involved all the marketing practices that were then employed in the industry, I take it?

A. You say all. I wouldn't be able to answer whether it involved 100 per cent of the practices.

Q. Principal marketing practices?

A. Even there I don't know whether I could go along because I don't know whether those would be the principal ones or not, but I will say they were the practices that the group was desirous of having covered by those supplemental codes.

Q. Did the discussions also involve what changes
2408 would be desirable in existing practices under the code, what improvements could be made in industry practice?

A. Yes; again, limited to the code.

Q. You state you do not know what the practices of individual producers are from time to time?

A. That is right.

Q. So then you wouldn't know whether following one of these discussions the producers might make, each of them, a change in his existing practice regarding something that had been discussed at one of these meetings?

A. I have no knowledge of it.

Q. Then it is entirely possible that the respondents could have left these meetings after having discussed these matters and put the practices into effect that they had been discussing?

Mr. Ewing: I would object to that, your Honor. It is purely speculative.

Mr. Wright: I submit that the witness has testified there was no agreement or understanding at these meetings. I want to bring out clearly the extent of his knowledge as to what happened.

Mr. Ewing: The question states, "It is entirely possible."

Trial Examiner Norwood: Read the question.

Mr. Wright: I am asking for his opinion on whether it is possible.

2409 Trial Examiner Norwood: Read the question.

(Question read as follows:

"Then it is entirely possible that the respondents could have left these meetings after having discussed these matters and put the practices into effect that they had been discussing?")

Trial Examiner Norwood: Overruled.

The Witness: It is entirely possible that they could have jumped out of the window or done anything.

Trial Examiner Norwood: Answer the question directly.

The Witness: May I have it read once again?

(Question read as follows:

"Then it is entirely possible that the respondents could have left these meetings after having discussed these matters and put the practices into effect that they had been discussing?")

The Witness: Yes, it is possible.

Mr. DuBose: I move to strike the answer as being based on a purely speculative question. I do that so that there will be no question as to our position.

Trial Examiner Norwood: Counsel may so move. The motion is denied.

Mr. DuBose: Exception.

By Mr. Wright:

2410 Q. Mr. Wormser, you state that you are not familiar with their pricing and marketing practices, those of individual companies, from time to time. I believe that was your testimony a moment ago.

A. Yes, sir.

Q. Are you familiar with the costs of production of lead pigments of the various individual respondents?

A. No, sir.

Q. From time to time?

A. No, sir.

Q. Didn't you state on direct examination that one effect of the paint code would have been to raise the price of white lead because it would have put the lead producers under the stricter costing provisions of the paint code?

A. Yes, but that has nothing to do with the cost of production of the individuals. That has no direct relationship.

Q. Well, if you don't know what the cost of production is how would you know what costing provisions—how it would affect the individual producers?

Mr. Ewing: I object to that, your Honor, as being purely argumentative.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: I think that is all right on cross-examination.

Mr. Wright: May I withdraw the question? It is
2411 clumsily put. I will reframe it.

By Mr. Wright:

Q. Mr. Wormser, in view of your statement that you do not know the costs of the individual producers, will you explain how you know that application of the costing provisions in the paint code would have raised the price of white lead-in-oil?

A. As I recall, Mr. Wright, the cost provisions of the paint code contained a lot of items which would have raised the costs theoretically to a greater level than if those particular items were taken out of the calculations of cost.

Q. I hand you a copy of the paint code and direct your attention to Article 22, "Selling below cost."

Mr. DuBose: Do you have the exhibit number of that?

Mr. Wright: I don't have it. Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. DuBose: I think it is Respondents' Exhibit 12.

By Mr. Wright:

Q. What costing provisions are you referring to now that would have operated to raise the price of white lead-in-oil?

A. Well, here is an item, the very first one that catches my eye, it says, "The cost of all other products shall include the following: The seller's total market replacement
cost of raw materials (based on costs furnished
2412 monthly, or oftener, if necessary, by authority of the
Paint Industry Recovery Board through Association
Headquarters, subject to approval by the Administrator)—"

Now, the Paint Industry Recovery Board was that paint association, in large measure, and if they could arbitrarily decide what they wanted to put in for a basic cost obviously that would raise the costs of the white lead-in-oil people.

Q. If you don't know the costing practices and costs of the lead pigments producers, can you state with certainty that the same measures might not have been applied with them?

A. Again, Mr. Wright, I fail to see the connection between the two. I think it is a matter of principle involved. Whether you are going to proceed in getting your costs on what you absolutely consider are your costs of production, or whether you use the arbitrary formula such as developed by the paint industry. I don't think it has any bearing on what the actual costs are, or any knowledge of the costs, because I actually haven't got any.

Q. You have no knowledge of what the individual costs were?

A. No, sir.

Q. You speak of the paint industry, paint, varnish and lacquer code authority. I assume you are speaking of the paint industry collectively now?

A. Yes, sir.

Q. Who were the largest producers of paint in that industry?

2413 A. I would say DuPont and Sears Roebuck and Sherwin-Williams—I would say those are the three largest, but there again, in that period, I would hate to trust my memory.

Q. Does the Eagle Picher Company produce mixed paint?

A. No, sir.

Q. Does the National Lead Company produce mixed paint?

A. Speaking of that particular time?

Q. I will speak of it now.

A. No, sir.

Q. Did they at that time?

A. No, sir.

Q. Have they ever been a factor in the mixed paint business?

A. They have a branch on the Pacific Coast that makes prepared paints.

Q. What is the name of that enterprise? Is that National Lead Company, or does that carry a different name?

A. It carries another.

Q. Is it the Bass-Heutter?

A. Bass-Heutter Company, although I think by now—I think it is all part of the parent organization.

Q. How large an operation is that, do you know?

A. No, I don't know, Mr. Wright; comparatively small, I would say.

Q. Mr. Wormser, I call your attention to Commission's Exhibit 505-A, which is the minutes of the meeting of the White Lead-in-Oil Committee, Lead Pigments
2414 Division, on October 28, 1933. The statement appears therein, "Freight and zoning problems were discussed without any understanding or agreement being made." Was it customary to note after discussions when no agreement or understanding was made in the minutes?

A. I don't know how to answer that, Mr. Wright. All the minutes were designed to do was to give an accurate record of the business taken up and transacted at these various meetings.

Q. Aren't there many instances in the minutes—are there many instances in the minutes where subjects are noted as having been discussed without any mention of whether or not an agreement was reached?

A. I think you will find some, Mr. Wright, but again I would have to look through the record to see what cases there were that would fall in that class.

Q. I direct your attention, Mr. Wormser, to Commission's Exhibit 508-B, which is a letter from Mr. F. O. Case, manager, Anaconda Zinc Oxide Department, to you, under date of July 24, to the Class 2 paragraphs of that letter.

A. Yes.

Q. Do you recall whether that matter was discussed at the meeting of—

Mr. Wright: Withdraw that question.

By Mr. Wright:

Q. I also direct your attention to Commission's
2415 Exhibit 508-A, which is a reply to that letter of Mr. Case.

A. Yes.

Q. Do you recall whether that matter of l.c.l. differential on dry white lead was discussed at the next meeting?

A. Again, I would have to refer to the record, Mr. Wright. That would be the answer that I would have to give you because it is all in the record if it was discussed.

Q. I direct your attention to this meeting of August 8—

Mr. DuBose: Of the dry products?

Mr. Wright: Yes.

By Mr. Wright:

Q. Are you familiar with what the practice was in 1933 with reference to having an l.c.l., or less than carload, differential on dry white lead?

A. No, sir.

Q. You do not know whether any of the manufacturers had such a differential or did not have such a differential?

A. No, sir.

Q. Nor whether they had at any subsequent time?

A. No, sir.

Q. Was there ever any discussion in that period of practices which it was contemplated that the individual producer would put into effect in their own marketing of lead pigments?

A. Again I must refer to the record, Mr. Wright.

Q. Beyond the record you have no recollection of
2416 whether there were or not?

A. Beyond the record I have no recollection of any discussions that relate to this particular point.

Q. Do you recall any discussions regarding putting into practice any of these matters which were discussed as going into the code, regarding the material which later appeared in Schedule A of the code, regarding the differentials between grades on red lead or the differential contracts?

A. No, sir.

Q. Or the dry white lead contracts?

A. No, sir.

Q. Are you familiar with the practice of quoting oxides on a differential over the price of pig lead?

A. Only vaguely, Mr. Wright. Not being in my backyard, as it were, I have never made an attempt to get thoroughly familiar with it. It hasn't been a problem that we have ever had to deal with at all, prior to the time the NRA law was passed, or after it was terminated.

Q. You don't know, then, what the practices of the individual companies were with reference to that type of quotation prior to the NRA?

A. Nor do I know what it is today.

Q. Then you are not an expert in the marketing practices of these respondents in the pigments field, I take it?

A. I am not an expert in marketing of those products.

2417 Q. Then the statement which appears in Respondents' Exhibit 137-A and B to the effect that it was the opinion of all present at that meeting of the Oxide Committee that the practice of selling oxide at a differential over pig lead had spread to such an extent that it had become one of the most serious abuses in the trade, you have no knowledge then of that situation?

A. No, sir.

Q. And no recollection of the discussion which took place at that time?

A. No, sir.

Q. Are you familiar with the differential points under which the keg products of the industry were sold prior to the NRA?

A. No, sir.

Q. Are you familiar with the market quotations on lead pigments that appear in the Oil Paint and Drug Reporter?

A. You mean as of today?

Q. Well, as of today, yes.

A. No, sir.

Q. Are you familiar with them at any period of time back to 1930?

A. When you say familiar, Mr. Wright, I don't really know what you mean. I know that the Oil Paint and Drug Reporter has that information. If I want to refer to it I can go to it so I don't need to keep it in my mind. 2418 So in that respect I consider that I am familiar with it.

Q. Then, as I understand it, you have no recollection of particular marketing practices in that time that might be employed by the pigments producers?

A. That is correct.

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: We will have a three-minute recess and then continue the examination.

(A short recess was taken.)

Trial Examiner Norwood: The hearing will come to order.

By Mr. Wright:

Q. Mr. Wormser, you testified about the pricing practices in the pig lead industry. Do you not know similar information regarding lead pigments during the OPA period?

A. I have a general idea, Mr. Wright. Of course, in the NRA days I made it a point to get familiar with as much as I could of the problem that the producers faced, and especially in connection with the preparation of the supplemental code of fair competition. But the minute that was over I lost all interest in it and my own responsibilities went far afield.

Q. I assume you knew what Mr. Case was talking about when you replied to his letter there in your letter to 2419 him on July 27, 1933, Commission's Exhibit 508-A, when you said, "I shall see that the point you bring out for discussion about the l.c.l. differential is placed before the meeting."

A. Yes. That merely brings out what I tried to make clear, that in those days whenever any trade custom or trade practice was an item on the agenda for discussion among the people at interest, I saw to it that that was placed on the agenda, and that was one point that was brought up, I believe, by Mr. Case.

Q. You appreciated the problem that Mr. Case was raising there, did you not?

A. At that time, yes, sir.

Q. What was that problem—or that matter, rather?

A. It related to the proper differential to adopt in a supplemental code of fair competition on dry lead.

Q. Dry white lead?

A. Dry white lead, for shipments under five tons.

Q. Was that ever adopted in any proposed code or code as finally adopted?

A. I would have to refresh my memory, Mr. Wright, by reference to the records and to the supplemental code as it was finally drafted.

Q. Do you know what the practice was during the OPA with regard to less than carload differential for dry white lead?

A. Again I don't recall, Mr. Wright.

Q. Do you have a paper there which would re-2420 fresh your recollection as to that differential?

A. No, sir; the papers I have related to pig lead entirely.

Q. I want to show you several documents and ask if they refresh your recollection any as to times at which l.c.l. differentials for dry white lead were established and put into practice for the industry.

Mr. Ewing: I object to the question. He refers to the industry generally. There is no proof to show there is any industry response on the subject. I think it should be directed specifically to some individual respondent.

Trial Examiner Norwood: Read that question.

Mr. Ewing: He testified he doesn't know the practice of the individuals.

Mr. Wright: Your Honor, this gentleman has just finished testifying that he was familiar with this matter which relates to this differential.

Mr. DuBose: During NRA.

Mr. Wright: This document relates to that time.

Mr. Ewing: He testified that Mr. Case's letter related to a problem concerning l.c.l. differentials that Mr. Case wished presented to this particular committee for consideration in connection with the code. That is a quite different matter from that to which the present question is directed.

2421 Mr. Wright: Your Honor, if these documents do refresh his recollection, certainly his recollection is a matter that is pertinent and relevant and admissible in this examination. I don't think any objection to an attempt to refresh his recollection can be entertained.

Trial Examiner Norwood: Read the question.

(Question read as follows:

"I want to show you several documents and ask if they refresh your recollection any as to times at which l.c.l. differentials for dry white lead were established and put into practice for the industry.")

Trial Examiner Norwood: I will overrule the objection and ask him to answer the question as it has been clarified by the discussion.

The Witness: Mr. Wright, this would indicate that at this particular period—

Mr. Ewing: May I interrupt and suggest that the answer be confined to whether the document refreshes the witness' recollection? That was the question.

Trial Examiner Norwood: The point is well taken. You may study the documents, and then if they refresh your recollection you may answer independently of any reference to the documents.

The Witness: My answer is no.

By Mr. Wright:

Q. At the time the code was finally put into operation, I believe it was early in June, 1934, were 2422 there any—do you recall any announcement of changes in trade practice by the individual pigments producers?

A. I don't recall, Mr. Wright.

Q. Do you recall whether at that time they announced the quoting of prices on a zone basis?

A. I don't know, Mr. Wright.

Q. Mr. Wormser, you testified on direct, as I recall it, that there were no agreements or understandings reached as to any of these trade practices at the meetings of the various divisions of the lead Industries Association other than that they were adopted for inclusion in a proposed code. Am I correct in that statement?

A. Yes, sir.

Q. What is your understanding of the term "agreement and understanding"?

A. You mean the legal definition?

Q. What was in your mind when you answered that question?

A. Well, I had in mind a mental vision of a group getting together and perhaps agreeing on a certain course of action with relation to marketing practices, or even, in those days, according to prices, because the sky was the limit in NRA days, it seemed to me.

Q. Would you consider it an agreement if a group of men met together and discussed the advisability of 2423 changes in industry practice without formally spreading it on the minutes that they were in agreement, left the meeting, all announced individually that practices which had been discussed—as exemplary, as improvements?

Mr. Ewing: I object. It calls for the witness' conclusion as to the operation of his mind.

Mr. Wright: Obviously it does. I am trying to find out what is in his mind when he answered the questions.

Trial Examiner Norwood: He is developing the witness' definition of the term which he used in the direct examination.

Mr. Wright: He expressed a conclusion when he answered those questions. I am trying to find out what that conclusion is.

Mr. Ewing: Could I have that question read? The way it was phrased I don't think that it would accomplish the end Mr. Wright has in mind.

(Question read as follows:

"Would you consider it an agreement if a group of men met together and discussed the advisability of changes in industry practice without formally spreading it on the minutes that they were in agreement, left the meeting, all announced individually that practices which had been discussed—as exemplary, as improvements?")

Mr. Duncan: That asks him whether or not he would draw an inference; not whether or not he would con-
2424 sider that an agreement.

Mr. DuBose: Moreover, if it is a hypothetical question it contains statements as to which there has been no proof.

Trial Examiner Norwood: But it is not a hypothetical question—although it carries a hypothesis.

Mr. DuBose: That is speculative.

Trial Examiner Norwood: Objections overruled. Answer the question.

The Witness: Mr. Wright, may I have it repeated once more? It is such a long question.

(Question read as follows:

"Would you consider it an agreement if a group of men met together and discussed the advisability of changes in industry practice without formally spreading it on the minutes that they were in agreement, left the meeting, all announced individually that practices which had been discussed—as exemplary, as improvements?")

Mr. Duncan: If your Honor please, may I object for the added reason: I think the question asks of the witness, whether he poses as an expert or not, for a conclusion which only the Commission can reach, as to whether or not under those circumstances it would be violative of anything in this complaint.

Mr. Wright: The original question, your Honor,
2425 to which this goes, directly called for the same sort of conclusion and was objected to on the same ground.

Trial Examiner Norwood: Answer the question.

The Witness: Mr. Wright, if I understand your question correctly, you ask me if it is an agreement if a group meet outside the facilities of the Lead Industries Association, come to some common understanding. Well, not knowing what the—

Mr. Wright: No, that wasn't the question.

The Witness: I am afraid I don't grasp what your—what the significance of your question is—it is so long. It just says, "Is it an agreement if," and then comes a long series of reservations that, frankly, confuse me. I would like to answer the question. If you could put it some way that would bring out the point you have in mind, perhaps I could answer it.

Mr. Wright: I shall try to reframe the question for you.

By Mr. Wright:

Q. Would you consider it an agreement or understanding if a group of men were to meet together and discuss their existing marketing practices, the possibility of improving those marketing practices by taking certain specific steps, and then without expressing themselves as in agreement at the meeting, individually left the meeting and announced through their own companies the trade practices, changes in trade practices which had been discussed
2426 at the meeting as desirable?

Mr. DuBose: Same objections—all of them.

Trial Examiner Norwood: Yes.

The Witness: Discussed at this meeting outside?

Mr. Wright: No. This is a hypothetical question. We are not talking about any particular meeting of any particular group now.

Mr. DuBose: It has been admitted that this is a hypothetical question. Since it is so, and since it is based on facts as to which there has been no proof, then I submit it is an improper question.

Mr. Wright: I submit the record is replete of proof of exactly this.

Trial Examiner Norwood: I didn't agree that it was a hypothetical question. He has made a condition there, but I think the question is not hypothetical, but is a question on cross examination intended to elicit the witness' understanding of the word he used, the word "agreement".

Mr. Wright: That is correct, but the situation stated doesn't apply to any definite, specific instance.

Trial Examiner Norwood: No.

Mr. Wright: It is a hypothetical question for the purpose of testing the witness' understanding.

Mr. DuBose: Not as proof of any fact in this proceeding except as to his understanding?

2427 Mr. Wright: Except as to his understanding.

Mr. Duncan: Hasn't government counsel already elicited from this witness what he meant by the term "agreement", so that when he now questions him with respect to what, perhaps, the Commissioner has in mind, the term "agreement", he goes afield?

Trial Examiner Norwood: It goes to what he meant when he used that word.

Mr. Duncan: He has answered that.

Trial Examiner Norwood: He can answer it again. I don't know that he has, but we will allow him to answer it again if he has, and to further clarify the denotation of the word "agreement" as he understands and his using it.

Answer the question.

The Witness: May I have the latest version of Mr. Wright's question read to me, please?

(Question read as follows:

"Would you consider it an agreement or understanding if a group of men were to meet together and discuss their existing marketing practices, the possibility of improving those marketing practices by taking certain specific steps, and then without expressing themselves as in agreement at the meeting, individually left the meeting and announced through their own companies the trade practices, changes in trade practices which had been discussed at the
2428 meeting as desirable?")

The Witness: Your Honor, I think that is, if I may say so, I feel that is a legal question which I am not competent to answer.

Trial Examiner Norwood: Answer that question or say you can't answer it. Make what answer you can on that, throwing light on your understanding of the word "agreement" as you have heretofore used it in your testimony. In the circumstances he named, would you consider that that constituted agreement?

The Witness: I think it would be an agreement.

Mr. DuBose: I move to strike the answer upon the ground that this is an answer as to a legal conclusion as to which the witness has not been qualified as an expert; and in addition upon all the other grounds heretofore stated.

Trial Examiner Norwood: Motion denied.

Mr. Wright: Off the record for just a minute.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Wright:

Q. Your answer is that you would consider that an agreement?

A. Under those circumstances.

Mr. DuBose: Same objection to that.

Trial Examiner Norwood: Same ruling.

2429 By Mr. Wright:

Q. You have stated that you do not know what the individual marketing practices of the producers on lead pigments were in that period or in any other period.

Mr. Duncan: Objection. He has already answered that.

Trial Examiner Norwood: This is cross examination. He can answer it again.

Mr. Duncan: I thought there was some limit as to the number of times you could ask the same question.

Trial Examiner Norwood: There is a limit, but I think it is a matter of discretion for me to determine when we reach that limit. I don't recall that he has answered—brought out exactly this. Go ahead.

By Mr. Wright:

Q. Was it your testimony on direct—withdraw that.

Your own knowledge then as to what was in the minds of the people who attended these pigment division meetings was as they expressed themselves at the meeting; is that correct?

Mr. Wood: I object to that, your Honor, for the reason that I do not know how one can ask the witness what would be in the minds of people. How would anyone know other than what they expressed.

Trial Examiner Norwood: He is asking him as to his knowledge; not as to the mind of somebody else.

Mr. Wood: I thought his question was as to the 2430 mind of the other.

Trial Examiner Norwood: No.

Mr. Wood: May we have the question?

Trial Examiner Norwood: Read the question.

(Question read as follows:

"Your own knowledge then as to what was in the minds of the people who attended these pigment division meetings was as they expressed themselves at the meeting; is that correct?")

Trial Examiner Norwood: Objection overruled. Answer that question..

The Witness: Of course, I had supplementary knowledge of fragmentary nature, to be sure, of the pigments and how they were used, and knew where quotations were made, so I can't truthfully say all my information was developed out of what was expressed at the meetings.

Mr. Duncan: Object to the answer, and ask that it go out of the record.

Trial Examiner Norwood: Motion denied.

Mr. Duncan: Exception.

By Mr. Wright:

Q. What was your knowledge then, on what specific subjects did you have knowledge beyond what was said at the meetings on these points that were raised at the meet-
ings regarding the adoption of zones or less than
2431 carload differentials, or agency contracts?

A. Well, I had in mind the competitive position of white lead and red lead, Mr. Wright. The competition that it had to meet with other materials and the stake that the mining industry had in developing the market for white lead to the utmost.

Mr. Wright: Your Honor, I move that that answer be stricken as not responsive.

Mr. Ewing: I submit it is responsive.

Trial Examiner Norwood: Read the question and the answer.

Mr. Wright: Your Honor, the question was directed to specific information regarding specific subjects.

(Record read as follows:

"Q. What was your knowledge then, on what specific subjects did you have knowledge what was said at the meetings on these points that were raised at the meetings regarding the adoption of zones or less than carload differentials, or agency contracts?

"A. Well, I had in mind the competitive position of white lead and red lead, Mr. Wright. The competition that it had to meet with other materials and the stake that the mining industry had in developing the market for white lead to the utmost.")

Trial Examiner Norwood: You may question him fur-
ther, but I think that is in an effort to answer your
2432 question. Motion denied.

By Mr. Wright:

Q. Do you have any specific information regarding zoning other than the expressions that up here in the minutes of these meetings?

A. No, sir.

Q. Do you have any specific information regarding less than carload or carload differentials beyond what appears in these minutes?

A. No, sir.

Q. Do you have any specific information regarding uniform contracts covering sales of lead pigments other than what appears in these minutes?

A. No, sir.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: We will recess until two o'clock.

(Whereupon, at 12:20 p. m., a recess was taken until 2:00 p. m., this day.)

2433 Afternoon Session.

2:00 p. m.

Trial Examiner Norwood: Proceed.

FELIX E. WORMSER, resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Wright.

Q. Mr. Wormser, you testified earlier that you were not familiar at that time with the trade practices, marketing practices employed by the individual companies in selling lead pigments and that you are not familiar with the changes that might have been made in those practices up to the present time; is that correct?

A. That is correct.

Q. But at that time, during these code meetings, you were present at discussions of those practices?

A. Yes, sir.

Q. Are you acquainted with Mr. Harold Rowe of the National Lead Company?

A. Yes, sir.

Q. He was present during a good many of those discussions, was he not, back in the code period?

A. I believe he was.

Q. Are you acquainted with Mr. Zoller of the 2434 Eagle Picher Company?

A. I am.

Q. Now, it was testified to by Mr. Rowe that the zones used by the National Lead Company on quoting on their pigments had been employed by that company since some time in the period between the fall of 1933 and the summer of 1934. It was testified to by Mr. Zoller of the Eagle Picher Company that most of the provisions which appeared in the Schedule A of the code had been employed by the Eagle Picher Company in its marketing of oxides since, approximately, the period of the code. I want to call your attention to Commission's Exhibit 808-E, which is copy of page 30 of the Oil, Paint and Drug Reporter for June 4, 1934, to the statement that appears there:

"With the lead industry's code becoming effective today, it is understood that other changes are taking place in the style of pricing lead oxides. Prices are to be established on a zone basis with the former Eastern prices applying in the New England, Middle Atlantic States and Midwestern areas. Southern and Gulf States delivered prices may be a quarter cent per pound higher than the basic prices, and the Pacific Coast and Rocky Mountain area will also carry a price differential, but the differentials have not been definitely established as this is written."

And also to the issue of the Oil, Paint and Drug 2435 Reporter of June 11, 1934, which appears in the record as Commission's Exhibit 808-H, the statement:

"Following the inauguration of the lead industry's code, corroders of white lead and lead oxides revised price schedules last week. There is no basic change in the prices, but differentials for certain delivery points have been changed, and at some few delivery points in the Rocky Mountain area, the revised prices represent a fractional change in favor of the buyer."

Does that refresh your recollection as to any change in the trade practices which occurred in that period on the part of individual producers of lead pigments?

A. No, sir.

Mr. Wood: I object, your Honor. I object to the summary of Mr. Zoller's testimony. I am perfectly willing for the witness to be shown the testimony and asked the same question.

Trial Examiner Norwood: Well he has pointed out the particulars in which he expects the exhibit to refresh. I think he may do that on cross-examination.

Mr. Wood: I do not know that the summary of Mr. Zoller's testimony is correct or incorrect. On principle I object to the use of his own summary of what some witness testified as grounds for attempting to refresh the recollection of the witness. The question has been answered,
2436 so it is a dead issue, you might say.

Trial Examiner Norwood: Well, I will give counsel the benefit of an exception on that. Overrule it.

Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Go ahead.

By Mr. Wright:

Q. Mr. Wormser, at the date of Commission's Exhibit 808-H you were in what capacity with the Code Authority, June 11, 1934?

A. Was that after the code had been approved by the NRA?

Q. I believe it is, Yes, sir.

A. If it is, I was secretary of the code authority.

Q. And also secretary of the Lead Industries?

A. Secretary of the Lead Industries Association.

Q. And your testimony is, then, that, occupying these positions, with these occurrences in the industry, you were unaware of them?

A. I was unaware of them. I don't know where Oil, Paint and Drug Reporter got that.

Q. I direct your attention to Respondent's Exhibit No. 94-B, wherein reference is made to Exhibit A attached to the minutes of the meeting of June 23, 1936.

A. Yes.

Q. Are you familiar with that brief which is men-
2437 tioned in that portion?

A. Yes, sir.

Q. Of Exhibit 94-B?

A. Yes, sir.

Q. Do you have that document in your possession?

A. Yes, sir. (Handing document to counsel.)

Q. Do you recall the provisions of that proposed legislation to which this document was addressed?

A. Only vaguely, Mr. Wright.

Q. Did this document state the position of the Lead Industries Association with reference to the provisions of that legislation?

A. I would say that it did, but it never was formally approved for submission to the Senate Committee, I believe.

Q. It was approved then, according to those minutes, was it not, as the expression of the industry?

Mr. Ewing: I object. The minutes speak for themselves and my recollection is that the secretary was directed to prepare a brief to be used subsequently if it seemed advisable.

Trial Examiner Norwood: How was that question?

(Question read.)

Mr. Ewing: I object further on the ground that the question relates to a document which is not identified except as being produced by the witness and not in evidence.

2438 Mr. Wright: On that point, your Honor, this document was omitted from an offer of the minutes of this particular meeting, although it was discussed in the minutes which are in evidence, and referred to as attached and a part of the minutes.

Mr. Ewing: It was omitted from the offer, as I stated at the time, for the reason it had not the formal approval of the Association, and was never used. We therefore did not feel justified in offering it. If Mr. Wright wants to offer it, all right.

Trial Examiner Norwood: He can direct questions to it, to the identification of that paper.

Mr. Ewing: It has already been identified. This question goes to the relationship of its contents to the intent or the attitude of the Association.

Trial Examiner Norwood: You are asking about a paper?

Mr. Wright: I am asking about a paper in evidence, namely, Respondent's Exhibit 94-B. I am examining him with reference to what that action purports to be which is reported in the minutes. The question didn't go to the contents.

Trial Examiner Norwood: But you mentioned Exhibit A to this exhibit.

Mr. Wright: That is right.

Trial Examiner Norwood: You are basing a question on that Exhibit A to this exhibit is not in evidence at this time.

2439 Mr. Wright: Right now, but it is discussed in a document already in evidence, as being drafted by the Lead Industries Association.

Mr. Ewing: Not by the Lead Industries Association, by Mr. Wormser individually.

Trial Examiner Norwood: I think you will have to read the last question, Mr. Reporter.

(Question read as follows:

"It was approved then, according to those minutes, was it not, as the expression of the industry?")

Trial Examiner Norwood: "It" being this exhibit A which is not in evidence?

Mr. Wright: Yes, sir, as stated on Respondent's Exhibit 94-B.

Trial Examiner Norwood: You are asking whether that paper was approved by the committee?

Mr. Wright: I am asking him whether the document referred to in that minute was adopted as an expression of the Lead Industries Association.

Trial Examiner Norwood: I think he can answer that question. He is not referring to the contents of it in any way.

Mr. Ewing: What meaning has the question without the contents being before the Commission?

Trial Examiner Norwood: He has a right to do 2440 that by way of identifying the paper.

Mr. Ewing: There is no dispute about the identification of the paper.

Trial Examiner Norwood: I will overrule the objection. Let him answer the question.

The Witness: What is the question?

(Question read as follows:

"It was approved then, according to those minutes, was it not, as the expression of the industry?")

The Witness: My answer is no.

Mr. Wright: I would like for this document to be marked for identification as Commission's Exhibit 855-A, B, C, D, and E.

(The document referred to was marked Commission's Exhibit 855-A through 855-E, both inclusive, for identification.)

By Mr. Wright:

Q. I show you document marked Commission's Exhibit 855-A, B, C, D, and E, and ask you if that is the document referred to on Respondent's Exhibit 94-B as Exhibit A attached to the minutes of the executive meeting of Lead Industries Association on June 22, 1936.

A. It is.

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

2441 (Discussion off the record.)

Mr. Wright: I offer Commission's Exhibit 855, with sub-numbers, in evidence.

Mr. Duncan: We object, on behalf of Glidden, on the ground that it is not binding on the Glidden Company.

Trial Examiner Norwood: Objection overruled.

Mr. Du Bose: May the same objection run to all respondents?

Trial Examiner Norwood: Yes.

Mr. Ewing: Based on the proposition that this brief was prepared by Mr. Wormser at the direction of the executive committee as shown by the minutes of the executive committee's meeting of April 10, 1936, Respondents' Exhibit 93, and that it was never in fact formally adopted or used.

Mr. Du Bose: And that it represented Mr. Wormser's personal thoughts on the subject, but has not been approved, and therefore was not binding upon any of the respondents.

Mr. Wright: Your Honor, counsel are identifying this document when it properly—those aspects ought to be gone into by the evidence.

Mr. Du Bose: It is already in evidence that it wasn't formally approved—in answer to your question, Mr. Wright.

Trial Examiner Norwood: It is in evidence that the paper was discussed and it is referred to in this exhibit.

Mr. Wright: It is a part of the exhibit which is in 2442 evidence.

Trial Examiner Norwood: Part of that exhibit, and in keeping with our policy heretofore about permitting the other side to complete the picture, I think it is only right to proceed with the paper. Counsel will have the benefit of their exceptions and Commission's Exhibit 855-A, B, C, D, and E is received in evidence.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 855-A through 855-E, both inclusive, were received in evidence.)

By Mr. Wright:

Q. Mr. Wormser, I call your attention to Respondents' Exhibit 93, the minutes of the executive committee, stating, "The committee was unanimously opposed to the bill S. 4055 * * *" Did you follow the instructions that appear there in Respondents' Exhibit 93?

A. I did.

Q. Then this brief is, as stated there, drawn up in accordance with the—based upon the discussion which took place at that meeting; is that correct?

A. Yes.

Q. It did represent the views which were expressed at that meeting?

A. As nearly as I could reflect them with my own composition.

Q. Mr. Wormser, I direct your attention to Re-
2443 spondents' Exhibit 129-X, which is Exhibit G to the
minutes of the Code Authority meeting of August
20, 1934.

A. Yes.

Q. And also to 129-G, where that letter from the Oxidite Battery Manufacturing Company is discussed in the minutes. Do you have any recollection of that situation?

A. No, sir.

Q. Do you have any recollection of the situation about which the letter 129-X speaks?

A. Only what is contained in the record, Mr. Wright.

Q. You have no knowledge, then, of any discount based on carload purchases of oxides as discussed in that letter?

A. No, sir.

Q. I direct your attention to the fact that the letter 129-X refers to the fact that "we are now compelled to buy this carload in one shipment, or pay a penalty of approximately 20 per cent." That is dated July 27, 1934. And that the minute, 129-G, directs, authorizes you to call the attention of that company to the fact that Schedule A of the Code had been suspended. How do you account for the fact—can you explain the fact that if that Schedule A was never made operative, nevertheless a complaint was received as to trade practices which were covered by that Schedule A?

Mr. Du Bose: When you say that the minutes there
show that the secretary was authorized to direct the
2444 battery company's attention to the fact that Sched-
ule A had been suspended, I believe the minutes state
that the secretary was directed to pass it along to the
Lead Pigments Division, calling their attention to the
fact that Schedule A had been suspended.

Mr. Ewing: Furthermore, the letter 129-X shows on its face that it does not refer to a specific complaint with respect to a specific transaction, because it starts by saying, "we wish to comment on one of the terms of the Lead Industries Code which is a big handicap to us." In other words, it is a reference to the code alone and not to any imposition of the terms of the code, as the question implies.

Mr. Wright: In answer to that I may say, your Honor, it says on its face, "We are now compelled to * * *".

Mr. Ewing: That is under the terms of the code, which is the first sentence, and it says, "Under the terms of this code, we are now compelled." It doesn't refer to anybody having compelled them.

Trial Examiner Norwood: What is the question?

(Question read as follows:

"I direct your attention to the fact that the letter 129-X
refers to the fact that 'we are now compelled to buy this
carload in one shipment, or pay a penalty of approxi-
mately 20 per cent.' That is dated July 27, 1934. And that
the minute, 129-G, directs, authorizes you to call the
2445 attention of that company to the fact that Sched-
ule A of the Code had been suspended. How do you
account for the fact—can you explain the fact that if that
Schedule A was never made operative, nevertheless a
complaint was received as to trade practices which were
covered by that Schedule A?")

Trial Examiner Norwood: Objection overruled.

Mr. Ewing: The question implies, "How does this witness account for the fact that this particular company could make a complaint if the terms of the code never became operative?" Now, it is implicit in that the suggestion that somebody was enforcing the terms of the code.

Mr. Wright: That is correct.

Mr. Ewing: And the letter plainly shows that it was not in connection with any attempt to enforce one of the terms of the code. The complaint was directed against the code itself.

Trial Examiner Norwood: Here is some evidence in the record, Respondents' Exhibit 129-X. Here is some evidence, in the code, which might indicate that the complaint was made. You haven't laid the grounds here for this witness' knowledge of that or made the situation such that it is incumbent upon him to account for it.

Mr. Wright: Your Honor, he was secretary of the Code Authority. The letter is addressed to him. The ques-
2446 tion asks him to account for the fact that the letter
refers to an existing injury in view of the statement in the exhibits and in his testimony that that never was made operative.

Mr. Ewing: The letter refers to no existing injury whatever. You are reading something into it.

Trial Examiner Norwood: Ask him if there was in fact such a complaint.

Mr. Wright: It is in the record already as such a complaint.

Mr. Ewing: The record shows specifically, "We wish to comment on one of the terms of the Lead Industries Code, which is a big handicap to us."

Trial Examiner Norwood: He is under cross-examination, and he may be asked to explain that.

Mr. Ewing: I object to the form of a question which carries with it the implication that it does in this case.

Trial Examiner Norwood: I sustain the objection to the question in its present form, but he may be asked about this thing and he may be asked to reconcile this with some of his own testimony.

Mr. Ewing: Certainly.

Mr. Wright: That, your Honor, was the sole purpose of the question.

Trial Examiner Norwood: I think so. I think counsel can ask more directly.

2447 By Mr. Wright:

Q. I believe you stated you had no independent recollection of that correspondence, Mr. Wormser; is that correct?

A. Yes, sir.

Q. So far as you know Schedule A of the code was never made operative?

A. Never made operative.

Q. Do you have any recollection that this indicated to you a complaint received about a differential which was under Schedule A of the Code?

A. I believe the explanation might be, Mr. Wright, that this gentleman, of this battery company, may have seen published reports.

Q. Do you know that that is the explanation?

A. No, I don't. You asked for my explanation. I am trying to arrive at an explanation.

Q. When you received that, did you consider that was a complaint about practices which were then current?

A. No, sir. I considered it, however, information which the Lead Pigments Division should have.

Q. If that were a complaint about practices which were in existence at that time would that indicate to you that the provisions covered in Schedule A of the Code had been put into effect by the Pigments producers themselves?

Mr. Du Bose: That is argumentative.

2448 Trial Examiner Norwood: I think he may answer that, on cross-examination.

Mr. Du Bose: Purely argumentative.

Trial Examiner Norwood: I don't agree with counsel fully in its being pure argument.

The Witness: What is the question?

(Question read.)

The Witness: Not necessarily, because the fact that the code, or that particular provision of the code was suspended, might not have been knowledge possessed by this man who wrote this letter.

Mr. Wright: No further cross-examination.

Trial Examiner Norwood: Redirect.

Mr. Ewing: We have no redirect, Mr. Examiner. We would like to reserve, and I don't suppose it is necessary, the right to recall at some future time for further direct, if we should deem it advisable, Mr. Wormser, but as far as redirect in the proper sense of the word is concerned, we have none.

Trial Examiner Norwood: You may recall him at any time.

Mr. Ewing: Yes.

Trial Examiner Norwood: Well, what is your further pleasure, gentlemen?

Mr. Ewing: Now, I suppose we should go off the 2449 record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Back on the record.

The motion is allowed for adjournment at this time to reconvene in Room 332, of the Federal Trade Commission, Washington, D. C., at ten o'clock a. m., whatever is the prevailing time, on Tuesday, May 13, 1947, and it is further contemplated that we hold a session thereafter beginning on June 10th in Washington.

(Whereupon, at 2:45 p. m., Wednesday, May 7, 1947, the hearing in the above-entitled matter was adjourned.)

2450

Room 332, Federal Trade
Commission Building,
Washington, D. C.,
Tuesday, May 13, 1947.

Met, pursuant to adjournment, at 9:00 a.m., E.S.T.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq., (Davies, Richberg, Beebe, Busick, & Richardson, 815—15th St., N. W., Washington, D. C.), appearing for Sherwin-Williams Company.

Edmund P. Wood, Esq., (2801 Carew Tower, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Henry E. Gardiner, Esq., (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James D. Ewing, Esq., and E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

2451 John A. Duncan, Esq., (1649 Union Commercial Building, Cleveland 14, Ohio), and

Roger Hinds, Esq., (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

2452 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on the 7th day of May, the hearing in Docket 5253 is now convened in Room 332, Office of the Federal Trade Commission, Washington, D. C., at 9 o'clock E.S.T., on the 13th day of May, 1947.

The reporter will please note the appearances.

Proceed, gentlemen.

Mr. Duncan: Mr. Sprague, will you come forward and be sworn.

PAUL E. SPRAGUE was thereupon called as a witness for the respondents and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Duncan.

Q. Please state your name and address.

A. Paul E. Sprague, Cleveland, Ohio.

Q. Are you a Vice President of The Glidden Company?

A. Yes, sir.

Q. How long have you been with The Glidden Company?

A. Since 1915.

Q. Then you were with the old Glidden Paint & Varnish Company?

A. That is right.

2453 Q. That was the predecessor of The Glidden Company which was formed in 1917?

A. That is correct.

Q. Will you tell us what your duties are at the present time?

A. I am in charge of the operations of the soya bean business, the feed business, and part of the food business.

Q. How long have you been so employed by The Glidden Company?

A. Since 1945.

Trial Examiner Norwood: Off the record just a minute.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: Your Honor, I would like to request a segregation of witnesses if there are any other witnesses.

Mr. Duncan: Well, Your Honor, in the room at this time are Mr. Arthur Knight of The Glidden Company, he is in charge of the Lead Division of The Glidden Company and he is from Scranton; also in the room is Mr. David N. Burruss, Jr., who is in charge of the Metals Refining Division of The Glidden Company, and he is from Hammond, Indiana. We intend to put on Mr. Burruss as a witness, and we may put Mr. Knight on. But it is our contention that these gentlemen are sufficiently high up in The Glidden Company so that frankly, an order of separation of witnesses should not be granted at this time.

Mr. Wright: I don't see what their position in the company has to do with the propriety of separating
2454 the witnesses.

Trial Examiner Norwood: They are parties to the suit.

Mr. Hinds: May I add that each of these gentlemen is the highest official next to the top executives, with respect to the industry which is under charge here, and without their presence here in court we would be greatly handicapped. I will be consulting Mr. Knight continuously, we will be consulting Mr. Burruss, they are clients, they are the accused in this case.

Trial Examiner Norwood: Are there any other witnesses in here? I don't see how it is practicable to exclude them, Mr. Wright. In any other circumstances I always exclude the witnesses if anyone makes such a motion, but in a case like that it is different.

Mr. Wright: Your Honor, I don't see how, when counsel for The Glidden Company are examining one of their witnesses, the other witnesses are necessary for consultation while they are examining a witness of their own.

Mr. Gardiner: If Your Honor please, you asked if there were any other witnesses present. It is possible that one of the gentlemen present here may testify for the International Smelting & Refining Company. That hasn't been determined yet.

Trial Examiner Norwood: One of the officials of these respondents?

2455 Mr. Gardiner: He is an employee of one of the respondents, he is not an official.

Trial Examiner Norwood: Well, I think—

Mr. Gardiner (Interposing) He would not testify this week, and may not testify at all. I merely mention that because you asked if there were any other witnesses present. It is not contemplated that at the present time he will be called, but he might be.

Trial Examiner Norwood: Under the circumstances I deny the motion. Go ahead.

By Mr. Duncan:

Q. Mr. Sprague, have you ever been in charge of the sales of the Chemical, Pigment, Lead and Material Divisions of Glidden?

A. Yes, I have.

Q. For how long?

A. For a period from 1935 to 1945.

Q. Were you ever in charge of the production and marketing of lead pigments for Glidden?

A. Yes.

Q. Since what time?

A. About 1925 to 1935.

Q. And when did the Glidden Company acquire the Euston Lead Company?

A. My recollection is that it was 1924.

2456 Q. Before that time, did Glidden sell white lead-in-oil?

A. Yes.

Q. To whom?

A. White lead-in-oil was sold by the Paint Divisions of The Glidden Company prior to that time, to the general trade that their salesmen contacted.

Q. Can you give us a date as to about when The Glidden Company started to job white lead-in-oil?

Mr. Wright: Objection, Your Honor. That is a leading question, and it contains a conclusion that is not in the record.

Mr. Duncan: This is preliminary, Your Honor.

Trial Examiner Norwood: I think it is more or less a preliminary question. Counsel will please refrain from leading on the main issue. The objection is overruled. Answer the question.

A. Glidden sold white lead-in-oil as early as 1921, and probably earlier.

By Mr. Duncan:

Q. And whose white lead-in-oil did it job?

A. Glidden sold white lead-in-oil as a jobber handling the brands of the principal producers at that time; specifically, the National Lead Company and Eagle-Picher Company, and also manufactured and sold white lead-in-oil of its own.

Q. What was the product called?

2457 A. Glidden's manufactured product was sold under the trade name of Endurance White Lead-in-Oil.

Q. How was it priced at that time?

A. It was priced according to schedules similar to those employed by competitors, but at a price concession under that charged by its competitors, usually a half a cent per pound under the schedules of the market, and with premiums or increases over the base schedules applicable to various distribution points that were found to be in effect in the trade.

Q. Why were the base schedules and the discounts and differentials set up?

A. The position of The Glidden Company as a jobber was that of attempting to earn for itself the resale margin provided in the jobbers' schedules, and the schedules were used for that purpose and to conform to the competition found in the market.

Q. Was National Lead Company then a predominant factor in the white lead-in-oil business?

A. It was.

Q. Well, when Glidden acquired Euston Lead Company in 1924, who was put in charge of it?

A. The former owner and founder of the business, Mr. Edwin Euston.

Q. When did you assume charge of the Euston Lead Company?

A. When Mr. Euston retired.

2458 Q. And when was that?

A. In 1925.

Q. Did you, yourself, have any prior experience in the white lead business?

A. No, I was entirely without experience in the business.

Q. Well, how did you find the business?

A. I found that the business of the Euston Lead Company had been in general an unprofitable business, largely because the product was inferior in quality and Mr. Euston had either failed or been unable to develop any substantial distribution. He depended upon price-cutting methods in order to secure orders.

Q. Well, did Mr. Euston give you any pointers when you took over this business?

A. Yes, he gave me many ideas that he had ~~about~~ how the business should be operated, both from a manufacturing and from a sales point of view, and about the purchases of raw materials, pig lead and so on.

Q. Well, what were they?

A. The principal thing that he pointed out to me in my recollection, was the importance of watching the pig lead market and of keeping purchases of pig lead closely related to sales of white lead.

Q. Well, did you, as a result of that pointer, do anything yourself to determine whether or not the pig lead
2459 market was a governing factor?

A. Yes, I started watching the market daily, and I kept a daily record of the market on pig lead, the market on white lead, and on white lead-in-oil.

Mr. Duncan: I ask that this be marked for identification as Respondents' Exhibit No. 141.

(The paper referred to was marked Respondents' Exhibit 141 for identification.)

By Mr. Duncan:

Q. I will hand you, Mr. Sprague what has been marked Respondents' Exhibit 141, and ask you to identify this, if you will?

A. This is the original of a chart that I kept, covering the period from 1922 on, until I discontinued it sometime in 1929, and it is the daily record to which I previously referred.

Q. The exhibit is the result of your own checking, is that right?

A. Yes, I kept this chart and made it myself.

Q. You started to mark the chart, did you, in 1925 when you were in charge of the Euston Lead?

A. Yes, at the time I assumed charge of the Euston Lead Company in 1925.

Q. Yet I notice that the chart starts at 1922. Did you go back for 3 years, is that the answer?

A. Yes, when I started to keep the daily record
2460 myself, I changed the method that had been employed by Mr. Euston, who kept his record in a series of books, and I started to keep it in the form of a chart or graph, and in order to have a background I checked up and

worked it back to the beginning of 1922. That is the reason the chart begins in the year 1922.

Mr. Duncan: We offer Respondents' Exhibit 141 in evidence, Your Honor, and have a photostatic copy thereof which we would like to substitute in lieu of the original.

Trial Examiner Norwood: Show it to Mr. Wright.

(Respondents' Exhibit 141 for identification shown to Mr. Wright.)

Trial Examiner Norwood: Is there any objection, Mr. Wright?

Mr. Wright: I haven't had an opportunity to examine it, Your Honor. (Examines document.)

I would like to cross-examine briefly on the identification of the document before making my objection.

Trial Examiner Norwood: You may.

Mr. Wright: Mr. Sprague, I call your attention to the typed material at the far left margin. When was that typing placed on the document, and by whom?

The Witness: It was placed on the document three or four weeks ago by my secretary in accordance with my request for her to put it down so that it would identify the source of the data.

2461 Mr. Wright: Was that in contemplation of its offer as evidence in this matter?

The Witness: Yes, sir.

Mr. Wright: I call your attention to the small dotted lines near the middle of the exhibit, in the middle of the page. Did you place those dots on there?

The Witness: Yes, those dots were placed on there in the year shown, 1925.

Mr. Wright: When was this document itself prepared, the original of this document?

The Witness: Originally I kept the chart in a series of graphs, each representing a year, and then in 1929 I stuck them together in the form in which they now appear.

Mr. Wright: Then the original of this document was prepared in the years shown on the face?

The Witness: Each yearly graph was prepared during each of the years indicated, and then they were stuck together in a continuous chart as you have it there.

Trial Examiner Norwood: What do the dotted lines represent there in the 1926 section?

The Witness: I do not recall.

Mr. Wright: What are the dotted lines to which I called your attention, appearing in the years 1924 and 1925, the broken lines?

The Witness: I do not recall the significance of
2462 those dotted lines, in 1925 or 1926, shown on the
chart.

Mr. Wright: What is the source of the figures that you used in preparing this chart?

The Witness: They were prepared or obtained principally from the quotations in the New York Journal of Commerce and from other currently available sources, but every day, every morning, I opened the New York Journal of Commerce every day and made a note of the markets that were there reported.

Mr. Wright: Does that apply to all the commodities that purport to be listed on here?

The Witness: It applies to each of the three commodities shown.

Mr. Wright: Are they currently reported, all three of those commodities, in the New York Journal of Commerce?

The Witness: They were at the time, and insofar as I know they still are.

Trial Examiner Norwood: I think the counsel should confine his voir dire questions to an explanation of what it is bearing on its admissibility. You may cross-examine him later.

Mr. Wright: Before I can perfect my objection, I would like to know some more about the source of these figures; that goes to the very heart of this question.

Mr. Duncan: I object to any further questioning
2463 along the line that Mr. Wright has been questioning,
because I feel he has exhausted his voir dire inquiry
as to whether or not this particular document is sufficiently identified so as to be received in evidence. I therefore object to further questioning.

Trial Examiner Norwood: You may ask him anything further so as to satisfy yourself as to how it was made, or any explanation bearing on its admissibility.

Mr. Wright: I have one more question that I would like to ask the witness along the same line.

Trial Examiner Norwood: Go ahead.

Mr. Wright: But there are other sources than the Journal of Commerce for the statistics which were graphed in here, is that correct?

The Witness: Why, yes, those statistics were published in various places. I couldn't get them daily in any other way than the Journal of Commerce every morning when I took them.

Mr. Wright: Did those prices reflect the actual prices at which transactions of sale were made?

The Witness: They reflected the markets as shown in the New York Journal of Commerce.

Mr. Wright: Your Honor, I object to the offer of this in evidence. In the first place, as shown, there are nota-
tions and captions on it that were made very recently
2464 for the purpose of this proceeding. In the second
place, there is no showing that the figures that were used in the matter are comparable. It is hearsay, it is not the best evidence of what prices were on these various commodities at that time. If Respondents wish to prove what prices were in the quotations of recognized market sources, they can bring those sources in.

Mr. Duncan: If Your Honor please, I don't know how the Commission could get better evidence than what we are trying to introduce through this exhibit. Here is an official of The Glidden Company who, from 1925 through 1929, personally charted this on a daily basis to see whether or not the pig lead market would govern the white lead-in-oil and the dry white lead markets.

Trial Examiner Norwood: This witness testified that he entered these things in from the data which he has described. I shall have to overrule the objection and receive this in evidence. The photostatic copy may be received, and the original returned.

(The paper referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 141, was received in evidence.)

By Mr. Duncan:

Q. Mr. Sprague, did you use this chart, now referred to as Respondents' Exhibit No. 141, in operating the Euston Lead business?

A. Yes, I found it of significant value in dis-
2465 charging my position as manager of that business.

Q. What did you find?

A. I learned from the chart a number of things that might be called the facts of life of the white lead business. In the first place, the chart showed and confirmed statements that had been made to me by Mr. Euston that the price of white lead moved responsibly up and down with the market price of pig lead. Usually, however, with a time lag in each case. The chart illustrated that that was true. The chart also illustrated that the difference between the market price of white lead and the market price of pig lead was, over an average period of 3 or 5-year stretches, fairly constant, although there were rather extended periods when the difference was narrow and there were extended periods when the difference was wide. That fact became one of the keystones that we had to recognize in the management of that business, because it was obvious that if we were going to be able to operate the white lead business it would apparently have to be done within the margins or spread that those curves illustrated.

Those were some of the significant things that arose from and which we learned from this chart.

Q. Did you use this chart to advantage in handling pig lead purchases?

A. Yes, we did, because one of the things the chart portrayed was the trends in the pig lead market.

2466 Q. Did you watch the London lead market?

A. Yes, I watched the London lead market in the daily quotations that were available, although I did not chart the London market.

Q. What else did the chart, referred to as Respondents' Exhibit No. 141, teach you in addition to the other advantages which you have already related?

Mr. Wright: Objection. He hasn't testified that it taught him anything yet.

Trial Examiner Norwood: That is a manner of expression. I think he knows what counsel means, which is—what does it portray.

You may answer it in that sense, if counsel will adopt my language.

The Witness: What was your question?

Mr. Duncan: Will you read the question?

(The reporter read the question as follows:

"Q. What else did the chart, referred to as Respondents' Exhibit No. 141, teach you in addition to the other advantages which you have already related?")

A. One of the significant things, to me, was that by watching the chart it became possible to do some prognosticating as to the trend and the probable changes in the price of white lead. For example, over substantial periods of time I observed that the difference between the price of white lead and the market of pig lead was around 2

2467 cents per pound, and I was able to use that with a great deal of benefit at times, because obviously it indicated that whenever the difference between the pig lead market and the going white lead market became less than 2 cents a pound, that the next movement in the white lead price would be a decline; and conversely, when that difference became wider than 2 cents a pound, the next movement to be expected was an advance in the price of white lead.

By Mr. Duncan:

Q. In discovering that fact, did you consult or receive any suggestion or intimation from any of your competitors?

A. No, none.

Q. In other words, that was exclusively your own discovery from the charts?

A. It was exclusively my own deduction, and I kept very quiet about it because I thought I had something.

Mr. Duncan: Mr. Reporter, will you read the fairly long answer of the witness just preceding his last few answers?

(The reporter read the answer as follows:

"A. One of the significant things, to me, was that by watching the chart it became possible to do some prognosticating as to the trend and the probable changes in the price of white lead. For example, over substantial periods of time I observed that the difference between the price of white lead and the market of pig lead was 2468 around 2 cents per pound, and I was able to use that with a great deal of benefit at times, because obviously it indicated that whenever the difference between the pig lead market and the going white lead market became less than 2 cents a pound, that the next movement in the white lead price would be a decline; and conversely, when that difference became wider than 2 cents a pound, the next movement to be expected was an advance in the price of white lead.")

By Mr. Duncan:

Q. With respect to the answer which has just been read, do you care to change your answer?

A. I would like to correct my answer, which was obviously in the reverse. When the difference between the pig lead market and the white lead market was less than 2 cents, the next change in white lead to be expected was an advance rather than a decline, as I stated originally.

Q. Then in discovering that fact, did you consult or receive any suggestion or intimation from any of your competitors?

A. None whatever.

Q. Will you please explain the words and figures, year by year, at the bottom of the chart? I am referring to Respondents' Exhibit No. 141.

A. The figures that I wrote in each year are explained in this manner: The figure after the letters "Avg.
2469 Dry" is the daily average for that year of the market quotations for dry white lead. The figures after "Avg. Pig" are the daily average for that year of the pig lead market, all of these figures being in cents per pound. The figures after the words "Over Pig" are the difference between the average daily dry white lead market and the average daily pig lead market. The figure after the word "Spread" is a calculated figure comprising the difference between the average daily dry white lead market and 80% of the average daily pig lead market.

Q. Why did you select 80%?

A. That was a calculated figure which I used for my guidance in indicating to me what the spread was between the cost of lead contained in a unit quantity of white lead—

Q. (Interposing.) That is dry white lead?

A. Dry white lead. (Continuing.) —and the average market for dry white lead.

Q. Per pound, is that right?

A. Per pound.

Q. Well, what is the significance of that fact?

A. Well, I regarded that as of particular significance, because the actual cost of the lead contained in white lead on any market situation was represented by that 80% figure, since the analysis of dry white lead is approximately 80% lead.

Mr. Duncan: I will ask the reporter to mark this as Respondents' Exhibit 142.

2470 (The paper referred to was marked Respondents' Exhibit 142 for identification.)

Trial Examiner Norwood: We will take a five-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: The hearing will come to order.

By Mr. Duncan:

Q. I hand you what has been marked Respondents' Exhibit 142, and ask you what it is?

A. This is a simple graph that I had prepared, showing the approximate lead content, by analysis, of the commercial lead pigments—dry white lead (basic carbonate), litharge, red lead, and also white lead-in-oil.

Q. When you speak of lead content, do you mean metallic lead content as distinguished from white lead?

A. Yes, I refer to the amount of metallic lead that is found upon analysis of these pigments.

Mr. Duncan: We offer this exhibit, Your Honor, in evidence. We would like to substitute the photostatic copy of the exhibit for the original.

Trial Examiner Norwood: That may be done.

Mr. Wright: May I examine briefly on this?

Trial Examiner Norwood: Yes.

Mr. Wright: Did you state this was based on an
2471 analysis of commercial lead pigments, Mr. Sprague?

The Witness: Yes, the chart portrays the approximate chemical analysis of the commercial pigments.

Mr. Wright: Who made the analyses represented on this chart?

The Witness: One of the men in our office computed them from the information I gave him and the chemical formula of the pigments.

Mr. Wright: What information did you give him?

The Witness: I told him what the formula was.

Mr. Wright: In other words, you told him what the lead content was?

The Witness: No, sir, I told him what the chemical formula was, and in the case of the white lead-in-oil I told him what the average amount of white lead and turpentine was in commercial white lead-in-oil.

Mr. Wright: In other words, it wasn't based on an actual analysis chemically of products which were on the market?

The Witness: Yes, sir, it was based on an actual chemical analysis of the various products.

Mr. Wright: Who made that analysis?

The Witness: Well, any chemist can calculate the analytical composition of a substance whose formula he has, from the atomic and molecular weight ratios.

2472 Mr. Wright: Well, then, it was made from that sort of calculation rather than a chemical analysis of a physical substance?

The Witness: Yes, the chemical analysis of the physical substance is found to exactly duplicate the results shown from the chemical formula.

Mr. Wright: Then you gave him a formula which you considered was the formula of the commercial pigments on the market, and he made that calculation from that; is that correct?

The Witness: We regarded as typical of the commercial pigments on the market, white lead as the basic lead carbonate; litharge as Pbo lead oxide; and red lead as the higher oxide, Pb_3O_4; and calculated the lead content from that.

Mr. Wright: As to the red lead, what grade of red lead was it that you gave him the formula for?

The Witness: The standard grade of red lead, Pb_3O_4. We used that as typical because of the various grades of red leads, the variance in the lead content is very slight.

Mr. Wright: What is that grade known as commercially? Is that the 95%?

The Witness: Yes, the 95% standard red lead.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

2473 Mr. Wright: What figures did you give him as to white lead-in-oil for purposes of this calculation?

The Witness: For purposes of the calculation, I gave him the composition of the stiff paste grade of white lead-in-oil, which is approximately 8% oil and 92% white lead.

Mr. Wright: That is basic carbonate?

The Witness: Yes. From that the lead content was computed. You will note that the chart is headed "Approximate", which was for the purpose of allowing for the very slight variations that may exist in various commercial grades.

Mr. Wright: In other words, then, this doesn't represent an exact percentage of any particular commercial product that is on the market?

The Witness: Exact to within 1 or 2 percent.

Mr. Wright: I have no objection to this exhibit.

Trial Examiner Norwood: Received.

(The paper referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 142, was received in evidence.)

2474 By Mr. Duncan:

Q. Mr. Sprague, what are the relative percentages, approximately, of pig lead as a cost element in white lead products and lead oxide products?

Mr. Wright: Objection, Your Honor. There has been no time element stated there and it is obviously impossible to answer it by a general statement.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Mr. Sprague, what are the relative percentages, approximately, of pig lead as a cost element in white lead products and lead oxide products?")

Trial Examiner Norwood: Do you want to fix a time when that formula prevailed?

Mr. Duncan: I will try to give a time if Your Honor wants the time element in there. I thought it was timeless.

Mr. Wright: Otherwise it calls for a conclusion on the part of the witness. It hasn't been established that these things bear any stable relation.

By Mr. Duncan:

Q. For example, in 1942 what were the relative percentages, approximately, of pig lead as a cost element in white lead products and lead oxide products?

A. In 1942, or at any other time—it makes no difference—the preponderating cost element in these products is the cost of pig lead. 2475

Q. Does the oxygen or the carbon amount to much?

A. It is inconsequential.

Q. Does the white lead—and when you have referred to white lead I assume you have meant dry lead during the entire examination this morning—

A. When I refer to white lead I refer to dry white lead.

Q. Now does that white lead contain approximately 80 per cent lead?

A. Yes, sir.

Q. And do the lead oxides contain approximately 90 per cent of lead?

A. Ninety per cent or higher.

Q. Are you speaking of percentages or by weight?

A. Percentage by weight.

Q. How does that bear on the relation of cost of lead to cost of the pigment?

A. The cost of lead used in manufacturing any of the lead pigments is the dominating cost element in preparing it.

Trial Examiner Norwood: He wants to know how would the percentage by weight compare with the percentage of cost—isn't that right?

Mr. Duncan: Precisely.

The Witness: The percentage of lead by weight contained in the lead pigments would be close to the
2476 percentage of the cost of the lead pigment at any
given time.

Mr. Wright: Objection, Your Honor. That is very vague. It hasn't been stated what pigment is referred to in the answer, and I move it be stricken.

Trial Examiner Norwood: The motion is denied. You can examine him and render this thing more definite.

By Mr. Duncan:

Q. When you referred to "cost" in answering that last question, did you refer to material cost?

A. No, I referred to the manufactured cost.

Q. Well, is the cost at any given time correspondingly preponderant in the cost of the finished product?

A. It is always preponderant.

Q. Have you prepared a study showing the pig lead market averaged over longer periods beyond the 1929 period that was referred to in the chart, Respondents' Exhibit 141?

A. Yes, sir.

Mr. Duncan: I will ask the reporter to mark this as Respondents' Exhibit 143 for identification.

(The chart referred to was marked Respondents' Exhibit 143 for identification.)

By Mr. Duncan:

Q. I will hand you what has been marked as Respondents' Exhibit 143 for identification and ask you what it is, Mr. Sprague?

2477 A. This is a chart or graph showing the monthly
average New York pig lead market, the monthly average dry white lead market at New York, and the monthly average card price for white lead-in-oil. It is a chart similar to the one that I prepared earlier, but instead of being a daily record it is a monthly average record, beginning the latter part of 1929 and extending through 1944.

Q. Was that chart prepared under your supervision and control?

A. Under my supervision and at my direction, yes.

Mr. Duncan: We offer in evidence, Your Honor, Respondents' Exhibit No. 143.

Mr. Wright: Mr. Sprague, when was this document prepared?

The Witness: My recollection is that it was prepared in 1945.

Mr. Wright: And the sources of the information are those listed at the bottom of the document, are they?

The Witness: Yes, sir.

Mr. Wright: In other words, the top line on the chart was compiled from data published in the American Paint Journal, issues of October 26 1938 and of October 31, 1944, is that correct?

The Witness: If that is what the chart states it is correct.

2478 Mr. Wright: Will you tell us the process of compiling this; what was done in compiling this chart?

The Witness: The chart was plotted from the data that was shown in the American Paint Journals referred to there.

Mr. Wright: And would your answer be the same with respect to the lines on the graph marked B and C?

The Witness: No, my answer would correspond exactly to what is shown on that graph. My recollection is that the pig lead market shown there was not obtained from the American Paint Journal.

Mr. Wright: You state that these are monthly average prices as they appeared in those publications?

The Witness: Yes, sir, they are.

Mr. Wright: Do you know from what sources those publications listed secured that information, or how they compiled that monthly average that they published?

The Witness: I did not inquire from these journals what their source practices were. I simply used the data that have been generally recognized in the trade as being correctly portrayed by these publications.

Trial Examiner Norwood: Did the publications give the monthly averages or did you figure out the monthly averages from data given in the publications?

The Witness: The publications published these
2479 charts showing the monthly average. There was no

calculation done by me in any way in connection with the chart.

Mr. Wright: Your Honor, I object to the reception of this document in evidence. It is obviously hearsay; it was prepared by an organization and there is nothing in the record about the sources of those statistics or how they arrived at the averages, or where they got them. It is plain that this witness prepared this chart from those sources in contemplation of this proceeding. The figures are not shown to be in any way reliable and I am deprived of any right of cross-examination as to the source of those figures.

Mr. Duncan: If Your Honor please—

Mr. Wright: (Interposing.) It is incompetent as proof of the matters for which it is offered. Certainly the American Paint Journal can't be used through this witness to prove what the prices of these various products were on any average basis in this manner. These respondents were engaged in the business of marketing all three of these products; they are obviously in possession of much better facts and figures as to the prices of these articles than some third party that is not in any way connected with this proceeding.

Mr. Duncan: Your Honor, I submit that this chart is admissible. It is a continuation of the first chart, Respondents' Exhibit No. 141. Now this Commission, I do believe, wants the entire picture. We have tried to trace this
2480 chronologically. We started off in 1922 and that
chart stopped at 1929. Now this picks it up in 1930, true on a monthly basis rather than daily, but it carries it right up to 1944. I submit that it would be very unfair if this document were not received in evidence for what it is worth.

Mr. Wright: Your Honor, counsel has characterized this as a continuation of Respondents' Exhibit 141, but it is obvious on its face that it is not. I assume that Your Honor when he admitted Respondents' Exhibit 141 did so perhaps as an exception to the hearsay rule on the basis of entries kept in the regular course of business by this man in connection with his official duties. This document, on the other hand, is something which was plucked out of a publication about which we have heard nothing before in this proceeding, and it is on a monthly average basis. There is no testimony as to how that average was compiled or from where the figures were obtained.

Trial Examiner Norwood: Well, I think there is a distinction between this and the other chart, but it has long been accepted as good practice to receive daily records from newspapers and periodicals showing fluctuations in the market price. Now this is removed from that because this is a tabulation of what this witness says those records showed. Our custom in receiving material of this kind is to condition its receipt on the data on which it is
2481 based being made available to the other side. If this data is available we can receive this for our convenience and counsel in support of the allegations of the complaint may then offer that in evidence if he wants to; he is privileged to do so if it isn't a true reflection of what those market quotations were. That has been our practice here and it is the practice in other governmental agencies to follow that principle of administrative procedure. I will ask counsel if that data is available?

Mr. Duncan: I will have to ask the witness that because I don't know. Are the data on which this is based available?

The Witness: The data are available and have been regularly published and the graphs charted from it adequately portray the trends of the market involved.

Mr. Duncan: We offer the exhibit in evidence, Your Honor.

Trial Examiner Norwood: That data is accessible to the Commission, I believe.

Mr. Wright: If this were an offer of the original data that would be something else, but even in that event I don't think it could properly be offered through this witness.

Trial Examiner Norwood: I think so.

Mr. Wright: There is absolutely nothing available to us on the source of this information. It is not market quotations; it is some third party's idea of what the
2482 average of market quotations was.

Trial Examiner Norwood: It is taken from the figures, he says, and he has testified when; it is taken from these trade-journals and from the market information that is regularly recorded in those journals, and I think copies of them are available and the Commission could find out whether this is a true reflection of that material; and I think it is sufficiently reliable to come in for consideration, at least.

Mr. Wright: Well, Your Honor, I don't think I should have the burden of calling the publisher of some document, some journal. That burden properly is on the respondents to establish the authenticity of this as a source of information and to bring in the original information. Here an attempt is being made to prove the market prices of the products which this witness sells.

Trial Examiner Norwood: This is something we are going to have to go into anyway, and we are going to have to get exact data on it, and I don't think it is going to prejudice anybody to receive this, so as to have something to start from, and then to go on. It is just a practical way of looking at it to start this study. It is not going to be taken as the final word here. It is received in evidence for whatever probative value it may have.

Mr. Wright: Well obviously, Your Honor, on the
2483 face of it, it has no probative value.

Mr. Duncan: Of course we take exception to that statement of counsel. We think it has a lot of probative value.

Trial Examiner Norwood: We will hear from counsel in support of the allegations of the complaint if these are incorrect in any way. The objection is overruled and the document is received, subject to the data on which it is based being available. If that is not available and cannot be obtained I will entertain a motion to strike the exhibit from the record. In this case also, a photostatic copy may be substituted for the original.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 143, was received in evidence.)

By Mr. Duncan:

Q. Mr. Sprague, from the standpoint of your sales and sales policies respecting white lead, what is the significant fact shown by Respondents' Exhibit 143, the monthly graph, which has just been received in evidence?

A. This chart portrays the relationship between the pig lead and the white lead and the white lead-in-oil markets, and from it the same conclusions may be drawn regarding those relationships and their significance that are obvious from the first daily chart that I kept myself.

Q. The chart received as Respondents' Exhibit 141?

2484 A. Yes. Respondents' Exhibit 143 shows that the same significant relationships maintained themselves through these years 1929 to 1944 as were shown in the years 1922 to 1929, and they were capable of the same uses as the first chart.

Q. Now to go back to what you call the "first chart", which we know as Respondents' Exhibit 141, did you actually use that chart in connection with your conduct of the business of the Euston Lead Division on behalf of the Glidden Company?

A. It was used constantly.

Q. By whom?

A. By myself.

Q. Will you describe more fully to what use you put Respondents' Exhibit No. 141?

A. Well, I have described a number of the uses and the significant things which it taught me. One of the significant things was that if I expected to be able to earn the same average gross profit in my white lead business as was earned by the market leader, I would have to adjust my prices of dry white lead up and down as rapidly as the market moved up and down. Obviously, the gross margin obtainable in the business is roughly measurable by these spreads between the two graphs. It showed me that if I cut under one I simply cut into my possible gross margin.

Q. Referring to Respondents' Exhibit 141 there appears on the chart the legend "E & M J". Will you 2485 explain what you meant by that?

A. Yes. For the purpose of checking myself in my computation of the daily average pig lead market, I recorded, during certain of these years, what that average was as it was reported by the Engineering & Mining Journal.

Q. And will you tell us what significance that has?

A. Well, it had these significant points. First, I wanted to see how comparable my calculation was, and then it was particularly interesting because in the years prior to 1925 I had found that Mr. Euston had purchased all of his pig lead on an average market price contract governed by the E. & M. J. average, and that then showed me what his average cost of pig lead had been in the years prior to 1925, and it was interesting to me to see for a year or two, I forget how many years it was continued—no, I guess it was not continued beyond 1925 because we ceased at that time to secure our pig lead on that kind of a contract.

Q. Had Mr. Euston suggested that you might be able to beat the lead market?

A. Mr. Euston warned me not to try it.

Q. What were the results of your efforts to beat the lead market?

Mr. Wright: Objection, Your Honor.

Trial Examiner Norwood: The objection is overruled.

Mr. Wright: It hasn't been established that he
2486 did try to beat the lead market; counsel is leading the witness.

Mr. Duncan: I will withdraw the question.

By Mr. Duncan:

Q. Did you follow Mr. Euston's suggestion?

A. No; like all newcomers we had to learn by experience.

Q. And what did experience teach you?

A. Our experience was very unsatisfactory in efforts to try to outguess the lead market.

Q. In addition to the daily markets being indicated by Respondents' Exhibit 141, which showed you the underlying trends up and down, did the chart prove to be of any value in the timing of your purchases of pig lead?

A. Yes, it did.

Q. And did you constantly use that chart for that purpose, among others?

Mr. Wright: Objection, Your Honor.

Mr. Duncan: I think this goes to the practice—

Trial Examiner Norwood: (Interposing.) He has given us that information before anyway; objection sustained.

Mr. Duncan: I will withdraw the question and put it this way.

By Mr. Duncan:

Q. Why did you stop keeping the daily chart record in 1929?

A. I left my immediate work and residence at the Euston Lead Company in Scranton at that time, and
2487 I ceased keeping the daily chart.

Q. Did you follow, however, the averages as published in various sources?

A. Yes, I did. I thought I had learned pretty much the lessons that the chart had taught me and I watched the lead market daily, but I did not chart it down daily.

Q. You stated earlier that in order to conduct the white lead business profitably you would have to do it either within the spreads shown on your chart, or else by being successful in producing a product far superior to National Lead's Dutch Boy so that it could be sold at a premium over National Lead Company's market, or be successful in finding out how to consistently purchase pig lead at below the average New York market. Did you endeavor to accomplish these results?

Mr. Wright: May I have the first part of that question read, please?

(The reporter read the portion of the question requested as follows:

"Q. You stated earlier that in order to conduct the white lead business profitably you would have to do it either within the spreads shown on your chart" etc.)

Mr. Wright: That is sufficient. Objection, Your Honor. That is putting words and conclusions in the mouth of the witness which his testimony doesn't warrant. It is in
2488 the form of a leading question.

Trial Examiner Norwood: I am inclined to think that it is pretty leading.

Mr. Wright: There was no such statement about the National Lead Company in the testimony of this witness, I don't believe.

Trial Examiner Norwood: I will sustain the objection. We will take a three-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Proceed, Mr. Duncan.

By Mr. Duncan:

Q. Mr. Sprague, what results did you try to accomplish when you were in charge of the Euston Lead Division of The Glidden Company?

A. Well, I tried to bring the business into a profitable position and it was obvious that this could be done in various ways. One of them would be to be able to purchase pig lead at an advantage by outguessing the market. Another would be to make a better product, sufficiently better so as to enable it to be sold in the market at a premium. If either one or both of those could be accomplished it would be possible to operate at a better profit margin than the market averages shown by the charts.

Q. Did you try to do both of those?

Mr. Wright: I object to that as irrelevant and im-
2489 material.

Mr. Duncan: I think it has relevancy.

Trial Examiner Norwood: Objection overruled.

The Witness: We tried very hard to do both of those things.

By Mr. Duncan:

Q. Did Euston Lead have any advantage in cost of manufacture?

A. We regarded our process of making white lead as one that was more economical than those usually employed.

Q. Well, was it of any consequence?

A. No. The manufacturing cost, according to our experience, of white lead, was such a minor factor in the total cost of the finished white lead that an advantage in the manufacturing process cost itself was inconsequential.

Q. Between 1924 and 1929 did Euston Lead develop and improve its product?

A. Our constant endeavor was to improve the quality of Euston white lead, and we succeeded in making improvements and in realizing those improvements irregularly all through the years. By 1929 there had been substantial improvement realized in the quality of the product.

Q. Was there any change in its color?

A. Yes, the improvement consisted of an improvement in the color or the whiteness of the product, which was of importance in the white pigment.

2490 Q. Who were Euston's customers on white lead-in-oil during that period of development and improvement?

A. On white lead-in-oil the sales were made principally to public purchasing agencies on bids, and I recollect to a few important industrial buyers of white lead-in-oil. Those sales were made always at cut prices, or rather at prices below the market for white-lead-in-oil because of the necessity to recognize the questionable quality of the merchandise.

Q. Well eventually did you depend on fortuitous pig lead purchases in order to make a profit in the white lead and white lead-in-oil business?

A. We depended upon our skill in that for a while but we had to abandon it because our skill didn't produce results. We couldn't successfully beat the market.

Q. Were you able to get a product better than National Lead's so that you could sell at a premium, and by "you" I mean the Euston Lead Division of The Glidden Company?

A. We thought we had attained a product that was superior to that of National Lead or other suppliers—

Q. (Interposing.) When did you think you had achieved that?

A. My recollection is that we thought we had done that about 1939.

Q. '39 or '29?

A. '39.

Q. Well, back along about 1929 did you have oc-
2491 casion to develop sales?

A. After we had made our first substantial improvements in the product during the period between 1925 and 1929, we thought we had gotten something that was good enough to compete with the market leader, Dutch Boy White Lead-in-Oil, and we undertook then, with hopes of success, to develop a distribution and a business on it.

Q. Well, what methods did you employ?

A. We employed about every method that could be conceived of as a means of accomplishing that result. The first method which we stressed was to attempt to interest the paint divisions of The Glidden Company in aggressively taking hold of the sale of white lead-in-oil, which we merchandised under the trade name of Euston White Lead-in-Oil.

Q. Was that successful?

A. We tried for some time to arouse successful results but we failed in doing so.

Q. For about how long a time was it that the Euston White Lead-in-Oil was sold by the paint divisions of The Glidden Company?

A. I will have to refer to some notes that I have, if I may, in that connection.

Trial Examiner Norwood: What are those notes to which you are referring?

The Witness: These are some notes that I pre-
2492 pared of some points that I wanted to bring out in
my testimony.

Mr. Wright: When were they prepared, Mr. Sprague?

The Witness: These notes were prepared yesterday.

Mr. Wright: From what sources were they prepared?

The Witness: These are notes that arose from quite a long period of time, to bring together my recollection and that of others with respect to the various matters that occurred during these years.

Mr. Wright: Do they include matters that were the recollection of others than yourself?

The Witness: They are the result of many discussions that I have had with others who were identified in one phase or another with these activities.

Mr. Wright: In other words, those notes contain information which yu secured recently from others in the organization?

The Witness: No.

Mr. Duncan: I object to that.

Mr. Hinds: I object to having the examination interrupted by this cross-examination. The witness is obviously permitted to refer to anything that will refresh his recollection, including a telephone book if that would serve his purpose, and it is improper cross-examination at this time.

Trial Examiner Norwood: It isn't cross-examination at all. He is asking a few questions on voir dire covering
2493 this material which the witness is using to refresh his memory. It occurs to me that it is such a document as may be used, so I think we may proceed. When you made those notes you knew them to be true, did you?

The Witness: Yes, sir.

Trial Examiner Norwood: Go ahead.

By Mr. Duncan:

Q. About how many years did The Glidden Company, through its sales division, attempt to sell Euston White Lead-in-Oil?

A. This first effort that I attempted to get The Glidden Paint divisions to undertake extended over a period of four or five years.

Q. Can you tell us why that was unsuccessful?

A. Yes, it was unsuccessful for a couple of fundamental reasons. The first one was that I was desirous of showing a profit in the Euston Lead Division, and my argument with the paint people was that they ought to be willing and able to build a sales distribution of Euston White Lead-in-Oil, functioning as a jobber, purchasing the white lead-in-oil, so to speak, from the producing plant on a jobbing basis, and operating on the jobber's margin. The objection to that was that the paint people didn't have enough of a margin to pay the kind of commissions to the sales force that they could afford to pay and did pay on the sales of other types of paint products. But the real difficulty was that the

2494 sale of white lead-in-oil by a paint organization was asking them to pull in both directions at the same time. They had no enthusiasm for selling white lead-in-oil, and none could be inculcated by the sort of incentive that was provided. The paint salesman reported that his job was to sell ready-mixed paint in competition with white lead-in-oil, or sell white lead-in-oil in competition with ready-mixed paint, and he didn't know how he was going to do both at the same time—and the effort failed for that fundamental reason.

Q. What was the pricing policy followed by the paint divisions over such sales as they were able to make?

A. The pricing policy at that time was that the paint divisions priced the white lead-in-oil at a concession of one-half cent per pound under the competitive market schedules and selling bases of the Dutch Boy White Lead-in-Oil.

Q. Now will you tell us what other method Euston Lead Division employed with respect to the sale of Euston White Lead-in-Oil?

A. Another method that we tried was to see if it could be accomplished by a direct mail selling policy.

Q. To whom?

A. By a direct mail presentation to large painters, painting contractors, distributors and important dealers.

Q. What result did you get from that?

A. The results from that effort were entirely
2495 unsatisfactory although at first there did seem to be some sizeable response, but it petered out and washed up.

Q. Did you apply any other methods on behalf of Euston?

A. Yes, sir, we made an extensive plan of bringing our Euston White Lead-in-Oil to the attention of buyers by direct sales methods, by the employment of salesmen who were to devote their time and attention in an endeavor to build the business. We couldn't afford to hire a lot of salesmen but we selected those territories where we thought the cream of the white lead-in-oil business would be found, and we provided the salesmen with promotional matter and with sales support, and turned them loose in the hopes that they could make the thing go by that method.

Q. Why did you think you could sell at Dutch Boy prices?

A. We tried on more than one occasion to bring our price level to that of the Dutch Boy White Lead-in-Oil.

During the time that this was done with our own direct salesmen we did it because we had made further improvements in the product, and we thought we were about to the place where we might expect on a quality basis, to be able to compete on a price equality basis with them.

Q. Did you attempt to prove the improvement to the trade?

A. Oh yes, we provided the salesmen with demonstration panels and celluloid exhibits that were designed to portray the color advantage of the product, and
2496 instructed them in testing methods, making comparative
tests with competitive white lead-in-oil, designed to show what we thought the advantage was.

Q. What was the result of the direct presentation program?

A. We were obliged to abandon it for the simple reason that the cost was prohibitive and the results were too long in coming. Our competition was just too good for us.

Q. Did you consider any other method?

A. Yes, we did. We again thought that we might be able to put the merchandise across by having it handled through the Glidden Paint divisions, and setting up a different basis for doing it. There were other methods employed among which I can remember that we attempted to locate large buyers of white lead-in-oil with the intent of using the method of making an attractive price to secure tonnage in isolated spots, that would justify the price, and would enable a backlog of volume to be obtained.

Q. What happened to that?

A. That idea was found to be not feasible at the time we tried it because the distribution pattern of white lead-in-oil had apparently changed from what it had been in some of the earlier years because we couldn't find any substantial volume of white lead-in-oil business in any one spot. White lead-in-oil is a maintenance item and a large volume does'nt exist in one spot as far as actual consumption
2497 of white lead-in-oil is concerned. We couldn't dent the
large distributors who were handling white lead-in-oil because our competition was too strong for us. We had to abandon the idea that we could build volume by finding a dozen or more spots where there was large volume and making a price to get it.

Trial Examiner Norwood: We will now recess for lunch until 1:00 o'clock, Eastern Standard Time.

(Whereupon, at 11:25 a.m., E. S. T., a recess was taken until 1:00 p. m., E. S. T., this day.)

2498 Afternoon Session.

2:00 p.m. E. S. T.

Trial Examiner Norwood: The hearing will come to order. Proceed, Mr. Duncan.

PAUL E. SPRAGUE resumed the stand and testified further as follows:

Direct Examination (continued) by Mr. Duncan.

Q. Mr. Sprague, did Euston Lead try any other methods?
A. Do you refer now to the sale of white lead-in-oil?
Q. Yes.
A. I explained a number of methods that were employed. One thing I did not describe was the program we tried of buttressing the efforts of directly employed salesmen by authorizing the holding and putting on of a series of painter meetings, where we would invite painters to a meeting place in the evening and entertain them and put on a demonstration of the qualities and properties of our white lead-in-oil. The men thought that since that method apparently had been so successfully employed by their competitors, and since they had a product that was better than it had been in the past, that that method ought to be employed to demonstrate it, and that was employed.

Q. And what results did that method have?

2499 A. Well, the result was that while it had a modicum of effectiveness, the cost of it and the results from it, again, were such that we couldn't afford to continue it. The trade acceptance of the Dutch Boy brand was not to be overcome quickly by those methods.

Q. And it was National Lead that had as its product the Dutch Boy White Lead?
A. Yes, that was the trade name of the National Lead Company which had been developed by a long period of years of advertising and promotion. It was extremely well regarded and the product was satisfactory, and the National Lead Company had the cream of the distribution of white lead-in-oil in terms of the dealers and distributors that were the better ones.

Q. Why did National Lead have this advantage? Can you assign any reasons as to why National Lead had this advantage?

A. Yes. We found that it sprang from the fact that they had, through the years, secured consumer acceptance, painter acceptance, to a remarkable and extraordinary degree. The acceptance of Dutch Boy White Lead as an article of quality was a matter of painter feeling that had been handed down from grandfather to grandson, and the consumer acceptance, or the painter acceptance was one of the main factors.

Another factor was that the Dutch Boy product was backed up by excellent service in the sense that adequate stocks were available and there was good distribution. Any time a painter wanted to get a keg of Dutch Boy White Lead he could go to his nearest dealer, as a rule, and get it. 2500

Another factor, which was a fundamental one, was that the multiple producing points of the National Lead Company and their facilities for production were at all times adequate to satisfy the entire market demand for white lead-in-oil. In other words, no one needed to wait a while to get Dutch Boy White Lead, it was always available.

As I recall it those three basic factors were wherein the strength of the Dutch Boy product lay, and where the tough bucking of competition had to be faced.

Q. Now after all these efforts, what did you conclude that Euston would have to do?

A. It was obvious to us that our methods had not been successful and in studying the situation and studying our experiences it seemed to us that there were several fundamental factors that had to come into play if we were ever going to get a reasonable distribution of Euston White Lead-in-Oil.

Q. What were those basic factors?

Mr. Wright: Your Honor, I would like to object to this whole line of testimony. I objected to it earlier on the ground that it was irrelevant.

Trial Examiner Norwood: The objection is overruled. Tell us about this competition, the nature and extent of it.

2501 The Witness: Well, the factors, as we saw them, were these. First, the price of our product could not exceed that of the market leader to any class of buyer. We were thoroughly convinced that it was hopeless to attempt to demonstate enough superiority in quality to get any class of buyer to pay an enhanced price over the price prevailing for Dutch Boy White Lead-in-Oil. One reason for that was the nature of the superiority that we thought we had attained, namely, one of odor and hiding power in the paint made from our white lead-in-oil. Well, we did have an advantage in color and it could be demonstrated that it was there, but we found that when it got on the side of a house alongside of Dutch Boy, in a matter of four or five or six months there was no difference in color to be seen, and it was an evanescent advantage.

The question of other characteristics of the product that we thought advantageous with regard to such things as the ease of spreading and the ease of breaking up for use were really minor points that couldn't be given a dollar value. We just found, time and again, that painters would say, "Well, maybe this is a little better but it is not worth any more money, I get the same results on the side of a house and I am not interested in any premium". That was the point that we had to accept, that it was fruitless to attempt to get a higher price at any stage of our efforts.

2502 Then the next thing that we recognized that had to be taken into account and accepted was that we certainly would have to abandon the idea of offering our merchandise to painters or consumers at a lower price than the market leader.

By Mr. Duncan:

Q. What led you to that conclusion?

A. Well, we had had by this time considerable experience in trying to sell our product at various lower prices, and we encountered a fundamental merchandising fact that an article that the consumer can't visualize and judge immediately as to its quality is injured by being offered in the market place at a cut price. It reacts against the product, injures it. We found that to be true and it was particularly true with Euston White Lead for these reasons: First, in our case such painter recollection as existed of our product that had been offered, was bad. Whatever they could remember about Euston White Lead was bad because the product wasn't up to competitive quality. Then we had to face the very special situation that resulted from the early history of the white lead-in-oil business.

Q. What was that?

A. That was reflected in this way. In the early history of the paint business in this country white lead-in-oil was the principal and the basic paint material, it was the only recognized quality white paint. And as the ready-mixed
paint business developed in competition with that,
2503 there also developed the various imitation and spuri-
ous white leads that were put on the market as white lead—Green Seal White Lead, for example, or XYZ White Lead, which in too many cases turned out to be adulterated merchandise.

Q. Was that suspicion cast on Euston's product?

A. That suspicion was cast upon Euston White Lead-in-Oil as well as any other white lead-in-oil that was exposed to the painter at a cut price. It lingered in their minds, these experiences in the past that they had had with low-priced white leads which were adulterated and inferior. Those things combined to convince us that we never were going to get anywhere with cut prices to the consumer and the painter.

Q. Did you ever attempt to overcome that situation, that is to overcome this suspicion that had been cast on your product?

A. We tried every method within reason that we could think of. At one time we advertised and we put on our kegs that we would pay one hundred dollars in gold to anybody that could prove that there was anything in one of those kegs except pure white lead and pure linseed oil.

Q. Did you ever have to make good on that guarantee?

A. No, we never did because our product was pure. We later placed on our kegs, and it is my recollection that we still do, a metal tab to the effect that it is guaranteed to be
pure white lead, pure linseed oil and nothing else, in
2504 the case of the stiff paste grade; and in the case of
the soft paste grade, nothing but pure linseed oil, pure turpentine and pure white lead.

Q. Did you apply a test known as the blow-torch test?

A. Yes, we gave our sales people, and we told our distributors and dealers to apply the blow-torch test to our white lead-in-oil for the purpose of proving its purity.

Q. Now you spoke of these basic factors and you have given us two of them, I think. What is a third basic factor which you found must govern a program for the successful sale of Euston White Lead-in-Oil?

A. The third factor was that we would have to get the sale of our white lead-in-oil into the hands of a sales organization who could handle it along with other items so that the sales expense that could be charged against the white lead-in-oil would be low.

Q. Why did you have to keep your sales cost so low?

A. Well, we were compelled to keep our sales expense low because in the first place we had a plant whose volume was limited and our job was to produce a profit within the scope of the volume of production attainable. Secondly, and more importantly, we learned from our chart of relationships between the price of white lead-in-oil less the discounts applicable, and the cost of pig lead, that it was more or less constant and that it was more or less
2505 narrow. So if we were going to undertake a sales
program that gave us a high cost per unit of white lead-in-oil sold, the only result would be to subtract too much from the attainable margin. We always had to operate in between the ceiling and the floor, the ceiling of the National Lead Company and the floor of the pig lead market. Now, if we increased our sales expense too high, or conversely, if we dropped our competitive price too low, we squeezed the life out of ourselves, and we couldn't live that way.

So I decided, and I convinced The Glidden Company, that we were not going to get the Euston White Lead-in-Oil marketed unless we could do it at a low unit sales cost, and I proposed a scheme by which it could be done.

Q. What was your scheme, and how did it result?

A. My scheme was that the paint sales divisions of the company take over the responsibility for the sale and distribution of Euston White Lead-in-Oil in those markets where the largest volume lay, namely, in sales to painters and painter-contractors and distributors and dealers, and where the sales cost was high. Now economically that was practical from The Glidden Company's point of view, because each year the company has grown, the sales organization has increased in numbers, and the intensity of its coverage of prospective white lead-in-oil users was enlarged, and the only thing that was necessary was to be
able to realize some enthusiasm on the part of that
2506 organization to take over the sale of the product.

Q. About when did the paint divisions of The Glidden Company take over the sale of the Euston White Lead-in-Oil?

A. My recollection is that it was in 1933 or 1932.

Q. Was that change in policy the result of action taken by the management of The Glidden Company?

A. Oh yes; the people in charge of our paint business were no more interested in doing a bang-up job of white-lead-in-oil distribution then than they had been before, and for the same reasons, and I proposed that we overcome one of the reasons by making it more profitable to the paint divisions to undertake it, and that was done by turning over the white lead-in-oil business or rather product by the Euston Producing Division of the company, to the Paint Sales Divisions at actual cost, so that they earned the entire gross margin that existed in the business.

Q. Well, did the attitude of the paint divisions of Glidden change as a result of this policy?

A. No, it didn't. The fundamentals were still there. The sale of white lead-in-oil was in opposition to the sale of ready-mixed paint, and it was a fundamental difference.

Q. Did The Glidden Company, in furthering its policy, take any other mandatory steps with regard to the sale of white lead-in-oil through its paint divisions?

A. Yes, it took every step that would be within
2507 the practical power of management. First it made it
mandatory that the company stop handling Dutch Boy lead or Eagle-Picher lead or any other kind that they had been distributing as jobbers. Then they went further and set up a quota for every salesman in the paint divisions every month, of white lead-in-oil business that he was to produce.

Q. Are you familiar with the pricing practices of the paint divisions of Glidden in carrying out these activities?

A. Yes, I am in general familiar with the pricing policies although I was not in charge of them.

Q. What was the pricing practice used in the sale of white lead-in-oil at this time, that is the selling price basis—

A. (Interposing.) I will have to check up on that and see. At the beginning of that period of what I will call mandatory distribution, the pricing was on the basis of the Dutch Boy schedules as we knew them, less a concession to the dealer or the distributor of a half a cent a pound, with the encouragement and desire of the company that the dealer maintain the market price to his painter and the painter-contractor customers, so that he would have the benefit of that additional margin to justify him for sales efforts of his own.

2508 Q. What was the practice with regard to prices charged for delivery at distant points?

A. Well, there were added premiums to the base schedules for deliveries at distant points, either related to equalization points that were in existence on the part of competition, or whatever competitive prices at those points were found.

Q. Were price cards or price lists used?

Trial Examiner Norwood: Off the record a minute.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Duncan:

Q. The last question I asked was: Were price cards or price lists used? I didn't hear the answer.

A. Yes, the use of price cards, according to my recollection, was started at the time that Glidden took over—that the Glidden Paint Divisions took over that responsibility.

Q. Over how wide an area was it endeavored to secure distribution of Euston white lead-in-oil?

A. We didn't know how wide an area would be required ultimately to result in the volume of sales that the white lead plant could handle. So white lead-in-oil was put into the hands of all of the Glidden Paint Divisions' sales organization at all parts of the country other than on the Coast.

Q. Will you state whether or not Euston followed National Lead Company's prices and differentials?

2509 A. I think I answered that a minute ago.

Q. Well, if you did, then why did—

Trial Examiner Norwood: (Interposing.) Let him answer the question.

Mr. Duncan: The Examiner says he wants you to answer the question.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Will you state whether or not Euston followed National Lead Company's prices and differentials?")

A. The pricing policy for the Euston white lead-in-oil and the prices made were similar to those of the National Lead Company with allowance for the deduction of a half a cent per pound to the dealer or distributor, which I referred to.

By Mr. Duncan:

Q. Why were National Lead's prices and differentials followed?

A. Because, for the reasons that have been mentioned, the Dutch Boy product of the National Lead Company was the market leader, we couldn't sell our merchandise at higher prices and we were unwilling to sell it, insofar as we could control it, to the painter and the consumer at lower prices, and we had to operate within the range of margins that existed between our pig lead cost and our white lead price; and we also were confronted, for the first
time, with the fact that Euston white lead-in-oil was
2510 in the hands of a nation-wide sales organization.
That made it necessary to price the material as carefully and as accurately as we could learn what the competition was in these various parts of the country.

Q. How were the price schedules of the National Lead Company obtained?

A. Well, it was easy to obtain the National Lead Company's price schedule, because it was their practice to mail out cards to the trade, the prices and the changes were published in the newspapers, in trade journals, and more importantly, the sales reports from salesmen contacting the trade, those things combined to enable a quick and close knowledge of the market to be obtained; and that, in connection with watching the trend of our chart, enabled me to keep, from my point of view, pretty well abreast of developments.

Q. Were continued efforts made to further improve the quality of Euston white lead-in-oil?

A. Yes, we constantly strove, throughout the entire period of our operation of the business, to do that.

Q. And what effect did that have on the current pricing policy?

A. Well, the farther we could effect improvements, the stronger became our feeling that we could either eliminate or reduce the price advantage that we had given to our
dealer or distributor. In other words, if we could
2511 reduce the sales resistance on the part of the painter,
we could reasonably ask our distributor to handle our white lead on the same margin as he could afford to handle the market leader.

By Mr. Hinds:

Q. Were there any selling practices that you found employed by National that you were unwilling to meet?

A. Yes, we were quite unwilling to—although we had to—meet some of the price declines at various times, when our own lead position was quite adverse and we suffered.

Another thing that we were unwilling to meet was the consignment setup that was put into effect by Dutch Boy, by National Lead, and also by Eagle-Picher.

Q. About when?

A. That I will have to refer to my notes to get about what that date is.

Q. Can you answer that without referring to your notes?

A. Not on an approximate date.

Q. Then please do so, if that will refresh your recollection as to when National and any other company put into effect the consignment plan.

A. About 1934.

Q. Did you learn of any change in competitive practices with respect to quantity discounts?

A. Oh, yes, we would hear reports from the trade here
and there about different discounts given for different
2512 quantities purchased at one time, or by different
classes of purchasers.

Q. How did you get that information?

A. From the same type of source as I described before in connection with base price schedules.

Q. What did you do about it?

A. When we found changes and those matters had been made by the National Lead Company, we met them as promptly as we could be certain what they were. When they occurred on the part of others, we were not so fast and we held off until we actually lost business and felt something had to be done.

Q. What about quantity discounts, when you learned of any changes in those by National Lead, what did you do about that?

Mr. Wright: Your Honor, I object to these questions that refer to conclusions as to what they did about facts that aren't in evidence here. I think this sort of testimony should be brought out by specific instances that are within the witness' recollection, rather than by these broad conclusions as to what they did. Or are these questions directed solely to what the policy of the company was, rather than what the company actually did?

Mr. Hinds: Both.

Trial Examiner Norwood: I think they are directed to both. Read the question.

(The reporter read the question as follows:

"Q. What about quantity discounts, when you
2513 learned of any changes in those by National Lead,
what did you do about that?")

Trial Examiner Norwood: The objection is overruled.

A. We met them as quickly as we could check and determine their accuracy.

By Mr. Hinds:

Q. What other competitive sales practices did you learn of in that connection?

A. We learned of changes made at various times in respect to the premiums charged over the base schedules for deliveries at distant points. The use of equalization points was changed and premiums were charged on the basis of deliveries in various areas; and as fast as we could establish that, we met them.

Q. Why did you do that?

A. We did that because we had found in the past, in respect to equalization points, and found in respect to the areas, that our average costs of delivery in those areas were substantially higher than the premiums that competition established for those areas, and in order for us to realize the maximum gross profit from those sales that competitive conditions would permit, we had to follow them promptly.

Q. Did you become a member of the NRA Code Authority for the lead industries?

A. Yes, sir, I did.

Q. What were the circumstances which led to your
2514 being appointed, if you know?

A. Well, the lead Code provided that the Code Authority was to consist of the Executive Committee of the Lead Industries Association and the chairmen of some of the various divisions of that Association, and I became automatically a member of the Code Authority because I functioned as a chairman of one of the divisions.

Q. What did your contribution consist of in that organization?

A. Which organization?

Q. As a member of the Executive Committee of the Lead Industries Association.

A. I was not a member of the Executive Committee of the Lead Industries Association. I said that my membership on the Code Authority was automatically the result of the fact that I had been a chairman of one of the divisions.

Q. What was your activity on the Code Authority?

A. I had very little activity on the Code Authority as such. I was active in serving on some of the various committees in connection with the development of the Codes. As I recall it, the Code Authority met usually in New York, and my recollection of participation in those meetings is very meager.

Q: Did you have any particular interest or purpose to serve in connection with the Code Authority?

A. I was very much concerned about the develop-
2515 ment of the Codes or the consideration of the development of Codes from the standpoint of a small producer of lead pigments, both lead oxides and of white lead and of white lead-in-oil, because I realized that if the industry were going to function under the NRA Act and were going to develop Codes that were to be improved by the NRA, that the interest of the small producer might be very much affected by the type of Codes that were developed, and I was quite anxious to participate in that work.

Q. When the Robinson-Patman Act was enacted in 1936, did that have any effect on your policy of pricing Euston Dry White Lead?

A. Yes.

Q. What was it?

A. Most of my testimony so far has related to white lead-in-oil, but you ask me now about dry white lead?

Q. Yes.

A. At the time you speak of, Euston Dry White Lead was priced at the ceiling of the National Lead Company on sales made to buyers other than those engaged in the manufacture of paint, and the paint manufacturers were sold at a price less than was charged the other industrial consumers, and while we were not certain that the requirements of the Robinson-Patman Act would affect that program, yet we thought it would be more consistent to
2516 render any question out of the picture by raising our price to the paint trade to the same level as we

charged others, and that was done and Euston Dry White Lead was sold thereafter at the same price to all classes of buyers.

Trial Examiner Norwood: What do you mean by the "paint trade" there, the dealers?

The Witness: No, dry white lead is used principally by paint manufacturers who make ready-mixed paints, and we had found and had proven, over all the years of our operation of the Euston Lead Company, that we encountered continual resistance in the sale of our dry white lead to the paint manufacturers, and since they were the largest single outlet for dry white lead we had to recognize that, and all through the years did it by offering them dry white lead at a lower price than prevailed in general to other consumers, and in recognition of that we were able to command some volume from the paint industry. The Robinson-Patman Act and the conception that our company had of it brought an end to that practice.

By Mr. Hinds:

Q. And that was a uniform delivered price, or were there some exceptions?

A. A uniform delivered price to all customers wherever they might be located. On the Pacific Coast, my recollection is that there was a different price, but we very rarely sold on the Coast. I believe only on two periods in the 20 years or more did we ever make any sales on the Coast.

2517 Q. When you did in those exceptional cases make sales, how did you price this product on the Coast?

A. We priced it at the competition for dry white lead on the Coast.

Q. What effect, if any, did the enactment of the Robinson-Patman Act have on your policy of pricing white lead-in-oil in 1936?

A. It didn't have any effect upon our policy of pricing white lead-in-oil, although it did affect—no, not with regard to white lead-in-oil, it didn't have any effect upon it.

Q. You are now speaking of 1936 when the Act was enacted?

A. The Robinson-Patman Act, yes.

Q. Why was that?

A. Well, we observed first that there had been no changes that reached our attention on the part of competitors in pricing white lead-in-oil, and we were confronted then, as we had been before and as we have been since, with the fact that we had to meet our competition as and where we found it; and furthermore, it was not our view that our pricing practice on white lead-in-oil in any way involved any violation of the Robinson-Patman Act as we saw it.

Q. Well, later did you discern any effect of the Robinson-Patman Act on your pricing of white lead-in-oil, or did it have any such effect?

A. I do not recall that it had any effect.

2518 Q. Did it affect your policy toward instructions, and so on, to your subordinates?

A. Oh, yes, we instructed our sales managers and the company instructed all of its sales executives to observe the requirements of the Robinson-Patman Act particularly with respect to pricing that would involve discrimination as between competitors.

Q. Now you have spoken of certain differentials. In your judgment were they sufficient in amount to have any effect on competition between your customers?

A. No, we didn't regard that the differences in premium prices for materials delivered at distant destinations would have any effect at all upon the competition as between jobbers and dealers and distributors, or any other class of buyer.

Q. Following the enactment of the Robinson-Patman Act, did you give any instructions to the Paint Divisions' sales managers in your retail stores?

A. Yes. They received instructions, as did all of those in charge of sales, to particularly avoid discrimination between competing buyers who came to the retail stores for merchandise.

Q. Did Glidden at length make available to its customers a consignment plan of selling?

A. Yes, with reluctance.

Q. What product was that?

A. On Euston White Lead-in-Oil only.

2519 Q. When was that? Can you answer that without referring to your notes?

A. I will have to get my notes again.

Q. If that will serve to refresh your recollection, please do so.

Mr. Wright: At this point, your Honor, I don't believe it is proper for him to read dates from his notes; that is, unless the paper will refresh an independent recollection he has as to that time.

Trial Examiner Norwood: You may refer to that and then put the paper away and give us your recollection if it is correct.

The Witness: That is correct. My recollection is refreshed, and the consignment plan was authorized about 1939.

By Mr. Hinds:

Q. Was that plan exclusive or did you make available any other plan to your customers?

A. You mean was white lead-in-oil sold only on consignment?

Q. Yes.

A. No. The consignment plan was a tool that was put in the hands of those salesmen and sales managers who said they had to have it; but the company continued to stress the desirability of making outside sales of white
2520 lead-in-oil as against consignment sales.

Q. What were the circumstances leading to your making available this consignment plan of selling white lead-in-oil?

A. The circumstances were these: In following up and in putting continual pressure on the paint divisions' sales organization to maintain and expand their sales of Euston White Lead-in-Oil the sales reports from many of the principal white lead-in-oil territories stressed that the men would have to have the consignment plan out there, and if they were to be expected to maintain or increase the sales volume.

In response to that continued pressure the company decided to permit the handling of Euston White Lead-in-Oil via the consignment route of an alternate method with the direct selling program for the use of those salesmen who said they had to have it to produce sales.

Mr. Welch: Your Honor, may we have a short recess?

Trial Examiner Norwood: We will take a short recess.

(Short recess.)

By Mr. Hinds:

Q. Did you emphasize either that plan or the outright sale plan?

2521 A. We strongly emphasized and preferred the outright sale as against consignment distribution.

Q. What were the advantages that you offered in outright sales?

A. We offered a price advantage to the dealer or distributor as a means of again attempting to offset the competitive pressure of the consignment method of distribution.

I might add that during the period that we bucked the consignment plan, which was four or five years—

Q. (Interposing.) You mean "bucked"? You mean resisted it and refused to introduce it?

A. Refused to do it. We made as careful a study as we could from the distributors and dealers as to what the consignment plan was worth in terms of dollars and cents per hundred pounds or per pound of white lead-in-oil.

Q. To the consignee?

A. To the distributor. The purpose of that was to attempt to find a figure that would be a sales off-set to consignment distribution and that would induce the dealer to make an outright purchase rather than to deal through consignment.

Q. What was your objection to the consignment plan? Why did you resist it so long?

A. Our company had experienced a great deal of difficulty and other troubles with consignment methods 2522 of selling paint products, and white lead-in-oil was a paint item. In the case of our company many, many of the white lead-in-oil sales were made in conjunction with other paint items, invoiced on the same invoice—or it would have been convenient to invoice them on the same invoice—and obviously that was out of the picture if one was to be sold outright and the other delivery on consignment.

There were other fundamental difficulties with consignment in paint items that had to do with the spoilage of goods in storage and with the marring up and rendering unsalable the package, and with changes in the quality and colors and shades of items, so that the Glidden Company as a paint manufacturer was unalterably opposed to consigning anything of that sort.

Q. What was your experience with the consignment plan after you made it available?

A. We had the experience that so often happens when pressure is put on a sales organization to produce orders, and they give a reason for failure, and you meet the reason, and you sell— We found, regardless, that the consignment method did not produce the volume of sales that had been represented it would.

Q. How long did you continue with it?

A. My recollection is that we continued that until 1941 or 1942 and then abandoned it.

2523 Q. You offered a printed form, did you, as contracts?

A. Oh, yes. Our Legal Department prepared a consignment agreement, which has already been introduced in this case.

Q. I show you Exhibit No. 650-A, introduced by the Commission, and can you state whether or not that is the form that you used when you did make such consignment transactions?

A. Yes, this is an actual Glidden consignment contract and has been signed by the customer.

Q. The terms were those therein stated, were they, when you used it?

A. Yes.

Trial Examiner Norwood: Is that in evidence?

Mr. Hinds: Yes, sir.

Trial Examiner Norwood: What exhibit is it?

Mr. Hinds: There are several of them, but this one is No. 650-A. Your Honor will recall several actual contracts were introduced, all on this same printed form.

Trial Examiner Norwood: Commission's?

Mr. Hinds: Yes, sir.

By Mr. Hinds:

Q. Did you follow the printed form of any of your competitors or did you get up your own form?

A. Our Legal Department prepared a consignment agreement that was our own.

2524 Q. When did you abandon this plan, did you say?

A. I said my recollection was 1941 or 1942.

Q. What were the circumstances that led to your abandonment of that plan?

A. Not only did the plan fail to produce the volume of sales that was expected of it, but it also produced some of the difficulties that we knew were inherent in the consignment method of distribution.

For example, it entailed reports of inventories on hand, and it entailed constant correspondence with the people who had consigned stocks and verifying inventories. It entailed maintaining an investment on the part of the Glidden Company in this consigned stock.

It generally fell of its own weight. There was continued opposition throughout the company to consignment, and the pressure of that group of sales people who wanted it wasn't enough to continue it when they didn't produce with it.

Q. During the period Euston and Glidden were producing white lead-in-oil, what other companies were selling that product?

A. The National Lead Company, Eagle-Picher Lead Company, McGregor Lead Company, John Wetherell and Brother, Sherwin-Williams Company, and the Anaconda
Company. Then, if you meant to include the entire
2525 period of Glidden's activities, there were many other
paint manufacturers who purchased dry white lead and ground lead-in-oil themselves and put it on the market under their own brand.

From Glidden's standpoint what one or more of those were the effective factors in the competition?

A. We regarded the National Lead Company's Dutch Boy White Lead as the criterion of competition. Secondly, the Eagle-Picher Lead Company product, although that was, according to our observations, not a close second.

Q. What were the total results of your ~~efforts~~ to promote sales of Euston White Lead-in-Oil over these years?

A. We finally succeeded at the top of securing the maximum of about 8.2 per cent of the white lead-in-oil business during any one year.

Mr. Hinds: May this be marked for identification as Respondents' Exhibit No. 144.

(The document referred to was marked as Respondents' Exhibit 144 for identification.)

By Mr. Hinds:

Q. I show you Exhibit 144 for identification and ask you if you prepared that or caused it to be prepared?

A. Yes, sir. I had one of my assistants prepare this chart.

Q. What does it purport to show?

A. It shows in the form of a graph the percentage
2526 of the sales of white lead-in-oil made by Glidden in
relation to the entire industry's sales of white lead-in-oil made during the same year plotted by years and

taken from the Glidden Company sales records and the statistics of the Lead Industry Association for the entire industry.

Mr. Hinds: Your Honor, I offer that in evidence. I would like to substitute the photostatic copy for the original.

Mr. Wright: I would like a pre-cross on the identification.

Trial Examiner Norwood: Very well.

Mr. Wright: You say the figures that are represented on the line were arrived at by the figures from the Glidden Sales Department in white lead-in-oil?

The Witness: They were derived from the Glidden Company's records of its sales of white lead-in-oil during those years.

Mr. Wright: Those are total sales of white lead-in-oil?

The Witness: Total sales.

Mr. Wright: And the figures against which they were compared were what?

The Witness: Total sales of all white lead-in-oil producers for the same year plotted as a percent, one to the other.

2527 Mr. Wright: Those were as reported by the Lead Industries Association?

The Witness: Totals for all producers as reported by the Lead Industries Association for those years.

Mr. Wright: I have no objection.

Trial Examiner Norwood: It is received in evidence, and the photostat will be substituted for the original.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 144, was received in evidence.)

By Mr. Hinds:

Q. Did you prepare a similar chart with respect to dry white lead or basic carbonate?

A. Yes, sir.

Mr. Hinds: May this be marked for identification?

(The chart referred to was marked as Respondents' Exhibit 145, for identification.)

By Mr. Hinds:

Q. I show you Exhibit No. 145 and ask you if that is the chart that you prepared with respect to dry white lead?

A. This is the chart that my assistant prepared at my direction.

Q. What does that purport to show?

A. This shows the sales by years of dry white lead basic carbonate by Glidden expressed as a per cent 2528 of the total sales of all dry white lead producers by years.

Mr. Hinds: I offer that in evidence, and I would like to substitute the photostat for the original.

Mr. Wright: Mr. Sprague, how are these percentages expressed—in tons or dollar volume.

The Witness: They are expressed in per cent. I will explain it to you, Mr. Wright.

For example, the year 1935, Glidden sold just under 18 per cent of all the white lead that was sold in that year, according to the Lead Industries' statistics.

Mr. Wright: Is that 18 per cent by value or is it expressed in volume?

The Witness: By weight.

Mr. Wright: That has nothing to do with sales price?

The Witness: No.

Mr. Wright: Were the figures on dry basic carbonate comparable figures reported by the Lead Industries Association?

The Witness: I don't understand.

Mr. Wright: Were the figures with which you compared the Glidden sales in this chart comparable figures to those which you mentioned in connection with Respondents' Exhibit 144?

The Witness: They were the figures as reported 2529 by Lead Industries Association.

Mr. Wright: Total figures?

The Witness: Yes.

Mr. Wright: And comparable to the Glidden Company organization?

The Witness: Yes.

Mr. Wright: No objetion.

Trial Examiner Norwood: The exhibit is received in evidence and the photostat will be substituted for the original.

(The chart referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 145, was received in evidence.)

By Mr. Hinds:

Q. Did you also cause to be prepared a chart relating by percentage to the sales of Glidden lead oxides in relation to those of the total industry?

A. Yes, sir.

Mr. Hinds: May this be marked for identification?

(The chart referred to was marked as Respondents' Exhibit 146, for identification.)

By Mr. Hinds:

Q. I show you Exhibit No. 146, for identification. Is that the chart you caused to be prepared?

A. Yes.

2530 Q. What does that purport to show?

A. This is a chart which portrays by years the percentage by years of the amount by weight of lead oxides sold by Glidden as compared to the total amount by weight of lead oxides sold by all other producers combined, as reported by the Lead Industries Association.

Mr. Hinds: I will offer that in evidence.

Mr. Wright: What products specifically do you mean to include in the term "lead oxides" in this exhibit?

The Witness: All lead oxides.

Mr. Wright: Does that include various grades of red lead and litharge?

The Witness: Red lead and litharge combined.

Mr. Wright: It doesn't include orange mineral or any of the other—

The Witness: The production of orange mineral was so small I do not recall with certainty whether that was included; whether it was or not would not amount to a fraction of a per cent. However, I would have to check as to whether orange mineral is in there.

Mr. Wright: As to these figures, I call your attention to the fact that they purport to relate to sales. Do they include in there these products that might be used by the Glidden Company in the manufacture of other articles?

2531 The Witness: I believe they do.

Mr. Wright: Do you have anything more than a belief as to that?

The Witness: No, I can't go further than that.

Mr. Wright: Were the figures on this exhibit, No. 146, comparable figures published by the Lead Industries Association, comparable to those that you testified about on Exhibit No. 144 and Exhibit No. 145?

The Witness: Yes, they are.

Mr. Wright: No objection.

Trial Examiner Norwood: It is received.

Mr. Hinds: I would like to substitute the photostat, if I may.

Trial Examiner Norwood: The photostat may be received as the exhibit.

(The chart referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 146, was received in evidence.)

By Mr. Hinds:

Q. In your judgment was there anything that your company did or could have done or refrained from doing which would have had any effect on competitive prices or pricing methods?

Mr. Wright: I object, your Honor, to that question. It obviously calls for broad general conclusions on the part of the witness and no evidentiary facts.

2532 Mr. Hinds: Your Honor, we are asking for his judgment. His company is charged with conspiracy and improper motives, and so on; and we have shown this gentleman to be a man of broad judgment and experience in the field. It would be in the nature of opinion. I think we have qualified him for opinion evidence within that field.

Trial Examiner Norwood: Read the question.

(The question was read by the reporter.)

Mr. Hinds: In the industry, of course.

Trial Examiner Norwood: I think he may answer that. You may cross-examine on it. Objection overruled.

The Witness: Nothing whatever.

By Mr. Hinds:

Q. What was Glidden's policy with respect to the gross margin on these lead pigments?

A. We evolved the policy of attempting to price our pigments at the ceiling competitive market so as to enjoy the maximum attainable gross margin from our sales volume. That was done because we had learned again and again that we were limited within a very narrow range of margin between our cost of lead and our selling price, and we had to live within that; the more we sliced at it from either direction, the more severe was our problem and the more difficult it was for us to survive.

2533 Q. Now, take up dry white lead. What is the technical name for that?

A. White lead basic carbonate.

Q. What is the formula?

A. No, I would have to refer to the textbook on that complete formula.

Q. But it is known as basic carbonate?

A. Basic lead carbonate.

Q. How did your company's relationship to that industry compare with its relationship to the white lead-in-oil industry, which you have previously described?

A. We attained in the sale of dry white lead a somewhat larger share of the total industry through these years than we had in the case of white lead-in-oil or in the case of oxides.

The reason for that was that the differences of quality in white lead when sold dry to the industrial concerns who are the buyers was more readily discernible and more readily salable, and we succeeded in making a creditable showing because we did improve our quality materially through the years.

In fact, we were the first to initiate the manufacture and sale of some types of white lead in this country.

Q. What was Glidden's role in the dry white lead industry, substantially?

2534 A. Just as in the case of the other lead pigments, we were essentially a follower in the industry, a minor and a small part of the industry.

Q. How did your prices for that product compare with those of National Lead?

A. That requires a bit of explanation. At the time—

Trial Examiner Norwood: (Interposing.) Just answer the question and let the explanation come out later.

The Witness: What was the question?

Trial Examiner Norwood: Read it.

(The question was read by the reporter.)

The Witness: Our prices compared with National Lead's prices in that, as our quality improved our price relationship approach that of National Lead. In the early years when our quality was low, our prices were correspondingly low, and as we went on and, as I have explained before, we eventually ceased to make any price concession at all on dry white lead.

By Mr. Hinds:

Q. Just prior to 1936 and in 1936 what was your policy in selling dry white lead?

A. We sold our dry white lead at the same competitive levels as that of the National Lead Company to all purchasers other than paint manufacturers.

Q. What about those?

2535 A. They received a concession or a set-in price of 1/8th cent per pound.

Q. Why did you give them that concession?

A. We found there was antagonism to purchasing white lead from the Glidden Company on the part of its competitors. They felt that the more they sustained the Glidden Company's activities, the more difficult would the Glidden Company competition be in the paint industry; and the tendency was to prefer to purchase dry white lead from other sellers.

Q. You told us about changes in prices of white lead-in-oil. How did they compare with changes in the prices of dry white lead?

A. We learned from the start that changes in the price of white lead-in-oil, market price, very closely corresponded to the average movements in the cost of pig lead to the same extent as they responded to average movements in the price of white lead.

Q. What, if any, role did you have in the Lead Industries Association?

A. I was a director of the Lead Industries Association for many years.

Q. What knowledge did you have as to the views and attitudes of its officers and directors?

A. I had a good knowledge of their views.

2536 Q. What were the activities of the Lead Industries Association in respect to prices, pricing, conditions of sale, or methods of sale of lead pigments?

A. No activities in regard to those matters.

Q. What was the attitude of the officers and directors toward any such activities?

A. They were opposed to it, and the Lead Industries Association officers and directors for the most part were not interested in the pigment business particularly.

Q. What were the predominant interests of the Lead Industries Association?

A. The mining and smelting interests.

Q. What was their attitude toward methods of selling and pricing products made from lead?

A. They were not concerned with the minutiae of those matters that pertained to all the products made from lead.

Q. What were the circumstances which led Glidden to lend its support to that Association?

A. We felt that Glidden owed support to the Association because of some very excellent work that it did. We were a very small part of the lead industry, and that support could be accorded at a fee that was also in proportion to the amount of Glidden's business, and the Association conducted some work in which we were interested and
2537 which we thought was of great value to the industry and to us.

Q. What, if anything, did the lead industries do or contribute with respect to lead pigments?

A. The most outstanding work conducted by the Association was research in connection with lead toxicity as an industrial hazard, particularly with respect to the lead pigments. That has a very significant value to the lead pigment business.

The Association supported researches at Harvard over a long period of years and took an active part in the Public Health Association work and in efforts to have a sound scientific knowledge of the true facts about the toxicity of lead about which there was a great deal of misinformation current in the public press and in the public mind.

I think the Association's work in that is the outstanding contribution to industrial hygiene and toxicity work that I know of.

In addition to that, the Association represented the industry in matters relating to tariff hearings and various legislative matters that came up in Congress, and they provided a means for promotional activities in respect to the sale of white lead and of red lead.

The Glidden Company did not participate in the white lead-in-oil promotion program of the Association;
2538 but, nevertheless, it was a very comprehensive scheme designed to promote the use of white lead-in-oil.

Q. What, if any, part did the Association play in connection with the activity of the manufacturers of dry white lead in connection with the Federal Specifications Board?

A. None.

Q. What, if any, information or service did Glidden receive from the Association with respect to the prices or pricing methods?

A. Nothing.

Q. Did you ever see any evidence of any activities of that sort by or between the Association or any of its members?

A. None whatever.

Q. Where was Glidden's manufacture of lead oxides handled?

A. At the Metals Refining Company, Hammond, Indiana.

Q. Where was the sale of lead oxides handled?

A. The sales were handled in their details at the office at Hammond, Indiana.

Q. What was your connection with Metals Refining Company?

A. I became the Vice President and General Manager of the Metals Refining Company about 1930 and was in charge of the operation of that business for a period of years thereafter until 1935.

After that I was in general charge of the sales of
2539 chemicals, pigments, and metal products of the company, which included an administrative responsibility for the sale of lead oxides.

Q. How much of a factor of the total operations of Metals Refining Company was its production of lead oxides?

A. The lead oxide business was a minor factor.

Q. What else did it make?

A. Metals Refining Company at that time were primarily engaged in the smelting and refining of non-ferrous metals, particularly lead and lead-bearing metals, and the so-called white metals such as lead, antimony, tin alloys.

Metals Refining Company was also a manufacturer of type metal and babbitt metal, and in that period developed the production and manufacture of various metal powders.

Q. What metals?

A. Powdered metals?

Q. Yes, sir.

A. Lead, copper, iron, and tin principally. Also developed a large production of the various oxides of copper.

Q. Had its production of lead oxides been a recent thing or a long-established thing at the time you took over?

A. No. The Metals Refining business when sold to Glidden in 1929 had but recently completed the erection of a plant for the manufacture of red lead and litharge and had not been far established in the business.

2540 Q. When you took over, what price policy did you
find was in effect with that concern with respect to
the lead oxides?

A. I found that the price policy of the former management was very similar indeed to that of the Euston Lead Company. The lead oxides produced were of irregular quality. They were sold at sub-market prices. The management explained to me that they had the theory that they could maintain a profitable operation in that area by laying less stress upon uniformity in quality than they did on cost, and by cutting—

Q. (Interposing.) You mean price?

A. Cost.

Q. Pardon me.

A. And by cutting the price under established market levels they could get sufficient volume within areas reasonably contiguous to Hammond to make their business go.

Q. Well, did you inaugurate any changes in that policy when you took over Metals Refining?

A. Yes, I did, because I had been through the mill and learned in the hard way some of the facts of life about this lead pigment business.

Q. What changes did you inaugurate?

A. In the first place, I was convinced after study-
2541 ing the margins that were possible in the sale of lead
oxides in respect to competitive price levels that we
would have no more chance of success in developing profit-
able sales there at cut prices than we found we had been
successful in developing them in the Euston Lead
Company.

2542 I also realized that I couldn't expect to bring my
prices up to competitive ceilings until I had gotten
my product ~~in~~ quality up to or approaching competitive
ceilings.

So we undertook a program of improving the quality of our lead oxides, and also a program whereby we could produce a number of additional grades of lead oxides that were originally produced, thus to enable us to command activities in a wider market and a better chance to bring our volume to the point where we could earn a profit.

Q. Turning back to white lead for a moment—from your experience in the white lead business, what was the relationship, if any, between costs and prices and profits in promoting that commodity?

A. The relationship between costs and prices and profits was a very simple one because the cost phase was so completely dominated by the cost of lead. So the position that the producer could maintain in his business, the relation between his lead cost and his product sales largely determined what margin he could earn and how he could come out.

Q. Coming back again to the lead oxides—was that substantially the same relationship or was there something different?

A. The same relationship, only much more so, because the margins were still narrower in connection with the lead oxides and the methods of sale, which provided that the
price was determined in terms of a fixed differential
2543 over your cost of lead gave you very much less leeway
than was the case if prices didn't move so quickly with respect to the cost of lead. You had to be right on the button.

Q. When you took over Metals Refining, what was your program respecting lead oxides?

A. Well, our first program was to improve the quality of our product, and we made plant investments to that end.

The second part of the program was to see if we could better our cost of lead position, not by trying to beat the lead market, but by trying to utilize scrap lead.

One of the principal activities of that plant, which was at that time one of the largest secondary lead smelters in that area, was to recover lead from scrap and residue sources, which contained lead, such as drosses, old storage batteries, and any type of junk that contained lead, antimony, or tin. At that time there was a large tonnage of battery scrap that flowed into the Chicago market from very far-distant points, points as far west as Spokane, as far south as Nashville, or as far east as Pittsburgh.

Trial Examiner Norwood: What time was that?

The Witness: That was the time I went to Hammond as the general manager in 1930. There were at that time in Chicago only a few smelters equipped to handle that volume of lead scrap. Our plant was one. We normally handled
upwards of 2,000 tons per month.

2544 Up to that time the basis upon which the lead-bearing residues in scrap could be purchased was such as to enable it to be refined and lead recovered at a cost somewhat less than the prevailing St. Louis lead market deliverable at Chicago. Obviously, if we could succeed in making from such scrap sources a variety of recovered lead that was pure enough to use in producing red lead and litharge, we would then have an advantage over those of our competitors who depend upon the purchase of pig lead upon the open market to make into lead oxides. We tried that plan, and we invested in a series of equipment and developed a process designed to continuously produce corroding grade of lead from scrap.

We put that plant into operation and thought we had gotten somewhere, but our advantage was short lived, less than a year. By that time the relationship between the cost of lead in scrap and the cost of scrap itself and the pig lead market was such that it was no longer profitable to produce a high quality of lead from such scrap was compared to buying it again in the open market, and we were back where we started from, having made our investment for naught.

I knew then that we were not going to be able to get any advantage over the other fellow as far as our lead cost was concerned, and I had learned before that we couldn't get any sales at higher prices than competitive levels unless we could succeed in making again some type of lead
2545 oxide that had properties or characteristics that would enable it to sell at a premium in the lead oxide market.

So we repeated our experience at Euston. We strove to accomplish that, and the result of our striving was that we did make some special types of lead oxides with some unusually careful controls and classifications, so they would command a preference in the market, but never would they command a premium in the market because the standard quality of lead oxides produced was in general high. Corroding lead was available on the market in large tonnage, and that is one of the most pure metals that exists in large tonnage anywhere. It is a very pure form of lead, and with it a very high grade pure form of lead oxide can be produced.

So our realization of our effort to get a higher margin through premium prices failed for the same reason that it did in white lead, but we ultimately did command some market preference so that we could sell at competitive ceilings. That process with us was gradual. We approached it from all angles at once, and it took a period of years to evolve some success from it.

Q. Did you distinguish between your read lead business and your litharge business with respect to the gross margin there?

A. Yes. The market prices for red lead, according to our costs, provided a somewhat wider margin for use than
litharge, and was more profitable for us to sell a ton
2546 of red lead than to sell a ton of litharge.

Q Did you have any separate policy with respect to the promotion of red lead?

A. Yes, sir.

Q. What was that?

A. As soon as I realized we had a greater profit in red lead, we naturally stressed the sale of red lead and we went further and installed some equipment by which we could make red lead at topnotch quality.

Q. After you became more familiar with the lead oxide business generally, what did you find was required for successful operation in that field?

A. Well, it was very simple and almost determinable by mathematics. Our lead cost was so much, we had such a maximum market, our production was such a tonnage, and now we had to price our product so as to enjoy the maximum gross return that we could get for the sales volume that we could figure within the framework of the volume capacity of the plant. Our problem was identical with what it was at Euston lead plant on white lead in its economic fundamentals.

Q. What was the result of maintaining the balance between lead purchases and lead oxide sales?

A. The result of maintaining a balance in the lead oxide business is that you enjoy neither losses nor gains from
market movements.
2547 Q. You mean speculative inventory gains or losses?
A. Losses or gains from market movements on the sales that you make. Of course, you can't avoid a loss or a gain on a working inventory with market changes. That is unavoidable.

Q. Was there anything else you inaugurated there besides what you told us after you became familiar with the lead oxide business?

A. Yes, we undertook as a part of our efforts to qualify our product for acceptance in uses where special care would provide a preference for the product among the trade, we cultivated those types of outlets and tried to get ourselves independent of doing business with the storage battery industry, which was the largest consumer of red lead and litharge, and with which industry we could earn the least profit.

Q. How did you cultivate those outlets?

A. In the manner that I have mentioned. We studied the requirements of the customer. We endeavored to arrive jointly with him at a specification which we could maintain by special care in our processing. The result was that he could use our litharge—usually that pertained to litharge more than to red lead—he could use our litharge with greater uniformity of results to him.

For instance, it was used in such things as processing litharge into chrome yellows and chrome greens, or such things as sweetening gasoline in the petroleum industry where litharge provided distinct factors to those consumers. 2548

Q. Did you have any local competition with lead oxides in Hammond?

A. At the time we acquired that business, there was no production of red lead and litharge, to my knowledg, in that area. However, a year or two after we got started, the former owners of the Metals Refining Company—

Q. (Interposing.) About 1932?

A. I think about 1932. The former owners decided to reenter the business of making and selling red lead and litharge. They put a plant up almost across the street from ours—not quite that close.

Q. What was the result of that?

A. That created a very difficult competitive situation for me because my new competitors knew all my customers and their preferences and their prices, and I had a great brake placed upon my effort to try to improve my position.

Q. You spell that b-r-a-k-e?

A. B-r-a-k-e.

Q. Now, when the Robinson-Patman Act was enacted in 1936, how did that affect your lead oxide policy?

A. That affected our pricing policy in the lead oxide business both directly and indirectly. The first effect that

I recall after we all had come to some understanding of just what the Robinson-Patman Act meant—in that 2549 connection, I recall going to Chicago and listening to Mr. Patman at a symposium explaining what the Act meant, and I have been astonished about what has come out of it since as compared to what he said then his law meant—that one thing we did was, as we had done all through our company, was to instruct our sales managers to comply with the Robinson-Patman Act.

In order to comply with it, as we saw it, we had to be a great deal more careful to determine what our competition was in order to be sure that we were as accurate as we could get, and weren't shooting in the dark. It placed a greater responsibility upon the management of the company in regard to meeting price competition than had existed heretofore.

That was constantly a problem that confronted us because we had a very difficult competitive situation. We had our former—the former proprietor of our company—

Q. (Interposing.) What was his name?

A. Hammond Lead Products Company—doing business next to us with a price policy similar to that which those men had employed when they sold their business to Glidden. Their concept was that secondary quality—first question, low cost of manufacture, low price to the consumer, and let it go.

Well, we would never know exactly what we were going to meet by way of competition in the lead oxide market in that area from day to day until we encountered it. It was a very severe problem to place enough restraint upon 2550 our sales people to really ascertain what their competition was, because, obviously, that condition creates a buyers' field.

Q. You have used the expression "what the competition was." You mean the exact competitive price you had to meet at a time and place?

A. I am speaking of competitive prices, yes.

Q. As the basis of your experience, what in your opinion is the principal factor in the sale of lead oxides?

A. It is perfectly obvious that the dominating factor in the sale of lead oxides is the cost of lead.

Q. What is the principal outlet for lead oxides?

A. The largest single group of consumers is the storage battery industry.

Q. How is that made up? How is it constituted?

A. During the period in which I was in contact with it, which we have been discussing here, the storage battery industry consisted of two groups of units. One group was large in number, poor in financial stature, weak in credit, and short on technical knowledge. The other, and smaller group, were large manufacturers, large consumers of oxides, excellent financial standing, good credit risks, and very ably staffed technically.

Q. Did you have any experience in selling to the large battery manufacturers?

A. Yes, but limited experience.

Q. Just tell us what that experience was, even 2551 though limited. Tell us why it was limited.

A. The first thing I found was the large storage battery manufacturer was getting pretty low prices from my competitors on his requirements of red lead and litharge, and then the next thing I found out was that if anyone tried to improve that situation he was told that the battery man would make his own oxides. I found both of those things were true.

Q. Could he make his own oxides practically?

A. Yes. As soon as the consumption of lead oxides reaches a practical manufacturing point, anyone who has that consumption can economically make them, themselves, and that is particularly true with litharge because the investment required in equipment to enter the litharge was relatively small.

Q. Now, what was your experience in selling to the smaller battery manufacturers, particularly insofar as it contrasted with the largest ones?

A. We got it in just the reverse fashion. The smaller battery manufacturer was salable at higher prices, but the cost of selling him was sufficiently high to end up in an offset.

Q. What is meant by black oxide?

A. Black oxide is a form of lead sub-oxide that was discovered to have excellent applicability in the manufacture of negative plates for a storage battery.

Q. Is that an advantage to any type of purchasers of lead oxides?

2552 A. Oh, yes, sir. It is an advantage to any battery manufacturer to develop the technique of making a negative plate from black oxide, and it is of great advantage to the large battery manufacturer who uses enough tonnage to justify his own manufacture of black oxide.

Q. Now, let us take up your policy of pricing lead oxides. What were the factors underlying your policy there?

A. Cost and competition.

Q. Were you successful in your program of pricing lead oxides, which you had?

A. Only moderately so.

Q. Why do you qualify it?

A. I qualify that because the margins were so narrow and the time factor that was involved in establishing the relationship with those various groups of consumers with whom we should deal satisfactorily at the ceiling prices was long, and while we did pull the read lead and litharge business out of the read, we never had anything to write home about.

Q. By "time factor," you mean it took long to get their confidence?

A. A long period of time, yes.

Q. What has your policy been in pricing lead oxides? You told us about the factors.

A. The policy has been to price lead oxides as close to
the ceiling maintained by competition, principally
2553 National Lead Company and the Eagle-Picher Lead
Company, as we possibly could, and to name our
prices for the most part at those ceiling levels.

Q. Now, the Glidden Company, of course, is engaged in producing and selling other products besides these various lead pigments, is it not?

A. The Glidden Company has a very widely diversified business, yes.

Q. Will you just roughly tell us what the other products are and how generally they relate in importance to these lead pigment products?

A. Well, the lead pigment business of the Glidden Company is relatively small, both in weight or tonnage and in dollars, compared to many of the other company's products. However, the purpose of the Glidden Company in acquiring these lead-pigment producing units arose first from its policy of developing a diversified chemical business, and, secondly, from its policy of desiring to protect its position in respect to the principal raw materials used in its paint manufacture, since paint was one of the large phases of Glidden's business.

Q. By "raw materials," you mean in this instance manufactured raw materials, such as oxides, dry white lead?

A. Whatever the raw materials are that go into the production of paint, of which white lead was an important factor, read lead a less important factor, and, of
2554 course, lead-in-oil, which we have discussed.

I think the important point in regard to Glidden's position, if I understand your question, is that whereas Glidden in both of these operations; namely, red lead and litharge business at one location and white lead business at another location, while those were small, a very small part of the total industry of which they were a part, yet the proportion of the production of those units that was used by the Glidden Company in its other operations was always small.

The result was that while Euston was a small producer of white lead and Metals Refining a small producer of lead oxides, yet we had to maintain a satisfactory consumer acceptance, and we had to sell the preponderating proportion of our production in the open competitive market, and we were not sustained in any way in those operations by the requirements taken by Glidden, itself.

Q. In other words, you had to sell most of it rather than use it yourself?

A. By far the preponderating proportion we had to sell in the open market in competition with the trade.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: We will recess at this time until 9 o'clock, Eastern Standard Time, tomorrow morning.

(Thereupon, at 3:10 o'clock p. m., Eastern Standard Time a recess was taken until Wednesday, May 14, 1947, at 9 o'clock a. m., Eastern Standard Time.)

2555 Room 332, Federal Trade
Commission Building,
Washington, D. C.,
Wednesday, May 14, 1947.

Met, pursuant to adjournment, at 10:00 a. m., E. D. S. T.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 815—15th St., N. W., Washington, D. C.), appearing for Sherwin-Williams Company.

Edmund P. Wood, Esq. (2801 Carew Tower, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

James D. Ewing, Esq., and E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

John A. Duncan, Esq. (1649 Union Commercial Building, Cleveland 14, Ohio), and Roger Hinds, Esq. (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

2556 PROCEEDINGS.

Trial Examiner Norwood: Pursuant to adjournment on yesterday, the hearing in Docket 5253 is now reconvened in Room 332, Federal Trade Commission Building, Washington, D. C., at 10 o'clock a. m., Eastern Daylight Saving Time, on the 14th day of May, 1947.

Mr. Sprague will please resume the stand for further direct examination.

PAUL E. SPRAGUE resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Hinds.

Q. Mr. Sprague, except during the period when the Code was being developed, did you or your company ever give or receive any price information or any reports or any data whatsoever from the Lead Industries Association concerning prices of lead pigments or any of those products?

A. No, sir.

Q. Did you ever give or receive from the Lead Industries Association any information about differential zones relating to lead pigments whether used by Glidden or by any other producers?

A. No, none, other than during the period of the NRA.

Q. Did you ever give or receive from the Lead
2557 Industries Association any information about freight
rates concerning lead pigments?

A. No, sir, at no time.

Q. Did you ever give to or receive from the Lead Industries Association, except during the period when the Code was being developed, any information or data regarding any other so-called cost factors or price factors with regard to lead pigments?

A. No.

Q. When Glidden has reduced its price of lead pigments, what have been the circumstances which have led to such a reduction?

A. The dominating circumstance was that we found we could make no sales unless we promptly reduced our prices to respond to competitive reductions. Therefore, the only consequence of failing to reduce was to go out of the market.

Q. You have already stated what you had observed as to circumstances which led to a reduction, but as far as you were concerned you reduced when your competitors reduced, is that it?

A. We reduced when competitors reduced, in order to stay in business.

Q. Well, now, what has Glidden's practice been with respect to inventories of your raw materials, goods in process and finished goods in the lead pigment field?

A. We learned from our experience that the only
2558 way to keep our market losses, our inventory losses,
low was to maintain the minimum practical working
inventory, both of raw material and of finished product.
In that manner we could avoid the market gains and losses,
which we sought to do.

Q. When you have reduced your price on a lead pigment, what effect has that had on the percentage cost of your raw materials as a percentage of your lead pigment?

A. Well, of course, as soon as prices are reduced, the percentage cost of the pigment sold thereafter in relation to the selling price becomes higher.

Q. Until you work it off?

A. Until the inventory has been brought to the prevailing market on which the sales are made.

Q. Well, now, when Glidden has increased its price of any lead pigment, what have been the circumstances that have led it to such increase?

A. Well, I endeavored to explain in my testimony here yesterday the reasons for Glidden's immediate increasing of prices to follow the market, which rested upon the necessity of doing so in order thereby to earn the maximum average gross on the sales. In other words, if we failed to increase the price as the market advanced, we would in effect cut off a portion of the attainable average gross margin.

Q. In so doing, was the fact of the inevitable losses
when the market declined, that you have already
2559 spoken about, a factor?

A. Well, of course I spoke of the over-all average position. The immediate consequence of an advance would be to recoup, theoretically, from the advance the same loss that was sustained on a decline, provided the inventories were the same at both times.

Q. Has Glidden, to your knowledge, or any of its divisions, at any time been under any constraint or obligation, express or implied, which has prevented it from charging any price or adopting any pricing practices or methods that it has regarded as best suited to its own commercial interests?

A. Not in the least.

Q. What fundamental motive has actuated Glidden in charging its prices and adopting its pricing and selling methods?

A. Well, the fundamental motive in doing that was to survive and earn a profit within the framework of the maximum price obtainable and the cost of lead required to produce the merchandise. If I understand your question correctly, that is a subject that I covered rather thoroughly yesterday in explaining why it was necessary to raise prices and why it was necessary to lower prices.

Q. Now so far as you personally are concerned, or so far as any other Glidden man is concerned that you know

of, has there ever been any sense of moral obligation or
esprit de corps or feeling of fellowship or solidarity
2560 with any of your competitors which has determined to
any degree Glidden's prices or pricing methods?

A. No.

Q. From your observation, what is the competitive condition which exists in the lead pigment industry and has existed prior to the filing of this complaint?

A. Do you mean as to the intensity of competition?

Q. Yes, the conditions with respect to competition or the lack of it.

Mr. Wright: Objection. It calls for a conclusion on the part of the witness.

Trial Examiner Norwood: Read the question.

(The reporter read the record as follows:

"Q. From your observation, what is the competitive condition which exists in the lead pigment industry and has existed prior to the filing of this complaint?

"A. Do you mean as to the intensity of competition?

"Q. Yes, the conditions with respect to competition or the lack of it.")

Trial Examiner Norwood: The objection is overruled.

A. My observation is very definite that through the
entire period of my contact, the competition in the industry
has been keen as among the units in the industry, and
2561 certainly as between Glidden and the industry.

By Mr. Hinds:

Q. Has there ever, during your knowledge of the situation, been any time when you regarded it as being in Glidden's commercial interests to initiate a price change of lead pigments, either up or down?

A. Very rarely. I should say no, it has never been to Glidden's commercial interest to initiate a change in prices.

Q. Why is that?

A. The reason is as I have described. If Glidden attempted to raise prices, it priced itself out of sales. If Glidden did not reduce prices, the result was the same.

Q. Have you, or to your knowledge has any other representative of The Glidden Company, ever received any request, any suggestion or any intimation, from any of your competitors, as to what role Glidden should follow with respect to Glidden's pricing and pricing methods?

A. No, I recall of none.

Q. During the period of your knowledge with relation to the lead pigment business of Glidden, has there been, or in your opinion could there ever have been at any time, any important adoption or change of policy or negotiation or agreement made with anybody outside of your company, with respect to lead pigments or the pricing of lead pigments, which you would not have known about promptly?

2562 A. No, I don't think that could have been done.

Q. Well, then, did your company at any time, to your knowledge, enter into any agreement or understanding or arrangement with any other producer or seller of any lead pigments, with respect to the fixing of prices or with respect to any pricing method?

A. No, sir.

Q. Has any such arrangement or understanding or agreement come to your knowledge?

A. On the part of Glidden?

Q. Yes, sir, that is what I meant.

A. None.

Q. Have you ever heard of any?

A. No.

Q. Did anyone in your company have any authority to enter into any such agreement, understanding or arrangement?

A. Well, there were people in our company who had authority to make agreements, but no such agreements were made that I know of.

Q. Did they have authority to make such an agreement, if you know?

A. Well, the corporate officers no doubt have authority to make any type of agreement that is legal on behalf of the company. The power was certainly there to do that if someone desired to do it and thought it was legal to do it.

2563 Q. Well, did your company, either through you
2564 or anybody else, to your knowledge, at any time enter into any such agreement, understanding or arrangement?

A. No.

Q. You understand that in these previous questions I have been including oral as well as written understandings, agreements or arrangements, do you?

A. Yes.

Q. Have you found the relationship between pig lead prices and the prices of lead oxides to be more sensitive or to be less sensitive than the relationship between pig lead prices and prices of white lead and white lead-in-oil?

A. Well, very much more sensitive, because the major tonnage of the lead oxides sold are sold in carload lots, and they are priced directly on the pig market each day.

Q. From the standpoint of your economic relationship to the industry, what is the role of a manufacturer of lead oxides, what does he do in the economic field?

A. Well, in effect he is a converter of metallic lead to lead oxide at what is in effect a toll charge.

Q. What attitude did you and your company take during the period of the development of the Code, with respect to the suggestion that the assembling and distributing of price reporting might be engaged in?

A. Well, I think I represented the company's attitude, 2565 it was left to me in that matter, and my own view was, at the start of the Code discussions, that price reporting might be a constructive method of accomplishing the purposes of the NRA, but I changed my views after consideration of the question and what was involved in preparing to do adequate price reporting, to the point where I questioned that it was a good thing to do, and I was opposed to it.

Q. You have spoken of areas with respect to distribution of white lead-in-oil where the differentials were different. What have been the factors in your own delineation of the boundaries of those areas?

A. Well, the principal factor and determining factor in our delineation was the competitive practices of the market leaders in the sale of those products. We also had to take into account the necessity of recognizing localized areas where a question of selling to people who directly competed with each other in those areas was involved.

Q. Taking into account those differentials, have your sales in the remote, the more remote regions from your plant been more or less profitable to Glidden as compared to the sales in regions near your plants? I am talking about the sales of lead pigments.

A. The sales in the more remote delivery destination points have been in general less profitable to us, because we were obliged to make shipments from one producing point in each case.

2566 Q. Why have you continued to offer your goods in those regions, then?

A. Well, the situation that led us to do that and which leads us to continue to do that, rests upon the requirement, fundamentally, that we obtain as much volume in those plants as we can within the scope of their capacity, and all through the years I can never recall a time when we had volume sufficient to fully occupy the capacity of the lead oxide plant, and very rarely a volume sufficient to occupy the capacity of the white lead plant. Now when we couldn't get volume within the nearby areas, we had to get volume further and further away, up to the point where we sustained an actual loss.

Q. Have you ever heard the suggestion from any source that for your uniform delivered prices you might consider substituting uniform f. o. b. mill prices? Have you heard of such a suggestion from any source?

A. Well, I have heard that suggestion in connection with some of the Federal Trade Commission matters that have been discussed with me in connection with this case. I never heard it from anybody in the trade, either buyer or seller.

2567 Q. Exactly. Have you given any consideration—yes or no—to what in your opinion would be the consequences of carrying out any such plan from the standpoint of Glidden—yes or no?

Mr. Wright: Objection, Your Honor. By the witness' own testimony he has never employed such a method for marketing and obviously it calls for suppositions and guesses and conclusions of the most unreliable sort.

Mr. Hinds: I merely asked him if he had considered it. The sixty-four dollar question would presumably come lated. Maybe he will say that he hasn't considered it, and in that case I wouldn't be able to ask him what the result of his consideration had been.

Trial Examiner Norwood: I think we must draw the line somewhere. I want this witness to give us the full details about his business, but this is purely speculative here. I think we have come to the point when we must stop this line of testimony.

Mr. Hinds: I would like to make a proffer—

Trial Examiner Norwood (Interposing.): I will sustain the objection, and counsel may make his proffer.

Mr. Hinds: We proffer this witness as an expert in

marketing and pricing problems, pricing method problems,
in connection with the lead pigments industry, and that
he would testify that in his opinion, for what it may
2568 be worth, in view of those qualifications, an f. o. b.
uniform price system in the lead pigments industry
so far as this single plant producer is concerned would put
them promptly out of business.

Trial Examiner Norwood: Now counsel may show any factual conditions which would bear on that question of whether or not it would be practicable or profitable for him to confine himself to the f. o. b. mill price. But put it in on that basis.

Mr. Wright: I would like to add to my objection, Your Honor, and also state for clarification of counsel that there is no suggestion in this complaint that the effect would be to require this respondent or any other respondent to establish a uniform mill net system of pricing or any other system of pricing. So the whole matter is an irrelevancy.

Trial Examiner Norwood: I thought, in connection with my ruling, that it was of doubtful relevancy, even the fact that I stated that if you had some factual material to put in on that point you might do so, but that is going as far as I think we should go in this investigation.

Mr. DuBose: Well, Your Honor, Mr. Wright has made
the statement that there is no suggestion in this complaint
that any respondent should be required to go on an f. o. b.
mill net. It seems to me that the necessary result of the
allegations of Count II would lead to the conclusion that
any other system under the Commission's theory is
2569 discriminatory unless the delivered price makes, in
the Commission's mind, only due allowance for transportation.

Mr. Wright: Your Honor, as to Count II I want to state right here that the theory of Count II is systematic discrimination, that is the principal theory, systematic discrimination for the purpose of matching and meeting prices as between these respondents.

Mr. Hinds: I must respectfully differ from my opponent as to what the Commission is claiming and what the complaint claims, because we have it on very high authority, including some of the Commissioner's published statements, and Mr. Woodin in many of his statements, interpreting this complaint, that this complaint indeed among other things seeks to proclaim as illegal per se under the Robinson-Patman Act, entirely apart from collusion or anything else with other producers, the mere charging of the same price to two competing customers at different distances from the mill. So we are obliged, unless we can have a very authoritative disclaimer of that to us very fantastic contention, to assume that the fantastic contention confronts us, and that was one of the reasons for my seeking to bring out from this witness what the results would immediately be to his company.

Mr. Wright: I want to say that Count II of that complaint goes to any method of pricing which systematically makes differences in real prices for the purpose of
2570 matching prices, whether it be a delivered pricing system or a mill net system, or whatever other type of system.

Mr. Hinds: The word "matching" being a word which has recently been judicially condemned from a very high source.

Trial Examiner Norwood: Counsel's statement there about what the Commission has held and stated I don't think is very well based. I remember a recent case which returned the order requiring them to cease and desist from applying the delivered price method for the addition to the order of the words "through agreement and collusion". What was the name of that case, do you remember?

Mr. Wright: I can't recall it offhand, Your Honor.

Mr. Hinds: Your Honor has already ruled on this question and I merely made a proffer. I am not arguing further against Your Honor's ruling. I made the proffer.

Trial Examiner Norwood: The ruling will stand. If you can show any facts which bear on this subject of whether or not people living nearer the mill are disadvantaged or discriminated against, we will receive that.

Mr. Hinds: I think I shall avail myself of the opportunity which seems to be suggested by Your Honor, to explore those factors a little more, without asking the sixty-four dollar question, as I might call it.

Mr. Wood: If Your Honor please, I have been
2571 trying repeatedly all through this case to find out just what the Commission's position is as to Count II. I know I have made a nuisance of myself, I have argued it before the Commission and I have brought it up over and over again. But according to Mr. Wright's statement this morning I have been misinforming my client as to what

the case was all about, all the way through. I thought that it involved the legality of selling at a delivered price, and that the Commission, in accordance with its own statements and publicity, was attempting to outlaw this so-called delivered price selling.

Mr. Hinds: Uniform delivered price selling.

Mr. Wood: Yes, uniform delivered price selling. Am I now to understand that that is all out the window and that nothing is involved here except conspiracy?

Mr. Wright: All I can do in that connection is to refer counsel back to the complaint itself. If there have been any official statements regarding the issues in this case, made either by the Commission or other people on the staff of the Commission, they have not come to my attention. I think the principal issues of Count II are very plain.

Mr. Wood: In other words, do they involve uniform delivered price selling, or do they involve only conspiracy?

Mr. Wright: They involve discriminations alleged to have been conducted for the purpose and with the effect of
eliminating competition in the primary line in which
2572 respondents are engaged.

Mr. Wood: By collective action rather than individual action?

Mr. Wright: No, sir.

Mr. Wood: That is what I am trying to get at. Does the complaint, in Count II, involve individual action as well as collective action, or only individual action?

Mr. Wright: I might say as to that, that Count II involves only individual action by each of the respondents.

Mr. Wood: And it doesn't involve uniform delivered price selling?

Mr. Wright: In so far as the manifestation of the uniform delivered price selling presents discriminations under the allegations of the complaint, of course it involves uniform delivered price selling.

Mr. Hinds: In other words, we discriminate between two competing purchasers by charging them the same price if they are at different distances, if that is what you mean.

Mr. Wright: I think the complaint is perfectly clear as to that, and I believe counsel have stated that there was no issue that they did not understand with reference to Count II of the complaint which related to this pricing method.

Mr. Hinds: It is only because of what you said this morning that we are again put in the condition of quandary.

Mr. Wood: I must have misunderstood counsel 2573 this morning because I understood him to say at an earlier time, in objecting to a question, that Count II involved a system of matching prices, which of course would necessarily involve more than one company. I don't care what the issues are but I would like to see them clear.

Trial Examiner Norwood: I want to explain, with respect to my remarks just made, which were more or less tentative, that I had in mind only the first Count, that I was speaking of it being based on agreement and collusion.

Mr. Hinds: Well, I had in mind more the second count in my question. But I will avail myself of the opportunity offered by Your Honor. I would first like to perhaps bring out more details as to Mr. Sprague's qualifications—

Trial Examiner Norwood: (Interposing.) I will be glad to hold an informal conference at any time for the purpose of clarifying the issues. We can go into each and every one of those things off the record so that we may speak very freely without being afraid of committing ourselves, and we will hold just as long a session as you want for the purpose of clarifying the issues, and that will be done at any time that counsel may request it. Proceed with the examination.

By Mr. Hinds:

Q. Mr. Sprague, a little more as to your qualifications. What has been your formal education?

A. Well, I am a graduate chemical engineer and 2574 have the degree of master of science in chemistry.

Q. You have had a diversified industrial experience?

A. Yes sir, I have been in charge of sales of the paint department of The Glidden Company in the East, have been a chemist in the laboratory, have been purchasing agent, and have had the various positions that are described in my earlier testimony yesterday in connection with lead pigments.

Q. I think you said that the lead pigments industry is a very small factor, relatively, in Glidden's business and in your experience, is that true?

A. The lead pigments business is a small part of the

Glidden Company's overall sales, but my experience in it has been a large part of my business experience.

Q. Has your experience included any f.o.b. uniform plant prices in any product?

A. Did you say uniform f.o.b. plant prices?

Q. Well, I mean a price which, considering the same grade and quality and quantity of goods is the same to each purchaser f.o.b. your plant—that is what I meant by being uniform.

A. Yes. One of the lines that our company handles and which I have had sales responsibility for, embodies sales on an f.o.b. plant basis.

Q. Has your experience covered both multiple plant production and single plant production?

A. Yes, it has, particularly in the pigments business.

2575 Q. Has your experience required you to keep informed as to the marketing practices of other producers than the one by whom you were at any given time employed?

A. Oh yes, it is constantly necessary, in connection with handling sales of raw materials, tonnage raw materials of the type that I speak, where those materials are in competition with others that may be alternately used, to keep very closely in touch with competitive developments.

Q. Will you give us the benefit of your judgment and informed opinion with respect to any difference that may exist between the position of a single plant producer and a multiple plant producer where prices are f.o.b. plant?

Mr. Wright: Objection. It is immaterial and irrelevant and is not a proper subject of this sort of testimony.

Trial Examiner Norwood: That is the type of question that is asked of economists.

Mr. Hinds: Don't you think that I have qualified this gentleman as an economist to the extent that he is a marketing, pricing and producing expert in the field in which he is engaged? He certainly knows the difference between the position of a single-plant producer and a multiple-plant producer. Otherwise he wouldn't be occupying the position he does, and his company would have gone out of business.

Mr. Wright: The fact that this gentleman is a vice president of The Glidden Company who has been in
2576 their employ for many years, doesn't qualify him as

a marketing expert to speak on such broad and general subjects as counsel has asked him about.

Mr. DuBose: He has already stated that his own personal experience includes single plant operation.

Mr. Wright: The question was very vague and general. It related to no product and there were no circumstances given in the question except a one-plant operation and a multiple-plant operation.

Mr. Hinds: If that is the only objection, I will be glad to reframe the question. It seems to me that these go to the weight rather than to their admissibility.

Trial Examiner Norwood: I will sustain the objection, but you may ask this witness to give the conditions in his business upon which an economist might base an opinion, and you may ask him his reasons, his practical reasons, why he sells this way or why he sells that way, based upon the requirements of his particular business.

Mr. Hinds: That will be quite satsifactory; that is really what I had intended to do.

By Mr. Hinds:

Q. Mr. Sprague, in your lead pigments business will you state the difference, if any, between the single plant producer and the multiple plant producer, with respect to f.o.b. prices?

Mr. Wright: Objection, Your Honor.

2577 Trial Examiner Norwood: That is the same question, isn't it?

Mr. Wright: It has already been brought out in the record that the company for which this witness is an executive is a single-plant producer as to each of these pigments involved, and he has not been qualified to speak of the operations of the multiple-plant producers.

Mr. Hinds: I think counsel fails to recollect that I particularly asked him if it had been part of his business to keep himself informed about the multiple-plant producer, whether his own company or the others—and in lead pigments it would be others of course—and he said that it had been part of his business to keep himself informed about marketing practices and conditions of competing multiple-plant producers. So I think, while Your Honor may have a different view from ours as to the weight of this testimony, certainly its admissibility, I submit, has been established because it is within the sphere of his knowledge.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Mr. Sprague, in your lead pigments business will you state the difference, if any, between the single plant producer and the multiple plant producer, with respect to f.o.b. prices?")

Trial Examiner Norwood: That is an economic 2578 question pure and simple. I think you can bring out the factual basis for such questions as that from this witness, and then we can go into that with qualified experts.

By Mr. Hinds:

Q. Having in mind, Mr. Sprague, the conditions in the lead pigments industry that you have observed, including the fact that some of your competitors have more than a single plant, why have you not adopted an f.o.b. pricing system?

Mr. Wright: Objection, Your Honor. This witness has already testified that he took the prices of the market leader as he found them and attempted to compete on that level; and he has already testified that the Glidden Company has never been in a position to initiate a price change on these lead pigments, has never felt itself in a position to do so. Now this is an attempt to bring out testimony inconsistent with his previous answers.

Trial Examiner Norwood: Well, he may correct his testimony or qualify it in any way he wants to, or confirm it.

The Witness: Your Honor, may I speak to our counsel, please?

Trial Examiner Norwood: No.

Mr. Hinds: Was there a ruling on that objection?

Trial Examiner Norwood: The objection is overruled.

Mr. Hinds: Please read the question to the witness, Mr. Reporter?

2579 (The reporter read the question, as follows:

"Q. Having in mind, Mr. Sprague, the conditions in the lead pigments industry that you have observed, including the fact that some of your competitors have more than a single plant, why have you not adopted an f.o.b. pricing system?")

Trial Examiner Norwood: Answer the question.

The Witness: We have not adopted an f.o.b. plant basis of pricing either in white lead or in lead oxides, be-

cause by doing so we would automatically circumscribe ourselves and make an isolated island of ourselves in the geographic area where our plant is located, and that would be fatal for our particular situation at the location point of these plants, more seriously with respect to the lead oxide plant at Hammond, possibly, than with respect to the white lead plant at Noranton. I have found that the trade relations aspect of f.o.b. selling pigments is the same whether you sell white lead or whether you sell lithopone or titanium oxide. I have been in charge of sales of lithopone from multiple producing plant points to the same classes of customers as I have sold white lead and red lead to from single producing plant points. I learned early in the white lead business, in respect to the sale of dry white lead now—the factors I am mentioning do not pertain, in my opinion, particularly to the white lead-in-oil sales which end at a different class of consumer—but I learned
2580 fundamentally that our trade relations and our customer
relations with the people who purchased our lead pigments and our zinc pigments, and our titanium pigments, were much happier when those purchasers all knew that they paid us the same price for our goods laid down at their door, ready for their use, than they were when we sold merchandise under my direction from a single producing plant on an f.o.b. plant basis, where each consumer had for himself a different cost for our merchandise when he started to use it.

I learned throughout my experience that it was a sounder position for a seller of bulk raw materials to be in, who was selling a product that the customer processed and used in preparing the article that he ultimately exposed for sale, to have those customers each know that I was selling them on the same basis. They had no quarrels then between themselves and no quarrels with me.

Now in selling mixed feeds, which is one of my present responsibilities with The Glidden Company, which is sold on an f.o.b. plant basis out of a single producing plant, one of our problems today in that business—which has been one of the first large businesses in this country to encounter the drop-off in volume that we will all hit some of these days, and which we have had in the feed business for the past six months—is that the volume in the industry
2581 has dropped off about 45 per cent. Now what has
happened to us in our single producing plant with an

f.o.b. plant basis of pricing? What happens is that our market area begins to contract and it is measured solely by the freight rate from our plant out, and from the other fellows's plant in, and the actual thing that has happened and is now happening in that business, our business, the Glidden Company's business there, is that whereas we for some years merchandised that material in the New England States, in Delaware, Maryland and Virginia, we now find our area constricted to within two or three states around our plant. Now that is the actual fact of what happens, and we are going to have to operate that business now profitably on sales within that area closely contiguous to the point of production.

Now the serious thing about that to my view, and it applies very particularly to the pigment business, is that since competition is an inherent urge in men and business, they have to compete somewhere on something, so if they can't compete on quality, which is the result when a uniform delivered price to the customer is in effect, competition then changes from price competition to quality competition, to competition on service, to competition on factors other than price, and that is, to my way of thinking, wholesome throughout. But when that type of competition ceases, and competition takes other forms, then the benefit
of improvements in quality, the urge to conduct re-
2582 search, and the desire of demonstrating to your cus-
tomer something superior for him, becomes sec-
ondary.

Now we find in our f.o.b. plant pricing point plant that our energy is now centered not on improving the quality of our merchandise, but our energy is now centered on getting low cost transportation out of that plant so that we can reach further out and have a delivered cost to the buyer now that is in competition with the other fellow who can reach him. What will be the effect? I don't know. We may have to acquire some truck lines and go into the transportation business in order to expand that market. The pressure of competition changes from that of quality, on a uniform delivered price method of pricing, to other phases of the business than quality of merchandise, and that, I think, is serious.

Trial Examiner Norwood: We will have a five minute recess.

(A short recess was taken.)

2583 By Mr. Hinds:

Q. Mr. Sprague, has Glidden Company and other producers of lead pigments any competitors outside of the field of lead pigments?

A. White lead is a white pigment, and it must compete with other white pigments in trade acceptance and use in the paint industry, which is the largest consumer of white pigments. There is always a relationship between the various white pigments.

The ceiling of one is related to the ceiling of another in terms of the price that the paint manufacturer can pay for those pigments. I don't want to mislead you by indicating that the relationship is entirely one of cost between the white pigments because there is, in addition to the cost relationship, factors that relate to the properties and characteristics that the various white pigments possess, and those are unique to the individual pigments.

Q. What are some of the other pigments other than lead pigments which compete within the limits you mention?

A. In the case of white lead, the competing pigments are lithopone, zinc oxide, titanium oxide and, most importantly, leaded zinc oxide.

Q. Are any of those competing pigments used by concerns other than those that are named as respondents in this case?

A. Oh, yes.

2584 Q. Name some of them.

A. The New Jersey Zinc Company, the Dupont Company, the Titanium Pigment Company, the American Cyanamide Company, St. Joseph Lead Company. There may be others, but I recall those.

Q. When you refer to the St. Joseph Lead Company, are you referring to its production of pigments other than lead pigments?

A. I am referring to zinc oxide.

Q. You said, I believe, you were a member of the White Lead-in-Oil Committee of the Lead Industries Association.

A. I don't recall that I ever said so, but I was.

Q. You were?

A. Yes, sir.

Q. I thought it had already been brought out. Did you attend the meetings of that Committee?

A. Yes, sir.

Q. What was the purpose of that Committee?

A. The Lead-in-Oil Committee or group was put together for the purpose of providing means and a way of expressing the opinions and the recommendations of the white lead-in-oil industry with respect to the formulation of codes.

Q. Did that Committee even consider the fixing of prices?

Mr. Wright: I object, your Honor. It calls for a conclusion of the witness.

2585 Trial Examiner Norwood: He was on the Committee, was he not?

Mr. Wright: Yes, sir.

Mr. Hinds: Yes, sir.

Mr. Wright: But I mean it calls for a conclusion on the part of the witness, a broad general conclusion as to what price-fixing was.

Mr. Hinds: There is no ambiguity. The word "consider" is an unambiguous word.

Trial Examiner Norwood: He can clarify that, if you think it is ambiguous. Objection overruled.

Mr. Hinds: You may answer.

The Witness: Not to my knowledge.

By Mr. Hinds:

Q. Did that Committee recommend that members of the Association report their prices and price lists to the Association for the use of other members?

A. My recollection is that the Committee gave consideration to the development of the methods by which price reporting could be accomplished, but that the Committee did not recommend such reporting.

Q. What were some of the methods to which they gave consideration in view of the possibility that they might recommend price reporting?

A. It was necessary in attempting to develop 2586 means by which price reporting could be done to design the manner in which the prices were to be named, and in such a manner that they could be reported and could be understood by those receiving the reports.

Q. What were suggested as possibilities for discussion as a means of making this price reporting feasible?

A. One of the difficulties, as I recall it, in trying to develop a system arose from the fact that there were so many price equalization or freight equalization points, and as a means of trying to improve that situation for reporting purposes, or to make it intelligible, the consideration of the zones was inaugurated.

Q. Well, when the Committee decided that it would not recommend price reporting at all, what, if any, action was taken with respect to this zoning suggestion?

A. None.

Q. I show you what appear to be the minutes of the Lead Pigments Division, White Lead-in-Oil Committee, of August 9, 1933. That is in evidence as Commission's Exhibit 501-A to -D. Without consulting these minutes, can you testify as to whether you were present or what occurred there, or do you require this to refresh your recollection?

A. No, I cannot. I attend many meetings, not only of the White Lead-in-Oil Committee but of the others.

Q. Please refresh your recollection and tell us
2587 whether you were present there.

Mr. Wright: Your Honor, I object to that. How can the minutes refresh his recollection as to whether he was there or not. He either recalls being there or he doesn't recall being there. If his information is going to be from the fact that the minutes said he was there, it isn't his own recollection.

Trial Examiner Norwood: You look at the minutes there and see if you recall by seeing the matters recorded there, see if it brings the whole picture of that meeting back to you and then lay aside the minutes and tell us what you remember about it.

Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Lay the minutes aside, and then answer the question.

By Mr. Hines:

Q. Do you recall whether at that meeting there was any reference to the possibility—

Trial Examiner Norwood (Interposing): Do you remember that you were present at that meeting?

The Witness: Yes, sir.

Trial Examiner Norwood: Go ahead.

By Mr. Hines:

Q. A moment ago you referred to minutes which
2588 were discussed for possible if you should decide, your
Committee should decide, to recommend price report-

ing. Do those not refresh your recollection as to what particular means discussed in the contingency that you should adopt price reporting?

A. Yes, they do.

Q. What?

A. The means that were required in that Committee and in all the other committees where we were attempting to develop a basis of price reporting was just that—to get a basis that was intelligible.

Now, my recollection of that meeting, as refreshed from the minutes, is this, that in order to get a basis for the reporting of prices for white lead-in-oil, it was necessary to know what the prices were and where they applied, and there were a huge number, a large number of freight equalization points that had come into being in that industry, and there wasn't any practical way that I can recall, and as far as that meeting and discussions, as to how price reporting could actually be accomplished with all of the equalization points.

Q. Were there any suggestions made—

A. (Interposing) Mr. Maston pointed that out, or it was pointed out in the meetings, just as the minutes state, and he undertook to try to make some recommendations.

2589 Q. Do you remember what they were?

A. Recommendations to solve the problem. Yes, sir, I remember this, that he developed a map. I remember seeing more than one map that he had in the course of that work, and he had the various areas of the country in colors as a means of simplifying a method or producing a method by which cost reporting would be intelligible and would be simple.

Q. Do you remember whether or not he was a proponent of having zone maps or that he merely raised it for consideration and discussion?

A. I would presume he was a proponent of it, as he volunteered to make some suggestions, but I do not recall any strong position on the matter that was taken by any members of the Committee.

Q. I show you Commission's Exhibit 513-B. Did you receive a copy of that letter, or does that refresh your recollection concerning any matters referred to therein?

A. Yes, sir, I received a copy of that.

Q. I notice that refers to a map. What was the map referred to therein by Mr. Maston?

A. I don't know what map it was except it was one of the maps that he prepared in connection with this work of the Committee. I paid no attention to the map because there wasn't anything I could do about it.

2590 Q. What, if any, action or decision or conclusions was reached by the Committee with respect to that or any other map?

A. My recollection is that there were no conclusions reached by the Committee, but the thing dropped out because the whole price reporting idea was abandoned.

Q. Did Glidden ever have or use a map, a so-called zone map, as far as you know?

A. No.

Q. You referred to these equalization points and differentials. Did you discover them to be in existence when you first entered the industry, or were they something that grew up after you came in there?

A. They were in existence when I first became familiar with pricing white lead-in-oil.

Q. Did you observe any change in these practices in that regard which developed only during the N.R.A. period or for the first time during the N.R.A. period?

In other words, did you observe any change in that regard following the enactment of the N.R.A.?

A. Our sales reports and information were that the use of premium prices on deliveries of white lead-in-oil at distant points instead of by equalization points, but by zones, occurred in the trade—I do not recall just when, but I think after the N.R.A. period.

2591 Q. What, if anything, did Glidden do in that connection after the N.R.A. was declared unconstitutional with respect to quoting differentials?

A. Glidden continued all through its period in the white lead-in-oil business of adjusting itself to its competition, whatever it was.

Q. Did you at any time consciously follow or feel restrained by any zone differentials or zones as such, or was your naming of prices at different points merely a matter of discovering what your competitors were doing?

A. We discovered what our competitors, and we initiated competitive pricing in accordance therewith.

Q. I show you what appears to be a mimeographed paper marked "Commission's Exhibit 593" and ask you if you have seen that before or know what it is.

A. Yes, I testified regarding that at the hearing in Cleveland.

Q. What is that?

A. That is a sheet taken from a bulletin that was issued by the paint divisions of the Glidden Company relating to white lead-in-oil pricing dated October, 1941.

Q. Now, did you give the original of that exhibit to anyone connected with the Federal Trade Commission?

A. Yes, my recollection is that I gave it to Mr. Dunn.

Q. When was that—about?

2592 A. I do not recall the time. It was the time he came to Cleveland to call on me in connection with matters relating to white lead-in-oil prices.

Q. Did he at that time or any other time ask you for a zone map?

A. He may have. I do not recall specifically that he asked for a zone map, but he asked me what were the prices of the Glidden Company on white lead-in-oil and how they might be defined, and in connection with answering his question I gave him that sheet.

Q. That Exhibit 593 that you just mentioned? You gave him No. 593?

A. Yes.

Q. Did you tell him that since 1935 Glidden had adopted National Lead Company's differential zones or anything to that effect?

A. No, I don't think I told him Glidden had adopted National Lead zones in 1935. I don't believe that was the case. What Glidden was to adjust to the competitive practices of the National Lead Company as they found them.

Q. Did Mr. Dunn in your presence write on the top of Exhibit No. 593 the lead pencil words, "Since 1935 adopted National"?

A. I do not recall his writing anything.

Trial Examiner Norwood: May I see that a minute?

2593 (Book handed to Trial Examiner.)

Trial Examiner Norwood: Thank you.

By Mr. Hines:

Q. Did you at anytime have any understanding or arrangement with National Lead that from 1935 you would adopt their differential zones?

A. No, not from 1935 or any other time.

Q. Did you ever discuss the matter of your adopting their differential zones with any representative of National Lead Company?

A. Not that I know of.

Mr. Hines: You may cross-examine.

Mr. Wright: Your Honor, it is almost 12 o'clock. I suggest we recess for lunch.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Please proceed, Mr. Ewing.

Cross-Examination by Mr. Ewing.

Q. Mr. Sprague, I show you the original document, a photostatic of which has been marked "Respondents' Exhibit 138-A, and ask you to read it to yourself.

Were you present at that meeting, Mr. Sprague?

A. Yes, sir.

Q. Do you recall discussion with respect to the
2594 question of establishing zones in the South and West
at that meeting?

A. Yes, I do.

Q. Will you state whether the members of the Lead Oxide Committee of the Lead Pigments Division of Lead Industries Association—I withdraw that.

Will you state in what connection the subjects considered at the meeting of the Lead Oxide Committee of the Lead Pigments Division of Lead Industries Association, Respondents' Exhibit 138-A and subletters, were given consideration?

A. Could I have that repeated, please?

Trial Examiner Norwood: Read the question.

(The question was read by the reporter.)

The Witness: I cannot recall much, if anything, about the duration of that meeting or length of discussions. I do recall the general character of the points that those minutes portray in connection with the Committee.

By Mr. Ewing:

Q. I think you may have misunderstood me. What I meant to ask you was: For what purpose did the Committee consider the subjects? What brought up the consideration?

Mr. Wright: Objection, your Honor. He has already testified that he can't recall this particular meeting.

Mr. Ewing: He didn't say that.

Mr. Wright: Read the witness' last answer.

Trial Examiner Norwood: Let the witness explain

2595 there whether or not he does recall the meeting.

The Witness: Yes, sir.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: He says he does recall it. I think that makes the question valid. Do you want the question read?

The Witness: I have answered the question.

Mr. Ewing: There was an objection.

Trial Examiner Norwood: Read the question.

(The question was read by the reporter.)

The Witness: Those meetings were all held, that one and all the rest of them, for the purpose of considering the development of the code work of the N. R. A.

By Mr. Ewing:

Q. Now, will you tell us whether members of the Lead Oxide Committee, meeting as such, ever agreed on the establishment of zones, which subject was discussed at this meeting of December 27 and 28, 1933?

A. Not to my knowledge.

Q. Will you tell us, if you know, whether at any period subsequent to this meeting and prior to the effective date of the code in June, 1934, the members of the Lead Oxide Committee ever agreed on the establishment of zones?

A. I know of no agreement among the members

2596 of the Lead Oxide group at any time on zones.

Q. Did you ever hear of any agreement?

A. No, sir.

Q. I direct your attention to the last paragraph of the minutes, Respondents' Exhibit 138-A, and ask you to look at Article II of Schedule A of the Code of Fair Competition for the Lead Industry, Commission's Exhibit 809.

Does Article II of Schedule A include the basis for sale at differentials referred to in the minutes of the meeting of December 28, 1933, Respondents' Exhibit 138?

I direct your attention particularly to paragraph (b) of the article, subparagraph (5), subparagraph (a).

A. I understand that. This schedule A defines how sales at a differential are to be conducted. I don't know what you mean exactly by a basis of sale, but says nothing about the differential, if that is the point you mean.

Q. What I meant was that the minutes referred to a discussion with respect to a basis for sale at differentials in connection with the consideration being given the code by the Lead Oxide Committee.

A. That is right.

Q. In the code we find this provision of Article II, which I have made reference to, paragraph (b), subparagraph (5), subparagraph (a). My question was—I believe you answered it—if that provision of the code was the
2597 basis of sale at differentials theretofore generally discussed and eventually finding its way—

Mr. Wright: Objection, your Honor. Counsel has characterized what appears in these minutes and has put a lot of conclusions in his question, obviously in an attempt to lead the witness.

Mr. Ewing: I haven't characterized it at all.

Mr. Wright: There is nothing in the minutes that this thing in the last paragraph had anything to do with. It was stated in that that it wasn't to be filed with the code.

Mr. Ewing: The whole subject of discussion, according to this witness, and according to Mr. Wormser, was all with reference to the code.

Now, this particular reference in these particular minutes, as Mr. Wright said—there was no need for filing it with the code. That was the judgment of the Committee at that point. I have tried to bring out, and I believe I have brought out from Mr. Sprague, that when the code appeared in final form, it did include a provision relating to sale at differentials over lead in the case of lead oxides; and I simply want to show that provision did go into the code even though by that December 27 and 28, 1933, meeting the Committee then apparently felt no necessity for such a provision.

2598 Trial Examiner Norwood: Read the question.

(The question was read by the reporter.)

Trial Examiner Norwood: Please restate the question.

By Mr. Ewing:

Q. Was a basis for sale at differentials over lead in the case of lead oxide the subject of a provision in the code as finally adopted?

A. Yes, sir.

Q. What provision in the code, Schedule A, contains such a provision?

A. It is contained in Schedule A, Article II, paragraph (5) with its subparagraphs. That was the result of the consideration given to the question by this Oxide Committee at some length.

Q. Will you state whether you had anything to do yourself with the drafting of that provision of the code?

A. Yes, I think I drafted it.

Mr. Ewing: I have no further questions.

Mr. Wood: Your Honor, I have just one question.

Trial Examiner Norwood: Very well, proceed.

Cross-Examination by Mr. Wood.

Q. Mr. Sprague, in your testimony with respect to the
sale of lead-in-oil you used the term "freight equaliza-
2599 tion points", didn't you?

A. Yes, sir.

Q. Will you explain thoroughly just what you meant by freight equalization points as you used the term in your testimony?

A. As I understand that term, the meaning of the freight equalization point meant that white lead-in-oil sold with respect to that freight equalization point would be charged to the buyer at the base price in effect otherwise, plus the freight cost from the equalization point to that buyer.

Q. In what sense do you use the term "base price" there?

A. I used the base price in this sense, that as I recall those schedules, the published price of white lead-in-oil or the card price was what I used as the base. Then a purchaser at a distant point would be charged the base price and an added charge in respect to that equalization point. It is a little complicated, and it has been some time since I have analyzed that.

Q. Why do you characterize it as complicated, Mr. Sprague? I am just trying to get on the record a complete statement of the system.

A. I think I have given you about as complete a statement of it as I can.

Trial Examiner Norwood: What would be added to the base price for the ultimate price which the purchaser pays?

2600 The Witness: I will need to use an illustration to explain my recollection of that. Is that satisfactory?

Mr. Wood: Surely.

The Witness: Assuming that the base price of white lead-in-oil was 12 cents and the sale was made in Boulder, Colorado, and the freight equalization point was Denver, and the premium applicable to Denver was 1/8th of a cent, then my recollection is that the buyer in Boulder would pay the 12 cents plus—He would be equalized at Denver at 1/8th, plus 1/8th of a cent, plus freight from the shipping point equalized at Denver.

By Mr. Wood:

Q. Did you use the term "Differential point" in your testimony in regard to that method of pricing white lead-in-oil?

A. I may have used the term "equalization point" as well as "differential point."

Q. What was the differential point?

A. The differential point was the destination point at which a certain premium applied to the price from the base.

Q. In figuring the price of any given commodity at any given point, was considerable computation necessary in those days?

A. Yes, the computation was not a severe problem. The real problem was to find out where these equalization 2601 points were and which they were from the standpoint of the Glidden Company now.

Q. Were they the same for all companies—equalization points?

A. I can't answer what the siuation was for all companies. My knowledge of this situation rests upon what Glidden discovered concerning the practices of National Lead and Glidden's efforts thereafter, but I can say that our observation was that in general similar competitive prices were quoted by others.

Mr. Wood: That is all.

Mr. Hinds: No further questions at this time.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: We will recess at this time until 2 o'clock.

(Whereupon, at 12:10 p.m., E.D.S.T., a recess was taken until 2:00 p.m., E.D.S.T., of the same day.)

2602 **Afternoon Session.**

2:00 p.m. E.D.S.T.

Trial Examiner Norwood: The hearing will come to order.

Proceed with cross-examination.

PAUL E. SPRAGUE resumed the stand and testified further as follows:

Cross-Examination by Mr. Wright.

Q. Mr. Sprague, I show you some documents, and ask you if these are the documents from which you prepared Respondents' Exhibit 143?

A. Yes, sir, those are the source material that my assistant used in respect to the graphs for dry white lead prices and white lead-in-oil prices, but not for the pig lead prices. This book (indicating) is the source of the data for the pig lead prices.

Mr. Wright: I request the reporter to mark for identification as Commission's Exhibit 856 and sub-numbers, the sheets purporting to be from the American Paint Journal Convention Daily of October 26th and 28th, 1938, and the Convention-at-Home Daily of October 31, 1944, being pages 36 and 38 of the Convention-at-Home Daily, and pages 20 and 24 of the American Paint Journal Convention
2603 Daily. I also request that the reporter mark for identification as Commission's Exhibit 857, page 497 of the book entitled, "Metal Statistics—1945" published by the American Metal Market.

(The papers referred to were marked Commission's Exhibits 856-A, 856-B, 856-C, 856-D and 857 for identification.)

Mr. Wright: I would like to request counsel, if it becomes necessary to introduce these into evidence, that we have an agreement that photostats be substituted for the originals, and the originals can then be returned to counsel.

Mr. Duncan: It is so understood. We have no objection to that.

By Mr. Wright:

Q. I show you documents marked for identification as Commission's Exhibits 856-A to D, inclusive, Mr. Sprague, and ask you if those are the source material from which were prepared the graph lines A and B appearing on Respondents' Exhibit 143?

A. Just a moment.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Wright:

Q. What was your answer?

A. May I have the question again?

(The reporter read the question as follows:

2604 "Q. I show you documents marked for identification as Commission's Exhibits 856-A to D, inclusive, Mr. Sprague, and ask you if those are the source material from which were prepared the graph lines A and B appearing on Respondents' Exhibit 143?")

A. Yes, sir.

By Mr. Wright:

Q. I show you a document marked for identification as Commission's Exhibit 857, and ask you if that is the source material from which line C in Respondents' Exhibit 143 was constructed?

A. Yes, sir, that is the source material which my assistant used in preparing that.

Mr. Wright: Your Honor, I offer Commission's Exhibits 856-A to D, inclusive, and 857, in evidence for the limited purpose of showing the source materials and the manner of constructing Respondents' Exhibit 143, and not as evidence of the truth of any matters that appear therein.

Mr. Duncan: No objection.

Mr. Hinds: No objection.

Trial Examiner Norwood: Received for the purposes stated.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 856-A, 856-B, 856-C, 856-D, and 857, were received in evidence.)

By Mr. Wright:

2605 Q. I call your attention now to Commission's Exhibit 857, and to the statement appearing at the top thereof, "Monthly Average Prices of Pig Lead—New York Delivery, based on American Smelting & Refining Company's quotations—50-Ton Lots". Do you consider that that accurately reflects the market of pig lead?

A. Yes, I always regarded the quotations of the American Smelting & Refining Company as most accurately reflecting the pig lead market of any current quotable figures.

Q. Then for the purposes of this chart, you accepted as the going price of lead the quotations of the American Smelting & Refining Company, is that correct?

A. We used in that chart the figures taken from the Metal Statistics book, and used those believing that they adequately reflected the pig lead market for the purposes of the chart.

Q. Now I call your attention to Commission's Exhibit 856-A under the heading "Ten Years' Prices of Some Raw Materials—White Lead, Basic Carbonate—Dry Casks, Per Lb.", and to the fact that under each year there appear two columns, one under "H." and one under "L." What is the significance of the two set of quotations each year?

A. Those figures are, as stated in the title here, the monthly high and low prices during each month for these materials.

Q. Do you know to what class of customers those
2606 were prices as of that time? Were those the retail
list prices; were those wholesale prices; were those
selling prices of the pigments manufacturers in carloads,
or less than carloads; or what prices were those?

A. These are stated here to be the monthly high and low prices of products used in paint and varnish manufacture.

Q. Do you know whether those prices are the lowest prices quoted by the pigments manufacturers or the highest prices quoted by them on those products to particular classes of trade?

A. When we sought to find material with which to prepare those graphs, I referred to this compilation because I had recalled, in previous years, that it was the habit of the American Paint Journal to show these ten-year averages. I know of nowhere else that I might secure that, and we accordingly used this information as—

Q. (Interposing.) Mr. Sprague, do you understand my question? I asked you to what class of trade that price was applicable as it appears there.

A. I will answer that this way. We know nothing about the origin of these quotations except as they are stated here to have been compiled by the Eastern Market Editor, and so forth. Beyond these figures we have no knowledge.

Q. As far as you know they could be, then, the keg price on dry white lead in 100-pound kegs to consumers, or they could be the carload price to manufacturers?

2607 A. If they were prices of that type, and in such packages, and for such consumers, then they would violate the subject of the prices as they are shown and would not meet the title shown on the table.

Q. What is the title there?

A. The title here says that these are the "Monthly High and Low Prices of Major Products Used in Paint and Varnish Manufacture—Compiled by Maurice W. Butler, Eastern Market Editor, American Paint Journal Co."

Q. But you don't know exactly to what class of trade those prices are applicable of your own knowledge, do you?

A. Of my knowledge we know nothing more than the title and the printed figures.

Q. Now I direct your attention to the fact that Respondents' Exhibit 143, in line B, Basic Carbonate Dry White Lead, is explained as monthly average price. Is there a monthly average price reported in the American Paint Journal, Commission's Exhibit 856-A?

A. No. The price shown here is high and low, and in the great preponderating number of months for which these prices are shown there is no difference between the high and the low. Where there was a difference in a given month, I told Mr. Stadder, my assistant, to use the average of those two figures.

Q. So that was a simple arithmetic average of the high and low?

2608 A. That is right.

Q. It didn't refer to the length of time at which one price might have obtained during the month? For instance, the high price might have obtained one day during the month, for all you know?

A. That is right, it was a simple arithmetic average, and that was satisfactory to me.

Q. It didn't reflect, so far as you know, though, an actual average price at which those products were sold during that month?

A. No. Such an actual average price would have been impossible to obtain on our part, or indeed on the part of anybody else, without knowledge of the tonnage of products that were sold from day to day.

Q. Would it not be a more accurate figure if there were in the basic data the length of time in the month at which each the high and the low price obtained?

A. Not unless the basic data also showed the volume of materials sold each day at those respective prices. This was the most accurate source of information and the most accurate information that I knew of to find for this purpose.

Q. Is that more accurate than would have been the records of the Glidden Company as to what they sold dry white lead for during these periods?

A. Those figures are not The Glidden Company's 2609 prices at all. Those are the market prices reported there. Glidden could have secured, if their sales records by months, and so on, still existed, a precise, actual average. But I was not using Glidden's prices in the chart.

Mr. Wright: Your Honor, I move that Respondents' Exhibit 143 be stricken from the record, on the ground that the figures have no value or relevancy. As has been stated by this witness, it was a simple arithmetic average taken from data which showed a high and low price during the period, and there is no indication in the basic data as to the class of customers or what price was being calculated; and it is already in the record that there are different prices for different classes of trade in different quantities and in different containers as to these various products which are covered by it.

Trial Examiner Norwood: Is that tabulation supposed to cover all classes of customers?

Mr. Wright: The witness has stated that he doesn't know what those prices are that appear in Commission's Exhibit 856-A, which has been stated by him to be the sole source of information of the material which is in Respondents' Exhibit 143.

Trial Examiner Norwood: Will you answer my question?

The Witness: May I have that again, please?

Trial Examiner Norwood: Read my question to the witness.

2610 (The reporter read the question as follows:

"Trial Examiner Norwood: Is that tabulation supposed to cover all classes of customers?")

The Witness: The tabulation states that it covers prices of dry white lead in casks. My recollection is that whenever dry white lead prices were quoted in casks in the New York or other publications that showed white lead prices, they referred to the price in barrels or casks, and that was the type of package and represented the type of price that pertained to the sales of dry white lead when made to the paint manufacturers and other large consumers.

Mr. Hinds: Before Your Honor rules on this motion, I would like to have an opportunity to further examine this witness on the identification of the document.

Trial Examiner Norwood: Yes.

Mr. Hinds: Mr. Sprague, you say that the only purpose of this graph was to show in ~~a~~ general way, over the years, the parallelism of the pig lead price, market price, to the price of the lead pigments referred to in the graph; is that right?

The Witness: That is correct; and also to show, as I testified, the general similarity over these time intervals of the situation portrayed in the chart I first kept myself by daily records.

Mr. Hinds: By contrast to the earlier exhibit 2611 which showed up to 1929 the daily market prices, you show here the monthly averages, is that right, rather than the daily prices?

The Witness: In this chart the monthly average, arrived at as described.

Trial Examiner Norwood: For that average you take the high and the low. Did you just divide that by two to get the common factor?

The Witness: I would like to call your attention, Your Honor, to this data. You will notice there that the figures given under the headings "H." and "L." are, in the preponderating number of months, the same, which meant undoubtedly that during those months there was no change in the price and the high and the low were the same. As I stated, during those months where there was a difference between the high and low, I instructed my assistant to take the arithmetical average and so use it in the graph, that being the most accurate available method to me to arrive at what the average was.

Mr. Hinds: Now, Mr. Sprague, I will ask you, in your opinion, in view of your experience, assuming it had been humanly possible, in those months where the price did change and where the high was different from the low, if you had been able to learn the tonnages and the periods where these different prices occurred and had been able to reflect that onto your graph, whether the difference between that and what you have given us would be visible to the naked eye on the graph?

2612 The Witness: I doubt it.

Mr. Wright: Objection, Your Honor. That calls for a conclusion.

Mr. Hinds: That is what I am asking for.

Mr. Wright: It hasn't been stated that he had any means or way of making such a weighted average, so how is it possible for him to make such a conclusion?

Mr. Hinds: It seems that it is possible.

Trial Examiner Norwood: You may cross-examine him on that.

Mr. Hinds: I haven't quite finished, however.

Trial Examiner Norwood: Go ahead.

Mr. Hinds: You were asked what would have been the situation had you been able to get Glidden's prices for the corresponding product that appears in one of the lines of your graph—.

Trial Examiner Norwood: (Interposing.) That question doesn't go to this motion here, I don't think. I think you are just referring to some of his evidence. Let's postpone that for re-direct.

Mr. Hinds: Well, the purpose of my question was prefatory to Your Honor's ruling on the motion, by way of redirect examination with respect to the preliminary cross-examination directed solely to that purpose. That is all I had in mind. It wasn't general.

2613 Trial Examiner Norwood: Go ahead.

Mr. Hinds: I will rephrase the question in this way. Were Glidden's prices, at the time you prepared that chart, available to you for more than a few years back, their sales records?

The Witness: No, sir.

Mr. Hinds: Do you know about how far back they were available?

The Witness: I haven't the least idea.

Mr. Hinds: In your judgment, from your experience in the business, would it have been practicable to have prepared that portion of your chart on the basis of Glidden's sales records?

The Witness: It would have been meaningless. My purpose was an entirely different one in preparing the chart.

Mr. Hinds: Do you know of any source of data or any method of graphically demonstrating the fact that you hope to demonstrate, better than this means or as good as this means or as accurate as this means?

The Witness: I have already stated that that was the only and the best source I knew of to get the information.

Mr. Hinds: If Your Honor please, regardless of the weight of this testimony, as to which honest minds may perhaps differ and which will be the subject of argument later, it seems to me that by a considerable margin, in this sort of a proceeding, we have demonstrated that it
2614 is entitled to be admitted in evidence for what weight it may have, in considering the limited purpose of it, which is to prove trends over a long period.

Mr. Duncan: Your Honor, in opposing the motion that has just been made by the Commission counsel to strike from the record Respondent's Exhibit 143, I submit, on behalf of Glidden, that the motion should be denied, first, for the reason that all of this goes to weight rather than to admissibility; and second, because I think it is apparent to Your Honor that The Glidden Company has not only complied with the suggested procedure made by you earlier in this proceeding, to give to the Commission's attorney whatever material we had in our possession which in any way related to this particular exhibit, but Mr. Sprague has testified that it was the best available source that he could find.

Now were not these particular exhibits—Commission's Exhibits 856-A and B, which were printed in 1938 long before the complaint was ever filed in this case—in evidence, I would say that there would be some reason for the Court to strike from the files this particular exhibit.

Trial Examiner Norwood: I shouldn't strike it on the ground that you hadn't furnished the supporting data, but the reason for making the supporting data available was in order that opposing counsel might examine it and verify the other and see whether or not the exhibit has evidentiary value.

2615 Mr. Duncan: And we submit that it does have evidentiary value.

Mr. Wright: Your Honor, it is plain, in spite of the statements that the witness has made about this, that he knows absolutely nothing more about the sources of these figures which appear in this Journal than appears on the face of the Journal. He obviously does not know from whom the figures were obtained or what the figures mean. He doesn't know as to white lead-in-oil, which is quoted at per pound New York, what price that is, whether it is a dealer price, a retail price, an agent's price, or whether it is a manufacturer's selling price. The same is true of white lead basic carbonate from which it comes.

Now they have constructed Respondents' Exhibit 143 as monthly average prices. We see now from this basic data how that average was obtained. It is an average which has absolutely no standing statistically or any other way. It is a simple arithmetical average of two figures about which the witness knows nothing.

Mr. Hinds: He said in most cases it was a single figure.

Trial Examiner Norwood: I have looked at the exhibit, and in most cases the high and low have the same figures.

Mr. Wright: I am willing to concede that in a good many instances that is the case, but that doesn't alter 2616 the fact that it is defective in those places where there is a difference. But more important and fundamental, it is defective in that we do not know—

Trial Examiner Norwood: (Interposing.) It is not denied that these documents are what they purport to be, and that this is information that was published to the trade at the times indicated there, is it?

Mr. Wright: It is information that was reported in another trade, not this trade. This is an association journal in the paint trade. There is nothing here that would indicate that these figures are probative or recognized in this industry as being accurate or reliable figures.

Mr. Hinds: I overlooked asking him that. Thank you for reminding me. I was about to ask him, I had it in my notes.

Mr. Sprague, are these two sources which you say you resorted to in preparing these graphs, sources that are generally accepted in the industry as representing facts as accurately as can be obtained?

The Witness: The American Paint Journal is a privately-owned publication, and one of the principal if not the principally recognized trade paper of the paint industry. It has nothing to do with any trade association, to my best knowledge and belief. It is customary in the paint industry, in referring to published sources of market information, to refer to those recognized sources that 2617 are customarily and currently used, of which the

American Paint Journal is typical and one of the leaders, although not the only one. It happened that that was the only one I recalled that published these ten-year averages or figures where I could quickly get that long range of years.

Mr. Hinds: I would like to ask one more question, if I may.

Mr. Sprague, I notice that on this graph, the period of one month is only a small fraction of an inch. Would you agree with me that it was perhaps a fifteenth or a twentieth of an inch? What would you say one month was?

The Witness: Yes, about 1/16 or 1/32 of an inch.

Mr. Hinds: I will ask you to assume that in every case where the price was different during the months, you left out any change in the graph and made your graph solely on the basis of those months where the price was unchanged so that there would be no averaging at all and simply leave it out entirely. Would the curve be perceptibly different as a representation of the comparison between pig lead prices and the lead pigment prices?

The Witness: It would not interfere in any way with the trend of the curve or the direction of the curve. Theoretically there might be an occasional spot where pig lead was very active where there would be a blank.

2618 Mr. Hinds: I notice here that for two or three years, from 1933 on to well into 1935 on your graph, line A, there seems to be an absolute straight line.

The Witness: Yes, sir.

Mr. Hinds: Suppose you had left out of the months, here and there, exceptional months, would that have been appreciably different?

The Witness: That straight line was unchanged regardless of whether it was in or out, because there were frozen prices on the OPA.

Mr. Hinds: Similarly on the B line, would the elimination of those exceptional months where there were two prices have affected the curve, so far as it represented the general point that you are trying to bring out?

The Witness: No, sir.

Mr. Hinds: And is that true also with respect to the pig lead line in its general contours?

The Witness: It is true with respect to each of the three graphs.

Mr. Wright: May I have some more cross-examination, in the light of Mr. Hinds' redirect? There is one point I want to bring out here.

Trial Examiner Norwood: All right.

By Mr. Wright:

Q. Mr. Sprague, I call your attention to the fact
2619 that on Respondents' Exhibit 143, on the left-hand
margin, one cent per pound is approximately one-half an inch on the graph, is it not? In other words, a difference of one cent a pound up or down in the price of any one of these three articles would make a difference of approximately a half-inch?

A. Yes, a little less than a half-inch, but close.

Q. Now I call your attention to the fact that the white lead-in-oil prices are simply listed as "Per Lb., New York."

A. Yes, sir.

Q. What is the difference between the suggested retail price of white lead-in-oil and the lowest price at which the Glidden Company sells it to any customer?

Mr. Hinds: Objected to as immaterial for the purposes of this chart, which are to show trends. It doesn't make any difference—

Trial Examiner Norwood: (Interposing.) Let him answer.

A. Mr. Wright, the difference between the suggested resale price of Glidden's white lead-in-oil and the price at which it was sold to a dealer—

By Mr. Wright:

Q. (Interposing.) The class of customer to which you sell at the lowest price.

A. (Continuing.) —would vary from time to time ac-
cording to the schedules. If you will pick out one
2620 of the Glidden schedules you have in evidence, we can
compute the difference to get at your question.

Q. Well, can you tell us what the difference was under OPA, from the early part of 1942?

A. No, I cannot.

Q. Was it as much as 3 cents?

A. I cannot tell you what it was.

Q. You know there was such a difference between your selling price to your dealers and the suggested resale price?

A. Oh, yes.

Q. You have no idea what that was?

A. I cannot tell you what it was, no. There are many of those schedules in evidence.

Mr. Wright: Yes, I want to put my finger on one, if you will pardon me just a moment.

Trial Examiner Norwood: All right.

By Mr. Wright:

Q. Let me call your attention to Commission's Exhibit 663-K, which is a price list, in 100 pound kegs under date of April 26, 1941, and the fact that your lowest price to the dealer appearing on that exhibit was 11¼ cents a pound, and your suggested retail price was 13¼ cents a pound. There is a two-cent spread. That would make approximately a one-inch difference in the levels of these lines on the chart, Respondents' Exhibit 143, as between the two—

2621 Mr. Hinds: (Interposing.) Objected to, on the ground that the materiality is not the level, but it is the comparison between two levels.

Mr. Wright: I will withdraw the question.

Now, Your Honor, it appears, first of all that this witness does not know what price was used in that publication under line A. One cent per pound makes a difference of almost a half inch. It is already established in the record that there is as much as two cents per pound difference in these different prices. So that, without establishing what prices is shown on this chart, the whole thing is absolutely misleading and valueless, it has no probative value whatever.

Trial Examiner Norwood: You have asked me to strike this as having absolutely no evidentiary value whatsoever.

Mr. Wright: As incompetent. It is hearsay.

Trial Examiner Norwood: I think that these matters that have been brought out go to the weight of this evidence, and if it appears otherwise I might strike it in the future, but it isn't clear to me—

Mr. Wright: (Interposing.) Your Honor, this witness has based a good deal of testimony on the basis of this chart. If this chart is absolutely valueless and misleading and has not been properly established as competent evidence, then properly this testimony should be stricken.

Trial Examiner Norwood: He has put it in here, 2622 and he stated the bases on which this was made. Now it is in a very good shape for you to direct any contrary evidence to, and I shall deny the motion for the time being at least.

By Mr. Wright:

Q. Mr. Sprague, as I recall your testimony, you first went with the Euston Division of Glidden in 1925, did you not say?

A. Yes, sir.

Q. And you remained there in that Division until 1929?

A. Approximately so.

Q. 1929 or 1930, right in that period?

A. 1929, I think

Q. During that time your duties were devoted exclusively to the practices and problems of the Euston Division of The Glidden Company, is that correct?

A. That is correct.

Q. Now in 1930, you went with the Metals Refining Division of Glidden, is that correct?

A. I changed my residence from Scranton to Hammond, and became, in 1930 or approximately then, the Vice President and General Manager of the Metals Refining Company, and from there on I devoted my time principally to the problems of the Metals Refining Company but also, and concurrently, to the general administrative responsibility for the Euston Lead Company.

Q. You divided your responsibilities, then, in that period?

2623 A. That is correct.

Q. Between Metals Refining and Euston?

A. Yes.

Q. Did you spend a portion of your time in Scranton?

A. Yes. I made regular trips to Scranton, perhaps I should better say irregular trips, but sufficient to keep in touch with what needed to have my own attention at Scranton.

Q. Were you consulted by the succeeding General Manager as to the problems of the business at Scranton?

A. Oh, yes, I was in constant contact with the manager at Scranton, and that continued up through until 1945.

Q. Now you left the Metals Refining Division, then, in 1935, did you not?

A. That is right.

Q. And then your duties encompassed the entire pigments production and sales of the Glidden Company?

A. No, not the production. I was in charge of the sales and distribution of those products from '35 to '45, but not in charge of the production or operation of the plants.

Q. Going back, now, to the period from 1925 to 1929 when you were General Manager of the Euston Division, how was dry white lead sold to the paint trade in those days, what was the price basis?

A. The price basis of Euston dry white lead to the paint trade, as well as to other trades, was probably de-
2624 scribable as one of getting the best price we could for the product in relation to the market price of white lead dry.

Q. Now geographically, did you sell dry white lead in those days in casks on differential points or equalization points, similar to those or in any way related to those about which you testified this morning?

A. I do not recall that there were any equalization points at any time in connection with dry white lead sales. You asked your question with respect to the period 1925 to 1929?

Q. Yes, sir.

A. During that period the Euston dry white lead was sold at a stated price agreed upon with the buyer, f. o. b. Scranton, freight allowed to the buyer's destination.

Q. Wherever located?

A. Wherever located.

Q. Including the Pacific Coast?

A. No, there were no sales made—well, let's see, 1925 to 1929, there may have been during a short period in those years some sales made on the Coast, in which case the price was a delivered price to the buyer on the Coast.

Q. Based on what?

A. Based on agreement between the buyer and seller.

Q. How did it relate to your prices in the Eastern part of the country?

A. I do not recall what the relation was at that time.

2625 Q. Do you know what the selling practices—

A. (Interposing:) I do not know what the relation was there as between our Eastern and Western prices, but I do recall that the price was related to the competitive schedules on the Pacific Coast.

Q. What were those competitive schedules, do you recall?

A. They were the schedules of the National Lead Company.

Q. Do you know what they were with regard to delivery in the Pacific Coast as against delivery in the Eastern part of the United States?

A. My recollection is that the price was higher on the Coast by a quarter of a cent per pound.

Q. Do you wish that to be your testimony, then?

A. That is my recollection.

Q. Are you sure of that?

A. Yes, sir.

Q. At that time, Mr. Sprague, what were the quantity differentials applicable to dry white lead in casks?

Mr. Hinds: Do you mean Glidden's?

Mr. Wright: Yes, sir.

A. We did not have any quantity differentials at that time to my best recollection, because we were obliged to sell our product at the best price we could get. I do not recall any quantity differentials.

By Mr. Wright:

2626 Q. Well, now, as I recall your testimony yesterday, you said that when you first went with the Euston Division, that you found them with an inferior product for which they couldn't get the full market price, is that correct?

A. That is correct.

Q. That within a period of years you had improved the quality to a point where you could sell at the same price as the market leader?

A. That is correct.

Q. About how long did it take for you to reach that position?

A. It took us until the action that we took around 1936 in response to the Robinson-Patman Act aspects, when we discarded the cut in price then given to the paint manufacturers. My recollection is that from that date forward we had no differences in our price as among the different types of buyers.

Q. Then when you stated that you were not up to the market leader in that early period, were you referring to that ½ cent differential to the paint manufacturers?

A. Oh, no, in the early days our price was as much as one cent per pound below the market leader.

Q. At what period of time did it get to the point where, as to other industrial purchasers than paint companies, you were on a competitive level, as you would say, with the National Lead Company?

A. That occurred, as I testified, after the Robin-
2627 son-Patman Act, I believe in 1936.

Q. No, I meant, discounting now the ½ cent differential to paint manufacturers, I believe you stated that in 1936 you were already on a level with National as to other than paint manufacturers. What I wanted to know was when you reached that level with National on other than paint manufacturers.

A. I would be unable to answer that as to the time that occurred. I can tell you the reasons why it occurred.

Q. No, I want your recollection of the time.

A. I do not recall the time.

Q. You have no rough idea of how long prior to 1936 it might have been?

A. It seems to me we had about reached that point before I left Scranton, I would guess around 1930.

2628 Q. Did you feel at that time that the quality of your dry white lead was equal to that of the National Lead Company?

A. Yes. Now bear this in mind. The quality of Euston White Lead should be discussed in terms of the type of use to which it was put. My remarks about quality have been related to the use requirements and preferences of the paint manufacturers. However, I found quickly in Scranton that my white lead, poor though it was as compared to the market leader, was perfectly satisfactory as a chemical, it was basic lead carbonate and it was pure. It lacked color and it lacked hiding power and lacked this and that that the paint manufacturers wanted, but it was a perfectly good chemical. So I discovered that people who bought white lead for use as a chemical were quite pleased with Euston White Lead once they had an opportunity to demonstrate that it would successfully function. And of those users, my first customers were the pottery people who used white lead as an ingredient for glaze, and there they didn't care whether it was the kind of white lead the paint men liked, or what, they used it as a chemical substance. And I was able to narrow my cuts in price first with respect to sales to that class of buyer, but that did not enable me to effect any change with respect to sales to the paint manufacturers—who were the largest consumers of the product.

Q. That was, as you stated yesterday, was it, be-
2629 cause of the position of Glidden in the paint industry,
rather than any intrinsic quality or lack of quality of your pigments?

A. There were two factors, both of importance. One, the one I described regarding the reluctance of paint manufacturers to go out of their way to deal with their competitor; and the second one, the question of the defective quality of the Euston White Lead for their use.

Q. Which was, as you stated, corrected by 1930 when you left?

A. No, I stated that the quality difficulties with regard to the paint manufacturer had not been completely corrected by 1930. I think it was later than that that we felt that had been accomplished.

Q. Do you have any idea when that was?

A. The only idea I can give you, sir, is that it would be some time between that date and the time that we did away with the paint manufacturers' discount in 1936.

Q. What was the effect of doing away with the paint manufacturers' discount in 1936, on your business with paint manufacturers?

A. I recall that there was no effect other than the temporary complaint from customers who had long had a preference, that they didn't like having it withdrawn.

Q. You stated that in the period in which you were with
Euston there was no quantitative, no quantity differ-
2630 erential on dry white lead, is that correct?

Mr. Hinds: I would like to have it noted that this is not cross-examination. I don't think we went into quantity differential with this witness. If you want to make him your witness I suppose we would have no objection.

Mr. Wright: At that point, Your Honor, I want to say that the direct examination of this witness covered everything in this case and a good many things in addition.

Mr. Hinds: But it particularly didn't cover that. I won't comment on the rest of the statement.

Mr. Wright: It covered discounts and marketing prices generally. I can make specific references to—

Trial Examiner Norwood (Interposing.): You covered the subject generally—objection overruled.

The Witness: Will you read the question?

(The reporter read the question as follows:

"Q. You stated that in the period in which you were with Euston there was no quantitative, no quantity differential on dry white lead, is that correct?")

The Witness: I don't believe I stated that.

By Mr. Wright:

Q. Well, I asked you if there was such a differential in that period prior to 1930, and it is my understanding of your answer that you said there was not. If I am wrong I would like to be corrected.

2631 A. Well, my answer is in the record. I would be glad to refer to it.

Q. Well, I will put the question to you again and ask you for your answer now, then. What quantity differentials were there in the period from 1925 to 1930 in dry white lead?

A. What I stated was that—pardon me, what period?

Q. From 1925 to 1930.

A. In that period we had to get the best price we could get for our white lead from each customer that we sold it to, and there were no relations that I can recall between the price that we got and the quantity that we sold.

Q. Did you offer purchasers in carload quantities a better price than you did purchasers in less-than-carload quantities?

A. We always did.

Q. You always did?

A. That is my recollection.

Q. Was that a part of your published price policy?

Mr. Hinds: Your Honor, I object to that on the grounds that the question implies there was a published pricing policy. I don't think that has been shown; I don't think there has been any such evidence.

Trial Examiner Norwood: Objection overruled.

The Witness: I don't recall that there were any prices published by Euston Lead, there may have been but I don't recall that there were. The practice we followed in pricing lead, white lead, then, when we got an inquiry or a chance to sell it, was to name a price, always with an eye to the prevailing white lead market. 2632

By Mr. Wright:

Q. Do you know whether or not at that time the National Lead Company quoted and offered to sell to carload purchasers at a differential under the price to less-than-carload purchasers, on dry white lead?

A. You are speaking now of a differential between carloads and less-than-carloads?

Q. Yes, prior to 1930, between 1925 and 1930.

A. I do not recall whether they did or not.

Q. Does The Glidden Company now offer a carload discount to dry white lead purchasers?

Mr. Hinds: Do you mean prior to the filing of this complaint?

Mr. Wright: I mean now.

A. I think so, but Mr. Knight can perhaps be more accurate on that than I can because I haven't seen the schedules for the last year or year and a half.

Q. Well, there is evidence in the record, I believe, that it has been customary in the period at least from 1937, on, to quote a quarter of a cent differential for purchases in carload lots on dry white lead, on the part of The Glidden Company.

A. For quite a long period of time that was done,
2633 and the cards that you have—

Q. (Interposing.) Do you know when that differential was first established by Glidden?

A. I do not recall the time. It was done as soon as competition was encountered.

Q. In other words, if the National Lead Company initiated that as a part of their regular policy, then The Glidden Company followed?

A. As soon as Glidden learned that that was the basis on which the National Lead product was available, Glidden Company's prices were made to meet it.

Q. Do you recall discussing the question of a differential between l.c.l. and carload purchases of dry white lead in any meeting of the lead industries association, pigments division?

A. Unless I could see the minutes I wouldn't recall such a discussion at a specific time, but certainly discussions of that question were a part of the overall discussions during the period of the Code.

Q. Now getting to those discussions in the Code period, I assume now you are referring to the meetings of the various branches of the Pigments Division. At those meetings did the members present discuss fully the practices which were then and had been in the past employed in marketing these various pigments?

2634 A. Well, the meetings that I attended discussed quite thoroughly all phases that related to the problems of the industry in the light of the situation in those days—everything we could think of.

Q. Did those discussions include suggestions by those present as to improvements which could be made in the marketing practices of the industry?

A. Very definitely, sir, they did.

Q. And those were full and complete discussions of those problems?

A. I can recall of no limits that were placed on anybody in those discussions.

Q. Were those people in general agreement as to many of the things which were discussed as improvements, as to the value of them in the industry?

A. Well, the history of those meetings was this, that there were many differences of opinion and as they met further and wrestled with problems they probably had the same situation as confronted General Marshall, they finally threshed them out to a point where they could agree on recommendations for the Code.

Q. This morning you described or gave an illustration of how the differential in equalization points on white lead-in-oil worked out in the period prior to 1933. As I recall it you gave an illustration of an order for delivery at
2635 Boulder, Colorado, which would take the price at the nearest differential point, plus the equalization of the freight from the shipping point to the differential point and the destination. Will you explain again how an order of that type would be priced under that method? Take again your illustration of an order at Boulder, Colorado, and a differential point at Denver.

A. Well, I don't claim to be up on the details of that, but I can repeat the illustration that I gave this morning which was that if the base price of white lead-in-oil was 12 cents, and Denver was a one-eighth cent premium equalization point, then it was my recollection that the price applicable to a sale in Boulder would be 12 cents, plus one-eighth cent, plus the equalized rate from the point of origin to Boulder, Colorado.

Trial Examiner Norwood: That is from Denver to Boulder, is it?

The Witness: The freight equalized from point of origin to Boulder against Denver.

Trial Examiner Norwood: It would be from Denver to Boulder, regardless of point of shipment?

The Witness: I don't believe there were any limitations in that method as to what the shipping point should be.

By Mr. Wright:

Q. What do you mean by "equalized with Den-
2636 ver"? What process do you go through to equalize
with Denver, in that situation?

A. My conception of that was this, that if the shipment originated at St. Louis, say, and the freight rate from St. Louis to Boulder was 15 cents, and the freight rate from St. Louis to Denver was ten cents, that the price would then be 12 cents, plus one-eighth cent, plus five cents per cwt. delivered at Boulder. Now as I say, I am not up on the details of that and I may be wrong, but that is my conception of it at this moment.

Trial Examiner Norwood: The five cents being the freight from Denver to Boulder?

The Witness: I don't know whether that is the freight from Denver to Boulder or not, it may not be, but it is the ratio of equalization of Denver against Boulder out of St. Louis.

By Mr. Wright:

Q. It required, in making a price by that method, did it not, a knowledge of the freight rate from the equalization point to the destination point, and from the shipping point to the destination point, for comparative purposes?

A. Not in making the price. The price was quoted to the buyer at 12 cents plus one-eighth cent, equalized Boulder against Denver. The buyer probably didn't know what that equalization was and probably the seller didn't; it had
to be computed, I imagine, at the time it was invoiced.
2637 A knowledge of freight rates would be involved in
that particular situation when the invoicing was done,
but as I understand it, not when the quoting was done.

Q. Well, the customer wouldn't know what the price was until that computation had been made, would he; he wouldn't know what his cost was?

A. He knew his price, 12 cents and one-eighth cent, Boulder equalized Denver. But the ultimate cost to him he wouldn't know until he got his invoice and checked his freight rates.

Trial Examiner Norwood: We will have a five minute recess.

(A short recess was taken.)

2638 Trial Examiner Norwood: The hearing will come to order.

Mr. Hinds: If Your Honor please, my attention has been called to an inadvertent statement by Mr. Sprague when he referred to the period from 1933 to 1935 as being the OPA period, and I move to strike that portion of his previous answer as unresponsive, besides being an inadvertence. Do you consent to that?

Mr. Wright: Yes, I have no objection.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. You can take that up in the morning and call my attention to the particular part of the record that you desire to be stricken.

Proceed, Mr. Wright.

By Mr. Wright:

Q. Do you recall in that period that we have been talking about, in the very early 30's and the late 20's, Mr. Sprague, whether the other pigments in kegs, 100 pounds, 50 pounds, 25 pounds, and 12½ pounds, were also sold on those differential and equalization points?

A. Except in one or two instances where special contracts were taken on a public bid that called for some small barrel, I recall of no sales of dry white lead by Euston in anything less than barrel lots.

2639 Q. When did The Glidden Company first begin quoting prices on white lead-in-oil on the basis of zones or territories within which a flat price applied?

A. After The Glidden Company discovered that was the basis of competition on white lead-in-oil.

Q. When was that?

A. I can't recall the date. I would have to refer to my notes and even then I am not sure that I have it. If you want me to see what I can find; I have my notes here.

Q. Mr. Harold Rowe testified earlier in this proceeding—are you acquainted with Mr. Rowe?

A. Yes, I am.

Q. He is one of the gentlemen with whom you conferred in these meetings of the Pigments Division?

A. Yes, he was a member and I think the chairman of one of them.

Q. He testified here that it was his best recollection that the National Lead Company first began quoting and selling on the zone basis in the latter part of 1933 or the early part of 1934. Do you have any recollection as to that?

A. No, I have no specific recollection of that although those dates seem to be about what I would expect. When National Lead started that I would be unable to say.

Q. Then as soon as you learned that National Lead was quoting on that basis The Glidden Company began
2640 quoting on a similar basis, is that correct?

A. That is correct.

Q. Do you recall anything of the geographical extent of the territories and the differentials between them, which were involved in the first quotations under the zone method by National?

A. No, only in so far as Glidden's meeting of that competition might throw light on it. We had to learn what National had done, either from their—

Q. (Interposing.) Wait a minute. I asked you if you knew what the extent of those was. I am not asking you why. Please tell me simply what the extent of those zones was, and the differentials between them?

Mr. Hinds: Territorial—

Mr. Wright: (Interposing.) The territorial zones and the differentials between them on white lead-in-oil?

The Witness: Well, our knowledge of the use of zones occurred after Glidden had put white lead-in-oil in the hands of the paint divisions, with responsibility to develop distribution, and—

By Mr. Wright:

Q. (Interposing.) When did that occur?

A. I testified on that yesterday. I can refer to my notes but I can't remember the date. Do you want me to refer to my notes and give it to you?

2641 Q. I would like your independent recollection—it was refreshed yesterday—about that.

A. Well, it is in my testimony of yesterday; you have the record here.

Q. But you don't know what you testified yesterday with regard to that?

A. I can't repeat all of the dates in every respect that

I testified to yesterday, without again refreshing my memory. I can give you my impression, if you wish that.

Q. Well, give us your impression and we will see what it is based on.

A. I think it was around '33 or '34.

Q. Now what are you referring to, the transfer of the sales to the paint divisions?

A. When the Glidden paint divisions began actively to take that over.

Q. Are you familiar with the geographical territories comprising the so-called par or base zone on white lead-in-oil which were employed by The Glidden Company during OPA?

A. I would only be familiar with that to the extent that my memory could be refreshed by seeing some of our bulletins, but it does seem to me that that didn't occur during OPA. It seems to me that we learned of zone activities after that.

Q. I am speaking now of OPA, when your ceilings were held during the OPA period, 1942 to 1945.

2642 A. Oh—will you ask that again, please, sir?

Q. Can you describe generally the geographical territory comprising your par zone on white lead-in-oil during the OPA period?

A. I think I can describe it generally, but not with particularity.

Q. Roughly what states did it consist of, or how was it bounded?

A. Roughly it was bounded by the Ohio River on the South, the Mississippi River on the West, and the Great Lakes and St. Lawrence on the North, and there was a line somewhere across the Mississippi River, in Wisconsin, I think, or somewhere.

Q. And that ran all the way to the Atlantic Ocean?

A. Yes.

Q. I believe it is already in the record that there were territories in which you charged one-eighth cent per pound over the par price, and other territories, with one-quarter, three-eighths, one-half and three-quarters?

A. Yes, sir.

Q. You are familiar generally with those zones, are you not?

A. I am familiar with the fact that there were those areas that we encountered, but I can't describe them with any degree of particularity.

Q. That is satisfactory. Can you tell me now over
2643 how long a period of time The Glidden Company had
employed those territories and those differentials
prior to 1942—

Mr. Hinds: (Interposing.) I object to the use of the word "employed" because the witness' expression was "encountered". He didn't say that they employed them.

Trial Examiner Norwood: The objection is overruled.

The Witness: What period of time prior to 1942?

By Mr. Wright:

Q. Yes.

A. From 1942 back to the time that they were first encountered.

Q. Well, now, were the territories of those zones and the differentials between them as they appear in the OPA period substantially as they were when you first encountered them? In other words, have there been any significant changes since you first encountered the zone method of quoting, in that zone method?

A. I would not regard that significant changes had occurred, but there were changes in the trade areas, boundary trade areas, as I recall it.

Q. When did those changes occur?

A. I couldn't tell you.

Q. I call your attention to Commission's Exhibit 593
which is in evidence—Announcement of Premium Zones
and Price Differentials Applicable to Sales of Euston
2644 White Lead-in-Oil, dated October 10, 1941, and to the
areas listed there in the par territory, and the various
differential zones. Is that substantially the same delineation of territories and differentials which was first employed by The Glidden Company?

A. I would regard that it is. On its face it indicates that it supersedes a previous schedule, indicating that there was a previous schedule and that it was different than this one.

Q. But you have no knowledge of that previous schedule, have you?

A. No specific recollection, no.

Q. No recollection of it?

A. No specific recollection of it, no.

Q. Do your records in The Glidden Company encompass any documents, historical documents, which would set out chronologically the changes in territories or differentials which have occurred from time to time?

A. I don't think so. We tried very hard to locate that information at the time this matter came up, and my recollection is that most, if not all, of the type of document or paper that would show that, were destroyed in the ordinary course of the company's business, which now turns out to be regrettable.

Q. Then you know nothing of the origin of that pencil statement on the top of Commission's Exhibit 593, "Since 1935 adopted National"?

A. I am familiar with that, Mr. Wright. I know, 2645 though, nothing of my own knowledge of the origin of it. I have heard considerable about the origin of it.

Q. Of that particular notation?

A. Of that particular notation.

Q. Will you tell us what you know about the origin of that notation?

Mr. Hinds: What he has heard, do you mean?

The Witness: It is just what I have heard in this case.

By Mr. Wright:

Q. I want to know what you know of your own knowledge?

A. I know nothing of my own knowledge about it.

Q. Did you discuss this document with Mr. Dunn when you gave it to him?

A. I think I did.

Q. Do you recall what you stated to him regarding that document?

A. No, I can't tell you what I stated to him, but I can tell you what I undoubtedly did state to him.

Q. No, I want your recollection of what you stated to him.

A. Well, I do not recall the words I used in talking with Mr. Dunn back at that time, other than to say that he was inquiring for information about these matters from me, he had been referred to me, and I gave him, to the best of my ability, the information he wanted.

2646 Did you state to him at that time that similar territories and differentials had been adopted by National Lead in 1935 and had been put into effect by Glidden after that, and followed since that time?

A. I didn't say to him, to my best recollection, anything about what National adopted in 1935, but I said to him, as I have said in this hearing repeatedly, that Glidden did follow the competition of the National Lead Company in regard to this pricing matter as promptly as they could.

Q. So that National may have adopted something like this in 1935, and if so you undoubtedly followed it, is that correct?

A. If National adopted—

Mr. Hinds (Interposing): Objected to. He hasn't made it clear whether he is asking what he said or what the fact was. I won't object on either ground if he makes the question clear. Does he want the fact or the conversation with Mr. Dunn?

Mr. Wright: I want the fact.

Mr. Hinds: There is no objection, then.

Mr. DuBose: I would like to object on the ground that the question is hypothetical and speculative and doesn't deal with facts.

Mr. Wright: We have dealt with many hypothetical matters heretofore in this gentleman's testimony.

Mr. DuBose: We are now making an objection on
2647 that ground.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. So that National may have adopted something like this in 1935, and if so you undoubtedly followed it, is that correct?")

Trial Examiner Norwood: Objection overruled. This is cross examination. Answer the question.

The Witness: If National adopted something like that in 1945, Glidden would have desired and undoubtedly did attempt to meet it as quickly as they could establish it.

By Mr. Wright:

Q. You said 1945—did you mean that?

A. I meant 1935.

Q. Mr. Sprague, you mentioned, as one of the factors in your business the competition with other pigments as far as basic carbonate white lead is concerned. You mentioned lithopone and zinc oxide and titanium pigments and leaded zinc oxide as the principal competition of white lead. Does The Glidden Company produce or market any of those pigments?

A. Yes, sir, it produces and markets titanium oxide and lithopone, in addition to white lead carbonate.

Q. Is Glidden a large producer of either of those pigments, percentagewise, in the respective industries?

2648 A. Glidden's business in titanium oxide is a very small proportion of the total—I refer to the production and sale of titanium oxide. Glidden's business in lithopone is the exception that proves the rule. It is probably the largest in the United States, produced at multiple producing points.

Q. Who are the principal producers of titanium pigments?

A. The Titanium Pigment Company, the duPont Company, and The American Cyanamid Company—I believe they operate their titanium business under that name, but if not it is a subsidiary of that company, formerly the Interchemical Company's operation.

Q. Under what name does The Glidden Company produce titanium pigments, under its own name or under an operating division with another name?

A. As The Glidden Company.

Q. Does the National Lead Company produce titanium pigments?

A. I am unable to state as I do not know the corporate relationship between National Lead Company and the Titanium Pigment Company.

Q. Do you know that there is a corporate relationship between those two companies?

A. Yes, sir, I think there is.

Q. How large a factor in the titanium pigments business is the Titanium Pigment Company?

A. One of the principal factors.

Q. Is it a dominant factor in the industry?

2649 Mr. DuBose: I object to that, if Your Honor please. He is going far afield and this witness has not been qualified as an expert in the field of titanium pigments and the relationship of other companies to that industry.

Trial Examiner Norwood: Objection overruled.

Mr. DuBose: I object also to the form of the question.

Trial Examiner Norwood: The objection is overruled. Answer the question.

The Witness: I was very actively in touch with matters of that sort up to the middle of 1945. I was a member of the

Titanium Pigment Industry Advisory Committee of the War Production Board, and it was my impression—although the statistics of production of the titanium pigments were never publicized—that the Titanium Pigment Company was a large or the largest producer of the so-called "let-down" titanium pigment, and that the duPont Company was the largest producer of the pure titanium oxide, but the difference there was not, in my judgment from what I was able to learn, very great.

By Mr. Wright:

Q. Would it be fair to say that the duPont Company and the National Lead Company between them control most of the production of titanium pigments?

Mr. DuBose: I would like to object on the ground that it is incompetent, irrelevant and immaterial.

2650 Trial Examiner Norwood: Objection overruled.

A. Over what period do you wish to apply that question?

By Mr. Wright:

Q. I wish to apply the question as of 1941.

A. I think the major part of the production of titanium pigment at that time was conducted by those two organizations.

Q. Are titanium pigments principally produced under patented processes?

Mr. DuBose: May we have a blanket objection to this whole line of questioning?

Trial Examiner Norwood: You may.

Mr. DuBose: And an exception?

Trial Examiner Norwood: Yes.

A. There are so many patents in connection with the manufacture of titanium pigments that I should imagine the principal production has something to do somewhere with some patents. I got lost years ago trying to keep up with titanium oxide patents.

Q. What concerns control the principal patents in that business?

A. Well, I think The Glidden Company has the principal patents.

Q. At the present time?

A. At the present time, and it had patents in 1941.

Q. Were those patents in that industry in litigation?

2651 A. I don't think Glidden's patents were in litigation.

Q. Is that an industry in which prices and terms are fairly well controlled through patent licenses?

Mr. DuBose: I again would like to renew my objection upon the ground that this whole line of questioning is irrelevant and immaterial to this proceeding.

Mr. Wright: Your Honor, the point has been raised several times in this proceeding that one of the distressing factors in the white lead business has been the competition of titanium pigments, and this witness went into it on direct and I think I should have a nopportunity of cross examining him regarding it.

Trial Examiner Norwood: I think that he should be allowed to proceed. We have gone into the matter of competition, and this touches on that, on the nature of the competition.

Mr. Wright: I will frankly state that the purpose of my questions is to bring out that this is the right hand competing with the left hand.

Mr. Hinds: Is there anything wrong about that?

Mr. Wright: No sir, but I want it in the record.

Trial Examiner Norwood: The objection is overruled. Answer the question.

The Witness: May I have the question?

Trial Examiner Norwood: Read the question.

2652 (The reporter read the question as follows:

"Q. Is that an industry in which prices and terms are fairly well controlled through patent licenses?")

The Witness: I don't believe the prices and terms are in any way concerned with the patent licenses that I know anything about.

Mr. Ewing: I don't know whether Mr. Wright wants this concession from me or not but I am perfectly willing to concede, as far as National is concerned, that its left hand, white lead, is competing with its right hand, titanium—there isn't any doubt about it.

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. Do you know whether any of the other respondents in this matter, including the Eagle-Picher Company, Sherwin-

Williams, the Anaconda Copper Mining Company, International Smelting & Refining Company, and the National Lead Company, produce and market lithopone?

A. The Sherwin-Williams Company produces lithopone, but to my best knowledge does not market it at this time. Eagle-Picher Lead Company produces, and I believe markets, lithopone. I do not believe any of the others in this action are involved in lithopone, other than Glidden.

Q. Does your company produce any zinc oxide?

A. No zinc oxide.

2653 Q. Does the Eagle-Picher Lead Company to your knowledge produce zinc oxide?

A. You mean zinc oxide as distinguished from leaded zinc oxide?

Q. Yes.

A. I believe they do.

Q. How about the National Lead Company?

A. I do not believe National produces a zinc oxide.

Q. Sherwin-Williams?

A. Not to my knowledge.

Q. How about International or Anaconda?

A. You will have to state your time period because there has been a change in their situation.

Q. Prior to the time that the complaint was issued in this matter.

A. Prior to the time of the complaint—yes, the International Smelting & Refining Company produced zinc oxide during years prior to the issuance of the complaint.

Q. Do they now produce it?

A. It is my understanding that they are out of business and have disposed of their properties.

Q. On zinc oxide?

A. On lead pigments and zinc oxide.

Q. Does your company produce leaded zinc oxide?

A. No, sir.

2654 Q. Who are the largest producers of leaded zinc oxide?

A. In my opinion the Eagle-Picher Lead Company are the largest producers.

Q. Of what is leaded zinc oxide composed, generally?

A. Leaded zinc oxide is a composite pigment that chemically is a blend, or it may not be a blend, it may be a composite of zinc oxide and basic lead sulphate.

Q. Is that sold in varying proportions of zinc oxide and basic lead sulphate?

A. Yes, the pigment has been marketed in more than one form. For example, there is per cent leaded zinc oxide and 25 per cent leaded zinc oxide, and so forth, depending upon the ratio of the basic lead sulphate and the zinc oxide contained in the product.

Q. In a five per cent leaded zinc oxide to what would the five per cent refer, would that be lead content or the zinc oxide content?

A. It is a long time since anyone has asked me that, but it is my idea that the product would be roughly 95 per cent zinc oxide and 5 per cent basic lead sulphate—that is my impression.

Q. Does the National Lead Company produce that?

A. Not to my knowledge.

Q. Does Sherwin-Williams produce it?

A. Yes.

2655 Q. Do they market it, do you know?

A. They have at times. If you will be specific as to time I can be more specific as to answer.

Q. Say in the period from 1936 to 1940, did they market it?

A. Yes.

Q. I believe you stated a while back that you did not know at what time the differential for carload over less-than-carload shipments of basic carbonate was first quoted generally in the industry—is that correct?

A. That is correct.

Q. Do you recall any discussion of the question of the desirability or undesirability of such an l.c.l. differential during the pre-Code days by members of the industry?

A. I know of no discussions by members of the industry on anything during the pre-Code days.

Q. When I say "pre-Code" I mean prior to the time that the Code was actually approved. I mean to include in there—

A. (Interposing.) I am distinguishing the time in my answer as between the time that the Code discussions began. I know of no discussions prior to that in the industry.

Q. Do you recall any discussion during the Code time, then, concerning that?

A. No, not without refreshing my memory. I couldn't recall a specific discussion or a specific meeting, but I
should expect that there was such a discussion along
2656 with all of the other considerations of those matters
incident to the Codes.

Q. I show you, Mr. Sprague, a document for the purpose of refreshing your recollection, and ask you if you will read this and then state to me whether your recollection is refreshed about any quotation of less-than-carload differential on dry white lead?

A. No, that does not refresh my recollection.

Mr. Wright: I have no further questions this evening, Your Honor.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

We will recess now until ten o'clock tomorrow morning, Eastern Daylight Saving Time.

(Whereupon, at 4:10 p. m., EDST, May 14, 1947, the hearing was adjourned to Thursday morning, May 15, 1947, at 10:00 a. m., EDST.)

2657

Room 332, Federal Trade
Commission Building,
Washington, D. C.,
Thursday, May 15, 1947.

Met, pursuant to adjournment, at 10:00 a. m., E. D. S. T.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq., (Davies, Richberg, Beebe, Busick, & Richardson, 815 15th St., N. W., Washington, D. C.), appearing for Sherwin-Williams Company.

Edmund P. Wood, Esq., (2801 Carew Tower, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

James D. Ewing, Esq., and

E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

John A. Duncan, Esq., (1649 Union Commerce Building, Cleveland 14, Ohio, and

Roger Hinds, Esq., (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

2658 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on yesterday, the hearing is now reconvened in Docket 5253, in room 332, Federal Trade Commission Building, Washington, D. C., at 10 o'clock a. m., Eastern Daylight Saving Time, on the 15th day of May, 1947.

I want to bring up a ruling that I made the day before yesterday, which appears on page 2531 beginning on line 20 of that page. After seeing the question in the record it is entirely different from what I had in mind at the time as to its purport, and I think that counsel for the Commission should have been sustained in his objection, and I am reversing my ruling and sustaining his objection, and striking the answer.

Mr. DuBose: What page is that, if Your Honor please?

Trial Examiner Norwood: 2531.

Mr. Wright: That is the answer that appears on line 13 of page 2532?

Trial Examiner Norwood: Yes, line 13 of page 2532. The objection is sustained for the reason given by the Commission's counsel.

Mr. Hinds: I assume we can reframe our question when it comes to redirect, but I will not interrupt at this time.

2659 Trial Examiner Norwood: That is right.

Proceed.

PAUL E. SPRAGUE resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Wright.

Q. Mr. Sprague, The Glidden Company is, I understand from your testimony, a very large producer of mixed paint; is that correct?

A. One of the largest producers, yes, sir.

Q. Is it among the first ten producers of mixed paint?

A. I think so.

Q. What is the attitude of the paint industry generally on the matter of selling on consignment?

A. My understanding of the attitude of the paint industry generally is that it is opposed to consignment selling.

Q. Do you recall the provisions of the Code of Fair Competition for the Paint, Varnish and Lacquer Industry generally?

A. No, I do not.

Q. Do you recall whether that had anything in it regarding the practice of selling on consignment of mixed paint?

A. No, I left the paint industry in 1925 in my active work, and I never even read the paint Code.

Q. When was it you stated that your company
2660 first began to employ consignment contracts in marketing white lead-in-oil?

A. My recollection is that it was about four or five years after that method of distributing white lead-in-oil had been adopted or started by our competitors.

Q. I believe you stated that you did not adopt your competitors' consignment contracts when you decided to embark on that practice, is that correct?

A. That is correct. I stated that our company prepared its own consignment agreement.

Q. By whom was that prepared, do you recall, by what department?

A. It was prepared by the Legal Department of our company.

Q. Do you recall what their instructions were?

A. No, it was handled entirely by our Paint Divisions.

Q. Do you know whether or not they had before them, when they drew those contracts, the contracts of your competitors?

A. I do not know whether they had competitors' contracts before them or not, but I surmise that they did.

Q. You were generally familiar with the paint business in the period 1933 and 1934, were you not, Mr. Sprague?

A. Well, I think I should answer that I was generally familiar with it in very rough outlines.

Q. You knew generally what the policies of The Glidden Company were in the marketing of paint?

A. No, I didn't follow that. The only paint item
2661 that I followed with any degree of interest was the white lead-in-oil.

Q. But you were in considerable contact with the Paint

Divisions of Glidden, weren't you, in connection with the transfer of marketing of that product to the Paint Divisions?

A. Not a great deal.

Q. Well, you first were employed by Glidden, as I recall, in 1915, did you say?

A. That is right.

Q. You had been with the company for 18 years by 1933, then, had you not?

A. That is right.

Q. Was the company then a large producer of paint?

A. In what year?

Q. 1933.

A. Yes.

Q. Relatively, in the industry?

A. Yes.

Q. Did you know of any plot or scheme by the paint industry to raise the price of white lead-in-oil in 1933 and 1934?

A. A plot or scheme by the paint industry to raise the price of white lead-in-oil?

Q. Yes, sir.

A. No, such a scheme would have been impossible.

Q. It has been testified here in this proceeding that it was the intention of the paint industry, through the 2662 provisions of the Paint, Varnish and Lacquer Code, to hamper the white lead-in-oil industry and to raise the prices of white lead-in-oil—

Mr. Hinds: (Interposing.) I object, particularly to the portion of the question which purports to state testimony, but I will withdraw my objection—

Mr. Wright: (Interposing.) I will withdraw the question.

Trial Examiner Norwood: All right.

By Mr. Wright:

Q. If it had been stated that there was a plot or plan on the part of the paint industry to raise the price of white lead-in-oil during the 1933 and 1934 period, would you say that was a correct statement of fact?

Mr. Hinds: I object to the form of the question. The fact exists independently of whether it had been stated or not. The hypothesis is entirely unnecessary in the question.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. If it had been stated that there was a plot or plan on the part of the paint industry to raise the price of white lead-in-oil during the 1933 and 1934 period, would you say that was a correct statement of fact?")

Trial Examiner Norwood: I think he may ask it that way. That is just a manner of speaking.

2663 Mr. Hinds: Well, it isn't a proper method of ascertaining evidentiary facts. Why not ask him what the fact was, if he knows? I am not sure that he knows.

Trial Examiner Norwood: You mean change it from a hypothetical to a categorical question?

Mr. Hinds: Yes.

Trial Examiner Norwood: I think the witness so understands it.

Mr. Hinds: My objection was to the form of the question, not to the relevancy of the subject matter.

Trial Examiner Norwood: Objection overruled. Answer the question.

The Witness: I will have to ask you to read it again, please.

(The reporter again read the question.)

A. I have no knowledge of any such plot or plan. I do recall that during the period of the Code development, there was a great deal of discussion and difference between the paint industry and the lead industry as to where white lead-in-oil should go in the Codes. But the features and the details of that controversy I do not recall very much about.

By Mr. Wright:

Q. Do you recall that that controversy had as an aspect the raising of the price of white lead-in-oil?

A. No, I have no recollection of that aspect, if
2664 there was such an aspect.

Q. Now if there had been any such move by the paint industry generally at that time, Glidden Company would certainly have known about it, would they not?

A. It is impossible for me to give you a categorical answer to that, because The Glidden Company has at times been in and out of the Paint Association's industry activities.

Q. You made the statement, as I recall it, on your direct-examination, and particularly with reference to lead oxides, that the producer was in effect a converter, and that the margin between the cost of pig lead and the price at which you could sell it was, in effect, a toll charge; is that correct?

A. That is correct.

Q. Now in the early days of your association with Metals Refining Company, you stated that you attempted to produce your own pig lead through secondary smelting, is that correct?

A. Yes, sir.

Q. Did that plan prove successful?

A. It proved unsuccessful economically.

Q. Well, then, following that you have relied upon outside purchases of pig lead, have you?

A. Entirely.

Q. Entirely?

A. Yes.

Q. You buy that on the regular market, I take it?

2665 A. Yes, sir.

Q. What pig lead price does Hammond take, is that the Chicago price of pig lead?

A. My recollection is that the cost of pig lead delivered at Hammond is 10 cents per hundredweight over the St. Louis lead market. If that is in error, I can correct it.

Q. Do you recall what the Chicago base is for pig lead?

A. My recollection is that that is the Chicago base.

Q. Now when you make litharge in your process of production, how many pounds of litharge do you produce out of 100 pounds of pig lead, do you know?

A. There are always process losses in handling lead, converting it, and there are weight gains due to the addition of the oxygen to the weight of the finished product. So the precise figures I couldn't give you, but you could calculate them—

Q. (Interposing) I believe Mr. Zoller and Mr. Merson testified—are you acquainted with either of those gentlemen?

A. Yes, I have met them.

Mr. Hinds: I think the witness hadn't finished his previous answer before the next question came.

Trial Examiner Norwood: Had you finished your answer?

The Witness: No, I hadn't. I said the amount produced could be very easily calculated from an analysis of the charts introduced earlier in the testimony.

2666 By Mr. Wright:

Q. Mr. Zoller and Mr. Merson testified, as I recall, that they produced about 107 pounds of litharge for 100 pounds of pig lead. Does that figure seem correct to you?

A. That is about right.

Q. Do you generally—I don't mean in all instances—but do you generally, or have you generally in the period, say, from 1936 to 1942, quoted carload litharge at $1.50 per hundred over the New York price of pig lead?

A. Yes, sir, and also on the basis of the St. Louis market.

Q. So that assuming now, that pig lead is 8½ cents a pound and your differential on litharge is a cent and a half, your price, then, is 10 cents per pound for litharge in carload quantities; is that correct?

A. That is right, delivered to destination.

Q. So that, assuming that you get approximately 107 pounds of litharge from 100 pounds of pig lead, your margin, then, between the price and the cost of your basic raw material, would be $1.50 plus 7 pounds at 10 cents, which would be picked up in the process of manufacture, or $2.20?

A. Well, the margin is the difference between the actual cost to produce the litharge and the selling price of the litharge. Now—

Q. (Interposing) I am talking about your gross margin between the price and the cost.

2667 A. That is correct, so am I. Now that gross margin consists of the factors involving the weight gain as an addition, the factors involving the process losses as a subtraction, and whatever they all are in the washout, the difference is the actual cost on the one hand and the selling price on the other.

Q. Assuming, now, that including your losses in production your overage was 7 pounds, at 10 cents a pound, you would add that to your $1.50 which would be your differential, and that would give you a figure of $2.20 a hundred pounds, would it not?

A. Well, I will have to do a little figuring here. I see what you are arriving at. I just want to check a little.

Will you say that again, Mr. Wright?

Trial Examiner Norwood: Let the reporter read the question.

(The reporter read the question as follows:

"Q. Assuming, now, that including your losses in production your overage was 7 pounds, at 10 cents a pound, you would add that to your $1.50 which would be your differential, and that would give you a figure of $2.20 a hundred pounds, would it not?")

A. I believe that is correct, provided you take into account that you secured 107 pounds; and the $2.20 then should be divided by 107 to produce a figure representing the differential at that point. In other words, it is
2668 not $2.20, but it is $2.20 divided by 107, if you assume that as the weight.

By Mr. Wright:

Q. But that $2.20 is the gross margin that you have to work with on that 107 pounds of litharge, that is your gross toll?

A. That is correct, minus the process losses, which you have not taken into account.

Q. I said to assume that it was 107 pounds; that you would already have deducted the losses, so we would have something to talk about.

A. All right. And that also assumes completely oxidized litharge to PbO.

Q. Will you explain that?

A. Yes. If we make sub-oxide, the black oxide or a brown oxide, or any other oxide that is not PbO, you do not get that 7 pounds weight gain that you are calculating. The weight gain becomes lower as the degree of oxidation of the lead falls.

Q. So that it is closer to a metallic lead content in the brown and black oxides than in the other litharges?

A. That is correct.

Q. Brown and black oxides are a part of the litharge category, though, is that correct?

A. Well, I regard them as such.

Q. You bill, now, to a customer, this litharge at 10 cents a pound, under this hypothetical calculation that we have made here?

2669 A. Yes.

Q. But the real thing is that $2.20, is it not?

A. Well, it is hard for me to tell what you mean by the "real thing". The present spread is that.

Q. In other words, it is out of that $2.20 that all your operating costs, every expense connected with the manufacture, and depreciatic and profit, come?

A. That is correct. You should not use the term $2.20 in that light, however, Mr. Wright, because that is $2.20 divided by 107 only when your selling price of litharge is 10 cents and your lead market is 8½ cents. The minute you get other relationships, then the spread changes.

Q. The relationship of that overage will then change and it will vary that figure up and down?

A. That is right.

Q. When the price of lead is low, your overage will be less in dollars and cents than when it is high?

A. That is right. You cannot assume there is a spread of $2.20 divided by 107 in the litharge business. That is only true when pig lead is 8½ cents.

Q. That is true. We were assuming that for the purpose of getting this out.

Now when you ship that litharge to a customer, is it your general practice to bill that freight collect, or to ship it freight collect, I mean?

2670 A. Our practice was to the greatest possible extent to ship freight allowed, we to pay the freight. Now that is my recollection. There has been a great deal of study made on that particular point at various times in our company. The result, fundamentally, at the end is the same, but there are questions of traffic matters involved as to whether you allow the freight or whether you ship collect.

Q. When you ship collect, you allow the freight on the invoice, is that correct?

A. That is correct.

Q. And when you have used the term "allow freight", you mean that you would prepay freight, did you?

A. When you bill freight allowed, it is my recollection that we pay the freight and then allow it as a deduction on the invoice.

Q. That requires an increase in your working capital, doesn't it, to have that tied up in prepaid freight?

A. The amount of money that is necessary to pay the freight bills is a necessary part of your working capital.

Q. You are not prepared to state what the general practice has been of the company with regard to oxides?

A. No, that is a detail that slips my memory. I do remember considerable attention being given to it at various times, by us, and I remember there was attention given to that point in connection with some of the

2671 Code discussions, although I do not recall whether they were in litharge or whether it pertained to the shipment of antimonial lead. But the factor of the capital involved, and the traffic aspect of who makes freight claims and who audits the freight bills, are the determining factors.

Q. Would the records of your company, or would officials in your traffic department, have readily available information on what the general practice had been with regard to these various products?

A. I don't believe that could be obtained other than through the extent to which invoices could be found.

Q. Well, now, the extent that you prepay the freight on a particular transaction would reduce that margin that you have to work on in that business by that amount, would it not?

A. Yes, it would, but it would make no difference whether we prepaid it or whether we didn't—

Q. (Interposing.) In either event, it would shrink it by that amount?

A. Yes.

Q. Do you know what your average freight and shipping costs are in any period in the last ten years on oxides?

A. No, I do not know precisely what the average is, because such an average would be a meaningless thing. We use various methods of transportation in order to effect
delivery, and any average would have to be an av-
2672 erage of trucking charges, an average of less-than-
carload freight charges, and an average of carload
freight charges, so that it would be relatively meaningless,
as I see it, and I know of no such figures.

Q. In this hypothetical situation that we have given here, with the 8½ cent pig lead and selling litharge at $1.50 over, and picking up your 7 pounds in the process of manufacture, giving you the total of $2.20, that $2.20 less whatever transportation charges are involved, then, is the real price at which you sell your product, is it not?

Mr. Hinds: Objected to on the ground that the witness said the figure was $2.20 divided by 107, which, if you would like to have me give it to you, I have just divided out; 2.056 is my rough calculation.

Trial Examiner Norwood: I don't see that that is ground for objection.

Mr. Hinds: My objection is that the question presupposes a fact which is contrary to what the witness has said. He said it is $2.20 divided by 107.

Mr. Wright: I am willing to concede that it is that, and the record will be plain as to just what this situation is.

Trial Examiner Norwood: I think it is clear. Objection overruled.

A. The price at which we sold the litharge is 10 cents per pound, in that hypothetical case.

2673 By Mr. Wright:

Q. But what you receive, actually, over the inescapable cost of your basic raw material, is that $2.20 less the transportation charge?

A. You asked me the price at which we sold the litharge, and it was 10 cents, and we received 10 cents.

Q. But you figure your working inventory of pig lead, do you not, at the then market price of pig lead?

A. I believe we are required to figure our inventories—what kind of figures? I assume you refer to those that we use in our accounting. We have to figure our inventories at their actual cost, and at the close of our tax year they have to be adjusted to cost or market, whichever is lower, and we have a variety of figuring, inventory figuring factors to consider.

Q. Figuring them at market replacement cost—

A. (Interposing.) Market replacement at inventory date,—whichever is lower.

Q. Now in selling litharge in less-than-carload quantities, I direct your attention to Commission's Exhibit 810-i, which contains the so-called card prices of litharge and red lead and orange minerals of the Metals Refining Company. What relation does the price of 8½ cents there, on shipments of less-than-five-tons of litharge, bear to the New York price of pig lead?

A. Our card price of litharge was that which we 2674 found necessary to meet the competition in the litharge market. We did not set it, we followed it. But we observed, and I believe that some of the cards will show, that there was a relationship there, on an average relationship, of a higher difference or a higher spread than applied to carloads, and that the spread followed closely the movements of the pig lead market.

Q. Do you recall what that spread was, generally?

A. There is a five-ton price in that card that you showed me—

Q. (Interposing.) There are two prices, 5 tons and less than 5 tons.

A. Yes, and my recollection is that that spread was 2½ cents, on an average.

Q. Over pig lead for less than 5 tons?

A. I am not certain of the detail on that.

Mr. Hinds: I would like to have it noted that this is not cross-examination, of course.

Mr. Wright: May I inquire the basis for counsel's—

Mr. Hinds: (Interposing.) There was no direct examination about quantity differentials, not from this witness.

Trial Examiner Norwood: He was asked about pricing, he went into that.

Mr. Hinds: The differences between prices of carloads or less than carloads or less than 500 pounds were
2675 not even hinted at by this witness. He discussed price on a different basis. I am not saying that it is not relevant in the case; I am just noting that it is not cross-examination.

Mr. Wright: I differ with counsel in that respect. I believe that this whole matter of these prices and the things to which I am about to allude were opened up on direct examination.

Mr. Hinds: I am sure counsel will not be able to point to anything in the direct examination which even remotely touches on quantity differentials.

Trial Examiner Norwood: Well, that is a part of this general subject. The objection is overruled.

Mr. Duncan: Please note an exception.

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. You stated that there was a differential on that less-than-5-ton price of approximately 2½ cents over the pig lead price?

A. I think that is correct, that is my recollection. Mr. Burruss is here, who has been very much closer to that than I, and I think perhaps he could give you more reliable testimony on that.

Q. Then the differential of 1½ cents in carload lots that was generally employed as compared to a differential of

2½ cents on less-than-carload lots, represented ap-
2676 proximately a 66⅔% larger margin over the price of
pig lead to you, did it not?

A. You are still using this particular hypothetical position of pig lead?

Q. Using any position of pig lead, if the difference over pig lead on the card is 2½ cents and the difference in pig lead on the carload price is 1½ cents, that differential on the less-than-5-ton price is ⅔ higher than the differential on the carload price, is that not correct?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

We will have a five-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. Do you recall the last question that we were on, Mr. Sprague?

A. Yes, sir. The answer is yes, it is a 66⅔% increase in the manufacturer's spread; and it is also a 10% increase in the selling price to the customer on that hypothetical case.

Q. In what the customer pays, at any rate?

A. That is correct.

Q. Red lead is likewise customarily sold in carload lots at a differential over the price of pig lead, is it not?

2677 A. Our sales, and I believe those of others, are made that way.

Q. What does the differential on red lead generally run as compared with that on litharge—95% red lead I am talking about?

A. Two and one-half cents as against one and one-half cents.

Q. And there is customarily the same relative difference on the so-called card prices of one cent higher for red lead than litharge?

A. Yes.

Q. The card prices, then, also bear a similar relationship as to red lead now, to the price of pig lead, as do the card prices of litharge; is that correct?

A. Yes, sir.

Q. How do you customarily move your card prices, in what fractions or amounts?

A. We watch for the announcement of changes in the card price of either the National Lead or the Eagle-Picher Company and immediately follow them.

Q. Well, what has been your observation as to the multiples or fractions in which those card prices of National and Eagle-Picher move?

A. We have found as a rule that they were adjusted with one-quarter cent movements of the pig lead market.

Q. I believe it has been testified here that the pig
2678 lead market customarily moves in fractions of a 20th of a cent a pound, or 5 cents a hundred; is that correct?

A. I have observed violent movements of the pig lead market in larger amounts.

Q. That is the smallest fraction that it moves in, is it not?

A. I don't recall any smaller movement than 5 cents a hundredweight.

Q. Now in your differential selling, you did not mean to indicate, did you, that when the price of pig lead moves up or down you need to see the carload price announcements of your competitors before you knew what the effect would be?

A. No, not with respect to the sales at a differential over lead. The only thing we needed to know was the lead market. I thought you were referring to the less-than-carload selling.

Q. No, sir, I am referring to carload now. So that you know when the price of lead moves up and down by any amount, that your carload prices on a differential are going to be up or down by the same relative amount?

A. We make every effort to learn that instantly, and at times have had a wire service to attempt to keep up with it.

Q. Now on your card prices of your oxides, do you wait until you see a card, when you know the price of pig lead has gone up to the next quarter of a cent on pig lead, do you always watch and see a card of National or Eagle-Picher before you change your card?

2679 A. The cards usually come to our attention somewhat later. The main source of information that I recall is the daily paper, the daily Metal Market, or the Journal of Commerce, which has that as of the day that it becomes known.

Q. It has been testified here by officials of the National Lead Company and the Eagle-Picher Company that generally speaking, the cards always move in fractions of a quarter of a cent with the pig lead market. Is that your understanding of the situation in the industry?

A. That was our observation, as I stated a few minutes ago.

Q. So that actually, then, you know, as a practical matter, that when the pig lead market moves up or down a quarter of a cent, there is going to be a card change with the pig lead market; is that correct?

A. I expect such a change.

Q. You would probably be very much surprised, would you not, if there were no such change?

A. That would be unusual.

Q. Would there be any precedent for it in the last 10 or 15 years that you can recall offhand?

Mr. Hinds: Will you read the question, please?

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Would there be any precedent for it in the last 10 or 15 years that you can recall offhand?")

2680 A. I recall that there have been times when those changes did not appear, but I cannot recall when or what the circumstances may have been.

By Mr. Wright:

Q. When you first went to the Metals Refining Company in 1930, you made, I presume, a thorough study of the marketing practices of that company and of competitors in the industry to determine how the product was sold at that time?

A. I knew how lead oxides were generally sold by the market leaders, because I had been selling them for a couple of years prior to going to Hammond. I didn't know anything much about what the Metals Refining Company had been doing in a broad way until I got there.

Q. But you knew what the general industry practices of the leaders were at that time?

A. That is correct.

Q. Do you recall in 1930 what the general practice was as far as quoting delivered prices? Were there any differentials added for delivery in certain areas or territories, or was there any equalization or differential point method employed?

A. I didn't know about that, because the sales that I had been making prior to 1930 were all carload sales. What I did was to purchase litharge and red lead in carloads and resell it for the Euston Lead Company.

Q. Now after you went with Metals Refining, did 2681 you become aware of the practices that obtained with regard to differentials for delivery, I mean differentials on account of the customer's location, now?

A. We had general sales information from the field to the extent of our contacts at that time, and we certainly knew something about the practices there.

Q. What were those practices?

A. I do not recall any more than that the differences that we have discussed, between carloads and less-than-carloads, were in general used in the trade. I don't recall that there were any sales made at that time for delivery at distant points, because the practice had been to attempt to develop a business on material deliverable close to Hammond.

Q. On which sales you made considerably larger margins than at distant points?

A. Well, that was the theory that I found was held there, that prices could be reduced under the prevailing market and a part of the reduction offset by a shorter freight haul to the customer.

Q. Now do you recall discussions during the Code period, of making differentials for delivery in certain areas of the South and the West on sales of oxides?

A. Yes, I recall there were such discussions relating to that. About all the detail that I can give you of those discussions is that the high costs of transportation into 2682 those distant areas was a tremendous factor in the cost of doing business, and the question of developing a means of meeting that problem in connection with the Codes was discussed.

Q. Now there are at present, are there not, differentials for delivery in card quantities of oxides in the West and the South?

A. Yes, I believe there are, and my recollection is both as regards carloads and less than carloads.

Q. Well, the ones for less carload are different, are they not, than those for carload? In other words, they are different territories and different differentials applying to them?

A. I do not recall for certain, but I don't think so.

Q. I direct your attention to Commission's Exhibit 762-A, and sub-numbers, which is in evidence as a bulletin of The Glidden Company to its branch offices, and I call your attention to the statement on Exhibit 762-B under "Red Lead and Litharge in Drums", and ask you to read that.

A. Yes, sir. It refers to Schedule AA.

Q. You will note that Schedule AA is the zone for those less-than-carload shipments.

Mr. Hinds: If Your Honor please, merely to save time if for no other reason, I object on the ground that this testimony is not within the issues in this case, because The Glidden Company's answer admits certain allegations of
the complaint with respect to carload and less-than-
2683 carload zonings, and therefore, besides not being
cross-examination, is not even in issue in the case,
and we are just wasting time.

Mr. Wright: This witness has been on the stand before, he was on the stand on direct-examination in Cleveland, and we have discussed these zones, and I have found it necessary to go through considerable preliminary questioning to get to the points I want. I tried to get at this particular point by my preliminary questions, and I am now refreshing his recollection from official papers of The Glidden Company which are in the record, so that we can establish in his mind what these zones were so that I can then question him about them. I am trying to use the shortest method of getting the information that we want.

Mr. Hinds: I would like to ask whether counsel disputes my statement that these facts are not in issue. Do you claim they are in issue in this case?

Mr. Wright: I claim that the questions relating to this zone system and how it arose, and the circumstances attending its origin and the manifestations of it, as far as price discrimination is concerned, are at issue in this case. I think counsel will agree as to that.

Mr. Hinds: I am asking whether these particular facts are in issue. I understood that they are not in issue; that they are admitted in the answer.

Mr. Wright: Whether The Glidden Company
2684 used zones or not is not in issue, but the other facts
attendant upon the use of those zones are in issue.

Mr. Hinds: If you will look in our answer, you will see that we agreed to your statement of facts in that connection.

Trial Examiner Norwood: There are issues there respecting motives and effects, and so on, and I think it is very clear that counsel is within his rights, and I shall overrule the objection.

By Mr. Wright:

Q. Can you tell me over how long a period of time The Glidden Company has quoted those particular products in those quantities on the basis of those differentials and zones as appearing in Schedule AA?

A. They were quoted from the period beginning January 29, 1942, and on until the next bulletin, whatever it was, was issued, which superseded it. I notice this bulletin in itself supersedes a previous one that was dated in May of 1941. These bulletins were issued by the Paint Divisions from time to time as they had price change instructions to give to their salesmen.

Q. Mr. Sprague, what I am trying to get at by my question—maybe I can explain it a little more clearly to you—is for how long a period of time prior to January 1942 did The Glidden Company quote on the basis of 2685 those zones and those differentials on those products, not on the basis of that document.

A. That I cannot answer, because this Schedule AA defining the areas is a part of this bulletin, which superseded a previous one. They may have been changed at this time, as far as I know.

Q. Then you don't know what those zones may have been prior to 1942?

A. Not of my memory, no. These are the zones in effect at this time, that is certain. But how much before that—

Q. (Interposing.) Do you know that there were zones in effect prior to that?

A. I cannot be certain that there were zones in effect prior to that. I would have to see the prior bulletins. I cannot fix in my mind the date of the usage of zones.

Q. Does The Glidden Company have in its records a set of those bulletins going back over any considerable period of time, from which it could be determined when they first began to use that zone method?

A. I do not think so. As I stated yesterday, we made a very thorough search for everything we could locate of this sort, but our practice of disposing of things in general in the company at two-year intervals makes it virtually impossible. We did think we could find some by checking some of the various offices, and so forth, but we were not, as far as I can recall, ever able to get a consistent sequential record of those things.

2686 Q. Then you don't know what changes might have been made in the period from 1930 to 1942 in the style or method of quoting on geographical differentials by The Glidden Company on oxides?

A. I can answer you in this way. Yes, we made changes in such style and methods as we had to to follow the competition that we had in the field. That applied to oxides as well as to the other lead products.

Mr. Wright: I move that that answer be stricken, Your Honor, as not responsive. I asked him if he knew.

Mr. Duncan: I ask that it stand, Your Honor. I think it is responsive. This is cross-examination.

Trial Examiner Norwood: Read the question and the answer.

(The reporter read the record as follows:

"Q. Then you don't know what changes might have been made in the period from 1930 to 1942 in the style or method of quoting on geographical differentials by The Glidden Company on oxides?

"A. I can answer you in this way. Yes, we made changes in such style and methods as we had to to follow the competition that we had in the field. That applied to oxides as well as to the other lead products.")

Mr. Hinds: If Your Honor please, inasmuch as it has appeared without dispute that the only style and method that this respondent ever had was to discover competition and to meet it when and where it found it, to ask him— 2687

Trial Examiner Norwood: (Interposing.) That doesn't come in—

Mr. Wright: (Interposing.) Your Honor, the question asked what changes his company had made, did he or didn't he know of them, and I want him to state on the record either that he does or doesn't know them.

Trial Examiner Norwood: The counsel will ask the direct question as to that, and he may bring that out, but he didn't ask it just that way.

Mr. Wright: It was a direct question—do you know what changes—

Trial Examiner Norwood: (Interposing.) You said, "Then you don't know". It makes a little difference there. I will deny the motion.

By Mr. Wright:

Q. What changes did the Glidden Company itself make in its method of quoting on oxides with regard to geographical areas in which differentials applied and the differentials applicable between them, in the period from 1930 to the date of that bulletin, January 1942?

Mr. Hinds: Objected to on the ground that it has not appeared that they made any changes in their method, their method having followed competition—

Trial Examiner Norwood: (Interposing.) Objection overruled. Let the witness answer the question so as to give us those facts. 2688

Mr. Hinds: I was making an objection that the question implies something that hasn't been shown.

Trial Examiner Norwood: If counsel is going to discuss the evidence and make statements here that might be construed as carrying a suggestion to the witness, I will ask the witness to withdraw while you discuss the matter. I don't think that it is good practice, and I will overrule the objection. Answer the question.

Mr. Wright: May we go off the record a minute?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Read the question.

(The reporter read the question as follows:

"Q. What changes did the Glidden Company itself make in its method of quoting on oxides with regard to geographical areas in which differentials applied and the differentials applicable between them, in the period from 1930 to the date of that bulletin, January 1942?")

Trial Examiner Norwood: Give us the information as to those changes, if any. Objection overruled.

The Witness: The question is: What changes in method were used? There were no changes in method used.

2689 By Mr. Wright:

Q. In other words, The Glidden Company made no changes in the territories to which differentials applied and the differentials themselves?

A. There were undoubtedly changes in territories and in differentials, but not in method.

Q. What were those changes in territories and differentials, do you recall any of them?

A. I do not recall any specific ones.

Q. Now it has been testified to here by Mr. Harold Rowe of the National Lead Company that the territories and differentials applicable to these oxides have been used by the National Lead Company in quoting since sometime around 1934. Do you recall the first employment of those territories and differentials by the National Lead Company?

A. As I testified yesterday, the only recollection that I have is that the employment of the zones, and so forth, occurred sometime after the Code period. I do not recall when that was.

Q. Wouldn't any large change in the territories and differentials applicable to them have been an important matter which would have engaged your attention at the time it occurred in the industry?

A. Yes, I think it would.

Q. Isn't that one of the matters, those differentials,
which was discussed at some length by the members
2690 of the industry at the meetings of the pigment divisions when they were considering the Codes?

A. There were discussions at the meetings of the Pigment Committee, but there were more extensive discussions at the meetings of the Lead and Oil Committee, I recall that it happened in both cases; but you must remember that that is 14 years ago, and I can't get pinned down too close on the dates and the months.

Q. Now you have been testifying about those meetings on direct-examination.

Mr. Hinds: I object to that statement, and ask that it be stricken out as a comment, and a very unfair one, because this witness has been testifying, refreshing his recollection when necessary, on a subject matter quite remote from what he is now being examined on.

Mr. Wright: I am willing to withdraw the statement.

Trial Examiner Norwood: The objection is overruled. He is within the province of legitimate cross-examination.

Mr. Hinds: I didn't make that objection. I objected to the comment by counsel, which he has been gracious enough to withdraw.

Mr. Wright: I said I would withdraw it, because the record will be perfectly plain as to what his testimony was on direct and on cross.

Trial Examiner Norwood: He has the right to refer 2691 to the witness' previous testimony, and comment on it and ask him to explain it.

By Mr. Wright:

Q. I recall your testifying on direct about what was discussed at a meeting of the Oxide Committee of the Lead Pigments Division on December 27th and 28th, 1933, on direct-examination, Mr. Sprague. Do you recall where that meeting was held?

A. I believe that meeting was held in Chicago.

Q. Do you recall a meeting of the Oxide Committee of the Lead Pigments Division on December 14th and 15th, 1933, at which Mr. Harold Rowe occupied the chair, and there were present Mr. MacGregor and Mr. Butzow, Mr. Erwin Willkie and Mr. William Willkie and yourself, Mr. Carroll, Mr. Coolidge, and Mr. Wormser?

A. I recall such a meeting, and that I attended such a meeting. I would need to refresh my memory as to the details of it.

Q. Would examining these minutes of that meeting, which appear as Respondents' Exhibit 137-A and B, refresh your recollection about that meeting? Do you recall that meeting?

A. Yes, sir.

Q. Do you recall the discussions that were carried on at that meeting?

A. In a general way only.

2692 Q. What was the discussion relating to the differential over pig lead being one of the most serious abuses in the trade, do you recall that?

A. Yes, I recall a few phases of that matter.

Q. What was the situation which was then considered to be an abuse?

A. Well, I recall one or two very specifically that I thought, and I think the others thought also, were a distinct abuse or difficulty, that arose out of the pressure, economic pressure, of that period of depression, and one of them was that there was a willingness on the part of the sellers of lead oxides who sold on a differential to accord the buyer some protection against market declines, and that was a very serious abuse to me, because I didn't have the background of sufficient pig lead inventories to have low averages or averages other than the market, and when I had sold a carload of lead oxide on a 6-cent market, for example, and the market dropped to four or five cents, I couldn't afford to protect my customer and finally deliver the litharge at a 4 or 5-cent market. That was one—

Q. (Interposing) I recall—

Mr. Hinds: (Interposing) I object to interrupting.

Trial Examiner Norwood: Just a moment. Mr. Wright will conduct the cross-examination.

Mr. DuBose: Your Honor, I believe he was continu-
2693 ing his answer.

Mr. Hinds: He said there were several abuses, and he was in the middle of the first one when counsel interrupted him.

Mr. Wright: The abuse that he is talking about as an abuse is a matter that is entirely unrelated to the question that was asked him, and I would like to ask—

Trial Examiner Norwood: (Interposing) Do you move to strike the answer?

Mr. Wright: I move that it be stricken, and I intend to reframe the question and get an answer to it.

Trial Examiner Norwood: Read the question and the answer.

Mr. Wright: I will withdraw the motion to strike, but I want to stand on my right to interrupt the witness on what I conceive to be an irrelevant answer, and reframe the question.

Mr. Hinds: I would like to have it ascertained whether the answer was irresponsive. It seems to me that it was perfectly responsive, and it had only just begun.

Trial Examiner Norwood: Well, we will get along faster if we will let counsel conduct the cross-examination without interruptions, unless there is something very serious.

Mr. Hinds: If it hadn't been for counsel's interruption, the question would have now been fully answered.

2694 Mr. Wright: Your Honor, I renew my motion to strike that answer as not responsive.

Trial Examiner Norwood: Read the question and the answer.

(The reporter read the record as follows:

"Q. What was the discussion relating to the differential over pig lead being one of the most serious abuses in the trade, do you recall that?

"A. Yes, I recall a few phases of that matter.

"Q. What was the situation which was then considered to be an abuse?

"A. Well, I recall one or two very specifically that I thought, and I think the others thought also, were a distinct abuse or difficulty, that arose out of the pressure, economic pressure, of the period of depression, and one of them was that there was a willingness on the part of the sellers of lead oxides who sold on a differential to accord the buyer some protection against market declines, and that was a very serious abuse to me, because I didn't have the background of sufficient pig lead inventories to have low averages or averages other than the market, and when I had sold a carload of lead oxide on a 6-cent market, for example, and the market dropped to four or five cents, I couldn't
afford to protect my customer and finally deliver the
2695 litharge at a 4 or 5-cent market. That was one—".)
Mr. Wright: Your Honor, the question related to *the* abuse, not *an* abuse, and it is the abuse mentioned specifically in the minutes, that of selling oxides at a differential over pig lead. The witness' answer related to the practice of protecting the buyer against a price decline on pig lead, which is an unrelated matter.

Trial Examiner Norwood: I think counsel is right.

Mr. Hinds: May I be heard on that? The witness was asked in connection with those minutes what abuses arose from this practice of quoting differentials over the pig lead market, and he said there was more than one abuse arising from that practice, and he was starting to relate the first one of the abuses, of which there are several, which arise from the practice of quoting differentials over the pig lead market. I understand there were several such abuses.

Trial Examiner Norwood: He asked for this one abuse, and he asked him for one thing, and the witness discussed another, and the answer is stricken.

Mr. Hinds: I respectfully ask for an exception, because these are several abuses arising from the one matter mentioned in the minutes.

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. Will you state to us, Mr. Sprague, what was the
2696 specific abuse that is referred to in the first sentence
of this paragraph of the minutes to which I have directed your attention?

Mr. Hinds: I object on the ground that the minutes themselves say that there were several serious abuses; that one of the most serious—

Mr. Wright: (Interposing) Counsel is coaching the witness by these objections.

Trial Examiner Norwood: I think counsel is out of order.

Mr. Hinds: I except to that ruling, also.

A. I must be reading the wrong place here.

(Mr. Wright indicates sentence to the witness.)

A. (Reading): "The practice of selling at a differential over pig lead had spread to such an extent that it had become one of the most serious abuses in the trade."

Your question, now, if I understand it, relates to what is this one most serious abuse?

By Mr. Wright:

Q. The abuse that is mentioned in that particular sentence.

A. That refers, in a generic sense, to practices arising from the method of selling at a differential over pig lead that was injurious to the industry.

Q. Then it doesn't relate to the practice of selling oxides at a differential over pig lead itself; it relates to other matters?

2697 A. It relates to abuses that flowed out of that practice.

Q. Well, now, I call your attention to the fact that the sentence in the minutes states that "The practice of selling oxides at a differential over pig lead had spread to such an extent that it had become one of the most serious abuses in the trade."

A. I have an advantage over you, Mr. Wright, because I was at the meeting and I know what was discussed, and the minutes are not of so much importance.

Q. In other words, the minutes, then, in that instance, don't accurately reflect what was discussed?

A. There is not an inaccuracy in the minutes, I think the minutes are fairly accurate. He was attempting to, in a short way, describe what happened at the meeting, and he referred to those abuses, and I know what the abuses were because I suffered from them.

Q. Well, now, had the practice of selling oxides at a differential over the price of pig lead been employed on a large scale and customarily in the industry prior to that period?

A. That practice was in effect as far back as I can remember.

Q. Only in the carload quantities, is that correct?

A. Well, I know of some contracts for the sale of lead oxides at a differential that were not specific as to

2698 whether the delivery should be in carload or less carload.

Q. Was the fact that it had been the practice of some producers prior to that time to accept at the carload differential price an order which was not delivered in a carload at one time, one of the things that was discussed in that connection?

A. Yes, very much so.

Q. You testified on direct that there were a great many battery manufacturers, numerically, did you not?

A. I said there were two groups of battery manufacturers; one was a large group, much larger than the other; and I didn't say how many of the battery manufacturers there were, but it was a fairly sizable industry.

Q. In connection with your duties, have you had any opportunity to study the battery business and the competitive conditions and practices that are extant in that industry?

A. Yes, I tried to be quite well informed on that matter during the period that I was in residence at Hammond.

Q. Is it a customary practice for the producers of oxides to furnish technical service to battery manufacturers in connection with the sale of their oxides?

A. Yes, it has been the custom for the oxide manufacturers to furnish that service during the period of my familiarity with the lead oxide business.

Q. The Glidden Company has furnished that service to its customers, is that correct?

2699 A. One of the things I tried to do was to strengthen our sales position by providing and supplying that service, and we did so for a period of time.

Q. What would be your estimate of the number of battery manufacturers presently in business in the United States at this time?

A. Well, I hate to pull a figure out of thin air, because I haven't a thing to put back of it. It was 1935 when I stopped my particular interest in watching that closely. But if you want just an estimate, it would be 150 or 175.

Q. You said there were two groups there. Will you explain those groups again?

A. Yes. That was a peculiar industry because there was a sharp line of demarcation between the small group of well-financed and large manufacturers, and the other group, which was all the rest.

Q. What is the minimum capital, do you think, that would be necessary to get into the manufacture of batteries?

A. To get into the manufacture of batteries? Well, based on what I saw among this large group of small manufacturers, it could be done in a basement with a drum of oxides and a keg of sulphuric acid and some plates purchased from somebody else, and I would say it was a very low investment required to get into the business, but I wouldn't want to say much about the kind of batteries that were made and what their worth was.

2700 Q. Is the battery business one which is characterized principally by small manufacturers in matter of numbers?

A. Yes. Like most other industries, there are very many more in number of the smaller battery manufacturers than there are of the larger ones.

Q. Who are the principal battery manufacturers?

A. My recollection is that that group would comprise the Electric Storage Battery Company; the U. S. L.—I believe that is now the Electric Auto-Lite Company, they have changed since I knew them; the Delco-Remy Company; National Battery Company; the Globe Union Company; the Solar Corporation.

Q. Does Solar produce the S. L. I. type?

A. There may be others, but that is as far as my memory serves me now.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

We will recess until 1:15.

(Whereupon, at 12:15 p. m., a recess was taken until 1:15 p. m., this day.)

2701 Afternoon Session.

1:15 p. m.

Trial Examiner Norwood: The hearing will come to order. Proceed, Mr. Wright.

PAUL E. SPRAGUE resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Wright.

Q. You were describing, I believe, the small and the large battery manufacturers at the time of recess.

A. Yes, sir.

Q. Are these products sold uniformly in drums or barrels of 600 pounds, whether to large or to small battery manufacturers?

A. Our sales to battery manufacturers have almost universally been in drums or barrels. But you asked me about the battery industry generally. I think some of the large battery manufacturers obtained deliveries in large returnable drums, and some without package at all, in bulk.

Q. Over how long a period of time has it been your practice to ship lead oxides in bulk?

A. That type of shipment is extremely limited and if it is practiced at the present time it is my recollection that it did not start until close to the time that I left Hammond.

2702 Q. Hasn't there been a general feeling in the industry against shipping these products in bulk or in paper bags?

A. Yes.

Q. For health reasons?

A. Yes, there has, because the oxides of lead are toxic or poisonous if taken into the digestive tract, and that fact mitigates against bulk shipments, and they are only justified where special arrangements exist between buyer and seller to load and unload the cars by suitable mechanical methods.

Q. Do you sell oxides in the usual 600 pound drums both to carload and less-than-carload purchasers?

A. Yes, sir.

Q. Now on the technical services that the company performs for battery manufacturer customers, are those performed by the sales personnel?

A. No, we found that the type of technical service that was needed and was valuable could not be expected of the sales personnel. It required the services of specialized, trained men in that technique.

Q. Were they under the sales department or in the sales organization?

A. Well, I would say that in our case it was a question of them being available at the command of the sales department, but those people also actually worked in laboratory experiments and occupied a general position.

Q. By what means do you make their services
2703 available to battery manufacturers; is it at the request of the customer or do you have some program for that?

A. Both on the request of the customer and as a means of sales service in the nature of check-up calls, and in the nature of sales promotion.

Q. Do you customarily, through that service, check up on the experiences of your customers in using your oxides?

A. That is correct, and we also found it was necessary, particularly in respect to that service to small battery manufacturers, to maintain facilities whereby we received and tested for those manufacturers the batteries that represented typical samples of their production.

Q. And you did that for all customers who requested it or wanted that service?

A. And up to the limit of our capacity to do that. It requires quite a substantial lot of equipment, and particularly a lot of time, to run those tests—they are time tests.

Q. How does your sales organization on oxides cover the battery business? Is it a matter of regular calls at frequent intervals on all customers, or just how do you handle it?

A. Yes, our experience was that you had to call on the battery manufacturer and talk with him direct.

Q. And you customarily call on all your customers, then, at regular intervals, is that correct?

A. Well, I am not sure that I get the full import
2704 of your use of the word "regular". In selling merchandise you have to call as often as you find it necessary to maintain the right relationship and to maintain the business. Sometimes that is irregular and in many cases it is more frequent.

Q. Do you have regular sales personnel whose principal duties are in the battery business?

A. The sales personnel of the lead oxide division were in general distributed geographically, and some of the men had more battery trade in their travelling areas than others.

Q. They were salesmen not alone of these oxides, but of other products as well, is that true?

A. That is true. We attempted to handle the sale of all of our products through a salesman covering a territory area.

Q. He would cover paint—

A. (Interposing.) No, I am speaking entirely of the products of the Metals Refining Company Division. The Metals Refining Company salesmen at no time attempted to sell anything that was produced by any other division except during one period when we attempted to enlarge our distribution of white lead-in-oil through the use of the sales force of the Metals Refining organization.

Q. Approximately how many salesmen are actually employed at the present time by Metals Refining Company?

A. I can't answer as to the number employed today. I think Mr. Burruss can give you that.

2705 Q. What was it at the time you were there?

A. During the period I was familiar with it, the number of salesmen was approximately eight to ten.

Q. You spoke of the large battery manufacturers being in a position to produce their own oxides. What battery manufacturers are now producing their own oxides?

A. I am unable to state what the battery manufacturers are doing now, but at the time I was familiar with it I knew that oxides were being produced for consumption in the making of batteries by the Electric Storage Battery Company; the U. S. L. Battery Company; and at that time the Willard Storage Battery Company, which was then an independent concern—

Q. (Interposing.) Is that now connected with the Electric Storage Battery Company?

A. Excuse me, I believe I should correct my statement. During my experience Willard was always a part of the Electric Storage Battery Company, but I meant to say that the Willard plant in Cleveland produced some oxides as well as the plant in Philadelphia, of the parent company. Oxides were produced also during that period by other battery manufacturers whose names I do not recall, in connection with a promotion scheme of a concern that had some equipment to sell that they alleged could be very easily used for making battery oxides. But I don't think that was a permanent phase of operation.

Q. What would you say would be the minimum
2706 total tonnage that a battery manufacturer could economically operate on, and produce his own oxides?

A. All I could do would be to estimate that because the question of fixed expense and overhead is quite an important one in determining at what point a manufacturer of standard articles can afford to start in as an additional effort to manufacture raw materials. But I will give you a guess, which would be a consumption annually of 4000 tons.

Q. Approximately what investment would be necessary to set up a production of 4000 tons of oxides per year, at the present time?

A. That would depend entirely upon the availability of housing.

Q. Speaking now as to the plant and equipment only, rather than as to the actual housing—I am talking about the machinery and plant.

A. I don't feel that I am qualified to answer that.

Q. Would you say that it would be quite a considerable investment?

A. No. The investment in that or any other manufacturing equipment today is so tremendously higher than it was during my experience here that it is probably safe to say that it would cost today nearly one and one-half or nearly two times what it would cost then.

Q. What would you say it would cost then?

2707 A. My guess would be, then, an investment, exclusive of housing, of $20,000.

Q. How many battery manufacturers, numerically, consume in excess of 4000 tons of oxides annually?

A. I couldn't answer that.

Q. Would it be very many?

A. Well, I would consider that it would be all of those whose names I gave you this morning, and quite some others in addition to that.

Q. But of that 150 or 175 battery manufacturers, the number would be quite small, would it not, who could profitably use 4000 tons of oxides a year?

A. It would be a small portion of the group but a large portion of the total tonnage consumed in storage batteries.

Q. As I understand your testimony, the lead pigments industry is constantly under the pressure of the possibility of production of oxides by the storage battery manufacturers?

A. That is correct.

Q. But that is not the case with the smaller battery manufacturers, is it?

A. Not where their consumption is less than the amount that would be attractive for them to produce the oxides themselves.

Q. Has it been your observation that the storage battery industry is one which is characterized in ordinary times by very sharp price competition?

2708 A. Yes, I think that is an industry that has been particularly characterized by sharp competition in all phases of competition, not only price but quality and service and guarantees and all those things that go into the merchandising program of storage batteries.

Q. During the period of the '30's, from, say, 1934 to 1940, was it an industry that generally operated on small margins, do you know?

A. During what period?

Q. From 1934 to 1940?

A. No, I have no way of characterizing or having knowledge of anything about that particular period as against others in that industry.

Q. Was there a fairly high rate of mortality among the smaller battery manufacturers during that period, or do you know?

A. That was immediately after the depression of '32. I would think there was a high rate of mortality in every industry during that period. I don't know that I could characterize the battery people as being worse.

Q. Has your company made any cost studies relating to sales in the battery business, showing relative cost of doing business with the various types of customers?

Mr. Hinds: Objected to as not proper cross examination, Your Honor.

2709 Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Has your company made any cost studies relating to sales in the battery business, showing relative cost of doing business with the various types of customers?")

Mr. Hinds: That, if it is material at all, is so as a part of respondents' case. It certainly is not cross examination.

Mr. Wright: Your Honor, I will direct your attention to a statement that this witness made on direct examination with regard to sales to various types of battery manufacturers, where he indicated that they suffered a loss on their sales—and I certainly can inquire into this matter.

Trial Examiner Norwood: Objection overruled.

Mr. Hinds: After being reminded of that, I will withdraw my objection; I had overlooked that.

Mr. Wright: I don't know what the purpose of the statement was—

Mr. Hinds: I have withdrawn my objection; I think you are right on that.

Trial Examiner Norwood: Answer the question.

The Witness: What do you mean by "cost studies"?

By Mr. Wright:

Q. Have you made an analysis of the various 2710 operating costs so that you can allocate them as to sales to the various classes of customers in the battery business?

A. I can recall that we made studies of this sort—to answer your question first, if you mean to keep accounting reports that do show that, the answer is no. But facing the problem in its broad aspects I recall one time that we made quite an analysis of the losses that we had sustained in our sales to the storage battery industry. This was some years ago, but I recall it because I used it as an argument on one of my visits to our headquarters office to see if I could persuade the company to adopt a more liberal credit attitude towards sales to the battery industry, and I had some data showing our costs in regard to credit losses. We also maintained for a period of years a plan whereby we tried to show our selling costs as among products by having our salesmen make daily reports allocating, on such reports, the time that they had spent in attempting to sell the battery manufacturer and some seven or eight categories of trade that those men sought to sell. I remember that was done.

Q. When was that done, do you know?

A. Sometime during the period 1930 to 1935.

Q. But you do not have any study, then, from which you could state with any authority, on the basis of statistics or studies of your costs, that you suffer a loss in your sales to small battery manufacturers?

2711 A. I can state, with the authority of the observation and belief of a manager of the business who is watching the expenses and the costs which he sustains in doing business, but I couldn't show it from an accounting study in cents per pound.

Q. Do you have in mind, when you are saying that, credit losses?

A. I have in mind all of the factors that would be involved in showing a loss.

Q. Is credit loss one of those factors?

A. It is one of them.

Q. Is it the principal one that is in your mind?

Mr. Hinds: Do you mean the largest, or occupying the majority position. The word "principal" is ambiguous.

Mr. Wright: I asked him if it was a principal one.

Mr. Hinds: Pardon me, I thought you said the principal.

A. I would regard actual cash credit losses as one of the intermediate factors in size, of dollar value, among those factors that would contribute to a loss in soliciting that business, based on our experience only.

By Mr. Wright:

Q. Over what period of time is that experience that you are referring to? Is that in the 1930-1935 period now?

A. During the period that I was right there every day.
Perhaps I could explain for you a little more than
2712 the matter of credit losses in the battery industry in
our experience developed in this manner, that we would have these bankruptcies or these failures, and then of course there would be a receivership and there would be settlements, and the actual realization of the loss was usually a year or two further ahead than the time the difficulty occurred. But it was a notorious situation that not only the Metals Refining Company but the other producers, and more particularly the Eagle-Picher Company, were always present at a bankrupt battery manufacturer's meeting.

Q. Going back now to the zone differentials, particularly in the South and the West, on the oxides, do I understand that you don't know when those differentials in substantially the form that they now exist, were first employed either by yourself or by any other competitor in the business?

A. I cannot recall that in respect to time, but I can recall it in respect to competitive conditions, as I have testified before.

Q. What do you mean by that?

A. I mean that that type of handling the pricing for sales at distant destinations was put into effect after it was encountered in the field.

Q. I show you Commission's Exhibit 808-H, which is in evidence, a portion of the Oil, Paint & Drug Reporter
under date of June 11, 1934, and ask you to read the
2713 first couple of paragraphs there in fine print.

A. All right.

Q. Does that refresh your recollection any as to the time at which those differentials were first employed?

A. It does not refresh my recollection, but it indicates to me very strongly that this is evidently about the time that the source of information obtainable in New York from the Oil, Paint & Drug Reporter made such an announcement.

Q. Has it been your observation that that is a reliable source of information regarding market changes and marketing practices in the pigments industry?

Mr. Hinds: Now if Your Honor please—

Mr. Wright (Interposing): I would like to request, before this happens, that if counsel in making his objection is going to state an opinion about what the record reflects, that it be done without the presence of the witness.

Mr. Hinds: I would be perfectly willing to have the witness withdraw. I think it is somewhat of a slur on the veracity of the witness—

Mr. Wright (Interposing): I don't mean it in that sense at all.

Trial Examiner Norwood: He is evidently making this suggestion out of an abundance of caution.

Mr. Hinds: Certainly. I might say that all of my objections will be based on a sincere belief that they
2714 are supportable on their merits. If they have any
collateral effect it will be due entirely, in my judgment, to the nature of the question which is asked, rather than to the character of my objection. However, I am very glad to have the witness withdrawn from the room.

Trial Examiner Norwood: Let counsel state the legal grounds for his objection, and then it will be clear to me as to whether the witness ought to be excused.

Mr. Hinds: The legal ground is that while the reliability of a statistical source such as this magazine, or a daily record of market conditions, is material—

Mr. Wright (Interposing): Right at this point—

Mr. Hinds (Continuing): —the reliability of a hearsay statement—

Trial Examiner Norwood: Off the record.

(Discussion off the record).

Trial Examiner Norwood: On the record. Will you kindly step outside, Mr. Sprague.

(The witness was temporarily excused from the room.)

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Has it been your observation that that is a reliable source of information regarding market changes and marketing practices in the pigments industry?")

Trial Examiner Norwood: You mean that that 2715 exhibit was?

Mr. Wright: That magazine, the Oil, Paint & Drug Reporter.

Trial Examiner Norwood: Why can't he ask him whether that is his impression or not?

Mr. Hinds: That is not the basis of my objection. It has nothing to do with whether he has an impression or whether he can form an opinion, which I will concede that he can. The point of my objection is that whether or not the source of hearsay evidence is reliable, is immaterial. Now if this were a statistical fact, if it were average sales per month, or daily sales, and the question were, "Does that reliably report the lead market?"—then such a question would probably be material because then we would get away from the hearsay rule. But this thing that the attention of the witness has been called to, I think if I saw correctly, was not a statistical statement, it was a hearsay bit of commercial gossip. Now whether the gossiper is a reliable gossiper or an unreliable gossiper is entirely immaterial. I think probably this witness might know whether he is a reliable gossiper or an unreliable gossiper. But what has that got to do with it?

Trial Examiner Norwood: You introduced an exhibit based on that type of testimony.

Mr. Hinds: No sir. We have introduced that sort of

magazine, maybe that very magazine, for all I know,
2716 as to statistical matters.

Trial Examiner Norwood: He is cross examining this witness and he certainly has a right to test his information and test his attitude on this entire subject.

Mr. Wright: The witness' previous answer was that this would indicate to him that the source in New York from which the Oil, Paint & Drug Reporter got its information thought that the zones were put into effect at that time. Now it follows—

Mr. Hinds: (Interposing.) May I be shown the portion of the exhibit to which your question is directed? If it is statistical, I will withdraw my objection, but I don't think it is; I think it is gossip.

(Exhibit shown to Mr. Hinds.)

Trial Examiner Norwood: I don't think we need to discuss this any further. I am going to overrule the objection, ask the witness to come back and answer the question, and the cross-examination may proceed on any of these sources of information which we have referred to heretofore.

Mr. Hinds: Exception.

Trial Examiner Norwood: Counsel has his exception in each and every case to the entire line, as he may desire.

Mr. Hinds: In answer to my request that I be shown the portion of the exhibit to which the question refers, counsel points to some text, not statistics.

2717 (The witness resumed the stand.)

Trial Examiner Norwood: Proceed.

Mr. Wright: Will you read the question.

(The reporter again read the question.)

The Witness: Yes, I think that should be regarded as a fairly reliable source of information of that sort, particularly the type of information that is readily obtainable in New York.

By Mr. Wright:

Q. Mr. Sprague, you used some notes to refresh your recollection on direct examination. Do you have those notes with you?

A. Yes, sir.

Q. In whose handwriting are those notes?

A. My own.

Q. Will you tell me the circumstances under which they were prepared?

Mr. Hinds: I have no objection.

A. Yes, I prepared the notes just prior to coming down here, in the form of very brief references to the testimony that I expected to give, for the purpose of enabling me to refresh my memory in case I was asked about dates beyond the point where I could keep them active in my mind—and other pertinent features.

By Mr. Wright.

2718 Q. Did you confer with others in the Glidden organization in preparing those notes?

A. No. As a matter of fact I didn't have an opportunity to do that; I prepared them after I left the office, and on the train coming down.

Q. So you prepared those notes, then, in your own handwriting from your own recollection?

A. I prepared the notes in my own handwriting and I prepared them furthermore from a memorandum that I had prepared for myself, reviewing what I could recall in connection with the sequence of events relating to the Euston Lead Company and the Metals Refining Company.

Q. You prepared that memorandum yourself, did you?

A. I prepared it myself, yes, sir.

Q. Didn't you say yesterday that others conferred with you in the preparation of those notes?

A. No, I did not. I said that I had conferred with others over a period of time in refreshing my mind as to what had happened in this sequence of events, but I had no help in preparing the notes.

Q. Well, then, in consulting with others regarding the sequence of events, you obtained information then, did you, regarding those events, from them?

A. I received assistance in bringing back to my mind some of the various things that had happened over 2719 that period, particularly with respect to white lead-in-oil activities.

Mr. Wright: I have no further cross-examination.

Redirect Examination by Mr. Hinds.

Q. Mr. Sprague, I call your attention to your testimony on page 2618 of the record, and ask you if you desire to correct it. You were asked concerning a certain graph which was introduced in evidence, and you were asked this question:

"Mr. Hinds: Suppose you had left out of the months, here and there, exceptional months, would that have been appreciably different?"

The previous question was:

"Mr. Hinds: I notice here that for two or three years, from 1933 on to well into 1935 on your graph, line A, there seems to be an absolute straight line."

Then your answer to the subsequent question was:

"The Witness: That straight line was unchanged regardless of whether it was in or out, because those were frozen prices of the OPA."

Do you desire to correct that?

A. Yes, that is an inadvertent statement. I associated in my mind the straight line with the one that resulted from OPA price fixing, whereas I notice that the question related to a straight line period in earlier years, and therefore my answer relating that to the OPA is inaccurate.

2720 Q. Do you desire to correct the following testimony which appears at page 2650 of the record:

"Q. What concerns control the principal patents in that business? (You were referring to the titanium oxide business.)

"A. Well, I think The Glidden Company has the principal patents."

A. Yes, I would like to correct that. I am not convinced that I made that statement but apparently everyone else agrees that I did, and I wish to see that the record is corrected.

Q. What should be the answer?

A. I should have stated that The Glidden Company had some patents in the titanium oxide field. I did not wish to state that Glidden had the controlling patents in that field, and I still doubt that I said it.

Q. You spoke of servicing the battery oxide business. Would you say that servicing was more a requirement in your sales to the large battery manufacturers or to the smaller ones?

A. The servicing was very much more a requirement to the smaller battery manufacturers. It was almost a sine qua non in order to sell them and in order for them to operate.

Q. Why do you say that in contrast with your sales, such as they were, to the large battery manufacturers?

A. Well, I believe I explained that—no, I did not explain it—but the technique of making a storage battery requires considerable experience and "know-how" in the compounding of the oxide paste that goes into the plates and in the forming and curing of those plates in preparation for putting the lead-acid cell in shape to function and ready to be sold. That required, furthermore, testing facilities and equipment to test the life and the performance characteristics of a storage battery after it had been built. We found that many, many of the small battery manufacturers did not have those facilities, and as a means, then, of getting their goodwill and their business it was offered to them by the seller of the battery oxides. That practice arose from the desire to make sales and also from the fact that—well, they all simmer back to the same end, the desire to make sales and the need for sales. 2721

Q. What about the large ones? You haven't answered my question with respect to the large ones?

A. The large battery manufacturers did not require anything like that kind of attention because they had their own facilities and even much more adequate and complete facilities than we had.

Q. With respect to the expense of collections, credit collections and investigations, from your experience was there any difference between such expenses in connection with sales to small battery manufacturers as contrasted with the larger ones?

A. Oh, yes; there was no expense of that sort in connection with the large battery industry. 2722

Q. What about the small ones?

Mr. Wright: Your Honor, I object to this line of testimony if it is by this means that counsel intends to prove any justification in the difference in prices to the different classes, because certainly this is incompetent evidence as to costs.

Mr. Hinds: It is sufficient to justify these questions at the present time, I think, if I say merely that I am having redirect examination on matters which counsel brought out on supposed cross, over an objection which I later withdrew.

Trial Examiner Norwood: As to the use to which this evidence will be put, that is a matter of argument and discussion later on—but I think it should be received at this time.

Mr. Hinds: Will you read the question?

(The reporter read the question as follows:

"Q. What about the small ones?")

Trial Examiner Norwood: The objection is overruled.

The Witness: Those expenses with regard to the small manufacturers were high.

By Mr. Hinds:

Q. Now as to the expense, if any, of warehousing, was
there any difference between the expense there on
2723 sales to the large manufacturers and sales to the
small manufacturers of batteries?

A. Well, the matter of—

Q. (Interposing.) Yes or no? My question calls for a yes or no answer—was there any difference?

A. Very much difference when you sell the small manufacturer whom you serve through a warehouse stock.

Q. Why was that?

A. Because of the expense of moving the goods into stock and out of stock, and the storage and the delivery costs.

Q. Now was there any difference in your sales to large battery manufacturers contrasted to small ones, as to cash discounts?

A. Yes, we accorded a cash discount for payment within ten days on sales of less-than-carloads to that trade and to other trade.

Q. Do you remember what the amount of that discount was that you gave to l. c. l. buyers?

A. One per cent.

Q. You have referred to selling and travelling. How did the expense there compare as between sales to small battery manufacturers and sales to large battery manufacturers?

A. Well, the per ton cost of selling was very high.

Q. On which?

A. On the sales to the small consumers.

2724 Q. What about the actual transportation? First I will ask you by what means did you transport to the purchasers of lead oxides, the said product?

A. We used the means of public transportation that gave the quickest service available to the customer, freight or truck.

Q. Was there any difference per ton in shipping by rail, in carload lots, as contrasted with less-than-carload lots, of lead oxides?

A. Certainly, the less-than-carload rate, either by freight or truck, is higher than the carload rate.

Q. Was there any difference in the truck rate as between the larger shipments and the smaller shipments?

A. My recollection is that the trucking rates broke, that is to say, a higher and lower, at a certain tonnage.

Q. Do you happen to remember what that breaking point was?

A. No, I do not recall, but I think it varied with different truck lines, and so forth. I don't think we had uniform truck rates in effect during the period with which I was familiar with this.

Q. As to the expense of invoicing, bookkeeping, billing, correspondence, postage and other clerical items, can you say whether there would be any substantial difference per ton in selling a carload or in splitting that up into, say 20 different smaller shipments of lead oxides?

A. Well, the cost of invoicing per invoice is in 2725 general the same, and the more invoices you have per ton of goods sold, the higher the cost. In our case we had a cost system whereby we costed each sale and multiplied, of course, the paper work in connection with sales because of that.

Trial Examiner Norwood: He asked if there would be any substantial difference. I don't think you answered that.

The Witness: I thought I had. The difference is that the cost is greater for—

Trial Examiner Norwood: (Interposing.) Would there be any substantial difference between the two classes of business?

The Witness: I think there would.

By Mr. Hinds:

Q. Mr. Sprague, you gave, as what you called a guess, 4000 tons as the minimum you thought it would have been practicable, when you were still in the business, for a battery manufacturer to profitably make his own lead oxides. In so stating did you have in mind the factor of price, or were you making an absolute statement?

Mr. Wright: Objection, Your Honor. The witness is on the record as to what he stated.

Trial Examiner Norwood: He can explain it or change it if he wants to. The objection is overruled.

By Mr. Hinds:

Q. The price of the oxides, I mean.

A. I am not sure that I understand your question,
2726 but I meant to say that it was my opinion that when
a consumer reached the point where he required over
a year 4000 tons of oxides, he then could well consider installing the equipment to produce that himself, for the purpose of having a better cost than were he to buy the material.

Q. Well, suppose he had reached that point, namely that he was consuming over 4000 tons of oxides a year, what would in your judgment be the deciding factor as to whether he would make his own or buy the oxides?

A. I think he would decide on the kind of a deal he could make with the lead oxide manufacturers, and how far he could beat them down.

Mr. Hinds: No further questions.

Trial Examiner Norwood: Do you have any further questions, Mr. Wright?

Mr. Wright: Yes, sir.

Recross Examination by Mr. Wright.

Q. Now on this matter of credit investigations, have you made any accounting surveys to show what your costs are as allocated to the various types of customers which you serve?

A. What do you mean by "surveys", Mr. Wright?

Q. I mean have you actually determined from your day
by day costs, by an accounting study, what the cost of
credit investigations is for battery manufacturers in
2727 the various different price classifications in which you
quote?

A. No sir, not in the sense you mean. We had another method of giving us our ideas on that.

Q. Do you have such information as to the cost of warehousing?

A. I think not.

Mr. Wright: No further questions.

Redirect Examination by Mr. Hinds.

Q. Mr. Sprague, when you say you have not made any survey within the meaning Mr. Wright gave to that word, have you given any consideration and business judgment to the extent to which members of your local and your headquarters credit departments and your various salesmen and other executives have been obliged to spend their time on credit investigations in the lead oxide, small lead oxide field, as contrasted with other selling fields of your company?

Mr. Wright: Objection.

Trial Examiner Norwood: Objection sustained.

Mr. Hinds: Exception.

By Mr. Hinds:

Q. Have you made such study and consideration of that and the other factors where you say the costs have been greater in selling to the small battery manufacturer than to the large battery manufacturer, to enable you to say with considerable positiveness whether or not in
2728 the aggregate they considerably exceed any quantity differential that you have allowed?

Mr. Wright: Objection.

Trial Examiner Norwood: Objection sustained. You shouldn't lead the witness in that way.

Mr. Hinds: I respectfully state that I didn't intend to lead him, and I didn't regard the questions as leading. It was an unintentional offense if I did.

By Mr. Hinds:

Q. Now Mr. Sprague, you did state, and you have been reminded of it on cross-examination, that the sales to the smaller battery manufacturers, even with the differential, were substantially less profitable than those to the larger ones. Why did you say that, what was the basis of your statement?

Mr. Wright: Objection.

Trial Examiner Norwood: On what ground?

Mr. Wright: The witness didn't make any such statement.

Mr. Hinds: I would like to make an argument, if there is any question on that, and I have no objection to the witness leaving the room. I am very earnest in this question.

Trial Examiner Norwood: I am going to sustain the objection to that question. You may bring out his recollection of what he did say and then you may base some question on that if you desire.

2729 By Mr. Hinds:

Q. What, if any, study and consideration have you given to the question of contrasting the profit or lack of profit on your sales to the larger battery manufacturers, buying in carload lots, and those sales in less-than-carload lots or less than 500 pound lots, to the smaller battery manufacturers, for the purpose of ascertaining whether or not, despite the differential, the one is less profitable than the other?

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. What, if any, study and consideration have you given to the question of contrasting the profit or lack of profit on your sales to the larger battery manufacturers, buying in carload lots, and those sales in less-than-carload lots or less than 500 pound lots, to the smaller battery manufacturers, for the purpose of ascertaining whether or not, despite the differential, the one is less profitable than the other?")

Mr. Wright: Objection. That is a long narrative statement to the witness, rather than a question.

Trial Examiner Norwood: The objection is overruled; answer the question.

A. We gave considerable attention to the cost of doing business as among customers of various sizes and customers of various kinds, and customers at various
2730 locations, out of which we realized, as I stated earlier
in my testimony, that we had to do certain things in respect to the type of trade we sold in order to make a profit. Now we found that the cost of selling the small customers, and particularly the small battery manufacturer, was inordinately high, and I gave, or rather responded to a number of reasons for that, that we had ob-

served in our business by a common observation. It was there for all to see. But there was no accounting study prepared to reduce it to a specific figure.

By Mr. Hinds:

Q. In your judgment would it or would it not have been practicable to classify your accounts so as to allocate the time spent by various executives, salesmen and others to these different classes of customers?

A. It would not have been practicable nor would it have been prudent. We were obliged to operate with a minimum of fixed expense of that sort.

Mr. Hinds: That is all.

Mr. Wright: I have no further examination.

Trial Examiner Norwood: Mr. Sprague, you are excused.

(Witness excused.)

Trial Examiner Norwood: We will take a short recess.

(A short recess was taken.)

Trial Examiner Norwood: The hearing will come
2731 to order.

Mr. Duncan: Mr. Burruss, will you be sworn.

DAVID N. BURRUSS, JR., was thereupon called as a witness for the Respondents and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Duncan.

Q. Will you state your full name and address?

A. David N. Burruss, Jr., Hammond, Indiana.

Q. And by whom are you employed?

A. The Glidden Company.

Q. And what are your present duties?

A. General Manager of the Metals Refining Division.

Q. That is located where?

A. Hammond, Indiana.

Q. When were you first employed by The Glidden Company?

A. In 1926.

Q. And where was that?

A. At Collinsville, Illinois.

Q. Will you tell us what your duties were at that time, in 1926?

A. I was manager of the Chemical and Pigment Divisions Plant located at Collinsville, Illinois.

Q. Will you relate to us your subsequent places
2732 and assignments, with the approximate dates, and
tell us your duties?

A. In 1933 I was in charge of the Nelio-Resin Division or Corporation and the Southern Pine Chemical Company, partially owned by The Glidden Company at that time, and they are now wholly owned divisions of The Glidden Company. I was also Assistant to the President of The Glidden Company. In 1935 I went to Hammond, Indiana, as General Manager of that Division.

Q. That is of the Metals Refining Division?

A. Of the Metals Refining Division.

Q. What have your functions included as general manager?

A. All the functions of management—sales, production, personnel.

Q. Do you remember when Glidden took over Metals Refining Company?

A. That was in 1929, I believe.

Q. And was it then a wholly-owned subsidiary of Glidden?

A. Yes.

Q. And how long did it continue as a wholly-owned subsidiary of Glidden before it became a division of Glidden, if you remember?

A. I think that was sometime in 1926, I don't recall the exact date.

Q. I don't think you understood my question. How long did Metals Refining Company continue as a corporation
before it became a Division of Glidden?

2733 A. I think it continued as a corporation from 1929
until sometime in 1936, but I am not sure as to the
exact time it was made a Division.

Q. At any rate it is now a Division of The Glidden Company?

A. Yes.

Q. Will you tell us what was produced by Metals Refining Company when Glidden took it over in 1929?

A. Antimonial lead, lead oxides and type metal.

Q. And did Glidden continue to produce all those products?

A. We continued to produce those products up until the war period, when we discontinued antimonial lead.

Q. What did Glidden produce at the Hammond plant in 1944?

A. Lead oxides and type metal, copper powder, iron powder, lead powder, cuprous oxide and cupric oxide.

Q. There is a distinction, is there, between cuprous oxide and cupric oxide?

A. They are both oxides of copper but they are different products.

Q. Now to what classes of customers does Glidden sell lead oxides?

A. To battery manufacturers, the oil refiners, fungicide manufacturers, dry color manufacturers and paint and varnish manufacturers.

Q. Do you include insecticide manufacturers in that?

A. Yes.

2734 Q. What percentage of lead oxides produced by Glidden is sold to the battery trade?

A. Over the period that I have been at Hammond, probably not over 30 per cent.

Q. Sold to battery manufacturers?

A. Sold to battery manufacturers.

Q. Let's take the battery manufacturers to whom Glidden has been selling lead oxides. Can you state approximately the percentage of your lead oxides that you have been selling in carload lots, and the percentage in less-than-carload lots?

A. Battery oxides would run approximately 60 per cent in carload lots and about 40 per cent in less-than-carload lots.

Q. And how would the 60 per cent carload figures be divided between the large and the small battery manufacturers?

A. Well, it would be a very small amount of that which ever went to a large battery manufacturer.

Q. Can you give us the percentage on that?

A. Probably not over ten per cent went to the large battery manufacturers.

Q. Will you tell us what difficulties, if any, have been encountered by Metals Refining Division in selling to the large battery manufacturers?

A. Well, having only one plant, there have been a number of factors that have affected our sales, or our ability

to sell the large battery manufacturers, such as our
2735 ability to properly service an account that is located some distance away from Hammond, to supply a battery manufacturer which has multiple plants. Our limited production of oxides was in some cases smaller than the total requirements of a large battery manufacturer. Then there is another difficulty in the fact that a large battery manufacturer is more or less standardized on the type of battery that he builds in his various plants, and he wants identically the same raw material in each one of those plants so as to have uniform specifications for their batteries. That made it difficult for us to sell even one plant, even though it were located in our own district, of a large battery manufacturer.

Q. In other words you had gained some experience then, from that, had you, that you didn't want to have all of your eggs in one basket?

Mr. Wright: Objection, Your Honor.

Trial Examiner Norwood: Objection sustained.

By Mr. Duncan:

Q. Were there any other factors that you can think of that you encountered in addition to the ones that you have already mentioned?

A. Well, to sell to some of these larger battery manufacturers it would take practically the entire output of our plant, which would mean that we would be having only one customer, and if we lost that customer we would be
2736 in a very bad position then for future business.

Q. Who have been your principal competitors in selling to the larger battery manufacturers?

A. National Lead and Eagle-Picher.

Q. Will you state the location and number of the lead oxide plants of each of your larger competitors?

A. National Lead has nine lead oxide plants distributed across the country—Brooklyn, Philadelphia, Atlanta, Charleston, West Virginia, Chicago, St. Louis, Dallas and two in California. Eagle-Picher has a plant in Joplin, Missouri, and one in Newark, New Jersey.

Q. Does Sherwin-Williams have but one plant?

A. Sherwin-Williams has a plant in Chicago.

Q. And Metals Refining only has the one plant and that is at Hammond?

A. It only has the plant at Hammond.

Q. Will you tell us approximately what the gross margin is between the cost of the pig lead and the price you ordinarily get for lead oxides?

A. In carloads, a cent and a half over pig lead on litharge, and 2½ cents over pig lead on red lead.

Q. And what is the principal factor in competing for the lead oxide business of the larger battery manufacturer?

A. It is largely a matter of being able to render service to the large manufacturer, rather than a question of price.

2737 Q. Relative to your principal competitors, have you been able to compete successfully on that basis?

A. No, we have not been able to render service to the larger battery manufacturers because of having only one plant and being, in most cases, quite some distance from the larger manufacturers.

2738 Q. About what per cent would you say you have been to sell to such buyers?

A. I think I estimated that around 10 per cent of our production, of our battery production.

Q. From your experience, Mr. Burruss, which part of your battery oxide business yields you the greater net profit?

A. Carload business.

Q. How do you explain that?

A. Carload business—Our expenses in connection with making those sales are much less than they are in making sales to the small battery manufacturer, the less-than-carload buyers. There are a number of factors that enter into that difference in freight and the clerical work in connection with handling of the orders through the plant.

Q. What has been your preference? Will you tell us whether you have had any preference with reference to selling?

A. We prefer to sell the carload buyers.

Q. You started to tell us the selling factors which you found made your sales to—was it less-than-carload buyers?—more expensive, or have you yet told us that?

A. I told you part of that.

Q. This is with reference to less-than-carload buyers of lead oxides. I want to know if you can tell us what selling factors you have found have entered into the picture as distinguished from selling lead oxides to carload buyers?

A. It affected our cost to those accounts—Did you 2739 mean the soliciting of that business?

Q. The cost.

A. In the selling to a small battery manufacturer or oxide user there were several additional costs: additional freight, additional cost of clerical work in handling the billing of the account, and so on, warehousing in connection with it, credit investigation being most if it, and credit losses in connection with that particular class of trade made up most of our expense in that connection.

Q. Is there an additional expense; namely, selling expense, that you include as a factor?

A. You refer to the solicitation of the account?

Q. That is right.

A. Yes; the more accounts you solicit in that case, the calls made by the salesman for the tonnage you obtain, your selling expenses are much higher.

Q. Will you explain, then, each of these items of additional cost more fully, if you can?

A. Well, your difference of shipping expense is the difference between the carload freight rate and the l. c. l. or truck rate. On the average that will run about 25 cents a hundred more. Then in the case of making out invoices, it takes the same amount of paper work to bill one drum of oxides or bill a carload of oxides. It is a multiplicity of paper work in connection with the handling of the order.

2740 The l. c. l. buyer is sometimes serviced out of a warehouse, and then you have additional warehouse expenses in and out in that connection.

Then the credit investigation, in the case of the large buyer simply means we refer to Dun & Bradstreet rating, and that is about all. The small fellow, we have to get special reports on him and sometimes even our Credit Department makes personal contact with him before we pass credit.

Q. In that instance, is there any necessity to make investigation of the l. c. l. buyer and to continue the investigation even after you have once sold him?

Mr. Wright: Objection, Your Honor.

Trial Examiner Norwood: On what ground?

Mr. Wright: It is a very leading question, suggesting the information which counsel wishes brought out.

Trial Examiner Norwood: Read the question.

Mr. Duncan: I will withdraw that.

By Mr. Duncan:

Q. With reference to l. c. l. buyers of lead oxides, what has been your experience with reference to checking on their credit?

A. In the first place, before we can sell them as a class— Of course, there are some that are perfectly all right, but a lot of them we have to go a point where we have to make special investigation. As I said, for instance, we 2741 have to send a man from our Credit Department or have the salesman come back and get additional information.

Then, on a repeat order from that customer, there have been cases where we had to spend an awful lot of time in following up those accounts in order to keep them in such shape that we could continue to sell them.

Q. What has been your credit experience with reference to the carload buyers as a class?

A. As a class we have been able to handle those accounts with a very small amount of credit investigation. Generally, the Dun & Bradstreet rating is sufficient and occasionally a special report. It seldom has to be followed up.

Q. Generally speaking, what has been the differential of your price by carloads and your price by less than carloads?

A. A half cent on five-ton shipments, and a cent on less than five-ton shipments over the carload price.

Q. Have you made a detailed cost analysis of the exact differences between the selling cost factors in the case of carload buyers and those in the case of less-than-carload buyers?

A. No, we haven't made any detailed analysis of that. Our records are not kept that way at all. Our entire selling expenses is lumped against the entire oxides sales.

Q. Now, in preparation for your testimony here, have you made a study for the purpose of giving us a rea- 2742 sonable approximation of those differences?

A. Yes. We checked on sales that we have made to some of these l. c. l. accounts.

Q. What have you found?

A. We find our expenses in that connection are considerably higher than they are in connection with the carload buyer. We estimate it about offsets the difference in price that is charged.

Q. What has been your experience in the case of buyers of less than five tons of battery oxides?

A. We have only sold a very small amount of those as a class. They have been comparatively poor credit risks and entailed an awful lot of follow-up in order to collect on sales we have made, and our expenses in connection with those have been much greater than in connection with the larger buyers.

Q. Does that additional or second half-cent differential that you charge the l. c. l. buyer who buys less than five tons of lead oxides cover the additional credit losses and credit investigation expense in that class of buyer?

A. I haven't any detailed—

Mr. Wright: Your Honor, I object to questions along this line which go to the matter of costs and expenses, and unless there is some more proper basis for a legal establishing of what those costs and expenses were. So far
2743 we are only having opinion evidence by this witness.

Trial Examiner Norwood: We are having estimates from these men who conduct the business and who have to do business, or at least who do business on these estimates, and I think they may come in for whatever they are worth. Any objection to their not being accurate surveys would go to the weight. I shall overrule the objection.

By Mr. Duncan:

Q. Did you understand my question?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

By Mr. Duncan:

Q. Did you understand the question?

A. Would you repeat it, please?

Trial Examiner Norwood: Read the question.

(The question was read by the reporter.)

The Witness: When you take into consideration the amount of time spent by our local Credit Department and our general Credit Department in Cleveland on that class of buyer, I would say that the added differential did not compensate for the expense in connection with handling that business.

By Mr. Duncan:

Q. Did you make any study of the expense of credit investigation?

A. I made no detailed study of the expense of 2744 credit investigation. That is, to be able to furnish you with any accurate figures as to the cost of handling any particular account.

Q. Can you tell us what your credit investigation and credit loss is in your sales from Metals Refining Division of lead oxides to carload buyers as a class?

A. As a class it has been relatively low as compared with the smaller buyers of oxides.

Q. What are the facts on the less-than-carload buyers? I am talking about the period before 1942.

A. Most of our losses on lead oxides were confined to the less-than-carload buyers, and most of our expense during that period was in connection with the smaller buyers. That is, prior to 1942. Since 1942 we have not been making very much lead oxide and have sold very few of those accounts.

Q. Before 1942, can you tell us about how many l. c. l. customers you had on your books, that is, approximately?

A. I can't give you an accurate figure, but I would estimate somewhere between 75 to 100.

Q. Have you been able to state exactly how much that expense has been in any typical period?

A. No.

Q. Would it be possible to give an exact figure?

A. No, our records are not kept—nor do we subdivide the expense of our Credit Department between our lead oxide business and all other lines.

2745 Q. What is your judgment on the matter generally?

A. Our losses in connection with the smaller accounts have been very much larger than with the larger buyers of oxides. Also our expenses in connection with servicing those accounts have been much larger. By "service", I mean collections and following them up on the part of our Credit Department.

Q. Will you state whether or not you have any warehousing expenses with respect to your sales of carload lots?

A. No, they were all shipped direct from Hammond.

Q. In other words, you didn't have to split up any carloads?

A. No.

Q. For local distribution, is that it?

A. Not to a carload buyer. It went direct from Hammond to the carload buyer's plant.

Q. Have you any way of showing your warehousing expense and what you call the moving-in-and-out-of-warehouse expense in relation to your less-than-carload sales in any typical period?

A. No, we have not kept any records on that in connection with our lead oxide sales, but we did make such a survey in connection with the handling of our lithopone business, and where we charge an extra quarter of a cent for ex-warehouse delivery. The result of that survey indicated the quarter-cent did not cover expense of in and out of
warehouse, and we added drayage charges to the
2746 customer's plant. I assume that would be applicable
also to lead oxides.

Mr. Wright: Your Honor, I move to strike all of that answer after "No, we have not". He is referring now to warehouse expense and dealing with customers on an entirely unrelated product.

Trial Examiner Norwood: It is clear that that final assumption should come out, I think.

Mr. Duncan: Your Honor, I have no objection to the assumption being stricken.

Mr. Wright: After he said he didn't know in answer to counsel's question should also come out.

Trial Examiner Norwood: Read the answer.

Mr. Duncan: That is just by way of comparison to lithopone.

(The answer was read by the reporter.)

Mr. Duncan: No objection to the last part. That should go out, but I think the balance—

Trial Examiner Norwood: (Interposing) The first part was not responsive to your question.

Mr. Wright: No, sir, and what the first part was related to directly was that assumption. If the assumption was invalid so also was the first.

Trial Examiner Norwood: He may lay the ground for this lithopone expense being approximately the same as
the other. Then, after he lays that ground, he may
2747 bring out what he did there, but in the present situa-
tion I shall allow the motion to strike everything after the first denial, "No, we have not".

By Mr. Duncan:

Q. Mr. Burruss, did you have occasion to check on in-and-out expense with respect to lithopone warehouse stocks?

Mr. Wright: Objection, your Honor.

He hasn't established any similarity.

Mr. Duncan: I am about to do that. I can't do it any other way.

Trial Examiner Norwood: I think you should lay your ground first as to the similarity in the cost of handling lithopone and the commodity with which this proceeding is concerned.

Mr. Duncan: All right.

By Mr. Duncan:

Q. Mr. Burruss, is there any comparison between lithopone products and lead products with respect to the handling of the products?

A. They are both handled in carload lots and l. c. l. lots and warehouse lots.

Q. Is it your judgment that the products can be compared with one another with respect to their warehousing expenses?

A. Most of those expenses are on a tonnage basis and a fixed charge per ton for in and out.

2748 Q. Is your answer in the affirmative then?

A. Yes.

Q. Will you tell us whether you made any study of the lithopone warehouse expense?

Mr. Wright: Objection, your Honor. All the witness said was that the lithopone was sold in carload lots and less than carloads and in warehouse quantities. That applies to almost any commodity in the whole United States. There is no indication here of the class of trade or the users or the similarity of the methods of handling it. All that answer went to was the quantities in which it was delivered. Obviously everything that is traded in is handled in those quantities from corn syrup to Wheaties.

Trial Examiner Norwood: My understanding is that he has indicated by his testimony that the cost of handling these two commodities are similar or practically the same. You may question him further about that if it isn't clear.

Mr. Wright: There has been no indication that they sold the same class of customers or that the hauls or circumstances under which they are sold and delivered are the same.

Trial Examiner Norwood: I don't think that is necessary here in showing these costs of handling.

Mr. Wright: Obviously the location of customers and the factors that are involved in the delivery are of the 2749 essence in determining the comparable basis of the two commodities. As I understand it, lithopone is sold to the paint industry. We are talking now about a product sold to the battery industry.

Trial Examiner Norwood: This question is directed to the cost of in and out of the warehouses.

Mr. Duncan: That is right, your Honor. I think the witness has shown the comparison of the products so that he can, at least, merely for the purpose of weight, attempt to tell your Honor that he has a study of the lithopone warehouse expenses and then it is up to your Honor to determine whether or not the assumption should be made that the results that he has reached with reference to his study of the warehouse expense in connection with lithopone should be applied to lead oxides.

Mr. Wright: Your Honor, on the same basis the warehousing expenses of the paint divisions of Glidden would be evidence of what their warehousing costs were for metallic leads or any other commodity, but still it has no relevancy to the warehousing costs of these different oxides.

Trial Examiner Norwood: If it were paint or anything else he wants to use as a basis of comparison, if he will show they are practically the same—counsel has some doubt as to whether grounds have been laid?

Mr. Wright: That was the sole purpose of my objection on that, that there hadn't been such grounds.

2750 Trial Examiner Norwood: I don't want to take the time to read the record back here. I will sustain the objection to the present question and ask counsel to make sure that the witness has answered as to these comparative costs between the two commodities.

2751 By Mr. Duncan:

Q. Mr. Burruss, in respect to warehousing expenses, do you regard the lithopone product in the same category as lead oxides?

Mr. Wright: Objection, Your Honor. That question is so broad and general that it is not specific, it doesn't relate—

Mr. Duncan (interposing): Specific reference was made.

Trial Examiner Norwood: Do you mean with regard to the cost of handling it in the warehouse, in and out?

Mr. Duncan: Yes.

Trial Examiner Norwood: You may answer that. I will overrule the objection.

The Witness: Both of those items are pigments, and they take approximately the same warehouse expense. I haven't checked that exactly one way or the other, but they are approximately the same.

By Mr. Duncan:

Q. Now, have you made any study of the expense, warehouse expense, with respect to lithopone?

A. Yes.

Q. Will you tell us what you found?

Mr. Wright: I object, Your Honor. The witness just stated he hasn't checked whether they are the same 2752 one way or the other. He has a belief.

Trial Examiner Norwood. Objection overruled.

By Mr. Duncan:

Q. Will you answer the question?

A. Will you repeat it, please?

Trial Examiner Norwood: Read the question.

(Question read by reporter.)

The Witness: The survey we made on lithopone indicated that our warehouse expense exceeded ¼ cent per pound.

By Mr. Duncan:

Q. Mr. Burruss, in your judgment what effect do price differences have in competition in selling lead oxides?

A. Service rather than the small difference in price controls the sales to the larger battery manufacturer. In case of the smaller manufacturer, price is apt to be competitive, but the main factor in making a sale to that class of account is a liberal credit policy.

Q. Did you find that Metals Refining Division was in the same position as its competitors to give service to the large battery manufacturers?

A. No. With one plant we were not in as good a position to service a large battery manufacturer having multiple plants.

Q. To what extent is price a factor, in your judgment, in selling to the small battery manufacturer?

A. It must be competitive on price to the smaller 2753 battery manufacturer.

Q. Have you been talking about the period since World War II started?

A. No, we haven't made much oxide since World War II.

Q. Will you explain the circumstances which have led Glidden to keep on selling lead oxides to a class of purchasers with greater credit losses and expenses?

A. We had to maintain a volume of production in our plant that would enable us to realize a profit on that operation, and where that was not obtainable from a source of good credit, we had to take on the less profitable business.

Q. In that regard how does your position compare with your competing producers of lead oxides?

A. We are in somewhat of a different position from our competitors because of having only one plant and not being able to enjoy or even to supply the larger battery manufacturers. We have had to confine ourselves more to the smaller users, and in that way we are in a different position than our competitors. The only other manufacturer that compares with us in size is Sherwin-Williams, and they consume most of their own oxides.

Q. Have you charged any higher delivered price to buyers at a distance from your single plant?

A. We charge a competitive price on oxides wherever we have sold them.

2754 Trial Examiner Norwood: Does that answer the question?

The Witness: We have charged differentials in those territories distant from our plant where it was possible to charge them.

By Mr. Duncan:

Q. Have you made any detailed differential analysis of the added cost of charging to delivery points, say, in the West?

A. No, I haven't made any detailed analysis of it.

Q. Why is that?

A. Our records are not kept so that we can obtain that information.

Q. But from your experience can you make a fairly reliable approximation?

A. The difference between the less carload and the carload freight rate to the distant points is generally sufficient to absorb the differential that is charged on shipments made from Hammond.

Q. Would you say that the distant buyers have been favored or not favored?

Mr. Wright: Objection, Your Honor.

Trial Examiner Norwood: Sustained.

Mr. Duncan: I will put it this way:

Q. As a result of that, what is the effect, then, on the distant buyer?

2755 A. The effect on the distant buyer and the effect on ourselves is that we have taken a less margin of profit on a sale to that buyer than we have on one close by. He has been able to get his oxides at competitive prices.

Q. Why have you been willing to do that?

A. Mainly to maintain volume of production in order to have an over-all profitable operation.

Q. To what extent have you sold your lead oxides in territories where the territorial differential has been added?

A. We sold a very small amount in those territories.

Q. Will you explain that, please?

A. Business is more expensive for us to handle because of the higher freight rates, and it hasn't been attractive, and we have only taken it when it is necessary to maintain volume.

Q. In the more remote regions, do you feel competition from other plants that are nearer?

A. Having only one plant in Hammond and going to the southwest or to the west or to the south, we have the competition of plants of our competitors who are located close by.

Q. How does that affect you?

A. That competition prevents us from realizing as much gross profit on those sales as we would if we were able to charge the higher differential without the competition.

Q. Why do you sell at all in those remote regions?

A. As I said, simply to maintain volume.

2756 Q. Have you ever had or used a zone map?

A. No.

Q. On those cases where you have before the war—that is, World War II—made sales in remote regions, how did you name your price?

A. We met the competitive price in the district, in the part of the country in which the sale was made.

Mr. Wright: Objection, Your Honor. It is not responsive.

Mr. Duncan: I think it is.

Trial Examiner Norwood: I think it is.

Mr. Duncan: Absolutely.

Trial Examiner Norwood: Overruled.

By Mr. Duncan:

Q. On those occasions when Metals Refining had decreased its price on lead oxides, what have been the circumstances leading to such a decrease?

A. Following the drop in the lead market and decrease in price of oxides on the part of our competitors, our price was lowered accordingly.

Q. What was the economic effect then upon your business?

A. Until the inventory that we had on hand was disposed of, we realized a smaller margin of profit on the tonnage produced from that inventory until it could be replaced at a lower market.

2757 Q. What have been the circumstances which have led you to increase your price of lead oxides when you have done that?

A. When there was an advance in the lead market and competition advanced their prices, we advanced ours also.

Q. Have you ever made lead oxides on any other basis other than the sale of the finished product?

A. Yes, we have made them on a toll basis.

Q. Will you describe that?

A. On that basis of sale the purchaser supplied us with lead and we converted it into lead oxides for him at a toll charge, which is the same differential as we would charge if we had bought the lead ourselves.

Q. In substance what is the economic effect of that practice in your business as distinguished from the economic effect of buying the lead and then selling the finished product to the customers at an agreed price?

Mr. Wright: Objection, Your Honor. This witness hasn't been qualified as an economist.

Mr. Duncan: He is running the business.

Trial Examiner Norwood: Read the Question.

(Question read by reporter.)

Trial Examiner Norwood: I think you could ask him questions that would bring that out in a factual way. I think you are asking him for an expert economist's opinion. You may ask him how that is reflected in his profits and

2758 losses and things like that, but I wouldn't couch it in the scientific language. Objection sustained.

By Mr. Duncan:

Q. Mr. Burruss, will you tell us how that was reflected in your profit and loss?

A. There is no difference between the sale of that kind and the sale made where we purchased the lead and sold it at a fixed price. We are simply converters in the first place, and all we have is the differential to work on.

Q. Now, Mr. Burruss, have you ever received any request or any suggestion or intimation from any of your competitors as to what role Metals Refining Division of the Glidden Company should follow with respect to Glidden's pricing and pricing methods?

A. No, sir.

Q. Did your company at any time to your knowledge ever enter into any agreement or understanding or arrangement with any other producer or seller of any lead pigments with respect to the fixing of prices?

A. No, sir.

Q. Has any such agreement or understanding or arrangement come to your knowledge?

A. It has not.

Q. Have you ever heard of any?

A. No, I never heard of any.

2759 Q. Did anybody in the company have any authority to enter into any such agreement, understanding or arrangement?

Mr. Wright: Objection, Your Honor. There is no showing that this witness has knowledge of the authority the people in the Glidden organization might have.

Trial Examiner Norwood: Read the question.

Mr. Duncan: If Your Honor please, this witness is in charge of the Metals Refining Division of the company. He was Assistant to the President for some years. He isn't just an employee.

Mr. Wright: He is not an officer of the corporation, however.

Mr. Duncan: He is manager of the Metals Refining Division.

Trial Examiner Norwood: Lay the ground for that or else ask him if he has knowledge of that.

Mr. Wright: I will withdraw the objection.

Trial Examiner Norwood: All right.

Mr. Duncan: Will you repeat the question?

(Question read by reporter.)

Trial Examiner Norwood: Answer from your own knowledge.

The Witness: Not to my knowledge.

By Mr. Duncan:

Q. Did the company either through you or anybody else at any time enter into any such agreement, understanding or arrangement? 2760

Mr. Wright: Objection, Your Honor. This is cumulative and leading.

Trial Examiner Norwood: Objection sustained.

Mr. Duncan: Note an exception.

Trial Examiner Norwood: Your qualification there—did the company do this through anybody else—renders the question objectionable. Ask him if he knows about it.

Mr. Duncan: All right.

By Mr. Duncan:

Q. Did the company through you at any time enter into any such agreement, understanding, or arrangement?

A. No, sir.

Q. You understand that when I refer to "agreement, understanding or arrangement" in these questions which I have just asked you, I have been referring to oral as well as written agreements, understandings or arrangements?

A. Yes, I understand that.

Mr. Duncan: That is all. You may have the witness.

Trial Examiner Norwood: Cross examine.

Cross-Examination by Mr. Wright.

Q. What is your definition of an agreement or understanding, Mr. Burruss?

A. A meeting of the minds of two parties.

2761 Q. In other words, if A and B met—I will withdraw that. How long have you been with Metals Refining Division, did you say, Mr. Burruss?

A. Since the Fall of 1935.

Q. You had nothing to do with the negotiations then under the Pigments Division of the Lead Industries Association?

A. No.

Q. You have been speaking of your prices being competitive and of competitive prices in your direct testimony. What do you mean by the word "competitive" in that sense?

A. By that I mean that we have sold our products at the highest price we could get for the products, meeting the competition we encountered in the price.

Q. The same as the price of the market leader in that area?

A. Wherever it was possible or wherever it was possible to ascertain that price.

Q. You stated that 30 per cent of the oxides went to the battery business. Where, roughly, are your sales percentagewise of the remaining 70 per cent?

A. Largely to the dry colors, insecticides, fungicides, oil refiners, paint and varnish trade.

Q. Did you sell in carloads to the paint and varnish trade generally?

A. Yes.

2762 Q. To what customers do you generally sell in carloads in the paint and varnish trade?

A. I can't give you the names of those accounts. They are on the tip of my tongue, but I can't think of them.

Q. What per cent of your business in oxides goes to the paint and varnish trade, roughly?

A. Including our own plants?

Q. No, sir. Sales to others.

A. That is the paint and varnish trade?

Q. I meant to exclude Glidden's own consumption.

A. That would be, roughly—I have no basis of making this estimate—I have made no analysis, but I would guess between 10 and 15 per cent.

Q. Of that somewhere between 10 and 15 per cent sold to the paint and varnish trade, how must of it was sold in carloads at the carload price?

A. To companies that I haven't been able to remember the names of are carload buyers and make up the biggest portion of that tonnage.

Q. When you were giving these figures, 30 per cent to battery manufacturers, you were combining the various litharges and red leads together, were you not?

A. Yes.

Q. Is there much litharge sold to the paint and varnish trade?

A. The varnish manufacturer, yes.

2763 Q. About how much of that 10 or 15 per cent of the oxide business to paint and varnish manufacturers is litharge?

A. That is small compared to the total of red lead business. There again it is probably 20 per cent or less.

2764 Q. Red lead makes up by far the biggest bulk of that?

A. Yes.

Q. How about the dry color industry? How is that divided between litharge and red lead?

A. Dry colors, I don't believe take any appreciable amount of red lead, if any at all, because those sales are litharge.

Q. In that industry are those products further processed?

A. Into chrome yellow and chrome greens.

Q. Made directly from the litharge?

A. Made directly from the litharge.

Q. How are those customarily purchased in the dry color business, carloads, five-ton—

A. Practically all in carload lots.

Q. How about the insecticide and fungicide portion of your business? How much does that account for outside of Glidden's own consumption?

A. That is approximately the same as the dry color business. It is all carload business.

Q. About how much of the total is it, roughly—five, ten percent?

A. That will run somewhere between 10 and 15 percent of the total oxide business.

Q. Do you sell any to the petroleum refining industry?

A. Yes.

Q. About how much of your production goes there?

2765 A. I would be guessing on that, but that particular tonnage is declining at the present time, owing to the fact that the oil refiners have put in recovery systems, and over a period there again I think we have somewhere around 10 percent, I would guess.

Q. What product of the oxides is principally used in the oil refining business?

A. Litharge.

Q. Is that used in making leaded gasoline?

A. No, that is used in sweetening gasoline, the removing of sulphur from gasoline.

Q. You stated on direct examination that 60 percent of your battery sales were to carload customers, that only 10 percent of them were large manufacturers. What do you mean by "large"?

A. In the case of a large manufacturer I was referring to those companies that have multiple manufacturing plants. A battery manufacturer who operated more than one battery plant.

Q. Aren't there some battery companies that are pretty large operations with only one plant?

A. Yes, there are several.

Q. Were you including any of those in there?

A. I guess you would include one in there, yes.

Q. Approximately what annual tonnage would you refer to as being large in point of consumption of these oxides?

A. Well, as a large battery manufacturer, I would
2766 say someone consuming 7,000 to 10,000 tons or more.

Q. A year?

A. A year. Maybe I am a little high on the lower figure.

Q. Would you consider Bowers Battery Company a large battery company?

A. A fairly large battery company. That is why I started to revise my figure when I thought of him.

Q. You spoke of the difficulty that you had in supplying the type of service necessary to keep the large battery companies as accounts. What kind of service do they require?

A. I was referring to our ability to deliver material to them in regular quantities and have it in their plants at the times they want it so there would be no interruption in their operations. That was what I meant by "service" there.

Q. Now, with reference to the exact control of oxides to specifications, you mentioned that as being one of the requirements of selling to a large account. What processes are necessary to control specifications and what specifications do you mean there?

A. I don't recall that I used that particular term. I was referring to, I believe, the specifications of the large manufacturer operating several plants in the manufacture of batteries, where he has the same formula in each plant for making a given type of battery. It requires the same oxides as the raw material in making that battery.

2767 Q. Does that require a uniformity of grind so there is a uniform particle size?

A. Not necessarily uniformity of grind, no. It is the way the oxide reacts in the formation of a battery plate, either positive or negative.

Q. What formula differences are you speaking of now? I want to find that out.

A. Formula differences?

Q. Yes.

A. Formation differences.

Q. You spoke of the different formulas that a battery manufacturer used in each of his plants.

A. Yes.

Q. What are those formula differences? What do you mean by that?

A. The specifications that he had for forming his batteries, what percentage of oxides, the time it took to form that plate or that battery into—that is, to finish off and convert it into an operating battery, the strength of acids that were used, and so on.

Q. What did that require on your part in supplying them?

A. Oxides from different plants react somewhat differently, depending on the process used in making the battery. Adjustments can be made in the battery plants to compensate for it, but where a man has a standard procedure
2768 set up for doing a job, and you change the type of raw material he uses, he has to change his method of processing the raw material.

Q. Those are factors which you can't control in the manufacture of the oxides, then?

A. We can't change our oxides to absolutely duplicate the products made by our competitors.

Q. You have a variety of different grades for performing different functions in accordance with the different tastes of different battery manufacturers; do you not?

A. Yes, we have a variation of oxides, but they don't necessarily conform to the same grades of oxides as made by competitors.

Q. You referred to the fact on direct, I believe, that the carload shipments were always made direct from the plant in carloads and the cost was, therefore, less.

I direct your attention to a series of exhibits which are in the record as Commission's Exhibit 831 with sub numbers. I call your attention to Exhibit 831-A, which is an invoice to the Federal Storage Battery Company, Chicago, showing 10 drums in September, 1941.

That is, apparently, the carload price in effect at that time. I believe it was testified here that the pig lead price then was 5.85 New York.

Mr. Duncan: You are referring to No. 736?

Mr. Wright: 735.

2769 By Mr. Wright:

Q. Is that the carload price? Do you recognize that as being the carload price?

A. 5.85 was the lead market.

Q. Yes.

A. That would be the carload price.

Q. That is the product, Metrox Plumbarge 95-X?

A. Yes.

Q. That is a litharge, is it?

A. That is battery oxide.

Q. This Metrox RM oxide No. 2 at 7.60—does that have 25 percent red lead, 75 percent litharge, for positive plate manufacture?

A. Yes.

Q. It customarily sells at a differential of 25 cents per hundred above the strict litharge price?

A. That is correct.

Q. That 831-A shows shipment of 20 drums. 831-D—

A. (interposing) Doesn't it all refer to the same order?

Q. Different shipping dates on these invoices.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

The Witness: I think that all refers to an order of the Federal Storage Battery Company, one carload order delivered to them over a period, during the period at
2770 least when we were definitely short on oxide production. Our stocks were down, and we delivered them over a period. I think that was what you are referring to.

By Mr. Wright:

Q. I note on No. 831-G, "applies on standing order." Was it customary to put a standing order in that way? With delivery periodically from day to day in less than carload quantities?

A. In truck shipments to Chicago. A customer would place an order, whether for truckload or carload. It would be trucked up there and we would try to deliver those as rapidly as we could. Sometimes we weren't able to get transportation in order to deliver those for days at a time.

Q. I call your attention to the fact that 831-O is an invoice of December 1 of 20 drums, which still refers to "applies on standing order of October 2, 1941."

A. I recall those and the time they were made up. There were some in there where we applied shipments to the wrong orders in our Accounting Department because we made shipments against one order and then came back and made shipments against the other as far as the invoicing was concerned. I think this is the account.

Q. Please just answer my questions now and don't volunteer.

I show you Commission's Exhibit 831-Z-26, which is an invoice of December 13, 1941, to the Illinois Battery & Electric Company of 11 drums of oxides. Is that
2771 the card price that appears for those positive and negative oxides there?

A. I wouldn't know unless I saw the card. Have you got the card for that time?

Q. I call your attention to the fact that on Commission's Exhibit 831-R to the Federal Storage Battery Company in what you said was the carload price, within three days of that, that the price on the same materials—

A. (interposing) This was the carload price if the lead market was 5.85. I qualified my answer that way.

Q. I understand it is established in the record that that was the price of lead during that period.

A. It depends on whether this price applies to that lead market, as to when that order was accepted in our plant. I don't know whether this—whether there had been a delay in it or not.

Q. Please don't explain these things unless you are asked a question about them.

A. I am sorry.

Q. Was it your custom in making these sales to make a price at the time you accepted the order and to continue shipping over a period of months at that same price irrespective of movement, pig lead market?

A. If we accepted an order for a definite amount of oxide for delivery to a given point, we would make delivery on that tonnage of oxide where we accepted the order at a given price.

2772 Q. On the date that the order was accepted?

A. On the date that the order was accepted.

Q. That is a contractual relationship which is common in the industry?

A. That is right.

Q. Well, now, calling your attention again to this invoice, Commission's Exhibit 831-Z-26, you will notice the Metrox Plumbarge there is $8.25 per ton.

A. Yes.

Q. And $8.50 is for the positive oxide. What transportation differential was there, if you know, involved in shipping 20 drums by truck to the Federal Storage Battery Company and 11 drums by truck to the Illinois Battery & Electric Company?

A. Difference in transportation—they are both located in Chicago?

Q. Yes. What was the cost difference involved in those two transactions?

A. I don't know what the actual cost was on either one of these shipments.

Q. I notice that on 831-O and 831-Z-26 the "via" is by Welch in both instances.

A. I think the freight rate on both of them is identically the same, but you asked me if I knew, and I don't know.

Q. That is the same carrier?

A. Yes.

2773 Q. Does that refer to a local trucking company?

A. Yes.

Q. And they had a set rule for delivery per hundredweight cartage in the city of Chicago?

A. That is right.

Q. Would there be any substantial difference between per hundredweight cartage rate in Chicago between 20 drums and 11 drums?

A. I don't recall the schedule of that trucking contract, but it has breaks in it as to the tonnage that is delivered.

Q. Would it be more than 5 cents a hundredweight difference on those two quantities, in your recollection?

A. I just don't know. I don't think so, but I don't know what it actually was.

Q. You don't know what the local cartage rate is in Chicago from Hammond?

A. No, I don't.

Q. I call your attention now to a shipment indicated as December 3, 1941, on Commission's Exhibit 841-Z-45 to the Bowers Battery Manufacturing Company, Inc., Reading, Pennsylvania, on 63 drums. That, likewise, is the carload price, assuming that 5.85 was the pig lead price at that time. Is that correct?

Mr. Duncan: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

2774 The Witness: Assuming that would be the carload price on the date this order was accepted.

By Mr. Wright:

Q. I call your attention to the fact that the bill of lading or freight bill that is attached to that invoice and appears as No. 831-Z-46 shows the freight rate there of 38 cents per hundredweight on that shipment of Bowers. Do you know whether this particular shipment went prepaid freight or collect?

A. Not unless it shows here on the bill of lading. I don't know which way it went.

Q. In either event, it came out of the price there of 38 cents, did it not?

A. It states on the invoice.

Q. That it was sent freight collect?

A. Freight collect.

Q. In that event, do you have some means of allowing the freight that was paid by the buyer when he received such a shipment as that? The invoice doesn't show any payment of freight back to the buyer.

A. We ship, if it is all right to give you this without a question, we ship on two bases: f. o. b. Hammond, with freight allowance to the customer, and we prepay the freight in those cases where it is difficult for the customer to pay his freight bill and get delivery. We credit the customer's account with the actual amount of the freight.

2775 Q. That he pays as shown by the freight bill?

A. That he pays, and it is returned.

Q. Presumably, you made a credit memorandum for Bowers in the amount of the freight shown on this freight bill as being paid per hundredweight of this material.

A. Yes.

Q. Is there any saving to you in your transportation costs in doing business with Bowers as shown on Commission's Exhibit 831-Z-45 as against 831-Z-26, the transaction with the Illinois Battery & Electric Company?

Mr. Hinds: That is objected to, Your Honor, on the assumption that counsel is sticking to his commitment that we are not going into individual discriminations, and that he is considering discriminations by classes, and in this case I assume between classes of customers, until it first be shown in which general class each of these customers is. I understand that when you justify by classes, you take people as a whole and not as individuals.

Trial Examiner Norwood: Objection overruled. He may answer.

The Witness: Will you read the question, please?

(Question read by reporter.)

The Witness: The carload freight rate from Hammond to Reading in this particular case, which applies to the
Bowers shipment, is higher than the truck rate from
2776 Hammond to nearby Chicago.

By Mr. Wright:

Q. In less than carload quantities?

A. In less than carload quantities.

Q. In such instances then, in your sales to the carload customer you actually incur a larger transportation cost than you do in sales to nearby less-than-carload purchasers?

A. I can sell across the street to a man an L. C. L. shipment and the cartage expense on that would be much less than a shipment of a carload of oxides to New York. I don't think there is any comparison.

Q. Isn't it a fact that some of your less-than-carload accounts paid cash on delivery when they purchased oxides from you?

A. I can't answer that question directly. I would say that if that was done, it was because we would not advance him any credit.

Q. In cases of those people who are sold on a cash basis your Credit Department has no further expense in connection with them because there is no credit investigation any more?

Mr. Hinds: Just a moment. That is objected to on the same ground, that where quantity differentials are involved, the customer must be taken by classes, and when you take any other base differential on any other kind of
classes, one particular customer may involve very lit-
2777 tle expense, buit if it comes in an expensive class, the
differential will apply to him.

In other words, on the class differential you have to take them by classes. I therefore object that the question is immaterial.

Mr. Wright: Your Honor, right there, that is the second objection Mr. Hinds made on the same ground in the last few minutes. I refuse to be jockeyed into the position that we are taking these discriminations by broad general classes. We have gone into that before, and that just isn't the case.

Trial Examiner Norwood: In any case, that is a question of application which we will have to resolve after a great deal of study, maybe, and discussion.

Mr. Wright: I think it ought to be plain on the record, before counsel finish putting in their defense I want the record to show that he has any thought that I contend only that these are broad general class discriminations and that by the testimony of this witness and Mr. Sprague he can say we found we had larger costs in doing business with less-than-carload customers; therefore, they are justified under the Robinson-Patman Act.

Trial Examiner Norwood: I feel you have a right to bring out this testimony here as to the matters which are brought up by matters of law which will be settled later.

We are bringing out all matters that apply here to
2778 bona fide contentions of either side. It is just a broad
investigation. Objection overruled. Please read the question.

(Question read by reporter.)

The Witness: That is correct.

By Mr. Wright:

Q. Regarding this matter of freight and cartage and the different types of customers, I call your attention to Commission's Exhibit 852-B and C, which is a list of storage battery manufacturers purchasing lead oxides from Metals Refining Company from October 1, 1941 to December 31, 1941. Did you have anything to do with preparing that document, Mr. Burruss?

A. I personally had nothing to do with preparing it.

Q. I will tell you that it is in evidence as furnished by the Glidden Company in answer to specific inquiries.

Now, I direct your attention to the fact that the truck rates there on deliveries from Hammond to Chicago and Berwyn and in that local metropolitan area appear to be 15 cents in less-than-carload and in 5-ton lots, and 11 cents in carload lots.

A. That is right.

Q. I also call your attention to the fact that in many instances the transportation charges per hundredweight involved in the less than 5-ton transactions are less than the transportation charges in either the carload or 5-ton lots.

2779 A. Where they are close by.

Q. Where they are close by your plant.

A. Yes.

Q. Now, you stated that you made a survey of some less-than-carload accounts. Was that your testimony?

A. We checked less-than-carload accounts.

Q. How did you check them? What did you do?

A. As far as our shipping expenses or selling expenses were, delivering to the less-than-carload accounts, if that is what you are referring to.

Q. Yes. I am referring now to the matters about which you testified on direct in answer to Mr. Duncan about checking the less-than-carload accounts on various items of expense.

A. Oh, yes.

Q. How did you select the accounts that were subject to that check?

A. I didn't check individual accounts.

Q. What did you do?

A. That is, in making this survey. I inquired of our credit department how much of their expense was involved and applicable to the smaller accounts, the 5-ton, and to the carload buyer.

Q. Do you know how they got that information for you?

A. I don't know exactly how they got it. I assume it was on the basis of the number of calls that were made on a particular account, the amount of correspondence involved.

2780 Q. For all you know it might have been someone's guess or opinion as to what—

Mr. Duncan (interposing): I object to the form of the question. It is in the alternative, either guessing or opinion.

Trial Examiner Norwood: Read the question.

Mr. Wright: I withdraw it.

By Mr. Wright:

Q. As far as you know, it might have been someone's opinion in the credit department as to how much of the time was spent in the various accounts?

A. I think we have reliable employees, and they give me the information that I ask for rather than a guess.

Q. You don't know how they might have obtained that information, do you?

A. No.

Q. Or what processes they might have gone through to get it?

A. I do not.

Q. Or what records they had available from which it could be secured?

A. No.

Q. Was that in the form of a written report?

A. No, that was in the form of a verbal statement from our credit department.

Q. And that purported to cover all your L. C. L. 2781 accounts both the 5-ton lots and less than 5-ton lots—those customers?

A. Yes.

Q. Do you make any distinction between the two as to the expenses between the two?

A. I don't recall that they made any distinction between the 5-ton and the less than 5-ton.

Q. Your information about selling expense—is that in the same category?

A. Selling expense is the same way.

Q. In other words, the basis of your information is the same?

A. That is right.

Q. And the expense of servicing the accounts—is that in the same category?

A. Yes.

Q. And as to warehousing expense on the lead oxides—is that in the same category?

A. That was a report that we had in our Chemical and Pigment Division.

Q. You are referring to lithopone reports?

A. The lithopone report.

Q. But as to any information on oxides, you have no more specific information than that which you referred to from the credit department and from the sales department?

2782 A. That is right.

Q. In what industry is lithopone sold?

A. Largely the paint industry.

Q. And your L.C.L. customers for oxides are primarily in the battery industry?

A. Largely, yes.

Mr. Wright: I have no further examination.

Mr. Duncan: I have no redirect, Your Honor.

Trial Examiner Norwood: Thank you Mr. Burruss. You are excused.

(Witness excused.)

Mr. Duncan: We have no further evidence to offer on behalf of the Glidden Company at this time, Your Honor, but we want to reserve on behalf of Glidden the right to introduce further testimony or recall the witnesses whom we have already produced here. We also reserve the right to introduce further exhibits.

Trial Examiner Norwood: You have that right under our procedure.

Mr. Duncan: Thank you.

Trial Examiner Norwood: What is your further pleasure?

Mr. Ewing: As we discussed last week, our plan would be to proceed here on the 10th of June, acts of God and public enemy excepted.

2783 Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: The hearing is recessed until 9:00 o'clock a.m., Eastern Standard Time, 10:00 o'clock District Time, on June 10, 1947, in room 332, office of the Federal Trade Commission, Washington, D. C.

(Whereupon, at 4:10 p.m., the hearing was recessed until 9:00 a.m. Eastern Standard Time, 10:00 a.m. District Time, June 10, 1947.)

2784 Room 332, Federal Trade
Commission Building,
Washington, D. C.,
Tuesday, June 10, 1947.

Met, pursuant to adjournment, at 10:00 a.m., E. D. S. T.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., and
Paul R. Dixon, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick, & Richardson, 815 15th St., N. W., Washington, D. C.), appearing for Sherwin-Williams Company.

Edmund P. Wood, Esq. (2801 Carew Tower, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Henry E. Gardiner, Esq. (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James D. Ewing, Esq., and
E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

2785 PROCEEDINGS.

Trial Examiner Norwood: Pursuant to adjournment on May 15, the hearing in Docket 5253, National Lead Company, et al., is now reconvened in Room 332, Office of the Federal Trade Commission, Washington, D. C., at 10:00 a.m., Eastern Daylight Saving Time, on the 10th day of June, 1947.

The reporter will note the appearances.

I suppose that it is in order this morning for me to rule on the motion to strike. Both Mr. Wright and the counsel for Glidden have filed memorandum arguments with me, and I suppose that it is agreeable to counsel not to put those documents in the record.

Mr. Wright: Well, won't those briefs go in the record under the new Rules, Your Honor?

Trial Examiner Norwood: They can be left out by agreement. You may make your motion for the record here.

Mr. Wright: May we go off the record a moment?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: Your Honor, I move that the testimony of the witness David N. Burruss, Jr., beginning in the transcript at line 5, on page 2738, and continuing through line 18 on page 2754, which is the direct testimony, and the testimony of the same witness on cross-examination 2786 beginning at line 4, page 2779, and ending at line 6 on page 2782, be stricken from the record.

I would also like to move that the testimony of the witness Sprague, lines 17, 18 and 19 on page 2551; and the further testimony of the witness Sprague beginning with the words, "But facing", on line 5 of page 2710 and continuing through line 19 of the same page; and the further testimony of the witness Sprague beginning at line 21 of page 2721 and continuing through line 4 of page 2725; and the further testimony of the witness Sprague beginning at line 2 of page 2729 and continuing through line 9 of page 2730, be stricken from the record.

The grounds of the motion are that this testimony was improperly admitted, being incompetent to prove justification for discriminations under Section 2(a) in the record, and that it was hearsay, opinion testimony based upon facts and records which were not available for purposes of cross-examination, and which were not within the personal knowledge of the witnesses.

Trial Examiner Norwood: This motion to strike the testimony of the witness Sprague is a new motion.

Mr. Ewing: That is correct.

Trial Examiner Norwood: We will have to take that under consideration, and we can discuss it further when I have seen the record and seen the particular lines 2787 involved. But counsel may go ahead now and discuss his motion to strike the testimony of the witness Burruss.

Mr. Wright: Your Honor, I want to say—

Trial Examiner Norwood: (Interposing.) The two memorandum briefs that have been filed here, one by counsel in support of the complaint and one by counsel for Glidden, may go in the record. I do not think it is necessary to copy them in the transcript here. But I would like counsel to state the substance of their contentions for the record here so as to bring the matter forward.

Mr. Wright: Your Honor, I would like to say first of all that while the motion as I originally filed it did not relate to the testimony of the witness Sprague, on reexamination of the record I have found that the testimony of the witness Sprague was in exactly the same category, so that my contentions in the memorandum brief in support of the motion as to the testimony of the witness Burruss are equally applicable to the testimony of the witness Sprague. In both instances the record is perfectly clear that neither of these gentlemen had any firsthand knowledge of the records and books of the company to know definitely that the costs of doing business with the various categories of customers were as was testified.

Now I will call your attention to the statement of Mr. Burruss on cross-examination, on page 2779 through 2788 2781, where he stated that he did not check any individual accounts in determining these costs. He inquired of the Credit Department and of the other departments as to what their costs were. He did not know the basis of the information which he received then from the Credit and other departments, to the effect that the costs of doing business with the less-than-carload customers were higher than with the carload customers.

In answer to a question as to whether he knew that it might have been someone's guess or opinion in the Credit Department as to how much time was spent in checking the various accounts, the best answer he could make was, "I think we have reliable employees, and they give me the information that I ask for rather than a guess." But in answer to the specific question as to whether he knew how they obtained the information, he said no; and he stated, with reference to all the other items of expense, that they were in exactly the same category as the credit information, excepting as to warehousing expense, and there he vaguely testified that there had been a specific study made as to lithophone. He did not have that study in his possession, and there was no showing in the record that the warehousing expense as to lithopone was in the same category as it was as to the products involved in this case.

Trial Examiner Norwood: Just make your general argument, because we will go over the items—

Mr. Wright: (Interposing.) It did not appear 2789 until this cross-examination came up that this was outright hearsay and that the witness had no direct knowledge of his own upon which to base that testimony. For that reason, I am seriously urging this motion to strike.

We have in this instance a peculiar statutory provision which places a positive burden on the respondents, having possession of the records from which these facts may be determined, to come forward and prove any justification on a cost basis, if they have one. To permit this testimony to remain in the record will be to wrongfully, on the basis of hearsay and opinion testimony, shift that burden back to counsel for the Commission to prove that there was no justification, from records which are in the possession of the Glidden Company. Now there was some testimony that the Glidden Company has no records from which it could be determined what their costs were. Well, it is a matter of common knowledge that a large corporation such as The Glidden Company has very accurate and complete records of its daily transactions, and certainly there should be a more substantial showing of an impossibility of producing those records and bringing in this information.

Mr. Ewing: As Your Honor has said, it was not the intention of counsel for Glidden to make any argument on this motion or in opposition to it, but since I am acting for them in this particular regard I think perhaps I should state for the record the basic grounds of their opposition 2790 which appear in the brief, and these are:

Glidden submits that the motion should be denied for the following reasons:

(1) The testimony (Appendix A) sought to be stricken was properly and fairly admitted inasmuch as it was competent and met the three practical and fundamental tests of the logical relevancy, reliability, and fairness.

(2) To strike such testimony would work irreparable injury to respondent Glidden, and would be highly prejudicial and would not make for a fair hearing.

(3) Even if such evidence was hearsay, which we deny, Burruss' testimony (Appendix A) possessed a moderate degree of reliability required for its admission, and its reception by the Examiner was entirely proper.

(4) Complainant's counsel was not deprived of his right to fully cross-examine the witness Burruss.

(5) The evidence should be permitted to remain in the record inasmuch as the estimates are, to use the words of the Examiner, "from these men who conduct the business and who have to do business, or at least who do business on these estimates * * * they may come in for whatever they are worth. Any objection to their not being accurate surveys would go to the weight."

And on the further ground, as supported by the decision of the Circuit Court of Appeals for the 7th Circuit
2791 in the Morton Salt case, decided on May 27, 1947,
with which Your Honor is familiar.

I take it that as far as the motion with respect to Mr. Sprague's testimony is concerned, we will be given an appropriate opportunity to answer it after we have had a chance to look at the portions of the record objected to.

Trial Examiner Norwood: That is right.

Mr. Wright: Your Honor, I fail to see what there is in the Morton Salt Company case which relates to this particular problem here. The essence of my objection is that I have been completely deprived of my right to cross-examine as to the factors and the basis of this testimony. These witnesses had no facts on which they could be tested. As Your Honor stated in his paper on Administrative Evidence in the George Washington Law Review, "General statements and incomplete data as to costs, profits, sales, and the like, offered by a party who has custody of complete records, not available to the opposing party, should be rejected as unreliable, for it may be inferred that the entire story would be against the offerer."

Trial Examiner Norwood: I have read both memorandum briefs, and read the motion, and the material that went with it, of Mr. Wright, and also the very thorough and well gotten up brief of Mr. Duncan. I have also read
the record covered by the motion, and we will con-
2792 sider these items as we come to them.

At page 2738, line 5, I see nothing to strike there—

Mr. Wright: (Interposing.) Your Honor, I don't know what your ruling is on the motion, but the questions and answers beginning on line 5 of page 2738 presumably all were based upon the estimates that the witness Burruss got from the heads of the various departments of Glidden, as the answer which continues on in line 9 will show, so that the whole statement, his whole answer that the carload business yielded the greater net profit, was apparently based on this—

Trial Examiner Norwood: (Interposing.) Well, the point I am considering in this thing is that this is general information which this witness would know as to whether or not—in fact, I think anybody knows it without listening to a witness saying that he gets more profit out of a carload than the less-than-carload, and that the freight per pound is less on carload business than on less-than-carload business.

Mr. Wright: There is no question about that. I would be willing to stipulate that the expenses on the carload business are probably less than they are on the less-than-carload business. But here is a question that went to the net profit on the various lines, and the witness has already testified that they made no examination of their books of account to determine that.

Trial Examiner Norwood: I understand that, but 2793 he has a right to give us these details about his business, and I shall accept that and consider it as going to his motivation for meeting the other fellow's price, and as going to the question of whether or not he named his prices by agreement or named them because of competitive situations, and so on. I wouldn't strike that testimony there. He has a right to tell us that, and he has a right to have us consider it, and I see nothing here that could be taken as justifying an alleged price discrimination. So I will deny the motion as to that passage.

Now coming down to page 2742, beginning at line 5—

Mr. Wright: (Interposing) Your Honor, I direct your attention to the answer that appears beginning at line 3 on page 2739. In addition to relating that there were several additional costs, including freight and clerical work, warehousing and credit investigations being most of it, where he stated, "credit losses in connection with that particular class of trade made up most of our" credit expenses —now that is something which can be determined by the records of the company. As shown by his cross-examination, he had no information on that subject except what the credit manager told him. Now there he is allocating all the credit costs to the less-than-carload accounts.

Now what the credit costs of the company were over
any period, and to what customers they could prop-
2794 erly be allocated, is something which can be deter-
mined by competent evidence and without any undue
burden on the respondent.

Trial Examiner Norwood: All he is doing is comparing these two classes of business. He isn't giving anything definite that could be taken into our calculations as justifying cost discrimination. He is testifying, as between the two classes, which one costs the most—

Mr. Wright: (Interposing.) After detailing all of the various items of additional expense in connection with smaller customers, he said credit investigation is most of it. In other words, that is most of the additional expense. And "in connection with that particular class of trade * * * most of our expense in that connection." In other words, credit investigation is the largest items of expense, and that class of customers accounts for most of it. There is an allocation or a purported allocation.

Now these are things which can be determined with a degree of certainty. I had no opportunity of cross-examining as to what their credit expenses were. This witness didn't know, he had no figures on credit expense, credit investigations,—on nothing. As soon as he answered, on the stand, that he had no information, there was no further cross-examination possible.

Trial Examiner Norwood: Now on page 2779, beginning
there, that refers to this item here.
2795 Mr. Wright: Yes, sir.
Trial Examiner Norwood: I will allow the motion
to strike lines 3 to 9 on page 2739, in view of the state-
ments of this witness contained on page 2779, and follow-
ing, respecting these costs.

Now on page 2742—do you have anything prior to that?

Mr. Wright: Yes, sir.

Trial Examiner Norwood: What is it?

Mr. Wright: The answer which appears on lines 14, 15 and 16 of page 2739, "Yes, the more accounts you solicit in that case", and following, winding up with the statement, "your selling expenses are much higher." This witness had no factual basis for stating that selling expenses were much higher.

Trial Examiner Norwood: I will allow the motion to strike lines 14 to 16 on page 2739.

What is your next item?

Mr. Wright: I would like to strike the material appearing in the answer starting at line 19 and running through line 25 of page 2739. You will note there a statement that the difference between the LCL and the carload freight rate runs on the average 25 cents a hundred. Now obviously this witness had no information on that, as appears in his
cross-examination. It appeared in the cross-examina-
2796 tion that he didn't know the difference between vari-
ous freight rates, even the local cartage rates in the
City of Chicago. That answer purports to account for 50% of the difference between the carload and the 5-ton price.

Trial Examiner Norwood: Is that covered by statements following page 2779?

Mr. Wright: It is covered by his answer that appears on line 17, that he didn't check any individual accounts; and there are other portions of the cross-examination which I can find, in which the witness didn't know what freight rates were, wasn't aware of what the difference in the cartage rate to the City of Chicago between less carload, and carload, was. And he had no basis there for any study which would determine on the basis of the business that Glidden did, that their costs on LCL shipments were 25 cents a hundredweight higher.

Trial Examiner Norwood: I see. The motion is allowed, to strike lines 19 to 25 on page 2739.

Mr. Ewing: I would like to direct Your Honor's attention to the fact that there was no objection to this testimony that you are striking, at the time it was given.

Trial Examiner Norwood: It was not until cross-examination that it appeared that the witness had no basis for the statement.

Mr. Ewing: We had some basis, because page 2779 shows
he made some check. And after all, he is running the
2797 business, he knows something about it, even though
he may not know exact figures. You can't run a business and not know something about the business.

Trial Examiner Norwood: He tells down here how he made this. He said he "inquired of our credit department how much of their expense was involved and applicable to the smaller accounts".

Mr. Ewing: I think that all goes to the weight and not to the admissibility. I think, as you said at the time, it is admissible for what it is worth.

Trial Examiner: But this shows on the face of it that they do have some information that these people who reported this to him could come here and tell us about. That didn't appear to me until just before we adjourned, in the last few pages, and I don't see how I can—

Mr. Wright: (Interposing) I will say it didn't appear to me what the purpose of this testimony was, either, until we got down, as appears on page 2742 of the transcript, where I made an objection to the whole line of testimony if it were for the purpose of showing costs of the company, beginning at line 22. Your Honor overruled that objection on the ground that they were estimates that these witnesses themselves knew about, as appears on page 2743. It didn't appear until cross-examination that they were estimates by other people which were related to the witness.

2798 Trial Examiner Norwood: I am going to make a correction there, as to the last material struck. Make it line 24, that is, that part of line 24 which ends with "carload of oxides." Everything there above that is struck, up to line 19. This other material, I see no harm in leaving it in, because it is material which the witness would know.

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

What is the next one, Mr. Wright?

Mr. Wright: I would like to strike everything now starting at line 24 on page 2741, and continuing on through. You will notice that on page 2742, the witness said, on line 2, "Yes. We checked on sales that we have made to some of these LCL accounts."

And then, on his cross-examination, he stated that he didn't check any LCL accounts; and all of the subsequent testimony there is based upon that purported checking of accounts.

Mr. Ewing: He testified on page 2779, in answer to your question, "We checked less-than-carload accounts." That is on line 6.

Mr. Wright: And then he stated immediately afterwards, "I didn't check individual accounts."

2799 Mr. Ewing: He said, "I didn't check individual accounts." He certainly testified that he checked less-than-carload accounts.

Trial Examiner Norwood: We are skipping now to page 2742, line 3; is that what you want struck?

Mr. Wright: No, sir. I want to start striking at page

2741, line 24, on through continuously until we get over to page 2754.

Trial Examiner Norwood: Well, I will not strike his statement there that they checked, because that is necessary to explain what comes afterwards; but I am going to strike that from line 5 to line 8.

Mr. Wright: That is satisfactory, Your Honor.

Trial Examiner Norwood: In view of his subsequent statements there as to the basis of that information, that is, I am considering that.

Mr. Wright: That is page 2742, lines 5 through 8, inclusive?

Trial Examiner Norwood: Yes.

Mr. Wright: The next answer is in the same category, the one beginning at line 11 and continuing through line 16, of page 2742, including the statement, "our expenses in connection with those have been much greater than in connection with the large buyers."

Mr. Ewing: I would say that a witness in Mr.
2800 Burruss' position would obviously know in a general way, and that is all he is testifying, in a general way that the expenses to a certain class are much greater than they are to another class.

Mr. Wright: Well, Your Honor, what their expenses were can be determined from their books and records. I can't cross-examine the witness as to what their expenses were, because he didn't know.

Mr. Ewing: He knew they were much greater.

Trial Examiner Norwood: Did you bring out anything on cross about those expenses?

Mr. Wright: Yes, sir. Now this sentence refers to credit investigations again, about which Your Honor has already granted the motion. You can see it reads, "they have been comparatively poor credit risks and entailed an awful lot of follow-up in order to collect on sales we have made, and our expenses in connection with those have been much greater than in connection with the ~~larger~~ buyers". Then immediately counsel asked him whether that overcame and justified the differential which they made, the next question. The purpose of this, we had to infer until counsel for respondents filed a brief in which they contended that this evidence constitutes a valid cost justification for the discriminations shown in the record. They stated that it was their feeling that the Commission could make findings on the basis of it.

2801 Trial Examiner Norwood: Well, in view of the witness' subsequent statement, I will grant the motion to strike, beginning in line 14 on page 2742; strike that portion reading "and our expenses in connection with those have been much greater than in connection with the larger buyers."

2802 Mr. Wright: Your Honor, with reference to the material now which starts at line 11 here, this is what must be opinion evidence, it can't be anything else since the man testified on cross examination that he didn't know what the actual facts were from the records of the company—

Trial Examiner Norwood: (Interposing): This man was in charge of sales, wasn't he?

Mr. Ewing: That is what my point was before, that here is a man running this particular branch of the business, and he knows something about it. Obviously he knows something about it.

Trial Examiner Norwood: It is difficult just where to draw the line.

Mr. Ewing: He may not know the figures to a penny but he certainly knows about what part of his business is expensive and what part isn't.

Trial Examiner Norwood: I shouldn't permit him to say that these expenses just about offset those other expenses when he testifies that he doesn't know either one.

We will take a two minute recess.

(A short recess was taken.)

Trial Examiner Norwood: All right, proceed.

Mr. Wright: The material beginning at line 17 and running through line 21 of page 2743 should be stricken.

2803 Trial Examiner Norwood: That is merely a question there which he didn't answer.

Mr. Wright: Page 2743, Your Honor. On 2742 the question from 17 to 20 was asked, and the answer appears on 2743, lines 17 through 21, where it was stated that the "added differential did not compensate for the expense in connection with handling that business."

Trial Examiner Norwood: The motion is allowed. Strike lines 17 through 21 on page 2743. What is the next?

Mr. Wright: Lines 6 and 7 on page 2744. That answer must have been based on some factual analysis by the credit department which certainly wasn't available for cross examination.

Mr. Ewing: It wouldn't have taken much factual analysis to know that a loss in a certain class of business existed.

Trial Examiner Norwood: The question asked him what his investigation disclosed, and his testimony on cross examination is that he made no investigation personally. That comes under the same category as the others.

Mr. Ewing: Well, he testified on cross-examination, Judge, that he checked less-than-carload lots.

Trial Examiner Norwood: I think when you run it out you will find that the foundation gives away.

Mr. Wright: How could he check less-than-carload accounts when he didn't check individual accounts. In order to get to the whole you have got to start with the parts.

2804 Mr. Ewing: Not necessarily, if you know something about the business.

Trial Examiner Norwood: Do you want the question and the answer stricken?

Mr. Wright: Yes sir.

Trial Examiner Norwood: Motion allowed. On page 2744 strike lines 3 to 7 inclusive. What is the next?

Mr. Wright: The question and answer beginning at line 8 and extending through line 14.

Trial Examiner Norwood: Is that covered by the witness' statements following page 2779?

Mr. Wright: Yes sir. That deals with the item of credit losses about which he was particularly examined there to determine what his investigation had been.

Trial Examiner Norwood: The motion is allowed. On the same page, 2744, strike lines 8 throug 14, inclusive.

Mr. Wright: The next is on page 2745, lines 1 through 6. In that connection you will note that the witness at the bottom of page 2744 said he had no exact figures or nothing from the records, and the next question requested his judgment.

Trial Examiner Norwood: The motion is allowed. On page 2745 strike lines 1 through 6.

Mr. Ewing: I would like to note there again, Your
Honor, that the question which was "What is your
2805 judgment on the matter generally?" was not objected
to, and certainly that question could have been objected to on the ground now indicated, if counsel had wished to, at the time, and in this case it was made very clear at the beginning that objections had to be taken at the time. Here is a mass of testimony to which no objection was

taken in large part, and now later a motion is made to strike it.

Mr. Wright: There was an objection to the whole line of testimony as being an improper way of putting in this cost material.

Mr. Ewing: It bears on the question of the intent in this company in doing business, and it bears on the question of how they arrived at these figures.

Trial Examiner Norwood: This will have to come out because in view of his subsequent statements he couldn't make any definite statement about that.

Mr. Wright: I would like to strike from line 15, on page 2746—

Trial Examiner Norwood (Interposing): I don't see anything there to strike. Do you mean from line 15 to the remainder of the page?

Mr. Wright: No sir. I think we can handle all this next part together, since it all relates to one subject, from line 15 on page 2746, down through line 10 on page 2752. All
of that testimony related to some sort of survey which
2806 the witness stated had been made on the warehousing
expenses for lithopone, and there were no supporting
data, there was nothing available for cross examination on that study. The witness was not familiar with the details of it; he didn't have any written study available for purposes of cross examination and he had not made the study himself personally. It all relates to that one point.

Trial Examiner Norwood: What line did you specify on page 2752?

Mr. Wright: I said line 10, but it should be line 9, I believe. Following that the witness was examined on another subject.

Mr. Ewing: In order not to prolong this particular phase I simply make the comment now that it would seem to me to be wholly improper to strike the questions in any event. I submit that none of this testimony with respect to lithopone should be stricken, but certainly it is not proper to strike the questions as well as the answers. Counsel was entitled to put the questions and there were objections to some of this lithopone testimony and they were ruled on at the time, and that is one thing depending on how they were ruled on, but certainly the questions shouldn't be stricken.

Trial Examiner Norwood: That point wasn't raised a while ago, but I had it in the back of my head at the time.

Mr. Ewing: This particular subject of lithopone
2807 was given some detailed consideration at the time.

Mr. Wright: As I understand it, under our procedure the material is not stricken physically from the record so that all the basic data upon which the ruling is based is preserved in the record; so it seems immaterial whether the questions are included in the stricken material or not. They will remain in the record.

Trial Examiner Norwood: I think the questions may stand on the ground that some men may ask questions that wise men can't answer.

Mr. Wright: I have no objection to leaving the questions in the record.

Trial Examiner Norwood: I will allow the motion to strike all the answers of the witness appearing in the transcript from line 15 on page 2745 through line 9 on page 2752.

Now as to this cross examination I don't think that should be stricken. Is there any reason why you want that stricken?

Mr. Wright: Your Honor, there is a further objection before coming to that. On 2754, the answer appearing at lines 15 through 18 is in the same category.

Mr. Ewing: I would suggest that the question there is, "But from your experience can you make a fairly reliable approximation?"

Mr. Wright: Well, it appeared on cross exami-
2808 nation later that the witness had no information on freight rates and he couldn't be cross examined about that.

Trial Examiner Norwood: The point about that is that he is making a comparison between amounts or figures or costs there and he doesn't know either one, so I think that that will have to come out, the answer appearing from lines 15 through 18 on page 2754.

Unless there is some good reason I shall deny the motion to strike the rest of it, that is, line 4, page 2779 through page 2782, line 6.

Mr. Wright: I have no objection to permitting the cross examination to remain in the record in the present state.

Trial Examiner Norwood: Call your witness.

Mr. Ewing: Might I note for the record an exception on behalf of Glidden to your rulings adverse to Glidden?

Trial Examiner Norwood: Yes.

Mr. Ewing: Mr. Tibbets.

ALBERT B. TIBBETS was thereupon called as a witness for the respondent National Lead Company, and having been first duly sworn, testified as follows:

Trial Examiner Norwod: State your full name.
The Witness: Albert B. Tibbets.

2809 *Direct Examination by Mr. Ewing.*

Q. Mr. Tibbets, by whom are you employed?
A. National Lead Company.
Q. In what capacity are you now employed by National Lead?
A. Sales Promotion Manager.
Q. When were you first employed by National Lead?
A. January, 1919.
Q. What was the nature of your first employment?
A. Assistant in the Advertising Department.
Q. How long did you continue to work in that capacity?
A. About seven years.
Q. In what capacity were you employed at the termination of that period?
A. The same, Assistant in the Advertising Department.
Q. How long did you remain in the Advertising Department?
A. About seven years.
Q. What was your next connection with the company?
A. Well, I was away a year as Sales Promotion Manager of the Butterick Publishing Company, and then I returned to do promotion work.
Q. In what department?
A. Well, I served under the Vice President in promotion work.
Q. What connection, if any, have you had with National Lead Company's white lead-in-oil business?
A. Well, I have served of course in the Advertis-
2810 ing Department in helping advertising promotion, and promoting and Secretary of the Sales Committee.
Q. When did you become Secretary of the Sales Committee, approximately?
A. I think I have my experience record here. 1928.
Q. Are you still connected with the Sales Committee?
A. Yes sir, in the same capacity.

Q. What connection, if any, have you had with the National Lead Company's business relating to lead oxides?

A. As Secretary of the Oxide Committee.

Q. How long have you been Secretary of the Oxide Committee?

A. I dont' know. Offhand, since about 1934—no, wait a minute, pardon me, I will change that. At the time that I was made Secretary of the Sales Committee that took in the Oxide Committee, and later on it was split into two committees and I don't remember just the date that was.

Q. I show you a copy of a map which has been marked in evidence as Commission's Exhibit 580, and ask you whether you are familiar with that map?

A. Yes sir.

Q. I show you photostatic copies of 14 pages which have been marked in evidence in this case as Commission's Exhibit 659-C to -P, inclusive, and ask you if you are familiar with that document?

A. Yes sir.

2811 Mr. Ewing: I ask that this document be marked Respondents' Exhibit 147 for identification.

Trial Examiner Norwood: It may be so marked.

(The document referred to was marked Respondents' Exhibit 147 for identification.)

By Mr. Ewing:

Q. Now Mr. Tibbets, I show you this map of the United States in which certain areas are colored, and upon which certain legends appear, and which has just been marked Respondents' Exhibit 147 for identification, and ask you to state whether you prepared this map at my request?

A. Yes sir.

Q. Do the territorial areas depicted on this map portray the territories which are set forth in color on Commission's Exhibit 580?

A. Yes sir.

2812 Q. In preparing the large map in your hands which has been marked Respondents' Exhibit 147 for identification, if you use as a basis the small map which is a copy of Commission's Exhibit 580 for the purpose of portraying on Respondents' Exhibit 147 for identification the territorial divisions shown on Commission's Exhibit 580?

Mr. Wright: Objection, your Honor. I believe the witness can be asked the circumstances of his preparation without being led by counsel.

Trial Examiner Norwood: I think that is more or less preliminary.

Mr. Ewing: It is all preliminary.

Trial Examiner Norwood: I think so.

Mr. Ewing: There is no peculiar significance or anything magical or mysterious about it. I just want the record to show in brief form.

The Witness: Yes, sir.

By Mr. Ewing:

Q. Now, I direct your attention to the large map which has been marked Respondents' Exhibit 147 for identification and, in particular, to the legends which appear thereon in the white square boxes.

They are not white on your Honor's copy, but they are square boxes.

I ask you to state what those legends represent.

2813. A. Those are the freight differentials in each zone.

Q. What?

A. Freight differentials.

Q. Do you mean by that that they are the differentials shown on Commission's Exhibit 580 for the territories in the particular color to which they are attached?

A. Yes, sir.

Q. Are the differentials portrayed on the large map, Respondents' Exhibit No. 147 for identification, the same as those shown on Commission's Exhibit 580, of which you have a copy?

A. Yes, sir.

Q. Now, I direct your attention again to Commission's Exhibit 659-C to -P, inclusive, and ask you to state whether the differential points shown on that exhibit are identified on Respondents' Exhibit 147 for identification in any way?

A. Yes, these ~~are~~ shown in red ink and the points are indicated by ~~the~~ red ink, underscored.

Q. Are all of the points shown as differential points on Commission's Exhibit 659-C to -P, inclusive, identified upon Respondents' Exhibit 147 for identification?

A. That is this large map?

Q. That is correct.

A. Yes, sir.

Q. Now, I call your attention to the fact that on
2814 the large map, Respondents' Exhibit 147 for identification, alongside each of the differential points iden-

tified, I believe you said, by underscoring, is a legend such as "1/4th" or "1/8th", as the case may be; and I ask you to state what those legends represent.

A. Freight differentials.

Q. For what purpose did you prepare Respondents' Exhibit 147 for identification?—The large map.

A. To show the differentials in effect some years ago as compared to the present differentials in colored zones, that is, indicated here by colors.

Q. Now, are the differentials and differential points shown on the large map which you prepared, Respondents' Exhibit 147 for identification, the same differential points and differentials set forth in Commission's Exhibit 659-C to -P, inclusive?

A. Now, I am making comparison between the red inks and the colored sections?

Q. No. Are these differential points which are underscored towns or cities and the accompanying fractional differentials the same differential points and fractional differentials as are contained in Commission's Exhibit 659-C to -P, inclusive?

A. Yes, sir.

Mr. Ewing: I offer Respondents' Exhibit 147 for 2815 identification, in evidence.

Mr. Wright: Your Honor, this is a derivation of two exhibits which are already in the record. I don't see that it adds anything to the record. It is really something which is more a briefing matter. I have no objection, however.

Trial Examiner Norwood: He is to make that the basis of his further testimony, is he not?

Mr. Ewing: That is correct.

Trial Examiner Norwood: Received as marked. Objection overruled.

(The paper referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 147, was received in evidence.)

Mr. Ewing: I might say off the record—

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Ewing: Now, I ask that the three sheets be marked Respondents' Exhibit 148-A to -C for identification.

(The papers referred to were marked Respondents' Exhibit 148-A through 148-C for identification.)

By Mr. Ewing:

Q. I show you Respondents' Exhibit 148-A to -C for identification, Mr. Tibbets, and ask whether that was 2816 prepared by you or under your direction?

A. That was prepared by me.

Q. Now, I call your attention again to Commission's Exhibit 659-C to -P, inclusive, and ask you to state whether you prepared Respondents' Exhibit 148-A to -C for identification from the information contained in Commission's Exhibit 659-C to -P, inclusive.

A. Yes, sir.

Q. Are all of the delivery and equalization points shown in Commission's Exhibit 659-C to -P, inclusive, shown on these three documents which you have prepared and which have been marked Respondents' Exhibit 148-A to -C, inclusive, for identification?

A. Yes, sir.

Q. Will you tell us whether you show on Respondents' Exhibit 148-A to -C, for identification, the differential per hundredweight under the sales methods employed by National Lead Company prior to the use by National Lead Company of the present zone may substantially similar to Commission's Exhibit 580 for identification in connection with the sale and distribution of white lead-in-oil?

Mr. Wright: May I have that question read?

Trial Examiner Norwood: Read it.

(The reporter read the question.)

Mr. Wright: I object to that question, your 2817 Honor, for the reason that it calls for several conclusions from the witness.

Now, as I had understood these questions they related only to whether the information was derived from these other two exhibits here; and insofar as the questions were based on a relation of those exhibits—580, 659, 147—to this, I have no objection to it; but counsel has characterized several things there regarding the method of selling which I object to.

Mr. Ewing: I only want to identify the point of time. It doesn't call for any conclusion; simply calls for him to state whether this exhibit shows the differential—that is, Your Honor, the so-called old system, or not.

Mr. Wright: I object to that characterization, your Honor. I have no objection to this, showing the differentials as they appear in Commission's Exhibit 659 and the differentials as they appear in Commission's Exhibit 580, but I do object at this point, under the qualification of this witness, to his characterizing what National did then and what they do now.

Mr. Ewing: I am perfectly content to have the record show that what he calls my characterization is simply a method of identification which has no significance whatever.

Trial Examiner Norwood: I think the question is involved. I should be much happier for counsel to reframe it.

2818 Mr. Ewing: I should be glad to rephrase it.

By Mr. Ewing:

Q. On these three sheets which you prepared and which have been marked Respondents' Exhibit 148-A to -C for identification, there is a heading in the middle, "Differential per cwt." and underneath that the words, "Old System." Will you tell us what the figures in that column are?

A. They are freight differentials at differential points, taken from this—whatever—What is this? 659-C—

Q. -C to -P, inclusive.

Now, will you tell us, Mr. Tibbets, what you mean when you say "freight differential"?

A. It is the freight differential charged the customer at those points or in those zones.

Q. Does it represent actual freight with respect to any particular customer or any particular shipment?

A. No.

Q. Now, I call your attention to the same exhibit and to the column headed "Differential per cwt." under which there appears the quoted words "Zone System" and ask you what those figures represent?

A. Those are freight differentials in the zones shown on this, whatever exhibit this is.

Mr. Ewing: Commission's Exhibit 580.

I offer Respondents' Exhibit 148-A to -C for identi-2819 fication in evidence.

Mr. Wright: I should like to request a short voir dire on the identification here.

I call your attention to the heading under "National Lead Company." "The following shows the differential charged at all delivery and equalization points under the old system of selling," et cetera.

From where did you get that information, Mr. Tibbets?

The Witness: From this exhibit here.

Mr. Ewing: Indicating Commission's Exhibit 659-C to -P, inclusive.

Mr. Wright: You made no independent check of any other records to determine whether or not these were all the delivery points quoted by the National Lead Company prior to going on the zone method?

The Witness: They were all the differential points.

Mr. Wright: You know that, do you?

The Witness: From this record.

Mr. Wright: From that record; but you examined no other records, did you, to determine whether or not they might be all—

The Witness: No, sir.

2820 Mr. Wright: So that the sole source of your information is as appears on the exhibits themselves?

The Witness: That is right.

Mr. Wright: Now, I direct your attention to the statement on 148-C, average differential per hundredweight, 123 cities and the figures following. From where did you get that?

The Witness: From my own calculation of counting up this.

Mr. Wright: In other words, you made a calculation from these figures then?

The Witness: Yes, sir.

Mr. Wright: How about the material directly below that on 148-C, in changing over to present zone system differentials charged, 71 at 123 cities, et cetera? From where did you obtain that information?

The Witness: From this same information.

Mr. Wright: That was your own conclusion?

The Witness: That is right. That is calculation.

Mr. Wright: Your Honor, I object to the reception of this document in evidence since it obviously contains conclusions and characterizations by this witness which he has not been qualified to make, and it is a misleading document to have in the record with these characterizations which appear upon it.

2821 Mr. Ewing: The characterizations are solely for the purpose of making available an easy way of seeing what the material is. The purpose of the offer is to set forth in concise form the information which is already in the record in these other exhibits so that at a glance you may compare the differentials based upon the territorial divisions that this company has employed.

Mr. Wright: Your Honor, I direct your attention—

Mr. Ewing: We are charged with a conspiracy commenced in 1933, and I propose to show that substantially the same method of distributing white lead-in-oil has been used since the inception of the company.

Mr. Wright: Your Honor, I am objecting at this point to these averages.

Mr. Ewing: That is a matter of arithmetic.

Mr. Wright: He has put some averages in here which are a very misleading proposition. It has not been established that there was any weighting of these averages to show any significance of them. These are points on 148-C that are properly part of Respondents' brief. They are contentions which can be made from the basic evidence.

Mr. Ewing: It is simply arithmetical calculations.

Trial Examiner Norwood: That has its basis in the record?

Mr. Ewing: That is correct.

Mr. Wright: It is in the record, except these 2822 conclusions.

Mr. Ewing: The conclusions are a matter of arithmetic.

Trial Examiner Norwood: Do you mean the conclusions contained in the headlines and some of the terms there?

Mr. Wright: At the bottom of it, where the witness has added his conclusion: "The average differential per hundredweight in 123 cities under the old system was .397."

Mr. Ewing: He added up a column and divided by 123.

Trial Examiner Norwood: I have never taken one of these tabulations—and they are so useful, ordinarily; the majority of them are very useful—I have never taken a one of them without limiting the use of those characterizations. They are always objectionable to the other side.

Mr. Wright: I have not checked the accuracy of this man's work. Obviously, what he has done is taken two exhibits—which anyone can do—and set down some figures.

Mr. Ewing: If there are any mistakes, we should be happy to correct them.

Mr. Wright: They can be checked for accuracy afterwards. I do object to conclusions.

Trial Examiner Norwood: This is just the same question that comes up in almost every case of this kind.
2823 I will receive this with the conditions that those characterizations not be accepted as evidence or considered in any way.

Mr. Ewing: They are not offered as such.

Trial Examiner Norwood: And also with another condition that no information be considered in the exhibit the basis of which does no appear somewhere in the evidence; that no information like that will be considered.

Mr. Wright: There is a further objection to this. I want to direct your attention to the fact that Commission's Exhibit 659 is dated September 10, 1924. Commission's Exhibit 580 was something which I believe was supplied sometime in the late '40's. There has been testimony that it was used, I believe since sometime in the mid-Thirties. Now, here is an exhibit which attempts by its heading and characterization to close the gap of 10 or more years.

Mr. Ewing: You forget, Mr. Wright, that Commission's Exhibit 659-C to -P, inclusive, runs down to 1930, as shown on it.

Mr. DuBose: It shows modifications.

Mr. Ewing: It shows modifications. As far as statements, characterizations or whatever you call them, we are not offering them to prove anything. All we are offering is a tabulation which shows the facts and figures that are already in with respect to this particular subject.

Mr. Wright: There is not one of these documents
2824 which has any date later than 1921 on it except for certain penciled notes.

Mr. Ewing: There is '21 (indicating); there is '21 (indicating); '21; '20—

Mr. Wright: '21; '20; '21; '21. There is no document on there dated later than 1921.

Mr. Ewing: I am not trying to bridge any gap. I am not saying that—

Mr. Wright: This heading here can be cited in briefs from now on out as showing that—

Mr. Ewing: I assure you—I have already stated three times at least that I attach no significance to the heading whatever. I don't know how I could make it any plainer.

Trial Examiner Norwood: Now, I think that—

Mr. Wright: Under that circumstance—

Trial Examiner Norwood: All that I require is that the material on which that is based is all in the evidence.

Mr. Ewing: That is correct.

Mr. Wright: In view of counsel's last statement, I have no objection to the reception of it in evidence.

Trial Examiner Norwood: Received as marked.

Mr. Wright: Subject, of course, to my further check as to accuracy, which I have had no opportunity to do.

2825 Trial Examiner Norwood: Yes.

(The papers referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 148-A through 148-C, were received in evidence.)

Mr. Ewing: I will ask that these two sheets be marked Respondents' Exhibit 149-A and -B for identification.

(The sheets referred to were marked Respondents' Exhibit 149-A through 149-B for identification.)

By Mr. Ewing:

Q. I show you two sheets which have been marked Respondents' Exhibit 149-A and -B for identification and ask you whether you prepared those sheets?

A. Yes, sir.

Q. I show you a copy of Commission's Exhibit 749 and ask you whether the selected cities shown on Respondents' Exhibit 149-A and -B for identification, which you have testified you have prepared, are the same as those shown on Commission's Exhibit 749.

A. Yes, sir.

Q. Now, on Respondents' Exhibit 149-A and -B for identification, I call your attention to the column of figures headed "Differential per cwt." under which there appears in quotes "Old System" and ask you to state from what source you obtained the figures in that column.

A. From this other exhibit over there.

2826 Q. Referring to Commission's Exhibit 659-C to -P, inclusive?

A. Yes, sir.

Q. I also call your attention to the fact that on Respondent's Exhibit 149-A to -B, for identification, you have a column headed "Differential per cwt." and underneath it the words quoted "Zone System", and ask you to state the source from which you obtained those figures?

A. From our—this—Commission's Exhibit 580—

Q. 659.

A. The cities located in the zones indicated on Commission's Exhibit 580.

Q. Now, I call your attention to the fact that in Respondents' Exhibit 149-A and -B for identification, in the column headed "Differential per cwt."—"Old System"—the word "par" sometimes appears. Will you state what meaning attaches to that description?

A. There is no freight differential charged.

Q. Now, I call your attention to the last column headed "Differential per hundredweight"—"Zone System", in which the word "par" appears and ask you what meaning attaches to that description in that column?

A. No freight differential charged.

Q. Is it correct to say with reference to Commission's Exhibit 580 that the cities in the exhibit, Respondents' Exhibit 149-A and -B, opposite which the word "par" appears, in either differential column, were located
2827 in the purely white territory?

A. That is right, yes, sir.

Mr. Ewing: May I have that question read back.

Trial Examiner Norwood: Read it.

(The reporter read the record as follows:

"Question: Is it correct to say with reference to Commission's Exhibit 580 that the cities in the exhibit, Respondents' Exhibit 149-A and -B, opposite which the word "par" appears, in either differential column"—)

Mr. Ewing: I should have said "in the last differential column."

Trial Examiner Norwood: Correct that.

Answer the question.

The Witness: Yes, sir.

Mr. Ewing: I offer Respondents' Exhibit 149-A and -B in evidence.

Trial Examiner Norwood: Objection?

Mr. Ewing: And again I state that any material appearing on it by way of description, characterization, or otherwise is not offered for any purpose whatever as proof in this case of anything.

Mr. Wright: Mr. Tibbets, I call your attention on 149-B to the average differential per hundredweight, 37 cities, and so forth. How did you arrive at those
2828 figures that appear?

The Witness: By arithmetical calculation.

Mr. Wright: They are simply averages, then?

They aren't weighted to show how much was sold in any particular territory?

The Witness: No, sir.

Mr. Wright: So they would not show, then, would they, the actual average differential on sales of the company—being an arithmetical average?

The Witness: Based on these figures.

Mr. Wright: Now, I call your attention to the statement there, "Cities designated by asterisks are located in our Pacific Coast branch and since there is no record to show whether or not the old method was followed in that branch territory, no comparison was possible."

Will you explain that designation there?

The Witness: It is simply that I did not have any record on that—anything on the Pacific Coast branch, so I left is out.

Mr. Wright: You mean the National Lead Company has no records in its possession showing the—

The Witness: In that branch?

Mr. Wright: —practices of that territory?

The Witness: On the old method.

Mr. Wright: Did you make a determination of 2829 what records were available?

The Witness: Yes, sir.

Mr. Wright: Then you were looking for other documents to include in that comparison?

The Witness: Yes, sir.

Mr. Wright: Then it was not just a comparison of these two exhibits, 749 and 659?

The Witness: You will have to let me get these for you now. 659? Which one is that?

Mr. Dixon: The list on the table.

The Witness: I based on these two records, yes, sir.

Mr. Wright: What I am getting at is now, did you mean by that statement on 149-A that there was no record in this case of what the practices were on the Pacific Coast?

The Witness: No, we had no record of the procedure or the differential procedure, as what I call the old method. We have no record of that in the Pacific Coast branch.

Mr. Wright: Your Honor, I object to the offer of this in evidence with the final characterizations which appear at the end of it. Pursuant to counsel's statement of qualification as to the heading, I have no objection to the basic data which are listed here under the columns, but I do object to the material appearing on 149-B relating to a search of records of the National Lead Company to 2830 determine what practices were on the Pacific Coast.

Mr. Ewing: I would like to ask one question that I think would clear that up.

Trial Examiner Norwood: Certainly.

By Mr. Ewing:

Q. In Commission's Exhibit 659-C to -P, inclusive, which was the basis from which you obtained, as I understand it, the figures given in the left-hand differential column, was there any information with respect to differentials obtaining in territory covered by the Pacific Coast branch?

A. No, sir.

Q. And, therefore, when you prepared this, based upon that exhibit, no Pacific Coast branch differential data were included, is that correct?

A. That is right.

Q. And your asterisk is simply to indicate why in giving the data you did not have any for those particular Pacific Coast so-called cities?

A. That is right.

Mr. Wright: Your Honor, I don't believe that entirely clears it up, because the witness stated that he meant by that, that he had examined the records of the National Lead Company to determine whether they had any records on the Pacific Coast. I am trying to get straight whether
this exhibit is simply a comparison of two documents
2831 already in the record, or whether they are something
else that is being brought in.

Mr. Ewing: I will ask the direct question:

By Mr. Ewing:

Q. Is the data which appears on Respondents' Exhibit 149-A and B, for identification, data derived wholly from Commission's Exhibit 580, the small amount, and Commission's Exhibit 659-C to P, inclusive?

A. Yes, sir.

Mr. Wright: I object to this evidence as not being proper since it is more properly briefing material which is cumulative in the record and serves no useful purpose. The basic data are here and already available. I see no point in receiving it in evidence.

Trial Examiner Norwood: The objection is overruled. The exhibit is received subject to the understanding and conditions respecting these others we have just received.

(The document heretofore marked as RESPONDENTS' EXHIBIT NO. 149-A and 149-B was received in evidence.)

Mr. Ewing: I ask that these two sheets be marked Respondents' Exhibit 150-A and B, for identification.

(The document referred to was marked for identification as Respondents' Exhibit 150-A and 150-B.)

By Mr. Ewing:

Q. Mr. Tibbets, in the regular course of your business and having no relation to this procedure, did 2832 you ever have occasion to study the sales by National Lead of white lead-in-oil from the standpoint of such sales as made by States and by branches?

A. Yes, sir.

Mr. Wright: I object, Your Honor. It is a very leading question. I think if the witness has made any study, counsel can bring out properly how he made it and how he kept those records.

Mr. Ewing: I asked him if he made a study.

Trial Examiner Norwood: He may ask—

Mr. Wright: In the regular course of business.

Mr. Ewing: I want to show it wasn't done for this case, it was done prior.

Trial Examiner Norwood: Objection overruled.

Answer the question.

The Witness: Yes, sir.

By Mr. Ewing:

Q. When did you have occasion to make such a study?

A. In 1943.

Q. Of what did your study consist?

A. Well, we used—we tried to establish potential markets in each case, and then we compared what we were doing in each State, that is, the sales in each State. We used Government figures on paintable surfaces, and 2833 I won't go into all details but ability to—purchasing power, and so forth. We got up a factor which compared with the—then we made a comparison of what sales we had in each State.

Q. Now, I show you these two sheets of paper which have been marked Respondents' Exhibit 150-A and B, for identification, and ask you whether you compiled the data shown thereon?

A. Yes, sir.

Q. Was the data shown on those sheets compiled in connection with the study which you have described?

A. Yes, sir.

Q. Based upon that study, have you at my request made a compilation showing sales by National Lead Company of white lead-in-oil by branches and by States, setting forth the percentage of total white lead-in-oil business done in each State and by each branch, exclusive of the Pacific Coast branch or San Francisco branch and the States served by it?

A. Yes, sir.

Mr. Ewing: I ask that these two sheets be marked Respondents' Exhibit 151-A and B, for identification.

(The document referred to was marked for identification as Respondents' Exhibit No. 151-A and 151-B.)

By Mr. Ewing:

Q. Now I show you these two sheets that have been marked Respondents' Exhibit 151-A and B, for identification, and ask you to tell us what they are.

2834 A. That was the percentage of sales by States and branches, excluding the Pacific Coast branch.

Q. Sales of what?

A. Sales of white lead-in-oil.

Q. In what year?

A. In 1942.

Trial Examiner Norwood: By whom was that?

The Witness: I got this—what do you mean?

Trial Examiner Norwood: By National?

The Witness: By National Lead Company, I beg your pardon.

By Mr. Ewing:

Q. And this is the data that you stated a few moments ago you compiled at my request?

A. Yes, sir.

Mr. Ewing: I offer Respondents' Exhibit 151-A and B in evidence.

Trial Examiner Norwood: Any objection?

Mr. Wright: Just a moment.

Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: Mr. Tibbets, is 151 a derivation of the study which is represented by 150?

The Witness: It is the same.

2835 Mr. Wright: It is the same?

The Witness: Yes, sir.

Mr. Wright: They are identical documents?

The Witness: Yes, sir. Well, let me see it just a minute. I have forgotten.

No, this is tonnage figures and these are percentage figures.

Mr. Wright: Are they percentage based on tonnage or percentage based on dollar value of sales?

The Witness: Based on tonnage.

Mr. Wright: Who made the calculations at each of the branches?

The Witness: The branches—you mean the giving of the tonnage report?

Mr. Wright: Giving the percentages in for each one.

The Witness: The percentages, I made that myself.

Mr. Wright: From data furnished you by the various branches?

The Witness: That is right.

Mr. Wright: How did they furnish that data?

The Witness: At my request.

Mr. Wright: I mean, in what form did they furnish it?

The Witness: They sent it to me in tonnage figures for each State they operated in.

2836 Mr. Wright: Tonnage figures for each State?

The Witness: Yes, sir; taken from the sales figures.

Mr. Wright: You mean arithmetical computation, turning those into percentages?

The Witness: That is right.

Mr. Wright: You didn't calculate the sales? Each State furnished that to you?

The Witness: They furnished to me at my request.

Mr. Wright: Is that a customary practice with the National Lead Company to make such studies of its sales in the various States?

The Witness: Well, it was part of this survey, yes. We keep it by States; yes, sir.

Mr. Wright: Was such a study made on the Pacific Coast?

The Witness: No. We didn't make this study on the Pacific Coast.

Mr. Wright: Why did you omit the Pacific Coast?

The Witness: Well, because they handle—have a mixed paint line out there and it is thrown in; it doesn't make a clear picture that we wanted to get west—east of the Pacific Coast branch.

Mr. Wright: Does this include any keg products outside of white lead-in-oil?

The Witness: Not those figures; no, sir.

2837 Mr. Wright: It doesn't include any red lead-in-oil?

The Witness: No, sir.

Mr. Wright: Or any other paint products?

The Witness: Just paste lead—white lead-in-oil; paste white lead

Mr. Wright: Do you have the basic data available from which these figures were compiled?

The Witness: You mean the letters of this? No, I didn't keep that. After I had made this transcript, I didn't need it.

Mr. Ewing: Referring to Respondents' Exhibit 150-A and B, for identification.

The Witness: You mean 150, don't you?

Mr. Wright: No, sir. All I have before me is 151.

The Witness: I thought you were asking about the white lead tonnage figures from the branches. I did not keep those letters.

Mr. Wright: Do you have the request which you made of the branch managers showing how they were to get the figures?

The Witness: No, sir. It is simple enough. I simply asked for their sales in each State, of their white lead-in-oil sales by tonnage.

Mr. Wright: They reported the tonnage back?

The Witness: Yes, sir.

2838 Mr. Wright: Do you know whether the letters and correspondence relating to this are still preserved in your files; could be produced?

The Witness: I wouldn't know that—not in my files.

Mr. Wright: Would they be in the files of the company?

The Witness: I wouldn't know that. That would be a branch file, and I wouldn't know whether they kept them or not.

Mr. Wright: I am talking about the correspondence he received back.

The Witness: That is what I say. I have nothing in my files on the original letters reporting this.

Mr. Wright: Is it possible to determine whether those records are in the files of the National Lead Company?

The Witness: Well, I looked for them; I couldn't find them.

Mr. Wright: You did look for them?

The Witness: Yes, sir.

Mr. Wright: How are these files kept?

Mr. Ewing: Now I am going to object, Your Honor. I think this has gone far enough as far as identification is concerned.

Trial Examiner Norwood: I think he has been inquiring as to that supporting data only.

Mr. Wright: How in the world am I going to
2839 perfect an objection unless I have an opportunity to
examine the witness.

Mr. Ewing: He has testified that 151-A and B was prepared by him in connection with this study and he has testified as to how he got the underlying data, and he says he has not the records from which he compiled them.

Mr. Wright: He said the underlying data was reported—

Mr. Ewing: —by the branches, and that he hasn't got it.

Trial Examiner Norwood: I think he may inquire about that; anything that goes to the reliability of that underlying data there.

Go ahead.

Mr. Wright: How is correspondence customarily filed in the organization?

The Witness: In my office?

Mr. Wright: Yes.

The Witness: By my secretary.

Mr. Wright: You keep personal files; you don't turn them over to some central filing branch?

The Witness: No, sir. We have our own files, each office.

Mr. Wright: How often do you destroy your files?

The Witness: Well, that depends on the type of information it is. Some things are kept for a good
2840 many years; other things are destroyed when we
consider they will be of no value to us.

Mr. Wright: How extensive was your search for it?

The Witness: We looked all through my files and had my secretary to look through them.

Mr. Wright: Had you ever made similar inquiries of this sort before?

The Witness: No, sir.

Mr. Wright: In 1942?

The Witness: This is the first study I made on that basis.

Mr. Wright: Have you ever made any inquiry since that time?

The Witness: No, sir; we got into the—you see, this was '42, and we got into abnormal conditions in the war and didn't see the necessity of making those studies.

Mr. Wright: Was 1942 a normal year?

The Witness: It turned out to be, fairly normal.

Mr. Wright: Do you know whether the copies of that correspondence and of your correspondence with the branch offices would be preserved in the branch offices?

The Witness: I wouldn't know that.

Mr. Wright: Your Honor, I object to the offer of this material in evidence. It is clearly hearsay and by the wit-
ness' own testimony it is not a record kept in the
2841 regular course of business or a regular entry made.
It was a special study and the basic data from which it was derived may be in the possession of the National Lead Company as far as this witness knows. Certainly the search for the basic data that he has described is not sufficient to determine that there is any possibility of procuring it.

Mr. Ewing: He has testified that he made this study in the regular course of business as part of his job with the National Lead Company and under the circumstances I submit that, regardless of what weight there may be eventually given it, it is admissible.

Mr. Wright: Your Honor, in answer—

Trial Examiner Norwood: I think counsel should show the reliability of this; sufficient reliability to have it come in.

Mr. Ewing: I will withdraw for the moment my offer of 151-A and B.

Trial Examiner Norwood: If it is subject to counsel's undertaking—

Mr. Ewing: I withdraw for the time being the offer of 151-A and B, and I will ask that the witness look at 150-A and B.

By Mr. Ewing:

Q. Tell us what information is shown thereon.

A. White lead-in-oil and white lead in liquid form
2842 or paint, by States and branches.

Q. Was that compiled by you?

A. Yes, sir.

Q. For what year?

A. It covered 19—sales of 1942.

Q. And when you say "sales," what company's sales?

A. National Lead Company's sales.

Q. Did it include sales in the Pacific Coast branch territory?

A. No, sir.

Q. Based upon what did you prepare that?

A. By reports from the branches.

Q. And those reports that you testified about in response to Mr. Wright's questions?

A. Yes, sir.

Q. And that is your own original record?

A. Yes, sir.

Mr. Ewing: I offer it in evidence.

Mr. Wright: Your Honor, 150—that is 150 apparently; I have not seen it—apparently, from the testimony of the witness, is the same information expressed in a different way. One is tonnage and one is percentagewise but still the basic data about which he was testifying I believe were the basic data from which he prepared 150. 151 is a further refinement of 150; but it was not something, an
2843 entry made in the due course of business.

Mr. Ewing: It was made in the regular course of business. The fact that it wasn't ever done before doesn't mean that it wasn't done in the usual course of business.

Mr. Wright: I appreciate that counsel asked the witness if it was made in the regular course of business, and that the witness answered "yes," but on voir dire it appeared that it was something which they made up in 1942, had never made before and never made since.

Mr. Ewing: He made it up as part of his job.

Mr. Wright: There has been no showing that the basic data can't be brought in for some sort of examination.

Trial Examiner Norwood: Do you have these tabulations made up on invoices, or something which the other side can verify? You usually have?

If Commission's counsel has something or other to verify any portion of the data here—

Mr. Ewing: The document in your hands, Judge, was prepared by the witness.

Trial Examiner Norwood: But he prepared it on reports by somebody else.

Mr. Ewing: I say that was prepared by the witness for the purpose of offering it here. The document which Mr. Wright has just given you was prepared by the witness, himself, from data available to him at that time which
2844 he no longer has, but he prepared it, himself, in the regular course of his job.

Trial Examiner Norwood: The condition we have always put on documents of this kind is that the supporting data be available to the other side. It doesn't have to be offered in evidence but there has to be some record, or something, from which the Commission can verify the figures.

Mr. Wright: According to the witness' testimony, it is perfectly possible that copies of these letters which were the basis of that are still in the files of the branch offices.

Trial Examiner Norwood: If the counsel will undertake to support that, I can receive them and then go on to make the examination, but it is subject to that condition.

Mr. Ewing: Well, we will make an attempt to.

Trial Examiner Norwood: You have to undertake to make the supporting data available to the other side.

Mr. Ewing: If I don't, I take it Your Honor will exclude the document or strike it at a later date?

Trial Examiner Norwood: We are going to take evidence based on that which you are not fairly certain you can furnish supporting data here for. I don't see how we can take it in.

Mr. Ewing: May I go off the record for a moment?

Trial Examiner Norwood: Yes.

(Discussion off the record.)

Trial Examiner Norwood: We will recess until 2 o'clock.

(Whereupon, at 12:12 p. m., a recess was taken until 2 p. m. of the same day.)

2845 Afternoon Session.

2:00 p. m.

Trial Examiner Norwood: The hearing will be in order. Proceed.

ALBERT B. TIBBETS resumed the stand and testified further as follows:

Direct Examination (Continued).

Mr. Ewing: In connection with my offer of Respondents' Exhibit 150-A and -B for identification, I would like to state that I believe that we will be able to produce the source material which forms the basis for it, or the equivalent, and with that statement I renew the offer.

Mr. Wright: Well, Your Honor, purely as a matter of procedure, I don't believe the material should be received until we have further background.

Trial Examiner Norwood: On condition that that be furnished, I believe it might be received; and if there is some legitimate examination you want to make on it, throwing light on its authenticity and so on—

Mr. Wright: (Interposing.) I have no objection to its receipt on that condition, provided the witness is to be examined further regarding the material; but if he isn't—

Trial Examiner Norwood: (Interposing.) You offer Respondents' Exhibit 150-A and 150-B?

2846 Mr. Ewing: Yes, and Respondents' Exhibit 151-A and -B.

Mr. Wright: That is provided, of course, I am given an opportunity, when the basic material is furnished, of having this witness here for further examination?

Trial Examiner Norwood: Yes, that is right. They are received, subject to the condition that the basic material is to be made available to counsel in support of the allegations of the complaint, and that thereafter he is to have the opportunity to cross-examine the witness further.

Mr. Wright: That is agreeable.

(The papers referred to, heretobefore marked for identification RESPONDENTS' EXHIBITS 150-A and 150-B, and 151-A and 151-B, were received in evidence.)

Mr. Ewing: I ask that this map be marked Respondents' Exhibit 152 for identification.

Trial Examiner Norwood: It may be so marked.

(The map referred to was marked Respondents' Exhibit 152 for identification.)

By Mr. Ewing:

Q. Mr. Tibbets, I show you this map, which has just been marked Respondents' Exhibit 152 for identification, and ask you to state if you know what the various figures, other than the legends such as ¼ cent, ½ cent, and so forth, that appear on the exhibit, are?

2847 A. These are the percentage of the sales of white lead-in-oil by States, excluding the Pacific Coast branch.

Q. Have you compared percentages, by States, of National Lead Company's white lead-in-oil business as set forth in your compilation Respondents' Exhibit 151-A and -B, which I show you, with the percentage figures, by States, shown on Respondents' Exhibit 152 for identification?

A. Yes, sir.

Q. Will you state whether they are the same?

A. Yes, sir.

Q. Meaning they are?

A. They are.

Q. Now directing your attention again to Respondents' Exhibit 151-A and -B, will you state whether, under National's method of selling white lead-in-oil, one or more branches may serve the same State?

A. That is true.

Q. Still directing your attention to Respondents' Exhibit 151-A and -B, will you tell us whether Alabama is served by National's Cincinnati branch?

A. Yes, sir.

Q. Is it served by any other branch?

A. St. Louis.

Q. Now I ask you to look at the map, Respondents' Exhibit 152 for identification, and in particular at

2848 Alabama, and ask you whether you have compared the percentage of business done in Alabama with the total of the St. Louis and Cincinnati branch business in Alabama, as shown by Respondents' Exhibit 151-A and -B?

A. Yes, sir.

Q. How does the total compare?

A. It is the same.

Q. That is, the percentage of business shown by the map as Alabama business, corresponds with the compilation in Exhibit 151-A and -B for the Cincinnati branch and the St. Louis branch business in Alabama?

A. Yes, sir.

Q. Where one or more branches serve a particular State, what does the percentage of business figure, shown by the map, Respondents' Exhibit 152 for identification, reflect?

A. The total white lead-in-oil,—the percentage of the total white lead-in-oil business of that State, of all States except the Pacific Coast branch.

Mr. Ewing: I offer Respondents' Exhibit 152 for identification.

Mr. Wright: Objection. It hasn't been identified as to who prepared it or the source of it.

Mr. Ewing: I will withdraw the offer. I forgot that, Mr. Wright.

Trial Examiner Norwood: All right.

2849 By Mr. Ewing:

Q. I ask you to compare Respondents' Exhibit 152 for identification with copy of Commission's Exhibit 5-A.

A. It is the same.

Q. As far as the territorial divisions indicated by the coloring matter are concerned?

A. Yes, sir, the different zones.

Q. I ask you to look at Respondents' Exhibit 151-A and -B, and Respondents' Exhibit 152 for identification, and compare the State totals of white lead-in-oil percentage business with the State totals indicated by your Exhibit 151-A and -B.

A. They are the same.

Mr. Ewing: I now offer the map, Respondents' Exhibit 152 for identification, and I might say that it is simply a pictorial representation of the data set forth in the other exhibit, Respondents' Exhibit 151-A and -B.

Mr. Wright: I still object. There has been no statement as to who prepared it and the method by which he prepared it.

Mr. DuBose: What difference does it make?

Mr. Ewing: It is a picture map of the States, with figures written in which compare with the other exhibit.

Mr. Wright: His testimony that he sees, by comparing this document and this document, that they have certain common features, doesn't make the document admissible.

2850 Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: I have a few questions on voir dire.

By Mr. Wright:

Q. Would you explain again how you derived the figure of .38 for the State of Alabama?

A. That is the sum of the percentage sold in that State by Cincinnati and St. Louis.

Q. How did you derive that sum, simply by adding the figure appearing under St. Louis for Alabama to the figure appearing under Cincinnati for Alabama?

A. That is right.

Q. And in any case where there was a duplication, it was derived in the same manner?

A. Yes, sir.

Mr. Wright: I make the same objection, Your Honor, to Respondents' Exhibit 152 as was made to Respondents' Exhibit 150-A and -B, and 151-A and -B, namely, that the basic data are not available for cross-examination.

Trial Examiner Norwood: I shall overrule the objection and receive Respondents' Exhibit 152 for identification, subject to the same conditions, that is, that the basic data for 150-A and -B and 151-A and -B, on which this map was based, be made available to counsel in support 2851 of the complaint, and if it is not made available I will entertain a motion to strike all this evidence.

(This map referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 152, was received in evidence.)

Mr. Ewing: I ask that this document be marked Respondents' Exhibit 153 for identification.

Trial Examiner Norwood: It may be so marked.

(The paper referred to was marked Respondents' Exhibit 153 for identification.)

By Mr. Ewing:

Q. I show you this paper, Mr. Tibbets, that has just been marked Respondents' Exhibit 153 for identification, and ask you whether that was prepared by you or under your direction, at my request?

A. It was prepared under my direction.

Q. From what source, if you know, were the figures derived?

A. From the books of the Accounting Department.

Q. Have you those figures with you?

A. No, sir.

Q. Will we be able to produce them in New York?

A. Yes, sir, I think so.

Q. Will you look at the branches listed on Respondents' Exhibit 153 for identification, and state which of National's ten branches there listed now produce white lead-in-oil?

A. Atlantic, Chicago, John T. Lewis, and St. Louis
2852 and San Francisco.

Trial Examiner Norwood: Those points manufacture it?

The Witness: Yes, sir.

By Mr. Ewing:

Q. Did National ever produce white lead-in-oil at any of the other branches shown on that exhibit at which there now is no production?

A. Yes, sir.

Q. Will you tell us at which branches it produced white lead-in-oil, if you know?

A. Boston, Buffalo, Cincinnati, Cleveland, Pittsburgh.

Q. I don't recall your answer to a preceding question, but will you tell us whether you included Chicago as a branch at which white lead-in-oil is now produced?

A. I thought I included it. It should have been.

Q. I couldn't recall.

Mr. Ewing: Subject to supplying the information in a fashion similar to the prior ruling, I offer Respondents' Exhibit 153 for identification in evidence.

Mr. Wright: Well, I have the same objection, of course.

Trial Examiner Norwood: Yes. Now that is subject to your producing the—

Mr. Ewing: The basic data from which it was compiled.

2853 Trial Examiner Norwood: When we get to New York?

Mr. Ewing: Yes, sir.

Trial Examiner Norwood: Received, under that condition.

(The paper referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 153, was received in evidence.)

Mr. Ewing: I now ask that these 9 sheets be marked Respondents' Exhibit 154-A to -I, inclusive, for identification.

Trial Examiner Norwood: They may be so marked.

(The papers referred to were marked Respondents' Exhibit 154-A through 154-I for identification.)

By Mr. Ewing:

Q. I show you these nine sheets marked Respondents' Exhibit 154-A to -I, inclusive, for identification, and ask you to state whether the information set forth therein was compiled and tabulated by you or under your direction?

A. I did it.

Q. Does this exhibit set forth pig lead prices from the earliest date stated thereon, namely, December 20, 1920, down through January 14, 1942?

A. Yes, sir.

Q. What pig lead prices does it purport to show?

A. New York prices.

Q. New York prices?

A. Yes, sir.

2854 Q. From what source did you obtain the prices set forth in this exhibit?

A. From the Sales Department.

Q. Now will you tell us what other prices this exhibit purports to show for what other pigments?

A. Paste White Lead, Paste Red Lead, Dry White Lead, Lead Sulphate, Dry Red Lead, and Litharge.

Q. When you say "Paste White Lead"—

A. (Interposing.) White lead-in-oil.

Q. And when you say "Paste Red Lead"—

A. (Interposing.) Red lead-in-oil.

Q. When you stated that you obtained the pig lead price figures from the Sales Department and referred to them before that as the New York prices, what company's prices were they, if you know?

A. I don't believe I am prepared to tell that.

Q. I will ask you this question. Were they National's prices?

A. No.

Q. Now with respect to the other pigments which you have mentioned, namely, Paste White Lead, Paste Red Lead, Dry White Lead, Lead Sulphate, Dry Red Lead, and Litharge, what company's prices are shown in this exhibit?

A. National Lead Company's.

2855 Q. Now what prices of National's with respect to those 6 pigments that I have just mentioned, were shown on the exhibit?

A. Paste White Lead, Paste Red Lead, Dry White Lead, Dry Red Lead, and Litharge—

Q. (Interposing.) I mean what was the price that you show here?

A. Per hundred. You mean from the standpoint of retail price?

Q. Yes.

A. That is list price.

Q. That is sometimes referred to in this case as "card price", is that right?

A. Right, card price.

Q. What price changes are shown with respect to those pigments?

A. I don't quite understand your question.

Q. I will withdraw the question.

Does this exhibit, to the best of your knowledge and information, set forth all card prices for these 6 pigments, other than pig lead prices, and changes in National's prices, for the period covered by the list?

A. Yes, sir.

2856 Q. Calling your attention to page 5 of the exhibit which has been marked Respondents' Exhibit 154-E for identification, I ask you to note in the two columns to the right, under the respective headings Dry Red Lead and Litharge, the pencil entries which appear, and I ask you who made those entries?

A. I did.

Q. What do they represent?

A. They represent the Dry Red Lead price at that date, April 4, 1930, and the Litharge price for the same date—pardon me, it is April 7, 1930.

Q. Under what circumstances were those entries made?

A. I made the correction in checking back on this, and my secretary didn't see it and I didn't see it.

Q. Now I call your attention to page 9 of the exhibit, marked Respondents' Exhibit 154-I for identification, and direct your attention to the last figures in the column headed Dry Red Lead and Litharge. Whose entries are those two pencil entries?

A. Those are mine.

Q. What do they represent?

A. They represent the price change on January 14, 1942, for dry red lead and litharge.

Trial Examiner Norwood: Are those figures $10 for Dry Red Lead and $9 for Litharge, respectively?

The Witness: Yes, sir.

By Mr. Ewing:

Q. Under what circumstances were those entries made by you?

A. I made them, and my secretary didn't catch them, and neither did I.

2857 Q. Do you mean by that answer that when the document was typed, they were not on there, and that upon checking you discovered their absence and supplied them?

A. That is right, sir.

Mr. Ewing: I offer Respondents' Exhibit 154-A to -i, for identification, in evidence.

2858 Mr. Wright: I would like a short cross-examination on the identification.

Trial Examiner Norwood: Very well.

By Mr. Wright:

Q. Did I understand you to say that you compiled this document?

A. Yes, sir.

Q. When did you compile it?

A. About a month ago, I guess.

Q. Will you tell us now just how you went about compiling it; what did you do to get the information?

A. Well, I had the records of the pig lead changes—

Q. Where did you obtain those?

A. From the Sales Department.

Q. Do you know where they obtained them from?

A. Yes, they compiled them. As every change is made they make a record of every pig lead change.

Q. When did they make that record?

A. In 1920—or even back of 1920, I have forgotten just what year it was, but it is from 1920 right straight through.

Q. Do you know what prices of pig lead that represents?

A. Yes, the New York prices.

Q. Is that common pig lead?

A. Yes.

Q. Or corroding lead?

2859 A. Yes.

Q. Which?

A. Corroding lead.

Q. It is corroding lead?

A. That is my understanding of it.

Q. And where did you get that understanding?

A. Well, that is what these pig lead changes are, for corroding lead.

Q. You are willing to stand on it, then, that these are figures for corroding lead rather than common pig lead that appear here? You know that there is a differential, do you not, between common and corroding?

A. Yes. I will have to change my answer; I don't know which these are.

Q. Do you know from what sources the Sales Department compiled that?

A. From the prices established in New York.

Q. Established by whom?

A. By the selling companies, the supplying companies.

Q. You don't know who those companies might have been?

A. No.

Q. Or how they received that information?

A. No; it is the New York market.

Q. On the paste white lead, that is the list price, you said the price a consumer would pay to one of your dealers?

2860 A. That is the list price.

Q. That is not the painters' price?

A. No.

Q. For what quantity is that price?

A. 100 pounds.

Q. That is ~~in~~ 100 pound kegs?

A. Yes, sir.

Q. That would be for a single keg or more than a single keg?

A. Well, it is a single keg price.

Q. There is no quantity discount on that?

A. No, sir.

Q. That is gross?

A. Yes, sir.

Q. Now as to the paste red lead, is that in the same category?

A. Yes, sir.

Q. As to the dry white lead, what sort of a container is that in?

A. That would be a keg price.

Q. Of 100 pounds?

A. Yes, sir.

Q. That would be the type of product which would be sold in accordance with those zones in Commission's Exhibit 580, on dry white lead?

A. Yes.

Q. How about lead sulphate; are the prices that
2861 are entered there in the same category?

A. That is a hundred pounds.

Q. One Hundred pound kegs?

A. Yes.

Q. And dry red lead and litharge, would those be 100 pound keg prices on those products?

A. Yes.

Q. Sold in accordance with the zones similar to those in Commission's Exhibit 580?

A. That is right.

Q. This wouldn't be the dry lead, dry red lead and litharge sold to paint manufacturers or battery manufacturers?

A. No, sir.

Q. This is the type sold to dealers for resale generally?

A. Not lead sulphate, we don't sell that through dealers.

Q. In what territory are these prices applicable?

A. New York.

Q. Would that be the par territory?

A. Yes.

Q. This would not reflect any changes that were made in discounts to dealers or other purchasers, would it?

A. No, sir.

Q. Only the list price changes?

A. Right.

Q. How did you get these price changes, Mr. 2862 Tibbets; just what procedure did you go through to obtain them?

A. The paste white lead was from actual cards, price cards.

Q. Did you have a complete set of those cards in your possession?

A. Yes, sir.

Q. How about the other products?

A. They changed so often that those were records kept by the Sales Department; they don't keep the cards for all of those things.

Q. How did they keep their records on that?

A. By just a tabulation of the changes as they made them.

Q. In what form were these tabulations?

A. In typewritten form on small sheets.

Q. They had a running tabulation of all the price changes?

A. That is right.

Q. Can you produce the cards and the tabulations and the basic data from the Sales Department, from which this was prepared?

A. Yes, sir.

Q. Would they be in a position to tell us exactly what those pig lead prices were, for what grade of lead, and how they were made, and from what source they got them?

A. No.

Q. They wouldn't know from what source those figures were compiled?

2863 Mr. DuBose: Who wouldn't know?

Mr. Ewing: I don't think he understood the question.

Mr. DuBose: I object to the question.

Mr. Wright: I will repeat it.

By Mr. Wright:

Q. Would the Sales Department know the source of these pig lead prices which they furnished to you, which appear in the first column of this exhibit?

A. I wouldn't know that.

Mr. Wright: Your Honor, I object to the receipt of this document in evidence without proffer, for examination at least, of the basic data upon which it was made. In the first place, as to the pig lead prices it is obvious that this witness doesn't even know what grade of lead is involved, let alone from what source the Sales Department obtained the information.

Mr. Ewing: We will supply the pig lead data, and with respect to the other price changes we have, I believe, all of the basic data here.

Mr. Wright: May we go off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Ewing: While I had not intended to offer the price cards showing changes in the case of pig lead, and
2864 the tabulations showing changes in the other pigment prices in view of the large number of them, I am prepared now to make the proffer of them to Mr. Wright for his examination in connection with any cross-examination he has of this witness. I can, of course, through this witness offer each and every one of the documents which support the compilation in case of the six pigments other than pig lead, but I didn't think it was necessary to burden the record with that unless you would like to have it in.

Trial Examiner Norwood: Suppose counsel confer about that and see if they can make some agreement on it.

Mr. Wright: I would like to go off the record for this discussion.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. We will take a ten minute recess.

(A short recess was taken.)

Trial Examiner Norwood: All right, proceed.

Mr. Ewing: I withdraw the offer of Respondents' Exhibit 154-A to i for Identification at this time.

I ask that this sheet be marked Respondents' Exhibit 155 for identification.

Trial Examiner Norwood: It may be so marked.

(The paper referred to was marked Respondents'
2865 Exhibit No. 155 for identification.)

By Mr. Ewing:

Q. I show you this sheet of paper which has been marked Respondents' Exhibit 155 for Identification, and ask whether it was prepared by you?

A. Yes, sir.

Q. What does it purport to show?

A. The average percentages of white lead-in-oil sales sold by branches through agents.

Q. For what years?

A. The years 1933 to 1941, inclusive.

Q. From what source did you obtain those figures?

A. From the branches.

Mr. Ewing: I would like to go off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Does this refer to consignment sales?

Mr. Ewing: Yes, sir.

Mr. DuBose: Under the agency contracts which are already in evidence.

Trial Examiner Norwood: What does that mean—the average percentage as compared to the total sales of National?

Mr. Ewing: Of each branch, of white lead-in-oil.

2866 Mr. DuBose: Other than the Pacific Coast.

Trial Examiner Norwood: That is, white lead-in-oil was 86 per cent of the sales of the Atlantic Branch?

Mr. Ewing: Eighty-six per cent of the Atlantic Branch sales of white lead-in-oil during this time were sales made through the consignment method.

Mr. Wright: May I ask a few questions on voir dire?

Trial Examiner Norwood: Yes.

By Mr. Wright:

Q. Mr. Tibbets, where did you get the information that appears in the note appearing at the bottom of the page?

A. From the branches.

Q. Is this the correspondence from the branches which I have here?

A. Yes, sir.

Q. Will you point out where in that correspondence you got that information?

A. That is my own compilation based on these. I wouldn't say that was—

Mr. Ewing: (Interposing.) I might say this. When I come to offering this exhibit I will omit from the offer, and we can physically strike it should it seem preferable, the two sentences appended, as well as the note below them.

Trial Examiner Norwood: Very well. Off the record.

(Discussion off the record.)

2867 Trial Examiner Norwood: On the record.

By Mr. Wright:

Q. Is this document which I hand you here, dated March 26, 1947, the letter which you sent to the branches?

A. Yes sir.

Q. And on the basis of which you received this information?

A. Yes, sir.

Mr. Wright: I have no further voir dire.

Mr. Ewing: I offer Respondents' Exhibit 155 for identification in evidence, except for the matter which appears below the word "St. Louis" and the figure "90".

Mr. Wright: Your Honor, I object to the offer and I direct your attention to the document which the witness has just stated was the one that he sent to the branch managers asking for this information, in which he requested them for an estimate. Now you will notice that the original exhibit doesn't state that it is an estimate. That is the vice of receiving a tabulation such as this sort separate and apart from the basic material. This would appear to be, from the exhibit itself, a tabulation which was made from the physical records of the company. In fact, all that the witness asked the branch managers for was a guess. The substance of this is a tabulation of guesses, it can't be anything else. It is stated in the replies, many of them, that this is frankly an estimate because they don't know.

2868 Trial Examiner Norwood: I think we will have to wait to receive this until we get a firmer foundation for it.

Mr. Wright: The people who made those estimates and guesses haven't been proffered. How do I know on what basis they made their guess? And the note which is appended "An average of 1 to 2 per cent was sold through dealers other than agents and the balance was sold to customers such as government and industrials" was an afterthought which this witness put on there, which he didn't get from any of the basic data.

Trial Examiner Norwood: I think that I will sustain the objection for the time being. Possibly you can put a little foundation under it later on and then maybe we will receive it.

Mr. Ewing: I have no further questions.

Trial Examiner Norwood: Cross examination.

Cross-Examination by Mr. Wright.

Q. Mr. Tibbets, you stated that the National Lead Company at one time manufactured white lead at Boston, Buffalo, Cincinnati, Pittsburgh and Cleveland, is that correct?

A. Yes sir.

Q. When was that?

A. I couldn't tell you the dates.

2869 Q. Have they produced any white lead at any of those places since 1930?

A. No.

Q. Since 1920?

A. I couldn't tell you; I haven't got the figures here at all.

Q. Have they produced it that you recall since you began your service with the company?

A. My memory wouldn't serve me as to that.

Q. But at any rate it is a long time ago, is it not?

A. Yes sir.

Q. What are these branches that appear in the exhibits here; what do you mean by the term "branch"?

A. That is a branch office, in branch territory.

Q. Is that a sales organization?

A. A sales organization and in some cases combined with manufacturing.

Q. In some cases?

A. Yes, I mentioned those.

Q. Now one manufacturing branch would manufacture for and ship into perhaps several branch territories?

A. That is right.

Q. So that actually the branch territories are simply a sales and bookkeeping proposition as distinguished from manufacturing, although some branches may also manufacture?

2870 A. That is right.

Q. What is the Oxide Committee of the National Lead Company?

A. Well—I don't understand your question.

Q. You stated, as I recall it, that you had been Secretary to the Oxide Committee since somewhere aronnd 1924; that is that committee?

A. It is the Sales Committee on Oxides.

Q. It is a Sales Committee, is it?

A. Yes sir.

Q. Does that committee consider marketing problems and methods of price quotation?

A. Yes sir.

Q. Do they originate recommendations to the Company as to changes in those marketing policies?

A. No, not necessarily—that is in a general way.

Q. What do you mean "in a general way"?

A. Well, any major change in policy they might discuss it at a committee meeting, but they don't determine the policy on prices.

Q. Are you familiar with the manner in which the company quoted on these oxides over any considerable period of time?

A. No.

Q. Your duties on the Oxide Committee and on the Sales Committee didn't include any experience, then, with the pricing methods that the company employed?

2871 A. Well, only for attending the meetings and recording what was done.

Q. You didn't take any part in the policy determinations or discussions?

A. No sir.

Q. You were in the advertising end of the business, you stated?

A. Sales promotion.

Q. Have you had anything to do with the advertising?

A. I did at one time.

Q. When was that?

A. From 1919 to about 1927, I think it was.

Q. Do the fields of advertising and sales promotion more or less run together on a number of things?

A. No.

Q. They do not?

A. No.

Q. What were the principal media of advertising of the company back in the period when you were in that department?

A. Magazines.

Q. What magazines, for instance?

A. Well, the Saturday Evening Post. I don't recall them all now, that was several years ago and I don't remember just what the media were at that time. That was back in 1927 when I left there. I had the direct mail 2872 anyway, I didn't have the medium selection.

Mr. Wright: May we have a five minute recess, Your Honor? I think we can probably get through with this witness in a hurry if we do.

Trial Examiner Norwood: A five minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. Mr. Tibbets, calling your attention again to Respondents' Exhibit 148, under the column "Differential Per Ctw. 'Old System'," do you know what that system was?

A. Yes, it was their differential points; we charged freight differentials.

Q. The figures are as you found them in Commission's Exhibit 659?

A. Yes sir.

Q. Do you know how long the company operated on that Old System?

A. No, I don't.

Q. Do you know when they changed to the Zone System as shown in Column 2?

A. Not definitely I don't.

Q. What is your recollection?

A. I prefer not to say rather than be inaccurate.

Q. Did you mean, in preparing this exhibit, to 2873 have it show that the differentials as shown in Commission's Exhibit 659 were changed to the differentials which are shown in Commission's Exhibit 580?

A. Yes sir.

Q. And that there were no intervening differentials between those that were different from those that appear here?

A. I followed the record.

Q. What do you mean by "I followed the record"?

A. Well, the exhibits that you have mentioned, the information you mentioned—I followed those.

Q. In other words, you don't know anything independent of what is in those exhibits?

A. No sir.

Q. You didn't mean this exhibit to show anything that was independent from what was in those two exhibits?

A. I followed those two exhibits.

Q. And there is nothing added from any other records or from your own knowledge at all?

A. No sir.

Q. Going back to Respondents' Exhibit 148, as I understood your testimony these figures in the Old System were added to the base price in making the price to the customer?

A. That is the freight differential, yes sir.

Q. How was that handled, do you know?

A. No, I wouldn't know that.

2874 Q. Did the customer pay the freight in those instances, do you know?

A. They paid the differential.

Q. They paid the differential over the par price?

A. Yes sir.

Q. Would the testimony which you have just given regarding those differentials as to Respondents' Exhibit 148 be the same in answer to the same questions regarding Respondents' Exhibit 149, as to the significance—

A. (Interposing): Yes, the difference in differentials.

Q. They are on the same basis, then?

A. Yes, they are.

Mr. Wright: I have no further cross examination, Your Honor.

Trial Examiner Norwood: Is there any redirect?

Mr. Ewing: No redirect.

Trial Examiner Norwood: Thank you, Mr. Tibbets.

(Witness excused.)

Mr. Ewing: I would suggest Your Honor that we adjourn now until tomorrow morning at 10 o'clock.

Trial Examiner Norwood: All right, we will recess until tomorrow morning at 10 o'clock, Eastern Daylight Saving Time.

(Whereupon, at 3:30 p.m., June 10, 1947, the hearing in the above-entitled matter was adjourned.)

2875 Room 332, Federal Trade
Commission Building,
Washington, D. C.,
Wednesday, June 11, 1947.

Met, pursuant to adjournment, at 10:00 a. m., E. D. S. T.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., and
Paul R. Dixon, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 815-15th St., N. W., Washington, D. C.), appearing for Sherwin-Williams Company.

Edmund P. Wood, Esq. (2801 Carew Tower, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Henry E. Gardiner, Esq. (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James D. Ewing, Esq., and
E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

2876 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on yesterday, the hearing in Docket 5253 is now reconvened at 10 o'clock a. m., on the 11th day of June, 1947, in Room 332, Office of the Federal Trade Commission, Washington, D. C.

The reporter will note the appearances.

Call your witness.

Mr. Ewing: I understood, Your Honor, you were going to rule this morning on Mr. Wright's motion to strike Mr. Sprague's testimony.

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

I have looked at the passages there, and will need some discussion before I can make any decision about them, so we will defer that until later today, or as soon as we can get to it.

Call your witness.

Mr. Ewing: Mr. McNair.

JOHN GORDON CRAWFORD McNAIR was thereupon called as a witness for the respondent National Lead 2877 Company, and having been first duly sworn, testified as follows:

Trial Examiner Norwood: State your full name.

The Witness: John Gordon Crawford McNair.

Direct Examination by Mr. Ewing.

Q. Mr. McNair, by whom are you presently employed?

A. National Lead Company.

Q. When were you first employed by National Lead Company?

A. October 5, 1910.

Q. By what branch were you first employed?

A. The Atlantic Branch, New York.

Q. By what branch are you presently employed?

A. Atlantic Branch, New York.

Q. What was the nature of your first employment in the Atlantic Branch?

A. I was a clerk in the office.

Q. And how long did you occupy that position?

A. Six months.

Q. Thereafter, what positions did you occupy?

A. Salesman.

Q. Still with the Atlantic Branch?

A. Yes, sir.

Q. How long were you a salesman with the Atlantic Branch?

A. Approximately 8 years.

Q. What was the nature of your employment following your employment as a salesman? 2878

A. Assistant Sales Manager.

Q. Still with the Atlantic Branch?

A. Still with the Atlantic Branch.

Q. And how long were you Assistant Sales Manager?

A. Six years.

Q. What was your connection with the Atlantic Branch thereafter?

A. I became Sales Manager, which job I occupied for about five and a half years; Assistant Manager of the Atlantic Branch for a period of about nine years; and Manager of the Branch for about eight years.

Q. Now will you tell us generally about the set-up of the Atlantic Branch, what products it distributes or manufactures, if any?

A. We manufacture a variety of lead products. In the Pigment Division, white lead-in-oil, red lead, litharge, basic lead sulphate, red lead-in-oil, linseed oil, and a lot of other miscellaneous items.

Q. Where are your plants located?

A. Of the Atlantic Branch?

Q. Of the Atlantic Branch.

A. We have two plants in Brooklyn, and one in Perth Amboy.

Q. What is manufactured at the Perth Amboy Branch?

A. Metal products and white lead.

2879 Q. Will you tell us approximately the white lead capacity of the Perth Amboy plant?

A. At the present time?

Q. At the present time:

A. Approximately about 14,000 tons a year of white lead-in-oil and dry white lead.

Q. Now will you tell us what you manufacture at the two Brooklyn plants?

A. Well, at the Perth Amboy plant we finish the dry lead, and we transport pulp white lead from the Perth Amboy plant to Brooklyn, which plant processes it by the addition of linseed oil.

Q. When you say you finish the white lead at Perth Amboy, will you explain that?

A. The dry white lead.

Q. The dry white lead.

A. Well, it simply comes over in water pulp, and that is put in driers and dried, the water taken out of it and it is dried.

Q. Will you tell us what the pulp lead is that is shipped from Perth Amboy to Brooklyn?

A. Pulp lead is the carbonated lead in water form. The process which we use in that plant is a cylinder process, better known as the Carter process; and that is
washed with water, and when it is finished, the wash-
2880 ing, it is shipped in tanks, that is, by tank-boat, to
Brooklyn, at which point it is dewatered by the addition of linseed oil, and it runs through a series of roller mills and is put into the kegs as lead-in-oil.

Q. Now during the time that you have been connected with the Atlantic Branch, has that branch operated any white lead plants other than those you have mentioned?

A. Yes, sir.

Q. Will you tell us where they were located?

A. We operated the Matheson Lead Company in Long Island City; we had another plant in Port Richmond.

Q. Do you still operate the plant at Port Richmond?

A. No, sir.

Q. What happened to it?

A. We shut the plant up, and it was finally demolished, to save taxes. The reason why we did that was because the volume was insufficient to operate that plant and the Perth Amboy plant economically. As a matter of fact, to manufacture white lead economically it is desirable to have your plant operating at its fullest capacity, which couldn't have been the case if our production had been divided between Port Richmond and Perth Amboy.

Q. What was the capacity of the Port Richmond plant at the time you shut it down?

A. About 12,000 tons, in round figures.

Q. Now what has become of the Matheson plant?

2881 A. The Matheson plant was likewise shut down,
and that has been sold; that is, the machinery was taken out of there and transferred, some to the Brooklyn plant and some down to Perth Amboy, and eventually the plant was closed up and sold.

Q. About when did you shut the Port Richmond plant, do you know?

A. I think it was in the late 30's, if I remember correctly.

Q. And about when did you shut the Matheson plant?

A. About '32 or '33, or somewhere in the early 30's.

Q. Will you tell us why you closed the Matheson plant?

A. We closed the Matheson plant for the same reason that we closed the Port Richmond plant, because it was not economical to operate that plant with the capacity we had going through it.

Q. And what was the capacity at the time you closed it?

A. Approximately 7,000 tons.

Q. You mean per year?

A. Per year.

Q. Am I correct in understanding that during the time that you have been Manager of the Atlantic Branch of the National Lead Company, you have had charge of all the activities of that branch, including manufacture, sales and distribution of its products?

A. That is correct.

Q. What connection, other than as Manager and
2882 Assistant Manager of the plant or of the branch,
have you yourself had with the white lead-in-oil business of National Lead Company?

A. Well, I was a salesman and sold it for 8 years.

Q. And what was your territory, Mr. McNair?

A. South Carolina, Georgia and Florida; and I was moved up then to the New England States, and eventually into the New York area, around Brooklyn and Jersey, prior to the time I was transferred into the office.

Q. Now in the regular course of your employment as a salesman, what contact, if any, did you have with painters or other users of white lead-in-oil?

A. I had a great deal of contact, because in the nature of my sales job it was necessary for me to contact painters, builders, architects, stores, wholesale distributors, railroads, and every type of industry that would prove a likely prospect for the consumption of white lead.

Q. What raw materials are used in the production of white lead?

A. Pig lead and linseed oil.

Q. How is white lead produced?

A. White lead is produced by several methods, such as the old Dutch process, the Carter process, the electrolytic process, the Lenox process—that covers the general range of the normal processes.

Q. What process was used by the Atlantic Branch
2883 in its production of white lead?

A. We have manufactured by the Lenox process, by the Dutch process, and the Carter process.

Q. Where did you manufacture with the Dutch process?

A. Perth Amboy and Brooklyn.

Q. By what process do you now manufacture?

A. We manufacture by the Carter process.

Q. And that is at Perth Amboy?

A. Yes, sir.

Q. Do you know at what branch or plants National now produces white lead, in addition to the plants of the Atlantic Branch?

A. Yes, sir.

Q. Will you state them?

A. New York, Philadelphia, Chicago, St. Louis, and San Francisco.

Q. Did National ever produce white lead at any of its other branches?

A. Yes, sir.

Q. Will you tell us at which branches it formerly produced white lead, if you know?

A. Originally, all branches at one time had a white lead plant, and that is how the branches came into being. They had a Boston branch, they had a plant in Salem,
Pittsburgh, they had a plant in Cincinnati, one at
2884 Cleveland—all of those plants have been discontinued.

Q. Did the Buffalo Branch have a plant?

A. Yes, Buffalo.

Q. Has National Lead Company prepared any material which portrays graphically the manufacturing story of Dutch Boy White Lead and Dutch Boy Red Lead?

A. Yes, sir.

Mr. Ewing: I ask that this be marked Respondents' Exhibit 156 for identification.

Trial Examiner Norwood: It may be so marked.

(The document referred to was marked Respondents' Exhibit 156 for identification.)

By Mr. Ewing:

Q. I show you this document, which has been marked Respondents' Exhibit 156 for identification, and ask you whether that is the material to which you have just referred?

A. Yes, sir.

Mr. Ewing: I offer Respondents' Exhibit 156 for identification, in evidence.

Trial Examiner Norwood: Any objection?

Mr. Wright: I would like to ask a question or two on identification.

Trial Examiner Norwood: Very well.

By Mr. Wright:

Q. Mr. McNair, who prepared this exhibit?

2885 A. Our Advertising Department.

Q. Did you have anything to do with preparing it?

A. No, sir.

Q. Do you know whether all the material in it is factually correct or not?

A. Yes, sir.

Q. How do you know that?

A. My experience in the lead business.

Q. You have examined it yourself, then, and know it to be correct?

A. That is right.

Mr. Wright: I have no objection.

Trial Examiner Norwood: Received.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 156, was received in evidence.)

By Mr. Ewing:

Q. Now I take it from what you have already testified that you are familiar with the operation of plants manufacturing white lead?

A. Yes, sir.

Q. Are you familiar with the construction of plants of that nature?

A. Yes, sir.

Q. Based upon your experience with National Lead
2886 Company, are you in a position to tell us the approximate cost, in normal times, say the late 1930's, of constructing a white lead plant of sufficient size to operate economically and of sufficient capacity to serve such a number of customers?

Mr. Wright: Objection, Your Honor.

Mr. Ewing: I just asked if he was in a position to tell us.

Trial Examiner Norwood: Objection overruled. Answer it.

A. I think I am qualified.

By Mr. Ewing:

Q. Will you tell us?

Mr. Wright: Objection, Your Honor. It hasn't been shown on the record that this gentleman is qualified to make any such statement. It hasn't been shown that he has constructed any plants or has any knowledge of the cost of their construction. He is the Manager of a branch. There has been no showing that they ever constructed any plant during that period of time or that this man is familiar with construction costs during that period.

Mr. Ewing: He is Manager of the branch, he is the operating manager of the plant at these various plants, and he has run them. He has taken them down, at least. I haven't asked if he has put them up. And I think he is qualified to make such an estimate.

2887 Mr. Wright: The question was unqualified as to what was the cost of a plant. There is no telling what sort of plant the question calls for or whether it is strictly a white lead plant—

Trial Examiner Norwood: (Interposing) You can bring out those particulars on cross-examination.

Do you feel, Mr. Witness, that you can give us a reliable estimate?

The Witness: I think I can, sir.

Trial Examiner Norwood: Or approximate those costs?

The Witness: Yes, sir.

Trial Examiner Norwood: Objection overruled.

By Mr. Ewing:

Q. Now will you give us the answer, Mr. McNair?

A. Back in 1930 or thereabouts, to construct a white lead plant with a capacity of around 10,000 to 12,000 tons per year, it would run over a million and a half dollars. The same plant today would cost considerably more money, due to the increased costs of construction.

Q. Now will you tell us how white lead-in-oil is used by the painter?

A. White lead-in-oil is purchased by the painter, and he mixes linseed oil with it, approximating, for the finishing coat, 3½ gallons to the hundred, adds a little drier to it, and the tinting colors if he desires to have it tinted.

2888 To the priming coat, he would add 2 gallons of oil and 2 gallons of turpentine to the hundred, and the necessary tinting materials if he desired to tint it.

2889 Trial Examiner Norwood: That is per hundred pounds?

The Witness: A 100 pound keg, yes sir. A hundred pound keg is equivalent to about $3\frac{1}{8}$ gallons in itself, and if you add 3 gallons of oil to it you would have $6\frac{1}{8}$ gallons of paint material.

Trial Examiner Norwood: What is the total gallonage?

The Witness: A hundred pound keg is equivalent, to a soft paste package, to about $3\frac{1}{8}$ gallons.

Trial Examiner Norwood: Go ahead.

By Mr. Ewing:

Q. So when you add three gallons of the other material, the thinner, to it, you have a hundred pound keg producing approximately $6\frac{1}{8}$ gallons of finished paint?

A. That is correct.

Trial Examiner Norwood: How much lead is in that?

The Witness: A hundred pound keg of white lead averages about 89 per cent carbonate and 11 per cent oil. With the heavy paste lead it will run about 8 per cent of oil and 92 per cent of carbonate.

By Mr. Ewing:

Q. What, if you know, is the relation of the cost of white lead-in-oil to the painter as compared to the painter's total cost in doing a paint job?

A. In normal times it would run 20 to 25 per cent of the total cost of the paint job.

2890 Q. What branches of National Lead distribute white lead-in-oil?

A. All branches.

Q. I ask you to look at these sheets that have been marked Commission's Exhibits 807-A to L, inclusive, and tell us whether they set forth the branches of National Lead and the branch territories?

A. Yes; these sheets represent the branches of the National Lead Company, with their boundaries, territorial boundaries.

Q. Do you know the historical reasons for the branches and the branch territories as shown by that exhibit, and as they now exist?

A. Yes, sir.

Q. Will you give us the reasons underlying the branch and territorial set-up of the National Lead Company?

Mr. Wright: Objection, Your Honor. This witness by his own testimony has never served in any capacity except with the Atlantic Branch of the National Lead Company. He has not been shown to have had anything to do with the policies or the operations of any of the other branches, and I strenuously object to his testimony about the larger policies of the National Lead Company in other of its branches, because it can be nothing but hearsay.

Mr. Ewing: I didn't ask him anything about policies
at all. I asked him if he knew the historical reasons
2891 underlying the branch set-up and he testified that he
did. Now he says that he knows it.

Mr. Wright: It can't be within his experience—

Mr. Ewing: (Interposing.) It can be within his knowledge—

Trial Examiner Norwood: (Interposing) You may cross-examine him on that, but I don't see how I can stop him from what he knows.

Mr. Wright: I have no objection to somebody from the National Lead Company who knows testifying, but I submit that this witness has never been out of the Atlantic Branch.

Trial Examiner Norwood: This isn't his opinion, this is his knowledge. You may ask him as to that, and if it develops later that it has to be struck, that may be done, but we should see what his knowledge is. Objection overruled.

The Witness: I am quite familiar with the branches of the National Lead Company because I have visited all of the branches, I have gone through all of their plants, I have conferred with them on sales records, and I am quite well versed as to the operations and the boundaries of all of our branches.

In the early days, before the National Lead Company was formed, there were a great number of white lead pro-
ducers, a total approximating eighteen or twenty.
2892 These companies sold white lead in their vicinity
where they could operate economically. When the
National Lead Company was formed they retained these branches and practically the territorial boundaries that the old company, the original company, operated in. They retained a great many of the brands for years, there were twenty-odd—Ulster, Atlantic, Brooklyn, Jewett, Anchor, Red Seal, Collyer, Fahnestock, Beeman & Bauman—maybe I have covered twenty. If I haven't, maybe I can figure out the rest of them.

By Mr. Ewing:

Q. So that the present branch system through which National now operates is the outgrowth of the development of the company?

A. Yes, sir.

Mr. Wright: Objection Your Honor. That was a statement by counsel.

Trial Examiner Norwood: I think so; objection sustained.

By Mr. Ewing:

Q. Were National's various branches all authorized to sell Dutch Boy White Lead In Oil?

A. Yes, sir.

Q. Were the various branches permitted to sell other brands in addition to the Dutch Boy Brand?

2893 A. The Dutch Boy Brand as a trademark was adopted, I believe, in 1907. At that time they put the Dutch Boy name and the Dutch Boy trademark on the body of the package, and on the heads of the package they retained the old names of the constituent companies. In our particular branch we had four of them, and as years went by they gradually dropped these names and substituted the name Dutch Boy on the cover in place of these old names of the original companies.

Q. Does National Lead Company, in distributing and selling white lead-in-oil now use a method based upon zone or territorial differentials?

A. Yes, sir.

Q. For how long, to your own knowledge, has National Lead Company used a method of selling and distributing white lead-in-oil based upon zone or territorial differentials?

A. More than 37 years to my knowledge, because they operated on that basis when I first came with the company, prior to 1910.

Q. Based upon the knowledge acquired by you in the regular course of your duties in your long employment with National, can you state for how long prior to 1910, when you came with the company, such a method of selling or distributing white lead-in-oil has been used?

A. When it was put into effect I do not know but it was in effect when I came with the company in 1910.

2894 Q. In connection with the sale of white lead-in-oil does National now portray graphically its acceptance of territorial differentials as a basis for sale?

A. Yes, sir.

Q. I show you a map, Commission's Exhibit 580, and ask you whether that portrays in substance National's territorial differentials as now used?

A. Yes sir.

Q. Do you know the approximate date when National first employed the present zone map in connection with its sale of white lead-in-oil?

A. I believe it was between the late Fall of 1933 and the early Spring of 1934, somewhere along in that period.

Q. Prior to the use of the present zone map how did National set up its zone or territorial differentials?

A. In practically the same way.

Q. Will you tell us what you mean by that?

A. Well, they had certain differential zones, they had equalization points and delivery points.

Q. When you say that they had differential zones, what do you mean?

A. Differential zones whereby in that particular area they would add a premium over their par prices to compensate for some part of the freight.

Q. I show you a copy of Commission's Exhibit 659-C to P, inclusive and ask you to examine it.

2895 A. Yes sir.

Q. Will you tell us whether that exhibit that you have just examined sets forth National's territorial set-up during the years to which it relates?

A. Yes sir.

Q. There has been some testimony in this proceeding concerning what has been described as consumer acceptance of the Dutch Boy label. Will you tell us what the phrase "consumer acceptance" means to you?

A. The National Lead Company over the years has spent a great deal of money advertising the Dutch Boy brand. Through our sales promotional activities with the painters, the property owners and other consumers, and the salesmen's activities, plus the quality of the product which we have always striven to improve it has built up in the mind of the painter as well as the property owner a great belief in the quality and the performance that can be expected from Dutch Boy White Lead.

Mr. Wright: I move that the answer be stricken. It was not responsive. The question asked him what he understood to be the meaning of the term "consumer acceptance".

Mr. Ewing: I think the first part of the answer was responsive, but I suggest that it be read back.

Mr. Wright: No sir, I don't believe he explained at all what that term meant.

Trial Examiner Norwood: Read the question and answer.

2896 (The reporter read the record as requested.)

Trial Examiner Norwood: That is what you mean by "consumer acceptance"?

The Witness: Your Honor that is how you get consumer acceptance.

Trial Examiner Norwood: Motion denied.

By Mr. Ewing:

Q. What was the consumer acceptance that you yourself found in regard to the Dutch Boy White Lead label in the course of your experience with the National Lead Company since 1910?

A. Will you repeat that again, please.

Trial Examiner Norwood: Read the question.

(The reporter read the preceding question.)

The Witness: To such a high degree that very often it has proved very embarrassing to me.

By Mr. Ewing:

Q. Have there been, during the years in which you have worked for the National Lead Company, actual expressions to you by painters and other users of white lead-in-oil of their reaction to the Dutch Boy product?

A. Many and many a time.

Q. Tell us, for example, what expressions have been made to you?

Mr. Wright: Objection, Your Honor; it is purely hearsay.

2897 Mr. Ewing: This witness has had contact with the public, Your Honor.

Trial Examiner Norwood: He is showing the public attitude as to this brand, and I think that is the only way he can do it. Objection overruled. Do you want the question read?

The Witness: No; may I answer it?

Trial Examiner Norwood: Yes.

The Witness: Painters have expressed to me often that the public is so conscious of the quality of Dutch Boy White Lead and its performance that when they take it on a job no question is raised as to the quality of the product, and it usually stamps them as a high quality painter by virtue of the fact that the material he is using is Dutch Boy White Lead.

Mr. Wright: I move that the answer be stricken. It is purely irrelevant, self-serving and hearsay.

Trial Examiner Norwood: I don't think so; I think he should be allowed—

Mr. Wright (Interposing): The quality of Dutch Boy or any other white lead isn't involved in this proceeding.

Trial Examiner Norwood: I think he should be allowed to tell his story here with respect to the marketing of this product and the surrounding circumstances of it as bearing on the fundamental issues. In view of the breadth of
2898 our inquiry heretofore it seems to me that we should let him tell these things. The motion is denied.

By Mr. Ewing:

Q. Mr. McNair, are there Federal specifications for White Lead?

A. Yes sir.

Q. I show you a printed copy of a document described as TT-W-251b, which contains a number of subheadings among them one being "Federal Specification for White-Lead", and ask you if that sets forth the Federal specification for white-lead, directing your attention in particular to the tables which appear on page 2?

A. Yes sir.

Q. Is the document, which I now ask be marked Respondents' Exhibit 157 for identification, a copy of those schedules, except for the headings?

A. This is a copy of the specifications.

(The document referred to was marked as Respondents' Exhibit No. 157 for identification).

Mr. Welch: Your Honor, may we have a few minutes' recess while they are looking at these documents?

Trial Examiner Norwood: We will take a five minute recess.

(A short recess was taken.)

2899 Mr. Wright: Mr. McNair, is this specific TT-W-251b presently in force?

The Witness: I think so. There is a supplement to that.

Mr. Wright: Does that supplement alter the basic specification?

The Witness: I don't think so.

Trial Examiner Norwood: Is this offered?

Mr. Ewing: It is identified but not offered.

Mr. Wright: I thought you had offered it.

Mr. Ewing: Go ahead and then I will make the offer.

Mr. Wright: Do you know for how long a time prior to the date of this specification which appears to be May 30, 1945 that it was in effect?

The Witness: The Government has had specifications for a number of years. They change from time to time.

Mr. Wright: I direct your attention to the statement appearing on the original document that this supersedes one of November 6, 1934, and to the note at the end of the first page that "Certain provisions in this specification are intended to conserve critical or strategic materials. When the present emergency is over this specification will be considered for revision."

Do you know what the specifications were that were applicable in 1934?

2900 The Witness: Not offhand.

Mr. Wright: You don't know what changes might have been made prior to that time?

The Witness: No, sir.

Mr. Ewing: I offer the document, Respondents' Exhibit 157 for identification.

Mr. Wright: Your Honor, the difficulty with this exhibit is, of course, that it does not contain, being an excerpt, the qualifications which appear on the original which show on its face it is an emergency measure to conserve basic material, so presumably from November 6, 1934 to May 30, 1945, the Federal specifications on these products were other than these. This would have no significance prior to May 30, 1945.

Mr. Ewing: I am willing for the record to show whatever limitations there are in the original. It is not, of course, offered as a statement of Federal specifications for any other period than represented by the original.

Trial Examiner Norwood: You are offering such portions of the original as this paper which I hold here, which has been handed me, is a copy?

Mr. Ewing: That is correct.

Trial Examiner Norwood: And counsel in support of the complaint indicates that it should contain some other portions of the original than what you are offering?

2901 Mr. Ewing: Only the limitations, as I understand.

Mr. Wright: The limitations appear on the face of the document.

Mr. Ewing: I am perfectly willing to have the record note them just as though physically noted on this.

Trial Examiner Norwood: The limitations are as stated by counsel.

Mr. Ewing: He read them from the paper.

Mr. Wright: That is correct. Subject to those limitations I have no objection to the receipt of the paper in evidence.

Trial Examiner Norwood: The exhibit is received subject to the limitations mentioned. Do you offer the supplement?

Mr. Ewing: I just offered the copy.

Trial Examiner Norwood: The copy is received as an exhibit.

(The document referred to, heretofore marked as RESPONDENTS' EXHIBIT 157 for identification, was received in evidence.)

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Ewing: I withdraw the offer of Respondents' Exhibit 157 for identification and ask that this printed document consisting of three sheets printed on both sides,
2902 be marked Respondents' Exhibit 157-A to F, inclusive, for identification.

Trial Examiner Norwood: Very well.

(Respondents" Exhibit 157 previously received in evidence was thereupon withdrawn.)

(The document referred to was marked Respondents' Exhibit No. 157-A through 157-F, for identification.)

Mr. Ewing: Now I offer Respondents' Exhibits 157-A to F, inclusive.

Mr. Wright: No objection.

Trial Examiner Norwood: The document is received as marked.

(The document referred to, heretofore marked as Respondents' Exhibit No. 157-A through 157-F for identification, was received in evidence.)

Trial Examiner Norwood: The copy heretofore presented is withdrawn.

Do you desire the substitution of a photostat?

Mr. Ewing: Yes, sir.

Trial Examiner Norwood: That may be done. Will that be furnished the reporter?

Mr. Ewing: We will ask the reporter to get the photostats for us.

Trial Examiner Norwood: And turn it in as the original.

2903 By Mr. Ewing:

Q. If my recollection is correct, Mr. McNair, I think I asked you before what you produced at the Brooklyn plants of the Atlantic branch, and I think you referred to the pulp lead shipped from Perth Amboy to Brooklyn, but went no further in your answer.

Will you tell us now what products are manufactured at the Brooklyn plants?

A. We have a linseed oil plant in Brooklyn which is adjacent to the white lead plant where we crush linseed oil. Naturally as a by-product we get cake, linseed cake.

We refine linseed oil, we produce white lead, some miscellaneous paint products, and at the Bradley plant we manufacture red lead and litharge.

Q. Where is the Bradley plant?

A. 85th and J, New York.

Q. Brooklyn?

A. Brooklyn.

Q. What is the name of the plant located at Port Richmond?

A. Jewett.

Q. And Port Richmond is where?

A. Staten Island.

Q. Referring to Federal specifications in Respondents' Exhibit 157-A to F, inclusive, I ask you whether as between brands of white lead meeting Federal specifi-
2904 cations, there is in your opinion any difference from the standpoint of performance?

A. Yes.

Q. Will you explain the differences which exist from the standpoint of performance or use, in your opinion?

A. There may be a difference in the whiteness, the ease of application under the brush, the spreading capacity—

Q. Is the difference in whiteness which you have mentioned a difference in hiding power?

A. Well, yes. There is a difference in hiding power of the lead, too.

Q. That is not the same thing as difference in whiteness?

A. No.

Q. When you say difference in whiteness you speak simply of the white color?

A. The brilliancy of it.

Q. Whereas hiding power—

A. Is the ability to cover, to obliterate.

Q. Has National Lead Company over a period of years made any effort to improve or perfect the quality of its Dutch Boy white lead products?

A. Yes, sir.

Q. Will you tell us about what efforts have been made?

A. We have constantly over the years striven to produce as high quality white lead as human ingenuity 2905 and modern machinery can make.

Periodically we buy our own brands in the open market as turned out by the various plants. The laboratory rates those and those reports are sent to the various managers of the plants.

In addition to that we also obtain in the open market our competitors' brands of lead and analyze that likewise as a basis of comparison of our quality.

Q. When you say the laboratory rates those, to what laboratory do you refer?

A. The National Lead Company's laboratory in Brooklyn.

Q. What improvements in quality are sought after in this testing work?

A. Well, ease of application, durability, whiteness and hiding qualities.

Q. When did any branch of National Lead first use the so-called agency plan for selling white lead in oil?

A. It was in the latter part of 1952.

Q. What branch of National first used that plan?

A. The Atlantic branch.

Q. Who in that branch introduced the plan?

A. I did.

Q. Who in that branch had charge of its administration?

A. I did.

Q. Was the agency plan ever used by any other 2906 of National's branches?

A. Yes, sir.

Q. When did any of National's other branches adopt the use of the agency plan?

A. The Atlantic branch put it into effect first, and then later on the Philadelphia branch adopted it and subsequent to that all the other branches adopted it.

Q. Did the Pacific Coast branch?

A. No, sir.

Q. When you answered the previous question with "All the others", you meant all others—

A. Excluding the Pacific Coast.

Q. So far as you know, has National's Pacific Coast branch ever used the agency plan?

A. No, sir.

Q. When the Atlantic branch first adopted the agency plan was there, so far as you know, any agreement by National or the branch with any other company producing and selling white lead in oil, to use such a plan?

A. No, sir.

Q. Will you tell us why you introduced the agency plan in the Atlantic branch?

A. Our brand of white lead was being offered by dealers as a loss leader. The popularity of the brand would attract painters into the stores and to encourage them in
2907 that respect they would sell white lead without profit.
On many occasions they have even gone below the actual cost to themselves.

Mr. Wright: Objection, Your Honor. I move that be stricken. That is hearsay testimony which is very vague and general and without any supporting data of any sort.

Trial Examiner Norwood: I think the manager will know when they are using the stuff as a loss leader.

Mr. Wright: It has not been established.

Trial Examiner Norwood: I will ask if he is answering that of his own knowledge, and he may tell us how he knows it. You may cross-examine him on that.

Is that a motion?

Mr. Wright: Yes, sir, a motion to strike.

Trial Examiner Norwood: Motion denied. You may renew it later if you want to.

The Witness: There is more to that question if you desire to have me finish.

By Mr. Ewing:

Q. Go ahead.

A. This attitude on the part of these dealers proved

very injurious to our product because it made those that desired to make a profit unwilling to sell it due to the fact of this cut-throat competition which impelled us to do something to preserve our business, and that is how the
2908 agency plan became adopted.

Q. It was for the purpose of meeting that situation, then, that you introduced the agency plan?

A. That is correct.

Q. From your standpoint or National's standpoint as producer and seller, was there any evil involved in selling through agents on consignment?

A. Economic—

Trial Examiner Norwood: Wait a minute.

Mr. Wright: Objection, Your Honor. That calls for a conclusion on the part of the witness.

Mr. Ewing: It calls for his opinion.

Mr. Wright: It calls for an outright conclusion.

Trial Examiner Norwood: He may give us the facts about that, directed as to whether or not there is some advantage, but "evil" is a pretty broad question, even a religious question.

Mr. Ewing: I didn't use the word in a religious sense, Your Honor.

Trial Examiner Norwood: Objection sustained.

By Mr. Ewing:

Q. Mr. McNair, in your opinion, what advantages accrue to the producer, or a producer such as National, through the use of a plan involving the sale of white lead in oil through agents on consignment?

2909 A. There is an economic evil because it required us to carry an abnormal stock of white lead being in the hands of these various agents throughout the country, which gave us a much greater inventory than we would normally have if we did not have the consignment plan. Furthermore it tied up a lot of capital.

Q. What was the objection to having the abnormal inventory?

A. There would be an injury. Well, in case the pig lead market declined we would have these abnormal stocks in the hands of our distributors which would not be the case if we had the stock actually in our plant.

Q. There has been testimony in this proceeding that a proposed master code was submitted by the lead industry through Lead Industries Association in August, 1933, in connection with the National Recovery Administration, containing a provision permitting the filing of supplementary codes.

Will you tell us whether you, with Mr. Harold Rowe, attended some meetings of the Lead Pigment Division of the Lead Industries Association or its sub groups concerned with the drafting of the supplementary code for the membership companies comprising the Lead Pigment Division?

A. Yes, sir.

Q. I show you the minutes of a meeting of the Dry Products Committee of the Lead Pigment Division, August 9, 1933, Respondents' Exhibit 135-A and B, and ask
2910 you to read those to yourself.

Trial Examiner Norwood: Are those meetings he attended?

Mr. Ewing: Yes, sir, that is the next question.

The Witness: Do you wish me to read all of this?

By Mr. Ewing:

Q. Just the first one.

A. Yes.

Q. Tell us whether you attended the meeting of the Dry Products Committee of the Lead Pigment Division on August 9, 1933?

A. Yes..

Q. In what connection were the subjects set forth at that meeting discussed?

Mr. Wright: I would like to request a short voir dire of the witness' recollection of that meeting which was 14 years ago before we get into a discussion of that.

Trial Examiner Norwood: He is using the minutes to refresh his recollection and I think counsel may ask if it does, in fact, refresh his recollection.

Mr. Wright: What is the state of your recollection of that particular meeting, Mr. McNair?

The Witness: Only by virtue of the fact that I have read these minutes and have seen that I was present.

Mr. Wright: You can't visualize the meeting and
2911 who was there and what was discussed?

The Witness: Only in a general way.

Mr. Wright: What general way?

The Witness: With reference to supplementary codes.

Mr. Wright: You don't have any independent recollection, after reading that, of a particular discussion that occurred at that meeting?

Trial Examiner Norwood: Read the question.

Mr. Ewing: I will rephrase it.

By Mr. Ewing:

Q. Will you tell us generally in what connection the subjects set forth in the minutes of that meeting of August 9, 1933 were discussed?

Mr. Wright: Objection, Your Honor. The witness has already testified he does not remember any particular discussion that occurred at that meeting.

Mr. Ewing: He said he had a general recollection.

Trial Examiner Norwood: Ask him to testify from his own recollection about this matter, and if he does not remember it he may say so. That is all we can ask him to do.

Do you want the question read?

The Witness: No, sir.

Trial Examiner Norwood: Can you answer from your own recollection?

2912 The Witness: The general discussion was in connection with supplementary codes, in connection with the N. R. A.

By Mr. Ewing:

Q. Now, I ask you to look at the minutes of the White Lead in Oil Committee of the Lead Pigment Division, of August 9, 1933, Commission's Exhibit 501-A to D, inclusive, and read them to yourself.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

By Mr. Ewing:

Q. Do you recall whether you attended a meeting of the White Lead in Oil Committee of the Lead Pigment Division of August 9, 1933?

A. Yes, sir.

Q. Have you any independent recollection with respect to your attendance at that meeting, other than as refreshed by your look at the minutes?

A. No, sir.

Q. Did you attend that meeting on August 9, 1933 of the White Lead in Oil Committee of the Lead Pigment Division?

Mr. Wright: Objection. He says he has no recollection of that meeting or of attending it.

Trial Examiner Norwood: He may recollect the fact that he did attend. Answer from your own recollection. I overrule the objection.

2913 The Witness: Your Honor, I attended quite a few of these meetings and by referring to these minutes of that meeting I see my name is listed there, and to that extent I was unquestionably there.

Trial Examiner Norwood: That document is already in evidence.

Mr. Wright: Your Honor, by the witness' own statement this document does not refresh his recollection. He reads the document and says he was there because his name is listed there.

Mr. Ewing: He said he remembered attending a number of these meetings and when he takes a look at this one he remembers he was there.

Mr. Wright: Will the reporter read the witness' answer?

Trial Examiner Norwood: I recall what his answer was.

Mr. Wright: I don't think he should be permitted to testify when his only information is that he sees his name in the minutes.

Trial Examiner Norwood: I am going to ask him to put down the document that he was told to refresh his memory from.

Now, is there a question pending?

2914 Mr. Wright: No, sir. There was an objection to the question counsel asked on the basis of the witness' statement he had no independent recollection and he presumed since his name appeared in the minutes that he attended the meeting. That is not proper refreshment.

Mr. Ewing: Of course it is. How else can you refresh it?

Mr. Wright: Proper refreshment is when you see a document which will stimulate an independent recollection in his mind.

My objection was to counsel's question relating to this meeting, in view of the witness' statement that he had no independent recollection as to this meeting.

Trial Examiner Norwood: I think he can ask any question regarding that meeting, regardless of what he said before. He may explain that and change what he said before. The objection is overruled.

Will counsel reframe the question?

By Mr. Ewing:

Q. Will you tell us whether you attended the meeting of the White Lead Committee of the Oil Pigment Division of August 9, 1933?

Mr. Wright: May I request you to instruct the witness to answer that question from his own independent recollection as it may have been stipulated by his examination of the document, but not from what he sees in the document?

2915 Trial Examiner Norwood: I think the witness understands.

If you don't recollect, tell us so.

The Witness: I have attended quite a few of these meetings and my memory is refreshed by reading those minutes, that I did attend some at the Lawyers Club, but as to the specific date I have no recollection except that the document states I was there on August 9th.

By Mr. Ewing:

Q. In what connection were the subjects discussed at the various meetings of the Lead Pigment Division or its subsidiary committees in the summer of 1933, which you attended—discussed by the persons present at those meetings?

Mr. Wright: Objection, Your Honor. He has not testified as to the dates when he attended those meetings.

Trial Examiner Norwood: I think he may tell us what happened at the meeting even though he does not remember the dates.

Mr. Wright: He doesn't recollect any specific meeting at any specific time.

Trial Examiner Norwood: I will let him tell us what he can, and you may cross-examine him, and if he has told something he doesn't know I will strike it.

The Witness: It was in connection with supplementary codes.

2916 By Mr. Ewing:

Q. When the National Lead Company determined to use in connection with the sale of white lead in oil, a map similar to Commission's Exhibit 580 which you have seen before, this morning, and which I believe you said was put in use sometime between the fall of 1933 and the spring of 1934, so far as you know was there any agreement by it with any other producer of that product, namely, white lead in oil, relating to the use of any such map?

A. No, sir.

Q. Again referring to Commission's Exhibit 580, the map which you have said, if I recall correctly, was put in use by National Lead sometime between the fall of 1933 and the spring of 1934, at what time was it put in use in relation to the adoption by National Lead of the so-called agency plan of selling white lead in oil on a nationwide basis?

A. Shortly thereafter.

Q. Who in National Lead established the prices at which it sold dry white lead, white lead in oil and lead oxides?

A. The general office.

Q. Will you tell us what you mean by the general office?

A. Well, the executives in the general office.

Q. As distinguished from the branches?

A. That is right.

Mr. Ewing: I ask that this document be marked 2917 Respondents' Exhibit 158 for identification.

Trial Examiner Norwood: Very well.

(The document referred to was marked as Respondents' Exhibit No. 158 for identification.)

By Mr. Ewing:

Q. I show you a document which has just been marked Respondents' Exhibit 158 for identification, and ask you by whom or under whose direction it was prepared.

A. I prepared this.

Q. What does that document which has been marked Respondents' Exhibit 158 for identification purport to set forth?

A. It sets forth the various selling schedules of the National Lead Company and the companies prior to the formation of the company, as far as those constituent companies that were taken into the Atlantic branch to market white lead.

Q. Upon what data did you prepare Respondents' Exhibit 158 for identification?

A. Historical records that I found in the office.

Q. I call your attention to the bottom of the second column where there appears the statement "Soft paste offered to trade September 1, 1927"; and I ask you to tell us what is soft paste?

A. Soft paste white lead is of thinner consistency than heavy paste white lead. It contains linseed oil and turpentine and mineral spirits.

2918 Mr. Ewing: I offer Respondents' Exhibit 158 for identification in evidence.

Mr. Wright: I would like to make a preliminary cross-examination here.

Trial Examiner Norwood: Very well.

Mr. Wright: Directing your attention to the first column, the description "white lead", what product do you mean by white lead there?

The Witness: White lead in oil.

Mr. Wright: So this entire document relates to white lead in oil?

The Witness: White lead in oil only.

Mr. Wright: Does this purport to be a complete description of all the terms and conditions which were offered on this product over this entire period of time?

The Witness: As far as I could ascertain from the records that I found.

Mr. Wright: What sort of records did you have?

The Witness: Historical records.

Mr. Wright: In what form were they?

The Witness: Various forms.

Mr. Wright: Will you describe them?

The Witness: Some were in longhand written on the stationery of those earlier days, others in printed form and others in card form.

2919 Mr. Wright: Do you have those documents in your possession still?

The Witness: I think so.

Mr. Wright: Your Honor, I object to the receipt of this document in evidence since it is based on documents which have not been made available, and there has been no opportunity for me to examine the basic material from which it was made. It is exactly in the same category as an exhibit of yesterday which was withdrawn after the basic materials had been examined.

Mr. Ewing: We will make the basic material available to him.

Mr. Wright: I don't think I should be put to the onus of later examining the basic material and then making a motion to strike on this sort of an offer, Your Honor. That is a burden that I don't believe should be placed on me.

Trial Examiner Norwood: That may be correct on something vital and directed to an issue—

Mr. Wright: The prices and terms and conditions of sale of the National Lead Company from 1863 to 1947 certainly go to the vital issues in this matter.

Mr. Ewing: I would say the prices of the Atlantic branch and its predecessors based upon records in the possession of Mr. McNair.

Mr. Wright: The document does not say that. It
2920 says "National Lead Company, changes in selling schedules, 1863 to 1947."

Trial Examiner Norwood: I merely started out to discuss the degree of availability which should be required, but the discussion took another turn.

Until this appears to be vital it seems to me like counsel's statement that he will make the material available to counsel in support of the complaint, is sufficient, isn't it?

Mr. Wright: No, sir, it is not. This is secondary evidence which should not be admitted unless the primary evidence is not available. Yesterday we had tabulations which were in error here, which had not been properly prepared.

Trial Examiner Norwood: Should the Commission be required to send its Examiner to the office of the Respondent and examine the basic material there and check it?

Mr. Ewing: We will bring it to him next week.

Mr. Wright: We will be in New York next week.

Mr. Ewing: And I will have to break in on Mr. McNair again and bring him out of town at a waste of time. You and I have to be there anyway.

Trial Examiner Norwood: I will hold this in abeyance like the other two until counsel on the other side is satisfied he will have an opportunity to object. I will reserve the ruling on 158 until we can make further arrangements about checking.

Proceed.

2921 By Mr. Ewing:

Q. To what types of use does soft paste lend itself?

A. For the painting trade.

Q. To what type of use does heavy paste lend itself?

A. The painting trade and other uses.

Q. What other uses?

A. The car builder uses it for putting on car wheels; it is used in making up putty by the painter; there are many uses.

The difference between heavy paste and soft paste is that the soft paste is of a more fluid consistency and the painter can turn it into paint more readily than he can heavy paste.

Q. So far as you know during your connection with National Lead Company, has it at any time ever entered into any agreement with any other company producing white lead or lead oxides, relating to prices?

A. No.

Q. So far as you know, has it ever entered into any such an agreement relating to the setting of zone differentials or territorial differentials?

A. No.

Q. So far as you know has it ever entered into any agreement relating to quantity discounts?

A. No, sir.

2922 Q. So far as you know has it ever entered into any agreement relating to districts of production?

A. No.

Q. So far as you know has it ever entered into any agreement relating to customer allocations?

A. No.

Q. So far as you know has it ever entered into any agreement relating to uniform terms of sale except to the extent that such uniform terms of sale may have been adopted in the code for the lead industry?

A. No.

Mr. Ewing: I ask that these photostats, ten sheets in all, be marked Respondents' Exhibit 159-A to J, inclusive, for identification.

Trial Examiner Norwood: Very well.

(The documents referred to were marked as Respondents' Exhibits 159-A through 159-J, for identification.)

Mr. Ewing: Off the record.

(Discussion off the record.)

By Mr. Ewing:

Q. I show you, Mr. McNair, the originals of ten documents, photostatic copies of which have just been marked Respondents' Exhibit 159-A to J, inclusive, for identification, and ask you to tell us generally what they are.

A. They pertain to marketing policy.

2923 Q. Are they part of the files of the Atlantic branch?

A. This letter?

Q. Yes.

A. It was gotten out of the Atlantic branch.

Q. When did you first see these documents?

A. About ten days ago.

Q. When I say "first" I mean at the present time; I mean now and not back in 1934.

A. I saw the document back in 1934, but I only saw these letters about ten days ago when they were found in our office.

Q. Will you tell us the circumstances under which you found them?

A. I was endeavoring to refresh my recollection on certain sales policies, and I went to a young lady in the office who has been there for a number of years, even though she is young, and asked her if she had anything pertaining to prices or as to our selling policies on our various products, and she went through her desk and pulled out these letters and gave them to me.

Q. Now, I direct your attention to Respondents' Exhibit 159-A which appears to be a memorandum dated June 9, 1934, addressed to all branch managers from Harold Rowe, and ask you whether the Atlantic branch received that?

A. This top letter?

Q. Yes.

2924 A. Yes, we received it.

Q. Prior to that had you received the document which has been marked Respondents' Exhibit 159-B for identification, appearing to be a memorandum dated May 11, 1934, addressed to Branch Managers, from Harold Rowe?

A. Yes.

Q. I call your attention to the next to the last paragraph of the May 11, 1934 memorandum, Respondents' Exhibit 159-B for identification.

A. These are not marked with any identification number at all.

Q. That is why I am giving you the date. It is the second one, next to the last paragraph.

A. What is your question, Counsel?

Q. I ask you whether you received with that memorandum of May 11, 1934, the eight accompanying sheets which appear to be instructions, interpretations, referred to in the May 11, 1934 letter?

A. Yes.

Q. Were those documents all received by Atlantic branch from the general office of National Lead?

A. Yes, sir.

Q. In the regular course of business?

A. Yes, sir.

Mr. Ewing: I offer Respondents' Exhibit 159-A
2925 to J in evidence.

Mr. Wright: No objection.

Trial Examiner Norwood: Received as marked.

(The documents referred to, heretofore marked as RESPONDENTS' EXHIBITS 159-A through 159-J, were received in evidence.)

Mr. Ewing: That closes the direct examination, Your Honor.

Trial Examiner Norwood: Cross-examine.

Mr. Wright: I suggest, Your Honor, we recess for lunch now and reconvene at 2 o'clock.

Trial Examiner Norwood: Is that agreeable?

Mr. Ewing: Right.

Trial Examiner Norwood: We will recess until 2 o'clock.

(Whereupon, at 12:10 o'clock p. m., a recess was taken until 2:00 o'clock p. m. of the same day.)

2926 Afternoon Session.

2:00 p. m.

Trial Examiner Norwood: The hearing will be in order.

Mr. Ewing: Before Mr. Wright starts his cross-examination, there are two or three more questions I would like to put to Mr. McNair.

Trial Examiner Norwood: Go ahead.

JOHN GORDON CRAWFORD McNAIR resumed the stand and testified further as follows:

Direct Examination (continued) by Mr. Ewing.

Q. I show you again Respondents' Exhibit 158 for identification, which you have testified you had prepared, and ask you to tell us how you came to prepare the information set forth on that document?

A. I was interested in finding out the various sales policies, as far as pricing is concerned, that the National Lead Company had.

Q. At what time was that?

A. When I made this original chart up, it was about 10 years ago, since which time I have brought it up to date.

Q. And on what [illegible] did you make the original chart up?

A. I don't understand the question.

2927 Q. I mean did you make it up about 10 years ago, bringing it back as far as it goes, and up to 10 years ago; or was it in the form of a record which you kept from time to time as the years went by with the company?

A. After I originally made it up, from that time on I recorded changes which occurred from the time the original chart was made up.

Q. When you say "original chart", you are not referring to this particular one?

A. Not this particular one, no.

Q. And that original chart was made up at least 10 years ago, approximately?

A. At least 10 years ago.

Mr. Ewing: That is all.

Trial Examiner Norwood: Proceed with the cross-examination.

Cross-Examination by Mr. Wright.

Q. What was your capacity with the National Lead Company during the period from about 1930 to 1939, Mr. McNair?

A. Assistant Manager.

Q. You were Assistant Manager, then, at the time of these meetings which were referred to on direct?

A. I think so.

2928 Q. When you attended those meetings, in what capacity did you attend them? Were you representing the National Lead Company at those meetings?

A. No, I attended with Mr. Harold Rowe.

Q. You went along with him?

A. Yes.

Q. Did you participate in those meetings?

A. In the discussions?

Q. Yes.

A. Undoubtedly I did.

Q. Mr. Rowe was representing the company, though?

A. Officially, yes, sir.

Q. Now will you explain to us the original breakdown of the National Lead Company as between the general offices and the branch offices?

A. The branches have a manager, who has jurisdiction over the branches. The general office contains the top executives, which dictate policies to the branches.

Q. What matters of policy are generally passed on from the general office to the branches?

A. Price changes and other pertinent facts in connection with the operation of the business.

Q. Are general policies as to terms and conditions of sale passed on?

A. Yes.

Q. Types of contracts?

2929 A. That is correct.

Q. Those are all determined in the general offices?

A. Yes, sir.

Q. So that the branch manager would not be in position to initiate any change in policy of any importance regarding the marketing of these products?

A. That is correct.

Q. You stated this morning that in 1939 it was your estimate that it would cost a million dollars or over a million dollars to construct a white lead plant of 10,000 tons annual capacity, is that correct?

A. No, sir, I think I said in the period around 1930 to 1932 or 1933—I don't think I mentioned 1939.

Q. Now for what process would that plant that you are speaking of now, be designed? Would that be an Old Dutch plant or a Carter plant?

A. The Old Dutch plant is practically a thing of the past.

Q. What process were you thinking of when you made that estimate?

A. The Carter process.

Q. How many of the white lead plants are—I am confining this only to those of the National Lead Company—how many of the white lead plants in existence now are of 10,000 tons capacity or more?

A. I am not so sure about the Pacific Coast, but
2930 the other branches would have at least 10,000 tons.

Q. Would that apply to your competitors' plants, too, or wouldn't you know?

A. Oh, I wouldn't know that.

Q. How would you break that million dollar cost down; what factors were you taking into consideration?

A. The cost of machinery, the building, the property, the equipment.

Q. Will you break that down into the component parts?

A. As to the cost of each?

Q. Yes, sir.

A. I couldn't do that.

Q. Well, how did you arrive at that figure, if you can't do that?

A. Because I have had a great deal of experience in the building of our plants, the additions that we have built, getting new equipment to improve our process, improve our product.

Q. Well, if you don't know the parts that go into the whole, how can you know the whole? How did you arrive at that figure of over a million dollars?

A. I gave an estimate of over a million and a half. Now it is quite possible that it may run many thousand dollars over that.

Q. What did you allocate, in your mind, to actual processing machinery, out of that total?

2931 A. Well, I couldn't answer that question, sir. It is a general figure that I gave.

Q. Well, it is just an opinion, then, isn't it?

A. Based upon my knowledge of a white lead plant.

Q. What I am trying to get at is what is that knowledge of costs, now?

A. Well, right now, or do you mean back in 1930?

Q. I am talking about back in the period about which you testified.

A. Well, I had occasion to buy a lot of equipment. We were making alterations to the plant, and I have a general idea what construction costs were, and what machinery cost.

Q. How much machinery or what machinery is necessary to the operation of such a white lead plant?

A. Cylinders, tubs, washing equipment, roller mills, pug mills, blow drums, motors—those are the vital items of equipment.

Q. That is the main factory machinery that is necessary?

A. That is right.

Q. How much floor space is required for such a plant?

A. Well, you would have on your floor with your cylinders, probably the building would be at least 200 feet long by 50 or 60 feet wide.

Q. That is the total plant area?

A. No, that is for the cylinders alone.

2932 Q. Those are the cylinders where you corrode the lead, is that right?

A. That is right.

The blow drum would probably occupy an area 60 x 80. Your washing equipment and tubs, and so forth, would probably occupy an entire floor under the cylinder floor. You would have a power plant.

Q. How much of that "over a million dollars", then, would be in machinery and equipment as distinguished from—

A. (Interposing.) From the building itself?

Q. As distinguished from the building and premises.

A. I would say the machinery in a white lead plant of that description would probably run $650,000.

Q. Now the Jewett Plant at Port Richmond, you stated that that was a plant that had 12,000 tons capacity of white lead?

A. That is right.

Q. And that produced only white lead?

A. That is right.

Q. It didn't produce red lead and litharge?

A. No, sir.

Q. How much was that plant carried on the books of the National Lead Company at while it was in operation?

A. That particular plant was carried close onto a million dollars.

Q. Now these plants that you referred to earlier 2933 at Cincinnati, Boston, Cleveland, Pittsburgh, and Buffalo, when were they last in operation?

A. I really don't know. The Boston plant has been down for a great number of years. The Cincinnati plant I believe was down in 1930. Did you mention Pittsburgh?

Q. Yes, sir.

A. Pittsburgh probably along the same time, but I am not so sure about those dates.

Q. Was that the National Lead Company of Pennsylvania that operated that Pittsburgh plant?

A. Yes, sir.

Q. At how much was that carried on the books of the company?

A. I don't know, I wouldn't know.

Q. What was the capacity of that plant?

A. I wouldn't know.

Q. Do you recall the capacity of the Cincinnati plant?

A. No, sir.

Q. How about the Buffalo plant?

A. No, sir.

Q. How about the Boston plant?

A. No, sir.

Q. You spoke this morning of the National Lead Company historically being composed of a number of plants at all these various different branches who served particular territories in which they were located, was that your testimony?

2934 A. That is right.

Q. Were they large plants, generally, or were they small ones, or do you know what size and capacity they were?

A. I would say offhand, outside of those particular plants that we had in the New York area and Philadelphia, they were relatively small plants in comparison.

Q. About how many tons do you mean, roughly?

A. I mean the size of the plant.

Q. Well, that would determine their capacity, wouldn't it?

A. That is right.

Q. Well, can you give us an estimate of what their capacity was?

A. No, I could not.

Q. Was it as much as 10,000 tons?

A. I couldn't answer that question.

Q. What is the capacity of your largest plant, white lead plant?

A. At Chicago.

Q. What is that capacity?

A. Probably about 18,000 to 20,000 tons.

Q. Is that one of the largest plants in the business?

A. Yes, sir.

Q. How does the Perth Amboy plant compare with that?

A. About three-quarters of that.

Q. Is that also considered a large plant?

2935 A. Yes, sir.

Q. So a 10,000 ton plant, then, would be a large plant, would it not?

A. It is a fairly large plant, yes.

Q. Do you know whether there have been, in your experience in the industry, plants operating with less than that capacity?

A. I testified this morning that we had the Matheson plant that had a capacity of around 7,000 tons.

Q. I suppose the cost of construction of the smaller plant would be correspondingly lower?

A. That is correct.

Q. So the effect, then, of the disbanding of these various branch plants, with their local territories which they served, was to give wider distribution to the remaining plants of the National Lead Company?

A. A greater production.

Q. A greater production and wider distribution?

A. To enable us to operate the existing plant at its maximum capacity, which is the most economical basis to operate a white lead plant on.

Q. What linseed oil plants does the National Lead Company operate?

A. Two.

Q. Where are they located?

A. Philadelphia and Brooklyn.

2936 Q. The production and marketing of that product is under your jurisdiction, too?

A. The New York plant, yes.

Q. How do you quote and sell linseed oil?

A. By the pound.

Q. What territorial differentials do you have on linseed oil?

A. We have a territorial differential on linseed oil.

Q. Is that in the form of zones?

A. A zone differential, yes.

Q. Roughly what is the par zone on linseed oil?

A. Minneapolis and Chicago.

Q. I don't understand you. You say Minneapolis and Chicago are the par zones?

A. The par territory is Minneapolis and Chicago. The reason for that is that that is the flax seed belt.

Q. What territory is Eastern Seaboard, New York and Pennsylvania?

A. Three-tenths of a cent over par.

Q. How many zones are there for linseed oil?

A. I couldn't answer that.

Q. How many zones are there in the territory with which you are familiar?

A. There are three.

Q. What are those zones?

A. New York—as far as our branch is concerned, 2937 we consider that par in our branch. Florida and Georgia on the Seaboard have a differential; and Macon, west of Macon has a higher differential than Seaboard.

Q. Those are the three areas in which you—

A. (Interposing.) In our branch, yes, sir.

Q. What is the Lenox process?

A. It is a precipitated process.

Q. Is that presently being used by the National Lead Company?

A. No, sir.

Q. How does that work,—do you put lead into solution?

A. Well, eventually you get it into solution. The lead is feathered and put in a tub and sprayed with acetic acid, and it is carbonated that way by precipitation.

Q. Does the National Lead Company use the electrolytic process?

A. No, sir.

Q. Do they use the Old Dutch process at any of their plants?

A. No, not now.

Q. What physical differences are there in white lead produced by the various different processes, Mr. McNair?

A. Well, there is a difference in the fineness of the particles.

Q. Is there a difference in color?

A. Yes, there is. The Dutch process has more yellow color to it than the Carter process. The Carter pro- 2938 cess is a very white process.

Q. How does the Carter process compare with the electrolytic process?

A. In whiteness?

Q. Yes, sir.

A. About the same, I should say.

Q. Are there any differences in Carter and electrolytic processed white lead?

A. Well, there may be a slight difference in the fineness of the particles.

Q. Is there any difference in hiding power?

A. Well, it depends upon the plant. It is possible when manufacturing under the Carter system that the product in some plants would have greater hiding than that in some other plants using the same system.

Q. Who was the Carter process developed by?

A. I couldnt answer that.

Q. Does that have any relation to the old Carter White Lead Company, Mr. F. M. Carter?

A. Whether the Carter process was used prior to the formation of the Carter Lead Company, I wouldn't know.

Q. You don't know the origin of the process?

A. No, I do not. The oldest process is the Dutch process.

Q. The Matheson Lead plant, when was that acquired by the National Lead Company?

2939 A. I couldn't give you the date accurately; I don't know.

Q. Was that prior to your service with the company?

A. Yes.

Q. Was that a previously independent operation?

A. Yes.

Q. How about the Jewett plant at Port Richmond?

A. The Jewett plant was taken into the company at the time of its organization, I believe.

Q. It goes back, then, to 1890, or so?

A. Yes.

Q. How about the plant at Cincinnati, when was that acquired?

A. I wouldn't know.

Q. How about the Boston plant?

A. I wouldn't know.

Q. How about the Cleveland plant?

A. I wouldn't know.

Q. The Pittsburgh plant?

A. I wouldn't know.

Q. The Buffalo plant?

A. I wouldn't know.

Q. Does the National Lead Company still manufacture white lead-in-oil for the duPont Company?

A. Yes.

Q. Under contract arrangements?

A. I don't know what their arrangement is.

2940 Q. That is handled in the general offices?

A. That is right.

Q. You supply that from the Atlantic Branch, however?

A. We do.

Q. Do you supply that in package form?

A. Yes, sir.

Q. With the duPont label on it?

A. Yes, sir.

Q. What would be the cost of construction of a litharge plant of 10,000 tons annual capacity, say, back in 1939?

A. Of 10,000 tons capacity?

Q. Yes.

A. To manufacture litharge only?

Q. Well, I will amend the question. We will make it a red lead and litharge operation to produce 10,000 tons, combined, of the two.

A. Then you would get into a much greater expense. If you manufactured litharge alone, a plant back in 1930 or thereabouts would not be a very expensive plant, probably $200,000 would have covered that.

Q. That is just a roasting operation of the pig lead, is that right?

A. Well, it all depends upon how it is made.

Q. How much would the added red lead cost be?

A. Then you would have to have additional equipment.

2941 Q. Do you know what the capacity, approximately, of the Eagle-Picher Company in Jersey is?

A. No, sir.

Q. Is that a large plant?

A. I wouldn't say it is the largest in the country. It is a fair sized plant.

Q. What would be the capital investment, in the 30's, for a plant of about that size?

A. In the 1930's?

Q. Yes.

A. I have never been in that plant, I have only seen it passing by on the train, so it is a rather hard question to answer. I don't know what equipment they have in there, or how much they produce.

Q. You are familiar with the Evans plant down in Charleston, West Virginia, are you not?

A. No, sir, I am not.

Q. What is the capacity of your red lead and litharge plant in Brooklyn?

A. We have gotten as high as 29,000 tons out of that plant.

Q. Is that the only plant in the Atlantic Branch that produces those products?

A. Litharge and red lead?

Q. Yes.

A. No, sir.

2942 Q. What other plants produce that?

A. Perth Amboy.

Q. What is the capacity of that Perth Amboy plant?

A. At that particular plant they could turn out about 20,000 tons.

Q. At what is that plant carried on the books, the red lead and litharge plant?

A. We don't make red lead there, just litharge.

Q. At what is that plant carried on the books of the National Lead Company?

A. We have just constructed that particular unit.

Q. What is the capital investment in that?

A. In that particular plant, I would say about $450,000 or $500,000.

Q. That is just the litharge end of the plant?

A. That is right.

Q. That is a 20,000 ton plant?

A. Yes, sir.

Q. Now it has been testified here that a battery manufacturer, for instance, can produce litharge and red lead profitably on his own account if his consumption is 4,000 tons a year or more. About what would be the capital investment, in the 30's, in a 4,000 ton litharge and red lead plant?

A. Probably $650,000 to $800,000.

Q. For a 4,000 ton plant?

A. Yes.

2943 Q. What would make the difference between that expense and the expense of the plant that you have just now constructed for 20,000 tons of litharge?

A. Well, that particular plant—you have to have a certain amount of equipment to produce 4,000 tons, but that plant may be capable of turning out seven or eight thousand tons with the same equipment.

Q. So, then, your testimony was with regard to one that had a capacity of about eight thousand tons?

A. No. There is a minimum amount of equipment that you must have necessarily in order to have an oxide plant, and if you want to have a production of 4,000 tons you have to have that minimum equipment.

Q. What is that minimum equipment?

A. It consists of furnaces, mills—

Q. (Interposing.) How many furnaces?

A. For 4,000 tons?

Q. Yes, sir.

A. To turn out red lead or oxide?

Q. Red lead and litharge, half and half; or, say 3,000 tons of litharge and a thousand tons of red lead.

A. You see red lead and litharge are made in different ways. To produce red lead you have to have more equipment.

Q. Isn't it correct that red lead is a further refinement or processing of litharge?

2944 A. That is right.

Q. Take a plant now that a battery manufacturer would be interested in, which is designed to produce 3,000 tons of litharge and 1,000 tons of red lead each year, for an estimated average consumption of 4,000 tons a year, just about what equipment would be necessary to make that average production?

A. You would probably require eight or ten furnaces, with the necessary equipment for charging and discharging, grinding, packing and so forth.

Q. Would those furnaces be capable of handling both the litharge and the further refining into red lead?

A. In certain processes, yes, sir.

Q. About what would that cost at pre-war construction prices?

A. A furnace?

Q. Yes.

A. You could probably build an oxide furnace for fourteen or fifteen thousand dollars.

Q. What does your charging and other handling equipment for a furnace run to?

A. Well, I couldn't answer that offhand.

Q. About how much would your grinding and other refining and screening equipment for handling the production of eight furnaces run to?

A. At the present time?

Q. No, prior to the war.

2945 A. I couldn't answer that question authentically.

Q. Are you familiar with the Atlanta plant of National?

A. No, sir.

Q. I thought you were familiar with all the operations of the various branches?

A. Those are oxide plants; I have very little to do with oxides in our business. White lead plants were what I was talking about.

Q. Doesn't the Atlantic Branch handle oxides and litharge and red lead?

A. That is right.

Q. You stated this morning that the cost of white lead would run to around 20 per cent of the cost of paint jobs, is that correct?

A. I thought I testified to the fact that the materials cost of a painting job averaged between 20 and 25 per cent of the total cost of the painting job.

Q. You meant all material costs?

A. That is right.

Q. On what do you base that estimate?

A. From actual knowledge of what I know to be true myself.

Q. What is that knowledge, how do you break it down?

A. Say a paint job costs $125, if you pay $25 for your materials, that gives you a percentage. It is a figure which is more or less recognized in the industry.

2946 Q. Did you make any study to determine that?

A. It wasn't necessary.

Q. How did you find it out?

A. From my actual experience.

Q. As a painter?

A. No, as a salesman in my contacts with painters.

Q. You stated this morning that you had used zones prior to 1910, in quoting on white lead-in-oil?

A. I did.

Q. What zones did you use prior to 1933 or 1934?

A. I couldn't answer the question as to what zones there were at that time, because when I started out as a salesman for the first time with the company I travelled in Georgia and Florida and there was a zone differential down there at the time.

Q. When you were speaking of zone differentials did you mean the differentials which appeared on Commission's Exhibit 659, the list of differential points?

A. I don't recognize the exhibit number.

Q. Well, look at this exhibit.

A. That (indicating) is a zone differential there in Florida.

Q. What do you mean by "that is a zone differential"? How did you make prices on that?

A. Half a cent over par.

Q. Was that a price to Jacksonville only?

2947 A. That is right.

Q. Then how would you make a price to Miami?

A. The price to Miami would be equalized with Jacksonville.

Q. What do you mean by that?

A. If a customer in Miami desired to purchase white lead, and if the rate from New York to Miami was, we will say, 85 cents a hundred, and from Jacksonville to Miami, 50 cents a hundred, the customer would only pay the fifty cents.

Q. In other words he would pay the half cent extra to Jacksonville plus the 50 cents difference in freight rates?

A. That is right. In other words, it would not cost a customer any more buying white lead if we shipped it direct out of New York than if he got it out of Jacksonville.

Q. That then really amounted to the price at Jacksonville plus the freight from Jacksonville to Miami?

A. If that freight was less than from New York, yes.

Trial Examiner Norwood: Jacksonville, then, is the shipping point there?

The Witness: No, sir, that is the equalization point.

By Mr. Wright:

Q. Are all these other points on here, then, equalization points?

A. No, sir; these (indicating) are delivery points.

Q. What is the difference between an equalization point and a delivery point?

2948 A. We deliver free of charge to a delivery point and we do not equalize any other shipments in that area with those points; whereas, in the case of an equalization point, we equalize the freight with that equalization point for shipments made in that area.

Q. For instance, then, take a point in the State of Vermont. You have Bellows Falls, Brattleboro, Montpelier, Rutland, St. Albans and St. Johnsbury as delivery points, and Burlington as an equalization point. Assuming, now, that you wanted to quote to a customer in some other place in Vermont than those that are listed there, how would you make your price to him?

A. If the rate from New York to the point in question was greater than that from Burlington to that particular point, than we would equalize with Burlington.

Q. Equalize with Burlington?

A. Yes.

Q. But, for instance, if a man were 20 miles out of one of these delivery points?

A. We wouldn't ship it.

Q. You would equalize it—

A. (Interposing.) We would not pay the freight on that; we would only pay the freight to delivery points.

Q. Well, then, would you charge him the price at the
delivery point, plus what his freight was from that
2949 delivery point to his destination?

A. Say that again, please.

2949 Q. Would you charge him the price at the delivery
point, twenty miles away, plus the freight from the
delivery point to destination?

A. We will deliver free of charge to a delivery point. For a point outside of a delivery point, which is not an equalization point or a delivery point, the customer pays the freight.

Q. In other words, for a man twenty miles out of St. Johnsbury, for instance, you would ship it to St. Johnsbury?

A. Oh no.

Q. You would ship it directly to him?

A. Directly to him, and he would pay the freight.

Q. He would pay the freight from New York?

A. That is right, on this schedule here.

Q. And that would be equalized with Burlington if that made any advantage to the customer?

A. That is right.

Q. Now in this method which is outlined in this exhibit, and about which you have been testifying, were there any territories in which a flat price prevailed?

A. You mean par territory?

Q. Yes.

A. Yes, the New York area is par territory.

Q. The New York area?

2950 A. Yes, sir.

Q. But there were no areas, say of a half a state, or a state, where everyone in the state received the same price regardless of his location, under that old method?

A. I don't quite get the question.

Q. Under the present method, using your zone map, everyone in the State of Tennessee, wherever located, pays the same flat delivered price, does he not?

A. I am not so familiar with Tennessee, it is not in my jurisdiction.

Q. Take Maine, then.

A. That is right.

Q. Were there any similar territories under this old method where everyone within the borders of a state or a large area paid the same flat price?

A. Take the State of New Jersey, they all received a flat price in the State of New Jersey.

Q. Under this old method?

A. Yes—

Q. (Interposing.) In other words every town was a delivery point?

A. It later on developed that way.

Q. What was it at the time of this exhibit, which is 1921?

A. I would have to examine that a little more closely.

Q. Here is the New Jersey listing here.

2951 A. This is 1924, is that the one you want?

Q. Yes.

Trial Examiner Norwood: What exhibit number is that?

Mr. Wright: Commission's Exhibit 659-C.

A. Back in that particular time the customers located in Connecticut other than those designated here, would pay their own freight.

By Mr. Wright:

Q. How about New Jersey?

A. It has practically every town listed in New Jersey that we ship to as a delivery point there, but should there be a town not listed here, they would pay the freight on it. In other words this record indicates whether or not we would allow freight to the customer, or equalize the freight to the customer.

Q. Now this is dated in 1924. Can you tell us what changes were made in that from 1924 to 1933, up to the time—

A. (Interposing.) I wouldn't remember the changes that took place.

Q. Were there any radical changes in method?

A. I couldn't answer that; that is too long ago for me to remember.

Q. You were speaking this morning about the fact that Dutch Boy has certain quality differences in the ease of
breaking, ease of application, spreading, whiteness
2952 and hiding power. What factors make the differences
in quality of Dutch Boy in those respects?

A. Well, the efficiency of manufacture, I would say.

Q. You mean now the processes that you use?

A. No, the efficiency of operation in the manufacturing processes. You might compare that with a cook getting flour, and two cooks will produce different grades of pie out of the same raw materials.

Q. Which ones of your competitors use the Carter Process in producing white lead-in-oil?

A. I don't think any of them do, to tell you the truth.

Q. What process does Eagle-Picher use, do you know?

A. They used to use the Old Dutch Process. Sherwin-Williams used the Old Dutch Process at one time; whether they do now or not I don't know. Anaconda uses the electrolytic process.

Q. Do the differences in the processes of manufacture have any effect on the ease of breaking and of application, and hiding power and whiteness, and spreading?

A. They could.

Q. How about Eagle white lead, is that an inferior product to your product?

A. I think that the National Lead Company makes the highest quality of white lead on the market today, and that is brought about by the fact that we have several plants
that are in competition with each other all the time to
2953 improve the quality of their lead; and, modestly
speaking, I would say that the Atlantic branch has
the best quality of the entire company.

(Laughter.)

Q. Is any white lead that you make and market sold under any other brand than Dutch Boy?

A. Yes, the Dutch Boy White Lead and the trademark appear on all of our packages, but as I testified this morning these older brands have been gradually dropped. Now in the Atlantic Branch we used to have four or five different brands. Today we only have two and those are the Dutch Boy Brand and the Atlantic Brand. The Brooklyn and the Ulster and the Union and Jewett brands have been dropped, discontinued.

Q. But the Atlantic Brand still has the Dutch Boy label on the side of the keg?

A. Oh yes.

Q. And it is known as Dutch Boy lead?

A. All the brands of the National Lead Company carry Dutch Boy Lead and the trademark on the package.

Q. They are all sold at the same price?

A. Yes, sir.

Q. How does lead produced by the electrolytic process compare in these qualities that we have been speaking of, particularly as to whiteness?

A. It is very white.

Q. Do you recall any instances in the industry
2954 when comparative tests were made showing the relative whiteness of the leads?

A. Oh yes.

Q. Will you tell us again, Mr. McNair, about this cutthroat competition and "loss-leader" selling that you referred to this morning on direct examination, as to white lead-in-oil?

A. Tell it over again?

Q. Yes.

A. Due to the popularity of the Dutch Boy trademark and its ability to attract customers to a point store, many distributors for selfish motives would market our brand of white lead at cost or at times below cost, to influence customers to come into their store.

Q. Who were these dealers that did that, who engaged in that practice?

A. There were a great many of them in the New York area. I could name you a dozen or twenty of them if you would like to have them.

Q. Was that confined principally to the New York area?

A. No, sir.

Q. At what other points in the country did the company encounter that situation?

A. In my conversation with other branch managers it was more or less prevalent in all large trading areas.

2955 Q. Do you know the reasons these people sold Dutch Boy at low prices?

A. I specified that reason.

Q. And the agency plan then was one that was designed to correct that situation?

A. That is correct.

Q. Did it prove effective in correcting the situation?

A. It did.

Trial Examiner Norwood: Would they ever cut the price without cutting it down to cost?

The Witness: Oh yes, yes sir. I only recall one area where they actually sold it below cost, and that was in Paterson, because there was a particular dealer out there who was trying to put his competitors out of business.

By Mr. Wright:

Q. That is the only instance that you can recall of a sale actually below cost?

A. In the Paterson area, yes.

Q. The other sales were made only below your suggested resale prices?

A. They were made at cost in many instances, ranging right up to our list price.

Q. This was effective in preventing them from selling below your list price, this agency plan, was it?

A. That is correct.

2956 Q. And that was the purpose of it, to control the resale price of your product?

A. That is correct, yes.

Mr. DuBose: I object to that. Will you read the question again. I think there were a few words in there that weren't quite clear.

(The reporter read the preceding question.)

Mr. Ewing: I object and move to strike the answer on the ground that under the agency plan there was no resale price; that is a misnomer. The goods were consigned to the agent and they were our goods, and he resold them at retail.

Trial Examiner Norwood: This witness is telling the story; the objection is overruled.

By Mr. Wright:

Q. Do you recall ever taking any dealer's agency away for failing to adhere to the prices in the agency contracts?

A. There may have been some instances, but very few.

Q. Do you recall receiving, in that period from 1933, on, complaints from other dealers of violations of those agency agreements?

A. We have had those complaints, yes sir.

Q. Did you check up on those complaints when you received them?

A. Yes.

Q. You made an effort to determine that those contracts were being lived up to by dealers?

2957 A. That is correct.

Q. How did you classify your accounts as between dealers and agents, when you first set up your plan?

A. The lead was sent to the agents on consignment, and it was in our control the entire time.

Q. After you embarked on the consignment plan, when you did decide to sell a dealer how did you determine whether he was to be an agent or a dealer?

A. In the Atlantic Branch we didn't sell to dealers.

Q. You had no accounts with dealers?

A. No, it was all through our agents.

Q. Were there retailers who handled Dutch Boy products who could not buy direct from you but who purchased from agents for resale?

A. Yes.

Q. How did you determine whether a man could be an agent or whether he had to purchase through an agent?

A. Well, we selected our agents, those distributors that we thought would be desirable. They were hand picked.

Q. And were some of the customers who had theretofore bought direct from you prevented from buying direct after that?

A. That is correct.

Q. And they paid a higher price then, did they not, for their lead, than if they had been able to buy direct on the agency basis?

2958 Mr. Ewing: I object to that—"buy direct on the agency basis".

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. And they paid a higher price then, did they not, for their lead, than if they had been able to buy direct on the agency basis?")

Trial Examiner Norwood: I don't understand that.

Mr. Wright: It is a perfectly clear question. The witness is ready to answer and he understood it.

Mr. Ewing: The contracts are in evidence and they are proper contracts carrying out the agency plan. They don't buy direct.

Trial Examiner Norwood: There is a confusion there.

Mr. Wright: These contracts are already in the record and the relationship is plain and this witness is thoroughly familiar with it and I think should be permitted to answer a perfectly legitimate question of that sort without having an objection which may be just a modification of his answer.

Mr. Ewing: I am objecting to certain phraseology in the question which is at least the subject of legal construction.

Trial Examiner Norwood: Will you read the last question again, please?

2959 (The question was reread by the reporter as follows:

"Q. And they paid a higher price then, did they not, for their lead, than if they had been able to buy direct on the agency basis?")

Mr. Ewing: That implies a legal conclusion.

Trial Examiner Norwood: As I understand there wasn't any buying on the agency basis.

Mr. Ewing: But if there is a question about it it should not be put in the question propounded to a layman.

Trial Examiner Norwood: Can't you straighten that out, Mr. Wright?

By Mr. Wright:

Q. If these people, after establishment of your policy of agency, had been agents and had the margin between the agency price and the resale price, they would have realized a larger gross on their sales of white lead. Is that not correct?

Mr. Ewing: I object to that, the agency price. Let's not ask the questions with the words in them that may be misleading.

Mr. Wright: The National Lead Company consigned the material to the agents and when the agents sold it they sent in a report and were billed for the difference between the National Lead Company's agents price and the sales price, and they received that margin between the so-
2960 called agents price and the sales price.

Mr. Ewing: I have no quarrel with the fact that there is an agents price, but let's not characterize it.

Trial Examiner Norwood: You may answer it with the explanation of the term "price" as used in the question.

The Witness: Direct from the National Lead Company —was that the question?

By Mr. Wright:

Q. Yes.

A. The agents were reselling the National Lead Company in the sales of our white lead.

Q. What compensation did the agents receive from the National Lead Company for selling your white lead at retail as compared to the difference between the price to the dealer and the suggested resale price?

A. The agent received a commission for his sales. It changed from time to time.

Q. In 1940 what was the difference?

A. At one time—the exact date I don't recall—but the agents commission was 10 and 10.

Q. I believe it is shown in the record that sometime in 1937—I think it was 1937 and I am willing to stand corrected on that—you discontinued the 10-10-2 and went on flat schedules so that you had no percentages involved, so that you had a list price, a painter price, a dealer
2961 price and an agent price.

A. That is right.

Q. What was the difference per hundredweight between the dealer price and the agents price, bearing in mind what I stated about that relationship—per hundredweight?

A. The dealers price was higher.

Q. By how much?

A. I don't recall the exact amount.

Q. About $1 per hundredweight?

A. In certain quantities, yes.

Q. Were those accounts which you classified as dealers and in the Atlantic branch refused to permit to buy direct, in competition with the agents in the resale of these products to painters and consumers?

A. They probably were, yes, in certain cases.

Q. You were intimately associated with the sales problems at those times, were you not?

A. Yes.

Trial Examiner Norwood: We will have a five-minute recess.

(Whereupon, a short recess was taken.)

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. The margins for agents on your agency contracts—have they been the subject of complaints from your 2962 agents as being too low to permit them to make what they consider a reasonable profit?

A. Distributors of white lead have always complained about the margin of profit that they have had.

Q. Is it considered in the trade as generally being a low margin?

A. That is right.

Q. So that one cent per pound on that to a dealer would be an important matter to him as regards his margin of profit in handling it?

A. Well, it all depends on what he sold it for.

Q. Assuming now that he paid your regular prices and sold it for your suggested prices.

A. It would be a close margin of profit.

Q. What would the margin now of a dealer who bought from an agent and resold to a painter at the present time? What would his cent-per-pound margin be?

A. Our list price today is $27 a hundred and I am not so clear as to what our agents' price is. If you have the cards there I could tell. It is $22.50 or something like that.

Q. Approximately 4½ cents per pound margin between—

A. If that is the spread. I am not sure of the agents' prices.

Q. Painters' prices are lower than list prices?

2963 A. Yes, they usually give a discount off that to the painter.

Q. So a dealer buying from an agent and reselling to a painter would have a low margin as compared with the agent buying direct from you and selling to a consumer?

Mr. Ewing: I object to an agent buying direct from us.

Mr. Wright: I will amend that to "acquiring".

Trial Examiner Norwood: Answer the question as amended.

The Witness: Yes, that is correct.

By Mr. Wright:

Q. Do you know whether all branches of the National Lead Company have the same policy with regard to refusing to sell direct to dealers, as the Atlantic branch?

A. I don't know.

Q. How long has it been the policy of the Atlantic branch to refuse to sell direct to dealers?

A. It was our policy during the time of the agency.

Q. The whole time?

A. Of the agency. Since that time, since the agency plan was done away with, we sell direct now to—

Q. Anybody that asks for it?

A. Generally speaking.

Q. Any recognized dealer?

A. Any dealer of fair size.

2964 Q. You said this morning that "We installed the agency system", I believe in 1932. You meant the Atlantic branch?

A. The Atlantic branch; they were the first ones to put it into effect.

Q. That was your own idea, was it?

A. That is correct.

Q. Was that on order of the general offices, or was that a matter of your own discretion?

A. No, I worked up the plan and sold the proposition to the general office.

Q. It was the general office that put—

A. They sanctioned it.

Q. They authorized you to do that?

A. That is correct.

Q. And when the November 15th order putting it into effect came down, that was a general office order to all branches, was it?

Mr. Du Bose: November 15 of what year?

Mr. Wright: 1933.

The Witness: If I remember correctly, I said the latter part of the year. I don't know if it was December or November.

By Mr. Wright:

Q. I think it is established in the record it was the 15th of November, 1933.

2965 Mr. Ewing: Nationwide except for the Pacific Coast branch.

By Mr. Wright:

Q. So that was a general office order. That was not your branch?

A. Oh, no.

Q. So that in your testimony this morning regarding these various matters, you were speaking as the manager of the Atlantic branch rather than the general offices, and the overall policy of the National Lead Company. Is that correct?

A. I don't quite get the question.

Q. When you were speaking this morning of "we" did this and "we" did that, you were speaking of the Atlantic branch rather than the policy of the general offices of the National Lead Company?

A. That is correct.

Q. That was your policy as manager of the Atlantic branch?

A. That is right.

Q. And you could not speak for the general offices of the company?

A. No, I could not.

Q. What quantity discounts do you now allow on dry white lead in barrels or drums?

A. I am not so familiar with those prices.

Q. I believe it is in the record that at least in 1942
2966 when OPA went on there was one-quarter cent a
pound differential for carload purchases of dry white lead. Is that correct?

A. I am not so familiar with those prices. My position has been more with the administrative policy of white lead and so forth during my entire career with the company.

Q. You have had charge of all sales of white lead to paint companies by the Atlantic branch?

A. That is correct, but those details are handled by my assistants.

Q. Do you recall when the one-quarter cent per pound differential on white lead for carload purchases was established?

A. No, sir.

Q. Is the white lead business a dying business, Mr. McNair?

A. I wouldn't say it is a dying business. I think white lead will be in demand for a great many years to come.

Q. Is it recognized as one of the principal pigments for white paint?

A. Dry white lead?

Q. Yes.

A. It is one of the principal ingredients, yes, for good mixed paint.

Q. Is it still recognized as a mark of quality in mixed paint?

A. Yes.

Q. And it still marks the best mixed paint?

2967 A. It still what?

Q. And the best white paint on the market still has a substantial quantity of white lead?

A. In my opinion the more white lead the paint has in it the better quality the paint is.

Q. And do you think that situation will continue in the future?

A. In superior mixed paint, yes, I think so.

Q. I call your attention to a document offered this morning which you identified, Respondents' Exhibit 159, this correspondence back in May and June of 1934.

There are a number of names appearing on the top of 159-A. Can you tell me whose names appear there?

A. Mr. Rowe, R. M. Rowe—he was Assistant Manager of the Atlantic branch.

My name appears on there, and Mr. Hurley—

Q. What was his position?

A. At that particular time he was Sales Manager. And Mr. Zang—he was in the sales department—

Q. Do you know who put that on there? Do you know whose handwriting it is?

A. It looks very much like Mr. Sidford's handwriting. He was the Manager of the Atlantic branch at that particular time.

Q. Who put the interlinings that appear there in 2968 either pen or pencil on those various sheets?

A. I wouldn't know.

Q. I call your attention on 159-B to the name written there, and underscored, in the right-hand margin. Do you know who put that on there?

A. No, I do not.

Q. That was on there when it was found in your files. Is that correct?

A. That is correct, and this is exactly as I found it in my files about ten days ago.

Q. I call your attention on 159-C to the word "new" written in the margin. Do you recognize that?

A. No, sir.

Q. You don't recognize the handwriting?

A. No, sir.

Q. I show you on 159-E the interlining there, "amount? for requirements".

Do you recognize that?

A. No, sir.

Q. I show you now on 159-G "Arrange with Mr. Cavarly for this marking."

Do you know whose handwriting that is?

A. That looks very much like Mr. Sidford's writing.

Q. He was the manager?

A. He was the manager, yes, sir.

2969 Q. Now, I call your attention to the statement appearing in the last paragraph of the letter of June 9, 1934, 159-A, and ask you to read that. Do you recall a confusion over the zone set-up at that time?

A. Well, it was rather a difficult matter to know which points were delivery points and which points were not delivery points. It caused a lot of confusion in that respect.

Q. Apparently under this there were no delivery points. There were flat prices in those states and areas?

A. No, there is a differential there (indicating).

Q. That is for delivery to any point in those states. Is that not the import of that document?

A. I think so.

Q. So there were no delivery points in those states, but customers within them all took the same price. Is that right?

A. I think so.

Q. Do you want to revise your answer then as to the confusion regarding what was the differential and delivery points?

A. This pertains to oxides and dry white lead, as I stated before. I am not too familiar with those particular marketing problems.

Q. What portion of the dollar sales of the Atlantic branch is accounted for by the so-called oxides and dry white, as compared to white lead in oil?

A. Gross margin, you mean?

2970 Q. No, gross sales.

A. Gross sales?

Q. Yes, sir.

A. Dry white lead will be the least important as to the actual dollars and cents. I can't state that. Then litharge would be next to white lead and red lead would be between litharge and dry white lead as to dollars and cents.

Q. And white lead in oil is the most important of your products?

A. In dollar volume.

Q. You see the statement here:

"In the hope it will help simplify this complicated matter we are planning to make up colored maps for each product which will be sent to you as soon as they can be completed."

Q. Do you recall ever receiving those colored maps?

A. I do not.

Q. Were you able to find any such maps in the records?

A. No, sir.

Q. Do you recall what the terms of sale for oxides and litharge and red lead were, as far as differential points or zones, prior to this announcement?

A. I don't recall, no, sir.

Q. Prior to 1934 while you were Sales Manager and
Assistant Manager of the Atlantic branch, was it
2971 customary to accept 90-day contracts on card prices
from customers for litharge and red lead?

A. I don't recall.

Q. You don't know?

A. No.

Q. Has it been customary in the past for years to accept such contracts?

A. I don't know.

Q. Now, in making your differential quotations on carload purchases of red lead and litharge, has it been customary in the period from 1934 to date to make contracts for carload purchases, based on a differential over the average quotation on pig lead as reported in the American Metal Market and the Engineering and Mining Journal?

A. I don't know whether that has been true or not.

Q. Now, I show you 159-B, the statement in the first paragraph: "The necessary changes in conditions for sale of dry lead were made on January 1st."

Do you recall those changes that were made on that date?

A. I do not, no, sir.

Q. Does that refer to dry white lead? Is that what is customarily referred to as dry white lead?

A. Dry lead, that is dry lead.

Q. I call your attention now to 159-D, the second paragraph, where it states:
2972 "All sellers have agreed to discontinue the old
90-day card price contracts."

Do you recall anything about those?

A. No, sir, I do not.

Mr. Wright: No further cross-examination.

Trial Examiner Norwood: Redirect?

Mr. Ewing: Inasmuch as I am going to have to recall Mr. McNair on this other document, I would like to reserve what little, if any, redirect I might have until next week, and with that understanding release him at the present time.

Trial Examiner Norwood: That is all right if it is agreeable to Mr. Wright.

Mr. Wright: That is satisfactory.

Trial Examiner Norwood: Very well.

(Witness excused.)

Mr. Ewing: Now, may we have about a two-minute recess?

Trial Examiner Norwood: We will have a five-minute recess.

(Whereupon, a short recess was taken.)

Mr. Ewing: If it suits Your Honor's convenience, I have discussed this with Mr. Wright—I think we would save time tomorrow if we would adjourn now until 10 o'clock and I think we can finish this week's work tomorrow.

Trial Examiner Norwood: Very well. We will re-
2973 cess until 10 o'clock tomorrow morning.

(Whereupon, at 3:45 o'clock p.m., a recess was taken until 10:00 o'clock a.m., Thursday, June 12, 1947.)

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2974

Room 332, Federal Trade
Commission Building,
Washington, D. C.,
Thursday, June 12, 1947.

Met, pursuant to adjournment, at 10:00 a.m., E.D.S.T.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., and Paul R. Dixon, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick, & Richardson, 815-15th St., N. W., Washington, D. C.), appearing for Sherwin-Williams Company.

Edmund P. Wood, Esq., (2801 Carew Tower, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

James D. Ewing, Esq., and E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

2975

PROCEEDINGS.

Trial Examiner Norwood: Pursuant to adjournment on yesterday, the hearing in Docket 5253 is now reconvened at 10 o'clock a.m., June 12, 1947, in Room 332, Office of the Federal Trade Commission, Washington, D. C.

The reporter will note the appearances.

Call your witness, Mr. Ewing.

Mr. Ewing: Mr. McCarthy.

FRED K. McCARTHY was thereupon called as a witness for the respondent National Lead Company, and having been previously duly sworn, testified as follows:

Trial Examiner Norwood: State your full name.

The Witness: Fred K. McCarthy.

Trial Examiner Norwood: You have testified before?

Mr. Ewing: He has testified twice before, when called by the Commission.

Trial Examiner Norwood: It is not necessary to swear him again, I don't believe.

Mr. Wright: I assume the same oath would govern his testimony. If there is any question about it, I would suggest that he be re-sworn.

Trial Examiner Norwood: Proceed.

Direct Examination by Mr. Ewing.

2976 Q. When were you first employed by National Lead?

A. In November, 1935.

Q. And in what capacity were you then employed?

A. As a salesman in the Cincinnati Branch.

Q. I think you testified heretofore that from 1939 to 1943, you were Manager of the Cincinnati Branch of National Lead?

A. That is true.

Q. Since 1943, in what capacity have you worked for National Lead?

A. I have been Manager of Trade Sales in the general office, and Chairman of the White Lead Sales Committee.

Q. And those are both positions in the general office?

A. That is true.

Q. What, in general, were your duties in the Cincinnati Branch from 1935 to 1943?

A. In chronological order, I began as a salesman; became Sales Manager; and then Assistant Manager of the branch; and in 1939, Manager of the Branch.

Q. Now what did your duties as a salesman consist of?

A. Calling on the trade that used the white lead and paint products distributed by the company under the Dutch Boy brand.

Q. Was that limited to the territory of the Cincinnati Branch?

A. Throughout the ten States served by the Cincinnati Branch, yes.

Q. Were those duties limited to the time that you
2977 were a salesman?

A. No, that was when those duties began, but throughout my experience at Cincinnati, I was in contact with our trade and customers in our territory.

Q. Did your duties, both as salesman and later as Manager, require you to travel throughout the territory covered by the branch?

A. Very much of the time I spent traveling.

Q. What contact did you have with customers purchasing white lead-in-oil from your branch?

A. Naturally, in order to be on top of my responsibilities, I endeavored to know most of our key accounts personally, and to know as many of our other customers as I could.

Q. I hand you copies of Commission's Exhibit 582-D and Commission's Exhibit 807-C, and ask you to state whether the map and the chart, those exhibits respectively, correctly portray the territory served by the Cincinnati branch while you were associated with that branch?

A. Yes, sir, they are identical.

Q. Will you tell us how white lead-in-oil was distributed from the Cincinnati branch during the period from 1935 to 1943 when the agency plan was in effect and while you were connected with that branch?

A. Cincinnati was no longer a manufacturing branch
of white lead products in that period, and we shipped
2978 to our own account at the various agency points,
from the factory at Chicago, throughout our territory, lead on consignment in kegs, and direct to customers in barrels where dry lead was involved, shipping only out of our Cincinnati warehouse and out of our Atlanta warehouse to local drayage deliveries.

Q. Was white lead, dry white lead, sold on consignment during that period?

A. Never.

Trial Examiner Norwood: Off the record just a minute.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

By Mr. Ewing:

Q. At what points throughout the territory of the Cincinnati Branch were agents located, to the extent that you can recall?

A. In most cities of over 5,000 population in each of the ten States.

Q. During the period from 1935 to 1943, while you were connected with the Cincinnati Branch, did you become personally familiar with the competitive problems facing the agents of the National Lead Company located at various points throughout its branch territory?

A. Yes.

Q. From your own personal knowledge, can you state whether any agent located in a town near or at the 2979 border of any zone served by the Cincinnati Branch was affected, from a competitive standpoint, by the zone differential applicable to the zone in the territory across the line?

Mr. Wright: Would you read that question, please?

(The reporter read the question as follows:

"Q. From your own personal knowledge, can you state whether any agent located in a town near or at the border of any zone served by the Cincinnati Branch was affected, from a competitive standpoint, by the zone differential applicable to the zone in the territory across the line?")

Mr. Wright: I object to that question, Your Honor. It calls for conclusions on the part of this witness as to matters which can be established. There hasn't been a proper groundwork laid here for that question, showing the location of these agents and the competitive situation in any particular respect. Now this can be proved by direct testimony of the parties involved, rather than these broad conclusions.

Mr. Ewing: That isn't what the question called for, Judge. It asked him whether he could state from his own personal knowledge, and it calls for a "yes" or "no" answer—can he state. I am not asking him the ultimate question.

Mr. Wright: Can he state a broad, general conclusion as to competitive effects as between agents within his territory and agents and other competitors without 2980 his territory.

Trial Examiner Norwood: I think that is probably irrelevant, because he wouldn't be permitted to state that knowledge in the way that you elicit it there, inquire about it. He will have to show what factual conditions brought about. You give the facts which indicate what the effects will be. As I understand it, you are going to the effects which this thing would have on different sides of the zone lines. Now we want to get at that in a factual way.

Mr. Ewing: Off the record, if I might.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

I will sustain the objection to the question as it stands now, but this witness may give us the facts of competitive reaction which came to him in the due course of business, he may do that. He may tell us how the system laid down a given article at a certain price in one town, and at a different price in another, and whether he lost any customers over there or not, and what they did about it—

Mr. Wright: (Interposing.) I take it that Your Honor means to exclude outright hearsay from that statement of what will be permitted.

Trial Examiner Norwood: He may give—

Mr. Ewing: (Interposing.) He can only do it by 2981 customer reaction.

Trial Examiner Norwood: Yes. He may give facts which came to him in the due course of business. He was manager there, managing these salesmen in that territory.

Mr. Wright: He is talking now about a relationship between customers and other people, not about problems encountered by his own salesmen. The question calls for something which can be proved by direct and reliable testimony.

Trial Examiner Norwood: If they quit buying from him and stated the reason why, and that came to him in the due course of business, he may tell us.

Mr. Ewing: And if they didn't quit buying from him, that, of course, is the negative, but it is still a significant factor.

Trial Examiner Norwood: Well, go ahead.

Mr. Ewing: Let's find out what he knows.

By Mr. Ewing:

Q. Does the territory which the Cincinnati Branch sold while you were there, contain so-called par territory?

A. Yes.

Q. Does it also contain so-called 1/8 Zone territory?

A. No.

Q. Is any part of the par territory sold by the Cincinnati Branch contiguous to any 1/8 Zone territory?

A. No.

2982 Q. Is any part of the par territory sold by the Cincinnati Branch contiguous to any ¼ Zone territory?

A. Yes.

Q. Now will you tell us what portion of the par territory sold by the Cincinnati Branch is contiguous to ¼ territory, and at the same time give us the ¼ territory?

A. The zone border of Kentucky and West Virginia was the south edge of our par area adjacent to the northern borders of Tennessee and our section of the State of Virginia, which were, in our territory, ¼-plus territories.

Q. Now along the line dividing those territories, looking at Respondent's Exhibit 157, will you state what cities or towns you see set forth on that map which, on the face of things, would appear to be competitive?

Mr. Wright: Objection, Your Honor. I don't think that that question is proper, a statement "which, on the face of things, seem to be competitive", is a very suggestive statement which calls for a conclusion.

Mr. Ewing: It doesn't call for a conclusion—

Mr. Wright: (Interposing.) Your Honor, I assume that counsel's purpose is to prove that none of these points are competitive, and I object to the characterization, "which appear on their face to be competitive".

Trial Examiner Norwood: You want to know whether these towns were within a competitive distance?

2983 Mr. Ewing: Yes, to look at the map and see if there are towns close together, and then we will find out what he knows about the competitive situation.

Trial Examiner Norwood: Well, he can designate what towns he is referring to. I will overrule the objection, with that explanation.

A. There are no towns along these borders in which we had agencies.

By Mr. Ewing:

Q. You are referring now to the border separating South Kentucky and South West Virginia, and the north border of the State of Tennessee and Western Virginia?

A. That is true.

Q. Now where, to the best of your recollection, did you have agents in Kentucky?

A. In Louisville, Lexington, Ashland, Covington, Newport, Henderson, Owensboro, Madisonville, Bowling Green, Danville, and for a time, I believe, in Hopkinsville.

Q. Where, to the extent that you can recall, did you have agents in Tennessee and Western Virginia which carried the ¼ differential?

A. Nashville, Chattanooga, Knoxville, Johnson City, Kingsport, and Bristol, in Tennessee; and in Virginia at Abingdon and Pulaski.

Q. Now did your branch include a territory carrying a ⅜ differential? 2984

A. Yes.

Q. What territory was that?

A. The States of Alabama and Georgia, and our parts of North and South Carolina.

Q. Now the boundary dividing that portion of the Cincinnati Branch territory which carried a ¼ differential, and that portion carrying the ⅜ differential, was, then, the southern line of Tennessee and the northern line of Alabama and Georgia, and the eastern line of Tennessee and the western line of North Carolina, is that correct?

A. That is right.

Q. Now will you tell us where, in that portion of North Carolina falling within the Cincinnati branch's territory, you had agents?

A. At Asheville, Shelby, Gastonia,—those are all I recall.

Q. Now I believe you said that your branch territory covered a certain portion of South Carolina, is that correct?

A. That is true.

Q. Will you tell us, to the extent that you can now recall, where, in that portion of South Carolina falling within your branch's territory, you had agents?

A. At Spartanburg, Greenville, and Anderson.

Q. Where, in the State of Georgia, did you have agents?

A. In Rome, Athens, Gainesville, Atlanta, Columbus, Newman, and Decatur. 2985

Q. Where, in the State of Alabama, did you have agents?

A. Birmingham, Montgomery, Dothan, Selma, Anniston, Gadsden, and Florence.

Trial Examiner Norwood: Would Chattanooga and Gadsden take the same rate, get the same price?

The Witness: No, sir, Gadsden would be ⅛ over Chattanooga.

By Mr. Ewing:

Q. Now while you were with the Cincinnati Branch, to what classes of customers did your agents sell white lead-in-oil?

A. Mostly to painters, to some dealers, maintenance accounts, local governmental purchasing agencies, and very occasionally to farmers.

Q. You referred to maintenance accounts. Will you tell us what they are?

A. Some small plant might want to paint fire escapes, for example, and would buy a keg of red lead-in-oil.

Q. Of those various classes of customers listed by you, will you tell us which class or classes, if any, bought at list or card price, so-called?

A. A farmer or property owner would pay that price if they ever bought lead-in-oil.

Q. Now while you were with the Cincinnati Branch, both as salesman and as Manager, did you ever receive
2986 complaints from your agents or others purchasing your products, with respect to the differential existing either between par territory and ¼ territory, or between ¼ territory and ⅜ territory?

A. Never.

Mr. Wright: Objection, Your Honor. It is irrelevant.

Trial Examiner Norwood: Objection overruled.

By Mr. Ewing:

Q. Your answer was what?

A. "Never".

Q. Did you ever hear, while you were a salesman or Manager of the Cincinnati Branch, of any restriction upon competition in the branch territory arising out of the existence of the territorial differential?

Mr. Wright: Objection, Your Honor. What this witness ever didn't hear of while he was Manager of the branch is highly irrelevant and immaterial and incompetent.

Trial Examiner Norwood: I think that that is calling for a rather broad conclusion. He may state any facts reported to him that would throw light on these matters, or what his salesmen reported to him.

Mr. Ewing: As you can see from his answer to the preceding question, I am in the difficult position of proving a negative; I can only prove that he never had any complaints, as he has testified, or what he has heard.

2987 Trial Examiner Norwood: I think he can show what he hasn't heard, but I just thought that your question was too broad there, and went to a conclusion.

Mr. Ewing: I ~~will~~ reframe the question so that there will be no question about it.

Trial Examiner Norwood: All right.

By Mr. Ewing:

Q. In the course of your connection with the Cincinnati Branch as Manager, what reports, if any, did you receive from your salesmen or from others, indicating the existence of complaints based upon adverse effect on competition from agents or customers?

Mr. Wright: Objection, Your Honor. That is irrelevant and immaterial, and it is also a very leading question and calls for information which has no place in this record.

Trial Examiner Norwood: I think that you should amend your question by asking if he had heard any complaints of conditions arising out of differences in price.

Mr. Ewing: I will be glad to amend the question to that effect.

Mr. Wright: He has already asked the question if he had any complaints on the territorial differentials, and the witness has said no. That is in the record.

Mr. Ewing: This is from a different source.

Trial Examiner Norwood: I think he may ask this. 2988 I will overrule the objection, with the understanding that the question is amended.

A. There were never any such complaints.

Mr. Wright: Your Honor, I move that that answer be stricken unless there is a proper question to which it is responsive. I don't think counsel has reframed his question in response to Your Honor's suggestion.

Trial Examiner Norwood: He adopted that.

Mr. Wright: To what question was that answer in response?

Trial Examiner Norwood: If the record is not clear on the matter, I will strike it.

Mr. Ewing: I would say that the witness responded to the question as amended; is that correct?

The Witness: Yes.

Mr. Wright: There were two questions, one suggested by Your Honor and one asked by Mr. Ewing.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

By Mr. Ewing:

Q. Mr. McCarthy, in answering the question which has been the subject of discussion, will you state whether you were answering the question as rephrased and amended by Judge Norwood?

A. It was the Judge's phraseology to which my answer applied.

2989 Q. Now you mentioned various classes of customers, and I believe that those that you referred to other than list, were dealers, painters, industrials and certain Government agencies, is that correct?

A. Yes.

Q. And you also mentioned maintenance accounts?

A. That is true.

Q. Now based upon your experience with the branch, both as salesman and as manager, can you state whether industrial accounts and government accounts, for example, were in competition with each other?

A. No.

Q. The question is—can you state?

A. Yes.

Q. Will you state?

Mr. Wright: May I have the first question?

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Now based upon your experience with the branch, both as salesman and as manager, can you state whether industrial accounts and government accounts, for example, were in competition with each other?")

Mr. Wright: I object to that, Your Honor, as calling
for a broad general conclusion on the part of this witness,
for which no basis has been laid. He is talking about
2990 wide categories of customers here, and it is a con-
clusion of the witness as to something which could be
established by direct evidence; it is self-serving in the ex-
treme.

Mr. Ewing: The question put to the witness called for a statement with respect to his personal knowledge based upon his experience in the business, as to whether, in the course of that experience he had found competition between these two particular classes of customers that I mentioned, namely, industrials and the Government. I think it is competent for him to answer that question if he has that knowledge, and he says he has. If he has, he has.

Trial Examiner Norwood: If, in his experience, he has observed that there is competition between Government and industry in the purchase of white lead—

Mr. Wright (Interposing): The question goes much beyond that. The question goes to the relationship of these customers with each other, which he could only have gotten second hand—such information. It can only be a conclusion based on hearsay.

Trial Examiner Norwood: He may tell us what his experience has been; he is telling the facts which his experience has developed, which would throw light on whether or not there is such competition. I shall overrule the objection and let him answer the question.

Mr. Wright: Exception.

2991 Trial Examiner Norwood: Give a factual answer; he is not asking you for an opinion, but give a factual answer if you know about this competition.

The Witness: There could hardly have been competition.

Mr. Wright: That, I submit, was not a factual answer; that was a conclusion.

Trial Examiner Norwood: If that is a motion to strike, I will allow your motion.

Mr. Wright: Yes, I move to strike that answer.

The Witness: There was no competition.

Mr. Wright: I move to strike that answer.

Mr. Ewing: That, I submit, is a proper answer because the question is conditioned on his knowledge and experience. In other words the answer to the question in effect is, "Based on my knowledge and experience there was no competition between those classes." That is as far as he can go. He can't go any farther than what his knowledge and experiences shows.

Trial Examiner Norwood: Please read me that original question.

(The reporter read the question as follows:

"Q. Now based upon your experience with the branch, both as salesman and as manager, can you state whether industrial accounts and government accounts, for example, were in competition with each other?")

2992 Trial Examiner Norwood: Whether government accounts and industrial accounts are in competition with each other?

Mr. Ewing: Yes, as far as his experience goes.

Trial Examiner Norwood: I don't know what that question means.

Mr. Wright: When you ruled on my objection, as I understood your ruling it was that he would be permitted to give any evidentiary facts out of his experience which would deal with that thing, and it wasn't to permit any broad, general conclusion.

Trial Examiner Norwood: I am going to reverse my ruling and sustain the objection to the question originally put, and strike the answers that were subsequently made. I think we should begin now and bring out the facts of this competition, whether any agents sold to one or the other, or whether there was bidding, or just what those facts of competition were.

Mr. Ewing: I am trying to develop the relationship from the competitive standpoint, between the classes of customers that I mentioned. Now—

Trial Examiner Norwood (Interposing): Do the same dealers sell to both classes?

Mr. Ewing: The same dealers may sell to both classes.

Trial Examiner Norwood: That is a factor in this competition, a factual matter.

2993 Mr. Ewing: But that isn't the point here; the point here is that with the industrial customer class getting one price, as I recall it, and the government customer class getting another price, there is no competition between those two classes, so there is no question of discrimination as far as they are concerned.

Trial Examiner Norwood: Why don't you, then, bring out the fact that when the government buys it, it is for consumption, or whatever they use it for, and when the dealer buys it, he is buying it for resale, and show us the competitive situation exactly as it is, instead of getting this man's opinion about a point of law.

Mr. Wright: You Honor, if we are to continue to discuss what counsel is trying to bring out from this witness I suggest that he be excused from the stand.

Trial Examiner Norwood: Well, I want him to understand what we are saying—

Mr. Ewing (Interposing): He isn't a stranger to this case.

Trial Examiner Norwood (Continuing):—about the facts.

Mr. Wright: I will subscribe to that statement.

Trial Examiner Norwood: We will have a five minute recess.

(A short recess was taken.)

2994 Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Mr. McCarthy, have you yourself sold, or do you know of sales by agents of the Cincinnati Branch to Government accounts?

A. Yes.

Q. Do you know for what use or uses the purchases were made?

A. The Government account was classified as a wholly tax-supported institution, and such merchandise of our manufacture was consumed for its own maintenance requirements.

Mr. Wright: I object to the answer as not responsive, and move that it be stricken.

Trial Examiner Norwood: He has answered the next question, but I think it may stand if counsel wants it to stand; I think it might as well, to save time. The objection is overruled and the motion denied.

By Mr. Ewing:

Q. Have you, yourself, sold or do you know of sales by agents of the Cincinnati Branch to the so-called industrial accounts—just yes or no?

A. Yes.

Q. What use or uses were made of the products by industrial purchasers?

A. The merchandise was consumed in their own maintenance program.

Q. Now have you yourself sold or do you know of
2995 sales by agents to the so-called painter class of customer?

A. Yes.

Q. Will you tell us what use or uses are made of the product by that class of customer?

A. Our material would be used by the painter in discharging his contract with the property owner.

Q. Have you yourself made, while you were a salesman, or do you know of sales by agents of the Cincinnati Branch, to the so-called dealer class?

A. Yes.

Q. What use or uses of the product would be made by that class?

A. The agents would sell to a dealer for resale purposes.

Q. How far, to the best of your recollection, is it from Chattanooga, Tennessee, to Gadsden, Alabama?

A. Upwards of sixty miles.

Q. During the time you were at the Cincinnati Branch, and since 1943 when you have been Manager of Trade Sales and Chairman of the White Lead Committee—if I recall your testimony correctly—what percentage of the sales of white lead-in-oil of National Lead were made at list price, if you know?

A. An infinitesimal fraction of one per cent.

Q. In the case of sales at list price what would be the type of customer involved?

2996 A. An infrequent buyer such as a property owner or a farmer.

Q. To what use would that class of customer put the product?

A. He might make paint out of the lead or make putty out of the lead, or use it for some purpose having to do with painting or plumbing.

Q. While you have been employed by the National Lead Company have you, yourself, known of any agreement between it and any other company or companies manufacturing white lead-in-oil or dry white lead, relating to the fixing of prices?

A. Never.

Q. I ask you the same question in relation to the fixing of zone or territorial differentials?

A. Never.

Q. I ask you the same question with respect to the restriction of production?

A. Never.

Q. I ask you the same question with respect to the allocation of customers?

A. Never.

Q. I ask you the same question with respect to fixing terms of sale, except as there were provisions in the Lead Industry Supplemental Code relating thereto?

A. Never.

Q. Basing this upon your knowledge as acquired by your experience, where would the so-called dealer

2997 class of customers be generally located?

A. Geographically?

Q. Yes.

A. In smaller towns, suburban areas of big cities, and in sparsely settled communities.

Q. Where, generally, on the same basis, would the painter class be located?

A. Mostly concentrated in metropolitan areas.

Q. I believe last October you testified generally as to how National Lead Company established its prices for white lead. Will you give us the factors taken into consideration by National Lead Company in establishing prices of dry white lead and white lead-in-oil?

Mr. Wright: I object, Your Honor. It hasn't been shown that this witness has had anything to do with the making of the prices at the general offices of the National Lead Company. The question is so broad and general, and it doesn't restrict it as to time.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. I believe last October you testified generally as to how National Lead Company established its prices for white lead. Will you give us the factors taken into consideration by National Lead Company in establishing prices of dry white lead and white lead-in-oil?")

2998 Mr. Ewing: I will add to that—since you have been Manager of Trade Sales and Chairman of the White Lead Sales Committee—if you know.

Mr. Wright: Now Your Honor, it hasn't been established just how prices are made within the organization of the National Lead Company. This witness hasn't been qualified as being able to testify on that matter.

Mr. Ewing: I asked him if he knew what the factors are.

Trial Examiner Norwood: I think he may state what factors he took into consideration respecting anything that he did about it.

Mr. Ewing: I think if he knows the factors the company takes into consideration, he being an official of the general office—if he knows, he surely can so state, and if he doesn't know he can say so.

Trial Examiner Norwood: I will overrule the objection; answer the question.

The Witness: The prices for dry lead would be established by the general office as a result of quite a few different factors—the cost of pig lead, the cost of containers, direct labor in the plants, freight, administrative overhead expense, our own so-called general office expense which encompasses a research laboratory, national advertising, the general office family, and so forth, and also the 2999 competitive situation arising from the current prices of other pigments such as leaded zinc, zinc oxide, titanium and other pigments with which we are in competition in our efforts to sell dry white lead to paint grinders, potteries, and other industrial consumers.

By Mr. Ewing:

Q. Would the price of ready-mixed paint be any factor?

A. Not to much of an effect on our pricing of dry white lead because in that—

Q. (Interposing): No, no—give us the factors in connection with white lead-in-oil?

A. The cost of pig lead, the cost of linseed oil, mineral spirits, containers, production costs from the factory side, labor rates and so forth; our own overhead, as previously mentioned, and primarily the existing price structure of competitive prepared paints and other factors of competition.

Q. To whom, or to what class or classes of customers is dry white lead sold generally?

A. Paint grinders and potteries, primarily.

Q. To what class or classes of customers is dry red lead sold generally?

A. The manufacturers of paint, varnish, storage batteries, ceramics—they account for the bulk of dry red lead consumption.

3000 Q. To what class or classes of customers does National Lead Company sell red lead in oil?

A. Railroads, steamships, industrial accounts, governmental agencies, and a minor percent to the painting trade.

Q. To what class or classes of customers does National Lead sell litharge?

A. Mostly to the manufacturers of storage batteries, producers of dry colors, varnish makers, and a small amount to paint grinders; also insecticide manufacturers use litharge.

Q. Now a little while ago you mentioned certain competitive pigments. Does National Lead produce any zinc oxide?

A. No sir.

Q. Does it produce any leaded zinc oxides?

A. No sir.

Q. Does it produce any lithopone?

A. No sir.

Q. Does it, either directly or through any subsidiary, produce any titanium oxide?

A. Yes, that we do.

Q. When a sale of white lead-in-oil is made direct to a customer, or was made direct to a customer by the National Lead Company, or one of its branches, as compared with a sale to a customer by one of its agents during the period the agency plan was in effect, was the same price paid in either event by that customer?

A. To the same class of customer, yes.

3001 Trial Examiner Norwood: Read that question and answer for me, please sir?

(The reporter read the record as requested.)

By Mr. Ewing:

Q. Mr. McCarthy, did you know a Mr. Lester Wilson?

A. Yes.

Q. What position with National Lead Company did he hold in 1937, if you know?

A. He was Chairman of the Metal Sales Committee, and Manager of Metal Sales.

Q. Do you know Mr. Joseph Martino?

A. Yes.

Q. Was he connected with the company in 1937?

A. Yes, as Assistant Comptroller and Secretary of the Metal Sales Committee.

Mr. Ewing: No further examination.

Trial Examiner Norwood: Cross-examination.

Cross-Examination by Mr. Wright.

Q. Mr. McCarthy, I take it that you are thoroughly familiar with all the customers that were sold by the Cincinnati Branch in that branch territory over the period with which you were connected there?

A. All of the key accounts and most of the others, yes sir.

Q. And were familiar with the competitive relationships that existed between those various customers? 3002

A. Yes.

Q. Do you recall having any conferences several years ago with Mr. Carl Depue of the Federal Trade Commission?

A. Mr. Depue, yes, sir.

Q. Isn't it correct that you cooperated with him in furnishing the records for a tabulation of invoices which was made up?

A. That is true.

Q. Do you recall obtaining from the various branch offices of the National Lead Company certain information regarding their accounts, which you turned over to Mr. Depue?

A. Yes.

Q. Do you recall obtaining for Mr. Depue from the branch offices lists of all accounts within those branches?

A. We got so much material for Mr. Depue that I don't recall the individual pieces.

Mr. Wright: I would like to have the reporter mark this document as Commission's Exhibit 858-A to -F, inclusive, for identification.

Trial Examiner Norwood: It may be so marked.

(The document referred to was marked Commission's Exhibit 858-A through -F, inclusive, for identification.)

By Mr. Wright:

Q. Now Mr. McCarthy, when you were listing those accounts which were close to the borders of the
3003 differential zones of the Cincinnati territory, did you
mean to list all of the accounts who were agents?

A. Those that I recall.

Q. Just those that you recall?

A. Yes.

Q. So there may very well have been a number of others along that line which you omitted?

A. There could have been.

Q. I show you a document, Commission's Exhibit 858-A through -F, and ask you if you recognize that document?

A. Frankly I don't recall having seen this before.

Q. Do you recognize that as a list of all the accounts of the Cincinnati Branch during the period designated?

A. Yes, these are all customers of the Cincinnati Branch.

Q. You don't recall that that document was supplied by you to Mr. Depue as a list of all those accounts?

A. It must have been.

Mr. Wright: Your Honor, I would like to interrupt the cross-examination of this witness now to obtain further identification of this document by another witness. I hesitate to do this but in view of the witness' failure to recognize this document I have no alternative.

Mr. DuBose: May we go off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

3004 Trial Examiner Norwood: On the record.

Mr. Ewing: I will stipulate that we supplied that.

Mr. Wright: In other words I understand that the stipulation is that Commission's Exhibit 858-A through -F is a document which was supplied by the National Lead Company?

Mr. Ewing: That is right.

Mr. Wright: I offer Commission's Exhibit 858-A through -F in evidence, as a document supplied by the National Lead Company setting forth as to the Cincinnati Branch, all customers to whom they sold white lead, dry or in oil, during the period from January 1 to March 31, 1943, with symbols as explained thereon.

Mr. Ewing: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked COMMISSION'S EXHIBIT 858-A through -F, for identification, was received in evidence.)

By Mr. Wright:

Q. Mr. McCarthy, during the period of the agency plan what was the differential between the dealer and the agent on white lead-in-oil?

Mr. DuBose: I object to that question. I don't think the word "differential" is the correct way to term the net which the agent received. It implies that there is a price, in other words.

3005 Mr. Wright: Your Honor, this witness was manager of that Branch and is the Manager of Trade Sales and knows exactly what I am talking about, and is thoroughly competent to answer that question, and any question he doesn't understand he can say so.

Mr. DuBose: I am sure we all know what this question relates to, but the record ought to be clear.

Trial Examiner Norwood: I don't think the word as used has such an implication.

Mr. Wright: I still urge that I have the right to use any terms in describing this on cross-examination, as I wish, as long as I don't try to trap the witness.

Trial Examiner Norwood: I don't know that that is the general rule, but at any rate I will overrule the objection and ask the witness to answer the question. Do you want it read?

The Witness: No sir. During the last few years of the existence of the agency plan there normally obtained about a dollar between the agent's cost and the dealer's price.

By Mr. Wright:

Q. That is a dollar per hundredweight?

A. Yes.

Q. Do you know whether the accounts which were classified as dealer accounts were in competition with your agents in reselling these products?

3006 A. There could have been instances of that nature.

Q. Do you know that there were instances of that nature?

A. Not definitely, no sir.

Q. Well, now, what were a man's qualifications in order to obtain lead at the dealer's price; what business did he have to be engaged in?

A. We had no contact with that type of trade; I wouldn't know.

Q. Well, now, you sold to dealer accounts when you were in the Cincinnati Branch, did you not?

A. No sir, we didn't sell to dealers.

Q. I call your attention to the fact that on this document here, Commission's Exhibit 858-A through -F that the symbol "D" refers to Dealers, and to the fact that there are accounts listed here designated as "D" for dealer and "A" for Agent. Now on Commission's Exhibit 858-B, for instance, in Peru, Indiana, there is the Jones Hardware Company with the symbol "D" alongside—presumably a dealer account—and Wellers Paint & W. P. Co., with the symbol "A" alongside, or an agent's account.

A. You are right.

Q. That would indicate, would it not, that there were sales direct to that class of accounts, at least during the period which this document covers?

A. You are correct; I am in error.

3007 Q. I call your attention to Exhibit 858-C, and to the Loeb Hdwe. Co., Montgomery, Alabama, with the designation "D" for Dealer alongside; and the G. W. Barnett Hdwe. Co., the Pittsburgh Plate Glass Co., and Teague Hdwe., all in Montgomery, Alabama, and all with the designation "A" for Agent, alongside. Is it not a fair assumption that the Loeb Hardware Company was engaged in a similar enterprise as those other accounts in that territory?

A. Yes sir.

Q. In other words, then, is it not fair to state that the dealers were primarily engaged in the resale of those products?

A. Yes sir.

Q. Were the agents also engaged in the sale of those products to similar classes of customers?

A. Yes.

Q. Would it not be fair, then, to state, that they were in competition with each other?

A. That could have been.

Q. Now as manager of the Cincinnati Branch you sold all products of the National Lead Company in that area, is that correct?

A. Yes.

Q. You sold litharge and red lead to the battery manufacturers?

A. Yes.

3008 Q. Did you also sell litharge and red lead in hundred pound and smaller kegs?

A. Yes.

Q. Were those products in those kegs sold to the dealer trade for resale generally?

A. Yes, they were.

Q. And they took the white lead-in-oil selling schedule, did they not?

A. No, they were priced on another schedule.

Q. On what schedule were they priced?

A. Just what do you mean by "schedule", Mr. Wright?

Q. I mean zone and territorial differentials, and the differentials as between the various sizes of kegs.

A. The package differentials were the same as for lead-in-oil, and the geographical zone differentials were identical.

Q. That is what I meant. Now from what factories or plants did the red lead and litharge sold by the Cincinnati Branch originate?

A. We would ship the western part from St. Louis, and the eastern part from Philadelphia.

Q. How about the Atlanta territory, the Atlanta plant?

A. That would come from St. Louis.

Q. Doesn't the company have a plant producing red lead and litharge in Atlanta, Georgia?

A. No, the Atlanta oxide plant makes only one
3009 grade of battery litharge, with no red lead facilities
and no facilities for other than this battery litharge.

Q. Do they make just one grade of battery litharge?

A. At the time I left there they had two types of a similar product for battery manufacturers only.

Q. What types have they made since you left there? You left there in 1939, was it not?

A. No, in 1943. I understand that they now make one or two other grades of the same battery litharge, but they still do not make red lead.

Q. How about the keg red lead and litharge, where did that originate?

A. From either St. Louis or Philadelphia.

Q. Where did you have warehouses in the Cincinnati Branch territory?

A. At Cincinnati and at Atlanta.

Q. Those were the only two warehouses?

A. That is right.

Q. And your dry white lead came from Chicago?

A. And St. Louis.

Q. And St. Louis?

A. Right.

Q. And your white lead-in-oil came from Chicago?

A. Chicago.

Q. You stated a while back that an infinitesimal
3010 fraction of sales were at list price while you were
manager at Cincinnati?

A. That is correct.

Q. You meant by the company itself?

A. And to my knowledge by our agents.

Q. But you don't know for sure the price at which they sold?

A. No.

Q. The only information you received from them was the amount that they sold and a remittance of all but what they kept as their compensation?

A. That is true.

Q. Did you ever receive complaints from any of the trade in your district regarding the narrow margin for the dealers and agents on white lead-in-oil?

A. It was a subject of discussion; because of the character of the product it was a narrow margin item.

Q. Did you receive complaints that the margin was too low?

A. Occasionally they would remark on the narrow margin at which they had to operate.

Q. What were these discussions that you referred to?

A. Well, we countered by showing them that it was a compact inventory and a fast turnover, so that at the end of the year their net compared very favorably with other slower moving, longer margin items.

Q. Did you receive such complaints principally from your agents?

3011 A. Yes.

Q. Mr. McCarthy, what have you had to do with the general policy of the National Lead Company in fixing and setting its prices and its price policies?

A. Every time a price has been changed since I have been in New York I have been in on the decision.

Q. That is, since 1943?

A. Yes sir.

Q. Then your answer as to the factors that entered into the price making didn't go back of 1943?

A. No sir.

Q. When a major change in pricing is made by the National Lead Company what are the mechanics for discussing that and finally deciding it within the organization?

A. Those immediately concerned with the decision would get all of the available material for basing such a decision, together, go over it in detail, consult with some of the people from the branches on occasion, and then announce by bulletin to the various branches what the new basis would be.

Q. Who has the authority to make the final decision and determine that you are going to do it?

A. Mr. Harold Rowe.

Q. He is the Vice President in charge of that aspect of the matter?

A. That is right.

3012 Q. In other words it is a higher level decision in the company organization, is it not?

A. The final decision, yes, sir.

Q. Is that ever acted on by the Board of Directors?

A. Not to my knowledge.

Q. Who below Mr. Rowe are immediately concerned with such decisions; does the White Lead-in-Oil Committee function as a committee to assess the factors involved?

A. No, not as a committee. Mr. Rowe and myself, our comptroller and one or two other general office officials would be in on such a decision.

Q. The comptroller would also be in on that decision?

A. Yes.

Mr. Wright: No further cross-examination.

Mr. Ewing: That is all, Mr. McCarthy.

Trial Examiner Norwood: Thank you, Mr. McCarthy.

(Witness excused)

Mr. Ewing: Might we have a short recess? I have some papers that the next witness is going to use and I think we could save some time if I talked to Mr. Wright about them to see if we might reach an accord on how we shall handle them.

Trial Examiner Norwood: All right, a five minute recess.

(A short recess was taken.)

3013 Trial Examiner Norwood: The hearing will come to order. At the request of counsel we will recess until two o'clock.

(Whereupon, at 12 noon, a recess was taken until 2:00 p. m., this day.)

3014 After Session.

2:00 p. m.

Trial Examiner Norwood: Come to order, gentlemen.

Mr. Ewing: Mr. Examiner, may I have these exhibits marked for identification as Respondents' Exhibit 160-A to -R, inclusive; 161; 162-A to -D, inclusive; 163-A to -G, inclusive; 164; 165-A to -O, inclusive; 166-A and -B?

Trial Examiner Norwood: They may be so marked.

(The papers referred to were marked Respondents' Exhibits 160-A thru 160-R; 161; 162-A thru 162-D; 163-A thru 163-G; 164; 165-A thru 165-O; 166-A and 166-B, for identification.)

J. R. HIGGINS was thereupon called as a witness for the Respondents and, having been first duly sworn, testified as follows:

Direct Examination by Mr. DuBose.

Q. Mr. Higgins, will you state for the record your full name and address?

A. J. R. Higgins, 345 Fairlawn, Webster Groves, Missouri—that is St. Louis County.

Q. By whom are you employed, Mr. Higgins?

A. National Lead Company.

Q. In what capacity?

3015 A. At the present time, Assistant Manager.

Q. When were you first employed by National Lead?

A. 1911 through a subsidiary company.

Q. That is the St. Louis branch of the National Lead?

A. St. Louis branch.

Q. In the course of your employment have you had anything to do with the sales of any of the products of the St. Louis branch of the National Lead Company?

A. Yes. In 1939— In 1929 I was made Assistant Comptroller and Sales Manager of the White Lead and Oxide Sales.

Q. And from that time on—

A. Later, in 1939, I was made Assistant Manager.

Q. From 1929 on you have had experience with sales of white lead-in-oil and oxide?

A. I have.

Q. How about dry white lead.

A. That is also included.

Q. Since 1929?

A. Yes.

Q. Mr. Higgins, I show you documents marked Respondents' Exhibit 160-A to -R, inclusive, for identification, and I ask you what those documents are.

A. These records are 1941 sales of heavy and soft paste white lead-in-oil.

Q. Who prepared those documents?

3016 A. The documents were prepared under my direction.

Q. As a result of what request were these documents prepared?

A. We had a request from our national office for the sales record of 1941, as I recall it.

Q. And as a result of that request these documents were prepared under your supervision?

A. That is correct.

Q. When were these documents prepared?

A. I would say in April of 1947.

Q. Is this date of any significance (indicating to witness)?

A. That is April 5, 1947.

Q. Now, take Respondents' Exhibit 160-A for identification. Will you tell us what those figures are under each heading beginning with the left-hand column?

A. This is a summary of the work sheets. The first column shows the zone, the second column shows the total of pounds sold, the third column the total freight and cartage, and the final column average freight per hundredweight.

Q. Per hundred pounds?

A. Per hundred pounds.

Q. And that covers, does it not, white lead-in-oil for 1941?

A. The first bracket covers white lead-in-oil for 1941.

Q. And those represent figures showing sales of the St. Louis branch of the National Lead Company?

3017 A. That is correct.

Q. Of that product for 1941?

A. That is correct.

Q. Now, coming to the item number 2 or second bracket, will you tell us what is represented there?

A. That is 1941 sales of dry white lead.

Q. Going back to the first bracket, these purport to be the total pounds sold of white lead-in-oil for the respective zones there indicated?

A. That is correct.

Q. And the same is true as to the freight and cartage by zones?

A. That is correct.

Q. And the average freight per hundredweight?

A. That is correct.

Q. The second line under item 2—will you tell us what that represents?

A. Under dry white lead we have a par classification which covers certain territory. It gives the total pounds, total freight and cartage, and the average cost per hundred pounds.

Q. Will you take the words "plus one quarter cent" and tell us what that purports to represent?

A. "Plus one quarter cent" is the differential that is added in certain territory, and it covers the total of 3018 white lead pounds sold into those territories, the total amount of the freight and cartage and the cost per hundred pounds.

Q. All of these figures represent, do they not, sales by the St. Louis branch of the National Lead Company?

A. That is correct.

Q. Under item number 3, will you tell us what is listed there?

A. That is the 1941 sales of oxides in carload lots.

Q. Will you take the words and figures appearing on the two lines below the heading?

A. We have a car territory. That covers the total pounds, total freight, cost per hundred pounds.

Q. Does that total freight also include cartage?

A. It includes cartage, and I should have said total freight and cartage.

Trial Examiner Norwood: Cost per hundred pounds—do you mean cost to the customer?

The Witness: Cost per hundred pounds, the freight charges.

The next line is the differential 25 cents, one-quarter, covering the total pounds, total freight and cartage, and the cost per hundred pounds.

By Mr. DuBose:

Q. Now, let's take item 2. The par and plus one-3019 quarter cent apply to the zones for dry white lead. Is that true?

A. That is correct.

Q. Item number 3 represents the zones for oxides in carload lots?

A. That is correct.

Q. And the figures applicable thereto?

A. That is correct.

Q. Will you tell us what item number 4 is?

A. 1941 sales of oxides in carload lots.

Q. Should that be carload or less than carload?

A. I would have to see these sheets a moment. Item number 4 includes the differential of one-quarter territory.

Q. What I am asking you about, Mr. Higgins, is the heading here. There apparently are two headings; one, item number 3 purports to be 1941 sales of oxides in carload lots and item number 4 also states 1941 sales of oxides in carload lots.

3020 Should that not be less-than-carload lots?

A. No, the first is carload. The word "car" should be added here (indicating), and the words "one-quarter differential" added here (indicating), and then you have the classifications.

Q. In other words, this represents car sales. What is the "plus one-quarter cent" on item 3?

A. That is under the differential territory of one-quarter of a cent.

Q. Will you go to Respondents' Exhibit No. 163-G, for identification, and tell us what that is?

A. That is the differential for the one-half cent territory.

Q. For what size lots?

A. L. c. l. lots. There was no carload classification.

Q. I show you Respondents' Exhibit 164, for identification, and I call your attention to the heading under the last item—

Mr. Wright: Off the record.

(Discussion off the record.)

By Mr. DuBose:

Q. Do you notice the heading under the last heading on Respondents' Exhibit 164, for identification?

A. Yes.

Q. Do you notice the heading under item 4 on Respondents' Exhibit 160-A, for identification?

A. Yes.

Q. Is that a correct heading?

3021 A. The headings should be "Carload Lots" and "Less-than-carload Lots" separated.

Q. In other words, item No. 4 should be "1941 Sales of Oxides in Less-than-carload Lots"?

A. That is correct.

Q. Instead of "Carload Lots" as is there stated?

A. That is correct.

Q. I show you Respondents' Exhibit 160-B, for identification, and ask you what that purports to show?

A. These are actual figures on cartage which we were able to determine from our records.

Q. When you say "actual figures on cartage," do you mean the cartage expense to National Lead Company?

A. Yes, to the National Lead Company at what we call warehouse points.

Q. What does that represent, National Lead's own trucking expense, or what they had to pay to outside trucking companies, if you know?

A. That is both, St. Louis truckage and outside trucking companies. Warehouses do not have delivery trucks.

Q. And these figures are taken from the books of the St. Louis branch of the National Lead Company?

A. That is correct, they are exact figures.

Q. Showing the cartage expense to National Lead Company, St. Louis branch, for the year 1941?

3022 A. That is correct.

Q. In connection with the warehouses at the points indicated on this exhibit?

A. That is correct.

Q. For the products white lead-in-oil, dry white lead, and oxide. Is that correct?

A. That is correct.

Q. Is Respondents' Exhibit 160-B, for identification, a summary of the material in Respondents' Exhibit 160-C, for identification?

A. That is correct.

Q. Now, take Respondents' Exhibit 160-D, for identification. What does that purport to show?

A. This is the differential par territory. It covers a list of towns in Illinois and Missouri, which are classified under par territory.

The first column represents where shipped from—in all cases St. Louis.

The second column is the freight rate from St. Louis according to the 1941 tariff which we had in our possession.

Q. That is under the numeral "4" on this page, Respondents' Exhibit 160-D, for identification?

A. That is correct.

Q. Do you know what that freight rate is, listed under item No. 4?

3023 A. That is the freight in the case of the first item, to Aledo, Ill., from St. Louis, 42 cents per hundred pounds.

Q. That is the freight rate which you obtained from someone in the National Lead Company's St. Louis branch?

A. We obtained that from our traffic department.

Q. You have a traffic department in that branch?

A. We have a traffic department at St. Louis.

Q. And they obtained their figures from the 1941 tariff books?

A. That is correct.

Q. Now, take the figures appearing under the heading "6," and beneath that the word "tonnage." Will you tell us what those figures are and where you obtained them?

A. The tonnage shown in column No. 6 is the actual tonnage which was sold in these various towns during the year of 1941.

Q. What product is involved?

A. Covering white lead-in-oil.

Q. Upon what records in the St. Louis branch of the National Lead Company are those figures based? What records are they taken from?

A. We have a card system which I believe I stated back some years ago, back in 1929 and 1930, in order to get a better analysis of the sales of our product.

We formerly kept it in just a few cities. My object at that time was to get a classification and find out 3024 where our tonnage material was going.

They apparently carried it along on a card system and some years later the plan was changed from the towns to the counties. We changed our sales plan because we divided some States for the salesmen, and the salesmen worked according to counties.

Q. Take the year 1941. Were those cards based upon tonnage sold to cities rather than by counties?

A. That is correct.

Q. How were those cards made up, that is, the cards from which these tonnage figures were taken?

A. That was made up by our statistical or auditing department. Fortunately they had these records.

Q. What were the mechanics of that; how did that work; where did they get the material to put on the cards, themselves?

A. At the time the invoices came through from the billing department they went to the Cardex department, and the girl took an actual record of the tonnage and so indicated on the card which she used, by punching the card at a certain notch on a machine devised for that purpose.

Q. Take Respondents' Exhibit 160-D, for identification, the towns listed under the heading "Illinois." Are those all the towns to which deliveries of white lead-in-oil were made by the St. Louis branch of National Lead Company for the year 1941?

A. That is correct.

3025 Q. Going back to the first line opposite the town Aledo—that shows that the shipment came from St. Louis?

A. That is correct.

Q. That the freight under column 4 from the warehouse was 42 cents—that is from St. Louis to Aledo?

A. That is correct.

Q. And column No. 5 the applicable rate was listed as 42 cents?

A. That is correct.

Q. Then the figures 6,050 represents pounds. Is that it?

A. Pounds is correct.

Q. Which represents the total poundage sold to customers in Aledo during the year 1941 by the St. Louis branch of the National Lead Company?

A. That is correct.

Q. And under column No. 7 "Applicable Freight," that is how the figure was arrived at?

A. That is the sum total of 6,000 pounds times the rate of 42, or $25.50.

Q. 6,050 pounds?

A. That is correct.

Q. For the rest of that page, the information opposite each of the cities is similar?

A. That is correct.

Q. The freight rates were obtained from the traffic department?

3026 A. That is correct.

Q. And the total pounds sold to customers located in these towns was obtained from your card system as to which you have just testified?

A. That is correct.

Q. Under the heading "Illinois" opposite the town "Decatur," will you tell us what the letters and figures "TL 22, LCL 32" represent?

A. L. c. l. represents the less-carload rate.

Q. Which is 32 cents?

A. Thirty-two cents.

Q. Per hundred pounds?

A. Per hundred pounds.

Q. What is the "TL"?

A. That is the truckload.

Q. That is 22 cents per hundred pounds?

A. Twenty-two cents per hundred pounds.

Q. In other words, that "TL 22" means that the truckload rate from St. Louis to Decatur, Ill., is 22 cents per hundred pounds. Is that correct?

A. That is correct.

Q. And that the less-than-carload rail tariff from St. Louis to Decatur, Ill., is 32 cents per hundred pounds?

A. That is correct.

Q. Respondents' Exhibit 160-D represents the entire tonnage or pounds of white lead-in-oil sold by 3027 the St. Louis branch from 1941 for the par territory?

A. That is correct.

Q. And at the bottom there is a summary, is there not?

A. That is correct.

Q. What does the figure 2,560,244, near the bottom of this page, Respondents' Exhibit 160-D, for identification, represent?

A. That represents the total figure of white lead-in-oil in pounds in the par territory.

Q. Sold by the St. Louis branch?

A. Sold by the St. Louis branch.

Q. In 1941?

A. In 1941.

Q. Right opposite that figure is the figure 584801. What is that figure?

A. That is the total of the freight charges according to the classification set down there.

Q. What is that? What does that figure mean? Is it $5,848.01?

A. That is correct.

Q. Beneath that are the words "plus cartage in St. Louis." What is the sum opposite those words?

A. $1,334.24.

Q. The total of $7,182.25 is a simple addition of those two figures immediately preceding?

3028 A. That is correct.

Q. What is this figure here "less $1,782.18"?

A. We had to separate that because this was in Missouri and that was in Illinois, and in order to get it straight we had to deduct the $1,782.18 from that.

Q. That represents the deduction for cartage in Missouri?

A. That is correct.

Q. And the total figure of cartage in St. Louis, $1,334.24, is the figure which appears under the heading "St. Louis" on Respondents' Exhibit 160-B, for identification?

A. That is correct.

Q. Now, will you tell us what Respondents' Exhibit 160-E, for identification, purports to represent?

A. That represents the differential territorial of one-eighth of a cent.

Q. Does that show sales, in other words, by the St. Louis branch of the National Lead Company for 1941 in the one-eighth differential territory?

A. That is correct.

Q. That and the continuing pages?

A. That is correct.

Q. Now, is the information on this page, Respondents' Exhibit 160-E, for identification, prepared in similar fashion and from similar records as were the figures on Respondents' Exhibit 160-D, for identification?

3029 A. That is correct.

Q. Respondents' Exhibit 160-F is a continuation of the one-eighth differential territory sales?

A. That is correct.

Q. As is Respondents' Exhibit 160-G, for identification?

A. That is correct.

Q. Now, will you tell us what Respondents' Exhibit 160-H through K, inclusive, represents?

A. That is one-quarter differential for white lead-in-oil, St. Louis branch, 1941.

Q. In other words, that shows the white lead-in-oil sales by the St. Louis branch of National Lead Company for the year 1941 in that particular territory?

A. That is correct.

Q. Was the information on these sheets prepared in similar fashion and from similar records as were the others that you testified about?

A. That is correct.

Q. I don't know whether you have told us this. On these pages throughout Respondents' Exhibit 160-A to R, for identification, under the numeral or column numbered 1, are the words "shipped from" and then entries thereunder. What do those entries represent?

A. In that case it represents the Kansas City warehouse.

Q. In other words, you there set forth the ware-
3030 house from which goods sold to these particular
towns were shipped?

A. That is correct.

Q. Will you tell us what the material on Respondents' Exhibit 160-L and M represents?

A. That represents the territory under the three-eighths differential, white lead-in-oil, St. Louis branch, 1941.

Q. Also sales by the National Lead Company, St. Louis branch?

A. Yes.

Q. That year?

A. Yes.

Q. In that territory?

A. That is correct.

Q. And the material appearing on those pages was prepared in similar fashion as the other page as to which you have testified?

A. That is correct.

Q. Now, Respondents' Exhibit 160-N and O represents what?

A. That is the territory covered under the one-half cent differential, National Lead Company, St. Louis branch, white lead-in-oil, year 1941.

Q. And those figures were prepared in similar fashion from similar records?

A. That is correct.

Q. What does Respondents' Exhibit 160-P and Q represent?

3031 A. That represents the territory covered by the three-quarters cent differential, National Lead Company, St. Louis branch, white lead-in-oil, for the year 1941.

Q. Sales to customers in that territory?

A. That is correct.

Q. Now, take the item "Athens, Texas," on Respondents' Exhibit 160-P, for identification, under column No. 1, and "Dallas."

A. That shows the shipment originated from Dallas. Material was shipped out of the Dallas warehouse.

Q. The material was shipped initially from St. Louis to the Dallas warehouse?

A. That is correct.

Q. And under column No. 2 is the figure "48." What does that represent?

A. That represents the commodity rate, carload, from St. Louis to Dallas.

Q. Forty-eight cents a hundred pounds?

A. That is correct.

Q. And under column 4 the figure "36" represents what?

A. That represents the l. c. l. rate, all-rail, from Dallas to Athens, Texas.

Q. And under column No. 5 the figure "84" represents what?

A. That is the sum total of the carload rate of 48 plus 36 cents l. c. l. rate to point of destination.

Q. Per hundred pounds?

A. Per hundred pounds.

3032 Q. In other words, Mr. Higgins, this Respondents' Exhibit 160-A to R, inclusive, for identification, shows in the case of a shipment from a warehouse located at a point other than St. Louis, the freight from St. Louis to the warehouse and the applicable freight rate from the warehouse to the particular city or town?

A. That is correct.

Q. I show you Respondents' Exhibit 160-R, for identification, and ask you what that represents?

A. That represents the differential territory one cent.

Q. Does that represent sales by National Lead?

A. Sales by National Lead Company, St. Louis branch, white lead-in-oil, towns under that list for the year 1941.

Q. I show you document marked Respondents' Exhibit 161, for identification, and ask you what that represents?

A. This represents the 1941 sales of white lead-in-oil for the St. Louis branch of the Nationl Lead Company, classified according to the States and then broken down into the various differentials, par, one-eighth, one-fourth, three-eighths, and so on.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

By Mr. D. Bose:

Q. And this shows pounds?

A. Total pounds in each differential.

3033 Q. I show you documents marked Respondents' Exhibit 162-A to D, inclusive and ask you to state what they represent?

A. These pages represent dry white lead sales in all States in the St. Louis branch under par territory with the exception of from Colorado, New Mexico, and Wyoming.

Q. And those three States are not in the par territory, are they?

A. That is correct.

Q. Those are sales for what year

A. Dry white lead for the year 1941.

Q. Are they listed by cities in each particular State?

A. These are listed by States.

Q. Those are by States?

A. Yes, and we have also the cities.

Q. Does that purport to show all of the sales of dry white lead by the St. Louis branch, by cities, for the year 1941?

A. That is correct.

Q. In the par territory?

A. That is correct.

Q. And the information contained on these documents marked Respondents' Exhibit 162-A to D, for identification, was prepared in similar fashion and from similar records as the information contained in Respondents' Exhibit 160-A to R, inclusive, for identification?

A. That is correct.

3034 Q. Now, in case of shipments from warehouses other than St. Louis, these documents, Respondents' Exhibit 16-A to D, inclusive, for identification, show the carload rates from St. Louis to the particular warehouse from which the shipments were actually made?

A. That is correct.

Q. And in that latter situation they show also the freight from the warehouse to the town in which the coustomer is located?

A. That is correct.

Q. And the applicable freight rate is either the freight rate directly from St. Louis to the towns mentioned or the total of the freight rate from St. Louis to the warehouse plus the freight from the warehouse to this particular city. Is that correct?

A. That is correct.

Q. I show you Respondents' Exhibit 163-A to D, inclusive, and ask you what these documents represent?

A. These represent the sales of oxides in carload lots in par territory, according to States and the towns shown as the point of destination.

Q. And those are, in other words, sales by the St. Louis branch of National Lead Company of oxides in carload lots for the year 1941?

A. That is correct.

3035 Q. To the customers in par territory?

A. That is correct.

Q. Were the figures which appear on these sheets, Respondents' Exhibit 163-A to D, inclusive, for identification, prepared in similar fashion?

A: That is correct.

Q. Respondents' Exhibit 163-C and D represents sales of oxides by the St. Louis branch of National Lead Company in less-than-carload lots for the year 1941?

A. That is correct.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

By Mr. DuBose:

Q. I show you Respondents' Exhibit 163-E, for identification, and I ask you what that represents?

A. That represents sales of oxides, National Lead Company, St. Louis branch, to differential territory one-quarter of a cent, according to the States and towns listed.

Q. In what lots or sizes?

A. In carload lots.

Q. Is it correct to say that Respondents' Exhibit 163-F, for identification, represents similar information as to sales of the St. Louis branch, National Lead Company, of oxides in less-than-carload lots?

A. That is correct.

3036 Q. I show you Respondents' Exhibit 163-G, for identification, and I ask you what that represents?

A. That represents the sales of oxides, National Lead Company, St. Louis branch, under differential territory one-half cent, according to the States listed for the year 1941.

Q. Did you say in what lots these sales were?

A. Less-than-carload lots.

Q. Now, Mr. Higgins, all of the information which appears on this series of documents marked Respondents' Exhibit 163-A to G, inclusive, for identification, was prepared in similar fashion and from similar records, as were these statistics and figures set forth in Respondents' Exhibit 160-A to R, inclusive for identification?

A. That is correct.

Q. I show you Respondents' Exhibit 164, for identification, and ask you what that represents?

A. This is the 1941 sales data which is the result of the work sheet and covers 1941 sales of heavy and soft paste white lead-in-oil, 1941 sales of dry white lead, 1941 sales of oxides in carload lots, 1941 sales of oxides in less-than-carload lots.

Q. Is it correct to say that that document, Respondents' Exhibit 164, for identification, contains the information appearing on Respondents' Exhibit 160-A, for identification?

A. That is correct.

3037 Q. I believe you stated that Respondents' Exhibit 160-A, for identification, is a general summary of the material set forth in Respondents' Exhibit 160-B through Respondents' Exhibit 163-G, these other documents as to which you just testified?

A. That is correct.

Q. Now, Mr. Higgins, I believe you stated that the tonnage or pound figures showing the sales of white lead-in-oil, dry white lead, and oxides which appear on these exhibits you have just identified, were taken from certain cards kept in the St. Louis branch of the National Lead Company?

A. That is correct.

Q. Did you tell us where the information on those cards was obtained from?

A. The records were obtained from cards which were made up some years ago to carry the tonnage in the various towns of the States that we covered.

Q. Were those cards based on actual invoice figures?

A. That is correct.

Q. Was the information set forth on the cards put thereon at the time the invoices came through your records?

A. That is correct.

Q. What happened to the actual invoices, themselves, on white lead-in-oil, dry white lead, and oxides for the year 1941?

A. The invoices were destroyed.

Q. Do you know when they were destroyed?

3038 A. They were destroyed some years back, five or seven or eight years back. That I cannot recall.

Q. 1941 is six years ago, so do you want to amend your answer? You mean there was a regular practice of destroying records after a certain period of time?

A. That is correct, that is what I had in mind.

Q. And these records you find are destroyed?

A. That is correct.

Mr. DuBose: Off the record.

(Discussion off he record.)

3039 Trial Examiner Norwood: On the record.

Mr. DuBose: At this time I wish to offer in evidence Respondents' Exhibits which have heretofore been identified as 160-A to -R, inclusive; 161; 162-A to -D, inclusive; 163-A to -G, inclusive; and 164, all now marked for identification.

Mr. Wright: Pursuant to agreement of counsel, I would like to defer my cross-examination on the identification of these documents to the hearing in New York next week. I understand this witness will be produced there, and that in the meantime we can have these photostated and I can be supplied with copies thereof.

Mr. DuBose: That is satisfactory.

Trial Examiner Norwood: Counsel may conduct a voir dire examination in New York.

Mr. Wright: May we take a short recess?

Trial Examiner Norwood: Very well, we will have a five-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Proceed.

Mr. Higgins, as I understand it, may stand aside, subject to reappearing in our New York hearing.

Mr. Ewing: Yes, sir.

Trial Examiner Norwood: Very well.

(Witness temporarily excused.)

Mr. Dubose: Mr. Matthiessen, will you take the stand?

3040 Trial Examiner Norwood: Have you been sworn in this case, Mr. Matthiessen?

Mr. Matthiessen: Not yet.

C. S. MATTHIESSEN was thereupon called as a witness for the respondent National Lead Company and, having been first duly sworn, testified as follows:

Trial Examiner Norwood: Give me your name, please, sir.

The Witness: C. S. Matthiessen.

Direct Examination by Mr. DuBose.

Q. Mr. Matthiessen, whom are you employed by?

A. John T. Lewis & Bros. Company, in Philadelphia.

Q. In what capacity?

A. At present I am a salesman on the road.

Q. Selling what product?

A. All their products.

Q. Does that include white lead-in-oil?

A. Yes, sir.

Q. And how long have you been associated with the white lead-in-oil business of John T. Lewis & Bros. Company?

A. Since April 28, 1906.

Q. Mr. Matthiessen, I show you documents which have been marked Respondents' Exhibit 165-A to -O, inclusive, for identification, and ask you what they
3041 represent?

A. These figures represent the actual freights taken from our paid railroad freight bills and various carriers' freight bills.

Q. Were these documents which have just been marked Respondents' Exhibit 165-A to -O, inclusive, for identification, prepared by you or under your supervision?

A. These were prepared by me and obtained from a distribution of expense book, from which I obtained these voucher numbers, headed White Lead-In-Oil. These are the actual amounts paid for freight.

Q. In other words, Mr. Matthiessen, taking the first column on the left, the heading above that is what?

A. January 1941.

Q. And under the heading "Voucher", the first item is 8335.

A. Yes.

Q. What does that represent?

A. That represents the voucher number on which those bills were paid.

Q. And the item under the heading "Par" is what?

A. That represents the freight paid in Par Territory.

Q. In other words, is it correct to say that the sum of $1.89 represents a figure which was obtained from an actual voucher of John T. Lewis & Bros. Company, representing a sale by that company of white lead-in-oil in the Par Territory?

3042 A. That is correct.

Q. And the items which appear under the heading "⅛" represent what?

A. They represent the freight paid in the territory which covers the ⅛ territory.

Q. Now that first figure under the ⅛ column, of $8.85—does that represent an actual freight bill which was paid in connection with a sale of white lead-in-oil by John T. Lewis & Bros. Company in January, 1941, in the ⅛ white lead-in-oil territory?

A. Correct.

Q. And that figure was obtained from Voucher No. 8337 of that company?

A. That is right.

Q. And were the items under the column headed "⅜" similar—16 obtained from actual vouchers?

A. Exactly.

Q. And is it correct to say that those represent actual freight paid by John T. Lewis & Bros. Company for sales of white lead-in-oil in January, 1941, to customers who were located in the ⅜ cent per pound white lead-in-oil territory?

A. That is correct.

Q. There are three columns on this exhibit, Respondents' Exhibit 165-A for identification, three main columns or divisions. What do they represent?

3043 A. They represent the total freight paid in the month of January, 1941, for the Par Territory, the ⅛ Territory, and the ⅜ Territory.

Q. And is the middle column a continuation of column 1?

A. That is correct.

Q. And the total, following column 3, is the total of all the items theretofore listed?

A. That is correct.

3044 Q. And the figure opposite the word "Total", under the heading "Par", of 40647, represents $406.47?

A. That is correct.

Q. Now at the bottom of the page, opposite the word "Cartage" is the figure $207.41—what does that represent?

A. That represents the actual cartage paid in par territory, and is figured out by the method of obtaining our cartage rates, which are all expenses paid for automobiles, plus their depreciation.

Q. From what record or records was that item opposite the word "Cartage" obtained?

A. I do not know that, sir, since I didn't obtain that. This was supplied me by Mr. A. M. Wilson.

Q. And who is Mr. A. M. Wilson?

A. He is the vice president of our company.

Q. Taking the other documents which have been marked respectively Respondents' Exhibit 165-B to O, inclusive, for identification, were those figures there set forth similarly obtained and from similar actual vouchers of John T. Lewis Bros. Company?

A. Exactly, sir. I examined every freight bill for the whole year of 1941.

Q. And these other pages represent the figures by month from February through December, inclusive, 1941?

A. Correct.

3045 Q. And they represent, do they not, actual freight paid by John T. Lewis Bros. Company on white lead-in-oil sales in par, ⅛ cent and ⅜ cent territories?

A. Correct.

Q. Plus the figure, in each month, for cartage, which you say was supplied by Mr. A. M. Wilson?

A. Correct.

Q. I show you Respondents' Exhibit 166-A for identification and ask you what that represents?

A. That represents the tonnage obtained from our IBM records; they are actual net sales.

Q. In other words, that shows the total pounds sold by John T. Lewis Bros. Company with respect to white lead-in-oil for the year 1941, in par, Plus ⅛ cent, and Plus ⅜ cent white lead-in-oil territories?

A. That is correct.

Q. And do the figures under "Total Frt. Cartage" represent the total of the figures set forth in these work sheets which have been marked Respondents Exhibit 165-A to -O, inclusive for identification?

A. Correct.

Q. What are the figures under "Average Frt. Per CWT"?

A. That is the average freight per cwt.

Q. How was that arrived at?

A. By taking the dollars and dividing the number 3046 of pounds into them to get our average freight rate.

Q. Per hundred pounds?

A. Yes.

Q. And that shows the average freight actually paid by John T. Lewis Bros. Company per hundred pounds for white lead-in-oil sold by that company in Par, ⅛ cent and ⅜ cent territories?

A. That is correct.

Q. I show you Respondents' Exhibit 166-B for identification and ask you what that represents?

A. That represents a summary of the work sheets, with their totals added, for the Par territory including the cartage, the ⅛ territory and the ⅜ territory, with proof of the sheet worked out on the right-hand column.

Q. And the totals which there appear are the same as the figures under the heading "Total Ft. & Cartage" appearing on Respondents' Exhibit 166-A for identification?

A. Correct.

Q. And this is a recapitulation, by month, of your work sheets which are Respondents' Exhibit 165-A to -O, inclusive, for identification?

A. Correct.

Mr. DuBose: At this time I offer in evidence Respondents' Exhibit 165-A to O, inclusive for identification, and Respondents' Exhibit 166-A and -B for identification.

3047 Mr. Wright: As in the case of the prior exhibits identified by Mr. Higgins, I would like to reserve my right to cross-examine on the identification of these exhibits until we resume again in New York.

Trial Examiner Norwood: Is that satisfactory to counsel?

Mr. DuBose: May we go off the record a moment?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Ewing: With respect to this witness' recall to the stand, in view of his own personal situation I am not prepared to state with any assurance that he will be recalled next week, but I do state that if we are to proceed with the proffer we will recall him and submit him to such examination not only in connection with the identification but subsequent examination if desired by counsel, or else we will have to withdraw the proffer of the exhibits.

Mr. Wright: That is entirely satisfactory so long as we have that understanding.

Mr. Ewing: You will either have the opportunity to examine him or you will not have to struggle with this batch of documents.

Trial Examiner Norwood: Are there any further questions of this witness?

3048 Mr. DuBose: Not at the present time. I understand that Your Honor is reserving his ruling on the offer, subject to the right of cross-examination by counsel for the Commission at some subsequent date.

Trial Examiner Norwood: That is correct. The witness will now be excused with the understanding that he is to appear later for further examination on the identification of these documents.

(Witness temporarily excused.)

Trial Examiner Norwood: What is your further pleasure, gentlemen?

Mr. Ewing: I suggest that we adjourn until Tuesday morning next, at ten o'clock in the Bar Association Building, Room 605, in New York City.

Trial Examiner Norwood: Is that satisfactory to you?

Mr. Wright: That is satisfactory.

Trial Examiner Norwood: This hearing will now adjourn to reconvene in New York City, in the Hearing Room of the Bar Association, 36 W. 44th Street, on Tuesday next, June 17, 1947, at 10 o'clock Eastern Daylight Saving Time.

(Whereupon, at 3:40 p. m., June 12, 1947, the hearing in the above-entitled matter was adjourned.)

3049

Trial Room,
Bar Association Building,
36 West 44th Street,
New York, N. Y.,
June 17, 1947.

Met, pursuant to adjournment, at 10:00 a. m., USST.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

Edmund F. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Robert H. Ecker, Esq., and
Henry E. Gardiner, Esq., (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting and Refining Company.

James D. Ewing, Esq., and
E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

3050 PROCEEDINGS.

Trial Examiner Norwood: Come to order. Pursuant to adjournment on June 12, 1947, the hearing in Docket No. 5253 is now reconvened in the Trial Room of the Bar Association Building, 36 West 44th Street, New York, N. Y. at 10:00 o'clock a. m., daylight savings time on June 17, 1947.

Let the record show the following appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

Edmund F. Wood, Esq., appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Robert H. Ecker, Esq., and Henry E. Gardiner, Esq., appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James D. Ewing, Esq., and E. Z. DuBose, Esq., appearing for National Lead Company.

Proceed.

Mr. Ewing: I call Walter P. Carroll.

Trial Examiner Norwood: Mr. Reporter, this is Mr. Walter P. Carroll, 900 West 18th Street, Chicago, Illinois.

WALTER P. CARROLL was thereupon called as a witness for the Respondents and, having been first duly 3051 sworn, testified as follows:

Direct Examination by Mr. Ewing.

Q. What is your full name?
A. Walter P. Carroll.
Q. What is your address?
A. 900 West 18th Street, Chicago, Illinois.
Q. Mr. Carroll, are you connected with the National Lead Company?
A. Yes, sir.
Q. In what capacity?
A. As manager of the Chicago branch.
Q. Are you also a director of the company?
A. Yes, sir.
Q. Will you tell us when you were first employed by the National Lead Company?
A. In August 1910.
Q. In what capacity were you then employed?
A. A clerk in the sales department.
Q. How long did you work in that capacity?
A. Until 1926 when I was appointed sales manager.
Q. What products did you sell while you were a salesman?
A. Oxides of lead, dry oxides of lead and metals.
Q. And in charge of what department of sales were you sales manager? I mean what products?
3052 A. Oxides and metals.
Q. How long were you sales manager?
A. Until 1938 when I was appointed assistant manager of the branch.
Q. How long did you serve as assistant manager of the branch?

A. Until 1941 when I was made manager.

Q. And you have been manager ever since?

A. Yes, sir.

Q. When were you first elected a member of the Board of Directors?

A. In September 1943.

Q. And you have been a member of the Board ever since; is that right?

A. Yes, sir.

Q. Does the Chicago branch include a manufacturing plant?

A. It includes three manufacturing branches at the present time.

Q. Plants?

A. Yes, sir.

Q. Will you tell us what they are?

A. The southern plant at 900 West 18th Street now manufactures metals. The Carter plant at West Pullman manufactures white lead, dry and in oil, paint and oxides, and the Raymond plant on the near west side manu-3053 factures or fabricates, extrudes and rolls tin, lead and allies thereof.

Q. Were you a member of any committee or committees which considered proposed revisions for a supplementary code in connection with the NRA?

A. Yes, sir.

Q. Do you recall what committee or committees you belonged to in that connection?

A. The Oxide Division or committee.

Q. Do you recall attending meetings of such a committee during the days preceding the adoption of the supplementary code for the lead industries?

A. Yes, sir.

Q. Do you recall whether you attended any meetings of the Dry Products Committee of the Lead Pigments Division during the days preceding the formulation of the code?

A. Yes, sir.

Q. Do you recall any particular date or dates of such meetings?

A. No, sir.

Q. I show you Commission's Exhibit 504-A and B and ask you to look at the two pages and read them to yourself (handing to witness).

A. Yes, sir.

Q. Now will you tell us, Mr. Carroll, whether your recollection is refreshed as to attendance at a Dry
3054 Products Committee meeting of October 27, 1933?

A. Yes, sir.

Q. Did you attend such a meeting?

A. Yes, sir.

Q. Will you tell us in what connection the various subjects reported in the minutes were discussed at that meeting?

Mr. Wright: Your Honor, I object. I would like to avail myself at this time of a short voir dire examination on the refreshment of this witness' memory from that document.

Trial Examiner Norwood: Is there any objection?

Mr. Ewing: I have no objection.

Trial Examiner Norwood: Proceed.

Mr. Wright: Mr. Carroll, do you have any independent recollection of that meeting?

The Witness: Yes, sir. That is, I couldn't remember the dates.

Mr. Wright: Can you visualize now in your own mind that particular meeting?

The Witness: Yes, sir.

Mr. Wright: Can you recollect where it was held?

The Witness: It was at the Chicago Athletic Club.

Mr. Wright: What was the date of that meeting?

The Witness: I don't know the date except as
3055 you have it there.

Mr. Wright: Do you recall who was at the meeting?

The Witness: Well—

Trial Examiner Norwood: (Interposing.) Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

Mr. Wright: Did you say that you recall who was in attendance at that meeting, Mr. Carroll?

The Witness: Well, I know Mr. Rowe was at the meeting. The others I would be merely guessing.

Mr. Wright: You don't recall anyone else at the meeting specifically?

The Witness: I know all of them that would be attending the meeting.

Mr. Wright: I want you to recall who was at the particular meeting.

The Witness: I couldn't recall who was at that particular meeting.

Trial Examiner Norwood: After looking at that if he knows he was at that meeting even though he doesn't remember many details, it would be sufficient to let him tell what he does remember about it.

Proceed.

By Mr. Ewing:

3056 Q. Now will you tell us, Mr. Carroll, in what connection the various subjects discussed at the meeting of the Dry Products Committee of the Lead Pigments Division of October 27, 1933, were discussed?

A. For the purpose of a supplementary code.

Q. Was the meeting considering various suggestions with respect to the supplementary code then in process of formulation?

A. Yes, sir.

Q. Do you recall attending a meeting of the Lead Oxide Committee of the Lead Pigments Division of the Lead Industries Association or meetings in December 1933?

A. I couldn't say what month it was.

Q. I show you Respondents' Exhibit 137-A and B and ask you to read it to yourself (handing to witness).

A. Yes, sir.

Trial Examiner Norwood: Does that refresh your recollection about that meeting?

The Witness: Yes, sir.

By Mr. Ewing:

Q. Will you tell us whether you attended a meeting of the Lead Oxide Committee of the Lead Pigments Division of the Lead Industries Association on December 14 and 15, 1933?

A. Yes, sir.

Q. Will you tell us whether you have any recollection of attending another meeting of that committee later 3057 in that same month?

A. No, sir.

Q. I show you Respondents' Exhibit 138-A and ask you to read it and then state whether your recollection is refreshed?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Ewing:

Q. Does it refresh your recollection?

A. Yes, sir.

Q. Did you attend a meeting of the Lead Oxide Committee subsequent to the meeting of December 14 and 15, 1933, which was held later in December?

A. Yes, sir.

Q. Now in what connection were the subjects recorded in the minutes of those two meetings which are in evidence as Respondents' Exhibits 137-A and B and 138-A discussed?

A. For the purpose of the supplementary code.

Q. I direct your attention to the first full paragraph following the attendance listing of the minutes of the meeting of December 27 and 28, 1933, Respondents' Exhibit 138-A and to the reference therein to the question of establishing zones.

Mr. Wright: Your Honor, this witness has already refreshed his recollection from that document. I think
3058 from now on we can have his independent testimony
regarding it and I object to any further displaying of the document to the witness and having him read from it.

He has already testified that his recollection has been refreshed as to that meeting.

Mr. Ewing: I haven't asked a question. I have directed his attention to this and then I want to ask the question.

Trial Examiner Norwood: I would ask the question and let him say that he doesn't recall it sufficiently and then he can refresh his recollection.

Mr. Ewing: The question that I am going to ask does not relate to what happened at that meeting. It just relates to this subject and I want to show what the subject is.

Mr. Wright: Your Honor, the witness testified a moment ago that he knew every subject in those minutes was discussed for the purpose of a supplementary code. Now if he testified as to that, then he must have known what the subject of those minutes were.

Mr. Ewing: I am not asking him that. There isn't any question before us.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

3059 By Mr. Ewing:

Q. So far as you know, Mr. Carroll, did the manufacturers of lead oxide make any agreement in regard to the establishment of zones in connection with the sale of lead oxides in the south and west portions of this country?

A. No, sir.

Q. I ask the same question with the addition, did they reach any agreement among themselves or make any agreement among themselves in regard to the establishment of zones in connection with the sale of lead oxides as far as the supplementary code was concerned?

A. Not that I recall.

Q. What?

A. Not that I recall.

Q. I show you a copy of the printed code of fair competition for the lead industries in evidence as Commission's Exhibit 809, and direct your attention to Article 2 which is headed "Conditions for sale of lead oxides in lots of at least 20 tons." That is Article 2 of schedule "A."

Do you recall whether at the meeting of the Lead Oxide Committee of the Lead Pigments Division of the Lead Industries Association held on December 27 and 28, 1933, a basis for sale of oxides at differentials over lead was discussed?

Just do you recall yes or no.

3060 A. Yes, sir.

Q. Does Article 2 of schedule "A" of the code, Commission's Exhibit 809, reflect the basis discussed at the meeting of the Lead Oxide Committee on December 27 and 28, 1933?

A. It does reflect it.

Q. So far as you know was there any agreement between the producers of lead oxide as to the amount of the differential to be added to the common lead price at New York?

A. No, sir.

Q. Were you in charge of the sale of lead oxide for the Chicago branch prior to 1933?

A. Yes, sir.

Q. Did you sell lead oxides yourself prior to 1933?

A. Yes, sir.

Q. Will you tell us whether, prior to 1933, freight was ever added to the sales price of lead oxides in sales to the various territories served by the Chicago branch?

A. Yes, sir.

Q. By whom was that freight paid?

A. The freight was paid by the customer, the buyer.

Q. Will you tell us in what territories sales of that nature occurred, if you can recall?

A. In Montana and Wyoming.

Q. Did the Chicago branch normally serve those territories?

A. We do from a sales end but from manufactur-
3061 ing we need to ship from Chicago or St. Louis.

Q. When the customer paid for the freight in those instances, was the freight from the point of actual shipment to the destination?

A. No. We added part of the freight. If the freight was more than a quarter, we added probably the difference.

Mr. Wright: Your Honor, I move to strike that last answer. It was obviously a guess and a hypothesis so far as the witness is concerned.

Trial Examiner Norwood: Read the question and answer.

(The reporter read the question and answer as follows:

"Q. When the customer paid for the freight in those instances, was the freight from the point of actual shipment to the destination?

"A. No. We added a part of the freight. If the freight was more than a quarter, we added probably the difference.")

Trial Examiner Norwood: Motion denied. You can cross-examine him on that.

By Mr. Ewing:

Q. Mr. Carroll, in stating your answer to the preceding question, what do you mean when you said "we added part of the freight over 25¢?"

3062 A. The car load freights to some of those western points where we sent special oxides amounted to, I would say, from 60¢ to $1.25 car load and LCL. And we have added, to my recollection, as much as 80¢ to the regular price delivered in the normal territory.

Q. If the freight was 25¢ or less, did you add freight?

A. No, sir.

Q. If the freight was 25¢ or more, did you absorb it to the extent of 25¢?

A. Approximately.

Q. Now prior to 1933, will you tell us approximately the number of special oxides that the Chicago plant manufactured?

A. We manufactured over 25 oxides with various variations for the various trades; different weights, acid absorption and so forth, dependent upon the requirements of that particular business.

Mr. Ewing: I ask that these be marked Respondents' Exhibit 167-A to O inclusive for identification and that we have permission to have them photostated and the photostats substituted.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: No objection, your Honor.

Trial Examiner Norwood: They will be marked for identification as Respondents' Exhibit 167-A to O inclusive.

3063 (The document referred to was marked Respondents' Exhibit 167-A, 167-B, 167-C, 167-D, 167-E, 167-F, 167-G, 167-H, 167-I, 167-J, 167-K, 167-L, 167-M, 167-N and 167-O for identification.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Mr. Carroll, I show you these cards that have been marked Respondents' Exhibit 167-A to O for identification and ask you whether you brought those cards here from Chicago (handing to witness)?

A. Yes, sir.

Q. Will you tell us what they are?

A. They are the changes in price mailed to the general trade using oxides in the Chicago district.

Q. Do they relate to price changes prior to the adoption of the code?

A. Yes, sir. That is, for as long as we had them that far back.

Q. Have you any price cards earlier than Respondents' Exhibit 167-A for identification which bears the date effective February 6, 1929?

A. Those were all we had available prior to that date.

Mr. Ewing: I offer Respondents' Exhibit 167-A to O inclusive in evidence.

Trial Examiner Norwood: Is there any objection?

3064 Mr. Wright: No objection.

Trial Examiner Norwood: They will be received in evidence as Respondents' Exhibit 167-A to O inclusive.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 167-A, 167-B, 167-C, 167-D, 167-E, 167-F, 167-G, 167-H, 167-I, 167-J, 167-K, 167-L, 167-M, 167-N and 167-O, was received in evidence.)

By Mr. Ewing:

Q. Were these price cards which are now in evidence as Respondents' Exhibit 167-A to O inclusive, the cards showing the price changes of the National Lead Company, Chicago branch?

A. Yes, sir.

Q. Who was president of the National Lead Company during 1933-1934?

A. Mr. Edward J. Cornish.

Q. Did you know Mr. Cornish?

A. Yes, sir; very intimately.

Q. Is he now alive?

A. No, sir.

Q. During the NRA period, meaning that time in 1933 following the passage of the National Recovery Act and up until the Supreme Court's declaration of its unconstitutionality in May 1935, did you ever have occasion to discuss with Mr. Cornish the National Lead Company's 3065 policy generally relative to the purpose and intent of the National Recovery Act in the regular course of your business?

A. Yes, sir.

Q. Will you tell us what company policy Mr. Cornish expressed to you at that time?

Mr. Wright: Objection, Your Honor, it is hearsay.

Mr. Ewing: It is the regular course of business and it is in the nature of instruction from the president to the assistant manager of the Chicago branch.

Mr. Wright: There have been nothing about instructions here and the only way that the regular course of business crept in was in counsel's question.

All that has been established was that he talked with Mr. Cornish and that Mr. Cornish told him certain things about the policy of the company.

Trial Examiner Norwood: Isn't that the only way that you can show his policy is what he said to his subordinates. In other words, you are proving a state of mind here.

Mr. Wright: I think that question goes way beyond a state of mind. This is a question: what were the policies of the National Lead Company at that time?

Mr. Ewing: He is the chief executive.

Trial Examiner Norwood: We have been delving into
the mental attitude of all of these people on this one
3066 subject and a state of mind is involved and company
policy, and he can tell us that.

Mr. Wright: This is certainly hearsay of the first water and there has been no showing that competent evidence, primary evidence, as to what the policy of the National Lead Company at that time prior to the NRA, can be produced.

There hasn't been any showing as to how he came into possession of this information, whether it was in the regular course of business in connection with his official duties or whether it was a personal conversation in the observation car of a train somewhere, or on a golf course.

Mr. Ewing: I asked him if he had any conversations in the regular course of his duties.

Trial Examiner Norwood: I will ask him this on voir dire.

Was this statement that he had with you an official statement that he made to you, something that was intended to guide your conduct in these matters?

The Witness: Yes, sir.

Trial Examiner Norwood: I will overrule the objection.

Mr. Ewing: Will you read the question, please?

(The reporter read the question as follows:

"Q. Will you tell us what company policy Mr.
3067 Cornish expressed to you at that time?")

The Witness: While Mr. Cornish was in sympathy—

Trial Examiner Norwood (Interposing.): Wait a minute now. Tell us what he said as indicating what it was. You can't read his mind. You can only tell what he said to you at those times in regard to official matters and in connection with your official duties.

Please confine your answer to that.

The Witness: He warned me that we should have nothing to do with price fixing because he considered the NRA a temporary and non-workable act. And as long as the

Sherman-Clayton Acts were on the books, that the company would live in their memory and that we could stand on our fifty years of business where we had established a reputation for quality, service and integrity; and that price fixing only shielded weaker competitors.

Mr. Wright: Your Honor, I move that that entire answer be stricken as stating the personal opinions expressed in hearsay. Certainly that has nothing to do with the official duties and instructions of this witness.

He was telling us what was in Mr. Cornish's mind.

Trial Examiner Norwood: Motion denied. We will take a five-minute recess at this time.

(A five-minute recess was taken.)

Trial Examiner Norwood: Come to order. Proceed.

3068 By Mr. Ewing:

Q. Mr. Carroll, I show you Respondents' Exhibit 167-A and ask you to explain the terms 60-2 per cent-15 set forth thereon?

A. The 60 days are net. In other words, when a bill is paid before 60 days, they pay it net. If they pay it on or before 15 days, they are allowed 2 per cent cash discount.

Q. Now I show you Respondents' Exhibit 167-0, and ask you to explain the terms 30-1 per cent-10 there?

A. The 30 days are the net time in which the bill is due net, and the 1 per cent is allowable if paid within 10 days from date of invoice in all instances.

Mr. Ewing: I ask that this be marked Respondents' Exhibit 168 for identification and in that connection I ask permission to have it photostated and a photostat substituted.

Trial Examiner Norwood: Leave will be granted to substitute a photographic copy and it will be marked Respondents' 168 for identification.

(The document referred to was marked Respondents' Exhibit 168 for identification.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. I show you Respondents' Exhibit 168 for identifica-
tion and ask you whether you produced that and
3069 gave it to me (handing to witness)?

A. Yes, sir.

Q. I direct your attention to the date July 28th which appears without the year. I withdraw that question.

Will you tell us what that paper is, Respondents' Exhibit 168 for identification?

A. This is a clipping that I took from the Chicago Tribune of July 28, 1934, a statement by Mr.—

Q. (Interposing) No. Did you yourself cut this out of the Chicago Tribune?

A. Yes, sir.

Q. At or about when?

A. On or about July 28, 1934, the day I read it in the paper.

Q. Do you make it a practice to collect clippings?

A. I have collected a few.

Q. How many besides this clipping?

A. This was in a book with two others which I was rather proud of.

Q. What were the other two?

A. The first was the result of a scholarship examination in the archdiocese of Chicago in which I had the highest score ever made and the other was a clipping from a San Antonio paper when I was commissioned a lieutenant in
the Signal Corps in 1917, and the other is this one, this
3070 article, Respondents' Exhibit 168, confirming Mr.
Cornish's stand on the NRA.

Q. And you say you kept it to see whether his words would come true?

A. Yes, sir.

Q. Do the statements attributed to Mr. Cornish in this clipping, Respondents' Exhibit 168 for identification, correctly set forth his directions of a similar nature to you?

A. Yes, sir; and I would like to read them.

Mr. Ewing: I offer it in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: Your Honor, I have no objection to the admission of this document into the record as such. I do object and move to strike the statement which the witness just made in answer to Mr. Ewing's last question which was a highly improper question and answer regarding whether this accurately reflected what Mr. Cornish had told the witness, because this obviously is a statement by Mr. Cornish to other people which had nothing to do with his statements to the witness.

Mr. Ewing: Well, I didn't intend to imply in my question that it had. I intended to ask as to whether it was an expres-

sion of a nature similar to the ones that were made to
3071 him.

Mr. Wright: That is exactly the point that I object to. He has already testified over my objection to what Mr. Cornish told him in his official business.

Trial Examiner Norwood: Inasmuch as there is no objection to this Respondents' Exhibit 168 for identification—

Mr. Ewing: (Interposing.) I am perfectly willing to consent to have the last question and the answer that has been the subject of discussion struck.

Trial Examiner Norwood: The last question and the answer will be struck, and the exhibit is received as Respondents' Exhibit 168 as marked.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 168, was received in evidence.)

Trial Examiner Norwood: It is understood that only the face of the exhibit is received in evidence.

What is the title there?

Mr. Ewing: "National Lead Shuns NRA Price Fixing, Sees Anti-Trust Law."

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Was Mr. Cornish a lawyer, if you know?

A. Yes, sir.

Q. Was he?

3072 A. Yes, sir; the best.

Q. Will you tell us generally whether the Board of Directors of the National Lead Company acts to establish prices for its lead pigments products?

A. The Board as such does not. It is usually left to the department heads to establish the price.

Q. That answer has reference to your own experience on the Board since September 1943?

A. Yes, Sir.

Mr. Ewing: That is all. You may cross examine him.

Trial Examiner Norwood: Cross Examination.

Cross-Examination by Mr. Wright.

Q. Mr. Carroll, how did your company sell oxides in car load lots prior to 1943? How did they quote them?

A. Oh—

Q. (Interposing.) I will withdraw the question. Prior to 1943 in quoting on oxides, were there any differentials over your base or Chicago price on account of the location of the customer?

A. No, sir.

Q. Was it a flat price then?

A. A flat price.

Q. The same as the Chicago price?

3073 A. Yes, sir. Pardon me. That's right.

Q. Anywhere in the territory served by the Chicago branch?

A. Yes, sir.

Q. That is your car load business now?

A. Yes, sir.

Q. Does that include the Montana and Wyoming territory?

A. No. Those were specials.

Q. How did you set that up?

A. They were special oxides that we would ship out to points for all oil companies for oil refining to those points.

Q. Was that car load business?

A. In some instances car load and in some instances less than car load.

Q. The car load price then anywhere in North Dakota at that time would be the same as the car load price in Chicago; is that correct?

A. No. We added the freight, part of the freight, from Chicago or St. Louis, depending on where we shipped it from.

Q. That is exactly what I was trying to get at. Then you didn't mean in your answer that you sold at the same price including freight transportation charges anywhere in the territory of the Chicago branch office prior to 1934?

A. Well, Montana, or Wyoming and Montana were not in Chicago territory.

3074 Q. But you did ship to them?

A. We shipped to them because the purchasing department or head office was in the Chicago district.

Q. How about North Dakota? Did you ship into North Dakota?

A. Not that I recall; no, sir.

Q. How far south did you ship from the Chicago office?

A. Nothing that I can recall.

Q. What was the territory prior to 1934 in car load business of the Chicago branch?

A. Michigan, Wisconsin, the northern half of Illinois and the corner of Indiana and Ohio.

Q. That was the branch territory?

A. Yes, sir.

Q. But you did ship outside that territory from your manufacturing plants there?

A. We made a few shipments of special oxides out of that territory; yes, sir.

Q. Just the special oxides?

A. Yes, sir.

Q. Didn't the Chicago branch ship into the territory on into the area of the Cincinnati branch?

A. That is true, we shipped for Cincinnati.

Q. In other words, the Chicago branch and the Cincinnati branch are sales and billing and head-office divisions
which include the manufacturing plants but the man-
3075 ufacturing plants will often serve more than one
branch territory on oxides; is that correct?

A. Correct. We ship that for the account of Cincinnati and it would be billed from Cincinnati and not from Chicago.

Q. You don't know the price that it would be billed at?

A. No, sir. We would bill the National Lead Company in Cincinnati and they in turn would bill the customer.

Q. So since 1934 in the car load oxide business, the Chicago branch served par territory, as you call it now, with no differential for freight added except in special instances in Montana and Wyoming?

A. Yes, sir.

Q. Now with reference to your card business, I show you Respondents' Exhibit 167-O, terms f.o.b. Chicago, Detroit and Milwaukee. What is the significance of that statement?

A. We shipped from Chicago, Detroit or Milwaukee warehouses.

Q. How did you handle freight or transportation on those?

A. In car loads we would deliver at this price and at less than car loads it would be f.o.b. the warehouse.

Q. With freight or cartage added?

A. Yes, with that paid for by the customer.

Q. Do you know the territory that those warehouses were? What physical territory does the Detroit warehouse serve on the car load business?

3076 A. Detroit would take fifty miles around Detroit and Milwaukee would take 20 or 25 miles around Mil-

A. (Interposing.) And in some instances we shipped

Q. Well now,—

A. (Interposing.) And in some instances we sphipped depending on whether we would save money.

Q. In some instances on less than car load you shipped direct from the plant to the different warehouses; is that correct?

A. Yes; and vice versa.

Q. How would you handle a charge of that sort? Would you add freight?

We are talking about prior to 1934. Would you add freight from the nearest warehouse point?

A. No. They would pay the freight. We would ship it collect.

Q. They would pay the freight from Chicago in the case that you shipped it?

A. Yes, sir.

Q. These card prices, I assume that is what is represented by the cards, Exhibit 167-A through O?

A. These are the prices we would print at Chicago when a charge was made in the pig lead market. An advance or a decline.

Q. These weren't car load prices, were they?

A. To some trade they would be car load prices.

3077 Q. To what trade would they be car load prices?

A. Well, to a special trade where the oxides were made specially.

Q. Would you give us an illustration of that?

A. Pottery, varnish, assayers and some color work.

Q. In the battery business, for instance would these prices represented by Exhibit 167 and the sub-numbers be car load or less than car load prices?

We are talking now about the dates of these cards.

A. As of the dates of these cards?

Q. Yes.

A. They would be less than car load.

Q. As of the date of that card which you have there, Exhibit 167-O, would that represent a quotation on red lead and the litharge in drums or barrels in any quantity less than a car load?

A. Yes.

Q. In other words, they had no 5-ton price at that time?

A. I won't say as to that. That I couldn't remember as far back.

Q. It says nothing in the cards about any other price?

A. That's right, it says nothing on the card.

Q. You can't recall the price classification?

A. No, sir; not definitely.

3078 Q. Now getting back to these people to whom these were the car load prices, what were the less than car load prices to these special classes of trade at that time?

A. Well, most of those were car load and if they were less than car load, they might have been the same because there would be very few of them to the best of my knowledge at this moment.

Q. Very few of them who bought less than car loads in the varnish trade?

A. Yes, sir.

Q. In the color trade?

A. Yes, sir.

Q. Ceramics?

A. At that time; yes, sir.

Q. Pottery?

A. Yes, sir.

Q. Back in the period covered by these cards now, did your branch have so-called card contracts?

A. Yes, sir.

Q. With purchasers who purchased in card quantities?

A. Yes, sir.

Q. That is, less than car load quantities?

A. Well, we would cover them for, say, three months.

Q. At the card prices?

A. At the card prices, yes, for a given quantity in the hopes that they would take it in the largest deliveries possible. 3079

Q. What was the duration of those contracts?

A. 90 days normally.

Q. A 90 day contract?

A. Yes, sir.

Q. You had similar contracts with car load purchasers, too, did you not?

A. Yes, sir.

Q. Do you now have 90-day contracts or any other type of requirement contract with purchasers at the so-called card prices on oxides?

A. No, sir.

Q. When did you abandon or cease using such contracts?

A. Well, due to our inability to obtain the pig lead and to know the price at which we paid for the lead, all orders were taken subject to the market at the time of the shipment or the average, for instance.

Mr. Wright: Your Honor, I move that that answer be stricken as not responsive.

Trial Examiner Norwood: Read the question and answer.

(The reporter read the question and answer as follows:

"Q. When did you abandon or cease using such contracts?"

3080 "A. Well, due to our inability to obtain the pig lead and to know the price at which we paid for the lead, all orders were taken subject to the market at the time of the shipment or the average, for instance.")

Mr. Ewing: I will consent to it being stricken.

Trial Examiner Norwood: Motion allowed.

By Mr. Wright:

Q. Can you tell me precisely or approximately the time at which the National Lead Company, the Chicago branch, ceased making these 90-day card contracts?

A. We have not ceased that I know of.

Q. When did you last enter into such a 90-day card contract?

A. That I don't remember.

Q. Were you entering into such contracts in 1938 and 1939?

A. I think we were.

Q. I am speaking now of card prices. I am not speaking of car load contracts or differential contracts.

A. Not that I recall.

Q. You were not using such contracts in 1938 or 1939?

A. Not that I recall.

Q. Were you using them in 1936?

A. I couldn't say then either without trying to look back at the records.

Q. Can you ascertain from your records when you last made a regular practice of entering into such con-
3081 tracts?

A. I don't know.

Q. You don't recall any such contracts since 1936, do you?

A. Yes. We have made commitments for specified quantities of oxides.

Q. Were they in the form of these 90-day card contracts?

A. No. They would be in the form of orders, an order given for 20, 30, or 40 or 50 tons for a future shipment.

Q. Now these contracts that I have been referring to which you said you employed at this time, they were printed form contracts, weren't they?

A. No, sir. We didn't have any printed form contracts at Chicago.

Q. Have you ever used printed form contracts at Chicago?

A. Not that I recall, no.

Q. On any of the oxides?

A. No, sir.

Q. Do you recall what changes in the methods of quoting and pricing the oxides were made in June of 1934?

A. In general there was no change made that I know of.

Q. What was your position in 1934 at the Chicago branch?

A. We sold oxides—

Q. (Interposing.) What was your position?

A. My position?

Q. Yes.

3082 A. I beg your pardon. I thought you meant—I was sales manager.

Q. You would be thoroughly familiar at that time, wouldn't you, with all the various sales policies with regard to these oxides?

A. Yes, sir.

Q. How they were to be priced and how they were to be sold?

A. Yes, sir.

Q. I show you a document, Respondents' Exhibit 159-A to J, which was identified by Mr. McNair as a letter that he received as manager of the Atlantic branch on June 9, 1934, about the pricing of oxides and other pigments.

I also show you Exhibit 159-B, a letter of May 11, 1934.

Trial Examiner Norwood: Is that a Commission's exhibit?

~~Mr. Wright:~~ That is Respondents' exhibit, your Honor.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed, Mr. Wright.

By Mr. Wright:

Q. Do you recall ever having seen those letters or similar letters before?

3083 A. I never saw either of those letters or similar letters.

Q. Do those refresh your recollection as to the changes that were made in the terms and conditions of sale of oxides in that period of time?

A. I did not see that document.

Q. Do the statements in the document refresh your recollection any?

A. You see part of this was of no interest to me in Chicago because it was only the conditions that would pertain to Chicago—we did have the document that I recognized before, this printed document—

Q. (Interposing.) The code of fair competition?

A. That is what I had.

Q. Well—

A. (Interposing.) I did not see those letters from Mr. Rowe at any time.

Q. What was your answer then to my question as to whether reading those documents refreshed your recollection as to what changes you made in Chicago at that time?

A. I would have to read those more thoroughly.

Q. From your examination that you made, they don't refresh your recollection?

A. No, sir.

Q. Mr. Carroll, will you tell us again about how you quoted this freight differential in Montana and Wyo-

3084 ming when the freight was more than a quarter of a cent per pound?

A. In those instances we added the difference between the car load or less than car load rate as obtained from the railroad for our traffic department.

Q. What did the quarter of a cent per pound have to do with it?

A. Because we had allowed usually—the freight in our district would amount to approximately a quarter of a cent.

Q. Was that average freight?

A. Well, not average freight but that would be the freight to the greatest distance at that time in the Chicago district.

Q. Then do I understand it that the freight was over 25¢ a hundredweight that the customer paid that difference?

A. No. Only where the freight was up on the 60¢ or 70¢ or 80¢ that we would recognize it.

Q. If the freight was just 50¢ then you allowed that?

A. I would say less than 50¢.

Q. Well now, just what is this figure now?

A. Well we have added from 25¢ to 80¢ that I recall vividly.

Q. What do you mean by "added?"

A. To the normal price for delivery in our district.

3085 Q. You have added 25 to 50¢?

A. 25 to 80¢.

Q. To 80¢?

A. Yes.

Q. Well now, can you tell us again just where you would add 25¢?

A. Well—

Q. (Interposing.) Where—

A. (Interposing.) This is, of course, as you remember as I said to you some time back that we were adding those prices.

Q. Yes, sir.

A. I do recall, as I say, adding as much as 80¢ a hundredweight on a shipment to one or the other of those points in Montana or Wyoming. I think it was Montana.

Q. But you don't recall any other details of the transaction?

A. Oh, yes. We shipped the material.

Q. What I mean is do you recall what the freight was?

A. It was 80¢.

Q. That was the actual freight incurred in shipping?

A. No. That was the difference what we would charge them. In other words, if we would ship that out there we would be losing money. We couldn't stand the whole freight so we had to arrive at some freight so I added the difference of approximately 25¢.

3086 Q. What I am trying to get at are the mechanics by which you did it.

A. No special mechanics but it was my own.

Q. By transaction?

A. That's right.

Q. You might do one one day, and another the next; is that correct?

A. That's correct; yes, sir.

Q. Now I understood your testimony, Mr. Carroll, that all the subjects discussed in the minutes of these meetings which you attended were discussed for the purpose of drawing a code or fair competition; is that correct?

A. Yes, sir.

Q. You stated that you attended the October 27, 1933 meeting of the Lead Pigments Division. Do you recall that that was the case, particularly as to that meeting?

A. Yes, sir.

Q. What were the subjects discussed at that meeting?

A. I would not be able to tell you.

Q. You don't recall what the subjects were that were discussed?

A. Not the particular subjects at that particular meeting. In general I know what was discussed at all the meetings.

Q. But you can't tell what every particular discussion was?

3087 A. No, sir.

Q. Or what the subject of it was?

A. On the particular dates, no, sir.

Q. Can you recall all of the subjects which were discussed at the three meetings about which you testified, the one in October and the two in December?

A. Yes, sir.

Q. You can recall all the subjects which were discussed at those three meetings?

A. As I was refreshed on reading them.

Q. What were those subjects?

A. Well, if I had this code over here I could probably tell you everything that was in there.

Q. But your refreshment then a few minutes ago wasn't sufficient?

A. Oh, yes. But it isn't refreshed now. I can't retain that. I depend on the actual records.

Q. Were you testifying from the records or from your own recollection?

A. Both.

Q. Well, can you testify from your own recollection without the records in front of you?

A. Not as to what went on at any particular meeting.

Q. I am talking about the three meetings together. You attended only three as I take it?

3088 A. Yes sir.

Q. What was discussed at the three meetings without reference to whether it was a particular one?

A. The question of quantities and whether the custom of entering orders for tonnages over a certain period weren't nuisances, what constituted a delivery. For instance, delivery had to be made in 3 days, they would like to make it in three days to constitute a car load.

Who paid the cartage if the buyer's vehicle was used. Those I recall vividly.

Q. Do you recall any others?

A. No, sir; unless I could refresh my memory.

Q. Do you recall whether there was any discussion as to the advisability of putting into practice in advance of the code any of the practices which the members felt were desirable practices in the industry?

A. That was discussed.

Q. Do you recall what the discussion was on that?

A. No, sir; not the particular ones that were deferred, but I know we had—there were tentative decisions made and sometimes deferred.

Q. As to that particular subject now about putting those things in operation?

A. Yes, sir.

3089 Q. There were decisions made at those meetings to that effect?

A. Yes, sir. Well now just a minute. I said they were not made at that meeting. They were deferred.

Q. All such decisions were deferred

A. I wouldn't say all of them because there may be some of them that were not. Of course we had a number of these practices ourselves at Chicago.

Q. Some of the practices which were listed in those schedules attached to the code?

A. Yes, sir. Now because it might mean profit or loss to us. In other words, the custom of entering an order for a quantity of material which might not be taken at a particular time might result in a loss.

Q. Do you recall any discussion of the limitation of productive facilities?

A. No, sir.

Q. That wasn't discussed at any of the meetings?

A. No, sir.

Q. Was the question of differentials in price between the various grades of red lead discussed at those meetings?

A. Yes, sir.

Q. Was the question of selling oxides in less than car load quantities at a differential over pig lead discussed at those meetings?

3090 A. No, sir.

Q. Were the questions of the differentials over the price of pig lead for any sales discussed at those meetings?

A. No, sir.

Q. When you say "no, sir," do you mean in your statement that they positively were not discussed at the meeting?

A. None of the meetings that I attended, they were not discussed.

Q. Don't you mean rather that you didn't hear them discussed, or don't recall any discussion of the same?

A. Not in my presence.

Q. Then you can state categorically that they weren't discussed at the meetings officially, at any rate?

A. To me officially or unofficially.

Q. Yet you attended all of the discussions of the committees as such? You weren't absent from the room at any time there?

A. I might have gone out to the washroom or the telephone.

Q. You stated that there was no discussion at all regarding the limitation of productive facilities?

A. Yes, sir.

Q. I call your attention to the first paragraph of the October 27th minutes, Commission's Exhibit 504-A, the statement that the chairman suggested that the members proceed to discuss the third draft of the supplement-

3091 ary code, etc., whereupon a general discussion arose as to the desirability of including paragraphs which had been omitted from the third draft relating to the limitation of productive facilities, divergent views being expressed.

Wouldn't that indicate that there was a discussion of that question at the meeting?

A. Well, I don't recall it as such.

Q. In view of the fact that that appears in the official minutes which were represented to be records kept by the secretary of the Lead Industries Association of the discussions, wouldn't it indicate perhaps that your recollection might be a little faulty in some particulars as to exactly what was discussed?

Mr. Dubose: Have you read the entire paragraph?

Mr. Wright: No, sir.

Mr. Dubose: I object on the ground that the entire paragraph has not been read.

Trial Examiner Norwood: Overruled.

Mr. Wright: Did you understand my question?

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. In view of the fact that that appears in the official minutes which were represented to be records kept by the secretary of the Lead Industries Association of the discussions, wouldn't it indicate perhaps that your recol-
3092 lection might be a little faulty in some particulars as
to exactly what was discussed?")

The Witness: Well, I don't know whether or not remembering that particular one would be a basis for forgetting or not being specifically clear on the other. That I wouldn't say, but I would leave that to the human element.

By Mr. Wright:

Q. You admit that it wouldn't be beyond human failings but there would be a number of things that might have been discussed fourteen years ago at those meetings which you wouldn't recall now; isn't that correct?

A. Some I might not recall; if they were important I think I would.

Q. But then when you answered as to exactly what was discussed, you were really answering so far as your memory serves you, were you not?

A. If they were important or an issue worthwhile, I am pretty sure I would recall it.

Q. Wouldn't you think that a question of including a paragraph, that a general discussion of the question of including a paragraph in the code relating to the limitation of productive facilities which resulted in the expression of divergent views, would be fairly important as an industry matter?

A. Well, I never heard of such a thing in this industry, in the thirty-seven years that I am active in it, and 3093 thirty-eight years connected with. I never heard of any expression from anyone asking to restrict production.

Q. Do you recall any discussion of dumping?

A. I would like to have you define dumping.

Q. I don't know, I am only using a term that appears in the minutes of one of these meetings.

Mr. DuBose: You are not referring to the meetings which Mr. Carroll attended.

Mr. Wright: Yes, sir; I am.

The Witness: Well, the only way you might apply dumping would be or could be, if that is what you are asking, could be that you might have an exceptionally high pig lead market and somebody who was afraid of the market might have sold some of the material at a special price, but that, I don't know about.

By Mr. Wright:

Q. You don't recall any question of dumping being discussed then at these meetings that you attended?

A. It could be, but again I say it wasn't important unless you can show me that it was important.

Q. Do you recall any discussions as to dry white lead that took place at any of these meetings?

A. Not particularly. I wouldn't pay so much attention to dry white lead because it wasn't my department.

Q. I take it then, from your statement of what Mr. 3094 Cornish told you, the clipping which you brought in, that if Mr. Cornish and the National Lead Company had engaged in any price fixing activities during the NRA, it would have been with full awareness of the existence of the anti-trust laws and of the fact that they were still in existence at the time, would it not?

A. I think with Mr. Cornish and I that it would be.

Mr. Wright: No further cross-examination.

Trial Examiner Norwood: Is there any redirect examination?

Mr. Ewing: No redirect.
Trial Examiner Norwood: You are excused, Mr. Carroll.

(Witness excused.)

Mr. Ewing: Might we adjourn until 2:00 o'clock, Mr. Examiner?
Trial Examiner Norwood: Is that agreeable to you, Mr. Wright?
Mr. Wright: Yes, Mr. Examiner.
Trial Examiner Norwood: We will recess at this time to reconvene at 2:00 o'clock.

(Whereupon, at 12:15 p. m., a recess was taken until 2:00 p. m., this day.)

3095

Afternoon Session

Trial Examiner Norwood: Come to order. Proceed, Mr. Ewing.

Mr. Ewing: I call J. R. Higgins.

J. R. HIGGINS, a witness called by the Respondent, having been previously sworn, resumed the stand and testified further as follows:

Cross Examination by Mr. Wright:

Q. Mr. Higgins, this series of documents which have been marked for identification as Respondent's Exhibit 160 through 164, about which you testified on direct examination, do you recall from whom in the National Lead Company's general office you received a request for this information?
A. The letter came into the office and I am not sure whether it was addressed directly to me. It was either addressed directly to me or one or two of the other officers of the company. I would say it came from Mr. Fred McCarthy.
Q. Do you recall what was in that letter of request? Do you recall what it specifically requested you to do?
A. Well, I saw a copy of the letter and it asked for certain information as to our records for 1941. Among the

other things was tonnage, freight and cartage and, as I
recall, the end was the cost per hundred pounds, three
3096 classifications, as I recall it.

Q. Of the transportation charges?

A. Yes.

Q. Do you know what the purpose of the request was? Did the letter state the purpose?

A. I believe it did.

Q. Directing your attention now to the document marked Respondent's Exhibit 164, there is a statement there: "The following is the information you requested in your letter of March 26, 1947." Is that the letter referred to there, the letter of March 26th, the original request for this information?

A. That's correct.

Q. But you do not recall as I understand your testimony, what was in that letter as far as the purpose for which the material was requested or specifically the details of the request?

A. I do not recall that, except the details of the request according to the three columns as shown.

Q. This recapitulation, then, in Exhibit 164, that is a summary of all the work sheets of the other exhibits; is that correct?

A. That's correct.

Q. And that is the final boiling down of the information?

A. That's correct.

3097 Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed, Mr. Wright.

By Mr. Wright:

Q. Will you tell us exactly the procedure that you followed in requesting this information from your staff and the technique which you followed in obtaining it?

A. When I received a copy of the letter, I contacted Mr. Sargent who signed that letter and told him that as far as I knew, our 1941 records had been destroyed. I was somewhat concerned to know how or in what way we could answer that letter, and give him the information that had been requested. After taking—attempting to find out the tonnage records, somebody came up with the answer that we put a card system into effect a number of years ago. I think I started it back, possibly some years before, at least, and trying to find the tonnage of the states, the large cities, and then the smaller towns.

I was interested in knowing just where the tonnage was going or being distributed. From that, one of the young ladies, I should say, who has charge of the filing card system, said she had the tonnage of the towns where the white lead had been distributed during the year of 1941. So we used that as a basis. It came up with the tonnage of
3098 each of the towns indicated for white lead and the
different classifications, dry white lead, oxides and anything else that was requested.

Q. Now, that is as to the figures which appear in the work sheets under tonnage, and also in the other exhibits under total pounds sold.

A. That's right.

Q. That is the derivation of those figures?

A. That's right.

Q. Now, what instructions did you give regarding the information on freight and cartage?

A. We made an effort, first, to determine from our warehouses, speaking of warehouses, branches of the St. Louis branch, and as I recall, we had certain haulage or truckage as the case might be, and in going into that record, we found that we could get actual figures on the cartage from the warehouses and from St. Louis, so that that portion of our records is what I would call factual information. That is absolutely correct and it is added into the total figure.

Q. Just what do those cartage figures consist of? How were they secured? From what records were they taken? How were they fitted into this thing?

A. They were taken into the record from our auditing department. I can't tell you where the details would be kept.

Q. Do you know how they kept those figures in the
3099 auditing department?

A. We have five different branches.

Q. In the St. Louis branch?

A. Yes. We call them warehouses which designates the warehouses separately so that we could check back on our records and find out just what operation each warehouse might be doing. One or two of them are manufacturing points and for that reason we had to have certain records separately with each warehouse.

Q. What are those warehouses again, in the St. Louis branch territory?

A. First, it is St. Paul, Omaha, Kansas City, Dallas, New Orleans and, of course, the major distribution from St. Louis.

Q. Now, taking the warehouse at Kansas City, what products did the Kansas City warehouse?

A. White lead in oil, dry white lead and small amounts of oxide.

Q. Of oxide?

A. Yes.

Q. Were mixed paints warehoused there?

A. Now, at that time we were not in the mixed paint business.

Q. How about solder?

A. Solder was carried at Kansas City. That is the metal items. I am speaking only of white lead and
3100 oxide, in my testimony.

Q. What other items other than white lead and oxides were warehoused in Kansas City?

A. White lead in oil, and I believe in 1941 we did have paint. We had pure white lead paint which has been discontinued. I wanted to correct that statement. Then there are certain specialties or painters' supplies that go along with the white lead in oil and linseed oil, lead mixing oil, colors in oil and what we call general painters' supplies, red lead, litharge, red lead, both in kegs and drums. Beyond that met department, I would simply have to give you my knowledge, not too much contact, but the metal end of the business also carried supplies there, some of which were made at Kansas City.

Q. In other words, the Kansas City warehouse, wouldn't it be fair to state, warehoused most all the products sold by the National Lead Company; is that correct?

A. That is correct, I should say.

Q. Well, now, coming back to these entries of cartage expense on white lead in oil, how did the warehouses segregate the cartage expense on white lead in oil from the cartage expense on all the other items?

A. They would have to show the totals at the end of the day of the different departments, and it would show on that classification. White lead in oil has—the records

3101 have always been kept separately from the other items.

Q. Would the cartage expenses on white lead in oil be kept separately from cartage expenses on flatting oil and linseed oil and other related items which, no doubt, would be sold to the same customer in the same shipment?

A. They were, because in our receipts, which you have some place, it showed the different warehouses and it showed the different products.

Q. Well, now, you know, and can testify for a fact, that these, then, are the actual figures on the cartage of white lead in oil as distinguished from any other product in that warehouse?

A. That's correct.

Q. And is not an average or an estimate?

A. They are factual, actual records.

Q. Which have been kept in the regular course of business all the way down the line?

A. That's correct.

Q. Now, how did you derive these figures on the work sheets such as those that appear under: "carloading rate to warehouse," "lcl rate warehouse to customer," "carload rate warehouse to customer," "truckload rate from warehouse to customer," as appear on Respondent's Exhibit 162-A (showing to witness)?

A. The matter of the records was discussed and I recall drawing up on my desk from a sheet of paper the
3102 headings that appear on the top of this page. And
that was the form that we used in arriving at these figures.

Q. Just how did you go about getting them? What request did you make of the traffic department? You testified they were made up by the traffic department.

A. The freight rates in all cases were supplied by the traffic department.

Q. I understand that. But now what request did you make of them? In response to what request from you did they give you these figures?

A. The request that we made to them having in mind the tonnage that went into these various towns that we had to designate to the best of our knowledge how that shipment was handled. That is, when the shipment went from our St. Louis warehouse, for example, to the St. Paul warehouse. We used carload shipments as much as we possibly could to the warehouse. In fact, in all cases, so then we had to analyze in our minds how the shipment was handled.

Q. Who are you talking about "we" now?

A. Those of us in the white lead department. I think there was eight in all that worked on this, including all departments.

Q. Including the traffic department?

A. Including the traffic department. There were three directly from the white lead department. Then we
3103 had to determine just how the shipments originating in St. Louis, going in carloads to the warehouses, and then from there to the customer. And we had to designate, which we did in this column, the carload rate. In this case, St. Louis to Omaha.

Mr. Ewing: What town are you referring to on that exhibit?

The Witness: This happens to be the first town of Council Bluffs, Iowa. Council Bluffs is across the river from Omaha. There are no trucking charges on this classification. It was extended at the rate because we actually got the cartage for a fact in order to determine any additional costs that went in in handling those shipments from the warehouse.

By Mr. Wright:

Q. Now, getting back to my original question, would you summarize for me just what you asked the traffic department to put on this sheet of paper?

A. Yes. While we have a general knowledge of freight rates, there is nothing accurate about it. So I asked the traffic department if they had the records from the year of 1941 and they told me that fortunately they had the tariffs and that changes had been made later than the 1941 tariffs. So that I felt absolutely sure that the freight rates that were put down were the actual freight and the actual records that appeared at that time.

3104 Q. Who was responsible for the so-called routing of the shipments? In other words, to say whether it should appear as being one shipped directly from the factory to the customer or from the warehouse to the customer.

A. The order would originate a good deal in the warehouse territory. An order would come in from any of the towns. It would go to the warehouse and the warehouse would make the shipment. So, following through on that, the warehouse necessarily had to get the material from St. Louis in order to make the shipments.

Q. Wouldn't it be fair to say, then, that on this routing and on the question of whether the rates that actually appear in these columns would actually have been used in the shipping, that these are estimates based upon your experience as to how those customers would probably have been shipped?

A. I don't—

Q. Would you like that read again?

A. Yes, sir.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Wouldn't it be fair to say, then, that on this routing and on the question of whether the rates that actually
appear in these columns would actually have been
3105 used in the shipping, that these are estimates based
upon your experience as to how those csutomers
would probably have been shipped?")

The Witness: That is correct.

By Mr. Wright:

Q. In other words, this is your best guess in 1947 as to how you routed those shipments in 1941?

A. That is correct. That is the best knowledge that the St. Louis branch could contribute on that job.

Q. But you can't say now that any particular shipment took any particular rate at that time as a specific transaction? You believe now that that is how it would have been shipped, probably?

A. Very few shipments would be made to small towns unless there was an exceptional rate in effect where the lcl rate from St. Louis to that point was lower than the combination of the carload to that warehouse and the lcl from there to the destination. Those we know from past experience over many years, how they are handled. Those are exceptions.

Q. But there are some of those instances?

A. I think so.

Q. Where the lcl rate from the factory to the customer is lower than the combination carload rate to the warehouse plus lcl from warehouse to customer?

A. That's correct.

Q. There may be such instances in here, might there not?

3106 A. I think there are, and I think they are classified the way they were actually shipped.

Q. Do you know for sure whether those were checked that way?

A. They were checked by three different people.

Q. Who checked them?

A. Three in the white lead department. The man in charge of the order department and two young ladies, one that has been with us for 28 years and another one for 20 years.

Q. Is that by people in the traffic department?

A. In the white lead department.

Q. Now, as to these combinations of rates as to which one would be lower. Do you know whether that was checked by the traffic department?

A. All figures were checked by the traffic department.

Q. We are talking now about something that goes beyond the figures, perhaps. There appear to be a good many combination rates here of a carload to warehouse and lcl from warehouse to customer. Do you know whether the traffic department checked all those to determine whether the lcl rate from the factory to the warehouse might not be lower?

A. I don't think so.

Q. You don't think so?

A. No, because we know from past experience in handling the warehouses, the major portion of it.

3107 Q. When you say this was all checked, you are speaking of this whole series of exhibits from 160-A to 164; is that correct?

A. Yes, sir.

Q. You yourself have checked this compilation?

A. I did.

Q. Calling your attention now to Exhibit 160-D, white lead in oil, St. Louis branch, sheet number 1, you come down to this figure in column number 7 of $5,848.01 which is apparently an extension of the freight rate against the pounds shipped to show the estimated freight expense.

A. Yes.

Q. On those transactions?

A. Yes.

Q. The figure below that of $1,334.24 which is plus cartage St. Louis, is added. Will you tell me why the $1,782.18 is deducted?

A. May I look at the next sheet there?

Q. Surely.

A. You have par territory on this sheet. This portion covers Illinois. This portion covers more, and in order to get the correct amount for the par territory, we had to deduct that $1,782. That was a statistical record which Mr. Sargent arrived at in breaking it up to get the par territory.

3108 Q. Wasn't more in par territory?

A. No, sir, it was not.

Q. When you made that deduction there, from what records did you ascertain the extent to which the cartage was in par or in the plus territory?

A. Well, the auditing department had the records, as I said, on the cartage, the drayage.

Q. As to each transaction?

A. They had the sum total of all the records. Those are statistics in the auditing department. We were arriving and working towards sheet number 1 and in order to get this amount correct, we had to separate the one-eighth from the par to take out the drayage that was in there in order to get an accurate record of both par and one-eighth so that they weren't dovetailed together.

Q. Then that $1,700, was that added to your figure on the one-eighth zone?

A. It should have been. It is deducted—pardon me. It was less, so, therefore, it was deducted and put in the one-eighth.

Q. You said you had no invoices. The only record of these transactions which you had were these cards which had been punched from the invoices years ago?

A. On tonnage?

Q. On tonnage.

3109 A. Tonnage only.

Q. So that there were no individual transactions reported?

A. That's correct.

Q. Well, now, how was the auditing department able to separate on a transaction basis the drayage and cartage expenses?

A. That is a simple matter for St. Louis, which includes

Kirkwood, St. Louis, and what we call the metropolitan area. That would have been an easy matter to deduct our freight, or rather, cartage would have been from the St. Louis plant to these points designated here. I am sure that they have that record, without any question.

Q. As to individual transactions?

A. The sum total.

Q. Classified by territories where they delivered it?

A. Yes, that's correct.

Q. In other words, they would set up their cartage accounts to Kirkwood, or such other places as were in the ⅛th zone as distinguished from those that were in the par zone?

A. That's correct. The reason I feel certain of that is that we have our own system of truckage in the St. Louis plants. That does not exist at the other warehouses. That is public service. So that is an actual record from our books.

3110 Q. Where does this $1,782 figure come from? Would you look at those exhibits and tell me where it comes from (showing to witness)?

A. It is the sum total of the white lead and the dry white lead. It does not include the oxides.

Q. Do you mean to say by that that it is the sum total of the figures on Exhibit 160-B, appearing in the first column under St. Louis?

A. That's correct.

Q. I call your attention to the fact that those first two figures only amount to $1660.78.

A. I can't analyze that further. I asked the same question and they said it was a separation between the ⅛th and the par and without further checking, I accepted that.

Q. And you do not know how that distinction was made, do you?

A. No.

Q. Was that figure of $1,782 cartage expenses out of the St. Louis warehouse?

A. That's correct.

Q. Direct warehouse expenses of your own trucks, was it?

A. Of our own trucks.

Q. Of your own trucks?

A. Yes.

Q. Anything in the metropolitan area of St. Louis
3111 was par, wasn't it?

A. That's correct.

Q. So that the ⅛th would have had to have been outside of St. Louis?

A. Beyond, I think, the area is 20 miles, approximately.

Q. Beyond 20 miles?

A. Yes.

Q. So that the 1334 would be cartage in the metropolitan area within 20 miles?

A. Yes.

Q. And the 1782 would be beyond 20 miles?

A. That is correct.

3112 Q. Calling your attention now to Exhibit 160-E,
Mr. Higgins, get down here to shipments into Iowa from St. Louis. Is that the plant or the warehouse that they are being shipped from now?

A. The plant and the warehouse are both the same thing.

Q. They are in the same establishment?

A. We call it the St. Louis works.

Q. So that when you listed freight rates there from warehouse to customer, that really was from plant or warehouse to the customer?

A. Correct.

Q. Now on your Davenport rate, you will notice it here in the middle of the page of Exhibit 160-E, there are three different figures given, an LCL rate at 43, a car load rate at 26 and a truck load rate of 30¢, but the applicable rate is given as 50¢.

Will you explain that (showing to witness)?

A. There is a fairly good tonnage at Davenport; in my opinion shipments to Davenport would go in truck loads. You might combine four, five or six customers.

Now under the tariff rules, you can ship to one customer. If you have more than one customer they make an additional charge for it. My analysis of Davenport would be that truck loads were shipped to Davenport and very likely a public warehouse handled the distribution.

3113 That will vary from years ago. We got it at 5¢
but it will vary 8, 10 or 12¢. So the analysis of that loads and that whatever the charge may have been for

a truck load rate would represent to the best of our knowledge the cost of getting that material there.

That does not show, by the way, a truck load rate. It shows a car load rate.

Q. Isn't that figure "TL 30," doesn't that represent truck load?

A. That would be the difference, the sum total of the drayage and the public warehousing in handling it.

Q. What drayage are you speaking about, the drayage at the Davenport end?

A. Yes.

Q. I call your attention to the fact that the highest classification which would involve no drayage is LCL; isn't that correct, that would go to the customer with no further drayage to be paid, wouldn't it? That is 43¢.

Yet the applicable rate which was used in deriving the freight cost there was 50¢. The same, I might add, is the case with the one directly below it which is Des Moines where the car load rate is 32½¢, truck load 45¢ and LCL 65¢ and the figure given under total applicable rate upon which you based your calculation is 71¢.

3114 Let me ask you this now, Mr. Higgins: Of that material going to Davenport, nearly a quarter of a million pounds, you can't state on the basis of the cards from which you got that tonnage how much of that might have been in truck load quantities to a single customer or in car load quantities, can you?

A. That was determined by an analysis of going over the accounts as to how the shipments would be made. It is about 62 tons and tonnage of that kind would be handled very likely in truck rates and through the public warehouse.

Mr. Ewing: Is he referring to Davenport or Des Moines?

Mr. Wright: I am referring particularly to Des Moines there where you have got a figure of nearly a quarter of a million or over a hundred tons.

The Witness: Shipments to Des Moines are in various quantities.

By Mr. Wright:

Q. Isn't it possible now as to either Davenport or Des Moines that there might have been one or more car load shipments to a single customer in that period?

A. I don't think so, sir.

Q. Well, you don't know that there weren't, do you?

A. In 1941 I would say there was no car load shipments.

Q. Can you state that as a fact, now, one which
3115 would be within your knowledge and which you are
willing to state here on the stand under oath that
there were no car load shipments?

A. To the best of my knowledge that is correct.

Q. What I am trying to do is to establish a fact. Now is your answer that you don't know of any or is it your answer that there were none to either Davenport or Des Moines during 1941?

A. I do not recall any car load shipments going to either point during that time.

Q. Well now, could there have been a car load shipment to either of those points that you wouldn't know of?

A. I do not believe so.

Q. Now could there have been a truck load to a single customer?

A. That is correct.

Q. There could have been?

A. Oh, yes, many.

Q. In both places?

A. Yes.

Q. Do you think there probably were truck loads to a single customer?

A. Possibly in the case of one customer, but to my
knowledge I have okayed the payment of bills for the
public warehouse at Des Moines very, very frequently.

3116 Mr. Wright: I move that that last answer be
stricken, your Honor. It wasn't responsive.

Trial Examiner Norwood: Motion allowed.

By Mr. Wright:

Q. Do I understand your testimony to the effect that there could have been and probably were one or more truck loads during 1941 to a single customer in Davenport and Des Moines?

A. That is possible.

Q. So that in that instance the freight applicable would have been the truck load freight rate?

A. That's right.

Q. Of 30¢ in Davenport or 45¢ in Des Moines?

A. That's correct.

Q. Now I call your attention to the sheet marked Exhibit 160-P. There is a transaction there at Corpus Christi, Texas, and in the column headed "No. 1," there is written in there what appears to be Dallas, 120,000 pounds in car load from St. Louis and then following that, car load St. Louis to Corpus Christi, 76¢. And a derivation here, total applicable rate 87¢ a hundredweight.

Will you tell us which of those several figures is the correct one to apply there and why?

A. The total amount given is 131,840 pounds. According to this record there is 120,000 pounds in car load
3117 from St. Louis shipped to Corpus Christi at a rate of 76¢. Those two car loads were shipped to the naval airport at Corpus Christi and the amount is so unusual, it stands out.

The smaller amount, the difference of 11,840 pounds would make up for the balance of the LCL which normally would have been shipped from the Dallas warehouse.

Q. On that 87¢ that was used there, it doesn't represent any actual freight rate, does it?

A. Well, they have a rate from Dallas of 97¢.

Q. Yes.

A. Now add to that, it does not appear but we have a commodity rate to get white lead in oil from St. Louis to Dallas which, at that time, was 48¢ a hundred.

Q. Well now, what I am trying to get at is here that according to this note, 120,000 pounds or well over 90 per cent of that 131,000, were shipped not at the rate which appears in column 5 here of 87¢, but at 76¢.

A. That's correct.

Q. Now where do you get that 11¢ that was added to the rate on that 120 000 pounds? Is that somebody's arithmethical average to determine what you would have to multiply the total poundage by to get this figure in column 7 showing what you think those shipments cost freightwise?

Mr. Ewing: Would you read that question, please?

(The reporter read the question as follows:

3118 "Q. Now where do you get that 11¢ that was added to the rate on that 120,000? Is that somebody's arithmetical average to determine what you would have to multiply the total poundage by to get this figure in column 7 showing what you think those shipments cost freight-wise?")

The Witness: That is correct, sir.

By Mr. Wright:

Q. Then that 87¢ doesn't represent any actual freight rate or tariff rate at all?

A. To the best of our knowledge it represents the cost of getting that material down to Corpus Christi.

Q. The average cost per hundredweight?

A. I would say it was the actual cost, sir.

Q. Well now, if the car load freight rate was 76¢, where do you get that freight rate of 87¢? That is what I am trying to get at.

A. We have determined the cost of lead in oil first for the remaining portion, to get it from St. Louis down to Dallas which is 48¢ in the car load. Then there was a rate from Dallas to Corpus Christi which, according to this record, is 97¢.

Q. So that then that gave you a total rate combination car load to warehouse and warehouse LCL to Corpus Christi of $1.45 a hundredweight?

3119 A. Yes.

Q. So how did you get the 87¢? You have got $1.45 on one hand and 76¢ on the other and those are the only two official tariff rates that you have?

A. Yes.

Q. So will you tell me the process by which they got that figure of 87¢, if you know?

A. Beyond the rates given I can make no further explanation.

Q. You don't know how that was derived?

A. No.

Q. Now going over here to sheet 160-Q, under San Antonio, there is a statement there under car load rate, under columns 2 and 3 running across there, car load from St. Louis, and then under column 4, there is LCL, $1.53. What is that $1.53? Is that the LCL rate from St. Louis to San Antonio?

A. That is correct, sir.

Trial Examiner Norwood: We will take a five-minute recess at this time.

(A five-minute recess was taken.)

Trial Examiner Norwood: Come to order. Proceed, Mr. Wright.

By Mr. Wright:

Q. Now, Mr. Higgins, going back to Exhibit 160-Q here, the less than car load rate from St. Louis to San Antonio,

$1.53, it is indicated on this that there was a car load
3120 from St. Louis. Yet the applicable freight rate used
in figuring was the less than car load rate.

Can you account for that?

A. San Antonio is one of the exceptions that I spoke of in my earlier testimony that a through rate from St. Louis would apply of $1.53. That shipment originated from St. Louis and went through to San Antonio.

Q. It is indicated on here, is it not, that that was in the form of a car load?

A. There is no price in here for the car load. There is no indication at all of a car load shipment.

Q. How do you account for that statement, car load from St. Louis, that appears opposite of San Antonio?

A. This is the LCL rate and that was the rate that they used in making the divisor for the tonnage.

Q. The amount that is included there is approximately a 20-ton car load, isn't it, 80,000 and some odd pounds?

A. A 40-ton car load.

Q. So that that could have been one shipment in a car load then, could it not?

A. I don't believe so.

Q. Well, what does that statement "CL from St. Louis" mean then?

A. There should be no notation of car loads there. The LCL rate applied and it went through at $1.53.

3121 Q. What is that "CL from St. Louis" doing there then? Did you put it in?

A. No, sir.

Q. Who put it in?

A. I don't know.

Q. You don't know what they might have meant when they put it in then, do you?

A. No.

Q. Was your answer no to that question?

A. The answer would be no.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed, Mr. Wright.

By Mr. Wright:

Q. How long have you been in the St. Louis branch, Mr. Higgins?

A. From January 1, 1915.

Q. Do you recall ever making any similar study of average costs in the various territories at any other time than the one here that is represented by these documents?

A. I have never made a survey of that kind before.

Q. Do you know of one ever having been made?

A. Not to my knowledge.

3122 Q. Now you stated on direct examination that those figures on cartage were all expenses paid for automobiles plus their depreciation; is that not correct, when you were figuring cartage?

A. I do not recall making any testimony about automobile charges.

Mr. DuBose: May I be off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed, Mr. Wright.

Mr. Wright: I withdraw that statement.

By Mr. Wright:

Q. Now your cartage that is represented here, does that include the cost of the National Lead Company's own vehicles?

A. I am not familiar with the charge off on the automobiles in connection with the actual drayage charges.

Q. Well now, the St Louis branch, the St. Louis plant and warehouse do have their own trucks in some instances, don't they?

A. At our St. Louis lead in oil works where I have control, we have two trucks.

Q. Do those trucks make deliveries to customers?

A. In the metropolitan area.

Q. Just in the metropolitan area?

A. That is correct.

3123 Q. Not to those points in the ⅛ zone just outside the metropolitan area?

A. That is true.

Q. Those are made by hired carriers?

A. That is right.

Q. So then that figure that you have in here of 1,334.24 cartage in St. Louis which was added to that par thing on Exhibit 160-D would then include the cost of those trucks that you operate yourself?

A. I do not believe that depreciation is included in those figures.

Q. Does it include the cost of cartage in those trucks?

A. No, sir.

Q. It does not?

A. Cartage only, actually.

Q. How did they figure of the cartage in their own trucks, how did they put that in that $1,334?

A. That would cover the cost of the operation of the trucks and the men employed as chauffeurs to drive the trucks.

Q. You know that for a fact, that that is how that is included in that figure or is that your opinion as to how they probably put it together?

A. The figures would have to be assembled in our office, that is correct, sir.

Q. Well now, what did you mean by that answer?

3124 A. That the figures—the auditing department would have to arrive at those figures.

Q. Do you know how they arrived at them, what factors they took into account in arriving at those cartage figures?

A. I don't know the details.

Q. You don't know the details?

A. No.

Q. You don't know from what records they took them?

A. No, sir.

Q. Either as to the outside trucking or as to the cartage expense on your own trucks?

A. If there was any outside trucking handled under emergency shipments, that would be included.

Mr. Wright: Would you read the question and answer, please?

(The reporter read the question and answer as follows:

"Q. Either as to the outside trucking or as to the cartage expense on your own trucks?"

"A. If there was any outside trucking handled under emergency shipments, that would be included.")

Mr. Wright: I don't believe you understood my question.

By Mr. Wright:

Q. What I meant was, do you know exactly what 3125 figures and from what source they took into account in putting together this figure of $1,334 as total cartage? Do you know where they got the figures as to outside cartage that they paid the public carriers? I withdraw that.

Presumably that $1,334 of cartage, St. Louis, contains cartage both expense from the operation of National's own trucks and cartage which was paid outside carriers in delivering; is that correct?

A. That's correct.

Q. Do you know exactly what figures the auditing department put together to arrive at that $1,335?

A. I cannot give you the details.

Q. I take it that all these figures have been checked and rechecked a number of times so that the only error you know of in them is the one which was pointed out on Exhibit 160-A, under the heading "4" which should have been car load instead of less than car load; is that correct?

A. I believe that is correct. I believe there was one correction on another page but the figure was correct as it was used.

Q. What was that other correction you were speaking of?

A. An error in the extension only.

Q. That has been corrected, has it, on this sheet?

A. Yes, sir.

Mr. Ewing: What sheet is that?

3126 Mr. DuBose: Exhibit 160-A.

By Mr. Wright:

Q. Now getting into the work sheets on dry white lead, Exhibit 162-A to D—that is, Respondents' Exhibit 162-A to D—on 162-C, there is a deduction of $961.30. Will you explain to me what that deduction is?

A. $961.30 is the sum total of drayage from the various warehouses indicated.

Q. Why was that deducted? Was that not a legitimate transportation expense in the par territory?

A. My explanation of that would be that they were trying to break down the actual figure in order to arrive at the sum total on our final sheet of the total amount for each territory.

Q. Well now, you have included cartage in your total as to these other territories when it applied to that territory, have you not? Why did you deduct it as to this particular one?

A. My answer to that would be the breakup, that they were in differential territories.

Q. Now you recall what the par territory is on dry white lead, don't you? I show you this list of points here and ask you to tell me which one of those is outside of the par territory (showing to witness)?

A. They are all outside the par territory.

3127 Q. All of these warehouses, St. Louis, New Orleans, Kansas City, Omaha and St. Paul?

A. That is correct.

Q. Outside the par territory of dry white lead?

A. Dry white lead, that is correct.

Q. What is the par territory for dry white lead?

A. All territories with the exception of Colorado, Wyoming—there is one other state that I do not recall—New Mexico.

Q. Are any of those warehouse points in Colorado, New Mexico or Wyoming?

A. They are not.

Q. They are not?

A. No.

Q. Then they must be in par territory then?

A. The warehouses are all in par territory then for dry white lead.

Q. This particular exhibit here, 162-A to C, is a compilation as to the sales in the par territory, is it not?

I call your attention to the heading "Differential territory par" on Exhibit 162-A. So that I would still like your explanation as to why you deduct cartage expense in the par territory.

A. May I have the work sheet for a moment, please?

Q. This is the work sheet, is it not?

A. There it is (indicating). I cannot identify it
3128 except to state that it has the actual figures for plus cartage in the first paragraph and the second classification is removing at the uniform rate of 10¢ to arrive at a certain figure.

Q. Then they just use the arbitrary figure of 10¢ on cartage on that; is that right?

A. That is correct.

Q. Coming over now to the figures on Exhibit 163-C and D, under the heading on Exhibit 163-C, "Par territory, oxides, LCL lots." On exhibit 163-D, there are several figures on cartage amounting to some $376.22 estimated cartage, Kansas City, Omaha and St. Paul which is deducted from the figure of $4,062.96.

Can you explain how that was deducted and why?

A. I think the same thing applies that we discussed with each of our warehouses, the cost of the drayage, and we had in mind to take 10¢ all over. We found later that we could, by a process in the auditing department, that we were able to get the actual records.

And I think in this case what they attempted to do was to deduct the 10¢ where they found there was a difference between the two rates.

Q. You say you think that was what they did?

A. I know that is what it is because I was told that the drayage was absolutely correct.

Q. Who told you that?

3129 A. The comptroller of the company.

Q. There is apparently there a figure of a little less than $1,200 which was added to the LCL differential on Exhibit 163-D of $2,878 making a total of $4,062.96. Will you explain to me what these figures below that which total $376.22 represented? If the top figures were actual cartage, why did you, as appears from the note there, deduct "less estimated cartage?"

A. I think they were included by the auditing department in arriving at the total and where they had included the 10¢ and found later that they had the actual drayage charges—

Q. So the, the estimated cartage appearing there should never have been there in the first place?

A. That is correct.

Q. And this other figure under cartage actual was the figure that they represented to you as the actual cartage?

A. That is correct, sir.

Q. But again on this cartage, outside of the fact that the comptroller telling you that those are the actual cartage figures, you don't know what processes he went through to obtain them and to break them down from the other products that might have been involved?

A. I am unable to give you the details on that part of the business.

3130 Q. Now coming to this series of exhibits on par territory, oxides in car loads and car load lots, does this slip attached to this exhibit here describe the par territory?

Mr. DuBose: What is the number?

Mr. Wright: Exhibit 163-A and B.

The Witness: That is correct, par territory.

By Mr. Wright:

Q. That would be Illinois, Iowa, Kansas, Kentucky, Missouri, Minnesota, Nebraska, North and South Dakota, Tennessee and Wisconsin?

A. That is correct.

Q. In what territory is Texas?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

The Witness: Texas is in the ¼ differential territory.

By Mr. Wright:

Q. Now I call your attention to Exhibit 163-B to the transactions there under the heading "Differential territory par," Dallas, Port Arthur and San Antonio.

A. That is incorrect. That should read "¼ differential car load lots.

Q. Those figures went into the total as under par territory then?

3131 A. Texas is in the ¼¢ differential territory and the only explanation I could offer is that when these sheets, before we left, on account of the detail, that the young lady took the receipts and attached these memorandum in order to make them more convenient to handle. Texas is in the ¼¢ differential territory definitely.

Q. In the addition and computation in 163-B, the Texas transactions follow Exhibit 163-A. Doesn't that total figure here carry over and make the total for par territory of 11,839,904 pounds?

A. That is correct.

Mr. Wright: I have no further voir dire on this.

Trial Examiner Norwood: Is there any objection to the proffer of the exhibits?

Mr. Wright: I wanted Mr. Ewing to have an opportunity for any further questions he wanted to ask the witness.

Mr. Ewing: Subject to the correction and perhaps further testimony with respect to them, we reoffer these exhibits.

Mr. Wright: I object to the proffer of the exhibits. I think it is plain that exactly what they are. It is a combination of an estimate and secondary record and guess work. When you examine the details that went into it,

3132 you find the thing is inaccurate. It is in error in a number of very important respects, and it can't be explained by this witness in a number of other very important respects.

I object strenuously to its receipt in evidence being of that character.

Mr. Ewing: I think a substantial portion of the basis of the objection goes to weight and the reason I mentioned the correction is that if and to the extent there is error, we will correct it. But if we are going to talk about them and have further testimony in connection with them, I think they should be in evidence.

Trial Examiner Norwood: I understand that we had a condition there that the basic data was to be available to the Commission's counsel.

Mr. Wright: That is correct.

Mr. Ewing: I can't make the basic data in the sense of the invoice available because they are not existent. I don't know what other basic data Mr. Wright would have in mind having.

Anything we have got within reason we will be only too glad to make available.

Mr. Wright: I am in this difficulty, that while Mr. Higgins, the witness, thinks he knows what went on in the minds of the people who got some of this material together, he doesn't actually know and these people are not available to me for cross examination. 3133

Of course, the fact that all humans are frail, we have seen that in these particular exhibits and we have seen that in other exhibits of this sort, and I dislike an important exhibit of this sort to come into the record without my having as much of the available source material as is possible.

I don't believe that these things should be offered until there is further testimony available by the people who prepared them as to just exactly what went into them and what records they got them from. I am going to strenuously object unless that testimony is available.

Mr. Ewing: My suggestion would be that they be received subject to a motion to strike if the errors aren't corrected and if the further testimony with respect to them isn't supplied.

Trial Examiner Norwood: I am at a disadvantage now. This witness, in identifying these papers, made certain statements and told us how he made them and told us the source from which they came. I just didn't memorize it at the time and I can't rule on this motion until I get that record and run through his testimony about the matter, or if you want to give me a resume of the testimony here if you recall it and you can tell me about it, it would probably refresh my memory.

3134 But he made those tabulations, did he?

Mr. Ewing: May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. You are excused.

(Witness excused.)

Trial Examiner Norwood: We will recess then at this time until 10:00 o'clock tomorrow morning.

(Whereupon, at 4:00 o'clock p.m., the hearing in the above entitled matter was adjourned until 10:00 o'clock a.m., the following day, June 18, 1947.)

3135

Trial Room,
Bar Association Building,
36 West 44th Street,
New York, N. Y.,
June 18, 1947.

Met, pursuant to adjournment, at 10:00 a.m., EDST.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

Edmund F. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Robert H. Ecker, Esq., and Henry E. Gardiner, Esq., (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting and Refining Company.

James D. Ewing, Esq., and E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

J. T. Welch, Esq., (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington, D. C.), appearing for Sherwin Williams Company.

3136 PROCEEDINGS.

Trial Examiner Norwood: Come to order. Pursuant to adjournment taken on June 17, 1947, the hearing in Docket No. 5253 is now reconvened in the Trial Room of the Bar Association Building, 36 West 44th Street, New York, N. Y., at 10:00 o'clock a.m., daylight saving time, June 18, 1947.

Let the record show the following appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

Edmund F. Wood, Esq., appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Robert H. Ecker, Esq., and Henry E. Gardiner, Esq., appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James D. Ewing, Esq., and E. Z. DuBose, Esq., appearing for the National Lead Company.

J. T. Welch, Esq., appearing for Sherwin-Williams Company.

Proceed.

Mr. DuBose: I call Mr. Hesselbrock.

Trial Examiner Norwood: Mr. Reporter, this is Mr. J. H. Hesselbrock, 118 Rosemont Avenue, Fort Thomas, Kentucky.

3137 J. H. HESSELBROCK was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

Direct Examination by Mr. DuBose.

Q. Will you state your full name?

A. J. H. Hesselbrock.

Q. What is your address?

A. 118 Rosemont Avenue, Fort Thomas, Kentucky.

Mr. DuBose: I ask that these sheets be marked Respondents' Exhibit 169-A and the following sub-letters for identification.

Trial Examiner Norwood: It will be marked as Respondents' exhibit 169-A to N inclusive for identification.

(The document referred to was marked Respondents'

Exhibit 169-A, 169-B, 169-C, 169-D, 169-E, 169-F, 169-G, 169-H, 169-I, 169-J, 169-K, 169-L, 169-M, and 169-N for identification.)

Trial Examiner Norwood: Proceed.

By Mr. DuBose:

Q. Mr. Hesselbrock, by whom are you employed?

A. The National Lead Company, Cincinnati branch.

Q. In what capacity?

A. As assistant comptroller.

Q. How long have you been so employed?

3138 A. Nineteen years with the company and two years as assistant comptroller.

Q. And prior to being assistant comptroller, what was your employment?

A. Accounting department, in charge of accounting for our Georgia Lead Works Division.

Q. Mr. Hesselbrock, are you familiar with the books of account and records of the Cincinnati branch of the National Lead Company?

A. I am.

Q. Did you in or about the month of March this year receive a request from the home office of the National Lead Company to obtain certain information?

A. We did.

Q. And what did that request ask for, if you recall?

A. The tonnage of white lead in oil shipped into the various differential zones, the freight applying against those shipments, and the average freight charged, and the same information was asked for car load shipments of oxides.

Q. Do you remember for what year?

A. For the year 1941.

Q. And have you prepared that information?

A. That information has been prepared.

Q. And are these sheets, Respondents' Exhibit 169-A to N inclusive for identification, the work sheets and the 3139 summaries setting forth the summary of the information on the work sheets in response to that request from the home office (showing to witness)?

A. They are.

Q. And these records relate to sales of white lead in oil and car load oxides by the Cincinnati branch of the National Lead Company for the year 1941; is that correct, Mr. Hesselbrock?

A. That's correct, sir.

Q. Mr. Hesselbrock, I show you Respondents' Exhibit 169-A for identification and I ask you to state what that represents (showing to witness)?

A. The pounds of sales shown on this exhibit were the total pounds taken from our net sales statement for the year 1941. The oxide covers the same period.

Q. Your first statement related to white lead in oil?

A. White lead in oil, yes.

Q. Now under the heading "Sales heavy and soft paste," that title refers to white lead in oil?

A. That refers to the white lead in oil department as established in our accounting set-up.

Q. That is, of the Cincinnati branch of the National Lead Company?

A. That is of all branches.

Q. These figures relate to the pounds sold by the 3140 Cincinnati branch?

A. Correct.

Q. Opposite the word "par" and under the heading "Total pounds sold" at the top of this exhibit, will you state what that figure 3,000,794 represents?

A. That represents the total pounds of heavy and soft paste sold in par territories.

Q. Par territory for white lead in oil?

A. Yes, sir.

Q. Again, opposite the same statement "par" under the heading "Heavy and soft paste" and under the sub-heading "Total freight and cartage," are the figures $15,424.13. What do those figures mean?

A. That is the exact amount of freight charged against the white lead in oil department in the par zone.

Q. Now is that $15,424.13?

A. Yes, sir.

Q. Opposite the same word "par" under the same general heading and under the sub-heading "Average freight per CWT" is the figure .514. What does that represent?

A. That is the average freight per 100 pounds of white lead in oil sold in par territory and was obtained by dividing the total freight and cartage by the total pounds sold.

Q. In other words, that is 51 4/10c per 100 pounds?

A. Yes.

3141 Q. That was arrived at by dividing 3,000,794 pounds into the figure $15,424.13; is that correct?

A. That's correct.

Q. Again, under the general heading "Heavy and soft paste," opposite the line upon which are the words and figures "par plus ¼" are certain figures. Will you tell us what that entire line represents beginning with the word "par?"

A. That figure represents—the pounds in that column represents the total shipments as determined by an analysis of the individual invoices to customers in the par plus ¼ zone. The freight and cartage was obtained by analyzing the expense account vouchers chargeable to freight and cartage, soft and heavy paste, applying against the par ¼ zone.

The average of .769 was obtained by dividing the total freight and cartage by the total pounds sold in that zone.

Q. Now the figure of .769 is 76 9/10¢ per hundredweight?

A. Right.

Q. And was arrived at by dividing the $2,353.56, the total freight and cartage by 306,037½ pounds; is that correct, sir?

A. That is correct.

Q. And opposite the words and figures "par plus ⅜" are certain figures. Will you tell us what those represent sir?

3142 A. Those figures represent the total pounds sold into the par plus ⅜ zone, the freight and cartage applying against those shipments and the average freight per hundredweight which was obtained, .937 per hundredweight which was obtained by dividing the total freight and cartage by the total pounds sold in that territory.

Q. Now under the general heading "1941 sales of oxides in car load lots," will you tell us what those words and figures represent (showing to witness)? On both lines following that general heading.

In all instances the invoices were analyzed to find exactly what shipments went into the par zone and the par plus ¼ zone. The freight was obtained from vouchers and freight rates.

The total freight was divided by the total number of pounds to obtain the average freight per hundredweight.

Q. And on the first line are the total pounds sold of oxides in car load lots in par territory with the total freight and cartage applicable there plus the average freight per hundredweight in par territory; is that correct?

A. That is correct.

Q. And the second line represents similar figures for the par plus ¼ oxide zone?

A. Correct.

Q. For car load lots?

3143 A. Yes, sir.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed, Mr. DuBose.

By Mr. DuBose:

Q. I show you Respondents' Exhibit 169-B for identification and I direct your attention to the statement in the left-hand column about one-third of the way down that column, the heading "Total sales," and underneath that the figure of 3,767,336 and ask you what that figure represents, Mr. Hesselbrock?

A. That figure represents the total sales of soft and heavy paste during the year 1941 as shown on our net sales statement.

Q. That is by the Cincinnati branch?

A. By the Cincinnati branch, yes.

Q. Is that a record kept in the ordinary course of business?

A. It is our standard procedure.

Q. And is it divided showing sales by years?

A. Each year is kept separately and this was a sales statement for the year 1941.

Q. So from that you are able to determine that the Cincinnati branch in 1941 sold 3,767,336 pounds of white lead in oil for that year; is that correct?

3144 A. That is correct.

Q. Just below that and in the same column is the word "freight," and underneath that is the figure of 22,093.89. Will you tell us what that word and those figures represent, sir?

A. The word "freight" represents the total freight and cartage expense chargeable against the white lead in oil department for the same year 1941 for the Cincinnati branch.

Q. And that is $22,093.89?

A. Correct.

Q. Where did you obtain that figure?

A. From our expense statements as regularly calculated. That is a standard report.

Q. Was that in the same statement that you obtained this poundage from?

A. Well, it is a separate statement but it pertains to the same business.

Q. It is a separate book or record, however?

A. It is a separate record entirely.

Q. Coming to the second, third and fourth columns on this same exhibit, will you tell us what they represent and from what records you obtained that information (showing to witness)?

A. In the second column that represents a recap of our sales into the Tennessee and Virginia territories

3145 which are listed as zone par plus ¼.

Q. Is that by pounds?

A. In pounds; yes, sir. These were obtained by analyzing each invoice for shipment into that territory for the year 1941.

Q. Now how did you obtain those invoices?

A. Well, we took all of the invoices for the year 1941 and broke them down into zone par plus ¼ and zone par plus ⅜ and analyzed the individual shipments that went into those zones and took the par territory by difference.

Q. In other words, you obtained the pounds sold in par plus ¼ and par plus ⅜ zone respectively, and the total of that is listed here for the par plus ¼ zone of 3,306,370½ pounds; is that correct?

A. That is correct.

Q. To that you added the pounds sold in the par plus ⅜ zone which is 460,505 pounds?

A. Right.

Q. And the total of those figures you subtracted from this figure in the left-hand column under the heading "Total sales," 3,767,336?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed, Mr. DuBose.

3146 Mr. DuBose: I will rephrase that question.

By Mr. DuBose:

Q. The total pounds under the heading "Tennessee and Virginia, par plus ¼" were added to the total pounds under Alabama, Georgia, North Carolina and South Carolina, par plus ⅜ and those two figures were subtracted from the pounds shown under the heading in the left-hand column, "Total sales" to arrive at the pounds sold in the par territory; is that correct?

A. That is correct.

Q. Now opposite the word "freight" are certain figures under the heading "par plus ¼, par plus ⅜ and par." Will you tell us what those figures represent and from what source you obtained them?

A. These figures were obtained from an analysis of our expense account.

Q. What do they represent?

A. Par plus ¼ was added to the par plus ⅜ territories and subtracted from the total freight charged against the white lead in oil department to obtain the freight and cartage charged in par territory.

Q. Now these figures represent dollars and cents of freight and cartage; is that correct?

A. Correct.

Q. And the total of the freight figures under the
3147 par plus ¼ were added to the total of the figures under
par plus ⅜ and the sum of those was subtracted from the figure in the left-hand column under the heading "freight" to arrive at the applicable freight and cartage charge for par territory which is in the last or fourth column under the heading "par"; is that correct?

A. That is correct.

Q. Underneath that line and opposite the words "ACGE rate," are certain figures. What do those represent?

A. Those represent the averages in each territory, in each zone.

Q. The average what?

A. The average freight rate in each zone.

Q. Per what?

A. Per hundredweight.

Q. So that the three figures there under the second, third and fourth columns represent respectively the average freight per hundredweight for white lead in oil shipments from the Cincinnati branch for 1941 in par plus ¼, par plus ⅜ and par zones; is that correct?

A. That is correct.

Q. Where were those freight figures under the heading "par plus ¼" and "par plus ⅜" obtained?

A. They were obtained by analyzing individual vouchers which had been charged to the white lead in oil ex-
3148 pense, freight cartage expense account, for par plus ¼ zone and par plus ½ zone. The sum of the freight charged against these two zones was subtracted from the total freight to obtain the freight and cartage in the par zone.

Q. Now I show you Respondents' Exhibit 169-D and E for identification and ask you what those sheets represent (showing to witness)?

A. Exhibits 169-D and 169-E represent the voucher numbers on which freight was charged to the white lead in oil department.

Q. Are those all the vouchers for sales in 1941?

A. They are all the vouchers for sales in 1941.

Q. And from those vouchers, you sorted out the vouchers dealing with shipments to the differential territories; is that correct?

A. That is correct.

Q. And from those differential territory vouchers, you obtained the actual freight figures shown on this Exhibit, Respondents' Exhibit 169-B for identification?

A. That is correct.

Q. Now getting back to Respondents' Exhibit 169-B for identification, under the heading "Sales WLO 1941" there are certain words and certain figures. Without reading the figures through will you tell us what they represent and what those words represent?

3149 Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

The Witness: We attempted to give here an estimate of the sales which were made through agents and the other sales to industrialists and other customers.

By Mr. DuBose:

Q. Now you say an estimate. Where did you obtain those figures?

A. Our 1940 and 1941 sales statements contain a breakdown of the total sales sold through agents.

Q. Well then, the figure opposite the words "Through agents" which begins with the numeral 3, was obtained from books of the Cincinnati branch kept in the regular course of business, were they not?

A. That's right.

Q. Was that the same record from which you obtained the pounds under the heading "Total sales"?

A. The same record, the net sales statement.

Q. And that record does actually show the number of pounds which were sold through agents; is that correct?

A. That's correct.

Q. And you were able to obtain that for the two years, 1940 and 1941?

A. That is correct.

3150 Q. As this exhibit shows?

A. Correct.

Q. So it is not just an estimate, is it, Mr. Hesselbrock?

A. No, sir. It is based on actual figures for those two years.

Q. Now there are certain percentage figures opposite the figures which show the pounds sold through agents or to others. Will you tell us what those percentage figures represent?

A. Assuming the total sales as 100 per cent, the sales through agents represent 89.49 per cent. This was obtained by dividing the sales through agents by the total sales in pounds.

Q. That is shown for both 1941 and 1940 there; is that correct?

A. That is correct.

Q. I show you Respondents' Exhibit 169-C for identification and ask you to state what this sheet represents (showing to witness)?

A. This sheet is an accumulation of the breakdown of freight to par plus ⅓ zone and par plus ⅔ zone as detailed on other work papers.

Q. And are the totals under the respective headings "par plus ⅓" and "par plus ⅔ and par" on Respondents' Exhibit 169-C for identification the same as the corresponding figures under the same headings opposite the word "freight" on Respondents' Exhibit 169-B for identification? 3151

A. They are.

Q. In the left-hand column under the heading which is on Respondents' Exhibit 169-C for identification, the heading "No. 22 cartage and freight 1941" are certain figures. Will you tell us what the figures under that heading represent and from what source you obtained them?

A. The number 22 represents the number of the expense account in our cost system. Freight and cartage is the name of the account. The total dollars represent the total freight and cartage chargeable against the white lead in oil department for the year 1941.

Q. I show you these work sheets which have been marked Respondents' Exhibit 169-F to J inclusive for identification and I ask you to tell us what they represent? You might look at all of them first.

A. The exhibits No. 169-F through 169-J represent the analysis of individual invoices.

Q. What do they show?

A. They show those shipments which went into par plus ¼ territory and par plus ⅜ territory.

Q. Do they relate to pounds or to freight?

A. Pounds only.

Q. So these sheets are the work sheets showing
3152 the pound or pounds of white lead in oil sold in the
differential territory served by the Cincinnati branch for the year 1941 which were obtained from actual invoices; is that correct, sir?

A. That's correct.

Q. And the totals of these pages, Respondents' Exhibit 169-F through J inclusive for identification are set forth on both Respondents' Exhibit 169-A and 169-B for identification, are they not?

A. They are set forth on Exhibit 169-B for accumulation and the totals transferred to Exhibit 169-A.

Q. In other words, the figures on Respondents' Exhibit 169-B for identification at the top of the page represent the page-by-page totals set forth on these documents, Respondents' Exhibit 169-F, to 169-J inclusive; is that correct?

A. That is correct.

Q. I show you Respondents' Exhibit 169-K to M inclusive for identification and I ask you what these three sheets represent (showing to witness)?

A. The schedules, Exhibit 169-K to 169-M represent an accumulation of individual items of freight charged against par plus ¼ zone and the par plus ⅜ zone.

Q. And where were those figures obtained?

A. They were obtained from the vouchers on which the freight was originally paid.

3153 Q. And are the totals appearing on Respondents' Exhibit 169-K, L and M for identification the figures which appear on Respondents' Exhibit 169-C for identification?

A. Yes, sir.

Q. And then the grand total of these figures which appear on Respondents' Exhibit 169-C for identification appear opposite the word "freight" and under the particular heading on Respondents' Exhibit 169-B for identification?

A. That is true.

Q. I show you Respondents' Exhibit 169-N for identification and I ask you to state what that represents (showing to witness)?

A. It represents the total sales of oxides in car load lots, pounds and freight.

Q. What territories?

A. Par plus ¼ and par territories.

Q. And that includes, you say, both pounds and freight in dollars and cents?

A. That is correct.

Q. And from what source were those figures, both as to pounds and freight rates, obtained?

A. The pounds were obtained from actual invoices covering sales in those particular territories. In the case of par plus ¼ and the state of Tennessee, the freight rate was applied against the total pounds.

3154 Q. Now taking the heading "par plus ¼, Alabama" on this Respondents' Exhibit 169-N for identification and the first column on the left-hand side, will you state what the words "St. L. to Birmingham, Alabama" mean?

A. It means these shipments went forward from our St. Louis branch to customers in Birmingham, Alabama.

Q. There is no oxide plant in Cincinnati, is there, Mr. Hesselbrock?

A. No.

Q. When Cincinnati obtained an order for a car load from a customer in Birmingham, Alabama, from what plant was that material shipped?

A. St. Louis.

Q. To whom was the freight on that shipment from St. Louis charged?

A. It was charged to the Cincinnati branch.

Q. By inter-branch vouchers?

A. Yes, sir.

Q. And from those vouchers you are able to ascertain that there were only these five car load shipments to par plus ¼ oxide territory so far as car load lots are concerned; is that correct?

A. Not from the vouchers but from the invoices.

Q. From the invoices?

A. Yes, sir.

3155 Q. Is there any difference?

A. No, because one would apply against the other. However, in the case of Alabama the freight rate was applied against the total weight of the shipment.

Q. In other words, under the heading "Freight rate," the figure 52 encircled is the car load freight rate for oxides from St. Louis to Birmingham; is that correct?

A. That is correct.

Q. And the total pounds sold by the Cincinnati branch in the par plus ¼ territory and shipped from St. Louis was simply multiplied by this rate of 52¢ per 100 pounds to arrive at ~~the total~~ freight applicable against these shipments; is that correct?

A. That is correct.

Q. Now under the heading "par, Tennessee," will you tell us what the column on the left represents?

A. It represents the weight in pounds as determined by an analysis of our invoices for shipments during the year 1941 into the Tennessee area or the Tennessee territory.

Q. That is for oxides in car load lots?

A. Oxides in car load lots only.

Q. Now under the same heading, what does the column on the right represent?

A. It represents actual freight paid.

Q. From what source was that obtained?

3156 A. That was obtained from the invoices of the branch.

Q. Now under the third general sub-heading on this exhibit, Respondents' Exhibit 169-N for identification, is the word "par." Will you tell us what that word means?

A. The word "par" means that that was shipments into the par zone.

Q. Other than Tennessee; is that correct?

A Other than Tennessee; yes, sir.

Q. Now under that heading "par" are two columns. Will you tell us what the left-hand column represents?

A. The left-hand column represents the weight of the shipments as determined by an analysis of the invoices.

Q. And will you tell us what the right-hand column represents?

A. It represents the freight actually charged against those invoices.

Q. Was that shown on the invoices themselves?

A. Yes, it would be.

Q. Now in case the Cincinnati branch obtained an order for a car load lot of oxides, from what shipping point would those oxides be shipped?

Mr. Wright: Objection, your Honor. That is going into the contents of the document rather than any characterization or identification. It is not yet in evidence.

3157 Mr. DuBose: I am simply trying to show how these figures are arrived at.

Trial Examiner Norwood: Read the question, please.

(The reporter read the question as follows:

"Q. Now in case the Cincinnati branch obtained an order for a car load lot of oxides, from what shipping point would those oxides be shipped?")

Trial Examiner Norwood: I think he can answer that irrespective of the exhibit. He can bring that out.

Objection overruled.

The Witness: Well, that is a question which I cannot answer because I do not handle the routing of any orders.

By Mr. Du Bose:

Q. Do you know whether that would be shipped from Cincinnati?

A. In no case.

Q. Do you know from what possible points it might be shipped other than Cincinnati?

A. It would or could be shipped from our St. Louis branch, from our Chicago branch, from our Philadelphia branch. That is all.

Q. When they were shipped—and I take it then that all of these car load shipments in par Tennessee and in par territory which you have listed there—they were

3158 not shipped from Cincinnati; is that correct?

A. No shipments listed were made from Cincinnati.

Q. They were all made from other branches of the National Lead Company; is that correct?

A. That is correct.

Q. Now did these other branches in each instance bill the Cincinnati branch for the freight charges?

A. Yes, sir.

Q. Was it from those inter-bills or invoices that you obtained these freight figures?

A. Yes, sir.

Q. And are the totals on this exhibit, Respondents' Exhibit 169-N for identification, as to both pounds and freight, the totals which appear under the heading "1941 sales of oxides in CL lots, on Respondents' Exhibit 169-A for identification?

A. They are.

Q. Mr. Hesselbrock, were these records, Respondents' Exhibit 169-A to N inclusive for identification prepared by you or under your direction?

A. They were.

Q. And did you check the totals and the work sheets and the figures thereon?

A. Not personally in all cases.

Q. Some others worked with you on the individ-
3159 ual invoices; is that correct?

A. Right.

Q. Who prepared the totals which are listed on Respondents' Exhibit 169-A and B and C for identification (showing to witness)?

A. I prepared the totals on Exhibit 169-A. The totals on Exhibit 169-B and 169-C were prepared by an assistant in the accounting department.

Q. Who was working under your direction?

A. Under my direction; yes, sir.

Mr. DuBose: I offer in evidence Respondents' Exhibit 169-A to N inclusive for identification.

Mr. Wright: I object to the receipt of these documents in evidence, your Honor. There is no basic data available here from which it can be ascertained what these figures represent.

An examination of this witness, since I have not yet seen these papers, is completely unintelligible to me and there are no records of any sort from which we can check here the method by which these things were prepared and what they represent.

Mr. DuBose: Your Honor, there has been just about as complete an identification as possible. This man obtained these figures from actual invoices, actual company records. We haven't these records with us, of course.

3160 Trial Examiner Norwood. Those records are in existence, are they?

The Witness: They are in existence.

Trial Examiner Norwood: Where are they?

The Witness: In Cincinnati.

Mr. Du Bose: And they will be made available.

Trial Examiner Norwood: They will be made available to the Commission's accountants?

Mr. Du Bose: At any time.

Trial Examiner Norwood: And at such time will you go over it with the Commission's accountant so as to show him the source in each case and so on, so that they may check these documents completely?

The Witness: If I am directed to do so by my superior.

Trial Examiner Norwood: I should have asked that with regard to counsel.

Mr. Du Bose: Yes, your Honor.

Mr. Wright: I object to putting that in in this fashion. When the Commission prepared similar tabulations the work sheets were made from the records in the possession of these companies and they were left with the company's accountants and they were checked over and worked out, so when it came time to consider the question of putting them in evidence, both sides knew what they were.
3161 Here are documents which I have never seen before and which are thrown at me in this fashion and by a ruling permitting them to go in subject to a ruling of basic documents, I am put to the burden and the Commission is put to the burden of going through the books and records of all these branch offices here to determine whether or not these things were properly made, and I don't think that is proper.

Trial Examiner Norwood: The Commission has a very expert and capable force maintained for just that purpose, and I should think that they would prefer examining this data in the office there and with this expert here to show them what it is.

It would be more satisfactory than bringing some of the stuff here to New York, and you would be inquiring about other material and it would be in Cincinnati. We receive this kind of information that is being offered here all the time in these cases.

Mr. Wright: My objection is to the receipt of it in evidence before we have had an opportunity. I mean to receive such secondary evidence as this, it is necessary to have some agreement of counsel ordinarily if we follow the rules on the matter.

Certainly I haven't been approached on that problem and I have had no opportunity of examining this material.

Trial Examiner Norwood: Counsel has said that 3162 he has agreed to make all this material available to the Commission. Now if I receive it, I am going to receive it under that condition.

Mr. Wright: Your Honor, I would suggest rather than admitting it subject to a motion to strike on the basis of our doing that, that you defer a ruling on the admission of the documents until we have had an opportunity of examining the basic data, in which case I may be able to withdraw my objection.

Trial Examiner Norwood: I think inasmuch as the data is as shown here that I will overrule the objection and receive these exhibits in evidence subject to the conditions here that the counsel make these completely available to the Commission and the Commission's experts.

Mr. Wright: Your Honor, I would like to suggest also as a part of that, that I be given an opportunity of deferred cross-examination of this witness with regard to these exhibits.

Trial Examiner Norwood: You may call him for further cross-examination.

Mr. Wright: Is it understood that he will be available to me for further cross-examination on this as part of the admissibility of these documents?

Mr. Du Bose: Certainly.

Trial Examiner Norwood: Yes.

3163 Mr. Du Bose: We will also have photostats of these made and substitute photostatic copies thereof.

Trial Examiner Norwood: It will be received in evidence as Respondents' Exhibit 169-A to N inclusive.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 169-A, 169 B, 169-C, 169-D, 169-E, 169-F, 169-G, 169-H, 169-I, 169-J, 169-K, 169-L, 169-M and 169-N, was received in evidence.)

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. We will take a five-minute recess at this time.

(A five-minute recess was taken.)

3164 Trial Examiner Norwood: Come to order. Proceed.

Mr. Wright: I would like to request a further cross-examination of this witness.

Mr. Du Bose: That is perfectly satisfactory.

Trial Examiner Norwood: Have you had all the direct you want on these documents?

Mr. Du Bose: Yes, sir.

Trial Examiner Norwood: Are there any further explanations that you would like to bring out?

Mr. Du Bose: Not at this time, although there might be more on the cross-examination.

Trial Examiner Norwood: The witness is excused, to be recalled at some future time, and the counsel for the National Lead Company undertakes to produce him for said examination.

Mr. Du Bose: Yes, sir.

(Witness excused.)

Trial Examiner Norwood: Proceed, Mr. Du Bose.

Mr. Du Bose: I call Edward L. Baum.

Trial Examiner Norwood: Mr. Reporter, this is Mr. Edward L. Baum, 711 9 Shore Road, Brooklyn, New York.

EDWARD L. BAUM was thereupon sworn as a witness on behalf of the company and, having been first duly sworn, testified as follows:

3165 *Direct Examination by Mr. DuBose.*

Q. What is your full name?

A. Edward L. Baum.

Q. What is your address?

A. No. 711 9 Shore Road, Brooklyn, New York.

Q. Mr. Baum, by whom are you employed?

A. I am employed by the National Lead Company, Atlantic Branch, New York City.

Q. No. 111 Broadway, New York City?

A. Yes.

Q. In what capacity?

A. I am assistant to the controller.

Q. And how long have you been so employed?

A. About 12 years in that capacity, 30 years with the company.

Q. And prior to being assistant controller, what were your duties?

A. Well, I was cashier for 2 years and travelling auditor for 2 years before that, and office manager in the National Lead Company crooke works in Brooklyn.

Q. In 1941, you were assistant controller?

A. Assistant to the controller.

Q. Assistant to the controller?

A. Yes, sir.

3166 Q. And you are familiar with the books, records, and books of account of the Atlantic Branch of the National Lead Company for the year 1941?

A. Yes, sir.

Mr. Du Bose: I ask that these two sheets be marked Respondent's Exhibit 170-A and B for identification.

Trial Examiner Norwood: They will be marked Respondent's Exhibits 170-A and B for identification.

(Whereupon, the documents referred to were marked Respondent's Exhibits 170-A and 170-B for identification.)

Trial Examiner Norwood: Proceed, Mr. Du Bose.

By Mr. Du Bose:

Q. Mr. Baum, I show you Respondent's Exhibit 170-A for identification and ask you to tell us what that record represents (showing to witness)?

A. This represents a record of the total sales of our heavy and soft paste white lead in oil in the year 1931.

Q. What year?

A. Pardon me, in the year 1941. That is broken down into the apportion of that total which was shipped to par zone and also the portion which went to the plus ⅜ths zone. It further records the total freight and cartage applicable to the shipments in those two zones. An arithmetical calculation was then made which gives the average cost per hundredweight freight and cartage for those two zones.

3167 Q. Is that with reference to sales by the Atlantic Branch only?

A. Yes, sir. It also shows a summary or a total of our oxides department sales for the branch only, and the freight and cartage paid by the branch applicable there which was again averaged out through an arithmetical calculation to show the average freight and cartage cost per hundredweight of oxides shipped.

Q. That shows only par shipments?

A. It does. It shows only par shipments because an analysis of the records disclosed that there were no shipments other than par from the Atlantic Branch.

Q. Now, I show you Respondent's Exhibit 170-B for identification and I ask you whether this is the work sheet from which the totals under the heading "heavy and soft paste white lead" were taken as shown on Respondent's Exhibit 170-A for identification?

A. I would answer that by stating that this exhibit, Respondent's Exhibit 170-B, is the work sheet from which the totals shown for shipments to the plus 3/8ths zone were derived.

Q. And that does not show—

A. That does not show the grand total for the total shipments of the Atlantic Branch.

Q. Now, I notice on Respondent's Exhibit 170-A
3168 for identification under the heading "heavy and soft paste white lead" and under the sub heading "total pounds sold" at the bottom of that column a figure, and I ask you to state what that figure is beginning with the numerals 19.

A. That figure is the total sales of heavy and soft paste white lead by the Atlantic Branch in the year 1941 to our customers, stated in pounds.

Q. From what source was that figure which appears at the bottom of that column on Respondent's Exhibit 170-A for identification taken?

A. That figure was taken from the sales accounting record of the heavy and soft paste white lead sales for the year 1941.

Q. Is that a record kept in the ordinary course of business by the Atlantic Branch?

A. That is. That is our regular standard procedure. I took that figure from that record.

Q. Now, going to Respondent's Exhibit 170-B for identification, opposite the heading "Florida" the second column, the heading "in pounds," or "in lbs." underneath that heading are certain figures. Will you tell us what those figures in that second column represent?

A. Well, these figures represent the portion of the total sales referred to a moment ago. that the point of destina-
tion of our shipments being in the State of Florida
3169 and identified by the several cities therein.

Q. Now, do these figures under that second column under the heading "in pounds" represent the pounds of white lead in oil sold by the Atlantic Branch to customers in these particular named towns in Florida and Georgia?

A. Yes, sir, they do.

Q. And do those represent all of the sales of white lead in oil in the 3/8ths zone by the Atlantic Branch for the year 1941?

A. Yes, sir, they do.

Q. Now, from what records were these figures showing the pounds, sold to customer in particular cities obtained? What records of the Atlantic Branch?

A. Well, these figures were taken from our sales analitical records which are checked periodically, I might say daily, with the sales accounting records. The only difference being that the sales accounting record is in total and the sales analytical records represent tabulations taken from the same source by point of destination.

Q. Now, you say sales analytical records. In what form are those records kept?

A. These records are kept on a visible card system analysis.

Q. And are those cards kept town by town?

A. They are.

Q. For the 3/8ths territory; is that correct?

3170 A. Well, by inference, yes. It is kept town by
town by Florida and Georgia, which happens to be a 3/8ths territory.

Q. So that they show all the sales by towns of the Atlantic Branch for the year 1941 in Florida and Georgia?

A. Yes, sir, they do.

Q. And Florida and Georgia are the only two states served by the Atlantic Branch for white lead in oil; is that correct, in 1941?

A. No. The only two states served in the 3/8ths zone, yes, sir, that's correct.

Q. Now, taking as an example the first town listed under the heading "Florida," the town of Daytona, the figure in the second column you have testified, I believe, represents the pounds of white lead in oil sold by the Atlantic Branch in 1941 to customers in that town of Daytona, Florida; is that correct?

A. That's correct, net weight.

Q. Net weight?

A. Yes.

Q. The third column "revised rates, lcl" has a figure opposite the town Daytona. Will you tell us what that figure represents?

A. Well, that figure represents the lcl rate, the minimum lcl rate from point of shipment to point of destination.

Q. Point of shipment from the Atlantic Branch?

3171 A. From the Atlantic Branch point of shipment to the point of destination being Daytona in this case.

Q. Now, under the fifth column under the heading "gross wt." is a figure opposite the town Daytona. Will you tell us what that figure represents?

A. Well, inasmuch as we do not record the gross weight of every shipment in summary form for sales record purposes, we felt that for this presentation we should add six per cent to the net weight to approximate what was considered to be the gross weight of these shipments to Georgia and Florida.

Q. In other words, the shipping weight of material is in excess of the actual pounds of the material sold; is that correct?

A. That's correct.

Q. And to arrive at that shipping weight you added six per cent to the pounds of material sold; is that correct?

A. Yes, sir.

Q. Now, under the next column under the heading "CL" is the figure .68 opposite the town Daytona. Will you tell us what that is?

A. Well, that represents the carload rate for white lead in oil shipments originating in Brooklyn and having a destination of Daytona, Florida.

Q. Under the next heading "carload weight," there is a figure opposite Daytona. Will you tell us what that

3172 represents?

A. That represents the minimum carload weight that pertains to that rate for shipments to Daytona, Florida.

Q. In other words, in order to obtain a carload rate for a shipment to Daytona, you would have to ship at least that much or that many pounds; is that correct?

A. Yes, sir.

Q. Now, under the next column is a heading which I wish you would read for us (showing to witness).

A. That says revised calculation. These totals—well, that is what it says.

Q. Revised calculation?

A. Yes.

Q. Now, underneath that, opposite the town Daytona, is a figure. Will you tell us what that represents?

A. This column referred to represents the cost of shipping the quantity specified calculated at the lcl rate to the point of destination indicated on each line at the respective rates and includes a local cartage to the carrier. That is to say, from our point of shipment in Brooklyn to the carrier.

Q. Arithmetically, what is that figure opposite Daytona, Florida, under the heading "revised calculation"?

A. Well, using Daytona to illustrate, the gross weight shipped to Daytona multiplied by the lcl rate to Daytona—

Q. That being in the third column?

3173 A. In the second column.

Q. In the second column?

A. I stand corrected. That is the third column.

Q. Under what heading?

A. Under the heading "lcl." That rate plus the average local cartage cost would equal the amount I have just referred to, which shows in this column marked—shall I read it?

Q. Revised calculation?

A. Revised calculation based on actual weights.

Q. Now, I call your attention to the next column headed "freight gross weight calculated on carload rates" and to a figure opposite the word Daytona and ask you what that figure represents?

A. Using the same gross weight shipped to Daytona, but applying the carload rate previously referred to, pertaining to Daytona, the multiplication was made and that figure indicates the extension or the cost thereof.

Q. In other words, that figure under the heading "freight gross weight calculated on carload rates" is the gross weight multiplied by the carload rate to Daytona; is that right?

A. That's correct.

Q. I call your attention to the last column on the right under the heading "calculation based on one carload shipment to each point of destination," and ask you to
3174 what that refers?

A. That calculation, again using Daytona to illustrate, represents the cost of one carload shipment of white-lead in oil to Daytona, Florida, calculated at the carload rate.

Q. Is that calculated on the minimum carload weight applicable to shipments to Daytona?

A. Yes, sir.

Q. Now, the figures under the same columns opposite the other towns in Florida and in Georgia were all arrived at by similar calculation; is that right?

A. Yes, sir.

Q. Going back to the heading in the third column "revised rates lcl," will you tell us where those figures were obtained?

A. Well, all of these rates were checked through our traffic department.

Q. Is that the general office traffic department?

A. Yes, sir, the general office traffic department of the company.

Q. And you asked them for the applicable lcl rates to these towns from either Brooklyn or New York, as the case might be, and they gave you those figures; is that correct?

A. That's correct. And in the case of the notation, "revised rates"—to explain the notation "revised rates," when checking the original calculation, errors were
3175 noted and accordingly the revised or correct rates
were recorded and these calculations are all made on these so-called revised rates.

Q. Just to the right of the revised rate lcl is a statement "original state," with figures underneath that for particular towns. Do I then take it you mean that where the original rate was not corrected, you found that that was correct?

A. That is a correct statement.

Q. But in either case, it is the lcl rate?

A. Yes, sir, in either case.

Q. Now, under the fifth column, the fifth general column under the heading "CL" are certain figures opposite each town. Will you tell us what those figures are and from what source you obtained them?

A. Those figures represent the carload rates to the respective points of destination and were checked through the company traffic department.

Q. You obtained those rates from the same source as the lcl rates?

A. Yes, sir.

Q. Now, going back to Respondent's Exhibit 170-A for identification, under the heading "heavy and soft paste white lead," the second column entitled "total freight and
cartage" has at the bottom thereof a figure. What
3176 does that figure represent?

A. That figure is taken from our expense accounting records which tell us how much freight and cartage expense was chargeable to the heavy and soft paste white lead department of the branch for the year 1941, the shipments to customers.

Q. Now, you say "our records." Whose records are those?

A. The branch records.

Q. And in what form are those records kept?

A. Well, they are bound. They are pencilled records bound in book form.

Q. And they show total freight and cartage paid by the Atlantic Branch in connection with sales of white lead in oil for the year 1941; is that correct?

A. Yes, sir.

Q. Now, going back to Respondent's Exhibit 170-B for identification again, at the bottom of the second column entitled "in pounds," is a figure. Is that figure the total pounds of white lead in oil sold by the Atlantic Branch in 1941 for Florida and Georgia?

A. Yes, sir.

Q. Then under the heading in the forth column "gross weight," is a figure. What does that represent?

A. That represents the net—the total net weight just
referred to increased by six per cent. In other words,
3177 106 per cent of the figure in the second column which
we estimate to be the weight of the material shipped
to Georgia and Florida in 1941.

Q. In other words, the figure, the total of the gross weight, represents 106 per cent of the weight of the material actually sold which in your opinion was a correct estimation of the shipping weight of that material; is that correct?

A. I would say it is the best estimation of the actual material billed in Georgia and Florida.

Q. Upon what factors did you base that estimate or what factors did you consider in arriving at your estimate of the shipping weight as being 106 per cent of the net weight of material sold?

A. Well, the company sells this material in various sized packages which, of course, represent the tare weight.

Q. What do you mean by that?

A. That is the weight of the package in which the material is sold.

Trial Examiner Norwood: That is exclusive of the container?

The Witness: In the case of white lead in oil, they usually ship the container in the package. They don't in other words, box it in the sizes that we ship to Georgia and Florida.

Trial Examiner Norwood: Doesn't that six per
3178 cent take care of the weight of the container?

The Witness: Yes, sir. I said package, but it is really a container.

By Mr. DuBose:

Q. Under the sixth column, the heading "revised calculation, amount" and at the bottom of that column there is a figure. Will you tell us what that total figure represents?

A. The figure referred to represents the total amount of freight and cartage expense calculated on the actual weights shipped on the basis of the lcl rates. I would like to correct that. Based upon the rate applying to the particular points of destination.

Q. What rate?

A. The lcl rate.

Q. So that this total under the column headed "revised calculation, amount" represents the total of the freight and cartage for shipments of white lead in oil in 1941 calculated by multiplying the actual weight shipped town by town as increased by six per cent to approximate shipping weight, and as multiplied by the particular lcl rate applicable to that particular town, and represents, rather, the total of all the shipments to these particular towns calculated in that fashion; is that correct?

A. It is correct, with the exception that we also include the local cartage cost to the carrier from the point of 3179 shipment.

Q. Where is that shown?

A. That is shown up here at the top of the column.

Q. What is that average cartage?

A. That average cartage cost is .0885 cents per hundred-weight.

Q. Was that in each case added to the lcl rate?

A. It was.

Q. Does this figure include cartage under the lcl?

A. It does not.

Q. It does not?

A. No.

Q. So that taking Daytona as an example, the pounds sold to Daytona as increased by six per cent and multiplied by the lcl rate and then there was added a figure showing cartage per hundredweight; is that correct?

A. That's right.

Q. Now, opposite this total figure that appears at the end of the column "revised calculation, amount" and to the left are the letters "A.V.G." and a figure, both of which are encircled in pencil. Will you tell us what those letters and that figure mean?

A. Well, after performing the calculation illustrated for Daytona for all points of destination and adding up the total freight and cartage expense, that amount divided 3180 by the net weight of the total shipments to Florida and Georgia gave us an average cost which is indicated in the circle.

Q. And the letters "A.V.G." mean average?

A. An arithmetical average.

Q. And average for how many pounds?

A. Per hundredweight.

Q. Now, which figure was divided into the total appearing at the bottom of the column "revised calculation, amount"? The figure showing the net weight of the material shipped or the figure showing the gross weight? That is, the net figure as increased by six per cent?

A. The figure showing the net weight of the shipment was used as the divisor, sir.

Q. Now, the figure which shows the total of the freight and cartage as calculated on the lcl rate and which appears at the bottom of the column entitled "revised calculation, amount" also appears, does it not, on Respondent's Exhibit 170-A for identification, opposite the words "plus ⅜ths" and under the second column entitled "total freight and cartage"; is that correct?

A. Yes, sir.

Q. And the figure on Respondent's Exhibit 170-A for identification opposite the words "plus ⅜ths," under the heading "average freight per hundredweight," are the
same as the figures encircled preceded by the letters
3181 "AVG" which appear on the left of the total under
the column "revised calculation, amount" on Respondent's Exhibit 170-B for identification; is that correct?

A. Yes, sir.

Q. Now, will you tell us how the figures on Respondent's Exhibit 170-A for identification, under the general heading "heavy and soft paste white lead" opposite the word "par" were arrived at?

A. They were arrived at by subtracting from the total sales shown on our sales accounting records the net weight of the shipments to the plus ⅜ths zone, the difference representing par shipments.

Q. Did you subtract the net weight or the gross weight of the shipments to the differential territory?

A. We subtracted the gross weight of the shipments to the plus ⅜ths zone from the total net weight—from the net weight of the total shipments.

Q. And the result of that was the figure appearing opposite the word "par" under the heading "total pounds sold"?

A. That's correct.

Q. Now, will you tell us how the figures appearing on Respondent's Exhibit 170-A for identification, opposite the word "par" and under the heading "total freight and cartage" were determined?

A. From the total freight and cartage expense of
3182 our white lead in oil department for the year 1941
expense records, we deducted the calculated amount of freight and cartage for the shipments to Georgia and Florida listed on Respondents' Exhibit 170-B. The difference applying to our par zone.

Q. Now, will you tell us how the figure on Respondent's Exhibit 170-A for identification, opposite the word "par" under the heading "average freight per hundredweight" was determined?

A. Well, having determined the amount of freight and cartage applicable to the par zone; that figure was divided by the total pounds sold in the par zone, giving us an arithmetical average cost of freight and cartage in the par zone.

Q. And that is an average freight and cartage cost per hundredweight?

A. Per hundredweight, yes.

Q. Mr. Baum, I call your attention to Respondent's Exhibit 170-B for identification, the next to the last column headed "freight gross weight calculated on carload rates," and to the figure at the bottom of that column, and ask you what that figure represents (showing to witness)?

A. That figure—you refer to the amount?

Q. Yes, to the amount.

A. The amount at the bottom of that column represents the cost of delivering white lead in oil to Georgia and Florida in the year 1941 to the respective points of
3183 destination, each of which was calculated on a carload rate basis.

Q. And that is the total figure for freight and cartage for all of these shipments based upon carload rates; is that correct?

A. That's correct.

Q. To the left of that total figure and in a pencil circle are the letters "AVG" and a figure. Will you tell us what those letters and that figure represent?

A. That represents the average cost per hundredweight of material delivered to Florida and Georgia, calculated by dividing that figure, by dividing the amount by the net weight of materials shipped.

Q. In other words, that figure just to the left of the total amount figured on the carload rate, is equivalent to the average cost to the Atlantic Branch per hundredweight of these particular shipments to these particular towns in Florida and Georgia and in the particular amounts as figured on the carload basis, the carload rate basis?

A. Yes, sir. That is a calculation only figured on a carload basis. It is not taken from any record.

Q. And those carload rates were obtained, as you stated, from the traffic department of the general office?

A. We are still using the same rates referred to previously, carload rates.

3184 Q. Now, I show you the last column on this exhibit, Respondent's Exhibit 170-B for identification, and I call your attention to certain figures which appear on the last two lines underneath that heading, and ask you what they represent?

A. Well, the next to the last line represents an amount arrived at by calculating the cost of shipments to Georgia only, based on one carload shipment to each point of destination listed for Georgia.

Q. At the minimum carload weight?

A. At the minimum carload weight and carload rates applying thereto.

Q. What is the last figure on that line, under that column? What does that represent?

A. The last figure on that line represents a cost calculated using the same method but covering both the states of Georgia and Florida. In other words, the figure referred to—the amount referred to a moment ago was simply a sub-total for the State of Georgia. In working up these figures we show separate totals for Georgia and Florida, and then a grand total.

Q. And this last figure is the total of the two sub-totals for Georgia and Florida?

A. That's correct.

Q. Now, to the left of that figure, which is the
3185 grand total, under the last column on Respondent's
Exhibit 170-B for identification, are the letters
"AVG" and a figure in a pencilled circle. Will you tell us
what those letters and that figure mean?

A. That is an arithmetical average arrived at by dividing the total amount calculated on the basis just mentioned by the net—by the total net weight of shipments to Georgia and Florida.

Mr. DuBose: I ask that this document be marked Respondent's Exhibit 171.

Trial Examiner Norwood: It will be marked for identification as Respondent's Exhibit 171.

(Whereupon, the document referred to was marked Respondent's Exhibit 171 for identification.)

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed, Mr. DuBose.

By Mr. DuBose:

Q. Mr. Baum, I show you Respondent's Exhibit 171 for identification, and ask you what that represents (showing to witness)?

A. Well, that represents a summary of the figures calculated on Exhibits 170-A and 170-B. It is put in the form of a letter.

3186 Q. That was pursuant to request?

A. That is pursuant to a request that we received for information.

Q. Now, is it correct to say that on Respondent's Exhibit 171 for identification, under the heading "1941 sales of heavy and soft paste white lead," the figures appearing are the totals of the figures appearing on Respondent's Exhibit 170-B—I will withdraw that.

Mr. Baum, you prepared this document which has been marked Respondent's Exhibit 171 for identification?

A. Yes, sir, I did.

Q. And the figures which there appear under the heading "1941 sales of heavy and soft paste white lead" are the figures which appear on Respondent's Exhibit 170-B for identification, as figured on the less than carload rate; is that correct?

A. If you add as presented on Exhibit 170-B and Respondent's Exhibit 170-A, that is correct. In other words, these two schedules together form the basis of that summary.

Q. Now, the total freight and cartage figures and the average freight per hundred pound figures which appear under this heading "1941 sales of heavy and soft paste white lead" are the result of the calculations made on Respondent's Exhibit 170-B for identification, on the less than carload basis; is that correct?

3187 A. Yes, except that you have got to bring this other sheet into consideration.

Q. To arrive at the par—

A. To arrive at the difference which was par. In other words, the Exhibit 170-A shows the total. Now, Exhibit 170-B shows Florida and Georgia. Now, in order to get the par we deducted the figures on Exhibit 170-B, Florida and Georgia, from the totals shown on Exhibit 170-A which gave me the calculation for par.

Q. This first calculation is based on the less than carload rate?

A. Yes. That appears definitely on Exhibit 170-B only. Yes, that is correct.

Q. Now, with regard to the last calculation on Respondent's Exhibit 171 for identification, under the heading "a calculation was also made using the same quantities and destinations but based on carload shipments and rates and the result follows" were similarly based upon the figures which appear on Respondent's Exhibit 170-A and B for identification as figured on the carload rate?

A. That's correct.

Q. Now, the last sentence which is a separate paragraph on Respondent's Exhibit 171 for identification contains the average per hundredweight as figured on Respondent's Exhibit 170-B for identification, in connection with the last column on that page in the fashion that you have explained; is that correct? 3188

A. That's correct.

Q. In other words, that particular calculation which appears in the last sentence and the last paragraph of Respondent's Exhibit 171 for identification is the result of figuring the freight which would have applied had all of these shipments to the particular towns involved in Florida and Georgia been made in carload lots in the minimum carload quantity; is that correct?

A. Not quite. I would say it would represent the average freight that would have applied had we made one carload shipment to each point of destination in Georgia and Florida, figured at the carload rates.

Q. That is what I meant to imply.

Mr. DuBose: May I be off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed, Mr. DuBose.

Mr. DuBose: May we withdraw this witness temporarily, Mr. Examiner?

Trial Examiner Norwood: He may be withdrawn.

(Witness temporarily excused.)

Trial Examiner Norwood: Proceed.

3189 Mr. DuBose: I call Mr. Leonard Werne.

Trial Examiner Norwood: Mr. Reporter, this is Mr. Leonard Werne, 76 Halsted Street, East Orange, New Jersey.

LEONARD WERNE was thereupon called as a witness on behalf of the company and, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. DuBose.

Q. Will you state your full name?
A. Leonard Werne.
Q. What is your address?
A. No. 76 Halsted Street, East Orange, New Jersey.
Q. Mr. Werne, by whom are you employed?
A. By the National Lead Company, general office.
Q. At 111 Broadway?
A. At 111 Broadway, New York.
Q. In what capacity?
A. At the present as assistant traffic manager.
Q. How long have you occupied that position?
A. Since February 1941.
Q. And prior to that time, what was your position with the National Lead Company?
A. I was employed on January 2, 1923 as rate clerk, which position I held and continued to hold in addition
3190 to duties as chief clerk, until April of 1926, at which
time I was named assistant to the traffic manager at St. Louis, Missouri. On January 5, 1931, I was transferred to San Francisco, California, as assistant traffic manager, which position I held until coming to New York in 1941 as assistant traffic manager.
Q. Now, Mr. Werne, during the course of your entire employment, then, you have been concerned with rates and traffic rates as they apply to products shipped by the National Lead Company?
A. That's correct.
Q. And you have had occasion to check official tariffs, commodity rates, carload and less than carload rates from various points as they might apply to a particular product or products of the National Lead Company?
A. That is correct.
Q. You do not remember offhand all of the traffic rates which might be applicable to white lead in oil for the year 1941, do you?
A. You mean throughout the country?
Q. Throughout the country.

A. No, sir.

Q. Would you know without refreshing your recollection what the lcl or carload rate for white lead in oil might be from Brooklyn, or New York, to any particular
3191 town or city in Florida and Georgia?

A. No, sir.

Q. Have you any records with you which would refresh your recollection as to the rates applicable for shipments of white lead in oil in 1941 from Brooklyn or New York to various towns in Florida and Georgia?

A. The question is, do I have that available?

Q. Yes.

A. I do.

Q. Will you produce such records?

A. Yes, sir (handing papers to counsel).

Q. Will you tell us, Mr. Werne, and in each case give the official tariff or whatever the official rate classification might be, what the rate for a white lead in oil shipment from either Brooklyn or New York in 1941 would be to Daytona, Florida at the less than carload rate?

A. Can I ask to have that question re-read.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Will you tell us, Mr. Werne, and in each case give the official tariff or whatever the official rate classification might be, what the rate for a white lead in oil shipment from either Brooklyn or New York in 1941 would be to Daytona, Florida, at the less than carload rate?")

3192 Trial Examiner Norwood: What is that document you are refreshing your memory from?

The Witness: These are in effect the freight rates with the complete tariff authority for each rate which I could not retain in my mind due to the fact that there are thousands of them.

Trial Examiner Norwood: Did you make that from the official rate books and so on?

The Witness: I did, sir. I made part of it and all of it was done under my supervision.

Trial Examiner Norwood: Does it specify which rate books it is taken from so that it can be verified?

The Witness: Yes, sir, it certainly does.

Trial Examiner Norwood: Proceed.

The Witness: The rate from New York to Daytona, Florida, on shipments of white lead in oil of 100 pound lots was 89 cents for 100 pounds from the New York dock of the steamship line to store door delivery at destination.

By Mr. DuBose:

Q. Is that for the year 1941?

A. That is for the year 1941. Now, in qualifying the
authority for that rate, I might say that it is known as a
combination rate which was made over Jacksonville, Flor-
ida. It is a combination of two rate factors made over
Jacksonville, Florida, and the tariff authority for the
3193 combined rate was Atlantic Seaboard Freight Tariff
45 Series and the St. John's River Line Tariff 11-A
Series.

Trial Examiner Norwood: We will recess at this time until 2 o'clock.

(Whereupon, at 12:30 o'clock p. m., a luncheon recess was taken.)

3194 Afternoon Session.

2:00 p. m.

Trial Examiner Norwood: Come to order. Will you resume the stand, Mr. Werne.

LEONARD WERNE resumed the stand and testified further as follows:

Direct Examination (Continued).

Trial Examiner Norwood: Proceed.

Mr. DuBose: Your Honor, shall we excuse the witness until the matter of the motion made last week in Washington is taken up?

Trial Examiner Norwood: I don't think it makes any difference. There is nothing that he should not hear.

Mr. Wright: Your Honor, since Mr. Hinds is here at this time I would like to renew the motion I made earlier on page 2686 of the transcript and strike certain portions of the testimony of the witness Sprague for the same grounds as were covered fully in the memorandum brief that I filed in support of the motion for striking the testimony of the witness Burrus, on the ground that it was improperly admitted and is incompetent, hearsay and opinion testimony based on facts and records which were not available for the purposes of cross-examination and which were not within the personal knowledge of the witness.

Trial Examiner Norwood: I have noted here that
3195 your previous motion was directed to page 2551 line 16, 18 and 19.

Mr. Wright: That's correct, sir, and also beginning with the words "but facing" on line 5 of page 2710.

Trial Examiner Norwood: I have got that beginning with the words "but facing" through line 19 and 2721 line 31 through page 2725 through line 4. Page 2729 line 2 through 2730 through line 9.

Mr. Wright: That is correct, sir.

Trial Examiner Norwood: May I look at the transcript on that?

Mr. Wright: Yes, sir.

Mr. Hinds: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed, Mr. Hinds.

Mr. Hinds: Generally as to the charge that these statements by a chief executive of a business division are hearsay, it seems to me that the objection stretches the hearsay rule far beyond any tolerable limits even if this were a court of law where the rules of evidence are very strictly observed and are fortiori in this administrative tribunal where there are more practical standards for admit-
3196 ting testimony.

To illustrate, the Commission without objection was permitted to ask and get the answers from a large number of businessmen as to who their competitors were. Had I objected that that is hearsay, I think I should have been left out of the hearing room and I should have deserved to be let out of the hearing room.

Yet there is even a sounder basis for saying that such testimony is hearsay, than to make that objection to these things that are the subject of this motion. The head of a business necessarily gives hearsay testimony by that strict definition when he states who his competitors are.

The only legal evidence by the strictest theory would be the evidence of some person who was present at the customer's office and saw a man come in whom he could identify as a salesman for the customer. Usually, the chief executive would not have had that experience because salesmen's customers don't come in while their competitors are there. I mean competitors' salesmen don't come in while their competitors are there, so that at the least, it would be secondhand testimony, hearsay, through the salesman, but actually would be thirdhand because even the salesman wouldn't be able to give legal evidence by this strict theory of my adversary.

3197 Actually what this executive says when he answers a question, "Who are your competitors?" he is saying what his salesman said his customers told him. That is the only knowledge he could possibly have. He comes in there and he gives that testimony based partly upon what he has heard second or thirdhand at the least or what he has gotten from some record which itself would be incompetent as legal evidence.

Now I say that that stretches the hearsay rule, stretches it too far. I say that a chief executive can say—we certainly wouldn't object and didn't object—who his competitors are. He can also say which of his articles is most popular.

The head of a shipping line can say, "We lost two ships last year through submarines." Would my opponent jump up and say, that is hearsay. Were you there? Did you see those ships sunk? How do you know that they weren't captured, or how do you know they are not still sailing the high seas?"

Now I think you will find that what I have said applies to every one of these objections insofar as it is hearsay. This man came in here and was paid to know the facts of this business the same as a railroad man knows that he has a spur line out of Altoona although he has never been to Altoona. So much for hearsay.

3198 I don't think that the standard that my friend seeks to use against us would leave very much of his testimony in the record. Now as to the objection that you can't compare two magnitudes or two quantities unless you can give at least an approximation of each by itself, that I think is demonstrably unsound.

The issue here is not how much the added elements of cost—there are seven of them, by the way, in these oxides as I recall them offhand. There is the added railroad freight or trucking in smaller lots. There is the warehousing where it is in smaller lots, the added cost of soliciting, that is sales, the fact that technical services are required by the small people which the big people don't require because they have their own technical experts.

Then there is the added clerical work, invoicing and so on, the existence of which I think courts take judicial notice of. There is the added expense of investigating doubtful fellows as to their credit even if they pay their bills, and the expense of getting after them and collecting from them.

Then there are credit losses. Now the question is not how much each of those is or how much they are in the aggregate related to a pound of a product but the question is, is that aggregate as much as or greater than ½¢ per pound?

3199 Now I say you do not have to be able to give even an approximation, much less an arithmetically demonstrated precision figure of each of two quantities in order to say that one is greater than the other. After a tornado, a pole is down-sticking out of a well. The witness sees it and he is asked "Was the pole longer than the depth of the well?" and he unhesitatingly says, "yes."

Yet he didn't get near the place and he couldn't for the life of him tell you how long the pole was or how deep the well was, but he knows that the pole was longer than the depth of the well.

An experienced fisherman who has fished a certain lake for many years and he has gotten paid to take people around testifies that there are more fish at one end of the lake than there are at the other. He couldn't possibly tell you how many fish there are at either end.

A seaman in an admiralty case says that ship "A" was further from him at the time he observed the situation than ship "B" but he can't give you an estimate as to how far either one was from him. But he knows that "A" was further away from him than "B."

Mankind for centuries knew that the sun was larger and further away than the moon. They seem to be about the same size but yet it wasn't until the time of Galileo that they knew even the approximate size of either one of
3200 those heavenly orbs or how far away they were from the earth.

Now an experienced man comes in and says, "I can't possibly give you the figure which represents the aggregate of all these added expenses. I can give you a rough guess on freight but the freight is about 25¢ per 100 more in the less than car load lots."

By the way, the evidence on that is here. The lawyers could dig it out if the clients could possibly afford to pay the lawyers for that work. The lawyers could dig it out but it would be a very elaborate piece of arithmetical analysis because we have all the freight rates and we could probably figure out for you what on the average the Glidden Company from its plant in Hammond which is the same freight rate I understand as from Chicago had to pay for less than car load lots as against car load lots.

Mr. Sprague and Mr. Burrus said that it was somewhere around 25 per cent which itself would be half of the entire aggregate. Now the evidence is there to be dug out. Our books do not distribute freight rates although that is an arithmetically ascertainable figure.

Our books do not distribute freight rates according to whether they are between car load lots and greater than car load lots. As a matter of fact, they don't even distribute them as between zones or as between different kinds of oxides. We can't get that from the books.

3201 It seems to be assumed here that we are ducking and coming in here with secondary evidence when we might get it from our books. It isn't in our books. The only way we could get that out, and I admit that it would be physically possible, would be to make an exceedingly expensive analysis, a survey.

You would have to take each separate invoice and relate it to whether it was less than car load or more than car load for a particular product. That is impracticable.

The Witness Sprague said that it was imprudent. Meaning that the advantage of it in this law suit wouldn't justify the expense. Now that happens to be one of the arithmetically ascertainable things.

I say it is impracticable even though I admit it is arithmetically ascertainable. Now warehousing: That is probably less arithmetically ascertainable than freight although that is conceivably the possible thing to do, but we don't keep our books that way.

Now when you get into these other things I say we are prepared to devote the entire assets of the Glidden Company to this study then we couldn't give it to you as an arithmetical attitude. You still have to have a businessman's judgment.

The expense of following up credit investigation—how
can we possibly relate that to dollars and cents except
3202 to say in our judgment that the expense is very
much larger in the case of the little fellow than in the
case of the big fellow? In fact, one of these witnesses, I forget which, said there was no expense of credit investigation or collection with respect to the big man. Now possibly credit losses, one of the seven, possibly that could be dug out by an elaborate analysis, but it can't be taken from the books.

The books don't show that. You would have to dig it out from the original records and make an elaborate study. Now when you come to such things as selling expense, a salesman—it takes just as much time for a salesman to call on a little fellow to get a 500 pound lot as it does to call on a big fellow and maybe the big man may give his order over the telephone for a car load.

We can't reduce that to dollars and cents and we couldn't possibly do it. Now it seems to me, and I think I am on sound ground that has been walked over before, when I say that the standards of evidence in this tribunal are practical standards.

I say that the standard that my friend invokes, the standard of evidence for justifying these quantity differentials—incidentally, this would apply to zone differentials—the standard that he invokes would make it impossible for any concern within the jurisdiction of the Federal Trade Com-
mission, and I suppose the same would apply to the
3203 courts if it is a rule, that same standard would allow
differentials only to two groups of business people in
this country. One, people whose volume of business in a certain commodity is big enough so they could afford as a practical business matter to go to the expense of either keeping their books on that basis or making elaborte surveys and hiring lawyers to come in and present it through witnesses or people whom the Federal Trade Commission didn't happen to get after, because everybody else, and that would include us, will be excluded from having any quantity differentials by this standard of evidence because our business people knowing all about this and having the advice of counsel as to what is involved in our friend's hoped for

standard of evidence on justifying differentials have decided that it simply is impracticable.

They cannot do it. It would cost more to meet my friend's standard than all the net profits of engaging in this particular business that would be lost by giving up differentials.

Now you heard one of our witnesses say that only about 10 per cent of our business is to the car load lot people. We would like to have them more but we can't get much more, and it wouldn't be safe for us to take much more, both of them said, if we could get it.

So the result of applying this standard against us,
3204 and it will be all the more so with regard to still
smaller concerns, will be that we will have to give up either the car load business or the less than car load business. It happens that it would be the car load business, I suppose, although that is the cream of our business.

That is where the profit lies despite the differential as both witnesses said. We would have to give that up or go out of business because we can't give up the less profitable small business because that represents, I think Mr. Burrus said, 90 per cent or a very large per cent.

Now that is the practical situation here. Now another objection has been made or implied that the testimony doesn't go far enough to say that there are added—that it costs more to investigate credits of the little men, it costs more to ship freight in less than car loads and so on. That is objected to on the ground that it doesn't go far enough.

My friend says it has no probative force. I don't think this court has the right—assuming that it were the only objection in the case—I don't think this court is justified in assuming that there will be no further evidence. If that is the only objection, it doesn't go far enough.

How do we know that one of the other respondents perhaps won't come in and give some evidence that will
have some evidentiary application to the Glidden
3205 situation? The commodities are approximately the
same. In fact, if they weren't approximately the same we couldn't be brought in here under the same complaint.

So that seems to me it can be disposed of by saying that we have no right to anticipate what further evidence will be in the record to supply that which may be lacking. I don't admit there is anything lacking. I think this goes entirely to the weight and not to the admissibility of the evidence.

I say that when an experienced businessman, even though his experience may been have derived as everybody's experience is from what other people have told him, his subordinates, and even though it may be in part derived from records over the years that he has consulted, when he gives you a business fact such as, who my competitors are, I say that he is giving evidence. He is giving legally admissible evidence and the only question there is for the finder of the facts, the trier of the facts, to say what weight shall be given to it.

Now in detail the first one is at page 2551 line 7 to 19. Mr. Sprague was asked what his experience was in selling the smaller battery manufacturers as compared to the larger ones. He says, "The smaller battery manufacturer was saleable at higher prices but the cost of selling him was sufficiently high to end up in an offset."

3206 We can't give you any better evidence than that. It is impracticable. We can't have stop watches on everyone of our salesmen. We have no records. We have to depend on the business judgment for what it is worth of the man who can size up on the witness stand and say whether or not he was a competent man and knew what he was talking about.

Now on page 2710 lines 5 to 19: He was asked whether he had made studies. I assumed his answers would be no. "Have you made analysis of the varying operating costs so that you can allocate them as to sales, as to the various classes of customers in the battery business?"

I assumed he was going to say no and to my surprise he said: "But facing the problem in its broad aspects I recall one time that we made quite an analysis of the losses we had sustained in our sales to the storage battery industry. This was some years ago but I recall it because I used it as an argument on one of my visits to our headquarters office to see if I could persuade the company to adopt a more liberal credit attitude," and so forth. I won't read all of it.

I maintain that that is relevant as showing in part the basis of his business experience which enables him to answer a broad general question with respect to his business which I still maintain is analogous to the question

3207 who are your competitors; who is your principal competitor?

Trial Examiner Norwood: You are referring now to page 2710 beginning with line 5?

Mr. Hinds: Yes, sir. Now page 2721 line 21 to page 2725 line 4, there are about four pages there that he wants to have stricken out. Some of it is colloquy but it starts with this question: "With respect to the expensive collections and investigations, from your experience was there any difference between such expense in connection with sales to small battery manufacturers as contrasted with the large ones?"

"A. Oh, yes, there was no expense of that sort in connection with the large ones."

So you have zero on one side.

Then I said: "What about the small ones?"

There were a lot of objections and your Honor finally allowed him to say, and he wants it stricken out: "Those expenses with regard to the small manufacturers were high."

That is only part of the story. He is later going to say that taking all of these seven things together they amounted to more than one-half per cent per pound in his judgment, in his experience. I say you have a better analogy—a perfect analogy to my case that the man said that the 3208 pole that he saw sticking out of the well was longer although for the life of him he couldn't tell you how long either one was.

Then he goes on: "Now as to the expense of any of the warehousing, was there any difference between expense there and sales to the large manufacturers and sales to the small manufacturers?"

And he said: "Yes, there was a difference." He said there was a difference. He couldn't tell how much the difference is, but when you ship less that a car load in order to be able to give service in a distant city you have to put the stuff in a warehouse. You have the warehousing charge and the in and out charge.

We can't tell you that in detail. It is impossible. Even if it were possible, the expense would be prohibitive. We would have to suffer a cease and desist order preventing us from having any of that business or having a differential if we had to meet such a standard of proof, and it would be even more so if the principle were established applying to still smaller units of business.

The Glidden Company is a sizeable company but this particular lead oxide business is not a sizeable business at all. It is a very small business. The whole net profits would be wiped out in legal and accountancy and other expenses and travelling if we had to meet this standard of proof.

3209 Then he goes on. The same thing is true with a cash discount. He tells you how much the cash discount is, 1 per cent, which isn't available to the larger car load buyers. That requires a pencil and paper and counsel can figure that out in his brief.

We are not threatening you with that and I don't think we intend to do it, but we are going to rely on principles that I am invoking here. It is the question of the weight of the testimony of a businessman.

As your Honor pointed out, this man's testimony is peculiarly evidentiary because he has to risk his business life on it. A trapeze performer whose life depends on whether that rope is strong enough, and he tells you that it is strong enough, that is better than a college professor telling you how strong the rope is. His very life depends on his judgment and the business life of these witnesses depends on the judgment that they have to reach in these matters.

Then we go to clerical items.

Trial Examiner Norwood: What page is that?

Mr. Hinds: The bottom of page 2724, invoices, clerical items.

Trial Examiner Norwood: That is not in the motion, page 2724.

Mr. Hinds: Yes, it is sir. It goes all the way from
3210 2721 to 2725.

Trial Examiner Norwood: Yes, I beg your pardon.

Mr. Hinds: I suppose that if we should give up manufacturing lead oxides and go into the cost accountancy business, we might be able to give you a figure on postage and typewriters, salaries, and so on, and typing ten invoices instead of one invoice, ten letters instead of one. But it would take all the net profits of the business to attempt any such thing.

Page 2729: That is the $64 question which sums up everything before, asking him in his judgment whether he made any study into what is the effect.

He says, "We gave considerable attention to the cost of doing business as among customers of various sizes and customers of various kinds and customers at various locations out of which we realized as I stated in my earlier testimony that we had to do certain things with respect to the type of trade we sold in order to make a profit.

"But there was no accounting study prepared to reduce it to a specific figure."

Then I said, I asked: "In your judgment would it or would it not have been practicable to classify your accounts so as to allocate the time spent by various executives, salesmen and others to these different classes of customers?"

"A. It would not have been practicable nor would
3211 it have been prudent. We were obliged to operate
with a minimum of affixed expense of that sort."

So in conclusion, I want to point out that the standard which my friend seeks to invoke of attempting to justify these quantity differentials and other differentials is an impractical standard which cannot in business life be met except possibly by concerns who have such a very large volume of business that the expense would only be a fraction of their net profits.

But even as to them, many of these expenses couldn't, if they had unlimited funds and were willing to go into bankruptcy, be reduced to any arithmetical standard.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Hinds: I would like to have your Honor give such weight as my argument may have in its application to the portions of the Burrus testimony which has already been stricken out.

Trial Examiner Norwood: I will consent to that.

Mr. Wright: I would like to say in answer to that, that of course the arguments that counsel made were equally applicable to the testimony of the witness Burrus be-
cause the testimony of both of those gentlemen was in
3212 exactly the same category and was apparently based
on exactly the same sort of information. We are dealing now with a statutory provision under Section 2-B of the Clayton Act which is a special statutory provision.

Your Honor can take judicial notice of the fact that in the numerous other cases which have been decided by the Commission where the question of cost justification of differences has come up that the rulings have without exception been the requiring of a detailed justification on the basis of some records rather than opinion or expert testimony by one of the executives which precluded any cross examination by Commission's counsel of the factors which went into his testimony.

Now with regard to the special burden that is raised under Section 2-C there, Congress apparently drew that portion of the statute with exactly in mind the situation that we have here with regard to the burden of proof and the burden of going forward with a cost justification after discriminations have been shown in the record.

As I stated in memorandum brief, Congressman Gilchrist in the Congressional Record, Page 8241, May 28, 1926, stated regarding this section: "Along this same line something has been said in argument about the burden of proof and it has been asserted that the bill is not constitutional because those who have specific and certain
3213 knowledge of their own good faith are permitted to prove it.

"We should distinguish between the duty of going forward with the evidence and the burden of proof. It is often wise to place the burden of producing evidence on the party best able to sustain it. It is very often held that where the party who does not have the original burden of proof but who possesses positive and complete knowledge concerning the existence of facts which his opponent has called a negative or where for any reason the evidence to prove a fact chiefly, if not entirely within the control of the party who does not have the general or original burden of proof, then the burden of going forward with and producing this evidence rests upon him who does have the facts primarily and chiefly within his possession."

And he went on to state that that section of the bill provides that after it has been shown that discrimination in price has really occurred, then the duty of going forward with the evidence to show justification and good faith rests upon the party who has almost exclusive possession of such evidence of good faith and who has such easy means of proving it.

Now Mr. Hinds has indicated that a number of these factors about which we are talking about can be ascertained. As to some of them he expressed doubt. But certainly the record doesn't show sufficient evidence to
3214 prove that doubt as to whether those things can be ascertained and they have been ascertained many

times in similar cases before the Commission involving exactly this proposition.

My adversary also states and admits that this is proof in his opinion that the differences in cost more than justify the differentials in price. In other words, he considers it to be competent evidence for that purpose.

Now a number of statements were made there which I don't believe were supported by the record, statements of fact. It was stated that it takes as much time by counsel in his argument for a salesman to get a 500 pound order as a car load order. Well now, that is something that can be ascertained by competent testimony.

It has not been shown in this record to be the fact. He contends that we cannot go back of and that we rely upon the opinion testimony of a competent executive.

Mr. Hinds: Oh, no. You can rebut it but you can't exclude it.

Mr. Wright: Who obviously knew what he was talking about. Well, I submit to your Honor that when on cross-examination it appeared that the witness had no figures or studies upon which to base his testimony, we couldn't tell whether he knew what he was talking about or not. I don't believe that Mr. Hinds is seriously going to urge the various analogies that he raised there of the testi-
3215 mony by the various witnesses as to who their com-
petitors were as having any bearing on this testimony.

Certainly it was not established as to that testimony that these gentlemen weren't basing that upon evidentiary facts that were within their own knowledge and certainly the analogy of the pole sticking out of the well has little to do with this question.

Now as to the specific parts of the record to which this motion relates, it is perfectly plain that the testimony goes beyond the mere opinion testimony by an executive that their costs were higher in dealing with certain classes of customers. It goes right to the heart of the matter, and as to the effect that they actually suffered a loss in dealing with these certain classes of customers, that the differentials and discriminations, the higher prices to the smaller purchasers did not recompense them for the higher expenses and we are asked to accept that in spite of the statement that 90 per cent of the business is with less than car load purchasers.

Now the original question and answer which appears on page 2551 and which was the grandfather, as it were, of all this other testimony which was brought out on cross appearing on lines 17, 18 and 19 of page 2551, the smaller battery manufacturer was saleable at higher prices but the cost of selling him was sufficient to end up in an offset.

3216 Mr. Hinds: That means an offset of the difference in price. It doesn't mean any loss. I don't think we claim that we sell at a loss as a whole.

Mr. Wright: There is intended by that opinion testimony to justify the discrimination which has been shown. It is the adding of the sum of all these factors and stating that the difference in price didn't justify the higher costs or did justify the higher costs.

I will withdraw that.

Trial Examiner Norwood: Is there anything in the cross examination? In making those other rulings, the cross examination was controlling. Is there anything in the cross examination with respect to these statements?

Mr. Wright: Yes, sir.

Trial Examiner Norwood: Begin there with page 2551, lines 17, 18 and 19. He is stating there that they were an exact offset.

Mr. Wright: He didn't say an exact offset, but he said it was an offset. Now from the ordinary meaning of that word you must conclude that that meant that they received less net profit in selling to the smaller purchasers than they did from the large purchasers.

Mr. Hinds: That was so testified to expressly, I believe.

Trial Examiner Norwood: What have you in the 3217 cross examination that would throw light on that?

Mr. Wright: The only basis for that answer could have been some examination of the cost factors and some study of those various factors there from which he could reach such a conclusion. That would be a conclusion of fact rather than an opinion that was drawn out of the air.

On page 2709 of the record, on cross examination, the witness was asked. "Have you made any analysis of the various operating costs so that you can allocate them as to the sales to the various classes of customers in the battery business?"

Trial Examiner Norwood: 2709?

Mr. Wright: Yes. The answer that appears on page 2710 beginning at line 3 and running down to line 19 indicates vaguely that they had gone into that in some fashion or another, but it wasn't brought out whether that was a written report or what kind of a study that was.

But when going on to line 22 of page 2710, "You do not have any study then from which you could state with any authority on the basis—"

Mr. Hinds: (Interposing.) By the way, that word should be "accuracy." The stenographer got it as "authority." You will concede that was "accuracy," won't you, Mr. Wright? I think you said accuracy and not authority.

Trial Examiner Norwood: The record may be cor-
3218 rected later.

Mr. Hinds: I think that should be accuracy and ~~not authority~~.

Mr. Wright: The question then related to whether he had any statistics or studies of costs from which he could state with either accuracy or authority that he suffered a loss of sales to small battery manufacturers.

"A. I can state with authority of the observation and belief of a manager of the business who is watching the expenses and the costs which he sustains in doing business, but I couldn't show it from any accounting study in cents per pound."

In other words, it is plain in the record. Coming back now to pages 2729 and 2730, the witness stated at the beginning of line 23 of page 2729 the fact that they gave considerable attention to the cost of doing business among various customers but he wound his answer up by stating that this was something that they had observed in our business by a common observation.

It was there for all to see. But there was no accounting study prepared to reduce it to a specific figure. So, as appears there, he had nothing but an opinion and judgment upon which to base his answers, and the net effect of his testimony when you get down to the last questions that were asked him there is that it is an opinion and hear-
3219 say statement upon which he couldn't be cross ex-
amined that these costs were so high that they more than offset the price differences.

Trial Examiner Norwood: In the cross examination on the other questions it was definitely shown that the statements of Witness Burrus, the cross examination showed there that his statements were based on hearsay reports and counsel on the other side was deprived of any inquiry into these bases and what they were and their reliability and so forth.

So far as I have gone here, I think that these statements here are on a different basis because he has not stated that they were based on reports made to him. He stated that they are based on his own opinion, on his own experience in his business. And the fact that they are not accurate goes to its weight.

Now the Commission is not justified in taking the position that this burden is to be sustained in any particular way. They have the burden of showing that the differences in the costs are no more than the differences in the price.

Mr. Wright: The Commission has that, sir.

Trial Examiner Norwood: No, not the Commission but the Respondents. I said "they" meaning the Respondents. But the Commission cannot say that you must put this in by tabulations made by an accountant or some other
witness.
3220 The Commission cannot say that that has to be of
a certain weight. It has to be of a sufficient weight to rebut the prima facie case. But it doesn't preclude the Respondent in putting in evidence that is vague even provided that it has any reasonable degree of substance in it. We can't say that you have to do this through tabulations and through expert accountants. The difference between exact figures and figures which the man is willing to swear to as based on his experience may be a difference of weight. But I haven't had the record to use and I will reserve this ruling on this until tomorrow morning to read the record.

Mr. Wright: I would like to make one further observation, your Honor, in view of what you have stated here. On the question of whether this evidence is competent as proof of what is offered now, it is admittedly opinion testimony and it is admittedly broad and general statements.

Mr. Hinds: We don't admit that. In fact, I was going to interrupt and say that we do not regard it as opinion testimony but as judgment and experience and facts and not opinion.

Trial Examiner Norwood: Let him finish.

Mr. Wright: It is obviously opinion testimony by this
witness. It is a broad and general statement by which
3221 we can't go into on cross examination. We can't get
the details because it is just something he knows from

his experience. He can't detail the things in his experience that lead him to that conclusion.

As your Honor stated in your paper in the George Washington Law Review that type of statement is not proper evidence to prove matters which can be the subject of exact proof, not necessarily by an accounting survey but by the ordinary means of proving such matters relating to costs or profits or prices or sales and the like.

Mr. Hinds: Let me say just one more thing.

Trial Examiner Norwood: Very well.

Mr. Hinds: If it be opinion, the witness has shown the expertness which entitles him to give opinion evidence. We do not regard it, however, as opinion evidence even though the witness was qualified to give an opinion. We regard it as fact testimony, facts testified to by a man who has had experience and who states his judgment.

I would like to give one further analogy. A surgeon is testifying and he is qualified to give an opinion if such be needed but he doesn't give an opinion. He said that the tumor on the man's left lung was larger than the tumor on his right lung. There was no means, practical means, of finding out how large either of them was.

He couldn't give you even an approximation in
3222 ounces of either one of the tumors but not as a matter
of opinion but as a matter of fact in the judgment of a skilled observer he says that one was larger than the other.

I maintain that that cannot be questioned on the ground that it is hearsay or opinion or doesn't go far enough, it goes to the weight.

Trial Examiner Norwood: I know, but even opinion evidence must be based upon facts that are on some evidence contained in the record, you see. And these statements of this witness were not given as being based on any of that.

Mr. Hinds: You mean the witness Sprague or the witness Burrus?

Trial Examiner Norwood: It is the witness Burrus, isn't it?

Mr. Hinds: I have been arguing about Sprague. You have already stricken out some of the Burrus testimony.

Trial Examiner Norwood: The witness Sprague.

Mr. Wood: If your Honor please, I would like to make a very short statement just to preserve my position on the record and I shall not be long.

Trial Examiner Norwood: Proceed.

Mr. Wood: I disagree entirely with Mr. Wright in respect to saying that this question arises in regard to Section 2-B of the Clayton Act. I think it arises in regard to Section 2-A. The Seventh Circuit Court of Appeals
3223 in the Morton Salt case brought out the difference
between a differential and a discrimination which Attorney General Tom Clark had previously suggested in a publication and which was covered in our brief on our motion to dismiss.

The Seventh Circuit Court of Appeals held that a differential was not necessarily a discrimination, that there was a qualitative difference between the two.

Trial Examiner Norwood: That decision just simply placed the burden back on the complainant. Under that decision there would not be any burden. That is, according to that decision the burden would not be on the respondent any more.

Mr. Welch: The burden would rise in a different stage of the proceeding.

Mr. Wood: At any rate, here is my only point and I will cut it rather short. That is, that evidence should not now be excluded on the presumption that that decision will be reversed.

Mr. Hinds: Whatever the burden may be, we have undertaken the burden and whether we had to undertake it or not, we did undertake it. My argument is that we sustained it to such an extent as the triers of the fact will eventually give weight to it that it cannot be excluded as inadmissible on any known ground.

Mr. Wood: I didn't make myself fully clear. I
3224 have one more point and that is that I conceive testi-
mony of the type given by Mr. Sprague and which I intend to attempt to introduce to be directed to the state of mind of the corporate executives as to whether or not these differentials publicly announced, available to all, are in fact and intended as discriminations in the sense of the statute.

Mr. Hinds: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: With reference to the Morton Salt case I agree that that was under Section 2-A and that related to when the Commission has sustained the burden under 2-A of proving discrimination. I am assuming now that this testimony if offered to rebut the presumption as provided under Section 2-B of a discrimination under 2-A, so that it is not controlled by the Morton case.

Now it may very well be that counsel may contend that we haven't proved any discriminations under the rule in the Morton Salt case. Well if that is the case, of course this has nothing to do with it.

Mr. Hinds: I think I am not at odds with my opponent on that feature. As I say, whether we had the burden or not, we undertook to sustain it. I think we have done it to such a degree as the testimony has weight.

3225 Trial Examiner Norwood: I want to thank counsel for their assistance in this matter and after I read the record, I will give my decision tomorrow.

We will now take a short recess.

(A short recess was taken.)

3226 Trial Examiner Norwood: Proceed.

By Mr. DuBose:

Q. Mr. Werne, you were in the hearing room this morning during the testimony given by Mr. Baum, the previous witness, were you not?

A. Yes, sir.

Q. And you have seen his worksheet, marked Respondent's Exhibit 170-B for identification, have you not?

A. I have.

Q. And you heard him testify that to the net weight of the material, that is, the white lead in oil sold, there was added six per cent to approximate shipping weight, did you not?

A. That's correct.

Q. Are you, in your position with the National Lead Company familiar with shipping weights as compared with net weights of white lead in oil shipments?

A. I am.

Q. And were you familiar with such weights for shipments during the year 1941?

A. I was.

Q. Will you state what factors must be taken into consideration at arriving at an estimate of shipping weight as compared with net weight of white lead in oil?

A. Of course, the main factor is your tare weight 3227 for the package.

Q. When you say "tare weight," what do you mean?

A. I mean the actual weight of the empty container.

Q. Now what is the average weight of the container as compared with the net weight of the white lead in oil itself?

A. Well, referring to Mr. Baum's testimony this morning, with reference to using a six per cent increase in the net weight in order to sustain a gross weight of 106 pounds, that, of course, referred only to a one 100 pound white lead in oil package. Now, that weight of six pounds tare for the container is arrived at through an agreement which is reached between the various weighing and inspection bureaus of the United States, which includes the Western Weighing and Inspection Bureau, the Industrial Weighing and Inspection Bureau and the Southern Weighing and Inspection Bureau.

Q. Are you testifying now as of your own knowledge there?

A. As of my absolute knowledge, yes. The packages in 1941 were manufactured at Granite City, Illinois. Approximately every six months test weights were taken of these packages by the three bureaus simultaneously and they arrived at the average weight for each empty container or group of empty containers. Now, as I recall, for 100 pound container, the tare weight arrived at was 6 pounds for the package and the cover. However, that varies a little as
3228 you go into a group of containers. The actual weight of one 100 pound empty white lead container may be 5.76. It may be 5.74. So that when you took a group, we would say, of 4 empty 100 pound white lead containers at an average of 5.75, your gross weight of those 4 containers would only reflect—I hope I am correct on this—23 pounds, instead of 24 pounds, when you take the per container average of 6 pounds which they arrived at for one container.

Q. Now, you spoke of certain tests being made. For what purpose were those tests made?

A. The tests were made for the purpose of obtaining the average weight to be applied for the empty steel containers or packages.

Q. Was that for the purposes of figuring freight?

A. That is correct.

Q. Now, when a shipment of white lead in oil is made, does the shipper actually weigh the material?

A. I would hesitate to answer that question, but I might, if I may, say this: When the tests of these containers are made by the respective bureaus and the weights per container or containers are agreed upon, a chart is set up from one which shows the gross weight which includes the hundred pounds of white lead in oil plus the gross weight, plus the tare weight ascertained for that package for one
container, for two containers, for three containers
3229 and all the way down to a hundred containers. So
that all that is necessary for a shipping clerk in any of our branches to do, is to look at the chart to determine what the gross weight for a set number of packages is.

Q. Now, you say, then, that 6 per cent represents the agreed percentage increase of net weight to obtain shipping weight for one, 100 pound package?

A. That's right.

Q. For groups of more than one 100 pound package does the percentage go up or down?

A. Generally speaking, they go down, because your average weight per package is not exactly 6 pounds.

Q. So that do you know what a hundred 100 pound bags or packages of white lead in oil would carry as shipping weight? What percentage increase of shipping weight?

A. I don't know without reviewing the file.

Q. It would be less than 6 per cent?

A. It would be less than 6 per cent, yes, may be only 10 pound, but it would be less.

Q. Now, going back to the line of testimony which we started prior to the noon recess, will you tell us what the less than carload rate for white lead in oil was in 1941 from either Brooklyn or New York, and specify the point of origin to Gainesville, Florida?

A. One dollar for 100 pounds, which applied from
3230 the dock of the steamship line in New York to store
door delivery at destination.

Mr. Wright: Your Honor, I object to the witness reading into the record statements off a paper which is not in evidence. I move that that answer be stricken.

Mr. DuBose: Well, that, your Honor, will recall that prior to the noon recess, questions were asked this witness as to whether or not he could give independently these rates and he said no, he would have to refresh himself from this record which not only contains the actual rate, but gives the official source of each rate.

Mr. Wright: That is the point of my objection, that he is reading off a paper the rates and the sources and the routes. The paper is not in evidence.

Mr. DuBose: I will be perfectly willing to offer the sheet in evidence, except that without his explanation I think it means nothing and I think it is simpler to have it read into the record.

Trial Examiner Norwood: If the witness can use the paper to look at and then testify from his own recollection which has been refreshed, he can put the paper away and give us those figures.

Mr. DuBose: Perhaps that would take longer than if he just identified them.

Trial Examiner Norwood: If he made those and
3231 knows they are true and will give their sources, and
it does not sufficiently refresh his recollection, it makes the paper itself admissible, isn't that right?

Mr. Wright: May I have that read, please?

Trial Examiner Norwood: Read my statement.

(The reporter read the statement as follows:

Trial Examiner Norwood: If he made those and knows they are true and will give their sources, and it does not sufficiently refresh his recollection, it makes the paper itself admissible, isn't that right?")

Mr. Wright: That is correct.

Trial Examiner Norwood: Provided that it is relevant and properly substantiated.

Mr. DuBose: I believe there is an objection pending.

Mr. Wright: Yes, sir. The objection to that answer was a motion to strike really that answer, on the ground that he was reading from a long tabulation.

Trial Examiner Norwood: Can you answer that, then, from your own recollection, after being refreshed?

The Witness: You mean, your Honor, after looking at that form?

Trial Examiner Norwood: Could you repeat that figure without looking at the paper?

The Witness: That particular figure, yes, sir.

3232 Trial Examiner Norwood: What is it?

The Witness: One dollar.

Mr. DuBose: Can we go off the record?

Trial Examiner Norwood: He has a right to testify to that if he can do it of his own recollection, so I will deny the motion. Go ahead.

Mr. DuBose: Can we go off the record here?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. DuBose: Your Honor, I should like to ask that these four sheets be marked Respondent's Exhibit 172-A to D inclusive for identification.

Trial Examiner Norwood: They will be so marked Respondent's Exhibit 172-A to D inclusive for identification.

(Whereupon, the documents referred to were marked Respondent's Exhibits 172-A, 172-B, 172-C, and 172-D, for identification.)

Trial Examiner Norwood: Proceed.

By Mr. DuBose:

Q. Mr Werne, I show you Respondent's Exhibit 172-A to D inclusive, for identification, and I ask you whether these were prepared by you or under your supervision?

A. They were prepared partially by me, but all under my supervision.

3233 Q. What do they purport to reflect?

A. The less than carload rates, also quantity rates and carload rates and the minimum weights together with other information necessary in order to give full explanation of the rate.

Q. Do they also show in each case the tariff authority for the particular rate cited?

A. They do.

Q. And have you checked the towns and the rates listed on Respondent's Exhibit 172-A to D inclusive for identification with the towns and the applicable lcl and carload rates listed on Respondent's Exhibit 170-B for identification?

A. I have.

Q. And are they the same?

A. They are not entirely the same.

Q. Will you point out to us what the differences are particularly?

A. Particularly there are shown on Respondent's Exhibit 172-A to D inclusive, certain quantity rates for lcl quantities which do not appear on Respondent's Exhibit 170-B.

Q. Now, the rates listed on Respondent's Exhibit 170-B for identification are what, lcl rates?

A. They are the lcl rates for a 100 pound shipment.

Q. For a 100 pound shipment?

A. That's right.

3234 Q. And in some cases, if I understand you correctly, they are for lcl shipments within the lcl shipment rates? There are also some quantity rates as distinguished from carload rates?

A. That's correct.

Q. Are all of those quantity rates, indicated on this Exhibit, Respondent's Exhibit 172-A to D inclusive for identification?

A. They are.

Q. Do you know whether or not the lcl rates listed as applicable to the various towns on Respondent's Exhibit 170-B for identification are the correct lcl rates for 100 pound shipments to those particular towns for 1941? Will you check them again and when you come to any difference, will you note it for the record?

A. Is it your desire that I point out as I come across any discrepancy in the two at this time?

Q. Yes.

A. Then I refer you to the lcl rate quoted on Respondent's Exhibit 170-B to Miami, Florida. The rate shown on such exhibit being 68 cents. That rate should be 69½ cents, the difference being that there is a wharfage rate of 1½ cents at Miami, which has not been included in the rate shown on Respondent's Exhibit 170-B.

Q. That extra cent and a half, then, is the wharfage?

3235 A. That's correct.

Mr. Wright: May I be off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. DuBose:

Q. Is that rate for lcl to Miami the only discrepancy you find between Respondent's Exhibit 170-B for identification and Respondent's Exhibit 172-A to D inclusive for identification, as far as the less than carload rates are concerned?

A. That is correct.

Q. Now, will you check the carload rates to the particular towns as listed on Respondent's Exhibit 170-B for identification with those listed on Respondent's Exhibit 172-A to D inclusive for identification and note on the record any discrepancies between the two exhibits?

A. The carload freight rates shown on Respondent's Exhibit 170-B, are identical with those shown on Respondent's Exhibit 172-A to D inclusive.

Q. That is the carload rates?

A. Yes, sir.

Q. Now I believe you stated, Mr. Werne, that Respondent's Exhibit 172-A to D inclusive for identification was prepared partly by you, but all under your supervision.

3236 A. That's correct.

Q. Can you state whether or not the rates there reflected are based upon actual tariff authorities in effect in 1941 as applied to white lead in oil?

A. They are.

Mr. DuBose: I offer in evidence at this time Respondent's Exhibit 172-A to D inclusive for identification.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: I have no objection to the receipt of these papers in evidence. Of course, I don't mean by that to concede any right I might have that the rates might have been different with regard to any other testimony.

Mr. DuBose: Certainly.

Trial Examiner Norwood: It will be received in evidence as Respondent's Exhibit 172-A to D inclusive.

(Whereupon, RESPONDENT'S EXHIBIT 172-A, 172-B, 172-C, 172-D, heretofore marked for identification, was received in evidence.)

Mr. DuBose: I have no further questions of this witness.

Trial Examiner Norwood: Do you have any questions, Mr. Wright?

Mr. Wright: Your Honor, I am in no position to cross examine this witness. He has testified exclusively about papers which I have not yet seen and have had no 3237 copies furnished me. His testimony was unintelligible to me since I couldn't follow the exhibits about which he was testifying.

Mr. DuBose: We will be glad to make Mr. Werne available for cross examination at a future date to be determined by agreement between counsel.

Trial Examiner Norwood: With the exception of a few questions there which you asked which were based on his own knowledge, all this has gone to the identification of these papers, and the papers are here. If you are not going to examine him any further on the papers, there is no reason for further cross examination except on the identification. On the basic data, and so on, that is. But if counsel agree that he may be recalled, I will agree that he may have a deferred cross examination with this witness if you want to.

Mr. Wright: I don't see how I am in a position to proceed right at this moment with cross examining him, because all of his testimony has been with regard to these tabulations which, as I say, I have not seen yet.

Trial Examiner Norwood: We can proceed and have this witness come back tomorrow and counsel have these papers to study from now until then.

Mr. Wright: I wouldn't have a copy of the transcript. It was meaningless to me when he testified about the thing. I will be glad to do my best to cross examine him tomorrow.

Trial Examiner Norwood: He can go over by 3238 agreement of counsel.

Mr. DuBose: Will the witness be excused until 10 o'clock tomorrow morning?

Trial Examiner Norwood: Do you want to examine him tomorrow or do you want to put it off?

Mr. Wright: It may be possible for me to examine him tomorrow after I have had some opportunity of looking at this transcript today, because without comparing the exhibit and the transcript, I can't make much of his testimony.

Trial Examiner Norwood: Will you get a copy of the transcript tonight?

Mr. Wright: I will request a copy of the reporter.

Trial Examiner Norwood: You are temporarily excused until tomorrow morning at 10 o'clock, Mr. Werne.

(Witness temporarily excused.)

Trial Examiner Norwood: Can we finish with Mr. Baum now?

Mr. Du Bose: Yes, your Honor.

Trial Examiner Norwood: Mr. Baum, will you resume the stand please?

EDWARD L. BAUM, having been previously sworn, resumed the stand and testified further as follows:

Mr. DuBose: Your Honor, at this time we would like
to offer in evidence these documents which have been
3239 identified by Mr. Baum, namely, Respondent's Exhibit
170-A and B for identification, and Respondent's Ex-
hibit 171. May we state for the record that we would be per-
fectly willing to agree that counsel for the Commission have
custody of these documents overnight to study them for
the purpose of possible cross examination of this witness
tomorrow, if he wishes to do so.

Trial Examiner Norwood: I will reserve the ruling until tomorrow morning so that counsel may have time to study those and to make his objections, if any.

Mr. DuBose: That will be perfectly suitable to us.

Mr. Wright: I will make every effort to prepare myself on these tomorrow morning and I will do my best in that regard. I am not prepared to make any voir dire examination on the identification nor to make any objections to the documents at this time.

Mr. DuBose: I take it, then, that the witness is excused until 10 o'clock tomorrow morning?

Trial Examiner Norwood: Yes. You are excused, Mr. Baum.

(Witness temporarily excused.)

Mr. DuBose: That is all we have today, your Honor.
We have in addition to these witnesses being
3240 recalled, some further testimony to offer tomorrow
and at this time I would like to suggest a recess until
10 o'clock a.m. tomorrow morning.

Trial Examiner Norwood: We will recess until 10 o'clock tomorrow morning, June 19, 1947.

(Whereupon, at 4 o'clock, p.m., the hearing was adjourned until 10 o'clock, a.m. June 19, 1947.)

3241

Trial Room,
Bar Association Building,
36 West 44th Street,
New York, N. Y.,
June 19, 1947.

Met, pursuant to adjournment, at 10:00 a. m., EDST.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

Edmund P. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Robert H. Ecker, Esq., and

Henry E. Gardiner, Esq., (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James D. Ewing, Esq., and

E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

J. T. Welch, Esq., (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington, D. C.), appearing for Sherwin Williams Company.

3242 Roger Hinds, Esq., (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

3243

PROCEEDINGS.

Trial Examiner Norwood: Come to order. Pursuant to adjournment taken on June 18, 1947, the hearing in Docket No. 5253 is now reconvened in the Trial Room of the Bar Association Building, 36 West 44th Street, New York, N. Y., at 10:00 o'clock a. m., daylight saving time, June 19, 1947.

Let the record show the following appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

Edmund P. Wood, Esq., appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Robert H. Ecker, Esq., and Henry E. Gardiner, Esq., appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James D. Ewing, Esq., and E. Z. Du Bose, Esq., appearing for the National Lead Company.

J. T. Welch, Esq., appearing for Sherwin Williams Company.

Roger Hinds, Esq., appearing for The Glidden Company.

Proceed.

Mr. DuBose: Mr. Werne, will you resume the stand, please.

LEONARD WERNE resumed the stand and, having
3244 previously been sworn, testified further as follows:

Further Direct Examination.

Mr. DuBose: Your Honor, I have a few more questions on direct examination.

Trial Examiner Norwood: Proceed.

By Mr. DuBose:

Q. Mr. Werne, I show you documents which were identified yesterday as Respondents' Exhibit 172-A to D inclusive, and I ask you whether you wish to make any corrections and, if so, what corrections ~~on~~ these documents (showing to witness)?

A. On Exhibit 172-C opposite the designation West Palm Beach, Florida, under tariff authority, the number 11 is shown which indicates and refers to the tariff reference shown on page 1 of Exhibit 172-A. This tariff reference No. 11 should be changed to No. 12.

Q. That is, the tariff reference on Respondents' Exhibit 172-C opposite the town West Palm Beach, Florida, under the heading "tariff authority" should read No. 12 instead of No. 11; is that correct?

A. That is correct.

Q. Continue, please.

A. Then referring to Exhibit 172-A at the lower left-hand corner is shown No. 11 with reference Clyde Mallory

A-289 series. The prefix to this tariff authority should read 12 instead of 11.

3245 Mr. DuBose: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. DuBose: I have no further questions.

Trial Examiner Norwood: Cross-examination.

Cross-Examination by Mr. Wright.

Q. Mr. Werne, wouldn't you say that these freight rates that you figured in that exhibit and which were carried over into Respondents' Exhibit 170-A and B for identification to those Florida and Georgia points were complicated rates to figure?

A. They were.

Q. And—

Mr. DuBose: (Interposing.) Excuse me, isn't that in evidence too, Respondents' Exhibit 170-A and B?

Mr. Wright: It was my understanding that it is not.

By Mr. Wright:

Q. It is true generally that freight rates are complicated things, particularly when there is a joint route or a joint rate so that capable traffic experts can come out differently on them?

A. All freight rates are complicated.

3246 Q. So that in the last analysis very often the only way you can determine what a rate is, is by litigation over the shipping charges with the carrier?

A. Well, all freight rates must be published. Of course there is the question of trying to determine the lowest freight rate in effect. We believe in our own traffic department, because we have fewer commodities and general commodities in the classification tariffs, that we do know our freight rates pretty well.

Q. Now going to Respondents' Exhibit 170-B for identification, there appear to be three methods of calculating the averages on the rates which appear on this exhibit; is that not correct (showing exhibit to witness)? That employed in column 6, that employed in column 7 and that employed in column 8.

A. You are talking now of freight rates?

Q. The method of calculating the average freight rates on those shipments.

A. Well, I can't say that I am qualified to answer how they arrived at those averages.

Q. You didn't figure those averages?

A. No, sir.

Q. Now can you state whether the rates appearing under CL, in column 5 include cartage from the plant to the dock?

A. Do you want me to go down the line and ex-
3247 plain each one?

Q. No, I just wondered if you could make an answer which would state categorically about the whole column.

A. Under the car load rates shown in the column referred to, there are seven designations under these car load rates which do not include lighterage free pick-up at our plant. On these seven points it is necessary that we deliver to the New York piers.

Q. Are those seven points indicated in any fashion on the exhibit?

A. I see on this exhibit that only five have been indicated. There are two additional points.

Q. How are they indicated on that exhibit?

A. With the "x" opposite the minimum weight.

Q. What about the other two points?

A. The other two points are on this exhibit but are not so indicated.

Q. Which are those other two points?

A. The other two points are West Palm Beach, Florida and Key West, Florida.

Q. But those have cartage added into those figures; is that right, on those seven points on this exhibit?

A. I can't answer that.

Mr. Wright: I have no further examination of this witness.

3248 Trial Examiner Norwood: Is there anything further?

Mr. DuBose: No, Mr. Examiner.

Trial Examiner Norwood: You are excused.

(Witness excused.)

Trial Examiner Norwood: Proceed.

Mr. Wright: May I be off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. DuBose: Mr. Baum, will you resume the stand, please?

EDWARD L. BAUM was recalled and, having previously been sworn, testified further as follows:

Cross-Examination by Mr. Wright.

Q. Mr. Baum, as I understand it now, Respondents' Exhibit 170-B, the work sheet, on the plus 3/8 zone on white lead in oil, Exhibit 170-A combines totals from Exhibit 170-B plus other figures from the par zone?

A. That's correct.

Q. And they are all tied together in this summary in Exhibit 171?

A. That represented a transmittal I made up from those two work sheets.

3249 Q. Now will you tell us just from what records you got the information appearing on Exhibit 171 under par pounds sold total cartage and freight for white lead in oil?

A. Yes, sir. That is the last figure I arrived at. I started in by referring to the 1941 record of sales.

Q. What is that record of sales?

A. That is a standard summary of the sales of heavy and soft paste white lead in this particular instance.

Q. For the whole branch?

A. For the Atlantic branch for the year 1941.

Q. It is a total figure for the year then?

A. Yes, and it is arrived at by accumulating the daily pounds of those commodities shipped by the Atlantic branch and checked through the means of a tabulation of the invoices for those commodities against the plant shipping record or warehouse shipping record, if you will.

And the monthly totals by accumulation are checked against stock reports. So that in that way by an accumulation of twelve monthly figures we arrived through what I call my sales accounting record to a total of—well, the total stated on this report.

Q. Does that include all shipments by the Atlantic branch to whatever customer?

A. That includes all shipments billed.

Q. Would that include shipments to the Du Pont Company?

3250 A. No.

Q. Under a contract?

A. It would not include the shipments to the Du Pont Company because that is an inter-branch billing proposition.

Q. Would that include all other shipments then?

A. No. It would only include those shipments to customers, to the classification we call customers' accounts receivable.

Q. Who are in that classification of customers' accounts receivable?

A. Well, there are several thousand customers, but it does exclude all what we call company branches and subsidiaries with the possible exception of one or two foreign or partly owned companies. I don't know those by name.

Q. Would that figure then, the total figure, include shipments to foreign branches and foreign customers?

A. As I say, I don't know them by heart. That is, through memory. But it does possibly include one or two foreign shipments.

Q. What do you mean one or two foreign shipments? Shipments to one or two foreign accounts?

A. I beg your pardon; yes, sir. Shipments to one or two foreign accounts which are associated with the company. I couldn't testify as to what extent because I have no knowledge of it.

Q. Would that also include sales of white lead in 3251 oil to any paint companies?

A. If they are in the category I mentioned before, yes. In fact, many of them no doubt are paint companies. I don't know how many.

That could be obtained from the records, but I don't know that.

Q. That wouldn't necessarily then include just the material packed in cases of 100 pounds or less, would it?

A. Oh, yes, because we sell all of the tonnage on this report—that covers material packed only in kegs of 100 pounds or less.

Q. It wouldn't include then anything in larger containers?

A. No, sir; definitely not.

Q. Sent to larger consumers?

A. We don't put that in this category.

Q. Now where did you get your figure that appears here on your total freight and cartage under that category?

A. Another standard record in the expense accounting system is the expense account which is broken down into several classes of expense and one of which is what we call freight and cartage.

Q. Is that allocated only to white lead in oil?

A. This particular figure on schedule Exhibit 170-A, the total has been taken directly from the expense accounting record of the Atlantic branch for the year
3252 1941 for the amount charged to white lead, heavy and
soft expense and for the freight and cartage white lead.

Q. Do you know how that is allocated in the case of mixed billings?

A. I know that we allocate all freight directly. By that I mean on the basis of the weight involved times the rate giving an extension and we accumulate those figures from carriers' invoices.

However, inasmuch as local cartage does enter into these calculations on schedule Exhibit 170-B, we assess or allocate local cartage on the basis of average cost per hundredweight shipped.

Q. In other words, it is an average figure then?

A. That is an average figure which is applied to all our products including white lead in oil.

Q. Then as far as local cartage is concerned, you don't have the actual figure?

A. No, sir; that is an average figure.

Q. And this total freight and cartage includes an average figure?

A. That is an average figure as schedule Exhibit 170-B indicates.

Q. I am talking now but not about the material in Exhibit 170-B but the cartage that is figured into the par zone shipments.

A. But as I explained in the first instance in an-
3253 swer to your first question, the average freight shown
for the par zone was arrived at by difference. That is, I took the total of the white lead in oil shipments to customers and the total expense freight and cartage and

from that are deducted the tonnage to Georgia and Florida as well as the calculated amount of freight and cartage applying thereto and by difference I arrived at the quantities sold in the par zone and the freight and cartage applying thereto.

And by an arithmetical calculation arrived at that average freight per hundredweight.

Q. So that the total figure that you started with then was not broken down as between cartage and freight? I am talking now about this—

A. (Interposing.) I didn't quite get that question.

Q. The total that you started with on total cartage and freight—this figure here on Exhibit 170-A—that wasn't broken down in any way?

A. No, sir. That is a total figure as I explained before. It is a total figure applying only to the white lead in oil department though.

Q. Does that include in that total figure any average cartage?

A. It does as I explained before. It is a direct freight charge or outside carriers' charges, but our own company equipment does the local cartage and that is applied 3254 on an average weight per hundredweight based on cartage cost sheets that we maintain in the office.

Q. And you just allocated that cartage based on your cost experience with your own trucking?

A. That's right; yes, sir.

Q. Do you know, Mr. Baum, where the bulk of the shipments represented in this approximate 20,000,000 pounds of white lead in oil sold in the par zone went in the par zone?

A. No, I do not.

Q. You don't know whether it was 95 per cent sold in metropolitan New York or 95 per cent sold some place else?

A. I certainly do not. That information could be obtained, but I don't know it.

Q. You don't know the allocation of it?

A. The records there are just like we got it from Georgia and Florida and we could get it from any state or any city for that matter.

Q. I assume the total freight and cartage figure there also included the foreign freight on those foreign shipments that were in there?

A. Now that brings up a point that I am not sure of for this reason: We formerly carried—rather we formerly maintained the records of the white lead in oil foreign sales as a separate department and, frankly, I am not sure what the date was that we consolidated that
3255 into one total with the domestic, so I cannot answer your question with any degree of accuracy.

I would have to look at the record.

Q. Now the only place then that the Atlantic branch sells outside of par territory is Florida and the eastern half of Georgia, isn't it?

A. To my knowledge, those are the only points to which we sell customers outside of par territory.

Q. Then the Philadelphia branch would no doubt handle all the intervening area there between the southern border of the Atlantic branch and the northern border of eastern Georgia?

A. I wouldn't say that because I don't know.

Q. But you jump over some other branch's territory to get down in there?

A. Yes, we do.

Q. Now on these oxides, what branch handles the car load sales in Florida and eastern Georgia?

A. I don't think I am qualified to say whether it is exclusively—I know that the Atlantic branch ships material down there but I don't know what the territories are.

Mr. Du Bose: May we state, Mr. Wright, that so far as these Respondents' Exhibits 170-A and B for identification and Respondents' Exhibit 171, refer to oxides and we are not offering them for that purpose at all. And
3256 those portions of the exhibit that have reference to oxides may be considered stricken from the sheets since we asked no questions on that.

We are offering it only to show the white lead in oil situation.

By Mr. Wright:

Q. Mr. Baum, isn't this what you did now; didn't you start with two total figures which you knew to be records?

A. Yes, sir.

Q. Total pounds of the branch and total freight?

A. That's correct.

Q. And cartage?

A. Yes.

Q. And then you made hypothetical calculations in this zone on three different freight bases; one, on a straight LCL basis; two, on a car load basis in the quantity shipped at car load rates and three, on a car load basis assuming a single car load to each point in the destination?

Neither one of which conditions necessarily had to apply throughout all those shipments. And then you deducted that from your two factual figures on the book and made these calculations from them?

A. My answer would be yes in the case of the second and third calculations but I just wondered which should qualify—I mean the answer yes as applied to the 3257 LCL, because in looking down the list of destinations here and having checked those rates through the traffic department that are applied, I would say that they—in most instances—yes, in most instances they represent an LCL rate which is not hypothetical.

But in several instances I will admit that they seem to be a total pounds involved which would take a car load rate whereas the calculation is all on an LCL basis.

Q. Many of them could have taken either a car load or a less than car load rate?

A. Yes. Because these, after all, are total figures for the year, and I can't say whether or not, to illustrate, Jacksonville, Florida, 46,897 pounds, might have been one car load and then several LCL shipments.

Q. Statistically speaking now, do you really think that your total figure for par is exactly comparable to your figures for these various points in view of the fact that in your par total figure you have no allocation to show where in the par zone the deliveries were made?

Mr. Du Bose: I object to that question as argumentive.

Trial Examiner Norwood: I think that he may answer. This is cross-examination.

Mr. Du Bose: That is true.

Trial Examiner Norwood: Objection overruled.

3258 The Witness: Well, I can't say between them—I can't say it wouldn't make an infinitesimal difference but as to how much difference when we calculate to four decimal places on an average rate per hundredweight, when you consider the fact that there were 104 tons, a total of 9,826 tons roughly 1 per cent shipped down to the Florida and Georgia zones, that calculation, using the method I did to arrive at the par average would be hardly noticeable.

I think with four decimal points it might make a one or two point, decimal point, difference.

By Mr. Wright:

Q. You don't have any other territory than the par, the ⅜ and the Atlantic branch?

A. No, sir.

Q. No ⅛ and no ¼?

A. For the white lead in oil?

Q. Yes.

A. Not to my knowledge, no. Can I qualify that?

Q. Yes.

A. Of course, I don't presume to know all the—not all, but to know any of the bases of calculation. That is, the differentials that may be used in the department. These figures that I have prepared cover what I understand to be the only zone differentials that apply to the Atlantic branch for the sales of white lead in oil.

Q. Do you have any warehouses for white lead in 3259 oil in the Atlantic branch?

A. I believe we have—in 1941 you are speaking of?

Q. Yes, sir.

A. It seems to me we had six or eight hundred consignment accounts which were equivalent to warehouses. In other words, the goods were lying there on consignment ready to be withdrawn.

Q. I am talking about a warehouse now to which you ship goods for transshipment to customers.

A. Yes, we did have one in Savannah and there might have been one—I am not sure because of the date which is six years ago—there may have been one in Jacksonville.

Q. Wouldn't the existence of those Savannah and Jacksonville warehouses throw out all your hypothetical calculations showing shipments direct from Brooklyn to those points?

A. Well, as I said, before, I admitted that in the second and third cases they were hypothetical but in the first instance where we marked, I believe, LCL, those are totals and they may or may not have been made up of less than car load shipments in some instances.

Of course, obviously most of them are LCL and they must have taken an LCL rate.

Q. Well now, are you sure, for instance, that all of these shipments went directly from Brooklyn to the customer direct without going through either the
3260 Savannah or Jacksonville warehouses?

A. No, I am not sure of that.

Q. In other words, they could have been warehoused in either of those places and been transshipped by truck or something?

A. These are final invoices of sales—final destinations covered by invoices billed to customers.

Q. Now the National Lead Company has a warehouse in Atlanta, doesn't it?

A. I don't know. I am only speaking for the Atlantic branch and they do not have a warehouse in Atlanta.

Q. You don't know of any deliveries from an Atlanta warehouse then into Atlantic branch territory?

A. I don't know of any, no.

Q. You checked all these calculations on here, did you not, Mr. Baum?

A. Yes, sir; I did.

Q. Will you check over the calculation that appears in the top part of the column, column 6, under the heading "freight-gross weights calculated on car load rates?"

A. Now as I understand it, Mr. Wright, you would like me to make—to indicate the weight and the rate—

Q. (Interposing.) No, sir; just check the addition of those figures.

A. Yes, sure.

3261 Trial Examiner Norwood: Off the record.

(Discussion off the recerd.)

Trial Examiner Norwood: On the record.

By Mr. Wright:

Q. Have you checked that, Mr. Baum?

A. It seems to be out one penny in the total. That figure there is out $200.

Q. That figure is out $200?

A. Yes.

Q. That is the figure of $989.79?

A. That should be $789.79. But the total used in calculating the average is out one penny and the average is not changed at all.

Q. But the total figures are out somewhere?

A. It is out one penny in the total, yes.

Mr. Wright: I have no further questions.

Redirect Examination by Mr. DuBose.

Q. Let me get this straight, Mr. Baum. Going back to Respondents' Exhibit 170-B for identification, the line opposite the words "total Florida" under the heading "freight-gross weight calculated on car load rates," should read $789.79 instead of $989.79; is that correct?

A. That's correct.

Q. Now the total at the bottom of that same col-
3262 umn opposite the words "grand total," however, are
correct to one penny; is that right?

A. That's correct.

Q. In other words, in adding total Florida and total Georgia, the figures should be $789.79 plus $657.07; is that correct?

A. Correct to two pennies.

Q. Are you anticipating my question, Mr. Baum.

A. I am sorry.

Q. The total Florida under that heading should be $789.79; is that correct?

A. That's correct.

Q. And the total Georgia under the same heading should be $657.07; is that correct?

A. That's correct.

Q. And the grand total under that same heading should be $1,446.86 instead of $1,446.88 as written; is that correct?

A. That's correct.

Q. So that the grand total which appears on Respondents' Exhibit 170-B for identification under the heading "freight-gross weights calculated on car load rates" is correct to two pennies; is that correct?

A. Yes, sir.

Recross Examination by Mr. Wright.

3263 Q. You heard about Mr. Werne's testimony re-
garding the seven points in Florida at which cartage
was not included in the car load rate used?

A. Yes, sir; I did.

Q. You heard his designation of those seven points?

A. Yes.

Q. Can you tell us whether cartage is figured in those car load rates on the seven points mentioned?

A. Could I tell you whether it is included in there, is that your question?

Q. Yes.

A. It is only included in five of those points, the ones indicated by the "x."

Mr. Wright: I have no further questions.

3264 Mr. DuBose: I reoffer, subject to your ruling of yesterday, Respondent's Exhibit 170-A and B for identification and Respondent's Exhibit 171 for identification, excluding so much of these exhibits as refer to oxides.

Trial Examiner Norwood: What was my ruling of yesterday which counsel referred to?

Mr. Wright: I haven't made any objection to it and I am prepared now to make an objection to the offer.

Trial Examiner Norwood: Proceed.

Mr. Wright: Your Honor, I first want to object on the ground of relevancy. The document is irrelevant because it doesn't relate to individual transactions within a class. It is speaking here now of all shipments in the par zone without regard to where they were shipped and without any breakdown of any sort. It is a total figure with an average which is meaningless.

My second objection is that the document combines actual records with estimates and guesses which make the total conclusion which comes out in Exhibit 170-A and Exhibit 171, a very misleading and erroneous conclusion. In the first place, as it was brought out, they started here with two total figures, the total pounds sold in the whole branch and the total freight in the whole branch. Then they went into the ⅜ths territory and found out how much was shipped into each town. They figured freight
3265 rates to those towns on three different bases and then deducted on the basis of those three different bases from the total figure as if individual shipments were made from Brooklyn to those towns. Then deducting that and deducting the pounds sold there, they were left with the residual sum, being as stated, the pounds sold in par and the total freight and cartage in par.

In the first place, the witness said there were foreign shipments left in that figure which isn't par at all in this foreign freight for all he knows, included in that total on the freight to par. We have no idea of the amount of either one of them but it makes the final calculation a very misleading and an erroneous one based on estimates.

In the second place, he stated that there were at that time two warehouses down here, one in Savannah and one in Jacksonville, and for all he knows a good many of those shipments went to these warehouses in these places and then were reshipped to the customer, so that these calculations, none of them would apply to such shipments.

Mr. DuBose: Are you through, Mr. Wright?

Mr. Wright: I am through.

Trial Examiner Norwood: I want to ask counsel how to settle these issues to show average costs.

Mr. DuBose: I beg your pardon?

Trial Examiner Norwood: How does it go to the settlement of these issues for you to show average costs?
3266 I think we ought to thrash that out right now and
not have any further motions in case the average cost is not going to be determined.

Mr. Du Bose: Your Honor has already admitted various records of this nature.

Trial Examiner Norwood: Yes, I know that.

Mr. Du Bose: Our theory is that the zone method for white lead in oil, as this exhibit relates to, was based upon average freight costs within the particular zones. Whether that be a valid argument is a matter of law. We are trying to show the facts to show that the average cost of shipping in, say, ⅛th, ¼ or ⅜ths territories does not exceed the difference between the average par freight cost and the average freight and shipping costs or cartage in the differential territories, but that there is some relation between the two.

Now, whether or not that be valid, as I say, is a question of law, but we believe we are entitled to show that to justify the zone method, so-called.

Trial Examiner Norwood: You think that would go to both issues?

Mr. Du Bose: It would certainly have relevance to both issues based upon all the evidence. There may be part of count number one of the amended complaint which, if
interpreted one way would say that these particular
3267 methods were unfair methods of competition regard-
less of collusion and, of course, count two alleges that they are discriminatory. So I think that this evidence is relevant as to both counts.

Trial Examiner Norwood: What about the objections made to these particular exhibits?

Mr. DuBose: On the relevancy the argument that I made, I think, holds true. All the rest of Mr. Wright's argument goes to the weight entirely to be given to a document which has been prepared along factual lines. Now, you will notice that there are three different calculations. Mr. Wright says, how do we know that some of these shipments might not have passed through warehouses? Well, assuming that, we made a calculation based upon carload shipments to each one of these points which is the cheapest way you could get them down there, regardless of whether it went through the warehouse or any other place. And, of course, they had to get from the plant to the warehouse first and the National Lead Company had to pay the shipping cost to get them down there before they could be restricted.

Trial Examiner Norwood: In other words, shipping them from the warehouse wouldn't have reduced it in any case, would it?

Mr. Du Bose: It wouldn't have reduced our calculation based on carload rates anyway, and that is why we used the alternative methods:

3268 Trial Examiner Norwood: I am inclined to agree with counsel that the objections go to weight and these can be analyzed and the incorrect features of the exhibits shown, if there are any. I shall give you the benefit of the doubt, that is, with regard to any doubts as to the relevancy on that issue. I think the general proposition would probably be considered in connection with count number one and as to average costs, it might enter some way into our consideration in determining the discrimination issue.

I will overrule the objection and receive the exhibits.

Mr. Du Bose: You are not limiting the reception of this to any particular count?

Trial Examiner Norwood: No. Respondent's Exhibits 170-A and B for identification and Respondent's Exhibit 171 for identification will be received in evidence.

(Whereupon, RESPONDENT'S EXHIBITS 170-A, 170-B, and 171, heretofore marked for identification, were received in evidence.)

Trial Examiner Norwood: Is there anything further of this witness?

Mr. Wright: That is all, your Honor.

Trial Examiner Norwood: You are excused, Mr. Baum.

(Witness excused.)

Mr. Du Bose: May we have a short recess at this
3269 time, your Honor?

Trial Examiner Norwood: We will take a five-minute recess at this time.

(Whereupon, a short recess was taken.)

Trial Examiner Norwood: Come to order. Proceed.

Mr. Wright: Your Honor, I assume that these last two exhibits that were received, 170-A and B, and 171, were received subject to the same restrictions that were placed on other similar material, namely, that unless the basic data were made available to me, that you would entertain a motion to strike.

Trial Examiner Norwood: That is true, we have had that understanding heretofore.

Mr. Ewing: The basic data is at 111 Broadway, and Mr. Baum, I am sure, will be glad to supply it to any Commission representative, except Saturdays.

Trial Examiner Norwood: Call your next witness.

Mr. Ewing: I call Ernest R. Dondorf.

Trial Examiner Norwood: Mr. Reporter, this is Mr. Ernest R. Dondorf, 191-30 114th Road, St. Albans, New York.

ERNEST R. DONDORF, was thereupon called as a witness on behalf of the company and, having been first
3270 duly sworn, testified as follows:

Direct Examination by Mr. Ewing.

Q. What is your full name, please?

A. Ernest R. Dondorf.

Q. What is your address?

A. No. 191-30 114th Road, St. Albans, New York.

Q. Mr. Dondorf, are you employed by the National Lead Company?

A. I am.

Q. In what capacity are you presently employed?

A. As manager of metal purchases.

Q. Will you tell us what your duties are in that regard?

A. Purchases of all virgin material, pig lead, antimony, silver, all virgin materials.

Q. How long have you occupied that position?

A. September 1, 1949.

Q. When were you first employed by the National Lead Company?

A. October 1, 1906.

Q. In what capacity were you then employed?

A. Office boy.

Q. How long did you continue to work as office boy, approximately?

A. Oh, until 1908 or 1909, I would say.

Q. Have you been continuously employed by the 3271 National Lead Company since 1906?

A. No, I wish to correct that. I was originally employed by the United Lead Company in 1906. That was a subsidiary of the National Lead Company.

Q. And have you been continuously employed by the National Lead Company, or one of its subsidiaries?

A. That's right.

Q. What was your next position after you ceased being office boy?

A. Bookkeeper.

Q. How long did you occupy that position, approximately?

A. Oh, until 1913, I would say.

Q. What was your next employment after that?

A. As manager of the export department.

Q. And how long were you manager of that department?

A. Until 1924.

Q. What was your next employment?

A. As assistant secretary of the United Lead Company.

Q. And how long did you occupy that position?

A. Until November, 1928.

Q. And did you go from that position to your present position?

A. No. In 1928 I went into the metal department.

Q. In what capacity?

A. As assistant to Mr. Hall, who was then the manager of the metal department.

3272 Q. And how long did you continue as his assistant?

A. Until 1939.

Q. Are you familiar with the purchases of pig lead by the National Lead Company, say, during the years 1936 to 1941, inclusive?

A. No. I was in the department but I had nothing to do with the purchase of pig lead.

Q. Well, I am asking you now if you are familiar with the purchases during that period?

A. More or less, yes.

Mr. Ewing: I ask that this sheet be marked Respondent's Exhibit 173 for identification.

Trial Examiner Norwood: It will be marked Respondent's Exhibit 173 for identification.

(Whereupon, the document referred to was marked Respondent's Exhibit No. 173 for identification.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Mr. Dondorf, I show you this paper that has been marked Respondent's Exhibit 173 for identification, and ask you whether that was prepared by you or under your direction?

A. Yes, it was.

Q. This document is headed "pig lead purchases (tons)" and purports to relate to the years 1936 to 1941 inclusive. I ask you to state from what source or
3273 sources the information contained in the document was obtained by you.

A. This information was obtained by a yearly statement that we make up in this department every year from permanent records.

Q. Does that statement purport to show the purchases made by the National Lead Company of pig lead during those years?

A. Yes, sir.

Q. Now, will you tell us a little more about what you mean when you said that it was made up from annual statements?

A. Statements like you have in your hand there. We make those up every year.

Mr. Ewing: I ask that these six documents be marked Respondent's Exhibit 174-A to F inclusive for identification.

Trial Examiner Norwood: They will be so marked for identification as Respondent's Exhibit 174-A to F inclusive.

(Whereupon, the documents referred to were marked Respondent's Exhibit 174-A, 174-B, 174-C, 174-D, 174-E, and 174-F for identification.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Will you tell us whether these documents marked Respondent's Exhibits 174-A to F inclusive for identification are records prepared in your department (showing to witness)?

A. Yes, they were.

Q. Are they prepared in the regular course of
3274 business in your department?

A. Yes.

Q. To what use are they put?

A. We prepare these records for the executives primarily to show what went on in the department during that year.

Q. With respect to the purchase of pig lead?

A. That's right.

Q. Now, do the figures shown on the document which has been marked Respondent's Exhibit 173 for identification correctly reflect the figures contained in the records which have been marked Respondent's Exhibit 174 A to F inclusive for identification, as well as the six principal companies from which National purchased pig lead in the years 1936 to 1941?

A. They do.

Mr. Ewing: I offer Respondent's Exhibit 173 for identification in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: I have a basic objection to this, on the ground of relevancy and furthermore that the basic data have not been supplied.

Mr. Ewing: As far as the ground of relevancy is concerned, I would say that in view of the allegations of the amended complaint with respect to our alleged control
of pig lead prices, it is quite relevant to show from
3275 whom and in what quantities we have been buying
pig lead. As far as the basic data is concerned, this is prepared from these other exhibits which I didn't offer and do not intend to unless Mr. Wright would wish me to, simply for the purpose of cluttering the records. They are the records of the department and if there are any other records of the department that Mr. Wright would like to see or have the Commission see, they are welcome to make any examination they would like at any time.

Trial Examiner Norwood: He may have those reports on which this tabulation is based?

Mr. Ewing: Certainly.

Trial Examiner Norwood: That is 174-A to F for identification?

Mr. Ewing: That's right.

Trial Examiner Norwood: What is this recapitulation on the bottom here, Anaconda five thousand and Smelting two thousand?

Mr. Ewing: That is the reference to others in the last year.

Trial Examiner Norwood: Objection overruled. The exhibit will be received as marked. The laboring data will be delivered to Commission's counsel.

(Whereupon, RESPONDENT'S EXHIBIT NO. 173, heretofore marked for identification, was received in evidence.)

3276 Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Now, Mr. Dondorf, you have testified that since 1939 you have been manager of the metal purchasing?

A. Yes.

Q. When in 1939 approximately did you become manager?

A. September 1st,

Q. Since that date what, if anything, have you yourself had to do with the purchase by the National Lead Company of pig lead?

A. I purchased all the pig lead for the entire company since that time.

Q. Is it within your province to select the source from which you purchase pig lead for the National Lead?

A. Yes.

Q. Will you tell us briefly what considerations enter into the selection by you of any particular company from which you purchase pig lead?

A. Well, it all depends on the grade of pig lead that I wish to purchase, whether chemical corroding or common.

Q. Well, will you explain that answer a little more?

A. Well, if I want to buy a lot of corroding lead, I would first go to the American Smelting and Refining Company and if I couldn't get my supplies from them, then I would go to the other producers.

3277 Q. Will you give us some of the other producers of corroding pig lead?

A. St. Jo Lead Company, United States Smelting Refining and Mining Company, Bunker Hill and Sullivan Mining Company. Those are the principal producers of corroding lead.

Q. From whom do you purchase common pig lead?

A. From the American Smelting and Refining Company, Anaconda Sales Company, Bunker Hill and Sullivan, American Metal Company.

Q. Are the purchases of pig lead as shown on Respondent's Exhibit 173 inclusive of both common and corroding pig lead?

A. That's right.

Q. Is it correct to say that they include all pig lead purchased by National during those years?

A. Correct.

Q. Does anyone else in your department buy pig lead under your supervision?

A. Yes. I have an assistant there.

Q. He works under your supervision?

A. That's right.

Q. Now, as far as you know, have you ever, since your employment in your present capacity, or has your assistant or anyone else in the National Lead Company ever suggested at any time to the American Smelting and Refining
3278 Company or any representative of it that it fix or establish a price for pig lead suggested by you or anyone else?

A. No, sir, not at any time.

Q. Would your answer be the same if I put the same question with respect to the other companies from which you purchase pig lead?

A. That's correct.

Mr. Ewing: I have no further questions.

Cross-Examination by Mr. Wright.

Q. Mr. Dondorf, on the basic data from which you compiled this exhibit, there are two categories of lead set out separately, are there not? Refined and common.

A. That's right.

Q. What is the refined lead that is in that basic data?

A. We classify refined lead as corroding lead.

Q. They are synonymous?

A. That's right.

Q. Is there a difference in the proportion of corroding lead over that period purchased from A. S. & R. as against the others compared to the proportion of common lead purchased from A. S. & R. as compared with the others?

A. It all depends, I have got to break that down. I can't tell you from that statement how much is corroding and how much is common.

3279 Q. Will you refresh your recollection as to the portion of corroding lead purchased from A. S. & R. during those years from those documents marked Respondent's Exhibit 174-A to F for identification?

A. Yes. In 1936 from A. S. & R. we purchased 30,465 tons of corroding lead.

Q. Out of a total purchase of how much?

A. Out of a total purchase—

Q. Of corroding lead now.

A. Out of a total purchase of 53,568.

Q. Now, how does that proportion that obtained in that year obtain in the other years there, without giving us the exact figures.

A. I would say about the same percentage each year.

Q. In the period of those years, 1936 to 1941, did the National Lead Company have any contractual relationship with the American Smelting and Refining Company covering its purchases of pig lead, either refined or common?

A. Yes.

Q. Roughly what was that contract?

A. It was always made on a monthly basis either by a flat price or an average for the month.

Q. How were your purchases distributed? Were they principally on the average basis?

A. No. I would say they were more on the flat
3280 price rather than on the average.

Q. Would that be a spot price?

A. That is what I mean by flat price, spot price.

Q. Do those contracts call for you to take any special percentage of your requirements of such lead? I am speaking now of the period from 1936 to 1941.

A. The contracts are made up either in corroding or common grades, you see. They are specified that way.

Q. Do they specify the amount that you shall purchase over a period of time?

A. That's right.

Mr. Wright: I have no further cross-examination.

Redirect Examination by Mr. Ewing.

Q. Over what period of time, Mr. Dondorf?

A. By months.

Q. Month to month?

A. Just month to month, that is all, yes.

Q. And you are free to terminate that arrangement at any time?

A. That's right.

Q. Did the contract or contracts in effect since you have been manager of your department call for the purchase by National Lead of any particular percentage of the requirements?

3281 A. No.

Mr. Ewing: That is all.

Recross Examination by Mr. Wright.

Q. Is it not true, Mr. Dondorf, now, that you are willing to get lead from any source that you can get it?

A. That is true.

Q. For over how long a period has that situation obtained?

A. That was all during the war period, I would say.

Q. How about in 1941?

A. It started in about 1941.

Q. Was there a plentiful supply in 1940?

A. I wouldn't say plentiful but we could get what we needed in 1940.

Q. It still didn't resemble the period in the early thirties though, did it, as far as the availability of supply?

A. That's right.

Q. You say in your experience in the company that you don't recall any requirements contract or any percentage of requirements contract with the American Smelting and Refining Company?

A. I don't remember, no, sir.

Q. But you haven't been in the metals department—how long a period of time is your service in the metals department?

3282 A. 1928.

Mr. Wright: No further examination.

Mr. Ewing: No further questions.

Trial Examiner Norwood: You are excused.

(Witness excused.)

3283 Trial Examiner Norwood: Proceed.

Mr. Ewing: I call Henry O. Bates.

Trial Examiner Norwood: Mr. Reporter, this is Mr. Henry O. Bates, 67 Briarcliffe Road, Mountain Lakes, New Jersey.

HENRY O. BATES was thereupon called as a witness for the Respondents and, having first been duly sworn, testified as follows:

Direct Examination by Mr. Ewing.

Q. Will you please state your full name?

A. Henry O. Bates.

Q. What is your address?

A. 67 Briarcliffe Road, Mountain Lakes, New Jersey.

Q. Mr. Bates, are you connected with the National Lead Company?

A. I am.

Q. In what capacity are you connected with it?

A. Secretary of the corporation.

Q. How long have you been secretary approximately?

A. Since 1938.

Q. When were you first employed by the National Lead Company?

A. 1902.

3284 Q. Have you been continuously employed by that company, National Lead, since then?

A. I was out for a few months in 1905 and 1906.

Q. Now as secretary you are the custodian of the minutes of the National Lead Company's stockholders' meetings, directors' meetings and Executive Committee meetings, are you not?

A. I am.

Q. Have you brought with you minute books covering those meetings this morning?

A. I have brought five of the minute books.

Q. Have you with you the original minutes of the directors' meeting of February 18, 1892 and also of the meeting of March 17, 1892?

A. I have.

Mr. Ewing: I ask that these two sheets be marked Respondents' Exhibit 175-A and B for identification.

Trial Examiner Norwood: They will be marked as Respondents' Exhibit 175-A and B for identification.

(The documents referred to were marked for identification Respondents' Exhibit 175-A and 175-B.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. I ask you to turn to the minutes of the Board of Directors' meeting of February 18, 1892.

3285 A. Yes.

Q. What was the next regular meeting of the Board of Directors after the meeting of February 18, 1892?

A. The next meeting recorded, the regular meeting of March 17, 1892.

Q. Now I hand you here with these photostats which have been marked Respondents' Exhibit 175-A and B for identification and ask you whether the photostats set forth in full the minutes of February 18, 1892 and a portion of the minutes of March 17, 1892 (showing to witness)?

A. That is correct.

Mr. Ewing: I offer Respondents' Exhibit 175-A and B for identification in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: I haven't finished reading them, your Honor.

Trial Examiner Norwood: Can you give us a little statement of purpose on this?

Mr. Ewing: Yes, sir. With respect to the meeting of February 18, 1892, I am offering it with specific reference to the last paragraph at the bottom of Respondents' Exhibit 175-A for identification where the resolution appears authorizing the Executive Committee to report on the advisability of discontinuing the manufacture of white lead at one plant and the grinding of lead in oil at another, and I propose to connect that with action that
3286 was later taken.

With respect to Respondents' Exhibit 175-B for identification, I am offering it with specific reference to the action indicated by the next to the last paragraph on the page relating to division of territory.

Mr. Wright: With reference to the offer with regard to the next to the last paragraph there, this document stops in the middle of a sentence which is a description of what they meant by the paragraph that counsel has pointed out.

Mr. Ewing: That is not the paragraph. The paragraph where it stops in the middle of the sentence relates to sales managers and that is not what I am interested in.

It is the paragraph before that and if you want the rest of the minutes in, why we will provide them.

Mr. Wright: May I inquire of counsel about the statement then following are the boundary lines for the several districts at the end of the paragraph?

Mr. Ewing: That is part of the report. As I say, I have no objection to offering all of the minutes. I simply didn't have them photostated because it didn't seem necessary. The originals are right here.

Mr. Wright: I don't see how we could consider receiving the first paragraph of something which continues

3287 on and is broken off right in the middle.

Mr. Du Bose: Why not?

Trial Examiner Norwood: Counsel can examine the minutes here and see if he has any objection.

Mr. Wright: Very well, your Honor. Your Honor, I don't see the relevancy of these exhibits. I would like to make an objection on that ground and I would like to make a further objection about Respondents' Exhibit 175-B that it is incomplete and the statement to which counsel called attention is misleading without having the entire minutes of that meeting included in the exhibit.

I don't think it means anything standing by itself.

Trial Examiner Norwood: Well, counsel can make a careful note of that so that he can introduce the rest of it inasmuch it is available to him.

Mr. Wright: Is it proper to introduce an excerpt out of the minutes in this fashion?

Trial Examiner Norwood: I think so.

Mr. Ewing: I don't know why not.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. I shall receive it subject to connection as Respondents' Exhibit 175-A and B in evidence.

(The document referred to, heretofore marked for

3288 identification RESPONDENTS' EXHIBIT 175-A and 175-B, was received in evidence.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Now I ask you whether you have with you, Mr. Bates, the minutes of the meetings of the Board of Directors of the National Lead Company held on December 21, 1911 and May 19, 1927?

A. What was that first date?

Q. December 21, 1911.

A. I have.

Mr. Ewing: I ask that these two photostats be marked Respondents' Exhibit 176-A and B for identification.

Trial Examiner Norwood: They will be marked Respondents' Exhibits 176-A and B for identification.

(The documents referred to were marked for identification Respondents' Exhibit 176-A and 176-B.)

By Mr. Ewing:

Q. Now I show you Respondents' Exhibit 176-A for identification and ask you whether that is a correct copy of that portion of the minutes of the Board of Directors' meeting of December 21, 1911, appearing at page 190 of the minute book?

A. That is correct.

3289 Q. And I show you Exhibit 176-B for identification and ask you whether it is a copy of that portion of the minutes of that same meeting appearing at page 192 of the minute book?

A. That is correct.

Mr. Ewing: I offer those photostats which have been marked Respondents' Exhibit 176-A and B for identification, being a portion of the minutes of the meeting of the Board of Directors of the National Lead Company held December 21, 1911 with the statement that the rest of the minutes are available and here and if counsel wishes to have a copy we will provide him with it.

But it doesn't seem to be necessary for us to burden the record with other than these two portions. I should say that I offer them specifically for showing the resignation from the Board of Messrs. Daniel and Murry Guggenheim and also the resignation from the Board of Mr. Edward Brush.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: In view of counsel's statements with regard to the availability of these records and further of the limited purpose of the offer to show the resignation of these men, I have no objection.

Trial Examiner Norwood: They will be received in evidence as Respondents' Exhibit 176-A and B.

(The document referred to, heretofore marked for 3290 identification RESPONDENTS' EXHIBIT 176-A and 176-B, was received in evidence.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Now, Mr. Bates, have you with you the minutes of the meeting of the National Lead Company's Board of Directors held on May 19, 1927?

A. I have.

Mr. Ewing: I will ask that these two photostats be marked Respondents' Exhibit 177-A and B for identification.

Trial Examiner Norwood: They will be marked for identification as Respondents' Exhibit 177-A and B.

(The document referred to was marked for identification Respondents' Exhibit 177-A and 177-B.)

By Mr. Ewing:

Q. Now I show you, Mr. Bates, Respondents' Exhibit 177-A and B for identification and ask you whether they correctly reproduce the minutes of the meeting of May 19, 1927 (showing to witness)?

A. They do.

Q. Respondents' Exhibit 177-A for identification is a reproduction of that portion of the minutes which appears in the minute book which you have produced as page 73?

A. Yes, sir.

3291 Q. And Respondents' Exhibit 177-B for identification is a reproduction, is it not, of that portion of the minutes which appears on page 76 of the minute book?

A. Yes, sir.

Q. So that when you answered my question a moment back, you did not intend to imply that these two sheets covered the entire minutes of that meeting?

A. That's correct.

Mr. Ewing: I offer Respondents' Exhibit 177-A and B for identification and, in particular, the last formal resolution which appears on Exhibit 177-B for identification relating to the minimum differential price on oxides.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: I object to the offer, your Honor, on the ground that this is incomplete. It is only a portion of the minutes.

Mr. Ewing: I make the same proffer with respect to the rest of the minutes.

Trial Examiner Norwood: Is there anything further?

Mr. Wright: No, sir.

Trial Examiner Norwood: The exhibit will be received as marked. Objection overruled.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 177A and
3292 177-B, was received in evidence.)

By Mr. Ewing:

Q. Mr. Bates, have you with you the original minutes of the annual stockholders meeting of February 16, 1893?

A. I have.

Trial Examiner Norwood: Were you secretary at that time?

The Witness: No, sir.

Mr. Ewing: I ask that this sheet be marked Respondents' Exhibit 178 for identification.

Trial Examiner Norwood: It will be marked for identification as Respondents' Exhibit 178.

(The document referred to was marked Respondents' Exhibit 178 for identification.)

By Mr. Ewing:

Q. I show you Respondents' Exhibit 178 for identification and ask you whether that correctly reproduces the fourth page of the minutes of that meeting, page 20 of the minute book in your hands?

A. That is correct.

Q. That is the meeting of the stockholders' meeting, annual meeting, of February 16, 1893; is that right?

A. That is right.

Mr. Ewing: In this case, I would like to offer all of the minutes of that meeting which appear in this
3293 minute book of annual meetings of stockholders at
pages 17 to 24 and would like the opportunity to substitute photostats which will be made and supplied.

Mr. Wright: I have no objection to that procedure.

Mr. Ewing: This is the first annual meeting.

Trial Examiner Norwood: You will deliver the photostats to the reporter before he sends in the transcript?

Mr. Ewing: Yes, your Honor. I ask that these be marked Respondents' Exhibit 179-A to G inclusive for identification.

Trial Examiner Norwood: They will be so marked for identification as Respondents' Exhibit 179-A to G inclusive.

(The document referred to was marked for identification Respondents' Exhibit 179-A, 179-B, 179-C, 179-D, 179-E, 179-F and 179-G.)

Trial Examiner Norwood: What is the purpose of that offering?

Mr. Ewing: I would be glad to state the purpose.

Mr. Wright: Has it been offered yet?

Mr. Ewing: Yes. The offer relates particularly to that portion of the minutes appearing on page 20 of the minute book "A" of the stockholders' meetings of the National Lead Company relating to the discontinuance of certain white lead factories and the enlargement of others.

3294 And also with respect to the following portions of the president's report of which the reference on page 20 is a part appearing on page 21 of the minute book "A."

Trial Examiner Norwood: When that is photostated will it include the page numbers there?

Mr. Ewing: Yes, sir.

Mr. Wright: As I understand it, it runs from page 17 to page 21.

Trial Examiner Norwood: Through page 24.

Mr. Ewing: It starts on page 17 and ends here.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

Mr. Wright: Your Honor, I object to the reception of this exhibit in evidence as competent evidence for the proffer which counsel has made. It consists of self-serving declarations to the stockholders that the company does not want to maintain a monopoly and that there will always be goods manufactured by the company, and they have brought a new efficiency to the business by closing up badly operated and uneconomic plants and so forth.

It has no evidentiary value of any sort. It is pure self-serving declarations by the company to its stockholders and the fact that it was made in 1892 doesn't lend it any more weight than if it was made last week.

3295 Mr. Ewing: We are charged with having started in business practically as a monopoly and it bears directly on that issue.

Trial Examiner Norwood: You charge that they acquired these properties and they have admitted acquiring these properties.

Mr. Wright: Yes, sir.

Trial Examiner Norwood: I don't think we can stop them from giving their explanation of it.

Mr. Ewing: Made at the time.

Mr. Wright: A pious declaration to the stockholders at the time that they had no aim to create a monopoly certainly is not evidence.

Mr. Ewing: Characterize it as you will, the fact remains that that is the record.

Trial Examiner Norwood: I think they have the right to put that in. Objection overruled. It will be received as marked, Exhibit 179-A to G inclusive with photostats to be supplied. The photostats will be the originals and given to the reporter.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 179-A, 179-B, 179-C, 179-D, 179-E, 179-F and 179-G, was received in evidence.)

By Mr. Ewing:

3296 Q. Mr. Bates, have you with you the minutes of the annual meeting of stockholders of the National Lead Company held on April 19, 1906?

A. I have.

Mr. Ewing: I ask that these two photostats be marked Respondents' Exhibit 180-A and B for identification.

Trial Examiner Norwood: They will be marked Respondents' Exhibit 180-A and B for identification.

(The document referred to was marked for identification Respondents' Exhibit 180-A and 180-B.)

By Mr. Ewing: I show you photostats which have been marked Respondents' Exhibit 180-A and B for identification and ask you whether they correctly reproduce pages 120 and 124 of the minutes of the annual stockholders' meeting of April 19, 1906 (showing to witness)?

A. They do.

Mr. Ewing: I offer Respondents' Exhibit 180-A and B for identification for the purpose of showing the election to the Board of Directors of the National Lead Company of Messrs. Daniel Guggenheim, Murry Guggenheim and Edward Brush.

Mr. Wright: I have the same objection with regard to the incompleteness of the exhibit. But if it is received under the same stipulation and limited purpose as stated by counsel, then I have no objection.

3297 Trial Examiner Norwood: It will be received in evidence as Respondents' Exhibit 180-A and B.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 180-A and 180-B, was received in evidence.)

By Mr. Ewing:

Q. I ask you, Mr. Bates, whether you have here the minutes of the meeting of the Executive Committee of the Board of Directors of the National Lead Company held on January 14, 1932?

A. I have.

Mr. Ewing: I ask that these two sheets be marked Respondents' Exhibit 181-A and B for identification.

Trial Examiner Norwood: They will be marked as Respondents' Exhibit 181-A and B for identification.

(The document referred to was marked for identification Respondents' Exhibit 181-A and 181-B.)

By Mr. Ewing:

Q. I show you Respondents' Exhibit 181-A and B for identification and ask you whether they correctly reproduce page 602 of the minutes of the Executive Committee meeting of January 14, 1932 (showing to witness)?

A. They do.

Mr. Ewing: I offer Respondents' Exhibit 181-A and B
for identification with the statement that the orig-
3298 inal minutes in their entirety are available to the
Commission at any time and for the specific purpose
of having received in evidence the first full paragraph on
Resepondents' Exhibit 181-B for identification being a reso-
lution in regard to certain prices on certain products.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: In view of counsel's statement about the availability of the minutes and of the limited purposes of the offer, I have no objection.

Trial Examiner Norwood: It will be received in evidence as Respondents' Exhibit 181-A and B

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 181-A and 181-B, was received in evidence.)

By Mr. Ewing:

Q. Now I ask you, Mr. Bates, whether you have with you the original minutes of the Executive Committee of January 6, 1935?

A. June 6th.

Q. June 6 is correct.

A. I have.

Mr. Ewing: I ask that this sheet be marked Respondents' Exhibit 182 for identification.

Trial Examiner Norwood: It will be so marked as Respondents' Exhibit 182 for identification.

3299 (The document referred to was marked Respondents' Exhibit 182 for identification.)

By Mr. Ewing:

Q. I show you Respondents' Exhibit 182 for identification and ask you whether that correctly reproduces the minutes of the meeting of June 6, 1935 of the Executive Committee?

A. It does.

Mr. Ewing: I offer Respondents' Exhibit 182 for identification, it being the entire minutes of that meeting and with particular reference to the last full paragraph prior to the notation of adjournment.

Trial Examiner Norwood: Is that just one page?

Mr. Ewing: Yes, sir.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: No objection, your Honor.

Trial Examiner Norwood: It will be received in evidence as Respondents' Exhibit 182.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 182, was received in evidence.)

By Mr. Ewing:

Q. Referring back to Respondents' Exhibit 180-A and B being a portion of the minutes of the annual meeting of the stockholders of the National Lead Company held on April 19, 1906, I call your attention to the recording 3300 in those minutes of the election to the Board of Directors of Messrs. Daniel Guggenheim, Murry Guggenheim and Edward Brush. Do you know who Mr. Edward Brush was?

A. I never knew him.

Q. Do you know who he was?

A. He was connected with the American Smelting & Refining Company.

Q. Do you know what interest or interests he represented on the Board during the period he was on the Board?

A. Only by hearsay.

Q. Well, will you tell us?

A. Those three gentlemen, Mr. Brush and the other two, were in the American Smelting & Refining Company which at the time held something of a stock interest in the National Lead Company.

Mr. Ewing: I have no further questions.

Cross-Examination by Mr. Wright.

Q. Is it customary, Mr. Bates—I withdraw that.

Mr. Wright: I have no cross-examination.

Trial Examiner Norwood: You are excused.

(Witness excused.)

Trial Examiner Norwood: Proceed.

Mr. Ewing: I now suggest that we adjourn for lunch, your Honor.

3301 Trial Examiner Norwood: We will recess at this time until 2:00 o'clock.

(Whereupon, at 12:50 p. m., a recess was taken until 2:00 p. m., this day.)

3302 Afternoon Session. 2:00 p. m.

Trial Examiner Norwood: Come to order. I want to dispose of this motion and that is the motion of Mr. Wright that the following testimony be stricken, to wit, page 2551 lines 17, 18 and 19, page 2710 line 5 beginning with the words "but facing" and through 19.

Now on page 2721 line 21 through page 2725 line 4, all of the statements of the witness, the answers of the witness contained in that part of the transcript.

Now on page 2729 line 2 through 2730 line 9.

I have given all this material and the arguments of counsel very careful consideration and I feel that this material consists of general statements and conclusions which, as shown at page 2729 to 2730 line 9 and elsewhere, were based on general impressions and not on any definite factors or information which prudent businessmen would rely on in determining whether their costs of sale and delivery were equal to or more than their price differentials.

In fact, it appears affirmatively that the witness had not attempted to reduce cost differences to a specific figure and it was further stated that it would "not have been practicable nor would it have been prudent" to allocate various costs to different classes of customers who received different prices.

3303 I think the law places the duty on this respondent to make such factual determinations in order to justify its price differentials. On the issues raised in count No. 2, the burden of proof cannot be sustained by general observations not supported by some substantial data.

Conclusions from this witness are not admissible in any case, but if accompanied by a factual basis, would probably be received in an administrative investigation such as this. But in the absence of these bases, I feel that this testimony is neither reliable, probative nor substantial and it would be of no advantage to the respondent for me to leave it in the record. It should be stricken in the interest of consistent procedure and to avoid any injurious precedent in this case.

The motion is therefore allowed.

Mr. Hinds: Exception.

Trial Examiner Norwood: Call your next witness.

Mr. Ewing: I call Charles Simon.

Trial Examiner Norwood: Mr. Reporter, this is Mr. Charles Simon, 8466 Radnor Road, Jamaica, New York.

CHARLES SIMON was thereupon called as a witness for the Respondent and, having first been duly sworn, testified as follows:

3304 *Direct Examination by Mr. Ewing.*

Q. Will you please state your full name?

A. Charles Simon.

Q. What is your address?

A. 8466 Radnor Road, Jamaica, New York.

Q. Mr. Simon, are you connected with the National Lead Company?

A. Yes.

Q. In what capacity?

A. Treasurer.

Q. How long have you been treasurer?

A. Since 1925.

Q. When were you first employed by the National Lead Company?

A. November 1904.

Q. Will you give us chronologically the course of your employment by way of the positions occupied by you?

A. I came as office boy and I worked in the stock transfer department and became stock transfer clerk, assistant treasurer.

Q. When did you become assistant treasurer?

A. 1915 and director in 1935.

Q. Then you were treasurer of the National Lead Company in 1930?

3305 A. Yes.

Q. Will you tell us briefly what was the investment policy of National Lead at that time?

A. Just short term investments in Governments and municipals.

Q. At or about that time did the company sometimes have occasion to invest in stocks or bonds of other industrial companies?

A. Occasionally.

Q. When such investments were made was there any limitation, generally speaking, from the standpoint of the business in which the companies were engaged?

A. Well, those investments we made, with the exceptions, they were very small investments. It wasn't anything that amounted to anything.

Q. When you did make such an investment, in what sort of a company would you purchase the securities?

A. I think we would look into the investment and see how much we knew about a particular company and the business of the company.

Mr. Ewing: I ask that this be marked Respondents' Exhibit 183 for identification.

Trial Examiner Norwood: It will be marked Respondents' Exhibit 183 for identification.

(The document referred to was marked for identification Respondents' Exhibit 183.) 3306

By Mr. Ewing:

Q. Will you tell us whether the National Lead Company at any time made any investment in the stock of the Eagle-Picher Lead Company?

A. Yes.

Q. Have you examined the records of the National Lead Company to ascertain by date the number of shares purchased in Eagle-Picher from time to time by or on behalf of National together with the purchase price per share, the cost of shares and the number of shares, if any, sold and the dates of sale, the sales price per share and the proceeds?

A. Yes.

Q. I have handed you Respondents' Exhibit 183 for identification and ask you to state whether that was prepared by you or under your direction?

A. Yes, that is correct.

Q. Does that exhibit correctly reflect the information therein set forth as obtained by you or under your direction from the books of the National Lead Company?

A. Yes.

Mr. Ewing: I offer it in evidence as Respondents' Exhibit 183.

Mr. Wright: From what records was this obtained, Mr. Simon?

3307 The Witness: From the books of the company.

Mr. Wright: What particular books contain this?

The Witness: The principal books of the company.

Mr. Wright: I have no further voir dire.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: Your Honor, I have no objection to the receipt of this document in evidence provided that it is under the same category as the earlier exhibits so that I may have an opportunity to examine the basic data.

Mr. Ewing: That is understood.

Trial Examiner Norwood: Does that exhibit make a reference to the basic data in any way?

The Witness: No, it doesn't say that.

Mr. Ewing: It was taken off the books to show these various things.

Trial Examiner Norwood: It will be received under those conditions as Respondent's Exhibit 183.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 183, was received in evidence.)

By Mr. Ewing:

Q. Now will you tell us generally, Mr. Simons, the circumstances under which National purchased these shares in the Eagle-Picher Lead Company?

A. That is a long time ago, but as I recall it, I
3308 think we had some telephone calls from some brokers
in Cincinnati. They called our attention to these shares, and that there was a block of stock that was apparently available.

And we had some investment funds there. At times we had an insurance fund, a fire insurance fund and so forth, and occasionally we would go into some other investments. In this particular case this stock was called to our attention and the broker kept offering it and we bought at times when we thought the price was right.

Q. When you say when you thought the price was right, do you mean by that, when you thought the price was low?

A. That's right.

Trial Examiner Norwood: This is the number of shares that National held of Eagle-Picher at these various times?

Mr. Ewing: Yes, and the sales dates.

Trial Examiner Norwood: I am referring to Respondents' Exhibit 183.

Mr. DuBose: It shows both.

By Mr. Ewing:

Q. Now in whose name was this stock purchased?

A. In the name of E. J. Cornish, Edward J. Cornish.

Q. During the time that National Lead held stock in Eagle-Picher in the name of E. J. Cornish or Edward J. Cornish was, so far as you know, National Lead ever represented on the Board of the Eagle-Picher Company? 3309

A. No.

Q. During the same period of time, so far as you know, did National or anyone in its behalf attempt to exercise any control or influence the Eagle-Picher Company in the management or conduct of its business?

A. I say no.

Q. During the period in which the stock was held by National was that stock voted?

A. I believe it was.

Q. Under what circumstances, if you know?

A. Well, I think it is our general policy of our company—we know something about proxies and stockholders, the action of stockholders in voting their shares, the lethargy—that it was our duty as a stockholder to really vote the stock if we felt everything was all right.

Q. And how did you vote the stock, if you know?

A. I think by regular proxy.

Q. Now what was your connection with the National Lead Company in 1906?

A. I was in the stock transfer department.

Q. There has been testimony here in this case as to the ownership of stock of the National Lead Company by one or more of the Guggenheims and Thomas Fortune Ryan. And there has also been testimony that Messrs. Daniel Guggenheim and Murry Guggenheim and Mr. Brush were elected to the Board of Directors of the National Lead Company, I believe, in April 1906. 3310

Do you know approximately when the Guggenheims acquired and offered for transfer stock of the National Lead Company?

A. I think it was the early part of 1906.

Q. Upon what is your recollection based?

A. I recall they had—one of their runners that always came—one of their representatives always come in to collect the checks for seals to us. He came in with a black bag—I recall it distinctly—and opened it up and pulled out a load of stock certificates.

Q. How many shares were in it?

A. I would say it was thirty-five thousand shares or more.

Q. What did he do with them?

A. It was all endorsed for transfer and he left it with us for examination and transferred it in the name of some individuals, some nominees.

Q. And at that time you were transfer clerk?

A. Yes.

Mr. Ewing: No further direct.

Cross-Examination by Mr. Wright.

Q. When did you receive this call from the brokers 3311 about the availability of this Eagle-Picher stock, Mr. Simon?

A. Oh, during the general business hours we got them.

Q. When in point of time, the dates?

A. The dates?

Q. Yes.

A. I think over the period from 1930 to 1932.

Q. Were you referring to a particular call from brokers in Cincinnati?

A. No, occasional calls.

Q. Who were the brokers in Cincinnati that called?

A. A. & J. Frank.

Q. A. & J. Frank?

A. Yes. I think there was a Mr. Kaplan.

Q. Is he the gentleman that called?

A. I believe he did most times.

Q. Did he call you?

A. He called me and sometimes he called Mr. Cornish.

Q. Do you know what he said to Mr. Cornish?

A. He simply said or told him that they had these shares of stock for offer and it looked to him like a good opportunity to buy some stock at a reasonable price.

Q. Now did you listen in on this phone conversation?

A. Well, Mr. Cornish repeated it to me and that is about the same thing that Mr. Kaplan told me, too, that these shares were up for sale and that he had them 3312 available and he could probably contact—

Q. (Interposing.) Did he know you had an interest in acquiring Eagle-Picher stock?

A. He didn't know it but he thought we might be a possible customer. I imagine he probably asked other people too.

Q. In this period now from 1930 to 1932, how many other industrial stocks did National have in its investment folio?

A. We might have had a few shares of American Smelting & Refining.

Q. Can you think of any other stocks now that you might have had?

A. We may have had some bonds of the St. Joe Lead.

Q. They would be bonds?

A. Bonds, yes.

Q. You can only think of one other common stock then in which you invested?

A. That's right.

Q. Did this broker customarily call you about other stocks and tell you they were available?

A. He might have.

Q. You don't recall his doing it?

A. I don't recall right now.

Q. Was it customary to receive calls from him about stocks being available? I mean outside of this incident.

A. That was his business to look for customers.

3313 Q. Was this stock held on the transfer records of the Eagle-Picher Company in the name of the National Lead Company?

A. No, Edward J. Cornish.

Q. Under E. J. Cornish?

A. Yes.

Q. Why was that arrangement resorted to?

A. That made it easier to transfer, a simple transfer.

Q. Will you explain that?

A. Well, stock in the name of the corporation calls for certain requirements whereas in the name of an individual you can just simply transfer that stock on the basis of his endorsement.

Q. When you speak of requirements there you are thinking of the requirements of retransferring it?

A. Stock transfer requirements, yes.

Q. Was it customary—I withdraw that. Did you have any other stocks or bonds in your investment folios which were on the transfer books in the name of an individual?

A. Yes, I believe in most cases if we held anything for a transfer nature we put it in the name of an individual so that it was available for resale.

Q. Was that the case with the bonds that you held?

A. They were bearer bonds.

Q. They were bearer bonds?

3314 A. Yes.

Q. Then the only other stock that you held in that period was A. S. R. stock?

A. That's right.

Q. Was that held in Mr. Cornish's name?

A. That was held in the National Lead Company.

Q. What other stock was held in the name of an individual during that period?

A. We had a number of stocks, I think probably some one or two small stocks, whenever we had a transfer which we felt we would liquidate sooner or later, we left it in the name of the individual. But in the case of the A. S. & R. stock, that was simply one of those conditions there that we figured the name of the National Lead Company would be all right, because there was a different condition that existed there.

The offer was made in a big block by a bank.

Q. How big a block was it?

A. Well, I guess it was about twenty thousand shares.

Q. Of A. S. & R.?

A. Yes.

Q. That you held at that time?

A. Yes.

Q. Do you still hold a substantial interest?

A. No.

Q. Why was it all right to hold the A. S. & R. 3315 stock in the name of the National Lead Company and not all right to hold the Eagle-Picher stock?

A. I don't think there was a question of it being all right. I don't think so, that isn't the point. It was just a question of convenience there, that is about all.

Q. Well now, this broker that called about the block of stock that was available, I notice your first purchase was just about 100 shares?

A. Yes.

Q. Was that the block you mentioned?

A. That is what he had available I think. That is what he spoke about and brought on the condition which eventually led to the purchase of this amount of shares that we had.

Q. Then the next day, July 30th, there was another block of 400 shares and then two and a half months later another block of 300 shares?

A. Yes.

Q. And then thirteen days later another block of shares?

A. Yes.

Q. And the next day another block of shares?

A. Yes.

Q. Are you sure that there wasn't a standing order with this broker to purchase that Eagle-Picher stock as he acquired it?

A. No, there was not.

3316 Q. Each one of those was a separate order and a separate transaction to that broker?

A. Absolutely.

Q. And they were all handled through that broker?

A. I think they were, yes.

Q. Do you know what the total number of shares of capital stock of the Eagle-Picher Company were at that time?

A. I think it was about close to a million shares.

Q. Close to a million shares?

A. A million shares, yes.

Q. Of common stock?

A. Common stock, yes, about nine hundred thousand or a million, I believe.

Q. Did any of the other officers of the National Lead Company or anyone associated with them hold any stock at that time in Eagle-Picher that you know of?

A. Not that I know of, no.

Q. Can you recall the circumstances under which the stock was voted? You said it was voted by proxy.

A. Yes. Well, the proxy that they sent out to vote. Each stockholder receives a proxy at every annual meeting. That is a requirement.

Q. What did you do, just fill in that proxy and just send it?

A. Yes. In the first place, it was signed by Mr. 3317 Cornish because the stock was in his name, you see.

Q. Mr. Cornish was the one that sent the proxy in, did he?

A. Yes.

Q. Do you know how he filled out those proxies?

A. He just signed the proxy. I think later on the stock was put in the name of the National Lead Company and that was after Mr. Cornish died in 1938.

Q. In other words, Mr. Cornish never retained personal possession of that stock?

A. No.

Q. It was always in the possession of the National Lead Company?

A. Yes.

Q. Now going back to 1906, will you tell us again about this runner coming in, Mr. Simon?

A. Well, just as I said, he came in. I was a stock transfer clerk and, of course, naturally a thing of that kind really would come to your attention to see a man come in with his bag and open it up and pull out a great big bunch of stock certificates and throw them out there for transfer.

Q. Were you advised at that time that that was Guggenheim or associated interest stock?

A. The only thing I saw there was 71 Broadway, the name of five or six nominees.

Q. You did actually examine the certificates?

3318 A. We had to in order to see that the transfers were valid.

Q. These were transfers in 1906 to the Guggenheims?

A. That's correct.

Mr. Wright: Your Honor, I have no more cross-examination. I would like at this time to move to strike that part of the witness's testimony though which related to conversations repeated to him by Mr. Cornish regarding telephone calls that he received from brokers. I will say that I didn't object to that on direct examination because it didn't appear at that time that he was repeating what Mr. Cornish had told him someone told him on the telephone.

Mr. Ewing: The answer to his move to strike was an answer to his question and, furthermore, the witness testified that the broker told him the same thing.

Trial Examiner Norwood: I think that is part of the picture he is giving here. I don't think that his testimony is of such a nature to require us to be too meticulous about that. Motion denied.

I notice these sales here in 1937, the prices are different from $3 in 1937—$25 a share. There was a different stock setup?

The Witness: I beg your pardon?

Mr. Ewing: That was the profit they made on the investment.

Trial Examiner Norwood: This is sales on this side?

3319 Mr. DuBose: That's right.

Trial Examiner Norwood: Is there any further examination?

Redirect Examination by Mr. Ewing.

Q. Mr. Simon, at the purchases of Eagle-Picher's stock as shown on Respondents' Exhibit 183, was the Eagle-Picher stock listed on the New York Stock Exchange, if you recall?

A. No, I don't think so. I don't believe it was.

Q. Now if you will look at Respondents' Exhibit 183, I call your attention to the column headed "cost" and the total insofar as it relates to common stock of $226,630. Was that the total cost of the common stock purchased by or on behalf of National Lead?

A. Yes.

Q. Then in the last column on the right headed "proceeds" again relating to the common stock, I call your attention to the total $1,086,014.03. Does that represent the gross proceeds received by National in selling the Eagle-Picher stock?

A. Yes.

Q. So that the difference between the total of the cost column and the total of the proceeds column, less whatever transfer or brokerage charges there may have been, represents profit to National Lead?

3320 A. Yes. There are no brokerage charges.

Q. The difference is the net profit?

A. It is all included, yes.

Mr. Ewing: No further questions.

Trial Examiner Norwood: Do they still hold in Eagle-Picher?

The Witness: No, sir.

By Mr. Ewing:

Q. Do you now hold any AS & R stock?

A. No.

Q. What disposition was made of the St. Joseph Lead Company bonds?

A. They were all sold. It was just held for a period of, I guess, four or five years or so.

Q. Did National's investment in either Eagle-Picher stock or AS & R stock or in the St. Joe Bonds represent an investment of a permanent nature?

A. No.

Mr. Ewing: That is all.

Recross Examination by Mr. Wright.

Q. Mr. Simon, when you were answering about any control or suggestions by the National Lead Company to the Eagle-Picher Company, when you stated that you knew of no one, you meant that you personally knew of no
3321 exercise of control of that stock to the Eagle-Picher Company?

A. Yes.

Mr. Wright: That is all.

Trial Examiner Norwood: You are excused.

(Witness excused.)

Mr. Wright: May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. By agreement of counsel the hearing is adjourned to reconvene July 22, 1947, Washington, D. C., office of the Federal Trade Commission, Room 332 at 10:00 a.m., city time. That is, Eastern Daylight Saving Time.

(Whereupon, at 2:50 p.m., the hearing was adjourned to reconvene in Washington, D. C., July 22, 1947, at 10:00 a.m., EDST.)

In the

United States Court of Appeals

For the Seventh Circuit

NATIONAL LEAD COMPANY,
Petitioner,
No. 10839 *vs.*
FEDERAL TRADE COMMISSION,
Respondent.

THE SHERWIN-WILLIAMS COMPANY,
Petitioner,
No. 10840 *vs.*
FEDERAL TRADE COMMISSION,
Respondent.

THE EAGLE-PICHER COMPANY, ET AL.,
Petitioners,
No. 10841 *vs.*
FEDERAL TRADE COMMISSION,
Respondent.

ANACONDA COPPER MINING COMPANY, ET AL.,
Petitioners,
No. 10842 *vs.*
FEDERAL TRADE COMMISSION,
Respondent.

Petitions for Review of Order of the Federal Trade Commission.

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3322

Hearing Room,
Federal Trade Commission,
Washington, D. C.,
July 22, 1947.

Before:

J. W. Norwood, Trial Examiner.

Appearances:

Edmund T. Wood and Richard Sewiss, American Building, Cincinnati, Ohio, representing Eagle-Picher Company and Eagle-Picher Sales Company.

E. Z. DuBose, 120 Broadway, New York, New York, representing National Lead Company.

3323 Henry E. Gardiner, 25 Broadway, New York, New York, representing Anaconda Copper Mining Company and International Smelting & Refining Company.

James T. Welch, 815 15th Street, N. W., Washington, D. C., representing The Sherwin-Williams Company.

Joseph S. Wright and Paul R. Dixon, appearing for the Federal Trade Commission.

3324

PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on June 19, 1947, the hearing in Docket 5253 is now convened in Room 332, Office of the Federal Trade Commission, Washington, D. C., at 10 o'clock a. m., City Time, July 22, 1947.

Appearances are as follows:

Joseph S. Wright and Paul R. Dixon appearing for the Federal Trade Commission.

Edmund T. Wood and Richard Sewiss appearing for Eagle-Picher Company and Eagle-Picher Sales Company.

E. Z. DuBose appearing for National Lead Company.

Henry E. Gardiner appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James T. Welch appearing for the Sherman-Williams Company.

I have laid out to furnish counsel a tentative statement of the issues here, both on Count 1 and Count 2, and have also made a short synopsis or outline of the complaint, stating the various charges and what I consider to be the logical order.

In respect to these charges, unless we make some changes pursuant to suggestions and criticisms from counsel, I shall treat this matter in this order in my report. I
3325 shall be glad to have suggestions along that line.

There is just one page here of tentative issues, and I think that we should settle those issues very soon. I should like to have any suggestions or any objections from counsel as to what the issues ought to be, or I would like to have them tender the issues to me; that is, such issues as they think should be considered.

Mr. Wood: If Your Honor please, could we have about five or ten minutes to look that over, because I would like to see how my own proposed testimony is going to fit within the framework of the issues as you have framed them.

Trial Examiner Norwood: Yes, you may have a recess.

(A short recess was taken.)

Trial Examiner Norwood: Are you ready to go ahead?

Mr. Wood: Yes.

Trial Examiner Norwood: All right, proceed.

Mr. Wood: I am going to make a very brief statement of the defensive position of the Eagle-Picher Company.

It is the charge of the bill of complaint that there has been a matching of prices among the producers of lead pigments throughout the country, and that as a result of that there has been no competition in the sale of lead pigments.

The record so far shows that these pigments are sold in general at recognized and fixed levels above the price
3326 of pig lead, and that the prices of the various companies in general have tended to be about the same at about the same time. That situation permits two possible inferences: One, that there is a price fixing conspiracy; two, that it is a type of industry in which price leadership exists. The Commission asserts the former, that it is a price fixing conspiracy; we assert that it is an industry in which price leadership exists.

Now, since there is no direct testimony, and everything is a matter of inference, we propose to show that there is very keen competition in the sale of lead pigments generally, and particularly between Eagle and National; that Eagle is competing very actively and very successfully with National in the sale of lead pigment, and that therefore that is evidence that there is no price fixing conspiracy. If there were a price fixing conspiracy, you would not have this keen competition which exists in the industry.

The nature of that competition was competition in value of the product delivered as distinguished from sheer price war. Eagle-Picher is in this position: Being the smaller of the companies, the less powerful, as alleged in the complaint, Eagle-Picher is not in a position to start a price war with National but does compete by the effort to give greater value in the product sold.

The products are not the same, they are different. 3327 Eagle-Picher custom cuts its product for the particular needs of the customer and has a very extensive research and technical sales service. It endeavors to give the customer the better job.

It is as if you were buying a suit and two tailors had the same quality wool suit at the same price but in one case they just sold you a suit of wool, "Take it," and in the other case there was a man that would pick out the model that was best suited for you, make alterations, and if necessary give you a custom cut coat. We say there is no matching of values there. The values are different even though the price is the same.

Now, to use another analogy, we admit that all products such as red lead or white lead in oil, Eagle-Picher has not been engaged in a price war with National but we say that General Stonewall Jackson's flank maneuver at Chancellorsville was just as much a military operation as Pickett's frontal charge at Gettysburg. We have not directly assaulted the entrenched position of National, but we have been carrying on what you might call a flanking attack, and succesfully, over a long period of years by the means suggested.

That is going to be the substance of the testimony

Trial Examiner Norwood: Call your witness.

Mr. Wood: Mr. Goetz.

Trial Examiner Norwood: Give us your full name, 3328 please.

Mr. Goetz: Alvin C. Goetz.

ALVIN C. GOETZ was thereupon called as a witness on behalf of respondent Eagle-Picher Company and, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Wood.

Q. Will you please state your residence and occupation, Mr. Goetz?

A. I live in Cincinnati, Ohio. I am the manager of the Technical Service Department of the Pigment Division of the Eagle-Picher Company.

Q. Will you please state your education?

A. I have a B.S. Degree in Chemistry from the Pennsylvania State College.

Q. What year?

A. 1915.

Q. Do you have any other degrees?

A. I have no other degrees.

Q. Are you a member of any technical societies or learned societies?

A. I am a member of several societies.

Q. What are they, please?

A. The American Chemical Society; I am a Fellow in the American Institute of Chemists; I am a member
3329 of the American Society for Testing Materials; the American Institute of Technical Engineers; the Federation of Paint and Varnish Production Clubs; the Chemical Market Research Group and also the Technical Group.

Q. Apart from the Eagle-Picher Company have you had in the past any positions on the boards or committees or anything like that in the lead industry?

A. I have served in a number of instances; I served in a technical advisory capacity on the Lead Industry Association Affairs regarding pigments. I also served, in the period from 1941 to 1945, as a dollar-a-year consultant to the Protective Coatings branch of the War Production Board, and also served as a per diem expense consultant for a six months period beginning ~~late in 1946, and as a~~ consultant on paint for the Public Roads Administration. In addition to that I have been continually consulted by various Government persons interested in paint, both in the use and in the writing of specifications.

Q. After leaving college what did you do?

A. After leaving college I became the chemist of Kellogg & Miller, linseed oil manufacturers in New York.

Q. How long were you there?

A. I was there from approximately June, 1915, until August, 1917.

Q. What did you do then?

3330 A. In approximately August, 1917, I entered the Armed Forces, Officers' Candidate School at Fort Niagara, New York.

Q. What did you do after leaving the service?

A. After leaving the service I was engaged temporarily by the Bureau of Fisheries to investigate the economic position of fish meal and fish oil on both the East and West Coasts with a view to improving the quality, et cetera.

Q. What was your next position?

A. I then became manufacturing chemist in the by-products department of the Southern Cotton Oil Company at Savannah, Georgia.

Q. How long did you stay there?

A. About two or two and a half years.

Q. What was your next position?

A. My next position was superintendent of the fatty acid plant engaged in the production of steric acid, red oil and pitch for Darling Company in Chicago.

Q. How long did you hold that position?

A. Approximately two years.

Q. What position did you have after that?

A. That brings us up to 1923 when I became associated with the Eagle-Picher Company in Chicago, Illinois.

Q. Have you been connected with the Eagle-Picher Company continuously since 1923?

A. Continuously since 1923 to date.

3331 Q. What was your first position with the Eagle-Picher Company?

A. My first position was as a technical salesman.

Q. Selling what products?

A. Selling all of our lead and zinc pigments.

Q. How long did you remain a technical salesman?

A. I remained a technical salesman from 1923 through to 1939.

Q. What was the change of position in 1939?

A. In 1939 I was transferred to the home office in Cincinnati to take charge of a newly formed technical service department.

Q. What was the newly formed technical service department?

A. The object of that department, or my duties?

Q. The object of the department first.

A. To keep the pigment division fully informed on all technical development concerning its welfare and also to attend technical meetings and investigate technical subjects and work in a technical service way with the industry in the development of the use of our products.

Q. While you were technical salesman did you have any contact with the Eagle-Picher Research Laboratory?

A. Did I have contacts?

Q. Yes.

A. Yes, continual contacts.

3332 Q. What was the purpose of the contacts?

A. To keep the Research Laboratory informed in detail as to technical developments and to work out research projects more particularly concerning protective coatings, and still more specifically what we know as paint.

Q. What in general was the scope of the activity of the Research Laboratory in so far as the selling of pigments was concerned? Just generally, Mr. Goetz.

A. That may be divided into two parts, what we call our sales service where problems come in from the users of our pigments, and the second part where we are engaged in the investigation work as to improvement in the use of our products, in the manufacture of paint, for example.

Q. What sort of salesmen do you employ in the pigment division of Eagle-Picher Company?

A. At the present time, and as long as I can recall, all of the pigment division salesmen have been either chemists, chemical engineers or electro-chemists.

Q. What is the purpose of employing men of that degree of technical qualification?

A. To give our customers the best service possible in the use of our products and to improve the quality of their own products.

Q. In giving customers service can you give us in a little bit more detail what sort of service you give the customers?

3333 A. For example, a paint customer might say, "Look over my paint for me, will you? See how you think it stacks up with competition today." We would look over his paint formula. We might suggest, for example, "You are a little low in hiding power, you ought to put in a little more of the high hiding pigments." We might say, "You have too much oil present." The customer might say, "Very well, but how do you know that?" So we refer to our several thousand exposures, both in effect at the time and the record from previous work and determine what he might expect in the way of performance in his paint from the changes which we suggest.

There are a great many errands to run. Oftentimes a person doesn't understand a Federal specification, for example, and our salesmen sit down with him and study out the specification and explain to him how to meet it.

Q. You referred to exposures. I would like to hand you a document which is marked for identification as Respondents' Exhibit 184-A through 184-D, and ask you if you can tell us what this document represents?

A. You asked me if I recognize these pictures?

Q. I ask you if you can tell what that exhibit represents?

A. This is a rather brief resume or outline of our test fence exposure where we study the performance of paint and the effect of changes for the benefit of ourselves 3334 and for the benefit of the trade, both on wood surfaces and on metal surfaces, and with several exposures, atmospheric and submerged.

Q. What do you mean by test fence? Explain in a little bit more detail, please.

A. In a study of paint it is rather costly and laborious to paint a house, for example, or a structure with a new paint. Usually in an important study there are many variables but so arranged that there is no conflict. There is only one variable made in a series at a time. Rather than engage 500 or 1000 houses which would be quite impractical, we use what are called panels which may be flat boards on the order of six to twelve inches wide and ten to eighteen or twenty-four inches long, or simulated siding of houses made up from clapboards. It is a much handier way and much cheaper.

Following our study of the performance of paint on these panels the next step is to separate the good from the bad and proceed by testing on a full scale structure like a residence.

Q. What is a test fence? You used the term "test fence".

A. We use the term "test fence" because of the manner in which the panels are exposed, which looks like a fence. For example, in this picture (indicating).

Q. Well, you are referring to the top picture on the page marked A there?

3335 A. The top picture on B.

Q. How large would that fence be, for instance? Can you give us some idea?

A. The fence would vary from 50 to 100 feet long. The space on which the panels are placed would be from 4 to 5 feet high, and a site would contain any number most of such fences.

Q. Well, for instance, can you give us an approximate idea of the size of your test fence at Joplin, Missouri?

A. We have a number of such structures to accommodate in the order of 5000 panels.

Q. Now, to whom does the information which you obtain from your test fences go?

A. Ultimately to the paint manufacturer.

Q. What is the purpose of giving that information to the paint manufacturer?

A. To help him make better paint.

Q. And what does your company get out of that?

A. Our company hopes that if we help the paint manufacturer to make a better paint, either maintain the same quality at a lower price or to make some special paint we hope that he is going to be good enough to remember us when he buys his pigments.

Q. To whom is this technical service available?

A. Our technical service is available to all of the
3336 industry and the Government, both Federal and State
services.

Q. Is it limited strictly to your customers?

A. We have no restriction to customers. We may do more work for some one person than another, but that is because he may have more requirements or ask that more be done. Some requests are very simple. Some take a lot of time and labor.

Q. You spoke of the Research Laboratory developing special pigments. What is the purpose of developing special pigments?

A. One example might be that a paint manufacturer wishes to change his formula, for some reason or other, whereby he uses a pigment which we don't manufacture, and that upsets his formulation. It may reduce the body and viscosity of his paint. We have to investigate and give him one of our pigments of such a nature that he will maintain the desired body in that paint.

He might also wish to reduce the cost of his paint by using some other type of pigment, or a different proportion of pigments.

Q. For how long a period of time have you been familiar with the so-called paint industry?

A. Since 1915.

Q. Now, in 1915, what was the position as to importance of basic carbonate white lead in the paint industry?

3337 A. I will have to ask you to repeat that question.

Trial Examiner Norwood: Read the question.

(The question was read.)

The Witness: In 1915, basic white lead carbonate occupied a very important place in the paint industry. White lead was the keystone of all exterior paint.

By Mr. Wood:

Q. Well, was white lead used just for white paint, or also for colored paints?

A. White lead is used in the manufacture of white and most tint paints, but not dark shades such as deep browns, maroons, and so forth.

Q. What was the attitude of the industry in 1915 in respect to other substances that were put into paint with white lead?

Mr. Wright: Objection, Your Honor. It hasn't been shown that this witness had any connection with this industry in 1915. As a matter of fact, he had just graduated from college at that time, and was employed in a linseed oil plant, as I recall his testimony.

Mr. Wood: I asked him directly when he became familiar with the paint industry, and he said in 1915. I don't care whether it is exactly 1915, or when it is, but linseed oil is one of the important items in the paint industry.

Trial Examiner Norwood: Read that question.

3338 (The pending question was read.)

Trial Examiner Norwood: Do you know that attitude?

The Witness: I do.

Trial Examiner Norwood: You may tell us. The objection is overruled.

By Mr. Wood:

Q. Will you please state what it was?

Mr. Wright: Your Honor—

Trial Examiner Norwood: Do you want to make a further statement?

Mr. Wright: I would like to make a further statement about it. I did not realize until now that he was being called as an expert witness on the attitude of the industry back at that time, and I submit that the qualifications that have been spread on the record don't show him to be such an expert witness as to testify as to what the attitude of the industry was at that time, because he had no connection with the industry at that time by his own testimony.

He graduated from college in 1915, and went with the Linseed Oil Plant, where he stayed for two years. From there he went to the Bureau of Fisheries, working on fish meal. His connection with the paint industry didn't begin until 1923, by his own testimony.

Mr. Wood: But the linseed oil industry is a part of the paint industry, Mr. Wright.

3339 Trial Examiner Norwood: I think you will have to lay the ground for that. I misunderstood the question there.

Mr. DuBose: He stated he knew of his own knowledge what the situation was, and I think Mr. Wright's objection goes to cross-examination and to the weight.

Mr. Wright: The question called for an expert statement as to what the opinion of the industry was at that time. It cannot be anything but a conclusion.

Trial Examiner Norwood: I will reverse my ruling and sustain the objection until further grounds are laid.

By Mr. Wood:

Q. Now I will relate my question to the period commencing in 1923, when you went to the Eagle-Picher Company, or whenever thereafter you became thoroughly familiar with the paint industry, and I will ask you whether or not you knew or learned in the period following 1923 the attitude of pigment purchasers who were paint manufacturers in respect to materials other than basic carbonate white lead which were mixed with basic carbonate white lead?

A. Well, the general attitude of the paint industry at that time was—

Mr. Wright: Excuse me, Your Honor. That question asked if he knew that.

Trial Examiner Norwood: That is right.

3340 By Mr. Wood:

Q. Answer yes or no first, whether you knew the attitude?

A. You are asking if I did or do know the attitude of the industry at that time?

Q. Yes.

A. I do know the attitude of the industry at that time.

Q. Will you please state what it was?

Trial Examiner Norwood: He asked about the attitude of purchasers, also. Do you know that?

The Witness: I do.

By Mr. Wood:

Q. In fact, you were engaged in selling pigments to purchasers at that time, weren't you?

A. That is correct.

Q. What was the attitude?

A. The attitude of the paint industry at that time was to use materials which had been used for a number of years; namely, white lead, zinc oxide and inerts in white and light tint paints. New pigments at the time were received with some reserve.

Q. That goes far enough in answering the question, Mr. Goetz.

Now, in 1923, when you commenced selling lead pigments for Eagle-Picher, what position did basic carbonate white lead occupy in the paint industry?

3341 A. At that time basic white lead carbonate occupied a dominant place in the industry.

Q. Do you know for how long it had occupied the dominant position?

Mr. Wright: Objection, Your Honor. It obviously calls for a conclusion, or hearsay on the part of the witness.

Trial Examiner Norwood: He asked if he knows. Answer that yes or no.

By Mr. Wood:

Q. Do you know the position?

A. The position of white lead in the industry at that time?

Q. Yes.

A. At that time, white lead occupied a very strong position, and furnished the bulk of white lead for paints.

Q. Now, in the answer to the previous question you used the term "dominant position." Could you explain just what you mean by dominant position?

A. By dominant position I mean that in 1923, when paint was formulated, the first thought was given to how much white lead could be used in the paint. That being determined, the other pigments in the formulation were adjusted to meet that white lead content.

Q. Do you know what formulation was considered the best outdoor paint in 1923?

3342 A. In 1923, 65 percent white lead, 25 to 30 percent zinc oxide, and approximately 10 percent inerts was considered a good paint in whites and light tints.

Q. Was a pure basic carbonate white lead paint considered better?

A. No, not considered better with basic white lead carbonate so long as some white lead was present.

Q. What is meant by the term "mixed paint"?

A. Mixed paint is the type of paint which one buys in the ordinary paint store all ready for use after stirring in the can.

Trial Examiner Norwood: That contains the oil and pigments?

The Witness: Everything is mixed ready for use.

By Mr. Wood:

Q. Do you know how a painter makes paint from white lead and oil?

A. I do.

Q. How?

A. He breaks up the white lead and oil, and usually allows it to stand or ripen. To any given quantities of that so-called shop lead, he adds additional linseed oil, thinner and dryer. Sometimes it is broken up directly on the job without first having gone into the form of shop lead.

Q. Does he add inert pigments or anything like that?

3343 A. Very rarely.

Q. Why is that?

A. Because the product has been used many, many years in that particular form, and there is no necessity for adding any other material, with one exception. Sometimes a little zinc oxide is added.

Mr. DuBose: May we have a recess, Your Honor?

Trial Examiner Norwood: Are you nearly through with this witness?

Mr. Wood: No.

Trial Examiner Norwood: We will take a five-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Proceed.

By Mr. Wood:

Q. In 1923 what was the relative demand for a pure basic carbonate white lead in oil paint in relation to a mixed paint?

A. In 1923 the demand for the straight white lead paint, as we call it, was still relatively high. Subsequently, however, along about 1924 the demand became drastically less.

Q. What has been the trend between then and the present time?

A. The trend has been distinctly toward the so-
3344 called ready mixed paint, the white lead in oil having
just about held its own, whereas the ready-mixed
paint production has increased manyfold.

Q. Now, is ready-mixed paint in competition with the pure basic carbonate white lead in oil paint?

A. In direct competition.

Q. How many types of white lead does the Eagle-Picher Company manufacture and sell?

A. Two types of white lead, basic white lead sulphate and basic white lead carbonate.

Trial Examiner Norwood: What is the difference between them?

The Witness: The difference is in chemical composition. The sulphate is a basic sulphate having the formula of $PbO{-}PbSO4$ and the carbonate $Pb(OH)_2.2PbCO_3$.

By Mr. Wood:

Q. I hand you a copy of the National Paint Dictionary, Second Edition, and direct your attention to the definition of white lead appearing on page 131, and ask you to read that definition into the record, please.

A. Read it aloud?

Q. Read it aloud into the record.

A. "White lead—"

Mr. Wright: Just a moment, please. I am going to object to that unless I can have an opportunity to see 3345 what is being read.

Mr. Wood: Let Mr. Wright read it first. It is just a formula.

The Witness: "White lead: 2 $PBCO_3.Pb(OH)_2$ or $PbO.PbSO_4$. The most widely used pigment in the paint industry, and sometimes incorrectly referred to as basic carbonate of white lead. It has excellent wettability with linseed oil and other drying vegetable oils, and produces a paint which exhibits excellent brushability in actual application. It is characterized by a high specific gravity and a very low absorption (7.0 to 11.0). White lead is now understood to mean either basic carbonate of white lead or basic sulphate of white lead. However, the term originally was used to indicate only the basic carbonate of white lead."

By Mr. Wood:

Q. What is the date of the dictionary from which you are reading?

A. July, 1942.

Mr. Wood: I call Your Honor's attention to the fact that paragraph 4-a, Count 1 of the amended complaint in the case reads:

"A. Lead pigments: This term includes the lead pigments commonly known in the industry as white lead 3346 (both basic carbonate and basic sulphate of lead)."

I was simply putting in the dictionary definition, Your Honor, to clarify the difference between the products.

By Mr. Wood:

Q. Now, is the basic sulphate white lead in competition with the basic carbonate white lead?

A. It is in direct competition with the basic carbonate of white lead.

Q. Is the basic sulphate white lead sold ground in oil the way basic carbonate white lead is sold?

A. To a very small extent.

Q. How is the basic sulphate white lead sold?

A. Almost exclusively in the dry powder form.

Q. To whom is the basic sulphate type of white lead sold primarily?

A. Almost the entire production in the order of 95 or a higher percent is sold to mixed paint manufacturers.

Q. And are their products in which they use that basic sulphate white lead in competition with the pure basic carbonate white lead paints made from white lead in oil?

A. They are in direct competition.

Q. What are the relative merits of the paints made from basic sulphate white lead and basic carbonate white lead?

A. There is no practical observable difference.

Trial Examiner Norwood: Read the question, please.

3347 (The question was read.)

The Witness: I assume you mean multiple pigment paints.

By Mr. Wood:

Q. Explain what you mean, Mr. Goetz, amplify your answer by stating just what you mean.

A. I mean used in a mixture with other pigments in the form of ready-mixed paint, ready for application as it comes in the package.

Trial Examiner Norwood: What is the basis then of the competition between the two?

The Witness: The Eagle-Picher Company feels that basic white lead sulphate produces a better paint and has exported the pigment to an infinitely greater extent than any other manufacturer of that particular pigment, because we think it gives the paint manufacturer a product with which he can make a good paint.

By Mr. Wood:

Q. Which is the more expensive of the two types of white lead?

A. The basic white lead carbonate sells at a somewhat higher price than the basic white lead sulphate.

Q. You stated in your answer to a previous question that the Eagle-Picher Company exploited the basic sulphate type of white lead. Why is that?

3348 A. Because for economic reasons the Eagle-Picher Company is in a better position to manufacture basic white lead sulphate than competitors are.

Q. What is the basis of that statement?

A. Because our plant is located in the mining area, the

Tri-State area, very convenient to our source of ores, whereas in the case of carbonate it is necessary to bring in pig lead from which the basic white lead carbonate is made.

Q. Where do you get the pig lead from which the basic white lead carbonate is made by Eagle-Picher?

A. From smelters and refiners who generally sell that type of material.

Q. From what material do you manufacture your basic sulphate white lead?

A. That is manufactured by two methods. Our production is almost entirely made from lead or concentrates. It can be made, however, by so-called wet or precipitation processes, but that is not the general practice.

Q. What is the wet or precipitation process?

A. That is a method whereby one starts with litharge which was previously made directly from pig lead and then precipitated by means of the use of a sulphate and under the proper conditions of temperature and PH value, and so on, obtaining a basic white lead sulphate precipitate.

3349 Q. Which process is the cheaper manufacturing process, to make it directly from the ore concentrate or to make it by the precipitation method?

A. Made directly from the ore is the cheaper process.

Q. Does National Lead Company make basic lead sulphate?

A. To the best of my knowledge their production is very small.

Q. But they do make some?

A. I can't say positively. I believe that they do but I can't say positively beyond that. It would be very insignificant.

Mr. Wright: I object to that last answer, Your Honor. If he says he doesn't know I don't believe he should be permitted to answer as to the extent. I move it be stricken.

Trial Examiner Norwood: Read the last answer.

(The answer was read.)

Trial Examiner Norwood: The motion is allowed to strike the last part of the answer beginning with "It would be very—"

By Mr. Wood:

Q. Do you regard the National Lead Company as an important competitor in the manufacture and sale of basic white lead sulphate?

A. Very much so.

Q. In sulphate?

3350 A. Oh, not in sulphate. I was referring to white lead.

Q. Do you know of any competitor of Eagle-Picher in the manufacture and sale of basic white lead sulphate who manufactures directly from the ore concentrates?

A. I do not.

Q. What position in the industry does your company consider itself to have in regard to the cost of manufacturing white lead basic sulphate?

Mr. Wright: Your Honor, I object to that. It obviously must call for a conclusion on the part of the witness, who obviously cannot speak as to the costs of other manufacturers.

Mr. Wood: I asked his state of mind, the attitude of the company as to where they thought they stood on basic white lead sulphate.

Trial Examiner Norwood: Read the question.

(The question was read.)

Mr. Wright: If it is counsel's intention to bring out what this witness thinks the company's position is, I must object on the ground that what he thinks the company's position is is irrelevant and immaterial.

Mr. Wood: I only asked what he thought their position was, and I think that is quite important from the point of view of explaining the competition.

Mr. Wright: He has no facts to go on, that I can 3351 see.

Trial Examiner Norwood: He might explain his actions to meet what he understands the conditions are in the trade. I think he may show that.

I overrule the objection.

Mr. Wood: Will you read the question to the witness again, please?

Trial Examiner Norwood: You may want it understood as something which you have determined from your business experience; and as something which you have acted on.

(The question was read.)

The Witness: A favorable position.

Trial Examiner Norwood: That is in regard to costs? Does that question go to costs?

Mr. Wright: Costs of manufacture as between his company and other companies, Mr. Examiner.

Trial Examiner Norwood: Do you know of the costs of your competitors?

The Witness: No, I do not.

Mr. Wood: Can I ask him if he thinks they are higher or lower?

Mr. Wright: I submit that what he thinks his competitors' costs are is wholly incompetent.

Mr. DuBose: It goes to purpose, Your Honor, this whole Count 1 is permeated with purpose.

3352 Trial Examiner Norwood: Now, he establishes something here that bears on the question of competition, and I think that he must give us something more substantial than just his guess at that.

Mr. Wright: He has already testified that he doesn't know anything about what his competitors' costs might be, so how can he reach the conclusion that he did?

Trial Examiner Norwood: You can show us that in some reliable data. I will allow the motion to strike the last answer.

By Mr. Wood:

Q. Of the two white leads, does Eagle-Picher endeavor to sell one in preference to the other?

A. We have always pushed the sale of basic white lead sulphate.

Q. Why?

A. Because it fits into our picture better than the sale of basic white lead carbonate.

Q. In respect to which white lead do you consider your company to occupy the more favorable competitive position?

A. Basic white lead sulphate.

Q. Why?

A. Because we are in a very strong position, having our plant right in the midst of our ore bodies, and our central mill where the ore for the manufacture of basic white lead sulphate is closely available.

3353 Q. Now, if you attempted to make that basic white lead sulphate by the precipitation process, what would it be necessary to do, taking the product from the ore concentrate? What additional steps would be required?

A. It would be necessary to reduce the ore to metal lead, whereby litharge would be made, which would be the starting point for the manufacture by the wet process.

Q. Then what would be the next step in the wet process?

A. The lithage is placed in tank under agitation with the sulphate, and under proper conditions of precipitation, such as temperature, PH value, a basic precipitate is formed which must then be filtered, dried and pulverized.

Q. Now, how many steps are there in manufacturing from the ore concentrate?

A. Essentially one step.

Q. What is that?

A. Namely the mixing of fuel, ore and air in a concentric nozzle, from which the mixture enters into a combustion chamber with the immediate oxidization of the lead sulphate of the ore to basic white lead sulphate. The only other step is carrying the fumes, the product of the oxidation, from there through a settling chamber, then into classifiers and filling machines.

Q. Has there been any controversy in the industry in respect to the relative merits of the basic carbonate
3354 white lead and the basic sulphate white lead?

A. Yes, there has been considerable controversy over the value of the two white leads in ready-mixed paint a decade or so ago.

Q. For how long has that controversy continued?

A. Since the beginning of the use of the pigment.

Q. What is the position of the Eagle-Picher Company?

A. The Eagle-Picher Company's position is the use of basic white lead sulphate on an equal basis with basic white lead carbonate in basic white paints.

Q. Give us a typical formulation you would recommend which contains basic sulphate white lead.

A. The present-day formulation would contain approximately 30 percent of white lead.

Q. You mean sulphate white lead?

A. Either sulphate or carbonate. About 30 to 32 percent zinc oxide, 12 to 15 percent of titanium oxide, and the balance an inert or extender, usually in the form of magnesium silicate.

Q. Does your company manufacture zinc oxide?

A. Our company does manufacture zinc oxide.

Q. Does your company manufacture titanium dioxide?

A. It does not manufacture titanium dioxide.

Q. Does National Lead Company manufacture titanium dioxide?

A. The Titanium Pigment Company manufactures

3355 titanium oxide, which is reported to be a subsidiary of National Lead Company.

Q. And does National Lead Company manufacture zinc oxide?

A. It does not manufacture zinc oxide.

Q. Now, in what form does your company usually sell its basic sulphate white lead to the paint manufacturer?

A. In the form of leaded zinc oxide, which is a mixture of basic white lead sulphate and zinc oxide.

Q. How many different leaded zincs has your company sold to the paint industry?

A. Five or six.

Q. What have been the differences between them, in general?

A. The amount of basic white lead sulphate present.

Q. Is there ever any difference in the particle size or the pigment size?

A. There is always a difference in paint making properties, paint properties being influenced by the physical and chemical nature of the pigments.

Q. Now, if you had a customer that wished to buy your leaded zinc, what type would you sell that customer?

A. That would depend upon his needs. We would ordinarily sell him 35 percent.

Q. How would you determine your customer's needs?

A. By the nature of the formulation which he is making. That would include pigmentation and physical prop-
3356 erties of the paint which he desires.

Q. And on the basis of what information would you make your determination?

A. Your question is not clear.

Q. In picking out a particular leaded zinc to sell a particular customer, what information would you use as the basis for your selection?

A. We would have to know his pigmentation formulation. We would also have to know what particular properties he desires in his paint. Mixed paint is a compromise. We have to know on what properties he wishes to place the most emphasis. For example, brushability—a paint which will flow easily under the brush—is one example. Also the white lead content.

Q. Has your company had any experience with the properties of mixed paints?

A. We have had several years' experience in the properties of mixed paints.

Q. Well, have you tested out various mixed paint formulas on your test fence?

A. We are continually testing out and have for a number of years developments of our own and also commercially produced paints, and generally recommended formulations that we hear about in the trade.

Q. Well, is the information resulting from those
3357 various tests and experiments available to a customer or prospective customer?

A. That information in some cases, if it is a special matter where the customer wishes his problem kept confidential between himself and Eagle-Picher, the information is not disclosed; but in general the information which is built up on the basis of these tests is freely available to all of the industry.

Q. Can you state the relative production of the Eagle-Picher Company of the basic sulphate type of white lead and the basic carbonate type of white lead say in the 1941-42 period?

A. In the period 1941-42, the production of basic white lead sulphate per se—that is the single pigment not mixed with any other material—and the basic white lead carbonate were approximately equal; but the production of basic white lead sulphate in the form of leaded zinc oxide was considerably greater than that.

Q. Well, how much greater than the production of basic carbonate white lead?

A. Our production of leaded zinc oxide would be approximately three and one-half times the production of basic white lead sulphate.

Q. Now, is your leaded zinc oxide in competition with basic carbonate white lead?

A. In ready-mixed paint, it is in direct competi-
3358 tion as a source of white lead.

Q. I hand you a booklet marked Respondents' Exhibit 185 and ask you if you can state what that is?

A. This is a publication of the pigment division of Eagle-Picher Company which presents the properties and uses of super sublimed white lead, which is our trade name for supplying white lead for basic white lead sulphate.

Mr. Wood: I would like to offer in evidence Exhibits 184 and 185.

Mr. Wright: I haven't examined either of those exhibits and should like to have an opportunity to do so.

I should like a short voir dire on the identification of these documents.

Trial Examiner Norwood: All right, go ahead.

By Mr. Wright;

Q. When was Respondents' Exhibit 185 published, do you know, Mr. Goetz?

A. There may be a date on there. That was published in June, 1940.

Q. Who prepared it, do you know?

A. That was a matter of collaboration between the research laboratory, the staff, myself and our advertising department.

Q. There were several departments in Eagle-Picher who collaborated on them?

A. Three, I believe.

3359 Q. Was this prepared as an advertising bulletin?

A. You might call it that. It was prepared as an information circular to give the paint trade primarily the properties and uses of basic white lead sulphate as a paint.

Q. With the objective in mind of increasing the sales of your pigments?

A. Naturally, that is right.

Q. In the paint trade?

A. That is right.

Mr. Wright: Your Honor, I have no objection to the receipt in evidence of Respondent's Exhibits 184-A through D, but I do object to the offer of Exhibit 185. It is a long, technical advertising circular prepared by the Eagle-Picher Company. There has been no verification of the information which appears in it. I must object to its receipt in evidence as a statement of the facts which it contains because those facts are susceptible of being proved by direct evidence and competent testimony.

Trial Examiner Norwood: The witness said he prepared them.

Mr. Wright: No, I believe he said that was prepared through the research laboratory, through the advertising department and the technical services. I certainly want to preserve my objection to all that material that is contained in there.

3360 Trial Examiner Norwood: What do you think about that?

Mr. Wood: The witness has testified that they were competing with National Lead. That was a document they got out in furtherance of competition.

Trial Examiner Norwood: This went to the customers?

The Witness: That is right.

Mr. Wright: It is an advertising circular to the customers. Now it is being offered presumably as a statement of facts about the relative technical differences in the manufacture of these pigments.

Trial Examiner Norwood: Well, I don't think it should be received for that purpose.

Mr. Wright: I would have no objection to its receipt in evidence as being what the Eagle-Picher Company believed in 1940 the case to be, but I certainly don't want it received as evidence of those facts.

Trial Examiner Norwood: It can be received as an actual act of competition; this is an instrument of that competition.

Mr. Wood: That is right.

Trial Examiner Norwood: The same as a representation made by a salesman as to whether or not there was any competition.

3361 Mr. Wright: There are statements here, for instance, purportedly taken from reports of State regulatory bodies, and so on.

Trial Examiner Norwood: The fact that he issued that to the trade can be shown. It will not be received to show the chemical content and the truth of those scientific statements. You will have to show that by other evidence.

Mr. Wood: By other witnesses, yes, I appreciate that.

Trial Examiner Norwood: It is limited to a showing that it is a sales instrument and it is received to be considered with respect to its bearing on competition, only. Received as marked, 184-A through 184-D, and 185.

(The documents referred to were marked RESPONDENT'S EXHIBITS NOS. 184-A, 184-B, 184-C, and 184-D and 185 and received in evidence.)

Mr. Wright: I would like to ask counsel if he has copies of those available?

Mr. Wood: I will try to get extra copies for you. Off the record.

(Discussion off the record.)

By Mr. Wood:

Q. Referring again to Exhibit 185, are you familiar with the contents of this exhibit?

3362 A. I am.

Q. Do you believe the contents of this exhibit to be true?

A. Absolutely true.

Q. In so far as comparisons of a pure basic carbonate white lead paint and a mixed paint containing basic sulphate white lead, have you ever on your own made any comparison between those two products?

A. Many times.

Q. Will you give us an example, some specific example that occurs to you where you yourself have made the comparison of the properties of those two types of paint?

A. The basic white lead carbonate type of paint is what we call a single pigment paint. There is very little can be done to regulate the properties of that paint. It is a paint which has been accepted by the trade for many years. On the other hand, mixed paints are what we call multiple pigment paints in which we have two or more pigments, using today at least four. With this assortment of pigments much can be done to regulate the properties of that paint.

As, for example, a multiple pigment paint in white contains a certain type of titantium oxide, which is what we call a chalking type of pigment. The organic matter in the linseed oil, which is the vehicle, disintegrates and permits the pigments which do not react with the linseed
3363 oil to wash away or chalk away. That is an example
of what can be done in the multiple pigment paints. In general the multiple pigment paints present a more attractive appearance than do paints made from basic white lead carbonate.

Q. I asked you to give an example of a physical comparison that you yourself have made between the two types of paint.

A. You mean the actual details of inspection?

Q. Yes, some job that you yourself either made or inspected.

A. Very well. In Cincinnati, Ohio, about four years ago, in the same neighborhood, one house was painted with straight white lead in oil, as we call it, which would be a single pigment basic white lead carbonate paint; two houses down the street was a house painted within thitry days of the time the other house was painted, which had a well known brand of ready-mixed paint. At the end of about nine months the house painted with white lead in oil or the single pigment basic white lead carbonate paint, showed a good film integrater but the painting was very unattractive in that it had an irregular dirt retention, whereas in the case of the multiple pigment paint the paint job was much more attractive because it was cleaner for the reasons which I mentioned just previously.

During the war I inspected hundreds of Army cantonments at three of which there were jobs on which 3364 straight white lead in oil had been used and also jobs on which two types of ready-mixed multiple pigment paint had been used. In all cases the multiple pigment paint showed greatly improved performance in the way of decoration over the straight white lead carbonate paint.

Q. I hand you a document marked for identification as Respondents' Exhibits 186-A through 186-E, inclusive, and ask you if you can state what that is?

A. These are photographs which were part of a brief which was presented to the members of the Federal Specification Committee on Paint at the request of the Chairman of the Committee. The manufacturers of basic white lead carbonate and manufacturers of basic white lead sulphate were required to present data concerning the usefulness and the properties of these two pigments in multiple pigment ready-mixed paint.

This exhibit which you gave me contains the photographs which were used in the exhibit presented by Eagle-Picher.

Q. What was the purpose of Eagle-Picher's exhibit?

A. The purpose of this Eagle-Picher Exhibit was to place into the hands of the committee information as to the performance of the two white leads, at the request of the chairman of the committee.

Q. Who was the chairman of the committee?

A. Mr. E. F. Hickson of the Paint and Varnish, 3365 Lacquer and Related Materials Section.

Q. Section of what?

A. Of the Bureau of Chemistry at the National Bureau of Standards in this city.

Q. Was he a Government employee?

A. He is a Government employee.

Q. What was he trying to do at the time?

A. A controversy arose in the committee which began on the basis of representations made by manufacturers of these two white leads. The committee wished information as to how paints performed when made in one case with basic white lead sulphate and in the other case with basic white lead carbonate, all other conditions remaining the same.

Q. What was the purpose of the committee in desiring that information?

A. The purpose of the committee, which is a standing committee and part of the Bureau of Federal Supply, as it is now called—at that time it was part of Treasury Procurement—this committee is charged with writing specifications for paints and related materials for use by Government agencies.

Q. In this particular case what was the paint specification to be used for?

A. The paint specification was to be used for what we would call in the trade ready-mixed outside house paint.

In this particular case if you wish me to identiy the
3366 specification it was TT-P-40, paint, oil, exterior ready-mixed, light tints and white; and also Federal Specification TT-P-25a, paint, exterior primer, ready-mixed white (undercoat for wood).

Q. Now, why was the Government at that time particularly determining the specification?

A. Well, this committee—as all specification committees are charged with doing and really do do—is trying to keep their specifications up to date.

Now, in the old days the Federal specification TT-P-36 was used, which contained for whites 70 percent white lead, 20 percent zinc oxide, and 10 percent inerts. In the case of tints, 60 percent white lead, 30 percent zinc oxide, and 10 percent inerts.

Now, since that specification was written, which dates back to 1930, considerable progress has been made in the technology of paint. Our whole philosophy in the formulating of what we call house paint or exterior paint has changed, due largely to the introduction and finally wide acceptance of the pigment known as titanium, meaning either titanium oxide or a composite pigment containing 25 to 30 percent of titanium oxide.

Now, the committee, wishing to keep their paint specifications up to date—and that is one of the most pro-

gressive committees—looked into the matter of chang-
3367 ing their paint formulation. In looking into the matter, the chairman of the committee always casts about in industry for ideas and copies of the specifications in the proposed stage are quite widely distributed amongst interested people—the ASCM, for example; the Federation of Varnish and Production Clubs; paint manufacturers who so desire them, and raw material manufacturers who desire them may have copies of all proposed specifications. The knowledge that the specification was about to be changed became quite general, whereupon certain individuals proposed the mandatory use of basic white lead carbonate either entirely, or to an amount to be stated in the specification.

The situation became sort of confused with representations made by this person and that person both from raw material houses, mixed paint people, and members of the Government, that the chairman decided, with the advice and consent of this committee, to ask certain individuals to present data on the details of performance of paint made with either one of these two white leads, and this is a portion of the data which was prepared and presented to the committee, each and every member given the information as Eagle-Picher had developed it. The same information was presented by other manufacturers who specialized principally in basic white lead carbonate.

Q. By the same information, you mean similar information?

3368 A. Similar information, the same type.

Q. They were on the other side of the question, though, weren't they?

A. That is right.

Q. Now, who was on the other side of the question; that is, in favor of the carbonate as against the sulphate?

A. This goes back to 1941. The National Lead Company was one, and the Glidden Company was another. Those two companies were the principal factors in presenting the data concerning basic white lead carbonate, whereas Eagle-Picher was the only one presenting data stressing basic white lead sulphate. Keep in mind that this data states the properties of each pigment, not one but each pigment, as was the case with the two companies just mentioned.

Q. In other words, they were contending for the superiority of the basic carbonate white lead without showing the properties of the basic sulphate white lead?

A. No, they contended that basic white lead carbonate had performed better in multiple pigment paints than basic white lead sulphate, by means of data which they had established and presented to the committee. Eagle-Picher, on the other hand, merely endeavored to and did show the equality of the two white leads as the source of white lead in multiple pigment ready-mixed paints.

Q. Before introducing this into evidence, I would like you just to summarize what these photographs show.

3369 Mr. Wright: Your Honor, I object to any summarization of what the photographs show. That is not a proper identification of the document.

Trial Examiner Norwood: Do not summarize any of the information in that paper, but you may summarize your description, telling us what it is. I do think you have completed that already.

Mr. Wood: Well, I will withdraw the question.

Trial Examiner Norwood: In other words, these are documents that were submitted to that committee on those questions.

Mr. Wood: I will withdraw the question, and offer into evidence Respondents' Exhibit 186-A through D.

Mr. Wright: Your Honor, I have several objections to this data. In the first place, it is obviously incomplete, and it is meaningless in and of itself. It is copies, apparently, of Sheets 1, 2, 4 and 7 of an appendix to a brief. There is no showing on this document of how these tests were conducted, if they are the result of tests, or what procedure was followed, or what the significance of them is. They are not competent evidence, in addition to the fact that they are entirely irrelevant.

Mr. Wood: I don't see how they can be considered irrelevant. The witness has testified that is part of the data submitted to the Government.

3370 Trial Examiner Norwood: I think it is time for the lunch hour. I will take this and look it over, and give my ruling after lunch.

What is counsel's pleasure?

Mr. DuBose: 2 o'clock.

Trial Examiner Norwood: We will recess until 2 o'clock.

(Thereupon, at 12:20 o'clock p.m., a recess was taken until 2 o'clock p.m.)

3371 Afternoon Session

(The hearing was resumed at 2 o'clock p.m., at the expiration of the recess.)

Trial Examiner Norwood: The hearing will be in order. With regard to the offer of Respondents' Exhibit 186-A through D for identification, I see no reason why you cannot put in these photographs here showing the difference under similar circumstances of the results obtained from the sulphate and the carbonate; but in its present condition, its only basis is that it is an exhibit to a brief which was submitted to the Committee of the Bureau of Standards. I presume that brief was to maintain one side or the other of some contention; I don't know. But that wouldn't give it a proper basis in evidence, as was the case of this other document that we took in. That was sent out by these people, but this doesn't have a competitive angle at all. This is purely a matter of fact as to the effects of these two different commodities or two different ingredients.

Mr. Wood: I might ask the witness the purpose of the brief.

Trial Examiner Norwood: If you will indicate this, or if he will testify that this is a fact, or will testify to the circumstances, and those differences are found to be relevant, you may do that.

3372 Mr. Wright: I don't see the relevancy of this at all. I don't see what counsel has in mind proving here. There is no contention that the products that Eagle-Picher manufactures and sells are not of equal quality with any other.

Trial Examiner Norwood: He is showing some things he is doing here to meet competition. These are competitive methods here, some activity here in investigating these differences and in developing this particular paint to meet competition. He is offering it for that purpose.

Mr. Wright: I concede that the Eagle-Picher Company has done technical research in paints and in various pigments, but of what possible relevance are comparative tests which are not described? This is just the end result apparently of some comparative tests which are not described in the exhibit, as to the value of a paint made with one type of pigment that Eagle-Picher sells as against a paint with another type of pigment that Eagle-Picher sells.

This isn't comparative as between Eagle-Picher and other companies.

Mr. Wood: On the contrary, the witness has testified that Eagle-Picher was pushing sulphate white lead, and National was pushing carbonate white lead. It is competition between these respective companies.

Mr. Wright: I disagree there is any evidence of competition between National and Eagle-Picher Company,
3373 your Honor.

Trial Examiner Norwood: Isn't that as far as you need to go to show that there is competition?

Mr. Wright: If counsel means by competition that his company sells one type of product and that National Lead solicits customers in the same type of business for that and similar types of products, there is no issue there between us.

Trial Examiner Norwood: He corroborates his statement that there is a difference between these by putting in these photographs here to show there is a difference in the results they obtain between the two.

Mr. Wright: I submit that hasn't been proven. It isn't proved by those exhibits.

Trial Examiner Norwood: He may do that, if he can authenticate it.

Mr. Wright: But National sells both of these materials, and Eagle-Picher sells both of these materials, as far as the record shows now.

Mr. Welch: But the percentage of each different product sold by the two companies varies considerably.

Mr. DuBose: Not only that.

Mr. Wright: I think that is a subject of proof.

Mr. Welch: There is no testimony to that effect.

Mr. DuBose: We maintain that price competition
3374 does not mean price war.

Trial Examiner Norwood: Go ahead, Mr. Wood.

ALVIN C. GOETZ resumed the witness stand and was examined and testified further as follows:

Direct Examination (Resumed) by Mr. Wood.

Q. Now, Mr. Goetz, in the period 1941 to 1942 was there any difference in the cost of paint manufactured from the two different varieties of white lead, carbonate and sulphate?

A. Yes, there was a difference in favor of the use of basic white lead sulphate, either as such or in the form of leaded zinc oxide.

Q. How much cheaper would a gallon of paint using the sulphate type of white lead be than a gallon of paint using the carbonate of substantially equal quality?

A. Between six and seven cents a gallon in favor of the basic white lead sulphate type of formulation.

Trial Examiner Norwood: Is that a substantial difference?

The Witness: That is considered in the paint trade a substantial difference. I might say that that depends on your formulation. We used in 1942 the 60-30-10 or the 70-20-10 type of formulation, which was then quite commonly used. In some areas, Your Honor, that is the 3375 difference between a profit and a loss.

Mr. Wood: Will you mark this Exhibit 187-A and B, please?

(The document referred to was marked Respondents' Exhibits 187-A and 187-B for Identification.)

By Mr. Wood:

Q. I show you a document marked 187-A and B, and ask you whether or not you know what this is?

A. Yes, this is a letter sent to the members of the Federal Specification Paint Committee with reference to the use of the two white leads in Federal Specification TT-P-36a, 101a and TT-P-81.

Q. Now, at that time what was the status of the two white leads as far as Government specifications were concerned?

A. The specifications permitted the use of either white lead to satisfy the white lead content required by the specification.

Q. Now, I call your attention to the statement appearing in the last paragraph on the first page of this letter, which reads:

"Because basic sulphate white lead as such (or in the form of leaded zinc oxide) is cheaper per pound than basic carbonate of lead, I am informed that no basic carbonate white lead was used in the million gallons of paint. As a result, I have received a request from a large basic 3376 carbonate white lead producer that this committee specify that one-half of the white lead in pigments of the TT-P-36a, TT-P-101a and TT-P-81 be basic carbonate of lead."

Mr. Wright: I object, Your Honor, and ask that counsel's question be stricken.

Mr. Wood: I haven't asked it yet.

Mr. Wright: I ask that counsel's statement be stricken, because that document is not in evidence.

Mr. Wood: I will offer the document in evidence.

Trial Examiner Norwood: Have you finished your question?

Mr. Wood: No, I haven't finished the question.

By Mr. Wood:

Q. Do you know who the basic carbonate white lead producer was that wanted the specifications changed?

Mr. Wood: I will introduce this into evidence.

Trial Examiner Norwood: I am confused over this situation here. This has been read into the record, but you didn't ask him if that were true. You read that to refresh his memory with respect to a certain firm there?

Mr. Wood: I identified the exhibit. I could put it in at that time after identification, but I was going to show its pertinence first by reading a section to him and asking
him what he knew about that section. It is optional
3377 with me as to when I offer it in evidence.

Trial Examiner Norwood: Is there a motion?

Mr. Wright: I made a motion to strike counsel's question with his statement of what was in that document, out of the record.

Trial Examiner Norwood: I will allow that motion.

Mr. Wood: In that case I will offer the document into evidence first as Exhibit 187-A and 187-B.

Mr. Welch: Off the record, Mr. Examiner.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: I am going to object to this, Your Honor, because it is absolutely irrelevant. It has no evidentiary value in this proceeding. It is obviously a letter seeking information on the subject of the comparative qualities of these pigments by the Chairman of the Technical Committee on Paint. It is evidence of nothing except that the committee did seek information on the pigments and it has no relevancy at all to this proceeding.

Trial Examiner Norwood: Do you concede that they did so seek?

Mr. Wright: The letter purports to show that. The witness has testified under oath that he received that from that man. I have no way of going back of that.

Trial Examiner Norwood: Off the record just a
3378 minute.

(Discussion off the record.)

Mr. Wood: I think it is extremely relevant on this count: That the charge here in this case is that the National Lead Company has monopolized the white lead business, controls it; that there is no competition in it and that Eagle-Picher has collaborated and cooperated with National to maintain that situation. That document and the other companion documents that go with it will show that the carbonate manufacturers tried to get a Government specification changed so that there had to be a high percentage of carbonate, the more expensive carbonate present in the formulations to come under the Government specifications, and that Eagle-Picher fought that tooth and nail in an effort to sell the greatest amount of sulphate possible, which was the cheaper of the two products. If that doesn't show competition I don't know what does.

Mr. Wright: Your Honor, right on that point maybe I can help Mr. Wood out. I appreciate there have been probably many instances in the recent history of this industry where there have been controversies about one thing or another in the lead business between Eagle-Picher and National and between Eagle-Picher and other members of the industry. The charge in this complaint relates to price competition. Now, I believe Mr. Wood has prac-
tically conceded that there is no such thing as price
3379 competition. I am willing to concede that there is
what Mr. Wood considers to be competition in the furnishing of technical services and sales services and the like.

Mr. Wood: I think this is an excellent example of price competition because the witness has just testified that the use of the Eagle-Picher material provided a more economical paint. If that isn't price competition what is price competition?

Mr. DuBose: In addition to that we do not concede Mr. Wright's remark that we admit there is no price competition in this industry. We distinctly claim that there is.

Mr. Welch: Your Honor, if I may make an observation, price competition even according to the Commission's theory ultimately turns not on the price to the customer—and using the Commission's definition of price—turns not on the price to the customer but the ultimate return to the manufacturer. The witness on the stand has already testified that the costs of two different products are entirely different so there is no price competition under the Commission's definition.

Trial Examiner Norwood: You mean there is competition in mill net?

Mr. Welch: Yes, sir.

3380 Mr. DuBose: Under the Commission's theory.

Trial Examiner Norwood: I will ask counsel to explain to me tersely the purpose of respondents' Exhibit 187-A to 187-B. Is it to show the truth of the contents there or to show the fact that this circular was sent out to the trade or to the paint industry?

Mr. Wood: That was sent to us.

Trial Examiner Norwood: It can't be admitted to show the truth of any of the facts therein stated.

Mr. Wood: I don't care about the truth of the facts therein stated, particularly.

Mr. Wright: For what other purpose could it be offered except to show it was an inquiry for information?

Trial Examiner Norwood: To show there was a contest between these people and that that contest was taken up before the Bureau of Standards and before this committee.

Mr. Wright: I don't believe that letter shows there was a contest between any particular people.

Mr. Wood: It is the opening document in showing the contest.

Mr. Wright: I assume from counsel's question, to which you sustained an objection, he is going to attempt by this witness, on the basis of that document, to identify unnamed parties who are mentioned in that letter.

Trial Examiner Norwood: Can't this witness tell
3381 us of his own knowledge everything he knows about this subject here?

Mr. Wood: You mean without the documents?

Trial Examiner Norwood: Yes. He can use them to refresh his memory then if Commission's counsel wants to let them in evidence, he can do it. I will sustain the objection to it for the time being, to that exhibit, that is 186-A to 186-E and counsel can proceed to bring out that information in a little more satisfactory way.

By Mr. Wood:

Q. Do you remember any sort of an controversy in the spring and summer of 1941 in respect to the basic carbonate and basic sulphate white lead in ready-mixed paints, TT-P-36a, TT-P-101a and TT-P-81?

A. I do remember a controversy.

Q. Will you state what you remember of that controversy?

A. The controversy arose at the time the specifications were reopened to bring them up to date in current paint technology, at which time a certain group of manufacturers of white lead whose product was either entirely the carbonate type or predominately the carbonate type, sought to have written into the specifications that a certain amount —they first desired 100 percent and later reduced their demand to 50 percent—of the white lead used to satisfy the white lead requirements in the specification should be
3382 the basic white lead carbonate type of white lead.

To support that position certain pamphlets were issued as requested in Mr. Hickson's letter which has just been under discussion.

Q. What position did the Eagle-Picher Company take in respect to that proposed change?

A. Eagle-Picher pointed out that for a number of years, 20 or more years, the two white leads had been accepted on an either-or basis and that it was not fair to the public or to the Government to require basic white lead carbonate at a higher price. We were agreeable that the matter should be entirely optional. We did not insist it should be one way or the other, we wished it to be optional on the part of the paint manufacturer.

Q. Who were the companies that were trying to put over the carbonate?

A. The National Lead Company, the Glidden Company and the Euston Company, which is part of the Glidden Company and also the Anaconda White Lead Company, or more properly, perhaps, known as the International Smelting & Refining Company.

Q. What were the relative prices of the basic lead carbonate white lead and the basic lead sulphate white lead?

A. There was a half a cent a pound difference. The exact price I cannot give from memory except to say they were on the order of six or eight cents a gallon.

3383 Q. Was there any additional saving by the use of leaded zinc?

A. A slight saving by the higher bulking value of basic white lead sulphate; largely theoretical, but some saving in that respect.

Q. That is over the sulphate alone?

A. No, over the carbonate. When used in the form of leaded zinc oxide there was an additional saving at that time and with the paint being made at the time it would amount to a difference in the order of six to seven cents a gallon.

Q. Why did Eagle-Picher when it was making both the carbonate and the sulphate types of white lead put up a struggle to prevent the change in making the certain percent of carbonate mandatory?

Mr. Wright: Objection, Your Honor, there has been no testimony that there was a struggle put up.

Mr. Wood: I think he testified that they resisted.

Trial Examiner Norwood: I think so. Did you, or not?

The Witness: I think that I did. I started to say that the Eagle-Picher Company resisted this change and I think there was an objection. I don't know whether I finished that statement, or not.

By Mr. Wood:

Q. Go ahead, anyhow.

3384 Trial Examiner Norwood: Answer the question. Objection overruled.

The Witness: What is the question?

Mr. Wood: Read it, please.

(The question was read.)

The Witness: Because Eagle-Picher's greatest interests lay in the use of basic white lead sulphate, because we were predominately a basic white lead sulphate house, whereas all of our competitors were either 100 percent or predominately basic white lead carbonate houses. Furthermore, since the specification had been entirely satisfactory to the Government and also in industry where the two white leads were used interchangeably, we could see no reason for making the change.

By Mr. Wood:

Q. How general was the competition between the basic white lead sulphate or the leaded zinc containing the basic white lead sulphate, and the basic carbonate white lead?

A. In the past decade the competition was extremely keen both as between basic white lead sulphate and carbonate as such, and also between basic white lead carbonate and basic white lead sulphate in the form of leaded zinc oxide.

Q. And has that competition been price competition?

A. That has been price competition due to the difference in the cost of arriving at a mixture of leaded zinc
3385 on the basis of leaded zinc oxide, or a mixture of basic white lead sulphate and zinc oxide.

Q. Now, did the controversy regarding those Government specifications continue into the year 1942?

A. Sometime in late '42, or early 1943.

Q. Do you know what the outcome was?

A. Yes, the outcome in the case of the Federal specification which finally issued under the No. TT-P-25—that is the primer specification—was that the white lead was mandated to be 50 percent white lead carbonate and 50 percent white lead sulphate.

Q. Was that with Eagle-Picher's agreement?

A. That was with Eagle-Picher's agreement, but there was also another specification involved, TT-P-40, in which the white lead content was allowed to be optional, and there were special reasons why there was a difference in the action of the committee in those two specifications.

Q. You used the word "agreement." You said with Eagle-Picher's agreement. Eagle-Picher's agreement with whom?

A. Perhaps I misused that word agreement. By agreement I meant during the prolonged discussions of this specification, in order to bring about some satisfactory specifications, with reference now to TT-P-25, the primer, Eagle-Picher decided, "Well, we are just not going to ball up the works any more. Let the boys go ahead and
3386 get out the specification. The Army is in need of primer paint. Let us go along and settle it."

So it finally came out on the so-called compromise basis, 50 percent of each, to satisfy the white lead content in TT-P-25.

Q. Do you remember whether or not your company protested to Mr. Hickson over the adoption of that 50 percent mandation of basic carbonate white lead?

A. I do recall such a protest.

Q. Do you remember the contents of that protest?

A. Well, substantially the protest was made on the basis that the optional use of the white leads had been satisfactory over a long period of years, in the case of one type of paint, namely TT-P-40, and we could see no reason to make a change at this time. In the case of the other type of paint, the primer TT-P-25, there was a divided opinion as to whether 100 percent of white lead of one type or the other type, or a 50-50 mixture of the two should be used in that type of formulation.

Q. Does the Eagle-Picher Company manufacture a product called blue basic lead sulphate?

A. It does.

Q. For how long has it manufactured it, to your knowledge?

A. To my personal knowledge, it has been made for 25 years or longer.

3387 Q. Does your company manufacture a product called red lead?

A. It does.

Q. What is the relationship between blue lead and red lead as far as their use is concerned?

A. Both are used substantially for protection of iron and steel against rusting.

Q. How is red lead manufactured by the Eagle-Picher Company?

A. Red lead is manufactured from litharge, which is first manufactured from pig lead.

Q. And how is blue lead manufactured by the Eagle-Picher Company?

A. Blue lead is manufactured from ores direct without first reducing the ores to pig lead.

Q. Which is the cheaper as manufactured by the Eagle-Picher Company? Which is the cheaper of the two products as maunfactured by the Eagle-Picher Company?

A. The blue lead is the cheaper.

Mr. Wood: Will you mark that 188, please, and this 189.

(The documents referred to were marked Respondents' Exhibits 188 and 189 for Identification.)

By Mr. Wood:

Q. I hand you two exhibits, marked 188 and 189 respectively, the first bound in blue and the second in red, and ask you what those two documents are?

3388 A. This (indicating) Exhibit 188, is a brochure put out by the Eagle-Picher Company describing the properties of blue lead, basic white lead sulphate, and giving formulations for their use in primers for the protection of ferrous surfaces under several types of exposure.

189 is a similar publication put out by the National Lead Company dealing with formulations for paint based on red lead.

Mr. Wood: I offer these two documents into evidence, Your Honor.

Mr. Welch: May we have a five-minute recess while the gentlemen are examining the documents?

Trial Examiner Norwood: It is a little early for the recess.

Mr. Wright: I might say, Your Honor, that there appear to be about 40 pages of printed material in these documents which I have never seen before.

Trial Examiner Norwood: We will take a five-minute recess.

(Thereupon a short recess was taken.)

Mr. Wright: I would like to ask a few questions on voir dire.

By Mr. Wright:

Q. Mr. Goetz, this document, respondent's Exhibit 188 for identification, what use it made of that? Has that 3389 been published to the trade generally?

A. This particular document has had limited circulation. It is circulated to paint manufacturers. It is designed particularly for formulators who have more than an average interest in the formulation of paints for protecting iron and steel under specific conditions.

Q. In other words, it is technical information by way of advertising your products to your customers?

A. Of course. We do this in the hope we are going to get some return in the way of tonnage, that is right.

Q. I notice there are some pencilled notations through here. What is the source of those notations?

A. Probably something I put down there for future changes.

Mr. Wood: May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

The Witness: It is very difficult, no matter how hard you try, to keep everyone in the company interested and after it goes to press and is actually being printed, in the last stages, you will always find something that needs changing so as soon as it comes out I always make it a point to go over it and make changes for future revisions.

By Mr. Wright:

Q. How did you come into possession of this document, Exhibit 189?

3390 A. That is generally available in the industry.

Trial Examiner Norwood: Is that a document from Eagle-Picher?

Mr. Wright: No, sir, this is a document that has printed on it "Published by the National Lead Company." I object to the receipt of these documents in evidence. They contain a mass of technical data on the composition of various types of paint. I think a glance at random will disclose the nature of the documents. I fail to see that they have any relevancy to the proceeding at all.

Mr. Wood: It is our position, of course, Your Honor, that they are excellent evidence of competition between the two companies.

Trial Examiner Norwood: Well, you don't object to the identification of this as being something that National issued, do you?

Mr. DuBose: Your Honor, I haven't made any objection yet. I should like to reserve my objections on the ground that perhaps it may be incorrect or it may not be a proper document published by the National Lead Company. I have no doubt that it is but I should like to reserve my objections on the ground of correction.

Mr. Wright: There are many, many statements of fact and expositions of fact reported in these two documents.

Certainly I don't think it is competent to prove those 3391 statements of fact by this method or by these documents.

Mr. Wood: I will make the statement that the documents are not offered to prove the accuracy of the facts represented in either document, but merely to show the technical warfare that is going on between the two companies.

Mr. Wright: I object to them as being incompetent to show any technical warfare between the two companies. They don't show any technical warfare on their face. They show that one company in one document is advocating a certain specification of paints for certain purposes, and another company is advocating another specification for paint for certain purposes. It is not shown that those purposes are the same.

Mr. DuBose: I take it that is the purpose of the offer.

Trial Examiner Norwood: So I understood.

Mr. DuBose: Solely.

Mr. Wood: Yes.

Trial Examiner Norwood: I think they may be admitted for that purpose. I will overrule the objection and receive Respondents' Exhibits 188 and 189, they being permanently bound pamphlets.

(The documents previously marked RESPONDENTS' EXHIBITS 188 and 189 for Identification were received in evidence.)

3392

By Mr. Wood:

Q. Does the National Lead Company put out blue basic lead sulphate?

A. They do.

Q. National Lead?

A. They sell blue lead also, but not in any quantities.

Q. How long have they sold it, if you know?

A. A matter of 20 years to my knowledge; it has been listed on their price cards although I don't think they sell much of it.

Trial Examiner Norwood: It is understood that Respondents' Exhibits 188 and 189 are received for the purposes for which they were offered, as stated by counsel.

Mr. Wood: That is right.

Mr. Wright: As I understand it Mr. DuBose was reserving objection, was he not, to the receipt of Exhibit 189?

Mr. DuBose: Reserving objection, Your Honor, not making objection, subject to the accuracy thereof.

Trial Examiner Norwood: He can move to strike them later if he wants to.

Mr. Wood: As far as I am concerned if Mr. DuBose can show that that document is a forgery I will be glad to withdraw it.

3393 By Mr. Wood:

Q. Now I hand you a document, four pages of which have been marked 190-A to D, inclusive, and will ask you if you can state what this booklet is?

A. This is a booklet put out by the National Lead Company on the subject of structural metal painting.

Q. I call your attention to the heading and the matter thereunder beginning at the bottom of page 52, which is marked here Exhibit 190-A, and ask you what the substance of that material is?

Mr. DuBose: I object, Your Honor, on the ground that this is referring to a document not in evidence.

Trial Examiner Norwood: Yes, objection sustained.

Mr. Wood: Your Honor, I am in a very difficult position here on this account: It is one case where I am offering a document for the untruth of what is stated, instead of the truth of what is stated. In other words—

Mr. DuBose: I object to that remark, Your Honor. As I understand counsel it is a document prepared by the National Lead Company and I move to strike the remarks of counsel.

Trial Examiner Norwood: Motion denied, it having appeared that it was a National Lead document. Counsel volunteered that.

Mr. Wood: It has been identified as such.

3394 Trial Examiner Norwood: But it hasn't come in yet. You can move to strike it after it comes in.

Mr. Wood: May we go off the record, Your Honor?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

By Mr. Wood:

Q. I call your attention to the cover page of this document, Respondents' Exhibit 190-D, and ask you to state your understanding of the origin of the document.

Mr. DuBose: Your Honor, I think we can perhaps simplify this matter by saying that I reserve my objection. For the moment I concede that to all apparent purposes it was issued by National Lead Company. I reserve, however, on the record my objection to the document, should it appear at any time later that it is not a document issued by the National Lead Company.

Mr. Wright: I should like to have the document properly identified on the record, in any event.

Trial Examiner Norwood: Now, is there a question pending?

Mr. Wood: Yes, ~~sir.~~ Will the reporter read it, please?

(The question was read.)

The Witness: The origin is the National Lead Company.

3395 By Mr. Wood:

Q. How did this document come into your possession, if you remember?

A. I picked it up in the trade some place. It was widely distributed.

Mr. DuBose: May I have the right of preliminary cross-examination here?

Trial Examiner Norwood: Just wait until he gets through identifying it.

Mr. DuBose: I beg your pardon.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

By Mr. DuBose:

Q. Mr. Goetz, do you recall under what circumstances the Eagle-Picher Company got this document, a few pages of which have been marked as Respondents' Exhibit 190-A to D, inclusive, for identification?

A. Yes. We heard about the circulation of it in the trade and we were able to pick one up.

Q. When you say in the trade, what do you mean?

A. Amongst paint manufacturers and paint specification writers.

Q. When you say "We picked it up in the trade," what do you mean, a salesman of yours?

A. Someone at Eagle-Picher picked that up.

3396 Q. And brought it back to your office?

A. That is correct.

Q. Outside of that you have no independent knowledge of who published this document, is that correct?

A. That is correct.

Mr. Wood: I offer the document into evidence.

Mr. DuBose: Just the pages that are marked?

Mr. Wood: Just the pages that are marked.

Mr. DuBose: Your Honor, may I state for the record that we, subject to correction, concede that this is a publication issued by National Lead Company.

Mr. Wright: Your Honor, I am not going to object to this on the ground of the identification subject always, of course, to a motion to strike later when I have had an opportunity to examine it, but I am going to object to its offer in evidence as being absolutely immaterial and irrelevant.

It is shown on the record that both of these companies produced both red lead and blue lead and what one of them might think about certain tests it has made as against what another might think about certain tests it has made, has absolutely no relevance to this question about price fixing.

We simply contend that the price of red lead has been
fixed by these two companies and others acting in
3397 concert and we contend that the prices of these other
pigments, lead sulphate and lead carbonate and blue lead have been fixed by a meeting of the minds of the companies. Whether one of them advocated the use of one over another is an entirely irrelevant proposition.

Trial Examiner Norwood: It is like some of the other evidence we have received here—and some of it on behalf of the Commission's contention—standing alone it would probably not mean much but taken in connection with other circumstances it might. I can't prejudge this thing. I can't say now but for the purpose of showing that one of these respondents was making statements in disparagement of the other's product, that is something they can properly show here as one of the circumstances bearing on what he has stated he proposes to show. I think since the document has been satisfactorily identified that it might be received to show that one thing.

Mr. DuBose: If I might say so, it seems to me it would fly in the face of common sense to say that there was a conspiracy and then to have one conspirator disparage a product of his co-conspirator.

Trial Examiner Norwood: That is a matter for counsel to discuss later on in his arguments and the fact that he might base an argument on that is one reason why I am
receiving it.

3398 I will overrule the objection and receive these four
pages in evidence for that purpose, and that purpose only, to show that National was disparaging the product of Eagle-Picher, or intending to show that.

Mr. Wright: Your Honor, I submit that is not a proper characterization of that exhibit, that National was disparaging the products of Eagle-Picher.

Trial Examiner Norwood: I didn't say that, I said I admit it for the purpose of showing that; 'I don't say whether it shows it or doesn't show it, but counsel has offered it for that purpose and all I have to determine is that there is some small degree of relevancy or some degree of relevancy, however small, which would justify me in admitting it which would not justify me in excluding it.'

This document is received Respondents' Exhibit 190A through 190-D. 190A is page 52; 190-B is page 53; 190-C is page 54 and the title page is marked Respondents' Exhibit 190-D. They are received in evidence for the special purpose stated.

(The documents referred to were marked RESPONDENTS' EXHIBITS 190-A, 190-B, 190-C and 190-D and received in evidence.)

Mr. Wood: I wish it clearly understood on the record that I am not offering the document as proof of the contents therein, but only for the purpose as stated by
3399 the Examiner.

Trial Examiner Norwood: Are you going to put photostats of that in, or not?

Mr. Wood: Yes, I will ask the reporter to obtain photostats of those pages.

Trial Examiner Norwood: And substitute them before you send them to the docket section?

Mr. Wood: Yes, sir, and substitute them.

Trial Examiner Norwood: Proceed.

By Mr. Wood:

Q. Now, what are the relative selling prices of red lead and blue lead?

A. Red lead sells at an appreciably higher price than blue lead.

Q. Can you state approximately how much higher?

A. I will have to speak from memory now, but in the order of two or more cents per pound.

Q. How, between the two products, which one does your company push?

A. We push the blue lead.

Q. Why?

A. For the reason that we are in a favorable position for the manufacture of that product, and in addition it has certain properties in paints not possessed by other pigments.

Q. Now, over a period of years, has your research 3400 laboratory expended any time or effort in improving the quality of blue lead in relation to the properties of red lead?

A. Well, our laboratory has investigated and approved the properties of both pigments, and emphasized the properties of blue lead to a very considerable extent and at considerable cost.

Mr. Wood: You may cross-examine.

Mr. DuBose: May I request the privilege of cross-examination before counsel for the Commission, if it is all right counsel for the Commission?

Mr. Wright: I have no objection to that.

Trial Examiner Norwood: Counsel may examine the witness: I am not sure you could properly call that cross-examination.

Mr. DuBose: As the answers may appear, I don't think it is either cross-examination or any other. It is examination by a correspondent in the case.

Trial Examiner Norwood: Go ahead.

By Mr. DuBose:

Q. Mr. Goetz, I believe you testified that in the Eagle-Picher Company you pushed, so-called, blue lead and also sulphate of lead, whether individually or as a component part of leaded zinc oxide. Is that correct?

A. I did.

Q. Now, in the industry, so far as sulphate of lead 3401 and carbonate of lead are concerned, was there a difference of opinion as to the efficacy of one over the other?

A. There was at one time.

Q. Particularly during the period, we will say, between 1923 up through 1934, was there a difference of opinion?

A. I would say there was a difference of opinion in that period.

Q. When did that opinion change, in your opinion?

A. The last words, please?

Q. When did that opinion as to the difference between sulphate and carbonate of lead change, in your opinion?

A. Within the last ten to fifteen years.

Mr. DuBose: I have no further questions.

Trial Examiner Norwood: Cross-examine.

Cross-Examination by Mr. Wright.

Q. Mr. Goetz, all your testimony has been with reference to the different pigments sold to paint manufacturers, has it not? That is all your department covers, is it not?

A. That is right.

Q. You have nothing to do with the white lead and oil?

A. To some extent I do.

Q. You haven't anything to do with the red lead, the litharge and battery end of the business?

A. No, I do not.

3402 Q. What was your tonnage of blue lead in 1941 sold to paint manufacturers for use as a pigment?

A. That figure I do not have in mind.

Q. Can't you give us an approximation of it?

A. In the order—I am guessing now, because I cannot carry figures that far back—of ten to twelve hundred tons.

Q. What was your tonnage of red lead in that same period?

A. There again I am guessing, but in the order of 10,000 tons, maybe a little less or it might be a little bit more, for paint purposes.

Q. In other words, it would be about equally divided?

A. No, just a minute. That is an industry figure. I really don't know.

Q. You don't know then whether you sell more red lead than blue lead, or vice versa?

A. I would say we sell much more red lead than we do blue lead.

Q. For paint purposes?

A. For paint purposes, but I am sorry I cannot give you the figure. I can give you the industry figure, which I would estimate is in the order I stated, namely, eight or ten thousand tons of red lead used for the manufacture of paint. Eagle-Picher's share I do not know.

Q. How is blue lead sold by Eagle-Picher Company? Can you tell me that?

3403 A. Yes, blue lead is sold in dry form in barrels and bags of 50 pounds net weight each. It is also sold mixed or ground into paste with linseed oil.

Q. What sort of containers is it sold in when ground in a paste?

A. In the customarily used metal kegs, steel metal kegs.

Q. One hundred pounds, 50 pounds and 25 pounds?

A. One hundred, 50, 25 and 12.5.

Q. What zone differentials are quoted on blue lead?

A. Sir, I cannot answer your question on that. I don't know.

Q. You don't know what the pricing setup is?

A. I don't know. I can only make the assumption that it is sold on the same basis as red lead and white lead.

Q. It is sold on the same basis?

A. I would assume that, but I cannot say positively, because I do not know.

Q. You stated it was sold at approximately two cents a pound cheaper than red lead?

A. I was speaking of the dry pigment.

Q. The dry pigment?

A. And that was an estimate, if you will recall, too. I would have to look in the records for that.

Q. How many people work in your technical service department for the pigments division, Mr. Goetz?

3404 A. Principally myself.

Q. Do you have any assistants?

A. I have the assistance of several of our salesmen part-time when I need it, and I have the wide assistance of our research laboratory.

Q. What is your relation with the research laboratory?

A. My relation is to keep the research laboratory informed of new developments, and to plan and work with them on programs of investigation, principally on paint matters.

Q. Now, does the research department cover all the scientific investigations for all the various divisions of the company?

A. Our research department carries on investigations for all of the divisions of the company, but it does not necessarily do all the investigational work, because some of it may be done outside from time to time.

Q. Well, they would handle all the paint matters and all the storage battery matters?

A. Substantially so, yes.

Q. And all the metallic lead research?

A. Substantially so. The company may see fit to have a problem worked out outside of the company, which is customary these days.

Q. Can you tell me what the approximate budget was for technical research on the pigments division matters in 1941?

3405 A. I am sorry, I do not have that figure.

Mr. Wood: I may say that all of this information Mr. Wright is asking and not getting the answer from this witness will be supplied, if he so requests, through other witnesses.

Trial Examiner Norwood: All right.

By Mr. Wright:

Q. Your work in the technical research department of the pigments division covers work on zinc oxide as such, doesn't it?

A. Yes, it does.

Q. And on leaded zinc oxide, a combination of the two?

A. That is right.

Q. Does Eagle-Picher Company produce any other pigments than those which have been mentioned here this morning?

A. We produce basic white lead silicate, which I don't think was mentioned this morning. It was mentioned this afternoon, but only in reference to the bulletin which was offered as an exhibit.

Q. And blue lead, red lead, litharge, basic carbonate and basic sulphate. You don't produce any lithopone?

A. Yes, we produce lithopone.

Q. Are you a large producer of lithopone?

A. I would say we are a relatively small producer of lithopone.

3406 Q. At what plant do you produce lithopone?

A. At our plant in Argo, near Chicago, Illinois.

Q. Lithopone pigment is interchangeable with the leaded zinc oxide?

A. No, it is not, not in the opinion of a big majority of paint technologists. It is used for a different purpose.

Q. Has it been used in place of the other white lead and zinc pigments?

A. It has in an emergency, but only because some other pigment is not available. I wish to point out it was only in an emergency, and such use is not countenanced by good formulators. One is an interior pigment and the other is an exterior pigment.

Q. How does the company sell leaded zinc oxide? Is that sold in drums or packages?

A. Fifty-pound paper bags.

Q. Do you know what territorial differentials are quoted on that product?

A. No, I am not familiar with prices. They are available to me anytime that I need them, but my work is of such a nature that I can always call and get prices when I need them. I know in a general way; but I don't know specifically today.

Q. You spoke of the houses that had been painted in Cincinnati with mixed paint and with pure white lead paint which showed a difference in color retention after a
3407 period of time. Do you know who painted those houses?

A. I don't at the moment. I know they were painted by master painters.

Q. But you don't know whether the methods or techniques of applying the paint on those two structures were identical, do you?

A. I would say for all practical purposes they were identical.

Q. Do you know that of your own knowledge?

A. Not of my own knowledge, because I was not present at the time; but I can tell from the looks of a job whether it is good workmanship, mediocre or bad.

Q. Did I understand you to state that the customary price differential between dry basic sulphate and basic carbonate is a half cent a pound?

A. Yes, I made that statement.

Q. And you stated that the difference in costs in 1941 and '42 in the use of basic sulphate or basic carbonate was six or seven cents a gallon. Is that correct?

A. Depending on the particular type of formulation, but the formulation which was most popular at that time, considering the basic white lead sulphate and leaded zinc oxide, its saving was, as I stated, between six and seven cents a gallon in favor of the basic white lead sulphate.

Q. Approximately how many pounds of lead pig-
3408 ments were in those paints per gallon?

A. Let us see. About 12 pounds—yes, about 12 pounds of pigment in a gallon of paint, of which in the case of white we will say 65 percent was the average lead content of the particular paint I have in mind. You must remember at that particular time we had gone into that period of transition when our ideas on the formulation of paint were changing, eventually resulting in the type of paint which we are using so extensively today, which is a lower lead content paint.

Q. Now, up to that time isn't it true that there were on the market a number of high quality paints which contained anywhere from 10 to 14 pounds of lead pigments per gallon?

A. No, I wouldn't say, not unless you are thinking of straight basic white lead carbonate paint where the pigment is entirely based on white lead carbonate. The average mixture weighed about 16 pounds to a gallon in those days, and with 4 pounds of oil present and maybe a half a pound of thinner and dryer, it was 4.5 from 16, which leaves 11.5. Keep in mind now that we were going through the transition stage, and 65 to 70 percent white lead was commonly used in the pigmentation, so 70 percent of 11 would be in the order of 7.5 to 8 pounds per gallon.

Q. Aren't there still paints on the market which contain a very high percentage of basic carbonate or
3409 basic sulphate white lead?

A. You must distinguish the type of paint. If you are referring to so-called ready-mixed pure white paint, which is essentially paste white lead reduced with oil and put into ready-mixed paint form, then there is an appreciable quantity of 100 percent pigment paint. But it all depends on what we mean by large.

In 1923 we figured we couldn't make a good paint without at least 65 to 70 percent white lead present. Today we have evidence to show, both on test fences and in the matter of several years' experience on houses, that we can make good paints with 30 percent white lead content, providing we have a judicious, proper combination of pigments.

Q. Now, this so-called controversy that you had between carbonate and sulphate, which ended with the TT-P-25 in 1943 on primer specifications, who did you notify of your agreement or acquiescence in that specification at that time?

A. That was such a long drawn out affair. I talked to Mr. Hickson about that, chairman of the committee.

Q. And told him the Eagle-Picher Company was willing to go along with that specification?

A. As he finally reached it, but you must remember that that specification dragged out for months and months and months, and we had I guess reams of statements and millions of words for and against one or the other,
3410 or any combination of the two. And also keep in mind that the Army at that time was needing paint

We didn't have this great shortage of paint until subsequent to 1942.

Q. Did the Lead Industry Association take any part in that controversy?

A. Not to my knowledge. I believe Mr. Wormser was called in by Mr. Hickson as an authority, and Mr. Vogelsang of the Tin-Lead-Zinc Branch, but they were called in only on account of the War Production Board having been in existence, or what was then called the Office of Production Management, and any changes in raw materials of a chemical nature, including paint, were not made without first consulting the proper office in the War Production Board, or its predecessor agencies.

Consequently, Mr. Vogelsang, who headed the Tin-Lead-Zinc Branch was called in to at least one meeting to state his views, and I think we brought Mr. Wormser along as a witness, and Mr. Wormser may have been invited by the committee. Mr. Hickson endeavored to be very thorough, very fair and very impartial in handling this matter, because in mind that we were at that transition period between a high lead paint and a low lead paint, and he wanted the Government to have the benefit of all modern technology, and yet he wanted to be fair in his dealings with everyone.

Due to the war situation, and the connection of
3411 these people with the War Production Board, several of the people were called in on the committee who would not in ordinary times have been invited, or whose opinion wouldn't have been considered.

Q. Was there not a very serious shortage of lead during the war?

A. At times a very serious shortage. At times there was plenty of lead.

Q. Did the shortage of lead in any way affect the Government's consideration of the specifications on these mixed paints?

A. Yes, it did.

Q. Tending to reduce the content, the minimum lead contents in mixed paints?

A. No, it did not work to reduce—as I recall it, it did not work to reduce the minimum lead content of the paint. What reduced the lead content in the paint was a natural development of the technology of paint, which extended a decade before the war, but which was brought to a head by mere coincidence at just about the time of the war, and at times during the war there was plenty of lead.

Q. Going back to blue lead now and its composition, what is the metallic lead content of blue lead?

A. Approximately 70 to 72 percent.

Q. That compares with what metallic content of
3412 the high grade red lead?

A. Red lead is 90 percent.

Q. Does that account in large part of the price difference which exists between those two commodities?

A. It may be one factor.

Mr. Wright: I have nothing further.

Trial Examiner Norwood: Redirect?

Mr. Wood: No redirect examination.

Trial Examiner Norwood: Call your next witness.

Mr. Wood: I would like to suggest an adjournment until tomorrow morning.

Mr. DuBose: May I join in that request?

Trial Examiner Norwood: Is this witness discharged, or do you want to bring him back?

Mr. Wood: Discharged.

Trial Examiner Norwood: The witness is discharged.

(Witness excused.)

Trial Examiner Norwood: We will recess until 10 o'clock tomorrow morning.

(Thereupon, at 3:45 o'clock p. m., an adjournment was taken until the following day, Wednesday, July 23, 1947, at 10 o'clock a. m.)

3413 Hearing Room,
Federal Trade Commission,
Washington, D. C.,
July 23, 1947.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

J. W. Norwood, Trial Examiner.

Appearances:

Edmund T. Wood and Richard Serviss, American Building, Cincinnati, Ohio, representing Eagle-Picher Company and Eagle-Picher Sales Company.

3414 E. Z. DuBose, 120 Broadway, New York, New York, representing National Lead Company.

Henry E. Gardiner, 25 Broadway, New York, New York, representing Anaconda Copper Mining Company and International Smelting & Refining Company.

James T. Welch, 815 15th Street, N. W., Washington, D. C., representing The Sherman-Williams Company.

Joseph S. Wright and Paul R. Dixon representing the Federal Trade Commission.

3415 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment of yesterday the hearing is now reconvened at 10 o'clock a. m., Daylight Saving Time, on July 23, in Room 332, Office of the Federal Trade Commission, Washington, D. C. The appearances are as follows:

Joseph S. Wright and Paul R. Dixon appearing for the Federal Trade Commission.

Edmund T. Wood and Richard Serviss appearing for Eagle-Picher Company and Eagle-Picher Sales Company.

E. Z. DuBose appearing for National Lead Company.

Henry E. Gardiner appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James T. Welch appearing for The Sherman-Williams Company.

You may call your witness.

Mr. Wood: Mr. Harner, please.

Trial Examiner Norwood: Will you give me your full name, please?

Mr. Harner: Harold R. Harner.

HAROLD R. HARNER, was thereupon called as a witness for the respondents Eagle-Picher Company and Eagle-Picher Sales Company and, having been first duly sworn, testified as follows:

3416 *Direct Examination by Mr. Wood.*

Q. Mr. Harner, will you please state your residence and occupation?

A. I am chief chemist of the Eagle-Picher Company and also assistant research director with my residence at Joplin, Missouri.

Q. Will you please state your education?

A. I am a graduate in chemistry cum laude from Westminister College at Fulton, Missouri.

Q. After leaving Westminister what did you do?

A. I went into the employment of the Eagle-Picher Lead Company at Joplin, Missouri, directly from school.

Q. In what capacity?

A. As a worker in the research department.

Q. How long did you occupy that position?

A. That was from 1924 until 1927.

Q. And what did you do next?

A. I was in the employment of Mr. J. H. Calbeck in the Calbeck Laboratories at Joplin, Missouri, doing contract work for the Eagle-Picher Company.

Q. What was the nature of your research work at Eagle-Picher and also in your next association?

A. My work at Eagle-Picher was primarily on
3417 storage batteries at that time, although I did a good
deal of other work, not storage batteries. During the interim when I was with Mr. Calbeck our work was on the reclaiming of values from storage battery plates.

Q. How long were you with Calbeck?

A. Three years.

Q. And what position did you take next?

A. I returned to the Eagle-Picher Lead Company as chief of the storage battery division in the research department.

Q. Have you been in the employ of the Eagle-Picher Company ever since?

A. I have.

Q. What have been your duties and responsibilities over that period of employment?

A. From the time I returned in 1930 until 1935 I was in charge of the storage battery division of the research laboratory. Beginning in 1936, the first of the year, I became chief chemist of the research laboratory and assistant to Mr. McMullen, the research director. About 1941 I became chief chemist of the entire company.

Q. What is the condition of Mr. McMullen's health at the present time?

A. Mr. McMullen is confined to his home with hypertension at the present time.

Q. And is unable to testify in this case?

3418 A. That is right.

Q. Can you give us an over-all picture of the business of the Eagle Picher Company, that is, just broadly, the fields in which the company is engaged and the general nature of its manufacturing efforts, as you understand them?

Mr. Wright: I am going to be required to object to that question unless it is amended so that the answer will clearly be from this witness' own experience as chief chemist of the company.

Trial Examiner Norwood: Well, haven't you pretty well covered that anyway?

Mr. Wood: I don't think so, I don't think there is anything in the record.

Trial Examiner Norwood: I will ask the witness to testify from his own experience.

Mr. Wood: That is perfectly all right as a qualification.

Trial Examiner Norwood: Go ahead.

The Witness: You want the scope of the company's activities?

By Mr. Wood:

Q. Just generally.

A. The Eagle-Picher Lead Company is engaged in the production of, primarily, raw materials or heavy chemicals
from lead and zinc, or lead and zinc ores. Their sub-
3419 sidiary, the Eagle-Picher Mining & Smelting Com-
pany produces lead and zinc ore from the mines, has mining properties, concentrating plants and smelters.

The Eagle-Picher Company's activities include not only pigments but insulation and metal goods as well.

Q. Where are the mining properties of the Eagle-Picher Company?

A. The major mining properties are in the so-called Tri-State field of Missouri, Kansas and Oklahoma, centered between Joplin, Missouri, and Picher, Oklahoma. They have another new field in the so-called Tri-State field of Illinois, centering about Galena, Illinois, and extending into Wisconsin and Iowa. They also have properties in Mexico and Arizona.

Q. What is the nature of the ore which is mined in the Tri-State district about Joplin?

A. The ore in the Tri-State field is quite unusual in that the lead ore, for example, is substantially free from silver and bismuth and is quite different from any other ore except that of the Tri-State Illinois field which resembles it very much. It is also another ore that is substantially free from silver and bismuth.

Q. What, if any, significance is there to that freedom from silver and bismuth?

A. This freedom from these two impurities makes it
possible to use these ores directly in the production of
3420 pigments, whereas if silver and bismuth were present
the ores could not be used directly in their manufacture.

Q. Will you please give us a brief over-all summary of the duties and responsibilities of the research laboratory?

A. Of course the primary duty of the research laboratory is to maintain the competitive position of the company both in regards to the technical services furnished in regard to the quality and types of products produced, and in regard to the development of new products as needed to meet competition and keep the company in their position in industry.

Now, we have other responsibilities. The research laboratory coordinates the plant development laboratories, and the plant control laboratories. Each plant has a control laboratory and a number of them have developed laboratories working on their specific products.

Q. Will you explain what you mean by the plant laboratories and the control laboratories, other than your laboratory?

A. All of our products are sold on very rigid specifications which require analyses of the product continuously. We must know that every barrel or lot of production meets the specifications. For example, at the Joplin litharge or lead oxide plant every barrel of lead oxide must be analyzed before it is accepted and checked for shipment.

We make so many different grades that it requires very complicated testing to be sure that each barrel or
3421 each lot, where lots are made, meet the specifications.

That is true in every plant, we have laboratories controlling them each chemically now. In addition we have developed laboratories in a number of plants to handle the specific problems of that plant.

For example, at East Chicago the laboratory is working on white lead and the recovery and refining of lead from secondary sources. We must keep those processes improved and this requires a staff at that point, in addition to the regular laboratory research staff at the central laboratories at Joplin.

Q. Could you give us a list, Mr. Harner, of the control or research laboratories that you know about, other than the central laboratory at Joplin, with which you are connected?

A. Yes.

Q. Would you do so, please?

A. There is a control laboratory at our zinc smelter at Henrietta, Oklahoma; a control laboratory and a development laboratory at our plant at Galena, Kansas, where basic sulphate is produced; there are two control laboratories and a development laboratory in the Joplin plant. There is a control laboratory and a development laboratory in the diatomaceous earth plant at Clark, Nevada.

There is a control laboratory at East St. Louis. There is a control laboratory at the zinc oxide plant at
3422 Hillsboro, Illinois—two control laboratories. There is a control laboratory at our lithochrome plant at Argo, Illinois. There is a control laboratory and a devel-

opment laboratory at our East Chicago plant. There is a control laboratory at our white lead plant at Cincinnati. There is a control laboratory and a development laboratory at our metal goods plant at Cincinnati.

There is a control laboratory at our metal goods plant at Dallas, Texas. There is a control laboratory at our Wabash, Indiana, insulation plant. There is a control laboratory at our Newark lead oxide plant.

I may have missed some, but I am certain of all those named.

Q. Now, what is the relationship of the Joplin laboratory, at which you are assistant research director, to the other laboratories of the company?

A. It is my duty as chief chemist of the company to supervise all of the control laboratories, both in regard to the tests conducted and the methods of test.

It is our duty as a research department to correlate the work of all the development laboratories so that it all goes forward on one unified plan.

Q. Now, in answer to one of the earlier questions, you mentioned technical service. Will you explain what you mean by technical service?

3423 A. Our technical service takes many forms which are brought on by the fact that we have such a diversity of small customers, many of whom do not have development or engineering laboratories. In order to provide them with the means to be competitive in the trade, we provide them with technical information both as to our products and as to how these products should be used, and we also assist them in designing or developing the products which they wish to manufacture.

I can give an example. During the war, on the batteries for tanks and Diesel batteries, only a few of the larger companies knew how to make these batteries. We designed the battery completely, including the size of the grids, the number of plates, the amount of material that must go in each plate, and submitted that information to all of our battery customers, enabling them to produce successfully for the Government these needed batteries.

Q. Did those batteries require special oxides or special blends of oxides, or particularly selected blends?

A. They did.

Q. And who made the selection?

A. We did.

Q. Now, what if any is the relationship between the research laboratory and the sales department of the pigments division?

A. The research between the laboratory and the sales department of the pigments division is very close. 3424 Every man in the sales staff of the pigments division is a technical man who services, as far as he can, his customers. If he cannot take care of their needs, then the research laboratory is called in, either by members of that department, or by transmittal of this information from the salesman or the technical representative to the laboratory where the problem may be worked on in the laboratory, and the solution reached which will enable the problem to be whipped.

Q. Who trains the salesmen, the technical salesmen in the pigments division?

A. The research laboratory.

Q. How do they train them?

A. Every new salesman or sales candidate is sent to research for a period of at least six weeks, ordinarily three months, and sometimes a year, where they go through a regular course of study in our products and the use of those products, and the technology which we have developed in regard to them, and also in regard to the field in which these products are used, so that when they go out they can understand the customer's problems and work with him in servicing the customer and keeping him competitive.

Q. What is the purpose of this working relationship between the research laboratory and the technical salesmen of the pigments division?

A. The purpose is fundamental in our principle of 3425 operation, because unless we can supply this technical information to the customer, we would have no position. Our position is built, and our competitive situation is based on technical service.

Q. Can you explain why your competitive position is based on technical service?

A. I don't know as I can very well. That is an involved subject, because it has been our principle of selling and our principle of working ever since I have been with the company. It is the only way we have been able to remain competitive in the industry.

Q. There was testimony yesterday with regard to test fences erected by the company. Do you have any familiarity with those test fences?

A. I do.

Q. What is their purpose?

A. Their purpose has several phases. It began as a study of all the different types of pigments to find out exactly the properties of each one in paint. We stepped up from that to combinations of these pigments to find the joint properties, or shall we say synargy, because sometimes when you add two things together you don't get the expected result.

Then we combined three pigments, and went on until we knew pretty well what would happen with any
3426 combination of pigments in paint.

That developed a mass of basic information from which we can then postulate formulations and check directly the exact paint formulations to be used in the trade.

Now, in addition to trying out the final definite formulas we developed, of course we studied current paint formulations in use in industry, securing samples of paint on the open market with which to compare the formulas which we are developing and studying.

Q. How long do you expose your panels on test fences?

A. That depends on the type of protection that is expected. On wood paints, it will vary, in the case of normal paints, from three to six years. In the case of metal protective paints, it may take ten years to complete a test.

Q. In other words, you leave one panel on a fence for that length of time?

A. That is right.

Q. During the history of your test fences, how many panels, approximately, have you exposed altogether, just approximately?

A. I believe our panel numbers are in the 20,000 somewhere at the present time, because they have been listed serially.

Q. Now, the collated information obtained from the test fences is available to whom?

A. To any of our customers. The reports are submitted. As soon as a piece of work or a section is
3427 completed, the report is written and submitted to the sales department, the technical division at Cincinnati, where it is made available through these salesmen to any customer to whom it will be of use.

Q. How about prospective customers?

A. I should say customers, or prospective customers.

Q. Has any information obtained from the test fences ever been presented to any governmental bodies?

A. It has.

Q. Which ones?

A. Quite a number. The Paint Group in Washington here Mr. Goetz spoke about yesterday; the Maritime Commission. I know it has been presented to the Navy, to many public roads or state road commissions; the Panama Canal Commission; the United States Engineers. I believe the Navy Department of Aeronautics during the war, when we did some work on aviation paints.

There are probably more, but I am not too familiar with all the places to whom this information has been submitted.

Q. What is your understanding of the term "mixed paint"?

A. My understanding of the term "mixed paint" is a paint in which two or more, and usually three, four or five different pigments are blanded so that the best combination of properties is secured for the purpose for
3428 which that paint is being produced. It is ready-mixed with oil, thinner, dryer and any other ingredient needed to make it ready to use on opening the can.

Q. Will you give us an example of the formulation of what you would consider a very high quality outdoor white house paint?

A. At the present time our formulations would probably be in the order of 35 percent lead sulphate, in the order of 25 to 35 percent zinc oxide, 12 to 15 percent TiO_2, titanium oxide, and the balance of the pigment as an inert, such as asbestine or magnesium silicate, the whole ground in a mixture of raw linseed oil and bodied linseed oil.

Q. Now, how would such a paint compare with a pure lead carbonate white paint, say when manufactured by the Atlantic Division of National Lead Company?

A. I should say it would be superior to the white lead. White lead has certain deficiencies as a single pigment which are quite well known.

Q. Well known by whom?

A. The industry, the paint industry.

Mr. Wright: Your Honor, I move that that answer be stricken from the record. There has been no basis laid to show that this witness has compared any such formulations he has testified about with the specific product produced by the Atlantic Branch of the National Lead Company.

3429 Mr. Wood: We will ask him whether he has or not.

By Mr. Wood:

Q. Have you ever tested out a pure white lead carbonate paint of the Atlantic Branch of the National Lead Company?

A. I cannot say of any branch. We have tested many white leads from the National Lead Company.

Q. You are not sure of the branch?

A. I wouldn't say about the branch.

Trial Examiner Norwood: Have you tested out the Dutch Boy brand?

The Witness: Yes.

By Mr. Wood:

Q. It was Dutch Boy brand that you were testing?

A. Yes, sir.

Mr. Wood: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: I still submit there hasn't been any proper basis laid that the witness has compared any specific paint to which he has testified with that paint.

Trial Examiner Norwood: I think you can cross-examine him on that.

Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

3430 By Mr. Wood:

Q. Now, on this test fence, Mr. Harner, do you test the products of competitors?

A. We do.

Q. Have you ever tested pure basic carbonate white lead paint made from Dutch Boy brand of the National Lead Company?

A. We have.

Q. And of pure white lead carbonate paints made from Eagle white lead?

A. We have, many times.

Q. Have you compared the properties of such paints with the properties of mixed paints of the formulation which you gave us just a moment ago?

A. We have.

Q. And how do those properties compare?

A. The findings indicate the mixed paint to be more satisfactory. White lead tends to check and discolor in service, and then chalk rather badly, although as far as protecting the surface on which it is laid, it gives good protection. But in appearance it is not as good.

The mixed paint will give protection and good appearance over a longer period of time.

Q. By white lead in your last answer, you meant basic carbonate white lead?

A. That is right in this case.

3431 Q. Which is the cheaper of the two paints?

A. The mixed paint will be cheaper to produce than the basic carbonate white lead.

Q. Can you tell us how many different lead pigments the Eagle-Picher Company manufactures?

A. Yes.

Q. Will you please name them, all of them?

A. We produce at least three kinds of basic sulphate white lead, basic sulphate blue lead, lead silicate, anhydrous lead silicate, white lead or the silicate white lead, the carbonate white lead, several types of red lead, five or six distinct processes or types of litharge with very many modifications in each type. We produce lead formate. We produce special silicates, such as our trade-marked Alsilox, which is a lead alumino-silicate. We produce the leaded zinc oxides, if you wish to include them, of which there are about six main types, and some thirty modifications. We also produce lead peroxide.

Q. Now, does your laboratory obtain samples of competitors' products and analyze their properties?

A. Yes.

Q. How extensively?

A. Whenever any product is brought out by a competitor, a number of samples are secured both to get information as to the product itself and as to its variability 3432 and range of properties. Then from time to time additional samples are secured on all competitive products so that we may keep posted if there is any change from the original material as brought out.

Q. Is that done systematically or haphazard?

A. Rather systematically. It isn't always possible to get samples just when we want them, but as nearly as possible, it is a systematic procedure.

Q. Now, have you ever analyzed any of the lead pigments of the National Lead Company?

A. We have.

Q. How many of them?

A. I couldn't give you a number. It is a great number, but I couldn't give you an actual number.

Q. Well, on the basis of analyzing the products of National Lead Company, what is your estimate as to the relative number of lead pigments manufactured by National Lead Company and the Eagle-Picher Company respectively?

A. From what I have seen, the National Lead Company produces a lesser number of products than Eagle-Picher in lead pigments.

Trial Examiner Norwood: I believe he is trying to find out how many are common to both, how many qualities both the concerns produce.

The Witness: Do you wish a further answer?

3433 Trial Examiner Norwood: Go ahead and ask a question.

Mr. Wood: Was Your Honor asking for the number of products that were exactly alike or the two companies?

Trial Examiner Norwood: Yes, of the two companies.

Mr. Wood: I think I can ask it in a way that will bring it out.

Trial Examiner Norwood: I will withdraw my question.

By Mr. Wood:

Q. His Honor was inquiring, Mr. Harner, in respect to the number of products which are common to the two companies, that is, the National Lead Company and the Eagle-Picher Company, so I am going to ask you, for instance, in respect to basic lead carbonate what are the similarities or differences in the products of National Lead Company and the Eagle-Picher Company, as far as carbonates are concerned?

A. As far as carbonates are concerned we both produce a range of carbonates to give different properties in paint but they are comparable ranges of pigments. I would say there is no substantial difference in the carbonates in the ranges of materials produced.

Q. How about the red leads intended for this paint grinders' industry?

A. The red lead, again we produce similar lines of
material although we started the use of an extremely
3434 fine red lead which was made from sublimed litharge
and the National took steps afterwards in order to
match the product but at the present time our lines of paint
grinders' red lead are comparable.

Q. Do you manufacture any lines of paint grinders' red lead that National doesn't manufacture now?

A. Not at the present time.

Q. But you have in times past?

A. Yes.

Q. And National has followed your lead in products?

A. That is right.

Q. In regard to blue lead does National have a comparable product?

A. As far as I know National Lead Company does not manufacture a product comparable to our blue lead.

Mr. Wood: Off the record a moment.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

By Mr. Wood:

Q. Now, do you know whether National puts out leaded zinc oxide?

A. I do not think they do, in fact I am rather certain National does not put out leaded zince oxide.

Q. What are the comparative qualities of the
3435 Eagle-Picher basic lead sulphate and the National
basic lead sulphate?

A. I have only seen one type of National basic lead sulphate which was a precipitated lead sulphate. We make three types, of which the precipitated is a minor item.

Q. What do you mean by precipitated?

A. A precipitated basic sulphate white lead is made by reacting a mixture of litharge, the lead oxide and water, with sulphuric acid in the correct proportions and under the right conditions to precipitate or throw down a lead sulphate of the right properties, which is then filtered, dried and milled for use.

Q. In other words, the product has to go through the pig lead stage?

A. The product has to go through the pig lead stage, the litharge stage.

Q. How about your lead sulphates?

A. The bulk of our lead sulphate is produced directly from lead ore, especially purified lead ore which is burned directly in a furnace like powdered coal to form the sublimed white lead fume.

Q. What is the relative cost of manufacture of the sulphate from the ore concentrate and from the pig lead?

A. I cannot give you exact figures. I have seen them but I know it is definitely lower in cost to produce the basic sulphate directly from ore rather than from pig lead.

3436 Q. What grade of ore is required to produce that type of sulphate?

A. It takes the type of lead ore produced in one of the Tri-State fields free from silver and bismuth and it must be further purified and chemically treated before it is burned to the sulphate.

Q. Do you know of any other lead ores in this country that could be so utilized?

A. None that I have seen.

Q. How about the basic silicate white lead, does National make that, do you know?

A. They make a basic silicate but it is not a white lead, it is rather a basic silicate chemical compound for other uses. From our examination of the pigment it does not appear to be a paint type of pigment material, that is, the National product.

Q. Do you know of any National product that is the functional equivalent of your basic white lead silicate?

A. I do not.

Q. Now can you name any other lead pigments going to the paint grinders manufactured by Eagle-Picher other than those you have named, which National does not make?

A. Offhand, no.

Q. Has your research laboratory devoted any work to the development of blue lead or basic lead sulphates

3437 or basic lead silicate white lead?

A. Oh, yes.

Q. How much in general over a period of years?

A. That work has been continuous for, well, over the entire period there has been work conducted and it has been intensified. I should say on the average that on those three pigments which you named for the past ten years there have been at least from six to ten men continuously employed on that group of three pigments.

Q. Has there been any particular emphasis on the research work on those particular products?

A. Definitely.

Q. Why?

A. Because they are particularly adapted to the Eagle-Picher setup. The basic sulphate white lead and the basic sulphate blue lead, especially so, since we control ore bodies from which we can make these pigments and we can make them economically so that we can make some money on them and sell them to our customers economically.

In addition to that their properties, as demonstrated by our tests, are superior.

Q. Superior to what?

A. To the competitive products such as carbonate white lead in the case of the red lead, and basic sulphate in the case of the blue lead.

3438 Q. Now turning to the battery oxides, how many different oxides of lead are there?

A. I would have to name them. I think there are about five.

Q. Please name them.

A. We have the PbO, lead monoxide, which is known ordinarily as litharge; we have Pb_3O_4, lead tetraoxide, known ordinarily as red lead. We have Pb_2O_3, the lead sequi-oxide which is not widely used but may be in the future.

Then there is a new one, the Pb_5O_8, which is not named and which has only been determined by X-ray to exist. Lastly there is the PbO_2, lead peroxide, which is the material which is in the positive plate of the storage battery. It is also used in industry for an oxidizing agent.

Q. Of those five oxides you have named how many does your company manufacture?

A. Three at the present time, the monoxide litharge, red lead and the peroxide. We do not manufacture the Pb_2O_3 or the Pb_5O_8, that is, not to our knowledge, there may be some mixed in the other materials.

Trial Examiner Norwood: Does National manufacture the three that you do?

The Witness: I am not sure about the lead peroxide. They manufacture the other two and they may manufacture the peroxide, but I don't know.

3439 By Mr. Wood:

Q. Now, are these various types of commercial oxides which you have named equivalent to each other? I mean, is every litharge just like everyother litarge or are there different types?

A. They are not. There are two physical modifications of litharge or PbO that are identifiable by X-ray, the tetragonal and orthorhomic crystal forms. In addition to that each manufacturing process produces an oxide of different properties, such as chemical reactivity or stability or rate of formation in a battery plate so that we have six different manufacturing properties at the present time for making litharge.

Q. By "we" do you mean Eagle-Picher Company?

A. I mean the Eagle-Picher Company.

Q. Why does the Eagle-Picher Company employ so many different methods of making one chemical?

A. The needs of our many customers are so diverse that in order to supply them with precisely the material which will give them the best results we produce litharge by all of these different processes.

Q. Do you know whether the National Lead Company sells that many litharges?

A. I don't believe they have quite as many; I think they have four or five different types of litharge. I think we have one or two more types than they have. 3440

Q. Now, are your litharges and the National Lead Company's litharges exactly the same?

A. No.

Q. They are not?

A. Our processes are not identical with theirs. They are comparable but not identical.

Q. Do the litharges of the two companies exhibit different properties when utilized in battery manufacture?

A. Yes.

Q. Such as what?

A. It is necessary to adjust the formulations in the battery plates, sometimes only slightly but in every case necessary when you go from one oxide to another. It is just as necessary between National and ours as it would be between any of the six modifications of ours. In other words, the adjustment would be, perhaps, only in the amount of fluids which had to be added to the mixture in making the paste; it might be in the type of fluids which had to be added; it might be the formation of the plates which would be different.

Q. By formation of the plates do you mean the electrical charging?

A. The initial electrical charging which converts the material in the plates from the original lead oxides into the final material.

3441 Q. By formation you do not mean the physical construction?

A. No, I do not.

Q. You mean the electrical development?

A. The electrolytic conversion.

Q. In making the switch from one company's oxide to the other do those variations have to be scientifically determined for the best results?

A. That is right, they do.

Q. In other words, you couldn't guess and get a good result?

A. No. In fact, there have been instances, and many, where such a change was made inadvisably and without proper examination where trouble, and serious trouble, was experienced; not that adequate results could not have been secured had this examination and changes been made.

Q. Well, for instance, if the Eagle-Picher Company is selling a battery oxide to an account which formerly used a National battery oxide, what type of service do you give the customer in connection with taking over the account?

A. We will study their process and get the details, then in our laboratory we will duplicate as near as we can that process and by selection we can tell which modifications of our oxides should be adaptable to that process.

We will then try that selected group and see which one does the best in that process, then we will select that
one, or possibly two, and make a plant test in the
3442 plant, just a single barrel or single test, and if that is
satisfactory we will run a larger batch until we are
assured it is giving the result we want.

Q. Are you able to catch up with National?

A. I think we are ahead.

Q. What is your effort in giving that type of service?

A. What is our effort?

Q. Yes, what are you trying to do?

A. To maintain our position in the field; that is how we get business.

Q. Are you trying to improve on National?

A. No, we are trying to improve on ourselves. We are already ahead of them, I think.

Q. In 1930 when you went back with the Eagle-Picher Lead Company did National Lead Company give any service at that time in connection with its sale of battery oxide?

A. To my knowledge, very little.

Q. Did the Eagle-Picher Company?

A. Yes, we did. We had ten men in the battery laboratory at that time in 1930.

Q. Has the giving of service to customers continued since that time?

A. Yes.

Q. On the part of Eagle-Picher?

A. Yes, it has.

3443 Q. Do you know whether or not at some point National Lead Company commenced to give service?

A. Yes, they did. I can't give the exact year but about 1940, possibly 1939, they hired a number of people and enlarged what had been a small battery laboratory to one that is comparable to ours at the present time, in size. I was told quite proudly by the National Lead representatives of the wonderful new laboratory they had and we began to see their men in the field there.

Q. Is there competition now between the two companies in the giving of technical service to customers in connection with the sale of battery oxides?

A. Very intense at the present time.

Q. How many grades of red lead do you manufacture for the battery trade?

A. We manufacture about, I believe, eight or nine different grades of red lead for the battery industry—shall we say types, rather than grades?

Q. Types?

A. That is right.

Q. Are those battery red leads the same as the red leads that are sold to the paint grinders?

A. No, they are not the same.

Q. Are they manufactured in the same batches, or anything like that?

3444 A. They are made in the same furnace but from different base materials and handled differently throughout the manufacture.

Q. So that the products are not interchangeable?

A. No.

Q. Do you know how many battery red leads the National Lead Company puts out?

A. No, I don't. They have several but I don't know the exact number.

Q. Can you estimate whether it is more or less than the number you put out?

A. Less, I think.

Mr. Wright: Objection, Your Honor, the witness already stated he doesn't know. He knows they have several, now he is asked frankly for a guess.

Trial Examiner Norwood: Read the question and answer.

(The record was read.)

Trial Examiner Norwood: I think he can give his impression about that.

Mr. Wright: Your Honor, that is something that can be determined by testimony. I don't want the record to show National Lead Company produces less on the basis of the witness' guess, when he has already stated he doesn't know.

Trial Examiner Norwood: He is just giving his opinion there.

3445 Mr. Wright: It isn't an opinion, it is a guess, an estimate after stating that he didn't know.

Trial Examiner Norwood: Did he state he didn't know?

Mr. Wright: Yes, sir.

Mr. Wood: Well, it seems to me that the witness has a right to state his impression or opinion there. After all, the point of this testimony is that the Eagle-Picher Company at least thinks it is competing successfully with National and if the laboratory thinks they put out a greater variety of red lead for competitive purposes than National, it shows the spirit and intensity of the competition.

Mr. Wright: He knows how many Eagle-Picher puts out, which I think he stated as nine; he doesn't know how many the National Lead Company puts out. I think it is improper for him to guess that National puts out less.

Trial Examiner Norwood: I will overrule the objection and let him answer that. Off the record.

(Discussion off the record.)

Trial Examiner Norwood: We will take a five-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Are you ready to proceed?

Mr. Wood: I have a few more question of the witness.

3446 By Mr. Wood:

Q. Mr. Harner, what is the Eagle-Picher plan of merchandising battery oxides?

Mr. Wright: I object to that, Your Honor. It hasn't been shown that this gentleman has had anything to do with the merchandising of these products. He has been a chemist and research man in the laboratory, by his own testimony.

Mr. Wood: I will ask a preliminary question there, Your Honor.

Trial Examiner Norwood: All right, go ahead.

By Mr. Wood:

Q. Do you have any duties apart from technical research itself in furtherance of the Eagle-Picher plan of merchandising battery oxides?

A. I do.

Q. What are they?

A. In training the salesmen who are to sell these oxides in the field.

Q. What is the Eagle-Picher plan of merchandising battery oxides?

A. The Eagle-Picher plan, as we teach it to the salesmen, is to sell these oxides as specialties, to fit them to the customer's individual needs.

Q. What is the purpose of that plan?

3447 A. The purpose of the plan has only one objective, and that is to maintain our competitive position in the field as compared with our larger competitors.

Q. Mr. Harner, have you ever prepared and delivered any technical papers before any technical societies?

A. I have.

Q. Approximately how many?

A. I have delivered about ten papers before the National Association of American Battery Manufacturers. I don't recall the exact number, but two or three before the Electrochemical Society, of which I am a member.

Q. What was the purpose of delivering these papers?

A. The papers before the National Battery Manufacturers Association was to distribute and make available generally to the battery industry the major findings of our laboratory in regard to storage battery technology.

Mr. Wood: You may cross-examine.

Trial Examiner Norwood: Cross-examine.

Cross-Examination by Mr. Wright.

Q. These processes for production of pigments directly from the concentrates, Mr. Harner, how many of the pigments of the Eagle-Picher Company are produced in that fashion?

A. The basic sulphate white lead, the bulk proportionate of our sulphate. We do have two other processes,
3448 but the bulk of our sulphate white lead is produced
by that method. The blue lead is also produced by that method. Some of our co-fumed leaded zinc is produced directly from ore, and all of our zinc oxide at the Hillsboro plant is produced directly from zinc ores, which wasn't mentioned before.

Q. How about litharge?

A. No.

Q. In other words, you must process that from pig lead?

A. That is right.

Q. Red lead is in the same category?

A. That is right.

Q. And basic carbonate?

A. That is right.

Q. Now, does the Eagle-Picher Company produce, or have they ever produced orange mineral?

A. Yes.

Q. How is that produced?

A. Our orange mineral is produced by our sublimed litharge, using a special grade of sublimed litharge, and not from lead carbonate or white lead carbonate as is the customary method.

Q. Then this advantage you were speaking about on the processing directly from concentrates is confined to the products we are principally concerned with, lead sulphate and blue lead?

3449 A. And leaded zinc oxide.

Q. Now, do you produce a product, leaded zinc oxide, from one operation, or is it a combination?

A. We have two different processes for producing leaded zinc oxide. In one it is produced in a single operation in which the product is known as co-fumed leaded zinc oxide produced simultaneously from a mixed lead-zinc ore. In the other, the basic sulphate white lead is produced separately from the pure zinc oxide, and then by selection of the two to get exactly the properties desired, they are blended together into what is called our blended leaded zinc oxide.

Q. Now, you sell those leaded zinc oxides, don't you, in percentage grades of 50 percent leaded zinc and 35 percent leaded zinc, and so forth?

A. 5 percent leaded zinc, 35 percent leaded zinc, 50 percent leaded zinc, 60 percent leaded zinc, and 70 percent leaded zinc. The latter two are specialties.

Q. Those are your specialties?

A. Yes.

Q. Now, can you reach those percentages by that co-fumed method?

A. About 50 percent is the maximum that can be reached by co-fuming, and that is rather difficult, I believe, from what I have seen.

3450 Q. Now, most of those percentages grades then are produced by the double process of mixing zinc oxide and basic sulphate, then?

A. We make the higher grades out of 35 percent leaded zinc by adding more lead to it. You see, we can add more lead to sublimed basic sulphate white lead, to the 35 percent leaded, and bring up the lead content.

Q. Now, these technical services that you make available to paint manufacturers, battery manufacturers, and others, they are made available to everyone in the trade?

A. That is right.

Q. Customers and prospective customers alike?

A. That is right.

Q. Irrespective of size?

A. That is right, whatever is necessary to take care of the needs of the customer, or the customer or potential customer. Remember that I do not necessarily mean customer when I use that term.

Q. Now, are you aware of the battery oxides, or have you tested them, that are produced by the Metals Refining Company?

A. Yes.

Q. Do you know whether they maintain technical research for battery manufacturers?

A. At the present time, I don't know. I assume so, but the man who was there is no longer with them, Dr. Johnson. They did maintain such service.

3451 Q. In other words, they would give service, so far as you know, to a battery manufacturer to make their oxides meet his processes?

A. Some. They had a small laboratory.

Q. And the National Lead Company does the same thing?

A. At the present time they are very active in servicing.

Q. Now, you were discussing ~~a~~ comparable formula of mixed paint containing 35 percent lead sulphate, 25 percent zinc oxide, 15 percent titanium dioxide, and the remainder inert?

A. As an approximate formula of the type.

Q. That is only one of probably thousands of formulas for paint?

A. That represents a typical good present formula today.

Q. There are many other formulas which will vary either way on content of any of those materials?

A. It is obvious to you that the possible combinations and permutations are infinite, although you might get over in a bad range if you go too far over in any one constituent.

Q. Now, as to merits or qualities of these different formulae, are there differences of opinion in the paint trade among manufacturers of pigments as to what the best formula might be?

A. Oh, yes. Each man has his pet formula.

Q. That is just your—.

A. That is based on our information.

3452 Q. —opinion?

A. Opinion if you wish. It is not just an opinion, but on our findings on our test fence and our laboratories; not just opinion only. It is based on those findings.

Q. Now, some of the other opinions in the trade have been based on findings on technical research, too, have they not?

A. That is right.

Q. Are you familiar with the ready-mixed white paint the Eagle-Picher Company at one time marketed?

A. I know they have such a product, and we have tested it.

Q. Do they presently market that product?

A. I think so, though I don't know. I assume they do, for I haven't heard otherwise.

Q. Do you know what the formula of that paint is?

A. As far as I know, it is straight white lead with linseed oil and thinner.

Q. What form of white lead is used in that?

A. The basic carbonate white lead.

Q. Are you familiar with the processes of manufacture that were employed in the Evans Lead Company plant at Charleston, West Virginia?

A. By hearsay from people who work at that plant.

Q. Have you tested any of the materials from that process of manufacture?

A. We have.

3453 Q. What materials do they produce there, do you know?

A. I don't know what they produce now, but at the time we tested them, they produced sublimed litharge, and what they called mechanical litharge, and of course the red leads made from the two litharges.

Q. Do you know of any unique processes they might have developed there in the Evans Lead plant?

A. I do not.

Q. In the mid-'30's?

A. I do not.

Q. You have stated that in order to switch the purchasers of battery pigments from one producer to another, the battery manufacturer would have to make changes in his technical processes?

A. Yes.

Q. He would also have to make changes if he switched from one type to another that you manufacture?

A. That is right.

Q. I take it that your organization is always willing to advise a customer of National or Metals Refining on just what technical changes would be necessary in order to switch from their product to yours, is that not true?

A. That is right.

Q. That is one of the purposes of your organization?

A. Yes.

3454 Q. The same would be the case with National or Metals Refining, I assume, in connection with a customer of yours that they desired to secure?

A. Yes.

Q. So that all the principal producers stand ready to give that service?

A. At the present time they do.

Q. You are aware of the problems in the battery manufacturing field, I take it, from your experience?

A. Yes.

Q. Are there any battery manufacturers located in Joplin, Missouri?

A. There is one battery manufacturer in Joplin, a small one—no, there are two manufacturers now.

Q. What are the names of those companies, do you recall?

A. The Ebart Battery Company, and I don't recall what the other is. I suggest you ask Mr. Chubb when he is on the stand.

Q. Are they customers of yours, do you know?

A. Yes.

Q. Both of them?

A. Yes.

Q. What batteries are sold principally in and around the area of Joplin?

A. As far as I know, all nationally advertised
3455 brands are sold in that area.

Q. Were there any batteries of the Vitalic Company sold in that area?

A. I expect so.

Q. And all the nationally known products?

A. Yes.

Q. —are also sold there?

A. Yes.

Q. Some of those nationally known battery manufacturers are also your customers. Is that correct?

A. They are.

Q. Which ones do you recall, just offhand?

A. That are our customers?

Q. Yes, of the nationally known ones.

A. Oh, National Battery Company, Globe-Union Company.

Q. Globe-Union is in Milwaukee, is that correct?

A. Yes.

Q. And you ship to them from Joplin?

A. I think so; I think that is where it is shipped from.

Q. I assume they would be carload purchasers?

A. Yes.

Q. Is that the manufacturer of the batteries that Sears-Roebuck sells?

A. Globe-Union, yes.

Q. What type of purchasers are these two small
3456 battery companies in Joplin? Are they carload purchasers?

A. I don't know whether they have ever reached carload scale or not; I don't know. They are small scale, that is all I can say.

Q. Can you estimate about how many batteries a day they put out in those plants—50 or 100?

A. No, I suggest you ask Mr. Chubb that question.

Q. Mr. whom?

A. Chubb.

Mr. Wood: He will be the next witness.

By Mr. Wright:

Q. What instructions to salesmen do you give regarding the pricing of your product?

A. Nothing. We know nothing about that.

Mr. Wright: No further examination.

Trial Examiner Norwood: Redirect.

Redirect Examination by Mr. Wood.

Q. You were asked about nationally known battery manufacturers who were customers of Eagle-Picher. You named several. Do you know whether or not any of the nationally known battery manufacturers manufacture their own battery oxides?

A. Yes, I do.

Q. To what extent do they manufacture their own
3457 battery oxides, as far as you know?

A. As near as I could tell, about 50 percent of the oxide used in batteries is manufactured by the battery companies, these larger battery companies.

Q. Which battery companies, for instance, manufacture their own oxides?

A. The Electric Storage Battery Company, which includes Exide and Willard; the Electric Auto-Lite Company, which includes Prestolite and U. S. Lite; the Dual Storage Battery Company.

Q. Is that a National Battery Company subsidiary?

A. It is a subsidiary of the National Battery Company. The Delco Company, which is a subsidiary of General Motors. The Bowers Battery Company of Reading, Pennsylvania. I believe that is all the larger companies that manufacture their own oxides.

Q. Do any of those companies buy red leads for batteries?

A. Yes, they do.

Q. Do they buy litharges?

A. Only, I believe, for special purpose batteries, or to supply capacity at peak production periods when they cannot make enough..

Q. Now, Mr. Wright asked you whether or not you were familiar with the problems of battery manufacturers, and
you said that you were. What particular type, if any,
3458 of battery manufacturers did you have in mind?

A. We are familiar with the problems, the technical problems—I should qualify it to that extent—of the battery industry with the exception of a few of the companies who make all their own oxides.

Q. You mean the larger companies?

A. Yes.

Q. Then you are familiar primarily with the problems of the smaller companies?

A. That is right.

Q. And what is your objective in giving these smaller companies all of this technical service and research?

A. Because it doesn't pay to have all your eggs in one basket. We have spread our business among the smaller customers, and given them the service to spread and diversify our sales of oxide, and thereby better maintain our competitive position in the industry.

Q. And what effect, if any, does that have on their competitive position in respect to the larger companies that manufacture their own oxides?

A. It maintains their competitive position. Without our help at times they wouldn't have stayed in business.

Mr. Wood: That is all.

Recross Examination by Mr. Wright.

3459 Q. Did I understand you to say the Bowers Company has its own oxide plant?

A. So I understand. I have not seen that particular installation.

Q. Where did you obtain your information?

A. Through a group who make equipment for battery manufacturers.

Q. You don't know whether that is true or not?

A. I have not verified it myself. I was told through an equipment group. It is hearsay in that sense.

Q. Do you know where this plant was reported to be located?

A. At Reading, Pennsylvania.

Q. Where is the plant of the Autolite Company, the oxide plant?

A. They have two that I know of, one at Niagara Falls at the U. S. Light plant and one at Speedway, Indianapolis.

Q. What is the capacity of those plants, do you know?

A. Not exactly. I have seen the oxide plant at Speedway, I know that that oxide plant exists and is operating.

Q. How about the Gould plant?

A. It is located at Depew, New York.

Q. Does Gould make the SLI type of battery?

A. They make some SLI type batteries, but they are primarily manufacturers of heavy duty batteries.

Q. Industrial batteries?

3460 A. Industrial batteries.

Q. With the exception of Gould all of the others that you mentioned as having plants, Electric Storage Battery Company, Autolite, Delco and Bowers are primarily in the field of SLI batteries, is that correct?

A. I wouldn't say that the Exide branch of Electric Storage Battery Company was primarily a SLI manufacturer.

Q. I didn't understand you to say it was the Exide branch.

A. That is one of the two branches, there are the Grant and Willard branches.

Q. What is their interest in Grant Company in Minneapolis?

A. I understand that Grant is a wholly-owned subsidiary of Willard Storage Battery Company.

Q. What is Willard's relation?

A. It is a wholly-owned subsidiary of Electric Storage Battery Company, as I understand it.

Q. Do the Willard branch and the Grant branch—or subsidiaries, if you will—manufacture their own oxides?

A. I don't know whether the Grant division of Willard makes its own oxide, or not, or whether they are supplied by Willard from one of their other oxide factories.

Q. Can you tell me what you would judge the minimum consumption of oxides would be which would make it economical for a battery manufacturer to produce his own oxides and erect his own plant?

3461 A. I wouldn't know.

Q. Would it be a substantial tonnage?

A. It would be my impression it would have to be a substantial tonnage.

Q. So that only a very large company could do that?

A. At least a large company.

Q. Either a large or a very large company?

A. That is right.

Q. No small or medium sized battery company could produce its own oxides in a modern oxide plant?

A. I don't believe so.

Q. You spoke of promoting the competitive position of the small battery manufacturers? Back in the mid and late '30's what was the position of the small battery manufacturer in competition, can you tell me that?

A. Well, they were at their worst position at the time the NRA went into effect.

Q. Did that condition continue for several years thereafter?

A. No, they improved because we were able at that time to show them how to make batteries meeting the requirements of the NRA Code.

Q. Was it a highly competitive field, the battery industry?

A. Extremely competitive.

Q. Was it competitive in a price way?

A. There was a price war until the NRA days.

3462 Q. Were batteries sold at extremely low prices in the period subsequent to the NRA by some of the companies?

A. I don't recall such severe price competition after that period.

Mr. Wright: No further examination.

Mr. Wood: No further questions.

Trial Examiner Norwood: Thank you, Mr. Harner. You are excused.

(Witness excused.)

Trial Examiner Norwood: Call your next witness.

Mr. Wood: Mr. Chubb.

Trial Examiner Norwood: Give me your full name, sir.

Mr. Chubb: M. F. Chubb.

M. F. CHUBB was thereupon called as a witness for the respondents Eagle-Picher Company and Eagle-Picher Sales Company and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wood.

Q. Will you please state your residence and occupation, Mr. Chubb?

A. I live in Joplin, Missouri, and am employed at the Research Laboratories of Eagle-Picher Lead Company.

3463 Q. Will you please tell us what your education was?

A. I got my B. S. degree at Baker University in Baldwin, Kansas, and my Master's degree at Massachusetts Institute of Technology.

Q. In what year?

A. 1933.

Q. What did you do after you graduated with your Master's degree from the Massachusetts Institute of Technology?

A. Started working at the Eagle-Picher laboratories immediately after graduation.

Q. Incidently, who offered you your position with the Eagle-Picher Company?

A. Dr. Schaeffer at that time was in charge of the research and it was through him and Mr. Harner I got my position.

Q. Did you know Mr. Zoller at that time?

A. No, I didn't know him at that time.

Q. He is an M. I. T. graduate too, isn't he?

A. That is right.

Q. What were your duties at the time you went to work for the Eagle-Picher Company in their research laboratory?

A. Well, in the usual fashion I started out as a helper and a laboratory boy. I was put in the battery research division and did whatever was to be done in that department.

Q. Are you still in that department?

A. That is right.

3464 Q. Have you ~~been in that~~ department continuously over that period of years?

A. I have.

Q. Will you tell us the different duties and responsibilities you had during your employment by the Eagle-Picher Company?

A. Well, I started out as a laboratory helper and within the next year or two I was called on to do sales service work, and I think in 1940 or 1941 I was placed in charge of all the storage battery research in the department.

Q. Will you explain what you mean by the term "sales service work"?

A. That is helping the salesmen to apply the information and technology which we gather in the laboratory, applying it to use with and for our customers so as to improve our position in using our product in our customers' plants.

Q. What do you mean by improving your position?

A. Well, just trying to do a better job than the other guy with respect to oxides, mostly, to improve our competitive position.

Q. Why do your customers require this sales service?

A. Well, many of them, in fact in number most of our customers are relatively small accounts and they do not have the facilities and manpower or technology back of them to do the best job which we think is possible 3465 with our products. In order to keep them using our products to the best advantage we have to show them not only how to use our products but give them basic information on how to make storage batteries by any process which they happen to be using or which we would like to put in in their plant.

Q. Do your customers compete with the major battery manufacturers who make their own oxides?

A. Very much so, yes.

Q. Do you ever examine any of the batteries put out by any of the major companies which make their own oxides?

A. Quite frequently we do, yes.

Q. What is the relative quality of the batteries put out by your customers under your direction and the batteries put out by the major companies, to which I have referred?

A. To the best of our ability it is to our interest to make our customers' batteries just as good as those batteries, and I think we do.

Q. Why?

A. Because it would mean that it would be only a matter of time until our customers went out of business if they couldn't equal those manufacturers' products.

Q. Can you give us some examples of the type of technical sales service you give to your customers, just typical examples of various types of service?

A. I think one early one which would probably 3466 stand out would be our early work with the NRA when a test was placed on the trade whereby guarantees of batteries were based on 20-hour rates. At that time no one knew anything about 20-hour rates except some of the larger manufacturers. It was evidently through their influence that tests were put in.

We had to develop information to meet that test so that it would be available to the many smaller manufacturers who were our customers.

Another example would be negative expanders. We keep a continual program in force trying to improve so-called negative expanders, which are addition agents for improving the cold capacities. During my stay with the company we probably increased the capacity of the negatives in that respect almost 100 percent.

Another example would be in drying plates—

Q. I was speaking of the sales service rather than your company's actual developments, that is, the type of sales service which you would give these smaller companies.

A. Well, a recent one would be actually helping, assisting in the setting up of a small battery plant which they didn't know how to set up, or, really, the processes that went into it. We were asked to show them what materials and equipment were necessary and we did so in the hope that by so doing we would get the business. That happens quite frequently.

Q. How many different battery oxides does your 3467 company make at the present time?

A. You mean—

Q. Different types of battery oxide.

A. Different products available to the battery industry?

Q. That is right.

A. There are probably in the neighborhood of 100.

Q. Do you know whether or not the National Lead Company puts out an equal number of products in the way of battery oxides?

A. Well, I could only answer that by saying I have certainly never seen nearly that number in the trade and I would assume that they do not.

Q. What is the purpose of putting out such a large number of battery oxides?

A. That is done in order to be of greatest assistance to any one customer. Every customer, every plant seems to have its own peculiar problems which require a special oxide or a special process and if it can be solved by making a special product we would like to do it.

There are also variations in climatic conditions over the country which require different types of negatives or positives. Incidently, a single all-purpose battery just isn't available. It takes a lot of variations, where you want to emphasize one quality over another and it is through all these variations both in performance and in manu-
3468 facturing facilities that we feel so many of our products are a good thing to go to our customers.

Q. How do you determine which product goes to which customer?

A. We first probably make a survey of the particular problem at hand. If a plant was running we would go in and study their process. He might or might not be having difficulty, or he might have something peculiar in the process which required emphasizing certain characteristics. After a study of all those factors we select the product or actually make a new one which we think will do the best job in that particular situation.

Q. Since you have been with Eagle-Picher Company what major developments has the Eagle-Picher research laboratory made in the battery field? You can refer to your notes there, if you wish, Mr. Chubb, if you have made any.

A. I think you can take them by steps. Of course, we consider the availability of so many different oxides is an important contribution to the battery industry because it allows people to make lots of different kinds of batteries, which was especially true during the past war when special purpose batteries were very much in need.

As I mentioned before in the early days we did develop the information that contributed to the battery industry's methods for meeting the 20-hour capacity
3469 and actually improved those capacities through the years in the past. Those capacities have been stepped up 15 or 20 percent in the last ten years.

In the mixing of the paste which is one of the initial steps in making a battery, we have developed methods for mixing which improve the quality, uniformity, and actually cut costs in that they reduce the scrap in the plant. That information has been published so that it is available to the industry.

In pasting, while we have not had any part in developing pasting machines themselves we certainly played a part in adapting materials to be used with those pasting machines and have made a continual study of the pasting machines being developed at all times and have developed products and methods of processing to fit those pasting machines.

In drying the plates, another early step in processing, we very early made a study and contributed to drying plates and replaced the earlier so-called pickle process where all plates were dipped in acid. Under the new process they are dried in either batch ovens or continuous ovens and we worked out schedules where these plates could be dried.

More recently we have developed a so-called damp process and the equipment for promoting that process whereby the plates are only partially dried. It has many advantages and is being accepted quite extensively
3470 throughout the trade. In conjunction with this equipment we have also changed other processes so as to get the full benefit in that it reduced the forming time.

Q. What do you mean by forming time?

A. That is the first charging of a battery. It reduces the time that is necessary for a battery to stay in a plant being charged before it can be either put in stock or shipped out. That works in with the processor equipment which I mentioned before.

Q. Did you mention Chubb processor?

Mr. Wright: Your Honor, I am going to object to any further questions along this line. It has absolutely no relevancy in this proceeding at all. It is cumulative. It has no bearing that I can see on the essential charges of price fixing and price discrimination in this case. I appreciate the Eagle-Picher Company is a fine company and they have done a lot of research work, but I think we have had that described fully enough for the purpose of this proceeding.

Mr. Wood: This is the last question along that line,

Your Honor, and we say it has a relevance to the case in this respect: If there were definite evidence of conspiracy here in this case instead of just a few circumstances from which the Commission requests that the inference of conspiracy be drawn, I agree that this would not rebut
3471 direct evidence, but when there is only inferential
evidence then by showing the money being poured into continuous, keen competition in research we say it is one factor from which the inference of price leadership could be drawn.

Mr. Wright: I object to counsel's statement that there is no direct evidence of conspiracy in this case.

Trial Examiner Norwood: Counsel's statement is not taken as evidence. I will overrule the objection and let him answer the question.

Mr. Wood: Let me finish this question, then I have just one more question which is slightly different.

Trial Examiner Norwood: Go ahead.

By Mr. Wood:

Q. Did you mention the Chubb processor?

A. That was mentioned indirectly; the plate processor, that is the Chubb processor.

Q. Is that a drying machine?

A. That is a machine for processing plates between the pasting machine and the forming process.

Q. Do any other major developments come to mind?

A. Of course at the present time a process has been developed and will be used for high acid formation where the batteries are only formed in a single acid rather than in the conventional formation where you charge and then dump, then recharge after you fill it with strong acid again.

3472 Q. What, in your opinion, has been the effect of
the Eagle-Picher research on competition in the battery industry?

A. Well, it has certainly tended to keep our customers in a competitive position.

Q. What in your opinion has been the technical resultant of the Eagle-Picher research, as far as the improvement in the quality of storage batteries is concerned?

A. I think we have been one of the leaders in any improvement that has gone on in batteries, certainly since I have been with the company, and probably for a short time before that.

Q. Does your company now have a contract with the Signal Corps to perform research work in storage battery development?

A. Yes, it does, and has had for the past three years.

Q. And apart from that work for the Signal Corps, which I imagine is restricted, is all of your research and service available to all customers and prospective customers?

A. Yes.

Mr. Wood: Cross-examine.

Cross-Examination by Mr. Wright.

Q. Your research services are available, as you said, to all in the field, that is, large, small medium sized and giant battery companies, is that correct?

A. That is right.

3473 Q. Has the availability of your research laboratory and your technical assistance been used as a sales argument to the large battery manufacturers to purchase oxides from you, rather than make their own?

A. Will you state that question again, please?

Mr. Wright: Would you read it to him, please?

(The question was read.)

The Witness: I don't believe I am in a position to answer that.

By Mr. Wright:

Q. Do you cooperate with the sales department on these matters?

A. To a certain extent, but there are some large manufacturers, as you class them, whose plants I never get into.

Q. Are there some whose plants you do get into?

A. That is right.

Q. You give them technical assistance?

A. That is right.

Q. Who are they?

A. Well, among them would be National Battery Company—I believe you classified your size as large.

Q. I am speaking of companies in the size range that have sufficient consumption of oxides so that they could conceivably make their own oxides rather than purchase from you. National Battery would be one of them?

3474 A. That is right; Price battery.

Q. That is in Reading, it is not?

A. That is in Hamburg, Pennsylvania. Then there is Solar.

Q. Where is that located?

A. Milwaukee. They have one plant at Milwaukee.

Q. You do considerable technical work with them, do you?

A. Yes.

Q. Improving their process?

A. Yes.

Q. Do most of the large battery companies have research staffs of their own?

A. Yes, they do.

Q. Are they in any way comparable to the research staff which you maintain?

A. Certainly.

Mr. Wood: Objected to, unless the question is qualified as to whether the questioner means quantitatively or qualitatively.

Mr. Wright: I asked in any way are they comparable. If the witness knows in what way they are comparable he can answer.

Trial Examiner Norwood: I think we can clarify that later. Objection overruled. Do you want the question read?

The Witness: Yes.

3475 (The question was read.)

The Witness: I think I will have to ask you what you mean by comparable. I was perhaps in error in answering yes.

By Mr. Wright:

Q. Can you compare the research staff engaged in research on battery manufacturing problems at the Solar Company, with yours, from the point of size?

A. Taking that one in particular they have a smaller staff.

Q. Do you think it is in any way comparable in quality or extent of research with your own research department?

A. I would say the quality of the work that they do would be comparable to ours. However, the quantity wouldn't be.

Q. The extent?

A. Well, I classify quantity and extent as the same thing, unless you have something else in mind.

Q. Do you furnish technical services for Globe Union?

A. We have worked with them.

Q. Do you sell oxides to Grant in Minneapolis?

A. At the present time we do not.

Q. Have you in the period, say, from 1936 to 1942?

A. It would be a very small amount.

Q. Do you have any customers in the State of Texas to which you supply oxides for battery manufacture?

A. I don't believe that I am qualified to answer
3476 that right now. That could be a changing condition.

I don't know whether we are selling anyone down there, or not.

Q. You don't recall furnishing services down there?

A. Yes, I do recall furnishing services there.

Q. Do you recall the two battery companies that Mr. Harner mentioned, located in Joplin?

A. There are two located in Joplin, Lead Products Company and Ebert-Allen Company.

Q. Are you familiar with those two operations?

A. Yes, I have been in the plant a number of times.

Q. Have you furnished services to them?

A. We do.

Q. What is the capacity of the Ebert-Allen plant?

A. Well, they have recently made a change. Right now I would say they have a capacity of 100 batteries a day.

Q. What is the change that you mentioned?

A. They have moved into larger quarters.

Q. When was that move?

A. In the past two months.

Q. What was their capacity prior to that move?

A. During last winter I think they made about 50 to 60 batteries a day.

Q. About what is the capacity of the Lead Products Company?

A. I would put it in the same category.

Q. Are they carload purchasers of oxide, do you know?

3477 A. Ebert-Allen is not. I think that the Lead Products Company have purchased carload quantities.

Q. You don't know that they always purchase in that quantity?

A. They haven't at all times, I know that; but I don't know just what you would classify as a carload purchaser.

Q. Are you familiar with the pricing schedule for these oxides?

A. No.

Q. You don't know anything about the territorial differentials applied?

A. No, I don't know a thing about it.

Q. The differentials between five ton and carload, and less than five-ton prices?

A. I know there is a difference, but the extent to which it differs I don't know.

Q. Are you familiar with competitive conditions in the battery business as far as the problems that your customers in that industry have faced during the last ten years or more?

A. Yes.

Q. What has been the situation generally of the smaller battery manufacturers in competition with Willard, Delco or Autolite? Is he generally—and I am speaking now in the period from 1936 to 1942—able to sell his battery for as high a price as the larger battery manufacturer?

3478 A. I don't know. I think that some have. I think a lot of that is a local condition. You have to take each individual instance.

Q. You don't think any general statement of general application could be made, then, that the small battery manufacturer is usually at a price disadvantage over the large nationally advertised product?

A. No, I don't think so.

Q. I am talking now of the period from 1936 to 1942.

A. Yes. I am not qualified to make a statement.

Q. Well, you testified you were familiar with these problems and had been in and done research and helped these manufacturers out with their problems. Certainly you must know something about what those problems have been.

Mr. Wood: Is there a question?

Mr. Wright: Yes.

Mr. Wood: Is that a question?

Mr. Welch: There is no question.

The Witness: What is the question? Where do we stand now?

Mr. Wood: The witness doesn't understand that as a question.

Mr. Wright: I would like to be permitted to make my own cross-examination.

Trial Examiner Norwood: Read the question.

3479 Mr. Wright: I made a statement to the witness for the purpose of refreshing his recollection in a further attempt to get an answer to the question about which he said he couldn't recall.

Mr. Wood: The witness was hesitating because there was no question.

Trial Examiner Norwood: Go ahead.

By Mr. Wright:

Q. Do you know—and I will repeat the question again—that it was generally the case in the period from '36 to '42 that the small local battery manufacturer was able to command as high a price for his product as the nationally advertised brands such as Willard, Exide, Autolite and Delco?

A. I still don't know what the question is.

Mr. Wright: Will your read the question, please?

Trial Examiner Norwood: Read it.

(The question was read.)

The Witness: I don't believe that the smaller manufacturers which you speak of did charge as much as these larger manufacturers.

By Mr. Wright:

Q. Do you recall in the period from '36 to '42 that some of the larger manufacturers quoted storage batteries at very low prices, comparatively speaking?

A. Did you say some of the manufacturers?

3480 Q. Some of the large manufacturers.

A. I don't recall that with batteries sold under their own name, no.

Q. Do you recall it with private brand batteries that weren't sold under their own name?

A. Yes.

Q. What do you recall about that?

A. Well, I think at one time you could buy cheaper batteries, probably around $3.

Q. What effect did that have in your experience on the competitive problems of the small battery manufacturer, speaking now of operations comparable to Ebert-Allen and the Lead Products ventures?

A. Well, I believe most of those fellows tried to meet that competition not by coming down in price, but by giving a different kind of service in the locality.

Q. Did it create a serious competitive problem for them?

A. Oh, yes, I think so.

Mr. Wright: No further questions.

Mr. Wood: Nothing further.

Trial Examiner Norwood: Thank you, Mr. Chubb.

(Witness excused.)

Mr. Wood: That is all I have in the way of witnesses, Your Honor.

Mr. Wright: You mean at this hearing?

3481 Mr. Wood: At this hearing.

Trial Examiner Norwood: Are there any further witnesses by any of the other respondents?

Mr. Gardiner: I have none, Your Honor.

Trial Examiner Norwood: Well, I suppose that since all counsel are not here, we had better meet at 2 o'clock, and I will discuss those issues with you for awhile.

Mr. Wright: May we go off the record for a moment?

Trial Examiner Norwood: And also to let counsel put their requests on the record for future hearings, and so forth.

(Off the record.)

(Discussion off the record.)

Trial Examiner Norwood: After discussion with counsel off the record, I have decided to adjourn the hearing to reconvene in Washington, D. C., Office of the Federal Trade Commission, at 10 o'clock a. m., City Time, on September 16, 1947.

Mr. Wright: It is my understanding that we will run fairly continuously at that time until we have completed respondents' testimony?

Trial Examiner Norwood: We will run as continuously as possible.

Mr. Welch: I would like to state for the record at this time that I have commitments in the case of F. T. C.
3482 vs. R. J. Reynolds Tobacco Company for the week beginning September 22 in Indianapolis, Indiana; the week beginning September 29 in New York, New York; the week beginning October 6 in Washington, each of those settings being, as far as I know, for one week; and also a hearing in Winston-Salem, North Carolina, for the week of October 27. With those exceptions, I will be available at any date in September or October.

Trial Examiner Norwood: Well, I will state that we have made our calendar with deference to the requirements of Mr. Welch and his firm heretofore, and we have refrained from doing some work in July because he was engaged, and so on, and I feel that after September it will be incumbent upon him to make arrangements in these other cases so that we can go on with this case. I am requesting him to do the best he can in that respect.

Mr. Welch: Your Honor, with all due deference, I do not recall that I resisted in any setting of hearings in July on my account, or that I resisted the setting of any in June. I don't know that any hearing has heretofore been postponed on my specific request.

Trial Examiner Norwood: I will add that we had a conference with counsel about adjusting these hearings, and I had one with Mr. McIntyre with relation to these hearings, and we have a great deal of trouble adjusting 3483 these hearings so that Mr. Welch can try more than one case before the Commission at a time. I am willing to make all reasonable concessions to him, but I don't think that I can adjourn this hearing another month on that account when there are other counsel in his firm who can be here when he is not introducing evidence for his particular client.

Now, I think you can make some arrangement where we can live and let live, and make it possible for us to go ahead with reasonable diligence to try the rest of this case, and I will ask counsel to give a good deal of thought to it. In the meantime, we will adjourn until September 16, as stated.

(Thereupon, at 12:40 o'clock p. m., an adjournment was taken until September 16, 1947, at 10 o'clock a.m., in Room 332 Federal Trade Commission Building, Washington, D. C.)

3484

Hearing Room,
Federal Trade Commission,
Washington, D. C.,
September 16, 1947.

Met, pursuant to adournment, at 10:00 a.m.

Before:

J. W. Norwood, Trial Examiner.

Appearances:

E. Z. DuBose, Attorney for the Respondent National Lead Company. (120 Broadway, New York, New York.)

Edmund T. Wood and Richard Serviss, Attorneys for Respondents Eagle-Picher Sales Company and Eagle-Picher Lead Company. (American Building, Cincinnati, Ohio.)

3485 Henry E. Gardiner, Attorney for Respondents Anaconda Copper Mining Company and International Smelting & Refining Company. (120 Broadway, New York, New York.)

James T. Welch, Attorney for Respondent The Sherwin-Williams Company. (815 15th Street, N. W., Washington, D. C.)

Joseph S. Wright and Paul R. Dixon, attorneys for the Federal Trade Commission.

3486

PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on the 23rd of July, 1947, hearing in Docket 5253 is now reconvened at 10 o'clock a. m., on the 16th day of September, 1947, in Room 332, Office of the Federal Trade Commission, Washington, D. C.

The following counsel have appeared:

James D. Ewing and E. Z. DuBose appearing for the National Lead Company.

Edmund T. Wood and Richard Serviss appearing for Eagle-Picher Company and Eagle-Picher Sales Company.

Henry E. Gardiner appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James T. Welch appearing for The Sherwin-Williams Company.

Joseph S. Wright and Paul R. Dixon appearing for the Federal Trade Commission.

You may call your witness.

Mr. Gardiner: If Your Honor please, I would like to call Mr. Frank Hurless.

FRANK H. HURLESS was thereupon called as a witness for the respondent International Smelting & Refining Company and, having been first duly sworn, testified as follows:

3487 *Direct Examination by Mr. Gardiner.*

Q. Will you please state your name and address?

A. Frank H. Hurless, Lowell, Indiana.

Q. At the present time, what is your occupation?

A. At the present time I am employed by the International Smelting & Refining Company in the Midwest area as a special representative. My duties consist right now mainly in the purchase of copper scrap for refining at Anaconda, Montana, and Perth Amboy, New Jersey.

Q. When were you first employed by that company?

A. In 1922.

Q. Will you kindly outline your activity with the International Smelting & Refining Company from that date down to the present, giving your various assignments with the company?

A. At first I was employed as a checker in the construction of a zinc oxide plant at Akron, Ohio.

Q. What time was that, when, what year?

A. 1922. My duties consisted in checking on the use of supplies and materials and the labor used in constructing the plant, as the construction was on a cost-plus basis. Subsequently I was in charge of the small plant office at Akron, Ohio.

In 1927 I began part-time sales work, and about 1929, as I recall it, I began full-time sales work.

3488 In 1929 I was transferred to the main office at East Chicago, Indiana.

In 1930, I was made district salesmanager and had charge of the dry white lead and zinc oxide sales in the Midwest area.

In 1936 I was made assistant salesmanager, and had charge of the sale of dry white lead, white lead and oil, and zinc oxide.

While assistant salesmanager, I virtually had charge of the sales of all territories, inasmuch as our official salesmanager, who was located in Akron, Ohio, had other duties which prevented him from giving full time to sales work.

Then in 1938 I was made salesmanager, and had full charge of the sale of dry white lead, white lead and oil, and zinc oxide in all territories.

Q. When did you first have anything to do with the sale of white lead and oil?

A. In 1931.

Q. The amended complaint in this proceeding defines lead pigments as the lead pigment commonly known in the industry as white lead, both basic carbonate and basic sulphate of lead, blue lead, red lead, or red oxide of lead, litharge or monoxide of lead, orange mineral and grinders' lead paste, such pigments as marketed either as dry products in the form of dry powder or in oil, in the form 3489 of a paste, after mixture with linseed or other oils.

What products covered by this definition have been produced by respondent, International Smelting & Refining Company?

A. Dry white lead and white lead and oil.

Q. Are those the only ones?

A. Yes.

Q. When did International first start to manufacture dry white lead?

A. In the latter part of 1936.

Q. Where was this operation conducted?

A. At East Chicago, Indiana.

Q. Prior to 1936, was dry white lead produced at the East Chicago plant of International?

A. Yes, it was.

Q. By what company was dry white lead produced prior to that time?

A. By the Anaconda Lead Products Company.

Q. Do you know what relation that company had to respondent, International, and respondent, Anaconda Copper Mining Company?

A. The Anaconda Lead Products Company was a subsidiary of the Anaconda Copper Mining Company, as was the International Smelting & Refining Company.

Q. Do you know whether there was any subsequent change in this relationship?

3490 A. Yes, there was.

Q. Is the Anaconda Lead Products Company still in existence?

A. No, it is not.

Q. What became of it?

A. The assets and properties of the Anaconda Lead Products Company were taken over by the International Smelting & Refining Company.

Q. Is the Anaconda Lead Products Company as a company still in existence, do you know?

A. No, it was dissolved.

Q. Do you know when?

A. In the latter part of 1936.

Q. When did the Anaconda Lead Products Company first start to produce dry white lead?

A. In the latter part of 1919.

Q. And do you know when they first made sales of that product?

A. In the first part of 1920.

Q. Do you know how much of a factor this production was in the total output of dry white lead in the earlier years of production of that commodity by this company?

Mr. Wright: Objection, Your Honor. This witness is not shown to have been employed or to have had any contact with these products prior to about 1930.

Trial Examiner Norwood: In the question, how 3491 much of a factor, it seems to me the term "factor" is not very definite. You must show any percentages within the knowledge of this witness.

Mr. Gardiner: I will withdraw that question.

Trial Examiner Norwood: Yes.

By Mr. Gardiner:

Q. Are you familiar with the figure showing the production of the International Smelting & Refining Company of white lead during the period that it produced dry white lead?

A. I am.

Q. I hand you an exhibit and ask that it be marked Respondent's Exhibit No.—

Trial Examiner Norwood: I think it will be 190. I will ask the counsel to check.

Is the next respondent's exhibit 190?

Mr. Wright: I can ascertain that in just a moment.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: According to my records, it is 190.

Trial Examiner Norwood: Very well. We will mark it 191, to be safe.

(The document referred to was marked Respondent's Exhibit 191 for identification.)

By Mr. Gardiner:

3492 Q. I show you Respondent's Exhibit marked for identification No. 191, and ask if you have seen this document before?

A. Yes, I have seen these figures before.

Q. Do you know anything about their preparation?

A. They were prepared under my supervision.

Q. At whose request?

A. At the request of our counsel.

Q. What does this record purport to show?

A. This record purports to show the percentage of International's production of dry white lead of the total production of dry white lead in the United States for the years shown.

Q. What was the basis on which these figures were calculated?

A. The figures for the total production of dry white lead in the United States were taken from figures submitted by the United States Bureau of Mines. The figures for the production of International were taken from our records in our accounting department at East Chicago, Indiana.

Mr. Wright: I would like a few preliminary questions on that.

Trial Examiner Norwood: Very well.

By Mr. Wright:

Q. Mr. Hurless, in what form were the figures secured from the Bureau of Mines?

A. Those figures are in the regularly published 3493 form of the Bureau of Mines. I think sometimes they are in book form or they can be secured by writing the United States Bureau of Mines direct.

Q. Were these secured from the publication of the Bureau of Mines known as the "Minerals Year Book"?

A. I do not know.

Q. Then you cannot tell me where we could have access to those figures?

A. Well, you could get the figures from the United States Bureau of Mines. But whether or not you would get them in the exact physical form we got them, I do not know.

Trial Examiner Norwood: Is that information confidential? Is that part of the confidential Bureau of Mines information?

The Witness: No, I do not think that this information is considered confidential, because my understanding is that anyone writing for it can secure it from the Bureau of Mines.

Mr. Wright: Your Honor, I realize that the Bureau of Mines does publish in its mineral year books figures on the total production of these various products and others, but I have no way of knowing whether these are the figures that appeared in the "Minerals Year Book", which is public information, or not.

By Mr. Gardiner:

3494 Q. Mr. Hurless, when were these figures compiled, do you recall?

A. I do not know the date, but I would say that it was probably a few months after this complaint was issued.

Q. And do you recall at that time what the request was so far as the compilation of these records with relation to securing the information on the world production? Was there any directive to you as to how you were to secure the figures on the United States production in this material?

A. Well, we were not told where we should go to get the figures; that is, whether from the "Minerals Year Book" or to write the United States Bureau of Mines. But I do know that at East Chicago we always maintained copies of the "Minerals Year Book" in our library. But whether or not these figures were actually taken from that or not, I cannot say.

Mr. Wright: Your Honor, may we go off the record just a minute?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Gardiner: I should like to offer at this time Respondent's Exhibit 191 in evidence.

Mr. Wright: Your Honor, I have no objection provided it is admitted subject to motion to strike later provided that the basic data from which this exhibit was com-
3495 piled is not made available on my request.

Trial Examiner Norwood: It will be admitted subject to that condition.

(The document referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 191, was received in evidence.)

Mr. Gardiner: I ask that this document be marked Respondent's Exhibit No. 192 for identification.

(The document referred to was marked Respondent's Exhibit 192 for Identification.)

By Mr. Gardiner:

Q. I show you this document marked Respondent's Exhibit 192 for Identification, and ask you if you have seen it before?

A. Yes, I have seen these figures before.

Q. Did you have anything to do with their preparation?

A. They were prepared under my supervision.

Q. Where?

A. At East Chicago, Indiana.

Q. What do these figures purport to show?

A. These figures purport to show the percentage of sales by International of the total percentage of sales in the United States for the years specified.

Q. What is the basis on which these figures were calculated?

A. The figures for total sales in the United States were taken from figures supplied by the Lead Industries
3496 Association.

The figures for sales by International were taken from our records, in our sales department at East Chicago, Indiana.

Mr. Gardiner: I should like to offer in evidence Respondent's Exhibit 192 subject to the same qualifications as Exhibit 191.

Mr. Wright: I have no objection subject to the same qualifications.

Trial Examiner Norwood: It is so received.

(The document referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 192, was received in evidence.)

By Mr. Gardiner:

Q. Did the Anaconda Lead Products Company and International sell dry white lead to the trade directly, or did they use a sales agent for some or all of their production?

A. They sold the dry white lead on a direct basis and through a sales agency.

Q. What was the name of this sales agency?

A. The Anaconda Sales Company.

Q. What connection did this sales agency have with respondent International or with respondent Anaconda Copper Mining Company?

3497 A. The Anaconda Sales Company is a subsidiary of the Anaconda Copper Mining Company, as was International or is International.

Q. Why was the Anaconda Sales Company used as a sales agency?

A. Because in certain States it is licensed to do business where the International Smelting & Refining Company is not licensed to do business.

Q. To what class of trade did Anaconda Lead Products Company and International sell dry white lead?

A. They sold principally to manufacturers of paint and ceramic products.

Q. What was the price basis or system on which Anaconda Lead Products and International first sold dry white lead?

A. On the basis of f. o. b. East Chicago, Indiana, freight allowed.

Q. To any point in the United States?

A. As I recall it, that was the case.

Q. Was any change subsequent made in this pricing system?

A. Yes.

Q. What was it?

A. We established a par zone and a Pacifiic Coast zone.

Q. What do you mean by par zone?

A. The territory in the United States east of the Rocky Mountains was considered the par zone, and the territory west of and including the Rocky Mountains was considered the Pacific Coast zone.

3498 Q. What was the par zone? I understand it is part of the United States that was included within that group, but what distinguishes that from the Pacific Coast zone? What was the difference between them?

A. There was a difference in price of one-quarter cent per pound.

Trial Examiner Norwood: In favor of the par zone?

The Witness: That is right.

By Mr. Gardiner:

Q. Now, do I understand that the material was sold in the par zone f. o. b. where?

A. East Chicago, Indiana.

Q. Freight allowed?

A. Freight allowed.

Q. Within any part of the par territory?

A. That is right.

Q. And what was the situation so far as the Pacific Coast zone was concerned?

A. It was sold f. o. b. East Chicago, Indiana, freight allowed, the price being one-quarter of a cent per pound more.

Q. Why did these companies adopt this two-zone system for selling dry white lead?

A. Well, we adopted it because it was adopted by our competitors, and we went along on the same basis.

Q. How did you know that your competitors had such a system?

3499 A. Well, it was very easy for us to pick up information regarding our competitors' practices in the pricing of their products from our customers and prospective customers.

Mr. Gardiner: Will you read my last question, please, and the answer?

Trial Examiner Norwood: Read the question.

(The question and answer were read.)

By Mr. Gardiner:

Q. Now, so far as your competitors were concerned, how did you learn what their prices were?

Mr. Wright: Objection, Your Honor. That is repetitious.

Trial Examiner Norwood: No, let him answer. Objection overruled.

The Witness: Will you repeat the question, please?

(The pending question was read.)

The Witness: We could very easily learn what our competitors' prices were by asking our customers and prospective customers.

By Mr. Gardiner:

Q. How did you determine what your competitors' general selling tactics were? How did you determine that?

A. By making inquiries from our customers and prospective customers.

Mr. Wright: Your Honor, I object to this line of 3500 questioning because it is not restricted to any period of time. So far as we know, we have been talking about the period from 1922 to the present. It is not limited to any specific instance.

Trial Examiner Norwood: It applies to the time when they made a change in the par zone and Pacific Coast zone, and the operations thereafter. I think that is sufficiently definite. You may cross-examine him further on it.

By Mr. Gardiner:

Q. Did Anaconda Lead Products or International allow any quantity discount on the sale of dry white lead?

A. Yes, they did.

Q. What discount was allowed?

A. A discount of one-quarter cent per pound under the less carload price was allowed for carlots of 20 tons or more.

Q. Was this discount allowed in both the par and the Pacific Coast zones?

A. Yes.

Q. Why was such a discount made?

A. Well, we allowed such a discount because it was the general practice of competition.

Q. How did you know that that was the general practice of competition?

A. By contacting our customers and prospective customers we would learn what our competitors were doing pricewise.

3501 Q. Did your companies quote different prices to railroads and industrials?

A. Yes.

Q. Why were different prices quoted to railroads and industrials?

Mr. Wright: Your Honor, I object to this line of questioning. It is not restricted as to time. We are talking about another matter than the zone matter now.

Trial Examiner Norwood: You may clarify that.

By Mr. Gardiner:

Q. Subsequent to the adoption of the par and Pacific Coast zones, did your companies quote any different prices to railroads and the industrials?

A. Yes.

Q. Why were different prices quoted to railroads and industrials?

A. Well, we quoted different prices to railroads and industrials because competitors were likewise quoting such prices.

Q. How did you learn that your competitors were quoting different prices to these groups?

A. By contacting industrial and railroad accounts we would find out what our competitors were doing pricewise.

Q. Through what medium did you make this contact?

A. Usually through our salesmen.

Q. During the period subsequent to the adoption
3502 of the two-zone system, do you know generally what
the profit and loss situation was so far as the production and sale of dry white lead was concerned?

A. Well, in a general way—

Trial Examiner Norwood: Answer yes, if you know.

The Witness: Yes, in a general way I know.

By Mr. Gardiner:

Q. What was the situation?

Mr. Wright: I object, Your Honor. What profit and loss situation might have been at a particular time is absolutely irrelevant to the issues of this matter.

Mr. Gardiner: If Your Honor please, I think it is very pertinent, because we are discussing the matter of pricing practices and the matter of competition, and it is important to determine what relation the pricing practices of a company had as to whether or not they were making or losing money.

Mr. Wright: Now, Your Honor, if that is counsel's purpose, to show that any one of the pricing practices had any effect on their profit and loss, it can hardly be established in this way. It is going to be necessary to get into the whole profit and loss structure of the company, and we are going to open up a field here that is going to be endless if we are going into the question of profit and loss as having anything to do with the changing or establishing
3503 of zone systems in this case.

Mr. Gardner: Well, of course the question has not been directed to the adoption of zone systems. The preceding questions dealt with prices so far as railroads and industrials were concerned, and I asked him if he generally knew what the situation was in that field, and the answer was yes. Now I have asked him what that situation in general was.

Trial Examiner Norwood: I think we are getting off the track here, I really do. I will sustain the objection.

By Mr. Gardiner:

Q. In the sales to railroads and industrials subsequent to the introduction of the par zone system, was any thought given to the sale of dry white lead at a price higher than that sold by your competitors?

Trial Examiner Norwood: Read that question, please.

(The pending question was read.)

Trial Examiner Norwood: You may answer.

A. No, I don't think we considered selling our dry white lead at a price higher than that of our competitors.

By Mr. Gardiner:

Q. Why not?

A. We could hardly be expected to get a premium for our product.

3504 Mr. Wright: Your Honor, I object to that, and I ask that the last answer be stricken. The witness said no consideration was given to the question of selling at a higher price.

Now, if no consideration was given to such a question, certainly it is improper to try to bring out that there was a particular reason for not giving consideration to the matter.

Trial Examiner Norwood: Well, he said that they gave no consideration, and now he is telling us why they gave no consideration.

Mr. Wright: If no consideration was given, obviously the matter never came up, and there was never any reason in anyone's mind.

In other words, the witness is already on the record that no consideration was ever given to that question. How can he have a reason in his mind, if the thing was never considered?

Trial Examiner Norwood: I will overrule the objection. I think he may tell us why they did not give serious consideration to selling the competitors. And I think he has already told us.

Did you say you could not get a higher price?

The Witness: I said that we could not be expected to get a premium for our products.

3505 Trial Examiner Norwood: Yes.

By Mr. Gardiner:

Q. Subsequent to the adoption of the two-zone system in the sale of dry white lead, did you ever sell that commodity at a price less than that sold by your competitors?

A. No.

Q. Why not?

A. The production and sale of dry white lead was not too profitable a business, and we felt that we had to get as much for our product as we possibly could.

Q. During the time that Anaconda Lead Products and International were producing and selling dry white lead, were they in competition with other companies?

A. Yes.

Q. What would you say as to the extent of competition that your company encountered on the sale of these products?

A. I would say that there was very stiff competition.

Q. Was Anaconda Lead Products or International able to improve their financial return through improvements in the methods of production?

A. To some extent.

Q. What improvements were made?

A. We discontinued our method of kiln drying dry white lead and substituted a mechanical Loudon dryer. Then we perfected a machine for mechanically washing
3506 also lead anodes. In the handling of our finished product in the warehouse, we installed the best mechanical equipment to be used in piling it and for taking it from stock and loading it into cars and trucks.

Q. Did these improvements in the production of this material result in an increase in your net return from the sale of that product?

A. To some extent.

Q. Was that reflected in any change in your prices?

A. No.

Q. Why not?

A. Well, our experience over a period of years was that we constantly had to strive to get lower costs. When we succeeded in cutting the costs in one place, they were usually offset in another place; for example, by increased costs of materials, supplies and labor.

Q. You testified previously that the Anaconda Lead Products Company went out of the business of producing dry white lead and was succeeded by International.

When that occurred, was there any attempt made to change the pricing system for dry white lead?

A. No.

Q. Did anything occur in the trade in the late '20's or early '30's that had a major effect on Anaconda Lead Products' outlets for its production of dry white lead?

3507 A. Yes; we encountered increased competition, due principally to the expansion of the use of titanium pigments. We were forced to go into outlying territories that we had not solicited before in order to endeavor to maintain our volume of sales and production.

Q. You stated that due to this increased competition you had to go out and sell in an area outside of the production area. Was anything done outside of attempting to secure more sales and to increase your production of dry white lead?

A. Yes; we decided to go into the production and sale of white lead in oil.

Q. Was that the primary reason for entering the white lead in oil field?

A. I would say that it was the reason.

Q. What percentage of Anaconda Lead Products' and International's dry white lead production came to be used in white lead in oil?

A. Generally about 30 to 35 percent.

Trial Examiner Norwood: Will you read that question, please?

(The question was read.)

Mr. Gardiner: May I have the answer again?

(The answer was read.)

By Mr. Gardiner:

Q. Was dry white lead ever sold under consign-
3508 ment by either of your companies?

A. No.

Q. Do you know of any agreement on the part of International with the other respondents in this proceeding, who are the National Lead Company, Eagle-Picher Lead Company, the Eagle-Picher Sales Company, the Sherwin-Williams Company, and the Glidden Company, for the adoption and maintenance of a system of delivered price quotations of dry white lead?

A. No, I do not.

Trial Examiner Norwood: Either or any of them?

The Witness: Either or any of them.

By Mr. Gardiner:

Q. Do you know of any attempt between International and any or either of the respondents just named in this proceeding for the adoption and maintenance of a plan whereby the United States is divided into zones for the purpose of selling dry white lead?

A. No, I do not.

Q. Do you know of any arrangement whereby International sought and secured advice, assistance and cooperation of the Lead Industries Association, its officers, employees and agents along with other respondents in this case previously mentioned in publishing and using non-competitive terms and conditions of sale in connection with the sales and offers to sell of dry white lead?

3509 A. No, I do not.

Q. Do you know if International ever used the office of the Lead Industries Association with the cooperation of officials of the same for the purpose of exchanging price factors and information concerning price factors to be used at times by International and other respondents in calculating, determining and announcing their offers to sell dry white lead?

A. No, I do not.

Q. In my last question, I referred to respondents, and by that I included all the respondents previously mentioned. Does that change the answer to the question?

A. No.

Q. Do you know if International ever agreed to adopt or adopted, maintained and used terms and conditions of sale employed in so-called consignment or agency agreements under the leadership of respondent National Lead Company for the purpose of preventing dealers from selling dry white lead and from making offers to sell such products at levels lower than the offers made by respective respondent producers whose names were affixed to such consignment or agency agreements?

A. No, I do not.

Q. Do you know if International ever agreed with the
other respondents previously named or with any one of them
to fix or fixed and included in offers to sell, the prices,
3510 terms and conditions at which said lead pigments were
sold or offered for sale in commerce?

A. No, I do not.

Q. When did International first commence the production of white lead in oil?

A. During the latter part of 1936.

Q. Where was this material produced?

A. At East Chicago, Indiana.

Q. Had it previously been manufactured at that plant?

A. Yes.

Q. By what company?

A. By the Anaconda Lead Products Company.

Q. When did Anaconda Lead Products Company first produce white lead in oil, if you know?

A. In the first part of 1931.

Q. You have previously testified that the Anaconda Lead Products Company went out of the business of manufacturing dry white lead upon its dissolution in 1936, and the acquisition by International of its assets and properties. Did the Anaconda Lead Products Company continue to produce white lead in oil up to the time of its dissolution?

A. Yes.

Q. Were these activities taken over and carried on by the respondent International at that time?

A. Yes.

3511 Q. Will you describe the Anaconda Lead Products
Company's first methods to sell white lead in oil and
the pricing methods that were employed?

A. Well in the beginning we knew practically nothing about the white lead in oil market. At first we thought we would confine our activities to selling white lead in oil to industrial accounts. We sent out at least one man to survey industrial accounts, and found out that the consumption of white lead in oil by such accounts was practically negligible.

Consequently, we began to promote the sale of white lead in oil in certain sections of the country through distributors who were given a defined territory. In other areas, we contacted the dealer trade direct.

In the beginning we did not have any regular pricing system, and we left it pretty much up to the salesmen to get the most that they could for our unknown product.

Q. At the time the Anaconda Lead Products Company went into the white lead in oil business, what was your position so far as sale of this product was concerned?

A. I was district salesmanager in the midwestern area.

Q. District salesmanager of what?

A. Of dry white lead, white lead in oil, and zinc oxide.

Q. Did I understand you to say that initially your sales were limited to the Midwest area, of white lead in oil?

A. Our sales were not limited to that area, no.

3512 Q. Were you in charge of these preliminary activities when the Anaconda Lead Products Company was first starting to sell white lead in oil?

A. When I was district salesmanager in the Midwest area, I really, from the beginning, devices the promotional methods for selling white lead in oil in all territories.

Q. And you were intimately familiar with the Anaconda Lead Products' sales problems so far as the sale of white lead in oil was concerned?

A. I would say that I spearheaded the thing.

Q. For that company?

A. Yes.

Q. Now, you previously testified as to the sales practices or methods when this material was first manufactured. Were these pricing methods subsequently changed?

A. Yes, they were.

Q. What price policy was subsequently adopted by the Anaconda Lead Products Company?

A. For sales to the dealers, we established a price for our white lead in oil that was one-quarter of a cent per pound under the price for the National Lead Company's agents.

Q. Were there any other changes made in your pricing methods at about that time?

A. I believe at about that time we began to sell white lead in oil on a zone basis.

3513 Q. What was the reason that prompted you to decide to sell white lead in oil at a quarter cent under the price charged by National Lead for a similar commodity?

A. Well we could not expect to get the same price for our comparatively unknown product that the National Lead Company got for their product which had been very well advertised for many years. The business from the beginning was not too profitable, and consequently we felt we could not get very far under the National Lead Company price, and so we adopted a method of selling at a quarter of a cent under the National Lead Company's price, that additional quarter of a cent per pound being considered by us as additional compensation for the dealer for promoting the sale of our unknown product.

Trial Examiner Norwood: When was that? After International took over?

The Witness: No, that was before International took over.

Trial Examiner Norwood: About when was it?

The Witness: I don't recall when it was, but I believe it probably was about 1933.

By Mr. Gardiner:

Q. You have testified you adopted a practice of underselling National's Lead price of a quarter cent per pound. How did you determine what National Lead's price was?

A. It was very easy for us to find out the National
3514 Lead Company's price by contacting our customers
and prospective customers.

Q. How did you get information from your customers? How did they know? Who were your customers?

A. Well, our customers to a limited extent were distributors in certain areas, but generally they were dealers.

Q. Were they also dealers of competing products?

A. The class of trade we termed dealers were both what National called their selling agents and the dealers that purchased from the National Lead Company's selling agencies.

Q. Did National Lead sell its white lead in oil by any particular trade name?

A. Dutch Boy.

Q. Was there any resistance in the trade to a low priced white lead in oil?

A. When we began to market white lead in oil, and in fact for a considerable period after that, there were some substitute products on the market. The substitute products would have a name that would be similar to the Dutch Boy name, and the containers were sometimes an imitation of the Dutch Boy containers. Any white lead in oil would be sold at a very low price would be viewed with suspision and probably would be considered a substitute of inferior quality.

Q. Could you have sold white lead in oil produced by Anaconda Lead Products Company, and subsequently
3515 by International, at a price equal to National Lead's?

A. No, I don't think we could.

Q. Could you have sold the material at a price lower than a quarter of a cent a pound below National Lead's price?

A. If we had, we would run into the danger of having it considered a substitute of inferior quality.

Mr. Gardiner: May we have a recess, Mr. Examiner?

Trial Examiner Norwood: We will take a five minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Go ahead.

By Mr. Gardiner:

Q. Did Anaconda Lead Products sell white lead in oil on a zone basis?

A. Yes.

Q. When did International first adopt the policy of selling on a zone basis?

A. During the latter part of 1936.

Q. Was that at the time that International went into the white lead in oil business?

A. That was at the time that International took over the assets and properties of the Anaconda Lead Products Company.

Q. Why was a zone system adopted by these companies as a means of selling white lead in oil?

A. We adopted it because it seemed to be the com-
3516 petitive practice.

Q. Would you describe generally what this zone system was?

A. Well, the country was divided in certain areas called zones. There was a par zone, one-eighth, one quarter, three-eighths, one-half, three-quarters and one cent. The zones in which there were higher differentials took higher freight rates.

Q. You just described the par zones as consisting of certain fractions, and then you said one cent. Do those previous fractions refer to fractions of one cent?

A. Those fractions that I mentioned are fractions of one cent over the par zone price, with the exception of the last one I mentioned, which was a full cent over the par zone price.

Q. You made some reference to freight. Do I understand that freight was charged in addition to these prices?

A. No.

Q. What was the situation on freight?

A. What I mentioned was that the zones other than the par zone, for which differentials were charged, usually carried a higher freight rate.

Q. That is all white lead in oil was sold f. o. b. East Chicago, freight allowed?

A. That is correct.

Q. And these price differentials related to the 3517 zones in which the material was delivered?

A. That is right.

Q. How did you determine what your competitor's practice was as to the zone system for the sale of this material?

A. We contacted customers and prospective customers to find out what our competitors were doing in this respect.

Q. Was any record made of what you determined as to what their practice was?

A. Well, I believe that occasionally our salesmen would put information to that effect in their sales reports. They may have dropped us letters to tell us what was going on price-wise by our competitors.

Mr. Wright: I object, Your Honor, and move that that answer be stricken. It was based on belief rather than the witness' knowledge. He stated that the salesmen may have reported these things. It is obviously not a matter within his own knowledge from his answer.

Trial Examiner Norwood: Did they usually report that kind of information?

The Witness: It was customary for our salesmen to write out a report on every call that they made on a customer or prospective customer, and in these reports they would put any information they picked up that they thought would be of interest to me as salesmanager regarding the activities of our competitors.

3518 Trial Examiner Norwood: Do you know that that information came to you in that way?

The Witness: Yes, I do.

Trial Examiner Norwood: Objection overruled.

By Mr. Gardiner:

Q. Did you keep a map outlining these zone systems?

A. Yes.

Q. Was this map prepared at the suggestion or request or instigation of the representatives of any of the respondents heretofore named in this case?

A. No.

Q. Did you ever discuss with any representatives or official of any of the respondents heretofore named in this proceeding the use of such a map as the price pattern or the use of such a map in the sale of white lead in oil?

A. No, I did not.

Mr. Gardiner: I ask that this be marked Respondent's Exhibit for Identification No. 193.

(The document referred to was marked Respondent's Exhibit No. 193 for identification.)

By Mr. Gardiner:

Q. I show you Respondent's Exhibit for Identification 193 and ask you if you have seen this document before?

A. Yes, I have seen these figures before.

Q. Do you know anything about their preparation?

3519 A. They were prepared under my supervision.

Q. Who requested that you have these figures prepared?

A. Our legal counsel.

Q. What was the basis on which these figures were calculated?

A. The figures showing the total production of white lead in oil in the United States for the years listed were taken from figures supplied by the Lead Industries Association.

The figures showing the production of white lead in oil by International for the years listed were taken from the records in our accounting department at East Chicago, Indiana.

Mr. Gardiner: I should like to offer at this time in evidence Respondent's Exhibit No. 193, subject to the same qualifications as the previous exhibits have been submitted.

Mr. Wright: Subject to that qualification, I have no objection.

Trial Examiner Norwood: It is so received.

(The document referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 193, was received in evidence.)

Mr. Gardiner: I ask that this be marked Respondent's Exhibit No. 194 for identification.

(The document referred to was marked Respondent's Exhibit 194 for identification.)

3520 By Mr. Gardiner:

Q. I show you Respondent's Exhibit No. 194 for Identification and ask if you have seen this document before?

A. Yes, I have seen these figures before.

Q. What do you know about their preparation?

A. The figures showing the sale of white lead in oil for the years listed were supplied by the Lead Industries Association.

The figures showing the sales of white lead in oil by International for the years listed were taken from the records in our sales department at East Chicago, Indiana.

Q. Were you requested to prepare these figures?

A. Yes, I was.

Q. By whom?

A. By our legal counsel.

Q. What was the basis on which these figures were calculated?

A. (No response.)

Q. Did I ask you that?

A. Yes.

Q. I say, from what sources were these figures taken?

A. The figures showing the sale of lead in oil, total sales, that is, in the United States for the years listed were taken from figures supplied by the Lead Industries Association.

Those figures showing the sale of white lead in oil
3521 by International for the years listed were taken from
the records in our sales department at East Chicago, Indiana.

Mr. Gardiner: I should like to offer into evidence at this time Respondent's Exhibit marked for identification No. 194 subject to the same qualifications as the previous exhibits have been accepted.

Mr. Wright: I have no objection to its being received subject to those qualifications.

Trial Examiner Norwood: It is so received.

(The document referred to, heretofore marked for identification RESPONDENT'S EXHIBIT No. 194, was received in evidence.)

By Mr. Gardiner:

Q. In what manner was white lead in oil sold? That is, how was it packaged?

A. In metal containers.

Q. What were the sizes of these containers?

A. 100 pounds, 50, 20, 12 and ½, 5, and 1.

Q. Did these containers carry a different price?

A. Yes.

Mr. Gardiner: I ask that this document be marked for identification Respondent's Exhibit 195.

(The document referred to was marked Respondent's Exhbit 195 for identification.)

By Mr. Gardiner:

3522 I show you Respondent's Exhibit marked No. 195 for identification and ask you if you have seen that before?

A. Yes, I have seen these figures before.

Q. Do you know anything about this document's preparation?

A. It was prepared under my supervision.

Q. What was the basis upon which these figures were calculated?

A. The price per 100 pound keg was taken from our regular price schedule which was in effect as of the date. The average freight per 100 pounds was arrived at by taking the total freight costs for the period and dividing it by the number of pounds shipped during that period. The net was the mill net. The decrease in net over East Chicago shows the decrease in mill net.

Trial Examiner Norwood: Does this relate entirely to white lead in oil?

Mr. Gardiner: Yes, Your Honor, this relates to white lead in oil.

By Mr. Gardiner:

Q. At whose request did you prepare this document?

A. At the request of our legal counsel.

Q. Why was the year 1942 selected?

A. As I recall it, that was what the sales department, or rather I as salesmanager, considered the last nearly normal year prior to the end of the last war.

3523 Mr. Gardiner: I should like to submit at this time in evidence Respondent's Exhibit marked for identification purposes No. 195, subject to the same qualifications as obtained with regard to the previously submitted exhibits.

Mr. Wright: Your Honor, this is a piece of made evidence, in that it was prepared at the request of counsel by this witness for the purpose of being offered in this matter. It purports to show that the price differences made between the par zone and the other zones, apparently, during the year 1942, were more than offset by the freight costs that were involved in these shipments. In other words, this does to the heart of the issue.

It has been improperly identified to make it admissible at this point, because we do not know what records were used in making this; nor do we know the means by which the records were processed to arrive at these averages.

There has been no basis shown here to the effect that the means of working it out and making this piece of artificial evidence which is thought to be admissible are reliable, or the nature in which it could be admitted as evidence of the facts which it purports to show.

Now, this cannot exist outside of the original records. So I must strenuously object to its admission. And I also would object to its being admitted subject to submission of documents later to me, because I think it is a highly
3524 improper method of handling this matter to put the burden on Commission's counsel of going through all records of this company for the year 1942 to ascertain how this thing was prepared and whether the records, which, after all, are the evidence, have been accurately reflected in this piece of evidence.

Mr. Gardiner: If your Honor please, so far as making evidence is concerned, it is true, as brought out on direct examination, that this was prepared at the request of counsel for the respondent. These figures were prepared from records which were or are available, or can be made available. They are not available here at this present time.

They represent averages which were arrived at, according to the witness who can elaborate as to the detail which was used in their preparation.

There is no question but what this represents a summary, and that should be the value in it showing in a simple manner the difference between the net realized in these various zones with relation to the zone price, and I submitted it subject to the same qualifications as these others were submitted, which was that complete records should be submitted to counsel for check.

Mr. Wright: I submit that this witness has not testified that these things were made up from any record which would be admissible in this case. He said we took 3525 average freight costs. Now, what did he take average freight costs from? We have no idea.

Trial Examiner Norwood: Where did you get these freight costs?

The Witness: We took the freight charges for each zone for the period specified from the records in our accounting department, and divided that by the pounds—

Trial Examiner Norwood: Was that the actual freight charges on the shipments actually made?

The Witness: Yes, sir.

Trial Examiner Norwood: There wasn't any average for a zone, was there?

The Witness: It was an average for a zone inasmuch as we divided the total freight charges actually paid for that period by the total number of pounds shipped into that zone during that period.

Mr. Wright: Your Honor, if we are going to get into the question of further identification of this, I would like the right of preliminary cross-examination.

Trial Examiner Norwood: Yes, go right ahead.

Mr. Wright: Certainly on the basis of the record as it is, this thing is inadmissible, because the records of the accounting department do not make something admissible unless it is the type of record which is sufficiently reliable that it could be admitted in evidence here.

3526 Trial Examiner Norwood: Go ahead.

Mr. Wright: Mr. Hurless, does this purport to cover the sales for the entire year of 1942?

The Witness: Yes, it does.

Mr. Wright: How did you determine the proportion of your sales which fell within the par zone and the various differential zones?

The Witness: We determined that by determination of the shipments.

Mr. Wright: Now, just what mechanical process did you go through, what records did you consult, and what means did you use?

The Witness: I had the records for the year 1942—

Mr. Wright: What records were they?

The Witness: The records of the shipments that were kept in our accounting department.

Mr. Wright: Were they invoices?

The Witness: This information was taken from invoices and freight bills.

Mr. Wright: You mean this document here was made up directly from invoices?

The Witness: And freight bills.

Mr. Wright: And original freight bills?

The Witness: Or copies of the original freight bills. I
don't know that we retained the original freight
3527 bill.

Trial Examiner Norwood: It represents the average of the freight actually paid, does it?

The Witness: That is right.

Mr. Wright: Now, I notice you have included in the top here "East Chicago" with a net of 10.50 on your first line there. You did not take into account the local cartage that might have been involved in deliveries there?

The Witness: Well, any deliveries to customers within the city limits of East Chicago would not necessarily be shipped by public carrier. Such deliveries would very likely be made by our own truck.

Mr. Wright: By your own truck, but at your expense in either event?

The Witness: Yes.

Mr. Wright: So that your net correspondingly would be reduced by the cost of that cartage?

The Witness: That is right.

Mr. Wright: Do you know what that cost might be in 1942 on an average basis?

The Witness: No, I don't.

Mr. Wright: As I understand it from Exhibit 194, your sales of white lead in oil during 1942 amounted to 1,813.9 tons?

The Witness: That is correct.

3528 Mr. Wright: You had the original invoices for that entire 1,813.9 tons?

The Witness: We had copies of the originals.

Mr. Wright: Or copies of the originals, and you segregated them all by the geographical zones?

The Witness: That is correct.

Mr. Wright: Does it appear on the invoice as to what zone the shipment was to?

The Witness: No, it did not appear on the invoices, marked, for example, one-eighth zone or one-quarter zone, but that could be determined by the price.

Mr. Wright: Now, did all of these invoices include just 100 pound containers?

The Witness: No. In exhibit 195 we gave the price per 100 pound keg to indicate the base price to the par and other zones, but the total shipment would be made up of the total amount of lead in oil shipped, which would be in 100 pound containers, and containers of other sizes.

Mr. Wright: In other words, these invoices from which you made it up might not have had 100 pound kegs? It might have had 12-½ pound cans, or 5 pound cans, or 1 pound cans?

The Witness: That is right.

Mr. Wright: So that your net in this column here was
not derived from those invoices in any way. Your net
3529 just shows what would have been the case had this
invoice been for hundred pound containers?

The Witness: Will you repeat that question, please?

Mr. Wright: The column under "net" in this exhibit that we are talking about now shows the net which would have applied had that shipment been in hundred pound kegs?

The Witness: Yes.

Mr. Wright: But it might not have been in one hundred pound kegs?

The Witness: That is correct.

Mr. Wright: Well, now, did you separate these invoices by geographical location?

The Witness: Yes.

Mr. Wright: Who did that, what employees did that?

The Witness: A clerk in our accounting department who handled the accounting matters in connection with the white lead in oil sales.

Mr. Wright: Now, how did you keep your freight records from which you got this average 100 pound freight rate?

The Witness: Well, as I remember it, we had a large ledger in which we entered the complete data from the freight bill, and then a copy of the freight bill was filed in the accounting department at East Chicago, Indiana.

3530 Mr. Wright: Now, from what did you get these figures? Was it from the ledger or from the freight bill?

The Witness: I don't know whether they came from the ledger or from the freight bill.

Mr. Wright: Would those freight bills be keyed to the invoices which showed shipments?

The Witness: We could locate the freight bill that would cover the freight charges for each invoice.

Mr. Wright: Could you tell the invoice that was involved from the freight bill or from the entry in the ledger?

The Witness: Yes, we could do that without any trouble.

Mr. Wright: Well, was that done in preparing this?

The Witness: It is my understanding that it was.

Mr. Wright: Do you know yourself that it was?

The Witness: Well, I did not do it myself, but the instructions were to carry out the work along that line.

Mr. Wright: Well, just what were your instructions? Can you recall exactly how you instructed the employees to make this up?

The Witness: I don't know that I can recall exactly, but in general the instructions were to determine the amount of lead in oil for this period that was shipped to each zone, and to determine the average freight cost
3531 by dividing the cost of the freight by the pounds of lead in oil shipped.

Mr. Wright: You did not tell them just how you wanted that done, but just told them to do it. Is that correct?

The Witness: That is correct. I assumed that they would go to the proper records and make the proper entries from them.

Mr. Wright: Do you know whether or not all of these records are still preserved in the form of invoices or copies of invoices and freight bills?

The Witness: When we closed our plant during 1946, it is my understanding that such records were shipped to Perth Amboy, New Jersey, for storage.

Mr. Wright: Are you able to state whether they are in existence at this time and can be made available?

The Witness: I cannot definitely state that, because I had nothing to do with the packing and shipping of the records.

Mr. Wright: Your Honor, I want to renew my objection now on two additional grounds: One, that this gentleman is not acquainted with the details in which these figures were compiled, but turned the job over to subordinates, and this can only be properly identified by the people who actually did the work, since he only assigned the task in a
general way; and for the additional reason that the
3532 basic data may no longer be available. According
to this witness, he cannot state whether it is or
whether it is not.

Mr. Gardiner: If your Honor please, this was submitted with the same qualifications as these previous exhibits, which was, as I understand Your Honor's ruling, that they would be stricken—

Trial Examiner Norwood: I will sustain the objection for the time being until it appears that it is possible for the basic data to be made available. Inasmuch as those are invoices, and just one year's invoices, that would not be a very large book. I should think counsel could bring those in.

Mr. Wright: It covers almost 2,000 tons of this material.

Trial Examiner Norwood: Well, tons—you could put many tons on one little invoice, you know.

Mr. Wright: Furthermore, there has been no direct evidence on the part of the respondent, who has the burden of supporting this document, showing the technique and means by which it was made up. This witness does not know what records were used to make any of this up, the freight record.

Trial Examiner Norwood: That point is well taken also, but it should appear here that there are basic data which can be produced, and also that somebody who brings them
can explain the thing to us. It is not in satisfactory
3533 condition now, anyway, but counsel may present that
again when he meets those objections. I will sustain
the objection for the time being. That is exhibit 195, is it?

Mr. Wright: Yes.

By Mr. Gardiner:

Q. Was white lead in oil ever sold by Anaconda Lead Products or International on consignment contract?

A. No.

Q. Were there any exceptions to this practice?

A. One.

Q. What was that exception?

A. The State of Wisconsin.

Q. Why was consignment contract used in the State of Wisconsin?

A. It is my understanding that the consignment contract was used in the State of Wisconsin because the laws of the State of Wisconsin provide that in case of insolvency, a consigned stock cannot be returned to the consignor unless there is a written agreement to cover it.

Mr. Wright: I move the answer be stricken. It concerns the witness' understanding. He is not competent to testify as to the reason for the company policy on the basis of knowledge that they may be required from others. It is hearsay.

Trial Examiner Norwood: He can give us his reason.

3534 Did you establish that policy or fail to establish it? Is it within your province to determine that policy?

The Witness: That policy was determined by our legal counsel.

Mr. Wright: He testified only to his understanding, Your Honor. I think a re-examination of the answer would show that he did not state of his own knowledge.

Trial Examiner Norwood: That would be all right, his understanding, if he made the policy. He can tell us the considerations.

But I think probably your objection should be sustained.

By Mr. Gardiner:

Q. Were you ever instructed to prepare consignment contracts for the use of sale of materials in Wisconsin?

A. Yes.

Q. Were you ever instructed to prepare consignment contracts for the sale of white lead in oil in any other States?

A. No.

Q. At the time you received these instructions, were you told the reason why you were required to prepare consignment contracts for Wisconsin?

A. Yes.

Q. What was the reason?

A. The reason was the laws of the State of Wis-
3535 consin provide that in case of insolvency, the consigned stock cannot be returned to the consignor unless there is a written agreement to cover it.

Q. Did either Anaconda Lead Products or International ever use any type of consignment arrangement in other States for the sale of white lead in oil?

A. They used the consignment arrangement.

Q. When was that arrangement first used, and describe its operation.

A. I cannot give the date when it was first used, but I believe that it probably was about 1932.

An order for shipment on consignment would be taken by our salesmen and forwarded to the main office at East Chicago, or would be sent indirect to that office by the customer. The shipment would be made and invoiced on memo billing.

About the 20th or 25th of every month we would send a form to the customer to be filled out. On it the customer would insert the amount of consigned stock on hand on the 25th or the preceding month, the amount of lead in oil received since that date, and the amount on hand on the present date, the difference being the amount that had been sold from the consigned stock.

Then the customer would be invoiced for that amount at current prices.

Q. Do you know who devised that procedure, or
3536 method of sale?

A. I mainly devised it, with the assistance of members of our sales department and accounting department.

Q. Was the arrangement you have just descibed put into effect at the instigation of, or through the agreement with, any of the respondents heretofore named, with any one or with an official representative of any one of these respondents?

A. No.

Q. How much business did the Anaconda Lead Products and International do by means of this consignment arrangement in the sale of white lead in oil?

A. Generally, the sales from consigned stocks accounts for 50 to 60 percent of our total sales of white lead in oil.

Q. Did Anaconda Lead Products or International ever supply dealers with price cards showing retail prices for white lead in oil?

A. Yes.

Q. Why were these cards given to dealers?

A. Those cards were informative and contained advertising value for us.

Q. Did Anaconda Lead Products or International ever require dealers to resell white lead in oil at these prices listed on such cards?

A. No.

Q. Did Anaconda Lead Products or International
3537 ever have any arrangements with dealers with respect
to the terms and conditions of resale or the prices of
materials resold?

A. Will you repeat that question, please?

Q. Did Anaconda Lead Products or International ever have any arrangements or any agreements with dealers with respect to the terms and conditions of the resale or the prices of the materials as such to be resold?

A. No.

Q. Did International, in selling and offering to sell dry white lead and lead in oil in commerce to agents or dealers for resale, require its customers to resell such products at prices and terms of sale fixed and determined and published by it?

A. No.

Q. Will you state again how many years you have been connected with the International Smelting & Refining Company?

A. 25 years.

Q. What relationship does that company have with respondent Anaconda Copper Mining Company?

A. It is a subsidiary.

Q. Are you familiar generally with the operations of the International Smelting & Refining Company throughout the United States?

A. I believe that I am.

Q. Are you familiar generally with the operations
3538 of the Anaconda Copper Mining Company through-
out the United States?

A. I believe so.

Q. Do you know whether the Anaconda Copper Mining Company has ever engaged in the production and sale of lead pigments?

A. It has not.

Q. Do you know whether the Anaconda Copper Mining Company ever gave any directions through its officers or agents to the Anaconda Lead Products Company or to the International Smelting & Refining Company as to the operations of those companies or to the prices to be charged for lead pigments and the terms or conditions under which they were to be sold?

A. No, I do not.

Q. Do you know if the Anaconda Copper Mining Company ever exercised any control over Anaconda Lead Products or International beyond that which a stockholder would ordinarily be expected to exert?

A. No, I do not.

Q. In advertising their products, did Anaconda Lead Products and International use a common name and trade-mark?

A. Yes.

Q. What was it?

A. It was the Anaconda trade-mark.

Q. Do you know if there was any arrangement with the Anaconda Copper Mining Company for such use?

A. I do not know of it.

3539 Q. Why was that particular trade-mark used?

A. Well, we used it to help us to sell our white lead in oil, which was a comparatively unknown product at that time.

Q. Do you know of any agreement on the part of International with the National Lead Company, the Eagle-Picher Lead Company, the Eagle-Picher Sales Company, the Sherwin-Williams Company, or the Glidden Company for the adoption and maintenance of a system of delivered price quotations for white lead in oil?

A. No, I do not.

Q. Do you know of any agreement between International and any of the other respondents in this proceeding heretofore named for the adoption and maintenance of a plan whereby the United States is divided into zones for the purpose of selling white lead in oil?

A. No, I do not.

Q. Do you know of any arrangement whereby International sought and secured advice, assistance and cooperation of the Lead Industries Association, its officers, employees and agents, along with the other respondents heretofore mentioned, or any one of them, in fixing, adopting, publishing and using non-competitive terms and conditions of sale in connection with the sales and offers to sell of white lead in oil?

A. No, I do not.

Q. Do you know if International ever used the 3540 office of the Lead Industries Association with the cooperation of the officials of the same for the purpose of exchanging price factors and information concerning price factors to be used at times by the International and the other respondents heretofore named or any one of them in calculating, determining and announcing their offers to sell white lead in oil?

A. No, I do not.

Q. Do you know if International ever agreed to adopt or adopted, maintained and used terms and conditions of sale embodied in the so-called consignment or agency agreements under the leadership of respondent, National Lead Company, for the purpose of preventing dealers from selling white lead in oil and from making offers to sell such products at levels lower than the offers made by the respective respondent producers heretofore named, whose names were affixed to such consignment or agency agreements?

A. No, I do not.

Mr. Wright: Your Honor I am willing to stipulate that this witness will testify that he does not know of any violation of this complaint, if it will save time.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record. Objection overruled.

By Mr. Gardiner:-

3541 Q. Mr. Hurless, you have previously been asked a series of questions about your knowledge of the existence of agreements between International and the other respondents in this case covering the sale and distribution of dry white lead. I have also asked you some of the same questions with relation to white lead in oil.

Is your answer the same as to those questions which you have previously been asked as to dry white lead—

Mr. Wright: You mean, with regard to agreements?

By Mr. Gardiner:

Q. With regard to agreements which have not been asked you with regard to white lead in oil?

A. The answer would be the same.

Mr. Gardiner: Off the record.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Gardiner:

Q. Is the respondent International now engaged in either the production or sale of any of the lead pigments heretofore described as included within the definition of the amended complaint?

A. No.

Q. When did International stop the production of dry white lead and lead in oil?

3542 A. Is the question, when did they stop?

Q. When did International stop the production of dry white lead and lead in oil?

A. In July of 1946.

Q. When did International make the last sale of those materials?

A. August, 1946.

Q. Does International have on hand at the present time any of such products?

A. No.

Q. What use is being made of the plant where these products were previously manufactured?

A. The plant where these products were previously manufactured was sold to the Eagle Picher Company of Cincinnati, and it is my understanding that they are using a part of it for the manufacture of dry white lead and white lead in oil.

Q. When was this property sold to the Eagle Picher Company?

A. On October 1, 1946.

3543 Q. When was the first public announcement made that International was going out of the white lead and oil business?

A. On June 20, 1946.

Q. What was the nature of this announcement?

A. Substantially the same as the one for dry white lead.

Q. Are the personnel who were engaged in the production and sale of these lead pigments still in the employ of International?

A. Only two.

Q. Who are they?

A. My secretary, Miss Helen Ohr, and myself.

Q. Are you familiar generally with the operations of the International Smelting & Refining Company and the Anaconda Copper Mining Company in the United States?

A. Yes, generally.

Q. Do you know of any facilities of the properties in this country or any other country that could be readily converted to production of dry white lead or white lead in oil?

A. I would say that there are no such properties.

Q. Would it be a correct statement to say that to go back into dry white lead or white lead in oil business, it would be necessary to purchase or construct a plant for that purpose?

A. Yes.

Q. Do you know if International has any intention
3544 of resuming the production of these lead pigments?

A. I believe that they have no intention whatsoever.

Mr. Wright: I move that that answer be stricken, Your Honor. This witness is obviously in no position to know the intention of the board of directors and governing officers of the corporation.

Trial Examiner Norwood: Motion allowed.

By Mr. Gardiner:

Q. In view of your familiarity with the Anaconda Copper Mining Company's operations, do you know of any plan that it has to enter the production of these materials through any of its susidiaries?

A. I know of no such plans.

Q. Can you elaborate on the reasons why International decided to go out of the lead pigment business?

A. Well, the reasons they decided to go out of the lead pigment business are briefly indicated in the letter of announcement that was sent to the trade on June 1, 1946.

Q. Was international influenced in its decision in any way by the action of its competitors?

A. No.

Q. With relation to the time that the decision was made to discontinue these operations, do you know when it was decided to sell the plant?

A. I believe it was about four to six weeks afterwards.

3545 Q. That is, it was four to six weeks after the decision was made to discontinue the operations that it was decided to sell the plant?

A. Well, I would put it this way: I heard about the decision to discontinue the operations about the middle of May, 1946, and about four to six weeks after that we began to make efforts to sell the plant.

Q. Were there other parties interested in its purchase besides the Eagle-Picher Company?

A. Yes.

Q. Do you know what the names of any of these prospective purchasers were?

A. The Metal and Thermit Company of East Chicago, Indiana; the American Zinc, Lead & Smelting Company of St. Louis, Missouri; and the Calumet Iron & Supply Company of East Chicago, Indiana. Those were the principal ones.

Mr. Gardiner: Your Witness.

Mr. Wright: I suggest that counsel has finished his direct examination that we recess for lunch.

Trial Examiner Norwood: Is counsel through now?

Mr. Gardiner: I am through with this witness, Your Honor.

Trial Examiner Norwood: What is your pleasure, gentlemen?

Mr. Wright: Two o'clock.

3546 Trial Examiner Norwood: We will recess until 2 o'clock.

(Whereupon, at 12:10 p. m., a recess was taken until 2 p. m., this day.)

3547 Afternoon Session

2:00 p. m.

Trial Examiner Norwood: The hearing will come to order.

Mr. Hurless will resume the stand.

FRANK H. HURLESS resumed the stand and testified further as follows:

Trial Examiner Norwood: Proceed with the cross-examination.

Cross-Examination by Mr. Wright.

Q. Mr. Hurless, will you state again your employment with the International Smelting & Refining Company, beginning back in the beginning?

A. I was employed by the International Smelting & Refining Company in 1922 as a checker on the construction of a zinc oxide plant at Akron, Ohio. I checked the materials and supplies and the amount of labor used in that construction since the construction was on a cost-plus basis.

Subsequently I had charge of the small plant office at Akron, Ohio.

Q. That is still International Smelting Company?

A. That is right.

3548 About 1927 I began part-time sales work and about 1929 I began full-time sales work and was transferred to the main office at East Chicago, Indiana.

Q. That is, sales work for International Smelting?

A. That is right.

In 1930 I was made district salesmanager. I was in the Midwest area and had charge of the sale of dry white lead and zinc oxide in the Midwestern area.

In 1936, I was made assistant salesmanager and had charge of the sale of dry white lead, white lead in oil, and zinc oxide. While assistant salesmanager, I actually had charge of the sales, since our official salesmanager in Akron, Ohio, had other duties that did not permit him to give full time to sales work.

In 1938, I was made salesmanager in full charge of the sale of dry white lead, white lead in oil and zinc oxide in all territories.

Q. What was your position when the International Smelting & Refining Company left the business of marketing these lead pigments? Were you still salesmanager at that time?

A. Yes, sir.

Q. What is your present position with the International Smelting Company?

A. I am a special representative for the International Smelting & Refining Company in the Midwestern area.

3549 Q. That is, sales representative?

A. No, not a sales representative; a sort of general representative.

Q. Who is the president of International Smelting & Refining Company?

A. It is my understanding that Mr. C. F. Kelly is president of International Smelting & Refining Company.

Q. Was he president of it back in 1936, do you recall?

A. I do not know.

Q. What office does Mr. Kelly hold in the Anaconda Copper Mining Company?

A. I understand that he is chairman of the board.

Q. Is Mr. Kelly also a director of International Smelting & Refining Company?

A. I believe that he is.

Q. Who are the other directors of International Smelting & Refining Company?

A. I believe that Mr. Frederick Laist is.

Q. That is L-a-i-s-t?

A. Yes. And Mr. E. O. Sowerwine is a director, I believe.

Q. Who are the other directors, do you recall?

A. I do not know who they are.

Q. Is Mr. Laist or Mr. Sowerwine connected with the Anaconda Copper Mining Company in any way?

3550 A. I believe Mr. Laist is the vice-president of the Anaconda Copper Mining Company.

Q. Does he have any official position with International Smelting aside from being a director?

A. I believe he is vice-president of International Smelting & Refining Company.

Q. What is Mr. Sowerwine's position with International beyond that, for the record?

A. I am not sure, but I think he is secretary-treasurer.

Q. You mean, you have difficulty in knowing who the officers of this corporation are?

A. Yes, sir, I do.

Q. What is his position with Anaconda Copper Mining Company?

A. Mr. Sowerwine is the vice-president, I believe.

Q. How many members of the Board of Directors are there of International Smelting & Refining Company?

A. I do not know.

Q. Do you know whether those members of the Board of Directors are also members of the Board of Directors or officers of the Anaconda Copper Mining Company?

A. I believe that Mr. Kelly is a director of both, but as regards the others, I do not know.

Q. And those three are the only ones that you can recall who are members of the board?

A. Those that I believe are members of the board.

3551 Q. Of International Smelting & Refining Company?

A. Yes.

Q. What other corporate officers are there besides those three men? Of International, I am speaking now.

A. Well, let us see. We have touched on the president, vice-president, and—

Q. Secretary-treasurer?

A. Secretary-treasurer.

I do not know that there are any other officers.

Q. Have you ever attended a meeting of the Board of Directors of the International Smelting & Refining Company?

A. No, sir.

Q. Do you recall ever receiving instructions from the Board of Directors of the International Smelting & Refining?

A. No, sir.

Q. Have you ever heard of a meeting of the Board of Directors of International Smelting & Refining Company, as such?

A. I cannot recall that I have.

Q. Who is the president of the Anaconda Sales Company?

A. I believe that Mr. C. F. Kelly is president.

Q. Is Mr. Laist an officer and director of the Anaconda Sales Company?

A. I don't believe that he is.

Q. Who are the other officers and directors of the Anaconda Sales Company?

3552 A. I believe that Mr. Clarence Glass is vice-president.

Q. What is Mr. Glass' connection with Anaconda?

A. Well, so far as I know his only connection is that he is vice-president of the Anaconda Sales Company.

Q. He has no independent office or no other office in the Anaconda Copper Mining Company?

A. Not that I know of.

Q. Who are the other officers of the Anaconda Sales Company?

A. Mr. Kennedy is vice-president of the Anaconda Sales Company.

Q. What is Mr. Kennedy's full name?

A. I don't know.

Q. What did you say his office was?

A. Vice-president of the Anaconda Sales Company.

Q. And Mr. Kelly, Mr. Glass and Mr. Kennedy are the three officers you know of in the Anaconda Sales Company?

A. Mr. Dohrman, I believe, is either secretary or secretary-treasurer.

Q. Do either Mr. Dohrman or Mr. Kennedy have any connection that you know of with the Anaconda Copper Mining Company?

A. I don't know of any such connection.

Q. As far as you know, they devote their full time to the operations of the Anaconda Sales Company?

A. That is my understanding.

Q. When did the International Smelting & Refin-
3553 ing Company first engage in the production of lead
pigments?

A. In the latter part of 1936.

Q. So that at the time you say you had to do with the sales of dry white lead, from the period 1930 to 1936, that company was not engaged in the production or sale of white lead. Is that correct?

A. No.

Q. What was the arrangement? I withdraw that question.

As I understand it, during that period from 1930 to '36, the production was by Anaconda Lead Products, and the sales were by Anaconda Lead Products and Anaconda Sales Company. Is that correct?

A. That is right.

Q. Well, how did you, as an employee of International

Smelting & Refining Company, have charge of those sales at that time?

A. Well, in my capacity—for example in 1930 I was district salesmanager—I simply sold the products that were produced by the Anaconda Lead Products Company.

Q. Well, were you acting for Anaconda Sales Company, Anaconda Lead Products Company, or International Smelting & Refining Company, or could you tell where one began and the other left off?

A. They were pretty much overlapping.

Q. Did they have common officers and common em-
3554 ployees during that period of time?

A. Well, the main office of the Aanaconda Sales Company at that time was in New York City. We had our main sales office at East Chicago, Indiana, from which point I operated.

Q. Were employees of Anaconda Sales Company operating that office too, or were they employed in that office?

A. No.

Q. Were employees of the Anaconda Lead Products in that office?

A. You mean in the sales office?

Q. Occupying joint offices?

A. Well, the operating, sales and accounting departments all had their offices in East Chicago in the same building.

Q. Was it the same department with different accounts, or were they physically separated?

A. Will you state that question again, please?

Q. Was it a single office with different accounts, or were the sales and accounting offices of the three companies physically separated?

A. No, the offices were not physically separated, but there were different accounts, Anaconda Sales Company and the Anaconda Lead Products Company.

Q. For bookkeeping purposes?

A. That is right.

Q. Now, when you sold dry white lead at that time, was
that transferred on the books from Anaconda Lead
3555 Products Company to Anaconda Sales Company to
International Smelting & Refining Company, or do
you know how that was handled?

A. If a sale was effected through the Anaconda Sales Company, I would say that there would be a transfer from Anaconda Lead Products Company to the Anaconda Sales Company.

Q. How, would you effect such a sale in the name of the Anaconda Lead Products Company in your capacity as salesmanager in that district?

A. I would not effect it, no. I would simply sell the material.

Q. You were the one who would make the sale?

A. That is right.

Q. Would you know in advance for which account it would be sold?

A. To some extent that would depend upon the immediate shipping point to the customer.

Q. In other words, there were certain territories in which accounts were for the Anaconda Sales Company?

A. That is right.

Q. Anybody located in that territory?

A. That is right.

Q. But that was the only basis of division?

A. That is right.

Q. Now, was part of your compensation paid by Anaconda Sales Company, part by Anaconda Lead Products, or were you an employee solely of International Smelting & Refining? 3556

A. I understand that I was an employee solely of the International Smelting & Refining Company.

Q. You don't know whether the other two companies were compensated for your services in selling for their account?

A. I don't know about the Anaconda Lead Products Company. I don't think the Anaconda Sales Company was, but I am not sure of it.

Q. Now, when the International Smelting & Refining Company acquired the plant of the Anaconda Lead Products Company in 1936, will you tell us just what changes of organization were made necessary as a result of that, what shifts of personnel, changes in methods of handling business?

A. Well, as I recall it there were practically no changes. I don't remember any that were made at the time.

Q. In other words, business was continued on. It was largely a bookkeeping transaction?

A. That is right, pretty much the same as before.

Q. Didn't you consider yourself an employee of the Anaconda organization, I mean disregarding the technicalities now?

A. Well, I think that I am a direct employee of the International Smelting & Refining Company.

Q. Did you ever attend any meeting of the Board of Directors of the Anaconda Sales Company?

A. No, sir.

3557 Q. Did you ever see any minutes of a meeting of the Board of Directors of that company?

A. I don't recall that I ever did.

Q. Do you know whether there has ever been a meeting, to your knowledge?

A. I don't know of any actual meetings, but I presume there have been.

Q. Do you know Mr. F. O. Case?

A. Yes, I do.

Q. What was Mr. Case's position in 1933?

A. In 1933, I believe—I am not too sure of the date—I believe he was general salesmanager.

Q. Of what company?

A. Of the International Smelting & Refining Company, pigment division.

Q. In other words, he was your superior officer at that time?

A. That is correct.

Q. He was not an employee of the Anaconda Sales Company or of the Anaconda Lead Products Company?

A. I don't believe so.

Q. Is he still with the Anaconda organization now?

A. Mr. Case is with the Anaconda organization.

Q. What is his position now, do you know?

A. I understand his position at the present time is assistant to the president of the Anaconda Copper Mining Company.

3558 Q. How long has he been in that position?

A. I think since about October of 1946.

Q. For how long a period of time did he remain with International?

A. I believe Mr. Case originally went with International about 1920 or 1921.

Q. How long did he remain?

Mr. Gardiner: If your Honor please, I don't know just what counsel has in mind here by this line of examination, but we are perfectly willing to stipulate that these companies—Anaconda Lead Products, Anaconda Sales Company and International Smelting & Refining Company—were all subsidiaries of the Anaconda Copper Mining Company, and the Anaconda Lead Products Company is today, and the Anaconda Sales Company, if that will facilitate matters.

Trial Examiner Norwood: Is that satisfactory?

Mr. Wright: I appreciate that there is no issue there, but counsel has raised the issue that the acts of these subsidiaries could be placed in a separate compartment, and neither had any responsibility for either of the others might have done. I think I have a right to bring out, since this question of this witness' relationship to the Anaconda Copper Mining Company was brought out on direct examination, this relationship on cross-examination.

Trial Examiner Norwood: Yes, this is cross-ex-
3559 amination.

Mr. Gardiner: I am not objecting, but I did not know what he was after.

Trial Examiner Norwood: Counsel may except that offer to stipulate in whole or in part, and be governed accordingly.

Mr. Wright: Well, there never was any issue as to whether there was a relationship of principal to subsidiary.

Trial Examiner Norwood: All right.

By Mr. Wright:

Q. When did Mr. Case leave International and go with Anaconda?

A. I believe that was about October of 1946. Correction. Mr. Case left International, I believe, about two years before the war ended to go to Las Vegas, Nevada, as general manager of Basic Magnesium, Incorporated.

Q. But up until that point he still had a connection with International?

A. That is my understanding, yes.

Q. So during the period from 1930 to '36, he was in charge of sales policies on these pigments of International?

A. I believe that is correct.

Q. From whom did he get his authority to act in determining sales policies in that period?

A. Well, I believe that Mr. Case pretty much
3560 developed his own policy as regards things.

Q. In other words, he was directly subordinate to the officers and directors of the International Smelting & Refining Company?

Mr. Gardiner: If Your Honor please, I do not want to object to each question, but I think the witness testified here as to his belief in these matters rather than what he knows.

Mr. Wright: Your Honor, this witness has testified, we did this and we did that, all morning, with regards to the period from 1930 on. Now, if counsel wants to urge that he has no authority to state what the company's policies were in that period, I am going to move to strike his direct testimony.

Trial Examiner Norwood: I think he may go ahead and state his views.

Mr. Gardiner: He was asked, where did Mr. Case get his instructions. Is that correct?

Mr. Wright: That is correct.

Mr. Gardiner: And his answer was, "He believes." In other words, he must know that.

Trial Examiner Norwood: He may make his own statement whether it be belief or whether it be direct knowledge.

By Mr. Wright:

Q. Mr. Case was your immediate superior from
3561 whom you took your instructions, I take it, during that period from 1930 to 1936?

A. That is right.

Q. And you discussed the policies of the organization with Mr. Case; is that correct?

A. Yes.

Q. And you and Mr. Case determined those policies; is that correct?

A. I would not say Mr. Case and I alone. We had Mr. L. G. Duncan, who was salesmanager with his office at Akron, Ohio.

Q. Salesmanager for International?

A. That is right, up until the time I was made salesmanager.

Q. Who in the corporate organization was Mr. Case responsible to?

A. I do not know.

Q. You know of no one between the officers and directors, then, and Mr. Case in authority in International Smelting & Refining?

A. I cannot name any individual to whom he directly reported on these matters. That is something that Mr. Case handled himself.

Q. You do not know of his getting any instructions from the board of directors or the corporate officers as to the company policy?

3562 A. I do not recall any specific instructions he got that would affect the sales policy.

Q. Now did you in the period from 1933 to 1944 participate in any of the Lead Industries Association pigment division meetings?

A. No.

Q. Who handled that?

A. Well, if there was any participation on our part, I presume that Mr. Case would do it.

Q. So you were not present at any of those discussions to know what matters were discussed at those meetings between 1933 and 1944; is that correct?

A. That is correct.

Q. I believe you mentioned in your direct testimony this morning that there is a quarter of a cent differential, or discount, for carload purchases of dry white lead.

A. Uuder the less-carload price.

Q. Under the less-carload price; is that correct?

A. That is correct.

Q. Can you tell me how long that differential has been in force?

A. No, I cannot.

Q. Did you ever discuss that differential with Mr. Case, that you recall?

A. I do not recall it.

3563 You do not recall Mr. Case's having any interest in adopting such a differential?

A. I do not recall anything about it, either way.

Q. What is the International Lead Refining Company?

A. I think the International Lead Refining Company was a subsidiary of the International Smelting & Refining Company.

Q. I show you a document in evidence as Commission's Exhibit 508-B, which has been identified as a letter written by Mr. F. O. Case, Manager of the Anaconda Zinc Oxide Department, International Lead Refining Company, under date of July 24, 1933.

Does that refresh your recollection as to that?

A. As to what?

Q. As to the relationship of International Lead Refining Company?

A. I believe that when we built our Zinc Oxide Plant at Akron, Ohio, it was under the name of International Lead Refining Company, Anaconda Zinc Oxide Department.

Q. In other words, it was known as the Anaconda Zinc Oxide Department, even though it was part of the International Smelting & Refining Company; is that right?

A. That is correct.

Q. I call your attention to that paragraph of this letter beginning with the words "I am not certain," and ask you to read that.

3564 Mr. Gardiner: I believe this is a matter of record. It is in here.

You are asking him to read it to himself, are you not?

Mr. Wright: Yes, sir.

By Mr. Wright:

Q. Do you recall discussing the matters mentioned in the last paragraph of Commission's Exhibit 508-B with Mr. Case?

A. Apparently this applies to the Pacific Coast. I believe that in my capacity as district salesmanager, I had nothing to do with the Pacific Coast at that time.

Q. I want to call your attention to the fact, "And I understand that they are going to charge a differential of one quarter of a cent for all shipments under five tons," which is in addition to the Pacific Coast situation.

Do you recall that matter?

A. I do not know that I understand the question.

Q. Do you recall any discussion with Mr. Case about the advisability of adopting that about the date of that letter, July of 1933, a less than-carload differential of a quarter of a cent on dry white lead?

A. For shipments under five tons?

Q. Yes, sir.

A. I do not recall that at all. In fact, I do not ever remember hearing or seeing anything about that five-ton differential. 3565

Q. There is a five-ton differential, is there not?

A. There is not at the present time, or there was not when he went out of the business in 1946.

Q. Would you explain again for me Mr. Hurless, what you called your consignment arrangement on direct examination?

A. Orders would be taken from our salesmen for shipment on our consignment arrangement, or the customer would mail the orders direct to our office for shipment on the consignment arrangement.

Q. Did you offer that to any dealer that wanted it?

A. No, I do not think we offered it to any dealer that wanted it. We would try to restrict it to dealers who we thought would sell a reasonable amount of lead in oil.

Q. You say, there was no contract involved?

A. Not except in the State of Wisconsin.

Q. How did you bill your shipments of that lead?

A. The shipment was billed to the Anaconda Sales Company or the International Smelting & Refining Company in care of the account that was purchasing the lead in oil or that would purchase it eventually from consigned stock.

Q. Now, then, the customers who had that arrangement would file reports monthly showing what they sold in various sized containers; is that correct, during the month?

A. Our report had the different sized containers
3566 listed with a separate column for each one, from 100
pounds down to 1 pound.

Q. What did the dealer fill in those columns with? What sort of figure did he put in those columns? Simply pounds sold, or what?

A. As I recall it, we would put on the report before it was mailed the amount of stock that our books showed was on hand with the dealer and the amount of lead in oil that had been shipped since the date of the last report. The dealer would insert his present stock on hand, which would be the number of different sized containers.

Q. Then what was the billing transaction that followed that report?

A. When the report was received from the dealer, it went to the accounting department for processing; that is, issuance of invoice to him.

Q. And you billed him then for the dealer's net price on what was sold; is that correct?

A. We billed the dealer for the amount shown as shipped during the period at the current price.

Q. The current dealer price?

A. That is right.

Q. Over how long of a period of time did that arrangement obtain?

A. You mean, what period of time did we have
3567 the consigned stock arrangement?

Q. Yes, sir.

A. I do not know when we started it, but I—correction: I believe we started that the latter part of 1932.

Q. And over how long a period did you continue to use it?

A. We continued to use it until we went out of business in 1946.

Q. Did you have any announcements to the trade covering the terms and conditions of that consignment arrangement?

A. Well, when there was a price change either up or down, we always notified our dealers both on direct sale and consigned stock arrangement of the new prices, and gave them the terms of sale.

Q. You supplied those dealers with these price cards, such as are in the record in evidence here showing dealers' selling schedule, as in Commission's Exhibit 661-Z-36?

A. That is correct.

Q. As well as the dealers' confidential price list?

A. That is right.

Q. Getting back to the first time that the zone method of selling appeared on white lead in oil, I believe you said that was around 1933 or 1944, did you not?

A. It was around 1933, as I recall it. But I do not remember.

Q. The latter part of 1933?

3568 A. I do not know.

Q. How did you sell white lead in oil prior to that zone method?

A. Well, we really did not begin to get started in the business of producing and selling white lead in oil until well along in 1932, and I think that our methods were pretty much on a hit or miss basis.

Q. How did you first hear about this zone method of selling?

A. Well, something like that being instituted would naturally cause considerable comment initially, and we would pick up information from the dealers and prospective dealers on whom we were calling.

Q. Did these dealers have any zone maps or anything from any competitors?

A. I do not believe that I ever saw or heard of a dealer having a zone map.

Q. As I recall it, your testimony this morning was that you determined those zones from the information which you picked up in the trade from dealers and so forth?

A. That is correct.

Q. If the dealers did not have a zone map, how would you get the complete information for the whole country on those zones and the territorial divisions between them, and the differentials?

3569 We would pick it up piecemeal. For example, a dealer in the so-called Tri-State area or Rock Island, Davenport, and Moline, who was any kind or dealer at all would know that in that territory where the par zone left off and the one-eight zone began. Then we could talk to a dealer or distributor in Richmond, Virginia, or vicinity, who would tell us where the par zone left off and the one-eight zone began in that territory.

Q. Are you telling us how you may have found that information or how you did find it?

A. I am telling you how we did find it, piecemeal, and put it together.

Q. Over how long a period of time did that obtain?

A. I do not know that I can answer that. We did not get it all at once. I know that.

Q. But you recall very well that process of piecing it together?

A. I remember that we had quite a time getting some of the information, and that we spent quite a little time and money doing it.

Q. Mr. Case also participated in that, I take it?

A. That is correct.

Q. Since he was salesmanager at that time?

A. Yes, sir.

Q. You don't recall Mr. Case mentioning that
3570 such maps or zones had been discussed at meetings of
the Lead Industries Association, do you?

A. No, I do not.

Q. On dry white lead, as I recall your testimony, you stated that you allow freight to the customer. Does that mean that you ship the material freight collect, and allow the amount of freight that the customer shows has been paid on the invoice when billing for the material?

A. No, we prepaid all freight charges.

Q. At all times?

A. That is right.

Q. On all products?

A. That is right.

Trial Examiner Norwood: Now, do you allow the same freight that you paid on every package?

The Witness: Well, for example, if the price of white lead in oil were 10½ cents per pound in hundred pound containers, and we were shipping from East Chicago to Akron, Ohio, we would prepay the actual freight from East Chicago to Akron, Ohio, and bill the customer at 10½ cents a pound.

Trial Examiner Norwood: But in shipping it to different places in a zone, would you charge just the actual freight in every case?

The Witness: We would prepay the actual freight, 3571 and the customer did not actually pay any freight as such.

Trial Examiner Norwood: But the freight was figured in that price, was it?

The Witness: Yes, sir.

Trial Examiner Norwood: Was that same amount of freight figured in the price that you paid, or was it an average figure?

The Witness: Well, our price structure was that in the same zone we charged the same price, paid the actual freight to the point of delivery, whatever that freight might be.

Trial Examiner Norwood: And then charged an average freight differential or an average freight amount added into the price. Is that right?

The Witness: Well, you mean from a cost accounting standpoint?

Trial Examiner Norwood: That is right.

The Witness: I believe in figuring our costs we used an average figure for freight.

Mr. Wright: May we have a five-minute recess?

Trial Examiner Norwood: We will take a five-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Are you ready to go ahead, gentlemen?

3572 Mr. Wright: Yes.

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. Do you recall a representative of the Federal Trade Commission calling on you in March of 1944 regarding the investigation the Commission was making in this case?

A. One representative called, but I don't recall the date.

Q. Do you recall Mr. Dunn, attorney-examiner for the Commission, calling on you?

A. As I remember, he was Mr. Carmichael.

Q. Do you recall making a statement to Mr. Carmichael at that time that the consignment practice of International was initiated in the fall of '33 rather than '32?

A. No, I don't.

Q. Going back to the parties, the different corporations that were involved here, did the International Smelting & Refining Company make any annual report to the stockholders or balance sheet showing its profit, losses, expenses and earnings?

Mr. Gardiner: If Your Honor please, I object to that question. I do not see the purpose of that, as to what report the International Smelting & Refining Company may have made to its stockholders. I don't see that that has any bearing in this particular case.

Mr. Wright: Well, Your Honor, he has certainly 3573 raised an issue here of the responsibility for the acts of these various subsidiary corporations, and it seems to me that that opens up the field pretty wide for determining their act relationship.

Trial Examiner Norwood: I think you may show it for that purpose. The objection is overruled.

The Witness: Will you read the question, please?

Trial Examiner Norwood: Read the question.

(The pending question was read.)

A. Well, in my capacity in sales, I would really have nothing to do with that sort of thing, and I don't know what was done in that respect, if anything.

By Mr. Wright:

Q. Would your answer be the same if a similar question were asked relating to Anaconda Lead Products Company?

A. Yes.

Q. And Anaconda Sales Company?

A. Yes.

Q. Now, did this office in East Chicago, Indiana, in which you were located, do business for the account of the Anaconda Copper Mining Company?

A. I don't believe it did.

Q. You don't know of any business it had in that regard?

A. No, I do not.

Q. There were no employees of Anaconda, as 3574 such, located in this office?

A. No direct employees of the Anaconda Copper Mining Company, to my knowledge.

Q. But there were employees of the three subsidiary corporations?

A. I don't believe we had any employees of the Anaconda Sales Company at East Chicago.

Q. Well, weren't all the sales of Anaconda Sales Company of these pigment products made through your office?

A. Well, we made the sales, as such, through our regular sales organization. In those States where the International Smelting & Refining Company was not licensed to do business, the sales were made through the Anaconda Sales Company.

Q. Did you have anything to do with the advertising policies of the company with reference to these pigments?

A. I would not say I had anything to do with the policies, but I did have considerable to do with the development of advertising.

Q. Where was this advertising run principally, in what media?

A. Are you speaking now of white lead in oil or dry lead or zinc oxide?

Q. If you can make one answer covering white lead in oil and dry white lead, that will be all right. If you cannot, just separate the two.

3575 A. I think that we ran some advertising on dry white lead in the American Paint Journal, and I think we ran advertising on white lead in oil in the American Painter and Decorator and in the National Painters Magazine.

Q. Do you recall an advertising campaign by International to the effect that its white lead was whiter than other preparations on the market?

A. Our what you might call slogan "Whiter and brighter."

Q. Do you recall advertisements of the sort I referred to, that your white lead was brighter and whiter than competitive products?

A. Yes, we advertised that.

Q. Did you advertise showing a spot of Anaconda white lead over white lead of a competitor?

Mr. Welch: Your Honor, we object to this. This case is not a false representation case; this is a conspiracy case. I don't think that kind of question is proper.

Trial Examiner Norwood: I think it goes to the matter of competition.

Mr. Wright: If Your Honor will bear with me, I believe my purpose will be plain. If it is not sufficiently connected up, I will be happy to entertain a motion to strike.

Trial Examiner Norwood: Objection overruled. Answer the question.

The witness: May I have the question, please?

3576 (The pending question was read.)

A. We advertised that Anaconda white lead will make a white spot on ordinary lead.

By Mr. Wright:

Q. Over what period of time did you advertise that fact?

A. Over a considerable period of time.

Q. Well, can you give me some estimate of what that was?

A. Well, I would say probably a five-year period.

Q. What five years is what I meant.

A. I would estimate that perhaps from 1933 or '34 to 1938 or '39.

Q. In 1938 or '39, did you have anything to do with representing International in the Lead Industries Association, in white lead in oil or pigments?

A. I did not represent International. I believe that I was aware that they were conducting a campaign to further the use of white lead in oil.

Q. Did you attend any meetings of the association?

A. I attended one meeting at which, I believe, we discussed the media for advertising.

Q. Do you know of any discussion ever taking place before any group of the Lead Industries Association with reference to your advertising of your white lead as whiter than competitors' white lead?

A. I don't recall of any.

3577 Q. No discussion of it in your presence?

A. Well, there wasn't any discussion of it in that one meeting at which I was present.

Q. Then you don't know of any other meeting at which some discussion might have taken place?

A. No, I don't.

Mr. Wright: I have no further questions.

Redirect Examination by Mr. Gardiner

Q. Mr. Hurless, referring back to your activities as a salesman at East Chicago, did you sell any products for any of the companies that were mentioned besides white lead in oil and dry white lead?

A. Will you repeat the question, please?

Trial Examiner Norwood: Read it.

(The pending question was read.)

A. When I was a salesman selling dry white lead and white lead in oil, I also sold zinc oxide.

By Mr. Gardiner:

Q. Over what period did you sell zinc oxide?

A. Well, I sold zinc oxide for the same period of time that I sold lead pigments.

Q. You have testified, Mr. Hurless, that you have made sales on behalf of Anaconda Sales Company, Anaconda Lead Products and International. So far as you know, 3578 was there any reason why there could not have been a cost accounting arrangement so that your services were charged to any one, segregated and charged to any one or all three of those companies?

Mr. Wright: I object to that question, if Your Honor please.

Mr. Gardiner: On cross-examination the question was raised several times as to whether or not this witness worked for one of these companies, and he testified that he sold material for them. I am merely bringing out the fact or attempting to bring out the fact that he could have worked for those various companies and been compensated by one company.

Mr. Wright: The question wasn't whether or not there was such an arrangement.

Trial Examiner Norwood: I think the question is objectionable for several reasons. One is that you asked him what could have possibly been there, whether or not such a situation could have obtained, and also it was a leading question. I think I will sustain the objection. You may bring out just exactly what the circumstance is by some other question.

By Mr. Gardiner:

Q. Were you at all times at East Chicago paid by International Smelting & Refining Company?

A. As I recall, the pay checks were those of the 3579 International Smelting & Refining Company.

Q. Do you know if there was any allocation as to your salary between the various companies for which you worked?

A. There may not have been any direct allocation of salary, but my understanding is that we would charge the other—for example, the Anaconda Lead Products Company,—so much selling expense in which there would be some charge for salary.

Mr. Wright: I object to that, Your Honor, as to what his understanding is. He is not tesifying as to facts.

Mr. Gardiner: If Your Honor please, there was a lot of testimony by this witness both on direct and cross as to understandings, beliefs, and so forth.

Mr. Wright: We are talking about something which can be ascertained correctly, Your Honor. This is not a matter which needs to be proved by speculation.

Trial Examiner Norwood: Objection overruled.

By Mr. Gardiner:

Q. When you sold white lead in oil in the par zone, what consideration was given to the freight to the points within that zone in computing your price?

A. No consideration was given to it.

Q. How did you arrive at your prices for the par zone?

A. The only way we arrived at our prices for the par zone was by establishing what our competitors' prices were and setting our prices accordingly.

3580 Q. Were your sales of white lead in oil at any time computed on the basis of your freight rates?

A. No.

Q. When you say that you allowed freight to a destination, what did you mean by that?

A. I meant that we actually paid the freight from East Chicago to the point of delivery.

Q. In the par zone, when a customer purchased white lead in oil, what did he pay for it, above the list price?

A. For Example, if the price for white lead in oil in the par zone was 10-½ cents per pound for 100 pound containers, that is what he paid, less his cash discount if he took it within the cash discount period.

Q. And was that true in the other zones, with the exception that the differential was applied within those zones?

A. That is correct.

Q. A moment ago in answer to a question, you said that you figured your cost on your freight in computing your prices. What did you mean by that?

A. I misunderstood the question. What I had in mind then was, if we were figuring production costs, for example, for our own use, we would take an average rate or an average selling cost in figuring those production costs. But in establishing our prices to the customers, our prices were always based on competitive prices, and we did not 3581 figure them by including the freight charges.

Q. So that when you say you figured freight rates in computing costs, that was merely for the purpose of determining whether or not you were operating at a profit or a loss or how much of either; is that correct?

A. That is correct.

Mr. Gardiner: May we have a recess for a short period of time, Your Honor?

Trial Examiner Norwood: How long do you want?

Mr. Gardiner: Three minutes.

Trial Examiner Norwood: We will take a three minute recess.

(A short recess was taken.)

Trial Examiner Norwood: The hearing will come to order.

By Mr. Gardiner:

Q. In the sale of white lead in oil, did you compete with a similar material produced by National Lead?

A. Yes.

Q. In your opinion, how did those two compare from the standpoint of quality?

A. We considered that our quality was superior to that of the National Lead Company, and we played that up in our advertising.

Q. Was there any price differential between the 3582 material that you sold and that of National Lead?

A. We sold at a quarter of a cent under the price at which National Lead Company sold. That is for lead in oil.

Trial Examiner Norwood: When was that? All the time?

The Witness: I would say that it was after we became fairly well established in the lead in oil field.

By Mr. Gardiner:

Q. And what was the reason you sold for a quarter of a cent below National Lead?

A. We sold our lead in oil a quarter of a cent below the price of National Lead Company because we had what at that time was a comparatively unknown product—

Trial Examiner Norwood: I think we went into that this morning and explained that fully.

Mr. Gardiner: Very well.

Mr. Wright:: We have gone into that fully.

By Mr. Gardiner:

Q. Did you compete in the sale of white lead in oil with Eagle-Picher?

A. Yes.

Q. What, is your opinion, was the quality of their product with relation to yours?

A. I do not think the quality of the Eagle-Picher white lead in oil was as good as ours, particularly as regards
3583 color.

Q. Did you sell it on the same basis as Eagle-Picher?

A. No; we sold our lead at a quarter of a cent per pound under the price Eagle-Picher charged for their white lead in oil.

Q. And why was that?

A. For the same reason that we sold under the price of the National Lead Company. The Eagle-Picher product was not as well accepted and as well known as the National Lead Product, but it was a very well known product as compared to our comparatively unknown product.

Mr. Gardiner: That is all.

Recross-Examination by Mr. Wright.

Q. About this understanding that you have that your services can be had by other Anaconda subsidiaries and billed to those subsidiaries, will you go into that further?

A. I cannot say that I know what the arrangement was there. But I think that, for example, the sales department would, each month, assess the white lead department, the lead in oil department and the zinc oxide department with a certain amount of selling expense for each department.

Q. Those are departments of International now that you are speaking of?

A. Yes.

3584 And the same would be true of the Anaconda Lead Products Company.

Q. All right. Is that conjecture, or do you know that that was done as to Anaconda Lead Products Company?

A. I could not definitely say that I know it was done as regards Anaconda Lead Products Company, but I can say definitely I know it was done as far as the other departments of International were concerned.

Q. But not outside of International?

A. I cannot definitely say. I believe it was, but I cannot definitely say so.

Q. Where are the main offices of International?

A. In New York City.

Q. 25 Broadway?

A. Yes, sir.

Q. That is the office that is listed here on the price card such as Commission's Exhibit 661-Z-193, as a district office?

A. At that time, we had a district sales office at 25 Broadway, but later it was moved to the Graybar Building, and was in the Graybar Building until we discontinued the manufacture and sale of lead pigments.

Q. I call your attention to 61-Z-194, which is in October, 1939. It shows the district office at 25 Broadway.

A. That is correct.

Q. That is the main office of the Anaconda Copper
3585 Mining Company, is it not?

A. Yes, sir.

Q. Now, do I understand, Mr. Hurless, that it has been your experience that you have been handling the sale of these pigments, and that your prices as far as your company is concerned, are set by your competitors? That is, you follow what your competitors do?

A. Our prices were based on what our competitors were doing.

Q. Yes. And those have been the same prices in so far as the dry product is concerned?

A. Yes.

Q. And the difference between that and white lead in oil was in effect that you would compensate the dealer 25 cents per hundred more than your competitors; is that correct?

A. That is correct.

Q. You consider that your company has had freedom of—

Mr. Gardiner: If Your Honor please, I object to that conclusion on the part of attorney for the Commission there. He says that we in effect give the dealer a compensation of 25 cents on the dollar more.

This witness has testified that there is no limitation on what the dealer sold his material for. Whether or not he elected to sell it for the same price as our competitors or at a different price was entirely in his province.

Mr. Wright: I used the words in that question, 3586 Your Honor, that the witness used himself on his direct testimony this morning.

Trial Examiner Norwood: Objection overruled.

By Mr. Wright:

Q. Do you consider that your company has a complete freedom of action in this industry as far as prices are concerned?

A. Well, we set our own prices.

Q. Well, now, you stated with this one exception that they are the prices that are set by your competition.

A. Well, we had the same prices that they were charging, with that one exception.

Q. That is what you mean by freedom of action?

A. We were free to do as we saw fit to do.

Q. In other words, then, you could have set prices lower if you had wanted to, or on a different basis, if you had wanted to, on these various products?

A. Any limitation was really due to conditions such as costs and so forth, not on the part of our competitors.

Mr. Wright: No further questions.

Mr. Gardiner: That is all we have for Mr. Hurley as far as the International Smelting & Refining Company is concerned, and Anaconda. We have no further witnesses at this time.

We would however, like the privilege at a later 3587 date of introducing further testimony.

Mr. Wood: I will have four witnesses tomorrow and Thursday. I would not elect to proceed today.

Trial Examiner Norwood: Is there anything further to come before the Commission today?

(No Response.)

Trial Examiner Norwood: The conclusion is obvious, that we recess until 10 o'clock tomorrow morning.

The hearing is adjourned until that time.

(Thereupon, at 3:20 o'clock p. m., the hearing was recessed until 10 o'clock a. m., Wednesday, September 17, 1947.)

3588 Hearing Room
Federal Trade Commission
Washington, D. C.,
September 17, 1947.

Met, pursuant to adjourmnent, at 10:00 a. m.

Before:

J. W. Norwood, Trial Examiner.

Appearances:

James D. Ewing and E. Z. DuBose, Attorneys for the Respondent National Lead Company.
(120 Broadway, New York, New York.)

Edmund T. Wood and Richard Serviss, Attorneys for the Respondents Eagle-Picher Lead Company and Eagle-Picher Sales Company.
(American Building, Cincinnati, Ohio.)

3589 Henry E. Gardiner, Attorney for the Respondents Anaconda Copper Mining Company and International Smelting & Refining Company.
(120 Broadway, New York, New York.)

James T. Welch, Attorney for the Respondent The Sherwin-Williams Company.
(815 15th Street, N. W., Washington, D. C.)

Joseph S. Wright and Paul R. Dixon, Attorneys for the Federal Trade Commission.

3590 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on yesterday, the hearing in Docket 5253 is now reconvened for the reception of further evidence on behalf of respondents, in Room 332 of the Federal Trade Commission, Washington, D. C., at 10 o'clock a. m. on the 17th day of September.

The appearances are as follows:

Edmund T. Wood and Richard Serviss representing Eagle-Picher Company and Eagle-Picher Sales Company.

James D. Ewing and E. Z. DuBose, representing National Lead Company.

Henry E. Gardiner, representing Anaconda Copper Mining Company and International Smelting & Refining Company.

James T. Welch, representing the Sherwin-Williams Company.

Joseph S. Wright, representing the Federal Trade Commission.

Will you call your first witness?

Mr. Wood: Mr. W. W. Vasferling.

W. W. VASTERLING was thereupon called as a witness for the respondents Eagle-Picher Company and Eagle-Picher Sales Company, and, having been first 3591 duly sworn, testified as follows:

Direct Examination.

Trial Examiner Norwood: Will you proceed?

By Mr. Wood:

Q. Would you please state your residence and occupation?

A. Kansas City, Missouri; Technical Director, Davis Paint Company.

Q. How long have you been in the paint business?

A. Since August of 1921.

Q. How did you start in the paint business?

A. I started in the paint business with the Campbell Paint & Varnish Division of the Glidden Company, Washing laboratory equipment, and so forth.

Q. How old were you when you started?

A. 15.

Q. What positions have you held since?

A. In the course of the years, I have held the position of technical director of the Campbell Paint & Varnish Company, plant superintendent of the Campbell Paint & Varnish Company, industrial salesman for the Phelan-Faust Paint Company, and technical director of the Davis Paint Company.

Q. How long were you with Glidden?

A. 12½ years.

Q. And how long were you with the second company you mentioned?

3592 A. Nine months.

Q. Nine months?

A. That is right.

Q. And how long have you been with the Davis Paint Company?

A. Since December of 1934.

Q. Will you describe the business of the Davis Paint Company?

A. The Davis Paint Company are essentially engaged in the manufacture of what is known in the industry as trade sales, comprising such products as exterior house paints, architectural enamels, decorative enamels, and such other allied products.

Q. How do you sell your products?

A. Our products are sold through our own stores, through associate stores, through dealers and direct mail order.

Q. With what companies does the Davis Paint Company compete?

A. With all companies who operate in the same territories in which we operate.

Q. Will you name some of them?

A. DeVoe, Glidden, Sherwin-Williams, DuPont, Armstrong.

Q. How about Montgomery Ward?

A. Montgomery Ward, Sears-Roebuck, Western Auto Supply.

Q. Now, on exterior white house paint, what is the general price range of the products offered in the Kansas City market?

3593 A. You mean the retail market?

Q. Yes.

A. At the present time, the retail prices of outside white in the Kansas City area range from $4.33 per gallon to $5.34 per gallon.

Mr. Wright: Your Honor, I move to have the answer to that last question stricken, because the present market price of paint in the Kansas City area is certainly irrelevant and inadmissible to this proceeding. The question relates to a period of time considerably subsequent to the date of the amended complaint.

Trial Examiner Norwood: He may want that as a basis of comparison. Let us see what he has to say.

Mr. Wood: It seems to me, Your Honor, that that is just simply background of the general competitive conditions.

Trial Examiner Norwood: I will overrule the objection. You may ask the question.

By Mr. Wood:

Q. Over a period of years, what have been the prices of exterior white house paint in the Kansas City market, if you remember?

A. I would say prior to 1942, the retail prices were in the neighborhood of $2.95 to $3.25.

3594 Trial Examiner Norwood: Is that outside paint that you are talking about?

The Witness: That is correct.

By Mr. Wood:

Q. Has there been over a period of years a spread in the prices of exterior white house paint?

A. Yes, there has.

Mr. Wright: Your Honor, I am going to object to further questions along this line regarding the price. This witness has not been qualified as an expert in marketing problems. By his own testimony, most of his time, if not all of it, has been spent as a technical director in the production of paint.

There has been no qualification of him as an expert in marketing or sales of paint. And these questions are calling for opinion answers, not related to his own experience.

Trial Examiner Norwood: I do not want this witness to give an opinion answer. He may tell us about the prices if he knows them. I want him to answer them of his own knowledge, and if he does that, whether he is an expert or whether he is a price maker or not does not make any difference.

Were you answering those questions from your own knowledge, Mr. Vasterling?

The Witness: Yes, sir.

3595 Trial Examiner Norwood: I will let him answer. Objection overruled.

By Mr. Wood:

Q. What sort of technical department does the Davis Paint Company have?

A. We have myself and another man who perform more or less the compounding of our products and testing them, and so forth, and making up our formulations.

Q. Do you have any research department?

A. Very well.

Q. What is the nature of it?

A. Our research is limited to making tests on the paints and testing them on exterior exposure panels of our own formulations.

We rely to a great extent on our suppliers for a lot of our technical information.

Q. Will you please explain that last remark in greater detail, that you rely on your suppliers for technical information?

A. Most pigment suppliers maintain large technical staffs. Their knowledge is distributed to paint manufacturers whose own technical staffs are limited due to the fact that the cost of operating the staff is exorbitant to the smaller manufacturers.

The information is given to us in the form of cor-
3596 respondence between ourselves and our suppliers on specific problems, and on problems of general interest is usually broadcast in the form of a bulletin from the supplier.

Q. How does your own technical department compare with the technical department of the Glidden Company, as you knew it at the time you were there?

A. The Glidden Company probably have, or did, at the time I was with them, about 20 or 25 people in their technical department. We have only two.

Q. What suppliers of pigments and materials have furnished the Davis Paint Company with technical service?

A. DuPont Company, the Eagle-Picher Sales Company, and the subsidiaries of the National Lead Company.

Q. What is the general nature of the technical service which they have supplied?

A. The general nature of those services is to bring to us the improvements that they have made in their processes which they hope in turn will help them to sell their products to us, and in that way help us to make our products better.

Q. And has that assistance been of any value to your company?

A. It has been of quite a value to us.

Q. In what respect?

A. It has helped us to improve our product beyond the point that we possibly would have improved it in
3597 the length of time that it takes to do those things.

For instance, they have quite a large research program that developes certain information months or years ahead of the time that we possibly could get that information ourselves.

Q. What effect, if any, does that service have on the competitive position of your company in the industry?

A. It keeps us in a competitive position.

Q. What do you mean by that?

A. Certain of the national manufacturers sell paint. Also, they are manufacturers of the raw material.

We take technical information that they have assembled and incorporate it in our products to put us in the same competitive position that they are with their own products.

Q. Now, what technical service has the Eagle-Picher Company provided the Davis Paint Company?

A. The Eagle-Picher Company has provided the service to us of exposure of paints on their test fences which we have examined from time to time. They have also done formulating for us at our request, and their laboratories at Joplin, Missouri, are always open to anyone in the industry who cares to go there and examine what they have to offer.

Q. Has that service been of any value to your company?

A. Yes.

Q. Do other companies selling the same line of
3598 products as Eagle-Picher Company also offer your
company service?

A. Yes, they do.

Q. What other products do you sell in your retail stores?

A. Will you repeat that question, please?

Trial Examiner Norwood: Will you read it, please, Mr. Reporter.

(The pending question was read by the reporter.)

By Mr. Wood:

Q. —besides paint?

A. We sell novelty items, chinaware, unpainted furniture, brushes, and painters' tools, and step ladders, and so forth.

Q. Do you sell white lead in oil?

A. Yes.

Q. What brands do you carry, in general?

A. Dutch Boy and Eagle.

Q. Why do you carry both?

A. There is a demand for both of them. The master painter usually makes up his mind that he prefers one over the other, and we have both for sale.

Q. Now, in respect to the items that you carry in your stores that you do not manufacture yourselves, do you have any preference in respect to how you buy; that is, whether you buy on a delivered price basis or on an f. o. b. basis?

A. We would much rather buy on a delivered price basis.

Q. Why?

3599 A. Well, there is an accounting problem involved, and when you purchase on a delivered price basis, you know exactly what that price is going to be. When you buy on the basis of the shipping point, you have to assemble all of your invoices, your freight bills, and go through an accounting to get the final figure.

Q. In your own bookkeeping, how do you carry the goods that you have on your shelves?

A. We carry our goods on a delivered price basis.

Q. In other words, on what they cost you on your shelves?

A. That is correct.

Q. Whether you buy f. o. b. or whether you buy delivered price?

A. That is right.

Q. You carry them at what they actually cost there on the shelf?

A. That is right.

Q. Now, on the lead pigments that you utilize in your paint, are they standard, uniform products as offered to you?

A. They are standard products, but they are not always uniform.

Q. In what sense are they not uniform?

A. Their physical characteristics vary, depending upon the process of manufacture.

Q. Could you give us an example?

3600 A. Yes. Two pigments which are offered as basic lead sulphate from two different suppliers would have different oil absorptions. They would produce paints of different viscosities, or body, while they are the same product chemically.

Q. What determines which product you want?

A. That is up to us to determine which is best for our product, the way we want to make it.

Q. Now, what products do you buy from Eagle-Picher?

A. Leaded zinc and basic lead sulphate.

Q. Now, is Eagle-Picher's leaded zinc all alike?

A. No.

Q. What are the differences in the grades, as far as you know them?

A. Eagle have two producing plants of leaded zinc. One of them is located at Hillsboro, Illinois; the other one is located at Joplin.

The leaded zincs which we are purchasing from the Eagle-Picher vary in physical nature depending upon which plant they are produced in. One material, the material that is produced at Hillsboro, is not an identical material physically with the material produced at Joplin.

Q. Are they the same price?

A. Yes, sir.

Q. Which material does your company take?

3601 A. We prefer to have the material delivered from Hillsboro.

Q. Why?

A. Because in our product it gives us the desired properties which we want, which we do not get with material that is delivered from the Joplin smelter.

Q. Which is the closer to you?

A. Joplin.

Q. But you prefer it from Hillsboro, Illinois?

A. Yes.

Q. And that is sold to you at the same delivered price regardless of what plant it is from?

A. Yes.

Q. Now, does this difference in physical characteristics of lead pigments apply to other products or just to leaded zinc?

A. That applies to both pigments.

Q. Have you ever purchased basic lead sulphate from Eagle-Picher in the past?

A. Yes.

Q. Do you find any difference in the quality of that from plant to plant?

A. I do not know.

Q. Have you tried the lead pigments of various pigment manufacturers in your business?

A. Yes.

3602 Q. And do you find that products with the same chemical name have differences?

A. Physical differences.

Q. Are those differences of importance to you as a paint formulator?

A. They are quite important.

Q. Do these pigments have different values to you?

A. Yes.

Mr. Wood: Could we have a five minute recess, Your Honor? I think we are about through with this witness.

Trial Examiner Norwood: We will take a five-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: We will proceed.

Mr. Wright: Your Honor, I want to request a requestration of the witness here.

Mr. Wood: I see no point in sequestering witnesses. Our only other witness is going to testify on a different subject.

Mr. Wright: They are both outside witnesses. Now, I have no idea of what the examination is, but neither of the witnesses is in any way connected with the Eagle-Picher Company.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

3603 Trial Examiner Norwood: Back on the record.

Mr. Mitchell will withdraw and remain within call. You may arrange with your counsel there. You can go up to the library on the eight floor.

Mr. Wood: We are going to be through with this witness in just a few minutes. I think Mr. Mitchell might as well stay in this corridor.

Trial Examiner Norwood: Proceed.

By Mr. Wood:

Q. What pigment manufacturers solicit your company's business?

A. The DuPont Company, the New Jersey Zinc Sales Company, The Glidden Company, the Sherwin-Williams Company, the National Lead Company, and the Eagle-Picher Sales Company.

Mr. Wood: You may cross-examine.

Cross-Examination by Mr. Wright.

Q. I understand from your testimony that you have been with the Davis Paint Company since 1934 as a technical director, Mr. Vasterling. Is that correct?

A. Yes.

Q. Is that a corporation?

A. Yes.

Q. Its principal office is in Kansas City?

A. Yes.

3604 Q. What was its dollar volume of paint sales, say, in 1942, roughly?

A. Around one million and three-quarters.

Q. A million and three-quarters.

A. Yes.

Q. Over what areas did it sell and solicit business in paint?

A. From the Rocky Mountains to the Atlantic Coast, from Canada to the Gulf.

Q. In other words, you have almost a national distribution except for the Pacific Coast?

A. Yes.

Q. Where are your stores located?

A. We have a company-owned store located in Kansas City, Missouri, Kansas City, Kansas, and Enid, Oklahoma.

A. You just have the three company-owned stores?

A. There are five company-owned stores in Kansas City, Missouri.

Q. I see. Where are your producing plants for paints and related products?

A. We have one producing plant at Kansas City, Missouri, and one producing plant at Cleveland, Ohio.

Q. How does the production of one plant compare with the other?

A. The production of the Kansas City plant is about 33 percent larger than the production of the Cleveland plant.

3605 Q. Is the bulk of your paint sold to dealers for retail?

A. Yes.

Q. What brands or trade names is it sold under?

A. Under the brand name of the Davis Paint Company.

Q. Do you make any different brand material?

A. Yes.

Q. For other marketers?

A. Yes.

Q. Do you make a full line of paint products?

A. We make a full line of products which are generally accepted as trade sales items.

Q. You spoke of having been supplied services by subsidiaries of the National Lead Company.

Who were those subsidiaries that you were referring to?

A. The Titanium Pigments Corporation.

Q. Is that the only one you had in mind when you made that answer?

A. Yes.

Q. What products do you purchase from them?

A. We purchase titanium oxide and titanium-calcium pigments.

Q. Are those pigments in competition with the white leads?

A. Definitely.

Q. Is the Titanium Pigments Corporation one of the principal producers of titanium pigments?

3606 A. Yes.

Trial Examiner Norwood: We will suspend for a few minutes.

(A short recess was taken.)

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. You testified, as I recall it, that prior to 1942 your outside lead paints sold in the price range of $2.95 to $3.25 a gallon; is that correct?

A. I testified that outside white house paint sold at those prices.

Q. Yes. In 1936, was that price range about reflective of the market?

A. I do not recall that far back.

Q. Do you recall anything about the competitive situation in the mixed paint business at that time?

A. There were various prices at which the product was sold.

Q. Do you recall prices being in some instances lower than that $2.95 for outside white house paint?

A. I do not recall that they were lower.

Q. Is that generally a competitive item in times of, shall we say, a buyers' market?

A. Highly competitive.

Q. Highly competitive. Is it an item were price may be a determining factor in getting business?

3607 I am speaking now of the period prior to 1942.

A. That would depend upon the efforts of our sales people to sell their customers.

Trial Examiner Norwood: Will you speak just a little more loudly, please?

By Mr. Wright:

Q. You stated that you would rather purchase on a delivered price than on a factory price. As I recall your testimony, that is because of the inconvenience of not knowing exactly what the stuff cost you laid down in your stores; is that correct?

A. Yes.

Q. Did you have in mind there equal prices? Where the cost was equal, would you rather have a delivered price than an f. o. b. price? Is that what you had in mind?

A. What do you base that equal price on?

Q. Let us take an assumption that you could buy a lead pigment out of St. Louis at $9 per 100, and it would cost you $1 per 100 freight to get it into your plant in Kansas City, or you could buy at $10 delivered in Kansas City. In that case, the cost to you would be equal whether you bought it on a delivered price or on a quotation at St. Louis. Was it that situation that you had in mind?

A. As long as the material was delivered to our competitors at the same price.

3608 Q. I am asking you whether—

Mr. Wright: I move that that answer be stricken as not responsive.

Mr. Wood: No, the answer was responsive. The question is a difficult question.

Trial Examiner Norwood: Read the answer.

(The answer was read by the reporter.)

Mr. Wright: The question, Your Honor, went to what he had in mind when he said that, and I was trying to bring out from him whether he had in mind that the f. o. b. plant price and delivered price were equal, and that he would prefer that.

Trial Examiner Norwood: You read that a little to fast for me. Will you read it again?

(The answer was again read by the reporter.)

Trial Examiner Norwood: I think he might explain that further.

Mr. Wright: It had absolutely no relation—

Trial Examiner Norwood: You mean that you would prefer the delivered price as long as your competitors had their goods delivered at the same price; is that right?

The Witness: Yes.

Mr. Wright: Your Honor, I must object to the answer to my last question. It had absolutely no relevancy to the point that I was trying to establish from this witness.
3609 I had not brought in competitors in any way in this matter.

I asked him simply whether, when he answered that he would prefer delivered prices, if he had in mind that in that preference the f. o. b. plant price and the cost of getting it would be the same as the delivered price. It has nothing to do with his competitors in any way.

Trial Examiner Norwood: Now, you asked a further question. But he qualified his answer by saying—

Mr. Wright: It was no answer to my question.

Trial Examiner Norwood: He qualified his answer, yes, to your question by saying that he would prefer the delivered price in those cases where his competitors got the same price. And you were questioning on a further matter.

Mr. Wright: Your Honor, I must except to my cross-examination's bringing in matters that counsel must put on on direct.

Mr. DuBose: What is that?

Mr. Wright: Or must establish on direct.

Trial Examiner Norwood: I think the answer may stand. I will deny the motion.

By Mr. Wright:

Q. Mr. Vasterling, let us take a hypothetical situation now.

We will assume that you have your option of buying basic lead carbonate either at $10 per 100 laid down in your Kansas City plant or $9 per 100 f. o. b. St. Louis.
3610 And we will assume for this purpose that the freight rate in St. Louis for a car at your siding in Kansas City is 75 cents per 100, so that by purchasing it under St. Louis f. o. b. price and paying the freight, you can obtain the material at 25 cents per 100 cheaper then at a delivered price.

In that instance, which would you prefer?

Mr. DuBose: I object on the ground that that is a hypothetical question, based upon a set of facts to which there is no proof.

Trial Examiner Norwood: Objection overruled. Answer the question.

The Witness: Economically, it would seem that the 25 cent saving would be advantageous, but we are going to ship the product which we make right back into the territory from which that lead is shipped from, and it may be offered to a paint company right next door at no freight at all. And if we do not have an equal price to what they have, then we are not in competition with them.

Mr. Wright: Your Honor, I move that that answer be stricken. It is argumentative and not responsive. It was in answer to my question as to which he would prefer.

Mr. DuBose: Your Honor, that was a hypothetical question that called for an opinion answer, which the witness gave.

3611 Mr. Wright: The witness' answer related to his practices in shipping a finished product after it had been manufactured.

Trial Examiner Norwood: The witness gave his answer and explained his answer.

Mr. DuBose: Certainly.

Trial Examiner Norwood: I think we might just as well get his complete idea about this thing, about his prices, and why he prefers them.

He says in substance that he does not prefer to have it laid down in his mill at 25 cents cheaper because he has to ship it right back to the source of the raw material.

Is that the substance of your answer?

The Witness: Yes, sir.

Trial Examiner Norwood: Then he has indicated to you that he did not prefer to save that amount. Now, you can ask him anything else you want.

By Mr. Wright:

Q. Was that your answer, if you had the opportunity of purchasing your lead pigments by that means at 25 cents cheaper than you now can, that you would prefer to not take that saving? Answer that yes or no, please.

A. Yes.

Q. You would prefer to take it?

A. We would not prefer to take the saving.

Q. Irrespective of what your practice might be 3612. on your finished product?

A. Yes.

Q. How big would the savings have to be in purchasing on f. o. b. and paying freight before you would find you would prefer it over buying on the delivered price—50 cents a hundred or a dollar a hundred?

A. Well, we prefer to buy on a delivered price that we feel is being given to others as well as ourselves.

Mr. Wright: Your Honor, I move that that answer be stricken as not responsive, and the witness be requested to answer the question.

Trial Examiner Norwood: Read the question and answer first, and then counsel may speak.

(The question and the answer were read by the reporter.)

Mr. Wright: The question, Your Honor was at what point, if any, would the saving overcome his preference. He has already stated his preference.

Mr. DuBose: He has not completed his answer, if Your Honor please.

Trial Examiner Norwood: I wish you would complete your answer and tell us how big the savings would be to induce you to prefer the mill price and pay your own freight.

The Witness: Well, that is an awfully hard question to answer, because the cost of one single item in a product is reflected, of course, by the delivery price. It would 3613 take a considerably lower price to reflect any appreciable cost in a gallon of paint.

Now, economically you might say we would be foolish not to accept 25 cents or 50 cents a hundred, but it gets back to the same argument that we still have to ship our product back into a territory where that material is produced.

Trial Examiner Norwood: Well, what difference would that make?

The Witness: Well, if the lead were shipped, as inferred, on a mill plant basis, we would be in competition with other paint producers who are located nearer to that producing mill, and there the freight rate to their plant would be less than ours and would give them a lower delivered price.

Trial Examiner Norwood: Now, in case you save that 25 cents, wouldn't that give you a competitive advantage?

The Witness: Not if the company that were located half our distance from the mill were going to have 37.5 cents.

By Mr. Wright:

Q. Then I take it your answers to these questions are based not so much on your own reluctance to accept the 25 cents, but on the basis of your fear—that is, a part of that hypothetical situation I put to you—that people in St. Louis would be purchasing that lead at $9 a hundred with no freight at all?

A. That is correct, and we are in competition with
3614 those people.

Q. So that your reluctance is based on that competitive situation, and not on your desire to pass up any saving that you might effect in the cost of your materials that go into paint?

A. Well, I think I have stated our position.

Trial Examiner Norwood: Well, answer his question.

Mr. Wood: Read the question.

(The pending question was read by the reporter.)

The Witness: Yes.

By Mr. Wright:

Q. Mr. Vasterling, do the suppliers of the so-called white leads offer them to you in various different grades or standards for different purposes?

A. Yes.

Q. Do you recall the different grades of basic carbonate that are offered say by the National Lead Company?

A. Oh, I think they have a product called 111 and 333.

Q. What are the differences in those products, can you state?

A. The differences are in the oil absorption of the product and the amount of body that they will give to a paint, physical properties that they would give to a paint.

Q. Aren't there also differences as to he tinting strength or hiding?

There could be.

3615 Q. Well, those are made for particular purposes,
then, aren't they? Those physical differences are calculated in advance by the manufacturers to serve specific purposes in the paint grinding industry?

A. Yes.

Q. Do other suppliers of basic carbonate attempt to make similar differences in their products to meet those same different requirements?

A. Yes.

Q. So that is it reasonable to say if you want a high oil absorption basic carbonate, you can get it not only from National, but from Eagle-Picher or other suppliers?

A. By comparison with the standard product that they manufacture, yes.

Q. So that while there are physical differences in the products various manufacturers offer similar differences in their product to meet similar purposes or requirements by paint grinders?

A. Yes, but a product offered in direct competition with another product may also have physical differences.

Q. Well, as far as basic carbonate is concerned, can you illustrate?

A. Yes, as far as basic carbonate is concerned.

Q. Well, will you tell us what you mean?

3616 A. Well, if you had the counterpart of Eagle-Picher's basic carbonate again the National Lead Product, you would find differences in the way it reacted in your paint system or formulation. While they would be offered to you as the same product of a competitive nature, in your own system or type of formulation they may give you differences.

Q. So that you would have to make slight adjustments in your manufacturing processes and formulations to account for those differences?

A. That is correct.

Mr. Wright: I have no further examination.

Trial Examiner Norwood: Any redirect?

Redirect Examination by Mr. Wood.

Q. Can you state briefly the history of the Davis Paint Company?

A. The Davis Paint Company was started roughly about 1922 by its present president, Mr. B. J. Davis, with an investment of under $2.00.

The company has grown since that time and expanded to the point where we have our own producing units, and are producing products in the neighborhood of a million and a half gallons a year since that time.

Q. About how many paint manufacturers are there in the United States, approximately?

A. Approximately 2500.

3617 Q. Now, when you use the term "mixed paint," What do you mean?

A. The term "mixed paint" relates to a product that is sold to the ultimate consumer in applicable form. That is to say that very little or no additional ingredients need be added for the application of the material.

Q. Now, what is the history of the mixed paint business?

A. The history of the mixed paint business has been one of bettering the product since their inception a good many years ago, I think around 1915 or '16 and was in direct competition for many years with white lead in oil, which was its chief competitor.

The quality of the product has been increased as time has gone on until we believe that the ready-mixed paint is an equal to white lead in oil, if not better, when it is properly compounded.

Q. When did titanium come into the market as a pigment to be used in mixed paint?

A. About 1921.

Q. Now, prior to that, what paints were used most generally for outside house paints?

A. Lead in oil was used quite a little, and paints that were prepared from leaded zinc and lithopone.

Q. What is the historical position of basic lead carbonate in oil in the paint industry?

3618 A. You mean as to the amount that is sold at the present time?

Q. No, historically, I said, in the past.

A. Well, lead in oil was an accepted product by the master painters for a good many years as a criterion to shoot at for a good surface coating.

Q. Over what period of years would you say?

A. Oh, possibly 70, maybe more.

Q. What is its present position? That is, what is the present position of lead in oil?

A. The present position of lead in oil is that its use is curtailed greatly by the acceptance of the buying public of the ready-mixed paint products.

Q. Are the ready-mixed paint products in competition with lead in oil?

A. Yes.

Mr. Wood: That is all.

Recross Examination by Mr. Wright.

Q. These 2500 paint manufacturers that you spoke of, Mr. Vasterling, do those include a very large number of small manufacturers who have relatively local distribution?

A. Yes.

Q. Who is the largest manufacturer of mixed paint in the United States?

3619 A. I believe Montgomery Ward is.

Q. The largest manufacturer?

A. Of ready-mixed paint.

Q. How does Montgomery Ward compare with Sherwin-Williams?

A. Well, I haven't seen figures recently on their production. I don't think I am qualified to answer that question.

Q. I take it from your answer, then, that you consider Montgomery Ward a larger manufacturer of paint than Sherwin-Williams?

A. Of outside house paint.

Q. I am talking about paint generally, in the field of paint.

A. Well, I would have to see some figures to answer that.

Q. You don't know?

A. No.

Mr. Wright: No further examination.

Mr. Wood: Thank you very much. (Witness excused.)

Mr. Wood: May we have a five-minute recess?

Trial Examiner Norwood: We will recess for five minutes.

(A short recess was taken.)

Trial Examiner Norwood: You may proceed.

Mr. Wood: Mr. Mitchell, please.

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J. O. MITCHELL was thereupon called as a witness
3620 for the respondents Eagle-Picher Lead Company
and Eagle-Picher Sales Company and, having been
first duly sworn, testified as follows:

Trial Examiner Norwood: Give your full name.

The Witness: J. O. Mitchell.

Direct Examination by Mr. Wood.

Q. Will you please state your residence and occupation?

A. Kansas City, Missouri; manufacturer of storage batteries.

Q. What company?

A. American Battery Manufacturing Company.

Q. How large is the American Battery Manufacturing Company?

A. We have two different companies. The Kansas City company will do in the year we are in now close to about a million dollars worth of business.

Q. The Kansas City company?

A. Yes.

Q. And what is the other company?

A. The other company is the American Battery Products Company, St. Paul, Minnesota.

Q. And how big a business does it do, about?

A. It will do this year about $600,000 worth of business.

Q. Will you please give us a brief history of your companies, that is when they were started and how they were started?

A. We started in Kansas City in about 1936. We
3621 bought out a company that was bankrupt, and we
continued with it in the same way, and changed our
sales policy slightly.

Q. By continuing in the same way, you don't mean you continued in bankruptcy?

A. No.

Q. Now, in 1936 was your company a carload buyer of lead oxide?

A. No, it was a truckload buyer.

Q. Is it a carload buyer now?

A. A carload buyer now, yes.

Q. Has the business of your company increased between 1936 and the present time?

A. Yes.

Q. By about how much?

A. Oh, I would say from 1936 we did maybe $30,000 worth of business, and have increased from $30,000 up to about a million dollars worth of business.

Q. Now, what companies call on you to solicit your business in the sale of lead pigments, that is, battery oxides?

A. National Lead, and I guess all the different oxide companies at one time or another were trying to get our business and called fairly regularly. National Lead and Eagle-Picher are the two that fight over it the most.

Q. And are their products exactly similar to one another?

A. No, they are very different.

3622 Q. What are some of the differences?

A. Well, with Eagle-Picher oxides, the main reason we use them is that they have what is referred to as a cold mix. We can mix our oxides with water, mix them in about two minutes, and after the oxide is used, after the plate has been made, the plates can be put in the battery within a matter of two or three hours. When we take that same oxide to the forming room, it can be formed and charged in one operation. We don't have to dump the battery and put in a different electrolyte and start over again.

Trial Examiner Norwood: Are the other products different from that?

The Witness: Very different.

Now, take the National oxide, you have to mix it with acid to start with. If you put acid and water together, you have got a heating action, and it takes about thirty minutes to mix the oxide. Then that plate cannot be used for two or there days.

In the forming room you have to charge the battery with one particular kind of acid, the battery has to be cleaned out, dumped and refilled with another acid for the final charge.

By Mr. Wood:

Q. Do the National salesmen say that their oxides are better than Eagle-Picher's?

A. Well, as time goes on, one company will be 3623 ahead for a while, the other company will take a big stride and be ahead of the other.

Q. At the present time, whose oxides do you prefer?

A. I prefer Eagle-Picher's.

Q. Have you ever had any technical assistance from members of the Eagle-Picher organization?

A. A lot.

Q. What has been the nature of it?

A. Well, they have developed first a plate dryer for us, a processor. When plates were pasted they had to be handled individually and put into ovens and cooked overnight, and then taken out of these trays and stacked. They developed a machine that is connected into the pasting machine, and that is all done automatically. The plates come right straight through and can be immediately stacked, which saves a lot of labor.

Q. Has that helped your company?

A. Yes, that particular machine saves us several hundred dollars a month.

Q. What other services, if any, has Eagle-Picher performed for you, services of a technical nature?

A. They run a constant testing for us on batteries. We send our batteries down there periodically for all different kinds of tests and ways to improve the batteries.

We also send other material down, too.

3624 Q. Does your company maintain a research department of its own?

A. No.

Q. Why not?

A. Well, we can get that from Eagle-Picher, so we don't see any reason to pay for one ourselves.

Q. Are you in competition with any of the larger battery companies?

A. We are in national competition with everybody that make batteries.

Q. Are you in competition with Willard, Exide, Electric Auto-Lite, and companies of that general type?

A. Yes.

Q. Do you know whether or not those companies have research organizations?

A. I naturally assume that they all have research laboratories. I don't know the extent of them.

Mr. Wright: I move the answer be stricken, Your Honor. It isn't based on the witness' own knowledge, but is an assumption.

Trial Examiner Norwood: Motion allowed.

By Mr. Wood:

Q. Does the technical service supplied to you by Eagle-Picher assist you in competing with the larger battery manufacturers?

3625 A. Very much so.

Trial Examiner Norwood: What is your matter of pricing?

The Witness: Retail-wise, while we have no retail price we have a suggested retail price varing from $20 to $30.

By Mr. Wood:

Q. Now back to 1936, did both National and Eagle-Picher solicit your business?

A. Yes.

Q. Did they each offer you technical service?

A. No.

Q. Which one did not?

A. Eagle-Picher offered us and National didn't.

Q. Does National now offer technical service?

A. Yes. I don't think it is of the same type, or as extensive, because it is a different part of the country.

Q. What men in the Eagle-Picher Company have given you the technical service to which you refer?

A. Mr. Chubb, mainly; Mr. Briggs and Mr. Harner, three of them.

Q. Have you ever visited the Eagle-Picher laboratory at Joplin?

A. Yes.

Mr. Wood: Mr. Welch has one question to ask the 3626 witness.

By Mr. Welch:

Q. Mr. Mitchell, does Sherwin-Williams ever try to sell you battery oxides?

A. No.

Mr. Welch: That is all.

Mr. Wood: You may cross-examine.

Trial Examiner Norwood: Cross-Examine.

Cross-Examination by Mr. Wright.

Q. Where or over what geographical area principally do you sell your batteries, Mr. Mitchell, and I am talking now of the Kansas City plant.

A. Arkansas, Oklahoma, Missouri, Kansas, Iowa and Nebraska.

Q. What is your principal distribution area from your St. Paul plant?

A. In the neighboring States, including Minnesota, North and South Dakota, and the northern part of Iowa and Nebraska.

Q. Did you acquire both of these plants at the same time, or vice versa?

A. No, we acquired the Kansas City plant in 1936, and the other plant was acquired about a year ago.

Q. Now, back in 1936 when you started the Kansas City plant, you stated that you purchased on a truckload basis from Eagle-Picher. Is that correct?

3627 A. That is right.

Q. Is that the five-ton price that you are referring to?

A. Yes.

Q. That is generally higher than the carload price, is it not?

A. Yes, I think it is a little higher.

Q. When did your purchase become such that you were eligible for a carload price, from the point of time?

A. As I remember, it was in about 1937 or '38. I cannot remember the exact date.

Q. Did you find it to be any competitive advantage to you to be able to qualify for that lower price in carload purchase?

A. Always with any saving you are naturally that much better off.

Q. Back in that period of time from '36 to '38, what was the competitive situation on batteries as to prices?

A. You mean the battery prices themselves?

Q. Yes, of your competitors, the prices that you had to sell at?

A. Well, our principal trouble then was not so much the matter of price as it was selling the customers. Since we were an unknown company, we had the problem of merchandising. That was our principal trouble back in those days rather than price.

Q. In those days, was it not true that there were
3628 some batteries in the market at extremely low retail
prices?

A. That is right.

Q. Sears-Roebuck, Montgomery Ward?

A. Yes.

Q. Did you encounter competition from Bowers Battery Company in that area?

A. Bowers sold in that area for about a year, but I have forgotten what year it was—1940 or '39.

Q. Is Grant Storage Battery Company of Minneapolis a competitor?

A. Yes, they operate through our same territory.

Q. In that period of '36 to '39, what were the price ranges of Grant? Were they low or high in comparison with the average?

A. I would say that on certain types of accounts they were high, and on certain types of accounts they were low.

Q. Can you explain that?

A. Well, batteries are normally sold with list, dealer and job prices, the three schedules. Grant had a price lower than the dealer but higher than the jobber. Where certain other companies will operate between jobber and dealer, they went about half way in between with a one-price deal.

Q. Did you find it necessary in that period of time when you first started, say from '36 to '40, to manufacture and sell a light, cheap battery at a low price?

3629 A. Yes.

Q. What kind of a battery was that?

A. Well, that is the way you describe it, a light cheap battery.

Q. What competition forced that?

A. Everybody, including ourselves. You know the old cycle where everybody forces the other person to do it.

Q. It was on a price basis that you were forced to do that?

A. Yes.

Q. What was your margin of profit on that battery in that period of time?

A. I don't remember the exact margin on it, but it was practically nothing, or maybe a loss. I don't remember the exact profit, but it was the same as no profit at all.

Q. Back in that time, was a matter of saving five to ten cents on the material cost of the battery of any importance to you?

A. No. Our principal trouble in those days was not a matter of price as much as it was a matter of selling the people on the idea that we had a good product and knew how to make a good product.

Q. Did the prices which you set on your battery have any relation to that?

A. Well, this particular battery, this light, cheap battery we mentioned—of course our idea was, and 3630 everybody else's was, to hold that sale to a very minimum. We only sold a few of those. They were referred to as price leaders.

Of course if we made all our batteries that way, we would have gone broke, but we kept down to a small percentage of them.

Mr. Wright: I have no further questions.

Mr. Wood: Nothing further.

Trial Examiner Norwood: Thank you, Mr. Mitchell. (Witness excused.)

Mr. Wood: May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

We will recess until 10 o'clock tomorrow morning.

(Thereupon, at 11:40 o'clock a. m., the hearing was recessed until 10 o'clock a. m., Thursday, Septemnber 18, 1947.)

3631

Hearing Room,
Federal Trade Commission,
Washington, D. C.,
September 18, 1947.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

J. W. Norwood, Trial Examiner.

Appearances:

James D. Ewing and E. Z. DuBose, Attorneys for the respondent National Lead Company. (120 Broadway, New York, New York.)

Edmund T. Wood and Richard Serviss, Attorneys for the Respondents Eagle-Picher Lead Company and Eagle-Picher Sales Company. American Building, Cincinnati, Ohio.)

3632-A Henry E. Gardiner, Attorney for the Respondents Anaconda Copper Mining Company and International Smelting & Refining Company. (120 Broadway, New York, New York.)

James T. Welch and Robert Mathis (Davies, Richberg, Busick & Richardson), Attorneys for the Respondent The Sherwin-Williams Company. (815 15th Street, N. W., Washington, D. C.)

Joseph S. Wright and Paul R. Dixon, Attorneys for the Federal Trade Commission.

3632-B

PROCEEDINGS

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment of yesterday, the hearing in Docket 5253 is now reconvened in Room 332, Office of the Federal Trade Commission, Washington, D. C., at 10:00 o'clock a. m. on the 18th day of September, 1947.

The appearances are as follows:

Joseph S. Wright appearing for the Federal Trade Commission..

Edmund T. Wood and Richard Serviss appearing for the Eagle-Picher Company and Eagle-Picher Sales Company.

E. Z. DuBose appearing for the National Lead Company.

James D. Ewing, appearing for the National Lead Company.

Call your witness, Mr. Wood.

Mr. Wood: Mr. Bowlby.

J. M. BOWLBY was thereupon called as a witness for the respondents Eagle-Picher Lead Company and Eagle-Picher Sales Company and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wood:

3633 Q. Will you please state your residence and occupation?

A. I reside in Cincinnati, Ohio, and am president of the Eagle-Picher Company.

Q. How long have you been president of the Eagle-Picher Company?

A. Since September, 1941.

Q. What was your business connection prior to that time?

A. For the preceding 20 years, I had been a member of the partnership of Barrow, Wade, Guthrie & Company.

Q. And what is your business?

A. Certified public accountants.

Q. Did they work for the Eagle-Picher Company under retainer?

A. They were the independent auditors of the Eagle-Picher Company from about 1926.

Q. Can you name some other typical plants of your firm?

A. Yes. Babcock & Wilcox; Island Creek Coal Company; New York, Ontario & Western Railroad Company—a large group of important companies, since the firm was the oldest accounting firm in the United States.

Q. And how many cities in the United States did you have offices, appoximately?

A. I would say 12 or 15.

Q. Will you please tell us what your education was, Mr. Bowlby?

3634 A. I graduated from college as a mechanical engineer and followed that profession for about five years, and I then entered into commercial and investment banking, and during that time attended night school and took a course in accounting and a course in law.

Q. Now, before becoming president of the Eagle-Picher Company, what, if any, was your connection with the Eagle-Picher Company?

A. From 1930 on, I was the partner in direct charge of the accounting work for the Eagle-Picher Company. During the depression I expanded the activities of the Chicago office of Barrow, Wade, Guthrie & Company, of which I was then senior partner, into the industrial management field, and commencing with 1936 I served the Eagle-Picher Company as a management consultant.

Q. Now, as management consultant to Eagle-Picher, did you at any time make a survey of the company's business?

A. Yes, I made a survey, a very extensive survey in 1936 and 1937.

Q. Did you make any recommendations to the company?

A. Yes, quite a number.

Q. Were they followed by the company?

A. To a degree at the time, not in full.

Q. What in general were the recommendations which the company followed?

3635 A. Oh, probably the principal one was the establishment of the divisional form of organization and operation which has obtained in the company from July 1, 1937, down to the present time.

Q. Will you please explain what you mean by the divisional form of organization?

A. Prior to the inauguration of that form of organization, the company had had one general sales manager who handled the selling staff which sold all of the products of the company, and they had one principal production man; whereas under the divisional form of organization, the division was integrated from top to bottom, and the divisional manager handled both the production and sale of the specific products segregated in the respective divisions.

Q. What are the present divisions of your company?

A. We have the pigment division, the white lead division, the metal division, the metal products division, and the insulation or home conditioning division.

Q. And who are the heads of those divisions at the present time?

A. Mr. Zoller is general manager of the pigment division; Mr. Hayt of the white lead division; Mr. Murdock of the metal products division, and Mr. Carter of the insulation division.

Q. What are your duties and responsibilities as 3636 president of the Eagle-Picher Company?

A. Well, just the normal duties that inure to an office of chief executive of a company of our size and breadth of activity.

Q. Do you attempt to run any of those divisions individually?

A. Oh, no.

Q. Are you familiar with the general policy in those divisions?

A. Yes.

Q. Now, at the time you made the survey for the company which led to the changes of July 1, 1937, did you familarize yourself with the competitive policy of the company to the extent necessary for that survey?

A. I did.

Q. And when you became president of the company in September, 1941, did you further familiarize yourself with competitive policies?

A. I have, since becoming president, kept myself informed on competitive policies of the various divisions.

Q. What was your purpose in familiarizing yourself with those policies?

A. Something that is obviously necessary to an understanding of the business and the establishment of other general policies which are dependent upon the competitive position of the company.

3637 Q. Now, did you at any time find any agreements or understandings between your company and National Lead Company, or any of the other companies engaged in the sale of lead pigments, affecting prices or terms or conditions of sale?

A. No, I never found any such agreements.

Q. At the time you became president of the company, were you concerned in any respect as to whether such agreements existed or not?

A. No, I don't believe it ever crossed my mind that such agreements might exist.

Q. If you had found any such agreements, what would have been your policy in respect to them?

A. Well, I certainly would have looked into their propriety, and if I had found that there were any improper agreements of that nature in existence, I would have taken the necessary steps to terminate them.

Q. Were you particularly conscious at that time of the activity of the anti-trust division of the Department of Justice?

Mr. Wright: Objection, Your Honor. I don't see that that has any relevancy in this matter.

Trial Examiner Norwood: Well, I think that is a leading question.

Mr. Wood: I think it is a proper question, because
Thurman Arnold's campaign was at its height at that
3638 time, and every executive in the country was feeling
very responsible as to his position in regard to the
anti-trust laws; everybody was.

Trial Examiner Norwood: What time was that?

Mr. Wood: September, 1941.

Mr. Wright: Counsel has supplied the answer that he hoped to get from that very leading question.

Trial Examiner Norwood: I think it is a leading question, but I think he may bring out the fact that he kept up with the law and the conditions respecting trade agreements, and so forth.

Mr. Wright: Your Honor, I am not objecting so much because of the fact that it is leading, but it is an absolutely irrelevant matter. Knowledge has no part in this proceeding. The fact that the Sherman Act is on the statute books and has been since 1890 is a well known fact to everyone connected with the business.

Mr. Wood: As president of the respondent corporation, I think the witness should have the greatest freedom in testifying to his own state of mind.

Trial Examiner Norwood: I think they have been allowed in all these cases to state their mental attitude toward this situation. I will overrule the objection. Let him answer.

Mr. Wood: Will you read the question to the wit-
3639 ness, please?

(The pending question was read by the reporter.)

A. Yes, I was.

By Mr. Wood:

Q. Now, what is the general competitive problem of the Eagle-Picher Company?

A. The Eagle-Picher Company is not a leader in any one of its respective lines. In several instances it is second in the field, and in the case of other products it ranks farther down the scale. But I make the point that not being a leader in any one of the lines, it is not in position to dictate the selling price policy in any of the fields in which it operates. It must follow rather than lead.

Q. In the insulation field, who is your principal competitor?

A. There are many. Johns-Manville is probably the principal one.

Mr. Wright: I object to further questions along the line of insulation, Your Honor, as irrelevant and immaterial to this case.

Mr. Wood: I am not pursuing the matter, Mr. Wright. I am just trying to bring out the fact that there is a general problem of the company in respect to which it has a formulated policy.

Trial Examiner Norwood: I think he wants to give 3640 us a complete picture of this company in throwing light on its various activities.

By Mr. Wood:

Q. Now, who is your principal competitor in the sale of zinc products?

A. New Jersey Zinc Company, with some substantial competition from St. Joseph Lead Company and American Zinc, Lead & Smelting Company.

Q. And who is your principal competitor in the sale of lead pigments?

A. National Lead Company.

Q. And who is your principal competitor in the sale of lead products?

A. National Lead Company and Federated Metals Division of American Smelting & Refining Company.

Q. Is it your company's policy to compete in any of these fields by means of price wars?

A. No.

Q. How would you define a price war?

A. A situation in which competing companies are constantly lowering prices to gain a larger segment of the available business.

Q. Now, if the second largest company in a given field commences a price war, what is the probable result, in your opinion?

3641 A. It will lose money and ultimately the more strongly entrenched company will win out in the war.

Q. If you lower a price below your competitor's price, how long is that competitive advantage likely to last?

A. Not any longer than it takes the competitor to lower his price below ours.

Q. Does your company compete with the National Lead Company in the sale of lead pigments?

A. It does.

Q. How does it do it?

A. By endeavoring to maintain a higher quality in its products and to give services to its customers over and beyond that given by its major competitors.

Q. If your company does have superiority of product in this respect to a competitor, is that an advantage to your company?

A. Obviously.

Q. Why, in spite of the fact that you said "obviously"?

The Witness: Will you read the previous question?

Trial Examiner Norwood: Will you read the question?

(The question was read by the reporter.)

The Witness: A superior product available at the same price will sell more readily than the inferior product available at that price.

By Mr. Wood:

Q. Can your competitor match that product, necessarily?

3642 A. Not necessarily.

Q. Has your company engaged in any research activities?

A. Yes, we have very extensive research facilities, both local plant facilities and central research activities.

Q. What if any is the relationship between your research activities and your competitive policy?

A. One of the major objectives of the reseach organization is to strive constantly to improve our products and to work with our customers in producing a product that will meet their requirements or will enable them to improve their products through the use of our products.

Q. Has your company engaged in any institutional advertising?

A. Yes. That is one of the things that I have done since I became president of the company, inaugurated a program of institutional advertising.

Q. What is the general scope of that program, or I had better say, what has been the general scope of that program?

A. It has varied from year to year as to the media employed, but its principal purpose has been to acquaint the business of financial community with the Eagle-Picher group of companies, their financial strength and stability, and incidently, with the products which Eagle-Picher manufactures and which by reason of their limited consumer use are very frequently unknown to the general public.

3643 Q. In what magazines have you advertised, in general?

A. Time, News Week, Collier's, Wall Street Journal, Chicago Journal of Commerce.

Q. Is it your opinion that that type of advertising has any effect on customer acceptance of your products?

A. I think it has a very material effect.

Q. Is that type of advertising intended to increase your business in local areas or nationally?

A. Nationally.

Q. Is it the policy of your company to compete on a national basis?

A. Yes.

Q. Did you read the testimony which Mr. Goetz and Mr. Harner and Mr. Chubb gave before the Commission in July?

A. I have read Mr. Goetz's and Mr. Harner's testimony. I do not recall that I read Mr. Chubb's.

Q. Does their testimony represent the type of service and help which it is your policy to give the customer?

Mr. Wright: Objection, Your Honor. If this witness is going to testify as to the type of activities that counsel is referring to in this question, he should testify to them directly himself rather than by adoption of another witness' testimony when he has not even been in the room when it was given.

Trial Examiner Norwood: I think it would save a
3644 great deal of time to let him adopt it. But if you
object to it, I think that that would be covering too much ground in one question and answer.

Mr. Wood: Mr. Bowlby, as president of the company, is not familiar with all of the details to which those men testified. Now, I did not ask him whether their testimony was true. I asked him whether or not those activities represented the policy of the company which was his purpose.

Mr. Wright: Now, I do not have off hand a recollection of all the activities that those three gentlemen described in that testimony. And I certainly cannot let such a question go by without objection and without having an opportunity of examining that testimony again.

Trial Examiner Norwood: If he is going to adopt the details, I think that would not be admissible at all. If he is going to adopt the general policy which this testimony reflects—

Mr. Wood: That is my point.

Trial Examiner Norwood: That is too much of an opinion. I think it will not take him long to tell us what their general policy is, and I think it is more satisfactory, in the face of an objection.

I think I shall have to exclude it.

Mr. Wood: I think he has testified previously that their policy was to give service, and that that has been 3645 adequately covered by his previous answers.

Trial Examiner Norwood: The testimony of these witnesses and what it reflects already appears in the record, you see. If he wants to add anything to it, I think he can do so especially, you see.

I will sustain the objection.

By Mr. Wood:

Q. Now, what, as you understand it, is your company's general policy in respect to the pricing policy of lead pigments?

A. In general we maintain a differential over and above the price of the basic raw material, that differential varying as between different products.

Q. On a lead pigment such as basic lead carbonate or lead oxide, what determines your company's exact price at any given time?

A. Primarily the price at which the product is obtainable from competition.

Q. What is your pricing policy on products such as leaded zinc, basic lead sulphate, and blue lead?

A. To the best of my knowledge, the same policy maintains in respect to those products.

Q. Are those products made just the same way as the oxides and the basic carbonate?

A. I could not tell you.

Q. What is the opinion of the management of your 3646 company as to the future of the business of manufacturing and selling basic lead carbonate in oil?

Mr. Wright: Objection, Your Honor. I do not think that that is a relevant matter to this proceeding. It requires hearsay, in the second place.

Trial Examiner Norwood: Will you read the question?

(The pending question was read by the reporter.)

Trial Examiner Norwood: I think that he can tell us what his opinion is, if it is relevant, and that is in part of that question.

Mr. Wright: Your Honor, what possible relevance does that have with respect to whether they are discriminating in price?

Mr. Wood: I think the purpose and the policy of the company is always a relevant matter in a case of this type.

Mr. Wright: Now, this is not the purpose or the policy of the company at the time we alleged these discriminations or conspiracies began. This is a projection into the future, which is admittedly quite some time after the initiation—

Trial Examiner Norwood: It is not required as an explanation of the present or past action, and I think I shall have to sustain that objection.

3647 Mr. Wood: Then I will ask the question differently, and put it this way:

By Mr. Wood:

Q. At the time you made your survey for Eagle-Picher in 1936 and 1937, what was your estimate of the position and future of the business of manufacturing and selling white lead carbonate in oil?

A. At that time the use of white lead carbonate in oil—that is in the paste form—seemed to be on the decline.

Q. Has your company ever considered giving up the business entirely?

Mr. Wright: Objection, Your Honor. What relevancy can that have to this proceeding?

Mr. Wood: I think it is rather important to show the company's general attitude.

Mr. Wright: Well, there again what has their general attitude on whether or not they had ever considered staying in the business or leaving it got to do with the specific acts which are charged in this complaint?

Mr. Wood: Well, I do not wish to be accused again of putting words in the witness' mouth by arguing an objection.

I think from the point of view of the testimony yesterday, and the testimony that has been in this case with respect to competition between lead in oil on the one hand and mixed paint on the other, which we conceive to be a
3648 very important matter in this case, I think that issue
in the case clearly makes this testimony relevant.

Trial Examiner Norwood: How are you going to connect this up with any of the issues as to what his view was? I can see how it might be of value in explaining some of his actions here, but I think I would ask him about the actions and ask him the reason for them.

Just bringing out the view unconnected I think is objectionable, and I shall sustain that objection.

Mr. Wood: I will go at the subject matter differently still and I will ask the witness whether or not his company manufactures and sells any paints?

The Witness The company does, through its divisions, subsidiaries and affiliates.

By Mr. Wood:

Q. Is your company at the present time competing in the mixed paint field?

A. To a relatively minor degree.

Q. Has your company made any effort to assist mixed paint manufacturers who bought lead pigments from you?

A. Yes, we have worked with those manufacturers on paint formulations to enable them to improve their products, and expand their volume of business, and thereby obtaining increased sales of our products or the introduction of new products manufactured by us.

3649 Q. Is there competition between mixed paints and white lead in oil?

A. Read the first part of that—is there competition?

Trial Examiner Norwood: Read the question.

(The pending question was read by the reporter.)

The Witness: There is.

By Mr. Wood:

Q. And from the point of view of your company policy, where have your placed your emphasis?

A. Up to the present time, emphasis has been placed on white lead and oil in a finished form, our RTU.

Q. And in what division has that been?

A. It is in the white lead division.

Q. And does that compete with the products manufactured by the pigments division and sold by Mr. Voller's division?

A. Yes, it does.

Q. What in your opinion is the relative importance of the white lead paste in comparison with the RTU?

A. You mean from a volume standpoint in the company's sales?

Q. From the point of view of your future business, as you see it.

Mr Wright: Objection, Your Honor.

By Mr. Wood:

Q. Your future prospects?

Mr. Wright: Objection, Your Honor, on the ground
3650 of relevancy again. I don't see what the future prospects as between two of these lead pigments have to do with the issues that we have at hand.

Mr. Wood: I am perfectly aware that all through this case there has been a great deal of testimony by practically every witness in the case, whether called by the Commission or called by the respondents, that is not directly linked to the most technical aspects of the issues of the case. A great deal is background testimony which we want in the record to give the Federal Trade Commissioners a picture of the industry as a whole, because they are charged with the responsibility of acting in the general public interest, and I do not think that all testimony should be excluded simply because you cannot tie it in closely with the technical aspect of an issue.

Mr. Wright: By counsellor's definition there, any executive or management problem of the Eagle-Picher Company would be relevant and admissible here in this testimony. It has no possibility of connection with the issues in the case. This does not relate to what was in the minds of the people when the system that we are talking about now was established; this is a question that relates to the mind of the man in 1947, his projection for the future.

Trial Examiner Norwood: Well, there are some rather intricate economic questions in this case, and probably
3651 we should admit some evidence here that would be considered not on the issues at all, but afterward, as to the remedy.

We have been inclined when we get the president of a company on the stand, and the company is a respondent, to resolve the doubt in his favor and let him tell us the story about his company. We have always done that through all the anti-trust cases, so unless there is any real positive harm to be done by it, I think that counsel should agree to let these matters in as to what his attitude is.

Mr. Wright: Well, Your Honor, my objection is based on the primary objection of all irrelevant matters, since all it does is serve to confuse possibly someone who may not be familiar with the issues involved as to the record in the case. Furthermore, it burdens the record with a mass of material that may be interesting from the point of view of management of the Eagle-Picher Company, but has nothing to do with this case.

Trial Examiner Norwood: Well, I think that counsel has stated the principal about that, but where these details here appear where the information may be of some probable value, even though it does not apply directly to the issues, I am inclined to resolve the doubt in the company's favor in the matter of letting him tell the whole story of his own business.

I will overrule that objection subject to striking this material if it appears injuriously irrelevant.

3652 Mr. Wood: Will you read the question to the witness, please?

(The pending question was read by the reporter.)

A. I anticipate that the RTU business will be much larger and more attractive than the paste segment of the business.

Mr. Wood: May we have a five-minute recess, Your Honor? I think I am through with the direct examination of this witness, but I want a chance to talk with Mr. Serviss.

Trial Examiner Norwood: We will take a five-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: We will resume. You may proceed, Mr. Wood.

Mr. Wood: You may cross-examine, Mr. Wright.

Cross-Examination by Mr. Wright.

Q. Where are the main offices of Barrow, Wade & Guthrie?

A. The head office?

Q. Yes, sir.

A. New York.

Q. New York. Is that where you maintain your offices as the senior partner in that firm?

A. No; I was senior partner in charge of the Chicago office.

Q. In Chicago?

A. Yes.

3653 Q. How long did you maintain your residence there?

A. From 1922 until 1941, when I went to Cincinnati.

Q. What is this product RTU that you referred to?

A. It is white lead in a ready to use form.

Q. How does that differ from the paste white lead?

A. Paste white lead has only a limited amount of linseed oil added, whereas the RTU, as I understand it, has the full amount of oil and dryers, and any other elements that enter into the finished paint product, so that it is ready to be applied without any further change.

Trial Examiner Norwood: Well, that makes it ready-mixed paint, does it not?

The Witness: Yes, sir.

Trial Examiner Norwood: What is the difference?

The Witness: Except that the RTU is only the white lead itself and it is not made in colors.

Trial Examiner Norwood: I see.

By Mr. Wright:

Q. That is a straight basic carbonate white lead pigment, then, is it?

A. That is correct.

Q. Does the Eagle-Picher Company do any substantial business in the marketing and sale of aggregates and tailings from its operations?

Trial Examiner Norwood: Will you read that 3654 question?

(The pending question was read by the reporter.)

Mr. Wood: I really have no objection to the witness' answering the question, but I feel that I should object on the score of relevancy.

Mr. Wright: Your Honor, I objected originally to testimony about their business in insulating materials and so forth, and I assure you that this will be connected up.

Trial Examiner Norwood: Objection overruled.

A. Yes, we sell the residue from our milling operations, which is customarily known as chats, or tailings.

By Mr. Wright:

Q. What are those products used for, Mr. Bowlby?

A. For railroad ballast and the topping of roads air strips, exhibition grounds, or anything of that kind.

Q. Those are all produced down in your lead producing fields; is that correct?

A. In the tri-state field.

Q. Over what areas do you market those products?

A. They go over a substantial area, because they are sold largely to railroads. However, delivery is made in the immediate vicinity to the connecting road.

Q. And the customer transports it wherever he wishes to use it; is that correct?

A. That is correct.

3655 Q. You sell it, then, f. o. b. at the point of pro-

A. Yes, sir.

Q. Do you attempt to make sales of that product on the eastern seaboard?

A. Not to the best of my knowledge.

Q. On the Pacific Coast?

A. No.

Q. Why don't you seek a national distribution of that product?

A. Because there is an ample outlet among the roads serving the territory where it is produced.

Q. Is that product in competition with aggregates and gravel and other materials used for ballast, such as cinders?

A. I cannot answer that definitely. I assume that it is.

Q. Approximately what is the price per ton at which that product is sold?

Mr. Wood: May it please the examiner, I object to the indefinite continuation of this line of questioning, because it has nothing to do with the issues of the case.

Mr. Wright: Your Honor, I can only assure counsel and yourself that I will attempt to connect this matter up.

Trial Examiner Norwood: This is cross-examination. He may be testing him as to his knowledge of this business.

Mr. Wood: There is no lead pigment involved in any respect.

3656 Trial Examiner Norwood: Objection overruled. Do you want the question read?

The Witness: If you please, Your Honor.

Trial Examiner Norwood: Will you read the question?

(The pending question was read by the reporter.)

A. I do not know.

By Mr. Wright:

Q. Can you state from your experience with the company whether it would be substantially less on a tonnage basis than, for instance, litharge, or red lead?

A. Oh, yes, it is much lower than litharge or red lead, because it is a waste product. I do know that the price varies according to the work that is necessary in cleaning and screening the product.

Q. Would transportation costs on shipping that material any great distance, say, from Joplin to San Francisco, amount to as much as the customary price at which you sell the product?

Mr. Wood: I object to the question as indefinite—"would amount to as much".

Mr. Wright: "As much or more", the question stated.

Mr. Wood: I am sorry. I did not understand it that way.

Trial Examiner Norwood: Is the objection withdrawn?

Mr. Wood: If I understand the question correctly,
3657 I am perfectly willing to have the question asked.

As I understand the question, you asked whether the cost of the freight to San Francisco would be as great as the cost of the product at Joplin; is that it?

Mr. Wright: That is it.

Mr. Wood: He can ask that.

Trial Examiner Norwood: Very well.

A. I would make the assumption that it would be more.

By Mr. Wright:

Q. Is it the policy of the company to seek national distribution on that chat or tailings?

A. No.

Q. Would it be fair to state that the cost of transporting the article from Joplin in the tri-state area would prevent national distribution of the product?

A. Yes, it would probably be fair to make that statement.

Q. Br. Bowlby, you were testifying about the efforts of the Eagle-Picher Company to improve the quality and to obtain quality advantages over competition on these various lead pigments.

From your experience, is it not logical to assume that any marked quality advantage of one product over another would ultimately reflect itself in selling price?

A. No, I would say that hat does not necessarily follow.

Q. What are the alternatives to that?

3658 A. The maintenance of the differential between that product and competitive products.

Q. The quality differential at the same price?

A. Yes.

Q. Is it not fair to assume that over a period of time, that quality differential would become so widely known that the inferior product could not be sold at the same price?

A. No, not necessarily. The inferior product may have ample demand for embodiment in that end product where the highest quality is not required.

Q. Now, let us take a battery of litharge, for instance.

A. Yes.

Q. Assuming that your company could develope a battery of litharge which is superior in many respects to that of the competition on the market—and that is a real superiority now, referred to—is it not logical to assume that the trade becoming aware of those advantages will divert business from the inferior product sold ~~at~~ the same price over a period of time?

A. Yes, for the production of an end use product that required that high degree of refinement.

Q. Your answer was yes, then?

A. With those qualifications.

Mr. Wright: No further cross-examination.

Mr. Wood: I have no redirect.

3659 Trial Examiner Norwood: Are there any further questions?

Mr. Wood: No further questions.

Trial Examiner Norwood: Thank you, Mr. Bowlby. (Witness excused.)

Mr. Wood: We have one more witness, Mr. Hayt, and his testimony will be rather brief. At the end of his testimony, we will have to discuss what we are going to do next, which is primarily up to Mr. Welch. I suggest that we meet at 2 o'clock.

Trial Examiner Norwood: You would rather defer calling this witness until 2 o'clock?

Mr. Wood: I understand the witness is leaving at 3:45.

Trial Examiner Norwood: We can examine this witness, and go along here for a half hour or more, and then we can reconvene at 2 o'clock to discuss the future arrangements.

Mr. Wood: Mr. Hayt, will you take the stand, please?

W. H. HAYT was thereupon called as a witness for the respondents Eagle-Picher Company and Eagle-Picher Sales Company and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wood.

3660 Q. You are the Mr. Hayt who testified previously in this case?

A. Yes.

Q. And you are employed by Eagle-Picher?

A. Yes.

Q. As manager of the lead in oil division, is that correct?

A. The white lead division.

Q. How long have you been employed by the Eagle-Picher Company?

A. The Eagle-Picher Company and its predecessor, about 33 years.

Q. What have been your duties with the company during the period of your employment?

A. Originally I was a salesman, then a branch manager, then assisant manager in the pigments division, and later a division salesmanager, and then a division manager.

Q. How long have you been head of the white lead department?

A. Since July 1, 1937.

Q. At the time you became head of that department, were there any understandings with National Lead Company or any other competitors with respect to the prices or the terms and conditions of sale of white lead?

Mr. Wright: I object to that question, Your Honor. It calls for facts that may be without this witness' knowledge. It did not require an answer as to whether he himself
3661 knew of any such understandings.

Mr. Wood: May I have the question read, please?

(The pending question was read by the reporter.)

Trial Examiner Norwood: He can only testify as to what came to his knowledge. I don't think he can testify generally as to what everybody in the company did.

Mr. Wood: Well, I will put it this way—

Trial Examiner Norwood: The objection is sustained on that.

By Mr. Wood:

Q. At the time you became head of the white lead department of the Eagle-Picher Company on July 1, 1937, would you have known about any agreements or other understandings with National Lead Company or any of your other competitors in the sale of white lead in respect to prices or terms and conditions of sale?

Mr. Wright: I object to that, Your Honor. The question is would he have known.

Trial Examiner Norwood: I think you had better ask him what he does know, what he did know or what came to his attention.

Mr. Wood: The man became head of the department at that time, and there could not have been understandings without his knowledge.

Mr. Wright: That is counsel's conclusion.

3662 Mr. Wood: Will you read my last question?

Trial Examiner Norwood: I think you should direct the question to his knowledge, and then the circumstances which would indicate that if there were any such thing, he would know about it.

I will sustain the objection to the question in its present form.

By Mr. Wood:

Q. To your knowledge, were there any agreements between your company and the National Lead Company, or any other competitors in the sale of basic lead carbonate in oil on July 1, 1937, or thereafter with respect to prices or terms and conditions of sale?

Trial Examiner Norwood: Answer the question.

A. There were none that I knew of, and none that I heard of subsequently.

By Mr. Wood:

Q. Now, Mr. Bowlby mentioned a product manufactured by your company called RTU. Can you explain in a little more detail just what the nature and purpose of that product is?

A. Well, white lead in oil in paste form is an inconvenient product to use in that it is a semi-finished product, and requires further processing. Although it is in direct competition with mixed pigment paints, the mixed pigment paints reach the user in a form ready to use,
3663 whereas it requires both skill and time to prepare the
white lead in oil for use.

We felt that that was largely responsible for the decreasing use of the product, and therefore wanted to put it in a form that was more readily acceptable to the consumer, which would save him time and eliminate the necessity for skill.

Mr. Wood: Will you mark this for identification, please, as Respondent's Exhibit 196.

(The document referred to was thereupon marked Respondent's Exhibit 196 for Identification.)

By Mr. Wood:

Q. I hand you a document which has been marked for identification as Respondent's Exhibit 196, and ask you if you can state what this document is?

A. That document is an advertisement for Eagle RTU white lead paint and some additional reference to Eagle white lead in oil.

Q. You said the document was an advertisement. I notice at the bottom of the document, "This advertisement will appear in Better Homes and Gardens, April, 1946; American Home, April, 1946."

Is the document an advertisement from a magazine, or a sample of an advertisement that appeared in a magazine?

A. It is a reprint or preprint of the advertisement as it was about to appear.

Q. And did the advertisement so appear?

3664 A. I presume so.

Q. Did your company put out other advertising of generally like nature?

A. Yes, considerable.

Mr. Wood: I offer the document into evidence.

Mr. Wright: Your Honor, I am going to object to this on the ground of relevancy and competency. On its face it has no relevancy to the case. It is incompetent for any purpose that I can conceive of at this point, since it is a proof of an advertisement about which the witness doesn't know anything. He doesn't know whether it was actually run or not.

Trial Examiner Norwood: That is a point well taken.

Mr. Wright: It is a document which he doesn't appear to have had anything to do with the preparation of.

Trial Examiner Norwood: That point is well taken. He has not said it appeared anywhere, but I would admit it to show what the respondent actually represented to the public if there is anything in there that appears to bear on the nature of the competition.

Mr. Wright: Your Honor, assuming now that that is an advertisement that appeared, it appeared subsequent to the date of issuance of the amended complaint.

Trial Examiner Norwood: Objection sustained.

By Mr. Wood:

Q. When did you put RTU on the market?

3665 A. It was first put on the market in 1940, I believe, for a short period, and then with the restrictions on the use of linseed oil that came in late '41, I believe, after a short experimental period it was withdrawn, and then subsequently replaced on the market in 1945.

Q. When in 1945?

A. Early, probably February or March.

Q. And did your company advertise RTU during 1945?

A. I cannot say definitely when the advertising program on RTU started, but probably late in '45.

Q. Do you authorize the advertising put out by your department?

A. The advertising is provided for through a central advertising department which handles the advertising for all divisions, but the division's appropriation for advertising is prepared under my supervision, and all advertising copy is submitted to me for approval and relief.

Q. Was this particular advertising copy ever submitted to you for approval and release?

A. Yes.

Q. And I am referring to Respondent's Exhibit 196.

A. Yes.

Q. And was the publication of this advertising authorized by you?

A. Yes.

3666 Q. Have you ever seen a replica of this advertisement, Respondent's Exhibit 196, appear in any magazine of national circulation?

A. If I have not seen that particular one, I have seen numerous ones substantially the same.

Mr. Wood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: I will sustain the objection subject to some further agreement between counsel about the matter.

Mr. Wright: Your Honor, I am going to move to strike all the testimony relating to the identification of this exhibit which referred to the contents of same and to counsel's statement which read into the record the contents of same.

Trial Examiner Norwood: Well, I think the record should show all this. I will deny that motion.

By Mr. Wood:

Q. Mr. Hayt, in the sale of your white lead in oil paint, what has been your pricing policy?

A. Well, generally speaking it has been our endeavor to set prices on cost plus a reasonable margin of profit, but in actual practice, the limiting factor was prices obtained by our competitors.

Q. And what competitors do you have in mind?

A. Well, the National Lead Company, Anaconda,
3667 Glidden, Sherwin-Williams.

Q. In general, have you changed price when the National Lead Company changed price?

A. Yes.

Q. How did you know of their price changes?

A. The information comes in very rapidly from our salesmen and sales offices just as soon as the price changes are announced.

Q. Have you always followed the National Lead Company in changing price on white lead paste?

A. Do you mean following them exactly as to the amount of the change?

Q. Yes.

A. No, we have not.

Q. Have you invariably made a change when the National went up in price?

A. I think generally when National has gone up that we have gone up to some extent.

Q. But not necessarily the same amount?

A. Yes, sir.

Q. Now, in respect to your product, RTU, how do you price that product?

A. On the same basis as I described for white lead in oil; that is to say, cost plus a reasonable margin of profit. But there the limiting factor is the competition from the
3668 highest grade ready-mixed paints.

Q. Does National have a product on the market that is comparable to RTU?

A. Not at the present time.

Q. In pricing RTU, do you follow the prices of National?

A. You cannot, if they do not have a product on the market.

Q. I am sorry.

In general, how does the price of RTU compare with the price of a good quality mixed pigment paint?

A. It is considerably higher.

Q. Does your company manufacture and sell a product called basic white lead sulphate?

A. Yes.

Q. Is that in your division?

A. No.

Q. Do you know to whom, in general, that is, what class of trade, your company sells that product?

A. Almost exclusively to paint manufacturers.

Q. The products of those customers are in competition with your RTU?

A. Directly.

Q. Now, in your advertising and merchandising, what is the emphasis between RTU and white lead in oil respectively?

Mr. Wright: I am going to object to that question, unless the time is specified on that, Your Honor. I do 3669 not think it is admissible to talk about such matters subsequent to the complaint.

By Mr. Wood:

Q. You may limit your question to—what is the date of the amended complaint? May, 1946?

Mr. Wright: I am going to take objection to any testimony later than the date of the original complaint in 1943, unless it can be connected up with practices and made relevant to practices prior to that time, because the issues as to the white leads here were drawn at that time.

Mr. Ewing: But there was an amended complaint which superseded the first one, and you certainly cannot limit it to the date of the original complaint under those circumstances.

Trial Examiner Norwood: No.

The fact being, as you bring out, that certain changes were made in the entire matter after the complaint was made, it would probably be considered in connection with the original.

I will overrule the objection to any relevant evidence prior to the date of the amended complaint. I will ask counsel to rephrase his question, and that will meet the other objections.

He did do that, did he?

Mr. Wood: I think I did do that. I said "limit your answer to the date of the amended complaint, to a 3670 period prior to the date of the amended complaint, which was May, 1946.

Mr. Wright: I did not so understand counsel. But if that was the question, I have no objection.

Trial Examiner Norwood: You may answer that question.

Do you want the question repeated?

By Mr. Wood:

Q. It was the question as to the relative emphasis your company placed on the products RTU and white lead in oil paste prior to the date in question.

A. Our emphasis has been placed almost entirely on the RTU product. White lead in oil paste is very much in a secondary position.

Q. What was your reason for placing your emphasis as you did?

A. The RTU is a product that is more acceptable to the consumer, because it reaches him in a more readily usable form, and therefore the prospective potential market is much greater, and the possibilities of prolonging the life of white lead as a business were more probable.

Mr. Wright: Your Honor, I am going to move to strike that question and answer and the one immediately preceding it. It calls for an answer based on emphasis, and that is a very strange and indefinite term and could have any one of many different meanings.

3671 Mr. Wood: The witness has made a very clear statement of the company's competitive policy in regard to the materials that are primarily involved in this case, and I think it should stand.

Trial Examiner Norwood: I think that emphasis is sufficiently definite in there. It is very clear what meaning is given to it.

Your motion is denied.

Mr. Wood: Could we have a recess until 1:30?

Trial Examiner Norwood: Is that agreeable?

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Is that agreeable, to recess until 1:30?

Mr. Wright: Very well.

Mr. Wood: We will recess, then?

Trial Examiner Norwood: We will recess until 1:30.

(Thereupon, at 12:05 p. m., a recess was taken until 1:30 p. m., same day.)

3672 After Recess

1:30 p. m.

Trial Examiner Norwood: Come to order.

Take the stand, Mr. Hayt.

W. H. HAYT resumed the stand and testified further as follows:

Cross-Examination

By Mr. Wright:

Q. Mr. Hayt, you spoke of the relative emphasis on RTU and paste white lead. What do you mean by emphasis?

A. The importance that the products take in our marketing plans.

Q. Well, will you explain that?

A. Originally, of course, there was no RTU in the line. Our only product at that time of that type was the keg lead, and ever since I took over the division in 1937 I felt that the white lead in oil, as such, was a dead duck and that changes should be made to make the product more readily marketable.

Finally I was able to get the company to agree to let me put a product of that type in the line, and having gotten that agreement, naturally I chose in all of our marketing plans, whether it was with the salesmen or in the advertising, to make that the leading product, and the advertising and sales emphasis was placed on that product. 3673

Q. Now, aside from the addition of more linseed oil and mineral spirits, how does the RTU differ from the paste lead?

A. Well, there is one other important element in there, the dryer which is also added so that it is a finished product in every sense of the word.

Q. That is the only other ingredient that is added aside from the additional spirits or oil?

A. That is right, you have got those three essential items, the oil, the voluble thinner and the dryer.

Q. About how much dryer is contained in each gallon of the RTU?

A. Relatively small, about a pint or half pint.

Q. Now, when was the name adopted for this product by Eagle-Picher?

A. Well, I started using that term shortly after I became head of the division. It was a convenient abbreviation in referring to a ready to use white lead paint. We just gradually condensed that to RTU as an abbreviation, and when we finally came out with the product, that became the official designation.

Q. When was that?

A. Originally I think it was late in 1940, for a temporary period.

Q. For how long a period was that? Did you
3674 cease manufacturing the product for awhile?

We took it off the market when the early wartime shortage developed in linseed oil, which presented manufacturing complications, and then we did not resume marketing it again until 1945.

Q. How do your sales of RTU in dollar volume compare, or did they compare in 1941 with your sales of paste white lead?

Mr. Wood: I object to the dollar volume questions for the simple reason that we do not wish to tell our competition just how well we are doing with the product.

Mr. Wright: The question does not require an answer in figures. It asked for a comparison of dollar volume.

Mr. Wood: Well, I am afraid they could figure it from the answer.

Mr. Wright: I asked about the period in 1941.

Mr. Wood: That is all right for 1941.

Trial Examiner Norwood: Answer the question.

A. Well, 1941 is hardly a fair period for comparison because, as I say, the product was put on the market for a relatively short period, and then withdrawn because of unforeseen raw material complications.

By Mr. Wright:

Q. For how long a period was it on the market at that time?

A. About 90 or 120 days.

Q. So that it really has not been on the market in
3675 any substantial sense until when? 1945?

A. 1945.

Q. At what time in 1945?

A. It was early in the year. I would say February; perhaps March.

Q. In your first year of full marketing back in 1945 and the early part of 1946, what was your relative volume on paste white lead and RTU?

Mr. Wood: I object to the question as calling for confidential information.

Mr. Wright: I do not see how it possibly can be figured, because we certainly have not gotten the individual figures on paste white lead sales of Eagle-Picher Company in this time. So if it is a proportional basis, how could it be disclosing any figures?

Mr. Wood: I think Mr. Hayt did produce figures back last October.

Mr. Wright: Your Honor, if the respondent is seeking to establish on the record here that this RTU is taking the place of white lead, how can he now come in and object to showing the relative volume of both of these products? It seems to me he has to take one position or the other.

Mr. Wood: I am perfectly willing to have him testify that it is taking place. But I do not wish to give the percentage figures if I can help it.

3676 Mr. Wright: In that event, Your Honor—

Trial Examiner Norwood: You can allow him to cross-examine him on the statement that it is taking place. Will you read the question again?

(The pending question was read by the reporter.)

Trial Examiner Norwood: Objection overruled. Answer the question.

A. I would say that RTU was two to three times in dollar volume the cake lead or paste lead sales.

By Mr. Wright:

Q. Do you have figures on those volumes for that period of time?

A. I do not have them with me. They are available.

Q. They are available from the company?

A. Yes.

Mr. Wood: I might say, I would like to say that we would certainly be willing to show Mr. Wright our books and our figures on that, but we do not want them made public unless it becomes necessary. But if Mr. Wright wishes to examine the figures or have one of the investigators for the Commission examine the figures, we will extend them every courtesy.

Mr. Wright: With that statement of Mr. Wood's, I will make no further objection to that testimony. Otherwise I intended to make a motion to strike.

3677 Trial Examiner Norwood: All right, sir.

By Mr. Wright:

Q. Mr. Hayt, as I understood your direct testimony, it was to the effect that it has been your policy in white lead sales to follow generally the prices, terms and conditions of sale announced by the National Lead Company; is that correct?

A. You mean, follow them at any given time, and make our changes at substantially the same date?

Q. Generally, follow them. Was that your testimony?

A. In the sense that we meet the conditions which they established as to terms of sale.

Q. Now, is white lead in oil the commodity where price chances occur very frequently in normal times of the relatively slow pigment market?

Mr. Wood: The question is objected to as indefinite. What is meant by "normal times"?

Mr. Wright: I withdraw the question to save argument, Mr. Examiner.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Wright:

Q. In your original answer this morning to those questions on direct examination where you say you gen-
3678 erally follow, you had no limitation of time on those answers, did you?

A. I do not know that I understand what you mean as to "limitation of time."

Q. You stated this morning that you generally follow the pricing practices and prices of National Lead Company?

A. Yes, sir.

Q. And you did not mean to limit that in your mind to any period of time, did you?

A. No.

Q. You are speaking now of your whole experience with the company?

A. That is right.

Q. Now, in the period of time from 1937 to 1941, or to the end of 1940, was white lead in oil a commodity on which prices changed very frequently?

A. I do not know what you mean by "frequently". I would say that during that period they probably changed three or four times a year.

Q. When you make a price change on white lead in oil, it affects your whole price structure? What mechanics do you follow to get that information out to the trade?

A. You mean, in the way of price card announcements?

Q. Yes, sir.

A. We have printed as quickly as possible and 3679 mailed immediately a price card or price change announcement to the trade at large.

Q. You have several types of price cards for several different types of trade, do you not? Or did you have in that period?

A. Two, really.

Q. What classes of trade were those?

A. There is the one that was for the distributor, indicating his cost, and then there were the other three representing the prices to the dealer; that is, the other three were on one card, representing the prices to the dealer, the painter, and the public.

Q. Did you also have price cards or quotations to railroads and industrials?

A. No.

Q. That was not handled by the card?

A. There were generally no announcements sent out to them. They determined the price by sending in inquiries and receiving quotations.

Q. My recollection of your testimony is that you have not always followed National in some cases. They have raised the price, and while you have raised it you have not raised it to the same extent that National has, and that otherwise you have not followed the lead of National in making changes in terms of conditions and prices on white lead.

3680 Is that a correct statement?

A. Yes, sir.

Q. Now did you mean that answer to be limited in time in any way? Do you have any particular period of time which was the basis of that answer?

A. No, that ranges over the period of my experience with the company.

Q. Now, taking the period from 1937 to 1941, will you cite an instance where there was such a change in price or practice by the National Lead Company which was not followed?

A. I don't think from memory that I can confine it that close as to time.

Q. Now, that is 1937 to '41, or five years?

A. Well, as I say, over those periods you have the price changes occurring at the rate of perhaps three or four a year, and it is hard for me to say specifically whether there were at that time any prices in effect which were not the same as National's.

Q. Now, I have here a document, Commission's Exhibit 656-A and B, which have been identified as a list of the changes in prices and terms and conditions of sale of white lead in oil by the National Lead Company over a period of time from February, 1930, down through January, 1944.

Will you please examine that and tell me what of the changes which are listed there—starting in January, 3681 1937, and running down through January, 1942—were not followed by Eagle-Picher Company?

Mr. DuBose: Did you identify that by exhibit number?

Mr. Wright: Yes, 656-A and B.

A. That would be difficult to do without making a direct comparison with our price changes at the same time, although this does remind me of some of these quantity prices for lots of various sizes which were in effect at that time, and I know that during that period there were occasions when we could not meet their quantity prices. They would set a price for a certain quantity, and we might have that same price, but on a lesser quantity.

By Mr. Wright:

Q. Now, to what are you referring there in that answer?

A. Well, some of these 1000 or 500 pound prices, and their reference to A, B and C.

Q. Now, I am asking from 1937 on down, and I am assuming that since you became manager of the white lead department in 1937, since you were not going to testify about things that occurred prior to that time—

A. I was the salesmanager in Chicago at that time, and was of course familiar with white lead prices.

Q. Now, I asked you particularly with reference to the period beginning with January 1, 1937.

3682 A. You would have much the same situation in here. I notice that they have some quantity prices, and

I cannot tell you specifically whether our quantity prices applied to exactly those same quantities, or not, but there were many times when our quantities prices were not the same as theirs.

Q. Now, let us get into this column under "Agents". That category of National's was the same as your distributors, was it not?

A. That is right.

Q. And on list price you had a corresponding figure. Now, comparing those two columns all the way down through January 1, 1937, are there any differences there?

A. Well, I cannot say as to that from memory, because there are a good many prices there on different dates. That would be quite a feat of memory to remember each one of those.

Q. You remembered this morning that you had not followed National Lead Company, and you stated that you had not raised the price when they had raised it. I assumed that you had some concrete instance that would be within the time which we are talking about now to illustrate that point.

A. As I recall it, there was no reference to the time this morning.

Q. Well, now, what time period did you refer to, then, this morning?

A. I was speaking generally about our practice
3683 during the period with which I am familiar.

Q. Well, now, this period that I have been talking to you about covers the first half of your experience in charge of that division, the period from 1937 through '41. Then the things that you were speaking of this morning, and on which your answers this morning were based, occurred subsequent to 1941?

A. Well, from the document you have shown me, I cannot state specifically whether any of the variations that I mentioned this morning occurred precisely during that period or not.

Q. In other words, you don't recall precise variations?

A. I recall the variations, but I don't recall exactly the time period in which they occurred.

Q. What were the variations?

A. Principally the ones that I mentioned as to differences in relationship between price and quality involved.

Q. Do you have a record of the price changes that

Eagle-Picher Company has made in its white lead in oil over the period since you have been in charge?

A. I think so.

Q. That would show all the various classifications as to quantity and dates of the changes?

A. Yes, with this exception, that oftentimes the cards
as published and when published would carry a price
3684 for a given quantity that might not later be adhered
to because it was less impractical.

Q. Will you explain that?

A. I mean that we might announce a price for a ton, and it might later develop that it was impractical to maintain that quantity, and we had to shave that and accept a thousand pounds at that price.

Q. In other words, you were departing from your announced terms and conditions of sale?

A. Because of the competitive situation.

Q. Now, it was the departures from your announced published terms and conditions that you were referring to when you said that you did not always follow National?

A. That may be. I am not too clear on that, because after the cards were out sometimes the actual schedules in effect would drift away from the announcements as made on the cards.

Q. Well, did that occur as to dealers and distributors?

A. Well, we have never had but very few dealers accounts, and I am thinking mostly of the distributors.

Q. In other words, the quantity differentials that applied to the distributors?

A. That is right.

Q. Under consignment contracts? I take it distributors were under consignment contract?

A. Now, again if you are limiting yourself to the
3685 consignment period, I don't think that that statement
would apply because the consignment contract was in
effect on any quantity contract.

Q. In other words, you did not make the quantity differentials to people under consignment?

A. That is right.

Q. Now, when did you abandon the consignment contract?

A. During the war, the early stages of the war.

Q. So then in the period that I was talking about from

1937 up to 1941 or '42 there would have been no quantity discounts to any of your distributors?

A. That is probably true.

Q. Well, don't you know?

A. Well, I cannot be specific on that particular period, because I don't have the record before me.

Q. Well, then, can you tell me what types of customers you did give those quantity discounts to in that period from '37 to 41 or '42?

A. Well, our direct sales to painters, for instance. Does that answer your question?

Q. Are there any other classes?

A. Well, that would be about the only type. We would have only those two types that amount to anything in our volume of sales, the distributor and the direct sale to the painter.

Q. In the period from '37 to '41, how would your
3686 sales volume be divided as between distributors and
painters, direct sales to painters?

A. Oh, I suppose 90 percent of it would be through distributors.

Q. So then these deviations that you have been talking about on quantity would only apply at most to about 10 percent of your business during that period?

A. That is right, during that particular period.

Q. Now, can you tell me whether there has been in your recollection any change in list price of white lead in oil, that is consumer price, by National Lead Company that has not been followed promptly by the Eagle-Picher Company?

A. Well, usually those changes would affect all classes of trade at the same time, and the same exception would apply except that the consumer or list price, as far as we as manufacturers are concerned, is a nominal price because we have very few transactions on that basis.

Q. In other words, you don't sell at that price?

A. That is right.

Q. But you do suggest that to your dealers on consignment accounts?

A. That is right.

Q. Well, then, if these prices of white lead in oil move on a whole scale, so that the list price, dealer price and
painter price would be affected by any change, can
3687 you tell me any changes now in the period up to the end
of 1945 in that scale, in that whole scale of prices,

leaving for the moment the question of quantities and quantity discounts, where such changes by National have not been followed by Eagle-Picher?

A. Not in that period that you mentioned, I don't think there were any exceptions or occasions where they didn't follow.

Mr. Wright: I have no further examination.

Trial Examiner Norwood: Are there any further questions?

Mr. Wood: Nothing further.

Trial Examiner Norwood: You are excused.

(Witness excused.)

Mr. Du Bose: Could we get off the record a moment?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: I have discussions with counsel for Sherwin-Williams, and they advise me that they are prepared to go forward with their presentation of evidence in Cleveland, Ohio, on the 15th, 16th, and 17th of October.

I have consulted with other respondents in the case, and they have advised that following that hearing—

Trial Examiner Norwood: 15th, 16th, and 17th?

Mr. Wright: Yes, sir.

3688 Trial Examiner Norwood: All right.

Mr. Wright: Just prior to or immediately following the election in the early part of November, they are prepared to go forward and clean up the few remaining ends of the testimony so that it will all be in and complete before the 15th of November, as I understand it.

Trial Examiner Norwood: National Lead will begin in November?

Mr. Ewing: Well, whatever loose ends there are, ours and anybody else's will go in early in November.

Trial Examiner Norwood: I see.

Mr. Wood: Eagle-Picher has very little if any more testimony in the case. I have to go over the record and see whether there are loose ends.

Trial Examiner Norwood: I see.

Mr. Wood: As I have said before, Mr. Wright and I may be able to clean them up by stipulation.

Mr. Wright: We will make every effort to.

Trial Examiner Norwood: You say in October you want to go to Cleveland; is that right?

Mr. Wright: Yes; Sherwin-Williams has a number of witnesses there, and I understand it will be inconvenient to bring them all down here.

Trial Examiner Norwood: All right. Now, where do you go from there.

3689 Mr. Ewing: Either here or New York or both. We can determine that out there.

Mr. Wright: Since there are several counsel involved, perhaps it would be better to get them to determine that between now and the 15th.

Mr. Ewing: What I had in mind is that I would naturally like to suit your convenience.

Trial Examiner Norwood: Then there is no western trip involved?

Mr. Ewing: There is no western trip involved.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Pursuant to request from and agreement with counsel, it is ordered that the hearing in this case in now adjourned to reconvene in Cleveland, Ohio, in the Federal Building, at 10 o'clock a. m., Cleveland time, on the 15th day of October, 1947, in the Office of the Custodian of the Building or in such room as will be designated by notice posted in that office and given to the Custodian.

(Thereupon, at 2:20 o'clock p. m., the hearing was adjourned until Wednesday, October 15, 1947, in Cleveland, Ohio.)

3690 Room 125,
Federal Building,
Cleveland, Ohio,
October 15, 1947.

Met, pursuant to adjournment at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph Wright, and David R. Reel, Attorneys for the Federal Trade Commission.

J. T. Welch, and T. J. Gray, (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington D. C.) and T. J. McDowell, (101 Prospect Avenue, Cleveland, Ohio), Attorneys for Sherwin-Williams Company.

Edmund P. Wood, Attorney for Eagle-Picher Lead Company and The Eagle-Picher Sales Company.

Eugene Z. DuBose, (Alexander & Green, 120 Broad-
3691-2 way, New York, New York), for the National
Lead Company.

John A. Duncan, (M. B. & H. H. Johnson, 1649 Union Commerce Building, Cleveland, Ohio), Attorney for The Glidden Company.

3693 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on September 18, the hearing in Docket 5253 is now reconvened in Room 125 of the Federal Building in Cleveland, Ohio, at 10 o'clock a. m. on the 15th day of October, 1947.

The appearances are as follows:

J. T. Welsh and T. J. McDowell and T. J. Gray, Attorneys for Sherwin-Williams Company.

Edmund P. Wood, Attorney for Eagle-Picher Company and the Eagle-Picher Sales Company.

John A. Duncan, Attorney for The Glidden Company.

Eugene Z. DuBose, Attorney for National Lead Company.

The attorneys for the Federal Trade Commission are Joseph S. Wright and David R. Reel.

Mr. Welch: I would like to note for the record the additional appearance of Mr. T. J. Gray who has not previously appeared in the case.

We will call as our first witness Mr. Brown.

Trial Examiner Norwood: Give me your full name, please, sir.

The Witness: Harry B. Brown.

Trial Examiner Norwood: Stand up and hold up 3694 your right hand.

(Witness sworn.)

HARRY B. BROWN was thereupon called as a witness for the respondents and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Welsh.

Q. Mr. Brown, how long have you been employed by Sherwin-Williams Company?

A. 27 years.

Q. In what capacity have you been employed?

A. As clerk and price supervisor and at present I am manager of price lists.

Q. How long have you been employed in that capacity?

A. 15 years.

Q. Just what are the duties and functions of that position?

A. The function is to disperse price information, and see that price lists are printed correctly.

Q. Does that also involve seeing that they are sent out to your various district offices, branch offices and stores?

A. Yes, it does.

Q. Are you familiar with the type of price announcement illustrated by Commission's Exhibit 662-B, through 662-Z-26?

A. Yes, I am.

3695 Q. How long have price announcements of that type been used by Sherwin-Williams, to your own knowledge?

A. Practically as long as I have been with the company, 25 years.

Q. Does that answer also apply to the practice of designating on those cards certain shipping points at which the announced prices apply on an f. o. b. basis?

A. Yes.

Q. That has been done for the whole 25-year period?

A. Yes.

Q. Now, when different districts are involved in connection with price announcements of the type we have been discussing, where is the information as to the applicable prices and the applicable f. o. b. shipping points inserted in such announcements?

A. In the trade sales bulletin.

Q. I am afraid you don't understand me. Let me state my question again. When you prepare announcements of the type we have been discussing, 662-W to 662-Z-26, at what point is the information on those cards relative to the prices and relative to the applicable f. o. b. shipping points inserted?

A. At the district point shown on the card.

Q. In other words, you print up the card without the prices and without the shipping points?

A. Yes.

3696 Q. And you send them to the district offices?

A. Yes.

Q. And the district offices put in that information?

A. Yes.

Q. After district offices put in that information, what do they do with the cards?

A. They—

Q. (Interposing.) I am talking just of the type of card we have heretofore mentioned.

A. They send the card to the dealers, with one copy to me, for checking.

Q. Now, when you get that card sent to you for checking, what do you do?

A. I check the prices and the f. o. b. points.

Q. Have you ever had an occasion to find that some f. o. b. points were on there which were not authorized by the general offices?

A. Yes.

Q. What action have you taken in such instances?

A. We have written the district office to remove the card immediately or on the next printing.

Q. Has that been done?

A. Yes.

Q. And the general offices authorize the use of only certain f. o. b. points?

3697 A. Yes.

Q. Now, can you tell me for what purpose announcements such those illustrated by Commission's Exhibit 594-A and B, 662-C and D, 662-G and H, and 662-S and T are disseminated?

A. They are sent to our district sales staff and representatives in branches showing the prices in effect at that date.

Q. For those branches and districts?

A. Yes.

Q. Is that the sole purpose?

A. Yes.

Q. Do those announcements of that type have any bases whatever—correction, strike that. Do those announcements serve as any basis whatever for either quotation or billings to customers, as distinguished from Sherwin-Williams' own branches, districts, and stores?

A. No.

Q. When LCL shipments are made to points which are not f. o. b. points and they are not made from the nearest warehouse or shipping point, how is the freight cost handled?

Mr. Wright: May I have that question read?

Trial Examiner Norwood: Read it.

(The reporter read the question.)

Mr. Wright: I object to that question, your Honor. No basis has been laid for what his answer is based on. If it is a general statement of what the company's policy 3698 is, that is one thing. If it is a statement of their general practice in handling that billing, it is another thing.

This witness so far has not been shown to have anything to do with the actual billing and handling of freight costs.

Mr. Welch: I will withdraw the question.

Trial Examiner Norwood: Very Well.

By Mr. Welch:

Q. Mr. Brown, are you familiar with the company's announced policy as to how LCL shipments are to be handled in those situations where the shipment goes to a destination which is not one of the recognized shipping points and the shipment actually is shipped from some point other than the nearest shipping point to that ultimate destination?

Mr. Wright: Objection to that, your Honor; there is no product designated in that. This company makes many products.

Mr. Welch: Lead products.

Trial Examiner Norwood: Lead products?

The Witness: Yes.

By Mr. Welch:

Q. What is that?

A. Equalization.

Q. Just explain that.

A. Equalization from shipment to a designated 3699 point other than a warehouse would be equalized with the difference between the cost to that warehouse and to the point at which the shipment is made.

Q. And will you give us—just to clarify that, give us an illustration of that?

A. If, for example, it costs 50 cents to ship from Chicago to Kansas City, and it costs 75 cents to ship to some point within the Kansas City area, we would allow the difference between the shipment to our warehouse and to the designated point.

Trial Examiner Norwood: You would add 25 cents to the f. o. b. price in that case?

The Witness: We would add in that case 15; I said 60.

Trial Examiner Norwood: I thought you said 50.

The Witness: 15 cents.

By Mr. Welch:

Q. In other words, the shipment would originate in Chicago?

A. Yes, it would cost 75 cents to lay it down. It would originally cost 60 cents to get it to Kansas City. We would allow the—

Q. (Interposing.) That is caused by the circumstances whereby you didn't have the stock in Kansas City at that moment so you give the customer the difference in what it would have cost to have gotten it to the warehouse.

3700 A. Yes.

Q. Now, when Sherwin-Williams equalizes freight, that is not an equalization predicated upon any competitor situation, is it?

A. No.

A. I call your attention to Commission's Exhibits 662-A and B, 662-E and F, 662-I, J, K, L, M, N, O, P, Q, R, U, V, and 779-A to D. How many announcements of that type do you prepare?

A. Just a sufficient quantity for our sales staff, branches, and representatives.

Q. That is disseminated to your own employees only?

A. Yes, sir.

Q. Now, do you get those up with different prices on them, or just the one set of prices?

A. One set of prices.

Q. What type of announcements are the only ones issued by Sherwin-Williams which show different prices?

A. These small dealer cards.

Q. Is that the one that appears as Commission's Exhibit 662-W through 662-Z-26?

A. Yes.

Q. That is the type you refer to?

A. Yes.

Mr. Wright: Your Honor, I object to the leading 3701 character of that question by counsel. As I recall it, he said, "What is the only type of card which shows different prices?"

That is subject to proper testimony by the witness as to whether it is the only card. It was a double-barreled question which contained a conclusion by counsel which I don't know whether is ratified by the witness or not.

Trial Examiner Norwood: Off the record just a minute.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Question withdrawn.

By Mr. Welch:

Q. What type of announcements by Sherwin-Williams show different prices?

A. The dealer price card mailed by the district office.

Q. Are you referring to 662-W, to 662-Z-26, inclusive, Commission's Exhibit?

A. Yes.

Q. Is that the only type that shows different prices?

A. Yes.

Q. Sherwin-Williams has sold pigments on an agency or assignment basis since you have been with the company, has it?

A. No.

Q. Mr. Brown, can you tell us how a determination
3702 is made as to what are f. o. b. shipping points? I am referring to the types of points referred to or identified in Commission's Exhibit 664.

A. Our own warehouse points have been shown on the dealer price card as illustrated by these exhibits.

Q. Do you have warehouses in each different district?

A. Yes.

Q. How many different districts do you have?

A. The districts change in numbers from year to year as we consolidate.

(Papers were marked Respondents' Exhibits 197-A, 197-B, 197-C, 197-D, 197-E, 197-F, 197-G, 197-H and 198-A, 198-B, 198-C, 198-D, 198-E, 198-F, 198-G and 198-H for identification.)

By Mr. Welch:

Q. Mr. Brown, I show you Respondents' Exhibits 197-A through H, inclusive. Can you tell us what those are?

A. Those are the dealer price cards issued by the district offices.

Q. Will you name the district offices which issued those?

A. Newark, New Jersey; Boston, Philadelphia, Cincinnati, Kansas City, Dallas, St. Louis, Chicago.

Q. Now, were there any other districts than those you have named?

A. The Cleveland district is missing in that group.

3703 Q. I show you Commission's Exhibit 662-Z-17; is that the comparable Cleveland card for the same date?

A. Yes.

Q. Now then, Respondents' Exhibits 197-A through H inclusive, and Commission's Exhibit 662-Z-17, does that include the price cards issued by all the various districts?

A. Yes.

Q. It does not include the Pacific Coast?

A. No.

Q. Now, I would like you to examine Respondents'

Exhibit 197-A to H, and each of the shipping points indicated thereon and tell me whether at one time or another—strike that. Tell me whether warehouse stocks were maintained in all the cities named on those exhibits for the proper sub numbers.

Trial Examiner Norwood: I think you had better offer those first. They are not in evidence yet.

Mr. Welch: I will offer Respondents' Exhibits 197-A to H, in evidence.

Mr. Wright: No objection.

Trial Examiner Norwood: They may be received.

(The papers referred to, heretofore marked for identification RESPONDENTS' EXHIBITS 197-A, 197-B, 197-C, 197-D, 197-E, 197-F, 197-G, and 197-H, were received in evidence.)

Trial Examiner Norwood: Answer the last question.

3704 (The reporter read the question.)

A. Yes.

By Mr. Welch:

Q. Now, for the period in which those cards were in effect, that is Respondents' Exhibits 197-A to H, inclusive, and Commission's Exhibit 662-Z-17, were the shipping points named on the respective cards the only authorized f. o. b. points?

A. Yes.

Q. I now show you Respondents' Exhibits 198-A to H, and ask you if you can tell me what those documents are?

A. They are cards issued for the different dates.

Q. Do they cover cards issued by all the districts except Cleveland and the Pacific Coast?

A. Yes.

Q. Is Commission's Exhibit 662-Z-1 the comparable Cleveland card for the same date?

A. Yes.

Mr. Welch: Respondents' Exhibits, for identification, 198-A to H, are offered in evidence.

Mr. Wright: No objection.

Trial Examiner Norwood: They may be received.

(The papers referred to, heretofore marked for identification RESPONDENTS' EXHIBITS 198-A, 198-B, 198-C, 198-D, 198-E, 198-F, 198-G and 198-H, were received in evidence.)

3705 By Mr. Welch:

Q. Will you now examine Respondents' Exhibit 197-A to H and Commission's Exhibit 662-Z-21, and tell us whether during the periods those price cards were in effect, warehouse stocks were maintained at each of the shipping points listed?

A. Yes, they do.

Q. That is warehouse stocks?

A. Warehouse stocks.

Q. Now, referring to Respondents Exhibit 197-A to H and Commission's Exhibit 662-Z-17, are those the only points—are ~~the~~ shipping points listed on those exhibits the only points where warehouse stocks were maintained during that time with the exception of the Pacific Coast?

A. Yes.

Q. Now, with reference to Respondents' Exhibits 198-A to H and Commission's Exhibit 662-Z-21, I will ask you the same question, whether those are the only points at which warehouse stocks were maintained?

A. Yes.

Trial Examiner Norwood: We will take a five-minute recess.

(Short recess taken.)

Trial Examiner Norwood: Come to order, please.

Mr. Welch: Your witness.

Cross-Examination by Mr. Wright.

3706 Q. Mr. Brown, how long have you held the position of manager of the price lists with the company?

A. 15 years.

Q. Were you in that work prior to the 15 years, in similar work?

A. Yes.

Q. Now, do your duties cover all the products of the company?

A. Yes.

Q. In that department?

A. Yes, trade sales and industrial.

Q. Now, you spoke of the district offices filling in these cards with the applicable prices and shipping points in their districts, and then sending the cards back to you for checking?

A. Yes.

Q. From what documents or information do they fill in those prices and shipping points?

A. Telegraphic information from Cleveland or letter if it is a week end.

Q. Now, is their basic information the so-called trade sales bulletins?

A. Yes.

Q. Does that include their f. o. b. points for the districts?

A. The trade sales bulletin covers only the billing 3707 to our own inside branches and warehouse points.

Q. Well, now, do these district offices now have any document which they keep currently showing all of this information on prices and points?

A. The document that they have is the bulletin issued by the trade sales department showing them the prices—one price which is in effect. That is the exhibit.

Q. You are referring now to Exhibits like Commission's Exhibit 662-I and sub numbers headed General Sales Department Price Bulletin?

A. Yes.

Q. That is where they get that information?

A. Yes.

Q. Now, your statement with regard to these f. o. b. points and equalization, were you referring throughout your testimony, now, to less than carload shipments?

A. Yes.

Q. What is the situation with regard to f. o. b. points on carload shipments?

A. The shipment is usually laid down at the price differential issued in the bulletin here.

Q. In other words, do I understand you then that in shipping a carload to a point which is not an f. o. b. point within a district, that the f. o. b. —that the price at the f. o. b. point would apply?

3708 A. Yes.

Q. There would be no equalization added freight, then?

A. Yes.

Q. Now, would that also apply to a mixed carload containing paint and paint materials as well as these lead pigments we have been talking about?

A. We have shipped carloads prepaid according to the price applying in the zone.

Q. What do you mean in the zone, now?

A. You are combining paint and lead in your question?

Q. Yes, sir.

A. Lead f. o. b. point has the price on this card.

Q. In other words, a mixed carload of paint and lead not at an f. o. b. point would take the same price as if it had been shipped to the nearest f. o. b. point?

A. Yes.

Q. He would pay nothing extra for freight at that point?

A. No.

Q. Even though it might only contain a hundred pounds of lead and oil in the car—so long as it was a car?

A. Carload.

Q. How do you handle truckload shipments?

A. Full truckload would be handled in the same manner, full truck.

3709 Q. In other words, then, there would be no added freight to the customer not at one of your f. o. b. points, if it were shipped in a truckload?

A. That is right.

Q. Now, these general trade sales department bulletins such as this bulletin No. 99, Commission's Exhibit 662-I, are those sent to your retail stores?

A. Yes.

Q. And those stores get their retail prices from those bulletins; is that correct?

A. They get their cost from the bulletin. The cards are used as the dealer cards.

Q. And you bill them at the same price that you would an ordinary dealer, then?

A. Yes.

Q. And they are expected to resell at the consumer prices which are set forth?

A. Yes.

Q. Now, do any of your retail stores maintain any warehouse stocks?

A. Yes, some. They are indicated on these exhibits.

Q. They are all in there?

A. Yes.

Q. No other retail store than those indicated in those exhibits then maintains any warehouse stocks?

A. No.

3710 Q. Do any stores resell—sell for resale except those which are listed in that exhibit?

A. Not to my knowledge.

Q. That is not the policy of the company?

A. Not the policy.

Q. Well, now, do you have any customers in towns where you have retail stores, dealers, now, which are not warehouse points?

Mr. Welch: Objection, your Honor. There is no showing that this witness has any knowledge of the customers' lists. He is not in the sales department.

Mr. Wright: I am laying the basis for a further question here. If the witness doesn't have any knowledge of this thing, he can certainly state it.

Trial Examiner Norwood: I think he may ask that on cross-examination. Objection overruled.

The witness: May I hear the question again?

Mr. Wright: Will you read the question?

(The reporter read the question.)

Mr. Welch: I would like to make a further objection. It was not restricted to proper cross-examination.

Mr. Wright: In answer to counsel's objection there, he has raised some issues about the general pricing policy of the company and he has covered it completely and this question is getting into the—this witness' know-
3711 ledge of that pricing policy and how it works out.

Trial Examiner Norwood: I think he may test his knowledge about it, in connection with the scope of the direct examination. Objection overruled.

(The question was again read by the reporter.)

Trial Examiner Norwood: Answer the question.

The witness: Not to my knowledge.

By Mr. Wright:

Q. Now, let me ask you this, if you know: We will assume for the purpose of this question, now, that you have a retail store in a city which is not an f. o. b. point on those cards, and that you have a dealer-customer in that same point. Would you sell to your retail store—I will withdraw that question.

When you sell to one of your own retail stores which is not at an f. o. b. point, how do you make the price to him? Do you equalize freight to him?

Mr. Welch: I object to any testimony with reference to the company and their own retail stores. That certainly isn't commerce or anything the Commission has jurisdiction over.

Trial Examiner Norwood: I think he may ask that question. It is proper on cross-examination to test him or to get further particulars about this system. Objection overruled.

3712 The Witness: Not to my knowledge.

By Mr. Wright:

Q. You sell him then at the same price as if he were at an f. o. b. point?

A. I have nothing to do with the pricing in the districts to the dealer or the inter-company transactions.

Q. Now, you make up these general trade sales department bulletins, do you not?

A. Yes.

Q. Which are supposed to govern the pricing practices of the district, do you not?

A. Yes.

Q. How do those general trade sales department bulletins instruct the district branches to bill the company-owned stores on these products?

Mr. Welch: Objection. The bulletin speaks for itself with reference to any instructions that may or may not be given.

Secondly, I want to move to strike all the testimony that has heretofore been given by this witness on cross-examination with respect to transactions between the company and its own stores because those are not sales.

Mr. Wright: It is—

Mr. Welch: (Interposing.) There is no testimony that there are sales.

3713 Mr. Wright: This record is already replete with information about the company-owned stores and the transactions there, and it is my contention that one of the issues in this case is that this Respondent has put into practice through its own retail stores these policies and matters that were agreed on as charged in the complaint through conspiracy in combination and has made effective the combination and conspiracy in that manner.

Trial Examiner Norwood: Motion denied.

Is there a question pending?

(The pending question was read by the reporter.)

Mr. Welch: Has your Honor overruled my objection to that as well as the motion to strike?

Trial Examiner Norwood: Yes. Objection overruled.

The Witness: It gives the prices in effect at some particular date and it gives the policy according to the zone differentials applying at the various branches and warehouses.

By Mr. Wright:

Q. Well, now, getting into this list of points as in Commission's Exhibit 662-C and D, will you tell us what that list of points is?

A. It states the S-W warehouses in each district branch zone points.

Q. All of these points aren't warehouses, are they?

A. No, they are not.

3714 Q. So that those points, for instance, as Bridgeport, Connecticut, there is no warehouse there, is there?

A. It would be stated on this if there is a warehouse there at the time these cards are issued.

Trial Examiner Norwood: Stated on what?

The Witness: On the dealer card; our warehouse point is stated here, and it would change as time goes on. We will make a new distributing point, and these must be compared with respect to the approximate date on our trade sales bulletins.

Trial Examiner Norwood: You mean the card like Respondents' Exhibit 197-A and so on?

The Witness: Yes.

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. You are familiar with the warehouses the company has had during the last five or six years, are you not?

A. I might be able to remember all of them.

Q. All right. Now, can you recall approximately where the warehouses were in May, 1942?

A. I could not name them, ~~no;~~ because I am not in the stock-keeping department.

Q. Now, let me ask you this: Do you recall that the company ever had a warehouse at Bethesda, Maryland, in May, 1942?

A. They did not.

3715 Q. Did not?

A. No.

Q. At Appleton, Wisconsin?

A. In 1942?

Q. Yes.

A. I don't recall.

Q. Asbury, New Jersey?

A. No.

Q. I call your attention to the fact that Bethesda, Maryland, and—in this Exhibit 662-S, will you tell me what that letter "E" means?

A. Eastern or base price.

Q. In other words, if the letter "E" is there, it takes the base price, these is nothing added for freight to that?

A. It is sold f.o.b. our warehouses. There is nothing to—added to the cost at that point as far as there is no warehouse.

Q. In other words, even though there is no warehouse at Bethesda, the "E" after that indicates that your company-owned store in Bethesda is billed at the flat eastern zone price; is that not correct?

A. I would say that is correct. They are billed at eastern prices.

Q. And no additional freight is added from equalizing from the warehouse?

A. I am not familiar with the inter-company billing policy.

3716 Q. Can you state who in the Sherwin-Williams organization is familiar with that?

A. I believe your comptroller would have charge of that, Mr. Reese.

Q. Now, this equalization to a point that is not an f.o.b. point there, what freight rates do you use in equalizing on an LCL shipment to a point that is not an f.o.b. point?

A. I am not in the traffic freight billing department. I I am sorry, I can't answer that.

Q. I am talking now about the making of price: You state how the price is to be made and what the company policy is with reference to these prices. What is the policy as to how that is to be calculated?

A. If the price would apply at some zone point where a quarter or a half cent would apply, that price would be used f.o.b. that point, and it would be equalized as I have said, from the difference between the warehouse to the customer *vs.* the Chicago warehouse to the distant point.

Q. Didn't you state before, it would be equalized by the rate between the company and the warehouse, and the company and the customer, rather than from the warehouse to the customer?

A. I said the freight would be, but the price would apply at the warehouse point from which they normally draw their supplies.

Q. That is correct. Now, you used an illustration 3717 of a freight rate of 75 cents from the plant to the customer?

A. Yes.

Q. And a freight rate of 60 cents from the point to the f.o.b. point?

A. Yes.

Q. In that case, you said you would add 15 cents for delivery to that point other than the f.o.b. point?

A. Yes.

Q. Now, what freight rate are you using for purposes of comparison from the plant to the warehouse? Are you using an LCL freight rate, or a carload freight rate?

A. I was using the LCL freight rate.

Q. From the plant to the warehouse?

A. Yes.

Q. Well, you don't customarily ship LCL to warehouse from the plant, do you?

A. I don't know.

Q. Will you tell us what the Pacific Coast District is?

A. The Pacific Coast District receives a wire regarding price changes at the same time the other districts get their report. They usually issue their own price lists according to the market's trend at that point.

Q. Do you send them any bulletin comparable to the general trade sales department bulletins?

A. They get one copy.

3718 Q. They get that bulletin?

A. Just that one copy.

Q. Do they send you in their price lists?

A. They do not print cards similar to these, I do not get them.

Q. How do they get the prices?

A. They issue a price insert for their representatives.

Q. How many districts are there in the Pacific Coast?

A. One at present. They are having three.

Q. Where do you get the information that you put in these general trade sales department bulletins?

A. From the Executive Committee.

Q. From the Executive Committee at the company?

A. Yes.

Q. Mr. Brown, do I understand your testimony, then, that all of the towns and cities where Sherwin-Williams has retail stores are not f.o.b. points?

A. They are not considered as such. This indicates the f.o.b. points.

Q. You don't know what the actual company practice of handling transactions is in those towns and cities, though?

A. I do not.

Mr. Wright: No further questions.

Redirect Examination by Mr. Welch.

3719 Q. Mr. Brown, when you refer to the Executive Committee, do you mean the trade sales executive committee; is that the group you mean?

A. Yes.

Mr. Welch: That is all.

Trial Examiner Norwood: You may be excused.

(Witness excused.)

Trial Examiner Norwood: Call your next witness.

Trial Examiner Norwood: What is your name, please, sir?

The Witness: Kenneth J. Sutherell.

KENNETH J. SUTHERELL was thereupon called as a witness for the Respondents, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Welch.

Q. Mr. Sutherell, how long have you been employed by the Sherwin-Williams Company?

A. Nine years.

Q. In what capacity?

A. In the general traffic department.

Q. In what capacity are you now employed?

A. Assistant chief clerk in charge of the rate section.

Q. How long have you been in that capacity?

3720 A. Since January of 1946.

Q. What are the duties of that position?

A. To supervise all rates which are checked in the traffic department and to check the rates also.

Q. What previous experience with freight rates did you have before you were employed by Sherwin-Williams?

A. Two years with Master Builders Company in Cleveland.

Q. What was the nature of the freight work you did there?

A. In the general traffic department, rates and general traffic work.

Q. To what extent are you familiar with freight rates and tariffs, procedures for calculating applicable rates between various cities for lead pigments?

A. I work with them all the time, it is my job to know them.

Q. Have you ever prepared any charts or analyses for use in hearings before the Interstate Commerce Commission?

A. Yes, I have.

Q. Such charts as you prepared for that purpose have been used in the course of hearings before the Interstate Commerce Commission?

A. Yes, they have.

Q. Have you been asked to make any maps showing freight rate information relative to lead pigments, especially white lead, both dry and in oil?

A. Yes, I have.

3721 Q. What freight information were you asked to portray on those maps?

A. I was given a list of the white lead producing points and asked to show the areas to which these—within which these producing points could ship at a freight advantage, using the freight rates in effect as of January 15, 1941.

Q. Now, was the location of the white lead producing plants and the dates of the tariffs to be used the only information that came to you from an outside source?

A. Yes.

Q. That is at the time you started the project, that is all that came to you from an outside source?

A. Yes.

Q. Everything except that is a result of your own work?

A. Or under my supervision.

Q. Now, I show you Respondents' Exhibit 199 for identification.

(The document referred to was marked Respondents' Exhibit 199 for identification.)

By Mr. Welch:

Q. Who prepared that document?

A. I did.

Q. Was that entirely your own work?

A. Yes, it was.

Q. Can you tell us whether that is a map that you
3722 prepared in response to that request for information?

A. It is.

Q. Well, now, will you tell us just step by step the procedure you followed in order to get the result now reflected on that map?

A. I considered two or more producing mills of white lead and I located a town in between those mills to which the rate was equal from both or more of the mills.

I located that city or town on the map and marked it. I then checked rates to points around that town, or on either side of it, until I located another point to which the rates were equal.

Q. Just one minute. On an average, how many points would you check the rates on before you could locate one point that had those characteristics?

A. I would say 30 points.

Q. And then when you located your next point, how many would have to be examined?

A. Probably the same number, sometimes more, sometimes less.

Q. Would that general average hold?

A. I would say so.

Q. Proceed.

A. I followed the same procedure all over the country, taking one producing mill against another one. When I had
located all the points to which the rates were equal, I
3723 drew lines which indicate the areas within which the
producing mill can ship at a freight advantage.

In other words, these lines represent the boundary line on freight costs. A mill in Chicago shipping over the line would be—

Q. (Interposing.) Over which line is that?

A. Over the line running from Seelyville, Indiana, to Pewey, Nebraska. The rate over that line would exceed the rate from a mill in St. Louis.

Q. All right. Now take the line that runs from Pensacola, Florida to Detroit. What would be the situation with respect to the mills lying on the different sides of those lines?

A. The mill lying on the east side of that line running from Wayne, Michigan, to Pensacola, would be able to ship within that area cheaper than the mills in Chicago, Hammond, or St. Louis.

Trial Examiner Norwood: To any points in that area?

By Mr. Welch:

Q. What mill?

A. From the mill at Cincinnati.

Mr. Welch: Now answer the Examiner's question.

The Witness: Within that area. There might be variations, but that possibly is very remote.

By Mr. Welch:

Q. What would be the situation with reference to
3724 the St. Louis plant?

A. The St. Louis plant would be able to ship within the area bounded by this line from Seelyville, Indiana, to Pewey, Nebraska, and from Seelyville, to Pensacola, Florida, to the line from San Francisco, from Oakland.

Q. At an advantage?

A. At an advantage.

Q. Over which mills?

A. The mills located at Oakland, and—

Trial Examiner Norwood: (Interposing.) I don't think you had better go into what the map shows. You can tell us what it shows but not go further than that. You haven't offered it.

Mr. Welch: I offer Respondents' Exhibit 199.

Mr. Wright: I have some preliminary questions on this, your Honor.

Trial Examiner Norwood: All right.

Cross-Examination by Mr. Wright.

Q. Do I understand your testimony, then, substantially, Mr. Sutherell, that one of the mills or points underlined in red here would have a freight advantage in shipping to all of the territory within the lines bounding it?

A. Yes.

Q. Now, are railroad rates on a mileage basis?

3725 A. Generally speaking, they are on a mileage basis. Certain towns are grouped in certain territories.

Q. Well, now, are the tariffs based on a mileage basis; did you mean that, the official tariffs?

A. The rate scales are based on a mileage basis.

Q. That is generally true?

A. The formula for establishing rates?

Q. Now, take this area around Chicago that is bounded by these lines which appear on here, what type of rates would you consult on that? Are those commodity rates?

A. The lowest rates.

Q. I asked what rates you consulted in order to determine the lowest rates—what tariffs you consulted?

A. Consulted the applicable tariffs.

Q. Did you compare commodity rates and class rates in each instance?

A. Yes, I did.

Q. But you went down these lines, as I take it, getting these points. Did you consult rates that were within the lines, rate points within the lines 10, 15, 20 miles?

A. Yes.

Q. How far back from the lines did you go in consulting all those rates?

A. I don't know how far I went back in mileage.

Q. Did you keep any record of the rates to these 3726 points along the lines in the tariff reference?

A. Yes.

Q. So that you had documents to show what these rates are from these points and tariff sources from which you secured them?

A. The documents are available.

Q. Do you have them in your possession now?

A. I don't. I have the rates. I do not have the tariff authorities in my possession.

Q. In determining some of these rates to these points along the line, were there joint rates and routes involved in those determinations?

A. Yes.

Q. How did you determine the lowest rate in that, or did you determine the lowest rate?

A. We did. These rates are the lowest rates.

Q. You consulted, then, every possible routing and every possible combination to obtain your lowest combination rate?

A. Yes.

Q. Now, speaking as a freight rate expert, is it your opinion that there is no rate in this territory around Cincinnati which is behind the line bounding Cincinnati which is lower from St. Louis or Chicago or Philadelphia.

A. No. I won't say there is no rate. As I stated before, sometimes certain—a group of towns takes the same rate.

3727 In other words, there might be a town one mile behind that line which would be just as cheap to ship from either point.

Q. In other words, then, that can't be an absolute line, freight rates being what they are?

A. Generally speaking, it can.

Q. Will you explain yourself?

A. Within some territories, it can be. Some territories are specific mileage rates to a specific point. In other territories, those rates are grouped, those towns are grouped.

Mr. Wright: No further preliminary cross-examination.

I want to object to the offer of this exhibit, however.

It is common knowledge, your Honor, that freight rates are the matters that are subject to controversy among traffic experts and many of them will come out with different pictures of rates and routes.

Here we are given absolutely no basic data, traffic reference, or rates applicable to any of these points along the line which make up these territories.

Furthermore, I object to the document on the grounds of relevancy and materiality.

Mr. Welch: Will you read the last part of that objection?

(Objection read.)

Mr. Welch: The last part of that is easy to answer

3728 in view of the answer setting forth an affirmative defense and no motion to strike was made and the exhibit is competent on that basis.

Secondly, we have stated—the witness has stated that he does have the rates available, on his person. Mr. Wright didn't request to see them. They are here.

As to the tariffs, the witness states that information is available, but he doesn't have it here with him at the moment. He does have the rate; the tariff sources from which they were taken, he does not have.

Trial Examiner Norwood: Objection overruled. The exhibit is received, Respondents' Exhibit 199.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 199, was received in evidence.)

Mr. Wright: Your Honor, at this point, if this document is received, I want to call on Respondents to produce the list of rates and references from which this document was made up.

Trial Examiner Norwood: Well, I understood that they would be produced. That would be a condition attached to the reception of this exhibit.

Mr. Welch: We are agreeable to that.

Trial Examiner Norwood: Specified sufficiently to enable the other side to check its accuracy.

3729 Mr. Welch: We are agreeable to that.

Trial Examiner Norwood: Proceed.

Mr. Welch: I think we will be able to supply that by tomorrow, and if Mr. Wright then wants to call the witness for further cross-examination in the light of that material being furnished, we will have the witness available.

I take it, however, the exhibit is now received subject to motion to strike if we do not furnish the material, so I can proceed on the theory that it has been received?

Trial Examiner Norwood: Yes. This is a document that has required a great deal of study and work, and I should think that this witness should be subject to recall after the other side has had sufficient time to study and check it. I think that should be a condition, also.

Go ahead.

Direct Examination (Continued) by Mr. Welch.

Q. I believe at the time we were interrupted for cross-examination, we were discussing a situation as between the St. Louis, Cincinnati, and Chicago locations?

A. Yes.

Q. We had gotten to the point where we were discussing the area in which St. Louis would have an advantage. As a freight rate expert, can you tell us on a broad basis just
what this map shows concerning the freight rate sit-
3730 uation of producers of white lead located in the re-
spective cities of Philadelphia, Scranton, Perth Amboy, Cincinnati, Chicago, St. Louis, Oakland, California?

A. It shows that producers of white lead in those points which you mentioned can ship within that area—

Q. (Interposing.) That is within the area—

A. (Interposing.) Bounded by lines.

Trial Examiner Norwood: The colored triple lines.

The Witness: In some cases—at a freight advantage over a competitor in an adjoining area.

By Mr. Welch:

Q. How long did it take you to make up this study, Mr. Sutherell?

A. Approximately four months.

Q. Did you spend the major portion of that time on looking up the rates and the tariffs?

A. Yes, yes.

Q. I believe on cross-examination you stated that you had taken into account commodity rates, classifications, exceptions?

A. Yes.

Q. And it is now your testimony that those are the lowest rates in those areas?

A. Yes.

Trial Examiner Norwood: One of those boundaries is indicated by a triple line. Off the record.

3731 (Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Welch: I will clear that up.

By Mr. Welch:

Q. Mr. Sutherell, will you explain the significance of the blue line?

A. The blue line covers rates on dry white lead.

Q. Will you explain the red line?

A. The red line covers rates on white lead in oil.

Q. Do the red and blue refer to carload or less than carloads?

A. Carload.

Q. What does the green line represent?

A. The green line represents LCL rates on both dry white lead and lead in oil.

Q. In less than carload lots?

A. Yes.

Q. Now, I notice throughout the entire part of the eastern United States and up to western North Dakota, South Dakota, Nebraska, Colorado, and New Mexico, the three lines practically coincide. Will you explain why there is a divergence between the lines in the western part of the United States?

A. Most of those rates have specific commodity rates, being based on different formulas; the carload rates and less than carload rates are based on different formulas.

3732 Q. But in the east they are based on the same or different formulas?

A. On the same formulas.

Q. And that is the reason the lines coincide?

A. That is right.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

Mr. Welch: I would like to have this marked.

(The map referred to was marked RESPONDENTS' EXHIBIT 200 for identification.)

By Mr. Welch:

Q. Mr. Sutherell, were you asked to make any map showing freight rates and information relative to red lead, both dry and in oil?

A. Yes, I was.

Q. What freight information were you asked to portray on that map?

A. I was given a list of red lead producing points and asked to show on a map the areas to which those producing points—within which those producing points could ship at a freight advantage.

Q. What period were you requested to use in making your calculation?

A. As of January 15, 1941.

3733 Q. Is the location of the red lead producing plants and the date of the freight rates desired the only information that came to you from an outside source at the time you started your studies?

A. Yes.

Q. I show you a map which has been marked as Respondents' Exhibit 200 for identification. Can you tell us what that is?

A. This map shows producing points of red lead and it shows the areas within which these producing points can ship at a freight advantage.

Q. Did you prepare this map yourself?

A. I did not. It was prepared under my supervision.

Q. Did you direct the procedure that was to be followed in preparing it?

A. Yes, I did.

Q. Did you personally spot check the accuracy of the work being done?

A. Yes, I did.

Q. To what extent, if any, did the procedure followed in preparing this map conform to the procedure you have detailed with reference to Respondents' Exhibit No. 199?

A. The procedure was exactly the same.

Q. Can you tell us how long the man who worked on that map took to check the rate data, tariff data, and prepare the map?

A. Approximately three months.

3734 Q. Now, as an expert on freight rates—

Mr. Welch: I will offer Respondents' Exhibit No. 200, subject to the same limitations which have heretofore been imposed by the Examiner.

Mr. Wright: I want to ask a preliminary question.

Trial Examiner Norwood: All right.

Cross-Examination by Mr. Wright.

Q. Calling your attention to the three words appearing underneath the description, "red lead," reading "same manufacturing costs," did you place that there?

A. No.

Q. Was it placed there at your direction?

A. No, it wasn't.

Q. How did that get on the document?

A. That was placed there by way of explanation of the map by the legal department.

Mr. Welch: Let him ask a question which will clear that up.

Direct Examination (Continued) by Mr. Welch.

Q. Was an assumed identical manufacturing cost one other item furnished to you at the time you prepared the two maps?

A. Yes, yes.

Mr. Wright: No further questions at this time.

3735 By Mr. Welch:

Q. In other words, you were given the location of the plants and assumed identical manufacturing costs and your studies thereafter were predicated upon rate differences; is that correct?

A. Yes.

Mr. Wright: Do you have available the basic—the rates and references that you used in making this?

The Witness: Yes.

Mr. Welch: I offer it subject to that qualification.

Trial Examiner Norwood: Received.

(The map referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 200, was received in evidence.)

Mr. Wright: I would like to have the same opportunity of deferring cross-examination after a reasonable opportunity for examining this exhibit.

Trial Examiner Norwood: He offered it under those conditions.

Mr. Wright: I want the record to note my objection to the receipt of it in evidence.

Trial Examiner Norwood: Objection overruled. It is received under the conditions heretofore applied to Respondents' Exhibit No. 199.

By Mr. Welch:

3736 Q. What does the blue line represent?

A. The blue line represents carload rates on dry red lead.

Q. What does the red line represent?

A. The red line represents carload rates on red lead in oil.

Q. What does the green line represent?

A. The green line represents less than carload rates on both dry red lead and red lead in oil.

Q. They are identical?

A. The LCL rates on dry red lead and red lead in oil are identical.

Q. Will you explain to us why you have the blue lines and the red lines in the form of two arrows out in the State of New Mexico and Colorado?

A. That is to indicate that from that point on until the next beyond red and blue line is reached, the rates would be equal from both Joplin and Dallas in view of the fact that transcontinental rates are maximum rates to that territory.

Q. Now, at which point would that rate identity between Joplin and Dallas begin?

A. At Grand, New Mexico.

Q. And from that point on, they would share—would they share the same territory?

A. They would share the same territory.

Q. And that is because of what?

A. Because of the transcontinental rates being the 3737 maximum rates.

Q. In other words, they have reached the highest freight rate they can reach?

A. Yes.

Q. Now, will you explain why it is that you have a certain area marked as served by both Newark and Brooklyn, whereas you also have separate exclusive territories for those two plants?

A. Newark and Brooklyn—I will start that over. The rates from Newark and Brooklyn to nearby points are different until a certain distance is reached. From there on, they become equal from both Newark and Brooklyn.

Q. Now, as an expert on freight rates, will you tell us just what this map shows concerning the freight rate situation on producers of red lead located in the respective cities which are underscored in red ink?

Mr. Wright: I object. The document speaks for itself. It has been identified. I don't think this witness has any proper basis for testifying as an expert on the significance of the document.

Mr. Welch: All the document shows is just some lines. We want to show what the significance is from a freight rate situation. Mr. Wright has examined this witness himself and asked questions predicated upon his being a freight rate expert. It comes at a late date to object to his being such.

Mr. Wright: I am not objecting to his being an expert, I am objecting to his explaining as an expert a document which has been fully identified and put in the record. The document speaks for itself. 3738

Trial Examiner Norwood: I think if it is conceded that this witness is sufficiently qualified as an expert—if it isn't conceded, I will review the evidence on it—if it is, he may give his opinion about various points raised in this case with respect to the freight, freight advantages, but I think the question is a little too general.

You may ask his opinion about different things there, but as to the entire scope of the map and what it shows, I believe that question is too broad. I will sustain the objection.

By Mr. Welch:

Q. Mr. Sutherell, will you state what this map shows concerning the freight rate situation of the red lead producer located at Atlanta, Georgia?

A. This map shows that the red lead producer at Atlanta, Georgia, can ship to the area bounded by lines running from Houma, Louisiana, over around Wilmington, North Carolina, at a freight advantage over mills located at Dallas, St. Louis, Charleston, and Philadelphia.

Trial Examiner Norwood: Can't anybody look at that map and tell that it shows that in the light of your testimony here?

The Witness: I would say so.

3739 Mr. DuBose: Is that Charleston, West Virginia?

The Witness: Yes.

By Mr. Welch:

Q. Does this map show the same condition with respect to area surrounding each of the other points underscored as producing points?

A. It shows the same condition as the other map.

Q. Does it show the same condition as you have described with reference to the producer at Atlanta?

A. Yes, exactly the same condition.

Mr. Welch: That is all.

Trial Examiner Norwood: Anything further?

Cross-Examination (Continued) by Mr. Wright.

Q. You said Respondents' Exhibit 200 was prepared under your supervision by somebody else?

A. Mr. Leggett.

Q. What is his capacity?

A. Rate clerk.

Q. How long has he been so engaged?

A. With the Sherwin-Williams Company, for three years.

Q. Prior to that time?

A. For approximately three years, with a motor carrier.

Mr. Wright: No further cross-examination at this time.

3740 Mr. Welch: That is all.

(Witness excused.)

Trial Examiner Norwood: Call your next witness.

Mr. Welch: That is all we have for today. Our other witnesses are out of town, but I think we will finish tomorrow.

I would like to have temporary possession of Respondents' Exhibit 197-A to H and 198-A to H for the purpose of having photostats made to substitute with them.

Trial Examiner Norwood: You may have those.

We will recess until 10 o'clock tomorrow morning.

(Whereupon, at 11:55 a.m., October 15, 1947, the hearing in the above-entitled matter was adjourned.)

3741

Room 125, Federal Building,
Cleveland, Ohio;
Thursday, October 16, 1947.

Met, pursuant to adjournment, at 10:00 a.m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph Wright, (and)
David R. Reel, Attorneys for the Federal Trade Commission.

J. T. Welch, (Davies, Richberg, Beebe, Busick and Richardson, Esqr's., 15th Street, N. W., Washington, D. C.), and

T. J. McDowell, (and)
T. J. Gray, (101 Prospect Avenue, Cleveland, Ohio), Attorneys for Sherwin Williams Company.

Edmund P. Wood, Attorney for Eagle-Picher Lead Company, and The Eagle-Picher Sales Company.

Eugene Z. DuBose, (Alexander and Green, 120 Broadway, New York, New York), for the National Lead Company.

3742 John A. Duncan, (M. B. & H. H. Johnson, 1649 Union Commerce Building, Cleveland, Ohio), Attorney for The Glidden Company.

3743

PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment of yesterday, the hearing is now reconvened in Room 125 of the Federal Post Office Building, Cleveland, Ohio, at 10:00 o'clock, a.m., on the 16th day of October, 1947.

The appearances are as follows:

J. T. Welch and T. J. McDowell and T. J. Gray, Attorneys for Sherwin-Williams Company.

Edmund P. Wood, Attorney for Eagle-Picher Company and the Eagle-Picher Sales Company.

John A. Duncan, Attorney for The Glidden Company.

Eugene Z. DuBose, Attorney for National Lead Company.

The attorneys for the Federal Trade Commission are Joseph S. Wright and David R. Reel.

The Court: Call your witness.

H. C. LEMKE was thereupon called as a witness for the Respondents and, having been first duly sworn, testified as follows:

Direct Examination.

Trial Examiner Norwood: Give us your full name, please.

3744 The Witness: H. C. Lemke.

By Mr. Welch:

Q. Mr. Lemke, how long have you been employed by the Sherwin-Williams Company?

A. Twenty years.

Q. And what positions have you held in that company?

A. I worked in branch offices as bookkeeper, cashier, district offices, and in the Accounting Department, assistant to the Credit Manager, in the district offices, and Auditing, and I now have charge of the Auditing Department of the Sherwin-Williams Company.

Q. How long have you had charge of the Auditing Department?

A. 1941.

Q. Continuously since that date?

A. Pardon me?

Q. Continuously since that date?

A. Yes, sir, continuously.

Q. What are the duties of that position?

A. The duties of this position are the supervising of men. As a department, we audit branches, offices, locations of the Sherwin-Williams Company.

Q. Does that include an audit of the division and district offices as well?

A. Yes, sir, district and division offices are included.

Q. What is the extent of your personal familiarity 3745 with auditing division and district invoices?

A. Well, I worked, personally checking this work, approximately five years before I became—before I became in charge of this department. And I have worked with our men, reviewing reports since I have been in charge of this department; plus the fact I visit special locations where we conduct audits.

Q. Why do you audit the invoices arising from the district and division offices?

A. Well, there are a number of reasons why we would audit invoices. It is a part—it is a phase of our procedure, and therefore we review all of our procedures in our branches district and division offices.

Q. It is the procedure in the branch, division and district offices with respect to freight policies as applied to lead products, one of the procedures which you review?

A. Yes, sir, it is.

Q. To what extent, as the result of that review of the procedures as to freight policies, to which extent, if any, are you familiar with the general freight policies of the Sherwin-Williams Company as to lead products?

A. Well, we ship lead products from various points.

Q. Just one second. My question is to what extent you are familiar with the general freight policy?

A. Well, I know what the policy is. I know what
3746 our method of shipping is and our procedure.

Q. Is there any variance in that freight policy as between the lead products, such as dry white lead, white lead and oil, dry red lead, dry red lead and oil and litharge?

A. No, it is the same policy.

Q. The freight policy is the same with respect to all of those products?

A. Yes.

Q. What is the policy with respect to carload shipments of lead products?

A. We ship from factory point to customer, and Sherwin-Williams pays the freight.

Q. Now, as far as lead products are concerned, how many factories do you have?

A. One.

Q. Do I understand, then, that all carload shipments of lead products originate in Chicago?

A. Yes.

Q. What is the policy of the Sherwin-Williams Company with respect to shipments to federal or county, municipal, governmental agencies, and agencies connected with those governmental agencies?

A. We ship freight pre-paid on such items.

Q. Why is that?

A. Because government agencies, and so forth, do
3747 not make it a practice to accept freight collect, and therefore, we can't ship it.

Q. Will they or will they not buy on any basis other than a delivery basis?

A. No. They will not, other than on delivery basis.

Q. Is your statement with respect to that policy true irrespective of the quantity involved in the shipment? In other words, does that policy apply to LCL shipments as well as carload shipments on government orders?

A. Yes, sir.

Q. Now, what is the company policy with respect to shipments of lead products to railroads and marine accounts, irrespective of the quantity shipped?

A. We deliver to their closest point of—the closest depot, pick-up depot.

Q. As far as the railroad is concerned, you deliver, or do you deliver to their nearest point on the line or to some other point?

A. To the nearest point on the line.

Q. Is that also true of marine accounts?

A. Yes, sir.

Q. Are there any cities other than Chicago where Sherwin-Williams maintain warehouse stocks for LCL shipments of lead products to purchasers?

A. Yes, there are.

3748 Mr. Welch: Just one second, Your Honor, if I may be off the record for a moment.

Trial Examiner Norwood: Yes, off the record.

(Discussion had off the record.)

Trial Examiner Norwood: On the record. We will have a five-minute recess.

(Recess had.)

Trial Examiner Norwood: Are you ready?

Mr. Welch: Yes.

Trial Examiner Norwood: Proceed.

Mr. Welch: Mr. Examiner, it is stipulated between counsel for the Commission and counsel for the Respondent, Sherwin-Williams Company, that the invoice shown on Commission's Exhibit No. 794-C, as SS Number 4544, erroneously shows that it was shipped from St. Louis, Missouri, to Kansas City, Missouri. An examination of the original invoice indicates that the origin of the shipment was St. Louis, Missouri, and the destination was St. Louis, Missouri.

It is further stipulated that on the same page, to-wit, Commission's Exhibit 794-C, the invoice identified as SL-531, erroneously shows Chicago, Illinois, as the shipping point, and Kansas City, Missouri, as the destination. An examination of the original invoice shows that the origin of shipment was Chicago, Illinois, and destination was St. Louis, Missouri.

3749 It is further stipulated that on examination of another invoice on the same page, to-wit, SL-5462, shows the origin as St. Louis, Missouri, and destination as Kansas City, Missouri. An examination of the original invoice shows that the origin was St. Louis, Missouri, and the destination was St. Louis, Missouri.

It is further stipulated that invoice number NO-29185, which appears on Commission's Exhibit 794-Z, which indicates that the origin of the shipment is Chicago, Illinois, and the destination New Orleans, Louisiana, should show the origin of the shipment was New Orleans, Louisiana, and the destination was New Orleans, Louisiana, by reason of visual inspection of the original invoice.

Is it so stipulated, Mr. Wright?

Mr. Wright: It is so stipulated.

Mr. Welch: It is stipulated between counsel for the Sherwin-Williams Company and counsel for the Commission, that in Commission's Exhibit 790, in the column under D, and opposite the listing "12½ pound kegs," the figure which apparently is "$16.50" should, in fact, be "$13.50."

Mr. Wright: I will agree to that.

Mr. Welch: Mr. Examiner, I will now offer in evidence documents which were identified as Commission's Exhibits 554, 555, 556 and 557. I offer them as Respondent's Exhibits 201, 202, 203 and 204.

3750 Trial Examiner Norwood: Any objection?

Mr. Wright: I would like an opportunity to examine them a moment, Your Honor.

Your Honor, I want to object to this correspondence. The only reason that those papers are a part of a mass of correspondence which the National Lead Company produced under a subpoena duces tecum, and which I didn't offer because they had no relevancy to the issues in this case. They are entirely unrelated matters. Several of the letters are inter-company notes between the branches of the National Lead Company and the head office, but have nothing to do with the question at issue here in Count 1 or Count 2 of the Complaint.

Mr. Welch: You don't question that the authenticity of the document has been established to the Commission?

Mr. Wright: I am not in a position to make a statement about that, because we don't have a transcript showing that portion, and I must reserve an objection on the grounds of improper identification until I have an opportunity to examine it.

Mr. DuBose: On behalf of the National Lead Company I should like also to reserve any objection that we would care to make on grounds that might appear after an examination of the record where they were identified.

I should also like to object particularly to what has been marked Commission's Exhibit No. 554, for identifica-
3751 tion, the postscript "written in pencil" which may or may not have been identified.

Mr. Welch: You can withdraw that objection.

Mr. Wright: What was the note there that you just erased?

Mr. Welch: I just wrote on that "National Lead."

Mr. DuBose: No, no. I don't mean that. I mean the—

Mr. Welch: You said a note in pencil.

Mr. DuBose: Where it says, "written in pencil—suggested to J. L. R. that we should not supply S-W nor anyone else—" which may or may not have been identified on the record. But I should like to reserve objection until we have a chance to study the record.

Mr. Wright: Counsel certainly hasn't established any purpose of this offer to show any relevancy or materiality of the documents at all, Your Honor.

Trial Examiner Norwood: Let us see what Mr. Welch has to say about their relevancy.

Mr. Welch: As to relevancy?

Trial Examiner Norwood: Yes.

Mr. Welch: We are charged with a conspiracy. I think the contents of the letter will show very definitely action which would ordinarily be incompatible to the conspiracy between National Lead and Sherwin-Williams, when National Lead in correspondence between its own two
3752 officers takes the position that Sherwin-Williams would buy National Lead and use them as loss leaders. And we offer them as showing that there is no attempted cohesion between the two companies.

Trial Examiner Norwood: Would you be satisfied with my reserving ruling on this until I can look up the record?

Mr. Welch: Perfectly all right.

Mr. DuBose: Subject to a motion to strike.

Mr. Wright: No, Your Honor, I would like to suggest that these be not admitted until counsel have had an opportunity to further examine the transcript where they were identified.

Trial Examiner Norwood: That is what I said. I will reserve the ruling.

Mr. Wright: All right.

Trial Examiner Norwood: I am reserving ruling.

Mr. Welch: All right.

Trial Examiner Norwood: Proceed.

Mr. Welch: Will you mark these for identification, please?

(The documents referred to were marked Respondents' Exhibits 201, 202, 203 and 204 for identification.)

Mr. Welch: May we be off the record?

Trial Examiner Norwood: Off the record.

3753 (Discussion had off the record.)

Trial Examiner Norwood: We will take a five-minute recess.

(Recess taken.)

Trial Examiner Norwood: You keep those other exhibits in your possession, Mr. Welch.

Mr. Welch: That is correct.

Trial Examiner Norwood: Proceed.

I am reserving ruling on the last offer in evidence of Respondents' Exhibits 201 to 204, inclusive.

Mr. Welch: Your Honor, on yesterday afternoon I asked permission to temporarily take possession of the originals which have been marked as Respondents' Exhibits 197-A through H, inclusive, and Respondents' Exhibits 198-A through H, inclusive. I have now had photostatic copies of those price cards prepared. They have been marked by the reporter with the same basic numbers, and same sub-letters, and I move the substitution of the photostatic copies, and the withdrawal of the original price cards.

Trial Examiner Norwood: Off the record.

(Discussion had off the record.)

Trial Examiner Norwood: Back on the record.

Any objection?

Mr. Wright: I have no objection to that.

Trial Examiner Norwood: That substitution will 3754 be made, and counsel may withdraw the originals and the photostats will now be the original exhibits.

Proceed.

By Mr. Welch:

Q. Mr. Lemke, I show you Respondents' Exhibit 197-A to H, inclusive, and 198-A to H, inclusive, Commission's Exhibits 662-Z-17 and Commission's Exhibit 662-Z-21, and ask you if you recognize the cities named on those respective exhibits as being shipping points, as being all of the cities except those on Pacific Coast in which Sherwin-Williams maintained warehouse stocks of lead products as of the date the price cards composing such exhibits were in effect?

Mr. Wright: Your Honor, may I have the question read?

Trial Examiner Norwood: Read the question.

(Whereupon, the question was read by the reporter.)

Mr. Wright: Your Honor, that is about a sex-tupple-barreled question.

Mr. Welch: It is a perfectly simple question, Your Honor.

Trial Examiner Norwood: Objection overruled.

Does that contain all of those cities except on the West Coast?

The Witness: Your Honor, I believe them to be the
location where we had shipping points, or points
3755 where we carried—as I say, shipping points, except
those on the west coast.

By Mr. Welch:

Q. As of the dates of the respective price cards?

A. That is right.

Q. And from an examination of all of the exhibits, Respondents' Exhibits 197-A to H, Respondents' Exhibits 198-A to H, Commission's Exhibit 662-Z-17 and 662-Z-21, do they cover all of the divisions of the Sherwin-Williams Company, except Pacific Coast divisions?

A. Yes, I believe they do.

Q. And they cover all of the proved shipping points as of the period of time in those districts with the exception of the Pacific Coast district?

A. Yes, I believe they do.

Q. Now, through your work in auditing the accounts of the various districts, have you audited the accounts of the Pacific Coast district?

A. Yes, we have. Our department has audited all locations of the Sherwin-Williams Company.

Q. As the result of that work, do you know of your own knowledge the cities on the Pacific Coast district where

Sherwin-Williams maintain warehouse stocks of lead products as of the same period of time, to-wit, September 1938, and September 1939?

3756 A. Yes, I do.

Q. Can you name those cities?

A. Spokane, Seattle, Portland, Sacramento, Santa Rosa, Oakland, Los Angeles and Phoenix.

Q. All right.

How are those two groups of cities, that is, those you have just now named as being located on the Pacific Coast, and those that you have referred to from the exhibits that I have enumerated in my previous questions; how are they designated by the company?

A. Points where we carry stock.

Q. Are they designated as shipping points?

A. Yes, sir. As shipping points.

Q. What is the freight policy of Sherwin-Williams as to less than carload shipments to purchasers located in or requesting delivery at any of the designated shipping points consisting of the cities appearing in the exhibits we have referred to and the cities on the Pacific Coast that you have specifically named?

A. We make shipments free of charge.

Q. Throughout your testimony in using the term "carload" and "less than carload", what do you mean?

A. A single shipment of a carload or truckload.

Q. Do I understand that the term "carload," then, applies either to a rail carload or to a truckload?

3757 A. We understand that.

Q. It is used interchangeably, for those two?

A. It is common knowledge.

Q. Now, in connection with your duties of auditing invoices and auditing the books of the division, district and branch offices of Sherwin-Williams, have you ever learned of any other cities which have been accorded the same freight policy with respect to lead products?

A. Yes, I have.

Q. What action, if any, did your office take to ascertain whether such action by your office making the sale on the basis of such policy had been approved by the home office?

A. In situations such as you mentioned there, we checked through our correspondence file at our various sales offices for the purpose of determining whether or not it has their approval as well as approval from headquarters.

Q. Did your office find any such approval was in existence as to some cities?

A. In some locations we have found it.

Q. Do you know, of your own knowledge, how many such cities in addition to those designated as shipping points, to-wit, those referred to and named on the exhibits that we have mentioned, and those that you have named on the Pacific Coast, have been accorded the same freight policy?

A. I beg your pardon. I would like to have that
3758 question repeated.

Trial Examiner Norwood: Read the question.

(Question read by the reporter.)

A. I missed the question. Do you want to know how many; is that the question?

By Mr. Welch:

Q. Yes.

A. Well, approximately, I think, there are five.

Q. Can you name them?

A. Washington, Gadsden, Alabama, Chattanooga, Tennessee, Pensacola, Florida, and San Diego, California.

Q. Is the freight policy of Sherwin-Williams for LCL shipments of lead products to those cities the same as it is with respect to the cities you have named on the Pacific Coast district and those that you have since identified in the exhibits we have been discussing?

A. Yes, they are the same.

Q. Can you tell me what the freight policy is for LCL shipments to all cities other than those which you have named as being shipping points of the Pacific Coast, other than those you have named as having the same freight policy accorded to them, to-wit, Washington, and San Diego, Pensacola, Gadsden and Chattanooga, and other than the cities appearing on the Commission's exhibits we have been referring to?

A. Would you repeat the question?

3759 Mr. Welch: Read the question.

(Question read by the reporter.)

A. Our policy is to ship freight collect.

Q. From what point?

A. From the closest point of shipment.

Q. Do I understand by that that you would mean the closest one of any of the cities that we have named in the three categories?

A. No, from the closest shipping point.

Trial Examiner Norwood: You mean that includes all points except those five cities you mentioned, Washington, Gadsden and Chattanooga—

The Witness: That is right.

By Mr. Welch:

Q. Those would be considered f.o.b. points, but not shipping points for other cities; is that correct?

A. That is right.

Q. Now, are there any exceptions to that policy?

A. Yes. There are exceptions when, because of not having stock at that shipping point, as mentioned in my previous answer, we may ship it from another shipping point.

Q. In that event, what do you do?

A. Well, in that event we ship and equalize the freight with the original or the—that is, the original shipping point from which the customer is accustomed to customarily
3760 draw his stock.

Q. Now, will you explain just how that equalization works?

A. Well, we determine the freight rate from the second shipping point to the—

Q. When you say second shipping point, do you mean the one from which shipment is actually made?

A. Yes, that is right. Thank you. To the first shipping point.

Q. By "first shipping point," do you mean the one which customarily supplies the purchaser?

A. Yes, sir.

Q. All right.

A. We equalize the freight charge for that particular shipment, charging the customer for the difference.

Trial Examiner Norwood: You charge that as if—

The Witness: As if—

Trial Examiner Norwood: —it was shipped from the customer's nearest shipping point; is that right, and if it is shipped from some further shipping point will you adjust that; is that correct?

The Witness: We adjust it.

By Mr. Welch:

Q. Will you give us an illustration?

A. Well, if we shipped from Dallas factory or ware-

house shipping point to a customer in Mississippi—
3761 then we will assume that the customer in Mississippi
may be at Meridian, Mississippi—I am only selecting that as a possibility—we would ship directly to Meridian instead of directly to the New Orleans warehouse where there is another shipping point. And we would determine the freight rate between Dallas and New Orleans, and also the freight rate between Dallas and Meridian, and we would charge the customer for the difference between those two rates.

Q. That is, you would charge him the difference in the rate between Dallas and Meridian and Dallas and New Orleans?

Mr. Wright: I object to this, that last question, Your Honor. That was simply a statement by counsel. I think the witness should bring out the testimony.

Trial Examiner Norwood: He is trying to clarify it.

Mr. Wright: The witness should bring out the company policy.

Trial Examiner Norwood: Objection overruled?

Have you answered that question?

The Witness: I am a little bit confused there. Would you repeat the question?

Trial Examiner Norwood: Wouldn't that price be the regular New Orleans price, plus the freight from New Orleans to the consumer, regardless of the fact that it was shipped from Dallas?

3762 The Witness: No.

Mr. Welch: Will you read back the question that I asked the witness, please?

(Question read by the reporter.)

A. Yes.

By Mr. Welch:

Q. Now, why would you make that kind of a shipment in that kind of a situation in the first place?

A. Only because in a situation, as an example, where we may not have the stock at the New Orleans shipping point.

Q. That would be one reason why you would do it?

A. Yes.

Q. Is it or is it not a fact that sometimes, under certain locations, and in view of certain rates, you find that you can avoid a trans-shipment from a smaller warehouse by shipping from some larger warehouse without there being any increase in the ultimate freight, because the freight from the two warehouses to the ultimate destination is the same?

A. Yes.

Mr. Wright: I object to that question, Your Honor. Is it or is it not a fact? Counsel is testifying here and having the witness ratify his statements. I think the witness should give us his own testimony.

Trial Examiner Norwood: It is a leading question, beyond all doubt.

3763 Mr. Wright: I realize that a certain amount of leading is necessary on this subject, but I believe that question is all out of bounds.

Trial Examiner Norwood: The objection is sustained, and the answer is stricken, and we will take a five-minute recess.

(Recess taken.)

Trial Examiner Norwood: Proceed.

Mr. Welch: Would you read back the last question and answer?

Mr. Wright: No, I believe his last question and the answer were stricken.

Mr. Welch: I am asking him to read back the last one which was answered.

Mr. Wright: Oh, I am sorry.

(Question read by the reporter as follows: "Question: Now, why would you make that kind of a shipment in that kind of a situation in the first place?

"Answer: Only because in a situation, as an example, where we may not have the stock at the New Orleans shipping point.

"Question: That would be one reason why you would do it?

"Answer: Yes.")

By Mr. Welch:

Q. Are there any other reasons?

3764 A. Yes, where we find that the freight rate is near or comparable or less if shipment is made directly to the customer which normally is served, in this particular example, from New Orleans, the shipment in the second case would then be made from Dallas, using the previous example.

Q. And in such a situation as that what freight if any would the customer have to pay?

A. If the rate is less than our rate to the New Orleans warehouse from Dallas to the New Orleans warehouse, then there wouldn't be any charge to the customer.

Q. But if he had received it from New Orleans instead of Dallas, what freight would he have been charged?

A. He would have paid the normal freight rate between New Orleans and destination.

Q. I show you the original of an invoice of a Dallas house copy bearing number 8579, which is one of the sub numbers under Commission's Exhibit—

Mr. Wright: 8579; was that the number?

Mr. Welch: Yes.

Mr. Wright: It appears on Commission's Exhibit 794-T, in line 41.

By Mr. Welch:

Q. (Continuing) —and also a photostatic copy of such document, which is one of the sub numbers under Commission's Exhibit 833—and, off the record, which specific
3765 number I do not have, but having identified the invoice number, you can later found out which sub number under 833 it is, I just don't happen to know right now.

I show you the original of that invoice. Does that illustrate the last type of situation that you discussed?

Mr. Wright: Off the record for a moment.

Trial Examiner Norwood: Off the record.

(Discussion had off the record.)

Trial Examiner Norwood: Back on the record.

By Mr. Welch:

Q. Your answer is—

A. Yes.

Q. From what point would Union, Mississippi, ordinarily be served?

A. New Orleans.

Q. Did you make any investigation as to why in this particular shipment it was shipped from Dallas to Union, Mississippi, rather than from New Orleans?

A. Will you read that question, please?

Trial Examiner Norwood: Read the question.

(Question read by the reporter.)

A. No, I did not.

Q. Are you familiar with the rates between Dallas, Texas, and New Orleans, Louisiana, and between Dallas, Texas, and Union, Mississippi?

3766 A. Yes, I am.

Q. Is that as a result of an investigation conducted?

A. Yes. I checked it.

Q. You checked those rates?

A. Yes, sir.

Q. Will you state what they were?

A. The rate from Dallas to New Orleans is $1.00, and from Dallas to Union, Mississippi, it is $1.10.

Q. To what point?

A. To Union, Mississippi.

Q. It is how much?

A. A dollar ten.

Q. Now, that situation, what freight did the purchaser pay?

A. The Sherwin-Williams paid the freight, the Sherwin-Williams Company paid the freight.

Trial Examiner Norwood: You know the rate from New Orleans to Union, Mississippi?

The Witness: Union, Mississippi?

Trial Examiner Norwood: Yes.

The Witness: Yes, $1.10.

Trial Examiner Norwood: From New Orleans?

By Mr. Welch:

Q. What did you state the rate from Dallas to New Orleans was?

A. I don't quite recall the rates, but I believe that
3767 I was wrong. The rate to New Orleans is $1.10, instead of $1.00.

Q. And the rate from Dallas to Union is how much?

A. ~~It is~~ $1.00 per hundredweight.

Q. Is it $1.00 or $1.09; do you recall?

A. I don't recall that. I think it is $1.00.

Q. Is it less than the rate from Dallas to New Orleans?

A. It is less.

Q. Then in that situation did the purchaser pay any freight whatever?

A. No, he did not.

Q. If he had been shipped from New Orleans to Union, would he have had to pay some freight?

A. Yes, sir.

Trial Examiner Norwood: Well, he would have had to pay that freight, the rate from New Orleans to Union in that case?

The Witness: Yes, he would have.

By Mr. Welch:

Q. But, actually he got it by reason of your substitution of a shipping point without paying any freight, is that right?

A. Yes.

Q. When you are equalizing freight in other types of situations, is it ever possible for the purchaser to pay more as the result of equalization than he would have paid had he been shipped from his normal supply service?

3768 Mr. Wright: May I have that question read?

Trial Examiner Norwood: Read the question.

(Question read by the reporter.)

A. No, it is not.

Q. Why is that true?

A. Because our shipping points are geographically located so that that is impracticable. That situation of that kind would require the second shipping point to be within the radius equal to the original shipping point and the destination.

Q. And in that event it would be the normal shipping point rather than the other point, is that right?

A. Yes, that is right.

Q. Now, are there any exceptions to that freight policy for making LCL shipments to all cities other than those designated as shipping points, and other than those you have named, such as Washington, San Diego, Pensacola, Gadsden and Chattanooga, other than the exceptions which involve equalizations?

A. Yes, there are exceptions.

Q. What type of an exception is that?

A. Well, there are two exceptions.

Q. All right. What are they?

A. Where we make a shipment within the same city where the point—where the warehouse stock is carried. And in those suburbs or contiguous cities which are surrounding the point of shipping city. 3769

Q. How do you describe those suburban cities, or cities that are contiguous to the shipping point center?

A. Well, our terminology is free delivery areas.

Q. Do they vary with each shipping point, depending on the size of the shipping point and the location of the contiguous cities or towns close to it?

A. Yes, it is dependent on that.

Q. Does it follow in each a standard pattern?

A. Yes, it follows a pattern that various companies follow in making deliveries.

Q. Is that a practice that is general throughout other types of industry other than the lead industry?

A. Yes.

Q. Is that a recognized method of handling deliveries?

A. Yes, it is.

Q. Is it commonly followed?

A. Yes.

Q. Now, do any other stores other than those of all the types you have heretofore named, ever make LCL shipments of lead products from their own stocks for which they charge freight from the store to the ultimate destination?

A. Yes, there are a few instances.

Q. Does that happen with any regularity?

3770 A. No.

Q. Have you recently examined the original invoices which are listed on Commission's Exhibit 794-A to 794-Z-13?

A. Yes, I have.

Q. Have you seen any tabulation which lists certain information appearing on the face of such exhibits in the same order and sequence as which those invoices are listed in Commission's Exhibit 794 with sub numbers?

A. Yes, I have.

Mr. Welch: I would like to have the documents that I now hand to the reporter, consisting of pages 1 to 23, marked, with appropriate sub numbers, as Respondents' Exhibit 205. And may we take a moment or two while he is doing that?

Trial Examiner Norwood: Yes. We will have a five-minute recess.

(Recess had.)

Trial Examiner Norwood: Proceed.

(The papers referred to were marked Respondents' Exhibit 205-A, 205-B, 205-C, 205-D, 205-E, 205-F, 205-G, 205-H, 205-I, 205-J, 205-K, 205-L, 205-M, 205-N, 205-O, 205-P, 205-Q, 205-R, 205-S, 205-T, 205-U, 205-V, 205-W, and X, for identification.)

By Mr. Welch:

Q. I show you the documents which have been
3771 identified as Respondents' Exhibit 205-A through 205-W, for identification. Is that the tabulation that you referred to in your previous answer?

A. Yes.

Q. To what extent, if any, have you verified the accuracy of such tabulation against the original invoices?

A. I checked all the invoices against this tabulation.

Mr. Welch: I now offer in evidence Respondents' Exhibit 205-A to 205-W, for identification.

Mr. Wright: Who prepared this exhibit, Mr. Lemke?

The Witness: One of our office people prepared the list.

Mr. Wright: What were his instructions?

The Witness: Well, to list the name of the customer and the order number, the origin of the shipment, the destination, and then anything relative to identifying as to the method of shipment, as far as it pertains to freight collect, or freight pre-paid, and so forth.

Mr. Wright: In other words, it purports to contain everything that appears in the invoice?

The Witness: So far as it pertains to the subject of identification as to the method of shipment pertaining to freight.

Mr. Wright: Was it prepared under your direction?

The Witness: Yes, sir.

3772 Mr. Wright: And this includes all of the invoices then listed in Commission's Exhibit 794 and the sub numbers?

The Witness: There are a few exceptions, and they are—and we marked them missing.

Mr. Wright: In so far as the other invoices, your followed the same order?

The Witness: Yes, sir.

Mr. Wright: Your Honor, I have no objection to this document. Of course, subject to my right to inspect the original documents and the information which was pulled off and put into this tabulation.

Mr. Welch: Those documents are available for inspection here this morning.

Trial Examiner Norwood: They may be received.

(The papers referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 205-A, 205-B, 205-C, 205-D, 205-E, 205-F, 205-G, 205-H, 205-I, 205-J, 205-K, 205-L, 205-M, 205-N, 205-O, 205-P, 205-Q, 205-R, 205-S, 205-T, 205-U, 205-V, and 205-W and X, were received in evidence.)

By Mr. Welch:

Q. Perhaps Mr. Wright has already asked you this question, but I would like to ask it myself:

What information is shown on this tabulation?

A. The customer's name, the invoice number, the 3773 origin of shipment, the destination and the marking so far as it pertains to, identifying as to how the shipment was made with respect to freight, that is collect, prepaid, and so forth.

Q. And the listings of the invoices in Respondents' Exhibit 205-A to W, are in the same order as they appear in Commission's Exhibit 794-A to Z, is that right?

A. Yes, they are.

Mr. Welch: Your Honor, off the record.

Trial Examiner Norwood: Off the record.

(Discussion had off the record.)

Trial Examiner Norwood: Back on the record.

By Mr. Welch:

Q. Now, I notice that under the column "marking" you sometimes have a notation "Free delivery area." From where was that information obtained?

A. From the attachments that were attached to the original invoices, shipping copy.

Q. Do you know what the purpose and reason was for which those attachments were first prepared and attached to the invoices?

A. Yes, I do.

Q. Will you state what it was?

A. For the purpose of identifying these original shipments as to the various classifications listed.

Q. Was it for the purpose of supplying specific information that the Federal Trade Commission had re- 3774 quested in connection with the tabulation which has now been admitted into evidence as Commission's Exhibit 794?

A. Yes.

Q. Will you explain the meaning of the term "will call" as it is used in the column headed "Marking"?

A. A customer stopping at one of our stock points or shipping points where we carry stock for the purpose of picking up the merchandise personally, or by someone in his employ.

Q. What is meant by the term "Caller"?

A. Approximately the same thing. An individual, either the man, the purchaser himself, or someone whom he has identified to do this for him.

Q. What is meant by the term "Wait"?

A. Approximately the same as my previous answers.

Q. Now, when those terms are used, what does that indicate as to whether there was any freight involved in the shipment at all?

A. No freight charged.

Q. Do you mean no freight charged or no freight incurred by either party?

A. No freight incurred either by Sherwin-Williams Company or by the buyer.

Q. Now, what does the term "C. L." mean wherever it appears on that tabulation?

3775 A. It has reference to identification on the original invoices, including truckload and carload.

Q. The term, therefore, applies equally to truckload and carload?

A. Yes.

Q. What does the term "Pt. C. L." mean?

A. Part carload.

Q. When there is no entry in the column headed "Marking" opposite a particular invoice, does that indicate anything to you?

A. Yes, it would indicate that—one of three situations.

Q. All right, will you enumerate them?

A. Shipment made on the collect basis, or a shipment—

Q. Just one second. Will you pick out one of those?

A. Shipment made on a collect basis?

Q. On a collect basis.

A. On Exhibit R-205-C, number 9642, origin of the order was Los Angeles, destination Las Vegas, Nevada.

Q. And there is no notation?

A. No notation.

Q. What does that mean to you in that particular situation?

A. That it was shipped on a collect basis.

Mr. DuBose: On a what basis?

The Witness: Collect basis.

Q. What is the second type of situation that would 3776 be brought to your mind by the absence of any data in the column headed "Marking"?

A. A delivery made within a shipping point city.

Q. Can you illustrate that type of situation?

A. On Exhibit R-205-A, Invoice No. 5322, Kansas City, Missouri, to Kansas City, Missouri.

Q. And when there is no marking in that type of situation, it indicates what?

A. That it was shipped at Sherwin-Williams' expense, delivered locally by cartage or through the medium of their own truck.

Q. All right. What other type of situation would be brought to your mind by the absence of a marking?

A. Deliveries made to cities contiguous to the shipping point.

Q. Will you illustrate that type of situation?

A. On R-205-C, Invoice No. 9768—I am sorry, I checked the wrong one there.

Q. All right.

A. I didn't look at the marking. Do you want one without marking?

Q. That is right.

In framing my last question, in saying without marking, I mean without marking on the invoices itself, not without marking on the attachments that you have referred to.

Will you identify that one?

3777 A. In that case, on R-205-H, Invoice 39516, origin Oakland, destination Berkley.

Q. Do you know of your own knowledge whether Berkley is in a free delivery area for Oakland?

A. Yes, I do.

Q. Now, leaving that tabulation for a moment, do you know the customary method by which Sherwin-Williams ships its products including lead products to its own stores in so far as carload or less than carload shipments are concerned?

A. We require our stores to order in carload quantities.

Mr. Welch: Your Honor, may we be off the record for a moment?

Trial Examiner Norwood: Off the record.

(Discussion had off the record.)

Trial Examiner Norwood: On the record.

We will recess at this time until 1:30.

(Whereupon, at 12:00 o'clock, Noon, the hearing was adjourned until 1:30 o'clock, p. m.)

3778

Afternoon Session.

1:30 p. m.

Trial Examiner Norwood: Proceed, Mr. Welch.

H. C. LEMKE resumed the stand and testified further as follows:

Direct Examination (Continued).

Mr. Welch: Yesterday on page 3827 of the record, counsel for the Commission stated as follows: "Your Honor, at this point, if this document is received, I want to call on Respondents to produce the list of rates and references from which this document is made up," referring to two maps which are Respondents' Exhibit 199 and Respondents' Exhibit 200.

I now wish to hand to counsel for the Commission three sets of tabulations which include the rate applicable at the various points marked on the maps and which have appropriate reference to the tariffs from which the rates were obtained, there being three sets applicable to each map.

Mr. Wright: I want to thank counsel for supplying this information. I want to point out my understanding of the state of the record was that I was to have a sufficient time for examination of these documents before deciding on whether the witness who testified as to the maps should be recalled for further cross-examination. 3779

Trial Examiner Norwood: Yes.

Mr. Welch: The length of time that counsel has for that purpose is something within the discretion of the Examiner and over which we have no control.

Trial Examiner Norwood: You would be able to cross-examine tomorrow, wouldn't you?

Mr. Wright: I don't see how that is possible, sir. This data here must run some 30 pages, tariff references and rates. I understand we are to run late here today, and I have no facilities for examining this material or these tariffs which are referred to are not available to me.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. I will ask counsel to see what he can do with it overnight, and I hope it can be managed so that we will not have to have a return trip to Cleveland for cross-examining that witness.

Mr. Wright: I appreciate that consideration, your Honor. I will do my best.

Trial Examiner Norwood: Yes.

Mr. Wright: I have no optimism about being able to check this material overnight.

Trial Examiner Norwood: See what you can do.
3780 Proceed.

By Mr. Welch:

Q. I show you an original invoice from Oklahoma City which carries the number 3453, which appears on Commission's Exhibit 794-C and which is one of the sub numbers on Commission's Exhibit 833. I also show you an Oklahoma City house copy invoice issued by Sherwin-Williams Company, No. 3552, bearing date of January 16, 1943. I am showing you both of those exhibits and I want you to state whether the notation on Invoice No. 3453 that the products covered on that invoice were to be shipped prepaid and without recovery of the freight by Sherwin-Williams was in accordance with Sherwin-Williams' policy or not.

A. It was not in accordance with Sherwin-Williams' policy, inasmuch as the order was shipped prepaid.

Q. Why do you say that?

A. Oklahoma City is a shipping point. Destination on this particular order is to Ralston, Oklahoma. Therefore, we have no basis from our policy standpoint to ship that order.

Q. You are referring to No. 3453?

A. Yes.

Q. What condition exists on 3552 as to freight charges?

A. On 3552, we charge customers the prepaid freight charges.

3781 Q. That means the customer pays?

A. Yes.

Q. Is 3552 in accordance with Sherwin-Williams' freight policy?

A. Yes, it would fall in line with Sherwin-Williams' policy.

Mr. Wright: Your Honor, I am going to move to strike that testimony with regard to invoice referred to as 3552 unless counsel is prepared to offer that invoice in evidence.

It is not recorded in any previous exhibit and the testimony was about an exhibit which does not appear in the record.

Mr. Welch: We are perfectly willing to offer it.

Trial Examiner Norwood: Do you offer it?

Mr. Welch: Yes.

Trial Examiner Norwood: Mark it Respondents' Exhibit 206.

(The document referred to was marked Respondents' Exhibit 206 for identification.)

Mr. Welch: I will withdraw it to make a photostatic copy.

Mr. Wright: That is perfectly all right.

Mr. Welch: I would like that to be numbered 206-A. If I may—there will undoubtedly in the course of this examination be others and they may be carried under—

3782 Trial Examiner Norwood: (Interposing.) I think that will confuse us unless you have them here now.

Mr. Welch: Your Honor, I have them here, but as I continue this examination, there are going to be different invoices I am going to produce.

Trial Examiner Norwood: Why don't you have them all marked now and examine him on them?

Mr. Welch: Your Honor, I am doing so as fast as I can get to them. They will all be numbered with a sub letter, the other following other immediately.

Trial Examiner Norwood: Mark it 206 and show it received.

(The document referred to, heretofore marked RESPONDENTS' EXHIBIT 206, was received in evidence.)

Trial Examiner Norwood: Proceed.

You did not have any objection, did you, Mr. Wright?

Mr. Welch: I understood it was being offered at Mr. Wright's request.

Mr. Wright: I have no objection.

Trial Examiner Norwood: It has been received.

By Mr. Welch:

Q. I now call your attention to Respondents' Exhibit 205-B and the invoice carries No. 3508 and 6368, and the notation under the column "Marking" is written

3783 "prepaid," with the destination being indicated as Alexandria, Virginia. Will you tell us why, within the policy of the company, those shipments were made prepaid?

A. Washington is one of those cities which I mentioned this morning as being an f.o.b. point, and Alexandria is a suburban city of Washington, and is considered a free delivery area.

Q. Is Alexandria recognized consistently as such by the company?

A. Yes.

Q. I now refer, on the same page, to Respondents' Exhibit 205-B, to invoice 10611, where the origin is shown as Philadelphia, Pennsylvania, the destination Marlton, New Jersey, and no marks in the marking column. What was the freight situation on that invoice, based upon that information?

A. May I see the copy of the invoice?

Q. I show you Philadelphia house copy bearing No. 10611.

A. That shipment is a collect shipment.

Q. Why do you state that?

A. Because it is not indicated as any other way of handling.

Q. Is there any notation on that to the effect that you paid the freight?

A. No, sir.

Q. I call your attention to the red pencil writing 3784 and ask you the same question.

A. Oh yes; it says, "Paid by customer," which would place it in record of what I stated before, that it was shipped collect.

Trial Examiner Norwood: Let's take a five-minute recess.

(Short recess.)

Trial Examiner Norwood: Come to order, gentlemen. Proceed.

By Mr. Welch:

Q. Mr. Lemke, since Respondents' Exhibit 205-A to W, inclusive, was put in evidence, have you placed any additional marks thereon?

A. Yes, I have.

Q. Will you explain what you have done?

A. I have taken those items which have not been identified in the column headed "Marking" and determined—let me say I have classified those into three groups.

Q. What are the three groups?

A. Local city delivery, marked by "A", and free delivery area for shipping point, marked "B", and prepaid and recovered or collect freight, marked "C".

Q. Now then, on the tabulations themselves, have you inserted another column headed, "Code"?

A. Yes.

3785 Q. And what entries have you made in that column?

A. I have made the—I have used either the letters A, B, or C.

Q. And to which invoices?

A. As to those invoices which do not have an identification in the column headed by the word "Marking."

Q. As to those that are marked B throughout the entire exhibit, beginning with Respondents' Exhibit 205-A, and running through 205-W, do you know of your own knowledge that the towns therein listed to which shipments were made from the points of origin therein listed were in fact within the free delivery zones of such shipping points?

A. Yes.

Q. Do you know of your own knowledge and from your examination of the original invoices which you have classified by the code letter C, that they fall within the scope of the policy you have previously stated to the effect that in such instances the freight would either be prepaid and then collected from the customer, or else the shipment would be sent out freight collect?

A. Yes.

Q. Now, Mr. Lemke, I call your attention to two invoices appearing on Respondents' Exhibit 205-F, the same bearing the numbers 4012 and 4030.

A. All right.

3786 Q. I would like to have you examine the original invoices which I hand you and tell me whether or not carload shipments are involved.

A. These two orders were shipped at the same time, evidenced by the shipping receipt number which is the same in both cases, No. 52336.

Q. Is the poundage shown on both?

A. Yes.

Q. Which one is shown and what is the total amount shown?

A. On Invoice No. 4012, the total poundage represents approximately 76,000 pounds.

Q. Is that information shown on the first page of No. 4012?

A. Yes.

Q. And the fact that the same shipping receipt number is on both invoices indicates that they went together as a part of a truckload order?

A. Yes, sir.

Mr. Welch: May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Welch:

Q. I now show you invoices bearing Nos. 3233 and 3260, which appear on Respondents' Exhibit 205-F.
3787 Can you examine the first sheets of Order No. 3260 and Order No. 3233, and explain the fact that No. 3233 was billed f. o. b. Oswego?

A. Invoice 3233 specifically indicates that the shipment was made prepaid, or f. o. b. Oswego.

Q. Now, look at 3260. Which of those two orders reflects the true policy of the Sherwin-Williams Company with reference to freight payment in a situation of that character?

A. Invoice 3260.

Q. Do I understand from that that the billing of 3233 is an error?

A. I would consider it such. It is not Sherwin-Williams' policy to ship that way.

Trial Examiner Norwood: That first one, 3233, was prepaid and recovered, wasn't it?

The Witness: No, there is no showing of recovery.

Mr. Welch: I would like to have 3233 marked as Respondents' Exhibit 207, and the first page of No. 3260 marked Respondents' Exhibit 208. And I would like to offer them both in evidence.

Mr. Wright: Are you offering this note that appears on here in red?

Mr. Welch: I know nothing about it.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: No objection.

Trial Examiner Norwood: Received as marked.

3788 (The documents referred to were marked for identification RESPONDENTS' EXHIBIT 207 and RESPONDENTS' EXHIBIT 208 and were received in evidence.)

By Mr. Welch:

Q. I now call your attention to Invoice No. 7948 and No. 7966 on page 205-F, involving shipments from Newark to the Bronx, and to New York, respectively. Do you know whether the Bronx and New York are both or either within the free delivery area from Newark?

A. They are both in the free delivery area.

Q. I now call your attention to Invoice No. 9555 appearing on Respondents' Exhibit 205-G, and I show you the original invoice listed thereon. Can you tell us whether or not that involves a carload shipment?

A. It does involve a carload shipment.

Mr. Welch: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Welch:

Q. What is your basis for stating that that is a carload shipment?

A. The quantity through the weight indicated on the face of the invoice, plus the fact that a good number of
the items are canceled, which together would make up
3789 a required carload weight. Therefore, we would ship
it to the customer.

Q. I now call your attention to Invoice No. 14939, No. 14936, and No. 14938 appearing on Respondents' Exhibit 205-G. Can you tell us whether those shipments involve carload shipments?

A. Yes.

Q. What is the basis for that statement?

A. The weight and the fact that all three orders were shipped on the same bill of lading number.

Q. What is the approximate total weight shown, just roughly?

A. Approximately 17,000 pounds.

Q. 17,000 pounds?

A. Yes.

Trial Examiner Norwood: Three shipments together make up a carload, is that the idea?

The Witness: That is right.

By Mr. Welch:

Q. Do the faces of those invoices indicate certain other invoices were shipped at the same time on the same shipping receipt?

A. Yes. In addition to this weight indicated on the face of the invoices, we have a notation that 14929 indicates it was shipped on other invoices in addition to the 14936 and 14938.

3790 Q. Which invoices are not in the possession of the Cleveland office, are they?

A. No.

Q. I now call your attention to Invoice No. 38336 appearing on Respondents' Exhibit 205-G and show you an original invoice and ask whether that shipment involved a carload shipment?

A Yes.

Q. What is your basis for making that statement?

A. The weight indicated on the face of the invoice.

Q. What is the rough weight?

A. Approximately 18,000 pounds.

Q. I call your attention to the notation with reference to Invoice No. 46019 appearing on Respondents' Exhibit 205-H. What relationship if any does Burlingame bear to Oakland, California?

A. Burlingame is in the free delivery area.

Q. I call your attention to Invoice 4838 appearing on Respondents' Exhibit 205-K. I will show you the original of that invoice.

Mr. Welch: The document now marked Respondents' Exhibit 205-H should be changed to read Respondents' Exhibit 205-H-1.

Trial Examiner Norwood: There is nothing on the record about these letters. All you have got to do is

3791 change the letters there. You haven't asked any questions about it.

Mr. Welch: We have offered the whole thing, your Honor.

I don't want to change my total sequence of numbers because I have been referring to the entire document.

Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Welch: H shall become H-1 and the one that was unnumbered will become H-2.

Trial Examiner Norwood: Change those numbers, Mr. Reporter, when you get down to H. Page No. 7 is H, and mark the ones after No. 7, beginning with I. Page No. 8

is I, and so forth, which makes the entire series concluded with the letter X.

Take five minutes recess and fix them up.

(Short recess.)

Trial Examiner Norwood: The record may show that this series, Respondents' Exhibits 205 run from "A" to "X" inclusive instead of "A" to "W" as heretofore designated, and that references to that may be corrected to include "X".

By Mr. Welch:

Q. Now, I note that normally that Invoice No. 4838
3792 to which I have called your attention indicates that
there was no marking thereon with reference to freight. I show you the original Invoice No. 4838 and ask you what the facts are with reference to who paid the freight and why?

A. The invoice indicates that the Sherwin-Williams Company paid the freight.

Q. Why?

A. Because the shipment was made to a shipping point.

Q. I now call your attention to invoices No. 14767 and 48255 appearing on Respondents' Exhibit 205-L and note that the column headed "Marking" does not have a notation as to who paid the freight. I show you the original invoices No. 14767, and 48255, and ask you if you have made any investigation as to who paid the freight, and if you made such an investigation, who paid it?

A. It appears that when we have to pay the freight on both of these invoices, inasmuch as they are government agency orders.

Q. That would be in conformance with your general policy?

A. Yes.

Q. I call your attention to Invoices No. 48260 appearing on Respondents' Exhibit 205-L, and note in the column headed "Marking" the words "entire amount returned." I show you the invoice. What is the meaning of the writing "entire amount returned"?

3793 A. It appears that the shipment was either not
acceptable to the customer and he returned it, or it was shipped in error, so the merchandise was returned to the shipping point.

Q. The entire amount of merchandise was returned, is that right?

A. Yes, the entire amount.

Q. Now, when situations like that happen, what is the company's policy with reference to freight?

A. Our policy is to adjust the original freight charge.

Q. And by adjust, you mean what?

A. Credit the customer for the amount he paid on the original shipment.

Q. I call your attention to Invoice No. 1090 on Respondents' Exhibit 205-L, and the absence of any notation in the column headed "Marking." I show you the original invoice No. 1090 and ask you what the freight situation was with reference to that invoice in so far as payments are concerned?

A. This shipment appears to be a carload quantity, therefore, it was prepaid.

Q. Why is there no prepayment notation on it?

A. Because the shipment, as indicated by the shipping statement, shows that it originated at Oakland, and was shipped by boat to Seattle, where it was reconsigned
3794 to customer as verified by the shipping statement at the Seattle warehouse.

Q. And Seattle is a warehouse point?

A. Yes, sir.

Q. Who paid the freight on that invoice after it was trans-shipped from Seattle to the customer at Hoquiam, Washington?

A. It would appear that this would be shipped at Sherwin-Williams freight expense because of the quantity involved, representing 19,024 pounds.

Q. Now, I call your attention to Invoice No. 12182 shown on Respondents' Exhibit 205-N and the fact that there is no notation in the column headed "Marking." I show you the original invoice and ask you what the invoice shows with reference to who paid the freight and why?

A. The Sherwin-Williams Company paid the freight on this shipment which originated at Kensington, or Chicago factory, and was shipped direct to the Seattle warehouse or shipping point where it was re-consigned to the customer. The quantity in this case, from the standpoint of weight, would indicate that the Sherwin-Williams Company also paid the freight from Seattle to Yakima, Washington.

Q. It being a carload?

A. It being a carload.

Trial Examiner Norwood: Did that ultimately
3795 amount to more than the price from Chicago to
Seattle?

The Witness: Would you repeat that, please?

Trial Examiner Norwood: Can you tell us whether the freight from Chicago to Yakima, Washington, was more than from Chicago to Seattle?

The Witness: Yes, very much more.

Trial Examiner Norwood: Go ahead.

By Mr. Welch:

Q. Mr. Lemke—

Mr. Welch: Your Honor, I would like to state for the record, however, that this freight equalization is not a problem in connection with this invoice because the freight was paid from origin to destination and there was no equalization involved. We are offering to show that.

Trial Examiner Norwood: Very well.

By Mr. Welch:

Q. I now call your attention to Invoice No. 7968, appearing on Respondents' Exhibit 205-M, and call your attention to the fact that the column headed "Marking" bears no notation. I would like for you to examine the original invoice and tell me what the size of it was, who paid the freight and why.

A. The weight of this shipment was 19,835 pounds. The invoice indicates "Car to Seattle." Therefore, it appears
that the shipment was made from Oakland to our
3796 Seattle warehouse and re-consigned to Anchorage.
Sherwin-Williams paid the freight.

Trial Examiner Norwood: Is that Anchorage, Alaska?

The Witness: Yes.

By Mr. Welch:

Q. Now, I would like to call your attention—still referring to Respondents' Exhibit 205-M. I note that Invoice No. 8323 has as its place of origin Seattle, and its destination Juneau, Alaska, and has no marking in the column, and no code letter in the column headed "Code." Is that correct or incorrect?

A. I would have to refer to the original invoice.

Q. Is Seattle the closest shipping point to Juneau?

A. Yes, it will appear that this order was shipped collect to Juneau, Alaska.

Q. Did it amount to a carload?

A. I don't think so.

Q. I now call your attention to Respondents' Exhibit 205-C, an invoice No. 4393 which shows a sale to the Columbus & Greenvill Company, of Columbus, Mississippi, which delivery was f.o.b. Chicago. Do you have any knowledge as to whether Columbus and Greenvill Railway Company is connected with the Gulf, Mobile and Ohio, and the Alton route?

A. Yes, and they have a line.

3797 Q. The Gulf, Mobile and Ohio, and the Alton Route, have a terminal at Chicago, is that right?

A. Yes, they do.

Q. Then, does the delivery of the merchandise to the railroad f.o.b. Chicago conform to Sherwin-Williams' policy for handling railroad accounts?

A. Yes.

Q. I now call your attention to Respondents' Exhibit 205-P, Invoice 4955, showing a shipment from Dallas to Panama City, bearing the marking indicating that the shipment was f.o.b. Panama City. Please examine the original invoice and tell me whether that constituted a carload, and if it did, the basis for your statement.

A. It constitutes a carload.

Q. What poundage do you find on the first page of the invoice?

A. Approximately 21,000 pounds.

Q. I call your attention to the entry in connection with Invoice 9800 on Respondents' Exhibit 205-P, involving a shipment from Houston, Texas, to Baton; what relation exists between Baton and Houston?

A. Baton is in the freight delivery area.

Q. Now, I call your attention to Respondents' Exhibit 205-R, and the Invoice No. 7320. I will ask you to look at the second tabulation. On that page, and tell me

3798 what the invoice number is?

A. 7225.

Q. I now show you an invoice bearing the number 7325. I will ask you to say whether the one you have listed as 7225 is the same as the one, the original of which I showed you?

A. It appears it should be 7325 instead of 7225.

Q. You show it 7325. Will you make appropriate corrections on Respondents' Exhibit 205, with the consent of the Commission's counsel, to make that conform?

A. Yes, sir.

Q. Now, with respect to that exhibit, I note that the marking shows that freight was allowed to destination on that shipment. I show you the original invoice 7325 and ask you to explain why freight was allowed?

A. It appears that an original shipment was entered and shipped indicating on the face of the invoice, "A truck will call with other orders," and it appears that it is the back order, or carried forward items which we shipped.

Q. Do I understand by that that they were not available for shipment at the time the truck picked up the other items?

A. It would appear so.

Q. Now, in a situation where the company is not in a position to ship all items in connection with a carload order at the time the carload order goes out, what is the company's standard policy?

3799 A. Sherwin-Williams pays the freight.

Q. Why is that?

A. Because it would be a direct additional cost to the customer, and we assume it is our responsibility to have the merchandise on hand to be handled with the original order.

Q. In other words, you don't want to penalize them?

A. That is right.

Q. I now show you Invoice No. 11232 appearing on Respondents' Exhibit 205-R. You will note that the statement under the column "Marking" is "Freight allowed to destination." Can you state from an examination of the invoice why that price was allowed to destination?

A. It would appear that this is a carload shipment.

Q. And under such policy, who would pay the freight?

A. Sherwin-Williams would pay the freight.

Q. What is the weight?

A. It is—

Q. Roughly.

A. I think that was approximately 12,000 pounds as indicated. However, to make positive the weight, I would want to estimate the number of gallons because the actual weight doesn't appear to be given in complete picture, but so far as the notations are concerned—

Q. Could you do that in a very few minutes?

A. Yes.

3800 Mr. Welch: Your Honor, we would like a few minutes' recess to figure that out.

Trial Examiner Norwood: Very well.

(Short recess.)

Trial Examiner Norwood: Come to order, gentlemen, and proceed.

By Mr. Welch:

Q. Are you now able to calculate that figure, roughly?

A. Approximately 16,000.

Q. Does the company occasionally take a carload rate even though there isn't sufficient tonnage in it to make a carload?

A. Yes, we do.

Q. Why is that?

A. There are occasions in certain circumstances when it is less expensive, or there is less freight charge to the company by paying the minimum carload order and shipping less than the minimum quantity than shipping that portion on an LCL basis.

Q. Would an amount of 16,000 pounds fall in that area?

A. Yes, it would.

Q. Mr. Lemke, have there ever been changes in the list of cities in which warehouses or shipping points are operated?

A. I wish you would repeat that question.

Q. Strike the question.

3801 Mr. Lemke, are certain cities sometimes listed as shipping points because warehouse stocks are carried there, and at other times not listed because they do not carry warehouse stocks?

A. Yes.

Q. Is Atlanta, Georgia, a city that has been in that position—Savannah, Georgia, I mean?

A. Yes, Savannah has.

Q. Was Savannah, Georgia, a warehouse—strike that. Was Savannah a shipping point during the period from September 1942, through April 1943?

A. What was the first date?

Q. September 1942. Correction, October 1942.

A. Yes, I think it was.

Q. I call your attention to Invoice No. 8373 appearing on Respondents' Exhibit 205-R, and show you the original invoice. I call your attention to the fact that the notation in the column headed "Marking" is prepaid. Can you tell me why that shipment was prepaid?

A. Because it was a carload shipment.

Q. How much poundage was involved?

A. 22,690 pounds.

Q. How much?

A. 22,860 pounds.

Q. I call your attention to Invoice No. 7200 on
3802 Respondents' Exhibit 205-R, and note that the col-
umn headed "Marking" bears the notation "Freight allowed to destination." Can you explain to me upon examination of the original invoice why that shipment was sent freight allowed?

A. There appears to be a carload order.

Q. What is the poundage involved, roughly?

A. Approximately 20,000 pounds.

Q. I now call your attention to Invoice No. 8525 appearing on Respondents' Exhibit 205-R and show you the original invoice. I call your attention to the note appearing under the column "Marking" which is "Prepaid." Can you tell us why that shipment was prepaid?

A. Carload.

Q. What is the tonnage involved?

A. 19,662.

Q. You mean pounds?

A. Yes.

Q. I call your attention to Respondents' Exhibit 205-U and the Invoice No. 8111 showing origin, Chicago, destination, Gary, Indiana. What relation exists between Chicago and Gary?

A. Gary is in a free delivery area.

Q. I now call your attention to Respondents' Exhibit 205-V and Invoice No. 1473 showing the place of origin as
Pittsburgh, Pennsylvania, and destination as Home-
3803 stead, Pennsylvania. What relationship exists be-
tween Pittsburgh, Pennsylvania, and Homestead, Pennsylvania?

A. Free delivery area.

Q. I show you Invoice 49923 appearing on Respondent's Exhibit 205-W, and I call your attention to the fact that the column headed "Marking" bears a notation "Prepaid." Will you examine the original invoice and tell us why the shipment was sent prepaid?

A. Carload.

Q. How much poundage was involved?

A. Approximately 18,000 pounds.

Q. Would that come within the range with which the company would prepay—would prefer to pay the minimum car rate, rather than the less than car rate?

A. Yes.

Mr. Welch: We think we are finished with this witness, Your Honor, but it is our thought that we may want to ask him some questions tomorrow. Due to the lateness of the hour, we would like to state that we would like an adjournment until tomorrow morning, but we will advise counsel for the Commission that in all probability the witness will be offered for cross-examination immediately upon the convening of the session tomorrow morning.

We also would like to state for the record that we will take temporary possession of Respondents' Exhibits
3804 Nos. 206, 207, and 208 for the purpose of making photostatic copies.

Trial Examiner Norwood: Very well, Mr. Welch.

We will recess now until 10:00 o'clock tomorrow morning.

(Whereupon, at 4:55 o'clock, p. m., October 16, 1947, the hearing in the above-entitled matter was adjourned.)

3805 Room 125, Federal Building,
Cleveland, Ohio,
Friday, October 17, 1947.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph Wright, (and)
David R. Reel, Attorneys for the Federal Trade Commission.

J. T. Welch, (Davies, Richberg, Beebe, Busick and Richardson, Esqr's., 15th Street, N. W., Washington, D. C.), and
J. T. McDowell, (and)
T. J. Gray, (101 Prospect Avenue, Cleveland, Ohio), Attorneys for Sherwin-Williams Company.

Edmund P. Wood, Attorney for Eagle-Picher Lead Company, and The Eagle-Picher Sales Company.

Eugene Z. DuBose, (Alexander and Green, 120 Broadway, New York, New York), for the National Lead Company.

3806 John A. Duncan, (M. B. & H. H. Johnson, 1649 Union Commerce Building, Cleveland, Ohio), Attorney for The Glidden Company.

3807 PROCEEDINGS.

Trial Examiner Norwood: Pursuant to adjournment, the hearing is resumed in Room 125 of the Federal Post Office Building, Cleveland, Ohio, at 10 o'clock A. M.

The appearances are as follows:

J. T. Welch and T. J. McDowell and T. J. Gray, Attorneys for Sherwin-Williams Company.

Edmund P. Wood, Attorney for Eagle-Picher Company and the Eagle-Picher Sales Company.

John A. Duncan, Attorney for The Glidden Company.

Eugene Z. DuBose, Attorney for National Lead Company.

The attorneys for the Federal Trade Commission are Joseph S. Wright and David R. Reel.

Trial Examiner Norwood: Mr. Lemke will resume the stand for further examination.

H. C. LEMKE resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Welch.

Q. Mr. Lemke, the testimony yesterday, you testified at length as to the policy of the Sherwin-Williams Company, with reference to handling carload and less than carload shipments to various types of purchasers. As a general policy that you described in your testimony yester-
3808 day—has it been the same over a period of 15 years?

A. Yes.

Q. The policy you described yesterday does—does it or does it not represent a departure from the policy you have maintained for 15 years?

A. It does not represent any departure.

Q. I now call your attention to Invoice No. 13050 which appears on Respondents' Exhibit 205-C, Invoice No. 2094 which appears on Respondents' Exhibit 205-D, Sherwin-Williams Invoice No. 14091 which appears on Respondents' Exhibit 205-D, and Sherwin-Williams Invoice No. 4060 which appears on Respondents' Exhibit 205-E, and I will call your attention to the notations appearing opposite each of the invoices I have referred to. The notation in each instance is either "Prepaid, freight allowed," or "Freight allowed," in the column headed, "Marking," and all of the invoices involving shipments to the Pusner paint store at Tucson, Arizona. Will you please explain why those shipments were sent prepaid or with freight allowed? Correction—will you strike that question?

When those—correction. Have you made any investigation and obtained reports as to why those particular shipments were sent either freight prepaid or freight allowed?

A. Yes, I have.

3809 Q. Tell us the result of that investigation and of those reports.

A. I learned that because of competition, these particular orders were shipped to Pusner on the basis of freight allowed.

Q. What was the competitive situation that made that necessary?

A. Well, I found that the company set up that policy at Tucson, selling customers there on the same basis.

Q. That is a competitor of Sherwin-Williams Company?

A. Yes.

Q. And how did that affect Sherwin-Williams' relationship with Pusner?

A. That we couldn't sell them on the regular Sherwin-Williams basis of freight collect which is our regular policy.

Q. Then when you found that you couldn't ship them on the regular basis, did you have to make any concession?

A. Yes.

Q. What was that concession?

A. We allowed the freight.

Q. I now show you Sherwin-Williams Invoice No. 657 which appears on Respondents' Exhibit 205-D and call your attention to the notation in the column headed "Marking" which reads, "Freight allowed;" did you con-
3810 duct any investigation and receive any report as to
why freight was allowed on that particular invoice?

A. Yes. I checked this particular invoice.

Q. What was the reason for the freight being allowed on that invoice?

A. Found that freight was allowed because we couldn't sell to the same customer represented on this invoice on our regular policy.

Q. Why was that?

A. Because of competition.

Q. Explain the competitive problem that brought that up.

A. Well, a competitor of the Sherwin-Williams Company sold this same customer on the basis of freight allowed, and therefore made it impossible for us to sell him on any other basis.

Q. I call your attention to Sherwin-Williams Invoice No. 4600 appearing on Respondents' Exhibit 205-B, being a shipment to the General Chemical Company, at Mount Claymont, Delaware, the designation in the column headed "Marking" being freight prepaid. Did you conduct any investigation and receive any reports as to why that particular shipment went out freight prepaid?

A. Yes, I checked this invoice.

Q. What did you ascertain?

A. I found that we had been shipping this customer for a long period of time on a prepaid basis. 3811

Q. Why had you been doing that?

A. Well, for a matter of competition, we were unable to sell the customer on any other basis. We therefore shipped it prepaid.

Q. Is this same customer purchasing from competitors of Sherwin-Williams?

A. Yes.

Trial Examiner Norwood: Had you been selling them prior to that time on a basis of freight charges collect and then recoverable?

The Witness: Yes, previous to the time, we had to—

Trial Examiner Norwood: (Interposing.) Then, in either case, the freight was included in the price, was it?

Mr. Welch: May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Do you understand the question?

The Witness: No; would you read it?

Trial Examiner Norwood: Read the question.

(The reporter read the question.)

Trial Examiner Norwood: Answer the question.

The Witness: Before that we didn't recover the freight which we are on the present basis. 3812

Trial Examiner Norwood: Then the only difference between the way you sold them after you met that competition and the way you sold them prior to that time was merely the matter of convenience in the matter of paying the freight, was it?

The Witness: No, we shipped them on a collect basis prior.

Trial Examiner Norwood: Did the customer own the goods at the same amount—on payment of the same amount, or at the same cost?

The Witness: Previously we shipped these customers on the basis of invoice collect delivered.

Trial Examiner Norwood: And the others were price plus the freight?

The Witness: Yes.

Trial Examiner Norwood: Now, later, when you met the competition, you lowered the price because you paid the freight; is that right?

The Witness: Yes.

Trial Examiner Norwood: I just wanted to understand the previous testimony.

Go ahead.

By Mr. Welch:

Q. In other words, before you had to meet this 3813 competition, the customer paid the freight cost.

A. Yes.

Q. And now since you have met the competition, you pay it?

A. Yes.

Trial Examiner Norwood: All right; thank you.

By Mr. Welch:

Q. I call your attention to Respondents' Exhibit 205-F and call your attention to the invoice to Henry R. Bollinger, No. 24769, No. 23535, No. 24768, No. 510, No. 521, No. 509, all of the invoices which I have referred to being invoices to Henry Bollinger, and the notations in the "Marking" column are, "F. O. B. destination," or, "Prepaid." Will you please state whether you made any investigation, obtained any report as to why those shipments were sent to Mr. Bollinger on that basis?

A. Yes, I checked all of these invoices.

Q. What did you ascertain as to the reason why those shipments were sent either prepaid or f.o.b. destination?

A. I found that all of those shipments were made on a basis of prepaid because of competitive sales to this same account. They were made on a freight paid basis delivered at these various locations, and therefore it was necessary that we had to handle on the same basis in order to sell that same account.

3814 Q. Was this a series of stores operated by the same man in several different locations?

A. Yes, I found that to be true.

Q. A chain store operator?

A. Yes.

Q. Did Sherwin-Williams formerly sell him on a freight collect basis?

A. Yes, sir.

Q. And the change was made—was the change made only after you found what the competitive situation was?

A. Yes, after we found what the situation was.

Q. I call your attention to Respondents' Exhibit 205-F and Sherwin-Williams Invoices 43996, 44126, 44122, 44228, 44312, all representing shipments from Sherwin-Williams Company to G. P. Barney and the notation in the column headed "Marking" appearing variously as "f.o.b. shipping point with 50 per cent allowance on freight," and in one instance, to-wit, 44122, entirely prepaid. All other instances being 50 per cent allowed. Did you conduct any investigation, obtain any reports as to why those shipments were sent on a 50 per cent prepaid basis and in the one instance on a hundred per cent prepaid basis?

A. Yes, I checked these invoices.

Q. What did you find out?

A. I found that the change in basis of shipment

3815 to this account to allowing 50 per cent of the freight and of course the one case allowed the complete freight.

Q. Why did you do that—did you find out why that was done?

A. Yes. The reason was that we were unable to continue selling this account on a regular basis.

Q. Had you formerly sold him on your regular basis of freight collect for less carload amounts?

A. Yes, sir.

Q. Did you find out the reason why you couldn't continue to sell on your former basis?

A. Yes, I found that a competitor of the Sherwin-Williams Company was selling on a competitive basis—on a freight allowed basis.

Q. Is that the reason that Sherwin-Williams made the change?

A. Yes, sir.

Q. I will now call your attention to Sherwin-Williams invoices, Respondents' Exhibit 205-F, Invoice No. 25714, Pelton Hardware, Middletown, New York, with a notation, "Freight allowed," and also on Respondents' Exhibit 205-G, Invoices 10620, 9269, 26649, also involving shipments from Sherwin-Williams to Pelton Hardware Company at Middletown, New York, and carrying the notation prepaid, 200 pounds or over, freight allowed, 200 pounds or

3816 over. Did you conduct any investigation and receive any reports as to why those particular shipments were shipped on a prepaid basis or freight allowed basis?

A. Yes, I checked these invoices.

Q. What did you ascertain?

A. I found that we had previously sold this account on a regular collect basis, but that at the time of these sales, we had sold them on the basis as indicated.

Q. Did you ascertain why that was done?

A. Yes. I learned that we were faced with a problem of not being able to sell this customer on the regular basis and therefore made the allowance.

Q. Why weren't you able to sell the customer on that basis?

A. Because they were able to buy from a Sherwin-Williams competitor on a basis which allowed the freight.

Q. I call your attention to Respondents' Exhibit 205-F and show you Sherwin-Williams Invoice No. 3136, addressed to Mohawk Wallpaper & Paint Company, Utica, New York, with the marking, "Prepaid." Did you conduct any investigation and receive any report as to why that shipment was made on that basis?

A. Yes, I checked this.

Q. What did you ascertain?

A. I found that we were unable to sell this cus-
3817 tomer at this time on the regular basis of collect be-
cause competitively—or because competition sold
them on the freight allowed basis.

Q. When you say competition, what do you mean?

A. A vendor who sold similar items.

Q. Had this company been sold on that basis previously?

A. On what basis?

Q. On the basis on which this order was shipped? Let me strike that. Before you ran into a competitive situation, how did you sell this customer?

A. We sold him on a collect basis.

Mr. Welch: Your witness.

Trial Examiner Norwood: Let's have a five-minute recess.

(Short recess.)

Trial Examiner Norwood: Come to order, gentlemen. You may proceed, Mr. Wright.

Cross-Examination by Mr. Wright.

Q. Mr. Lemke, how long have you been in your present position?

A. Since 1941.

Q. Since 1941?

A. Yes.

Q. What [illegible] the title?

3818 A. Manager of the auditing department.

Q. And what was your title in the position you held immediately prior to 1941?

A. Assistant to the credit and accounting manager.

Q. How long were you in that position?

A. I am sorry, that was the position before. I was traveling previous to my present assignment.

Q. Traveling?

A. Yes.

Q. In what capacity?

A. In the capacity of an auditor, investigating branches.

Q. For what period prior to 1941 were you doing that?

A. Approximately '41.

Q. That was back to 1936?

A. Yes.

Q. Prior to 1936, what was your position?

A. I was working in the district office as the assistant to the credit accounting manager.

Q. What district was that?

A. Southcentral District, now known as the Southeastern.

Q. What is the district office?

A. District office was at that time Cincinnati, now at Atlanta, Georgia.

Q. And how long were you in that position?

A. I started there in 1933.

3819 Q. Then, actually your experience doesn't go back 15 years as far as the company's policy is concerned, if you started in 1933?

A. That is right. When I worked in the assistant to the credit manager—in Cincinnati—I traveled under his supervision and those branches which were under his supervision, I reviewed and did similar work.

Q. But that was starting in 1933?

A. '33, yes.

Q. So that actually that experience doesn't go back quite 15 years. You stated that you were familiar with the policy for 15 years back?

A. Well, I worked previously to Cincinnati in the same capacity under Mr. Campbell in our district office in Cleveland.

Q. You weren't working out of headquarters and dealing with headquarters policies for all branches prior to 1936?

A. No, sir.

Q. You were in a particular branch?

A. Or district.

Q. Or district.

A. Yes.

Q. Now, regarding these transactions with Pusner and Switzer and General Chemical and Bollinger and Barney and Pelton and Mohawk, about which you were testi-
3820 fying this morning, did you participate in any of those transactions when they occurred?

A. No, sir.

Q. Now, you stated that you made an investigation of those invoices which was the basis of your testimony; is that correct?

A. Yes.

Q. What did that investigation consist of?

A. I checked with the office handling those particular transactions.

Q. And they told you that was the situation?

A. They showed reports where our sales office had approved and headquarters approved those particular sales.

Q. Based on reports that had actually been kept in the files?

A. Yes, sir.

Q. Where are those reports, do you have them?

A. No, I haven't. They are available here.

Q. Was all of the information that you gave about those transactions on the reports?

A. Reports made by them; yes, sir.

Q. No part of your answer then in any respect was based on what those officials in the districts where those customers were located had told you had been the situation?

A. I wish you would repeat that question.

3821 Trial Examiner Norwood: Read the question.

(The reporter read the question.)

The Witness: I don't quite get one sentence. I should like to have that repeated.

(The reporter again read the question.)

The Witness: My report here was based entirely on what I found through checking the situation as represented by these particular orders, the same basis our procedure would be in auditing any situation.

By Mr. Wright:

Q. Tell us just exactly what you did.

A. I checked with the county manager in the accounting of these individual offices.

Q. How did you do that?

A. By contacting them either through letter, telephone, or wire.

Q. Now did their responses come to you?

A. An the same basis.

Q. Telephone calls, telegrams or letters?

A. Yes, sir.

Q. Did they transmit to you the documents which you have referred to?

A. No, sir.

Q. You haven't seen them?

A. No, sir.

3822 Q. Then actually all your testimony on these things was based on what these gentlemen told you, either orally or in a letter?

A. Yes, sir.

Mr. Wright: Your Honor, I would like to move all the testimony of this witness at this time regarding the transactions with Pusner, General Chemical, Switzer, Barney, Pelton, and Mohawk—it didn't appear on direct examination that the investigation which the witness referred to was one purely of hearsay, and since it now appears on cross-examination that this witness has no information except what was told him on a phone or in a letter from a branch official, his testimony is clearly inadmissible and should be stricken.

Mr. Welch: Your Honor, we take the position that those witnesses testified that those reports—in the first place, he is in the auditing department. The auditing department questions all invoices which do not follow the regular policy, and in questioning those, they obtain back these reports. These reports were obtained in the regular course of business, and the company had a right to rely on them

and did rely on them. I think perhaps that the manner in which some of them may have been received may go to the weight, but not to the right of this man to testify on the basis of reports that were received by him in the
3823 regular course of his auditing functions with the company.

Mr. Wright: Your Honor, that is the point. These aren't in the regular course of his auditing functions with the company. This man called these officials to determine something for the purpose of this proceedings about transactions already recorded here. There may be documents or reports kept in the regular course of the business in the branch offices. They have never been presented here and this witness has never seen them, by his own testimony.

He made statements here to the effect that prior to that time they were sold on a freight collect basis. When this competitive situation came up—he didn't name the competitors or any of the situations which gave rise to these things.

Certainly a branch manager or an official familiar with the transaction and dealing with the customer would be competent to testify what that situation would have been and would be subject to proper cross-examination as to those situations. Here it is being brought in by hearsay which completely deprives me of an opportunity of ascertaining the proper information.

Trial Examiner Norwood: Did your reports indicate in each case who the competitor was that had been
3824 selling him lower?

The Witness: In most instances, I don't recall. I could name some of them.

Mr. Wright: Your Honor, even in that event, all he knows is what a man told him on the telephone or wrote him in a letter. It is not record kept in the regular course of business. This was an inquiry specifically for the purpose of this hearing and for the purpose of his testimony.

Trial Examiner Norwood: Well, I think that if he is going to show justification of that price variation, he would have to show more exact information than he has given us here, general information here, and he would have to show it by direct evidence rather than this investigation.

Mr. Welch: Your Honor—

Trial Examiner Norwood: (Interposing.) He received this information, not at the time that the lower price was made. It isn't information that he received in the due course of business and acted on. His report comes after the action is taken by somebody else.

Mr. Welch: Your Honor, he has testified that he obtained these reports in the same manner in which he obtains reports—in the first place, he testifies that now when a sale is made and isn't made on the recognized 3825 basis, that the auditing department checks it and makes an inquiry, just as he testified he made this inquiry, maybe by telephone, maybe by wire, maybe by letter. Why did you do this? It is reported back. The company has satisfied itself on that basis and acted on it in approving that sale and letting it go through.

This investigation was made the same way as the ones on which the company does rely in the course of its operations. It is true this one was made subsequently but it follows the pattern that the company does make them and upon which it acts.

Mr. Wright: No—

Trial Examiner Norwood: (Interposing.) It seems to me the information upon which they acted was received by this branch manager, or whoever was in immediate supervision over the salesman who reported it. He would be permitted to tell what this salesman told him, and he would be permitted to show that he had investigated and found it was a bona fide claim on the part of the customer which justified him in making the lower price, so I think this is once removed from that, and so far as this evidence relates to the making of a lower price than this Respondent made to other customers in order to meet an equally low price of the competitor, I think that I will allow the motion. The evidence can stand for other purposes.

3826 Mr. Wright: Your Honor, I want to point out now that my objection and my motion go also to an issue that has been raised here.

It has been my contention that the Sherwin-Williams Company has substantially followed the zone method of selling. The issue has been raised on that. A vice-president of the company said we don't follow the zone system, we add freight to a customer not at a shipping point. These other records were put in by the Commission to prove that they don't add freight in many instances, and it was to rebut that.

Now, he has—

Trial Examiner Norwood: (Interposing.) I think he can show that.

Mr. Wright: This witness is testifying about competitive situations here. If I cross-examine him on a point he doesn't know, all he can tell me is that the man who told him didn't tell him that. "The man that told me this story, didn't tell me what the answer was to that situation. I had nothing to do with these transactions."

Trial Examiner Norwood: He has testified that in general he has followed this policy here which it is claimed is analogous. Then he gave other testimony showing that he departed therefrom.

You don't object to the testimony showing that he 3827 departed from it, do you?

Mr. Wright: I object to trying to vary what appears on the face of written documents in the record, officials' transactions, invoices of officials' transactions of the company, by hearsay evidence, which has gotten up for the purpose of this hearing.

Mr. Welch: Mr. Wright—

Mr. Wright: (Interposing.) The actual evidence of these transactions are in the record.

Mr. Welch: I object to the statement that we are trying to vary them. We are trying to amplify them and explain them but not vary them.

Trial Examiner Norwood: I will let my ruling stand. I have allowed your motion with a qualification.

Mr. Wright: If it is hearsay and is inadmissible because it deprives me of cross-examination, how can any part remain?

Trial Examiner Norwood: It is admissible to show the fact that they did vary.

Proceed.

By Mr. Wright:

Q. Mr. Lemke, with reference to Pusner, now, where is he located?

A. He has a place at, I believe, Tucson. I am not sure, I will have to refer to the invoice.

3828 Q. Who was the competitor involved in this situation with Pusner?

Mr. Welch: Just one second. Your Honor, the motion as I understand it was allowed in so far as the competitive situation was concerned. Now, if that is true, I object to cross-examination on the competitive situation because his testimony has been stricken so far as that is concerned.

Mr. Wright: The testimony—if the testimony is to stand in the record for any purpose, I demand a full and complete cross-examination.

Trial Examiner Norwood: Overrule your objection.

Mr. Welch: Yes.

Trial Examiner Norwood: If he can bring out some further testimony from this witness that renders that admissible for all purposes, he may do so.

I understood that it is to be received only on the proposition of showing the variations and for no other reason.

Mr. Wright: I didn't understand the testimony was offered for that reason. I didn't know what was in counsel's mind.

Trial Examiner Norwood: Go ahead.

The Witness: I think the competitor in the case was Fuller Paint.

3829 By Mr. Wright:

Q. You think it was?

A. I would have to refer to a reference to make it positive.

Q. What reference?

A. Report made to me by our accounting department.

Q. You received a letter from your accounting officer?

A. I believe there is a letter.

Q. Which was the basis of your testimony?

A. Yes.

Q. Statements that were in that letter. Do you know anything else about that transaction that isn't in that letter?

A. I know the method of handling that particular transaction from the face of the invoice and the markings thereon.

Q. You have no other knowledge outside of the exhibit we have been talking about this morning and that letter you received about that particular situation involving Pusner?

A. No, except general information about our problem of selling competitively.

Q. I asked you about this particular transaction.

A. I know that we have a problem with Fuller Paint selling customers.

Q. No.

Mr. Wright: I move that be stricken as not being
3830 responsive.

Trial Examiner Norwood: Read the question and answer.

(The question and answer were read by the reporter.)

Trial Examiner Norwood: Motion denied.

By Mr. Wright:

Q. When did you first start selling on a fully prepaid basis in less than carload lots to Pusner as a result of this competition?

Mr. Welch: Will you read that question, please?

Trial Examiner Norwood: Read it.

(The reporter read the question.)

A. I don't know exactly the date.

By Mr. Wright:

Q. That wasn't in the letter?

A. I don't recall whether there was any reference made as to when we transferred it as to the exact date, but I believe it is in the letter.

Q. Now, with reference to Switzer. I believe Switzer is in Flagstaff?

A. That is right.

Q. Who was the competitor involved there?

A. I believe it was Premier Oil Company.

Q. Where are they located?

3831 A. I don't know.

Q. What is their business?

A. Selling paints and oiling and so forth, sundries, associated sundries.

Q. In other words, in some of these situations the competition would be not alone from lead pigments, lead in oil, but also mixed paint?

A. In reference to paints, I used lead and oil for paints.

Q. When did this situation first arise so that you made the departure from your stated policy with reference to Switzer?

A. I don't recall, I don't know when the change was made.

Q. Was that transaction also covered in a letter that you received as a result of your inquiry?

A. I think it was.

Q. How did you obtain the information regarding the General Chemical Company situation?

A. I checked with our manager in Philadelphia.

Q. How did you do that?

A. By letter.

Q. You received a letter back from him?

A. Yes, sir.

Q. Giving you the details?

A. Yes, sir.

Q. Do you have that letter with you?

3832 A. No, I haven't.

Q. Who was the competitor involved there?

A. I don't recall the competitor's name in that case.

Q. Do you recall whether it was listed in the letter?

A. I am not positive about it.

Q. When did this situation first arise when you changed your policy with reference to that company?

A. I don't recall the exact date.

Q. Was that in a letter?

A. Yes, there was information in the letter as to the approximate time when they started selling them, but I don't recall as to any exact dates.

Q. How about the information regarding Bollinger, who did you get that from?

A. Bollinger, from our credit and accounting manager in—

Q. (Interposing.) By correspondence, by letter?

A. By telephone, by letter, and by wire.

Q. Do you have the correspondence and telegrams? Did you receive correspondence and telegrams in response to your inquiries from him?

A. Yes.

Q. Who was the competitor involved in that situation?

A. I don't know.

Q. What time did it—at what date did it become necessary to make the change from your policy?

3833 A. In Mr. Price's correspondence he indicated the time that change had to be made in the Bollinger account, but I don't recall generally when that took place.

Q. How about the Barney, Pelton, and Mohawk situations, were they also out of the New York office?

A. Yes, they were.

Q. And they were obtained along with the Bollinger information?

A. Either with or separately, I don't recall exactly.

Q. In the same manner?

A. Yes.

Q. Do you recall who the competitors were in any of those situations?

A. No, I can't give you the names of the competitors.

Q. Can you tell me the time of any of them?

A. When they changed?

Q. Yes.

A. Not exactly: I don't recall the date of the changes.

Q. In your experience with the company, has it been the general practice that the company will adjust to meet competition in this matter of freight charges where it is necessary?

A. Yes. It has become necessary and in order to do that, we find in our auditing activity that those changes have been made and we do list them as an exception,
3834 but before accepting them, we see to it from our normal course of business that they have been properly approved by the sales office and headquarters.

Q. Now, in these situations involving these gentlemen, you didn't have any such records as those here in Cleveland at the general offices, did you?

A. Only because the period of time it covers that our records are not set up as exceptions from our auditing.

Q. Do you know what the competitive practices were in these situations which led to these situations? I am talking about the specific ones you testified about, Pusner and Switzer and General Chemical and Bollinger and Barney and Pelton and Mohawk?

A. I don't understand what you mean by competitive practices.

Q. Well, you stated that you changed your method of handling freight charges to meet competitive practices in each of those situations. Do you know what those competitive practices were?

A. Yes, it was that we were unable to meet the price that they were being sold by competitors.

Q. Do you know whether that was a matter of competitive price or the way competitors handled their freight charges?

A. Well, I think—

Q. (Interposing.) Don't tell us as to what you
3835 think in regard to these situations, tell us what you know.

A. I know that the freight collect policy was changed to freight prepaid policy, in order to meet such situations.

Q. But you don't know what the actual practices of each competitor were in each of these situations, do you?

A. I know generally from a discussion and from my investigation of certain individuals.

Q. You mean from your conversations over the phone and your letters and wires with the branch officials when you got this information?

A. Wherever an accounting manager with whom I checked on all these situations didn't satisfy my investigation from a letter, then I made it a point to telephone him and refer to records that indicated just how these situations were handled so that I was positive before accepting that, on the same basis I made any audit, that what I stated in here so far as conditions are concerned, that it was right, it was acceptable to me.

Q. But you don't know the names of the competitors in most of the situations and you don't know the exact situation that you were meeting, whether it was a change in the price or change in the method of handling freight charges by the competitors?

A. In those particular cases, I didn't concern myself
with what that practice of a competitor was so much
3836 as determining that our responsible man in charge
gave me such information, who has that responsibility to—

Q. (Interposing.) And that is what you are repeating here is the information they gave you?

A. Some, of this information I have not been able to recall and record in my mind because of the large number of items.

Q. Now, you testified yesterday and this morning, Mr. Lemke, at great length about the company's policy with reference to freight handling. When you made these marks on Respondents' Exhibit 205, with sub numbers, under the column "Code," A, B, C, and so forth—when you were marking the transactions A and B, you were doing that of your own personal knowledge of what the local city delivery areas and free delivery areas around near shipping points were, were you not?

A. Yes.

Q. That wasn't on the basis of company policy, you knew that?

A. I knew what the company policy was.

Q. But you also knew these areas of your own knowledge?

A. Oh, yes; I did.

Q. Now, those that you mark with a "C" now, those transactions in which there was no indication on any of the exhibits that we have in the record as to who paid the
3837 freight, you marked them C as having freight prepaid and then recovered, or as being sent freight collect. You don't know of your own knowledge as to each of those transactions that that was done, do you?

A. Oh, yes; I do.

Q. You have checked each one of these transactions and know that?

A. No, but we have a procedure of handling invoices that we know what the requirements are, if they were handled otherwise.

Q. Well now, it was the company's policy, in those situations where you marked them with a C to send them freight collect, or to prepay and then recover the freight? You testified to that, but isn't it correct to say that you assumed that they were handled that way, but you don't know of your own knowledge as to each transaction that they were so handled?

A. It is not right to assume that we don't know because we do know.

Q. How do you know?

A. Our orders are all sent collect by original instructions, and, by the way, they are audited carefully, that this procedure is followed. Our shipping offices do not enter a shipment on a bill of lading unless that order instructs them otherwise.

3838 Q. Didn't you testify yesterday that you discovered from time to time instances where they had prepaid the freight on transactions in less than carload at points other than shipping points where they should have sent it freight collect or recovered it?

A. Yes, sir.

Q. Couldn't that have been the situation as to some of these transactions that you marked with a C here?

A. In those cases we would find an additional charge.

Q. Where?

A. On an invoice.

Q. It couldn't happen otherwise?

A. Not unless it was an error.

Q. That is what we are talking about is errors.

A. The error would show up, though, in our accounting.

Q. It wouldn't show up on the invoice?

A. No, but it would show up on our ledger account because it was shipped prepaid and it automatically would have to be accounted for to the customer.

Q. Now, let's go back to this policy again. You state it is the policy to equalize freight with the shipping point?

A. Yes.

Q. To any customer of these lead products, located away
from a shipping point, unless the shipment is in a
3839 carload or a truckload, it is a government, railroad,
or steamship company; unless it is one of those
special points which are not shipping points, but to which free delivery is allowed, Chattanooga, Washington, and others, or unless there is a local competitive situation where you make a free delivery area. Does that substantially state it?

Mr. Welch: Will you read that question, please?

(The reporter read the question.)

Mr. Wright: I will withdraw the question.

By Mr. Wright:

Q. It is the general policy to a customer located away from a shipping point to equalize freight by charging him the difference in the freight rate from the factory to his location as compared with the freight rate from shipping point to factory?

A. The customer would only stand the freight not excessive to the freight rate which is in position to be used from the normal shipping point to his location.

Q. Well now, let's get back into another one of your illustrations. Take the situation that you were speaking of yesterday with reference to Union, Mississippi. I believe you stated that the closest applicable shipping point was New Orleans?

A. That is right.

Q. Now, if you ship him direct from Chicago in
3840 less than carload, how do you bill him?

A. We would bill him the amount of freight from New Orleans to his location, or Union, Mississippi.

Q. That would be the situation if you shipped him out of Dallas?

A. No, Dallas' rate is less to Union than it is to New Orleans.

Q. What rate do you charge him then? You don't charge him any freight at all?

A. We don't charge him any freight at all.

Q. Now, that policy, then, doesn't apply when you have got what you call a carload order?

A. There is no freight involved on carloads.

Q. And you said that the carload policy also extends to truckloads?

A. Yes, sir.

Q. What is the weight, minimum weight of a truckload under your policy?

A. Approximately 20,000 pounds. It varies, I think, depending upon length. I am not sure.

Q. You adopt for that purpose the minimum carload weights that appear in the tariffs, or do you have some company rule on that?

A. I have always taken our transportation department's weight as authentic.

3841— Q. Now, assuming you have a situation where you have an amount which is a truckload but is not a rail carload, and yet you send it by rail freight, you pay an LCL rate on that but the customer is not billed that amount?

A. It is not our custom to ship by rail in that situation, but it will go by truck.

Q. Then it would invariably go by truck?

A. Yes.

Q. That policy then doesn't apply to truckloads and carloads, doesn't apply to government agencies, is that what you testified to?

A. What policy were you—

Q. (Interposing.) This freight policy of adding freight from a shipping point.

A. Yes.

Q. You mean "Yes, it does not apply to government agencies"?

A. The freight policy of adding freight or equalizing at the shipping point does not apply to carload shipments.

Q. Does it apply to shipments to any agencies of the government?

A. Yes.

Q. Does that include local, municipal, and state governments?

A. Yes.

3842 Q. And Federal?

A. Yes.

Q. It doesn't apply to railroads or steamship lines, either?

A. No, it doesn't apply to—

Q. (Interposing.) Does it apply to what you call your industrial accounts?

A. Yes.

Q. In billing your own stores, does it apply to your billing of your own stores?

Mr. Welch: Objection, your Honor, to any testimony of intercompany billing among stores. How they handle their own financial arrangements with their own stores is not involved in this case. The practice of the stores—I understand, your Honor has held that the practice of the store in selling to other customers from their retail stores is in the case, but this is the first question of intercompany billing that has come up and I object strenuously to that testimony being received.

Trial Examiner Norwood: Objection overruled.

The Witness: I would like to have the question read.

Mr. Welch: May we have a short recess, your Honor?

Trial Examiner Norwood: Yes, take a short recess.

3843 (Short recess.)

Trial Examiner Norwood: Back on the record.

After further discussion off the record, I will reverse my ruling and sustain the objection to the question relating to the question of the policy of the Respondent with its company-owned stores.

Go ahead.

By Mr. Wright:

Q. Mr. Lemke, do the retail stores maintain warehouse stocks of lead products, under your policy of the company?

Mr. Welch: Your Honor, may I have a continuing objection without having to get up and repeat it, to any questions, any answers that relate to retail store operations, how they sell, what they do?

Trial Examiner Norwood: No.

Mr. Welch: May I have the objection?

Trial Examiner Norwood: Counsel may have his objection. I will overrule the objection.

Mr. Welch: And it will be a continuing objection?

Trial Examiner Norwood: To questions of how the retail stores sell.

Go ahead.

The Witness: I would like to have the question read, please.

3844 (The reporter read the question.)

The Witness: Yes, we carry stock for resale.

By Mr. Wright:

Q. Now, to refresh your recollection, I show you Commission's Exhibit 776 with sub numbers, which is a roster of retail stores of the Sherwin-Williams Company as of October 1, 1944. Does the company also sell lead products, white lead, white lead in oil, red lead, red lead in oil, to dealers, dealer-customers who are located in the same towns in which you have stores?

Mr. Welch: Objection, your Honor.

This witness in the first place was not questioned on direct with respect to that type of matter. I don't know what he has any knowledge of it. He is not in the sales department. He doesn't know whether dealer-customers are located in those cities or not.

Trial Examiner Norwood: He can tell it if he knows. Objection overruled.

The Witness: We ship merchandise to some of those locations where there are dealers.

By Mr. Wright:

Q. Now, is it ever a practice of the company in handling an LCL shipment to the dealer in a town in which a store is located, other than the regular warehouses of which we have been talking, to ship that order to the dealer
3845 from the store?

A. Yes, occasionally, accommodation sales.

Q. In those instances, it would be cheaper to ship a less than carload order from a factory or warehouse, would it not? In other words, delivery from a store which had a stock would be an economy to you?

A. We don't make it a practice to use our stores to service regular accounts of that sort, but we do use them for occasional accommodation, special rush orders, and only occasionally.

Q. What is the basis of sale as far as transportation charges to the customer, when that is done at a point which is not a shipping point?

A. If the shipment is made to any town outside of where a store may be located, it is shipped on a truck basis.

Q. If it is in the same town?

A. It is a local delivery, along with our regular cartage deliveries.

Q. Would that be—even though the place where the store is is not a shipping point, if it was local delivery in that town, it would be treated as if it were a shipping point?

A. Yes, on these few accommodation sales.

Q. Freight from the shipping point wouldn't be added?

A. No.

3846 Q. Now, you gave us a list of these shipping points from those price lists the other day, Mr. Lemke. I show you Commission's Exhibit 662-C and D which is a document headed "Lead and Zilo price differentials for shipments from all S-W warehouses and retail branches." That is dated 1936. Does there—there is a similar list, Commission's Exhibit 662-G and H, for 1937, and a similar list, dated May 21, 1942, Commission's Exhibit 662-S and T. Are there not on those lists many locations which were not included in your list of shipping points?

Mr. Welch: Your Honor, I object to the form of the question because it is misleading to the witness in that he has quoted the caption on one exhibit. The captions on the two other exhibits do not conform to the one quoted.

Mr. Wright: We will talk then about 662-C and D from which the caption was quoted.

The Witness: There are—

By Mr. Wright:

Q. (Interposing.) There are many points on there not included in shipping points?

A. Yes, not on the list previously discussed.

Q. This document purports to give the prices and differentials at those points. There is nothing there about addition of the freight to any of those points. Can you explain that fact?

3847 Mr. Welch: Will you read the question?

(The reporter read the question.)

A. No.

By Mr. Wright:

Q. This is in evidence. I call your attention to the fact that this is in evidence as a part of a general trade sales department bulletin by Sherwin-Williams Company, stating its prices in terms of sale, if you will examine Commission's Exhibit 662-A and B, which accompanies the list you referred to.

A. I would like to have that question read.

(The reporter read the question.)

Mr. Welch: Just one second.

Mr. Wright: The previous question.

Mr. Welch: Your Honor, I object to the question on the ground that there is no evidence that the two documents accompany each other. They bear somewhat close dates. There is no reference on one to the other.

Mr. Wright: I would like to correct counsel and point out the statement on 662-B "where the delivery point is outside the eastern territory, add to these prices the full advanced differential as shown on the attached Bulletin 16," which obviously refers to—

Mr. Welch: (Interposing.) No, this is Bulletin 18. That says Bulletin 16. There is nothing to show that this 3848 accompanied Exhibit 662-A and B.

Mr. Wright: Well, off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: I will withdraw the pending question.

By Mr. Wright:

Q. Mr. Lemke, are you familiar with the general trade sales department bulletins which are similar to Bulletin No. 37, May 21, 1942, in the record as Commission's Exhibit 662-Q and R?

A. I know about them, but I am not familiar with all of the detail.

Q. In your duties as auditor in order to determine company policy with regard to prices and so forth, you consult these general trade sales bulletins; is that correct?

A. At the current audit, we would then verify with the current bulletin, but for me to be familiar with a document I haven't seen for several years, I don't know that I would recall all the details.

Q. Now, from your use of these trade sales bulletins in your duties there, I would like you to examine Commission's Exhibit 662-R and the statement under the term "Zone differentials," and then examine Commission's Exhibit 662-S and T.

A. I don't know whether this document is a price—

3849 Mr. Welch: (Interposing.) Just a minute, he hasn't asked you a question.

By Mr. Wright:

Q. I want you to examine the two of them.

A. Yes.

Q. Do the general trade sales bulletins include a list of lead and Zilo price differentials similar to the one in the record as 662-S and T?

Mr. Welch: Read the question, please.

(The reporter read the question.)

A. I don't know. I don't quite understand your question.

By Mr. Wright:

Q. Have you seen a document similar to this, 662-S and T, as a part of your general trade sales bulletins, of which 662-Q and R are copies?

A. I have seen similar ones.

Q. Are they considered to be a part of the general trade sales bulletins?

A. Yes.

Q. Now, can you tell me how the freight is handled on less than carload shipments to customers located in the towns which appear on 662-S and T, Commission's Exhibits, which are not shipping points?

A. Yes.

3850 Q. Will you tell us how?

A. Shipments made from factory or shipping points to customers in any of these stores where there isn't a shipping point located, we would ship LCL—we would ship less than carload rates on the basis of freight collect.

Q. In other words, that ~~would be~~ handled exactly in accordance with the policy of the company you have been testifying about for the last two days?

A. Yes, it would.

Q. Will you tell me again the list of shipping points on the Pacific Coast?

A. Spokane, Seattle, Portland, Santa Rosa, Sacramento, Oakland, Los Angeles, Phoenix.

Q. Those are all there are, to your knowledge?

A. Yes.

Q. How far back would your answer go on that?

A. I don't understand your question.

Q. Over how long a period of time has that been true that those have been shipping points on the Pacific Coast?

A. As long as I have had any knowledge of them.

Q. I show you Commission's Exhibit 782-A through -S, which is a price bulletin by Sherwin-Williams Company, dated February 5, 1943, and direct your attention particularly to Bulletin No. 6 in that series—no, 5, which is Commission's Exhibit 782-D, and ask you to examine that.

3851 A. Yes.

Q. Now, directing your attention to those statements, "f.o.b. terminal points," do you know what is meant by "terminal points" in that price bulletin?

A. No, I am not familiar with that.

Q. Doesn't that indicate to you that deliveries are to be made free on board to those points in those zones?

A. Restate that question, please.

(The reporter read the question.)

The Witness: It would indicate that.

By Mr. Wright:

Q. Without the addition of any freight at those points?

A. I am a little confused about your question. You mean free on board?

Q. I mean free on board at those points, rather than being shipped freight collect to the customer.

A. I don't know what reference the "f.o.b. terminal points" is. I am not certain about that.

Q. I will let you examine the whole exhibit which is a series of price bulletins from the Sherwin-Williams office. You can perhaps refresh your recollection by examining the exhibit.

Mr. Wright: May we have a short recess while the witness examines the exhibit?

Trial Examiner Norwood: Yes. Take a short
3852 recess.

(Short recess.)

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. Have you gotten any more light from a further reading of that exhibit, Mr. Lemke?

A. Yes, I think I understand it better now.

Q. Will you explain it now?

A. Explain what?

Q. What the term "f.o.b. terminal point" means with reference to delivery and freight charges.

A. I don't know, but it would indicate that these particular locations are considered terminal points, but I don't know that freight would be allowed to shipments in those particular points. That I don't know.

Q. I call your attention to the fact that Commission's Exhibit 782-F indicates that Salem, Oregon, is also a shipping point where no freight is added or delivered.

Mr. Welch: Just a second. Your Honor, I object to that statement.

Mr. Wright: It is not a question. I have not yet perfected the question.

By Mr. Wright:

Q. Do you recall anything about that situation at Salem?

Mr. Welch: Your Honor, I would like to have the
3853 statement read back.

Trial Examiner Norwood: Gentlemen, I am going to ask you to take seats, please. It makes for confusion.

Mr. Welch: I would like to have counsel's statement read back.

Trial Examiner Norwood: Read back the statement.

(The record was read by the reporter.)

Mr. Welch: There is no statement on there to the effect that Salem is a shipping point. There is a statement that shipments to Salem are f.o.b., but there is no statement to the effect as stated by counsel.

Trial Examiner Norwood: Doesn't that come to the same thing?

Mr. Welch: No, your Honor, this may be off the record.

Trial Examiner Norwood: Put it on the record.

Mr. Welch: All right.

We may sell customers at Salem, Oregon, and delivered to that point f.o.b. That doesn't mean that is a shipping point on which we will make shipment on any kind of basis. I object to the characterization of it as a shipping point.

Trial Examiner Norwood: I will ask the Commission's counsel to frame his question in line with that explanation.

Mr. Wright: I will withdraw the question, your
3854 Honor.

By Mr. Wright:

Q. As an expert auditor, what is the meaning of the term "f.o.b." as customarily used in business, Mr. Lemke?

A. Free of delivery.

Q. Free of delivery, did you say?

A. Well, now, I have always understood f.o.b. to mean, as an example, f.o.b. Chicago means that we delivery at that particular point.

Trial Examiner Norwood: Freight paid?

The Witness: Yes.

By Mr. Wright:

Q. Delivered to the customer freight paid at that point?

A. That is right.

Q. Now, I direct your attention on Exhibit 782-F to this statement, "Shipments to Salem, f.o.b. Salem, Oregon. Shipments to other points, f.o.b. Portland, Oregon."

A. Yes.

Q. What does that indicate to you about your practices at that time in that area?

A. Shipments to Salem, for example, would be made f.o.b. Salem.

Q. And shipments to other points in Oregon would be made where?

A. Made—I understand you—

3855 Q. (Interposing.) And shipments to other places in Oregon are made f.o.b. Portland; isn't that correct?

A. Yes.

Q. Wouldn't that indicate that a customer purchasing at Salem would not be charged any freight on that shipment, but would receive the freight paid at Salem, whereas customers at other points in Oregon would pay the freight from Portland?

A. Yes, that would be true.

Q. Wouldn't that also be a fair interpretation from your experience of Commission's Exhibit 782-D, and the f.o.b. terminal points that are set forth there?

Mr. Welch: The witness is allowed to see the exhibits? May I show him my copy?

Mr. Wright: This is a little clearer.

By Mr. Wright:

Q. Wouldn't that also indicate from your experience that the customer received the shipment at that point without paying any freight charges?

A. I am not quite familiar with the terminology there, f.o.b. terminal points.

Q. What is your definition of the word terminal?

A. Well, it is a center or a location.

Q. Wouldn't that statement there of certain localities being f.o.b. terminal points be logically interpreted 3856 to be points at which the goods were sold to the customer without the addition of freight charges?

Mr. Welch: Objection to how it would logically be interpreted.

Trial Examiner Norwood: Objection overruled, let him tell us about it.

Mr. Welch: What his interpretation is.

The Witness: It would indicate it.

Mr. Wright: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Recess until 1:30.

(Whereupon, at 12:00 o'clock, Noon, the hearing was adjourned until 1:30 o'clock, p.m.)

3857 Afternoon Session.

1:30 p.m.

Trial Examiner Norwood: All right, gentlemen, proceed.

H. C. LEMKE resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Wright.

Q. Now, Mr. Lemke, these Pacific Coast shipping points you spoke of, Spokane, Seattle, Portland, Sacramento, Oakland, Los Angeles and Phoenix, assume now that you were going to ship to Butte, Montana. That is in the Pacific Coast area, is it not?

A. I don't know for certain.

Q. It is the western part of Montana. I would assume it would be. Spokane, Washington, would be the geographically closest shipping point to Butte?

A. Yes, it would be.

Q. On a less than carload shipment, according to your statement of policy, to Butte, they would add the freight charges from Spokane or some one of these other points that might be closer, to Butte?

A. The closest one.

Q. To Butte?

3858 A. Yes.

Q. And that is how they would arrive at that price?

A. Well—

Mr. Welch: (Interposing.) Objection, your Honor; it isn't price. He is interchangeably using the words "freight" and "price."

Trial Examiner Norwood: I think that—

Mr. Wright: (Interposing.) I withdraw that. I had no intention of confusing the witness.

By Mr. Wright:

Q. Is that how they would handle that transaction?

A. Yes.

Q. I call your attention to the fact that in this Commission's Exhibit 782-E that we were looking at this morning in the Pacific Coast bulletins, "For deliveries to points outside par zone add the following differentials: Zone 1, 25 cents per zone higher; Zone 2, 50 cents per zone higher; Zone 3, 75 cents per zone higher." Now, I call your attention to the fact that Butte is listed on 782-D as being in Zone 3. Spokane, the shipping point you mentioned, is in Zone 2. How would the statement on 782-E of those differentials affect that transaction we are talking about at Butte?

A. I don't know, but those differentials affect prices, not the rate.

Q. In other words—how would you suggest that
3859 would be worked out according to policy? How would
you calculate the price there?

A. Well—

Q. (Interposing.) Would you add the 75 cents differential for Zone 3?

Mr. Welch: Objection, your Honor; this witness is not qualified as to price setup.

Mr. Wright: I beg to disagree with counsel. He has qualified this man as one who has gone in and audited these transactions and knows how the company's policy applies to all of them.

Trial Examiner Norwood: I will overrule the objection; you may answer.

The Witness: I don't know that.

By Mr. Wright:

Q. Now, I call your attention to Commission's Exhibit 789 which is from the confidential price book of the Sherwin-Williams Company on the Pacific Coast effective January 26, 1942, the note there, "Advance Los Angeles Schedules 25 cents per hundredweight for San Bernardino, Riverside, Pomona, and Santa Barbara prices." Do you know whether those are f.o.b. prices at those points that are contained in that note, without the collection of any additional freight from customers at those points?

A. No, I don't know.

3860 Q. I call your attention to the statement immediately above the one I read to you: "Above prices are f.o.b. Los Angeles, California"; that would indicate that freight was charged from Los Angeles, would it not?

A. Providing you shipped from Los Angeles.

Q. Los Angeles is your warehouse for southern California, isn't it?

A. Yes.

Q. Shipping point?

A. Yes.

Q. As an exception under that note that prices are f.o.b. Los Angeles is a statement that there is a 25-cent per hundredweight differential for those following places, all of which are within a hundred miles of Los Angeles. What does that indicate to you about how the prices are made at those points out there? Is it—

A. (Interposing.) I don't know but I assume that would be added to the price.

Q. And then freight from Los Angeles added in addition, under your policy?

A. Providing any of these locations are not in the free delivery area, that is right.

Q. Well, now, some of those places are as much as 60 to 70 miles from Los Angeles?

Mr. Welch: Is that a question.

3861 Mr. Wright: I was calling the witness' attention to a fact that is well known to everyone who has been in that section of the country.

The Witness: On that basis, it would be, I assume.

By Mr. Wright:

Q. In other words, what they would do would be to sell to those places and add the freight to Riverside, for instance, and still add 25 cents in addition?

A. I don't know, but that is what I would assume.

Q. In other words, you wouldn't assume that—from that note that there would be no freight addition except for that 25 cents extra which is to be added on that price?

A. I don't quite understand that question.

Q. Isn't it a reasonable assumption from the statements which are appearing in that Commission's Exhibit 789 that when a less than carload shipment is made to one of those towns in the note, that no freight is added but they are sold at a price simply 25 cents a hundredweight higher than the Los Angeles price?

Mr. Welch: Objection, your Honor. He asked him just the other way a moment ago, that freight would be added in addition to the 25 cents.

Mr. Wright: I asked the question one way, and I am trying to ask the question the other way.

3862 Trial Examiner Norwood: Objection overruled. Answer the question.

The Witness: I don't know anything about the 25 cents additional to the price. However, I do know that the freight would be collect.

By Mr. Wright:

Q. To Riverside or San Bernardino?

A. No.

Q. In other words, that is not an exception to this policy you have been talking about?

A. There is no exception so far as it pertains to freight.

Q. You stated that with reference to the item covered by Invoice No. 46019 appearing on Respondents' Exhibit 205-H that Burlingame is in the free delivery area for Oakland, California, is that correct?

A. Yes.

Q. Do you know what geographical relationship obtains between Oakland and Burlingame?

A. I don't know, but I assume around 20 or 25 miles.

Q. I call your attention to Commission's Exhibit 794-K where that same invoice, 46019, is recorded, and to the information which was filled in by the traffic department of the Sherwin-Williams Company showing that 37½ cent rate between Oakland and Burlingame. Now, are there any other areas which you consider as free delivery areas 3863 that you are talking about now which involve freight rates in excess of 25 cents a hundredweight?

A. I don't know of any.

Q. You also testified that Baton was in the free delivery area—you stated with reference to Invoice No. 9800 which appears on Respondents' Exhibit 205-P that Baton was in the free delivery area of Houston. Is that one of those contiguous suburbs that you spoke of as being in the free delivery area?

A. I know that Baton is considered in a free delivery area.

Q. I call your attention to Commission's Exhibit 794-U where that particular invoice is also recorded with the information supplied by the Sherwin-Williams traffic department showing a freight rate between Baton and Houston of 30 cents a hundredweight. Do you know how far those two areas are apart?

A. No, Baton is right in the bay area, there.

Q. Now, referring back to the transaction which you were discussing in your direct examination which is recorded on Respondents' Exhibit 205-O and also on Commission's Exhibit 794-C, you stated that you checked it—

Mr. Welch: (Interposing.) Will you identify the transaction, Mr. Wright?

Mr. Wright: The invoice number is 8579.

3864 By Mr. Wright:

Q. You stated that you had checked those rates and the rate from St. Louis to Dallas was $1 and Dallas to Union was $1.10, therefore, there had been no change in the rate from that.

Mr. Welch: I object, I believe that was changed later.

Mr. Wright: You revised that to $1.09.

Trial Examiner Norwood: Yes, I think he did.

By Mr. Wright:

Q. Now, did you check those rates in the applicable tariffs, applicable to the time the shipment was made?

A. I follow the traffic department. I am not in a position to say what checking gave me.

Q. But you didn't actually get into that yourself, into checking the tariff?

A. No, sir.

Q. Now, when you were talking about these invoices, Mr. Lemke, and your policy on freight payments and charges to customers, you were speaking of lead products, generally, were you not?

A. Yes.

Q. You testified that this Respondents' Exhibit 206, Invoice No. 3552, was in accordance with the policy?

A. Yes, sir.

3865 Q. What products does that cover?

A. Pure zinc oxide in oil.

Q. In what size container?

A. 90 pound.

Q. In a returnable drum?

A. Yes, sir.

Mr. Wright: No further cross-examination.

Trial Examiner Norwood: Any further questions?

Mr. Welch: Your Honor, will you give us a recess for a minute or two?

Trial Examiner Norwood: Yes.

(Short recess.)

Trial Examiner Norwood: All right, proceed.

Redirect Examination by Mr. Welch.

Q. Mr. Lemke, do you know whether the cartage rates for city delivery vary in the different cities?

A. Yes.

Q. Is their uniformity of local transportation companies for city deliveries as to cartage prices?

A. No, there is not uniformity.

Q. With reference to Respondents' Exhibit 206, if the product shipped under that invoice had been white lead in oil, would it have been handled the same way with reference to recovery of freight charges?

3866 A. Yes, it would.

Q. Does the fact that two different products are involved in Invoice 3453 which appears on Respondents' Exhibit 205-A and the product involved in Respondents' Exhibit 206 are different products affect your testimony that Invoice 3453 was an error in that the freight was not recovered?

A. It wouldn't change the circumstances at all.

Q. On cross-examination you were shown Commission's Exhibit No. 776, A to N, inclusive, and were questioned as to whether all the stores thereon listed maintained warehouse stocks and your answer was they maintained stocks for resale. Does that mean that they maintain—that the stores listed on that exhibit maintain wholesale stocks or warehouse stocks for resale?

A. No, not wholesale or warehouse stock in that sense.

Q. What do you mean?

A. Stock in the sense of selling retail.

Mr. Welch: That is all.

Mr. Wright: I have just one or two questions on that subject.

Recross Examination by Mr. Wright.

Q. Those stores sell to contractors and painters, do they not?

A. Yes.

3867 Q. Are those also sold direct by the Sherwin-Williams Company in some instances?

A. No.

Q. The company does not sell direct to paint contractors?

A. It is not their policy to.

Mr. Welch: I object. The question was asked contractors and painters. The question is now contract painters. Contractors and painters are different classifications, and contract painters are something else again.

Trial Examiner Norwood: Clarify that, please.

By Mr. Wright:

Q. Does the Sherwin-Williams Company sell to paint contractors direct?

A. No, it is not their policy to sell direct.

Q. Do they sell to industrial accounts for their own consumption and use in maintenance?

A. Yes, they sell direct to industrial accounts for maintenance.

Q. Do the retail stores also sell direct to industrial accounts?

A. To some of the smaller businesses.

Mr. Wright: No further questions.

Redirect Examination by Mr. Welch.

Q. Just one question. Do retail stores sell to
3868 painting contractors?

A. Yes.

Q. And do they sell to—

Mr. Welch: (Interposing.) Your Honor, will you permit us to have the recross examination repeated?

Trial Examiner Norwood: All right.

(The entire recross examination was read by the reporter.)

Mr. Welch: I believe I have no further examination.

Trial Examiner Norwood: Thank you, Mr. Lemke.

(Witness excused.)

Trial Examiner Norwood: Call your next witness.

STANLEY LANDGRABE was thereupon called as a witness for the Respondents, and having been first duly sworn, testified as follows:

Direct Examination by Mr. Welch.

Q. Will you give your full name for the record, please?

A. Stanley Landgrabe.

Mr. Welch: Will you mark this, please?

(The paper referred to was marked Respondents' Exhibit 209 for identification.)

Mr. Welch: And this the next number, please.

3869 (The paper referred to was marked Respondents' Exhibit 210 for identification.)

By Mr. Welch:

Q. Mr. Landgrabe, how long have you been employed by the Sherwin-Williams Company?

A. About 22 years.

Q. In what capacities have you been so employed?

A. Cost accountant and factory auditor.

Q. In what capacity are you now employed?

A. Factory auditor in charge of factory accounting.

Q. What is the scope of your present position?

A. To have charge of all factory accounting and audits that are necessary.

Q. To what extent, if any, does that include cost accounting for the production of lead pigments and lead products?

A. To the extent it is one of the factors of Sherwin-Williams Company, and since I have control or supervision of all of it, it is just one of my duties.

Q. You have supervision of all the cost accounting?

A. Yes.

Q. Will you give us in some detail the experience that you have had in making determinations or findings as to Sherwin-Williams' cost of producing red lead?

A. Well, a number of years back, I was lead products bookkeeper for the Chicago plant, and since that
3870 time, I have worked in the controlling end.

Q. And have you had the lead products factory cost books under your supervision in the last few years?

A. Yes, sir.

Q. What grades of red lead do Sherwin-Williams produce, or did they produce, in the period 1932-1946?

A. 95 per cent, 97 per cent, 98 per cent.

Q. What difference is there, if you know, in the three grades of lead produced by Sherwin-Williams?

A. The difference is the number of hours required to burn the pig lead before the finished product is obtained.

Q. What about oxidation?

A. In the manufacture of red lead, it is a process of oxidizing pig lead.

Q. Is there any difference in the three grades other than the degree to which they have been oxidized?

A. No.

Q. Which way does oxidation run, upwards with the percentage?

A. The longer—

Q. (Interposing.) In other words, is 97 per cent red lead oxidized to a higher extent than 95?

A. That is right.

Q. And 99 to a higher extent than 97?

A. That is right.

3871 Q. How do you obtain that difference in oxidation?

A. Through the formula given us by the local factory upon their time studies.

Q. I don't believe you understood my question, Mr. Landgrabe. How do you obtain the difference in the oxidation between the three grades?

A. By the period it is in the furnaces.

Q. And what is your common name for that?

A. Burning time.

Q. Is that the time by which that process is known?

A. Yes.

Q. Now, is there any other factor that enters into obtaining the 95 or 97 or 98 per cent grades other than the burning time?

A. No.

Q. Do you know the size of the batches of red lead burned by the Sherwin-Williams Company at a single time?

A. Yes, usually 3,000-pound batches.

Q. Did the lead plant at Chicago ever make any time studies as to the relative length of time required to burn 95, 97, and 98 per cent red lead?

A. Yes.

Q. Are the results of those studies transmitted to your office in Cleveland?

A. Yes.

3872 Q. What were the results reported?

A. The results were to produce a batch of 3,000 pounds of red lead, 95 per cent, would require 24 hours' burning time; 97 per cent, 36 hours' burning time; and 98 per cent, 48 hours' burning time.

Q. Were the reports you received from the factory of such a character that you, as a cost accountant, would accept them as an authoritative basis for making up cost analyses?

A. Yes.

Q. To what extent have they been relied upon by Sherwin-Williams, if any, in the course of years in determining the cost of producing the three grades of red lead?

A. They have been relied upon to the extent that it is the only way we have of determining the cost of 95, 97 and 98 per cent red lead.

Q. Have you recently had occasion to determine the manufacturing cost for producing 95, 97, 98 per cent red lead on a per hundred pound basis?

A. Yes.

Q. Have you prepared any report showing this information for a particular period?

A. Yes, I have prepared a report showing the burning cost.

Q. I show you Respondents' Exhibit No. 209 for identification. Is that the report that you refer to?

A. Yes.

3873 Q. Now, will you tell us in detail just how you made the determinations that are indicated on that report?

A. I took the period January 1, 1945, to June 30, 1945, or six months.

Trial Examiner Norwood: Don't tell us anything on the exhibit. Just identify it. Tell us how you made it and we will put the exhibit in and let it speak for itself.

Mr. Welch: Your Honor—

The Witness: (Interposing.) This report was reproduced from information supplied direct from the white lead factory, plus information retained in our home office.

Trial Examiner Norwood: All right.

Mr. Welch: I offer Respondents' Exhibit 209 in evidence.

Mr. Wright: I would like some preliminary cross-examination on it.

Mr. Welch: I will ask a few questions that may solve the problem.

Trial Examiner Norwood: Go ahead.

By Mr. Welch:

Q. Do you have with you the reports from the plant which indicate the items of expense that you have referred to such as maintenance and repairs, power, fuel, sundries?

A. Yes.

Q. Can you give—what did you do to get those figures?

3874 A. Yes.

Q. What does the word "service" mean?

A. Labor, productive or nonproductive.

Q. Do you have the tabulations from which that item was taken?

A. Yes.

Q. Do you have the reports from which you took the poundage for the various months of January through June, 1945?

A. Yes.

Mr. Welch: Do you want to see those before your preliminary examination?

Mr. Wright: Off the record.

Trial Examiner Norwood: All right. Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: I have no objection to the exhibit.

Trial Examiner Norwood: Received as marked, Respondents' Exhibit 209.

(The paper referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 209, was received in evidence.)

By Mr. Welch;

Q. Mr. Landgrabe, will you tell us first where you got the information—strike that. Will you tell us where
3875 you got the information as to the total number of pounds of 95 per cent red lead and the total number of pounds of 97 per cent red lead manufactured in the period January 1, 1945, to June 30, 1945?

A. From monthly operating reports supplied by the factory or the lead processing factory.

Q. And those reports have been reproduced here today, have they?

A. Yes.

Q. Now, when you come to the item, "Burning service and expense," what does the term "service" mean?

A. It means all labor, both productive and nonproductive.

Q. Then, the expense items are maintenance and repairs, is that right?

A. Yes.

Q. Power, fuel, and sundries?

A. Yes.

Q. Now, you have a column headed June 30, 1945, to date. Does that mean January 1, 1945, to June 30, 1945?

A. No. By that, I refer to September 1, 1944, to June 30, 1945.

Q. So then in order to get the period that you have in your third column, January 1, 1945, to June 30, 1945, what do you have to do?

A. It was necessary to deduct the period Septem-
3876 ber 1, 1944, to December 31, 1944.

Q. And what column is that series of figures in?

A. The middle column.

Q. Now, are all the figures—where did you obtain the figures that are in those two columns?

A. Directly from our monthly operating reports.

Q. Have those reports been made available in the hearing today?

A. Yes.

Q. Coming down to the item "Total service and expense," I find in the third column the figure 7,253.24. Does that represent the total service and expense for producing the total poundage of 95 or 97 per cent lead referred to in the first series of figures up in the heading "Red lead produced"?

A. It refers to the total burning cost of producing—

Q. (Interposing.) That many pounds?

A. Yes.

Q. The next item is burning or furnace hours. Will you tell us for 95 and 97 per cent lead, will you tell us just how you made that calculation to obtain the total number of furnace hours shown?

A. By using the time studies supplied by our manufacturing factory, that is 24 hours to burn 95 per cent, 36 to burn 97 per cent, and with the results of a 3,000-
3877 pound output of red lead, we converted the total quantity produced to the number of batches, multiplied by the number of hours to produce the various grades per batch to determine the total furnace hours.

Q. Now, when you come to the item headed "Burning costs per hour," how did you arrive at that figure?

A. The total burning hours divided by the total burning cost will equal the cost per burning hour.

Q. Do I understand that it is hours divided by cost, or cost divided by hours?

A. Cost divided by hours.

Q. Now, will you come to the item "Burning cost, 95 per cent lead on a hundred pound basis." How did you determine that?

A. After I secured the cost per hour, I multiplied by the number of hours to produce the 95 per cent red lead to secure the total cost of burning.

Q. Then, you reduced that to a hundred pound basis?

A. That is then reduced to a hundred pound basis.

Q. Did you follow the same formula to determine the burning cost of 97 per cent red lead?

A. Yes.

Q. Can you tell us what the variable factors are in the cost of manufacturing 95, 97, and 98 per cent red lead?

A. The variable factors are the number of hours
3878 the different grades burn.

Q. Have you entered on this report all of the items that enter into burning expense?

A. Yes.

Q. Now, do you know what the term "burden" means from an accounting point of view?

A. Yes, it is the additional expense the company has to operate aside from actual production cost. That is speaking from the manufacturing factory standpoint. As far as sales, they have their own burden, but I am speaking of from a factory standpoint.

Q. Will the burden vary with the three grades?

A. Definitely, yes.

Q. In what direction would it vary?

A. It would vary depending upon the quantity of each that can be produced. In other words, 95 per cent red lead can be made in 24 hours while 97 per cent would take 36 hours and 98 per cent would take 48 hours, or the production for 95 per cent in any given period would be twice that of 98 per cent.

Q. So your burden per hundred pounds for 97 per cent would be higher or lower than that for 95?

A. Higher.

Q. How much higher?

A. Oh, it is in proportion. That all depends on
3879 how you distribute burden, but naturally the more
you can produce, the less your cost is going to be and that cost is reflected also in the burden.

Q. Now, on a per hundred pound basis, is the burden on 98 per cent higher than the burden on 97 per cent?

A. On 98 per cent, it would be higher than 97 per cent.

Q. Now, the figures and work that you have done do not include burden, do they?

A. No, this is just the—

Q. (Interposing.) So that any difference in burden in producing the three grades would be in addition to the three figures shown on Respondents' Exhibit 209?

A. That is right.

Q. Now, based upon the work you have done in preparing this chart which is shown as Respondents' Exhibit 209—strike that, please.

Why do you not have any entries under the 98 per cent column on Respondents' Exhibit 209?

A. No 98 per cent was produced.

Q. Now, based—

A. (Interposing.) During the dates shown there.

Q. Now, based on the study that you have done, what

is your opinion as an expert cost accountant in this particular field as to the extent to which the cost of producing 98 per cent red lead would exceed the cost of producing
3880 97 per cent per hundred pounds?

Mr. Wright: Objection, your Honor. He hasn't been established here as an expert cost accountant to testify as to opinion testimony.

Trial Examiner Norwood: I think he may—

Mr. Wright: (Interposing.) It may be—

Trial Examiner Norwood: You may tell us anything you know based on your experience, but I think you can figure out some difference here from what he has already told us and this table.

Mr. Welch: I thought I would like to get it in the record in the form of his direct testimony.

Trial Examiner Norwood: I will let him tell it. Objection overruled.

Mr. Wright: Furthermore, this calls for a conclusion.

Trial Examiner Norwood: Don't just speculate on it.

Mr. Wright: He can't answer from his own knowledge by the question. The question called for his opinion.

Mr. Welch: I will modify the question to say from your own knowledge, taking into account the same formulas you used in demonstrating the difference between 95 and 97 per cent.

The Witness: Will you please read the question
3881 over to me?

Trial Examiner Norwood: Read the question, please.

(The reporter read the question.)

The Witness: I would say that from my own experience, the actual cost is more to produce 98 per cent than 97 and more to produce 97 per cent than 95 per cent.

By Mr. Welch:

Q. How much more would it cost?

A. That all depends upon the burning costs per hour.

Q. Well, on a ratio the same ratio that was used in this table, how much would it have cost you to produce it had there been the same burning expense?

A. On a ratio basis, it would cost one and a half times as much to manufacture—no, half again the manufacture 97 per cent red lead over 95, and twice as much for 98 per cent.

Q. That is, 98 per cent would cost twice as much as 95 per cent, is that your testimony?

A. Yes.

Q. That is due to the fact that the burning time is approximately twice as long?

A. That is correct.

Q. And the factors that you took into account are the factors that arise in connection with the burning?

3882 A. That is right.

Q. Now, in connection with your cost accounting work, have you made any analyses of the differences in the cost of containers?

A. Yes.

Q. Just a minute. For 100 pounds, 50 pounds and 25 pounds and 12½ pounds containers for lead in oil?

A. Yes.

Q. What was the basis for such an analysis?

A. The basis for the contracts were the—the contracts with the supplier of the containers.

Q. Do you have those contacts?

A. Yes.

Q. Did you prepare any written analysis of such contracts to show the differences per hundred pounds of lead in oil for the various containers from hundred pound kegs down to and including 12½ pound pails?

A. Yes.

Q. I show you Respondents' Exhibit No. 210 for identification and ask you if that is the analysis that you refer to?

A. Yes.

Mr. Welch: We offer it in evidence.

Mr. Wright: I would like some preliminary cross-examination.

3883 *Cross-Examination by Mr. Wright.*

Q. Do those contracts from which the figures were taken include all the terms and conditions of the transactions by which you purchased those products?

A. Yes.

Q. There are no other documents affecting them?

A. No.

Q. Or agreements affecting those contracts?

A. No.

Q. In any way?

A. No.

Q. Do those contracts cover these containers supplied with lithograph labels?

A. Some of them.

Q. In Exhibit 210?

A. Yes.

Q. With covers?

A. That is right.

Mr. Wright: I have no objection to the exhibit.

Trial Examiner Norwood: Exhibit 210 of the Respondents is received.

(The paper referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 210, was received in evidence.)

3884 *Direct Examination (Continued) by Mr. Welch.*

Q. Now, for what years did you prepare this study?

A. Well, there was no specific year. The contracts are drawn up for whatever—the statement is drawn up—

Q. (Interposing.) I have one for 1942, one for 1943.

A. That is correct.

Q. And you have the cost for how many containers and covers?

A. For a hundred containers and covers.

Q. In what different sizes?

A. Twelve and a half pounds, twenty-five, fifty, and hundred pound packages.

Q. What did you do, then, after you had the cost per hundred containers to translate it into the cost of a hundred pounds of lead in oil?

Mr. Wright: Objection, your Honor. There is no statement that that is the cost of a hundred pounds of lead in oil.

Mr. Welch: The document at the head shows white lead in package cost, and the information later is the cost per hundred pounds.

Mr. Wright: There has been no explanation of whether it is a hundred pounds of cans or what.

By Mr. Welch:

3885 Q. What does the item "cost per hundred pounds" mean?

A. The cost per hundred pounds referred to per hundred pounds of material.

Q. In such containers?

A. In such containers.

Q. All right, now, how did you arrive at that amount?

A. Well, to arrive at the costs per hundred in fifties, it requires two fifty-pound containers to fill one hundred pounds of the white lead in oil; therefore, since your container cost is 37.3 cents per container, the cost per hundred pounds would be 74.7 cents.

Q. And you use the same formula throughout in arriving at the cost per hundred pounds?

A. Yes.

Trial Examiner Norwood: Now, that means that in the fifty-pound can the cost of the container and the cover is 74.7 cents?

The Witness: That would be for two fifty-pound containers of white lead in oil.

By Mr. Welch:

Q. Are there any other factors which would increase the cost of Sherwin-Williams of preparing the smaller size containers as compared to the hundred-pound container?

A. Yes, your filling and finishing would depend on the size of the container.

3886 Q. Do they increase or decrease as the size of the container decreases?

A. The cost increases as the size of the container decreases.

Trial Examiner Norwood: Off the record.

(Proceedings off the record.)

Trial Examiner Norwood: All right, go ahead.

By Mr. Welch:

Q. Why would that last answer be true?

A. Because of the simple fact that you cannot sell two pint milk bottles with water at the same time you can sell one quart milk bottle. The same applies in filling any packages, the smaller the package you wish to fill with a required amount of material—it will take longer to fill the small packages than the larger.

Trial Examiner Norwood: How about the sealing of cans, the cover of the container?

The Witness: That becomes a part of the increased cost, too.

Mr. Welch: Your witness.

Cross-Examination (Continued) by Mr. Wright.

Q. Mr. Landgrabe, speaking of burden, I believe you testified that was the same as overhead.

A. Yes.

3887 Q. You mean general administrative overhead?

A. That is right.

Q. None of that would be an organizational burden, would it?

A. That is the reason I stated that overhead, the factory cost, the supervision, fixed charges that cannot be directly pro rated to the produced article such as rents, supervision, and so forth.

Q. Why did you select this particular period represented on Respondents' Exhibit 209?

A. The reason I selected that, our regular procedure as far as monthly operating reports is to retain them only for a two-year period. That is month by month. To secure the information necessary to verify those reports—what actually happened was I had to have recourse to the only information that was available.

Q. Are you familiar with the six months' period of the red lead manufacturing operations?

A. You mean the period—

Q. (Interposing.) January, 1945, through June, 1945.

A. I am not any more familiar with that period than any other period.

Q. Did you have any occasion during that period to be familiar with the conduct of the manufacturing operations in the red lead department?

3888 A. No.

Q. Was that in every way a normal manufacturing period as far as costs were concerned?

A. Yes.

Q. There were no unusual operating or manufacturing expenses that were incurred in that period?

A. Not to my knowledge.

Q. Did you make any effort to determine whether that was the case?

A. Well, from observation of our actual costs at other times, I would say that there is no—actually no variable difference of any concern in this period.

Q. It is true, isn't it, that in a period as short as six months, your manufacturing costs in any department can vary considerably due to unusual operating conditions?

A. That is the reason I took six months' period. The differences would be better—it gives a better picture than one month.

Mr. Wright: No further cross-examination.

Trial Examiner Norwood: What does this show as to the actual cost of a hundred pounds shipped in fifty-pound containers over that same hundred pounds shipped in a hundred-pound container?

Mr. Welch: You deduct this from this 21.7 cents.

Your Honor, we have a short stipulation.

3889 Trial Examiner Norwood: All right.

Mr. Welch: It is stipulated by counsel for the Commission and counsel for the Respondent, Sherwin-Williams Company, that if the witness Sutherell who testified yesterday were recalled to the stand today, he would testify that the rate from Dallas to Union, Mississippi, on January 25, 1943, in LCL quantity would be $1.16 per hundredweight, according to Peel's ICC-3361, and Fife's ICC-28, and that the rate from Dallas to New Orleans, Louisiana, on the same date in LCL quantities was $1.17 per hundredweight per Peel's ICC-3527 and Fife's ICC-28.

Is it so stipulated, Mr. Wright?

Mr. Wright: I so stipulate.

Mr. Welch: That is all.

(Witness excused.)

Mr. Welch: We have no further witnesses that the Respondent, Sherwin-Williams Company, proposes to produce at this hearing, so at this time we are not in position to say we have closed our defense. I will state, however, if we do put in other businesses, they will be put in after the contemplated hearings in Washington and New York and as far as we now know, we do not anticipate requesting any specific hearings for the purpose of further evidence by this Respondent.

Trial Examiner Norwood: Anything further?

3890 Mr. DuBose: We have a number of out of town witnesses who can get here, get to Washington more easily in the middle of the week than they can at the beginning of the week.

Trial Examiner Norwood: Is there any further request as to these hearings?

I want to give counsel notice as I expect us to continue without further intermission until all the evidence is received in this case, that is without further intermission except for November 4 which is Election Day, and if we adjourn over from the Washington hearing, we will reconvene on the 5th and continue without any cessation.

Mr. Wright: I will endeavor to accommodate myself to that and any rebuttal witnesses that I call will be called immediately following the close of the Respondents' testimony.

Trial Examiner Norwood: I invite attention to the notice I have sent counsel about the necessity of conserving time on this case and ask them to please cooperate in every possible way.

By request and agreement of counsel, the hearing is now adjourned to reconvene the taking of further testimony in Washington, D. C., on the 29th day of October, 1947, in the office of the Federal Trade Commission, Room 332, or otherwise, as may be posted on the bulletin board, at
3891 10:00 o'clock A. M. on that date.

Mr. DuBose: Thank you, your Honor.

Mr. Welch: That will be all right with us, your Honor.

(Whereupon, at 3:30 o'clock, p. m., October 17, 1947, the hearing in the above-entitled matter was adjourned.)

3892
Hearing Room,
Federal Trade Commission,
Washington, D. C.,
October 29, 1947.

Met, pursuant to adjournment, at 10:15 a. m.

Before:

J. W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Attorney for the Federal Trade Commission.

E. Z. DuBose, Attorney for the Respondent National Lead Company. (120 Broadway, New York, New York.)

3893 Edmund T. Wood, Attorney for the Respondents Eagle-Picher Lead Company and Eagle-Picher Sales Company. (American Building, Cincinnati, Ohio.)

Henry E. Gardiner, Attorney for the Respondents Anaconda Copper Mining Company and International Smelting & Refining Company. (120 Broadway, New York, New York.)

James T. Welch, Attorney for the Respondent The Sherwin-Williams Company. (815 15th Street, N. W., Washington, D. C.)

3894 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on the 17th of October at Cleveland, Ohio, the hearing in Docket 5253 is now convened in Washington, D. C., Office of the Federal Trade Commission, Room 332 at 10 o'clock a. m. on October 29, 1947.

The appearances are as follows:

Edmund T. Wood, representing Eagle-Picher Company and Eagle-Picher Sales Company.

E. Z. DuBose, representing National Lead Company.

Henry E. Gardiner, representing Anaconda Copper Mining Company and International Smelting & Refining Company.

James T. Welch, representing The Sherwin-Williams Company.

Joseph S. Wright, representing the Federal Trade Commission.

Mr. DuBose: Mr. Matthiessen, will you resume the stand?

C. S. MATTHIESSEN was thereupon recalled as a witness for the respondents National Lead Company, and, having been first duly sworn, testified as follows:

Direct Examination (Resumed) by Mr. DuBose.

3895 Q. Mr. Matthiessen, I show you Respondents' Exhibits 165-A to O, inclusive for identification, and 166-A and B, which were identified by you at the time of the hearing in Washington on June 12 of this year, and I call your attention to the fact that at those hearings you testified as to poundage and freight, but stated that you had not checked cartage figures.

Pursuant to my request, have you recently checked the cartage figures which appear on these exhibits that I have just mentioned?

A. I have.

Q. And at that time you had in your possession these other exhibits, is that correct?

A. Yes.

Q. Now, when you refer to cartage figures, are those the figures which appear on Respondents' 166-B, among other exhibits, under the heading, "Par-T" and opposite the word, "cartage" with respect to each month.

A. Yes, sir, they are the net cartage figures for that particular month.

Q. I show you Respondents' Exhibit 165-A to O, inclusive for identification, and do the figures opposite the words, "cartage", which appear as to each month on Respondents' Exhibit 166-B for identification also appear on these work sheets, which are the work sheets for the month by month tabulations. 3896

A. That is right.

Q. Now, will you tell us from what source the cartage figures, which appear on Respondents' Exhibit 166-B for identification, were taken, from what sources?

A. They were obtained in an entirely different manner than the freights. They are an accumulation of the total costs of the operation of our trucks, plus the purchase of new trucks, plus the write-offs for those trucks each year, divided by 12, and they are the wages paid to the drivers, the helpers, the overtime, the gas, the oil, and everything else applicable to the operation of those trucks.

Q. Now, the trucks also; you say our trucks. You refer to the trucks owned by the John T. Lewis Company in Philadelphia?

A. That is right.

Q. Now, trucks also carry other materials than white lead in oil, is that correct?

A. That is correct.

Q. Do you make any allocation of the trucking costs to white lead in oil, and how do you do it?

A. That is obtained in this manner: At the end of each month, all of our figures are computed to a pound basis, and the total number of pounds are taken and divided into the total costs for the operation of those
3897 cars, thereby getting a rate of freight to charge
against the cartage. Then for white lead in oil, we have that rate, and we multiply that by that rate to obtain that cartage figure.

Q. If I understand you correctly, then, you take the monthly total poundage or production by John T. Lewis Company of all products?

A. That is right.

Q. And divide it into the figure which you have for cartage for that month?

A. That is right.

Q. And get the unit cost per pound?

A. That is right.

Q. And with that you then multiply it by the number of pounds of white lead produced that month?

A. That is right.

Q. To get the applicable cartage applied to white lead in oil.

A. That is right.

There is one other item there which we have a credit on. For all the weight that we take by our trucks to railroads, platforms or stations, we are allowed a credit of five cents, which is deducted from the cartage for white lead.

Q. In other words, the railroads give you that credit?

A. That is right.

3898 Q. Now, taking these figures opposite the word "cartage", which appears in the recapitulation of the work sheets for each month, Respondents' Exhibit 166-B, are those figures taken from any particular source?

A. Oh, yes, definitely.

Q. What is the record in your office?

A. Well, the record in our office is obtained from our distribution of expenses.

Q. And is that a record kept in the regular course of business?

A. Yes, sir.

Q. And it reflects the cartage attributable to white lead in oil, for instance, for each month?

A. For that particular month.

Q. Now, I notice that cartage charges apply only to par territory.

A. That is right, for our trucks never operate out of par territory.

Q. And the John T. Lewis Company pays no trucking costs, as such, outside of par territory, is that correct?

A. That is correct.

Q. I also note on Respondents' Exhibit 166-A for identification, under the general heading, "1941 Sale of heavy and soft paste white lead", the last column to the right is headed, "Prt. per Cwt." Should that "Prt" be "Frt"?

A. That certainly should. That is freight.

3899 Q. That is a typographical error.

A. That is a typographical error.

Q. Now, Mr. Matthiessen, have you available at John T. Lewis Company in Philadelphia, or in the company's warehouses, all of the invoices which you testified about last June, and all of the cartage figures and all of the records showing tonnage of white lead in oil sales for 1941?

A. We have.

Q. And will those records be made available to anyone in the Federal Trade Commission who wishes to examine them?

A. Yes, sir.

Q. And will you, upon reasonable notice, be able to help whatever investigator comes from the Federal Trade Commission to examine those records?

A. I certainly will.

Mr. DuBose: At this time I offer in evidence Respondents' Exhibit 165-A to O, inclusive for identification, and Respondents' Exhibit 166-A and B for identification.

Mr. Wright: I would like preliminary cross-examination for identification.

Trial Examiner Norwood: What is the purpose of these exhibits?

Mr. DuBose: I think we stated it last time, but to recapitulate, these records show what the Philadelphia branch of the National Lead Company's average freight costs 3900 for white lead in oil sales for 1941 are, and they show what the average freight per hundred pounds in par territory is, what the average freight is, plus one-eighth, and similar figures for plus three-eighths territories for white lead in oil for the year 1941, and last June this witness rather exhaustively identified all of the figures on these work sheets, except the cartage figures, and he at that time stated that he had not checked those figures, but in the meanwhile he has checked them.

Trial Examiner Norwood: Counsel may go ahead with his preliminary questions.

Cross-Examination by Mr. Wright.

Q. What is the geographical territory which is the plus three-eighths zone described in Exhibit 165-A which the Philadelphia branch ships, Mr. Matthiessen?

A. In our territory it consists of, I would say, two-thirds of North Carolina to the east; about 85 per cent of South Carolina, and the town of Augusta, Georgia.

Q. From Augusta, Georgia, east in Georgia?

A. No, the only time that—The only town that we have that we operate in is Augusta, Georgia.

Q. You don't have any other customers in Georgia except that one town?

A. That is the only town, sir.

3901 Q. Do you have any accounts in Florida that are included in that?

A. No, not with our branch. That is taken by New York.

Q. So then the three-eighths zone you are speaking of is only eastern North and South Carolina and Augusta, Georgia?

A. That is right.

Q. What is the one-eighth zone that appears on this exhibit?

A. The one-eighth zone is the state of Virginia.

Q. Do you sell in the western part of Virginia from the Philadelphia branch?

A. We sell as far over as Roanoke, Virginia.

Q. You don't sell in the plus twenty-five cent zone of Virginia?

A. No, sir.

Q. Now, getting to this Exhibit 165-A, in the column headed "Voucher", with these numbers, what are those numbers, Mr. Matthiessen?

A. Those numbers are the numbers of our vouchers where we, say, for illustration, pay the Pennsylvania Railroad, with an accumulation of possibly a week's accumulation of invoices to us, and they are gathered together and we make one check for that entire voucher.

Q. And that is a freight voucher?

A. That is a freight voucher.

3902 Q. What are the products which the John T. Lewis Company sells throughout the territories covered by this exhibit?

A. Well, in the paint industry we sell dry white lead, white lead in oil, dry red lead, red lead in oil, ready-mixed red lead, linseed oil of all descriptions, dry colors, colors mixed in oil—That is a paste color—and various other items like lead mixing oil, flattening oils, and then we have a metal department where we ship all types of babbit solders, sheet lead, lead pipe, pipes in bends, and things like that.

Q. Now, these vouchers from which you procured this information, what appears on the face of these vouchers?

A. We have a book called Disbursement of Expenses, and in this book is listed the voucher number applicable to white lead. I only picked the vouchers where we had white lead, payments of white lead accounts, and I took possibly, during the course of 1941, several thousand vouchers out and examined them, and the records that I have there are exact copies of the invoices we paid for white lead.

Q. Now, what appears on the face of these vouchers now?

A. What do you mean by the face of the voucher?

Q. What figures appear on those vouchers?

A. Well, the amount chargeable to white lead, the amount chargeable to oxide, the amount chargeable to linseed oil.

Q. Is each product separated on the face of the voucher itself?

3903 A. Yes.

Q. On the freight voucher?

A. Yes.

Trial Examiner Norwood: Well, is this all for shipments of 100 pounds or less?

The Witness: I don't quite get your question, sir.

Trial Examiner Norwood: The freight information you are giving here, and these shipments you have indicated here on these vouchers, particularly shipments in freight, are they all on shipments of 100 pounds or less?

The Witness: One hundred pounds or more?

Trial Examiner Norwood: Or more?

The Witness: Yes.

Trial Examiner Norwood: None less than a hundred pounds?

The Witness: We never ship less than a hundred pounds. We ship no less than 500 pounds.

Trial Examiner Norwood: All right, go ahead.

By Mr. Wright:

Q. Then the amount allocated to each product appears on the face of the original voucher in the Distribution of Expense book?

A. Yes, sir.

Q. And you then did not include any freight or cartage which could be allocated to any other product in the

3904 figures that were represented on this exhibit?

A. No. We checked each voucher to find mistakes, if any occurred.

Q. So that these sheets here show the amount of freight and cartage allocated to each of those vouchers, is that correct?

A. That is right.

Q. Where did you get your total figure of sales over this period?

A. That was taken from another book entirely, where we took the total pounds of white lead in oil sold for that particular month.

Q. You did not check any original invoices to determine those sales?

A. Oh, yes.

Q. You went back to the original invoices, then?

A. Yes.

Q. You did not take—

A. (Interposing.) Excuse me, please. Let me tell you this: Before we pay each freight bill, they are very carefully checked as to pounds. Then it goes to the Traffic Department to be checked as to freight rate. Then the extension is checked. If everything else is correct and that bill is correct, it is set aside for payment.

Q. But you checked, then, each original invoice 3905 to get the total pounds sold in each territory?

A. I did not check each original invoice. I checked each original freight bill.

Q. And that is where you get your figures which are on Respondents' Exhibit 165-A to O, inclusive.

Now, calling your attention to Respondents' Exhibit 166-A, where total pounds sold are set forth and compared with the figures that you derived from 165-A, exactly what document or from what document did you get those figures?

A. We got those from the sales records.

Q. Which were in what form?

A. I don't know that, sir.

Q. Did you get them out of a book that had a line showing so much pounds sold during July or August or something?

A. Yes, sir.

Q. Now, how was that broken down territorial?

A. That was not broken down territorial.

Q. How do you separate the sales in plus one-eighth and plus three-eighths from the par sales?

A. From our freight invoices, knowing the territories.

Q. Well, will you explain that in detail as to the technique you used in doing that?

A. Well, we have a set territory for par territory, which is north of Washington, D. C., including up to our upper part, which takes in Trenton over to Point 3906 Pleasant; up through Wilkes Barre and down along the Susquehanna, all through Maryland, and takes in the state of Delaware and that section of Maryland, including Washington, D. C., is our par territory.

Now, where the freights go over comes in the Virginia territory, and where the freights go higher still is in North and South Carolina and Augusta, Georgia.

Q. What I would like you to do, Mr. Matthiessen, is tell us just how you got this figure of 1,100,000 pounds sold in the plus one-eighth and the 1,231,600 pounds sold in the plus three-eighths.

A. We divided that up by the territories.

Q. Well, now, you did not look at the original invoices?

A. No, we did not look at the original invoices. They were all done right up in our office. We have all those figures right up in our office for you, sir.

Q. Well, now, I appreciate that.

What I want to know is exactly how you did this now. Where did you get these pounds? Did you get those from the freight vouchers you are talking about now?

A. No, we didn't get the pounds from the freight. They were already checked beforehand. They were definitely checked when that bill was passed for payment. That is when they were checked.

Q. Now, you stated to me that you got this figure 3907 on total pounds sold from a sales record and said, for instance, one million pounds sold during July, 1941, and that sales record did not say where those pounds were sold.

A. But they are. We have that record right up in Philadelphia.

Q. The sales record, as it is entered there, shows the locality in which those things are sold?

A. Yes.

Q. By zone or by state or in what fashion?

A. By zone.

Q. They are set up that way?

A. Yes.

Q. Kept regularly that way in the regular course?

A. Yes, sir.

Q. Over how long a period of time have you done that?

A. Since about, I would judge that was around '27 or '28 when that started, somewhere in there.

Mr. Wright: I have no further preliminary cross.

Trial Examiner Norwood: I want to ask you about this par territory. Just what does that par territory, as you have used it in these tabulations, cover?

The Witness: That covers where we do not charge any excess for freight.

Trial Examiner Norwood: I know, but I mean what states? I want to know which one of the maps which
3908 are in evidence that I can compare this to.

Mr. Wright: May we got off the record, sir?

Mr. DuBose: Commission's Exhibit 580 shows the white lead in oil.

Mr. Wright: May we go off the record, your Honor?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Is there any objection to the exhibits?

Mr. Wright: Yes, your Honor, I want to object to the exhibits on the ground of relevance. Certainly they have nothing to do with the basic charge here of fixing and maintaining prices and monopolistic position, because they can't conceivably affect that in any way. Secondly, I want to object to their reception as to count two in the sense that they purport to show averages of many individual transactions, which certainly are no defense as to a charge of transaction in specific transactions which fall within groups and classes.

Mr. DuBose: If your Honor please, other exhibits of this same nature have been admitted in evidence, and I should think to get a complete picture, they should be admitted under the same general ruling.

Trial Examiner Norwood: I will receive them subject to connection, that is, by the addition of other information which may be taken together with that to throw some
3909 light on what the average freight is in the various zones.

Mr. DuBose: That is our purpose, your Honor; not to show an isolated branch, but to try to get all the branches and show an overall picture.

Trial Examiner Norwood: The objection is overruled, and the exhibits are received as stated.

(EXHIBITS NO. 165-A TO O, INCLUSIVE AND 166-A AND B were thereupon received in evidence.)

Mr. Wright: I have no further cross-examination.

Trial Examiner Norwood: Thank you, Mr. Matthiessen.

(Witness excused.)

Mr. DuBose: Could we have a short recess?

Trial Examiner Norwood: We will take a five-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Come to order.
Call your next witness.
Mr. DuBose: Mr. Hesselbrock recalled.

J. H. HESSELBROCK was thereupon recalled as a witness for the Respondents National Lead Company, and, having been previously duly sworn, testified further as follows:

Direct Examination (Resumed) by Mr. DuBose.

Q. Mr. Hesselbrock, I call your attention to the fact that in the hearings in New York on June 18 of this year, 3910 through you were introduced in evidence Respondents' Exhibit 169-A to N, inclusive, which you identified and explained at that hearing.

I call your attention to the fact that on the summary sheet, so-called, Respondents' Exhibit 169-A, opposite the heading or the notation "Par Plus One-Fourth", which you at that time explained was par plus one-quarter territory for white lead in oil, and under the heading, "Total Pounds Sold", opposite that notation are the figures 306,037½. Are those the total pounds sold by the Cincinnati branch in 1941 for white lead in oil in the par plus one-quarter territory for white lead in oil?
A. Yes, sir, they are.
Q. And in that connection, I call your attention to the minutes of June 18, page 3145, to the question:

"Yes. In other words, you obtained the pounds sold in the par plus one-quarter and par plus three-eighths zone, respectively, and the total of that is listed here for the par plus one-quarter zone of 3,306,370½ pounds; is that correct?
"A. That is correct."
Is that figure 3,306,370½ correct?
A. No, it is not.
Q. What should it read, and I refer you to Respondents' Exhibit 169-A.
3911 A. It should read 306,037½ pounds.
Trial Examiner Norwood: Off the record.
(Discussion off the record.)
Mr. DuBose: That is all. Mr. Hesselbrock is presented for cross-examination.

Cross-Examination by Mr. Wright.

Q. Mr. Hesselbrock, the Cincinnati branch is merely a billing branch of the National Lead Company for these products, is it not?

A. For the white lead in oil and oxide products, yes.

Q. It does not, then, ship to any of the customers?

A. Well, we warehouse in Cincinnati, and we do ship from there.

Q. Over how wide an area do you ship from that Cincinnati warehouse?

A. Well, throughout the entire territory, the Cincinnati branch territory, I should say.

Q. That would include the territory all the way down to the Gulf of Mexico?

A. No, it is a portion of Indiana, Ohio, all of Kentucky, a portion of Tennessee, a portion of Virginia and West Virginia, North Carolina, South Carolina, Alabama and Georgia.

Q. Then any LCL shipments of these products would be shipped to the customer from the Cincinnati 3912 branch warehouse rather than directly from the factory involved?

A. Not necessarily.

Q. How do you determine that as a matter of general practice?

A. Well, that is determined in an effort to save as much freight as possible.

Q. Do you have any other warehouses in the Cincinnati branch territory?

A. Just in Atlanta, Georgia, our own plant there. The warehouse has small quantity shipments into Atlanta.

Q. How do you serve the territory in Alabama, Mississippi, and other parts of Georgia?

A. Well, we make no shipments into Mississippi, but in Alabama and Georgia practically all the shipments are from another branch, direct LCL shipments.

Q. Now, going back to 169-A and this total pounds sold in the par zone during 1941, you have a figure of 3,000,794 pounds. Where did you get that figure, from what specific record?

A. That figure was gotten from a specific record. That was obtained by difference. We did obtain the par plus a quarter and par plus three-eighths figures from actual invoices into those territories. The par figure was obtained by difference.

Q. Well, difference from what?

A. From the total sales during the year 1941.

Q. In other words, the figure then of 3,000,794 is
3913 derived by deducting what you found in the par plus
a quarter and par plus three-eighths from the total
figure?

A. From the total sales.

Q. Then in your area you don't keep your sales broken down into par plus a quarter or plus three-eighths, as the previous witness testified they did in the John T. Lewis branch?

A. We do not keep them separate.

Q. What is your office technique or branch technique for handling the freight charges which have been borne by the other branches in shipping to customers in your branch territory?

A. Well, we are billed for the exact amount of freight which another branch would pay for our account for a shipment to one of our customers.

Q. Now, how are those figures reported to you, as total figures?

A. No, they are involved as individual charges on individual shipments.

Q. Well, now, suppose a shipment included flatting oil, linseed oil, and dry red lead, as well as heavy paste white lead, how does the figure come to you, say, from the St. Louis branch?

A. Each item is billed as an individual product.

Q. Separate?

A. Separately.

3914 Q. So then these figures on freights which are added here were taken from those actual billings in each case?

A. In each case, sir.

Q. Did you work out a difference on par, a quarter and three-eighths on freight factors, as you did on the pounds sold?

A. Yes, we did.

Q. You did that in the same way, then?

A. That is right.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

By Mr. Wright:

Q. What is 169-D, Mr. Hesselbrock?

A. Those are the numbers of the vouchers on which freight was recorded.

Q. In what area is that applicable?

A. That would be our complte charge for freight for 1941 chargeable to the white lead in oil department. It would cover all territories.

Q. I call your attention to the statement on 169-B, "Through agents, 3,371,397, and then the figure 89.49 per cent. What is that figure and that description?

A. I don't quite understand your question. You are referring to the pounds or to the percentage?

Q. Well, both the pounds and the percentage.

3915 A. On our net sales statement for the year 1941, which shows the total sales of white lead in oil, the sales were broken down into the sales through agents and to other purchasers.

Q. Now, in this figure appearing on 169-A, average freight per cent per hundredweight in the par zone, .514, is there included in that figure the inbound freight rate from the producing plants that serve the Cincinnati branch warehouse?

A. Yes, the inbound freight is included in that figure.

Q. In other words, in figuring your average freight per hundredweight in the par zone, in calculating that as to shipments from the Cincinnati warehouse, you went back of the actual freight incurred from the Cincinnati warehouse, and also took your inbound freight from Chicago, say, to Cincinnati?

A. That figure was obtained by difference, and the freight was originally charged against the white lead in oil department, and since that figure would not appear in the par plus quarter or par plus three-eighths zones, it would automatically appear in the par freights.

Q. Where is the Cincinnati warehouse customarily served from, what factory?

A. Well, it is served from several, St. Louis, Chicago, and in emergencies from Philadelphia.

3916 Q. And all of the inbound freight, then, on that material would appear in this tabulation which you have made here in 169-A?

A. It would.

Q. Because it is charged to the Cincinnati branch warehouse.

A. That is right.

Q. ~~Is cartage~~ included in this?

A. Well, the only cartage we would have would be in the City of Cincinnati itself, and that is par territory, and that again would automatically appear in the par freight.

Q. Is your cartage in the Cincinnati local territory now done in your own trucks, or is that in hired carriers?

A. Well, it is done in our own trucks except in cases of emergency.

Q. Now, are the cost factors for your own trucks included in this total figure, so that they are reflected in this .514?

A. They are included in the total figures, yes, sir.

Q. Do you ever in an emergency fill an order in the Cincinnati branch that might be in the territory of another branch?

A. We ~~have~~ in emergencies.

Q. Where would those pounds appear? Are they compensated in this?

A. Those pounds were not included in these sales. Those
would be included in the sales of the other branch.
3917 Both pounds and dollars of freight would be charged
to that branch.

Q. Now, your oxide calculations, then, were made in exactly the same way, I take it?

A. In the same way, yes, sir.

Q. Does your Atlanta plant ship any red lead throughout your territory direct?

A. Not in carload lots.

Q. Do they ship in less than carload lots?

A. They do if it is warehoused there.

Q. I am talking now about materials produced in Atlanta.

A. Are you speaking now of 1947 or 1941?

Q. Well, we will speak, say, of 1945.

A. Well, in 1945 they began to manufacture oxide in Atlanta.

Q. And ship and sell them throughout that area?

A. That is true.

Q. They were not in production in 1941?

A. No, sir.

Q. When did they reach production of any consequence?

A. In 1942 or 1943 that plant started to operate.

Q. Do they make a complete line of oxides?

A. Just battery oxides.

Q. What is that, litharge and red lead?

A. Uncalcined litharge and negative plate litharge.

Q. Do they make any mixture that contain a certain percentage of red lead with the litharge? 3918

A. No.

Q. They don't make what is commonly known as positive?

A. Positive, yes, but that is uncalcined litharge.

Mr. Wright: I have no further examination.

Trial Examiner Norwood: Off the record just a moment.

(Discussion off the record.)

Mr. DuBose: Nothing further.

(Witness excused.)

3919 Trial Examiner Norwood: Let's go back on the record and let Mr. DuBose make his complete proposal as to the schedule.

Mr. DuBose: Your Honor, at this time I should like to respectfully move that the hearings be adjourned until November 6, at which time we propose, subject to Your Honor's approval, to have hearings on November 6 and 7 in Washington, and thereafter to adjourn to New York for November 10, 12, 13, 14, and 15 if need be, at which time, subject to Your Honor's approval, the hearing will be held in Room 10 of the Bar Association Building, 42 West 44th Street, New York, at which time all of Respondents hope to be able, and fully expect to be able, to put in all of the remaining testimony.

Trial Examiner Norwood: Is that agreeable to you, Mr. Wright?

Mr. Wright: Yes, sir. And I might add that if there is any time remaining in that week I may be able to complete any testimony evidence that I might want to offer in rebuttal. If not, I intend to complete it in the following week.

Trial Exmainer Norwood: Now, I want to repeat what I previously said to counsel, and repeat my urgent request that if they have any appeals which they might want to make under Rule 20, to go on the record on this immediately after all the evidence has been received, and also to have their proposals so that they may be presented not longer than one week after the close of the testimony. 3920 At least I shall request that. Maybe we will have to take ten days, but I think we can do it in a week.

Is there anything further?

(No response.)

Trial Examiner Norwood: The hearing is now adjourned to reconvene in Washington, D. C. in Room 332, Federal Trade Commission, at ten o'clock a. m., Eastern standard time, on November 6.

Mr. Welch: November—what?

Trial Examiner Norwood: November 6, at ten o'clock a. m., with the understanding that we will follow the proposed schedule as far as may be possible.

(Whereupon, at 11:30 o'clock a. m., October 29, 1947, the hearing in the above-entitled matter was adjourned, to reconvene at 10 o'clock a. m., November 6, 1947, in Room 332, Federal Trade Commission, Washington, D. C.)

3921 Hearing Room 532,
Federal Trade Commission,
Washington, D. C.,
November 6, 1947.

Met, pursuant to adjournment, at 10:00 a.m.

Before:

J. W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Attorney for the Federal Trade Commission.

Paul R. Dixon, Attorney for the Federal Trade Commission.

3922 E. Z. DuBose and James D. Ewing, Attorneys for the Respondent National Lead Company. (120 Broadway, New York, New York.)

Edmund T. Wood, Attorney for the Respondents Eagle-Picher Lead Company and Eagle-Picher Sales Company. (American Building, Cincinnati, Ohio.)

Henry E. Gardiner, Attorney for the Respondents Anaconda Copper Mining Company and International Smelting & Refinining Company. (120 Broadway, New York, New York.)

Robert Mathis, Attorney for the Respondent The Sherwin-Williams Company. (815 15th Street, N. W., Washington, D. C.)

3923 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on October 29, the hearing in Docket 5253 is now reconvened for the taking of further testimony in Room 532, Office of the Federal Trade Commission, Washington, D. C., at 10:00 o'clock a.m. on the 6th day of November, 1947.

The appearances are as follows:

Edmund T. Wood, representing Eagle-Picher Company and Eagle-Picher Sales Company.

E. Z. DuBose, reperesenting National Lead Company.

James D. Ewing, representing National Lead Company.

Henry E. Gardiner, representing Anaconda Copper Mining Company and International Smelting & Refining Company.

Robert Mathis, representing The Sherwin-Williams Company.

Joseph S. Wright, representing the Federal Trade Commission.

Paul R. Dixon, representing the Federal Trade Commission.

Call your witnesses, gentlemen.

Mr. Ewing: We will recall Mr. McNair.

Trial Examiner Norwood: Mr. McNair is recalled for cross-examination, is he not?

3924 Mr. Ewing: He testified before.

Trial Examiner Norwood: Yes. Mr. McNair, you have been sworn?

Mr. McNair: Yes.

Mr. Ewing: We are recalling him not only for cross-examination but for further direct.

Trial Examiner Norwood: All right.

JOHN GORDON CRAWFORD McNAIR was thereupon recalled as a witness for the respondent National Lead Company, and having been previously duly sworn, testified as follows:

Direct Examination (Resumed) by Mr. Ewing.

Q. Mr. McNair, when you testified here last June, you identified this document, as I recall it, which I have in my hand, and which is marked Respondent's Exhibit 158 for identification, which I show you. That document, as I recall your testimony, was prepared by you, is that right?

A. Yes, sir.

Q. Now, will you tell us briefly exactly what that shows.

A. This chart goes back for a number of years and shows the various selling schedules of companies that were taken into the National Lead Company at the consolidation of the National Lead Company, and since that time is the National Lead Company.

Q. Well now, when you say companies that were 3925 taken into the National Lead Company, you are referring to the incorporation of National Lead, is that correct?

A. That is true.

Q. And when you say companies that were taken in, do you mean all of the companies that became a part of National Lead or—

A. No, sir, only those companies who were taken in and eventually became the Atlantic Branch.

Q. Now, do you know offhand what those companies were, or some of them?

A. Well, the Brooklyn White Lead Works, the Ulster White Lead Works, the Jewett White Lead Works, the Atlantic White Lead Works, Robert Colgate & Company, the Union Lead Company—that is about all, I think.

Q. Now, you have said that you prepared this chart, as you call it, yourself. From what records did you prepare it?

A. From scrapbooks that we had in the office.

Q. And have you those scrapbooks here?

A. Yes, sir.

Mr. Ewing: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Are you ready now, gentlemen?

Mr. Ewing: Yes.

3926 By Mr. Ewing:

Q. These scrapbooks, Mr. McNair, that you produced, are the source of the information set forth on Respondents' Exhibit No. 158 for identification?

A. Yes, sir.

Q Now, you spoke of Respondents' Exhibit No. 158 for identification as setting forth the Atlantic Branch and its predecessors' selling schedules, I believe. Do you mean that Respondents' Exhibit No. 158 for identification purports to set forth each and every price change?

A. No, sir.

Q. When you say selling schedules, will you tell us exactly what you mean.

A. It means the different methods they have had in selling white lead, as to whether there was a discount, a rebate, the general set-up of a selling policy.

Q. In other words, rather than setting forth the history of the selling schedules of the Atlantic Branch and its predecessors, this document which is marked Respondents' Exhibit 158 for identification purports to set forth only what you call its selling policies as they were put into effect from time to time?

A. That is true.

Q. And am I correct in understanding that all the information that appears on Respondents' Exhibit 158 for identification is taken from these scrapbooks that
3927 you have produced here this morning?

A. Yes, sir.

Mr. Ewing: I offer Respondents' Exhibit 158 for identification.

Mr. Wright: I would like some preliminary cross-examination, your Honor.

Trial Examiner Norwood: All right.

Voir Dire Examination by Mr. Wright.

Q. Mr. McNair, I note in the first column, to the left of this exhibit, that there are prices listed prior to 1890. As I understand it, the National Lead Company was organized and incorporated in 1890.

A. In 1891 and 1892, I think it was.

Q. I see. Now, whose prices are those which appear on this prior date to the date of the incorporation?

A. They appear in those books.

Q. Well, will you tell us whose prices those were?

A. Those prices were obtained from those constituent companies that we took in at the time of the formation of the National Lead Company.

Q. In other words, they were predecessor companies of the National Lead Company?

A. I gave them in my testimony.

Q. Were they predecessor companies of the Na-
3928 tional Lead Company?

A. That's right.

Q. Out of which National was formed?

A. That's right.

Q. Well now, did they quote prices together as a unit in that period or did each company have different price lists?

A. I don't know, sir. The records will speak for themselves.

Q. Well, I am asking you now what this exhibit purports to show.

A. This exhibit shows the selling schedule or the policy of those companies—

Q. Well—

A. —by the National Lead Company.

Q. Does that represent the policy of all of them or of a particular one of them?

A. Well, they were taken from the particular ones shown in the book there.

Q. Well now, as I understand your testimony, you don't recall whether that was from a particular one or from the common quotations of the constituent companies.

A. I hadn't looked at those books since I made this chart up some 12 or 14 years ago.

Q. This purports to show, then, every change in a discount or selling practice as reflected in the price cards, from this beginning date up to the present time, is that correct?

A. As far as I could ascertain from the records.

3929 Q. Did I understand you to say you made this up 12 or 14 years ago, Mr. McNair?

A. About that time, yes.

Q. Mr. McNair, you didn't indicate on this exhibit anything about how freight was handled at various times?

A. No, sir.

Q. The charges to customers?

A. No, sir.

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: I am willing to withhold objection if these matters can be admitted subject to reasonable opportunity of examining the basic data, and the right next week in New York, if I require it, to recall this witness for further cross-examination on the basis of the basic data.

Mr. Ewing: Yes.

Trial Examiner Norwood: If agreed to, the exhibit is received in evidence so condtioned.

(The paper referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 158, was received in evidence.)

Trial Examiner Norwood: The prices that are named on that exhibit, are they fo.b. prices or what?

The Witness: Well, I think—

3930 Trial Examiner Norwood: Delivered prices?

The Witness: I think, your Honor, they are all delivered prices. To 37 years of my knowledge, all those prices have been delivered.

Trial Examiner Norwood: All delivered prices?

The Witness: And I imagine the same thing existed years before that.

Mr. Ewing: I take it that subject to the suggestion made by Mr. Wright, the exhibit will be reecived.

Trial Examiner Norwood: Yes, it has been received. Proceed.

Direct Examination (Continued.)

Q. Mr. McNair, I call your attention to the fact that in Respondents' Exhibit 158 at times reference is made to white lead in oil and at times reference is made simply to white lead. Does the information contained in the exhibit relate entirely to white lead in oil?

A. Yes, sir.

Q. So that whenever a reference is made solely to white lead, that means white lead in oil as far as that paper is concerned?

A. White lead in oil.

Q. Now, I ask you to look at the lefthand column on the exhibit, and in particular the entry dated December 13, 1880, and the next entry dated January 21, 1884, in each of which the word "rebate" or "rebates" appears, and
3931 ask you to tell us what those words "rebate" or "rebates" mean.

Mr. Wright: Your Honor, I am going to object to that question in its present form. This is a question of a witness as to what a word may or may not have meant in 1877 or 1180, which is obviously beyond his knowledge or experience.

Mr. Ewing: Oh, I will amend the question by adding "if you know."

Trial Examiner Norwood: He may tell us what he understands in the light of his knowledge of the affairs of these companies, or what he understands the term "rebate" to mean.

The Witness: If the counselor will refer to the second column, the period of April 26, 1918, he will see that at that particular time the ¼ cent rebate was discontinued.

Having been with the company at that time, I am well aware of the fact of what the word "rebate" means.

It simply means that at the end of the year, if the customer had bought a certain quantity of white lead, he was entitled to a rebate of so much per pound on his yearly purchases.

By Mr. Ewing:

Q. So that was not a current discount, as you might say, but it was based upon the total purchases of the particular year by a particular customer?

A. That is correct.

3932 Q. Now, I call your attention to the second column from the left and to the entries under the date April 26, 1918, and in particular to those relating to 2,000 pounds, 5 ton, and car lots, and ask you to tell us what the discount shown on the exhibit means.

A. The customer buying in 500 pound lots for delivery at one time received a 10 per cent discount from the list price; 2,000 pound lots for delivery at one time, 10 and 2½ per cent; 5 ton lots, 10 and 5 per cent; and carload lots, 10 and 6 per cent.

Q. Well now, when you say that in case of carload lots it was 10 and 6 per cent, is the 10 per cent a discount from list price?

A. The list price. The discounts are taken off the list price, 10 per cent off, and then 6 per cent off of that.

Q. And when you say 6 per cent of that, what figure do you have in mind?

A. The list price.

Q. Six per cent of list or 6 per cent of list less 10 per cent?

A. No, if the list price—let's see if it is shown here. The list price at the time in question was $12.50 per hundred pounds. You would take 10 per cent off of that, and then, in the case of carload lots, an additional 6 per cent.

Q. Off—

A. Off of the list price.

Q. Off list price?

A. The list price, yes.

3933 Q. Now, in that same second column, I direct your attention to the last entry under date of November 18, 1920, and ask you to explain the discounts shown there.

A. Well, the same explanation would apply to that as it does against the others.

Q. The only difference being the amount of discount shown?

A. The difference in discounts, that is all.

Q. And you show those differences in the discount as a variation in the selling policy?

A. Selling schedule, that's right.

Q. Now, I ask you to look at the first entry in the third column under the date of April 24, 1930, and ask you to explain the discounts shown there.

A. That was the same with the different schedule of discounts allowed.

Q. Now, in that same column, if you will look under the various headings, you will find references to painters, dealers, and agents, and the references to painters and dealers in that column are the first to appear on that document. In other words, they did not appear in either the first or second columns.

A. You have reference to the bracket March 1, 1935?

Q. Yes, and the subsequent one marked January 1, 1937. Will you tell us what those classifications meant as far as the Atlantic Branch was concerned.

A. Those were the schedule of prices at which
3934 our agents were authorized to sell at, the suggested
retail price to painters and dealers.

Q. Now, did the Atlantic Branch at that time sell so-called painters and dealers direct?

A. No, sir.

Q. And at that time the Atlantic Branch was operating on the agency or consignment plan which, if I recall your testimony correctly, first started in the first part of 1932, or the latter part, rather.

A. Demember 30, 1932, I think it was.

Q. Now, with respect to that same entry, there is a heading "Agents" and I see there that there are three classifications. Will you explain these three classifications.

A. The A classification were those distributors that bought in very large volumes.

Q. When you say "bought" you mean prior to the agency, is that correct?

A. Prior to the agency. Then, when we established the agency price, of course they were our distributors and those were the distributors of our products that ordered—that we delivered to them large tonnages of white lead.

The B classification is a distributor that got a lesser quantity and the C classification was the smallest agent.

Q. Now, as far as you know, did any other branch of National Lead Company similarly classify its agents?

3935 A. Yes, sir.

Q. After January 1, 1937—and I believe you will find an entry of that date relating to "Agents all"—did Atlantic Branch classify agents?

A. After that date, sir?

Q. Yes.

A. No, sir, they were all put on the same basis.

Q. Now, I direct your attention to the last two entries in that column, relating to the first and second advances of March 1, 1937, both of which refer to discounts to the trade, and ask you to tell us what in that exhibit you mean by the trade.

A. In that particular case the trade would be the painters, property owners, or any consumer that would buy in those quantities.

Q. Now, I refer you to the last two entries in the third column in which you will note in each case there is a reference to list, and these appear to be the first entries in that exhibit relating to list, and I ask you to tell us what you meant by list.

A. What column is that, counselor?

Q. The last two in the third column.

A. March 1, 1937?

Q. In each you will see there is a reference to list, with a price.

3936 A. That is the list price for white lead in oil.

Q. When you say list price, tell us what you mean. To whom is that price charged?

A. Well, the list price as such was subject to a discount if the dealer or painter bought in certain specified quantities as shown here.

Q. Well, who paid the list price, if anyone?

A. Yes, I would say so. A property owner, a casual purchaser of white lead, would pay the list price.

Trial Examiner Norwood: The consumer would pay that, is that right?

The Witness: A consumer, a property owner.

Trial Examiner Norwood: Would pay that to the retailer?

The Witness: That's right.

By Mr. Ewing:

Q. That is the price I would pay if I went in any store?

A. That's right.

Trial Examiner Norwood: Then this product is sold to distributors and dealers at a certain discount from list, is that right?

The Witness: Not at the present time, sir. We have a flat price.

Trial Examiner Norwood: You mean when those entries were made?

3937 The Witness: That's right.

Trial Examiner Norwood: The entries that you were just speaking of?

The Witness: Yes. I would like to correct that, your Honor. At that particular time that we are referring to, we had agents at that time and they were distributors for the National Lead Company, but when the agency plan of selling was discontinued, then they bought at an established price.

By Mr. Ewing:

Q. Now, if you will look at that exhibit you will see that at times price is expressed in terms of cents, and at times price is expressed in terms of dollars. When it is expressed in terms of cents, to what weight does it refer?

A. Per hundred pounds.

Q. Cents?

A. Cents per pound.

Q. Cents per pound.

A. In the case of dollars, dollars per hundred pounds.

Q. In the first and second columns, and in the third column prior to those first two entries in which "list" appears, you will find various references to a white lead price as distinguished from a quantity price or a discount. Will you tell us whether those references to price are list price references.

A. If I understand you correctly, where it shows—say, on November 18, 1920, there is shown on here "White
3938 lead—14¼ cents a pound."

Q. That's right.

A. That is a list price.

Q. So that although the word "list" first appears at the end of the third column, prices theretofore appearing in the third column and in the first two columns are in effect list prices?

A. That is correct.

Q. Now, I direct your attention to the entry in the fifth column under date of June 7, 1946 and I ask you whether on that date National Lead Company, in distributing and selling white lead in oil, was operating on the so-called agency or consignment plan.

A. No, sir.

Q. Now, I call your attention to the fact that in that entry under the date of June 7, 1946 and in every entry on your exhibit thereafter, there is a reference to "list," "painters," "dealers," and "distributors."

Will you tell us what outfit you classified as distributors as distinguished from dealers and painters?

A. Those are the accounts that we sell direct.

Q. Do you sell the so-called dealer and painter accounts direct?

A. No, sir.

Q. And when you—when I say "you" I am referring to the Atlantic Branch, as I suppose you assume.

3939 A. I assume so, yes, sir.

Q. And the Atlantic Branch does not sell list direct, is that correct?

A. You mean at the list price?

Q. Yes.

A. No, sir.

Q. What is the significance of the listing in that exhibit of what will appear to be prices to list, painters, and dealers?

A. Those are the suggested resale prices that we recommend to our distributors to sell that particular class of trade.

Q. And did you make similar recommendations to your agents during the time the agency plan was in effect?

A. Yes, sir.

Mr. Ewing: I have no further direct examination.

Trial Examiner Norwood: Cross-examine.

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: We will take a five-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Now, will you make a little statement for the record?

Mr. Ewing: Yes, sir. I respectfully request that the
hearing be adjourned until tomorrow morning at
3940 10:00 o'clock for the purpose of permitting counsel
to consult with counsel for the Commission with respect to a stipulation which we hope that we will be able to agree upon and enter into that will save a substantial amount of time as compared with the other method of introducing the same proof.

Trial Examiner Norwood: Is that agreeable to you, Mr. Wright?

Mr. Wright: Yes.

Trial Examiner Norwood: Recessed until 10:00 a.m. tomorrow morning when we will reconvene in Room 388.

(Whereupon, at 12:00 o'clock noon, November 6, 1947, the hearing in the above-entitled matter was adjourned, to reconvene at 10:00 o'clock a.m. November 7, 1947 in Room 388, Federal Trade Commission, Washington, D. C.)

3941 Hearing Room 388,
Federal Trade Commission,
Washington, D. C.,
November 7, 1947.

Met, pursuant to adjournment, at 10:00 a.m.

Before:

J. W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Attorney for the Federal Trade Commission.

E. Z. DuBose and James D. Ewing, Attorneys for the Respondent National Lead Company. (120 Broadway, New York.)

3942 Edmund T. Wood, Attorney for the Respondents Eagle-Picher Lead Company and Eagle-Picher Sales Company. (American Building, Cincinnati, Ohio.)

Henry E. Gardiner, Attorney for the Respondents Anaconda Copper Mining Company and International Smelting & Refining Company. (120 Broadway, New York, New York.)

James T. Welch, Attorney for the Respondent The Sherwin-Williams Company. (815 15th Street, N. W., Washington, D. C.)

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PROCEEDINGS

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment, the hearing on Docket 5253 is now reconvened in Room 388, Office of the Federal Trade Commission, Washington, D. C., at 10:00 o'clock a.m. on the 7th day of November, 1947.

Please note the appearances.

Will Mr. McNair resume the stand?

Mr. Ewing: Yes.

Trial Examiner Norwood: Do you wish to cross-examine him, Mr. Wright?

Mr. Wright: Yes.

Trial Examiner Norwood: Proceed.

JOHN GORDON CRAWFORD McNAIR was thereupon recalled as a witness for the respondent National Lead Company, and, having been previously duly sworn, testified as follows:

Cross-Examination by Mr. Wright.

Q. As I understand it, Mr. McNair, this exhibit, Respondent's Exhibit No. 158, was made up from the basic data contained in these four large scrapbooks which have been submitted, is that correct?

A. That is correct.

3944 Q. Does it reflect all the changes in pricing policy and discount policy which appear in these volumes?

A. No, sir, it does not. It only reflects those changes in the selling schedules.

Q. What do you mean by selling schedules? Do you mean the discounts off of list?

A. The various selling schedules.

Q. It doesn't necessarily reflect, then, changes in the method of handling freight charges, differentials?

A. No, sir, nothing to do with freight whatsoever; nothing to do with freight.

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

By Mr. Wright:

Q. Mr. McNair, I call your attention to a statement, in the earliest of these books, of delivery and equalization points of the Atlantic White Lead and Linseed Oil Company, dated May 10, 1889, which states that, "Until further notice we will allow freight on Atlantic lead to, and equalize freight with the following points * * *" and then lists Birmingham, Mobile, and Montgomery, Alabama, Washington, D. C., Jacksonville, Florida, Atlanta, Georgia, Augusta, Georgia, Macon and Savannah, Georgia, New
Orleans, Baltimore, Charleston, South Carolina,
3945 Richmond, Virginia, Norfolk, Virginia, Wheeling,
West Virginia, Austin and Dallas, Texas, Fort Worth, Houston, San Antonio and Waco, Texas, and also a list of some 34 or 35 points in New York, 11 points in New Jersey, and 3 points in Pennsylvania.

You were with the Atlantic Branch and with the National Lead Company, I believe you stated, since approximately 1910, is that correct?

A. That is correct.

Q. How do the practices with which you were familiar at that time when you first came with the National Lead Company, with regard to freight equalization and delivery, compare with those that I have called your attention to as being in effect in May 1889?

A. Well, we had equalization points and delivery points at the time I came to the company.

Q. Similar points as are set out in that exhibit of 1889?

A. That's right. Whether or not they are identical with those I don't know, but some of them are.

Q. Now, I direct your attention to a document which appears in this earliest book here, which appears to be a notice to the trade on prices of these various lead pigments by the National Lead Company, the Atlantic Branch, in January 1894, January 1, 1894, and the statement, "F.o.b. at New York; freight—all prepayment of or allowance for freight on lead is discontinued."

Now, that practice as set forth in that exhibit did
3946 not obtain when you first came with the company, did it?

A. No, sir, it did not, to my knowledge.

Q. Now, I call your attention to the fact that in the second oldest of these volumes, pages 140 and 141, there are price cards of the Atlantic Branch on white lead and oxides, February 21, 1924, which quote white lead, dry and in oil, in 100-pound kegs, at 14¾ cents per pound, and the Dutch Boy Red Lead in Oil at 16¼; and also to a card appearing in the same place, under date of February 22, 1924, by the National Lead Company of California, San Francisco, which quotes Dutch Boy White Lead Dry or in Oil, in less than 500-pound lots, at 14¼ cents per pound, and Red Lead in Oil in less than 500-pound lots at 15¾ cents per pound.

That would indicate that there was a half-cent differential on the Pacific Coast below the prices in the Atlantic Branch. Do you know anything about that situation that applied at that time?

A. No, sir, I do not.

Q. But the cards do indicate that to be the case?

A. It would indicate that, yes.

Q. I call your attention to the material appearing on page 14 of the book which contains the pricing from the latter part of 1931 on, to the quotations appearing in the card dated December 28, 1931 on lead pigments and oxide
of the National Lead Company, Atlantic Branch, and
3947 the fact that there does not appear to be any quantity
discount appearing on dry white, the basic carbonate,
and basic sulphate as it appears in that quotation.
Is that correct?

A. You will have to repeat the question.

Q. That card of December 28 and the preceding card of December 14, appearing on the same page, do not indicate that there was any quantity discount applicable to the white pigments, dry, the basic carbonate, and the basic sulphate?

A. No, it would not indicate that.

Q. Was there such a quantity discount previous to that period of time, do you recall?

A. I couldn't recall now without referring to the records.

Q. I call your attention to what appears to be the next card in sequence on the white pigments, dry, carbonate, and basic sulphate, dated December 14, 1933, effective January 1, 1934. I call your attention to the statement there, "Less one-fourth cent per pound for 20 tons in one shipment."

It has been a policy to grant that one-fourth cent per pound for 20 tons in one shipment since approximately that time, has it not?

A. Well, it was at that time, and if it was granted it would be shown on subsequent price cards.

Q. Do you know whether such discounts were granted previous to that time?

3948 A. I couldn't say without referring to the records.

Q. What records would you want to refer to?

A. The price cards.

Q. These records here?

A. That's right.

Q. Well, would you refer to these records, then, and give us an answer to that.

A. How far back do you want to go?

Q. Well, as far back as you will need to go to determine where that thing was initiated.

A. I will have to keep going back until I find it.

Mr. Wright: Off the record.

(Discussion off the record.)

By Mr. Wright:

Q. All right.

A. I judge from this card dated December 28, 1931 that we didn't allow any quantity discount on quantity purchases at that time.

Q. I show you similar cards appearing back prior to that time, dated 1930.

A. There was apparently no quantity discount in effect at that time.

Referring to the card dated November 7, 1929, there is nothing to indicate thereon that we had a quantity discount at that time.

3949 Q. Wouldn't that indicate to you that that—

A. Well, the reason I wouldn't be able to answer that question, sir, unless I went all through the records,~~—is~~ because if you will note from this chart shown on Exhibit 158, we have adopted a certain selling policy, then we have discontinued it, and later on we have picked it up again, and I couldn't definitely say that the quantity discount on oxides would establish the date indicated here, whatever the date is.

Q. Dry white we were speaking of, rather than oxide.

A. Well, dry white lead. But where it was shown on the card that in 20-ton lots we allowed a ¼ cent rebate—

Q. Well, did you allow such a discount, it would appear on the card?

A. It would appear on the card. But the point I am trying to bring out is that we may have discontinued it at one time, or, going back all over the records, we may have given it an earlier date and then dropped it and taken it up again. I wouldn't know without going all through the records.

Q. Will you bear with me just a moment and we will go back a little farther than 1929 and you can look at these dry white cards then.

A. In the card effective July 10, 1929, there is no indication that we gave it at that time.

Effective November 20, 1928, it wouldn't indicate on the card that we gave it at that time.

3950 The card issued under date of September 9, 1927—there is no indication it was extended at that time.

On the card issued under date of March 2, 1923 there is no evidence that we gave a rebate, at that time, on quantity. On this particular card in question, there is a notation hereon which seems to be different from some of the others, that on dry pigment in kegs and barrels in quantities of one ton or more—

Q. Presumably there was a higher price on quantities of less than a ton in that instance there.

Now, you have examined these cards which had both the oxides and the white lead on them in prior years, back to 1923. I call your attention now to the price list dated May 28, 1935 for oxides and the expression on there, "Less ½ cent per pound for 5 tons in one shipment." From your examination of those previous cards, would that appear to be a new practice at that time?

A. I would assume so.

Q. Now, I also call your attention to the fact that there are two cards under that same date, one blue, and one yellow, both Atlantic Branch cards, and that the yellow card quotes prices which are ¼ cent higher correspondingly than the blue card. What is the significance of that, do you recall?

A. I wouldn't know, because I was not tied up in the oxide end of our business.

3951 Q. Well now, I show you corresponding blue and yellow cards of the Atlantic Branch under date of June 29, 1934, where the yellow card, which quotes prices ¼ cent higher than the others, is said to apply to Florida and Georgia.

A. I thought that might apply to Florida and Georgia. What is the question you want me to answer on this?

Q. I called your attention to those two cards. Does that appear to be a change in practice from what had previously obtained on the method of quoting on these oxides?

A. Well, this indicates that Florida and Georgia territories—there is a differential there of ¼ cent a pound over the New York area.

Q. Presumably that might explain the yellow card, ¼ cent higher, under date of May 28, 1934.

A. I would judge that, but it seems to be that Florida should be on there, but maybe the card was significant of the fact that it was a southern price card.

Q. I see.

A. I think that would be the answer.

Q. Now, calling your attention to Exhibit 158 again, here in this third column, under this card of March 1, 1935 which sets up three classes of agents, A, B, and C, with an apparent 15 cents per hundred differential between the three classes, will you point out where you obtained that information out of this basic data, Mr. McNair.

3952 A. Well, that information is not contained in here, except it may be in letter form.

Q. Now, I direct your attention to the agents' selling schedule appearing on page 51 of the third volume here, dated March 1, 1935, and to the other price lists which appear as of that date in the same place.

Is there any place in here where that differential between types of agents appears?

A. No, it doesn't appear on there. These agent prices here are a compensation which we paid to our agents for the distributing of our white lead, and it may have been given to them in a special—

Q. I call your attention to the document appearing on page 50, effective March 1, 1935, "Revision of first paragraph, Section 7, appointment of selling agency," which is a form for setting the price or agent's compensation there to your consignment agents.

A. There must be the notice that we informed the agent of his compensation. This must have been filled in here.

Q. But those actual figures that appear in there on that differential are not out of this basic data, are they?

A. I don't know whether it is shown somewhere else in here or not.

Q. Well, would you glance through it in that period of time and see if you can find it.

3953 A. I assume, counselor, that you looked all through here for that information, and if you say you couldn't find it, I will accept it as such.

Q. I would rather, since you prepared the document from this, have you satisfy yourself as to where it is, if you can find it there.

A. Understand, when this document was made up, it was made up with the idea to show the various changes in methods of selling white lead, and why it was made up, because I had the contention that there is nothing new under the sun. I showed in the record where we established a certain policy back 30 or 40 or 50 years ago, and the cycle has repeated itself, where we went back to the same policy.

Q. Yes. What I am trying specifically to find out is this: Somewhere you got those figures, $8.15, $8.30, and $8.45 which appear opposite the A, B, and C under that agent thing there.

A. Well, those figures were the actual basis of compensation that we were allowing our distributors.

Q. But that doesn't appear anywhere in these?

A. If you have looked for it and couldn't find it, I would say no, it is not in here.

Q. I have looked for it, and I haven't been able to find it. Well, what was the basis of your putting that in the exhibit, Mr. McNair?

A. Just to show what the selling policy was at that time.

3954 Q. Well now, what document did you get that out of?

A. Documents from our sales records out in the office.

Q. Can you produce those—

A. Sure.

Q. —and show that on that date and from that date until the date of the next card, January 1, 1937, that was the continuing policy of the company?

A. I am quite sure I can, yes.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. Now, Mr. McNair, I call your attention to the document appearing here, the agent's selling schedule effective March 1, 1953, on page 51, and also to the March 1, 1935 entry under Respondent's Exhibit 158, to the classification, "Painters: Less than 500 pounds, ½ cent less than list price; 500-pound lots, one delivery, 1 cent less than list price; and 1,000-pound lots, one delivery, 1½ cents less than list price."

This was what the agent was required to sell your white lead in oil for, is it not?

A. That is right.

Q. Now, you also sold to him for his own account other keg products containing dry white lead, litharge, red lead in oil, and dry red lead, did you not?

3955 A. I assume so. We did not consign red lead or litharge or dry white lead to those.

Q. They were sold outright to the dealer?

A. They were purchased by him outright and he sold that at any price he wanted to.

Q. You did suggest, however, a list price and a painter price to him?

A. I would have to look at the card at that date to see whether we did or not. I doubt it on litharge or dry white lead, because it is the normal practice for a paint store to buy a 100-pound keg, stick it under the counter, and dish it out in bags or some other container when a customer wants to buy a small quantity.

Q. Well, I now direct your attention to the Form 1-B price list for agents, January 1, 1937, Dutch Boy—no, I withdraw it.

Now, in making up the quantities that appear in this designation under March 1, 1935, and which also appear in this agents' selling schedule here, were those quantities white lead in oil only?

A. Yes, that pertains to white lead in oil.

Q. In other words, to make a 1,000-pound lot in one delivery, it would have to be white lead in oil only?

A. That's right.

Q. Well now, I direct your attention here to a 3956 letter which appears under date of December 22, 1936, on page 72, signed by Mr. McNair, Assistant Manager, to Dutch Boy White Lead Selling Agents, and to the following statement:

"We refer to Item 4 relative to Price Card 1-B, covering Dutch Boy White Lead, Dry Red Lead, Litharge, and Red Lead In Oil. Formerly, we allowed our agents to include these products with Dutch Boy White Lead In Oil to make a total of 500 or 1,000 pounds and allow the quantity prices that applied to the quantities mentioned.

"This is to be discontinued after December 31, 1936. The 500 and 1,000 pound prices on and after January 1, 1937 will apply to Dutch Boy White Lead In Oil only. Dry white lead, dry red lead, litharge, and red lead in oil should not be included to make up orders for 500 or 1,000 pounds.

"If this is not perfectly clear, please get in touch with us at once."

Does that refresh your recollection about that situation any as it applied prior to January 1, 1937?

A. Prior to January 1, 1937? I would assume from this letter that on and after that date the practice was discontinued.

Q. But prior to that date it did exist and they could make up their quantities as appearing in price lists?

A. They were made up in true.

Q. Well, this is the genuine document, is it not? Is that not your signature?

3957 A. Well, that is a replica of my signature.

Q. You have no reason for questioning the genuineness of that document or the accuracy of what is stated in it?

A. Not at all; not at all.

Trial Examiner Norwood: That document is not in evidence; you are merely using it to refresh his memory?

Mr. Wright: Well, may we go off the record a moment about this?

Trial Examiner Norwood: Yes. Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Go ahead.

By Mr. Wright:

Q. Now, Mr. McNair, all of these prices that appear in Respondent's Exhibit 158 are prices to the trade and to dealers and so forth? There are no Government prices included in it?

A. No, sir.

Q. I direct your attention to the letter on the letterhead of the National Lead Company, Atlantic Branch, effective February 27, 1939, addressed to Dutch Boy White Lead Selling Agents and stating as follows:

"We are pleased to give you the following instructions relative to Government quotations. The prices you will quote for Dutch Boy White Lead In Oil are:

"On Bids Where Cash Discount Is To Be Shown, quote—

"Per Hundred pounds:

3958 "100-pound kegs—$10.25 less 2 per cent
"50-pound kegs—$10.50 less 2 per cent
"25-pound kegs—$10.75 less 2 per cent
"12½-pound kegs—$11.00 less 2 per cent.

"Where Your Bid Is To Be Net Cash, quote—

"Per Hundred Pounds:

"100-pound kegs—$10.045 net cash
"50-pound kegs—$10.29 net cash

"25-pound kegs—$10.535 net cash

"12½-pound kegs—$10.78 net cash.

"No further discounts of any kind are allowed. The above prices will apply to all Government bids regardless of quantity.

"By Government quotations or bids, we mean the Federal Government departments, State departments, Counties, Municipalities, or, in short, any sale that will be paid for with Government funds.

"All our agents will be governed by the above schedule and as it is our desire to have no misunderstanding, we wish you to get in touch with us if these instructions are not perfectly clear."

Do you recall the circumstances of sending out that letter?

A. Yes, sure.

Q. What led to that letter, can you tell us?

A: These agents of ours, representing the National Lead Company in selling our products, had to be 3959 guided as to what our policy was in selling Government departments that they would normally sell to. It is usually all in small lots. Big bids on Government, we handled direct ourselves.

Mr. Wright: I have no further cross-examination.

Mr. Ewing: No further examination.

Trial Examiner Norwood: Well, were those terms copied by either of the competitors?

The Witness: Not to my knowledge.

Trial Examiner Norwood: That policy with respect to Government bids?

The Witness: I wouldn't say so.

Trial Examiner Norwood: Thank you, Mr. McNair.

(Witness excused.)

Mr. DuBose: May we have a two-minute recess?

Trial Examiner Norwood: You may have a five-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Call your witness.

Mr. Ewing: Mr. McCarthy.

Trial Examiner Norwood: Mr. McCarthy, you have been sworn in this case, haven't you?

Mr. McCarthy: Yes.

F. K. McCARTHY was thereupon recalled as a witness for the respondent National Lead Company, and, 3960 having been previously duly sworn, testified as follows:

Trial Examiner Norwood: Will you give us your initials, Mr. McCarthy.

The Witness: F. K. McCarthy.

Direct Examination by Mr. Ewing.

Q. Will you tell us, if you recall, Mr. McCarthy, when Mr. Harold Rowe first was made a member of the Board of Directors of the National Lead Company.

A. It was April, '38 or '39, thereabouts.

Mr. Ewing: I ask that this paper be marked as Respondent's Exhibit 211 for identification.

(The paper referred to was marked Respondent's Exhibit 211 for identification.)

By Mr. Ewing:

Q. I show you this paper that has just been marked Respondent's Exhibit 211 for identification and ask you if you will read it and tell us whether it refreshes your recollection as to the date of Mr. Rowe's election to the Board of Directors.

A. It is a company news letter dated April 22, 1938, under the head of Board of Directors and Executive Committee.

Trial Examiner Norwood: Don't tell us what the paper is. Just tell us whether it refreshes your recollection.

The Witness: Yes, sir.

By Mr. Ewing:

3961 Q. Will you again give us the date upon which Mr. Rowe was first elected to the Board.

A. April 22, 1938.

Q. Now I show you the document which has been marked as Commission's Exhibit 615-A, 615-B, 615-C, and 615-D and ask you to read it over to yourself.

A. Yes, sir.

Q. That exhibit purports to set forth a price schedule as of April 26, 1941, which shows prices for railroad, steamship, Government, State, and Municipal subdivisions, does it not?

A. Yes, sir.

Q. To whom was that exhibit issued in the National Lead Company?

A. The several branch managers.

Q. Were those price schedules in that exhibit, or similar schedules, ever published in the sense that they were published to the trade at large?

A. No, sir, those were for instruction of our branch officials, to guide them in quoting to these classes of trade.

Q. Then they are not, if I understand you correctly, similar to your price cards that were published to the trade?

A. Oh, no.

Q. National Lead sells some of the lead pigments in one-pound and five-pound cans, does it not?

A. Yes, sir.

3962 Q. Will you tell us what pigments are sold in those quantities.

A. Heavy paste white lead for the plumbing trade primarily is packed in one-pound and five-pound tins, which have to be shipped in cartons, and the large users of that were mill supply jobbers, wholesale hardware houses, and so forth, who distributed it then to retail channels for use by plumbers and people who used it for a calking compound and things of that nature.

Q. As compared with your other can or keg products, what differential in pricing is there with respect to the one-pound and the five-pound cans?

A. Because of package costs and nuisance and so forth, there was a substantial premium in the little one-pound cans over the 100-pound keg.

Q. In other words, you charged more for the one-pound can, relatively speaking, than you did for the keg of 100 pounds?

A. That is right.

Q. Now, you are familiar, are you not, with the sale by National Lead Company of dry white lead?

A. Yes, sir.

Q. What percentage of National's sale of dry white lead was represented, say in 1941, by sales in quantities of less than 500 pounds?

A. Possibly 2 per cent, but I would imagine much
3963 less than 2 per cent.

Q. Now, I show you, Mr. McCarthy, the bound volume consisting of sheets which are in evidence as Commission's Exhibit 752-A to 752-Z-144, and ask you to look at it and tell us whether you have ever seen that before.

A. Yes, sir.

Mr. Wright: If it will save time, I will stipulate that Mr. McCarthy assisted in the preparation and gathering of basic data on that matter.

Mr. Ewing: I appreciate your suggestion, but I am not going to be long.

By Mr. Ewing:

Q. Mr. Wright has just said that he would stipulate that you participated in the gathering of the data from which those tabulations were prepared by the Commission's representatives. In that connection, I ask you whether you, yourself, went over the invoices, which were collected by National from its various branches, involving the sale of white lead in oil to various customers during the periods indicated on that exhibit.

A. Each invoice?

Q. Well, substantially.

A. There were 55 pounds of them.

Q. Well, what would you say, roughly, was the extent to which you examined the invoices?

A. Well, as they came in, in response to the Com-
3964 mission's request, we classified them by geographical
source and classification of trade, in order to speed up the work and cooperate with the Commission's investigators who were assigned to this task.

Q. And did you do that yourself?

A. Yes, sir.

Q. Now, what classification, for example, did you put the invoices in as you prepared them?

A. Obviously, agents accounted for the bulk of them. Then we had industrial accounts, railroads, manufacturers who would buy dry products. They accounted for practically all of the invoices.

Q. Now, when you classified these invoices that you went over, you did that prior to the submission of the invoices to the Commission's representatives, is that correct?

A. Yes, sir.

Q. When you classified them, did you do that work in accordance with National's policy with respect to trade classifications?

A. Definitely.

Q. Will you tell us whether, when, for example, you classified manufacturers—what was the principal consideration involved in that classification?

A. It would be the identity of the customer.

Q. Would the use to which he put the product
3965 have any bearing on it?

A. Yes, naturally.

Q. What can you tell us with respect to National's policy in classifying trade from the standpoint of competition as between classes?

A. Well, it has always been a very definite policy to treat each classification in a similar fashion, that is, to avoid discrimination or a conflict.

An agent, for example, had a certain basis. A paint grinder buying raw material for his own use would be on a different basis. An industrial account, buying our products for maintenance and not for resale would be in still a third category, and governmental or wholly tax-supported institutions, of course, were not conceivably in competition with any of these other classifications and they had a separate basis.

Q. Is it fair to say that to the extent that it was possible, you endeavored to include in each classification people who were similarly situated, and not to include some customer who was actually subject to a different classification?

A. That is right.

Q. And it was on that basis, was it, that you, yourself, to the extent that you did so, classified the invoices which formed the basis for this tabulation represented by Commission's Exhibit 752, and so forth?

A. The invoices were self evident.

3966 Q. Now, I take it from what you have testified to before that you were familiar, generally, with the sale by National of white lead in oil.

A. Yes, sir.

Q. Are you familiar with the sale by National of white lead in oil in the so-called par territory?

A. Definitely.

Q. What percent, would you say, of National's total white lead in oil business is represented by sales in par territory?

A. Over a period I would say the average was 75 to 80 per cent.

Mr. Ewing: No further direct examination.

Trial Examiner Norwood: Cross-examination.

Cross-Examination by Mr. Wright.

Q. Mr. McCarthy, in connection with the classification of customers that you were referring to on direct, in the preparation of this tabulation did you seek to determine into which of your various classifications the customers listed in this tabulation fell?

A. Yes.

Q. How did you seek to determine that?

A. By the face of the invoice; the identity, the firm name, the type of material, the size of the package.

Q. Did you also obtain from the branch offices in
3967 each case a list of the customers with whom business
had been conducted over the period of time represented here, and with the designation of the class into which each of those customers fell?

A. I think that information was secured, too.

Mr. Wright: I would like to ask that these papers be identified as Commission's Exhibit 859-A, 859-B, 859-C, 859-D, and 859-E.

(The paper referred to was marked Commission's Exhibit 859-A through 859-E for identification.)

Mr. Wright: And I would like to ask that this document be marked as Commission's Exhibit 860-A, B, C, D, E, F, G, and H.

(The paper referred to was marked Commission's Exhibit 860-A through 860-H for identification.)

By Mr. Wright:

Q. Now, I hand you herewith the documents marked Commission's Exhibits 859 and 860 with sub-numbers, and ask you to examine them.

A. Yes.

Q. Do you recall those letters, or those documents, rather, Mr. McCarthy?

A. Yes, sir.

Q. What are they?

A. As I recall, Mr. Wright, the Commission asked for specific information from a list of a great many dif-
3968 ferent cities and towns and different parts of the country for specific periods, and my office then asked the branches to supply, from their records, invoices covering transactions during these periods and at these places, where they were available.

Q. Well now, was that request made and this information submitted during the course of the conversations about and the preparation of Commission's Exhibit 752-A and sub-numbers?

A. As I remember, yes, sir.

Q. And the information was gotten in connection with the transactions that were recorded in that document?

A. That is correct.

Q. Now, do those documents purport to list the classifications of the different types of accounts, as between manufacturer, industrial, agent, dealer, of those accounts listed there?

A. They do.

Q. Are those accounts which are sold by the National Lead Company?

A. Yes, sir.

Mr. Wright: I offer Commission Exhibit 859-A through 859-E, and Commission Exhibit 860-A through 860-H in evidence.

Trial Examiner Norwood: Any objection?

Mr. Ewing: I have no objection as far as the documents are concerned, but I don't know what they add, exactly, to the record, except ten or twelve more pieces of paper.

3969 Trial Examiner Norwood: How do they tie in with this big exhibit?

Mr. Wright: Well, may I ask the witness one more question about the exhibits, which isn't strictly identification?

Trial Examiner Norwood: Go ahead.

Mr. Wright: Well, no, I won't need to do that. It has already been answered.

Well, these exhibits show by the legend, which appears on 859—and the legend is explained on 860-H, which classifies each of these accounts as a dealer, a painter, an industrial, an agent, or railroad—what they are. There has been testimony here that the National Lead Company didn't sell direct to dealers, that they confined their sales only to agents, and it was brought out in direct examination of this witness that the customers, in so far as possible, who were competitive were kept in the same class.

Now, it is my opinion that this is direct evidence on that issue since it sets out, on the basis of the respondent's own figures, what the situation was.

Mr. Ewing: My point is: Doesn't it all appear already in this other big exhibit, where there is each heading? There is the heading "Agents" and then the number of names appearing, and then "Dealers," and a number of names, and then "Industrials," and so on.

3970 Mr. Wright: Well, in order to get the information out of this big exhibit on the classification of customers, it is necessary to go through over 200 pages, and I am not sure it is as complete in the basic exhibit as it is in these few sheets which set the thing up.

There was already admitted into evidence a similar document relating to the Cincinnati Branch, in view of this witness' previous testimony that in that branch they did not sell to dealers.

Trial Examiner Norwood: Has the witness explained to us what those red pencil marks are on 859?

Mr. Wright: The witness was asked on direct if these purported to distinguish between the various classes of customers in those categories. Now, the documents themselves explain what those marks mean. There is a legend showing what a "A" means and what "D" means and what "P" means and what "I" means.

Trial Examiner Norwood: Is there any objection to the exhibits?

Mr. Ewing: No.

Trial Examiner Norwood: Received as marked; Commission's Exhibits 859-A through 859-E, and 860-A through 860-H.

(The papers referred to, heretofore marked for identi-
fication COMMISSION'S EXHIBIT 859-A through
3971 859-E and COMMISSION'S EXHIBIT 860-A
through 860-H, were received in evidence.)

Mr. DuBose: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: By agreement of counsel, I will undertake to get photostatic copies of these last two exhibits made and to furnish the originals to the reporter as soon as the photostats have been completed.

Trial Examiner Norwood: That may be done. Then you will have the photostats for them at our New York hearing next week. Is that what they want done?

Mr. Wright: I can probably have photostats I can put in the mail for them today.

I have no further cross-examination.

Mr. Ewing: I have no redirect.

Trial Examiner Norwood: Thank you, Mr. McCarthy.

(Witness excused.)

Trial Examiner Norwood: Call your next witness.

Mr. Ewing: Now, your Honor, our next order of business is something that we are agreed on in principle, I think but we haven't actually formulated the exact phraseology, and that is, we had proposed to offer testimony at this time with respect to certain bids made by the various respondents in response to Government business. Mr. Wright and I and others have talked about 3972 it, and he has in his possession records that are, we'll say, more authentic than some of the sources that we were going to rely on, as I understand it.

It will save a great deal of time and trouble if we can agree to have these bids go in. He wants some; we want some; we are not going to argue with each other as to what goes in and what doesn't go in, as I understand it.

Mr. Wright: Well, as I understood it, we were going to, rather than put in a mass of documents and get into something which would delay this thing by requiring a lot more evidence and testimony, agree on a statement as to contentions of each of us as to aspects of this bidding problem, which would largely dispose of the thing on a restatement of facts.

Mr. Ewing: It would be, in a sense, a statement of fact, with neither of us drawing inferences.

Mr. Wright: And with a reasonable number of specific instances set out for illustrative purposes.

Mr. Ewing: Right. Now, actually I don't know how much of a job that is, but I should think we could get together and do that this afternoon.

Mr. Wright: It is perfectly agreeable.

Trial Examiner Norwood: Will you have any further testimony?

Mr. Ewing: No further testimony. So my suggestion would be that we adjourn, and we resume—at what time would you think?

3973 Mr. Wright: Whatever time suits you. We can meet you in this room. It is probably the most satisfactory place, and we can do that.

Mr. Ewing: Yes.

Mr. Wright: May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: I think that 3:00 o'clock will be all right.

Trial Examiner Norwood: Then we will recess now until 3:00 o'clock this afternoon.

(Whereupon, at 11:55 o'clock a.m., a recess was taken until 3:00 o'clock p.m., this day.)

3974 Afternoon Session.

Trial Examiner Norwood: The hearing reconvened at 3 o'clock, and discussion was had, and it was finally requested by counsel and approved by the Examiner that the hearing recess to reconvene in the City of New York in the Bar Association Building at 42 West 44th Street, in Room 10, at 10 o'clock a.m. on the 12th day of November 1947.

(Whereupon, at 4:05 o'clock p.m., November 7, 1947, the hearing in the above-entitled matter was adjourned, to reconvene at 10 o'clock a.m., November 12, 1947, in Room 10, Bar Association Building, 42 West 44th Street, New York, New York.)

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Trial Room No. 10,
Bar Association Building,
42 West 44th Street,
New York, N. Y.,
Wednesday, November 12,
1947.

Met, pursuant to adjournment, at 10:00 a.m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

Edmund P. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company:

Robert H. Ecker, Esq., and
Henry E. Gardiner, Esq., (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James D. Ewing, Esq., and
E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

J. T. Welch, Esq., (Davies, Richberg, Beebe, Busick & Richardson, 815 Fifteenth Street, Northwest, Washington, D. C.), appearing for Sherwin Williams Company.

3976 Roger Hines, Esq., (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

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Proceedings.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment in Washington on November 7th the hearing in Docket 5253 is now reconvened at 10:00 o'clock a.m. on the 12th day of November, 1947, in Room

10, Bar Association Building, 42 West 44th Street, New York, New York.

The reporter will please enter the appearance in the usual manner.

Call your first witness.

Mr. DuBose: Mr. Baum.

Trial Examiner Norwood: Yes, sir, Mr. Baum.

Mr. DuBose: Mr. Baum being recalled.

EDWARD L. BAUM was thereupon recalled as a witness for the respondents, and having been previously duly sworn testified further as follows:

Direct Examination (Continued).

Trial Examiner Norwood: Give us your full name, Mr. Baum.

The Witness: Edward L. Baum.

Trial Examiner Norwood: Mr. Baum, you have been sworn in this case?

The Witness: Yes, sir.

Trial Examiner Norwood: Take a seat.

3978 By Mr. DuBose:

Q. Mr. Baum, you testified on behalf of the respondent, National Lead, at the hearing here in New York last June 19th, I believe, and at that time you gave the following testimony at pages 3249 and 3250 of the official transcript:

"Question. Would that include shipments to the DuPont Company?

"Answer. No.

"Question. Under a contract?

"Answer. It would not include the shipments to the DuPont Company because that is an inter-branch billing proposition."

In that connection, Mr. Baum, I believe you were talking about your tabulations of white lead in oil sales by the Atlantic branch of the National Lead Company for the year 1941, is that correct?

A. Yes, sir.

Q. And in that testimony you stated that your tabulation did not include shipments to the DuPont Company because of that stated reason; is that correct

A. Yes, sir.

Q. Now, when you used the words to the effect that shipments to the DuPont Company were not included in your tabulation because that is an inter-branch billing proposition, what did you mean?

3979 A. I meant that for accounting purposes the Atlantic branch billed all transactions covering shipments to the DuPont Company as they billed them to our General Office, who in turn billed the DuPont Company. In other words—

Q. (Interposing.) In other words, if the Atlantic branch at any time billed any part, any part of a contract, for white lead in oil for the DuPont Company it would bill the Atlantic branch, which in turn would handle the billing to the DuPont Company, is that correct?

A. No; it would bill the General Office.

Q. It would bill the General Office; is that correct?

A. That is correct.

Q. Who in turn would bill the DuPont Company?

A. Who in turn would bill the DuPont Company, that is right.

Trial Examiner Norwood: Proceed.

By Mr. DuBose:

Q. Mr. Baum, you also testified that your tabulations showing sales of white lead in oil by the Atlantic branch for 1941 in the par territory have included shipments to foreign customers, is that correct?

A. Yes, sir.

Q. Now, have you in the interim at my request checked the sales records of the Atlantic branch for 1941 in an endeavor to discover the number of pounds sold by the Atlantic branch for 1941 to foreign customers?

3980 A. Yes, sir, I have.

Q. Have you those figures with you?

A. Yes, sir.

Q. Do you recall them offhand?

A. Not exactly. I didn't attempt to memorize it, but I could.

Q. Would you refresh your recollection with whatever you have with you?

A. I can do that, yes, sir.

Trial Examiner Norwood: What was the last question?

(The pending question and answer were thereupon read.)

Mr. DuBose: We are trying to show the pounds in the foreign shipments of white lead in oils by the Atlantic branch in 1941 which was included in the par territory variation.

Mr. Wright: Are you attempting to vary the terms of the exhibit?

Mr. DuBose: No. This is included. Of that total so much was shipped foreign shipment.

Trial Examiner Norwood: Very well.

Mr. DuBose: Let me ask you that because of the total you gave for foreign territory. There is a total which total included foreign shipments?

The Witness: Yes, that is correct.

By Mr. DuBose:

Q. That is the total for 1941?

3981 Mr. Wright: Do I understand the witness is refreshing his recollection from a document or reading from a document?

Mr. DuBose: He is refreshing his recollection from a document that he is reading.

The Witness: Shall I say something?

By Mr. DuBose:

Q. No; just refresh your recollection and give us the pounds.

Mr. Wright: I object to that, Your Honor.

Trial Examiner Norwood: If he investigated and has these figures I think he may read them off from these figures if he made them himself. Did you?

The Witness: These figures were prepared under my supervision on the I. B. M. tabulator, and this is the original run-off that was made at the conclusion of 1941 for statistical purposes.

Trial Examiner Norwood: Did you verify that? Did you check it?

The Witness: Yes, sir.

By Mr. DuBose:

Q. These are original records you say Mr. Baum?

A. This is the original tabulation as part of our regular routine of preparing reports of foreign sales, and this is the tabulation that came off the machine immediately after the close of the year 1941.

Q. When you say "this" you are referring to 3982 the record you hold in your hand?

A. This paper (indicating).

Trial Examiner Norwood: He may refer to that in giving his testimony about these figures. He is not supposed to carry those in his mind, all that column of figures. He has testified to the correctness of them.

Can you?

The Witness: I can't, sir.

By Mr. DuBose:

Q. Will you then give us the total number of pounds of foreign shipments for the Atlantic branch of white lead in oil for the year 1941?

A. The shipments of white lead in oil by the Atlantic branch in the year 1941 exported or foreign shipments I would say was 705,934 pounds.

Q. 934?

A. Yes.

Trial Examiner Norwood: Yes, 934.

By Mr. DuBose:

Q. Now, Mr. Baum, I show you a photostatic copy of Respondents' Exhibit 170-A, and opposite the word "par" in the second column from the left under the general heading "Heavy and Soft Paste White Lead," and the subheading "Total Pounds Sold," are the figures 19,652,155. Is that figure of 705,934 pounds which you have just given us as constituting the foreign shipments 3983 of white lead in oil by the Atlantic Branch for 1941 included in that figure of 19,652,155?

A. It is.

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed.

By Mr. DuBose:

Q. Now, will you tell us, Mr. Baum, how freight was handled on these foreign shipments in 1941 which totaled 709,934?

A. Well, the terms on all foreign shipments are f.a.s. New York.

Q. When you say "f.a.s." what do you mean?

A. Freight alongside steamer.

Q. Now, you say the terms are that. Were they that in 1941?

A. Yes, sir.

Q. And by that do you mean that the National Lead Company, Atlantic branch, would deliver foreign shipments to the pier ready to be placed aboard a ship, is that correct?

A. That is what is done, yes, sir.

Q. From there who paid the freight and other fees?

A. The customer pays from there on.

Q. Now, at the hearing on June 19th of this year you also testified that your tabulation, Respondent's Exhibit 170-A did not include shipments in containers carrying larger than 100 pounds, is that correct? 3984

A. Yes, sir.

Q. What shipments were made by the Atlantic branch of National Lead in 1941 in larger containers?

A. Well, we ship what is called grinders' white lead in oil to paint grinders and ink manufacturers. And my statistics, or, rather, the statistics referred to, do not include such tonnage, because it is our accounting practice to consider that as the sales for statistical purposes of another department.

Trial Examiner Norwood: What sort of a container does that go in, a car?

The Witness: They go in, usually, casks and drums larger than 100 pounds. They are not sold to the trade, and for that reason we have never included grinders' lead in oil in our white lead in oil sales.

Trial Examiner Norwood: Thank you.

By Mr. DuBose:

Q. Now, Mr. Baum, since you last testified have you at my request checked the statements of grinders' white lead by the Atlantic branch for the year 1941?

A. I have.

Q. And have you records with you that show what those shipments were?

A. I have.

Q. Where did those shipments take place as with respect to par or three-eighths territory?

3985 A. All deliveries of grinders' lead in oil where shipped to consignees located within the par zone.

Q. Within the par zone?

A. Yes.

Q. And as you have stated those purchases were paint manufacturers or other manufacturers?

A. Yes.

Q. Will you tell us from whatever records you have in your possession what the total number of pounds of grinders' white lead shipments by the Atlantic branch in the year 1941 amounted to?

A. May I refer to this memorandum I have?

Trial Examiner Norwood: Yes.

By Mr. DuBose:

Q. Will you refer to that memorandum?

A. Yes.

Trial Examiner Norwood: That is the same memorandum you had a while ago?

The Witness: No, sir, this is a different one.

Trial Examiner Norwood: Was that made in the same way?

The Witness: No, this was not made in the same way.

By Mr. DuBose:

Q. Will you tell us how that memorandum you have just referred to was made, the new memorandum?

3986 A. The new memorandum I have here was taken by further tabulation, run off from the I. B. M. sheets about the same time the export sales were made, and I copied these figures in that tabulation referred to.

Mr. Wright: At what time was that, Mr. Baum?

The Witness: At what time I took this off?

Mr. Wright: When was that made up, the record from which you took it?

The Witness: The record from which these figures were taken was made up I would say within 60 days after December 1, 1941. That is the period during which we run off a lot of annual balances, tabulations and reports for various departments which they require to show the result of the year's business.

Trial Examiner Norwood: Now, do you not think that those two documents should be marked for identification?

Mr. DuBose: Why, I would be glad to.

Mr. Wright: Off the record.

Trial Examiner Norwood: This is off the record.

(Discussion off the record.)

Trial Examiner Norwood: Go ahead.

Mr. DuBose: He can identify them in case it becomes necessary.

By Mr. DuBose:

Let me ask you one more question, Mr. Baum.

3987 The record which you have now, which you made up from other records, was that record prepared by you or under your supervision, this particular memorandum?

A. The original record was prepared under my supervision.

Q. How about this record?

A. I actually copied this from that record.

Q. And the original records are in the Atlantic branch?

A. They are there for inspection.

Q. They are there for inspection?

A. Yes.

Q. Will you now give us the total number of pounds of grinders' white lead sold by the Atlantic branch in 1941?

A. The total pounds in grinders' white lead in oil shipped during the year 1941 was 1,572,303 pounds net.

Q. What was the total of freight and cartage applicable to those shipments?

A. The total freight and cartage applicable to those shipments was $4,295.40.

Q. And mathematically what does that work out to per hundred pounds?

A. That reduces it to .2732 per hundred pounds.

Q. In other words, 27.3 cents per hundred pounds?

A. That is right.

Q. And as you have stated, I believe, all of this grinders' white lead was shipped in par territory?

3988 A. That is right.

Mr. DuBose: No further questions.

Trial Examiner Norwood: Cross-examine.

Mr. DuBose: Would you like a short recess?

Mr. Wright: I would like a recess. I would like to examine the documents from which the witness has been refreshing his recollection.

Trial Examiner Norwood: I think it is hardly time for a recess. Let us pause until you read it. We will recess in about thirty minutes.

(After a brief interval.)

Trial Examiner Norwood: Proceed.

Cross-Examination by Mr. Wright.

Q. Mr. Baum, you spoke of the DuPont shipments being billed through the Central Office. Were there any other similar contractual relationships whereby the Atlantic branch supplies white lead in oil under private label?

A. Not to my recollection in the year 1941, during the year 1941.

Q. So that there would be no similar situation such as that?

A. No. I feel quite sure there were not.

Q. Included in this thing?

A. My answer would be no.

Q. Now, the grinders' white lead in oil, what was
3989 that product exactly? Is that white lead in oil of
similar consistency and quality as white lead in oil which is sold under Dutch Boy label?

A. It is, I would say, similar in all respects except that it contains a great deal more linseed oil.

Q. Well, is it thinner in consistency? In other words, does it contain more oil than the soft paste?

A. Yes, sir, containing more vehicle, that is, linseed oil, it becomes thinner in consistency.

Q. How is that product sold as far as territorial differentials? Does that take the same territorial differentials as the white lead in oil in their smaller kegs?

A. I don't believe I can testify as to price differentials. I am not in the sales department.

Q. Do you know?

A. I don't know positively.

Q. Now, this figure of grinders' lead in oil of 1,572,303 pounds shipments, to how many customers does that represent in America?

A. That represents shipments by the Atlantic branch to four different customers.

Q. What was the average price of that product?

A. The average price was $7.92 per hundredweight.

Q. Where were those customers located?

A. The customers were all located in what is
3990 termed "par" territory; in New York City, Jersey
City, and Providence, Rhode Island.

Mr. Wright: No further examination.

Mr. DuBose: No further examination.

Trial Examiner Norwood: Thank you, Mr. Baum.

(Witness excused.)

Trial Examiner Norwood: Call your next witness.

Mr. DuBose: Mr. Tibbets.

ALBERT B. TIBBETS was thereupon recalled as a witness for the respondents, and having been previously duly sworn, testified further as follows:

Direct Examination (Continued.)

Trial Examiner Norwood: Mr. Tibbets, you have been sworn in this case heretofore?

The Witness: Yes, sir.

Trial Examiner Norwood: Give your name and address.

The Witness: Albert B. Tibbets, National Lead Company, 111 Broadway, New York.

Trial Examiner Norwood: Proceed.

By Mr. DuBose:

Q. Mr. Tibbets, I believe you testified in Washington on June 10th of this year?

A. Yes, sir.

Q. And at that time, as the record shows, through
3991 you were introduced in evidence Respondents' Exhibits 150-A and B, 151-A and B, and 152, upon the condition that the underlying data be furnished to the Commission or to its counsel; 150-A and B being, as you then identified them, a report gotten up in 1943 by the Home Office, showing the sales of white lead in oil by branches by States and giving a tonnage of each branch per State. Since that time have you communicated with the branches of the National Lead Company, other than the Pacific Coast branch, and obtained a report from them respecting these figures which were originally obtained in 1943?

A. Yes, sir.

Mr. DuBose: I ask that these records be marked.

Trial Examiner Norwood: Begin with Respondents' Exhibit 212.

Mr. DuBose: Respondents' Exhibit 212-A and sub-letters respectively for identification.

(The papers referred to were marked Respondents' Exhibits 212-A, 212-B, 212-C, 212-D, 212-E, 212-F, 212-G, 212-H, 212-I, 212-J, 212-K, 212-L, 212-M, 212-N, 212-O, 212-P, 212-Q, 212-R, 212-S, 212-T, 212-U, 212-V, 212-W, 212-X, 212-Y, 212-Z, 212-Z-1, and 212-Z-2, for identification.)

Trial Examiner Norwood: What have you marked?

(Discussion off the record.)

Trial Examiner Norwood: Proceed.

3992 Mr. DuBose: Pursuant to agreement with counsel for the Commission at this time, in lieu of testimony on the subject, I will make the statement that Mr. Tibbets since last testifying wrote to the branches which checked their records, the branches, and sent back here the original report which they checked with their records, or rechecked their records, and made a new report on the white lead tonnage sold by each branch, excluding the Pacific Coast, each branch shown on Respondents' Exhibit 150-A and B, and in all respects the figures coincided with a new check, with the exception of the Boston branch, which on a recheck of our 1942 sales records discovered that the figures appearing on Respondents' Exhibit 150-A should read for Maine 204 tons, for New Hampshire 105 tons, Massachusetts 1613 tons, instead of the figures there indicated.

When I said "there" I am referring to Respondents' Exhibit 150-A.

And I should also like to make the statement that the underlying records are in the possession of the branches and are available for inspection by the Commission at any time.

Mr. Wright: I am willing to agree with counsel's statement that Mr. Tibbets, if called, would have testified that he had such checks made of the branch records, and
that with the variations which have been pointed
3993 out the figures in Respondents' Exhibit 150-A and B
were correct from their records.

Trial Examiner Norwood: Very well.

By Mr. DuBose:

Q. Mr. Tibbets, at the hearings in June in Washington when you identified Respondents' Exhibit 153, which was introduced in evidence, you stated that these figures were in the Home Office books.

I show you a copy of Respondents' Exhibit 153, and

I ask you whether since that time, at my request, you have checked the actual record which contained those figures?

A. Yes, sir.

Q. Will you tell us what that record is?

A. It is a loose-leaf holder with the years showing the tonnage figures from each branch.

Q. And where is that record physically located?

A. In the accounting department in the General Office.

Q. At 111 Broadway, New York?

A. At 111 Broadway, New York.

Q. And is that book available for inspection?

A. Yes, sir.

Q. By the Commission or its counsel at any time?

A. Yes, sir.

Trial Examiner Norwood: Let me see that.

(Document handed to the Trial Examiner.)

3994 Trial Examiner Norwood: Thank you.

By Mr. DuBose:

Q. Now, Mr. Tibbets, I show you Respondents' Exhibit 154-A to 154-I for identification, which you started to identify last June in Washington, and do you recognize that document as the one that you testified to about in the June hearings?

A. Yes, sir.

Q. Now, since the hearing last June have you rechecked all of the figures and dates shown on Respondents' Exhibit 154-A to 154-I for identification?

A. Yes, sir.

Q. And did you find some errors?

A. Yes, sir.

Q. Will you give us whatever corrections you wish to have noted on this exhibit?

Trial Examiner Norwood: What exhibit is that now?

Mr. DuBose: 154-A to 154-I for identification.

The Witness: On page 7.

Mr. DuBose: When you say "7" you are referring to Respondents' Exhibit 154-G for identification?

The Witness: Yes, sir.

Mr. DuBose: All right, sir.

The Witness: The paste red lead price should be $12 instead of $14.

Mr. DuBose: All right. Will you continue?

3995 The Witness: On page 8—wait a minute. Yes, page 8.

By Mr. DuBose:

Q. When you say, "page 8," you are referring to 154-H for identification?

A. Yes, sir.

Q. All right, sir.

A. The paste red lead price for January 1 and March 1, 1937, should be struck out. There were no retail prices issued for those two dates.

Q. All right. Is there any other on that same page?

A. And the date of paste red lead price should be September 15 instead of September 13, 1937.

Q. Do you mean the paste red lead price of $13.75 which appears opposite September 13th actually went into effect September 13th?

A. That is right.

Q. Are there any other corrections?

A. Not to my knowledge.

Q. Now, Mr. Tibbets, have you with you all of the underlying data which show all of the prices reflected on this Exhibit 154-A to 154-I for identification?

A. Yes, sir.

Q. And will you produce those?

A. There is one of them, pig lead prices, ~~and~~
3996 white lead, and oxide price cards.

Q. Now, Mr. Tibbets, I show you Respondents' Exhibit 154-A to 154-I for identification, and ask you whether you can tell us what the pig lead prices that appear thereon are?

A. Common.

Q. Common pig lead prices?

A. Common pig lead prices.

Q. And from what source did you obtain these?

A. From a record in the Atlantic branch that was kept of every change of pig lead prices.

Q. Now, I ask you to look at the paste white lead prices and I now ask you to tell us what those prices were.

A. That was list prices or resale prices.

Q. And how about paste red lead?

A. That is the same per hundred pounds.

Q. Per hundred pounds?

A. Per hundred pound keg.

Q. Now, on all the others, namely, dry white lead, lead sulphate, dry red lead and litharge, will you tell us what those prices are, or for what quantities those prices are?

A. Per hundred on a barrel price basis.

Q. And a barrel is either five or six hundred pounds?

A. Around five or six hundred pounds.

Mr. Wright: No further questions.

Trial Examiner Norwood: Off the record a minute.

3997 (Discussion off the record.)

Mr. DuBose: I would like to state this on the record: That I am deferring offering Respondents' Exhibit 154-A to 154-I, inclusive, for identification, subject to Mr. Wright's preliminary cross-examination.

Trial Examiner Norwood: We will take a 5-minute recess.

(Thereupon a short recess was taken.)

Cross-Examination (Continued)

By Mr. Wright:

Q. Mr. Tibbets, do you know where the Atlantic branch got the figures purported to be shown in these documents here?

A. Yes.

Q. On pig lead prices?

A. Yes, the Metal Purchasing Department.

Q. In other words, they were supplied to them by another division of the National Lead Company?

A. Yes, sir.

Q. Do you know where the Metal Purchasing Department got it?

A. Yes. They would get a phone call from either A. S. & R. on St. Joe Lead as to the price change, and then they would send out notices to branches of the price changes in pig lead.

Q. Now, you say they would do that. Do you know that?

A. They do.

3998 Q. Do you know of your own knowledge that that is the source of the information contained in this list?

A. Yes, sir, to the best of my knowledge, yes.

Q. Now, just what is your knowledge?

A. Well, they keep the same record in their office, which is open to your examination, showing the same information.

Q. Did you check the figures back of this list that was in the Atlantic branch?

A. No, sir.

Q. Now, getting to these price cards on various products here, these are all quotations of the Atlantic branch, are they?

A. Well, I don't recall. I know they are all par price lists. There may be other branches in there. I was interested in getting the par prices.

Q. Where did you get these cards?

A. I got them mostly from the office or files of Harold Rowe.

~~Q. Do you~~ know that is a complete set of all price changes that are covered in that period of time?

A. Yes, sir.

Q. How could you check them?

A. I checked them against the list and against the list I have there on the exhibit.

Q. Well, what I am getting at is how could you
3999 check these cards as being all that there were, the
complete set?

A. That hasn't every price change that was kept there. They kept them all from 1921 on.

Q. Do these cards show a succession from one year list to another?

A. Yes, sir.

Q. On the face of them?

A. That is right.

Mr. Wright: I have no further preliminary cross.

Mr. DuBose: I at this time should like to offer in evidence Respondents' Exhibit 154-A to 154-I for identification.

Mr. Wright: I have no objection.

Trial Examiner Norwood: I will ask you to indicate on there the corrections which this witness has made in the testimony just given. It may be entered with a pen, or in any way.

Redirect Examination by Mr. DuBose.

Q. Mr. Tibbets, will you use your pen and make those corrections which you spoke of, and then we can go off the record?

Trial Examiner Norwood: Yes; off the record.

(Discussion off the record.)

Trial Examiner Norwood: The exhibit is received in evidence.

4000 (The papers referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 154-A, 154-B, 154-C, 154-D, 154-E, 154-F, 154-G, 154-H, and 154-I, were received in evidence.)

Mr. Wright: Off the record.

(Discussion off the record.)

Mr. DuBose: No further direct examination.

Cross-Examination (Continued) by Mr. Wright.

Q. Going back to Respondents' Exhibit 153, do you know what classes of business in white lead paste are included in the figures which appear on that exhibit?

A. Well, you mean whether it is trade or Government business, and so forth, included in those?

Q. Yes.

A. The total white lead business done by our branch of paste lead I couldn't tell you.

Q. Would that include shipments?

A. I couldn't tell you; I can't answer exactly what is included in those figures.

Q. Would the Atlantic Branch, for instance, include your shipments to DuPont under your contractual relationship with that company?

A. No, they wouldn't go in there; I am sure of that.

Q. Did you check this to know exactly what did go in?

4001 A. No, but those are figures on trade sales.

Q. Those are trade sales?

A. I would say this: that having had that done by the Accounting Department and out of our records which I saw I am not in a position to tell you exactly what is in those figures.

Q. You would not know what the figures from branches are in there?

A. I couldn't tell you that.

Q. Or whether grinders' white lead would be in there?

A. There wouldn't be. I can tell you that definitely.

Q. Do you know grinders' lead is not in there?

A. I know that, yes.

Mr. Wright: Thank you, Mr. Tibbets.

Redirect Examination (Continued) by Mr. DuBose.

Q. You said according to your best knowledge this included trade sales; is that correct?

A. Trade sales, yes.

Q. That would include ordinary purchases of white lead in oil either for resale or for use by painters and others; is that correct?

A. That is right.

Mr. DuBose: No further questions.

4002 *Recross Examination by Mr. Wright.*

Q. The fact remains, however, Mr. Tibbets, that you do not know of your knowledge exactly what is in those figures?

A. Having made a careful check of that, no, I don't believe I could say so.

Mr. Wright: Nothing further.

Redirect Examination (Continued) by Mr. DuBose.

Q. Let me ask you whether the book from which this material was obtained relates to branch percentages of Company white lead paste sales?

A. That is right.

Mr. DuBose: All right; that is all.

Trial Examiner Norwood: Thank you, Mr. Tibbets.

(Witness excused.)

Trial Examiner Norwood: Call your next witness.

Mr. DuBose: I was just going to give these (indicating documents) back to him.

By agreement of counsel the exhibits which heretofore were marked Respondents' Exhibit 212-A to Z-2 for identification shall deemed withdrawn and the number may be used again in another exhibit.

Trial Examiner Norwood: Wait a minute. I do not think there is any necessity for that. There is already testimony in the record about it, and the reporter is bound
4003 under his contract to list that number so that you can
turn back and see just what happened.

Mr. DuBose: All right, sir.

Trial Examiner Norwood: With respect to the exhibits that were numbered that way.

Mr. DuBose: May I say this, then: they are still in our custody?

Trial Examiner Norwood: They are still in your custody, yes.

Mr. DuBose: They are still in our custody, and there was no necessity we found for offering them because of the agreement that counsel for the Commission made with me.

Trial Examiner Norwood: Yes, that is all clear, but the record will stand to show just what happened with respect to that number.

Call your next witness.

Mr. DuBose: Mr. Higgins.

J. R. HIGGINS was thereupon recalled as a witness for the respondents, and having been previously duly sworn, testified further as follows:

Direct Examination.

Trial Examiner Norwood: State your full name and address, Mr. Higgins.

The Witness: J. R. Higgins, St. Louis, Missouri.

4004 Trial Examiner Norwood: Mr. Higgins has been sworn. You may take the stand.

Proceed.

Mr. DuBose: I ask that these documents be marked Respondents' Exhibit 213-A and succeeding letters for identification.

(The papers referred to were marked Respondents' Exhibit 213-A, 213-B, 213-C, 213-D, 213-E, 213-F, 213-G, 213-H, 213-I, 213-J, 213-K, 213-L, 213-M, 213-N, 213-O, 213-P, and 213-Q, for identification.)

By Mr. DuBose:

Q. Mr. Higgins, do you recall in Washington last June 12th identifying the documents which have been marked Respondents' Exhibit 160-A through Respondents' Exhibit 160-R for identification, which are listed in the index to the minutes for June 12th, and which constituted a study made under your direction of sales by the St. Louis branch of the National Lead Company for the year 1941 covering white lead in oil, or heavy and soft paste white lead, dry white lead, oxides in car lots and oxides in less than car lots? Have you since those hearings rechecked all of the figures and rates and so on shown with respect to heavy and soft paste white lead sales by the St. Louis branch of the National Lead Company for 1941?

A. We have rechecked all our records.

4005 Q. And did you have a complete new set of corrected figures typed up in your office at St. Louis?

A. That is correct.

Q. I show you Respondents' Exhibit 213-A through Q for identification, and I will ask you whether those are the corrected figures and rates for white lead in oil sales by the St. Louis branch of the National Lead Company for the year 1941?

A. Those are the corrected figures.

Q. Now, you explained in some detail at the last hearing on June 12th how these figures were arrived at, is that correct?

A. Yes, on the original testimony that is correct.

Q. On the original proposed exhibit?

A. That is right.

Q. Were these figures and rates in Respondents' Exhibit 213-A to Q for identification similarly prepared as the former exhibit? Were they prepared in the same fashion?

A. They were prepared in the same fashion, but a careful check was made to avoid any errors that may have appeared as the result of an effort on our part to consolidate into eight days the billings for different commodities covering the tonnage freight rate and all the details. That took ten or twelve employees eight days to prepare.

Q. Now, let me ask you this, Mr. Higgins: For the most part of it the figures are the same as those appearing
4006 in Respondents' Exhibit 160-A through R, inclusive, for identification, for the most part?

A. That is correct.

Q. But you did make corrections. What did those corrections generally consist of?

A. The classification of freight rates that were applicable to the shipment, either from St. Louis or from our warehouse points and where the combination of rates were involved.

Q. How about cartage figures? Were they carefully checked?

A. The cartage figures are actual figures which we found were in our Auditing Department, and we made an attempt on our original sheet to fix the estimate of the drayage, and then the actual drayage which came afterwards. There was some confusion in arriving at those figures, although the end figure was identically the same.

Q. And in this new compilation, the Respondents' Exhibit 213-A to Q for identification, wherever you show cartage those are actual cartage figures?

A. That is correct.

Q. And wherever you show rail rates you have in each instance made an honest endeavor to discover the exact applicable rate which would be applicable to these particular towns and to particular pounds there sold, is that correct?

A. That is correct.

4007 Q. And if I were to ask you as to the method by which the figures which appear on Respondents' Exhibit 213-B through Q, inclusive, for identification, would your answer be along the same lines as the answers you gave me on June 12th with respect to the white lead in oil figures which appear on Respondents' Exhibit 160-D through R, inclusive, for identification?

A. That is correct.

Mr. Wright: An objection, Your Honor. Read the question.

Trial Examiner Norwood: Read the question.

(The pending question was thereupon read by the reporter.)

Mr. Wright: That is a highly improper question, Your Honor.

Mr. DuBose: Your Honor, I could take him through—

Trial Examiner Norwood (interposing): Well, it is just to permit him to adopt that previous testimony; that is, to state that these documents were gotten up in the same way and are based on the same data except for these corrections.

Mr. DuBose: I have already asked him the question. He has replied.

Trial Examiner Norwood: Yes.

Mr. DuBose: For the most part these are the same figures, and the new compilation is just a correction in the old compilation.

4008 Trial Examiner Norwood: Yes. I will overrule the objection.

Mr. Wright: As I understand it the question is not a question as to what the witness has testified, but was a question as to what the witness would answer if you asked him, if counsel asked him a question.

Mr. DuBose: I do not see the difference.

Mr. Wright: I see it.

Trial Examiner Norwood: I think that question is clarified. Go ahead.

By Mr. DuBose:

Q. What is your answer, sir?

A. That is correct.

Q. In other words, Respondents' Exhibit 213-B through Q for identification and all the facts and figures appearing thereon were prepared from the same sources and in a similar fashion as were the facts and figures which were on Respondents' Exhibit 160-D to R for identification?

A. That is correct.

Q. And I show you Respondents' Exhibit 213-A for identification and ask you what that purports to be?

A. This report is the 1941 sales of white lead in oil classified under the various zones, total pounds sold under each zone, total freight and cartage for each zone and the final figures, the average freight per hundredweight of each zone.

4009 Q. And those figures which appear on 213-A are a summary of the corrected figures which appear on Respondents' Exhibit 213-B through Q for identification?

A. That is correct.

Q. And to the extent that they represent corrected figures they differ slightly, or to some degree, with the summary you have heretofore identified, which appears on Respondents' Exhibit 164 for identification?

A. That is correct.

Mr. DuBose: I offer in evidence Respondents' Exhibit 213-A to Q, inclusive, for identification.

Mr. Wright: May I ask whether there are to be similar documents similarly related to the other exhibits offered?

Mr. DuBose: This is a similar document to those other exhibits.

Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Are you ready to go ahead?

Mr. Wright: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Back on the record.

Make your statement, Mr. Wright.

Mr. Wright: I would like to request an opportunity of examining these exhibits and the other data which 4010 were previously identified, and to defer preliminary cross-examination on identification of this exhibit until some time tomorrow.

Trial Examiner Norwood: Yes.

Mr. DuBose: That is agreeable with us.

Trial Examiner Norwood: I will defer the ruling until tomorrow, and this witness will come back tomorrow at any time the counsel may require.

Mr. DuBose: I will have some further questions.

Trial Examiner Norwood: And for some further questioning about it.

Have you another witness you can put on?

Mr. DuBose: I have some more questions of this witness.

Trial Examiner Norwood: All right. Go ahead. And that is 213 that is pending.

Mr. DuBose: That is right. I ask that this document be marked Respondents' Exhibit 214 for identification.

(The paper referred to was marked Respondents' Exhibit No. 214 for identification.)

Mr. DuBose: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Back on the record.

By Mr. DuBose:

Q. Mr. Higgins, I show you Respondents' Exhibit 162-A, B, C, and D, for identification, which you identified 4011 last June 12th in Washington as representing the figures showing dry white lead sales by the St. Louis branch of the National Lead Company for the year 1941 in par and in one-cent territories, and I call your attention particularly to Respondents' Exhibit 162-C for identification, and I ask you whether there have been any corrections made on this document since it was identified on June 12th?

A. Yes.

Q. Now, on 162-C is the figure 1,357,409; is that the corrected total plus cartage figure?

A. That is the corrected figure.

Q. In other words, that is the estimated freight plus the cartage corrected figure?

A. That is correct.

Q. And I ask you whether the next column, under the heading "Less St. Louis, New Orleans, Kansas City, Dallas, Omaha, and St. Paul," whether those figures have been added since this document was identified?

A. That is the correction of the—

Q. (Interposing.) Those have been added? That is all I am asking you.

A. Those have been added.

Q. And I ask you whether or not you and I, working together, did not add the last entry on that page, "Less Kansas City," and so forth?

4012 A. That is correct.

Q. Now, Mr. Higgins, you identified, I believe Respondents' Exhibit 162-A to C, inclusive, as being the dry white lead sales by St. Louis for par territory in 1941, is that correct?

A. That is correct.

Q. And in some instances cartage figures appear of 10 cents a hundred opposite those entries?

A. That is correct.

Q. And I believe you stated that those were at that time estimated cartage per hundredweight?

A. That is correct.

Q. Now, you had formerly had on this sheet cartage for the six points, St. Louis, Kansas City, New Orleans, Dallas, Omaha, and St. Paul, is that correct?

A. That is correct.

Q. And those are actual cartage figures as corrected?

A. That is correct.

Q. Did you find upon recheck that some of the estimated 10-cents per hundredweight cartage figures would be applicable to those six towns? Do you get what I mean? I mean when you rechecked it.

A. Yes, that is correct.

Q. Did you not find that some of the estimated 10-cent cartage were for the various cities for which you added cartage at the end?

4013 A. That is correct.

Q. Then your correction under the heading "Less St. Louis, New Orleans, Kansas City, Dallas, Omaha, and St. Paul," which you have explained that you added were a subtraction of the estimated 10 cents per hundredweight that you had in the body of these sheets, is that correct?

A. That is correct.

Q. And those corrections carried through in every instance except for the shipments to Kansas City, from Kansas City, which carried a cartage of 10 cents, and of which the poundage was 53,400, is that correct?

A. That is correct.

Q. And on checking yesterday with me did you and I discover that error?

A. We did.

Q. And did you see me make the final correction in my handwriting, a correction, "Less Kansas City, 53,400 times 10"?

A. That is correct.

Q. Now, the final figure on that page, Respondents' Exhibit 162-C, which you said you saw me make in my handwriting, is the corrected total freight and cartage for dry white lead, St. Louis branch, 1941, sales in par territory, is that correct?

A. That is correct.

Q. That corrected figure appears in the summary, which is Respondents' Exhibit 214 for identification, is that correct?

4014 A. That is correct.

Q. I show you Respondents' Exhibit 162-D for identification, which you identified as dry white lead sales in the one-quarter territory?

A. That is correct.

Q. And I ask you whether or not any corrections have been made on that?

A. There are no changes there.

Q. Now, Respondents' Exhibit 214 for identification purports to show what?

A. This purports to show 1941 sales of dry white lead.

Q. By the St. Louis branch of National Lead Company, is that correct?

A. St. Louis branch of National Lead Company, that is correct.

Q. And is that paper a summary of the final figures reached and as corrected which appear on Respondents' Exhibit 162-A through D for identification?

A. That is correct.

Mr. DuBose: At this time I should like to offer in evidence Respondents' Exhibit 162-A to D, inclusive, for identification, and Respondents' Exhibit 214 for identification, which has been identified by the summary of those exhibits heretofore identified.

Mr. Wright: Will you tender the witness for 4015 preliminary cross-examination on the identification?

Mr. DuBose: Yes.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed with your cross-examination.

Mr. Wright: Your Honor, I would like to have the same privilege of examining these documents, as you can tell there is considerable complexity to them, and I have never seen these corrections which have been made on the exhibits since they were first identified.

Trial Examiner Norwood: Counsel may have until tomorrow to examine them, the same as in the case of the other exhibits. I will defer the ruling.

Mr. DuBose: May we go off the record for a moment?

Trial Examiner Norwood: Yes.

(Discussion off the record.)

Trial Examiner Norwood: Back on the record.

Mr. DuBose: Could we go on the record while I make a motion for an adjournment until tomorrow morning?

At this time, Your Honor, I should like to move for an adjournment of these hearings until 10:00 a.m. tomorrow morning at the same place.

Trial Examiner Norwood: Is that agreeable to counsel for the Commission?

4016 Mr. Wright: That is agreeable to me, sir.

Trial Examiner Norwood: Now, as I understand from our off-the-record discussion, this is necessary to allow the Commission's counsel to examine these exhibits, and it is impracticable for respondents to produce any more witnesses today. But I want to ask them then to let us run continuously after I re-convene tomorrow morning, so that we may get through this week.

We are under a great necessity for saving all the time possible. I will ask counsel to co-operate.

We will meet in this room tomorrow morning.

Mr. DuBose: Yes, sir.

Trial Examiner Norwood: Do you want to meet any earlier than 10:00?

Mr. DuBose: I do not think that is practical either, Your Honor.

Trial Examiner Norwood: We will recess until 10:00 o'clock tomorrow morning in this same room.

(Whereupon, at 12:00 o'clock noon, November 12, 1947, the hearing in the above-entitled matter was adjourned until tomorrow, November 13, 1947, at 10:00 o'clock a.m. at the same place.)

4017

Trial Room No. 10,
Bar Association Building,
42 West 44th Street,
New York, N. Y.,
Thursday, November 13, 1947.

Met, pursuant to adjournment, at 10:00 a.m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

Edmund P. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Robert H. Ecker, Esq., and
Henry E. Gardiner, Esq., (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.) appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James D. Ewing, Esq., and
E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

J. T. Welch, Esq., (Davies, Richberg, Beebe, Busick & Richardson, 815 Fifteenth Street, Northwest, Washington, D. C.), appearing for Sherwin-Williams Company.

4018 Roger Hinds, Esq., (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

P. J. McDowell, Esq., Midland Building, Cleveland, Ohio, appearing for Sherwin Williams Company.

4019

PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order. Pursuant to adjournment yesterday the hearing in Docket No. 5253 is now reconvened at 10:00 o'clock a. m. on the 13th day of November, 1947, in Room 10, Bar Association Building, 42 West 44th Street, New York, New York.

The reporter will please enter the appearances.
Call your first witness.
Mr. Wright: Mr. Higgins.

J. R. HIGGINS was thereupon recalled as a witness for the respondents and, having been previously duly sworn, testified further as follows:

Trial Examiner Norwood: Will Mr. DuBose ask the questions?
Mr. Wright: No, I will.

Cross-Examination (Continued) by Mr. Wright.

Q. Now, Mr. Higgins, when you testified first, you testified that according to these documents which have been identified as Respondents' Exhibits 162-A and sub numbers, 213-A and sub numbers, 214 and 162-A to D, are all revisions and further boiling down of the information in the first exhibit?

A. Yes, the corrections and errors which were apparent to us in going over the picture.

4020 Q. What was the purpose of making these exhibits up, Mr. Higgins?

A. The new—

Q. The original and the new ones?

A. The purpose was in response to a letter which we had received from our New York office to make up certain figures covering tonnage, cost of freight and cartage and the end figure, which as I recall, was the cost per hundred weight. That briefly was the outline, and which was the final figure which we worked to.

Q. Now, we had extensive cross-examination about various factors and figures that went into these things when you were here in New York the last time. Have you remembered or read that transcript since the time, and are you familiar with the examination then?

A. Yes, sir.

Q. Are the methods and the techniques employed on the new material 213 and sub numbers and 214 the same as the methods which you testified about on your direct and cross-examination?

A. They were identically the same.

Q. Identically the same?

A. Yes.

Q. So if I asked you the same questions on cross-examination about the new material 213 and 214 your answers would be the same?

4021 A. That is correct.

Q. Now, I call your attention to 163-A to D, 163-A to H, 163-G which are pending on an offer in evidence relating to the objections I made: I notice that none of this new material contains anything about objections I had—

Mr. DuBose: Just a moment, I don't recall that there is an offer pending.

Mr. Wright: I beg pardon, I think it has been offered and re-offered.

Mr. Ewing: At this point I will withdraw the offer of those particular exhibits.

Trial Examiner Norwood: Off the record, just a minute.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. DuBose: Counsel for the Commission has called attention to the fact that at the hearings last June in Washington, and again in the subsequent week of June 18, I believe in New York, counsel for the respondent National Lead offered and re-offered through the witness on the stand the following exhibits then marked for identification, namely, Respondents' Exhibit 160-A through R, inclusive, 161, 162-A through D, 163-A through G and 164. At this time we should like to withdraw our offer of those exhibits to the following extent: We withdraw our offer as to Respondent's Exhibit 160-A through R, inclusive, 161,
4022 162-A through D, 163-A through G, and 164. At this
time we should like to withdraw our offer of those exhibits to the following extent: We withdraw our offer as to Respondent's Exhibits 160-A through R, inclusive, 161, 163-A through G, inclusive, and 164, and our offer now with respect to this freight and tonnage information is restricted to our offer made yesterday, namely, Respondent's Exhibit 213-A through Q for identification, Respondent's Exhibit 214 for identification and Respondent's Exhibit 162-A through D with the corrections to Respondent's Exhibit 162-C which were made since the document was originally identified and about which Mr. Higgins testified yesterday.

Trial Examiner Norwood: The counsel may withdraw them.

By Mr. Wright:

Q. As I understand it, Mr. Higgins, you went back over all of the material that was originally identified since the last hearing; is that correct?

A. I made a very very careful study of the white lead in oil because we found in going through the records that there were errors that were apparent. As I explained yesterday, the first job was done in about eight days' time, ten or twelve people, and involved a year's work.

Q. Did you go over the objection I had to the situation as it showed in there?

4023 A. Nothing more than what covered in the testimony that was sent to me. I didn't go over anything further.

Q. You didn't further check the objection I had to the time of what the situation was?

A. No, sir, I have not made any further check.

Q. Since this last hearing in New York?

A. That's right.

Q. I take it, that the purpose of this 213-A through Q is to show the average freight per hundred weight in zones, to show that their differentials are justified from your point of view, is that not correct?

A. Yes, sir, that is correct.

Q. Now, I call your attention to some matters which appear on this exhibit, 213, Q in the par zone now on white lead in oil, State of Illinois. You show us to Quincy two rates, a truckload of twenty-five cents and less than carload, thirty-five cents?

A. Right.

Q. And your extension on that tonnage, on that poundage of 66,130 is thirty cents a ton?

A. That is correct.

Q. Which is an average between the truckload and less than carload?

A. That is correct.

Q. You do the same in Springfield, you split the 4024 difference between the truck load rate of twenty-seven cents and L. C. L. rate of thirty-one cents and expend it to twenty-seven cents a hundred on 94,000 pounds roughly?

A. Yes.

Q. When you get over on Exhibit 213-D, there is a rate of fifty-three cents which appears to be less than car load rate; is that correct?

A. That is correct.

Q. Yet there was a quantity involved there of 87,121 and ½ pounds. I call your attention to Waterloo on the same exhibit which carries a rate of sixty-three cents which is apparently the less than car load rate?

A. That is correct.

Q. The amount offered is 87,004 and ½ pounds. I call your attention to the fact that in Duluth on Exhib't 213-E you show first a thirty-four cent rate in the St. Paul warehouse and ~~then a~~ forty-cent less than car load rate giving you a total extension then of eighty-seven cents employed in 112,363 pounds. I call your attention to the fact that on 213-H you carry a similar extension of a rate for St. Joseph taking the car load to Kansas City, twenty-nine cents a hundred, less than car load rate from Kansas City to St. Joseph of twenty-five cents or a total extension of fifty-four cents a hundred and that the pounds involved were 82,347 and ½?

A. Yes.

4025 Q. I call your attention to the fact that on 213-L you show, apparently, a less than car load rate from St. Louis to Jackson, Mississippi of eighty-nine cents where there is 63,200 pounds involved?

A. Yes.

Q. Will you explain to me why these par zone shipments, Mr. Higgins, where we have quantities from 66 to 100 thousand pounds involved that you figure that they were shipped on an average between the truck load or car load rate and the less than car load rate, yet when you get into the premium zones in similar quantities you figure it all at the less than car load rate?

Mr. DuBose: Well, I object to that question upon the ground that it does not correctly summarize the figures with respect to the par zone.

Mr. Wright: I will amend the question then to make it on the basis of the figures which I have just called Mr. Higgins's attention to, then.

A. When these figures were prepared, when the tonnages for the towns were prepared, it was not less to one individual. I had two people come in to my office and we sat down and we collectively went over and discussed the various shipments; how they were handled. The corrections that were made are errors that were apparent, possibly an oversight, but in the case of the par zone you speak of

4026 here in Quincy and Springfield, Peoria, we took an average of the rates because we found it was necessary at that time to make less than car load shipments. And in order to arrive at an accurate figure we took the average in those points as near as we could determine the cost of the freight in getting the shipments from St. Louis to those points in the par territory.

Q. Why do you assume there were never any truck loads or car loads shipments involving 1,000 pounds. For instance, from Duluth to St. Paul it was 82,000 pounds, from Kansas City to St. Joe, when you do assume an equal rate between truck loads and less than car loads in places like Quincy and Duluth on smaller quantities?

A. As far as the warehouses are concerned, we make every effort from our own plant to our own warehouse—

Q. Exactly.

A. To the warehouse points, then the local shipments are made from there.

Q. What was the basis of your determining that on that 56,000 pounds to Quincy that half of that went by truck load and that as to the 112,000 pounds to Duluth none of it went by truck load or car load?

A. In the case of Duluth, we accomplished the point by shipping from the warehouse. If we had shipped from St. Louis to Duluth the freight rate would have been much higher.

Q. I am talking about the truck loads which show 4027 shipments of 112,000 pounds from St. Paul to Duluth. How can you assume none of that went by truck load?

A. It may have been—you are speaking of Duluth?

Q. Yes, sir.

A. There was not enough at that time to make shipments directly from St. Louis, either truck loads or so it was shipped out of St. Paul as the material was available.

Q. Weren't the warehouses in your St. Paul territory served by truck to Duluth rather than less than truck loads or less than car loads when it was possible to do so?

A. When the tonnage was much less than that, that would be absolutely correct.

Q. We are talking about 1941. We are talking about a city you shipped 112,000. In that case you say it went less than car loads. In another case in a town which only took

56,000 pounds you say that went half by truck and the other half less than car loads. How do you make that distinction between those particular cities?

A. We know pretty well in the case of our accounts in Peoria who would take truck loads and who would take L. C. L. shipments and we could determine from our shipments those who handle the shipments. I think that is an absolute correct record. This is the best job the combined efforts of all of our people could do in arriving at this.

Q. Since all of the material for St. Joe and all 4028 of the material for Duluth, apparently went out of the Kansas City and St. Paul warehouses, respectively, you would not have records as to that in your central office, would you?

A. We would have the tariffs for 1941.

Q. I am talking now about the records from which you know what went in truck loads, what went in less than truck loads and what went L. C. L.?

A. I would say that there is no one could go back into 1941 with a 100 per cent memory of every shipment, but I will state that to the best of my memory our shipments went the way they are listed, those shipments were handled that way.

Q. That is what I am getting at.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. DuBose: I have just one or two questions here. We re-offer the same exhibits, namely, 213-A through Q, inclusive, for identification, 214 and 162-A to D as corrected.

Mr. Wright: Well, Your Honor, I object to the receipt of this in evidence. I think it is apparent by now the long time we have spent on direct and on cross, both at this hearing and the previous hearings in New York and Washington just what this information is, and I think it has become apparent in those two hearings how unreliable such information can be. It is obvious on the state of the record now how unreliable it can be. I can't question the 4029 figures that appear in there showing the tonnages shipped to each town. I must assume that those are the figures as they appear in the records of the company. I can't at this time question the validity of the rates for the different classifications or the routing which they took, but I do very strongly object to the methods by which these figures have been put together to reach the results which it sought to be shown in 213-A and in 214. It is highly misleading and it has no validity whatsoever. It involves, as has been shown on the examination so far, speculation, purest speculation. Here we have an allocation of business whether to truck loads or to less than car loads. They don't know which one they want, they don't know which way it was shipped so they split the difference, as to certain transactions in the par zone. As to certain transactions in the premium zones that allowed tonnages twice as large as those in the par zone.

The assumption is made they all went less than car loads. The effect of it is to raise the rate in the premium zone, and bring the justification of the raise of rates on an average basis, the validity of which I am certainly not going to accept. I can have no objection to the introduction of a figure of a poundage sold to these towns and the territories, but insofar as exhibits going beyond that point, I must object.

Mr. DuBose: If Your Honor please, Mr. Wright has not objected to tonnage and freight rates. He has
4030 picked out certain isolated instances, and we respectively urge he has a right to urge that objection, but it goes to the weight of the exhibit not to its admissibility. The document has been fully explained, how it was prepared. If it has errors, that is a matter of giving weight to the conclusions reached, but not to the admissibility of the records.

Mr. Wright: First of all, I object to the characterization "isolated instances." Furthermore, on the matter of weight, if this information is not put together in a proper form to reflect actually what was done, there is no question of weight, it is nothing, it can not mean anything. It is just not admissible. If either has weight or it is inadmissible. I say that the information about the manner in which it has been put together, which has been elicited previously and today, show that it is wholly unreliable and should not be admissible for that purpose.

Trial Examiner Norwood: Here are some documents that have some information, in the part of which is recognized as being correct, and information based on estimates and it appears clearly, as to some of them, that they based on estimates, and the witness has told us about that, and counsel may therefore cross-examine him on every item, so that it may appear just how this was made, and I think that the matters which have been urged by Commission's counsel go to the weight of the document.

4031 Mr. Wright: Your Honor, the whole thing boils down to these two papers down here, 214 and 213-A. Let me call your attention as to how these were arrived at. On 213-A there is a listing of accounts sold in the various zones. As I say, while I am not conceding to the correctness of that, still I can't object to this. Column 2 has the total freight and tonnage. How is that arrived at. It was arrived at by multiplying something which has no validity to the end results. That multiplication can have no validity.

Mr. Ewing: The witness testified that he has gone over these matters with his associates and assistants and they know where they do business and with whom they do business. To break it down to isolated instances, as Mr. Wright has done, is to distort what he testified to.

Trial Examiner Norwood: I shall overrule the objection and receive the exhibits. I think those matters go to the weight of the exhibits. Counsel may go into it and show the correctness throughout. I don't think that at any time the receipt of documents in evidence show that the Trial Examiner thinks that every item is true.

(The documents referred to, heretofore marked for identification as RESPONDENTS' EXHIBITS 213-A, 213-B, 213-C, 213-D, 213-E, 213-F, 213-G, 213-H, 213-I, 213-J, 213-K, 213-L, 213-M, 213-N, 213-O, 213-P, 213-Q; 214, 162-A, 162-B, 162-C, 162-D, were received in evidence.)

4032 Mr. DuBose: Now that the preliminary direct and cross have been concluded and the documents have been received, I have some further direct on the documents just admitted in evidence.

Trial Examiner Norwood: Go ahead.

Direct Examination by Mr. DuBose.

Q. Mr. Higgins, I show you Respondents' Exhibit 213-B in evidence, and I call your attention to a shipment from St. Louis to Alton, Illinois, or shipments, rather, for the year 1941 in the total amount of 51,576 pounds, which total poundage is more than one car load; is that correct?

A. That is correct. At that time 20-ton cars.

Q. Twenty-ton cars, that makes it 40,000 pounds?

A. That is correct.

Q. And the applicable rate given there was twenty cents, which I take it is the L. C. L. rate from St. Louis to Alton?

A. That is correct.

Q. I call your attention to another item on the same exhibit relating to par zone shipments for 1941 from St. Louis to Bloomington in the total amount of 52,375 pounds to which was applied the rate of thirty-seven cents. Is that the L. C. L. rate?

A. That is the L. C. L. rate.

Q. I call your attention to the same exhibit on
4033 which appears a shipment from St. Louis to Jacksonville, Illinois in the total poundage of shipment for the year 1941, in the total amount of 47,662 and ½ pounds to which was applied the rate of thirty cents. Is that the L. C. L. rate?

A. That is the L. C. L. rate.

Q. I call your attention again to another shipment in the par zone on the same exhibit from St. Louis to Mattoon, Illinois, which shipment for 1941 totaled 52,049 and ½ to which was applied the rate of thirty-four cents. Is that the L. C. L. rate?

A. That is correct.

Q. Now, Mr. Higgins, you have testified that in determining what rate was applicable you had a round table conversation with other members of the St. Louis branch staff; is that correct?

A. That is correct.

Q. You have the records showing who the customers are?

Mr. Wright: Your Honor, I object to the leading character of these questions.

Mr. DuBose: I will withdraw the last question.

By Mr. DuBose:

Q. Do you have records or does anyone in your office know the identity of the particular customers in these particular towns?

A. We all know the individual customers.

4034 Q. Now, would you know from your experience in the St. Louis branch and from the collective experience of the other members with whom you consult whether or not ordinarily a particular customer is a car load or truck load customer?

Mr. Wright: I object to that question, Your Honor, it was leading, it was putting the words in the witness' mouth, and it called obviously for conclusions, which could only be hearsay.

Trial Examiner Norwood: Read the question.

Mr. Wright: I might say I don't mind so much counsel testifying for the witness in identifying the documents, but I do object to characterizations after they are in the record. I think the witness can be allowed to testify for himself.

Mr. DuBose: It was a direct question, Your Honor.

Trial Examiner Norwood: Read the question.

(Last question read by the reporter.)

Trial Examiner Norwood: I think that contains the answer. Objection sustained.

By Mr. DuBose:

Q. All right, Mr. Higgins, from your experience in the company of twenty years, your experience with the sale of white lead in oil, do you in many instances know the category in which a customer will fall; yes or no?

A. Yes.

4035 Q. Now, what categories do customers fall into?

A. First, L. C. L. shipments. An order comes in to the desk, many orders. The orders are looked over and sorted, the shipment from St. Louis is entered with a notation on it, and sent to the Traffic Department and the shipment is made. If the shipment is from Minnesota, North Dakota or any of the territory adjacent to the branch warehouses, it is automatically sent to the Omaha warehouse or St. Paul warehouse, whichever the case might be, and the order is entered through our Order Department and allocated to that branch warehouse where the shipment is made.

Q. Let me ask you this question, Mr. Higgins: Do you know, ordinarily, in what quantity a particular customer located in a particular town will buy white lead in oil?

A. I think I do.

Q. In your discussions with the other members of the St. Louis staff, when you were estimating whether or not shipments to particular towns were truck loads or car loads or combinations of both, did that element, namely, whether or not—withdraw that.

In your discussions with other members of the St. Louis branch at which you reached the conclusion that as to particular towns there should be an average between truck loads and L. C. L., did your knowledge of whether ordi-

narily a customer located in that particular spot
4036 purchased L. C. L. or other quantities enter into that estimate?

Mr. Wright: Objection.

Mr. DuBose: I don't see why. That is perfectly proper.

Trial Examiner Norwood: What is the ground?

Mr. Wright: It starts off by putting several conclusions and an assumption of fact in the witness' mouth before he can arrive at an answer to the question.

Trial Examiner Norwood: Read the question.

(The question was read by the reporter.)

Trial Examiner Norwood: I think it is in evidence that he did have this consultation and come to that conclusion.

Mr. Wright: Your Honor, I asked the witness what distinction he made on cross-examination and he could not give me a satisfactory answer and counsel is giving him a tailor-made distinction in his question.

Mr. DuBose: I object to that. It is perfectly clear these people knew the customers in particular towns and as a result of that knowledge they decided whether it should be a truck load or car load. I am trying to find out what he knew about the customer which led him to that conclusion.

Mr. Wright: Can't the witness be asked what made him reach that distinction?

Mr. DuBose: All right, I will ask him.

Trial Examiner Norwood: Question withdrawn. Go on.

4037 By Mr. DuBose:

Q. Mr. Higgins, I show you Respondents' Exhibit 213-B, for identification which shows a shipment for 1941 in the par zone from St. Louis to Decatur, Illinois and the total amount of 158,112 and ½ pounds to which was applied the rate of twenty-seven cents, which is an average between truck loads and L. C. L. What considerations were taken into account in arriving at this figure of twenty-seven cents which is the average between truck loads and L. C. L.?

A. I am perfectly acquainted with the customers in Decatur, Illinois. Their business, tonnage that they have handled in previous years and the tonnage they handled in 1941, to the best of my knowledge, the division of the truck load to certain customers and division of L. C. L. where the rate was twenty-two cents for the truck load and thirty-two cents for the L. C. L., gave us the average of 27 cents on 158,112 and ½ pounds, which is in my opinion, the correct rate applicable to that tonnage going to Decatur for the year 1941.

Q. Why is that, in your opinion, a correct estimate?

A. Because some of the customers at Decatur would take shipments from truck loads while there are a number of other customers who would get only L. C. L. shipments.

Q. Now, when you made a similar study with the others in the St. Louis branch, in connection with all these white lead in oil shipments for 1941, and when you deter-
4038 mined what you thought was the applicable rate, did the same consideration enter into your mind and were they taken into account at that conference?

A. That is correct. They came to my desk and we spent hour after hour going over the details and studying each town on that list.

Q. Now, Mr. Higgins, how long have you been connected with the sales of white lead in oil by the St. Louis branch, white lead in oil department?

A. I have been with the National Lead Company 37 years, and to my knowledge, my memory, it was in 1930 when I went into the white lead department.

Q. And since 1930 have you been in close contact with the sales of white lead in oil by the St. Louis branch of the National Lead Company?

A. That is correct.

Q. And when you arrived at the applicable rate, did the applicable rate, which is shown on these exhibits 213-A through Q, inclusive, represent in your opinion the applicable rate based upon your experience and knowledge of the sales by the St. Louis branch of white lead in oil?

Mr. Wright: Objection, same objection.

Trial Examiner Norwood: Sustained. That has the answer in it.

By Mr. DuBose:

4039 Q. Now, Mr. Higgins, when you obtain or receive, rather, from the home office the letter asking for this information, did that letter state for what purpose the information was sought?

A. I do not recall the details. I saw a copy of the letter. It was not addressed to me, but I think I testified previously that I knew what the information was wanted for.

Q. You did know?

A. I think I did.

Mr. DuBose: No further direct.

Cross-Examination by Mr. Wright.

Q. Who are these customers in Decatur?

Mr. DuBose: I object to that on the ground it will disclose confidential trade information.

Trial Examiner Norwood: I don't think so.

Mr. Wright: If he is going to rest on that, I would like to have stricken from the record the exhibits regarding the names in this case.

Trial Examiner Norwood: Objection overruled. Go ahead.

Mr. DuBose: You mean names of customers?

Trial Examiner Norwood: Yes, in 1941.

By Mr. Wright:

Q. What were the names of customers who bought 4040 white lead in oil?

A. Black Hardware Company. Decatur Paint and Varnish Company. Those two accounts are large buyers.

Q. They would customarily be shipped in truck loads?

A. That is correct, sir.

Q. Who are your customers in Duluth, Minnesota?

A. Marshall Wells Hardware Company.

Q. That is a very large concern, isn't it?

A. Very large hardware concern.

Q. I assume this tabulation for your shipments would be less than car loads since that is the way it is set out in the tabulation?

A. What was that?

Q. I was asking you, since it is indicated all shipments to Duluth are less than car load, to St. Paul they were less than car load or less than truck load?

A. That is correct. We had the Kelly Thompson Company and Pierson Paint Company, St. James & Company.

Q. Marshall Wells is wholesale hardware company?

A. That is correct.

Q. How would you estimate its business would compare to Decatur Hardware Company or Black Hardware Company as to relative size in volume?

A. No comparison, Marshall Wells is a big concern covering six or eight states and Black Hardware does 4041 not have as much business and does both jobbing and retail business, covering Illinois and portions of Indiana and some southern territory.

Q. Is it principally a retailing concern?

A. I would say that they did a large jobbing business, because years ago they purchased many, many car loads from us.

Q. Marshall Wells would be many, many times larger as an enterprise?

A. There is no question about that, sir.

Q. Who are your customers in St. Joseph, Missouri in 1941, which I am speaking of?

Mr. DuBose: Your Honor, I was not being facetious before with my objection. Now, there are certain trade secrets and the names of customers certainly should not be divulged on a public record here.

Mr. Wright: This is the first time that this question has come up. We have long tabulations with the names of customers on them.

Trial Examiner Norwood: A reasonable number of questions may be asked to test this witness' knowledge; and this goes to that, and I think he may ask him what the names are to see if he knows who they are.

Mr. Wright: There are already in the record lists of customers in practically every town in the United States during the period of 1941 and there was no objection on
any of the respondents' parts to supplying that infor-
4042 mation. They were very cooperative about it. We
prepared those tabulations, now in evidence, in corroboration with the respondents, you might say.

Trial Examiner Norwood: I think the names of a few of these customers is a sufficient number to test this witness' knowledge and will not prejudice the respondents in any way.

Mr. DuBose: I assumed he was going to offer every town and every state.

Trial Examiner Norwood: I don't think so.

Mr. Wright: I assure counsel I have no intention of doing so.

Trial Examiner Norwood: Objection overruled.

The Witness: St. Joseph, Missouri?

By Mr. Wright:

Q. Yes.

A. Hyatt Hardware Company and there are five or six more concerns with a branch of Cooks warehouses.

Q. Hyatt is a large concern?

A. Yes.

Q. Are they similar to the ones in Decatur?

A. They cover a larger territory.

Q. Covering a larger territory than the ones in Decatur?

A. That's right.

4043 Q. I believe you stated before, Mr. Higgins, none of the information we have here, either as to town or as to cardage or as to freight, contains anything which can not be properly attributed to white lead in oil, in flatting, linseed oil, red lead in oil, no white lead points?

A. That is correct.

Q. Isn't it customary for large warehouses of hardware store to order a variety of mixed shipments, a variety of products, particularly out of the warehouse, and don't orders customarily include other things other than white lead in oil?

A. They take different freight classifications.

Q. Shipped together?

A. Mixed. White lead in oil would take one hundred pounds or more.

Q. Excuse me.

A. White lead in oil would take one hundred pounds or more for the minimum rate to apply.

Trial Examiner Norwood: We will take a brief recess.

(A five-minute recess was taken.)

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. On your dry white figures here, Mr. Higgins, Exhibit 162-A through D, I believe the testimony was par is everything east of the Rocky Mountains?

A. That is correct.

4044 Q. Now, are you thoroughly familiar with the warehouse procedure on handling shipments in pool?

A. Pool cars would not be handled in the warehouse, they would be handled from St. Louis.

Q. Do you handle cars from St. Louis?

A. Are you speaking of 1941, sir?

Q. Yes.

A. I do believe there were no pool cars during 1941.

Q. Were there any in the three years prior to 1941?

A. There may have been.

4045 Q. Now, getting back to Decatur, Illinois, I think your comment there on white lead was—no, let's take

Quincy, your poundage on white lead was 66,000 pounds. You are familiar with the customers and trade there in Quincy?

A. Yes, sir.

Q. Approximately how many pounds, altogether, of all products of the National Lead Company sold in Quincy, all the other items like flattening, red lead, mixed paint colors in oil, dry colors, linseed oil, all the other products?

A. We may or may not sell all of those items to one or two major accounts in Quincy. I have it in mind there was one account that had the best turn-over in handling shipments in truckloads. He turned his stock a number of times a year which was good business so therefore I have Quincy fairly well in mind. We may not sell all the products, we would sell him white lead in oil, red lead in oil, dry red lead, he may purchase linseed oil from us, but I think he has linseed oil connections which he purchases elsewhere.

Q. How about flattening oil, dry colors, colors in oil?

A. Colors in oil is a comparatively small item and I believe at that time we were not handling colors in oil, although I am not sure. We took that up later.

Q. How would his total poundage of other products, this customer you are talking about, compare with the poundage of white lead in oil?

4046 A. There would be no comparison at all, sir.

Q. Can you give us an estimate or comparison, it need not be exact, say three times as much white lead in oil as other products, two times as much, about the same amount?

A. I would say his tonnage is 90 per cent lead in oil and 10 per cent the other.

Q. Aren't there towns in which you have accounts whose purchase of a larger percentage of white lead in oil is larger than this particular account?

A. In 1941 we were confined entirely to white lead in oil, red lead in oil, and we did not have the other ramifications of the paint business that some of the other branches may have had, at that time.

Q. You handle quite a bit of linseed oil out at the St. Louis branch?

A. We handle a great deal of linseed oil for manufacturing purposes.

Q. You handle that under the Dutch Boy label?

A. Whenever we have brought in linseed oil in carloads in St. Louis, we have brought them in in five-gallon and one-gallon containers. We have never, at St. Louis, been a factor in the linseed oil business.

Q. You serve the whole trade in the St. Louis branch area Dutch Boy linseed oil, in Dutch Boy containers?

A. We do now.

4047 Q. Who services that area?

A. For instance, Northwest, you have individual customers such as large national concerns, and the major portion of the linseed oil business is taken there. I don't recall that we sold it in cans.

Q. By the National Lead Company?

A. So when we speak of linseed oil, we in St. Louis are confining our major production to the manufacture of white lead in oil and red lead in oil.

Q. How about flattening oil?

A. Flattening oil we do not manufacture. We bring that in in carloads from the East and manufacture where we have a demand.

Q. You receive Dutch Boy flattening oil throughout that area?

A. That is right.

Q. In 1941, approximately how many pounds of that would the St. Louis branch sell, can you give me an idea?

A. Oh, five or six carloads we covered it.

Q. You don't know what the situation is with reference to the other branches as to those products?

A. I am not familiar with that detail.

Q. Now, when you were here last, Mr. Higgins, you stated that these documents which were then offered in evidence had been correct and represented the best that could be done as far as getting these figures, is that correct?

A. I misunderstood the question. Are you speaking of today?

4048 Q. No; when you were here last in New York.

Mr. DuBose: Last June.

By Mr. Wright:

Q. Last June?

A. That is correct.

Q. Since that time you have gone over them and you have found actually there were a lot of discrepancies in those figures?

A. I checked over the white lead in oil and dry products and found errors that should not have been in there.

Q. Do you suppose if you were to do that again now that you might similarly find the same sort of mistakes and errors in computation and allocation of the freight rates to customers?

A. I do not believe so. I think that that record that I brought here represents the best job the St. Louis branch can do, and I think myself it is one hundred per cent correct.

Mr. Wright: No further examination.

Mr. DuBose: No further examination.

Trial Examiner Norwood: Thank you, Mr. Higgins.

(Witness excused.)

Trial Examiner Norwood: Call your next witness.

Mr. DuBose: Mr. Owens.

4049 THOMAS OWENS was thereupon called as a witness for the respondents, and having been first duly sworn, testified as follows:

Direct Examination by Mr. DuBose.

Q. Mr. Owens, will you tell me by whom you are employed?

A. National Lead Company, Executive Office.

Q. In what capacity?

A. Office Manager in the Accounting Department.

Q. Office Manager of the Accounting Department?

A. Yes, sir.

Q. Now, will you tell us when you first came with National Lead and what positions you have had with National Lead since that time?

A. I have been continuously employed by the National Lead Company since June of 1934, first in the position of office boy, then as general accountant, cost accountant, traveling auditor, and finally office manager.

Q. Now, when did you become a traveling auditor, do you recall?

A. Back around 1940.

Q. And when did you become a general cost accountant in the Home Office?

A. About December, 1942.

Q. And when did you assume your present position as office manager, general accounting office, in the Home Office?

4050 A. February 1, 1947.

Q. Now, did you or have you received a degree from a university?

A. Yes, sir, Bachelor of Science in Accounting, New York University.

Q. When did you receive that degree?

A. In June of 1941.

Q. Now, since 1940 you have been generally familiar with the accounting department in the Home Office?

A. Yes, sir.

Mr. DuBose: I ask that these documents, Respondents' Exhibit 215-A and B be marked for identification and these two, 216 for identification and 217.

(The documents referred to were marked Respondents' Exhibits 215-A, 215-B, 216 and 217 for identification.)

By Mr. DuBose:

Q. Mr. Owens, I show you Respondents' Exhibit 215-A and B for identification and I ask you to tell us generally what these figures purport to show, what these documents are, generally?

A. These figures show columnar arrangements of the five white lead manufacturing plants in the National Lead Company, total weight in pounds shipped various cities throughout the United States, car load freight rates, l.c.l. freight rates, customer locations, extensions, and also
4051 car load freight rates from the manufacturing branch to the customer, total cost, l.c.l. freight rates from the manufacturing branch to the customer and extensions.

Q. And to what product does this document relate?

A. Dry white lead.

Trial Examiner Norwood: That is 215 he is talking about?

Mr. DuBose: 215-A and B, dry white lead.

By Mr. DuBose:

Q. Now, in the second column, the second column from the left under the heading "Weight in pounds," are certain figures and there is another column entitled "Customers Allocations." Do these weights include all the customers in that location or only a particular type of customer?

A. These figures apply only to the car load customer in that location.

Q. How did you determine who or what companies were car load customers and from what source did you obtain the weight in pounds?

A. We have records indicating the total shipments of dry white lead to our various customers throughout the United States.

Q. You say we have. Where are those records located, and what do they consist of?

A. 111 Broadway, a loose-leaf book arranged by
4052 states, and cities in these states.

Q. Is that in any particular department?

A. That is in the dry white lead selling department. From those records we were able to determine the car load customers and the l.c.l. customers.

Q. Now, do those records show the names of the customers?

A. Yes.

Q. Now, how do you determine who are the car load customers?

A. From information supplied to us by the dry white lead selling department. They went through the entire records and picked out the car load customers and distinguished them from the l.c.l. customers.

Q. And was it headed the dry white lead department?

A. It was.

Q. And did you sit down with anyone when you were seeking these customers?

A. I did, with the head of the dry white lead department.

Q. And those purport to be all of the car load customers for 1941 for all the branches of the National Lead Company, so far as dry white lead is concerned, for the year 1941?

A. Yes, sir.

Q. Now, the first column on the left is headed "Manufacturing Branch," and underneath that first entry, "Pacific Coast, Melrose, California." What does that mean?

A. The National Lead Company Pacific Coast
4053 Branch operating a plant at Melrose.

Q. Which manufactures dry white lead?

A. Dry white lead at that point.

Q. And do all of the items in the succeeding columns from left to right down to the name "St. Louis" apply to operations by the Melrose California plant?

A. Right.

Q. Now, take the first entry under the column "Weight in Pounds," and extending that over to the right under "Customers Location," "Town of Los Angeles, California," does that weight mean that that amount was sold from 1941 to car load customers in Los Angeles?

A. It does.

Q. The third column is entitled "l.c.l. rate, c.w.t."?

A. That represents the car load freight rate from the manufacturing branch to the selling branch.

Q. What is "c.w.t."?

A. Per hundred pounds.

Q. The fourth column is entitled "Selling branch," and underneath that all the way down there are certain names. What does that refer to?

A. That refers to the fact that the customer is located in the territory of that particular selling branch.

Q. In other words, first you have manufacturing
branches and then the selling branch, which actually
4054 handles the sale; is that correct?

A. Yes.

Q. In the fifth column, under the heading, "Cost", although there are not any entries under Melrose, there are under some of the other branches; will you tell us what that refers to?

A. That cost would have reference to the car load rate from the lead company manufacturing plant to the lead company selling plant, in this instance is the manufacturing branch which is the same as the selling branch. There is no entry in that column.

Q. Now, under the next column—withdrawn. The sixth column is headed, "l.c.l. rates, c.w.t." What does that refer to?

A. That refers to less than car load rate, from the selling branch to the customer.

Q. Now, you have already explained that the customer's location is the location of the car load. Under the eighth column, or rather the eighth column which is entitled, "Cost", and there are certain figures under that; what is that figure, what do those figures in that column represent?

A. Those figures represent the cost of l.c.l. shipments from the selling branch to the customer.

Q. And the next column is under the heading, "Total Cost." What does that total cost represent?

A. That total cost represents the cost of a shipment, car load rates, from the manufacturing branch to the selling branch and the l.c.l. rate from the selling branch to the customer's location. 4055

Q. Now, going over to the right two columns and several spaces above that, there is a heading, "M. F. G. Branch to customer." What does that refer to?

A. That refers to a shipment from the manufacturing branch directly to the customer at a car load rate.

Q. And underneath that are the two separate headings, "c.l. rate, c.w.t." and "total cost." What do they refer to, what do those headings represent?

A. c.l. rate per hundred pounds and the extension of the total weight should be in pounds by the car load freight rate.

Q. In other words, the rate is the car load rate from the manufacturing branch direct to the customer at his location?

A. That is right.

Q. And the total cost would be the car load rate times the number of pounds of dry white lead shipped from the manufacturing branch to the customer?

A. That is correct.

Q. Now, two columns over further is the general heading, "MF Branch to Customer," and underneath that subheading "l.c.l. rate and total cost." Will you tell us what those columns represent?

A. Those columns represent cost of shipping l.c.l. rate from the manufacturing plant directly to customer, and l.c.l. less than one hundred pounds, less than car loading rates applying from the manufacturing plant to the customer's location, plus the total pounds shipped to obtain the total cost. 4056

Q. Mr. Owens, you told us under the second column weight and pounds you obtained those figures from the records of the sales department of dry white lead at 111 Broadway; is that correct?

A. That is correct.

Q. From what source did you obtain the car load and l.c.l. rates?

A. Car load and l.c.l. rates were obtained from the National Lead Company Traffic Department.

Q. Under whose supervision were those rates prepared for you?

A. Mr. Werner, I believe.

Q. Now, are similar figures and shipments and calculations made for the St. Louis, Chicago, Atlantic, Perth Amboy, Philadelphia manufacturing branches of the National Lead contained on Respondents' Exhibit 215-A and B for identification?

A. Yes.

Q. And in each case the particular figures applicable to each manufacturing branch begin with the first entry opposite the name of the particular manufacturing branch?

A. That is correct.

Q. Now, I show you Respondents' Exhibit 215-B,
4057 for identification and the figures opposite the words
"Grand Total"; are they the summary of all other figures which appear on 215-A and B?

A. That is correct.

Q. In those columns?

A. Yes.

Q. So that there you have the grand total of the weight in pounds of dry white lead sold by the National Lead Company in all of its branches for carload customers in 1941; is that correct?

A. That is correct.

Q. And under the fourth column, or rather, the next figure opposite "Grand Total" is the total cost at carload rates shipped from the manufacturing branch to the selling branch; is that correct?

A. That is correct.

Q. Where that occurred?

A. Where that occurred.

Q. Then the next figure is the total cost, is it not, of the l.c.l. rate from the selling branch to the customer location where that occurred?

A. That is correct.

Q. And the next figure is the total cost of the last two items, or a summary of the total of the last two items?

A. That is correct.

4058 Q. Then the next figure opposite "Grand Total"
is the total cost at carload rates on direct shipments from the manufacturing branch to the customer; is that correct?

A. That is correct.

Q. And the final figure opposite "Grand Total" is the total cost on direct shipments from the manufacturing branch to the customer at the l.c.l. rate; is that correct?

A. That is correct.

Q. And down at the bottom of the page, on the left-hand side, opposite the heading or the notation "Manufacturing Branch to Selling Branch to Customer, l.c.l.," are certain figures. Now, the weight in pounds is the same as the grand total; is that correct?

A. That is correct.

Q. And the next figure represents the total cost of carload shipments through the selling branch and l.c.l. branch from the selling branch to the customer; is that correct?

A. That is correct.

Q. And the third figure is the cost per hundredweight; is that correct?

A. That is correct.

Q. Now, the next heading, or the next notation, that is, "Manufacturing Branch to Customer, l.c.l.," with the same total weight in pounds, is that correct?

A. Yes.

4059 Q. And the next figure represents the total cost of shipping that weight direct from the manufacturing branch to the customer and the carload rate?

A. That is correct.

Q. And the third figure represents that breakdown per hundred pounds?

A. Correct.

Q. And the last entry is the manufacturing branch to customer, l.c.l., with the same total weight in pounds; is that correct?

A. Correct.

Q. The next figure represents the cost of shipping that total weight directly from the manufacturing plant to the customer at the l.c.l. rate?

A. Correct.

Q. Now, the third entry is the mathematical cost per hundredweight?

A. Correct.

Q. Now, I show you Respondents' Exhibit 216 for identification, and I ask you generally what that purports to be?

A. On this sheet we have prepared figures for the years 1939, 1940, and 1941, which represent selling and admin-

istration expenditures of the Atlantic branch of the National Lead Company. In addition, we have the number of invoices which this branch processed during the years 1939 to 1941, and we have obtained an average cost per invoice. We have then made a comparison of the
4060 freight cost and invoice cost when the shipment moved directly from the manufacturing plant to the customer in carload quantities, to compare that with the same cost when the shipments moved from the manufacturing branch to the customer in less than carload quantities.

Q. In less than carload quantities in what particular quantities?

A. Carload of 20 tons while l.c.l. are quantities of 5 tons.

Q. What else does it show?

A. We also have a comparison of cost of freight and invoice cost, shipments from a manufacturing plant to a customer in carload quantities of 20 tons as compared to a freight and invoice cost of a manufacturing plant shipping to the selling branch in carload quantities and reshipping to the customer in l.c.l. quantities of five tons.

Q. Now, taking Respondents' Exhibit 216 for identification, the figures under the headings "Mfg. Br. to Customer, C. L.," manufacturing plant to customer, l.c.l., and manufacturing branch to selling branch, c.l., selling branch to customer, l.c.l., together with the representation of manufacturing to customer c.l.w., those were taken and were made up from the results reached on Respondents' Exhibit 215-B; is that correct?

A. That is correct.

Q. In other words, in the three categories that
4061 you have on 215-B, taking the total weight sold figured in the three methods, one carload to selling branch, l.c.l. to customer, second carload on direct shipment from the manufacturing branch to the customer, and the third, l.c.l. cost from the manufacturing branch direct to customer, are all reflected in this calculation which you made on a 20 and 5-ton basis, is that correct, on Exhibit 216?

A. That is correct.

Q. Now, in the middle of the page on the left, under Freight Cost and Invoice Cost, which are the figures showing the comparison between the cost of shipping 20 tons and 5 tons, manufacturing branch to customer, c.l. for 20 tons, manufacturing branch to customer l.c.l. for five tons, underneath that heading on the left is the pencil notation "Per Ton Cost," and the figures under "Manufacturing Branch to Customer," carloads with 20 tons, is the cost per ton of shipping direct from the manufacturing branch to the customer at the carload rate based upon the averages worked out on 215-A and B; is that correct?

A. That is correct.

Q. And the next figure to the right, showing manufacturing branch to customer, l.c.l., for five tons, shows the per ton cost of shipping per ton on an average of those figures in 215-A and B, plus the invoice cost for that particular shipment; is that correct?

A. That is correct.

4062 Q. Over on the right is the difference per ton, or the excess of the l.c.l. shipments for 5 tons per ton over the carload shipments for 20 tons; is that correct?

A. That is correct.

Q. And a similar study is made with respect to the per ton cost freight and invoice, with respect to shipments in a comparison of shipments of 20 tons direct from manufacturing branch to customer at carload rates and l.c.l. 5-ton shipments from manufacturing branch to selling branch at the carload rate and selling branch to customer at the l.c.l. rate; is that correct?

A. That is correct.

Q. Now, you have on Respondents' Exhibit 216 for identification, toward the top of that exhibit, and opposite the notation "Cost per invoice average," certain figures under the headings 1939, 1940, 1941. You have also above that a total figure for administrative expenses for those three years and selling expenses. Will you tell us what Respondents' Exhibit 217 for identification represents?

A. Exhibit 217 represents the total selling and administrative expenses for the Atlantic branch for the years 1939, 1940, and 1941, and the individual expenses account for the making up of the administration and selling expenses.

Q. Does it also show the total number of invoices entered by the Atlantic branch or processed by the At-
4063 lantic branch in those three years?

A. It does.

Q. And what did you take into account in setting up or picking out certain items that went into the total administrative account as well as the items which go under total selling expenses?

A. We have taken all the recognized expenses, administrative and selling, which go into the cost of doing business, taking them from the records of the United Branches for the years '39, '40, and '41.

Q. And you have divided the number of invoices for those particular years, 1939, 1940, and 1941, into the total administrative and selling expenditures to arrive at the cost for individual invoice?

A. That is correct.

Q. And the three figures in the lower right-hand corner of Respondents' Exhibit 217 are the figures showing the invoice cost figured in the manner you have just explained for the three years 1939, 1940, and 1941?

A. That is correct.

Q. That means that on the average, as you have there prepared it, the cost so much to prepare a single invoice, is that what that figure represents?

A. That is correct.

Q. Now, going back to Respondents' Exhibit 216
4064 for identification, toward the upper right-hand corner, opposite the words "Cost per invoice," the same figures which appear, are they not, at the bottom of Respondents' Exhibit 217; is that correct?

A. That is correct.

Q. On the later tabulation on Respondents' Exhibit 216 there is a figure representing invoice cost which is different from any one of the three figures representing cost per invoice under 1939, 1940, and 1941. What is that other figure?

A. We have averaged the invoice cost for the three years which gave us the average cost for the three years of $7.45 per unit.

Q. And that is a simple mathematical average. You added the three invoice costs, the unit cost for 1939, 1940, and 1941, and divided by three; is that correct?

A. Yes.

Q. Going back to Respondents' Exhibit 215-A for identification, Mr. Owens, under the sixth column entitled l.c.l. rate, cwt., are certain figures representing you explained the l.c.l. rate from selling branch to customer's location. Now, under the heading selling branch, will you take for example Cleveland, and the customer's location for that particular shipment is Cleveland, the same town. Now, the figure applicable to that is what, under the l.c.l. rate, cwt.?

A. Five cents per hundred.

Q. What does that mean? Is that the train l.c.l. rate?

4065 A. That is the lowest truck load rate. Throughout these computations we use 5 cents a hundred trucking rate in the same city limits.

Q. And so that where under this particular column the figure .05 is used, what you figured as the lowest truck load rate from the selling branch to the customer's location; is that correct?

A. That is correct.

Q. And the other figures thereunder are the rail l.c.l. rates from selling branch to customer's location; is that correct?

A. That is correct.

Mr. DuBose: May we go off the record a minute?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. DuBose: Back on the record. At this time I offer in evidence 215-A and B for identification, Respondents' Exhibits 216 for identification, and 217 for identification.

Mr. Wright: Well, Your Honor, I would like to have sufficient time to examine these very complicated documents before cross-examining Mr. Owens on them. I thought that we were reaching the tag-end. I didn't think we would run into an elaborate accounting job as this.

Trial Examiner Norwood: Do you want their records to come back tomorrow?

4066 Mr. Ewing: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: We will recess until 2:00 o'clock. The witness Owens will be back tomorrow morning at 9:00 o'clock.

(Whereupon, at 12:00 o'clock noon a recess was taken until 2:00 o'clock p. m., of the same day.)

4067 Afternoon Session.

2:00 p.m.

Trial Examiner Norwood: The hearing will come to order.

Mr. Wright: What is the Commission's next exhibit number?

Trial Examiner Norwood: 860 is the last I have.

Mr. Wright: I'd like to ask that these be marked as Commission's Exhibits 861-A and sub numbers; and that these be marked Commission's Exhibits 862-A and sub numbers; and that this one be marked Commission's Exhibit 863.

(The documents referred to marked Commission's Exhibits No. 861-A through G; 862-A through O; and 863, for identification.)

Mr. Wright: Your Honor, yesterday there was admitted into evidence Respondents' Exhibit 154-A through F through the witness Tibbets who produced as the basic data from which 154-A to 154-I was compiled a quantity of—

Trial Examiner Norwood: Wait a minute. That was one of the exhibits that wasn't received.

Mr. DuBose: Yes, sir, that was received.

Mr. Wright: That was in evidence after page 4000 according to the transcript.

Trial Examiner Norwood: All right. I just omitted to put it down here.

4068 Mr. Wright: Yes, sir.

Trial Examiner Norwood: Go ahead.

Mr. Wright: The basic data from which that exhibit was compiled was supplied to me by counsel for the National Lead Company, and I would like to ask the counsel for the National Lead Company to stipulate on the record that Commission's Exhibit 861-A through G is a true copy of the price cards on dry white lead, basic lead sulphate from a period beginning on December 30, 1932 running down to May 11, 1942.

Mr. DuBose: I so stipulate.

Mr. Wright: I would like to ask counsel for the National Lead Company to agree that Commission's Exhibit 862-A through O are copies of price cards of the National Lead Company on lead oxides or litharge, dry red lead, and orange mineral running from May 31, 1933 through

January 14, 1942 as supplied in support of Respondents' Exhibit 154 and sub numbers.

Mr. DuBose: I so stipulate.

Mr. Wright: I would like to ask counsel to identify Commission's Exhibit 863 as photostatic copies of various price lists on white lead published by the Atlantic Branch and the Boston branch of the National Lead Company as of March 1, 1937.

Mr. DuBose: I will so stipulate, with the statement that I assume that the handwritten material on one of
4069 these price cards is part of the exhibit.

Mr. Wright: Well, I will say that all of the handwritten material that might appear on all of these things was on them as they were supplied by the National Lead Company, presumably as part of all the exhibits.

Mr. DuBose: Then I so stipulate.

Mr. Wright: Now, I would like to offer Commission's Exhibits 861, 862 and 863 with the various sub numbers in evidence.

Mr. DuBose: No objection.

Trial Examiner Norwood: Received.

(The documents referred to, previously marked for identification, received in evidence as COMMISSION'S EXHIBITS NO. 861-A through G, 862-A through O, and 863.)

Mr. Wright: May we take a short recess?

Mr. DuBose: A three-minute recess?

Trial Examiner Norwood: All right.

(At 2:40 p.m. a brief recess was taken.)

Mr. Welch: Your Honor, we have a short stipulation.

Trial Examiner Norwood: Go ahead.

Mr. Welch: It is hereby stipulated and agreed by and between counsel for the Federal Trade Commission and counsel for Sherwin-Williams that if S. B. Coolidge were recalled as a witness in this proceeding he would testify that the testimony which he gave at a hearing held in
4070 Cleveland, Ohio, on July 25, 1946, and which appears
at pages 1311-1333 of the record and the statement of Sherwin Williams' counsel at pages 1529-1530 of the record did not fully and correctly state the freight policy of the Sherwin Williams Company as to lead products involved in this proceeding, and if he were further questioned as to Sherwin Williams' freight policy for such products his testimony with respect thereto would be the same as the testimony of H. C. Lemke, who testified in this

proceeding on October 16th and 17th, 1947, and he would adopt such testimony in toto as his own.

He would also testify that the lead products sold by Sherwin Williams on the Pacific Coast are purchased by it from W. P. Fuller & Company and from Premier Paint and Color Works, who manufacture such products on the Pacific Coast, and that shipments of such products from Chicago to the Pacific Coast area are made only when such products may be included in isolated car load shipments of paint products to the Pacific Northwest Coast Area.

He would also testify that Sherwin Williams does not manufacture, and for at least 20 years has not manufactured, red lead or litharge for use by battery manufacturing industries.

It is further agreed that for the purposes of this proceeding it shall be considered that S. B. Coolidge has appeared and has testified to the foregoing effect.

4071 Now, it is my understanding that Mr. Wright agrees to that stipulation with a modification—not a modification, but an additional statement which he will want to tender and to which I will agree.

Mr. Wright: I want the record to show that I will so stipulate with the following proviso, that as to the business of the Sherwin Williams Company on the Pacific Coast, that it is agreed by counsel in the proceeding that I may have the right to request a reopening for the purpose of producing evidence or testimony on that point alone and for that limited purpose, within a period of two weeks from today, on proper notice given to all parties. With that provision, I am willing to stipulate and agree as stated by Mr. Welch.

Mr. Welch: And I agree to the provision.

Mr. Wright: I would like further to add that as a part of this, it is understood by counsel that the time within which I have to give notice to counsel of a reopening for the limited purpose stated won't operate to hold up any other phase of the matter, and that for all other intents and purposes the record may be closed prior to that time.

Trial Examiner Norwood: Yes. That is understood.

Mr. Ewing: While we are waiting for those documents, I think I can make a statement now for the record with respect to Mr. Rowe.

4072 Mr. Harold Rowe, a Vice President of National Lead Company, who has heretofore testified in this proceeding as a witness called by the Commission, suffered a stroke on March 24, 1947, and since that date has been confined to his home without the power of speech. Mr. Rowe, had he not been so stricken at that time, which was shortly prior to the time the respondents' case began to go in, would have been called as a witness for the respondent National Lead, but for that reason he cannot be recalled. And it is my understanding that that statement of fact is accepted by counsel for the Commission and that under those circumstances it is unnecessary for me to call Mr. Rowe's physician to so testify.

Trial Examiner Norwood: Yes.

Mr. Wright: I am perfectly agreeable to that statement without any inferences that might arise from it. I am willing to agree that Mr. Rowe is so incapacitated and that he might have been called.

Mr. Wood: I would like to make a statement.

Trial Examiner Norwood: Go ahead.

Mr. Wood: I would like to state for the record that Mr. A. E. Bendelari, who was President of the Eagle-Picher Company approximately during the time of the NRA, and whose name appears on various documents, is still alive but living in retirement outside of Lexington, Kentucky. He has a bad heart condition and does
4073 not have a clear memory of all of the events in question.

I would also like to state that Mr. R. M. Roosevelt, who was a vice president of the Eagle-Picher at that time, has not been connected with the company since 1937 and is now living in Connecticut, but he is totally disabled.

Mr. Wright: I have no objection to counsel's statement.

Trial Examiner Norwood: Any further statements?

Mr. Wright: May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: It is stipulated and agreed by and between counsel herein, that, subject to the approval of the Commission, the requirements of Rule 20 (A) and (B) of the Rules of Practice of the Federal Trade Commission to the contrary notwithstanding, motions for reconsideration and reversal of rulings of the trial examiner admitting or excluding testimony or evidence, and appeals to the Commission from such rulings shall be made to the Commission at the time of briefing and arguing the case to the Commission on the merits, and that no party shall be deemed

thereby to have waived any objection or any exception to such ruling or right to urge such objection or exception to the Commission at the time of argument on the merits. It is expressly understood that the purpose of this stipulation is to expedite the determination of this matter
4074 before the trial examiner and the Commission.

As I understand it, all of counsel who are here representing all of the respondents, except the respondent Glidden Company, are in agreement with that, and that we have word that counsel for Glidden is willing to go along with that, and that if he has any objection to it that he will let us know at some time during the hearing tomorrow, and that in the meantime other counsel will contact him for that purpose.

Is that understanding satisfactory to counsel?

Mr. Welch: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: I am also advised that while counsel for the Anaconda and International is not objecting at this time to the stipulation, that he wishes to reserve his final decision on the matter until the hearing tomorrow.

Trial Examiner Norwood: No objection to that statement from counsel present?

Mr. Ewing: None at all.

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: I will transmit a copy of the record with this statement to the Commission as soon as I return to Washington, pointing out that it is an agreement
4075 between counsel for the purpose of expediting the
matter, and will request them to notify counsel whether or not the proposed procedure is acceptable.

Mr. DuBose; Off the record.

(Discussion off the record.)

Mr. Welch: Mr. Examiner, I would like to offer in evidence Respondents' Exhibits 201, 202, 203, 204, which have previously been marked for identification. The offer here was delayed pending Mr. Wright's checking the identification, in view of the fact that the documents were originally identified as Commission's Exhibits for identification 554, 555, 556, and 557.

Mr. Wright: May I ask counsel where that ruling was made—off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: Well, Your Honor, may I request a reservation of the ruling on that application until the first thing in the morning?

Trial Examiner Norwood: Yes.

Mr. Wright: May I have custody of these documents until morning?

Mr. Welch: Yes. I would like to have the following documents marked with the next succeeding respond-
4076 ents' numbers.

Trial Examiner Norwood: 218, is that right, Mr. DuBose?

Mr. DuBose: That is correct.

(The documents referred to were marked Respondents' Exhibits 218, 219, 220, 223, 224, 225, 226 and 227 for identification.)

Mr. Welch: Respondents' Exhibits 218 through 227 for identification are offered in evidence, and I will ask the Examiner to reserve the ruling until tomorrow morning, after Mr. Wright has had an opportunity to examine the documents.

Trial Examiner Norwood: The ruling is reserved.

Mr. Wright: I want to state for the record that I have requested counsel for the National Lead Company to produce original minutes books of the Executive Committee of the Board of Directors of the National Lead Company, and that by agreement I am going to read into the record a portion of those minutes which I understand counsel are willing to stipulate into the record with the same effect as if the secretary of the company were called as a witness and identified same.

Mr. Ewing: That is correct.

Mr. Wright: The minutes of meeting of the Executive Committee held December 7, 1933, Present: Messrs. Beale, Beschorman, Carter, Cornish, Rockwell, Sidford and Thompson. The last paragraph of the minutes of
4077 that meeting is as follows:

"Resolved, that effective January 1, 1934, the price and terms of sale of dry white lead and basic lead sulphate in barrels be and they hereby are established as follows: In 20 ton lots, delivered either by rail in one shipment or by truck within three days in more than one shipment, dry white lead, 6½ cents per pound, basic lead sulphate, 6 cents per pound; in less than 20 ton lots, dry white lead, 6¾ cents per pound, basic lead sulphate, 6¼ cents per pound; terms, 30 days net, with discount of 1 per cent for payment within ten days; all sales to conform to such uniform conditions of sale as may from time to time be established pursuant to Article II of the Supplementary Code of Fair Competition for Lead Pigments Division of Lead Industries Association" and that said minute is signed by M. D. Cole, Secretary.

Trial Examiner Norwood: Is that stipulated in evidence—is that it?

Mr. Ewing: That's right.

Trial Examiner Norwood: Anything further?

Mr. Ewing: No, sir. I move that we adjourn.

Trial Examiner Norwood: Does counsel wish to reconvene at 9:00 or 10:00 tomorrow morning?

Mr. DuBose: At 10:00 o'clock, I think, Your Honor.

Trial Examiner Norwood: Inasmuch as the witness Owens will not be here?

4078 Mr. DuBose: Yes, sir.

Trial Examiner Norwood: If he is expecting to be here, someone should notify him.

Mr. DuBose: I shall see him.

(Whereupon, at 4:00 p.m. the hearing was adjourned to November 14, 1947, at 10:00 a.m.)

4079 Trial Room No. 10,
Bar Association Building,
42 West 44th Street,
New York, N. Y.,
Friday, November 14, 1947.

Met, pursuant to adjournment, at 10:00 a.m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

Edmund P. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Robert H. Ecker, Esq., and
Henry E. Gardiner, Esq., (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.) appearing for Anacanda Copper Mining Company and International Smelting and Refining Company.

James D. Ewing, Esq., and
E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

4080 J. T. Welch, Esq., (Davies, Richberg, Beebe, Busick & Richardson, 815 Fifteenth Street, Northwest, Washington, D. C.), appearing for Sherwin Williams Company.

Roger Hinds, Esq., (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

P. J. McDowell, Esq., Midland Building, Cleveland, Ohio, appearing for Sherwin Williams Company.

4081

PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on yesterday, the hearing in Docket No. 5253 is reconvened in Room 10, Bar Association Building, at 42 West 44th Street, New York, N. Y., at 10:00 o'clock a.m., on November 14, 1947.

Please enter the appearances. Note that Mr. Worth Vaughan of general counsel for American Smelting and Refining is appearing especially today with us.

Call your witness.

Mr. Ewing: Mr. Brownell.

Whereupon,

FRANCIS HERBERT BROWNELL, a witness called on behalf of the respondent, after having been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Ewing.

Q. Mr. Brownell, you are presently connected with American Smelting & Refining Company?

A. I am.

Q. In what capacity?

A. I am a director of—a director and chairman of the finance committee.

4082 Q. Will you tell us when you first became connected with the American Smelting & Refining Company?

A. Back in 1912, I was then living in Seattle, Washington, and I then became counsel for the American Smelting & Refining Company in some of their western enterprises, and gradually took over the litigation or all of the legal affairs of the plants situate west of the Mississippi River.

Q. Subsequent to that time did you come to New York?

A. Late in 1916 I came to New York and became vice president and general counsel which I remained. In 1919 I was made chairman of the finance committee and began to take over executive functions. And in 1921 I gave up the general counselship entirely and even the name, and became first vice president, the second executive officer of the company. And I remained that until 1941, when Senator Guggenheim died, and I became head of the company until this last election last April, when I was eighty years old, and I retired.

Q. Prior to your retirement, when you say you were the head of the company, was your position chairman of the board?

A. Yes.

Q. Now, Mr. Brownell, we subpoenaed you to attend at this hearing, didn't we?

A. I beg your pardon?

Q. We subpoenaed you to attend this hearing?

A. Yes.

Q. I show you a photostatic copy of a document 4083 which is marked as Commission's Exhibit 93-A, dated February 26, 1906, and ask you whether you are familiar with it?

(Document handed to witness.)

A. Yes, I was at a later date. I was not at all familiar with the origin of the contract, which was before I was connected with the company. In 1921, at the time of its expiration, I had a great deal to do with it and had occasion to go over it very fully.

Q. At the time of its expiration in 1921, that you just referred to, was any attempt made to renew it?

A. Yes.

Q. And did you have anything to do with it at that time?

A. I had charge of that subject.

Q. Did you see anybody in National Lead Company in connection with it?

A. Yes, I saw the head of the company, Judge Cornish.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Ewing: That is Exhibit 93-A through I.

Trial Examiner Norwood: Just so we have that.

By Mr. Ewing:

Q. Was the contract renewed?

A. It was not.

Q. Was the failure to renew it due to Mr. Cornish?

A. Yes.

4084 Q. Do you know why he would not renew it?

A. For the reasons that he expressed to me at the time.

Q. Will you tell us what they were?

A. Judge Cornish said that necessarily the two companies would have to deal together because we were at the time—we had more lead for sale than any other company in the United States, and on the other hand, they claimed that they were the largest consumer of lead in the United States. He said, "There isn't enough lead to supply the National Lead's demands unless we buy from the A.S.&R.,

and there aren't enough consumers to use all of the A.S.&R. production unless the National Lead takes some of it. Necessarily we have to deal together."

Now, he, Judge Cornish, I should say, saw no reason why there should be the contract. On the other hand, he thought that the contract, while he had no particular criticism of the past contract, was perhaps at times stifling. He said, "We do not want to be"—we, the National Lead—"do not want to be bound by a certain amount from you to some extent, that handicaps our ability to buy perhaps at the lowest price, which is our ultimate objective, and on that account we feel that it is wiser for us not to be bound to take any specific amount."

I say, "We," I am indirect. I am saying to say what Judge Cornish said.

Trial Examiner Norwood: Yes.

4085 Mr. Ewing: Yes, we understand.

I ask that this photostat be marked Respondent's Exhibit 228.

(Document referred to was marked Respondent's Exhibit No. 228 for identification.)

By Mr. Ewing:

Q. I show you this photostat, Mr. Brownell, and ask you whether you executed the original on behalf of the American Smelting & Refining?

A. I did, and I had this photograph taken of it just the other day. That is my signature (indicating) and that is the agreement Judge Cornish and I formally agreed to execute at the conclusion of the contract in 1906.

Mr. Ewing: I offer Respondent's Exhibit 228 in evidence.

Mr. Wright: No objection.

Trial Examiner Norwood: Received as marked.

(RESPONDENT'S EXHIBIT NO. 228, previously marked for identification, was received in evidence.)

By Mr. Ewing:

Q. Since 1921, when the 1906 contract with National Lead terminated, has National Lead continued to purchase pig lead for American Smelting?

A. It has.

Q. Generally on what basis?

4086 A. Generally on what we call our sixty-day contract, also on what we call our average price contract.

The American Smelting & Refining Company will only sell lead to a delivery in the calendar month succeeding the date of the contract, because we must know what our tonnage is coming out of the refineries and what we will have available for delivery.

If National Lead made a contract, for example, on the first day of November, it might extend for delivery to the 31st day of December, but if they made a contract on the 30th day of November, likewise, it would have to expire on the 31st day of December. The delivery cannot exceed 30 days and may go as high as 60 days, depending upon the date of the contract in the calendar month.

The average price contract is a contract that is made for delivery within the same period, but it is not based on a specific price like the individual contract which specifies a given price of the lead. The average price would be the average of the A. S. & R.'s quotation for lead during the month in which the delivery is to be made.

Q. I show you a document which has been marked Commission's Exhibit 113 in evidence and ask you if that is an average contract of the kind that you have referred to?

(Document handed to witness.)

A. Yes, this is the average price contract.

Q. Will you tell us, Mr. Brownell, whether to your
4087 knowledge any official of the National ever attempted to influence American Smelting & Refining in setting its pig lead prices?

A. Yes and no. The National Lead Company's man who has charge of their buying comes to our man who has charge of the selling, and he always tried to get as low a price as he could for his lead—naturally—the usual buyer-seller relationship. So far as any official of the National Lead Company coming to me at any time or to any other officer of the company that I know of to speak of the general price of lead, irrespective of a particular individual contract, no. That has never happened.

Q. That is what I had in mind, the general price of lead.

A. No.

Trial Examiner Norwood: Those were bargaining agreements?

The Witness: I beg your pardon?

Trial Examiner Norwood: They were bargaining agreements?

The Witness: Bargaining agreements on individual contracts.

By Mr. Ewing:

Q. American Smelting & Refining publishes its lead quotations?

A. Yes.

Q. And those quotations are fixed by American Smelting & Refining?

A. Yes.

4088-A Q. And if I understood your prior answer with respect to those quotations, no National official attempted ever to influence any American Smelting official?

A. No.

Q. Will you tell us how American Smelting & Refining establishes its quotations on lead?

A. Most of the lead which the American Smelting & Refining has of United States origin is purchased lead, it is purchased in the form of ore or concentrates from the mines. Perhaps approximately 80 to 90 per cent of our lead originates in that way. Now, each day we publish a quotation on which we buy, and that is the price on which we sell on the same day. So far as it is humanly possible, and it is not of course practically impossible, we try to sell every day what we buy that day.

Trial Examiner Norwood: You don't buy the pig lead in its finished form, do you?

The Witness: No.

Trial Examiner Norwood: In the ore?

The Witness: In the ore and in the concentrates and consolidated concentration of ore that arrives at the smelter in carload lots, as a rule. And then a sample is assayed, and the lead content and the content of other metals, if any, are ascertained, and we pay the miner for the lead as soon as the assays are completed, on the price of the day 4088-B of the arrival or the day of the agreement on assaying, whichever the contract may happen to provide. Now, in the case of lead, it takes approximately 60 days between the time of arrival of the ores and concentrates at a smelter and the time that we have it smelted and the product of the smelter refined and actually available for sale in commercial form. The price may vary during all that time, in that 60 days, and that is why we try to sell every day what we buy that day.

In order to be able to do so, we accumulate or did accumulate and have on hand constantly a source of lead or an amount of lead equal to that which is normally in process for this 60-day period. It is a reservoir, and we try to sell at the outgoing end of that reservoir every day an amount of lead equal to what comes in at the incoming end.

We are in a sort of dual position. We are trustee for the miner, in a sense, in getting the highest price that we can for his lead; on the other hand, we have to properly represent the market. And that is the object of our quotation.

Mr. Ewing: I have no further questions.

Cross-Examination by Mr. Wright.

Q. These two types of contracts that were mentioned, Mr. Brownell, the fixed-price contract—

4089 A. Yes.

Q. —is that the price of the prevailing spot quotation on the date on which the contract is entered into?

A. As a rule, yes. I think uniformly on a specific contract.

Q. By that contract, then, you undertake to supply lead, under the contract, at that spot price during the period it is in force?

A. No. Maybe I don't understand you. There are two types of contracts, the average-price contract, which is for a specific tonnage of lead, a thousand tons, 500 tons, 2,000 tons, whatever it may be, to be delivered during a given month and to be paid for at the average price of lead for the month of the delivery, based on the A.S.&R. quotation for lead for that month; now, the other contract is for, say, 500 tons or 100 tons, as the case may be, at, we will say, 6½ cents, or today, 15 cents per pound. It is the price on the day of the agreement.

Q. That is really a spot transaction?

A. A spot transaction except that the delivery is 30 days in the next succeeding month.

Q. But it could cover the same tonnage, a large tonnage, to be delivered at various times over the succeeding—

A. Yes, that could be done, too.

Q. Now, on this average price in the contract, how is the average price calculated; is that simply an arithmetical division of the quotations during the month? 4090

A. Yes. There are 25 business days. The price of lead on each one of those days that there are in that month

—if there are 25, it would be divided by 25, and that would give the average.

Q. You spoke of the American Smelting & Refining Company being one of the largest sellers of lead. Approximately, Mr. Brownell, in 1941, when you retired, what was the percentage position of the smelting company on its refining capacity in the United States?

A. Well, the largest mine production of lead during this entire period of which we are speaking, since 1921, has been that of St. Joseph Lead Company. That is the biggest individual mine. I imagine the Bunker Hill—I haven't looked it up to be accurate, but my impression would be that the Bunker Hill is about the second mine. The intake of lead of the A. S. & R. is that of almost all the other mines. Not Eagle-Picher; they have their own smelter. Bunker Hill has its smelter. We have smelters, lead smelters, at East Helena, at Selby, which is on San Francisco Bay, at El Paso, Texas; at Leadville, Colorado; at Murray, Utah; and at Federal, which is in East St. Louis, near Alton, I believe within the limits of Alton in Illinois. We have those bed smelters. And their tonnage takes in the tonnage, oh, I presume, of four or five hundred little mines scattered
4091 all around, no one of which amounts to very much.

Now, the total output of the American Smelting & Refining, and this will be confined at the moment to the United States production, and excluding any foreign production, because we handle almost as much foreign, and at times more foreign, production than we do with United States production. The United States production in 1921, I think, our production, total production, was in excess of St. Joe, except very seldom, once in a while, they might exceed us, where a strike had occurred or some incident had occurred to reduce the production of a certain group of large mines.

Today it is in and out. For about, I think, about three or four months St. Joe production is ahead of our production. More of the time our production is ahead of theirs. It is pretty nearly even.

Q. When you add your domestic smelting and refining capacity to your processing of foreign ores and concentrated—

A. We are way up above—we would have, taking our world production—we have smelters in Mexico as well as in the United States, and taking our world production we are the largest producer of lead in the world, individual producer of lead in the world.

Trial Examiner Norwood: Would you estimate the percentage of world lead which American Smelting handles?

The Witness: I would hesitate to make a state-

4092 ment of percentage. I can send you the percentage. I happened, in another connection, to look up our percentage of lead for 1932-1940, not so long ago, but I am a little hazy on the percentages, and I wouldn't dare state the percentages.

By Mr. Wright:

Q. Mr. Brownell, do the so-called lead pigments—now, that would be white lead, both the sulphate and carbonate, red lead, litharge, and the battery oxides, do they account for a substantial portion of the lead consumption in the United States?

A. Yes, they do still. They used to do so much more than at the present time. At the present time, white lead, for example, has been very greatly reduced, largely because during the war the Government restricted the use of white lead.

You see, during the war, from 1942, shortly after some time in the spring or the summer of 1942, as soon as we got going, until some time in the spring of 1946, we had nothing to do about where we sold at all, and for that matter we had nothing to say about the price, in this sense, that there was a ceiling placed on the price. The demand would have paid for double the ceiling very easily, but we all sold at the ceiling, and the Government told us whom to sell to. They issued allocation certificates to National Lead and to the other defendants here, and we had to supply them. We had nothing to say about it.

4093 Q. In the period up to 1941, just prior to the war, wasn't there an increasing consumption, particularly on the battery oxides?

A. Yes.

Q. Due to the development of the automobile industry?

A. Yes, and the internal combustion engine generally.

Mr. Wright: I have no further examination.

Mr. Ewing: Nothing further.

Trial Examiner Norwood: What is your best estimate about the world percentage there during the years you mentioned?

The Witness: Well, of course, the world percentage varies in any given year. I should say that we produced somewhere between 30 and 40 percent of the total world production.

Trial Examiner Norwood: Thank you.

Any further question?

Mr. Ewing: No further questions.

Trial Examiner Norwood: Thank you, Mr. Brownell.

(Witness excused.)

Mr. Ewing: May we have a short recess?

Trial Examiner Norwood: All right; a five-minute recess.

(A short recess was taken.)

Mr. DuBose: Please mark these for identification.

(Documents referred to marked Respondent's Ex-
4094 hibits Nos. 229-305, A to D, for identification.)

Mr. DuBose: Mark these.

Trial Examiner Norwood: All right.

(Documents referred to marked Respondent's Exhibits Nos. 306-A and B, 307-A and B, and 308-A, B, and C, for identification.)

Mr. Wright: Now, that is Commission's Exhibit 864 and 865-A, B, C, D, and E.

Trial Examiner Norwood: All right, A through E.

Mr. Wright: Yes, sir.

(Documents referred to marked Commission's Exhibits Nos. 864 and 865 A through E for identification.)

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Ewing: With respect to the stipulation read into the record yesterday relating to Rule 20, Mr. Hinds has advised me that that stipulation is satisfactory to him, and I understand that Mr. Gardiner finds it satisfactory to him, so that that is clear.

Trial Examiner Norwood: Mr. Gardiner is present?

Mr. Gardiner: Yes, your Honor.

Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Ewing: By agreement among counsel, I now
4095 offer in evidence Respondent's Exhibits 306-A and
B, 307-A and B, 308-A, B, and C, which will be identified more fully in a stipulation which will shortly be read into the record.

Mr. Wright: No objection.

Trial Examiner Norwood: Received.

(Documents referred to, previously marked for identification, were received in evidence as RESPONDENT'S EXHIBITS NOS. 306-A and B, 307-A and B, 308-A, B, and C.)

Mr. Wright: Your Honor, I want to offer in evidence Commission's Exhibits Nos. 864 and 865-A through E, by agreement of counsel, which documents will likewise be further described in the ensuing stipulation.

Trial Examiner Norwood: They are received.

(Documents referred to, previously marked for identification, were received in evidence as COMMISSION'S EXHIBITS NOS. 864 and 865, A through E.)

Mr. Wright: Now, I want to read into the record an agreed statement that has been worked out by counsel as follows:

It is hereby stipulated and agreed that if a representative of the Department of Purchases of the City of Cincinnati were called to testify, he would testify that for the years 1932 to 1944, inclusive, bids were received by that Department for basic carbonate white lead for purchase by the City of Cincinnati as set forth in the document marked as Commission's Exhibit 864.

4096 It is further stipulated and agreed that if a representative from the Milwaukee Board of Purchases were called to testify, he would testify that bids were made to the City of Milwaukee, Wisconsin, for purchases by the City of Milwaukee of white lead in oil as set forth in the document marked as Commission's Exhibit 865-A through E.

It is further stipulated and agreed that if a representative from the United States Treasury Department, United States Navy Department, and the Panama Canal Zone were called to testify, they would testify that during the years 1939, 1940, and 1941 bids were made as set forth in Respondent's Exhibit 306-A and B, 307-A and B, and 308-A, B, and C.

It is further stipulated that, as they may appear in said exhibits, the name Mammolith is a trade name of the Respondent Glidden Company; J. Lucas & Company is owned by the Sherwin Williams Company; the letters E-P, capital letters in quotes refer to Respondent Eagle-Picher Company; the letters S-W, capital letters in quotes, refer to respondent Sherwin Williams Company; that Hammar refers to a brand name of the Respondent Eagle-Picher Company; and that Acme White Lead and Color Works is owned by Respondent Sherwin Williams Company.

The City of Cincinnati, referred to above, is the City of Cincinnati, Ohio.

Now, is it my understanding that all counsel are 4097 agreed on that matter as has been stated?

Mr. Ewing: That is correct.

Mr. Wright: I understand, Mr. Ewing, that you cleared this matter with Mr. Hinds?

Mr. Ewing: I am authorized to represent him on that matter.

Trial Examiner Norwood: Any disagreement on that among counsel?

There are none; proceed.

May we take up this matter of those exhibits on which the ruling was deferred until today, or such of them as counsel are prepared—

Mr. Ewing: That refers to the reserved rulings that were made yesterday—

Trial Examiner Norwood: Are you prepared to take a position on them, 201 through 227?

Mr. Welch: No, sir, it is not inclusive. It is 201 through 204, inclusive.

Trial Examiner Norwood: Yes.

Mr. Welch: And then 218 through 227.

Trial Examiner Norwood: Let's take those.

Mr. Wright: I want to state, your Honor, that all of these papers offered to be copies of documents which were submitted to the Commission under subpoena duces tecum by the National Lead Company in the very 4098 early stages of this proceeding and were given identification numbers at the time to keep the documents which were brought in under that subpoena, the many documents, in order. They obviously have no relevance to any issue in the case. They are, practically all of them, inter-office communications between the main office and the various branches of the National Lead Company about matters of purely internal policy, as to whether a particular freight rate was involved, and billing for the company's transportation of white lead to itself at another town, as I understand the transaction, which can have absolutely nothing to do with the question of price fixing or with the question of discrimination.

Now, the series of exhibits running from 218 through 227 are in that category.

Mr. Welch: Mr. Wright, may I ask you a question. Are you correct in your statement that the billing is from National to National? They are sales by National to Sherwin Williams, as I understand it.

Mr. Wright: Well, I was referring to exhibits 218 through 222.

Mr. Welch: Yes.

Mr. Wright: There are two separate series of papers which refer to whether or not the proper freight rates
in shipping dry white lead to Dallas was the maxi-
4099 mum carload rate of 77 cents a hundred or the mini-
mum rate of 64 cents per hundred and whether or not
there was any claim involved with the Railroad if the wrong rate had been paid. And that is something that has absolutely nothing to do with the case or with any conceivable issue in the case.

Trial Examiner Norwood: They are respondent's Exhibits 201 through 204?

Mr. Wright: Yes, 201 through 204 are inter-branch correspondence between the Chicago branch of the National Lead Company and the Pacific Coast branch of the National Lead Company and the home office.

Trial Examiner Norwood: Yes?

Mr. Wright: Relating in the period—in the first quarter of 1942, at a time when, I might remind your Honor, when we were at war and ceilings had been imposed and normal conditions no longer prevailed in this business, as the record shows, and as to whether or not they were going to sell Sherwin Williams some white lead. There is a spot in here as to what the Sherwin Williams plans might have been as to merchandising.

What relevance does that have? It does not go to any issue in the case.

Trial Examiner Norwood: Does counsel object to the receipt of these documents in evidence?

Mr. Wright: Yes, that was the meaning of my
4100 statement.

Trial Examiner Norwood: I will ask Mr. Welch to take up 201 through 204 and give us his position on it and the purpose for which they are offered. I think he stated that heretofore.

Mr. Welch: I think I have; and I will try to be as brief as possible.

We have been charged with conspiracy. This correspondence shows that Sherwin Williams attempted to obtain some white lead in oil from National and that National had a series of letters between the Chicago branch office and the main office and decided not to sell Sherwin Williams the lead, and gave their reason for it. I would like to state that off the record because I don't think it is fair to put it on the record unless you admit the exhibits.

Trial Examiner Norwood: I will look at the exhibits.

Mr. Wright: I would like to remind your Honor of the date of the correspondence as to whether or not it is pertinent to this matter.

Mr. Welch: Your Honor, I think that a statement of that character by that organization as to what their attitude was toward Sherwin Williams has some weight and some bearing on the question of conspiracy between the two companies, and that is the purpose for which the documents are offered.

Trial Examiner Norwood: It shows their com-
4101 petitive attitude?

Yes, I think that I shall overrule the objection and receive them.

Mr. Welch: 201 to 204 inclusive.

Trial Examiner Norwood: That's right, received, Respondent's Exhibits 201 through 204.

(Documents referred to, previously marked for identification, were received in evidence as RESPONDENT'S EXHIBITS NOS. 201 through 204.)

Mr. Welch: Now, then with respect to Respondent's Exhibits 218 through 227, inclusive, contrary to Mr. Wright's statement, this involves purchases of lead, dry white lead, by Sherwin Williams from National Lead Company and the controversy between the two over the right freight rate and the amount that was to be charged Sherwin Williams in connection therewith.

Mr. Wright: Where does it say that in the exhibits?

Mr. Welch: Right here (indicating).

Now, your Honor, this, as I said before, concerns the discussion between Sherwin Williams and the National Lead on the question of the applicability of a freight rate. As a matter of fact, the wrong freight rate had been applied, and National had paid the right rates, and the Sherwin Williams attempted to get some of the benefits of that, and National, in effect, states, "Nothing doing."

4102 Mr. Wright: I object very strenuously to counsel's characterization of those exhibits into that effect.

Trial Examiner Norwood: Counsel's statements are not evidence.

Mr. Welch: We have been relying on that for some time.

Trial Examiner Norwood: Now, this reflects the attitude of one competitor to another here?

Mr. Wright: No, sir.

Mr. Welch: Your Honor, in that particular situation we were not competitors, Sherwin Williams was buying from National. In that particular instance it was seller and customer relationship, rather than a competitive one, at that level.

Mr. Wright: I assume from the correspondence that the price was a delivered price and that it was shipped freight collect, and for that reason an improper allowance had been made on the invoice for freight.

Mr. Welch: No, there was no allowance at all.

Trial Examiner Norwood: Does it show a more or less hostile attitude or just what?

(Discussion off the record.)

Trial Examiner Norwood: I will sustain the objection to the exhibits 218 through 227.

Mr. Welch: Now, Mr. Wright, I would like for 4103 you to stipulate that on Commission's Exhibits 794-Z-9-Z-12 and 791-B-S, that the rates therein depicted are rail rates and not truck rates. Those are Commission's Exhibits.

Mr. Wright: I have never had this called to my attention before, so I am going to have to take a few minutes.

Mr. Welch: Let me make my proposal and you act on it when you are in Washington.

One other proposal: I propose to stipulate that Commission's Exhibit 791-E erroneously lists a city known as Richmond, Indiana, and that it should be Richmond, Virginia; the City of Richmond, Virginia, appearing on other exhibits under the same basic number, 791.

Mr. Wright: I will be very glad to take those matters up.

Mr. Welch: Mr. Lewis, will you take the stand, please?

Whereupon,

CARL M. LEWIS, called as a witness on behalf of the Respondent, having been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Welch:

Q. Mr. Lewis, by whom are you employed?
A. Sherwin Williams Company.
Q. How long have you been employed by that concern?
4104 A. 28 years.
Q. In what capacity are you now employed?
A. Division sales manager.
Q. In what division?
A. In what is known as the Newark division.
Q. How long have you been division sales manager?
A. In Newark since 1936; and from 1932 to 1936 in Albany, New York.
Q. Is Albany a separate division from Newark?
A. Not at the present time.
Q. From 1932 until 1936 it was a different division.
A. Yes.
Q. Has it been consolidated with the Newark division?
A. Yes, sir.
Q. I show you the original of Sherwin Williams invoices No. 24769, No. 23595, No. 24768, No. 510, No. 521, and No. 509, all of which invoices are further identified on the tabulation now in evidence as Respondent's Exhibit 205-M.

Can you tell me who the purchaser is on each of those invoices?

(Documents handed to witness.)
A. Henry R. Ballinger, Poughkeepsie, New York.
Trial Examiner Norwood: Off the record, just a minute.
(Discussion off the record.)
4105 Trial Examiner Norwood: Proceed on the record.

By Mr. Welch:
Q. Mr. Lewis, will you continue your answer.
A. Henry R. Ballinger, Poughkeepsie, again; Henry R. Ballinger, Poughkeepsie, again; Henry R. Ballinger, Hudson, New York; Henry R. Ballinger, Poughkeepsie; Henry R. Ballinger, Poughkeepsie; again.
Q. Now, Mr. Lewis, are you familiar with the general

freight policy of the Sherwin Williams Company with respect to less-than-carload shipments of lead pigments, such as dry white lead, white lead in oil, dry red led, red lead in oil, and litharge?

A. Yes.

Q. Can you state what that general freight policy has been on less-than-carload shipments?

A. The freight policy would be f.o.b. the factory, or equalization points.

Q. Now, do you use the term "equalization point." as synonymous with shipping point?

A. Yes.

Q. I show you Respondent's Exhibit 198-A through H, inclusive, or—are the cities listed on those exhibits cities that you would call shipping points?

A. Yes, most of them. Some of these I am not familiar with. But we would take them to be—

4106 Q. I am using this exhibit merely as an illustration, not of your particular branch.

A. Yes, these would be shipping points.

Q. And the cities that are listed as shipping points on whatever price cards are issued in your division—

A. That's correct.

Q. —are the points from which shipment would be made?

A. That's correct.

Q. Or from the factory?

A. Yes, sir.

Q. And in either of those circumstances, what would be the freight policy on less-than-carload shipments?

A. Less than carload, the rate would be f.o.b. those shipping points.

Q. The invoices that I have referred to a moment ago, do they conform to that policy or do they differ from it?

A. Well, they differ.

Q. Will you explain why?

A. To meet competition of other lead companies.

Q. Will you explain that in detail, just exactly how that arose and what happened?

A. In the case of Henry R. Ballinger of Poughkeepsie—

Q. Just one moment. May I withdraw that question for a moment.

Are you personally familiar with that account?

4107 A. Yes, sir.

Q. Have you had direct dealings with that particular account yourself?

A. I established that account when I was traveling back territory in 1932.

Q. Now, will you make your explanation as to why?

A. In order to make Mr. Ballinger competitive with the other leading paint dealers in Poughkeepsie, we had to deliver white lead to his store.

Q. Is there any peculiar competitive situation in the paint business presently at Poughkeepsie?

A. Well, nothing different than in any other central community, a town of that size.

Q. In your answer when you said you had to deliver it for competitive reasons, do you mean deliver it free of freight?

A. That's right.

Q. And what was the condition that you met when you opened the account as to following your general policy of charging freight on less-than-carload shipments?

A. Well, you are speaking now in the case of white lead?

Q. This particular account on those particular lead pigments.

A. It was our competition. I was delivering to the key dealers, key paint dealers, in Poughkeepsie, and if Mr. Ballinger was to sell white lead in competition with
4108 these dealers, we had to deliver our white lead to him.

Q. That is, without freight cost?

A. Without freight cost.

Q. Now, I show you Sherwin Williams' invoices No. 43996, No. 44126, No. 44122, No. 44228, No. 44312, all of which invoices are abstracted on the tabulation which is now in evidence as Commission's Exhibit 205-F, and ask you if you can identify the purchaser listed on those invoices?

(Documents handed to witness.)

A. G. P. Barney, Watertown, New York; G. P. Barney, Watertown, New York; G. P. Barney, Watertown, New York; G. P. Barney, Watertown, New York; G. P. Barney.

Q. Are you personally familiar with that account?

A. Yes.

Q. How long have you been familiar with it?

A. Since about 1939 or 1940.

Q. Have you sold the account personally yourself?

A. No, I have not.

Q. Have you called on it personally?

A. I have called on the account.

Q. Do the invoices that I have asked you to examine conform to Sherwin Williams general freight policy for less-than-carload shipments?

A. No, there are exceptions here.

Q. Will you explain why those exceptions were made?

4109 A. For the reason that in Watertown, if Barney is to be in competition with the other large paint dealers in Watertown, we were compelled to allow him freight on white lead.

Q. That is, you make some concession on the freight delivery?

A. That's right.

Q. Do you know what competitive accounts there are in Watertown that he has to compete with?

A. I could name one or two.

Q. What brands do they handle, of lead pigment?

A. National Lead, Eagle-Picher.

Q. Is Watertown a particularly highly competitive city or not?

A. It is a shipping center and very competitive.

Q. Are there other accounts in Poughkeepsie where competitive brands are handled?

A. Yes, sir.

Q. Which one is particularly and primarily?

A. Well, E. V. Grant would be one.

Q. What competitive brands of lead pigments do they handle?

A. That would be National Lead, Eagle-Picher. They are the main ones.

Q. I now show you Sherwin Williams' invoices No. 25714, which is abstracted on Respondent's Exhibit 205-F, which is in evidence, and original invoices No. 10620, 4110 No. 9269, and No. 26649, which are abstracted on Respondent's Exhibit 205-G, and I will ask you if you can identify the purchaser on those invoices?

(Documents handed to witness.)

A. All of these are Putnam Hardware Company, Middletown, New York.

Q. Are you familiar with that account?

A. Yes, sir.

Q. How long have you been familiar with it?

A. I would say since—I may not be correct—but as I recall, since about 1939, 1940.

Q. Have you sold the account yourself?

A. Yes, sir.

Q. Are you familiar with the competitive situation in Middletown, New York?

A. Yes, sir.

Q. Will you state what it is?

A. It is the same as it is in any other trading center such as Poughkeepsie, Watertown, Newburgh.

Q. Are competitive lines aggressive or otherwise in that city?

A. Well, they are aggressive in that city and in all cities.

Q. Which accounts are particularly competitive there that you have to meet?

A. It would be National Lead Company mainly; 4111 Eagle-Picher in some instances.

Q. The last group of exhibits which I showed you as being the Putnam Hardware account at Middletown, New York, do the invoices that I showed you follow or deviate from the Sherwin Williams freight policy?

A. There are exceptions.

Q. And why were the exceptions made?

A. In order to place this account in a competitive condition with other established dealers.

Q. Can you identify the purchaser shown on Sherwin Williams invoice No. 3136, which is abstracted on Respondent's Exhibit 205-F?

A. Mohawk Wallpaper and Paint Company, Utica, New York.

Q. Does that invoice conform in so far as the freight policy is concerned as to Sherwin Williams general policy?

A. No, there is an exception there.

Q. Are you familiar with the account yourself?

A. Yes, sir.

Q. How long have you been familiar with it?

A. Since 1932.

Q. Have you sold the account yourself?

A. Yes, sir.

Q. Will you state why the exception to the general policy is made in selling this account?

A. In order to make that dealer competitive with 4112 the other paint dealers in Utica.

Q. Which are the principal competitive lines there that create this situation?

A. National Lead and Eagle-Picher, possibly others.

Q. Mr. Lewis, are you familiar with the containers, the 100 pound containers, 50 pound containers, 25 pound and 12½ pound containers in which white lead in oil and red lead in oil are sold?

A. Yes, sir.

Q. Are they the same or are they different?

A. They are the same.

Q. Now, if an invoice has no information on it with respect to how freight is to be handled, what is the policy and procedure followed?

A. We always—

Mr. Wright: I object to that, your Honor.

Mr. Welch: He is the division sales manager.

Mr. Wright: He is being asked to give a conclusion as to what it means when there is nothing on an invoice about how freight may be—

Mr. Welch: I said, what was the procedure followed.

Trial Examiner Norwood: He wants to know how they handle the transaction of which this invoice is evidence when the invoice does not have these particulars stated on it. I think he can show those particulars either by
4113 the invoice or by his own testimony.

Mr. Wright: Now, we don't have all of the invoices from which these documents were made in the record, but there has been a variance in policy; some of these invoices show freight prepaid; some of them show freight collect; and some of them don't show anything.

Mr. Welch: That is the only type I am asking him about, that is, the ones that don't show anything.

Mr. Wright: I appreciate that, but—

Trial Examiner Norwood: Just what was the transaction when it is an invoice like that?

Mr. Wright: He is asking about invoices that do not have anything about freight on them, what that means.

Trial Examiner Norwood: You can cross-examine on it. Objection overruled.

By Mr. Welch:

Q. If there is no notation on the invoice as to how the freight charge is to be handled, what procedure is followed?

A. In every instance, to my knowledge, they are f.o.b. the factory or the shipping point.

Mr. Welch: Just one second, your Honor.

That is all, your witness.

Trial Examiner Norwood: You may cross-examine, Mr. Wright.

4114 By Mr. Wright:

Q. When you spoke of carload shipments now, did you mean a railroad carload?

A. We speak of carload shipments as either a railroad car or a truckload, but the majority of them are truck, 20,000 pounds or over.

Q. Is 20,000 pounds a minimum truckload in your branch?

A. Yes, that's correct.

Q. No shipment of less than that quantity is handled as a truckload?

A. Yes, when the original order is not filled completely, then we consider it is not the fault of the customer and we do not penalize him by making him pay freight.

Q. In other words, even though it might only involve an actual shipment of 5 to 10,000 pounds, you don't add freight from the shipping point in that case?

A. That's right.

Q. When you spoke of carload you meant truckload as well as railroad carload?

A. That's right.

Q. Do I understand it to be your policy in the Newark branch to meet the competition where you find it of other sellers of white lead in oil in the method of handling freight charges to the customer; is that the substance of your testimony?

4115 A. Yes, I would say so.

Q. You are in the sales department, you testified I believe?

A. That's right.

Q. Do you make up the invoices in that connection, have anything to do with the making up of the invoices?

A. No, sir.

Q. Who handles that?

A. Our accounting department.

Q. As they process those invoices, they put various stamps and notations on them to indicate the steps that have been taken in shipping and billing the customer, and so forth?

A. That's right.

Q. What then is the basis of your statement that in every instance where nothing appears as to how freight was handled that the thing was shipped with freight added from the shipping point?

A. Well, we usually,—we take the stand that for some reason or other that through probably a clerical error it was left off; usually they always show on an order.

Q. How freight was handled?

A. Yes. We always list it, but where it is left off, then the instructions are to make it f.o.b. the factory, and that is done.

Q. Is that a general office instruction?

A: That is the general rule that we follow, yes, sir.

4116 Q. Now, I show you on Invoice No. 24769, one of those you testified about, that the notation there "Shipped prepaid" is put on with a rubber stamp.

A. Well, this is a truckload order, sir, truckload order, and then that would be delivered shipped to destination. We would prepay the freight on it.

Mr. Wright: No further cross-examination.

Mr. Welch: Just about two or three questions, your Honor.

Trial Examiner Norwood: All right.

Redirect Examination by Mr. Welch.

Q. Mr. Lewis, in cross-examination, I believe, you stated it is your general policy in this division to state, even if it is going to be freight collect to so state on the invoice was that your answer to Mr. Wright?

A. That's correct.

Q. Do you know whether or not that applies in other divisions or only in your own division?

A. Only in my own division.

Q. That is all you know anything about?

A. That's right.

Q. And that rule that that be done in this division is a division rule and not a general executive office rule from Cleveland?

4117 A. I have never seen any. It is just a good business practice, to proceed that way.

Q. And that is the way you operate in this division generally?

A. That's correct.

Q. Now, you testified in answer to another question of Mr. Wright's that you attempted to meet competition; are there a number of cities in which Sherwin Williams has accounts and other companies such as National Lead Company, Glidden Company, and Eagle-Picher, also have accounts, but where you do not have to deviate from your general freight policy in order to continue selling your dealers?

A. Many towns of that nature. We only delivered that where we were forced to make important accounts competitive, particularly in the larger centers.

Q. And that would be approximately—that would be a very small number compared to the cities in which you did not have to make that concession?

A. That's correct.

Mr. Welch: That's all.

Recross-Examination by Mr. Wright.

Q. Will you list the towns where you do not deviate, where you sell any accounts of any particular importance, where you do not deviate from what you stated to
4118 be the general policy of handling freight.

Mr. Welch: Will you read that question, please?

(The question was read by the reporter.)

A. I wouldn't be able to name actual towns, but I do know that in many of the towns where white lead is not an important factor in that merchant's business—by that I mean there are not the number of painting contractors who usually take most of the white lead and create the competitive condition—a small dealer will order 100 pounds or 50 pounds or 25 or 12½, and that will be sold f.o.b. our factory or shipping point.

Q. In other words, that would not include towns where there was any substantial business in white lead in oil?

A. There might be exceptions.

Q. But as a general rule, that general policy then would apply only to the towns where there was a very small white lead in oil business?

A. Not necessarily. For example, we might take on a new account who had been buying his white lead from our competitors and then he would look to us as a source, and if he told us that a competitor was delivering lead, then we would consider an exception in order to be competitive.

Q. Can you estimate for 1941 the percentage of white lead in oil of the total sales in the branch to which freight was added from shipping point?

4119 A. No, sir, I cannot.

Q. Would it be as much as five percent?

A. To which freight was added?

Q. Was added from the shipping point. In other words, excluding all your shipments of truckloads to shipping point, and to factory point, excluding all your split truckload orders where you couldn't deliver a full truckload, and excluding all those towns where you do meet competition as you say, and didn't add freight, what percentage would be the total of shipments to which freight was added, on white lead in oil.

A. I wouldn't be able to estimate that percentagewise. I would say the bulk of our white lead shipments were made to the larger trading centers.

Mr. Wright: No further questions.

Mr. Welch: Just one second, your Honor.

That's all.

Trial Examiner Norwood: Thank you, Mr. Lewis.

(Witness excused.)

Mr. Ewing: I suggest at this point that you call Mr. Warshow.

Mr. Wright: All right.

May we take a five-minute recess?

Trial Examiner Norwood: All right.

(A short recess was taken.)

4120 Mr. Wright: I am calling Mr. Warshow.

Whereupon,

HERMAN T. WARSHOW, was called as a witness on behalf of the Commission, having been duly sworn, was examined and testified as follows:

Mr. Wright: I am stating for the record that I am calling Mr. Warshow for the Commission. It is out of order, but I am trying to save time.

Direct Examination by Mr. Wright:

Q. Mr. Warshow, what is your present business?

A. I am vice president of the National Lead Company, one of the vice presidents.

Q. How long have you been in that capacity?

A. About 10 years.

Q. What was your position prior to that time?

A. Before that I was controller of the company.

Q. For how long a period of time?

A. Since 1921.

Q. Can you give us in general what your duties as controller were?

A. Well, they were the usual duties of the controller. I had charge of all accounting, tax work, renegotiation, the usual duties of a controller.

Q. Did you work closely with the president and 4121 the board of directors in your duties?

A. Yes, I did.

Mr. Warshow, were you well acquainted with Mr. E. J. Cornish?

A. Yes, I was.

Q. What was Mr. Cornish's position with the National Lead Company up until the time of his death?

A. Well, until somewhere in the 30's he was president, and after that he was chairman of the board until his death in 1938.

Q. All during the 20's and 30's he was president?

A. He was president. He didn't become chairman of the board until about somewhere in the early 30's, and he remained chairman of the board until his death in 1938.

Q. Do you recall discussing with Mr. Cornish and the other officers of the National Lead Company in the early 30's the matter of acquiring the Eagle-Picher Company?

A. Well, I don't recall very much about that. That is a long time ago. That would be when?

Q. 1930, 1931.

A. That would be about 17 years ago.

Q. Yes.

A. Well, I don't recall very much about that.

Q. Well, do you recall that there were discussions on that?

A. I read the other gentleman's testimony while
4122 I was waiting, and I refreshed my memory some-
what, but I don't recall very much about it.

Q. Well, do you recall now discussing with Mr. Cornish and the other officers of the company the matter of making an offer to the Eagle-Picher Company of a certain sum for the assets of the company during the early 1930's?

A. No, I don't.

Q. Do you recall attending a meeting in Washington in the Department of Justice with Mr. Cornish to discuss that matter?

A. I don't recall that at the moment. I'd have to look up my files. You see, I didn't know what you were going to require. I haven't made any preparation; I haven't looked up the files, or anything.

Q. Now, the matter of acquiring the Eagle-Picher Company would be a rather important matter, wouldn't it?

A. No, no, I don't think so. We have had a lot more important matters than that in the last fifteen years.

Q. In so far as capital expenditures?

A. Capital expenditures, acquisition of other companies, which involved a whole lot more money than the possible acquisition of Eagle-Picher. I say that with all due respect to the gentleman in front of me. It is a good-size company.

Q. Would you recognize Mr. Cornish's signature?

A. In those days the price of the stock was very low,
it was down to as low as $3 a share and they had
4123 about 900,000 shares, and that would have meant a
total expenditure for the entire company of only
$2,700,000.

Q. Would you recall the National Lead Company, through its president, stated that it was authorized by the board of directors to make an offer of $10,000,000 in May of 1931 to the board of the Eagle-Picher Company for the acquisition of the Eagle-Picher Company?

A. No, I don't recall anything of that kind.

Q. I show you a document and ask you to read it and ask you if it refreshes your recollection.

(Document handed to witness.)

A. All right.

Q. Does that document refresh your recollection about the proposal of the type that I was talking about?

Mr. Wood: Before answering, I would like to just once and for all state my position on the record, just to save my position.

Trial Examiner Norwood: Yes.

Mr. Wood: I therefore move that all of the testimony of this witness relating to whatever intentions National may have had with respect to Eagle-Picher be stricken, and I object to all further questions along that line. My reasons are two in number:

My first reason is that the complaint charges conspiracy between National and Eagle-Picher, and I cannot see
4124 that the monopolistic intentions of National are in any way binding upon Eagle-Picher or that Eagle-Picher is in any way involved.

My second point is this, and that is that anything—that in any case the testimony goes only to whether or not the National Lead Company has violated Section 2 of the Sherman Act, and not Section 1, but Section 2; and there has been no case so far that holds that the Federal Trade Commission has any jurisdiction whatsoever over cases that would be involved in Section 2 of the Sherman Act as distinguished from Section 1.

I won't interrupt again. I wish that objection to apply to all testimony along that line.

Trial Examiner Norwood: Well, don't you think I'd better reserve my ruling on that until after he has completed his testimony?

Mr. Wright: Already we have considerable testimony in the record about the stock holdings of the National Lead Company in Eagle-Picher Company, about the acquisition of various companies by the National Lead Company, and it is all very closely related to the allegations which appear in the complaint. As a matter of fact, I believe this is specifically alleged in the complaint.

Trial Examiner Norwood: Well, I will deny the motion for the time being. You may renew it when he has completed his testimony.

4125 What was the question?

(The question was read by the reporter.)

The Witness: Well, I can't say that I recall this.

By Mr. Wright:

Q. You don't recall the general subject that is covered in that document?

A. No, I don't. I recall the purchase of the stock, but I don't recall any offer as is indicated in this letter for the entire assets of the Eagle-Picher Lead Company.

Q. Can you identify the signature of Mr. E. J. Cornish?

A. It is rather difficult. I am not a handwriting expert. I wouldn't want to do that. I know his signature, yes. I have seen it a great many times. But I think it could be forged easily, and I would not know the difference.

Mr. Wright: May we go off the record for a few minutes?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: May we go back to the record?

Trial Examiner Norwood: On the record.

Mr. Wright: No further questions of this witness.

Trial Examiner: Any cross-examination?

Mr. Ewing: None.

Trial Examiner Norwood: The witness is excused.

(Witness excused.)

Mr. Ewing: Off the record.

412[illegible] Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Ewing: Mr. McCarthy.

Whereupon,

FRED K. McCARTHY, having been called as a witness on behalf of the respondent, previously sworn, testified further as follows:

Trial Examiner Norwood: He has been previously sworn.

Direct Examination by Mr. Ewing.

Q. Mr. McCarthy, I show you a number of documents which have been marked Respondent's Exhibits 229 to 305-D for identification and ask you to tell us what they are.

A. These are copies of telegrams sent by the general office of the National Lead Company in New York to branch managers and others concerned in the company announcing changes in prices of pigments.

Q. Are they all telegrams?

A. In every instance that is a copy of a telegram.

Q. And from whose files are they produced, what office of National?

A. The office of Harold Roe, Vice president of the Company.

Q. When you say they were sent to various people concerned, does that include in some instances, wholly

4127 or partly-owned subsidiaries of National?

A. Yes, except on announcing changes on oxides; Morris P. Kirk and Evans and others would be concerned.

Mr. Ewing: I offer Respondent's Exhibits 229 through 305-D for identification in evidence.

Trial Examiner Norwood: Any objection?

Mr. Wright: I understand by agreement with Mr. Ewing, since I have not had an opportunity of examining this group of documents, that he will supply photostatic copies of them to me, and then I can reserve my objection until examining them some time next week. I will make every effort to hold it down so that we won't have to recall Mr. McCarthy for further examination.

Trial Examiner Norwood: We will consider the offer as pending.

Mr. Ewing: That concludes what we have to offer except for the matter of those exhibits just referred to and for Mr. Owens continued testimony next week; and with respect to that material I have to get up for Mr. Wright, my suggestion would be either Thursday or Friday, whichever is most convenient.

Mr. Wright: Either of those two dates is acceptable to me; whatever counsel finds convenient would be all right.

Before we close here, I want to discuss one matter Mr. Wood and I had pending.

4128-A Trial Examiner Norwood: You suggest that we adjourn until Thursday in Washington; is that it?

Mr. Ewing: Yes, sir.

Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Dubose: We don't want Mr. McCarthy any more, do we?

Mr. Wright: No, we don't.

Trial Examiner Norwood: Mr. McCarthy, you are dismissed.

(Witness excused.)

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: I would like to make a statement for the record that Mr. Wood and I have discussed the means of settling certain points without the necessity of calling one of the officials of the Eagle-Picher Company, Mr. W. R. Dice, down here to testify, and we have agreed on the following statement, which replaces the testimony that Mr. Dice would give if he were called as a witness.

The agreement as to what Mr. Dice would testify if called as a witness is as follows:

4128-B It is hereby stipulated and agreed by and between counsel for the Commission and counsel for the respondent The Eagle-Picher Company and The Eagle-Picher Sales Company that, if W. R. Dice were called as a witness, he would testify:

That he is vice president and comtroller of The Eagle-Picher Company; that he has been connected with the company in various capacities for nineteen years and was executive vice president between 1937 and 1941, at which time Joel M. Bowlby became president of the Eagle-Picher Company; that he is and has been for many years last past familiar with the pricing policy of the company; that between January 1942 and the filing of the complaint herein, substantially all lead pigments were sold at substantially ceiling prices; that prior to January, 1942, and during the time he was executive vice president of the company, the company generally met prices quoted by the National Lead Company on all lead pigments made from pig lead including basic lead carbonate and lead oxides; that during this period the Eagle-Picher Company manufactured certain lead pigments, including blue lead, basic white lead sulphate and basic silicate white lead, directly from available ore concentrates mined by the company's subsidiaries; that the company made these latter products at less cost than it could make products functionally comparable from pig lead; that the prices set by the company on those latter products were determined by the company;

and that the Eagle-Picher Company's sales of basic 4129 white lead carbonate and basic white lead sulphate for the years 1937 through 1944, inclusive, are as follows:

Year	Sales Tonnages Basic White Lead Carbonate	Basic White Lead Sulphate
1937	4,533	7,348
1938	3,356	5,955
1939	3,246	5,315
1940	2,769	4,986
1941	5,163	8,066
1942	3,116	5,820
1943	3,113	3,889
1944	3,666	4,342

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: I want to put on the record here the request to the reporters, that owing to the emergency here and our endeavors to close this case as soon as possible that the reporter is to be requested to prepare these exhibits and send them to Washington as soon as possible. I should like to have them to work with before Thursday, and certainly we want to have them there when counsel meet there, so we would appreciate it if they 4130 would make every possible effort to get these down promptly to Washington.

Mr. Wright: Now, as I understand the state of the record, we have finished all the presentation of evidence and all other matters except for the very limited subjects which were stated to have been pending here, including the subject of my examination of Mr. Warshow, Owens' testimony, and I think there were one or two matters yesterday where I asked for the right to notify you within the next week.

Mr. Ewing: That's right, and this last batch of exhibits that we offered.

Trial Examiner Norwood: I may state then that subject to the condition of some special testimony, that the taking of testimony in this case is closed.

Mr. Welch: No, sir, I don't think it is. You are actually going to take some more.

Mr. Wright: We may take some more Thursday. All I wanted to point out is that we have reached the point where everything is cleaned up except some very limited matters.

Mr. Welch: But we have to keep the record open.

Mr. Wright: And we have to keep the record open for some testimony and for some exhibits.

Trial Examiner Norwood: I will reconsider that and say that we will probably close in Washington on our next hearing.

Mr. Wood: I wish to make it clear on the record
4131 that I do object to any statement offered by Mr. Ewing or otherwise put into the record with respect to the alleged attempt of National Lead Company to buy the Eagle-Picher Company. I will probably not be present in Washington next week, but I wish that objection on the record now to go to the whole subject matter.

Trial Examiner Norwood: Yes. Counsel may have that objection in case this matter is received, and I shall enter your objection.

Anything further?

Mr. Ewing: No, sir.

Trial Examiner Norwood: By request of counsel, in agreement, the hearing is now adjourned to reconvene in Washington, D. C., in the offices of the Federal Trade Commission at ten o'clock a.m. on next Thursday, November 20, 1947.

(Whereupon, at 12:45 p.m. the hearing in the foregoing matter was adjourned until Thursday, November 20, 1947, at ten a.m. in Washington, D. C.)

4132 Room 332
Federal Trade Commission Building
Washington, D. C.
Thursday, November 20, 1947

Met, pursuant to adjournment, at 10:00 a.m.

Before: John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

James D. Ewing, Esq., and
E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.) appearing for the National Lead Company.

J. T. Welch, Esq., (Davies, Richberg, Beebe, Busick & Richardson, 815 Fifteenth Street, Northwest, Washington, D. C.) appearing for Sherwin-Williams Company.

4133 PROCEEDINGS.

Trial Examiner Norwood: The hearing will now come to order.

Pursuant to adjournment in New York on November 14th, the hearing in Docket 5253 will now convene in Washington, D. C., in Room 332 of the Federal Trade Commission Office, at 10:00 o'clock a.m., on the 20th day of November, 1947.

Please note the appearances.

Call your witness.

Mr. DuBose: Mr. Owens.

Trial Examiner Norwood: Have you been sworn in this case, Mr. Owens?

Mr. Owens: Yes.

Trial Examiner Norwood: Mr. Owens is recalled for further examination.

THOMAS F. OWENS was thereupon recalled as a witness for the Respondents and, having been previously duly sworn, testified as follows:

Direct Examination by Mr. DuBose.

Q. Mr. Owens, I show you Respondents' Exhibit 215-A, which you identified last week in New York, and I call your attention to the 12th line from the top. Opposite "Weight in Pounds, 40,000, Selling Branch, New Orleans Warehouse," in the fifth column after the heading "Manu-
4134 facturing Branch," under the heading "L.C.L. Rate /Cwt." the figure is 1.05. Is that a correct figure?

A. No, sir, that figure should be 5 cents a hundred.

Q. Now, what does 5 cents a hundred represent there?

A. That is the trucking rate from New Orleans Warehouse to the customer.

Q, Now, I call your attention to the extensions in the columns following the column noted as "Customer's Location." Where the l.c.l. rate figures in that, is it at the rate of 1.05 or 5 cents?

A. The extension in Column 7 has been made at the rate of 5 cents a hundred.

Q. So that the 1.05 there is a typographical error; is that correct?

A. Yes, sir.

Q. Now, I note also, in the next to the last column opposite that same item, the l.c.l. rate 1.05. Is that a mistake, too?

A. No, sir, that is the freight from St. Louis Manufacturing Branch to New Orleans.

Q. In other words, that is the l.c.l. rate per hundred pounds direct from the St. Louis Manufacturing Branch to New Orleans?

A. Correct.

Q. I also call your attention to Respondents' Exhibit 215-A, to the 15th line from the top. Under the head-
4135 ing "Customer's Location" the town's name is spelled M-e-r-i-d-e-n, Mississippi. What should that be?

A. I believe that should be Meridian, Mississippi.

Q. Instead of Meriden, Mississippi?

A. That is correct.

Q. If that anywhere near Laurel, Mississippi, do you know?

A. No, sir, I do not.

Mr. DuBose: At this time, your Honor, I renew my offer of Respondents' Exhibits 215-A and B, 216, and 217 for identification.

Mr. Wright: I would like to request preliminary cross-examination on this, and I would like to state that I would like rather extensive preliminary cross before your Honor rules on these particular exhibits.

Trial Examiner Norwood: You may question him on anything going to the admissibility of the papers, identification.

Voir Dire Examination by Mr. Wright.

Q. Mr. Owens, will you tell us again now how you selected the transactions which appear on 215-A and 215-B.

A. You mean by that, the particular customer locations?

Q. The particular customer locations and the weight of the shipments.

A. From the records which we keep in the New
4136 York office, we know exactly how much dry lead is
shipped to every customer throughout the United States. Therefore, in preparing the schedule we went to that record, and with the assistance of the head of the dry lead sales department, all the carload customers were selected.

Now, there is one exception to that statement, and that is that where the customer was located immediately adjacent to or within the immediate area of our manufacturing plant, those sales do not reflect on this statement.

Q. Those sales were omitted from the statement, in other words?

A. Yes, sir.

Q. Now, I call your attention to the tenth line up from the bottom of 215-A and B. Under "Customer's Location," there appears "St. Louis." The corresponding column for that transaction, "Selling Branch," is "St. Louis." There is an amount in the transaction of 702,000 pounds. The carload rate there is given as 16 cents a hundred. The less-than-carload rate appearing in the next to the last column on that transaction is 46 cents. How did you arrive at that?

A. I don't follow you on that. How did I arrive at what?

Q. At those rates that were applicable from St. Louis to St. Louis, as it appears.

Mr. DuBose: Just a moment. May I object to that question? It shows the manufacturing branch as
4137 Chicago, Mr. Wright.

Mr. Wright: Oh, I will withdraw that.

By Mr. Wright:

Q. Now, you went over the total figures, then, in 1941, of dry white lead, as I take it, and your grand total of pounds sold, over on 215-B in the first column, is 17,821,375 pounds. Now, with the exception of that one transaction from Chicago to St. Louis, all of those tonnages are at points not immediately adjacent to your factories. How does that total that you have entered here, 17,821,375, compare with your total dry white lead sales in that period?

A. It approximates 55 per cent.

Q. In other words, then, 45 per cent of your dry white lead sales were sold in and around the factories and not recorded on these exhibits?

A. Or in less-than-carload quantities.

Q. Well, how much of it is represented in less-than-carload quantities? Can you state that?

A. No, I don't have that figure. The combined figure would approximate 45 per cent.

Q. Well now, to give a complete picture of your transportation costs on all your white lead business during 1941, would it not have been necessary for you to record all of the transactions in this particular commodity, with the freight costs on all of those transactions?

4138 A. No, I don't think it was necessary. I think we have representative figures here.

Q. But this doesn't relate to your whole business of dry white lead. Your total freight cost that you get over here on 215-B is only a freight cost on carload shipments to other points than your factory points. It isn't representative of your whole business.

A. Well, I think you may have two questions in yours. In the first place, the total freight figures which we have here are not the total freight costs incurred during the year 1941.

Q. They are theoretical freight costs based on different types of freight rates, is that correct?

A. Correct. To the extent that we are dealing with actual weights and actual freight rates—

Q. But theoretical extensions in so far as they would represent actual shipping costs incurred.

A. As far as total cost is concerned, yes.

Q. Now, in making up these exhibits, the various rates which appear here, carload, l.c.l., are all rail freight rates, are they not?

A. Correct, with the exception of—

Q. Local cartage.

A. —local cartage.

Q. Right. Now, from your experience with the company, is it not a fact that a considerable portion of
4139 your tonnage of white lead, dry white lead, now,
moves by truck?

A. A good portion of it does move by truck, and in making up these figures I have eliminated the trucking shipments, tried to eliminate the trucking shipments.

Q. To these points?

A. To these points, yes. The trucking shipments are the ones where the customer is located close to the manufacturing point.

Q. Well now, isn't it a fact that a truckload shipment will often take a rate equal to or approximately the same as the rail carload rate?

A. Frankly, I don't know. I stayed away from trucking rates.

Q. Now, in going through these customers, did you ascertain whether they were regularly shipped by rail as against truck?

A. Frankly, I didn't ascertain definitely that all these customers always took in rail shipments. However, when the traffic department was asked for the rates, which they supplied in this instance, they were to give us the rail rates, since in the great majority of cases the railroads would be used for that purpose.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

By Mr. Wright:

Q. Well now, let's look at a typical transaction here,
Zanesville, Ohio, down in about line 22 or 23, where
4140 you show an l.c.l. rail rate from Cincinnati to Zanes-
ville of 38 cents a hundred.

Trial Examiner Norwood: What sheet is that on?

Mr. Wright: On 215-A.

By Mr. Wright:

Q. You don't know, do you, whether or not the Cincinnati warehouse might service Zanesville, Ohio, on dry white by means of truckload shipments rather than l.c.l. rail shipments?

A. No, sir.

Q. I call your attention to the second transaction on 215-A. Palo Alto out of Melrose. That is within a few miles of Melrose, is it not, Palo Alto?

A. I don't know.

Mr. DuBose: You mean as the West goes, Mr. Wright?

Mr. Wright: No, I mean literally. It is common knowledge that Palo Alto is in the San Francisco Bay area, as is Melrose.

Trial Examiner Norwood: Wait a minute. Where is that Palo Alto transaction? Is that on the first sheet?

Mr. DuBose: It is on the second line, your Honor, of Respondents' Exhibit 215-A.

By Mr. Wright:

Q. Mr. Owens, since these are all carload customers, why did you list on this exhibit l.c.l. rates from warehouse to customer, and from manufacturing branch to customer?

4141 A. Why did I?

Q. Yes, sir.

A. It is my understanding that in some instances shipments may move in either way. It may be direct shipment to the selling branch, or the warehouse, carload quantities, and shipments from there to the customer in l.c.l. quantities, or it may be an l.c.l. shipment directly from the manufacturing branch to the customer.

Q. Then these aren't all carload shipments, then? They include l.c.l. shipments?

A. Yes, l.c.l. shipments from the warehouse or selling branch to the customer, or from the manufacturing branch to the customer, but the customers are the carload customers.

Q. Oh, you classify the customers as carload customers, then, rather than taking carload transactions; is that correct?

A. I fail to see the distinction between the two.

Q. Well, now, then as I take your testimony, these are customers who customarily purchase in carloads.

A. Correct.

Q. Who get the carload price.

A. Correct.

Q. But an undetermined amount of this tonnage may be shipped in less-than-carload quantities; is that correct?

A. 1941?

Q. Yes, sir.

4142 A. It is quite possible that part of it may have been shipped in l.c.l. quantities.

Q. Yet you didn't take the other customers, located perhaps in these same areas or in other consuming centers, who customarily purchase in l.c.l. quantities?

A. No, sir.

Q. Now, these end figures ~~that~~ you got by extending these theoretical rates in the three different fashions, then, are theoretical figures in so far as what the actual shipping costs of National Lead Company might have been on this product during 1941?

A. Correct.

Q. Turning now to Respondents' Exhibit 217, will you tell me what the item appearing opposite No. 17 in the first line, under the column 1939, represents?

A. You refer to $141,003.32?

Q. Yes.

A. Account 17 represents the salaries of the individuals working in the accounting department, credit department, as well as some of the salaries of the—it also takes the salary of the manager of the branch.

Q. Just those three categories?

A. No, it takes in any office salary.

Q. All office salary?

A. Yes.

4143 Q. Now, is that of the Atlantic Branch?

A. Only.

Q. Only?

A. Yes.

Q. Now, when you say all office salaries, do you mean now to exclude salesmen's salaries from that?

A. Yes, sir. They are contained in Account 20.

Q. That is the entire branch office expense, then?

A. Right.

Q. As far as salaries are concerned?

A. Yes. All branch salaries would be reflected in the account shown.

Q. Would that include the assistant manager of the branch, the comptroller of the branch?

A. When I say his salary is included in here, the sales manager's salary would show in "Salesmen's Salaries & Expense," but the figures which appear in Exhibit 217 include all the salaries of that particular branch.

Q. That would include the salaries of the branch in so far as they related to the administration of the productive facilities of the Atlantic Branch?

A. Well, the complete administration and selling efforts of the Atlantic Branch.

Q. Covering all their products?

A. All their products.

4144 Q. And all of their activities?

A. Correct.

Q. Then that would include the administrative overhead of the factory operation?

A. If by that question you mean the salaries of plant superintendents and other supervisory employees of the factory, the answer is no.

Q. In other words, this wouldn't include the salaries of people who were actually in the factory?

A. No, sir.

Q. But it would include the salaries of the officials of the branch who supervise the factory operations?

A. Correct.

Q. From the main office?

A. The men who supervise the administrative and selling functions.

Q. Of the—

A. —Atlantic Branch.

Q. That would include all the metallic products?

A. Correct.

Q. All of the oils?

A. Yes.

Q. All of the mixed paints?

A. Yes.

Q. All of the putty, solder, everything that is handled by the Atlantic Branch? 4145

A. Correct.

Q. Now, the same is true, then, of all these other items which appear down here?

A. The same is true of all.

Q. The sales expense is likewise distributed all through the branch?

Mr. DuBose: Mr. Owens, will you answer verbally so that your answer may appear in the record, instead of nodding.

The Witness: Yes. What was the question?

Mr. Wright: Will you read the question.

(The pending question was read by the reporter.)

The Witness: Will you rephrase the question?

Mr. Wright: I will withdraw the question.

By Mr. Wright:

Q. Item No. 20, "Salesmen's Salaries & Expense"—those are sales of all branch products, throughout the branch?

A. That's right.

Q. Now, do you think, as an accounting proposition, that the end total, "Total Administrative & Selling Expense," represents the best accounting procedure actually to determine that item?

A. You are referring to the $565,000?

Q. Yes, sir.

A. Yes, sir, those are actual figures.

4146 Q. There are no items which are improperly included in there or which should, by proper accounting procedures, have been excluded?

A. Under our accounting setup, we feel that all these items of expenses are the ordinary expenses of doing business and properly included in any sort of a financial statement.

Q. Now, getting down to the next line below that, under the heading "Total Regular Number of Invoices Entered," will you tell us how you got that figure?

A. Atlantic Branch maintains a record of every invoice prepared. They keep a daily record of the number of invoices prepared, covering all of their sales. This figure was simply taken from their books for the three years of 1939, 1940, and 1941.

Q. Do you know what things are entered in that record? Now, do you include in that the billings to agents on consignments of white lead in oil?

A. If it represented a charge to the agent, material sold, it is considered here as an invoice.

Q. Well now, as I understand the state of the record, there are two different types of billings to an agent. One is the shipping memorandum, when goods are shipped to him. Another is a monthly report billing him for what he has sold. Now, are both those types of things entered in that invoice?

A. No, sir. Included in this figure is the monthly
4147 statement, as you put it, to the consignee, if there is a
money value involved in the transaction.

Trial Examiner Norwood: A little louder, please.

By Mr. Wright:

Q. But in the case of a shipment, say, of dry white in 100-pound kegs, or red lead in oil, to one of your distributor accounts, those invoices would appear separately from the consignment billing?

A. They would be a separate invoice recorded for that transaction.

Q. Are you familiar with the breakdown, in point of numbers, of that figure of 76,238 regular number of invoices, as between your trade sales items and your industrial sales items, such as dry white lead in 600-pound kegs?

A. No, sir.

Trial Examiner Norwood: Now, I didn't understand clearly what you said. On invoices to the agents for the goods that they have reported sold in the month—do you give them an invoice based on the report, then?

The Witness: Yes, sir. When the material is shipped to the consignee, there is usually a memorandum billing, as we refer to it, issued to him. Then, he reports periodically, usually on a monthly basis, the amount of material which he sells. We then issue to him a bill for material sold. At that time we have an invoice entered.

4148 By Mr. Wright:

Q. Now, Mr. Owens, there may be several memoranda billings to an agent during a month on these products, white lead in oil, yet there will only be one agent's report every month; is that correct?

A. I believe so; yes.

Q. So that figure which you entered here in the 76,000 may not represent anywhere near the total number of memoranda billings reflecting actual shipments to agents?

A. Well, you are assuming that we sell all merchandise on consignment.

Q. I am talking now about the stuff you do sell on consignment, white lead in oil, or did sell during this period.

A. As far as I know, dry white lead was not sold on consignment.

Q. I am talking about white lead in oil, and I assume white lead in oil billings to the agent were included in this total of regular invoices.

A. That is correct.

Q. So that what was included as to your agents on white lead in oil might be a considerably smaller figure than the actual billing memoranda or shipping memoranda covering the shipments to the agents?

A. Well now, you are drawing a distinction between
shipping memoranda and billing memoranda. I have
4149 used "Regular Number of Invoices Entered," and
not attempted to ascertain the number of shipping
memos that have been made.

Q. Well, what I am trying to get at is: Do you know whether use of the shipping memoranda, rather than the billing memoranda, would have increased this figure?

A. Probably would have; would have increased the number of invoice units.

Q. Yes.

A. If you consider them to be an invoice unit—

Q. Yes.

A. —the answer is yes.

Q. Now, is it not true that a good many invoices that might be represented in that figure of 76,000 would include several different products?

Mr. DuBose: Do you mean each invoice, Mr. Wright? Otherwise, I object on the ground the question is ambiguous.

Mr. Wright: Will you read the question, please.

(The pending question was read by the reporter.)

By Mr. Wright:

Q. I will amend the question and say: There are invoices represented in the 76,000 figure which cover more than one product on the same invoice?

A. Yes.

Q. About how many different products are offered in
the trade sales department, do you know, customarily
4150 sold to the paint and hardware dealers?

A. By the Atlantic Branch?

Q. Yes, sir.

A. White lead in oil, linseed oils—

Q. Different types and kinds of linseed oils, is that not true?

A. Right. Various types of white lead; colors in oil, miscellaneous painted products. That would about take care of all the materials sold to a paint store or hardware dealer.

Q. But there probably would be in excess of 20 different items, taking the various grades and kinds of things offered to the trade?

A. Yes, sir.

Q. All or any part of that might appear on a single invoice; is that not true?

A. Correct.

Q. Now, on 216, as I understand it, you lumped together the combined administrative and selling expense of the whole branch and divided it by the number of invoices, and came out with that figure under "Cost per Invoice—Average;" is that correct?

A. That is correct.

Q. Simple arithmetical averages of those figures?

A. Yes, sir.

4151 Q. Do you consider that that has any relation to the actual cost as regards dry white lead sold in 600-pound kegs, the invoice cost or selling expense?

A. The selling expenses are the actual selling expenses, divided by the number of invoices of all products, giving us the average cost per invoice.

Q. Well now, if you divided the number of chairs in the board of directors' room by the combined administrative and selling expenses, that would have, by the same token, given you the cost of each chair in the board of directors' room.

Mr. Ewing: I object to that as purely argumentative.

Mr. Wright: I submit, your Honor, that is perfectly proper cross-examination.

Mr. Ewing: It is the most ridiculous question.

Mr. Wright: I am trying to get out of this witness what that figure $7.42 means.

Trial Examiner Norwood: I think that is merely argument there. Objection sustained.

Mr. Wright: May we have a short recess for a moment, your Honor?

Trial Examiner Norwood: We will take a five minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. Mr. Owens, is it not possible to determine ac-
4152 curately by recognized accounting procedures, the actual administrative and selling expense which can be properly attributed to the product dry white lead in 600-pound kegs in the Atlantic Branch?

A. No, sir, I don't think you can do that and arrive at an answer which you can say is perfectly accurate. There are too many accounting factors which require arbitrary distribution.

Q. Well now, are there not recognized, standard arbitrary distributions of cost as between different products?

A. You mean from an administrative and selling angle?

Q. Yes, sir.

A. I don't know of any methods of distribution. Each company usually arrives at their own which they feel are fair, reasonable.

Q. Well now, as to the product dry white lead, has the National Lead Company not made accounting and cost surveys to determine their administrative and selling expenses, from actual records, on the product dry white lead?

A. No, sir, we couldn't do it, and there is no accounting technique that would enable us to do it.

Trial Examiner Norwood: Would an invoice for dry white lead and lead in oil cost any more if made out by your company than an invoice for other things which they sell?

The Witness: No, sir, there is no reason why one should cost more than the other.

Mr. Wright: Would you read that question and
4153 answer, please.

(The question and answer referred to were read by the reporter.)

By Mr. Wright:

Q. During the period of the Office of Price Administration, didn't the National Lead Company keep what they considered to be accurate cost records as to the various different products which they produced and sold?

A. Manufacturing costs, yes. Selling and administrative expenses are a matter of distribution.

Q. Well, didn't they, during that period, distribute selling and administrative costs as between the various products?

A. Yes.

Q. They did?

A. Yes.

Q. In other words, then, you have kept such records.

A. That is correct.

Q. Which allocate, as to the different products, all of your costs, selling, administrative, production, transportation?

A. Yes.

Q. And overhead; all the various different things.

A. Yes, sir.

Q. So that those records would show exactly what portion of these costs are attributed to each different product?

A. On our basic distribution, yes, sir.

4154 Q. I assume, now, that that basis of distribution would be to take an arbitrary part of the branch salaries and the administrative officers', and allocate that part to that product on the basis, either of the dollar volume sold in relation to the total dollar volume, or some other basis of that sort.

A. Briefly, wherever possible, it would be a direct distribution of the product. In other instances, where you could not distribute directly, it would be on a fair and reasonable arbitrary basis.

Q. Now, do you keep such records in the regular course of business?

A. Yes, we do.

Q. For tax purposes? For other purposes?

A. I don't know for tax purposes, but we do keep those records.

Q. But that is an entirely different type of record than this represented by the combination of three exhibits, 215, 216, and 217?

A. Yes, but for the fact that the total selling and administrative expense as shown on Exhibit 216 would agree with it.

Q. With the combined total of everything?

A. Correct.

Q. Including metallic lead products and linseed oil and mixed paint and those things?

A. Correct.

4155 Q. Do you keep such records by customer classes or trade classes?

A. I don't believe we keep them by customer classes. We keep them by product classes.

Q. Product classes?

A. Yes.

Mr. Wright: No further preliminary cross.

Trial Examiner Norwood: I understand that the exhibit is offered now.

Mr. Wright: Well, it was offered previously.

Mr. DuBose: I just want to ask one or two questions and I will re-offer it.

Trial Examiner Norwood: Yes.

Direct Examination (Continued) by Mr. DuBose.

Q. The figure appearing opposite the words "Cost per Invoice-Avg" on Respondents' Exhibit 216 for identification represents the cost per invoice regardless of the product; is that correct?

A. Correct.

Q. Now, will you tell us, if you know, how an invoice is processed in the Atlantic Branch? What steps do you go through?

A. Upon the receipt of the order, a form is typed up and prepared, which is then routed to the credit department for credit rating. After approval by the credit department, the order will be passed along for entry on 4156 the company records, and notices will be sent to the plants to prepare for shipment. The invoice is then billed after shipment, recorded in the accounts receivable department, turned over to the mailing department for mailing purposes, and then, at this point, the accounting department begins its distribution and the preparation of sales statistics.

Q. So all in all, it goes through seven or eight departments; is that correct?

A. At least.

Mr. DuBose: I now re-offer Respondents' Exhibits 215-A and B, 216, and 217 for identification.

Mr. Wright: I would like to ask two more questions here on this matter now.

Trial Examiner Norwood: All right.

Voir Dire Examination (Continued) by Mr. Wright.

Q. This averages out, then, all of the credit expense on a per invoice basis, whether that credit expense relates to white lead in oil, linseed oil, colors in oil, or mixed paint; is that correct?

A. Are you referring to Account 27?

Q. Yes, sir.

A. Yes, it does.

Q. Based on your experience as an accountant now, and
with the company, would you say that the credit ex-
4157 penses properly allocable to dry white lead in 600-
pound kegs, sold to industrial customers for their
own use, would be as much as the credit expenses properly allocable to trade sales to dealers and others for resale?

A. Frankly, that is a difficult question to answer, but I will do my best on it.

You draw the distinction between industrial sales and trade sales. Now, to begin with, you have a great difference between the quantities involved, but on a proportionate basis, I know of no reason why the loss on one should not be the same as the other.

Q. Well, now, would your expense of investigation, which I assume is a part of your credit expense that appears in here—

A. Yes, sir.

Q. Would that be as much in selling to people buying in five and twenty-ton quantities for their own consumption and use in manufacturing processes as similar credit investigations of small hardware stores and paint dealers?

Mr. DuBose: I object on the grounds that the question is ambiguous. Do you mean, Mr. Wright, per pound or per customer?

Mr. Wright: I am talking about per customer.

Trial Examiner Norwood: Answer the question.

The Witness: Will you read that back?

(The pending question was read by the reporter.)

4158 The Witness: I am still not sure I understand
the question, but as far as an order coming through
and going through the credit department, one for a 600-pound item of dry lead would probably take just as much time and effort as one for 20 tons of dry lead. Is that your question?

By Mr. Wright:

Q. No. I am speaking now of the comparison of the cost per customer of credit investigations of the purchasers of dry white lead in 600-pound barrels in varying quantities, as against the credit investigation of your trade customers, namely your small paint stores and hardware stores who buy white lead in oil and similar products for resale.

A. You see, the problem there is you may well spend more time looking up one individual paint store customer than you would looking up credit rating on a large outfit, and once you have ascertained the credit rating on a large outfit, from that point on it is not necessary to go through that same procedure.

Q. Isn't it true, now, that most large industrial consumers are listed in Dun & Bradstreet and the other reports, with a very good credit rating, so that you, once you have looked at it, don't need to keep referring to it and make investigations of it? Isn't that an accurate statement?

A. That's right.

Q. Now, is that true with your small trade sales customers?

A. Many of those people are also listed in Dun &
4159 Bradstreet. Upon receipt of their first order, we would have to investigate their credit rating. From that point on, our experience would help us out in issuing credit to them.

Q. But with relation to these small customers, wouldn't it be fair to assume that your credit investigation would have to be on a more continuous basis than it would with your large industrial customers?

A. If it is a risky customer, yes; if it is a good small customer, no.

Q. Now, small customers not listed in Dun & Bradstreet —isn't there more expense in making an investigation than there is with your large industrials who are so listed?

A. I understand that many of the small customers are listed in Dun & Bradstreet.

Q. As to those which are not—

A. Then there is additional work required to determine their credit position.

Q. Well, now, on a transaction basis, wouldn't you assume from your experience that your credit losses are probably higher with your small trade sales customers than they are with your large industrial customers?

A. Not necessarily so. While you may have small customers—well, put it this way: Whereas the total credit loss from the small customers may involve more transactions, the net loss may not be any greater than from one of the larger customers.

4160 Q. Well, aren't these figures put up on a transaction basis rather than a customer basis or tonnage basis?

A. These are the total losses.

Q. On a transaction basis, however. They have been figured out on these invoices—

A. They have figured—

Q. —on a transaction basis, rather than a total dollar volume or poundage basis.

A. That's right, on a per unit basis.

Q. So that on a per unit basis, your credit losses will be more with the smaller customers on trade sales than they would be with the larger industrial customers; is that not true?

A. No, I still don't follow you on that. Will you rephrase the question?

Q. Well, I will withdraw the question.

Mr. Wright: I have no further preliminary cross.

Mr. DuBose: The offer is pending, your Honor.

Mr. Wright: May I inquire as to the purpose of the offer here?

Mr. DuBose: Yes, Mr. Wright. It is in the record so far that there is a quarter of a cent differential between carload and less-than-carload shipments of dry white lead, and in these exhibits we have attempted to justify that from the cost accounting standpoint. In so doing, this witness has taken all of the carload customers of the 4161 National Lead Company, except those who were shipped by truck in the immediate vicinity of the manufacturing branch, and has shown what the cost was to ship these carload customers, as they customarily do receive shipments in carload quantities, that is, direct from the manufacturing branch to the customer at the carload rate.

This witness has compared that actual cost with the cost of shipping in two other methods, one of which involves shipment from the manufacturing branch to the local warehouse at a carload rate, and shipments out of the warehouse to the customer at less-than-carload freight rates, or, if it is in the same town, their local trucking rate of 5 cents a hundred, which is certainly a reasonable figure.

The other category, the other comparison, is with that carload rate direct, with a direct less-than-carload shipment, direct from manufacturing branch to customer.

In that way, we believe that this is an accurate and representative picture which shows the actual difference in shipping costs alone, plus invoicing, of shipping these customers in carload quantities; as compared with what it would cost us to ship them in less-than-carload quantities in the two other methods.

Mr. Wright: Your Honor, I want to thank counsel for his statement.

Let us look at these exhibits. Exhibits 215-A and B represent 55 per cent of the total pounds of dry white
4162 lead shipped over the entire country. As the witness has stated, they do not include a substantial tonnage here which is sold in and adjacent to the factory locations of the company.

Now, those factory locations are Philadelphia, Perth Amboy or the Metropolitan New Yorw area, Chicago, St. Louis, and the San Francisco Bay area in California. We know enough about this business to know that all five of those areas are among the most substantial consuming areas for dry white lead in the country. There are figures in the record indicating that in 1941, out of the St. Louis Branch alone, there were 1,381,000 pounds of dry white lead, packed in these containers, sold in St. Louis. We don't know what the corresponding figure would be of the pounds sold in Chicago, the pounds sold in Philadelphia, the pounds sold in the New York area, the San Francisco area. No doubt they are substantial.

They are omitted here. Why are they omitted? Simply because the only transportation costs involved on those transactions would be local cartage, and that would be practically the same whether it was to a carload customer or to a less-than-carload customer. So that the total effect of that would be to materially change the relationship between the figures which appear on here.

Now, let me go on from there. These are not the shipping expenses incurred by the National Lead Company, by this witness' testimony. These are a theoretical extension
4163 of transportation costs on three different bases.

The first basis is l.c.l. from the factory to the customer. That is put in there even though the witness stated that these were to carload customers; so that has no value whatever as reflecting anything that the company did.

Then it is put up on a rail carload shipment directly from the factory to the customer. That may more nearly reflect the facts.

Then it is set up in a third way, showing a carload rate to a selling branch, which may not be the factory branch, with a l.c.l. rate from the selling branch to the factory or to the customer.

Now, we know that in carload quantities, it—or, at least it defies reason to suppose that carload customers are shipped l.c.l. by rail at rates up to $1.27 a hundredweight out of a selling branch warehouse. It was not taken into account that truckload shipments, which may involve quantities as low as 15,000 pounds or 7½ tons, would take a rate materially lower than the less-than-carload rail rate, a rate comparable to the carload rail freight rate on quantities less than a carload. So that the transportation figures, even on a theoretical basis, are further distorted because there is not taken into account the portion of the tonnage which might have moved in truckload.

Now, they are further distorted because all l.c.l.
4164 shipments, or, rather, all shipments to l.c.l. customers, are omitted. Now, some of those l.c.l. customers might have bought carloads. I assume that, since the witness stated that some of these carload customers bought in less-than-carload quantities and that the breakdown was not in carload transactions, but to customers classed as carload or less-than-carload. That further distorts the figures.

Now, what use is made of the figures? Mind you, that 215-A and B relate to every manufacturing branch in the country and that only the last four lines on 215-A and the first six lines on 215-B relate to shipments by the Atlantic Branch. The rest are all outside of that branch territory. Exhibit 217 purports to be the total administrative cost of the Atlantic Branch, including the executives of the branch, all the accounting department, credit department, and so forth, with all the rent, insurance, taxes, pensions, old age benefits, and so forth. The next category is selling expenses, and that is likewise complete as to the branch office.

Now, in that first category of office salaries and office expenses, a portion of that cannot be attributed to the invoice expense and the selling expense of white lead, because the branch manager and the assistant manager in that office are in a supervisory position over the manufacturing operations in the branch, and we know that there are several factories in the branch producing lead
4165 pigments, and there are other factories producing products which are in no way involved in this case by any stretch of the imagination: lead shot, lead pipe, solder, powdered lead, colors in oil, linseed oil, flatting oil, any one of dozens of products which the National Lead Company sells, and which, of course, are sold and handled through this Atlantic Branch.

Now, all that portion of the main office administrative expenses there is tacked on to the selling expenses and overhead on dry white lead, and it can't properly be allocated in that fashion. It relates to production, not only of white lead, but of a host of other products. The whole administrative and selling expense covers every product in the branch, as we have said. How much of it could properly be allocated to dry white lead, I don't know. Apparently this witness doesn't know.

Then, that total figure is divided by what is called a total regular number of invoices. Now, they don't really mean invoices there, because they included in that their so-called billing to agents, which was a final statement they sent the agent at the end of the month on his account. There may have been ten shipments to the agent, twenty shipments, as far as we know, during the month. The effect of including those consignment report billings rather than the actual shipments to those agents is to reduce the total number of regular invoices, and thereby, of course,
4166 to increase this figure $7.42 that appears here, which is arbitrarily said to be the average cost per invoice. Well now, average cost per invoice, as we have seen here, includes the salary of the head of the office relating to production of lead shot, of solder, of any of these other things.

Now, you get over on 216, and here is where all of these exhibits which are related are tied together to form the conclusion for which counsel offers this exhibit. He then compares the three arbitrary figures that he got from 215-A and B, which, as we have seen, have nothing to do with actual transportation charges on dry white lead, and he adds the freight cost on 20 tons and the invoice cost on 20 tons together, and he says that the per ton cost of administering an invoice and selling and shipping to a carload customer of dry white lead is $5.40 a ton.

Then he says that figuring an l.c.l. customer at five tons—now, I don't know where that five tons came from—an l.c.l. customer can buy up to 19 tons, and he is still an l.c.l. customer; he can buy from 600 pounds to 19,000, or 19¾ tons, and he is an l.c.l. customer. That arbitrary figure of five tons was put in there without any explanation of how it was arrived at, and the invoice cost of $7.45 was added, and then the freight cost based on these different arbitrary things was added, so that you get in three different ways the selling cost per ton as between the l.c.l. and the carload.

4167 Well now, the whole thing is spurious because incompatible elements have been combined. This witness testified that the National Lead Company regularly breaks down its expenses, administrative expenses, selling expenses, and freight expenses as to dry white lead, so that presumably on the basis of those allocations, the respondents could have come in here and said, "As to so many pounds of dry white lead that we sold in 1939 or 1940 or 1941, our administrative expenses properly allocable were so many dollars; our transportation expenses so many dollars; our selling expenses so many dollars," and we would have had the most accurate figure that could have been given on what those expenses were. But this material is made evidence of a wholly unreliable kind.

Trial Examiner Norwood: Well now, in other words, the freight figures you have given here cover shipments over the entire country; is that right?

The Witness: Yes, sir.

Mr. Wright: Only a portion, your Honor, of shipments over the entire country, a very carefully selected portion which is selected in a way that will make the figures come out the way the respondents want.

Mr. Ewing: I object to that, selecting them in a way that would make the figures come out the way the respondents want.

Trial Examiner Norwood: Well, counsel may
4168 speak to that. But do the invoices represented by all
that freight—that is, are those invoices included in

this number of invoices you have here on this exhibit, or are you just taking the number of invoices in one particular branch, the Atlantic Branch?

The Witness: Using the Atlantic Branch invoices.

Trial Examiner Norwood: And you are combining them with figures of shipments all over the country that may be covered by a great many other invoices; is that right?

The Witness: Selecting the Atlantic Branch as being representative of the Lead Company.

Mr. DuBose: It is already in evidence, your Honor, that the Atlantic Branch, on trade sales over the years from 1920 to 1941, roughly took care, on trade sales of white lead in oil, of between 25 and 27 per cent of the entire company's business.

Trial Examiner Norwood: Well, if he is adding these expenses here and dividing by the number of invoices, shouldn't this be the number of invoices that cover these shipments which he has tabulated here?

Mr. DuBose: Your Honor, we could do that and it would take us six years.

Mr. Ewing: No, you miss his point. As I understand it, you are referring to those shipments on the two larger sheets.

Trial Examiner Norwood: Yes.

4169 Mr. Ewing: And wanting to know the relationship between them and the invoices shown on 217.

Trial Examiner Norwood: That's right.

Mr. Ewing: Now, the invoices shown on 217 have nothing to do with these shipments of white lead in carload lots all over the country to customers other than metropolitan district customers. The invoice figure, as I understand the witness' testimony, relates to all the business done by the Atlantic Branch alone.

Mr. DuBose: Alone.

Mr. Ewing: And it doesn't relate to all the business represented by the other exhibits.

Trial Examiner Norwood: But added here on 216 and 217 is the freight expense.

Mr. DuBose: That's right.

Mr. Wright: On 216.

Mr. DuBose: As a factor; as one of the factors.

Trial Examiner Norwood: As one of the factors?

Mr. DuBose: That is true.

Trial Examiner Norwood: And it is covered by hundreds or maybe thousands of other invoices that are not counted in this divisor?

Mr. DuBose: That is perfectly true, and, your Honor, this whole argument and your questions and Mr. Wright's
statement are all relevant, perhaps in a brief. They
4170 all go to the weight. There has been no dispute as to
the identification of these figures, as to exactly what they are, as to their accuracy. I presume we can back them up, and if they want to come up to the Atlantic Branch, we will be glad to show them all the figures.

This whole argument goes to the weight. Now, it is relevant on that.

Trial Examiner Norwood: I agree with counsel on that.

Mr. DuBose: And I think now we are just talking about the admissibility.

Mr. Wright: I beg to differ with counsel on that. My objection didn't go to weight; my objection went to competency. Counsel made a proffer of this, presumably as competent evidence—

Mr. DuBose: That's right.

Mr. Wright: —on this subject. Now, will you tell me what relation 76,000 invoices covering everything from shot to lead pipe and white lead in oil and red lead in oil and all their trade sales and their industrials and their agents' billings and everything else, have got to do with the relative cost of selling these customers on 215-A and B, as against the customers who are not listed here, who buy in less-than-carload quantities?

Mr. DuBose: Well, as I say, that goes to the weight.

Mr. Wright: And 216 is solely devoted to the
4171 purpose of bringing all those together and stating,
"This is our relative cost of doing business with these two types of customers," and I submit that it is simply a multiplication and a division of factors which have no relation to each other.

Trial Examiner Norwood: Well, that may be very true, and respondents may introduce a witness here to prove something and his statements may not prove it, but may disprove it, but can I stop him from testifying?

Mr. Wright: Your Honor, I am not suggesting you stop a man from testifying, but I certainly state that a paper such as this 216, which is made up for the purpose of this proceeding to show that the relative cost of doing business between two classes of customers was so much, is inadmissible unless it has some weight and unless the basic data are competent to show what this purports to show.

Trial Examiner Norwood: Well, I think it is very clear what it does show. There are factors here that may be considered, and I am not going to say what it proves or what it disproves now, but I will give it exhaustive study. These papers are gotten up with a great deal of labor, and it appears to me, looking at it, they have made their statements here and it is made very clear what they are. They have answered all these questions, and I couldn't exclude that from some consideration.

Let the counsel show that they are not competent 4172 to show certain things.

Mr. Wright: Your Honor, I wouldn't suppose for a minute that anyone who really examined those would be misled by the conclusion that appears on there, but I dislike having things in the record which require a great deal of technical explanation as to why they are incompetent and why they don't mean what they say they mean.

Trial Examiner Norwood: But this happens to be that kind of a case.

Mr. DuBose: That is exactly it. If we didn't have the Robinson-Patman Act, we wouldn't have this sort of thing.

Trial Examiner Norwood: In another case—I can cite you there the Standard Brands case—the Commission allowed two or three months to have this survey made, and after we finally analyzed it, we found that they based the whole thing on some predetermined percentages, they called it, and it wasn't accepted by them. But it was received in evidence as their story of how this thing was, and the Commission's experts were given two or three months then to figure the thing out and show just why it didn't apply.

Mr. Wright: Your Honor, perhaps I didn't make myself clear as to one portion of this. Now, you will recall that this witness testified under my examination that regular records are kept, which show a proper allocation of all the various different cost factors actually incurred by the company.

4173 Mr. DuBose: Not between carload and less-than-carload customers. He said that.

Mr. Wright: As to this product. Now, in other words, the exact proportion of the selling and administrative expenses of the Atlantic Branch as to dry white lead are in the possession of the company.

Mr. DuBose: Certainly, but not between customers. What we are trying to do here is to show the difference between carload and less-than-carload.

Mr. Wright: Well now, it is a perfectly proper accounting procedure to have brought in the actual costs, which wouldn't have—

Mr. DuBose: Which wouldn't have meant a thing; wouldn't have meant a thing in this case; wouldn't show the difference. Certainly, over-all we have so much per ton—I think it is $4.86 per ton of dry white lead. What does that mean? I am not testifying and I don't want that to be taken as a figure, but it doesn't mean a thing. It means that out of all the tons that we sell, we have a certain expense. It doesn't show the difference between carload and less than carload.

What we had to do, of course, in a sense, was to make an arbitrary selection. Why? Because under the Commission's theory, the Robinson-Patman Act, you have to have a cost accounting justification for your different
4174 prices, and that is exactly why we did it.

Trial Examiner Norwood: I shall overrule the objection and receive the exhibits. These objections that go to the weight can be met by other evidence or argument. I have been very much interested in what has been said on both sides, and it has thrown a great deal of light on this paper, and I think it will lessen my work there, but I don't see how I could exclude it, how I can say that it does prove this thing conclusively, or that it doesn't prove anything at all. I can't say that now.

Respondents' Exhibits 215-A, 215-B, 216, and 217 are now received in evidence.

(The documents referred to, heretofore marked for identification as RESPONDENTS' EXHIBITS 215-A, 215-B, 216, and 217, were received in evidence.)

Mr. DuBose: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. DuBose: May we have this marked for identification? I think the next number is 309.

Trial Examiner Norwood: Yes.

(The document referred was marked Respondents' Exhibit 309 for identification.)

4175 Q. Mr. Owens, I show you Respondents' Exhibit 309 for identification, and I ask you to tell us what that purports to be.

A. This is a statement showing the cost of both soft and heavy paste packages in four sizes, 12½'s, 25's, 50's, and 100's; cost per 1,000 packages; cost per package. We then translated the cost into 100 pounds of material packed, that is, the package cost, and then we have the cost per 100 pounds of material packed in 12½'s, 25's, and 50's, the cost in excess of the 100-pound size.

Q. In other words, the last figure on the right under the two general headings, shows the excess of the cost of the package alone, of the 100 pounds of material packed in 12½-pound packages, 25 and 50, over the cost of a single 100-pound container; is that correct?

A. Correct.

Q. And that is for white lead in oil, both heavy paste and soft paste?

A. Correct.

Q. Now, when you say heavy paste, what do you mean?

A. Heavy paste means white lead in oil, 91 per cent carbonate and approximately 9 per cent oil.

Q. And soft paste is what?

A. Soft paste is a white lead paste with approximately 89 per cent carbonate, 9 per cent oil, 2 per cent turpentine.

Q. And I show you these documents and ask you
4176 whether these are invoices covering the package cost
per thousand packages shown on Respondents' Exhibit 309 for identification.

A. Yes, they are.

Mr. DuBose: I offer in evidence Respondents' Exhibit 309 for identification.

Mr. Wright: No objection.

Trial Examiner Norwood: Received.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 309, was received in evidence.)

Mr. DuBose: That is all we have of this, I hope our final witness, but Mr. Ewing has a statement.

Trial Examiner Norwood: Have you any cross-examination?

Mr. Wright: I would like to make a brief examination of the witness on several questions.

Trial Examiner Norwood: Yes.

Cross-Examination by Mr. Wright.

Q. Going back to the source of your information on these different customers, I believe you stated that you had a book showing all the carload customers of dry white.

A. A book showing all the customers?

Q. Broken down as to carload and less-than-carload customers.

A. No, sir; it is not broken down into carload customers.

4177 Q. Just carload customers?

A. It is a book containing all the names of all the customers of dry white lead.

Q. How do you know which ones are carload and which ones are less?

A. I believe I put into testimony that it was with the help of the sales manager of the dry lead department. He ascertained who the carload customers are who the l.c.l. customers are.

Q. For this purpose, then, you did distinguish as between those customers?

A. That's right.

Mr. Wright: No further cross.

Trial Examiner Norwood: What would be your estimate of the number of invoices that would be represented by the shipments that are tabulated here and entered on Respondents' Exhibit 215-A and B? You entered here on 217 "Total Regular Number of Invoices" and you have divided that into some totals here which include total freight for the entire country; isn't that right?

The Witness: This represents the entire country.

Trial Examiner Norwood: Yes. Now, what would you say would be the number of invoices which would be involved in the freight which you have entered on these large sheets? The 76,238 for 1939 represents the invoices of the Atlantic Branch?

4178 The Witness: Alone; yes, sir.

Trial Examiner Norwood: Well now, what would be your estimate of the other invoices that were issued with respect to this freight that is entered in here on these large ones?

The Witness: I am afraid I couldn't give you even an estimate of that.

Trial Examiner Norwood: Well, it would be considerably more, would it, or not? A small amount or a large amount?

The Witness: We have the total number of invoices for the Atlantic Branch.

Trial Examiner Norwood: Yes.

The Witness: Now, if we assume that the Atlantic Branch represents 25 per cent of the trade sales of the company, then I would assume that this figure of 76,000 represents approximately 25 per cent of the total number of invoices rendered by the National Lead Company in the year 1939.

Mr. DuBose: '41.

Trial Examiner Norwood: I see.

Mr. Ewing: I would like to direct attention to page 4126 of the transcript where Mr. McCarthy was called last week, where he testified with respect to Respondents' Exhibits 229 to 305-D for identification, that in each and every instance the document was a copy of the telegram. Examination shows that practically every one is a copy of a telegram, but one or two of them are letters or attached memoranda.

4179 Mr. Wright: I am willing to concede that the documents show on their face what they are, and he may have been mistaken as to what they are.

Mr. Ewing: I thought there would be no objection to correcting such a minor error.

Might I substitute for the originals, which we are offering as Respondent's Exhibits 229 to 305-D inclusive, photostatic copies, and offer them as those exhibits?

Mr. Wright: No objection.

Trial Examiner Norwood: Yes, counsel may.

Mr. DuBose: They have been marked on the photostats.

Mr. Wright: No objection to the offer, either.

Trial Examiner Norwood: Those are exhibits that were previously marked?

Mr. DuBose: They were marked last week in New York.

Mr. Ewing. Exhibits 229 to 305-D inclusive.

Mr. DuBose: There are some sub-letters in there. You remember, your Honor, you took those down.

Trial Examiner Norwood: I have a list of them on my docket; 229 to 305-D, correct. Is there any objection?

Mr. DuBose: There is no objection.

Trial Examiner Norwood: They are received in evidence as Respondents' Exhibits 229 to 305-D as sublettered in the case of some of them, and heretofore shown on the record.

4180 (The documents referred to, heretofore marked for identification RESPONDENTS' EXHIBITS 229 thru 233, 234-A and B, 235, 236-A & B, 237-A & B, 238 thru 240, 241-A & B, 242-A thru D, 243-A & B, 244-A thru G, 245, 246-A thru N, 247-A & B, 248 thru 251, 252-A & B, 253 thru 258, 259-A & B, 260-A & B, 261-A & B, 262 thru 270, 271-A & B, 272 thru 286, 287-A and B, 288 thru 291, 292-A & B, 293, 294, 295-A & B, 296 thru 304, 305-A thru D inclusive, were received in evidence.)

Mr. Wright: May we have a short recess?

Trial Examiner Norwood: We will take a five-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Proceed.

Mr. Wright: I would like to have this marked as Commission's Exhibit 866-A and B.

(The document referred to was marked Commission's Exhibit 866-A and 866-B for identification.)

Mr. Wright: I would like to offer Commission's Exhibit 866-A and B and stipulate at the same time that if witnesses are called by the National Lead Company, they would testify in accordance with the statement that Mr. Ewing is now going to read.

Trial Examiner Norwood: I had better rule on the proffer, first.

Mr. Ewing. There is no question about the fact that that is a copy of a letter that was actually written.

Trial Examiner Norwood: This is the exhibit to which Mr. Wood strenuously objects?

Mr. Ewing: That's right.

Mr. Wright: I might say in that connection, your Honor, I am not contending that the National Lead
4181 Company ever acquired the Eagle-Picher Company. I think it is relevant in this case as to the state of mind of the National Lead Company and its corporation officials at various times during this period, and certainly

this letter indicates that. It goes to one of the issues in the case, about the alleged intent of the National Lead Company to monopolize this business.

Mr. Ewing: As I said, there is no question that this is a copy of a letter actually written. I would object to it on the grounds that it is incompetent, irrelevant, and immaterial, but not on the ground it is not a copy of the letter.

Trial Examiner Norwood: Well now, I will defer the ruling on this until I have studied it very carefully, on account of Mr. Wood's being absent.

Mr. Wright: Well, your Honor, could we take a short recess and you rule on it then, because I have another offer that I am going to make based on this.

Trial Examiner Norwood: Well, I wanted to ask you if you think we will have an afternoon session.

Mr. Ewing: Well, as far as we are concerned, when I read this statement, we are through.

Mr. DuBose: Your Honor, may we say that we would like to join, in so far as National Lead is concerned, with the second objection noted on the record by Mr. Wood,
namely that a violation of Section 2 of the Sherman
4182 Act is not within the jurisdiction of the Federal
Trade Comm[illegible] Section 5.

Mr. Wright: [illegible] go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Back on the record, now.

I have heard discussion on this by counsel, and I have read the letter carefully, and I think that it may be admitted for the sole purpose of showing that National Lead made an offer to purchase Eagle-Picher, and I don't see how this could prejudice Eagle-Picher in any way whatsoever, and I will overrule the objections and receive the exhibit, Commission's Exhibit 866-A and 866-B.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT 866-A and 866-B, was received in evidence.)

Mr. Ewing: With respect to Commission's Exhibit 866-A and B, it is stipulated that if a witness or witnesses from National Lead were called, he would testify with respect to that exhibit as follows:

Early in 1931, Frederick Hertenstein, a vice president of the Eagle-Picher Lead Company, and a member of its board of directors, suggested to Edward J. Cornish, presi-

dent of National Lead Company, that he consider the purchase by National Lead Company of a large block of stock of the Eagle-Picher Lead Company. Thereafter, ne-
4183 gotiation developed into a proposition that National Lead could purchase the physical assets and good will of the Eagle-Picher Lead Company, and on or about March 14, 1931, National Lead requested of the Attorney General of the United States an expression of his attitude with respect to such a proposition. From time to time, National Lead Company supplied the Department of Justice with additional data.

On or about May 8, 1931, the Department of Justice advised Edward J. Cornish that it preferred to express no opinion as to the legality of the proposed transaction. On May 12, 1931, Edward J. Cornish sent Frederick Hertenstein a written proposal addressed to the President and Board of Directors of Eagle-Picher Lead Company, with the request that Hertenstein present it in proper form to the company.

Hertenstein returned the written proposal to Cornish with the advice that neither he nor his associates approved of the proposal as made, and that he would not submit it to the Board of Directors of the Eagle-Picher Lead Company.

A copy of this written proposal was sent to the Department of Justice at the same time that the original was sent to Hertenstein. The original is in the possession, at the present time, of the National Lead Company. The negotiations were never resumed, and no transaction along the line proposed was ever consummated.

Trial Examiner Norwood: Is that agreeable?

4184 Mr. Wright: I am agreeable to stipulating that witnesses, if called on behalf of the National Lead Company, would so testify.

Trial Examiner Norwood: Is there anything further?

Mr. Wright: Yes, your Honor. I would like to have marked for identification Commission's Exhibit 867 and sub-numbers, and Commission's Exhibit 868 and sub-numbers.

(The documents referred to were marked Commission's Exhibit 867-A through 867-L, and Commission's Exhibit 868-A through 868-O for identification.)

Mr. Wright: In the hearing at Cleveland, in connection with the offer of Respondents' Exhibits 199 and 200, which were maps prepared by the traffic department of the Sherwin-Williams Company, showing breaking points of freight rates, or purporting to show breaking points of freight rates as between producing points of white lead and red lead and litharge, there were submitted for convenience of Commission's counsel, computations of the rates, the actual rates in cents per hundredweight at the various points indicated on those maps, together with tariff references, showing the sources of those rates.

I have had the material relating to dry white lead and white lead in oil marked as Commission's Exhibit 867-A to 867-L for identification, and I have had marked as Commission's Exhibit 868-A to 868-O for identification,
4185 the comparable material relating to red lead, red lead
in oil, and litharge. I would like to offer those exhibits by agreement of counsel as thus identified.

Mr. Welch: That's all right.

Mr. Wright: What is the state of the record?

Mr. Welch: I said I agree.

Trial Examiner Norwood: Has other counsel agreed to the exhibits?

Mr. DuBose: Well, as far as National Lead is concerned, we have no way of checking those rates, and subject to correction—

Mr. Wright: May I say that I am not offering those as the rates. I am offering those as a list of the rates and the tariff references which were used by the traffic department of the Sherwin-Williams Company in making up Respondents' Exhibits 199 and 200.

Mr. DuBose: No objection on that score.

Trial Examiner Norwood: They may be received as marked, Commission's Exhibits 867-A through L and 868-A through O.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBIT 867-A through 867-L and COMMISSION'S EXHIBIT 868-A through 868-O, were received in evidence.)

Mr. Wright: Your Honor, I would now like to re-
4186 offer Commission's Exhibits 527 and 528.

Mr. DuBose: What are they?

Mr. Wright: May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: May I make a statement in connection with my re-offer now?

Trial Examiner Norwood: Yes.

Mr. Wright: These exhibits are photostatic copies of carbon copies of letters addressed by Albert Chatfield, a stock broker in Cincinnati, Ohio, to Messrs. E. J. Cornish and F. M. Carter, Chairman of the Board and President of National Lead Company respectively, under dates of June 15 and July 20, 1935. The exhibits were produced by the National Lead Company under subpoena and were identified by counsel for that company as being "true and correct photostats of document supplied and furnished by National Lead Company" to the Federal Trade Commission, and each of them was further identified as "a letter" addressed to the respective officials of the National Lead Company.

They were first offered in evidence and discussed on pages 585 to 594 of the transcript, were reoffered at pages 679 and 681 of the transcript. They were previously excluded on the ground that they had not been sufficiently connected up.

I would like to call your attention to Commission's 4187 Exhibit 700-B, which is a transcript from the stock transfer agent of the Eagle-Picher Company, showing 44,900 shares of common stock of Eagle-Picher in the name of E. J. Cornish over a period of time from 1932 to 1943.

Mr. DuBose: 1930, it should be.

Mr. Wright: Well, at any rate, that exhibit has the dates correctly.

Respondents' Exhibit 183 is a document prepared by National showing its ownership of Eagle-Picher stock, including dates of purchase and dates of sale.

Mr. Chatfield was called as a witness in this proceeding. Although these documents had not been produced by him, they came from the files of National, and your Honor will note on the upper corner of the letters the legend indicating that they were from the files of Frederick M. Carter, who is the president of the company.

When Mr. Chatfield was examined, he was a reluctant witness. When he was asked about Commission's Exhibit 527 for identification, whether it was a copy of a letter from him to Mr. Cornish, he said:

"Well, it must be. I went in to see Mr. Cornish on several occasions originally, about stock owned with National Lead in view of purchasing, and I may have written this letter in answer to that interest."

When he was asked whether he had received any
4188 letters back from Mr. Cornish in response to any
letters he wrote, he said that he had not, and that communications from Mr. Cornish were:

"Well, just by telephone or he would be out here or something like that."

And when he was asked if he recognized Exhibit 528, he said:

"That is a letter written to Mr. Carter, President of the National Lead Company."

And he was asked, "By whom?" and he said:

"Signed by me. This was a month later."

Trial Examiner Norwood: Chatfield said that?

Mr. Wright: Yes. The Examiner, Mr. Ballinger, said:

"Now let me see if I understand this. Do I understand that you wrote these two letters to Mr. Carter?"

And the witness, Chatfield, said:

"No. One letter was written to Mr. Cornish."

The Examiner said:

"Did you receive a response from that letter?"

The witness said, "No."

Mr. Ballinger said:

"Did you receive a response to the letter to Mr. Carter?"

Mr. Chatfield said:

"No. As I remember, I didn't receive anything.
4189 This Mr. Weatherhead lived in New York City and
he had charge of the whole matter and nothing ever came of it. We couldn't do anything with it, and Mr. Weatherhead, at this time I think he is dead. He has been dead for several years."

The question was then asked: "These letters were in response to communications that you had with Mr. Weatherhead?

"Answer: No, these letters were in response to conversations that I had in New York City with Mr. Carter.

"Question: And they were in response to and pursuant to those conversations, is that correct?

"Answer: Well, I guess so. I don't—this thing has been so long ago that it is very vague in my mind. I have been through so much in the way of securities since this ~~deal that we usually~~ dismiss them when there is nothing to it. The whole thing didn't amount to anything."

Now, on the basis of that testimony, it is a reasonable inference that Mr. Chatfield was engaged in negotiations

involving the securities of the Eagle-Picher Company with Mr. Cornish and Mr. Carter. While he had no clear independent recollection of the details of that business, and while he didn't remember the details of these particular letters, he recognized them as copies of letters that he had sent to these gentlemen relating to subjects that he had had
conversations with them about in person in New York
4190 City, and apparently in Cincinnati.

Now, later on, Mr. Simon, Treasurer of the National Lead Company, was called as a witness for the Respondent. He is the gentleman who identified Respondents' Exhibit 183, which was the record of purchases and sales of that stock. He stated, first of all, that the stock which was held in Mr. Cornish's name was actually stock owned by the National Lead Company, and it was in the possession of the National Lead Company, although not on the transfer of records of the Eagle-Picher Company.

Then he stated that it was an investment and he could point to the profit that was ultimately made in selling that stock. He could only point out one other common stock that had been purchased by the National Lead Company as an investment in similar circumstances, and that was stock of the American Smelting and Refining Company.

Mr. DuBose: Wasn't that preferred stock, Mr. Wright?

Mr. Wright: It may have been preferred stock, the A. S. & R. stock. At any rate, he testified that that was not held in the name of Mr. Cornish and Mr. Carter. That was held in the name of the National Lead Company. He was asked why, and he said, "Well, we thought that would be all right in that situation."

Then he was asked why it was that in Respondents' Ex-
hibit 183 there was a succession of small purchases of
4191 blocks of stock, 100 shares one day, 200 shares an-
other day, 300 shares another day, in successive periods of three days, a week, two weeks, three weeks. The stock was then selling from $3 to $5 a share, so that a block of 100 shares represented a very small amount of money. The stock was not listed on the New York Stock Exchange.

He was asked if there was a standing order, a firm order with brokers in Cincinnati, to pick up that stock. He said no. He said, "We would receive telephone calls, Mr. Cornish or myself, from some broker in Cincinnati."

Mr. DuBose: A. and J. Frank.

Mr. Wright: "Who would say, 'Well, we have 100 shares of Eagle-Picher stock. Would you be interested in purchasing it?'" and presumably they would say, "Yes, we would be interested in purchasing it," and then a week later another call would come in about a similar quantity. Except for three or four purchases, they were all small quantity purchases over a period of time.

Now, we have just received into the record an exhibit which shows that the National Lead Company, immediately prior to the dates on which the purchases of Eagle-Picher stock commenced—

Mr. Ewing: That is incorrect.

Mr. DuBose: I think in August 1930.

Mr. Wright: Well, the bulk of the purchases, I 4192 believe, occurred in a period subsequent to the date of May 12, 1931, and continued on for a period of several years, including the time covered by 527 and 528.

Now, the witness Chatfield, by his testimony, has been established to have been acting for the National Lead Company in some security transaction—

Mr. Ewing: No.

Mr. Wright: —the details of which were hazy in his recollection.

Mr. Ewing: No.

Trial Examiner Norwood: Go ahead.

Mr. Wright: By the very information contained in those exhibits themselves, an agency relationship is established between him and Mr. Cornish or the National Lead Company in the transaction involving Eagle-Picher securities.

Now, it is uncontroverted that those documents were genuine documents, letters, held in the files of Frederick M. Carter, the President of the National Lead Company, and brought in by the National Lead Company. It is uncontroverted that Chatfield had at that time some relationships involving the Eagle-Picher stock with Mr. Cornish and Mr. Carter. We know now that Cornish was buying, in his own name, for National Lead, a considerable quantity of Eagle-Picher stock. We know that in 1931 he had tried to acquire the physical assets of the Eagle-Picher Company.

4193 I submit that these exhibits, which are of unquestioned genuineness, and are of unquestioned relevance, are admissible in this proceeding, and I respectfully reoffer them.

Trial Examiner Norwood: Has counsel any objection to the receipt of these?

Mr. Ewing: It certainly has. In the first place, the witness Chatfield testified, if I am correct in my recollection—and I am quite certain I am—that he tried to work up a deal, and the quotation read by Mr. Wright a few moments ago shows he didn't work up a deal.

There isn't any doubt about what stock we did buy. The record shows that. But there also isn't any doubt about the fact that these letters were written by Chatfield on his own behalf, trying to work up a deal that was not worked up, and that he wasn't our agent or anybody else's agent as far as these respondents were concerned. It was his attempt to work up a deal, and he didn't do it, and what earthly relevance they have—it has all been gone over before. Nothing that has come into the record in any way improves the Commission's counsel's position as far as the offer of these letters.

Trial Examiner Norwood: Hasn't Mr. Chatfield testified since I ruled?

Mr. Ewing: No, sir.

Mr. Wright: Mr. Simon testified, the treasurer. Mr.
Simon testified and brought in a record of these pur-
4194 chases, showing purchases ranging from $800.

Mr. Ewing: Through A. & J. Frank, and not through Chatfield.

Mr. Wright: He said brokers in Cincinnati, and I said, "What brokers?" and he said, "Some of it was A. & J. Frank," but he did not testify that.

Mr. Ewing: Well, you know he didn't buy from Chatfield because Chatfield made no deal.

Trial Examiner Norwood: I said—

Mr. Wright: Well, Mr. Simon was unable to bring in a record to show exactly from whom all those purchases were made.

Mr. Ewing: The man who wrote the letters that you are now offering, who wrote those letters, himself testified he made no deal, so it is perfectly clear that nobody bought any stock through him.

Mr. Wright: I am willing, just as in the other exhibit, to accede to the fact that National never had over the amount of shares which had been testified on there, and that certainly they did not acquire a controlling stock interest.

Mr. Ewing: I don't want any inference that National was going after Chatfield to make a deal, because the evidence is clear that it wasn't, and I strenuously object.

Mr. Wright: Now, you will notice the name of a
4195 gentleman that is mentioned in one of those letters
there is a gentleman whose name has figured in a
recent exhibit here.

Mr. Ewing: He could mention anything he wanted.

Mr. Wright: Mentioned as being the man he talked to in this connection.

Mr. Ewing: What has that got to do with their admissibility?

Mr. Wright: There has already been a relationship established by the Chatfield testimony.

Mr. Ewing: The relationship established is that Chatfield tried to work up a deal.

Mr. DuBose: And nothing came of it.

Mr. Wright: Well now, the letters show on their face the subject of the transaction, and he testified that the letters were written in response to conversations that he had had with Mr. Cornish and Mr. Carter in New York.

Mr. Ewing: He didn't testify that Mr. Cornish or Mr. Carter asked him to write them.

Trial Examiner Norwood: I suppose we will have an after-lunch session here, and I will reserve the ruling on this. I want to review that testimony of Mr. Chatfield's first.

Let's recess until 2:00 o'clock.

(Whereupon, at 12:30 p.m., a recess was taken until 2:00 p.m. this day.)

4196 Afternoon Session.

2:15 p.m.

Trial Examiner Norwood: The hearing will come to order. I have just received an air mail, special delivery letter from Mr. Edmund P. Wood, representing the respondent Eagle-Picher Lead Company, making certain objections, and I shall enter it on the record and give him the benefit of an exception to any rulings that I made this morning or will make respecting the subject-matter of the letter. The letter reads as follows:

"Dear Sir:

"Mr. Ewing has transmitted to me a copy of the statement which he transmitted to Mr. Wright by letter dated November 17, 1947. Mr. Serviss and I have carefully checked the statement in relation to the obtainable information and believe the statement to be a correct and accurate statement. Nevertheless, I object to the introduction of any and all evidence pertaining to the negotiation which failed, on the grounds which I stated upon the Record last Friday in New York. Further, I shall move to have stricken from the Record certain testimony introduced in the early phase of the case pertaining to the same general subject matter.

"The Eagle-Picher Company is operated by its present management and there can be no proper issue in the case which does not pertain to the propriety of present conduct. The proffered evidence should not be received be-
4197 cause it is not pertinent.

"Moreover, the evidence should not be received because it is incompetent. Mr. Hertenstein, who is now dead, was acting primarily on his own behalf as a large stockholder in the Eagle-Picher Lead Company, and his motives back there in 1931 are beyond recall. Certainly the Trial Examiner will take judicial notice of the fact that 1931 was a critical and unusual time in which wealthy men were daily leaping from windows, some literally, some figuratively. Some thought about such things and lost their nerve or changed their minds. It is hard enough to draw proper inferences from events which actually happened, much less from events which did not happen. No useful purpose will be served at this time by attempting to hold a speculative post mortem over an abortive transaction long since consigned to oblivion.

"'Very truly yours,
/s/ Edmund P. Wood.''

I now want to settle the matter of Commission's Exhibits 527 and 528. I have been very much interested in the argument; during the luncheon hour I have gone back and reviewed this matter and reviewed the evidence of Mr. Chatfield.

I am of the opinion that it has been sufficiently connected to receive in evidence and I shall, therefore, receive the exhibits for whatever value they may have.

Off the record now.

4198 (Discussion off the record.)

Trial Examiner Norwood: Commission's Exhibits 527 and 528 are received in evidence.

(The documents referred to, heretofore marked COMMISSION'S EXHIBITS 527 and 528 for identification, were received in evidence.)

Mr. Wright: If your Honor please, we have reached a point now here where, except for one minor point, I do not believe there is anything pending for the record. That point is one which I raised at the time when I entered into a stipulation with Mr. Welch in New York as to what the witness Coolidge would testify if he were called to the stand.

At that time I said there was one point in his testimony which I had some reason to question, and that I wanted an opportunity to rebut an inference that might arise, namely, the statement that if he were called to testify, he would say that all the white lead in oil bought by Sherwin-Williams on the Pacific Coast was purchased from Premier and Fuller except for isolated shipments in carloads.

Mr. Welch and Mr. McDowell have been trying to work out something on this matter which would show exactly what the situation was with reference to the division of purchases by Sherwin-Williams and shipments from their own Chicago plant.

If it cannot be worked out, I want to reserve the right to recall Mr. Coolidge for the limited purpose and only

4199 for the purpose of cross-examining on the basis of that statement, and I am only going to that phase of the matter only.

I understand Mr. Ewing and Mr. Welch are agreeable —off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: On the record. Therefore, if it is agreeable to your Honor, we can close the taking of testimony today on that one condition. That will make this the conclusion of the taking of testimony, and any further proceeding on that minor point will involve only counsel of Sherwin-Williams, no other counsel except Sherwin-Williams' counsel, and there will be no evidence or testimony admissible except for that limited purpose, and while I hope it may be possible to settle it by an agreed-to statement on that situation by counsel of Sherwin-Williams, it may be necessary for that one witness to appear and testify.

Trial Examiner Norwood: Is that agreeable?

Mr. Ewing. That is correct.

Mr. Wright: And now, subject to that one condition, it appears that we could close the record at this point and take up the matter of further proceeding.

Trial Examiner Norwood: Yes.

Mr. Wright: I might add that, on that point, the matter involving Mr. Coolidge will be concluded one way or
4200 another within the next week or ten days.

Trial Examiner Norwood: Then, on the basis of the statement by counsel, I will now formally close the taking of testimony. If it is necessary, on this one point discussed by counsel, to take testimony on that point, as to that it will be a reopening, which I have a right to make in the meantime; but the taking of testimony is now formally concluded.

Counsel will be allowed until Monday, December 1, 1947, in which to file any arguments, briefs or requests for findings which they may submit to me.

These should be filed with the Secretary and the Trial Examiner will be furnished copies promptly; but if counsel so desire, they may submit whatever informative material by way of briefs or requests for findings—I will call them proposals—they may submit these proposals in part only, if they wish, directing attention to those points as they consider controverted issues, and may submit fuller and more complete proposals for findings and conclusions before the Commission prior to the consideration of their case on the final hearing.

Mr. Ewing: While counsel for the respondent fully appreciate your position in the matter of filing proposed findings and conclusions and your interest in making the suggestions that you have made with respect thereto, we feel that we must take an exception to the ruling re-
4201 quiring the filing by December 1 because of the time situation, and we would like permission to ask the Commission for an extension.

Trial Examiner Norwood: Yes.

Mr. Ewing: And I repeat, we appreciate your position on that, your Honor.

Trial Examiner Norwood: Off the record now.

(Discussion off the record.)

Mr. Wright: On the record. We have no objection to that at all.

Trial Examiner Norwood: Counsel may take the matter up and call me, and whatever date the Commission orders will be the date they will observe in filing their proposals.

Mr. Wright: It is my understanding all counsel will attempt to compose any differences they might have on corrections to be made in the record, and that that will be undertaken just as soon as it is physically possible and at a later date, within a short period of time, any differences that cannot be composed on proper corrections in the record will be submitted to you.

Trial Examiner Norwood: I think you will find that the Rules provide with respect to corrections of the record that those proposed corrections shall be listed in triplicate citing the page and line of each correction and indicating the corrections which they think should be made, and that opposing counsel shall get a copy and one copy is
4202 sent to the Trial Examiner, and they inform each other then as to any objections they may have, and also inform the Trial Examiner.

Mr. Wright: My statement was made on the basis of discussion I have had with counsel in the hope we could eliminate the submission of corrections by six different sets of counsel in the matter.

Trial Examiner Norwood: Yes.

Mr. Wright: And with the hope, if possible, they might agree in advance on corrections so there will only be one list; and any that are controverted or upon which they could not agree will be submitted in accordance with the Rule.

Trial Examiner Norwood: Is that agreeable?

Mr. Ewing: Yes.

Mr. Welch: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: It is the rule of the Commission that no corrections be entered physically on the record and that no corrections be allowed except those which involve a change of substance; but I see no harm in approving the entire list of corrections and incorporating them into the record.

After your proposals are in we could set a day for final hearing at which these corrections will be approved and then counsel may argue the case.

4203 One reason that I suggested you put in abbreviated proposals to me and enlarge on them later before the Commission is because I think you will be able to work that out much better after you see the Trial Examiner's report. So, whatever the counsel desire to do about that or whatever the Commission may authorize, I will inform you later.

Off the record.

(Discussion off the record.)

Mr. Wright: On the record. Pursuant to our discussion, your Honor, I make the motion that it be ordered by you that on the day one week following the last day for filing proposed findings and conclusions that we assemble here for the purpose of hearing argument by counsel on both sides as to their contentions.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Is that agreeable to counsel?

Mr. Ewing: That is agreeable.

Trial Examiner Norwood: It is understood that corrections in the record be submitted by counsel and settled at the last hearing or prior thereto.

The hearing is adjourned to reconvene as stated in the motion. We will reconvene at ten a.m. on that date in Room 332, Federal Trade Commission Building, Washington, D. C.

4204 (Whereupon, at 2:40 o'clock p.m., November 20, 1947, hearing in the above-entitled matter was adjourned.)

4205 Room 332
Federal Trade Commission Building
Washington, D. C.
Wednesday, January 7, 1948.

Met, pursuant to adjournment and agreement, at 10 a.m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

James D. Ewing, Esq., and E. Z. DuBose, Esq., appearing for the National Lead Company.

J. T. Welch, Esq., appearing for The Sherwin-Williams Company.

Roger Hinds, appearing for The Glidden Company.

Edmund P. Wood and

Richard Serviss, appearing for Eagle-Picher Company.

H. E. Gardiner, Esq., appearing for International Smelting Company and Anaconda Copper Mining Company.

4206 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order. Pursuant to adjournment on November 20, 1947, and agreement of counsel, the hearing in Docket 5253 is now reconvened, for the purposes as heretofore stated and agreed on, in Room 332, Offices of the Federal Trade Commission, Washington, D. C., at 10 o'clock a.m. on the 7th day of January 1948. The following counsel appear:

Appearing for the Federal Trade Commission: Joseph S. Wright.

Appearing for the respondents: James D. Ewing; E. Z. DuBose; J. T. Welch; Roger Hinds; Edmund P. Wood; Richard Serviss and H. E. Gardiner.

Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed, Mr. Wright.

Mr. Wright: Your Honor, there was one matter relating to the respondent Sherwin-Williams Company pending from the last hearing. In the interim, counsel for Sherwin-Williams and myself have agreed upon a stipulation of facts which has also been submitted to the other counsel relating to the testimony of Witness Coolidge and to certain designations in Commission's Exhibits 791 and 794 regarding Sherwin-Williams freight rates and invoice transactions, and I would like to have this stipu-
4207 lation read into the record. Is that satisfactory to you, Mr. Welch?

Mr. Welch: That is satisfactory to Sherwin-Williams.

Mr. Wright: The stipulation is as follows:

"It is stipulated and agreed by and between counsel for respondent The Sherwin-Williams Company and counsel supporting the complaint that the stipulation entered into between counsel and appearing in the transcript at pages 4069 and 4070 may be and the same is hereby amended by substituting for the second full paragraph thereof appearing at lines 11 through 18 inclusive of page 4070 of the transcript the following, which would be the testimony of the witness S. B. Coolidge if he were further recalled as a witness in this matter, and that same may be considered to the same extent and effect as if the said S. B. Coolidge had so testified:

"In 1941 Sherwin-Williams sold 637-600 pounds (318 tons) of white lead-in-oil on the Pacific Coast. The records as to the sources from which this white lead was obtained are not now available. Some was purchased from W. P. Fuller Company, some was purchased from Premier Paint & Color Works, both of which concerns have white lead plants located on the Pacific Coast, and a substantial portion was also shipped from Sherwin-Williams' plant in Chicago in mixed carload lots with paint products. Since 1941 the percentage purchased on the Pacific Coast has substantially increased and the portion shipped from
4208 Chicago has decreased correspondingly.

"It is further stipulated and agreed by and between counsel that the designation 'Richmond, Indiana' appearing in Commission's Exhibit 791 should be 'Richmond, Virginia'; and that the freight rates appearing in Commission's Exhibit 794 Z-9 to Z-12 inclusive are rail freight rates."

Trial Examiner Norwood: You may proceed.

Mr. Wright: Your Honor, I have not had an opportunity to go into the proposed findings and conclusions—

Trial Examiner Norwood: Just one minute, please. Are there any corrections to the record to be proposed here?

Mr. Ewing: There are corrections for the record, but in view of the necessity of working in connection with the preparation of the findings, I am frank to say we have not completed ours, and I think Mr. Wright is in the same position.

Mr. Wright: I am in the same position. Sherwin-Williams through counsel has submitted a list to me but I have not had opportunity to go into them.

Mr. Ewing: I don't think there will be anything substantial.

Mr. Wright: There are a number of, for instance, erroneous descriptions of the exhibits in the record which might be important, though most of them are apparent from the context of the record itself. May we go off the record on this discussion?

4209 Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed now on the record.

Mr. Wright: Your Honor, I must begin by stating that I simply have not had an opportunity to examine in detail all of the proposed findings and conclusions which have been filed by the respondents and the citations thereto. So, I am in the position of stating that I am in disagreement with so many of those findings and conclusions which have been filed which are contrary or inconsistent to those which are contained in the proposed findings and conclusions which I submitted.

Trial Examiner Norwood: I will state now for the record that all counsel will be given the opportunity to submit to me any further proposals or any written replies to the other proposals or citations. The only requirement is that the other side shall be furnished with a copy, and that privilege to all counsel will be extended to January 25. Those proposals or documents may be mailed to me with a statement that they are being furnished to the other counsel as well. You may go ahead.

Mr. Wright: I would like to state in rather general terms the series of contentions that I have here on the basis of the record. First, Count 1: It is my contention

that the lead pigment industry in its origin was one made up of a large number of small producers located all
4210 over the entire face of the country; that beginning
with the organization of the National Lead Company in 1891, which consolidated into one ownership a large number of the previously independent producers and sellers of lead pigments, and continuing on down through with the subsequent acquisitions by the National Lead Company, that through these acquisitions and consolidations the physical organization and make-up of the industry was completely and radically altered, so that finally when the period 1933 was reached, there were relatively a very few remaining producers, and of these producers National was by far the largest and in a dominant position. Up to this point, 1933, however, there were at least some vestiges of the localized marketing methods and pricing practices remaining in the industry from the period in which it was composed of a great many small producers.

In the white lead-in-oil and cake products business there obtained up to 1933 a system of differential and free delivery points which for the purposes of respondents' subsequent activities presented great difficulty in the meeting and matching of prices. As is shown in the list of differential points appearing in Commission's Exhibit 659-C, there were literally hundreds of different towns and cities which were either free delivery or equalization points.

As to the equalization points, in order to quote a delivered price it was necessary for the respondent to make a freight calculation. May I amend that? When selling
4211 at a locality which was not included in this list of
points it was necessary for the respondent in order to quote a delivered price to make a freight rate calculation and to compare the shipping rate to the location of the customer with the freight rate to the equalization point and in the event the former were higher than the latter to add the difference to the delivered price quotation.

In many other respects the industry was characterized by deviation and variations in pricing practices. These variations in practices are brought out clearly in the allusions to them in the minutes of the various divisions of the lead pigment division.

Now, the recollection of the witnesses who were called and questioned regarding practices obtaining prior to 1933 was very vague, and it is only by inference that we can fill in the picture of what those practices were.

Following the passage of the National Industrial Recovery Act and in the summer of 1933, the respondents met together for the ostensible purpose of drafting a supplementary Code of Fair Competition for the lead pigment industry. I believe that every draft of a Code produced at these meetings appears in the record as an exhibit. So, it is possible to determine exactly the matter the respondents were placing in the drafts of their proposed Code of Fair Competition as the result of these lead pigment division meetings.

4212 It is my contention that at these meetings the respondents went far beyond their ostensible aim and purpose of drafting a supplementary code of fair competition, and undertook by agreement and combination completely, to reorganize the prices and pricing practices in the lead pigment industry. In two of the principal items of the conspiracy, the so-called agency plan and the zone system, it is perfectly plain and apparent that it was never the intention of any of the respondents that these matters should be even referred to in any draft of the Code.

Now, as to what was done by the respondents at these meetings as the result of these meetings, the record is clear. The respondents discussed all of their various diversities of practice, and they had a meeting of the minds as the result of these meetings, and they put into practice and operation and into effect the pricing practices which they had agreed were desirable at the meetings.

There has been raised a principal issue by the respondents, that their activity during the period of the National Industrial Recovery Act in 1933 under the Schechter decision in 1935 are not subject to the Federal Trade Commission Act and that they cannot be held accountable for their actions during this period.

Well, now, let us examine this matter of any claims for exemption under the National Industrial Recovery
4213 Act. Section V of the N.I.R.A. contains the following provision:

"While this Title is in effect (or in the case of a license, while Section 4 (a) is in effect) and for sixty days thereafter, any code, agreement, or license approved, prescribed, or issued and in effect under this Title, and any action complying with the provisions thereof during such period, shall be exempt from the provisions of the antitrust laws of the United States."

The leading decision on the matter of exemption for cooperative activity during the Code period is the decision of the Supreme Court in *U. S.* v. *Socony-Vacuum Oil Company, et al.*, 310 U. S. 150. Other cases in which this question has been considered by the courts are *Dietzen Company, et al.*, v. *F.T.C.*, 142 Fed. (2d) 321; and, then, there was the so-called Cement case reported at 157 Fed. (2d).

Trial Examiner Norwood: Which Cement case is that, the last one?

Mr. Wright: The *Cement Institute* v. *Federal Trade Commission*.

Trial Examiner Norwood: Yes.

Mr. Wright: In the Dietzgen case the Court quotes:

"It may be argued that the N.R.A., being unconstitutional, never lefted the restrictions found in either antimonopoly act. In other words, the N.R.A. was ineffective for all purposes. We are convinced that notwith-
4214 standing this fact, the Government was estopped to
prosecute citizens who complied with N.R.A. codes, for violations of either the Sherman Antitrust or the F.T.C. Acts, because the N.R.A. was presumably valid until by judicial pronouncement it was declared to be invalid, and in this case invalidity was not determined until its unconstitutionality was decreed by the Supreme Court."

While in the Socony-Vacuum case the Court had held that there was one way and one way only that exemption from the antitrust laws could be secured for actions during N.R.A. and that was in strict accord with the exemption provisions of the statute, the Seventh Circuit sits up in the statement I have just read a form of constructive estoppal for actions done by the respondents pursuant to or in compliance with a code of fair competition.

All of the trade practice provisions of the Code of Fair Competition for the lead industry are contained in Article VII of that Code, which appears in the record as Commission's Exhibit 809. Section 1 of Article VII prohibits six different types of practices which are, with two possible exceptions, well recognized unfair methods of competition against which the Federal Trade Commission has proceeded in many instances: misbranding, misrepresentation, commercial bribery, inducing breach of contract, and making false and derogatory statements regarding a competitor. The two possible exceptions are the provisions of Article VII, paragraphs (d) and (f), relating to guaran-

tees of the life of service of lead pigments, and cer-
4215 tain forms of loss-leader selling.

Section 3 relates to the filing of monthly reports on production, inventory and shipments.

Now, there is nothing in either section 1 or section 2 which remotely affects the situation involved in this proceeding as far as I can ascertain. Any exemption which the respondents might claim under N.R.A. must be found in section 2 of Article VII, which reads as follows:

"Each member of the industry engaged in the manufacture and sale of lead pigments shall file with the secretary within ten days after the effective date of this Code, a list of the prices at which his products will be sold and a memorandum of any of his conditions of sale at variance with those set forth in schedule A attached and which is made a part hereof. Any change in price or conditions of sale shall be reported to the secretary in such manner as to reach his office within 24 hours after the effective date of such change. Any member making a sale or quotation, which does not conform to the basis he then has on file, shall notify the secretary in detail by letter mailed within 24 hours. The information supplied the secretary shall be reissued immediately to the reporting members."

It will be noted particularly that the code provision in section 2 does not require adherence to the terms and conditions of sale set forth in the three articles of sched-
4216 ule A, and recognizes the right of any producer to
vary these terms and conditions and depart from them to any extent he sees fit, or indeed wholly to disregard them, provided only that he advises the Code Authority to the effect. Thus, the only requirement of section 2 is the filing of prices and a listing of variations from the terms and conditions of sale.

It is perfectly plain from a reading of the minutes of the meetings of the Lead Pigment Division—both the Dry Products Committee and the Oxides Committee—that the respondents were not seeking in those meetings to outline standards of quoting, but they were in fact discussing the advisability of adopting for use and employment by themselves of the methods and terms and conditions of sale which were discussed at those meetings.

Nowhere in the Code, even by the broadest stretch of inference, is there any authority for agreement by the respondents to adopt the various zones and the differentials applicable thereto; to adopt agency contracts; to adopt uniform cash and quantity discounts and container differentials; or to adopt a uniform method of quoting the differentials over pig lead.

Most of these things had no mention in any draft of the Code and those of them that were mentioned were not mandatory on the respondents under the Code. Hence, adoption by the respondents of any of these matters which were discussed and agreed upon at the meetings can-
4217 not be characterized as "an action complying with the provisions thereof"—

Trial-Examiner Norwood: Well, Mr. Wright, are you contending that they were not privileged to discuss every possible subject in a meeting that might be suggested to determine what they were to recommend go into the Code?

Mr. Wright: Well, sir, my point there is that there are appearing in the record drafts of the supplementary code for the lead pigment industry, from the first draft to the final approved Code, which is Commission's Exhibit 809; and that in none of these drafts was there any requirement of adoption of these matters, so that under the literal terms of Section 5, there can be no exemption for agreements reached because they were not agreements in compliance with any provision of the Code.

Now, as to this constructive estoppal that the Court brings up in the Dietzgen case: I am assuming now that the purpose of this constructive estoppal is, as the Court went into more detail about it in its decision in the Cement case, to prevent businessmen from being misled by the Government into coming in and fixing prices on the erroneous assumption that they had an exemption from the antitrust laws, and then have the Government turn around and prosecute them for a violation.

The record in this case is perfectly plain that these respondents were operating under no such illusion that they were invited by the Government to fix the prices.
4218 That is perfectly plain from the exhibits in the record. As a matter of fact, following one of the Lead Pigment Division meetings of the Dry Products Committee on October 27, where the minutes show that the question was discussed of the possibility of adopting the provisions of the supplementary code for the Pigment Division immediately rather than waiting for the approval of the President, the secretary was directed to procure a legal

opinion to ascertain whether this would be in violation of the antitrust laws. There is the first indication that the respondents were aware that they had no blanket exemption under the N.R.A.

Commission's Exhibit 522 is a letter from Mr. Wormser, secretary of the Association. Having carried out his direction in the minutes of October 27, he wrote Mr. Carter, the president of National and the chairman of the Dry Products Committee, as follows:

"I called on Mr. Locke this afternoon to obtain his opinion with respect to the legality of immediately installing a uniform basis of sale for the lead oxides and dry products by agreement among the producers. Mr. Locke read the supplementary code provisions, article II, and also the suggested outlines of the uniform basis for sale. Although he noted that stipulations as to price had been omitted from the outlines"—

May I interrupt my quotation at that point to refer
4219 back to the previous minute, where it was agreed as
stated in the minute that out of deference to the antitrust statute no reference of price would be made in the Code. To continue the quotation:

"He felt that it might be unsafe to have an agreement prior to the approval of our Code as factors other than price in the uniform sales contracts might possibly be picked up by the authorities as having a bearing on price and hence being in restraint of trade. He suggested that the best practical solution for the moment seemed to be the adoption of the uniform basis of sale by one or more of the interested members, which could be followed voluntarily by the others, without agreement on the subject but merely because it was individually to their best interests to do so. I wired you the substance of Mr. Locke's views for no doubt you will wish to discuss the subject further with the other members who now happen to be in Chicago."

Now, there are other exhibits in the record in the form of letters from Mr. Carter to other producers confirming the subject of this correspondence and indicating that it was this procedure that the respondents had in mind.

Getting back to the Code now, it was the testimony of Mr. Wormser, the secretary of the association when he was called on behalf of the respondents, that section 2 of Article
VII of the code, of which Schedule A is a part, was
4220 never effective, and that the respondents had secured

exemptions from this provision of the Code during the whole life of the N.R.A.

Thus, while there were limited Code provisions affecting the marketing of lead pigment, they related only to a basis for filing a price which was never done, as far as the record shows; and the Code provisions, limited as they were, were never made effective. Thus, no action of the respondents during this period could have been in compliance with the Code pursuant to section 5.

All through the minutes of the meetings and the correspondence between the parties, we see an awareness of their duties and responsibilities under the antitrust act. We see them discussing every phase of the marketing of these various lead pigments. As to some of the phases which they discussed the reasons for the suggested changes were made plain.

Mr. Carter of the National Lead Company was very frank in his letter to Mr. Richter, the manager of duPont, when he was discussing a meeting of the white lead-in-oil committee early in August and early in September, that the agreement on the adoption of the agency plan was for the purpose of controlling the price of white lead-in-oil in the hands of the dealers and distributors.

The purpose of the respondents as to agency appears plain also from the minutes of the meeting of August 9 of the white lead-in-oil committee, where it was stated
4221 that adoption of the agency plan would take care of such matters as guarantee of price, spring datings, deviations from terms, and the like. In other words, it was the purpose by the adoption of an agency plan to rectify and control all the previous troublesome deviations and variations which had obtained in the white lead-in-oil business except the matter of zone which, of course, could not be taken care of in the agency plan.

Now, how can it be stated that following the frank discussion which appears in the minutes of the white lead-in-oil committee on August 9 and subsequently, and the statements which appeared in Mr. Maston's letter and Mr. Carter's letter of the discussions of the advisability of putting this agency plan in effect and showing an interchange of information between the respondents as to what they were doing in this matter, followed by a simultaneous announcement on the 15th of November by National and Eagle, the principal producers, putting the thing into effect in a substantially identical form and manner—can it be said that that is independent action?

The same is true of the zone system. Here was a method which admittedly was a very troublesome and cumbersome method of marketing. As Mr. Maston said, you could never be sure as to what points were equalization points, and there was other difficulty that was a matter of common knowledge. Following the frank discussion of the benefits which would flow from common use of this zone
4222 system, overnight the zone system appears.

It is uncontroverted that it went into effect sometime immediately following these discussions by the respondents. Is it reasonable to suppose that there was no meeting of the minds of the respondents in their discussions as to these practices? It is my contention that it is more reasonable to suppose that the respondents in that and in other matters followed the advice which Mr. Wormser got from counsel and which he relayed to Mr. Carter in Commission's Exhibit 522, that there was to be no agreement but that following the discussion the respondents agreed that one company would announce the program and the others would follow. It is beyond argument that that constitutes an agreement under the cases.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed.

Mr. Wright: While the institution of the agency plan in white lead-in-oil and the various zone plans affecting all of the pigments are two of the outstanding matters on which agreement was reached at the time, and two which are plainly beyond the Code in any way even by inference, since they were not mentioned in any draft of the Code, there are still other matters on which the respondents reached an agreement.

It is significant of the radical changes in marketing
4223 practices which were adopted for dry products, the
statements which appear in the letters of Mr. Harold Rowe to the branch managers of National under dates of May 11 and June 9, 1934, respondent's exhibits Nos. 159-A and subnumbers, wherein—

Trial Examiner Norwood: Now, those terms and conditions and so forth and the matter of pricing in relation to the lead market, weren't they covered by the Code?

Mr. Wright: As to that, your Honor, there appears in

Schedule A which is incorporated by reference into section 2 of Article VII—

Trial Examiner Norwood: Your proposal page 22?

Mr. Wright: Yes, sir. There are three articles in Schedule A. The first article relates to the conditions for sale of lead oxide in lots of less than 20 tons. Now, under "Price" in article 1 of Schedule A appears the provision: "Seller's card or quoted price in effect on date order is received with allowance as follows:

"1. Not more than ½-cent per pound for minimum shipment of 5 tons for one buyer at one time to one destination. * * *

"b. Emergency shipments of smaller quantities may be made at the 5 ton prices only to a customer for whom the seller has a 5 ton order on hand for immediate shipment or 5 tons en route to the same destination."

Also: "No protection against decline in seller's
4224 price may be given."

And then, there follows the customer differential—or rather, the differentials between grades of red lead.

A similar provision appears in article 2 on the carload oxide sales, except it sets out the price shall be determined by adding a differential to the price of common lead in New York, the lead price applying to each order to be specified by the buyer as (1) the A.S.&R. close of market quotation on the day the order is received, or (2) the A.S.&R. quotation at the close of the market on a future date definitely agreed upon by buyer and seller when order is accepted, or (3) an average quotation which could be secured either from the Engineering and Mining Journal or the American Metal Market.

Now, the base price in those two provisions is not touched upon in the Code but every addition to the base price is touched upon. Quantity discounts is specified; exactly what the price quotations that must be used are is specified; and how it must be used is specified.

If you will recall, previous to the adoption of the Code the minutes of the Lead Pigment Division show that out of deference to the statute price will be omitted from the basis of sale. However, now, on May 11, 1934, which is approximately a month before this Code is approved, Harold Rowe, who was the principal representative of the National Lead Company at these discussions and a principal official, wrote to all these branch managers and he sent them

4225 a copy of this Schedule A, which apparently had been approved but not put into effect, and along with it he sent an interpretation of it to tell them what it meant, because some parts of it are necessarily obscure because the essential information is omitted.

Now, you will notice that the portion I read in article 1 of Schedule A on the less than carload quantities said, under "Price," that the price was agreed to be the seller's quoted price in effect; that no protection in decline against the seller's price may be given.

In the interpretation of that particular provision which appears in the attachments to Mr. Rowe's letter of May 11, the following is stated:

"All sellers have agreed to discontinue the old 90 day card price contracts. Firm orders will be accepted for shipment up to 30 days."

And, then, going on further under "Price":

"You will note that no protection against decline may be given. This is a point on which there was a great deal of discussion and it was finally decided to make a definite rule which is intended to mean that the price to apply to any order is that 'in effect on the date the order is received.'"

Now, doesn't that sound—

Trial Examiner Norwood: Pardon me. Those matters were incorporated in the Code, were they not?

4226 Mr. Wright: No, sir, the matters which the—

Trial Examiner Norwood: He was interrupting, wasn't he, the Code?

Mr. Wright: He is interpreting a provision of the Code which is incomplete in and of itself; but, as pointed out to you, this provision of the Code was never made effective. Furthermore, this provision of the Code simply set up a standard of quoting so that a producer who varied from it would only report his variations from the Code. The Code, had it become effective, was not mandatory on any respondent to adopt any of these provisions, but they simply report any variations from it.

Trial Examiner Norwood: As I understand it, part of the Code was agreed upon and thereafter it was ineffective, and in the meantime one of the members put it out on his own motion. Is that right?

Mr. Wright: We are referring now to a document of National?

Trial Examiner Norwood: Yes.

Mr. Wright: But, it is my contention, and I think the record is plain, that what National did all the respondents did.

Trial Examiner Norwood: I just wanted to fit this into the picture. He sent that out prior to adoption, sent out his own interpretation around with it, to his own
4227 people, is that right?

Mr. DuBose: To the branch managers of National Lead Company.

Trial Examiner Norwood: Yes.

Mr. Wright: And I am pointing this out, your Honor, to show what is meant by some of these provisions in article 1, and also to show that these respondents were agreeing to put these things into practice, not agreeing upon a standard of pricing quotations for which the Code provides.

There is a statement that all sellers agreed to discontinue the old 90 day card price contracts; and there is a further statement that "this is a point on which there was a great deal of discussion and then it was finally decided to make a definite rule which is intended to mean that the price to apply to any order is that" and it quotes—" 'in effect on the date the order is received.' "

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: We will take a five-minutes' recess.

(A recess was taken.)

Trial Examiner Norwood: Resume.

Mr. Wright: Now, to continue with the so-called interpretation of Schedule A by Mr. Harold Rowe on May 11, 1934, in both of the interpretations, that of article 1
4228 and of article 2, there is included a description of the zones and territories of differential.

Trial Examiner Norwood: What exhibit is that?

Mr. Wright: Respondent's Exhibit 159-A to -J. I am speaking now specifically about -D, -E of 159.

Nowhere in Schedule A does there appear anything about zones nor does it appear in any other part of the Code. But, interpreting Schedule A on the less than carload red lead and litharge, Mr. Rowe advises as follows:

"In the following States the card prices will be ¼-cent a pound higher than those shown on the card enclosed," and then he lists Southern and Western States, as substantially alleged in the complaint in that regard, with the remark in parentheses that the schedule for states served by Pacific Coast were not yet determined.

Later on, June 9, when he sent his supplemental instructions to the branch managers, he states that since that date, referring to May 11, the zone differentials for oxides in the territory served by the Pacific Coast have been determined and a change has been made in New Mexico, Colorado, Wyoming, Montana, applying to less than carload lots.

Then he goes on to state that on dry white lead there has been also a change from the original 4 cents added to the par price in those four states.

The same is true of the 20 ton lot interpretation.
4229 There the various differentials in certain states as alleged in the complaint are set forth in interpreting that schedule.

Trial Examiner Norwood: Does the schedule say the differentials shall be agreed upon between buyer and seller?

Mr. Wright: No, sir, the final-draft provisions of schedule A on the less than carload oxides and on dry white lead specified prices as being seller's card or quoted price on the carload and the differential was on that.

Mr. DuBose: As agreed upon by buyer and seller.

Mr. Wright: I will stand corrected. In the carload red lead and litharge it is agreed upon by buyer and seller at differential figures.

You will recall that they said, "agreed upon" but was placed in "out of deference to the statute," but in the instructions under date of May 11 Mr. Rowe stated as to these differentials that the differentials that will apply to 20 ton lots will be as follows in par territory: $1.50 for litharge and special negative battery oxide; $1.75 for special positive battery oxide.

You will recall that that is a litharge containing 25 per cent red lead; up to and including 95 per cent it is $2.50 for red lead. In other words, in interpreting article 2 of Schedule A, Mr. Rowe sets forth those differentials.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

4230 Trial Examiner Norwood: On the record. That differential is over common lead? It is over common pig?

Mr. Wright: Over common pig lead, yes, sir.

You will recall, your Honor, the testimony by the dry products representatives of Eagle-Picher and National as to the relationship which has existed between the New York price of pig lead and both the card price on less than 5 ton lot and the differential price on carload lot, where there is an automatic following of the card price; where the pig lead market in New York moved by as much as 25 cents the card price is automatically changed up or down in the same amount, and the carload quotations move up or down correspondingly in multiples of 5 cents cwt.

Trial Examiner Norwood: Read that last statement, please.

(Statement referred to was read by the reporter.)

Mr. Wright: Except as to the position of Sherwin-Williams there is no issue in the record as to the use of the zone system from the time of the discussion of these matters in the Lead Pigment Division and the present date.

There is no question either that it has been general practice of the principal producers of red lead and litharge to follow the terms and conditions of sale as were set forth in Schedule A from that time to the present.

Now, Sherwin-Williams states that it has not em-
4231 ployed the zone system, and relies on the testimony
of the witnesses that it was the company policy to sell on a system of warehouse differential points which resembles in many respects the system which obtained prior to the Code period.

It is my contention that a reading of the record will disclose that what is stated as the company's policy is in fact an exception to it and that the position as stated is analogous to describing a black cat with a white tip on his tail as a white cat except for most of his tail and all of the rest of his body.

It is the Sherwin-Williams Company's general policy to follow a system of warehousing differential points, except where lead pigments are included in what is described as a carload but which is in fact a truckload order of as little as 10,000 pounds; except in sales from its company-owned store; except where there is a considerable volume of business in some town away from one of its so-called shipping points; except where there is competition from the other respondents requiring them to meet the zone system. All of the warehouse and distribution points or shipping points coincide with the zones themselves as employed by Sherwin-Williams.

The following of the zones on red lead and litharge by Sherwin-Williams is set forth on Commission's Exhibit 823 which details the zones in the same fashion as was set forth by the other respondents in their comparable
4232 instructions to branches and announcements to the trade.

Trial Examiner Norwood: Now, is that the first map in your proposals?

Mr. Wright: No, sir. The thing that I am now referring to is the fourth map in the proposal, less than carload red lead and litharge zone map.

Trial Examiner Norwood: And your citation in connection with that is Commission's Exhibit what?—referring to Sherwin-Williams?

Mr. Wright: I am referring to Sherwin-Williams' announcement in that respect in Commission's Exhibit 823-C, -D, -E and -F.

Trial Examiner Norwood: I should like to have references in connection with these four maps.

Mr. Wright: Well, your Honor, in connection with those maps, as stated therein—there are a number of maps in the record, beginning with the earliest one which was submitted by Mr. Maston as chairman of the White Lead-in-Oil Committee and running down to the discussions of the zones and territories as late as 1941 and 1942. From time to time there were some diversities in practice. The maps which appear in my proposed conclusions, the white lead-in-oil cake products zone map is taken from a similar zone map which was offered in evidence by the respondent National as Respondent's Exhibit 147.

The difficulty with the white lead-in-oil zone map
4233 is that there have been from time to time certain minor changes in territory, particularly in cities which were located on or near the borderline of the zones. Substantially, this map is the map which we contend has been used since the time of the Code days, from 1933 to 1934. Glidden has not used a comparable map. Glidden has followed the zone system by describing in detail and literally the territory within each zone — but that is Tweedle-Deeing and Tweedle-Dumming. The use of the map is not the gravamen here, it is the use of the system itself, and however they describe the zone, whether by maps or by geographical areas, it is the same.

Trial Examiner Norwood: The object of my quuestion was to secure these references to each map so that if I should find them correct and wish to use them in my report, I can enter these references to the exhibits and have them photostated right into the face of the map that I use.

Mr. Wright: I wanted to supply your Honor and counsel for the respondents with a list of all citations of various maps and descriptions of territory that appear in the record.

I might say that the only difficulty is as to the white lead-
in-oil map. My contention is that the dry white lead zone
map has been used without change and that the carload
and less than carload red lead and litharge maps
4234 have been used with one change, and I want to state
at this time that the record shows that sometime in
1942—the exact date of which can not be ascertained—

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: The States of Arkansas and Oklahoma on red lead and litharge, which appear on these maps here as being in the premium zone, were made into the par zone. These maps as they appear in here are an attempt to reflect the situation as it existed from the time the conspiracy was initiated down to 1941 or 1942. I wanted to make that explanation since I do not recall that I covered it particularly in my proposed findings.

But, with that exception on the red lead and litharge maps and with the explanation on the white lead-in-oil map, they are substantially as have been announced.

Now, it is my contention that these practices which were so fully discussed by the respondents at these meetings and which were put in operation immediately following and made effective, have been followed over since in substantial form.

It is not necessary—since I cannot say that they have not been deviated from—it is not necessary to prove this conspiracy so as to show an absolute, 100 per cent, literal compliance. That would be beyond the realm of possibility.

4235 It is my contention that through the zone system
and through the common adoption and common use
of this differential method of quoting over A.S.&R. New
York spot quotations or spot carload quotations and on

average prices on average price contracts, and through the fixed relationship of card price to that same price, that the respondents put into operation in the 1933 to 1934 period a system and a mechanics of price fixing which has been employed by them ever since.

It was not necessary at the expiration of N.R.A. for the respondents here, as with the respondents, for instance, in the Dietzgen case which the Circuit Court discusses in the opinion I have cited before, to make a resolution to continue complying with the practices covered by the Code.

The Code was never effected. The principal parts of the respondents' conspiracy never found their way into the Code and such a resolution would have been surplusage. It has been a system which is self-perpetuating. It is necessary for the respondents only to know one factor as to any product, and they know then exactly what every other respondent is doing. Knowing the price of pig lead as quoted by American Smelting and Refining Company in New York, every respondent knows what the quotation is going to be to any customer in the United States on red lead and litharge; knowing a change in the price quotation in the par zone on white lead-in-oil or dry white lead, each respondent knows exactly what the quotation is going
4236 to be to any customer by any company at any point in the whole United States.

It is a system which has required no cooperative nurturing and fostering in the sense of continual meetings and cooperation over the elements of the system. It has not been necessary. It was put into operation as a self-perpetuating scheme and it has been followed by the respondents ever since that time.

Now, there has been some diversity. Some of the respondents, for instance, have quoted white lead-in-oil at differentials to dealers and distributors below that of the National Lead Company. That was explained by one of the witnesses as being a form of extra compensation to the dealer to enlist his support of a lesser-known brand along with the Dutch Boy brand. In every instance the suggested resale price to consumers and to painters by all of the respondents was identical. That differential as employed on white lead-in-oil never found its way to the consuming public. It took the form of a little bribe to the dealer for handling a lesser-known brand. Eagle-Picher did it with its Hammer brand but it was not necessary to do it with the Eagle brand which was sold at the same price as National.

Trial Examiner Norwood: Well, was it any more than a suggested retail price be maintained on final sales to buyers, and does that reflect this dealer reduction?

4237 Mr. Wright: According to—let me answer that in this way. A great deal of white lead-in-oil sold during this period was sold under consignment contract arrangement, so that the price at which the dealer or agent sold was absolutely fixed and controlled by the respondent. The dealer had no choice. The dealer could not reflect any price difference to the public.

And, the other sales by the respondents, for instance, now, the other sales by the respondents who did not adopt consignment or who used it only for a limited period, were under price cards and announcements and instructions to the dealer to resell the product at the price stated.

Trial Examiner Norwood: Well, were those differentials given to these consignees?

Mr. Wright: Yes, sir, the record shows that. The record shows that the differentials were given to the consignees, and it is a matter of presumption that those agency contracts at least were lived up to and, by the same token, it is a matter of presumption that at least a substantial part of the sales under suggested resale price instructions to the dealers were made in accordance with those price instructions.

There are two other instances of diversities in practice, one of them in the sales particularly by National and Eagle-Picher of red lead and litharge to some very large battery manufacturers, and there are some transac-
4238 tions in the record which show a shrinkage of the
general and normal differential under the price of pig lead.

Trial Examiner Norwood: But, was the shrinkage equal?

Mr. Wright: No. There are some instances in the record where there appear to be genuine competitive prices in the sales to some of the very large battery manufacturers. It is my contention that that is accounted for by what stands uncontroverted in the record, the ability of the very large battery manufacturers to produce their own oxide if the price was not one to suit them.

There is one other point of diversity, and that is in the

Government bid to three federal agencies. Your Honor will recall that in the first meeting—or, earlier, you will recall that in one of the early white lead-in-oil committee meetings, that of August 9, 1933, the respondents took up that matter of bids to government agencies.

The minutes, Commission's Exhibit 501-C, contain the following:

"The question of open quotations on Government and State business was thoroughly discussed. Any plan to eliminate excessively low bids would be helpful to the entire industry."

And, they considered the possibility of apportioning such business; that was discussed. There was a difference of opinion as to methods which might be used, the following being suggested: capacity; last year's government
4239 and state business; average last three years' government and state business; average last ten years' government and state business.

There is nothing further in the minutes on this matter, and there is no further evidence that any such agreement was reached. In their announcements to branches, sales personnel, most of the respondents have outlined exactly the method that should be followed in quoting on government and state business, and that method was strictly in accordance with the system—use of the zone and use of the other various pricing practices which we contend were adopted by agreement.

Trial Examiner Norwood: Were their instructions to their dealers similar with respect to that bidding?

Mr. Wright: There are no instructions to dealers that I recall on bidding on government business, your Honor.

Trial Examiner Norwood: Sherwin-Williams Company issued an instruction about government bidding.

Mr. Wright: I don't recall.

Trial Examiner Norwood: Now, is there anything else in the record like that?

Mr. Wright: Commission's Exhibit 615, I believe it is, is a long document by the National Lead Company dated, I believe, in January 1942.

Mr. DuBose: April 26, 1941.

Mr. Wright: April 26, 1941, and it sets out in detail the methods to be employed in quoting government
4240 agencies and state governments and railroads and others. It is a document which, I understand, was submitted to the branches as an instruction, in type.

There is evidence in the record in the form of bids to the Cities of Cincinnati and Milwaukee showing identical bids which follow out the method and the system employed by the respondents.

Now, assuming that the bids to the Federal agencies were strictly competitive and not the result of any prearrangement and where there is evidence of competition as to those bids, as with these three agencies, still that does not detract from the conspiracy which has been followed out in substantial form in doing business with every other class of customer.

Trial Examiner Norwood: Well, I have some citations here, I think set out in National's proposals showing a table; could you give me the citations of those bids which you say are identical?

Mr. Wright: Yes, sir, Commission's Exhibits 864 and 865.

Mr. DuBose: Those are Milwaukee and—

Mr. Wright: And Cincinnati.

Trial Examiner Norwood: Off the record a minute.

(Discussion off the record.)

Trial Examiner Norwood: Proceed on the record.

Mr. Wright: It is my further contention that the
4241 National Lead Company has assumed a position of
dominance in the industry directly through the practice of acquiring its competitors. While the bulk of such acquisitions were accomplished a great many years ago, there have been several important acquisitions within the period with which we are concerned, and the record shows in uncontroverted form that it was National's intention for a period of years in the early 1930's to acquire control of the respondent Eagle-Picher, the second largest factory in the industry.

The effect of such acquisition by National on the lead pigments industry is obvious. It would leave the National Lead Company in an absolute monopoly position so that there would be no freedom of choice on the part of any other person in the industry.

There was considerable testimony by witnesses representing other respondents as following National, at which time Mr. Sprague, the vice president of Glidden, referred to National's price as the ceiling price in the industry.

Since the means by which National has secured its present position is one of acquisition and abandonment of productive facilities in most instances, I strongly urge a finding to that effect and conclusions in the proposed order against any further acquisitions by National of any of the assets or capital stock of any competitor engaged in the lead-pigment industry either in sale, distribution, or manufacture.

4242 As to discrimination—the system employed by the
respondents is essentially discriminatory. As pointed out in more detail in my proposed findings on pages 33, 34 and 35, the actual sales revenue of the respondents on red lead and litharge is a very narrow one, amounting in the case of litharge in carload quantities to less than two dollars cwt.

Yet, each of them is willing to quote prices and hold himself out to sell at shipping point prices which shrink that net margin by more than 25 per cent. Each of the respondents realizes his largest net sales return from those customers located in his own factory town. For the reciprocal and mutual privilege of being able to sell in the factory and producing areas in which its competitors have a freight advantage, he is willing to maintain a similarly high net sales price in his own freight-advantage territory.

The so-called delivered prices of the respondents are really not prices, they are simply quotations announced in advance of their willingness and intention to sell, conveniently framed in the zone method so that each can be sure to match the similar quotation of the other to any customer located at any point.

It is my contention that price must be considered as the price received at shipping point by the seller and after the deduction of transportation. In a great many instances,
according to the record, that is the actual method of
4243 conducting the transaction, the goods being shipped
freight collect and the buyer taking title at the seller's
shipping point.

In the various drafts of the Code, including the final draft of the Code, the respondents themselves set forth that the delivery is to be made at the seller's shipping point. The so-called zone differential added to the delivered price quotations have the effect or purportedly have the effect of recouping transportation charges but in dealing with distant customers do not reflect the changes and variations in shipping point prices received by the respondents from those customers, as more specifically set forth in the proposed findings and conclusions.

Your Honor will note carefully the testimony of the numerous small-battery manufacturers who were called as witnesses in this proceeding. There is no conflict in the record about the competitive situation which existed in the manufacture and sale of electric storage batteries during the period of the 30's. Witness after witness engaged in the industry testified that it was characterized by extreme price competition. Representatives of the respondents likewise testified from their contact with the battery industry that it is a highly competitive one.

It is composed of more than 200 different manufacturers ranging in size from very large multiple plant producers to small one-man enterprises who produce 50 batteries a day.

4244 A good many of these smaller customers were located in the factory towns of the respondents, in Chicago and in St. Louis. Two of them, I believe, were in Joplin, Missouri. These witnesses testified that companies who were shown in the record to have been sold battery oxide by the respondents located at considerable distances from the producer's plant, they showed that the respondents received a great shrinkage in their net shipping point prices, shipped batteries back into those producing localities where the respondents are located and contributed greatly to the competitive distress of those small manufacturers during the period of the 1930's.

The record shows that the cost of lead pigment used in producing a storage battery amounts to approximately 30 or 33 per cent of the total material cost in such a battery. A normal small battery requires from 10 to 12 ponds of red lead and litharge in the manufacture of the plates in the battery. Thus, a discrimination of a half-cent a pound or 50 cents cwt. against the small manufacturer amounts to 5 cents per battery in his material cost.

These respondents were perfectly willing to ship from St. Louis to Niagara Falls, New York, or to Minneapolis or to other distant points and absorb approximately a half-cent from their carload price in selling to these large battery manufacturers; yet, from a small man to whom a delivery is made in company-owned truck located in
4245 the same city, the highest possible net price is secured.

Now, such a situation as that I have referred to, such discrimination, is inherent in the zone system, which is discrimination for the purpose of and with the effect of enabling the respondents to suppress and eliminate competition between and among themselves; and it is heightened and added to by the gross discrimination apparent in the quantity discounts and the different quantity bases of selling red lead and litharge as between the carload lot and the 5 ton and the less than 5 ton purchasers.

Trial Examiner Norwood: Now, if I understand you, you contend that the differential between the zones hit the small battery man, and you have set out there was a differential of a half-cent for less than 5 tons, or something like that. Now, there were other differentials to be added to that half-cent?

Mr. Wright: Perhaps I am not quite sure what you have in mind. There are really two separate types of discrimination. One is that inherent in the zone system through this method of systematically varying the shipping point prices which operates directly and immediately against the nearby customer and in favor of one more distantly located on a reciprocal basis.

Then, there is also unconnected with the zone system,
the matter of these differentials which were set up by
4246 agreement back in the 1933 and 1934 period, although
I am not contending that the agreement has anything to do with the legality of the less than 5 ton discount, providing in selling to a carload purchaser—in other words, a man who buys a 600 pound barrel of the material is to be sold it at $1.50 differential over the N.S.&R. price in New York; but if a man buys less than that, he buys on the card price.

Now, it is the testimony of witnesses by the respondent that card price is calculated at a difference of $2.50 instead of $1.50 over the price of New York pig lead. Now, those are the two categories, the carload and the less than carload. Now, the less than carload is divided into two categories. Generally speaking, the man that purchases less than 17 600-pound drums will pay one cent per pound, from .8 to 1 cent per pound more, simply because of the quantity he purchases, than the man who buys 65 or more drums; whereas the man who buys from 18 to 64 drums of 600 pounds will pay from .3 to ½-cent per pound more than the 65 or more drum purchaser.

I am contending that each of those is a violation of section 2 as set forth in count 2.

Trial Examiner Norwood: Have you set out any instances that are shown in the record as to these lead battery manufacturers? That is, you contend that selling on the zone price discriminates against these small 4247 manufacturers who were near the source of supply.

Mr. Wright: Yes, sir.

Trial Examiner Norwood: And then you contended that there were certain effects here which amount to practically one cent a pound as against the large manufacturer; have you set out with respect to any particular purchasers what it would all add to by way of a price difference?

Mr. Wright: Yes, sir. That is done to a certain extent at least on page 34 of the suggested findings, although I would like to point out to your Honor that the two things are not necessarily related.

My only point in connecting the two was to show cumulatively what I am maintaining and contend, namely, that the amount of discrimination as to either one is sufficient to injure competition in the storage battery industry in normal times substantially, that the combination of the two—and they can be and are combined since a great many of those small battery manufacturers are located in Chicago, in St. Louis and in other points where the respondents maintain factories, that when you add those two together, the net effect on competition in the battery industry is considerable.

I think the inherent discrimination in the zone method would amount to as much as one-half cent a pound or 5 cents a storage battery, whereas those on the quantity basis amount to as much as one cent a pound or 10 4248 cents on a storage battery; and it was testified to that this matter of from 5 cents to 10 cents in saving of material cost to producers of storage batteries, your Honor will recall, is a very important matter in times of normal competition.

The arbitrary nature of the system is well set out by the situation existing in Dallas, where National operates its own producing plant; in every instance in selling it adds 25 cents per cwt. for delivery to a customer located right in the City of Dallas, and that customer is in competition—being the Vitalit Company—with large manufacturers back in the par zone who are not forced and required to pay that ½-cent per pound zone differential added to the price but as to whom National also shrinks its shipping price by a considerable amount in addition to that.

A similar direct effect on competition, discriminating against a customer located in a producing and factory point of the respondents is well brought out in the testimony of the St. Louis Paint Manufacturers, which your Honor will recall. Some of it is set out in detail on pages 38, 39 and 40 of the suggested findings.

Trial Examiner Norwood: Well, as I recall it now, that evidence, they testified, some of them, that a few cents would not make any difference, and some said 5 cents would make a big difference, and so would 10 cents, and so on.

I just want to know the counsel's contention as to
4249 what the evidence shows as to the amounts of price
difference, as to the price difference against these particular people, whether it amounted to 10 cents or what. I am not sure the record is clear.

Mr. Wright: Well, your Honor, I will say in that respect that there are a large number of invoices of Eagle-Picher Company particularly, showing their sales to customers, manufacturers located in the areas, about which those in St. Louis customers were questioned.

There is evidence in the record showing sales by the National Lead Company to that area and there is evidence showing in practically every case the exact freight rate which was involved.

Now, in every instance the amount of the freight rate from the shipping point is the amount of the discrimination less whatever transportation cost might be shown in the cartage in dealing with the local customer, so that the discrimination follows directly the transportation cost.

Your Honor will note in shipping from St. Louis down to those points in Texas that freight rates in some instances amounted to as much as one dollar per cwt., which would be one cent a pound.

Trial Examiner Norwood: Well, if charged a half-cent more down in Texas, wouldn't that lessen the discrimination by that?

4250 Mr. Wright: Well, it is my contention that if in
that particular instance the local customer were given the benefit of his location in the form of a price which was at or near the price that the respondents were willing to accept from a distant customer, the effect of that would be to give that customer the normal benefit of his location and to remove the discrimination against him by reason of his location.

As I stated earlier, I am not in the position to take up in detail the various suggested findings and conclusions by individual respondents. I appreciate your Honor's offer of more time in which to submit further representations regarding those and I shall undertake to do that as expeditiously as possible.

Trial Examiner Norwood: I think it would be constructive to give us a draft of an order which you think or which you contend should be issued.

Mr. Wright: Your Honor, I will be happy at this time to outline an order, but I fully intended within the next few days to prepare a detailed form of order, draft of order, which I shall be happy to file with you and also make available to other counsel in this matter.

It is my contention that the findings will support the entry of an order to cease and desist which will run against a planned course of action, agreements, conspiracy to use
or maintain or continue the various practices which
4251 are set out in more detail in the proposed findings as
having been agreed upon in the 1933-1934 period and followed by the respondents continuously since that time.

I believe that an order should be entered which will prevent National from securing any interest, directly or indirectly, in the control of the physical assets or properties or capital stock of any concern or enterprise engaged in the sale, manufacture or distribution of lead pigments.

I believe that the record warrants the entry of an order which will require the respondents to cease from systematic price discrimination in the form of shipping point prices as is inherent in the zone system.

I believe also that the record will warrant an order against each of the respondents except as encountered in International which is not engaged in the sale of red lead and litharge against the discriminations inherent in the quantity differential basis of sale of red lead and litharge.

As I say, I am only outlining this at the present time and I should like to submit very shortly a proposed form of order in detailed form and also to submit further representations regarding the findings and conclusions as submitted by the various respondents.

I would like also to have the privilege of urging further citations of evidence in support of the contentions in the
proposed findings and conclusions because I have not
4252 had an opportunity to cite all of the evidence which

appears in the record in support of the various contentions.

At this point I would like to state that there are three errors that I know of now in my statement of proposed findings and conclusions which I should like to correct, if counsel will bear with me.

On page 29 in the next to the last line in the paragraph in the middle of the page, where there is a statement, "including other agencies," running into the next line, the word "government" is to be inserted between "other" and "agencies."

On page 34 in the last line of the first full paragraph after the figure "$.10" insert "per battery."

On page 36 in the paragraph in which the various companies are listed in the center of the page, in the line above the line with the colon, change "arrangements" to "area."

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: We will recess until 2:00.

(Whereupon, at 12:30 p.m., January 7, 1948, a recess was taken to 2 p.m., this date.)

4253 Afternoon Session.

2:20 p.m.

Trial Examiner Norwood: Come to order. Proceed.

Argument by Mr. Gardiner.

Mr. Gardiner: The respondent, the International Smelting and Refining Company, has filed certain proposed findings, conclusions and reasons therefor with your Honor, and has cited in those findings and conclusions portions of the record which it is believed bear out the request that those findings are proper and the conclusions correct.

It does not seem to me that much is to be gained by my repeating the substance of those proposed findings. Your Honor has it, and I do not wish to burden the record at this point with a repetition of the same.

However, I would like to say in substance that the position of the respondent International is that there has been no showing on the part of the Commission, and there is no evidence in the record, of any conspiracy as alleged in the amended complaint, so far as that respondent is concerned.

That would seem to be borne out to a certain extent by the discussion this morning by counsel for the Commission. It was stated on several occasions, and it is contained in the Commission's proposed findings and conclusions, or
rather in counsel for the Commission's proposed
4254 findings and conclusions, that the conspiracy stems
from agreements or conversations and discussions
which took place during the years 1933 and 1934.

A very quick answer to that, so far as the International is concerned, is the fact that the record distinctly shows, without any doubt, that so far as the zone system for the sale of dry white lead was concerned that was not adopted or followed by International until October of 1935, which is a year after the period during which the counsel for the Commission contends that this conspiracy was instituted.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Go ahead.

Mr. Gardiner: The contention is also that the zone system, so far as lead-in-oil was concerned, stems from the same series of meetings and conferences during 1934 and 1933. There again the record shows, so far as International is concerned, that it did not adopt the zone system so far as the sale of lead-in-oil is concerned until January 1, 1937, a period of three years—at least three years and possibly four years—beyond the time at which the Commission contends or that counsel for the Commission contends this agreement was reached.

Trial Examiner Norwood: That is for white lead-in-oil?

4255 Mr. Gardiner: Yes, your Honor.

Trial Examiner Norwood: Go ahead.

Mr. Gardiner: Now, it seems difficult to—

Trial Examiner Norwood: January?

Mr. Gardiner: January 7, 1937.

I might say at this point, your Honor, that it is my intention, if I have sufficient time, as I have indicated I hope I may have, to point out to your Honor these fallacies of these contentions as far as counsel for the Commission is concerned by citations to the record bearing out my statement that the zone systems were not adopted until those dates.

The position of the respondent International, so far as discrimination is concerned, is that it has sold, during the time in which it was selling the lead pigments which it produced, to the class of customers at the same price and has treated them exactly the same. As to any differential, so far as quantities were concerned, the same differentials were made to the customers of that class.

And, for that reason, it contends that there has been no discrimination so far as the sale of its products are concerned.

The record, of course, shows that International respondent, while engaged in the manufacture and sale of dry
white lead and lead-in-oil from the years 1936 to 1945,
4256 is no longer in that business, has sold its plant where
these materials were produced, and has no intention
of going back into that business—that is, no present intention.

Trial Examiner Norwood: It sold its plant in 1940 something?

Mr. Gardiner: October 1, 1945.

Mr. Ewing: 1946.

Mr. Gardiner: I'm sorry, your Honor, it was October 1, 1946.

The respondent Anaconda has filed its proposed findings and conclusions and reasons in support thereof, and again I see no particular point in going over those except to point out again the position that we have taken all along, that the respondent Anaconda Copper Mining Company has never been in the business of the manufacture or sale of any of the lead pigments covered by this complaint.

Your honor will find in the conclusions in those proposed findings citations to authorities which bear out the generally-acknowledged principle that a parent corporation is not responsible for the acts of its subsidiary merely by the fact that it owns all of the stock and that some of the officers or all of the officers are similar.

Now, I would like to take up a few points in the findings of the Commission which I think are in error, and again
these will be pointed out at a later date if I have the
4257 opportunity to get up a supplemental statement on
that point.

It is my understanding this was an action involving the production and sale of lead pigments. I therefore see very little reason for any proposed finding which reads that

Anaconda is one of the world's largest producers and fabricators of non-ferrous metals, including copper and zinc.

That seems wholly irrelevant. There is no citation to that. I assume it is in the record some place. But as to whether or not the Anaconda respondent produces copper in large quantities does not seem pertinent to this discussion or to the findings of your Honor.

There is a further statement that Anaconda is still engaged in the production of zinc oxide. There is no citation in the record to that point, and there counsel for the Commission may have concluded from the fact that the International Smelting and Refining Company at one time produced zinc oxide that it still does so.

I do not think the record is clear on that point. But, the plant which was sold by International at East Chicago, Indiana on October 1, 1946 was the only property of International where zinc oxide was produced, and that was sold along with the part of the property which produced lead-in-oil and dry white lead. There is no other property of Anaconda which produces zinc oxide.

4258 On page 17 of counsel for the Commission's proposed findings, there is a statement to the effect that "on November 9, 1933, Carter wrote to Paul Sprague of Glidden sending copies to officials of Eagle-Picher, Sherwin-Williams, et cetera, and refers to Commission's Exhibit 523.

Examination of Commission's Exhibit 523 will show that copies were sent to certain named individuals, one of whom was a Mr. F. O. Case. Mr. F. O. Case in 1933, as shown by the record, was an employee of International and was not connected with Anaconda.

Trial Examiner Norwood: Is that a statement in the Commission's proposals?

Mr. Gardiner: Yes, your Honor, on page 17.

Trial Examiner Norwood: Now, where is that statement?

Mr. Gardiner: It is the third paragraph from the top of the page, beginning, "On November 9, 1933 Carter wrote," et cetera.

Trial Examiner Norwood: That should be "International" instead of "Anaconda"?

Mr. Gardiner: Well, the person named there is Mr. Case, and the record shows at the time that he was a sales manager for International.

Trial Examiner Norwood: Very well.

Mr. Gardiner: On the top of page 22 of counsel for the
Commission's proposed findings, it is stated that
4259 National and Eagle-Picher adopted and put into
effect an agency arrangement on November 15, 1933,
following the discussions of the white lead-in-oil committee and the correspondence about it with their competitors.

The paragraph below there reads, "The record indicates that Anaconda adopted the so-called agency arrangement at about the same time and continued thereafter to market approximately 50 per cent of its white lead-in-oil by this means."

I would like to point out, your Honor, that the International's predecessor, Anaconda Lead Products Company, adopted what ~~it has~~ described or what has been described as a consignment arrangement in 1932; that neither the Anaconda Lead Products Company, which preceded International, nor International have ever adopted or sold by an agency arrangement. The record sustains that point amply, and citations will be made to that if the time permits.

Trial Examiner Norwood: All right. Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Gardiner: So, the position of International is that there is no basis here for a finding of conspiracy or discrimination as far as any of its acts are concerned. That
so far as the respondent Anaconda is concerned, that
4260 it never was in the business. The fact it is the parent
company of International in no way charges it with
the acts of its subsidiary.

In view of that fact we respectfully submit that the complaint should be dismissed so far as those two respondents are concerned.

Argument by Mr. Hinds.

Mr. Hinds: If your Honor please, in behalf of Glidden, a minor correction should be noted on page 6 of our proposed findings, in that in the fifth line of Finding 31 the word "employment" should appear instead of the word "improvement."

Trial Examiner Norwood: Employment?

Mr. Hinds: "Employment" it should be.

Trial Examiner Norwood: Yes.

Mr. Hinds: While we have adopted in so far as applicable the reasons for our findings the same as those suggested by National Lead, we have not, it is true, furnished your Honor with citations to the record or reasons specifically applicable to the additional findings, namely, our Findings No. 2 to 35, which we have submitted in behalf of Glidden.

I shall avail myself of your Honor's kind offer before the 25th to supplement our findings by such reasons and such citations, although I think it is fairly obvious
4261 what our reason is.

We offer only one witness, if you disregard Mr. Burrows whose testimony was principally on quantity differentials in lead oxides, most of which your Honor struck out. Our sole witness was Mr. Sprague, and his testimony is of limited compass, all of which is undisputed.

Our reason for each of our specific proposed findings is that each of them is supported and fairly summarizes the undisputed testimony of Mr. Sprague.

I take it as axiomatic that the materiality of the evidence has been prima facie established by your Honor's admitting it over objection, or without objection. It has been completely undisputed. It can not be rejected as inherently improbable, because I maintain it is not only consistent with probabilities but it is required by inherent probabilities.

So, it seems to me that each of Glidden's proposed findings, if it meets that test—and I think they all do, should almost as a matter of mathematical demonstration be found by your Honor.

Now, Glidden on the conspiracy charge, Count 1, is to a certain extent in a different position from some of the other respondents, particularly with respect to the case in so far as it is based on what was done during the Code or NRA days.

At that time Glidden was not competitive with the 4262 other respondents because, admittedly, it had taken over the Euston white lead products from the Euston Company and the metal refining oxide products from the latter company and was not competitive in price. Its products were not up to the standard nor was the advertising and good will and consumer acceptance up to the standard of other respondents.

The price was correspondingly lower; it wasn't in the same field. So that even if it had entered into an agreement, as to which there is no evidence, as to price, it certainly did not execute any such agreement or did not perform any such agreement, because its prices until considerably after the NRA period were not competitive.

They were very much lower, because it was only after—and it is undisputed—it was only sometime after that period that it was able to get its quality and hence its customer acceptance up to a point where it could compete in price with its competitors, especially National Lead and Eagle-Picher.

Trial Examiner Norwood: You mean by "competing," selling as high as the other companies?

Mr. Hinds: That's right. Its prices were considerably lower. It could not get the prices that the other respondents could, and that is all explained in Mr. Sprague's testimony and summarized, I think fairly, in our proposed findings.

4263 The consignment or so-called agency arrangement was not adopted by Glidden until long after it was adopted by the other respondents, and then only reluctantly, and then only as an optional alternative to its normal method of outright selling, and then only by a form of agreement which differed not only in form but in substance from that of National Lead, and was thereafter abandoned as, in Glidden's case, being unproductive and unprofitable and unsatisfactory.

Trial Examiner Norwood: Glidden did not adopt it until 1939, did it?

Mr. Hinds: It was four years after the others adopted it.

Now, as to conspiracy, the ideal way from the point of of the prosecutor to establish conspiracy would be to have detectives, dictographs, actually hearing the conspirators conspiring, possibly with a motion picture adjunct. That is, of course, not always possible.

I concede that conspiracy may be established by inference from established facts. However, I want to call your Honor's attention to the fact that when you employ the inference method of establishing conspiracy he who has the burden of proof must not only show that the facts are consistent with there having been a conspiracy, but he must exclude any other possible or reasonably probable explanation.

4264 A prosecutor in a criminal case can show that circumstances under which a man met his death were consistent with the fact that he met it at the hands of the defendant. It is not necessary for the defendant even to show that he met it in some other way. He may demand an acquittal by merely showing that the death might well have resulted from someone else's hand.

Now, in our case we go far beyond that. We point out without proof that the facts which are cited as requiring an inference of conspiracy could well have occurred without such causation. That I think would be enough to require a finding against conspiracy—or rather one of no evidence of conspiracy.

But, we have gone far beyond that. We proved by undisputed testimony numerous facts which, any one of which, might have explained these facts which the prosecutor relies on to draw an inference of conspiracy.

The principal fact, I think, that is relied on, as I understand it, by Commission counsel, is the similarity of price, the following by Glidden of pricing, its selling practices, by the other respondents, particularly National Lead.

As to the former it did not occur until sometime after the NRA days. But we must concede—in fact, our own findings proffer the statement—that we did follow the Na-

tional Lead prices approximately and with consid-
4265 erable closeness. Now, can you infer from that fact
that we had an agreement with National Lead or
with anyone else?

I would like to take a simple illustrative case which I think shows in its bare bones the logic of this conspiracy-by-inference theory.

In a certain locality which is both windy and snowy it has been observed that a messenger on bicycle, pursuing his daily route, follows closely behind a moving van which also has the same route. Not only do they find that he does this every day, but when the moving van changes its route around some other blocks you find this messenger still following closely behind the van.

Not only that, but when there is deep snow he actually puts his bicycle right in the rut which is made by the moving van.

Those facts are certainly consistent with the explanation that there was an agreement between the driver of the truck and the messenger that he should follow closely in their track. We inquire of the messenger, we ask him if there was any such agreement, and he says, "No, I never talked to the driver or anyone connected with the moving van."

"Well, how do you explain it?"

He says, "Do I have to explain it? Aren't there many possible explanations other than that we had an agree-
ment? As a matter of fact, I find that I can't suc-
4266 cessfully drive my bicycle in this wind unless I get
behind some big object that is moving in my direc-
tion."

"But we note that when the van slows up you slow up, and when the van goes a little faster you go a little faster. How do you explain that?"

"Well, if I didn't keep up with the van I wouldn't get the place I want to get as fast as I would otherwise get there, and I might get back into a wind of my own. If I tried to get ahead of the van I wouldn't get anywhere. I can't buck the wind alone."

"But you follow right in the very rut of the van."

"Yes. I find that makes much easier going."

Those are all precisely shown by the undisputed testimony of Mr. Sprague.

We could tell in advance what the next move up or down in lead pigments would be. We would tell which way it was going to be, because we had observed by scientific studies that the market for lead pigments follows with a time lag the market for pig lead, and we are not charged with having any influence on the market in pig lead.

We could not tell exactly when there would be a change or the exact amount, but we could tell whether the next change would be up or down.

Now, what caused Glidden's changes in price? Glidden
determined its own changes of price up or down. And
4267 how did it determine it? It determined it by watch-
ing National Lead's price or, to a lesser extent, Eagle-Picher's price. And its price went up or went down with theirs. It was their act. They didn't consult National Lead or Eagle-Picher; they didn't have to, any more than this bicycle messenger consulted the driver of the truck and said, "Please, mister, may I ride in your rut?"

Possibly the driver of the truck did not even know there was a messenger boy following him. More probably, if it happened day after day, he became aware of it. But it was a matter, presumably, of somewhat indifference to him—just as it has been a matter of indifference to National Lead whether Glidden priced itself out of the market by bidding higher or got all the gross profit it could fairly get by not going lower.

Now, I think that sums up the conspiracy charge. And there is judicial support for the fact that you can not fairly infer conspiracy because small producers follow either the prices or the pricing practices of the large producers. They could not have stopped us from following their prices if they wanted to.

Neither this Commission nor any court can order us to bid lower than National Lead or order us to bid higher. They can not order us not to bid exactly the same as National Lead. They can only order us not to agree
4268 with National Lead.

There is not the slightest evidence that we have ever agreed with National Lead or that we have ever consulted with them on prices, even on pricing methods. We consulted with them only as we did so at the earnest insistence of our Government during the Code days, the testimony as to which I will not refer to because others will cover that more fully.

Now, as to the Robinson-Patman Act, the Commission's counsel seems incurably to be obsessed with the idea that while the Robinson-Patman Act permits differentials, if justified by freight differences, that it requires such differentials.

The Robinson-Patman Act does not require any producer to charge different prices to competing customers merely because the cost of freight or any other cost is different. Freight is one of the costs of the producer. There are other costs. The Act cites several of them: selling, cost of production. Freight is merely one of the costs which the seller is confronted with in performing his side of the agreement.

What the buyer does is to pay an agreed sum which is known as the price. What the seller does is to pass title and make delivery of certain specified goods at a time, which is usually implied, sometimes expressed, and at a place which is usually expressed or, if not, it is necessarily implied.

The place of delivery is just as much a part of the
4269 obligation of the seller as the specification of the
goods or the time. How the seller gets his goods to the specified place is one of his headaches. It comes under the heading of cost. He has many other costs—the cost of the raw materials, the labor. Even his lawyers sometimes cost him something!

The Commission selects one of those costs and arbitrarily selects the cost of performing with respect to the place of delivery and says the price is not what the parties say it is for performing this contract, that it isn't what Congress says it is and refuses to say otherwise, that it isn't what the Supreme Court says. Price, we say, is an arithmetical difference by subtracting from what the parties agree is the price one of the costs, and we pick out transportation as the cost which we say is to be deducted in order to ascertain what we say is the price.

Trial Examiner Norwood: Isn't he selling transportation also?

Mr. Hinds: That is one of the things that he agrees to do; he agrees that the goods shall be so-and-so, that the time shall be so-and-so, and however he does it, by camelback or by flight or by carrying it on his back, by steamship, by truck or train, he somehow or other will get those goods at a particular price at a particular time and a particular place.

4270 How he does it is one of his costs. Price is an exact opposite term from cost. You can not analyze a price into different costs.

A man says, "I will sell you a horse and saddle for $150." Five minutes before that he had bought the horse for $125. Neither the Commission nor the United States Supreme Court nor any professor of economics can say that the price of the saddle is $25 and the price of the horse is $125. The price of the horse plus saddle is $150, and nobody except the parties themselves can analyze that into two different prices.

In these cases of Pittsburgh plus, where the parties agreed, stipulated, that there should be two prices, one the price of delivering the goods and the other the price of the goods, then of course the courts and the Commission have to take the price as the parties agree on it.

Here the parties agreed on a delivered price, and it was the same for everybody in a given area.

Now, it isn't a sign of mental deficiency to argue that the law should be otherwise. That argument has been made persistently before Congress, urging that the price under the Robinson-Patman Act be defined not as what the parties agree to but given an artificial definition of that price minus one of the costs—in this case the cost of transportation.

4271 Congress has persistently rejected that. The Supreme Court has repeatedly commented on Congress' refusal so to legislate, and has repeatedly said, as it did in the Corn Products case, "Congress was unwilling to require f.o.b. factory pricing and thus to make all uniform delivered price systems and all basing point systems illegal per se."

And in the Staley case the Supreme Court said, "But it does not follow that respondents may never absorb freight when their factory price plus actual freight is higher than the competitor's price, or that sellers by so doing may not maintain a uniform delivered price at all points of delivery, for in that event there is no discrimination in price."

And again it has said the same thing in a number of different ways. Another place it says—the Seventh Circuit quoting the Supreme Court: "Notwithstanding this Congressional attitude as recognized by the Supreme Court, this court is now urged by the Commission to hold that the system is illegal per se, and to require that cement be sold on an f.o.b. plant basis."

Now, the Act permits differentials provided the sellers can justify these differentials by differences in any one of three costs—manufacture, selling or transportation. It does not require that there be any differentials. It permits them not to have any differentials between two competing buyers, even though their costs may widely
4272 differ. That is something that they are permitted to
do but not required to do.

Now, a further argument showing that price means price—and, if the parties agree on a delivered price, it means a delivered price—is shown by the Act itself, because the Act permits a difference in price, and to the extent that there is a difference in the cost of transportation.

But if price means what our friends say it means, the f.o.b. mill net, this permission to justify differences in it by cost of transportation is mere gibberish. How can there be any difference in cost of transportation in an f.o.b. mill net price?

So, Congress besides having rejected the amendments which would have defined price the way the Commission would like to see it, has by the language of the Act shown what it means—that it couldn't possibly mean anything but the ordinary price, the consideration paid by the purchaser for delivery of goods at a particular time and place.

Trial Examiner Norwood: Couldn't they make different f.o.b. mill prices?

Mr. Hinds: Certainly, if the parties agreed that delivery shall be at the factory or that the price shall be less transportation. That is the price. But we are confronted here, as far as Glidden is concerned, with a situation where
Glidden agrees. Its price cards state that freight is
4273 allowed; in other words, that the price is the same in

any one zone, no matter how far you are from our factory.

When this was addressed to Congress, the tears that were extracted for the forlorn situation of the man near the factory who is deprived of his so-called freight advantage are clearly wiped away by the fact that the man at the remote place may be selling his competitive products right at the door of the factory.

Our friend very well brought out that fact in our behalf, I thought, this morning, and I will now thank him.

He cited a case where a poor manufacturer in Dallas who used lead oxides, competing with his more fortunate brother in New York, has to pay 25 cents more. But he forgot to remind you—and I think I saw the gleam in your Honor's eye that you caught it—that if this man in New York is competing with the man in Dallas he is soaked with the freight in selling his product in Dallas.

This is an argument that I do not think is really relevant before your Honor, because your Honor has to take the law as it is given by Congress. This, however, would be an excellent way where my friend would knock himself out if he were making this argument in Congress, where it should be made.

Trial Examiner Norwood: The point I queried about
this morning was whether or not adding a zone differ-
4274 ential—in other words, if under this system the fur-
ther away you get from the source of supply the
greater the discrimination against the man at home, if you add a half cent zone differential on that doesn't that lessen that long distance discrimination?

Mr. Hinds: It does lessen it.

Trial Examiner Norwood: Just that much? I mean doesn't that minimize it to that extent?

Mr. Hinds: It does lessen it. And I want to be perfectly frank—and whatever concession I make is not to be considered as binding on any of the other respondents—but I think Glidden will freely concede that if our customers in Zone 2, we'll call it, are competing with those in Zone 1, we must show that this differential, taking zone by zone, is no more than compensates us on the average for the additional cost of transportation. I think we have met that proof, and I do not think our opponents dispute that because they argue just the opposite way. They say the discrimination is against the near man and in favor of the far man, and I agree with them on that in so far as these zone differentials are concerned.

I think, if anything, these zone differentials are not enough. They might well be higher. And when my friend is arguing this way, he argues that we are discriminating against the nearby man. Then when he comes to the
4275 zone differentials he says, "Ah, these are not justified. You don't justify these zone differentials. They are more than the cost of transportation."

You can not have it both ways.

Now, I am going to close with one further observation as to the effect that it would have, at least on the Glidden Company and I think on the industry, of a cease and desist order which would refuse differentials on lead oxides as between carload shippers, large buyers, and the small, fly-by-night, bad-credit, little buyers. That would inevitably, in Glidden's case—and the evidence is undisputed from Mr. Sprague and hasn't been stricken out; your Honor held it to be material and legally admissible. We would like to have all of our business the big carload buyers; they do not require the technical service, they do not require continual credit and investigation, they do not require warehousing, they do not require several other things, and they are all enumerated in our findings.

It is a profitable business. It is the "cream" of the business. And we wish we could take and dared to take more. But in view of great competition which we suffer from the big oxide manufacturers themselves, which our friend points to, who will make their own, invert their own if the price justifies it, and from our colossal competitors, we do not dare take on more than a safe fraction of that business.

4276 Mr. Sprague or Mr. Burrows pointed out that once or twice we got a little bit gay and we bit off a big fraction, and then all of a sudden it went out and we were left with a big hole.

Why, then, do we take this unprofitable higher-priced business? It is higher-priced because they do not get the differential. It is unprofitable relatively. Why do we take it? We take it because we acquired both our lead oxide plant and our white lead plant in order to furnish us with our own manufactured raw materials. It is part of Glidden's policy.

We have to sell most of our stuff, and since we do not dare and can not sell all of it to the gilt-edge trade, we have to deal with these small fellows. Some of them were on the witness stand, and your Honor could size them up. We have to sell to these people. And if this Commission's order required us to do away with the differentials, we would have to either stop selling to the little fellows because we could not make a profit at a low price, or we would have to give up the lower-priced, more profitable business.

In other words, such an order would advance monopoly because it would knock one producer out of either the small field or the big field. I say that at the present time it makes for American competitive health that we have this reasonable differential so that we can charge fairly in accordance with the real differentials of these various costs.

4277 Trial Examiner Norwood: What about the five-ton differential? Between five ton and less than five ton?

Mr. Hinds: Well, of course, that is a question of degree, and as this Commission has said in many cases, as long as the producers in good faith draw boundary lines we are not going to condemn those boundary lines because it is not possible to justify each particular instance exactly on that line.

A producer is permitted to make, say, three or four—in our case three—classifications. Nobody in the world, no system of cost accountancy, can infallibly put that line exactly at a given point. All that this Commission asks and all that the law requires is that you draw these lines between quantity classes with some reasonable attempt to meet reality.

Now, the fact that our smallest type is the least profitable, and the middle type is less profitable, and the top classification is the most profitable and most to be preferred, to my mind shows our good faith in making these quantity differentials. We would prefer to sell them all at the lowest price, much prefer to lose the differential and be saved the expense of warehousing and higher costs on trucking and so forth.

Mr. Wright: May we have a recess?

Trial Examiner Norwood: Five minutes' recess.

(Whereupon, a short recess was taken.)

4278 Trial Examiner Norwood: Proceed.

Argument by Mr. Wood.

Mr. Wood: I am going to take up two small points out of order because they more or less follow right along the lines of Mr. Hinds' discussion.

I call attention to the zone maps in the suggested findings of fact for the Commission and to the dry white lead zone map.

Now, we are criticized as violating the Robinson-Patman Act because we sell at the same price in St. Louis as we do in Texas, or vice versa, because we sell at the same price in Texas as we do in St. Louis. That is a violation of the Act according to the Commission.

If you turn the page to the next map you find that we are criticized because we charge more. So, we apparently violate the Act because we do not have a zone or because we do have a zone—either way.

I call your attention to the inconsistency of that position.

On the Robinson-Patman Act itself I agree entirely with Mr. Hinds that the Act intended to leave things as they were as far as prices were concerned in this respect. Part of the goods of the country, as we know, are sold, f.o.b. Automobiles, f.o.b. Detroit. Machine tools, f.o.b. Cincinnati. A great many other things are f.o.b.

4279 On the other hand, there are just as many, if not more, things that are sold on a delivered price basis as a matter of common custom.

As I see it, the Robinson-Patman Act did not intend to change that at all. It intended to leave it just as it was. But it did provide that where there was a difference in cost of delivery that could be taken in account if the seller wished in making the price differential. He did not have to make a price differential, but he could use that as a reason for making a differential if he chose.

I think that is the correct meaning of the Act and that the Act on its face shows that it did not intend to outlaw delivered price selling per se, because otherwise that difference in cost of delivery would make no sense then.

Trial Examiner Norwood: The differences would justify a lower price but not the same price? It that right?

Mr. Wood: The difference in cost would justify a lower price if you wanted to give a lower price, but you do not necessarily have to give a lower price. There is nothing to compel you to give a lower price.

Now, turning to page 7 of the Commission's proposed findings, I call attention to the three paragraphs in the middle of the page in respect to Eagle-Picher. Eagle-Picher does not at the present time operate a lead pigment factory in Cincinnati. It disposed of the property, 4280 and there is nothing in the record to indicate that Eagle-Picher is manufacturing in Cincinnati.

Trial Examiner Norwood: Where is that statement on that page?

Mr. Wood: I think it is—

Trial Examiner Norwood: I see it now—the fourth paragraph.

Mr. Wood: The fourth line down.

Trial Examiner Norwood: The fourth line down in the first full paragraph.

Mr. Wood: I wrote to Mr. Wright about that. The Cincinnati plant is completely out of operation, and Eagle-Picher's only white lead plant is in Chicago now.

Also there is the finding that we added the International Smelting and Refining business to our business. There is nothing in the record to indicate that we got one nickel's worth of the business they used to have. They closed down their plant; we bought the plant. But there is nothing in the record to show that we took any of their business at all, a single customer.

I have commented before in the record on the Commission's attack on Eagle-Picher because National apparently harbored designs to acquire it once. That is a dead issue in the case, because nothing happened. And I do not see where any findings should be made on that score.

4281 Trial Examiner Norwood: Which is that now? That last remark?

Mr. Wood: All of the findings in respect to National's purchase of Eagle-Picher's stock and the offer to buy the business and good will of the company—which, by the way, was never submitted to the company. It was submitted to Mr. Hertenstein who was an officer of the company, but he sent it back refusing to submit it to the board of directors.

The proposed finding of fact of National Lead Company is accurately stated; the proposed finding of fact of the Commission is not accurately stated.

Trial Examiner Norwood: What page is that on?

Mr. Wood: Can you come up with the page there, Joe?

Mr. Wright: That is discussed on page 6 of the proposed findings.

Trial Examiner Norwood: Are there any inaccuracies in that paragraph beginning, "In February 1906 * * *"?

Mr. Wood: Made by National in June 1931 but was not accepted by that company. It was not even submitted to the company. I would not say it is exactly inaccurate, but the innuendo is that it was submitted to the company and the company turned it down, where the fact was that it was submitted to an individual who declined to submit it to the company.

As I say, the proposed finding of the National Lead
4282 Company is accurately worded.

Trial Examiner Norwood: Well, how would that affect Eagle-Picher anyway?

Mr. Wood: That is what I would like to know. That is the point I was coming to—that I can not see it has anything to do with Eagle-Picher whatsoever.

We are charged here with an unfair method of competition. Anything that happened between directors of Eagle-Picher Company and National back in 1931 that led to nothing is no evidence of any unfair method of competition or participation in conspiracy or anything else on the part of Eagle-Picher. I think it is completely irrelevant to the case.

Trial Examiner Norwood: I do not think that that was received by me as showing anything against Eagle-Picher —that offer of National. It was offered as against National.

Mr. Wood: This is a conspiracy charge. I have nothing more to say about it if it is understood that it has nothing to do with Eagle-Picher.

Now, the Commission's position is very difficult to comprehend in some respects, because it takes this position, that National is so big, so powerful, so monopolistic, that it has controlling power and can force Eagle-Picher and the rest to follow it; and, on the other hand, that we have conspired to follow them.

Now, certainly if they haven't the power to force
4283 us, that negatives the inference, in the absence of any
clear showing, that we have conspired with them to do it.

The truth is sort of halfway in between there. Eagle-

Picher does compete with National but is not strong enough to compete in price. In other words, National is the bigger company, with the larger distribution, the greater number of plants, the greater resources. They have some of that power that the Commission attributes to them, and Eagle-Picher can not pursue an independent pricing policy.

If we cut a price, they can cut it and then cut it again. And if we start to fight that way, we are going to get licked. I mean there just is not any question about that.

So, to that extent the Commission is right. But where in its complaint it summarizes the evils allegedly flowing from these practices complained of and states the competition is stifled and nullified, now that is not true. We put on a series of witnesses on behalf of Eagle-Picher, all of whom testified to Eagle-Picher's efforts to compete with National.

The Commission talks of matched prices all the time. Now, this money that Eagle-Picher is putting into research, a very substantial amount of money that otherwise might go into profits, they are putting that in to avoid matched products. We are doing everything we can to have better products.

4284 The mere charge of matched prices seems to me rather silly when a company is spending a fortune to avoid matched products. The two are ~~not~~ consistent. We could pocket that profit if this was a rigged industry and we weren't competing. There is no point at all in putting that money into research except for the sake of competing to better advantage.

We had witnesses who testified about the dry pigments. We had witnesses who testified about the battery oxides, about the technical services provided by Eagle-Picher.

We put in pictures of the fence out in Joplin, with the thousands of samples on it. We showed that all of that was available to all of our customers. We testified about our work with battery oxides. We showed that about half of the batteries made in the country are made by concerns who manufacture their own battery oxides, who do not buy them either from Eagle-Picher, National or anyone else.

Mr. Mitchell testified that he started out with a small company and that his company grew. He testified that Eagle-Picher was instrumental in keeping the small companies in competition with the large battery companies who manufactured their own oxides.

Trial Examiner Norwood: Eagle-Picher charged that differential on the less than five ton, didn't it?

Mr. Wood: We follow the pricing policy of National quite literally. There may be a few points of devia-
4285 tion, but to a major extent we followed the pricing
policy of National except on a product like lead sulphate or blue lead or leaded zinc oxide or some of our specialties which compete with National products. That is, our basic lead sulphate competes with their basic carbonate in mixed paints.

On the pricing of our sulphate we are rather in an independent position. Of course, we sell it in relation to a great many other cost factors; that is, the price of carbonate and—oh, there are a lot of factors that enter into the pricing there. But we are not in the same position on basic lead sulphate as we are on basic lead carbonate, because we make it from ore concentrates instead of putting it through the stage of pig lead.

Trial Examiner Norwood: You sell that for less than National sells the carbonate?

Mr. Wood: I think it is usually a half cent a pound under the price at which National sells the carbonate. We sell more basic lead sulphate than carbonate to the mixed paint manufacturers, and we have always urged it and pushed it in paint formulæ. In fact, one of the purposes of the test fence is to test one against the other and to be in a position to prove to our trade that they can make up formulæ with the basic lead sulphate that will give them as good results at a lesser price than they can get with the carbonate.

It is that type of thing I refer to when I say there
4286 is competition and active, vigorous competition be-
tween the two companies. And regardless of the coincidence of some of the pricing policies they are forced to by the size and power of National, still we are competing as hard as we can in the only way that it is safe for us to compete, by offering different and better products, better technical service, everything we can give them in the way of laboratory help, research, advice, and everything else. I call attention to the fact I have asked for specific findings in regard to the subject matter which I have just discussed.

Trial Examiner Norwood: Yes.

Mr. Wood: And you will remember that the president of Eagle-Picher, Mr. Bowlby, testified that this was the policy, the competitive policy, of the Eagle-Picher Company, which it had been pursuing as a matter of company policy over a period of years.

Now, Mr. Wright said this morning that as to the Robinson-Patman Act there were two types of discrimination—discrimination coming from selling on delivered price and selling on zone system on one hand, and discrimination as a matter of quantity discount on the other hand.

Back in June 1946 when Mr. McIntyre put in those heavy summaries of invoices, I raised the objection that we ought to be given some warning of just how those were to
4287 be used. Apparently my fear was unfounded, because when I had received this document I looked in vain for anything specific as to just where Eagle-Picher had violated the Robinson-Patman Act. There is absolutely nothing in here—that is, in the Commission's proposed findings of fact—that tells me any more than I was told in June 1946 as to just what it is that the Commission claims to be a violation of the Robinson-Patman Act on the part of Eagle-Picher.

Now, it is true that we have followed the pricing policy of National, but the mere selling at different prices is not in and of itself a violation of the Robinson-Patman Act, because the Act specifically provides and I quote:

"And where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them."

Well, in the first place, I am sure that it is not charged that any of the pricing policies of Eagle-Picher tend to create a monopoly in any sense. There is nothing in the record to justify it, so that is out.

The last part of it—"or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination"—there is nothing in the rec-
4288 ord here to show that anyone has knowingly—I mean any customer of Eagle-Picher—has knowingly received the benefit of the discrimination. There is absolutely nothing in the record to justify any finding in that regard.

That leaves the question of whether or not the effect of such discrimination may be substantially to lessen competition. We are in no position to defend in respect to that charge unless we are given specific instances. In other words, we have to be told, "You sell to Customer A, let's say, in less than carload lots. You sell to Customer B in carload lots. The price is different on the two. Those two companies are in competition with each other, and that competition is lessened."

Then, we have a chance to say, "Well, no. After you look at all the factors in the case, the competition is not lessened. They are still in competition and in plenty of competition."

If we are not given certain specific situations, then we are in a position of having to try to prove a negative, you might say. In other words, we would have to take all our customers and say, "We sell to Customer D at one price, and we sell to Customer X at another, but there is no decrease in competition there."

Then, we would have to go on to Customer E and Customer Y and all the permeations and combinations.
4289 We would have to prove a series of negatives, you might say, unless we are given some sort of specific proposition to meet and given a chance to defend ourselves on it.

Now, I have searched through this in vain, and I can not find a single instance where there is an example of competition being lessened.

Mr. Wright said something this morning about some battery manufacturers in Joplin, Missouri, one of whom I think bought at less than carload price, or something like that, and there was competition from national manufacturers located elsewhere.

I do not see where that is evidence. That was his statement. I do not think it is in the record in quite that form. But, even so, I do not see where that is evidence of lessening competition. That is evidence that there is competition. It might be Mr. Wright's theory that the man in Joplin was entitled to a monopoly in Joplin; that is one possible theory. But the statute says "lessening competition," and I do not see how evidence that there is competition can be construed that competition is being lessened or injured or destroyed.

In regard to the battery manufacturers in Chicago, there was just one after another that came in and testified. There-were any number in that group who testified they started out as small companies, that they bought on the less 4290 than carload scale, that they were helped along and received technical help from Eagle-Picher or National, that they grew, that they got into carload class, and they competed with other concerns.

There were numerous examples of that type. And it seems to me that that is evidence that competition is not being lessened in fact. The mere fact that some very small fellows say that five cents a battery might make a difference to them—I mean the very smallest in the industry, the rebuilders, the people that work in cellars and attics and do not have insurance or any accounting or any of the normal costs of business—of course they'd like to pocket every extra nickel they could get. And from the looks of some of them a nickel might have counted quite a bit!

But, taking that Chicago testimony as a whole, the testimony was that there was a great deal of competition and active competition. The little were competing with the big, and the big were competing with the little. And that the battery business of the country was handled by over 200 manufacturers at least.

The same way with the paint business. There are hundreds of small paint companies. The paint people too would like their extra nickel or dime. But the testimony is there that small companies are competing with Sherwin-Williams and Glidden and duPont and all the rest of 4291 them. They are competing with small paint companies.

There is no evidence that these pricing policies have in any way prevented widespread and wholesale competition in the paint business. In fact, all the testimony is that there is competition. And, of course, where there is competition anybody would like a nickel or dime saving if he could get it. That is human nature.

But I do not think that type of testimony is sufficient to satisfy the statute that the pricing policy lessens competition. That is entirely a matter of guesswork one way or another. And I want to repeat that in as far as Eagle-Picher is concerned, for us to be enjoined under the Robinson-Patman Act, it seems to me, it has to be shown that some specific violation of the Robinson-Patman Act existed, some situation where competition may be substantially lessened by the existing practice, and that it can not be done by means of generalities.

That applies to the Commission's case regardless of whether the quantity discount is involved or whether the zone differential is involved.

Now, I also ask for the finding that Eagle-Picher can not compete with National except by selling on a delivered price basis because of National's greater size and greater number of manufacturing plants. We are the second largest; that is, Eagle-Picher is the second largest. It is 4292 trying to compete. I think it is clear from the Government allegations, from the statements made by Mr. Wright, and from all the evidence in the case that it is absolutely necessary for Eagle-Picher to be able to put down goods in a customer's factory at the same price National does, no matter what you call it. We have to be able to deliver the goods at National's price. Otherwise, with our smaller number of factories, our smaller size, we are simply going to be out of business, and National will have the whole thing.

I am going to file a written reply, a written statement in reply to this. I received it at such a late date that I did not have time to prepare in detail with citations to the record for this argument.

Trial Examiner Norwood: Counsel may do that.

Mr. Welch: Your Honor, without at this time presenting my argument in connection with proposals that have been made on Sherwin-Williams, I would like to take just a few minutes in connection with the argument that has been made by Mr. Hinds and Mr. Wood, particularly on the meaning of the phrase "may substantially lessen competition" as it appears in the Clayton Act.

I call attention to the case of the *Standard Fashion Company* v. *Magrane Houston Company*, 258 U.S. 346. That case involved Section 3 instead of Section 2, but the language is the same in that it prohibits certain con- 4293 tracts or agreements or understandings where the effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

That language is exactly the same as the language in Section 2; consequently, the court's language is equally applicable, and I quote from the decision handed down by Mr. Justice Day:

"Section 3 condemns sales or agreements where the effect of such sale or contract of sale 'may' be to substantially lessen competition or tend to create a monopoly. It thus deals with consequences to follow the making of the restrictive covenant limiting the right of the purchaser to deal in the goods of the seller only.

"But we do not think that the purpose in using the word 'may' was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would under the circumstances disclosed probably lessen competition or create an actual tendency to monopoly; that it was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial."

I just wanted to call that Supreme Court decision to your Honor's attention in connection with the arguments advanced by Mr. Wood and Mr. Hinds.

Mr. Wright: I just want to say one thing. I am 4294 not going to attempt to make any detailed answer.

But with reference to Mr. Welch's quotation of the Magrane Houston decision and the meaning of that term as applied to Section 3, I would like to invite your Honor's attention to the recent opinion by the Supreme Court of the United States in United States *vs.* International Salt Company, also involving Section 3 where an entirely and wholly different construction was put upon that very phrase.

Trial Examiner Norwood: What is the volume?

Mr. Wright: I can not give you the citation. It is the present term; it is unreported. It is within the past few weeks, handed down by the Supreme Court. I will attempt to furnish a copy of that in support of it.

Trial Examiner Norwood: I think I have a copy on my desk.

Mr. Ewing: I move, your Honor, that we adjourn to Monday here, at which time I will present National's position and Mr. Welch that of Sherwin-Williams.

Trial Examiner Norwood: Is there any objection to that?

Mr. Wright: No, sir, no objection at all.

Trial Examiner Norwood: I will put on the record an explanation while Mr. Wood is here. I told counsel that they may file supplemental or reply proposals and any sort of briefs or arguments that they wanted to not later 4295 than January 25th. I have thought about that since Mr. Gardiner insists on a few more days. I think that is too late. Physically I don't think it would be possible to be any later than that. But if it is after that date, you can file it with the Commission anyway.

I could not undertake to transmit those things if they are not filed before that time—on or before that time. I could not undertake to transmit those and submit rulings on them for the record in my report if they are any later than that, because I am endeavoring to finish this by the 31st of January. I may not be able to do so.

But I do not see how I can see my way clear to extending the date any further than that. If it comes in after that, though, I will transmit it to the Commission along with my report.

Mr. Gardiner: Could your Honor make it the 26th, which is Monday?

Trial Examiner Norwood: Yes. If it gets here Monday I will receive it and rule on it. That is Monday, the 26th.

Also I will ask counsel to properly specify which are proposals on which the Procedure Act requires me to rule, and which are reasons and argument. They have done that in these very helpful proposals that are already made.

So, with that understanding, we will recess until
4296 10:00 a.m., Monday, being January 12, 1948, in this
room, Room 332, Office of the Federal Trade Commission, Washington, D. C.

(Whereupon, at 4:00 p.m., January 7, 1948, the hearing in the above-entitled matter was adjourned.)

4297 Room 388
Federal Trade Commission Building
Washington, D. C.
Monday, January 12, 1948.

Met, pursuant to adjournment and agreement, at 10 a.m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

James D. Ewing, Esq., and
E. Z. DuBose, Esq., appearing for the National Lead Company.

J. T. Welch, Esq., appearing for The Sherwin-Williams Company.

4298 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order. Pursuant to adjournment on January 7th, the hearing in Docket No. 5253 is now convened in room 388, Offices of the Federal Trade Commission, Washington, D. C., at 10 o'clock a.m., Eastern Standard Time, January 12, 1948.

Appearing for the Federal Trade Commission: Joseph S. Wright.

Appearing for the respondents: James D. Ewing; E. Z. DuBose; and J. T. Welch.

The hearing is convened to receive further argument, and any corrections of the record which counsel may wish to offer.

Mr. Wright: Your Honor, there are a number of corrections in my statement of January 7th. I am only going to touch upon those which make some substantial difference. On page 4215, line 5, the figure 2, referring to the sections of Article 7 of the Code for the Lead Pigments Industry, should be 3.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: There is a statement appearing on lines 13 and 14 of page 4239 that might be subject to some misinterpretation, although it is a literally accurate
4299 statement, that there are no instructions to dealers bidding on Government business. Well, that is true, in the sense of dealers for resale, so far as I know, but there are instructions in the record, as appears from the exhibit, to the branches and agents as to the method of bidding on Government business.

There are a number of other corrections, which I will take up later, as they aren't of too considerable importance at this time.

Argument on Behalf of Respondent, National Lead Company.

Mr. Ewing: On behalf of respondent, National Lead Company, we propose to outline generally our position in this case, what we think it has boiled down to by way of really fundamental issues, and, without going into any great detail, indicate why we have submitted the proposed findings that we have, and comment in some detail with respect to each or certain of them.

In preparing our proposed findings, we were mindful of the new Administrative Procedure Act and of the new rules of the Commission, and we have endeavored to set forth factual statements as far as possible, and where they require explanation such as to indicate that they are ultimate facts, we have tried to give them. Perhaps we have gone unnecessarily into detail in respect to some matters, but we felt that to cover the subject under the conditions under which the proposed findings were prepared, that it was necessary.

4300 Now, I propose to discuss what we might call the affirmative side of our position, and when I am finished, Mr. DuBose is going to discuss the Commission's proposed findings.

My recollection is that back in February, 1947, after the Commission's case had been completed, Mr. Wright stated that this in his view—and he was expressing his personal view—was essentially a price fixing conspiracy case. Of course, he was not eliminating the Robinson-Patman angle.

As I see it, from the standpoint of the conspiracy charged, this case has boiled down to, say, three fundamentals. They are, of course, not as simple as I am going to make them, but there are three fundamental points that I see in the claim, or in the charges as supported in the Commission's case.

First, it is claimed, as I read the record, that the adoption of what we have called the agency plan, was one of the evils, and a part of the conspiracy charged.

Second, the adoption of the zone system of selling, or method of selling, if you prefer. Putting that in another way, you could call it the use of territorial divisions, or territorial differentials, there being a uniform price in each territory graduated as the country goes west until you come back to a normal par on the west coast. When I speak of those two methods, agency and zone, I am not unmindful of the fact that not all of the respondents used agency, and I am not unmindful of the fact that at 4301 least one of the respondents takes the very positive position that they do not use a zone or territorial method.

The third fact, or the third one of these three points, is the use by some or all of the respondents generally of what has been described as uniform terms and conditions of sale. Now, of course, the contentions made with respect to those three major features in the case, go into a great many ramifications.

As to the second part of the case, there is the fundamental claim that the use of a uniform zone delivered price method is per se a violation of the Robinson-Patman Act, because it is claimed that there is discrimination as between the near buyer and the far buyer in each territory, and it is also claimed that the use of zone differentials in and of themselves is bad.

As I read Mr. Wright's proposed findings, I see now no claim similar to the one made in the complaint, or the amended complaint, to the effect that there is discrimination as between customers along the zone boundary lines or borders. And I think that Your Honor will recall that there was considerable testimony to the effect that there was no such thing, and that the territorial outlines had been adopted with the idea of eliminating, or at least reducing to the absolute minimum, the possibility of there being an adverse effect on competition.

There is also the claim that the oxide differentials 4302 are discriminatory. And, finally, there is the claim in the case of the National that discrimination results, or has resulted from the agent classification on the one hand and the dealer classification on the other.

Now, as I see it, those are the main points in the charges against the respondents.

Trial Examiner Norwood: Now, in that oxide differential, you refer to the five ton differential?

Mr. Ewing: The quantity differential.

Trial Examiner Norwood: In the sale of dry white lead.

Mr. Ewing: Oxide. Carload 5 ton and less than 5 ton. Now, while there may be quarrel with the wording, I think that a substantial portion of the first section of those findings is not the subject of any real dispute. We felt that as a basis for the subsequent findings, it was advisable, if not necessary, to first cover in some detail the nature of the products involved in the proceeding. Now, we all know what they are, and I am certainly not going to waste everybody's time by standing up here and talking about these products, but I do want to emphasize two things in connection with them.

In the first place, the respondents had competing products in two senses, to the extent that they all manufactured dry white lead basic carbonate. We say that they competed with each other, to the extent that Eagle, 4303 for example, not only manufacture the dry white lead basic carbonate, but also the sulphate, which they say they press, and which the record shows to have been sold, at least in recent years, in greater quantity than they have sold their basic carbonate.

There is another element of competition—there is the further element of competition with certain products that are not lead pigments, for example, that have been mentioned, described somewhat, in this proceeding, ingredients which enter into and have entered into the manufacture of so-called ready-mixed paint. And there is evidence in this proceeding that clearly establishes that the lead pigment business, leaving aside the oxide, from the standpoint of the paint industry as a whole is a very small factor as compared with the ready-mixed paint business. It has, therefore, been our contention that the ceiling of the ready-mixed paint business hanging over all of the lead pigment business, involving paints ultimately, is a factor which constrains against monopoly and also against unlawful competition and conspiracy.

The second factor that seems to us of importance about pigment—and I do not believe there is any dispute about this—is the importance of pig lead. Now in the original complaint the Commission charged in effect that National controlled the price of pig lead through its large purchases from the American Smelting and Refining Company. In the amended complaint that charge, if I have correctly
4304 stated it, was in effect withdrawn, and there was a substitute of quite a different nature, although fundamentally, perhaps, bearing on the same point.

It is charged in the amended complaint, paragraph 7-A-8, that National, through its relationship with American Smelting and others, had a monopolistic influence on and was an important factor in the determination and quotation of market prices for pig lead, and that American Smelting and Refining holds a dominant position in the sale and production of pig lead.

Now, I think that so far as those charges are concerned, it is fair to say that through the testimony of Mr. Brownell, former chairman of the board of the American Smelting and Refining, and also through the testimony given more than two years ago by Mr. Baer, it is clear that while National has been a large customer of American Smelting and Refining, about which there is no doubt, that it has not exercised, and does not exercise, and could not exercise, any control over the pricing of pig lead. And that is further borne out by the fact that the record shows that in recent years National's purchases, generally speaking, have been in greater quantity from the St. Joe Lead Company than they have been from any other source. That, of course, in a sense is a side issue, but it points up the fact about which I am sure, there is no dispute that the price of pig lead is a very important thing in this case, because, these being lead pigments, and pig lead as converted
4305 being the principal ingredient in the pigments, and representing substantially all of the material cost in the case of some pigments, and a substantial part, at least, in the case of others, it naturally has a direct bearing—the price of pig lead naturally has a direct bearing on the price of lead pigments, I am going to say more about price later.

The next heading that we put in our findings was to outline the business of the respondents. Now, there is no need of discussion on that. There isn't any real dispute about that. It is there, really, simply for record purposes. We give some statistics with respect to the business done, but it has no particular importance other than the general background. We then give the history, as we read the record, of the National Lead Company itself.

Now, there has been a suggestion in this case that prior to the organization of the National Lead Company in 1891, you had a very active, competitive industry, comprised of a great number of small companies, all engaged in the business to a greater or lesser extent. The detail does not appear in the record, if my memory serves me.

There isn't any question about the fact that in December, 1891, National was organized, and the process of the organization took the form of its acquiring the assets of some sixteen or seventeen companies, most of which were in the lead pigment business—I think there was one 4306 linseed oil company, or castor oil company—and at the same time it acquired the stock of those companies, all of which had been members of the so-called National Lead Trust, which existed prior to 1891 and in substance controlled the industry. So, it is not quite exact to say that you had a lot of competing individual entities before and that National Lead when it came into being, scooped them all up and made them into one tight knot.

Trial Examiner Norwood: Well, what is the difference in the concerns owned by the National Lead Trust, and the United Lead Company? Are they the same thing?

Mr. Ewing: No, sir. The United Lead Company was organized by the Guggenheim interests and Thomas Fortune Ryan. It was an amalgamation of companies, and eventually the United Lead Company was sold to the National Lead Company in February, 1906.

Now, there is a difference between the two situations, because the companies making up United Lead Company were principally engaged in the manufacture, sale and distribution of metallic lead and lead alloys as distinguished from the business of the National Lead Company, which was lead pigments.

It is unimportant, perhaps, but the record indicates that the Guggenheim interests forced the sale, or the purchase by National of United Lead.

Now, in 1907, the National Lead acquired the stock of

Magnus Metal. Magnus Metal was never engaged in
4307 the sale of lead pigments, or their manufacture.

In March, 1913, we acquired all of the stock of Heath and Milligan Manufacturing Company, but in September, 1919 we sold it to the Glidden Company.

Prior to that, and in March, 1906, we had acquired the stock of the Carter Lead Company, and in 1912, the stock of the Matheson Lead Company, and so on, as set out in our ~~findings, and~~ in our answer.

Trial Examiner Norwood: You say Magnus was sold to Glidden?

Mr. Ewing: No. Heath & Milligan. Now, there is testimony, not exact as to date, except it places the time a great many years ago, that indicates with respect to the plants which had manufactured lead pigments, for economics, and other similar reasons, National abondened manufacture. We have, if I recall it now, some 12 branches. I think the record indicates that at one time or another there was some form of manufacture at those branches. Now there are five branches, which encompass a plant which makes lead pigments in the form of white lead basic carbonate. There are nine plants which manufacture the oxides, litharge and red lead.

Trial Examiner Norwood: Let me see—National now has twelve manufacturing branches?

Mr. Ewing: Twelve branches, but not manufacturing
branches. At five of the twelve branches, you will find
4308 a white lead plant. At nine out of those same twelve
branches, you will find an oxide plant.

Now, on pages 10 and 11 of our proposed findings—finding No. 16, we set out in some detail what I will term for convenience the Eagle Picher transactions. It has been charged that National has attempted to acquire, or has acquired or did attempt to acquire the control of the Eagle Picher Company, and there have been three divisions of evidence on that point—if divisions is the right word.

First, there is the unquestioned, undisputed fact that through Mr. Cornish, National did in fact acquire in the early '30's and continued to hold until the early '40's, up to some forty thousand odd shares of stock of Eagle Picher. And it is also clear, and I do not believe disputed, that, as the result of that stock transaction, National made a very nice profit, to say the least.

The testimony from Mr. Simon, the treasurer of the

National Lead Company, who was right in on the transactions, is clear and unequivocal to the effect that National bought it as an investment. They did have a policy that permitted them to invest in companies of the same general nature where they thought they knew something about the business and could make an intelligent investment. But, as the record indicates, they made no great practice of that.

Secondly, and this, I believe, has been the subject 4309 of much more discussion than it deserves, there is the evidence, in the form of the Chatfield letters, which to my mind, and I would say to any reasonable man's mind, simply indicates that an ambitious broker was trying to drum up a deal, and he certainly didn't drum one up. And, as I have said before, and as I hesitate to say again, it is no proof of anything, so far as I can see. Certainly we didn't inspire it, and there is nothing to indicate that we inspired it, and it certainly cannot be used as the basis for an inference that we were trying to get into the Eagle Picher picture through that channel.

The third thing, and here there is no dispute, is that some time early in January, 1931, Mr. Hertenstein, who, in fact, was vice-president and director of Eagle Picher, came to Mr. Cornish as an individual and attempted to arrange a deal whereby National should purchase a substantial amout of Eagle Picher stock.

By May of 1931 the point was reached where Mr. Cornish and National felt themselves in a position to make an affirmative offer; and a copy of that offer, which was in the form of a letter addressed to the president and the board of the Eagle Picher Lead Company, was sent by Mr. Cornish to Mr. Hertenstein, with the request that he deliver it to the proper authorities.

At the same time, Mr. Cornish sent a copy of that letter to the Department of Justice, which had been receiv-4310 ing advice about this proposed transaction from time to time.

Mr. Hertenstein replied to Mr. Cornish, stating that the stipulation didn't go so far as to cover what he said. Mr. Hertenstein never delivered that letter, as requested by Mr. Cornish. In other words, it never reached the Eagle Picher Company officially, and he returned it to Cornish without presenting it to the board, expressing the opinion that the offer was unsatisfactory. And that was the end of that.

Now, it is obvious that the proposal as contained in the letter was there to be submitted, if Hertenstein had wanted to submit it, and to that extent it indicated a willingness on National's part to do what it proposed to do. But, to my mind, it is equally obvious, and particularly because of the steps taken in connection with the Department of Justice, that that is not substantial probative evidence of an attempt on National's part at monopoly.

Trial Examiner Norwood: Did they offer a stated price in that letter?

Mr. Ewing: My recollection is that they did. Am I not right, Mr. Wright?

Mr. Wright: Well, I do not recall that they did in that letter. Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

4311 Mr. Ewing: I do not want to trust my recollection
as to what it stated with respect to price, but, of course, the letter is in the record.

Now, I think that I have reached the point which leads to a discussion of the activities of the respondents in the Lead Industries Association. I am afraid that I am responsible for having burdened the record with a great deal of material in that connection.

I have already said, and I repeat it, because I think it is one of the most important facts in this case, that Lead Industries Association is an entirely different colored horse from any other industry association that I have seen involved in one of these proceedings brought by the Commission. In fact, if the others are horses, the Lead Industries Association isn't a horse at all.

I say that, not only because of the nature of its activities and its purposes, and the way it carried them out, but also because of the very nature of the beast itself. The Lead Industries Association was formed back in November, 1928, and, according to its charter, it was formed to foster scientific research, promotional work, disseminate pertinent information concerning lead products, and act as a representative of the industry before the public.

From the very beginning, it included the primary producers of lead, that is, the miners, the smelters, and
4312 the refiners; and it also included the manufacturers
of lead products, some of whom were also ultimately retailers of lead products.

Now, it is perfectly obvious, and the secretary of the association so testified in effect, that a large smelter and refiner, such as American Smelting and Refining, or St. Joe Lead Company, would not stand idly by and let National Lead and the associated manufacturers or processors of lead pigments, monopolize manufacture and distribution of the finished product, because if they did, they would cut the outlet for their own production, and it would necessarily be very much against their self-interest.

The same, of course, is true in converse with respect to the position of the manufacturers of lead pigment. If they found the smelters and refiners going monopolistic, they would certainly want to take action about it.

Now, that, in effect, was the testimony that Mr. Wormser gave. And you will recall that back in New York in April, 1947, he testified in some detail as to what the association did, and what views various members had expressed with regard to the activities of the association, and his own personal views.

So I say that as far as its purposes, its inception,—and I am now speaking generally,—its activities are concerned, the overwhelming weight of evidence shows that 4313 Lead Industries Association took no part in, would have violently opposed, and would have had nothing to do with a conspiracy such as that charged.

Now, it is interesting to note that in this proceeding, Lead Industries was not made a party. There again is a difference between it and some of the other proceedings, not being a party, but being the subject of charges put Lead Industries in an anomalous position, to say the least.

It is true that the amended complaint does not charge Lead Industries Association with nefarious activities to the extent that the complaint itself did, but it does charge that the respondents—and I will summarize—it is paragraph 7-B-3—in effect that the respondents secured the advice, assistance, and cooperation of Lead Industries Association in fixing, adopting, publishing and using noncompetitive terms and conditions of sale.

And it further charges, sub-paragraph 4, that the respondents exchanged directly and through the offices of Lead Industries Association price factors and informing concerning price factors expected to be used and which at times were used in calculating, determining and announcing prices.

Lead Industries not being represented, I am in effect undertaking to represent them. As I said, in the overall picture, the evidence is overwhelming in establishing that
Lead Industries did not and could not have furthered
4314 a price fixing conspiracy in this case. No price in-
formation was ever disseminated by Lead Industries Association.

It is true that each company reported to Lead Industries Association certain statistical matter, but that statistical matter was never transmitted from the Association office, say in the case of a report made by National, to Sherwin-Williams, with the statement that this is National's report. What was transmitted and published was the overall picture, the totals of all, and I do not believe at this time that Mr. Wright makes any contention that there was price reporting as such, or dissemination of price information as such.

Now that leaves, I believe, in the Association's history that which is perhaps the most important single thing in this case, and that is, what did the respondents as members and the Lead Industries Association do in respect to the National Industrial Recovery Act and Codes.

Now, I do not pretend to carry the detail in my head, and if I tried to carry it, I would undoubtedly make a series of erroneous statements, but I think I can summarize the picture generally.

There was a master code for the lead industry, and under it, it was contemplated that there should be filed supplementary codes, and one of these supplementary codes was to be a supplementary code covering the lead pigments
division of the industry. Those supplementary codes
4315 were to cover unfair practices.

There isn't any doubt about the fact that the lead pigments division of the Lead Industries Association, whose members were the representatives of the companies interested in those goods, met for the purpose of formulating a supplementary code, commencing their meetings early in July, 1933. They met repeatedly. They met in two subdivisions. There was a dry products committee, which in turn had a white lead and oil subcommittee. There was an oxide committee, which was part of the dry products committee, as I recall it.

Now, these people didn't want any code at all, and they didn't want this supplementary code, but, as the record shows, the Deputy Administrator, N. R. A., was very, very insistent. So they attempted to undertake the drafting of the code, and the record, as you know, is full of successive drafts. It is also full of the meetings.

Each and every one of these meetings—and I believe that this appears in almost all of the minutes—was held in connection with the formulation of this code, or the attempt to formulate it. And, if that doesn't appear affirmatively in the minutes themselves, it is clear from the testimony of Mr. Wormser and of others who actually attended meetings and who have testified in this case.

These discussions embraced a number of subjects, all of which were brought up and considered for the purpose of determining whether they should be proposed 4316 as an element or elements of the code.

In many instances you will find that a committee adopted a resolution to a certain effect, indicating that such and such provisions were offered by that committee for the purpose of inclusion in the code, and then it never appears in any supplementary code, or in the code itself.

In some cases the minutes show a clear abandonment. In other cases, you must infer the abandonment from the fact that it didn't appear. But all of those discussions, and all those agreements, if you want to call them such, were discussions with respect to the inclusion of a certain provision or provisions in the code, and the agreements were not agreements to do these things, they were agreements to have a provision such as this go into the code.

Now, there is a great difference, because Mr. Wright's position is that we discussed them, they didn't find their way into the code, but we agreed on them anyway. I say there isn't a scintilla of evidence to justify that; that it is plain on the face of the minutes, it is plain from the uncontradicted testimony of every witness, that they were discussed for code purposes only, and that they were not the subject of agreement only to the extent of agreeing on them to go into the code. Of course, I could repeat myself on this subject ad nauseam, but I am not going to—if 4317 I have not done so already—but I think it is of somewhat importance in this case.

Now, before I leave the subject of Lead Industries, there are one or two other matters that I want to direct your attention to. In the first place, there has been a suggestion that an effect should be given, or a recognition taken, of an attitude expressed in one way or another with respect to the anti-trust laws.

The record indicates that Mr. Cornish, then, I believe, president of National, stated publicly that he did not think the N. R. A. was going to last, and that the anti-trust laws were still on the books, and that they should be lived up to; and a more or less similar statement appears in the record in another form.

That would indicate to my mind an awareness of the fact that, regardless of the N. R. A., regardless of whether you were a protagonist of the N. R. A. or a reluctant associate with it, that these people did not intend to violate the anti-trust laws.

A different interpretation is now suggested, and that is that they were aware of the anti-trust law, and they thought they had found a way they could get around it. Everyone is entitled to his own view, but to my mind that consideration suggested is wholly unpersuasive, for this reason: These people may not have been the smartest people in the world, but at least they were, generally
4318 speaking, successful business men engaged in the
operation of large business enterprises, and to suggest that they would plaster their record with statements of that nature and then stick their necks out in a wholly obvious way, is just incredible to me. I just cannot believe such a thing would happen.

Now, I do not say that, whatever their intentions were, that they might not have been successful in violating the anti-trust law, but I do say you cannot infer from their previous allegiance to the anti-trust law, an intention to in fact violate it.

Second, when N. R. A. was declared unconstitutional, the Lead Industries Association and the Pigments Division in Memphis wound it up just as fast as they could, and you can almost hear them saying "Good riddance."

And then in November, 1935, the Coordinator for Industrial Coöperation, a Mr. George L. Berry, who, apparently, was in charge of activities by some organization to perpetuate by voluntary means in industry practices that had met with approval under the N. R. A., approached the Association with such a suggestion, and they turned it down flatly, as appears from the resolution which is in evidence as part of, or is in evidence as Respondents' Exhibit 92.

Trial Examiner Norwood: Was he the attorney that they consulted?

Mr. Ewing: No. He formerly, I believe, had some
4319 connection with N. R. A., but at the time he wrote
Lead Industries in November, 1935, he was Coordinator for Industrial Cooperation, whatever that may be; and he wrote them asking them to come down to discuss and consider voluntary action to continue the N. R. A. activities.

Now, when the Lead Industries Association received that request, the executive committee met, and adopted this resolution, to which I have referred; and the substance of the resolution, after recitals, the final recital in this resolution reads as follows:

"Whereas, the Lead Industry has made greater progress out of the depression from the standpoint of both employer and employee since the termination of the N.R.A. than it did before, Now, Therefore, Be It Resolved, that it is undesirable for the lead industry as a unit to send a representative to the meeting called by Mr. George L. Berry, to be held in Washington on December 9, 1935."

Now that is a plain indication, as plain as it can be, that they wanted no part of the N.R.A. in any substitute form, and to my mind it leads directly to the inference, or directly supports the contention we make with respect to the nature, character and activities of the Association and its members.

Now, I think you can say that the Commission's case
contains the suggestion that you had an industry
4320 which was going along, operating—perhaps the con-
tention is that it was operating more rigidly than prior to 1891, as I mentioned earlier, but that when you got to 1933 and N.R.A., you had an overturn, and things were all different. The facts just do not bear that out. I am not going to go into the detail, because that is going to be covered by Mr. DuBose, but I mention it, because some of the things I am now coming to discuss bear on my point at the beginning. I said that the agency method was one of the big factors here.

My recollection of the testimony is that International Smelting and Refining had a so-called consignment method, commencing early in 1932. In 1932, National adopted on a local basis the so-called agency method. Under the agency method, title remained in National. It experimented with agency, and it determined to, and did, effective as of November 15, 1933, go on agency on a nation-wide basis, except for the Pacific Coast, which never had it.

Now, there isn't any dispute about the fact that Eagle went on an agency plan in substance of the same character. There isn't any dispute about the fact that National's officials discussed it with Eagle, and there isn't any question about the fact that we told Eagle we were going to go on it in advance; on November 15, 1933.

Where is the vice? The cause—and I think it is perhaps
indicated in the record that there was some reluctance
4321 about adopting agency—but the cause was an industry evil, and that was loss leadership.

Now, that was particularly important to us, because here we had as the result of years of business established our Dutch Boy label to the point where it had the highest degree of consumer acceptance, and that it was recognized in effect as a premium product. Its competitive position was entirely different from the admittedly inferior brands of some competitors. Anything that the mind could devise to stop the practice of having dealers use Dutch Boy as a loss leader was something that was to be given consideration by National. Of course, it is something that is given consideration by all kinds of businesses, because the problem is not confined to lead pigment.

Certainly, there can be no reason why National could not have, in and of itself, adopted an agency method, provided it fell within the law, if it wanted to. There was no reason why Eagle could not do it if it wanted to. There was no reason why Glidden could not, as it did—did it with reluctance, and then quit.

I cannot see the basis for an inference because of the fact that two or three companies discussed this thing and decided for the obvious economic reason to use it. It is clear from the Code minutes that at one meeting National's
representative came right out and said "We are
4322 going to do it. Here is the way it is." And some
said they thought they might do it, too.

Now, one reason, as you know, for National and others fighting the attempt to bring them under the paint and varnish code, was the fact that the paint people were unalterably opposed to consignment, and, if their code prohibited consignment, why, that, at least, was not a possible solution to the loss leader problem. In any event, there is no agency now.

Second, zones. Now, Mr. Wright stated, at least last week, and he may have said the same thing before, that his point in connection with zones doesn't rest upon the existence or non-existence of a map, it is because the fact is that what we have called a zone method involves the territorial system of selling whereby certain territories take a differential higher than the so-called par territory.

I quite agree with him that the existence of a map, or the non-existence of a map, while it may be a factor of some sort, certainly doesn't determine whether you are doing business on a zone basis, with uniform delivered prices in the particular territory and with advancing differentials as you come to changing lines.

We have testimony in this case—before I come to that, there is testimony in this case that indicates that National and the others who did use maps, took to the map 4323 form of expressing the zone territorial method of sale and distribution some time between the fall of 1933 and June of 1934. When that occurred, except as between those dates, it is impossible, I think, for anyone to say, but it certainly occurred.

Now, take National's case. McNair, who was manager of the Atlantic Branch dating back to 1910, testified that ever since he knew, National had always used a territorial method of selling which involved the use of differentials. He didn't purport to be able to tell you the details of it, but he was positive in his testimony on it.

Then there is in evidence the exhibit—the number of which I can never remember, which sets forth National's branches, delivery points, differential and equalization points. I think it is 859.

Mr. Wright: 659.

Mr. Ewing: 659. I am not going to attempt to go into or waste your time here with an explanation of the differential delivery point system, but we do know that by 1930 —this exhibit dates back to 1920—we do know that by 1930 there were better than 500 points. Now, we took those points, and superimposed them on a map, and the result is startling, and wholly confirmatory of Mr. McNair's testimony. If you will look at the territories that are determined by the point system, if you want to call it that, as against the map, I don't say it fits like a glove, but it 4324 is very, very close.

Trial Examiner Norwood: That is a respondent's exhibit, is it not?

Mr. Ewing: That is right. It is our map—Respondents' Exhibit No. 147. Now, I think the fair inference—first, I should say I think the evidence is very clear that National in substance, even though it first came up with a map some time between November, 1933 and June, 1934, in substance used a zone or territorial method of sale which involved differential territories, at least since 1910, and there is every reason to believe since long before that. So that the actual use of a map, whenever it occurred, had no particular significance, and didn't represent a chameleon change of color from before 1933 and after.

Trial Examiner Norwood: When they sold from those delivered points, did the customer pay the freight from the equalization point to his location?

Mr. Ewing: If he were a customer located at a point other than a delivery point, he would pay the freight differential, but most of the delivery points were big cities, and most of the business, of course, was done there.

Trial Examiner Norwood: That is the same system that Sherwin-Williams now apply, does it not?

Mr. Ewing: Well, not quite, no. But I will let him point out the difference in his system. Therefore, I say as
a practical proposition that the record establishes
4325 that we have been doing business in substantially the
same way. In what I have just been talking about, I should limit to white lead and oil. With respect to dry white lead basic carbonate, National divided the country into two zones, east of the Rockies, and west of the Rockies. Sprague testified, as I recall it, that prior to 1933 the West Coast had carried a differential. In any event, the division as between west coast and east, is not an arbitrary one, obviously, and it is not unrealistic, or anything like that.

Oxide, zones. There again, you have a map, but the record indicates very plainly as to how those oxide zones were set up by National. It is true that during the code meetings there had been discussions of that subject, and that zones were a matter which never found their way into the code.

While the code was waiting for approval, in the late spring of 1934, National sent a letter to its branch managers, which has been referred to before, and that is Harold Rowe's letter of May 11, 1934, Respondent's Exhibit 159-B. That makes it very clear that National at that point de-

cided to have zones and to adopt and put into effect the terms and conditions of sale which were found in the proposed code subsequently approved. And he states plainly that that is what they were doing. I think the only inference that you can draw is that National independently decided then that it wanted oxide zones and was going to use these terms and conditions of sale, and that it
4326 was doing it regardless of what anybody else did.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Ewing: Now, what I have said with respect to the adoption by National of oxide zones, is true with respect to the adoption of the so-called uniform terms and conditions of sale, which were covered by the same memorandum. In view of the fact that both of those subjects are going to require more discussion by Mr. DuBose, I am not going to burden the record with further comment on them.

On the question of price, there isn't any doubt about the fact, as I have said, that lead being the principal material component, the price of lead is the principal factor by way of material cost affecting price. And we all know that in the case of litharge and red lead, the custom of the business has been to sell those products at a fixed differential over the current market price of pig, and that as that market price varies, depending on the quantity, you get a variation in the price of lead pigment to oxide.

The record shows that National adopted that differential method of selling the oxides back in 1927. It didn't come into being, it wasn't new, and followed after the code days —they adopted it in 1927. Now, the price being what it is, and the nature of the oxide product being what it is,
4327 it is almost inevitable that the differential method of selling it was involved, because otherwise, the industry would have had a hard time in pricing.

Dry white lead, being sold in large quantities to large paint manufacturers, generally speaking, reflected fewer price changes than any of the other products. White lead and oil consistently reflects the price changes in pig lead, but with a lag, and, of course, there are other factors in the pricing of white lead and oil, such as the cost of the linseed oil, and so forth.

Why is there a lag in the case of white lead and oil?

Well, white lead and oil represents a product with respect to which there are a large number of small outlets, and, as I say, as distinguished between dry white lead, which is a quantity proposition, you have a very narrow margin. It is obvious there is some profit in the case of red lead and litharge. I don't know whether you can figure it or not, but Mr. Wright pointed it out the other day, and I think the same is true with respect to all of these products. There is a greater spread between the painter price, because for all practical purposes there were no direct customer sales.

In the case of white lead and oil and the price of pig. Under the Old Dutch process, it took 120 days to corrode your lead, with the result that from a pricing standpoint, you had all of that stock in process, as well as raw
4328 material on hand and finished goods coming out. Under the Carter process, the time is reduced to ten days, I believe, so that the amount of material tied up in process is not the same. But in the case of each product, the price of pig certainly has a very definite bearing and relation to the price of the product, and as the price of pig changes and reacts, there is a reaction in the price of the product.

I repeat that in the case of oxides, the margin is very small, and the margin, I think it is fair to say, is small in the case of dry white lead; and white lead and oil, although it is a little larger. But the prices vary, and they reflect the price of the principal raw material ingredient. So that you have not got here a case of rigidity in price not reflecting the true underlying market condition. And I think that is a very important factor.

Now, there is just one other subject I want to mention briefly, and that is reverting to the suggestion that the respondents here have no protection from the provisions of the National Industrial Recovery Act.

Entirely aside from my contention, which I believe the evidence establishes, that there were no agreements except for standard code prices, any person carrying out a provision of that code is entitled to protection. I certainly think that it cannot be disputed that industry representatives when they were considering the formulation of
4329 codes, could discuss any matters they wanted to with absolute and complete freedom. When they came in this case to the point of having a code, they included a

price reporting provision and a provision at least permitting the use of uniform terms and conditions of sale. I say at least permitting, because I can see room for the contention that the provision was mandatory, although the particular provision does not so state itself.

What happened? The code was approved, and they asked to be relieved from compliance with those provisions, and they were given three months' relief. They asked again, and the record indicates that they never did attempt to comply with those provisions. There was no price reported.

Now it is contended that since we didn't have to comply with the provisions relating to terms and conditions of sale, anybody who did anything can't claim protection because they weren't carrying out the terms of the code.

Now I say that the code was there. The mere fact that we might have been given relief, or had it held in abeyance, that there is an exemption, doesn't lead to the conclusion that there was no code provision, and that because he did this he had no protection.

That, as I say, is entirely aside from the argument that I earnestly urge, that National adopted a uniform standard of terms as its own independently and without agreement, but I do not see how they can blow hot or cold on that point.

4330 That concludes my part of our presentation.

Mr. DuBose: Your Honor, these first few matters I am going to take up for the most part involve perhaps minor corrections to the proposals as submitted by Mr. Wright.

I call Your Honor's attention to page 4 of the proposed findings and conclusions of counsel for the Commission, and the first paragraph following the list of cities, the first sentence, which states: "National is by far the largest producer and seller of lead pigments in the United States," and then he sets up the white lead and oil percentages, and the next phrase is: "About 50 per cent of the dry white lead."

Now, actually, that is incorrect. McCarthy, who was manager of trade sales for National, stated that according to his recollection for a great many years National's percentage of dry white lead sales and shipments was approximately 30 per cent.

Now that is transcript, page 1665, in addition, Commission's Exhibit 664, which shows the percentage of National's dry white lead basic carbonate sales for 1940, 1941 and 1942, shows that those percentages varied between 35 and 37 per cent.

Now, on page 5 of the proposals of Mr. Wright, at the middle of the page, reference is made to the alleged negotiations during 1902 between National and the well-known Messrs. Thomas Fortune Ryan, Daniel Guggenheim, et al. looking to the purchase of certain properties. And
4331 at the bottom of that page reference is made to Commission's Exhibits 5-B and C, which were the minutes of a special meeting of the board of directors of National held December 11, 1902.

It is true that at that meeting the purchase of those properties was authorized. Now on page 6 of Mr. Wright's proposals, the first line, it is stated: "These negotiations do not appear to have been completed."

Well, in the first place, the minutes don't show negotiations as such. There was an authority to purchase. Actually, that authority to purchase was rescinded, as is clearly shown in Commission's Exhibit 6-C, which is a portion of the minutes of the adjourned regular meeting of the board of directors of National, held on January 22nd, 1903.

Trial Examiner Norwood: Authority as to this list on page 5, that was rescinded?

Mr. DuBose: That was rescinded.

Trial Examiner Norwood: On C-Ex-6-C?

Mr. DuBose: On Commission's Exhibit 6-C. Now, Mr. Ewing has already brought out the facts with respect to the stock purchases, and so forth, by National, in Eagle Picher, and I just want to point out that the stipulated facts with reference to the proposal in May, not June, 1931, as listed there, appear at pages 4182 and 4183 of the transcript.

We begin on page 9 of the proposals by counsel for the Commission to come to the first, you might say, im-
4332 portant inference or implication which counsel seeks to put into his proposals, most of which, we will demonstrate, are wholly unsupported or directly contrary to the reliable probative and substantial evidence.

I refer on page 9 to the last sentence of the paragraph under the heading "American Smelting and Refining Company," where it is stated that the position of the AS&R, as that company is called by all the parties here, in the domestic lead market, and its dominance "is demonstrated by the fact that the respondents herein agreed to use its daily quotations of lead prices as the sole basis for quoting spot carload prices on red lead and litharge."

I take it that the inference there is that not only was there an agreement, which in itself would be illegal, to use AS&R's daily quotations, but that the amounts to be added to AS&R's pig lead quotations is sought to be inferred.

Well, reference is made to Commission Exhibits 809, 615, and Respondents' Exhibit 137. Now, Commission Exhibit 615 is a notice from the home office of the National Lead Company to its branch managers, pointing out that on carload quotations for government, municipal, industrial, rail, steamships, and so forth, National itself was using a straight differential over AS&R's pig lead quotations. The other two exhibits relate to the code, one of them being the code itself. Respondents' Exhibit 137 is the minutes
4333 of the meeting of the Lead Oxide Committee of the
Lead Pigments Division, held on December 14th and 15th, 1933, which was one of the meetings at which terms for the supplemental code covering lead oxides were discussed. Commission's Exhibit 809 is the code itself. In Schedule A, Articles 1 and 2 contain the conditions for sale of lead oxides, as to both less than carload, and carload lots.

And, as Your Honor pointed out last Wednesday, with respect to the carload differential over pig lead, article 2 of the code itself states that the differential shall be "as agreed upon by buyer and seller," another indication that the lead pigments industry, unlike almost every over industry in the country in 1933 and 1934, did not want price fixing, even in a code.

Trial Examiner Norwood: Well, as I read that proposal there, it was merely cited to show American Smelting and Refining Company's importance in this price structure here. So if that wording were changed there, would that be satisfactory?

Mr. DuBose: I should think so.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. DuBose: Now, on page 10 of counsel's proposals—and when I throw this out and refer to counsel's proposals,
I mean proposals submitted by counsel for the Com-
4334 mission, in the matter of the first full paragraph,
which is just before Part II, page 10, it is stated that

the respondents between them account for a substantial portion of the production of competing products, that is products which compete with these lead pigments.

Now, there is really no proof in the record as to just what portion of these competing products the particular respondents produce, that is, of pigments, other than those mentioned in the amended complaint, although it is true that Glidden, through its own vice-president stated that it was one of the largest producers of lithopone.

However, when you come to perhaps the most important competing product, such as leaded zinc oxide, true, Eagle-Picher stressed this—but there are no per cents in the record, and I take it that there wasn't any claim that there was any such proof.

Then we come to the next to the last sentence of the same paragraph, in which the statement is made that the National Lead and DuPont "have recently been found to have a monopoly power in production and sale of titanium pigments, which are also produced and sold by Glidden through its subsidiary, American Zirconium Company."

There is nothing in the record with respect to this alleged recent finding, but I suppose that counsel wishes the
Trial Examiner to take official notice of the recent
4335 decision of the Supreme Court, affirming a decree of
the Southern District of New York Federal Court—
United States *vs.* National Lead Company, which is reported in the Advance sheets, 332, U. S. 319.

Now, actually, if official notice may be taken of that case by the Trial Examiner without proof of record in that case, actually, that case dealt with cross licensing of patents and a cartel arrangement, and the lower court in denying divestiture by National and division of certain of its plants, held, and the Supreme Court reiterated that holding, that in the absence of these restrictive cross licensing and cartel arrangements, healthy competition would be fostered in the industry. The court, particularly at pages 347 and 348 of Volume 332 of U. S. Reports, and again at pages 351 and 352, points out that even with these restricted agreements between National and DuPont, there was still active and healthy competition between those two. And it also points out that the two other producers not involved had increased their competition while this arrangement was going on. So that the court concluded that this was not a proper case for divestiture, which the Government was seeking to have the Supreme Court decree to be proper, because they stated—

Trial Examiner Norwood: Well, I would like, before full argument on both sides, to be shown the relevancy of that matter.

4336 Mr. DuBose: I suppose it is this: By making that statement, counsel for the Commission was saying that National, while it is true that its lead pigments compete with other products, nevertheless had a monopoly power in one of these competing products, namely, titanium.

In that connection, Your Honor will recall that in the 1946 St. Louis hearings, one of the paint manufacturers from St. Louis pointed out that in the early '30's, when titanium first came on the market, it was very high priced; prices had been reduced; they had found that it was better in some respects than basic carbonate of lead, and that it was being used more and more to replace basic carbonate of lead.

And I suppose counsel's contention is there, "Sure, you have these competing products, but you control those two," and I just wanted to point out that that record in that anti-trust case is not before the Trial Examiner. But if you can take official notice of it, that statement that National and DuPont had monopoly power, is contrary to the direct holding in that Supreme Court case.

Trial Examiner Norwood: We will recess to 1:30, and we will reconvene in room 332, on this floor.

(Whereupon, at 12:10 o'clock p.m., a recess was taken until 1:30 o'clock p.m. of the same day.)

4337 Afternoon Session.

1:30 p.m.

Trial Examiner Norwood: The hearing will be in order. You may proceed, Mr. DuBose.

Argument of Mr. DuBose (Resumed).

Mr. DuBose: Your Honor, before we go into the merits of counsel's proposals, and not in a spirit of criticism, we would like to say that in our opinion the proposals of counsel for the Commission hardly meet the requirements of the Rules, as we understand them.

We understood, and attempted to set forth in our proposed findings—and I speak for all Respondents there—numbered findings of fact, some evidentiary, a lot of ultimate facts, and referred therein to the record, made concise conclusions of law, and attempted to give our reasons for both at the end.

In reading counsel's proposals, however, we are faced with a mixture of all three intertwined, and I say we don't say that in any spirit of criticism. We all were working against time, but it has to some extent made our work of reply a little more difficult.

Now, before I leave our proposals, the proposals of respondent National, perhaps in some instances we have cut a few corners and made flat statements that there
4338 was no agreement; there was no conspiracy. In so
doing, of course, we meant that the record contained no evidence, and no substantial, probative and reliable evidence that those ultimate facts existed.

So, as I say, in a non-critical spirit we point this out, which will explain perhaps the rather voluminous reply that was necessitated by the manner in which counsel's proposals were given to us.

As we understand the new Administrative Procedure Act and the new rules of the Federal Trade Commission, under both of which this proceeding is being heard, the evidence necessary to support either proposed findings or the findings that are finally made must be reliable, probative and substantial, and that counsel in support of the complaint under the Administrative Procedure Act has the burden of proof; under the new rules of the Federal

Trade Commission must support them by the greater weight of such evidence, namely reliable, probative and substantial evidence.

Inferences can be drawn only from such reliable evidence. Inferences cannot in turn be based upon inferences. Nor can an agency in arriving at its informed expert judgment neglect to found that judgment on the substantial evidence in the case.

In Part 2 of his proposals, counsel begins what I imagine
he would view as the crux of his case. In Part 2 the
4339 attempt is made to show that before 1933 the lead
pigments industry was characterized by deviations
among the various manufacturers as to practices and methods of sale; but that after 1933, under the guise and cloak of forming a code, the Respondents set forth a rigid system.

Now, counsel states that the recollection of witnesses as to practices prior to 1933 was very vague. Necessarily, much of the parol testimony was vague even as to a few years ago, since 1933; but we believe that the evidence clearly shows that as a general matter the same pricing practices have obtained in the lead pigments industry for years prior to 1933. Some of the price cards prior to 1933 substantiate this.

Respondent's Exhibits 154-A to I, which was a tabulation that was gotten out by the witness Tibbetts showing the relationship between common pig lead prices New York and the prices of the various pigments, substantiate that statement.

Perhaps next to McNair, the one witness who had a more intimate connection with the industry prior to 1933 was Mr. Sprague, who in 1924 and 1925, upon the acquisition by Glidden of Houston Lead, went into that plant to run it. He testified as to the pricing practices then in effect. He showed that the market leader then, as now, was National
Lead Company, based largely upon the amazingly
4340 successful consumer acceptance that the Dutch Boy
label had established for itself among master painters in this country, who handed down their knowledge of this particular product from generation to generation.

There was the same practice prior to 1933 of selling white lead in oil and dry white lead on the basis of territorial differences in price.

Prior to 1933, oxides were sold on what might be called a territorial differential basis, because on distant shipments, as Mr. Carroll testified, where the freight was more than 25 or 30 cents, freight was added to the price on carload shipments, and on l.c.l. shipments freight was charged in addition to price from certain designated warehouses.

The attempt has been made to show that from 1933 on, oxides were sold on a flat differential over pig lead; litharge at a dollar and a half for carload quantities, red lead at two and a half dollars over pig lead.

The minutes of the National Lead Company Board of Directors of May, 1927, show that National Lead then established that differential of a dollar and a half and two and a half—in 1927, six years before 1933—and at the same time established minimum card prices on l.c.l. shipments of two and a half dollars and three and a half dollars respectively.

4341 So what do we come down to? As Mr. Ewing pointed out this morning, the complaint seems to be that regardless of this general pricing schedule and system as we have seen, which went back to the beginning of the industry, nevertheless, certain changes were made which found their way into Schedule A of the Code.

You adopted agency, and you adopted zones.

Trial Examiner Norwood: But the agencies and zones didn't get into the supplemental code, did they?

Mr. DuBose: They were discussed, and as the Commission's own proof shows—Commission's Exhibit 505—in the meeting in October 1933, freight and zoning problems were discussed without any understanding or agreement being made. That is the Commission's own exhibit. The minutes do not again refer anywhere to zones for white lead in oil, which was the subject of that discussion. We say the Commission can't ignore its own substantial, reliable and probative evidence.

On dry white lead, counsel—on page 12, and in other places in his proposals—states that apparently prior to 1933 there was a lower differential on the Pacific Coast for dry white lead, and he refers to the cross-examination of McNair and the ancient documents that McNair had in preparing his schedule of selling practices.

4342 The reference there was to a price card of 1924, and it merely shows that in certain quantities at that time there apparently was a lower differential for both white lead in oil and dry white lead on the Pacific Coast.

However, Sprague was definite in his recollection that prior to 1933 there was a one-quarter cent differential for dry white lead, prior to 1933, and that is also a reasonable inference to be drawn from certain other testimony.

Trial Examiner Norwood: Now, how does that bear on the issues here?

Mr. DuBose: Very much so.

Trial Examiner Norwood: —as to whether they were selling lower or higher on the Pacific Coast?

Mr. DuBose: Well, our contention is that dry white lead prior to 1933 was also sold on a higher differential on the Pacific Coast, and that the only change made in June 1934 by National itself was the addition of four other states to that Pacific Coast Zone—New Mexico, Colorado, Wyoming, and Montana.

As counsel for the Commission points out, in December 1933, National Lead Company resolved to adopt the terms and conditions of sale in Schedule A for dry white lead basic carbonate beginning January 1, 1934, some five and a half months before the Code was approved, and that appears in the minutes.

Nowhere is any mention there made of selling at a quarter of a cent higher on the Pacific Coast. There was
4348 a quantity discount carload and less than carload, so
that when we come to June, and Respondent's Exhibit 159-A, which was Mr. Rowe's letter to the branch managers of National of June 9, 1934, in the second paragraph it said:

"On dry white lead, a difference of one-quarter cent per pound has been added to the par price in those four states," which would tie in with Sprague's recollection that there was only a modification in 1933-1934 of the dry white lead zones.

Mr. Ewing has also pointed out that the white lead in oil zones for all practical purposes went back to 1910, so we are left with oxide zones and agencies, and the terms and conditions set forth in Schedule A.

Before we get to that, we might look into the claim beginning on page 12, the bottom thereof, of counsel's proposals, in which it is stated that for the ostensible purpose of considering and drafting a supplementary code, the Respondents met together in the fall of 1933.

What are the contemporary documents aside from the parol testimony?

In the first place, here are Respondent's Exhibits 50-K and L, which was a letter dated October 2, 1935—before this case was ever heard of—sent by Mr. Wormser of Lead Industries Association to Mr. Marshall, who was a director of the Division of Review of the NRA, which was
4344 winding up its affairs, and who wanted a lot of information from the Lead Industry as to how the Code worked there and what was back of the Code, and so on. He had a long list of questions that he sent.

The Board of Directors of Lead Industries Association met and authorized Mr. Wormser to send a letter dated October 2, 1935, to which I have just referred, in which, among other things—it was stated:

"In general the members of the lead industry were not of the opinion that a Code under the National Industrial Recovery Act would materially help the lead industry, but pursuant to urgent representations by National Recovery Administration officials, steps were taken to draft a code for the industry."

Respondent's Exhibit 50-O, which is a letter dated the day after—or rather before—October 1, 1935, sent by Mr. Wormser to Mr. Janssen, who was a Deputy Administrator in charge of the lead code of NRA, reads:

"Answering your telephone inquiry as to the reason for the suspension in the operation of Section 2 of Article VII of the Lead Code, you will recall the history of this particular section.

"The Pigments Division had mixed feelings from the start about the advisability or need of incorporating an open price provision in the Code. The section was
4345 included only, I think it fair to state, at the insistence of NRA, which strongly endorsed the proposal. Upon approval of the Code, however, the Pigments Division felt that the lukewarmness of some members made it desirable to postpone the establishment of this practice and to request a suspension until full agreement had been reached."

In Respondent's Exhibit 81-A to C, which are minutes of the Executive Committee of the Lead Industries Association held on September 21, 1933 during the code period, the Chairman called attention to the fact that he had received the following communication from the NRA, and this is a letter from NRA to the Chairman of Lead Industries Association, Executive Committee:

"In conversation with you on September 11 it was our understanding that you would file supplemental codes to the basic lead code not later than September 16.

"We beg to advise that up to this date we have not received these supplementals and are asking that you give this your prompt attention."

That was signed by H. O. King, Deputy Administrator.

The Lead Industries Association replied that they were working on them and hoped to have them in shape.

4346 Now, what do these documents establish? That the Respondents under the guise and cloak of meeting the requirements of the NRA met to form an illegal conspiracy?

That insinuation flies in the very face of the documentary evidence, and that documentary evidence is fully supported by the clear and convincing testimony of Mr. Wormser, who stated the same thing, that they didn't want codes, but did it at the urgent insistence of NRA, and of the other witnesses who testified as to those meetings.

Then in Part 3, which runs from pages 13 to 28 of counsel's proposals, we come to the crux of his case.

Trial Examiner Norwood: Just a minute. Cite me that documentary evidence you are talking about there.

Mr. DuBose: Respondent's Exhibit 50-K and L; 50-O; 81-A to C, particularly 81-A and B.

Trial Examiner Norwood: All right.

Mr. DuBose: There may be others; we don't say that is all.

In Part 3 counsel comes to what he apparently regards as the crux of his case, and that is entitled "Cooperative activities (1933-1934)."

As we see it, his position comes down to three propositions:

First, that under the guise of drafting supplementary codes we met and formed illegal agreements. I think
4347 we have fully answered that.

Second, that some of the agreements did not find their way into the Code, and therefore were not protected by the exemption from the anti-trust statutes which is provided for in Section 5 of the NIRA.

What are these so-called agreements? They are listed on pages 26, 27 and 28 of counsel's proposals, beginning near the bottom of page 26, and they are numbered 1 to 14.

Since that apparently is the crux of his case, let us look at those alleged agreements.

The first is to sell white lead in oil and keg products on the basis of territorial differences or zones. We have shown that as far as white lead in oil is concerned that that went back to 1910, so that can be disregarded.

Second is to sell white lead in oil on the basis of consignment contracts, and even in this counsel has to state "except that Sherwin-Williams and Glidden did not take part in this understanding."

Well, Mr. Ewing has fully covered that agency situation, and all I want to do is to show this: that National started this thing for itself in 1932, before the NIRA was passed. They found it was a good method around New York and in the east to get rid of this vicious practice of using Dutch Boy as a loss-leader so they could sell what we claim 4348 are some of the inferior products of some of these other respondents.

Trial Examiner Norwood: Why did the others do it?

Mr. DuBose: Why did the others do it? Which one did it? Eagle-Picher [illegible] the only other one that did it. They had an Eagle brand that was being kicked around, too, but we didn't care what they did with their Eagle brand. We were going to protect our Dutch Boy brand.

It is perfectly obvious that there was no agreement among the respondents.

Trial Examiner Norwood: Well, didn't International?

Mr. DuBose: Never. International, before we even started agencies, had a consignment arrangement, not an agency.

Trial Examiner Norwood: And Glidden didn't come in until '39?

Mr. DuBose: Glidden tried it. As Mr. Sprague testified, their salesmen thought that would be another method whereby they could sell their product. They tried it, but they didn't sell any substantial part. It was a headache to them because of the mixed paint situation, and they dropped it.

Trial Examiner Norwood: Thank you.

Mr. DuBose: Both Sherwin-Williams and Glidden 4349 at these meetings were violently opposed to the consignment feature.

Now, here is Commission's own Exhibit 505-A, which was a meeting of the White Lead in Oil Committee of October 28, 1933. The same exhibit which shows there was no agreement on white lead in oil zones also shows this:

"The Chairman described a new agency system which the National Lead Company was putting into effect—"

And, by the way, the Chairman was Mr. Carter, I believe, or Mr. Rowe of the National Lead Company.

"—for the sale of its lead in oil products, stating that it was an adaptation of a method used by General Electric and other companies, and was designed to correct destructive price-cutting in the white lead in oil business which had seriously affected the marketing of the product. Some other members stated that they, too, were planning to use the consignment system."

We know of no law or any principle of law in the cases which prohibits one competitor from telling any other competitor of a legal method of getting rid of what, from the manufacturer's standpoint, is an economic evil.

In that connection, the agency method of the Gen-
4350 eral Electric Company had at that time received Su-
preme Court approval in, I believe, 272 U. S., and it
is referred to by the Chairman there.

Now, Number 3 is to sell lead pigments in kegs and cans at uniform container differentials. Well, I don't know any proof to show that that started in 1933. Perhaps there is. I don't know.

Number 4 is an agreement to eliminate and refrain from permitting guarantees against declines in prices upon lead pigments packaged in kegs or cans, and red lead and litharge in less than carload lots.

Well, as far as red lead and litharge in l.c.l. lots is concerned, Schedule A of the Code itself in Article I, Subdivision B(4)(c), states that no protection against decline in seller's price may be given.

Trial Examiner Norwood: Was that in the supplemental code that was suspended and never put in operation?

Mr. DuBose: I will come to that in a moment. It was in the Code, suffice it to say for the present.

Fifth is to sell dry white lead on the basis of differentials in zones. We have just shown that prior to 1933 apparently dry white lead had a higher differential on the Pacific Coast.

Sixth is to sell dry white lead upon uniform discounts
with a uniform addition to price quotations for de-
4351 livery in lots of less than twenty tons. That is spe-
cifically provided for in Article III of Schedule A,

Subdivision B(2)(c), which provided for the quarter cent differential for carload lots.

Seven is to eliminate and refrain from entering into contracts to sell dry white lead at a stated differential over the price of pig lead.

In that connection counsel has referred to certain price cards of Eagle-Picher, or certain price data of Eagle-Picher which apparently shows that Eagle-Picher at some time had sold on a differential basis. Again Article III of Schedule A shows that the price shall be the seller's price on the date the contract is made.

Eight and nine deal with oxide zones, and we maintain that Respondent's Exhibit 159-B to J inclusive, which is the letter from Harold Rowe to the Branch Managers of National—not to the other Respondents—shows that National Lead, in connection with Articles I and II of Schedule A was going to set up oxide zones on its own, and evidently the others followed that, since National Lead was the largest producer. They were glad to get a higher price in those distant areas since they didn't have plants there.

Ten is to eliminate and refrain from entering into contracts to supply red lead and litharge in quantities
4352 less than twenty tons at a stated differential over the
price of pig lead. Well, I don't know what that means, because both before and after 1933 on l.c.l. shipments of red lead and litharge National, beginning in 1927, charged customarily a differential of two and one-half cents and three and a half cents.

Trial Examiner Norwood: Isn't there something in the complaint charging you with doing that?

Mr. DuBose: This is what counsel says the evidence in 1933 shows that we agreed to at that time. I don't know how in 1933 National could agree to eliminate and refrain from entering into contracts on l.c.l. red lead and litharge at a stated differential over the price of pig lead when it did it before that time and has done it since on the same basis.

Eleven is to quote and sell red lead in quantities of less than twenty tons on the basis of price cards to go up and down when pig lead fluctuates as much as twenty-five cents.

Well, Article I of Schedule A again said that the seller's price shall be the card price, and as far as I know that has always been the situation, the card price. We have got card prices on red lead and litharge on l.c.l. shipments going back to antiquity.

Twelve—and as far back as the twenty-five cents a
4353 hundred, there is no showing when that started. Both
Zoller and Merson said that is customary, but whether or not it is customary before or after, we don't know.

Twelve is to quote and sell red lead and litharge in twenty-ton quantities on the basis of an S&R price in New York on these stated differentials, a dollar and a half for litharge, litharge seventy-five per cent, $1.75; and ninety-five per cent red lead, $2.50; ninety-eight per cent, $3.00.

Well, the basic litharge and red lead, ninety-five per cent red lead of $1.50 and $2.00 again we say was established by National itself in 1937 and the record so shows. I don't know when the record shows as to seventy-five per cent litharge and twenty-five per cent red lead. However, Article II of Schedule 5 provides for the differentials for ninety-seven per cent red lead and ninety-eight per cent red lead in Subdivision B (5) (d), which says that ninety-seven per cent or ninety-eight per cent red lead shall be marked on the package and "shall be sold at not less than one-quarter cent and one-half cent per pound irrespective of the seller's price for the grades of lower red lead content."

Thirteen alleges agreement to fix arbitrary alleged discrimination between carload, five ton, and less than five
ton purchases of oxides on certain stated differen-
4354 tials. I will go to the differentials first; two litharge
two and one-half over pig lead, and ninety-five per cent red lead of three and one-half again were established by National in 1927. In both carload and less than carload, the Schedule A did make a change because there it provided that the New York price would govern to which a differential as agreed upon between buyer and seller would be had, while prior to that it had been National's custom to permit Chicago and St. Louis to sell on their pig lead.

The five-ton differential is the only thing added there. Prior to 1933 we had a carload and less than carload of a cent. The five-ton differential for oxides is set forth and provided for in Article I of Schedule of the Code in Subdivision B (4) (a) (1). That brief says that in less than carload lots, oxides shall be sold at a price which are the seller's card or quoted price in effect on the date the order is received with an allowance of not more than one-half cent per pound for minimum shipments of five tons.

Trial Examiner Norwood: Well, are there any differences in costs shown, costs of delivery and so on as between five ton and less than five ton?

Mr. DuBose: Not any specific showings as such, not as we showed, for instance, in connection with the white lead in oil zones and as we showed in dry white lead.
4355 On that five ton, Mr. Roe in his letter of May 11, Respondent's Exhibit 195-B, said 'that the five ton price is being induced to take care of the medium size buyer who is unable to meet the twenty-ton requirement but is entitled to something better than the occasional users of the single barrel, which is provided for as I say in Schedule A.

Fourteen is an alleged agreement to establish arbitrary prices, terms and conditions of sale applicable to sales to customers classified as "Government," railroad, steamship lines and industrial.

As far as Government contracts are concerned, if any such agreement were ever made, Respondent's Exhibits 306 to 308 dealing with Government bids on red lead, litharge, dry white lead and white lead in oil in quantities from ten thousand to a million pounds, shows that that agreement was not followed, to say the least. I know of nothing in the record that shows any agreement on prices and materials and conditions of sale to railroads and industrials.

Trial Examiner Norwood: What about this condition here? Are any of these people competitors? Government, railroads, steamship lines and industrials?

Mr. DuBose: Well, railroad, steamship lines and industrials were generally in the same general classification. They all use them for maintenance purposes. In
4356 other words, the red lead in paint and white lead in oil they would use in keeping up their plants and equipment, and so on. I don't think there is any proof that they use it for any other purposes except in the case sometimes—

Trial Examiner Norwood: Were all of them consumers?

Mr. DuBose: Well, I suppose sometimes the paint manufacturer might be classed as an industrial. Now, he would use the raw product in the grindings of his paint which he would later resell to the public, but here he is not talking about discrimination. He is talking about these agreements. This is what he says was done in 1933, and we have shown, 1, that it wasn't done before 1933, or 2, that there is no proof of any such agreement and any such inference would be directly contrary to the substantial evidence, or, 3, it found its way into Schedule A, so that the next step became extremely important to counsel for the Commission. He realized he must try to knock out Schedule A, and he does that by an argument which can only be classified as tortuous. Any argument so tortured would raise doubts as to its validity on its face. How does that argument run? First, he says in the Code itself, Article VII.

Trial Examiner Norwood: Is that in his oral argument to me?

4357 Mr. DuBose: Both in this oral argument and in his proposals as we spell out his argument. Article VII contains a trade practice rule for lead pigment differentials, and I am reading from page 337 of Commission Exhibit 809. He says Section 5 merely required filing of prices and differentials from the terms and conditions of sale of Schedule A, and therefore Schedule A didn't have to be followed. Then what is his step to follow it? He says you get no protection from Section 5. Now, Section 5 of the NIRA says: "While this title is in effect, and for sixty days thereafter, any Code agreement or license approved, ascribed or issued and in effect under this title, and any action complying with the provisions thereof taken during such period shall be exempt from the provisions of the anti-trust laws of the United States."

Now, he says, "You weren't even required to follow Section 2 of Article VII, and right there he comes up against his first insuperable barrier. If there was no agreement to follow them even for Code purposes, how can you spell out agreement on any of their basis?"

Secondly, even if there were agreement on those terms and conditions of sale which found their way into Schedule A, it was agreement to include those in the Code. The section, or Schedule A, Section 2, Article VII, and Schedule A is incorporated by reference into Section 2 of 4358 Article 7—was not deleted from the Code. It was not deleted from the Code. They merely obtained an exemption from the mandatory or impliedly mandatory provisions. Again counsel is faced with a second insuperable barrier. If there was nothing mandatory about it, there couldn't have been any agreement to follow.

Now, why did they get an exemption?

Trial Examiner Norwood: Do you think they couldn't agree to follow it in case they weren't forced to follow?

Mr. DuBose: There could be outside of that, yes, but what does the record show? In the code meetings they agreed to have this in the Schedule, then when they get up to the Code they get an exemption from it. Why?

The exemption order—it didn't delete the Schedule or the Section, exempted the members of the industry from the provisions of Section 2 of Article VII and Schedule A for a period of three months provided, "that such exemption be granted without prejudice to further extension beyond three months if at the end it shall appear to the Administrator that the industry has been unable to determine it upon either the execution of Section 2 of Article VII and Schedule A—which is a part thereof—or upon the modification thereof.

4359 Now, a further exemption was requested in the fall of 1934 at the expiration of those three months. Why?

Because the industry "has not yet been able to determine upon the modification of Article VII, Section 2, it desires."

There are two ideas there, on both of which counsel is hooked. If it weren't mandatory, there is no agreement, because the only agreement in the record was to include it for Code purposes, and if they later decided to get an exemption from it, the agreement falls itself. In the second place, regardless of that, it was in the Code, and anyone, whether by common course of action, planned or otherwise, who followed Schedule A was complying with a term or provision of a Code, and specific granted exemptions under it and the anti-trust statutes as provided for in Section 5 of the NIRA.

Trial Examiner Norwood: We will recess for five minutes.

(A short recess was taken.)

4360 Trial Examiner Norwood: Proceed.

Mr. DuBose: In this Part 3 of his proposal, counsel repeatedly refers to a statement which appears in one of the minutes of the meetings, Commission's Exhibit 504-B, where uniform bases for the sale of oxides and dry white lead were being discussed for code purposes. Those eventually became Schedule A, and he attempts to imply and have one infer that the words "that prices were not mentioned in deference to existing statutes" was used in some cynical or sinister fashion to mean "Well, we have already agreed on prices, why do we have to put them in?"

Then he says, "They were well aware—"

Trial Examiner Norwood: I don't find any part 3. It skips from 2 to 4.

Mr. DuBose: I think part 3 begins on page 13 at the top of the page.

Trial Examiner Norwood: Thank you.

Mr. DuBose: It also says that the manufacturers of lead pigments were well aware of the anti-trust statutes, because they sent Wormser to consult counsel, and then Mr. Carter later wrote to the other respondents.

Well, we say that "in deference to existing statutes" means exactly what the term implies. In other words, they were not going to indulge in price fixing even for code purposes when the sky was the limit, as Mr. Wormser
4361 said, and when almost every other industry, as has been seen in the other cases before the Commission, put in everything that they possibly could in the code to have exactly every price known. Every price had to be reported. If they did not follow the pricing, they were to be cracked down upon by the Administrator.

We knew the NRA was temporary. We were not going to have any price fixing provisions, even in the code, regardless of what these fellows said. Even on price reporting we were reluctant to put in anything. The Administrator put in or suggested and urged the adoption of a section which would practically amount to rigid adherence to filed prices. We didn't even want that, and we redrafted it.

He says that Mr. Carter discussed, in the Fall of 1933, the use of uniform provisions with the others. What does Mr. Carter say in that letter? He says that it was thought that since prices were not mentioned, that in spite of the fact that counsel did not give a go-ahead signal, after discussion, they felt there was nothing wrong in having the privilege of following them, if they wanted to, and what is the proof?

There was only one company, National Lead, which followed any of those in Schedule A before May 1934, and that was only as to dry white lead. We know of no law that prohibits any manufacturer or seller from adopt-
4362 ing any schedule of materials which in themselves

are non-discriminatory or otherwise fair methods of competition.

Would Mr. Cornish, then president of the National Lead, and a lawyer, have made the public statement in July of 1934, Respondent's Exhibit 168, and we quote:

"We feel"—We, National Lead—"that price fixing permits inefficient competitors to enter an industry. For this reason we are glad that none of the N. R. A. associations in which National Lead Company holds memberships provides for price-fixing.

"The suspension of the anti-trust laws, which was effected by the National Industrial Recovery Act, is only temporary in my opinion. When the anti-trust laws return, many companies may again have to learn to operate on an efficient, economical basis."

Would the president of a large concern, who is a lawyer, have made that public statement if he did not sincerely believe, and having known of the code and all of its provisions, that there was nothing in there which in itself contravened the anti-trust statutes?

There is one other thing that deserves comment on this Part 3, and that is the apparent attempt to use this group of documents, Respondent's Exhibit 159-A to J, as a
springboard from which to claim that this on its face
4363 shows agreement with other respondents. We say
nothing could be further from the fact. In support
of that, counsel refers to 159-D, where is was stated:

"All sellers have agreed to discontinue the old 90-day card price contracts. All sellers have agreed." That is what Mr. Rowe told his branch managers. He also refers to the quotation later on on that same page:

"There was a great deal of discussion as to the rule against protection against price decline, and it was finally decided to make a definite rule which was intended to mean that the price to apply on any order is that 'in effect on date order is received'."

Both of those provisions are in Schedule A. He is referring there to Schedule A, Article 1, Terms of sale as to oxides in lots of less than 20 tons. The price there was to be the seller's card or quoted price. There was no protection against decline.

Now, when you come to the 90-day contract, the price was to be seller's card price. Article 1 further provides in Subdivision (B) (7), that shipment shall be made at least within 30 days from the date order is received.

With respect to this provision, which in effect got rid of 90-day contracts, Mr. Rowe said:

"The words 'at least' were put in at the request 4364 of the N. R. A.,"—This is from Respondent's Exhibit 159-D—"which is also responsible for some of the other phraseology in the schedules. Any order taken at the prevailing price must be for shipment within 30 days."

The N. R. A. itself requested that 90-day contracts be discontinued, and it was provided for in Schedule A, and any action complying with that, we say, is protected by Section 5 of the N. I. R. A.

We realize that counsel in this case has been placed in a difficult position, counsel for the Commission. This is the first case that we are aware of where it is not claimed—and there is no proof of any agreement after the termination of N. R. A. to continue the practices.

All the other cases—Deitgen, Malters, Milk and Ice Cream Can, and Ford Howard—proved either agreements before N. R. A. or after or both.

Thus, in the Ford Howard Paper Company case they met a few days after N. R. A. was declared unconstitutional in their association. "The Crepe Paper Association case we agree to continue the practices." A year later they say, "We agree that this shall be our list of prices."

That, we believe, accounts for what we again say is the tortured argument in this case, that we couldn't follow the terms of a code, and the attempt to show by inference, based upon inference and ignoring the re- 4365 liable and substantial documentary evidence that no agreements on anything that was not in Schedule A were ever made.

We believe that this case is the case in which the language of the Circuit Court in the Cement Case Company can aptly be used, and I am quoting from 157 Federal 2d 533 at page 549:

"To hold that members of an industry can be invited and perhaps required by the Government to participate in a program for the general welfare under a promise of immunity, and that evidence of their doings and activities in connection therewith can be used to hold them for a conspiracy would constitute a fraud or perhaps confidence game would be a more appropriate designation."

Counsel, to get around that principle, which is more than equitable estoppel, but is based upon the statute of the N. I. R. A. itself, relies upon the Socony Vacuum case, and he says there the court pointed out how you could obtain exemption by putting it in the code and getting it approved, which we did.

But let us look at the Socony Vacuum case. What were they doing there? They were buying distress gasoline in the Texas and Midcontinent area for the practically admitted purpose of keeping the retail prices of gasoline up in the midwest. With this hot oil coming in there, it
4366 would have destroyed their price structure. While
they urged acquiescence on the part of the N. R. A. officials, actually the record shows that after the Schechter decision on May 27, 1935, and with that in mind, the Tank Car Stabilization Committee of the respondents in that case, the oil producers, held a meeting at which is was decided that the buying program should continue, and thereafter the committee continued to meet each month to set up these powers. That is after the N. R. A. appeared, and that is referred to at 310 U. S. 185. That is a wholly different situation.

That brings counsel down to Part 4. He now says there is an illegal conspiracy, because you did these things, and in spite of the fact that the N. R. A. urged you to do it, you got it in your code. You don't obtain the benefit of an exemption. But he does not claim that there is any agreement among any of the respondents after N. R. A. He could hardly make such a claim. When N. R. A. was ended, the code authority of the Lead Industries Association, which is composed of the executive Committee and the chairman of the various divisions like Lead Pigment, Metallic Lead, and so on, met and wound up its affairs, returned the labor statistics in the fall of '35, as Mr. Ewing pointed out, when Berry, who had the resounding title of Coordinator of Industrial Cooperation, wanted to get the lead industry down in Washington to discuss voluntary following of N. R. A., they said nothing doing.

4367 No exclaiming, of course, no meeting of the respondents after N. R. A. But he says National Lead, on June 6, 1935, by its executive committee, says that the termination of N. R. A. does not require any changes in our practices. Why not? No order, that I know of, ever issued by the Federal Trade Commission in a case of this sort has prohibited anything but a planned or agreed-to course of action.

That shows on its face that National Lead itself, in general, was going to follow these terms and conditions of sale as a matter of individual choice. They didn't wait to talk to anybody else. They said, "We don't think there was any price fixing in this business we had before, and we think we are going to follow it. We know of nothing illegal in that. And, as a matter of fact, there hasn't been rigid adherence to that, as Mr. Carter and Mr. Merson testified.

Certain provisions of Schedule A have not been followed as a matter of general company policy. The same way with Eagle Picher. They have not adhered rigidly to that program. They have made certain exceptions.

On page 29 of his proposals, counsel tacitly admits that what he calls "the considerable dissimilarity in offered prices" on bids by the respondents and others to governmental agencies, might be some evidence of substantial competition, but he says, "Even if such were the case, the price difference as to one particular type of customer
4368 does not detract from a conspiracy as found."

Well, we have quoted from those government bids on pages 40 to 42 of our proposals. We have shown the quantities involved. We have shown that those bids, on their face, are all over the lot. If these respondents were going to try to fix up a price fixing conspiracy and adhere to it, how can that action on those big bids be explained?

As the Court in the Cement case said, if they were conspirators, they were a queer lot of conspirators.

Now, sales to government agencies are not governed by the Clayton Act, Section 2-A, as amended by the Robinson-Patman Act. Everyone knows that. So, where you don't have that Robinson-Patman Act language hanging over your head, and you have these big bids coming in, which may mean the difference between keeping up your plants to full capacity or not, you have got them bidding all over the lot. If they started bidding all over the lot in these other sales of pigments, which would be governed by the Robinson-Patman Act, someone in Cleveland may say, "Hey, how about this? You are selling in Cleveland at this price." And we say, "Well, we thought we might get the business." The Robinson-Patman Act acts to promote a certain rigidity.

We have a low margin of profit, and it is curious to note that on page 41 of this proposal, while complaining of the dealer-agent differential, and while stating that white 4369 lead in oil was a low margin product, on the same page, under a different heading, Effects of Respondent's Practices, counsel says, "Well, the effects are to keep the prices of lead pigments at levels above those that would prevail were it not for such combination."

Now, it is perfectly obvious that you can't have both. Look at this case. You have got a pig lead floor. You have got a narrow margin in every one of the products between pig lead and the finished product.

National Lead for years had been the market leader. These other fellows felt the squeeze. Sometimes they tried to put out a shoddy product, and they found they couldn't get away with that. They tried to improve their methods of manufacture, and that cost something. As McNair said, it costs a million dollars to build a decent white lead plant of good capacity. They found themselves in a squeeze there between the ceiling of our price—because certainly they couldn't sell at prices above Dutch Boy—and the narrow margin between that and the floor of pig lead.

We say that this case demonstrates on its face that for years the market leader has been a conservative and beneficial influence in the industry.

Now, when we get to discrimination, so-called, in Count 2, as we see, the counsel claims four specific things: 1. The quantities differential in oxides; 2. The practice of 4370 selling dry white lead throughout this big zone which extends all over the United States except for those Pacific Coast States; 3. The zones themselves in white lead in oil, and running throughout all three of those, of course, is the mill net theory, or, as counsel now calls it, net shipping point, but I don't think that changes the theory. The fourth element of discrimination claimed by counsel applies only to National Lead. That is its alleged customer classification between dealers and agents. Well, now, to support the quantities differentials on oxides, counsel relies upon the testimony of battery manufacturers. Some said, "Sure, it would be of advantage to us from a competitively standpoint to save five to ten cents a battery."

What did others say? It wouldn't make a bit of difference. In the first place, we believe that the testimony that a saving of five or ten cents per battery would be of advantage to a competitor does not show either the tendency or the fact of substantial lessening of competition, and we say that the testimony of such battery manufacturers as did so testify was not even as strong as the evidence that was thrown out in the Morton Salt case by the Circuit Court, 7th Circuit, in *Morton Salt* against *Federal Trade Commission,* 162 Federal 2d 29.

We say even if that tended to show substantial lessening of competition, counsel, who called all the battery
4371 manufacturers except one, Mitchel, called by Eagle Picher, can't say, "Well, I am going to pick out these that I want and forget about the others." It is his own evidence, and he has got to support his proposals by the greater weight of the evidence.

Now, in any event, counsel tried to limit most of the battery manufacturers to this price competition that they had in what? A 13-plate low-powered battery that all of them admitted was a loss leader, something they had to make because other people made them. When you get into the premium batteries, the quality batteries, as Mitchel testified, and as the others testified, there are prices all over the lot. Price was not then the determining factor in the majority of batteries. It is quality.

Then we come to dry white lead. The mill net theory there is the only thing they had. As far as quantity differentials on dry white lead are concerned, our witness, Owens, by his charts and his figures, fully substantiated the difference of 25 cents in the cost of delivery and invoicing and of sale alone.

Now, what does he show in dry white lead? Well, they are paint manufacturers. They are the largest buyers of the dry white lead basic carbonate. All of those that testified operated in the par zone. As a matter of fact, no paint manufacturer in the east or midwest would probably
4372 go into those Pacific Coast States, so for practical purposes you practically have the mill net theory working in all the United States up to the Pacific Coast.

Well, we just say that mill net is not the way to define price. Price is what the buyer and the seller agree upon to pay for something for delivery to a certain point, and in addition to the Staley case, from which Mr. Hinds, I believe, quoted the other day, we would like to call your Honor's attention to this statement from the Senate Committee report of February 3, 1936, which we quote on page 45.

Trial Examiner Norwood: I am familiar with that.

Mr. DuBose: And in addition, the witness Vasterling showed why paint manufacturers want a flat delivered price. At first glance, someone might say, "Well, that testimony looks funny." But examine it. These paint manufacturers, even those that testified in St. Louis went all over the country into Texas and Louisiana and Georgia, some of them even as far as lower Alabama, and manufacturers in Kansas City, competing with manufacturers in St. Louis, want to be put on an equal basis. They don't think it is discriminatory. They don't want to be punished because of their location, because of a disadvantage on freight, which is in counsel's theory.

They don't want to be penalized for that accident of location.

4373 Can the Commission or any administrative agency compel an industry, regardless of merits of the law, to follow a system which purchasers don't want?

Now, in white lead in oil zones, he says the same shipping point, net shipping point theory applies, and we say that is absurd as a matter of law.

Counsel also states that you can't justify differentials from zone to zone on an average freight cost basis.

Well, on that we respectfully submit that justifying those different prices from zone to zone on an average basis comes strictly within the proviso, because it is making due allowance for differences in the cost of sale or delivery resulting from the differing methods in which such commodities are to such purchasers sold or delivered.

The zone method is just such a method as to come within that proviso, and the only way you can justify such a method is on the average basis.

Trial Examiner Norwood: Making due allowance would be making an adjustment on the basis of the actual freight in shipment.

Mr. DuBose: This is on the basis of actual freight.

Trial Examiner Norwood: And allow for an average for an entire zone.

Mr. DuBose: That is what we claim, that we, by 4374 showing that, come within that proviso in any event, and of course there has been no attempt to show that these differentials, which go up by one-eighth of a cent, have any effect, competitively or might tend substantially to lessen competition. There is no showing of that, nothing from which such an inference could be drawn.

Now, the only other thing deals with the alleged discrimination policy of National between its agents and dealers. The simple answer to that is that in transactions between itself and its agents, the Robinson-Patman Act has no application, that is, in transactions between National and its agents. They are not sales. Title to that white lead in oil remains in National, and the agent sold it for the account of National. It is as though National sold it itself, and National could sell itself to anyone, provided that the general classifications were not competing with each other, and that we clearly showed, I believe.

There is one other thing that we would like to mention just briefly. Counsel apparently urges that an order be entered which, among other things, would, in effect, permanently enjoin National Lead Company from acquiring the stock or assets of any competing concern. There is no thought, so far as we know, in any law or any statute for that proposed order, and in that connection Mr. Justice Frankfurter, in the recent International Salt case, 4375 said in his dissenting opinion that "The Commission is not authorized to make its order needlessly destructive. The baby is not to be thrown out with the bath."

As we see it, there is no present law which prohibits, under any and all circumstances, one competitor from acquiring the assets of another, although there is a certain bill pending that may become law. Under certain circumstances, of course, under the Sherman Act, an injunction can be obtained for some specific acquisition, but never has there been any permanent ban that will run forever against a competitor under any circumstances acquiring the assets of another. Even as to stock purchases you have got to bring an individual action under Sections 7 and 11, the Clayton Act, and even there the Federal Trade Commission has to show some specific instance that the law has been violated or is about to be violated, and you have to have a special hearing, and of course this case was not brought under those sections.

Just one other thing. Counsel for Sherwin Williams, the other day, quoted from the Standard Fashion Company case, 258 U. S. 346, and counsel for the Commission, although he said he had not checked the case thoroughly, stated that the International Salt case contained a definition of those words, "May tend to substantially lessen competition,'' splitting the infinitive, as the statute 4376 does, that the salt case contains a construction of Section 3 of the Clayton Act in those very words in an entirely opposite fashion. I don't believe he is correct there. Of course, in the International Salt case, the practice under attack was making tie-in sales of unpatented articles, and the Court merely held, ''It is unreasonable, per se, to foreclose competitors from any substantial market,'' and further said, ''The volume of business affected by these contacts can not be said to be insignificant or insubstantial, and the tendency of the arrangement to accomplishment of monopoly seems obvious.''

We say that does not destroy the effectiveness of that definition which was quoted the other day.

Mr. Ewing: That closes what the National Lead has to offer.

Trial Examiner Norwood: Thank you, sir.

Mr. Welch?

Mr. Welch: Do you want to take a five-minute recess before you start hearing from me?

Trial Examiner Norwood: We will take a five-minute recess.

(A short recess was taken.)

4377 Trial Examiner Norwood: Proceed.

Argument by Mr. Welch.

Mr. Welch: Mr. Examiner, I find myself in the very enviable position of being almost a Monday morning quarterback. I have been on the side lines in this case for several years without too much direct participation in it. Consequently I think I have some insight on some of the angles that the others in the heat of passion may have missed, and I would like to take the opportunity to expound on those for a few moments.

Before doing so, I cannot refrain from taking the opportunity to direct a few remarks to this document that I believe is entitled ''Proposed Findings and Conclusions'' prepared by Mr. Wright.

Now, throughout this case we have heard quite a bit about blended tobacco, blended whiskey—blended paint, even. This document is even more blended than any of those products, so I want to call your Honor's attention—as has already been done by my associate, Mr. DuBose—

to the fact that this document is a combination of a good many things, including the white dog with the black spot on his tail, or vice versa, depending on which way you are looking at the dog, from the north end or the south end—conclusions, argument, generalization, lack of citation, or what have you. It isn't my understanding that that is
4378 what Rule 21 calls for.

Trial Examiner Norwood: Rule 21 calls for a factual proposal and conclusions, doesn't it?

Mr. Welch: With citations, references and reasons.

Trial Examiner Norwood: It has more citations than Glidden.

Mr. Welch: I have no comment in reply to that, Your Honor.

I call your attention to Item 4 on page 2 where the statement is made that the litharge is sold by the respondents to the battery manufacturing industry, or sometimes referred to in the trade by the respondents as oxides of lead.

Of course, Sherwin Williams doesn't sell oxides to the battery trade, and Mr. Wright in fairness does at some other points in his proposed findings so state, but this is merely cited as an evidence of the generalization and I will cite one or two others and then stop on that thought that we strenuously object to any commitment or agreement on our part inferentially or otherwise that the generalized use of the term "Respondents" describes anything Sherwin Williams did unless there is a specific page citation where it says in black and white that Sherwin Williams did it, and we want that objection to run throughout this entire proceeding.

Now, for another illustration I call your attention
4379 to page 8, down at the bottom of the page, "but is engaged in the sale of such products to paint and varnish manufacturers and other users."

Well, I looked that up, page 1648, and I found where Mr. Merson did make some reference to the fact that red lead was sold for use in paint manufacture, and Mr. Wright said "And Litharge for varnish?"

Mr. Merson said, "No, not that very much. Red lead for paint."

Then I see this further statement in the paragraph including lithopone. What are the facts about that? Mr. Sprague was testifying at page 2652 and 2653. Mr. Sprague said:

"Oh, yes, they make lithopone." Mr. Wright queried, "Do they market it?" "Not to my knowledge."

Now, is that a justification for this generalized statement talking about competitive products?

It is said here also that Sherwin Williams is a manufacturer and producer of zinc oxide. Well, that just isn't so, because the record shows that Mr. Sprague was being questioned as to whether Sherwin Williams made zinc oxide, and Mr. Sprague said, "Do you mean as distinguished from leaded zinc?"

Mr. Wright said "Yes," and Mr. Sprague said,
4380 "No." He said, "No, they don't make it."

Now, then, we come to page 10 at the top of the page. "The Respondents Eagle Picher and Anaconda do a limited amount of business on the West Coast in states west of the Rocky Mountains."

We contend if any respondent is entitled to an accolade for a small amount of its business in any particular territory, we are entitled to it doubled in space, because our volume is less than every other respondent's volume in every one of the products mentioned, and it has been so indicated on the record repeatedly.

As a matter of fact, Sherwin Williams sells no dry red lead and no litharge on the Pacific Coast at all. In 1941 we sold 318 tons of white lead in oil on the Pacific Coast.

Those items are merely given as illustrations, and in making those statements I can appreciate the difficulties that counsel for the Commission was up against. I understand that—the limitations of time and the number of respondents involved—so I have no criticism from that standpoint.

My sole purpose in making the statement is that by my failure to specifically attack any single use of a general term "Respondents" I do not want to be understood as acceding to that being a proper designation of the activities of my own client.

4381 Now, the first discussion that I note of Mr. Wright's to which I want to call some attention is at 4210 where he refers in 1933 to a system of differential and free delivery points, and that, as shown in the list of differential points appearing in Commission's Exhibit 659-C, literally hundreds, and so on—and he goes on to the next page.

Trial Examiner Norwood: That is in his discussion?

Mr. Welch: That is right.

Now, then, when I go from there I go back to page 11 of his brief, and I find his illustration. There is a reference to Commission's Exhibit 659-O, and he said there there is only one town in each of four said states.

I don't know where he picked those four states, and I don't know why he omitted the great state of Mississippi when he made those selections. But be that as it may, it isn't correct, and I do like to have the record correctly reflect the situation, and I therefore call your Honor's attention to Commission's Exhibit 659-J, the same exhibit but another sub-letter, that is all.

Now, what is this differential—an equalization point system? I think the National Lead people have explained that very clearly as applied to their company. The testimony shows very clearly that as applied to Sherwin Williams it is quite a different thing.

4382 The other companies have differentials and equalization points from which shipments may never be made. They are arbitrarily selected points in various cities.

Sherwin Williams' shipping points are actually factory warehouses in every instance. They are places where we carry warehouse stocks.

Trial Examiner Norwood: Are shipments always made from those stocks?

Mr. Welch: Yes, with the one exception that for convenience purposes, when there is a carload order, rather than ship a carload to a warehouse, and then reload it and reship it, we make up the carload back at the factory point and ship direct.

I will go into some of those later, and at this time if I may interpolate, your Honor, my entire discussion of this subject is on the cuff, so if at any time you have any questions you want to ask, please feel at liberty to do so. It will not interrupt my chain of thought, if there is such.

Trial Examiner Norwood: Thank you.

Mr. Welch: Now, when I look at these cities Mr. Wright has referred to in Alabama, Arkansas, Kentucky and Louisiana, he has one city in each of those states.

Well, in the first place, we say there is no evidence that we used the same system, or that if we did use the same system, we used the same cities. And there is con-
4383 siderable variance in that scope.

As a matter of fact, in New Orleans, Louisiana, Sherwin Williams at that time had at least 4 stores, not only in New Orleans, but Monroe, Shreveport and Baton Rouge. In Kentucky we had two that were the same, but we had one additional store—we had one in Lexington.

Now, your Honor, that is assuming what the Commission has contended, that is to the effect that exhibits such as 662-C and D represent a list of shipping points, and that Sherwin Williams stands ready and willing to ship from any of those points.

We contend we do not, but even assuming we do—I am willing to assume that for the moment—assuming we do, they are not the same as National's, so how can the general statement be made as to there being industry wide any equalization point system.

Now, just a moment on equalization, that term has been used differently by two different groups in this case. The National people have explained how they use it, that they have an equalization point. If you ship somewhere else, you equalize freight against that point.

We have explained how equalization is used in the Sherwin Williams setup, and it is simply this: a lot of people apparently throughout this case have thought there was a lot of hocus-pocus and legerdemain about it, but 4384 it isn't that at all, and I will go back to the original example that we used.

We have a man from Union, Mississippi. We have a warehouse in New Orleans, Louisiana. We have a warehouse in Dallas, Texas. The one in Dallas, Texas is a much larger and more complete warehouse than New Orleans.

We look up the rates when the man from Union wants to buy from us, and we find we can ship from Dallas to Union cheaper than we can ship from New Orleans to Union. Now, that doesn't stand to reason. It is silly. It shouldn't be, but we didn't do it—the Interstate Commerce Commission did that. They set those rates.

The purchaser was shipped from Dallas, but he got the advantage of the Dallas rate, and the witness has testified repeatedly that in no instance of equalization did the man pay any more than he would have paid had he received his products from his ordinary shipping point.

Trial Examiner Norwood: You have cited in that connection Respondent's Exhibit 205, wasn't it?

Mr. Welch: I believe that was one of the numbers, Your Honor.

Now, basically to get down to Sherwin Williams' position in this case, the two basic positions that we take are these: The first is about the zone system. As to that we say simply that Sherwin Williams—and I am 4385 referring now to the keg products, any item sold in containers of a hundred pounds or less—didn't have a zone system. We didn't have the zone system because we used a shipping point system, and by that I don't mean the same thing that some of the other respondents mean when they say equalization point.

We actually shipped from the places that we called shipping points. They were that in fact, and that is where the goods came from.

With certain exceptions, the shipments from that shipping point to the ultimate distination carried their full freight, and not a nickel more and not a nickel less. There was a general offer to sell FOB certain shipping points, and that offer was adhered to, and it was so stipulated in the record that we did.

Trial Examiner Norwood: Were your delivery prices at the shipping points the same as the zone prices of the Respondents?

Mr. Welch: Your Honor, I went to considerable effort in my proposals to demonstrate beyond all doubt that that was not a fact, and that was the second point I wanted to raise.

Trial Examiner Norwood: Go ahead.

Mr. Welch: That if you deny our contention that we don't operate on a zone system, and admitting for 4386 the purpose of this argument that we did, it is so different from the others that you wouldn't recognize it, price-wise, and in several other respects which I have set out fully, and I don't think it is necessary to take your time to repeat them except I can say this briefly: Take the eight western states. In the East we had as much as a dollar and a half variance between dry white lead, white lead in oil, dry red lead and litharge.

On the west coast they are all the same, and actually—I mean that—they were all the same price, though in the East there was as much as a dollar and a half variance between them.

In the West, Sherwin Williams red lead in oil was a dollar a hundred pounds higher—less than the difference between it and other products in the East.

Sherwin Williams pricing structure is such—and it is demonstrated in these proposed findings—without regard to National's position of selling to both dealers and agents, Sherwin Williams' price was different from that National offered to either category, and that was consistently true.

Now, that isn't an idle statement that Sherwin Williams has made predicated merely upon the presence in evidence here of price card information.. That is taken from invoices, and I have tabulated that. The long tabulation 4387 was put in by Commission's counsel to show substantial adherence to those price structures, and they do not correspond to the ones set out in subparagraph A of paragraph 8 of Count 1 of the Complaint.

It is like a cross-word puzzle. Sometimes it just won't add up, and this one doesn't. The figures just don't match anybody else's. Why? I think that is pretty easy. Sherwin Williams covers the earth in paint. We are highly competitive with the lead industry. We are not interested in selling lead particularly. It is merely a line that is carried to fill out our line with our dealers so that when painters come in and insist on having lead in oil or dry lead, rather than a ready-mixed paint, they can get it.

Price is not important to us. We set our own price on our own system and schedule, and we held out for it and got it, and the invoices show we got it.

Now, then, coming to dry white lead, we are accused of having done some very reprehensible things there. Maybe we did, but this record doesn't show it. It just hasn't been proved.

You know, this new rule that we have has just recently come into effect, and I was quite interested in it, having been a former Commission employee, and I approached my proposals from the standpoint that I thought 4388 most Commissioners would approach them and as I have probably approached them before.

How much do I have to have? It is in there? Can I get it? Can I squeeze it out?

It can't be done. It can't be squeezed out of this record because it just isn't there. The cow is completely dry—no cream, not even any bluejohn.

The same thing applies, coming to the oxides. Here is the setup, Map No. 3, carload, red lead and litharge zone map, and the only thing I know about carloads of litharge and red lead is contained in a very simple little stipulation which says, "Sherwin Williams does not do business in these products on the Pacific Coast. Company officials do not now have any information that carload shipments of red lead or litharge are made to any point in differential territories except shipments to Sherwin Williams' own plants."

Plants is different from branches or from warehouses. We use that product in our own plants in manufacturing paints, and we ship to those plants in what has been described in the complaint as differential territories.

There is not one single scintilla of evidence in this case that Sherwin Williams ever sold one single carload of red lead or litharge in the territories described as differential territories.

4389 I can't say any more than that. Once I have said that, there is no point in my discussing the differential territories, who designed them, how they operated, or what they did with them because I have never gotten to that point.

They have never proved that we operated any business in those areas, so why are we concerned with them?

Of course the two primary factors in this conspiracy angle of the case are the agency plan and the zones. Well, admittedly we have nothing to do with the agency plan. Everybody admits that. They admitted it at the time, and there was a fight going on, and it was obvious, between the paint people who were trying to bring the lead people under their code, and the lead people saying, "We will have nothing to do with you."

Unfortunately Sherwin Williams was in a position where they did to some extent have to be in both industries, though of course obviously their heart was in the paint industry, and when the proposition of agencies and consignments was broached, Sherwin Williams says, "We will have no part of it", and never did. That is Number One.

Number Two is the zones. We say we have no part of
that. Now, there is a statement in here—I was much sur-
prised—to the effect that before these famous agreements
were reached in 1933 there weren't any quantity dis-
4390 counts. Well, I looked at the Sherwin Williams price
card for January 6, 1933, six months before the first
meeting. I find quantity discounts, 500 pound orders, ton
orders, five ton orders, carload orders. On what product?
White lead in oil, dry white lead, dry red lead, dry litharge.

I don't know what the other people were doing, but here is this general statement that I find in these proposals submitted by the Commission to the effect that there weren't any quantity discounts in those products before these famous or infamous meetings of 1933 took place.

Well, of course, I don't know how seriously counsel for the Commission is taking the position that the respondents in this case are in a position to influence, if not force, a certain retail price on their items.

Well, some of them did have fair trade contracts in certain States. Obviously, that is not against the law, if they do it individually, but as far as Sherwin Williams is concerned, it never had them in any State. There is a statement on Sherwin Williams' price cards which says, "Sherwin Williams suggested retail prices," but there isn't a line of testimony from any dealer that he was ever in any way criticized for not adhering to those prices, if he did not; that any line was taken away from him; that he was refused the poducts when he ordered them, or that any other policing activity ever took place.

4391 Of course, we controlled the retail prices in stores we owned. Remember, Sherwin Williams is in a different position than these other respondents in that we have over 300 stores located throughout the United States where we sell to people such as the Examiner, counsel for the Commission, and counsel for Sherwin Williams, who goes and buys direct from Sherwin Williams a pint, a quart or a gallon of paint or white lead or litharge or whatever product he may want, and of course we control those prices.

There is no law that can prohibit us from doing that.

Now, coming to Count 2 and this matter of discriminations, I must confess that I have had many a sleepless night about this case. I feel somewhat in the position of the man who at one time had a medical case down here before the Commission and the Commission stopped him from representing anything at all about his product, so he ended up with it in a great big beautiful bottle with a great big star on it, and all it said was, "Cited by the Federal Trade Commission."

Is that what is going to happen out of this case, if the order proposed by counsel for the Commission is the result? That has worried me for no little bit, because despite the fact that I am now on the outside, I do have regard for the Commission, for the Commission's proce-

dures, and for its effective control over monopolistic practices. But by the eternal Gods, I don't like to see the
4392 Commission confirm one and give it a certified copy of a degree, saying to any respondent here, "You take nine-tenths of the United States and leave the rest for the little suckers."

4393 I don't know whether the Commission will see it. I don't know. But it is so simple.

Of course, it is stated here in the findings very adroitly —these proposed drafts—about how Chicago has an advantage over other plants in one of these fields. Very interesting, but every other plant except the one in Chicago, and including Chicago, is controlled by one of the respondents, and then we are met with the proposition that there is a reciprocal giving up of territorial advantages. Why, that is sheer poppy-cock. We have got nothing to give up. We are hanging on by the skin of our teeth and always have been.

Your Honor, I feel very seriously about the effect, the possible effect if there should come out of this case an order saying, "You can realize only a uniform mill net on your products because"—and I think these two simple little maps, and I kept them as simple as I could because I thought by their very simplicity they might demonstrate to the Commission the serious economic possibilities that might flow, might or will necessarily flow, they can't do otherwise. Here is National, nine oxide plants, five white lead plants. You talk to me about reciprocal giving up of territorial advantages? There just aren't any such.

4394 Your Honor, that is about all, with one exception, and that is that I think throughout this whole case, broadly speaking, there has been a complete failure of proof in so far as Sherwin-Williams is concerned. What do I mean by that? I mean by that that I think it is still the law—of course, it has been changed very considerably, but I think it is still the law that the Commission has to prove something about some competitive effect, and that has not been done. Battery manufacturers? Sure. Sherwin-Williams did not sell to the battery trade. Paint manufacturers? Dry white lead? Yes. Is there any showing that Sherwin-Williams sold white lead to any one of them or to any one of their competitors? Not a line, not a line. There is one statement by Mr. Merson that Sherwin-Williams sells red lead for use in paint, but there isn't anything about white lead. There is not one line in this 4,000 page record showing anything about the effect of any practices in so far as Sherwin-Williams is concerned in selling its products.

Now, as I stated in my proposals, I don't care if five cents a battery or ten cents a battery does make a vital difference in the battery business. Maybe it does, but that has nothing whatever to do with what difference or lack of difference it would make in some other industry, particularly when we bear in mind the fact that Sherwin-Williams'
own price announcements show that we are primarily
4395 selling maintenance accounts, railroads, steamship
lines, apartment houses, industrial concerns. They are not making a product they are requesting to sell out of the product they buy from us. They are merely keeping up their equipment.

It seems to me that with that being the situation it is almost impossible—and perhaps that is why it wasn't done —almost impossible to prove any competitive effect in the respective lines of business of the concerns making the purchases. Oh, yes, the argument that I will be met with is what about your own line? My answer to that is that any concern whose business is one per cent or less can have very little effect, competitively or otherwise, on the business of anyone else. Thank you, sir.

Trial Examiner Norwood: Mr. Wright.

Mr. Wright: May we go off the record here?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Welch: It is now rather late in the day, and I am not going to be able to cover a reply to all of the statements by Mr. Hinds, Mr. Gardiner, Mr. Ewing, Mr. DuBose, Mr. Welch and Mr. Wood in the time remaining today. I understand that counsel want to return to their offices, so if that is agreeable with counsel and with the examiner, I will file as quickly as possible a statement in lieu of my oral reply to the arguments of counsel.

4396 Mr. Ewing: That is certainly agreeable to all
counsel for the respondents.

Trial Examiner Norwood: Counsel may do that, and we have a clear understanding then about filing any additional proposals between now and the 25th. I will ask counsel to send those in, in whole or in part, as soon as they can. The quicker you send it the more help it will be to me.

Now, there is nothing further, I understand, so the case is now closed.

Mr. Welch: Your Honor, just one second. Corrections to the record. I don't believe they have been disposed of.

Trial Examiner Norwood: Do you have any statements of corrections for the record?

Mr. Wright: Can we attempt to get together with counsel? It will not be necessary for Your Honor to hold a hearing, I don't think. We will get an informal agreement between ourselves on that, and submit that matter with the corrections that we are agreed on and any other representations that we might have about those things we might not agree on. I don't think it will be any of those.

Mr. Ewing: I don't think there is a chance of their being disagreement as to the corrections.

Mr. Wright: To you by the 25th of January.

4397 Trial Examiner Norwood: They should be made
long before that. You don't contemplate then their being entered on the record in a conference with the rule?

Mr. Wright: It was my thought they could be filed in the form of a statement which would be a part of the record.

Trial Examiner Norwood: The Commission's rule is that those corrections be in the record proper, and appearing at the last hearing so that everybody will know just where to turn to find out what the corrections are that have been made.

Mr. Wright: If that is the case, Your Honor, could we then set a hearing for the 25th for the limited purpose of inserting in the record the corrections that we can agree on, and it will not be necessary for any counsel except those local counsel here to attend that.

Trial Examiner Norwood: Not on the 24th, 25th or 26th of January, because I will have my report well under way by that time. We have to close the case and then the docket transmits to me the entire record so that I can go to work on the report, and I can't delay that any longer. I suppose in the emergency you may submit the agreed list to me and I can approve them all and file them in the record.

Mr. Wright: I should think that would be satisfactory, because this presupposes that we will all be in agreement
on what they are, and none of us will urge anything
4398 inconsistent.

Mr. Ewing: I can't conceive of there being any disagreement.

Trial Examiner Norwood: There is nothing to prevent my approval of these corrections after the case has been closed, so with that understanding that you will submit to me agreed lists of corrections to the record, which I will allow in whole or in part, as appears just and proper, and I will have those filed in the record, and with that understanding the case is now closed. Within thirty days, or such further time as may be necessary, I will file my report and recommend a decision to the Commission. Counsel, under the rule, will have the stated number of days to file their briefs and serve them on each other. I refer you to the rule on that.

The hearing is adjourned sine die.

(Whereupon, at four o'clock p.m., the hearing was adjourned.)

In the

United States Court of Appeals

For the Seventh Circuit

NATIONAL LEAD COMPANY,
Petitioner,
No. 10839 *vs.*
FEDERAL TRADE COMMISSION,
Respondent.

THE SHERWIN-WILLIAMS COMPANY,
Petitioner,
No. 10840 *vs.*
FEDERAL TRADE COMMISSION,
Respondent.

THE EAGLE-PICHER COMPANY, ET AL.,
Petitioners,
No. 10841 *vs.*
FEDERAL TRADE COMMISSION,
Respondent.

ANACONDA COPPER MINING COMPANY, ET AL.,
Petitioners,
No. 10842 *vs.*
FEDERAL TRADE COMMISSION,
Respondent.

Petitions for Review of Order of the Federal Trade Commission.

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1386 COMMISSION'S EXHIBIT NO. 5.

Minutes of Special Meeting of Board of Directors of National Lead Company held at No. 100 William Street, New York, on Thursday, December 11, 1902 at 11 A. M.

Present:

Messrs. L. A. Cole
J. A. Stevens
J. L. McBirney
R. P. Rowe
E. F. Beale
A. P. Thompson
G. O. Carpenter
F. W. Rockwell
E. C. Goshorn

The time of the meeting was taken up in discussing the advisability of entering into a contract for the purchase of properties and businesses of a number of concerns engaged in the manufacture of lead and kindred products.

On motion, the meeting was adjourned until the following day at 10 A. M.

Charles Davison,
Secretary.

Minutes of Adjourned Special Meeting of Board of Directors of National Lead Company held at No. 100 William Street, New York, on Friday, December 12, 1902, at 10 A. M.

Present:

Messrs. L. A. Cole
J. A. Stevens
J. L. McBirney
R. P. Rowe
E. F. Beale
A. P. Thompson
G. O. Carpenter
F. W. Rockwell
E. C. Goshorn

The principal part of the time was again consumed in discussing the contract referred to in minutes of meeting held the previous day.

1387 On separate motions, the following resolutions were each unanimously adopted, the roll being called in both cases:

~~Resolved,~~ That the officers of this company be authorized to execute and deliver an agreement between this company and Messrs. T. F. Ryan, Daniel Guggenheim and H. H. Rogers, which said agreement is in words and figures following:

This Agreement made this .... day of ...., 1902 between ...., parties of the first part and National Lead Company, a corporation of the State of New Jersey, party of the second part, Witnesseth:

Whereas, the said parties of the first part have acquired or control by purchase or option to purchase the properties and businesses of the following concerns engaged in the manufacture of lead products and kindred products:

Name of Concern	Located At
Hoyt Metal Company	St. Louis
Chadwick-Boston Lead Company	Boston
Tatham & Bros.	New York
Tatham & Bros.	Philadelphia
Gibson & Price Mfg. Co.	Cleveland, O.
James Robertson Mfg. Co.	Baltimore
Raymond Lead Co.	Chicago
E. W. Blatchford Mfg. Co.	Chicago
Lawrence Shot Lead Company.	Omaha, Neb.
Markle Bros.	E. St. Louis, Ill.
American Shot & Lead Company	New York, Cincinnati, St. Louis, Mo.
Kahn Bros. & Co.	New York
Thomas W. Spark	Philadelphia
Ronalds, Johnson & Co.	Brooklyn
L. M. Ramsey Mfg. Co.	St. Louis
N. O. Nelson	St. Louis
W. J. Matheson & Co., Ltd.	New York
Wetherill & Bro.	Philadelphia
N. Z. Graves & Co.	Philadelphia
McDougall White Lead Co.	Buffalo, N. Y.
Sterling White Lead Co.	Pittsburgh, Pa.
The Davis Lead Co.	Pittsburgh, Pa.
Gebhart White Lead Co.	Dayton, O.
1388 The Eagle White Lead Co.	Cincinnati, O.

Carter White Lead Company
Chicago and Omaha
Hammar Bros. White Lead Company
St. Louis, Mo.
Union Lead & Oil Company Brooklyn, N. Y.

and

Whereas, the said party of the second part is now engaged in the manufacture of lead and kindred products and desires to enlarge its business:

Now, Therefore, in consideration of the premises and of the sum of One dollar by each party to the other in hand paid, the receipt of which is hereby acknowledged, the parties hereto covenant and agree as follows:

I. The parties of the first part agree to sell, convey and deliver or cause to be sold, conveyed and delivered unto the party of the second part the aforesaid properties and businesses as going concerns, including the good will and all property and rights, real and personal, of every description of said concerns, and each of them, as the same existed on the first day of July, 1902, with such changes as have since occurred in the ordinary course of business, together with all accretions and additional property acquired by said concerns, or any of them, between said date and the date of the consummation of the sale contemplated in this agreement (except that in the case of the aforesaid Ronaldo, Johnson & Co., of Brooklyn, N. Y., L. M. Rumsey Mfg. Co. of St. Louis, and N. O. Nelson of St. Louis, the good will, machinery and fixtures only are to be sold and delivered) also all the shares of capital stock of such of the aforesaid concerns as are incorporated (except in the case of the said Union Lead & Oil Company of Brooklyn, N. Y. whose capital stock is not to be delivered). The said properties and businesses are to be sold and delivered free and clear of any and all liens or encumbrances of any nature or description, except an obligation of $150,000 for the purchase price of property occupied by the said Union Lead & Oil Company, which said obligation is to be assumed by the party of the second part.

II. The parties of the first part agree that the titles of the aforesaid concerns to their respective properties may be examined under the supervision of counsel of the party of the second part and that the reasonable expense of such examination and certification of said title shall be borne by the parties of the first part.

1389 III. The party of the second part agrees (subject to and conditioned upon the assent of its stockholders) to purchase from the parties of the first part the aforesaid properties and businesses, and to pay therefor $17,000,000 in par value of 5% debenture bonds and $15,000,000 in par value of the common capital stock of said party of the second part, when and after the assent of the stockholders of the party of the second part to such purchase and to the increase of capital stock and issue of stock and debentures required to complete the same shall have been obtained.

IV. In case the parties of the first part shall find it impracticable to deliver within six months after January 1, 1903, the property and business of Wetherill & Bro. of Philadelphia, or the property and business of the aforesaid Eagle White Lead Company of Cincinnati or the property and business of Hammar Bros. White Lead Company of St. Louis, they shall not be required to do so, but in that case there shall be deducted from the aforesaid purchase price $706,000 in par value of said debenture bonds for the said Wetherill & Bro., $2,353,000 in par value of said debenture bonds for the said Eagle White Lead Company and $529,000 in par value of said debenture bonds for the said Hammar Bros, White Lead Company.

V. The parties of the first part agree to procure from each of the individuals composing the aforesaid concerns and from each of the officers and directors of such of said concerns as are incorporated and from said Union Lead & Oil Company an agreement satisfactory in form and effect to the party of the second part that neither of them will, except as manager or director or employee of the party of the second part or of some branch of its business carry on or be engaged or interested or permit their respective names to be used directly or indirectly in any business which could compete with the business heretofore carried on by their respective concerns, or the business to be hereafter carried on by the party of the second party, for the period of fifteen years from the date of this agreement in any part of the United States of America except .... without the written consent of the party of the second part.

VI. The parties of the first part agree, upon the consummation of the sale contemplated in this agreement,
1390 to pay to the party of the second part the sum of
$6,500,000 in cash, provided all said properties and
businesses are delivered, in the event that the properties

and businesses of the said Wetherill and Bro. cannot be delivered $300,000 is to be deducted from said payment in cash, if the said properties and business of the Eagle White Lead Company cannot be delivered the sum of $900,000 is to be deducted from said payment in cash, and if the said properties and business of the Hammar Bros. White Lead Company cannot be delivered the sum of $200,000 is to be deducted from said payment in cash. The parties of the first part shall be credited as part of such payment with the amount of net quick assets (exclusive of tools, implements, animals, vehicles, materials or tools or implements in use or which have been used) of the concerns whose properties and businesses are sold and delivered to the party of the second part. For the purpose of ascertaining the amount of such net quick assets, in every case where they are not mutually agreed upon by the parties hereto, the same shall be appraised by ...., certified accountants, whose certificate as to such amount shall be final and binding upon both parties, for the purposes of this agreement. In making such appraisal said accountants shall estimate raw materials at their market price at the date of transfer, and raw materials in process of manufacture at their actual cost at the several stages of such manufacture. In all cases where accounts and bills receivable are included among said quick assets the payment thereof at maturity shall be guaranteed by the parties of the first part.

VII. The party of the second part shall pay to the parties of the first part, in addition to the considerations already mentioned, the further sum of $1,000 in par value of the aforesaid debenture bonds for each one cent of saving per ton effected in the manufacture of white lead by the Union White Lead & Oil Company's process, as compared with the process in use at the Jewett Works of the party of the second part on Staten Island, provided, however, that the product of said Union White Lead & Oil Company's process proves to be of equal commercial value with that of the product of the said process in use by the party of the second part; the comparison to be made over a period of six months, commencing .... under conditions to be mutually agreed upon by the parties hereto.

The amount of said savings, if any, shall in case of disagreement, be ascertained by three arbitrators, one 1391 selected by the parties of the first part, one selected by the party of the second part, and the third chosen by the two so selected.

VIII. The sale and transfer contemplated by this agreement shall be consummated on or before January 1st, 1903, provided the assent of the stockholders of the party of the second part shall theretofore have been obtained. But in case it shall not have been possible to complete the examination of the titles of said concerns by said date, such further time shall be allowed as shall be reasonably necessary to complete such examination.

In Witness Whereof, the parties of the first part have hereunto set their hands and seals, and the party of the second part has caused its corporate seal to be hereunto affixed and these presents to be signed by its .... the day and year first above written.

Resolved, That the following actions of the Executive Committee be and are hereby approved and confirmed:

Appropriating $6,000 for repairs to corroding houses at Southern Works, Chicago, to be charged to Repairs as cost is incurred.

Appropriating $1,000 for cost of erecting storage tank for water, about 20,000 gallons capacity, at Southern Works, St. Louis.

On motion, the meeting then adjourned.

Charles Davison,
Secretary.

1392 COMMISSION'S EXHIBIT NO. 6.

Minutes of Adjourned Regular Meeting of Board of Directors of National Lead Company held at No. 100 William Street, New York, on Thursday, January 22, 1903, at 11 A. M.

Present:

Messrs. L. A. Cole
J. A. Stevens
R. R. Colgate
R. P. Rowe
G. O. Carpenter
A. P. Thompson
E. F. Beale
F. W. Rockwell

The minutes of meetings held November 20, December 11, 12 and 18, 1902, and January 15, 1903, were read and duly approved.

President Cole officially notified the Board of the death of the Treasurer Joseph L. McBirney on December 24, 1902, and on motion appointed the following Committee to draft resolutions expressing the sentiments of the Board:

F. W. Rockwell, Chairman
E. F. Beale
J. A. Stevens

On separate motions, the following resolutions were each unanimously adopted, the roll being called in each case:

Resolved, That the following actions of the Executive Committee be and are hereby approved and confirmed:

Authorizing sale to Cass & Daly of a plot of ground 140 x 285 ft. at Salem, Mass. for the sum of $5,000.

Appropriating $650 for cost of hydraulic pump at Eckstein Works to be charged to Repairs during 1903 in equal monthly amounts.

Appropriating $4000 for cost of 4 new corroding houses at the Eckstein Works.

Authorizing the following completed C. & R. Ac-
1393 counts to be charged to Maintenance Account on December 31, 1902:

Atlantic Branch.

No. 169—	2,217.35	One hand furnace and repairing German furnace at Bradley Works.
No. 174—	5,346.99	Dock at Crooke Works.
No. 176—	1,977.50	Re-building Stacks at Jewett Works.
	$9,541.84	In all.

John T. Lewis & Bros. Co.

No. 166—	$3,535.55	Cost of erecting tan Sheds.

Resolved, That the net amount of $5,652.85 credited to Plant Investment during the year ending December 31, 1902, as per detail below, be and is hereby approved and confirmed:

Cr.

Net Proceeds from Sale of Davis-Chambers property by the National Lead & Oil Co. of Pa.	49,476.00
Sale of a strip of land by the St. Louis S. & R. Co. to the St. Louis Branch	375.00
Sale of old engine &c. from Anchor W. L. Works	300.00
Sale of old boilers &c. from Maryland W. L. Works	165.52
	$50,316.52

Dr.

Maryland W. L. Works Charged back	32,803.75	
Balance of cost of Chicago Oxide Plant	923.39	
Cost of 5 add'l Red Lead Furnaces at Chicago	7,339.59	
Cost of add'l Lead Pipe Press at Chicago	3,221.94	
Purchase of a Strip of Land by the St. Louis Branch from the St. Louis S. & R. Co.	375.00	
Balance to Cr. of Plant Investment	5,652.85	$50,316.52

Resolved, That the sum of $159,234.07 be and is hereby carried to the credit of Surplus Account, Said Sum being the undistributed portion of net earnings of the Company for the fiscal year ending December 31, 1902.

Resolved, That this Board hereby fixes the amount to be reserved out of the accumulated profits as working capital until further action by this Board at $1,437,041.57, being balance shown in Surplus Account on December 31, 1902.

1394 Resolved, That in conformity with the By Laws of this Company, the annual meeting of stockholders be held February 19, 1903, at No. 1 Exchange Place, Jersey City, N. J. and that the books for both Common and Preferred Stock be closed January 29, 1903, and remain closed until February 9, 1903, and that the President appoint a Committee, with power of substitution, to receive proxies, and to vote the same, at the said meeting of stockholders.

Resolved, That John B. Frothingham and Harold Naudain be and are hereby appointed Inspectors of Election of Directors at the stockholders meeting to be held February 19, 1903.

Resolved, That a sum not to exceed $50,000 be and is hereby appropriated to cover cost of Advertising during 1903.

Whereas, At a meeting of this Board held December 12, 1902, a resolution was passed authorizing the execution and delivery by the officers of this Company of a certain agreement, which said agreement was made a part of the record of that meeting and

Whereas, The said proposed parties to said agreement have since declined to become parties thereto,

Therefore be it resolved, That the resolution of December 12, 1902, authorizing the execution and delivery by the officers of this Company of the said agreement be and the same is hereby rescinded.

In accordance with a resolution above recorded, the President appointed the Committee, with power of substitution, to receive and vote proxies at the annual meeting of stockholders, to consist of Messrs. L. A. Cole, F. W. Rockwell and J. A. Stevens.

On motion, duly seconded, Mr. L. A. Cole was constituted Chairman of the Committee on Construction, Repairs and Manufactures, to fill the vacancy made by the death of Mr. McBirney.

On separate motions, the roll being called each time, the following resolutions were adopted. Mr. Stevens voting in the

---

United Lead Company
National Lead Company

Dealings and Contracts.

On Feb. 26, 1906, the American Smelting and Refining Company entered into a contract with the National Lead Company for the sale of pig lead. The contract recites that the Smelting Company is a producer and seller, and the National Company a consumer and purchaser, of pig leads, known as "corroding", "desilverized common", "soft Missouri" and "chemical" lead, and that the National Company owned the entire capital stock of the St. Louis Smelting and Refining Company, engaged in mining lead ores in Missouri and refining lead ores at its works at Collinsville, Ill.; and the contract provides in substance as follows: that the Smelting Company shall endeavor to procure ores derived from domestic sources for the production of pig lead in sufficient quantity to fill the orders of the National Company; that the Smelting Company agrees to sell, and the National Company agrees to buy, (1) all the requirements of the National Company for pig lead for the purpose of corroding and in the manufacture of white lead, except pig lead to the amount of not exceeding 30,000 tons

a year, produced by the Collinsville works and used by the National Company in the manufacture of white lead and oxides of lead, (2) 85% of the total requirements of pig lead of other kinds of the National Company in each year, but not exceeding altogether (including pig lead covered by 1) 85% of the pig lead derived from domestic ores produced by the Smelting Company and the companies which the latter operates or otherwise controls, excluding the Selby Company; that if the Collinsville works in any year produces lead in excess of 30,000 tons, the National Company shall sell to the Smelting Company, at the option of the latter, all such excess, or so much thereof as the Smelting Company shall elect, at 5% less than the schedule price of the Smelting Company for corroding pig lead; that in determining the 85% of the National Company's requirements (other than for corroding purposes) that company may, at its option, deduct (a) lead which the National Company is compelled to take under contract now in ef-
1439 fect, such contracts not to be extended without the
consent of the Smelting Company, (b) chemical pig lead not made or deliverable by the Smelting Company as the National Company may be required to buy to meet the demands of its trade; that so much of the said 85% of the National Company's requirements as the Smelting Company fails to ship may, at the option of the National Company, be purchased from other parties; that the price for pig lead, other than corroding lead, shall be the average of the lowest daily schedule prices of the Smelting Company for the respective qualities and brands specified, at the respective points of delivery, in effect in the calendar month preceeding the month of shipments, such price, however, not to exceed on any day the price at which lead of a similar quality could be imported and delivered at the points of delivery if purchased at the spot quotation of the London metal exchange on the same date, after payment of commission, freight, duty, etc.; that the price of corroding lead shall be the foregoing price for pig lead, plus $2 per ton in excess thereof (subject to certain corrections on account of the presence of bismuth); that the agreement shall continue in force for 15 years from its date.

On the same day, Feb. 26, 1906, the American Smelting and Refining Company entered into a contract with the Hoyt Metal Company, a constituent company of the National Lead Company, for the sale of antimonial lead. The contract recites that the Smelting Company desires to sell, and the Metal Company to buy, the Smelting Company's entire product of domestic antimonial lead, the latter term being defined as "antimonial lead in commercial form produced in the United States of America, but not including antimonial lead produced in bond, nor including antimonial lead held by the Smelting Company for further treatment, reduction, refining, or composition, nor including lead containing less than 2% of antimony". The contract provides in substance that the Smelting Company shall sell, and the Metal Company shall buy, all the domestic antimonial lead produced by the former during the life of the contract, such lead to contain not less than 14%, nor more than 40%, of antimony; that all lead shipped from 1440 refineries in Chicago or west thereof shall be delivered f.o.b. cars St. Louis, and all lead shipped from refineries east of Chicago shall be delivered f.o.b. cars Perth Amboy; that all lead produced in any one month under the contract shall be shipped during that month or within five days thereafter, up to 800 tons, no shipment in any month to exceed 800 tons, except with the consent of the Metal Company; that the price of the lead for St. Louis delivery shall be the average daily price of common desilverized lead as quoted in that month by the Smelting Company for lots of 50 tons or more for delivery in St. Louis within 30 days; that the price for lead shipped for Perth Amboy delivery shall be the average of the daily prices of common desilverized lead as quoted within the month by the Smelting Company for lots of 50 tons or more for delivery in New York City within 30 days, provided that if this price shall be more than 1.075¢ per pound above the average of daily spot quotations for soft Spanish lead given by the London metal exchange for the month in which such shipment is made, then the price to be such average London metal exchange spot quotations, plus 1.075¢ per pound (this proviso being based on a tariff rate of 1½¢ per pound, and the margin of 1.075¢ per pound to vary in proportion as the tariff rate may vary); that the price specified is subject to certain corrections on account of the presence of arsenic; that the contract shall continue in force for 15 years from its date.

The foregoing agreements with the National Lead Company and the Hoyt Metal Company were made simultaneously with an agreement by the National Lead Company for the purchase of the common stock and bonds of the

United Lead Company from the managers of a syndicate which had undertaken the underwriting of the securities of the latter company, to which underwriting the American Smelting and Refining Company was a subscriber.

The United Lead Company was organized under the laws of New Jersey in January (certificate amended in May), 1903, and was capitalized at $25,000,000, divided into 250,000 shares of $100 each, of which $10,000,000, represented by 100,000 shares, was 6% cumulative preferred stock, and $15,000,000, represented by 150,000 shares, 1441 was common stock. The company was also authorized to issue $15,000,000 in 5% debenture gold bonds, due July 1, 1943, and redeemable any time after April 1, 1911, by lot.

The organization of the company was promoted by Grant Hugh Brown, who entered into a contract with the United Lead Company, dated June 17, 1903, (copy not available) whereby he undertook to convey, or cause to be conveyed, to the United Company the capital stock, or the properties and business, of the following companies:

1. American Shot and Lead Company; entire capital stock.
2. Gibson Price Company; entire capital stock.
3. McDougall White Lead Company; property and business.
4. Hoyt Metal Company; capital stock.
5. Markle Lead Works Company; capital stock.
6. Union Lead and Oil Company; property and business.
7. Gebhart White Lead Company; property and business.
8. J. Van Lengerke; letters patent.
9. James Robertson Manufacturing Company; property and business.
10. E. W. Blatchford Company; property and business.
11. Tatham and Brothers; property and business.
12. Picher Lead Company.
13. Raymond Lead Company; property and business.
14. Bender and Aldred Company.
15. Carter White Lead Company.
16. Chadwick Boston Lead Company; capital stock.

Of the foregoing companies, three, namely, the Picher Lead Company (12), Bender and Aldred (14), and the Carter White Lead Company (15), were not acquired. Of those acquired; the American Shot and Lead Company is said to have been a consolidation of the principal shot towers of the country; it had plants at New York, Chicago, Cincinnati, St. Louis, New Orleans, Omaha, St. Paul and Pittsburg. The other companies named included many of the principal lead alloy factories and some of the white lead works outside of the National Lead Company, which was the largest manufacturer of white lead and various lead oxides in the country.

Brown further agreed to pay to the company $3,000,000, most of which was paid in quick assets of the companies acquired. In exchange he was to receive $12,000,000 par value in the company's bonds and $15,000,000 par value
in the company's common stock. Owing to the failure
1442 of Browne to acquire the Picher Lead Company, the
Bender and Aldred Company, and the Carter White Lead Company, it was agreed that $1,360,000 par value in bonds of the company should be deducted from the amount of such bonds deliverable to him under his contract, thus making the total amount deliverable $10,640,000 par value.

In the organization of the United Lead Company Browne was associated with Thomas F. Ryan, who had heavily invested in the Union Lead and Oil Company above mentioned, a concern organized to manufacture white lead according to a new process. This company had not proved successful, and the plan was formulated for the consolidation of the Union Company with the other lead manufacturing companies above enumerated in the formation of the United Lead Company. In this project Mr. Ryan interested Mr. Daniel Guggenheim. Accordingly, on July 16, 1903, a syndicate agreement was made between Grant Hugh Browne of the first part, the subscribers of the second part, and Thomas F. Ryan and Daniel Guggenheim, syndicate managers, of the third part. This agreement referred to the contract between Browne and the United Lead Company, and provided for the underwriting of $5,000,000 of the bonds of the United Lead Company at 80% of their par value. The agreement further provided that Browne should deliver to the syndicate managers, in addition to bonds up to $5,000,000 as paid for at 80%, all the common stock of the United Lead Company receivable by him under his contract, except so much thereof as might be needed to acquire properties and except such as Browne was entitled to for his expenses and commissions. The American Smelting and Refining Company subscribed to $750,000 par value of these bonds and paid on account of its subscription $600,000, such payments being made in June, July and August, 1903. This subscription proportionally represented 22.11% of the total subscriptions.

Up to February, 1906, the United Lead Company had received on account of the Browne contract, in addition to the properties and capital stock of the constituent companies mentioned, $2,096,764.92 in cash or its equivalent, on account of the $3,000,000 cash or its equivalent payable by Browne. The United Lead Company, on the other hand, had issued on its part $9,510,000 par value in bonds
1443 on account of the $10,640,000 par value in such bonds
issuable under the contract, as well as $5,000,000 par value in common stock on account of the $15,000,000 par value in such stock issuable under the contract. At this time, therefore, the securities of the United Lead Company were held as follows:

Bonds authorized	$15,000,000
Bonds issuable under contract,	10,640,000
Common stock authorized,	15,000,000
Common stock issuable under contract,	15,000,000
Preferred stock authorized,	10,000,000
Preferred stock issued (in treasury)	16,500
Bonds held in treasury,	$ 700,000
Bonds held by public,	5,418,000
Bonds held in syndicate,	3,392,000
	$ 9,510,000
Common stock held in treasury,	$10,000,000
Common stock held by public,	255,800
Common stock held by syndicate,	4,744,200
	$15,000,000

To entitle the syndicate, therefore, to the additional bonds deliverable under the contract, amounting to $1,130,000 par value, and to the additional common stock deliverable under the contract, amounting to $10,000,000 par value, the syndicate was required to pay to the United Lead Company the difference between the $3,000,000 in cash or its equivalent payable under the contract and the $2,096,764.92

already paid, or $903,235.08. This amount was paid in February, 1906. The syndicate managers thereupon had at their disposal—

Bonds already held,	$ 3,392,000
Bonds now received,	1,130,000
Total bonds,	$ 4,522,000
Common stock already held,	$ 4,744,200
Common stock now received,	10,000,000
Total common stock	$14,744,200

On Feb. 26, 1906, the syndicate managers entered into a contract with the National Lead Company for the sale to the latter company of all the securities of the United Lead Company thus held by them; and they further agreed by this contract to cause to be conveyed to the National
Company the white lead plant and business of the
1444 Selby Smelting and Lead Company in California near
San Francisco. The National Company agreed to give in exchange $9,725,091.69, payable $2,713,600.00 par value in its preferred stock, $5,750,000.00 par value in its common stock, and $1,261,491.69 in cash. The National Lead Company was capitalized at $50,000,000, divided into 500,000 shares of $100 each, half preferred and half common. At this time $17,904,000 par value of preferred stock was outstanding, and $14,905,400 of its common stock was outstanding. The stock of the National Lead Company issued in exchange for the securities of the United Lead Company increased the outstanding stock of the National Company by the several amounts so issued. In the distribution of the stock of the National Company made by the syndicate managers the American Smelting and Refining Company received as its share 5,400 shares of preferred stock and 9,839 shares of common stock. In the syndicates distribution of cash the American Smelting and Refining Company received as its share on account of its subscription, $33,932.59.

Apart from its subscription of $600,000 to the syndicate underwriting; the American Smelting and Refining Company, in January 1904, bought 50 bonds of the United Lead Company directly from that company, paying par value for the same, or $50,000. These bonds were sold by this company in June and October, 1906, for $38,950. In the months of April, June, July and October, 1906, and February, 1907, the stock of the National Lead Company received by the American Smelting and Refining Company on account of its syndicate subscription was sold for $1,321,233.59. The details, therefore, of the investments of the American Smelting and Refining Company in connection with the organization of the United Lead Company are as follows:

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1903	Payments account subscription to syndicate:		
June	Amount paid	$ 25,000.00	
July	Amount paid	250,000.00	
August	Amount paid	25,000.00	
1904			
Jan.	Amount paid	300,000.00	600,000.00
	Purchase of United Lead Co.'s 5% bonds:		
1904			
Jan. & Apr.	Cost par		50,000.00
	Total cost		650,000.00

Amount Realized:

National Lead Co.'s stock received from syndicate: 5,400 shares preferred, 9,839 shares common; sold as follows:

1906		
April	2,400 shares preferred	$ 245,327.00
June	700 shares preferred	71,123.50
July	2,300 shares preferred	233,691.50
October	9,000 shares common	712,655.50
1907		
February	839 shares common	58,436.09
	Total	1,321,233.59

	Sale of 50 bonds:			
1906				
June	34 bonds	$27,030.00		
October	16 bonds	11,920.00	38,950.00	
	Cash received from syndicate:			
1906				
December		$30,021.32		
1906				
September		3,911.27	33,932.59	
	Total realized			1,394,116.18
	Net amount carried to Profit & Loss			744,116.18

In addition to the stock of the National Lead Company received by the Smelting Company on account of its syndicate subscription, the Selby Smelting and Lead Company received for its white lead plant and business at San Francisco 7,500 shares of the National Lead Company's common stock. This stock was sold during the year 1907 for $563,950.

1446 It will be observed from the foregoing account that although the United Lead Company was formally organized in the spring of 1903 and was engaged in business as a separate entity from about that time, its organization had not been completed up to the time of the sale of certain of its securities to the National Lead Company, inasmuch as all the terms of the Browne contract had not been fully complied with and, hence, all the securities deliverable thereunder had not been issued, much less finally disposed of by Browne or the syndicate managers. From this circumstance it resulted that the affairs of the United Lead Company during the period from its organization to the sale to the National Lead Company were virtually under the control of the syndicate managers. The president and treasurer of the United Company during this period were also officers of the American Smelting and Refining Company. The directors of the United Company were Thomas F. Ryan, J. J. Moreman, Charles Tatham, E. R. Hoyt, Daniel Guggenheim, Morris Guggenheim, Simon Guggenheim, Barton Sewell and Edward W. Nash. Of these nine directors, the last five named were directors of the Amer-

ican Smelting and Refining Company. Following the sale of United Lead securities to the National Lead Company, the officers of the United Company were chosen by the National Company and no longer included any persons identified with the American Smelting and Refining Company. On the board of directors, however, the latter company continue to be represented by Murry Guggenheim and Edward Brush. The American Smelting and Refining Company was also given representation on the board of directors of the National Company, in 1906. Of the fifteen directors of the latter company, three were, Daniel Guggenheim, Murry Guggenheim and Edward Brush. These representatives, respectively, resigned their positions on the directorates of the above companies in 1911. The reasons for such resignations were two: first, because neither the American Smelting and Refining Company nor the directors named were stockholders in either company, except as holders of qualifying shares and except as stock of the National Company may have been bought and sold from time to time
1447 as an investment; second, because it was felt that the position of these gentlemen as directors in a lead purchasing company was inconsistent with their position as directors in a lead selling company with which they were primarily concerned. Aside from the connection involved in these directorships, the American Smelting and Refining Company ceased to have any interest in the stock or other securities of both the United Lead Company and the National Company after the purchase of the former by the latter and after the Smelting Company had disposed of its distributive share of the National Company's stock as above noted.

By reference to the lead sales contract made with the National Lead Company, it will be noted that the National Company is required to buy from the American Smelting and Refining Company—

> (a) all of the National's corroding lead requirements, except so much thereof as its Collinsville plant supplies up to a maximum of 30,000 tons per annum;
>
> (b) 85% of all its pig lead requirements, exclusive of corroding lead, less so much chemical lead of other brands as may be demanded by its trade;

and that the Smelting Company is required to meet these requirements up to 85% of its domestic production of pig lead of all kinds, excluding the production of Selby. For the earlier contract years, accurate figures of sales under this contract are not available. Figures for subsequent years are the following.

Corroding Lead (tons)

Contract Year	Nat'l Production Collinsville	A. S. & R. Co. Sales to Nat'l	Total
Feb. 1906 to Mch. 1907			
Feb. 1907 to Mch. 1908	24,994		
Feb. 1908 to Mch. 1909	26,663	57,186	83,849
Feb. 1909 to Mch. 1910	26,446	61,074	87,520
Feb. 1910 to Mch. 1911	23,165	49,791	72,956
Feb. 1911 to Mch. 1912	28,772	29,725	58,497
Feb. 1912 to Mch. 1913	20,720	58,825	79,545

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Chemical Lead Purchased from Others

1906-7	
1907-8	
1908-9	12,321 tons
1909-10	20,750 tons
1910-11	22,830 tons
1911-12	22,093 tons
1912-13	26,620 tons

National Consumption and A. S. & R. Sales

Contract Year	National Consumption			A. S. & R. Sales to Nat'l	
	Total	Less Nat'l Corr'd'g	Less Corr'd'g & Chem.	Total	Less Corr'd'g Sales
1906-7				115,948	
1907-8				103,662	
1908-9	173,279	146,616	134,295	125,891	68,705
1909-10	188,824	161,378	140,528	130,106	69,632
1910-11	169,332	146,167	123,337	103,824	54,033
1911-12	147,730	118,958	96,865	89,367	59,542
1912-13	170,600	149,880	123,260	114,916	56,091

National Consumption in Excess of A. S. & R. Sales

	1908–9	1909–10	1910–11	1911–12	1912–13
Collinsville Product	26,663	26,446	23,165	28,772	20,720
Chemical Lead	12,321	20,750	22,830	22,093	26,620
	38,984	47,196	45,995	50,865	47,340
Balance Consumed	134,295	140,528	123,337	96,865	123,260
A. S. & R. Sales (total)	125,891	130,106	103,824	89,367	114,916
Excess	8,404	10,422	19,513	7,498	8,344
Add Collinsville & Chemical	38,984	47,196	45,995	50,865	47,340
Total Excess	47,388	57,618	65,508	58,363	55,684

National Consumption in Excess of A. S. & R. Sales
(corroding lead excluded)

	1908–9	1909–10	1910–11	1911–12	1912–13
Total Consumption	173,279	188,824	169,332	147,730	170,600
Corroding Lead	83,849	87,520	72,956	58,497	79,545
Other Lead	89,430	101,304	96,376	89,233	91,055
A. S. & R. Sales (ex. corr'd'g)	68,705	69,032	54,033	59,542	56,091
Excess	20,735	32,272	42,343	29,691	34,964
Per Cent. Excess	23	31	45	30	38
Per Cent. A. S. & R. Sales	77	69	55	70	62

1449 Proportion of A. S. & R. Lead Product Sold to National.

(Less production of Selby and amount produced on toll)

Contract Year	Total A. S. & R. Product (corroding included)	Percentage Sold to Nat'l
1906-7	155,659	74%
1907-8	188,938	54%
1908-9	166,667	75%
1909-10	185,668	70%
1910-11	189,321	55%
1911-12	193,475	46%
1912-13	201,493 (?)	57%

Proportion of National Consumption Purchased from A. S. & R.

(5 years, Mch. 1, 1908, to Mch. 1, 1913)

	Corroding Lead	Other Lead	Total Lead
National consumption	382,367	467,398	849,765
A. S. & R.	256,601	307,403	564,104
Per cent A. S. & R.	67%	65%	66%

Proportion of A. S. & R. Production Purchased by National.

(5 years, 1908 to 1913)

Total A. S. & R. production (including Selby)	1,074,461
Total National purchases	564,104
Per cent purchased	52%

1450 Company, or in the sale of the latter to the National Lead Company. It may, or may not, have been an object of some of the others concerned. The profits realized on the sale of the United to the National were sufficient to furnish an adequate motive for such sale on the part of the sellers.

2. The situation of the Smelting Company throughout these transactions, as it must always be, by reason of the peculiarity of its business, was that of a producer who must always take, and pay for on the spot, all the raw material of his product that may be offered, when it is offered, and in the quantities offered, with practically no control over such quantities. This procedure involves enormous outlays of money and enormous acquisitions of stocks, which are constantly replenishing, and which, therefore, cannot be suffered to accumulate. To keep such a process in motion, stocks must be disposed of practically as fast as they are acquired; and to keep the business solvent, prices must be realized on the sale of such stocks which on the whole are as high as the prices paid. The risk that this steady intake and output cannot be as regularly disposed of, and that such prices cannot be realized, is necessarily very great. In proportion to this risk is the need of the Smelting Company for an assured market at steady prices for its product. Instead of marketing its product in the form of crude metal, the Smelting Company might extend its operations by working up its product, in whole or in part, in form for final consumption, and market the same as a manufacturer. This would be one way of assuring a demand and outlet for its product, or a portion of it. Instead of taking its chances in the market as it may exist from time to time, and making no effort to diminish the risk incident to its business, the Smelting Company might contract ahead for the sale of its product, or portions of it, with consumers whose requirements are both large and constant. Both courses were followed in the present instance. In itself, either course would seem to be, not only legally unobjectionable, but commercially natural and proper.

3. But, it may be said, at the time of making the lead sales contract in question, the National Lead Company was engaged in the lead smelting business as well as in the 1451 lead manufacturing business, and deriving its supply of corroding lead in part from its smelting operations,

and was in a position to so extend such operations as to derive therefrom, not only its supply of corroding lead, but its supply of pig lead generally; the Smelting Company, in turn, was in the lead manufacturing business as well as the lead smelting business; to the extent that each company was engaged in the business primarily conducted by the other, they were competitors; and by the lead sales contract this competition was eliminated. The fact is, however, that the extent to which the two concerns were so competing was negligible. The National's smelter at Collinsville (St. Louis Smelting and Refining Company) treated only ores from its own mines in Southeastern Missouri (Ingalls, pp. 116-117), and when the contract was made, was producing but 1,500 tons per month or 18,000 tons per year (Brush to Lehmann Apr. 4, 1913). It still treats the same ores, and is permitted under the contract to produce 30,000 tons per year. Since the contract was made, it has actually produced from 20,000 to 26,000 tons per year and as much as 28,000 tons per year. At no time prior to the contract did the Smelting Company's relative interest in the United Lead Company exceed 23 per cent of that company's capitalization. The products of most of the constituent companies, furthermore, like shot and lead alloys, were not manufactured by the National Company. In so far, moreover, as the Smelting Company's interest in the United Lead Company was anything more than a mere investment, which it seems principally to have been, and is to be regarded as an entry into the manufacturing field, it marked a departure from the settled policy of the Smelting Company to confine its operations to the production of raw metals, and was a tentative venture at most. Both before and since, the Smelting Company has consistently stopped short of taking up those branches of the metal industry which undertake to put metals in shape for final consumption (except on the West coast, where the situation is peculiar, and where the Selby Company had already adopted a different course, which it has continued to follow). To have remained permanently in the lead manufacturing business the Smelting Company would have had to go outside of its chosen field and become qualified
1452 in the details of a separate industry. If, therefore,
the effect of the contract was to rid the Smelting Company of a possible competitor in the smelting business, and the National Company of a possible competitor in the manufacturing business, this was a remote and incidental

result of the acts of the parties, and neither the direct and necessary effect of the contract, nor the primary purpose it was plainly intended to serve. The subject matter of the contract was the sale and purchase of pig lead—the product which the Smelting Company must dispose of, and which the National Company must obtain. The contract directly tended to meet the respective needs of both companies. It gave the former company a market for a large portion of its product at prices reasonably steady; it gave the latter company, in large part, an assured supply of necessary material at similar prices. This was the obvious and controlling motive of the contract, as well as its immediate and necessary result. If it also resulted in the abandonment of any possible intention, on the part of the Smelting Company, to compete with the National Company in manufacturing, or, on the part of the latter, to compete with the former in smelting, this was an entirely secondary and incidental effect. The object of the Smelting Company being to insure a continuous outlet for its pig lead, there would be no need of retaining an interest in a manufacturing company, if a long term contract could be made to supply, not only that company's requirements, but the requirements of another large company in addition. The object of the National Company being to insure a constant supply of raw material, which it was able itself to produce in part only, it might prefer to subordinate its own production to that of another company, if it could contract for the purchase of the entire excess of its requirements on favorable terms. The contract in no way restricts the output of the National Company in respect of its proper and established business of manufacturing; nor does it in any way restrict the output of the Smelting Company in respect of its proper and established business of smelting and refining.

4. The open lead market is contracted, of course, by virtue of the agreement, to the extent, on the one hand, that the product which this company would have to offer is 1453 diminished by the requirements of the National Company, and, on the other hand, to the extent that the National Company is no longer obliged to bid for its requirements. The extent to which a closed market thus exists is much less than would appear from the face of the contract. Assume that this company produces and sells 60% of the lead product of the country. As shown above, the National Company purchases under the contract only

52% of this company's production, or 31.2% of the country's production. This leaves 48% of the production of this company, or 28.8% of the total production, for sale in the open market. The latter percentage added to the 40% produced independently of this company makes 68.8% of the total production available for the market. Of the total requirements of the National Company, this company furnishes only 66%; of the remaining 34%, about 14% represents corroding lead of the company's own production, and about 20% represents market purchases.

5. Under the contract, the largest single consumer of pig lead in the United States agrees to purchase exclusively from the largest single producer, for fifteen years, all its requirements for corroding lead (save so much as it produces itself up to a certain maximum), and eighty-five per cent of all its requirements for other lead (save such quantities as it may require of other brands); and such producer agrees to sell to such consumer a sufficient amount to meet such requirements up to eighty-five per cent of its domestic production. As the contract has worked out, the consumer actually purchases from the producer but 67% of its requirements in respect of corroding lead, only 65% of its requirements in respect of other lead, and but 66% of its total requirements of lead of all kinds, while the producer actually sells but 52% of its total production. Does this situation give evidence of wrong-doing? The largest, no less than the smallest, producer must sell to some one, if he is to produce at all, just as the largest, as well as the smallest, consumer must buy from some one. There can be no objection to their dealing with each other, as in the present case, unless the dealing is of such a nature as to deprive other consumers of an opportunity to purchase their supplies, or to deprive other producers
1454 of an opportunity to sell their production, or unless the dealing results in the making of a monopoly price. None of these features characterize the dealing in question. The supply of pig lead has never fallen short of the full demand on the part of all consumers, who have accordingly never suffered from an inability to procure their raw material as needed (except, possibly, at rare intervals of short duration when an abnormal industrial situation has existed, in no wise due to the workings of the contract). Other producers have regularly been able to dispose of their product, at prices which on the whole were at least equal to the prices paid to this company and frequently

higher. Of the country's total production of pig lead, 40%, say, comes from other producers. Purchases of the National Lead Company under the contract absorb not more than 32% of the total production, leaving 68% thereof to be taken by other buyers. Such other producers, therefore, representing 4/10 of the supply, have open to them a consuming field representing 7/10 of the demand, so far as the present contract is concerned. Neither a specific price nor a specific scale of prices is fixed by the contract. The prices are determined by reference to the average of those specified in the regular schedule of prices issued by this company on which its sales of pig lead are made in New York from month to month. The fact that a large proportion of the total pig lead sold is delivered under a contract between a single seller and a single buyer, under the circumstances, does not result in the fixing of a monopoly price, but tends to the maintenance of steady prices and to avoidance of wide fluctuations. The latter fact is shown by a comparison of this company's New York quotations with the general market quotations in New York. Thus in 1905, the first year of the contract, the general market quotations were: highest 6.25; lowest 4.45; difference 1.80; while the company's quotations were: highest 5.60; lowest 4.45; difference 1.15; and this company's highest price was 55 cents lower than the highest outside price. Similar figures for other years were—

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	Gen'l Quot'n, N. Y.			A. S. & R. Quot'n, N. Y.			Below
	High	Low	Diff.	High	Low	Diff.	High
1906	6.35	5.45	.90	6.00	5.35	.65	.35
1907 (1)	6.35	3.50	2.85	5.75	4.75	1.00	.60
1908 (1)	4.60	3.65	.95				
1909	4.75	3.95	.80	4.70	4.00	.70	.05
1910	4.75	4.375	.375	4.60	4.40	.20	.15
1911	4.60	4.25	.35	4.45	4.25	.20	.15
1912	5.15	4.10	1.05	5.10	4.00	1.10	.05

[(1) In November 1907, this company ceased to quote a price distinct from that of the general market, and for the balance of that year and during the year following there was only one quotation. This company was powerless to prevent the falling of prices which occurred.] In the foregoing figures, there is nothing to suggest either the power or the attempt to exact monopoly prices. If prices were high in 1906, they were more than correspondingly low in 1907 and the year following. In the first period there was

a great expansion of trade; in the second there was a panic. But this company is without power to raise prices and keep them raised, even if it wished to do so, because it does not control production. It must take the ores that are offered to it by the mines, and the higher the price the more the mines offer and the greater the production. The increased production must be sold to avoid greater increases. When the supply has outrun the demand, and sales must be made, prices must inevitably fall. When they fall below what was paid for the metal in the ore, *i. e.*, the prices previously ruling, the smelting company must lose. Hence the necessary policy of the company to fix prices for its product at the level, as nearly as it can be judged, corresponding to the relation between supply and demand, as that may vary at different times. Such prices are not monopoly prices.

1511 COMMISSION'S EXHIBIT NO. 93.

Agreement, made this Twenty Sixth day of February, 1906, between American Smelting and Refining Company, a corporation organized and existing under the laws of the State of New Jersey, (hereinafter called the "Smelting Company"), party of the first part, and National Lead Company, a corporation organized and existing under the laws of the State of New Jersey, (hereinafter called the "National Company"), party of the second part.

Whereas, the Smelting Company are sellers or producers of pig lead of the kinds or classes called "corroding" and "desilverized common" and "soft Missouri" and "chemical" lead and desire to sell such pig lead, and:

Whereas the National Company are consumers and purchasers of these several kinds or classes of pig lead, and:

Whereas the National Company are owners of the entire capital stock of the St. Louis Smelting and Refining Company, which company is mining lead ore in Missouri and smelting and refining lead ores at its works at Collinsville, Illinois:

Now, Therefore, in consideration of the premises and of one dollar, lawful money of the United States of America, by each of the said parties to the other in hand paid, the receipt whereof is hereby acknowledged, and of the agreements herein contained, the parties hereto agree with each other as follows:

I. The Smelting Company agrees to use its best efforts to produce or acquire ores derived from domestic sources for the production of pig lead of the various kinds
1512 which it hereinafter agrees to sell in sufficient quantities to fill the orders of the National Company lodged in accordance with the provisions of this agreement.

II. The Smelting Company agrees to sell to the National Company, and the National Company agrees to buy from the Smelting Company, at the prices and upon the terms and conditions hereinafter stated:

First: All the requirements of the National Company for pig lead for the purpose of corroding and in the manufacture of white lead, except pig lead to the amount of not exceeding thirty thousand (30,000) tons in any one year produced by said Collinsville works which is used by the National Company in the manufacture of white lead and oxides of lead.

Second: Eighty-five per cent. (85%) of the total requirements of pig lead of the other kinds hereinbefore specified (measured by tons) of the National Company in each year, but not exceeding all together (including pig lead covered by sub-division "First" above) eighty-five per cent. (85%) of the quantity of pig lead derived from domestic ores which is produced by the Smelting Company and the companies in which it owns a majority of the capital stock or which it operates or otherwise controls (excluding the Selby Smelting and Lead Company); subject, however, to the exceptions hereinafter stated in clause "V" hereof.

III. The requirements of the National Company for pig lead or for any kind or class of pig lead shall for the purposes of this contract be understood to be the amount of such pig lead actually used in the several processes
1513 of manufacture at the several works owned, leased, operated or controlled by it.

IV. If the said works at Collinsville shall in any year produce lead in excess of thirty thousand (30,000) tons, then, and in such case, the National Company shall sell to the Smelting Company, at the option of the Smelting Company, all such excess, or so much thereof as the Smelting Company shall elect, at five per cent. (5%) less than the schedule price of the Smelting Company for corroding pig lead for point of delivery designated by the Smelting Company, such price to be ascertained as hereinafter specified in the case of corroding lead sold to the National Company.

V. From the requirements of the National Company before determining the eighty-five per cent. (85%) of its requirements for pig lead other than for corroding and the manufacture of white lead to be purchased as above provided by the National Company from the Smelting Company, the following deductions or exceptions may, at the option of the National Company, be made, viz:

(a) Pig lead and corroding lead taken and paid for by the National Company which it is compelled to take by the provisions of contracts now in effect, copies of which are hereto annexed; which said contracts, however, shall not be renewed or extended without the consent of the Smelting Company;

(b) Such chemical pig lead not made or deliverable by the Smelting Company as the National Company may be required to buy to meet the demands of the trade for special brands; but the National Company agrees to
1514 use every reasonable effort to limit such purchase of chemical pig lead;

VI. So much of said eighty-five per cent. (85%) as may at any time be ordered in accordance herewith by the National Company from the Smelting Company, and which the Smelting Company fails to ship in accordance with the provisions hereof, upon said orders, may, at the option of the National Company, be purchased from parties other than the Smelting Company.

VII. Sales hereunder by the Smelting Company to the National Company shall be on the following terms and conditions:

(a) All such kinds or classes of pig lead shall be of good merchantable quality.

(b) All such corroding lead shall be carefully selected and refined at the various refineries owned, leased or controlled by the Smelting Company.

(c) Orders from the National Company for deliveries of pig lead hereunder shall be lodged with the Smelting Company on or before the first day of the calendar month previous to the month in which shipment is to be made, specifying the dates of shipment, kinds, quantities and destinations of deliveries required, and all such orders shall be filled and shipment thereof provided for by the Smelt-

ing Company during the calendar month specified in said orders, and such shipment is to be made as near as practicable to the day of shipment so specified; provided, however, that if the amount of orders for shipment in any calendar month exceed eighty-five per cent. (85%) of
1515 the total production during such month of pig lead
by the Smelting Company and by the companies in which it owns a majority of the capital stock or which it operates or otherwise controls (excluding the Selby Smelting and Lead Company) derived from domestic ores, or if the amount of such orders exceeds the amount of the kinds or classes of pig lead actually used in the various processes of manufacture at the works owned, leased, operated or otherwise controlled by the National Company during the month preceding the month in which said order is made, then the Smelting Company shall not, except with its consent, be required or hereby bound to fill or conform to or recognize or make shipments upon any such orders for any such excess; and provided, further, that the Smelting Company shall ~~not~~ be obliged without its consent to sell hereunder for delivery at any point more than eighty-five per cent. (85%) of the amount of pig lead other than corroding lead required by the National Company at that point during any one calendar month.

(d) Deliveries of lead hereunder by the Smelting Company shall be "f.o.b." tracks most convenient to the works of the National Company at the destinations specified in the orders therefor, the routing of the pig lead to point of destination being in all cases controlled by the Smelting Company.

(e) Terms of settlement shall be prompt cash on arrival of pig lead at destination.

(f) The Smelting Company shall take a suitable sample of each carload of corroding lead shipped hereunder. Such sample shall be divided into three portions, of which one shall be sent to the National Company, and one
1516 shall be sealed for references in case of umpire. If
any dispute shall thereafter arise concerning the percentage of bismuth contained in any corroding lead sold hereunder, the umpire sample of the carload in dispute shall be sent to Messrs. Ledoux & Company (or some other reputable assayer in New York City to be mutually agreed upon in case Messrs. Ledoux & Company cannot or will not act or shall be unsatisfactory to either party), and the determination of the umpire shall be final as a basis for set-

tlement, except in case the report of the umpire assayer is higher than both of the reported assays of the parties hereto or lower than both such reported assays, in which case the assay of the party nearest to the results obtained by the umpire assayer shall constitute the basis and control in settlement of the particular lot in question. The cost of the umpire's determination shall be paid by the party hereto whose results are farthest removed from those of the umpire assayer.

VIII. The prices to be paid by the National Company for pig lead hereunder shall be as follows:

(a) The price for pig lead, other than corroding lead, shall be the average of the lowest daily (exclusive of Sundays and New York legal holidays) schedule prices of the Smelting Company for the respective qualities and brands specified in said orders of the National Lead Company at the respective points of delivery therein designated in effect in the calendar month preceding that during which shipments are to be made; such lowest daily schedule prices, however, shall not exceed on any day the prices at which lead of a similar quality could be imported and 1517 delivered to the respective points designated as points of delivery in the orders of the National Company if purchased at the spot quotation of the London Metal Exchange of the same date, and after all expense of purchase, including interest, commission, freight and duty has been paid.

(b) The price for corroding lead shall be based upon that to be charged for desilverized common pig lead at the same time, such price for desilverized common pig lead being determined as in the last foregoing paragraph "(a)" hereof; and the price for corroding lead shall be two dollars ($2.00) per ton in excess of such price for common desilverized pig lead, except that from such price for corroding lead there shall be deducted in the case of corroding lead containing over five one-hundredths per cent. (.05%) and not over eight one-hundredths per cent. (.08%) of bismuth the following amounts per ton:

In case of lead containing over five one-hundredths per cent. (.05%) and not over six one-hundredths per cent. (.06%) twenty cents (20¢).

In case of lead containing over six one-hundredths per cent. (.06%) and not over seven one-hundredths per cent. (.07%) forty cents (40¢);

In case of lead containing over seven one-hundredths per cent. (.07%) and not over eight one-hundredths per cent. (.08%) sixty cents (60¢); and except that the price for corroding lead containing over eight one-hundredths per cent. (.08%) of bismuth shall be the same as the price of desilverized common pig lead.

1518 (c) Should the National Company desire shipments of pig lead to be made in less than fifteen (15) days from the date of receipt of the order by the Smelting Company, and in amounts exceeding in the aggregate two hundred (200) tons in any one calendar month, and the Smelting Company shall be able to and shall fill such orders, the price of such excess over two hundred (200) tons shall be fifty cents (50¢) per ton in excess of the regular price above fixed.

IX. Where either party hereto has herein covenanted or agreed with respect to anything to be done by any corporation controlled by it, or a part of whose stock is owned by it, such agreement is intended to and shall be taken to be an agreement of such party hereto by proper means to procure such action by such corporation.

X. This agreement shall continue in force for fifteen (15) years from the date hereof, and shall be binding upon and enure to the benefit of the successors and assigns of the respective parties hereto.

In Witness Whereof, the parties hereto have caused these presents to be signed in their respective names by their respective Presidents or Vice Presidents and their respective corporate seals to be hereto affixed, attested by their respective Secretaries, pursuant to resolutions of their respective Boards of Directors, certified copies of
1519 which resolutions are hereto attached, the day and year first above written.

American Smelting and Refining Company
By (Illegible) Jewell,
(Seal) *Vice President.*
Attest:
G. M. Borden
Assistant Secretary.

National Lead Company,
By R. A. Cole
(Seal) *President.*
Attest:
Charles Dairson
Secretary.

COMMISSION'S EXHIBIT NO. 94.

1521 Agreement, made this 26th day of February, 1906, by and between American Smelting and Refining Company, a corporation of the State of New Jersey, (hereinafter called the Smelting Company), party of the first part, and Hoyt Metal Company, a corporation of the State of Missouri, (hereinafter called the Metal Company) party of the second part:

Whereas, the Smelting Company is a manufacturer or producer of domestic antimonial lead, and desires to sell to the Metal Company, and the Metal Company desires to buy, the Smelting Company's entire product of such lead during the term of this contract;

Now, Therefore, the parties hereto, in consideration of the premises and of one dollar by each to the other paid, the receipt whereof is hereby acknowledged, and of the agreements herein contained, hereby agree with each other as follows:

First: It is mutually agreed that the phrase "domestic antimonial lead" as used in this contract, means antimonial lead in commercial form produced in the United States of America, but not including antimonial lead produced in bond, nor including antimonial lead held by the Smelting Company for further treatment, reduction, refining or composition, nor including lead containing less than two per cent. (2%) of antimony; that the word "ton" as used in this contract, means a ton of two thousand (2,000) pounds, and that the word "month" as used in this contract, means calendar month;

Second: The Smelting Company agrees to sell to
1522 the Metal Company, and the Metal Company agrees to buy from the Smelting Company, all of the domestic antimonial lead produced by the Smelting Company while this contract remains in force at the prices, and upon and subject to the terms, conditions, limitations and exceptions in this contract expressed; and the Smelting Company agrees that all such lead shall contain not less than fourteen per cent. (14%) and not more than forty per cent. (40%) of antimony.

Third: It is mutually agreed that deliveries of lead sold hereunder shall be made by the Smelting Company as follows: Lead shipped from refineries in Chicago or west thereof shall be delivered f.o.b. cars at St. Louis, Missouri, and all lead shipped from refineries east of Chicago shall be delivered f.o.b. cars at Perth Amboy works of the Smelting Company.

Fourth: The Smelting Company agrees that it will ship such lead to the Metal Company as follows: Such lead produced in any month while this contract remains in force shall be shipped during such month or within five days thereafter, except that if such lead produced in any month shall exceed eight hundred (800) tons, such excess shall not be shipped unless the Metal Company shall in writing notify the Smelting Company of its election to receive the same or some stated part, proportion or amount thereof. If at any time the Smelting Company shall have on hand any such excess, the Smelting Company may add such excess to its production during any subsequent month in which the product of the Smelting Company is less than eight hundred (800) tons to an extent sufficient to
1523 make, with such addition, a total amount not greater than eight hundred (800) tons and such amount so increased shall be considered to be the product of the Smelting Company during such month.

Fifth: It is mutually agreed that the price for lead sold hereunder shipped in any month for St. Louis delivery shall be the average of the daily prices of common desilverized lead as quoted in said month by the American Smelting & Refining Company for lots of fifty (50) tons or more for delivery in St. Louis within thirty (30) days; and that the price for lead sold hereunder, shipped in any month for Perth Amboy delivery, shall be the average of the daily prices of common desilverized lead as quoted in said month by the American Smelting & Refining Company for lots of fifty (50) tons or more for delivery in New York City within thirty (30) days;

Provided, however, that if the price as above computed for any shipment of said lead would be more than one and seventy-five thousandths (1.075) cents per pound above the average of the daily spot quotations for soft Spanish lead, as given by the London Metal Exchange (without any discounts or deductions) for the month in which such shipment is made, then the price to be paid for the lead in such shipment shall be such average of London Metal Exchange spot quotations plus one and seventy-five thousandths (1.075) cents per pound, instead of said average price quoted by American Smelting & Refining Company;

And provided, further, that inasmuch as the United States tariff on imports of antimonial lead (known in the tariff law as "type metal") is now one and one-half (1½) cents per pound, now, therefore, if such tariff should

1524 be increased or diminished, then the above mentioned amount of one and seventy-five thousandths (1.075) cents per pound shall be modified by increasing or decreasing the same by the exact amount per pound by which such tariff shall be so increased or diminished, and the amount as so modified shall be substituted in the foregoing provision for said amount of one and seventy-five thousandths (1.075) cents; and if the parties hereto shall at any time be unable to agree as to the amount of such modification, each party hereto shall immediately name an arbitrator, and the two arbitrators so appointed shall determine the amount of such modification, and if they fail to agree they shall appoint a third, and the decision of any two of such arbitrators thereon shall be final and binding upon the parties hereto.

If any dispute shall arise concerning the meaning and effect of this agreement, such dispute shall be arbitrated and determined in like manner.

And provided, further, that if the arsenic contained in any of the lead sold hereunder shall exceed one and one-quarter per cent. (1¼%) then the following deductions shall be made from the price hereinbefore provided, viz: if the arsenic exceeds one and one-quarter per cent. (1¼%) and does not exceed one and one-half per cent. (1½%), the deduction shall be two dollars ($2.) per ton; if the arsenic exceeds one and one-half per cent. (1½%) and does not exceed one and three-quarters per cent. (1¾%); the deduction shall be three dollars ($3.) per ton; if the arsenic exceeds one and three-quarters per cent. (1¾%) and does not exceed two per cent. (2%), the deduction shall be 1525 four dollars ($4.) per ton; if the arsenic exceeds two per cent. (2%) and the Metal Company is willing to accept such lead, the deduction shall be four dollars ($4.) per ton.

If the arsenic contents of the antimonial lead exceed two per cent. (2%) and the Metal Company, or its assigns, is not willing to accept the same at a price of four dollars ($4.00) per ton less than that fixed in the Fifth Article hereof, then such lead shall not be shipped hereunder and neither the Metal Company nor its assigns shall be under any obligation to purchase it under this contract, unless an agreement can be reached as to its value and the Smelting Company is willing to ship at such value. If such an agreement cannot be reached, the Smelting Company shall be at liberty to dispose of this portion of its product of antimonial lead elsewhere, as it may see fit.

Sixth: It is mutually agreed that all payments hereunder shall be made in thirty (30) days from the date of the bill of leading for each shipment, with the privilege to the Metal Company of paying within sixty (60) days from said date, with interest after the expiration of said thirty (30) days until the date of payment at the rate of six per cent. (6%) per annum, and with the additional privilege to the Metal Company of paying "spot cash" less interest at the rate of six per cent. (6%) per annum from the date of payment to the expiration of said thirty (30) days.

Seventh: This contract shall continue in force for fifteen (15) years from the date hereof.

Eighth: This contract shall respectively bind and
1526 inure to the benefit of the successors and assigns of the respective parties hereto. Notices to be given hereunder may be given by or to such successors or assigns and shall be sufficient as to their interest; but either party, its successors or assigns, in giving any notice hereunder, may disregard any succession to or assignment of any of the rights of the other party, or of any interest therein or thereunder, unless written notice shall have been given of such succession or assignment and of an office of the successor or assignee at which notices may be delivered.

In Witness Whereof, the parties hereto have caused these presents to be signed in their respective names, by their respective Presidents, and their respective corporate seals to be hereto affixed, attested by their respective Secretaries, pursuant to resolutions of the respective Boards of Directors of the parties hereto, certified copies of which resolutions are hereto attached.

American Smelting & Refining
Company,
By David Guggenheim,
President.

(Corporate Seal)
Signed, sealed and delivered
in the presence of:
Attest:
G. M. Borden,
Assistant Secretary.

Hoyt Metal Company,
By (Signature illegible),
Vice President.

(Corporate Seal)
Attest:
B. J. Thompson,
Secretary.

1589 COMMISSION'S EXHIBIT NO. 498.

Members of The Lead Industries Association.

Alpha Metal & Rolling Mills, Inc., 363 Hudson Avenue, Brooklyn, N. Y.

American Metal Co., Ltd., 61 Broadway, New York, N. Y.

American Smelting & Refining Co., 120 Broadway, New York, N. Y.

Anaconda Lead Products Company, East Chicago, Indiana.

Andrews Lead Company, 36 Greenpoint Avenue, Long Island City, N. Y.

Balbach Smelting & Refining Company, 253 Broadway, New York, N. Y.

Bond Manufacturing Corp., Monroe and Fifth Streets, Wilmington, Delaware.

Bunker Hill & Sullivan Mining and Concentrating Company, Kellogg, Idaho.

Cambridge Smelting Company, 100 Pacific Street, Cambridge, Mass.

Cerro de Pasco Copper Company, 44 Wall Street, New York, N. Y.

Chief Consolidated Mining Company, Eureka, Utah.

Columbia Smelting & Refining Company, 98-106 Lorraine Street, Brooklyn, N. Y.

Crown Metal Company, 117-9 East Washington Street, Milwaukee, Wisconsin.

Dayrock Mining Company, Wallace, Idaho.

Division Lead Company, 836 West Kinzie Street, Chicago, Illinois.

The Eagle-Picher Lead Company, Temple Bar Building, Cincinnati, Ohio.

Euston Lead Company (The Glidden Company), 500 Penn Avenue, Scranton, Penna..

Evans Lead Company, Charleston, West Virginia.

Federal Mining & Smelting Company, 120 Broadway, New York, N. Y.

Federated Metals Corporation, 295 Madison Avenue, New York, N. Y.

The Flemm Lead Company, Inc., Bradley Ave. and School Street, Long Island City, N. Y.

W. P. Fuller & Company, 301 Mission Street, San Francisco, Calif.

Gardiner Metal Company, 4820 South Campbell Avenue, Chicago, Illinois.

General Lead Manufacturing Company, 2132 Market Street, Denver, Colorado.

Girard Smelting & Refining Company, Milnor & Bleigh Sts., Tacony, Philadelphia, Pa.

Globe Metal Company, 1030-56 West North Avenue, Chicago, Ill.

Goldsmith Bros. Smelting & Refining Co., 5 North Wabash Avenue, Chicago, Ill.

Hammond Lead Products, Inc., First Trust Building, Hammond, Indiana.

Hecla Mining Company, Wallace, Idaho.

Hercules Mining Company, Wallace, Idaho.

Hudson Smelting and Refining Company, 85-91 Hyatt Avenue, Newark, N. J.

Imperial Type Metal Company, 3400 Aramingo Avenue, Philadelphia, Penna.

International Smelting Co. (United Metals Selling Co. Agents), 25 Broadway, New York.

The Johnston Tin Foil & Metal Company, 6016-6120 South Broadway, St. Louis, Mo.

Lewin Metals Corporation, Monsanto Post Office, East St. Louis, Illinois.

Marks Lissberger & Son, Inc., 23-01 Borden Avenue, Long Island City, N. Y.

Metals Refining Company (The Glidden Company), Hammond, Indiana.

Nassau Smelting & Refining Company, 50 Church Street, New York, N. Y.

National Bearing Metals Corp., 4930 Manchester Avenue, St. Louis, Mo.

National Lead Company, 111 Broadway, New York, N. Y.

Northwest Lead Company, 1744 Fourth Avenue, South, Seattle, Washington.

North-Western Metal Manufacturing Company, 1328 North Second Street, Minneapolis, Minn.

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Park Utah Consolidated Mines Company, Continental Bank Bldg., Salt Lake City, Utah.

Republic Metals Corporation, 273 Green Street, Brooklyn, N. Y.

Reynolds Metals Company, 19 Rector Street, New York, N. Y.

Rochester Lead Works, 380 Exchange Street, Rochester, N. Y.

St. Joseph Lead Company, 250 Park Avenue, New York, N. Y.
Sherman Lead Company, Wallace, Idaho.
The Sherwin-Williams Company, 101 Prospect Avenue, N. W., Cleveland, Ohio.
Silver King Coalition Mines Company, 1010 Kearns Bldg., Salt Lake City, Utah.
Silverstein and Pinsof, Inc., 1123 West 14th Street, Chicago, Illinois.
Standard Rolling Mills, Inc., 264 Calyer Street, Brooklyn, N. Y.
Sunshine Mining Company, Miller Bldg., Yakima, Washington.
Tamarack & Custer Consolidated Mining Company, Wallace, Idaho.
Tintic Standard Mining Company, Walker Bank Bldg., Salt Lake City, Utah.
Nathan Trotter & Company, 36 North Front Street, Philadelphia, Pa.
United American Metals Corporation, 196 Diamond Street, Brooklyn, N. Y.
United States Smelting Refining & Mining Co. Inc., 57 William St., New York, N. Y.
USL Battery Corporation, Niagara Falls, N. Y.
Wetherill & Bro., 30th below Chestnut Street, Philadelphia, Penna.
White Metal Rolling & Stamping Corp., 80 Moultrie Street, Brooklyn, N. Y.
Winchester Repeating Arms Company, New Haven, Conn.

October 1933.

1595 Members of The Lead Industries Association.

May, 1942.

Alpha Metal & Rolling Mills, Inc., 363 Hudson Ave., Brooklyn, N. Y.
The American Metal Co. Ltd., 61 Broadway, New York, N. Y.
American Smelting & Refining Co., 120 Broadway, New York, N. Y.
Baker Lead Mfg. Co., 28 Cherry St., Worcester, Mass.
Bunker Hill & Sullivan Mining & Concentrating Co., Kellogg, Idaho
Cambridge Smelting Co., 100 Pacific St., Cambridge, Mass.

Chief Consolidated Mining Co., Eureka, Utah.
Crown Metal Co., 117-9 E. Washington St., Milwaukee, Wis.
Dayrock Mining Co., Wallace, Idaho.
*Dickson Weatherproof Nail Co., P. O. Box 334, Evanston, Ill.
Division Lead Co., 836 W. Kinzie St., Chicago, Ill.
The Eagle-Picher Lead Co., American Bldg., Cincinnati, Ohio
*The Electric Auto-Lite Co., Toledo, Ohio
Ethyl Gasoline Corp., 405 Lexington Ave., New York, N. Y.
Euston Lead Co. (The Glidden Co.), 500 Penn Ave., Scranton, Pa.
Evans Lead Co., Charleston, W. Va.
Evans Metal Co., P. O. Box 97, No. Side Branch, Atlanta, Ga.
Federal Mining & Smelting Co., 120 Broadway, New York, N. Y.
Federated Metals Division of American Smelting & Refining Co., 120 Broadway, New York, N. Y.
The Flemm Lead Co., Inc., Bradley Ave. & School St., Long Island City, N. Y.
W. P. Fuller & Co., 301 Mission St., San Francisco, Calif.
Gardiner Metal Co., 4820 S. Campbell Ave., Chicago, Ill.
General Lead Manufacturing Co., 2132 Market St., Denver, Colo.
Goldsmith Bros. Smelting & Refining Co., 58 E. Washington St., Chicago, Ill.
Hammond Lead Products Inc., First Trust Building, Hammond, Ind.
Hecla Mining Co., Wallace, Idaho
Hercules Mining Co., Wallace, Idaho
Hudson Smelting & Refining Co., 85-95 Hyatt Ave., Newark, N. J.
Imperial Type Metal Co., 3400 Aramingo Ave., Philadelphia, Pa.
International Smelting & Ref. Co. (Anaconda Sales Co. Agents), 25 Broadway, New York, N. Y.
The Johnston Tin Foil & Metal Co., 6016-6120 S. Broadway, St. Louis, Mo.
Kahn Brothers, 785 Humboldt St., Brooklyn, N. Y.
Kansas City Smelting Co., 2215-23 Guinotte St., Kansas City, Mo.
The Lewin Metals Corp., Monsanto Post Office, East St. Louis, Ill.

Marks Lissberger & Son, Inc., 23-01 Borden Avenue, Long Island City, N. Y.
John R. MacGregor Lead Co., 4520 W. 15th St., Chicago, Ill.
Metals Refining Co. (The Glidden Co.), Hammond, Ind.
National Lead Co., 111 Broadway, New York, N. Y.
North American Smelting Co., Inc., Edgemont & Tioga Sts., Philadelphia, Pa.
Northwest Lead Co., 2700—16th Ave., S. W., Seattle, Wash.
Park Utah Consolidated Mines Co., Continental Bank Bldg., Salt Lake City, Utah
Pittsburgh White Metal Co., 284 Hamilton Ave., Brooklyn, N. Y.
River Smelting & Refining Co., 4195 Bradley Road, Cleveland, Ohio
Rochester Lead Works, Inc., 380 Exchange St., Rochester, N. Y.
St. Joseph Lead Co., 250 Park Ave., New York, N. Y.
Sherman Lead Co., Wallace, Idaho.
The Sherwin-Williams Co., 101 Prospect Ave., N. W., Cleveland, Ohio
Silver King Coalition Mines Co., 1010 Kearns Building, Salt Lake City, Utah
Silverstein & Pinsof, Inc., 1708-1720 Elston Ave., Chicago, Ill.
Standard Rolling Mills, Inc., 143 Jewell St., Brooklyn, N. Y.
Tamarack & Custer Consolidated Mining Co., Wallace, Idaho
Tintic Standard Mining Co., Walker Bank Building, Salt Lake City, Utah
United American Metals Corp., 196 Diamond St., Brooklyn, N. Y.
United States Smelting Refining and Mining Co., Inc., 57 William St., New York, N. Y.
The Victory White Metal Co., 1205 Main St., Cleveland, Ohio
Vulcan Lead Products, 1712 W. St. Paul, Milwaukee, Wis.
The Wensley Metal Products Co., 1445 Osage St., Denver, Colo.
White Metal Rolling & Stamping Corp., 80 Moultrie St., Brooklyn, N. Y.
*Winchester Repeating Arms Co., New Haven, Conn.

* Associate Member.

Directors—Lead Industries Association

1940, 1941, 1942, 1943, 1944.

B. N. Zimmer, V. P., American Metal Co. Ltd. 61 Broadway, NY 6, NY.

F. H. Brownell, Chairman of the Board, American Smelting & Refining Co. 120 Broadway, NY 5, NY.

Clarence Glass, V. P. Anaconda Sales Co. 25 Broadway, NY 4, NY.

S. A. Easton, President, Bunker Hill & Sullivan Mining & Concentrating Co. Kellogg, Idaho.

A. E. Bendelari, Eagle-Picher Lead Co. American Building, Cincinnati 1, Ohio

*J. H. Schaefer, V. P. Ethyl Corp. 405 Lexington Ave. NY 17, NY.

E. L. Newhouse, Jr. Pres. Federated Metals Division of American Smelting & Refining Co. 120 Broadway, NY 5, NY.

L. E. Hanley, Pres. Hecla Mining Co. Wallace, Idaho.

P. E. Sprague, V. P. The Glidden Co. Union Commerce Bldg. Cleveland 15, Ohio

F. W. Rockwell, Pres. National Lead Co. 111 Broadway, NY 6, NY.

O. N. Friendly, General Mgr. Park Utah Consolidated Mines Co., Continental Bank Bldg., Salt Lake City 1, Utah.

Clinton H. Crane, Pres. St. Joseph Lead Co. 250 Park Ave. NY 17, NY.

James Ivers, V. P. Silver King Coalition Mines Co., Kearns Building, Salt Lake City 1, Utah.

J. W. Wade, Pres. Tintic Standard Mining Co., Walker Bank Building, Salt Lake City 1, Utah.

F. F. Colcord, V. P. United States Smelting Refining & Mining Co. 57 William Street, New York 5, NY.

* Director during 1944 only.

Executive Committee—Lead Industries Association.

Chairman	Clinton H. Crane	(address above)
	F. H. Brownell	" "
	F. F. Colcord	" "
	L. E. Hanley	" "
	F. W. Rockwell	" "

Officers—Lead Industries Association.

President	Clinton H. Crane	(address above)
Vice Presidents	F. H. Brownell	" "
	F. W. Rockwell	" "
Secretary & Treasurer	F. E. Wormser	420 Lexington Avenue, New York, N. Y.

1602

Directors—Lead Industries Association.

1934.

B. N. Zimmer, V. P. American Metal Co. Ltd. 61 Broadway, NY; NY.

F. H. Brownell, Chairman of the Board, American Smelting & Refining Co. 120 Broadway, NY, NY.

S. A. Easton, Pres. Bunker Hill & Sullivan Mining & Concentrating Co. Kellogg, Idaho.

R. M. Roosevelt, V. P. Eagle-Picher Lead Co. 420 Lexington Ave. New York, N. Y.

Ivan Reitler, Pres. Federated Metals Corp. 295 Madison Ave. NY, NY.

J. F. McCarthy, Pres. Hecla Mining Co. Wallace, Idaho.

P. E. Sprague, V. P. Metals Refining Co. Cleveland, Ohio.

F. M. Carter, Pres. National Lead Co. 111 Broadway, New York, NY.

G. W. Lambourne, Genl. Mgr. Park/Utah Consolidated Mines Co. Salt Lake City, Utah.

W. Y. C. Hunt, Reynolds Metals Co. Federal Reserve Bank Building, Richmond, Va.

Clinton H. Crane, Pres. St. Joseph Lead Co. 250 Park Ave. NY, NY.

W. Mont Ferry, V. P. Silver King Coalition Mines Co. Salt Lake City, Utah.

J. W. Wade, Pres. Tintic Standard Mining Co., Salt Lake City, Utah.

J. A. McCarthy, V. P. United Metals Selling Co. 25 Broadway, NY, NY.

F. Y. Robertson, V. P. United States Smelting Refining & Mining Co. 57 William St. NY, NY.

Executive Committee—Lead Industries Association.

Chairman,	Clinton H. Crane	(address	above)
	F. H. Brownell	"	"
	F. M. Carter	"	"
	J. F. McCarthy	"	"
	F. Y. Robertson	"	"

Officers—Lead Industries Association.

President	Clinton H. Crane	(address	above)
Vice Presidents	F. H. Brownell	"	"
	F. M. Carter	"	"
Secretary & Treasurer	F. E. Wormser, 420 Lexington Avenue, NY, NY.		

1603 Directors—Lead Industries Association.

1933.

B. N. Zimmer, V. P. American Metal Co. Ltd. 61 Broadway, NY, NY.

H. M. Brush, V. P. American Smelting & Refining Co. 120 Broadway, NY NY.

S. A. Easton, V. P. Bunker Hill & Sullivan Mining & Concentrating Co. Kellogg, Idaho.

R. M. Roosevelt, V.P. Eagle-Picher Lead Co. 420 Lexington Ave. NY, NY.

Ivan Reitler, Pres. Federated Metals Corp. 295 Madison Ave. NY, NY.

J. F. McCarthy, Pres. Hecla Mining Co. Wallace, Idaho.

P. E. Sprague, V. P. Metals Refining Co. Hammond, Indiana.

E. J. Cornish, Chairman of the Board, National Lead Co. 111 Broadway, NY, NY.

G. W. Lambourne, Pres. Park Utah Consolidated Mines Co. Salt Lake City, Utah.

Clinton H. Crane, Pres. St. Joseph Lead Co. 250 Park Avenue, NY 17, NY.

J. A. McCarthy, V. P. United Metals Selling Co., 25 Broadway, NY, NY.

A. A. MacLean, V. P. USL Battery Corp. Niagara Falls, NY.
F. Y. Robertson, V. P. United States Smelting Refining & Mining Co. 57 William St. NY, NY.
R. C. Swanton, V. P. Winchester Repeating Arms Co. New Haven, Conn.

Executive Committee—Lead Industries Association.

Chairman,	Clinton H. Crane	(address above)
	H. M. Brush	" "
	E. J. Cornish	" "
	F. Y. Robertson	" "
	R. M. Roosevelt	" "

Officers—Lead Industries Association.

President	Clinton H. Crane	(Address above)
Vice Presidents	H. M. Brush	" "
	R. M. Roosevelt	" "
Secretary & Treasurer	F. E. Wormser, 420 Lexington Avenue, NY, NY.	

Pigments Division—F. M. Carter, Chairman.

White Lead in Oil Committee.

Members—1933.

W. E. Maston, Chairman, August, 1933
Eagle Picher Lead Company
F. M. Carter, Chairman, September, 1933
National Lead Company
Anaconda Lead Products Co.
Euston Lead Company
W. P. Fuller & Company
National Lead Company
Sherwin-Williams Company
Wetherill & Bro.
Eagle Picher Lead Co.

Non-Member.

E. I. duPont de Nemours & Co. Inc.

Dry Products Committee.

Members—1933.

Harold Rowe, Chairman—1933
National Lead Company
Anaconda Lead Products Co.
Andrews Lead Co. Inc..
Euston Lead Company
Evans Lead Company
Hammond Lead Products Inc.
Metals Refining Co.
National Lead Company
Sherwin-Williams Company
Eagle Picher Lead Co.

1607

Advisory Committee.

White Lead Promotion Program.

1939.

K. C. Brownell, American Smelting & Refining Co.
W. R. Dice, Eagle Picher Lead Co.
Harold Rowe, National Lead Company.
E. V. Peters, St. Joseph Lead Company.
F. F. Colcord, United States Smelting Refining and Mining Co. Inc.

Lead Industries Association.
Graybar Building, 420 Lexington Avenue.
New York, N. Y.

Pigments Division.

White Lead-in-Oil Committee.

New York, N. Y. August 9, 1933.

A meeting of the White Lead-in-Oil Committee of the Lead Pigments Division of the Lead Industries Association was held at the Lawyers Club, New York City, on Wednesday, August 9, 1933, at 2:45 P. M.

Present:	Representing:
W. E. Maston, Chairman	Eagle-Picher Lead Co.
F. M. Carter	National Lead Co.
J. G. McNair	National Lead Co.
Harold Rowe	National Lead Co.
P. E. Sprague	Euston Lead Co.
T. H. Zappert	Euston Lead Co.
S. B. Coolidge, Jr.	Sherwin-Williams Co.
R. L. Ziegfeld, Assistant Secretary.	

Mr. W. E. Maston occupied the chair.

It was agreed that this group would consist of those companies now manufacturing White Lead-in-Oil, and be open to any other company or individual who may become manufacturers of this product as a member of the Lead Industries Association. The present membership follows:

Members:

- Anaconda Lead Products Co.
- Eagle-Picher Lead Co.
- Euston Lead Co.
- W. P. Fuller & Co.
- National Lead Co.
- Sherwin-Williams Co.
- Wetherill & Brother

Non-Member:

- E. I. duPont de Nemours & Co. Inc.

The Supplementary Code of Fair Competition for the Lead Pigments Division was discussed, but no definite recommendations as to its final form were made.

1615 The item of "reports" was given the most consideration, and it was the general sense of the meeting that individual reports of production, stocks, and shipments (or sales) as now reported to the Association be made available to all other members of the group at periodic meetings of the Committee.

Price Lists: At a given date, preferably on or before September 15, 1933, all members of this group will file with the Secretary their price list with terms and conditions of sale. Any change in the lists or terms to the trade shall be reported to the Secretary in writing. Upon making a sale or quotation at variance with this previously announced price list or terms, each member shall notify the Secretary in writing within 48 hours of such variation, giving name to whom made. It was left for decision at next meeting if these variations would be reported promptly to all members of the group or be held for distribution at a regular Committee meeting. Regarding the question of making a price concession on any lead pigment or products designed to cut the price of White Lead, dry or when ground in oil, or using either of these products to cut the other, should be effectively covered by the industry's code.

Grinders Paste White Lead: This product has caused considerable disturbance among the trade, particularly where it has found re-sale as White Lead-in-Oil packed in standard kegs. It was the sense of the group that a means should be found to stop such practice, preferably by a guarantee from buyers that Grinders Paste is for use in their finished products only, and never offered for sale as Pure White Lead-in-Oil. Further consideration of this important point will be given at the next meeting, and include the possibility of restricting the sale of Dry White Lead when it is ground to paste form and sold as Pure White Lead-in-Oil in conjunction with other paint products at below cost.

The Agency or Consignment method of marketing White Lead-in-Oil, as now being used in a restricted territory, extending from New York City south to and including Washington, was thoroughly explained and discussed. At the present time the National Lead Co. and the Eagle-Picher Lead Co. are selling almost exclusively under this plan, and report that jobbers and dealers with hardly a

dissenting voice have approved the plan. The Agency plan is not the exclusive type designed to give certain rights or privileges, which competitors cannot meet, but one
1616 under which a Distributor may sell as many brands as he chooses. It is expected the two companies now using the Agency plan will extend it over a much wider area on or before October first. Under the Agency plan of selling, it is evident many of the abuses and non-profit sales among distributors can be corrected at the same time it removes the practice of—Price Guarantees, Spring Datings, deviation from terms, etc. This method of selling will in the future be described as the "Agency Plan."

Freight Differentials: There is a lack of just what points in the country take on advance differentials over the par list price. It was suggested that a zone basis similar to that used by the Linseed Oil group might be worked out and thus simplify the arrangement. The Chairman agreed to offer further suggestions at the next meeting.

The West Coast situation was briefly discussed, and it was agreed that the Committee should work out some plan for coordinating with this group of manufacturers whereby their territorial conditions as to prices, terms, etc. would not be disturbed. It might be necessary to establish a dividing line between East and West to avoid confusion.

The question of open quotations on Government and State business was thoroughly discussed. Any plan to eliminate excessively low bids would be helpful to the entire industry. The possibility of apportioning such business was discussed. There was a difference of opinion as to the method which might be used—the following being suggested:

Capacity
Last year's Government and State business
Average last three years Government & State business
Average last ten years Government & State business

The group was asked to give this further thought.

Painter's Meetings: It was generally agreed that such meetings have considerable educational value, and therefore have proven useful. The manner of entertainment came in for the most criticism, particularly the advertising of such affairs as dinners, banquets, etc. From relatively small groups usually held in Distributors' stores with "light refreshments" the plan has grown to such an extent that outside halls and hotels are necessary to take 1617 care of the "banquet" feature. Vaudeville has recently come into the scheme of things, and the entertainment feature bids fair to overshadow the educational. Many of the meetings are "padded" for effect, and in some towns as many as four "feeds" have been on tap in one week. Some method might be worked out to keep this plan on its original basis.

The meeting adjourned at 7:45 P. M. to meet in Chicago, Monday, September 11, 1933.

W. E. Maston,
Chairman.

R. L. Ziegfeld,
Assistant Secretary.

1618 COMMISSION'S EXHIBIT NO. 502.

Lead Industries Association
Graybar Building, 420 Lexington Avenue
New York, N. Y.

Pigments Division.

White Lead-in-Oil Committee.

New York, N. Y. September 6, 1933.

A meeting of the White Lead-in-Oil Committee of the Lead Pigments Division of the Lead Industries Association was held at the Commodore Hotel, New York City, on Wednesday, September 6, 1933 at 10:00 A. M.

Present	Representing
F. M. Carter, Chairman	National Lead Co.
F. O. Case	Anaconda Lead Products Co.
J. R. MacGregor	Eagle-Picher Lead Co.
W. E. Maston	Eagle-Picher Lead Co.
F. W. Potts	Eagle-Picher Lead Co.
P. E. Sprague	Euston Lead Co.
T. H. Zappert	Euston Lead Co.
J. G. C. McNair	National Lead Co.
Harold Rowe	National Lead Co.
S. B. Coolidge, Jr.	Sherwin-Williams Co.
A. P. Wetherill	Wetherill & Bro.

F. E. Wormser, Secretary.

Mr. F. M. Carter occupied the chair.

The Chairman suggested that in view of code developments since the last meeting the Division immediately consider what provisions should be included in a Supplementary Code of Fair Competition for the Lead Pigments Division if one were to be filed in Washington prior to the hearing of the Lead Code.

Several paragraphs in the proposed Paint Code, being applicable to the White Lead-in-Oil Division, were adopted as follows:

(1) Guaranteeing Paint Jobs—Definite time guarantee on the life and/or service of the products of the Industry is hereby prohibited.

1619 (2) Misbranding, mislabeling and false advertising—Transactions known to the law as misbranding, mislabeling and false advertising are specifically prohibited by this Code, and after the effective date, shall be punishable as a violation thereof in addition to any other penalties imposed by any other law.

(3) Gifts to Employees of Another—It shall be a violation of this Code for any person engaged in the Industry to offer or give—or permit any representative of his to offer or give—any commission, gratuity, or other thing of substantial value to employees of his customers or prospective customers, except in the case of payments made with the consent of the employer for a definite service rendered.

(4) Exchange of Goods—No manufacturer shall exchange his goods for those of another.

(5) Inducing Breach of Contracts—No manufacturer either directly or indirectly or through his salesmen, representatives, or agents, shall encourage any purchaser of the products of the Industry to disregard or fail to live up to his commitment to another member of the Industry.

(6) Disparagement of Competitors—The use of or participation in the publishing or the disseminating of any false statement, representation or insinuation which disparages the business of a competitor, or attacks the reputation, goods, prices, credit, service or advertising of any competitor or of any other industry, is an unfair and uneconomic practice and is prohibited.

(7) Returned Goods—No merchandise shall be returned without first securing the consent of the manufacturer. On such goods as are accepted for return, a reasonable charge shall be made and freight charges must be prepaid by the shipper returning the merchandise, except in the case of defective products or where in some other way the manufacturer may be responsible.

The following paragraph on Taxes was adopted:

Taxes—Any sales tax uniformly becoming applicable upon all sellers shall be for buyer's account and shall be added to the selling price and paid by the buyer.

The advisability of including a paragraph in the Code covering price lists and the exchange of price information was next considered.

1620 Whereupon it was unanimously resolved that members of this group file with the Secretary their price lists together with terms and conditions of sale. Any change in the said lists and terms shall be reported promptly to the Secretary. Upon making a sale or quotation at variance with the previously reported price list or terms, each member shall notify the Secretary in writing promptly concerning the variation.

It was also agreed to adopt the following paragraph as an unfair trade practice:

No product shall be sold at a concession in price in order to influence the sale of any lead product.

Meeting adjourned at 5:30 P. M.

F. M. Carter,
Division Chairman.

W. E. Maston,
Committee Chairman.

F. E. Wormser,
Secretary.

20

1621 COMMISSION'S EXHIBIT NO. 504.

Lead Industries Association
Graybar Building, 420 Lexington Avenue
New York, N. Y.

Lead Pigments Division.

Dry Products Committee.

Chicago, Illinois. October 27, 1933.

A meeting of the Dry Products Committee of the Lead Pigments Division of the Lead Industries Association was held at the Chicago Athletic Club, Chicago, Illinois, on Friday, October 27, 1933 at 10:00 A. M.

Present	Representing
F. M. Carter, Chairman	National Lead Company
F. O. Case	Anaconda Lead Products Co.
W. H. Hayt	Eagle-Picher Lead Co.
J. R. MacGregor	Eagle-Picher Lead Co.
W. E. Maston	Eagle-Picher Lead Co.
F. W. Potts	Eagle-Picher Lead Co.
R. M. Evans	Evans Lead Company
Wm. Wilke, Jr.	Hammond Lead Products Inc.
P. E. Sprague	Metals Refining Co.
W. P. Carroll	National Lead Co.
O. H. Greene	National Lead Co.
Harold Rowe	National Lead Co.
S. B. Coolidge, Jr.	Sherwin-Williams Co.
J. W. Todd	Sherwin-Williams Co.

F. E. Wormser, Secretary.

Mr. Carter occupied the chair.

The Chairman suggested that the members proceed to discuss the third draft of the Supplementary Code of Fair Competition for the Pigments Division whereupon a general discussion arose as to the desirability of including paragraphs which had been omitted from the third draft relating to the Limitation of Productive Facilities and to Dumping. Divergent views being expressed.

It was moved and seconded that the third draft of the Supplementary Code of Fair Competition for the Lead

Pigments Division be adopted subject to the approval 1622 of the Executive Committee and to be submitted to Washington at a date later to be agreed upon.

Unanimously carried.

The members then proceeded to discuss the features of a Uniform Basis for Sales as provided for in the Code. In the course of this discussion

It was moved and seconded that Article V on Taxes in the third draft of the Supplemental Code of Fair Competition for the Lead Pigments Division be eliminated and be included in Uniform Sales Contracts.

Motion carried.

After much study and discussion outlines setting forth Uniform Bases for the Sale of Lead Oxides and Dry White Lead in Carlots and Less Than Carload Lots, respectively, were drafted, subject to further study by the members. The suggested outlines appear on pages appended.

It was agreed, in deference to existing statutes, that no reference to prices should appear in the outlines except for the specification that "prices were to be agreed upon between buyer and seller."

A question arose as to the possibility of adopting the provisions of the Supplementary Code for the Pigments Division immediately rather than waiting for the approval of the President, but as the decision hinged upon the legality of the Code provisions, the Secretary was requested to procure a legal opinion on the subject, reporting to the Chairman.

Whereupon it was moved and seconded that the third draft of the Supplementary Code of Fair Competition for the Lead Pigments Division, as revised, together with the suggested Uniform Bases for Sale, be submitted to the N.R.A. subject to approval of its legality. (Revised draft appended.)

Unanimously carried.

The meeting adjourned at 11:15 P. M.

F. M. Carter,
Chairman.

F. E. Wormser,
Secretary.

1623 COMMISSION'S EXHIBIT NO. 505.

Lead Industries Association
Graybar Building, 420 Lexington Avenue
New York, N. Y.

White Lead-In-Oil Committee.

Lead Pigments Division.

Chicago, Illinois. October 28, 1933.

A meeting of the White Lead-in-Oil Committee of the Lead Pigments Division of the Lead Industries Association was held at the Chicago Athletic Club, Chicago, Illinois, on Saturday, October 28, 1933 at 9:00 A. M.

Present	Representing
F. M. Carter, Chairman	National Lead Company
F. O. Case	Anaconda Lead Products Co.
W. H. Hayt	Eagle-Picher Lead Co.
J. R. MacGregor	Eagle-Picher Lead Co.
W. E. Maston	Eagle-Picher Lead Co.
P. E. Sprague	Metals Refining Co.
O. H. Greene	National Lead Co.
Harold Rowe	National Lead Co.
S. B. Coolidge, Jr.	Sherwin-Williams Co.

F. E. Wormser, Secretary.

Mr. F. M. Carter occupied the chair.

The Chairman described the new Agency System which the National Lead Company was putting into effect for the sale of its lead-in-oil products, stating that it was an adaptation of a method used by General Electric and other companies and was designed to correct destructive price cutting in the white lead-in-oil business which had seriously affected the marketing of the product. Some other members stated they too were planning to use the consignment system.

Freight and zoning problems were discussed without any understanding or agreement being made.

Mr. Maston suggested that the white lead members endeavor to devise a slogan which might be used by all of

them in advertising during 1934 and also suggested
1624 that the Lead Industries Association might be a very
useful medium for joint publicity purposes with the
added support of the mining and smelting companies in
furthering the use of white lead.

The meeting adjourned at 12:00 A. M.

F. M. Carter,
Chairman.
F. E. Wormser,
Secretary.

1625 COMMISSION'S EXHIBIT NO. 506.

September 11, 1933.

Mr. F. M. Carter, President
National Lead Company
111 Broadway
New York, N. Y.

Dear Mr. Carter:

I have written Mr. Richter as you suggested in your letter of September 8th and a copy of my communication is attached.

Shall I be guided by the policy of keeping Mr. Richter fully informed of our meetings in the future to save you the trouble of further correspondence?

Sincerely yours,
Secretary.

1626 CC. Mr. Carter

September 11, 1933.

Mr. Wm. Richter, General Manager
Fabrics and Finishes Department
E. I. Du Pont de Nemours Company
Wilmington, Delaware.

Dear Mr. Richter:

Mr. F. M. Carter, Chairman of the Lead Pigments Division of the Lead Industries Association, has asked me to provide you with a copy of the Master Code of the Lead Industries Association, together with copies of the Minutes of the two meetings of the Division which have so far been held.

Accordingly, I am pleased to enclose a copy of our Code as it was filed in Washington and the minutes of the meeting of August 8th, Dry Products Committee, and August 9th, White Lead-in-Oil Committee. Just as soon as the minutes of the meeting of September 6 and 7th have been prepared for distribution to our members of this Division, I shall see that you are provided with a copy.

Sincerely yours,

Secretary.

1627

National Lead Company
111 Broadway
New York

F. M. Carter
President

September 8, 1933.

Mr. F. E. Wormser, Secretary
Lead Industries Association
420 Lexington Av.
New York, N. Y.

Dear Mr. Wormser—

I attach copy of a letter which I am sending Mr. Richter, of the Dupont Co. because I want you to know what I have said to him. Will you please see that he is provided with a copy of the master code, and copy of the minutes of the Pigment Section meeting.

I realize that there might be some members of the Committee a little critical about a non-member being posted, but here is a situation where I do feel under obligations to Mr. Richter to be very frank and if he does not get it direct from you I would feel required to send him a copy of my own minutes.

In any event, he has assured me they would go along and co-operate. As a matter of fact, that is a fundamental characteristic of the Dupont Co.—they work co-operatively with others and I am not anticipating any trouble from that source.

Yours very truly,

F. M. Carter,
President.

1628 September 8, 1933.

Mr. W. H. Richter, General Manager
E. I. Dupont de Nemours Co.,
Wilmington, Dela.

Dear Mr. Richter—

You told me you were quite willing that the National Lead Co. should represent your Company in code discussions, held by members of the Lead Industries Association, and you were willing to go along with anything which was agreeable to the others.

There have been several meetings of the Pigment Section, without however having as yet reached a final draft. There are, however, several features about which I think you should have some information and it is for that purpose that I write you.

As I think you know, Lead Industries Association adopted a master code covering only the subject of rates of wages and hours of labor. This was filed with the Administration and members were granted the use of the Blue Eagle. I am asking Mr. Wormser, Secretary of the Lead Industries Association to send you a copy of that code so that you will be fully informed.

As you will note, the right was given to file supplementary codes for the several Divisions, and what I refer to now relates to the Pigment Section, the only part, I think, in which you have an interest. I am asking Mr. Wormser to provide you with the minutes of the last meeting, and hope there will be no objection to your receiving it through this channel. If there is, I will pass it on to you direct as soon as I get it.

The only feature which I expect you will find it difficult to agree with is the Agency System for selling white lead, in oil, which we are expecting to adopt later in the season. It has not been announced nor are we in a position to say anything about it, but we discussed it with members of the Pigment Section. Under this Agency System, we will follow the plan which we have been testing out during the current year in some of the eastern markets. Under this plan, we consign a stock to the dealer, and he acts as our agent. It is practically the same plan as has been in successful use for many years by the General Electric Co. for the sale of Mazda lamps. It permits us to control the resale price, which is a feature of vital importance to the corroder selling in markets like the New York district, for example; where, under present conditions, prices were absolutely demoralized, lead in oil being sold some times below the cost to the dealer.

1629 In operating the plan, we have been "choosey" in the selection of agents, seeking the better class of dealer, but not refusing to sell any one who could qualify because of the size of outlet offered, and who could subscribe to the requirements of the contract. We expected a good deal of trouble but the Atlantic Branch, in this metropolitan district, has found occasion to discipline only two agents. In each case, they were obliged to withdraw the agency and take the stock away because of the dealer not conforming to the prescribed schedule of prices.

Under this Agency Plan, the dealer is not bound to the sale of any one particular brand of lead, but is free to handle such other brands as he chooses. We do, however, expect him to maintain the market on such other brands as well as our own, although we have no control over that.

Under this plan we have been confining all quantity sales to agents, that is to say, we have sold no dealer on the 5-ton or carload basis without his being an agent. Industrials or large consumers have, of course, been sold without regard to the agency basis, that plan being adapted only to a dealer or distributor.

As I say, this plan has been in effect in this metropolitan district; also in Baltimore, Washington, Philadelphia and surrounding district, ever since the first of the year. It has operated even better than we had hoped, and we are planning to give it a wider application so that in 1934 it will be in effect generally, except possibly at far western points.

When the plan was first discussed, I will confess I, and pretty generally all of my confreres, were violently opposed to selling on a plan which involved selling on consignment. While selling on consignment is admittedly an evil, I now feel confident that of the two evils with which we are confronted, we have chosen the lesser in selecting the agency system.

Now, then, we discussed the plan at the meeting of the Pigment Section the other day and found both Sherwin Williams Co. and Glidden Co. radically opposed because of its consignment feature. I can well understand it and I would expect your reaction to it would be the same because it will involve you in embarrassing situations with paint customers. Sherwin-Williams frankly told us they could not follow such a method. By the way, the code under which the Pigment Section will work contemplates each member filing with the Secretary of the Lead Industries Association, a price list representing list upon which he sells and his regular discounts. Each member is asked to report to the Secretary deviations from this list. He is a free agent to make whatever price he chooses but is under obligations to report it to the Secretary, and he in turn will inform the other members. In this respect, it parallels the method used in the old days of the Lead Institute, of which Dupont was a member. I might add, by the way, it worked very well in those days.

As you will, I think, observe from the above brief outline, Dupont should find itself in a position to readily function and conform to the code requirements. I certainly hope that this will be true, for in all of my own thinking I have tried constantly to keep in mind the great desirability of avoiding conditions or situations which might be found
1630 onerous to some member of the Association. Whatever plan we work under should be practical and workable for all concerned.

I am not trying to post you fully in all details as to what has been discussed and done, but rather, because I felt an obligation to do something in the way of informing you as to discussions held; feeling a responsibility because of your generous offer to put Dupont's interest in our hands.

With very kind regards,

Yours very truly,

Signed (F. W. Carter),
President.

1631 COMMISSION'S EXHIBIT NO. 507.

September 17, 1934.

Mr. F. M. Carter, President,
National Lead Company,
111 Broadway,
New York, N. Y.

Dear Mr. Carter:

I am enclosing copy of a proposed draft of letter to Mr. Janssen, requesting extension of the temporary exemption from the provisions of Section 2, Article VII and Schedule A, granted us under date of June 27, 1934.

If you and Mr. Roosevelt, as Chairman of the Pigments Division approve this draft, I shall mail it to Washington tomorrow.

Will you, therefore, kindly telephone me your criticisms and your suggestions?

Sincerely yours,

Secretary.

1632 September 17, 1934.

OK 9/18/34

Mr. R. M. Roosevelt, Vice President,
Eagle-Picher Lead Company,
420 Lexington Avenue,
New York, N. Y.

Dear Mr. Roosevelt:

I am enclosing copy of a proposed draft of letter to Mr. Janssen, requesting extension of the temporary exemption from the provisions of Section 2, Article VII and Schedule A, granted us under date of June 27, 1934.

If you and Mr. Carter approve this draft, I shall mail it to Washington tomorrow.

Will you, therefore, kindly telephone me your criticisms and your suggestions?

Sincerely yours,

Secretary.

1633 **Proposed Draft.**

Dear Mr. Janssen:

Under date of June 27, 1934, an order granting temporary exemption from the trade and marketing provisions for the Lead Pigments Division of the Lead Industry, particularly in reference to the provisions of Section 2 of Article VII and Schedule A was granted by the Administrator for a period of three months from that date, provided "that such exemption be granted without prejudice to further extension beyond three months if at the end it shall appear to the Administrator that the Industry has been unable to determine upon either the execution of Section 2 of Article VII and Schedule A, which is a part thereof or upon modification thereof."

Inasmuch as the Lead Pigments Division has not yet been able to determine upon the modification of Article VII, Section 2 it desires, a further extension for a period of at least three months granting temporary exemption from the provisions of Section 2, Article VII and Schedule A is respectfully requested.

Very truly yours,

Secretary.

1644 COMMISSION'S EXHIBIT NO. 508.

Mr. F. O. Case, Manager July 27, 1933.
Anaconda Lead Products Company
East Chicago, Ind.

Dear Mr. Case:

I believe that the notice which I sent out on July 25th, referring to the forthcoming meetings of the Lead Pigments Division, crossed your letter of the 24th in the mail. By this time you will know of course that Mr. Carter is planning to devote August 8th to a meeting and discussion of the Dry White Lead and Oxide problems to be followed on the 9th with a meeting of the Lead-in-Oil group.

Although I realize that the lead oxide meeting is not very important to you I do hope you will be able to be with us on August 9th. In any event, I shall see that the point you bring out for discussion about the LCL differentials is placed before the meeting.

With very best wishes,

Sincerely yours,

Secretary.

1645 Anaconda Zinc Oxide Department

International Lead Refining Company

General Sales Office
East Chicago, Ind.

Office of General Sales Manager

Plants:
Akron, Ohio
East Chicago, Ind.

July 24, 1933.

Mr. F. E. Wormser,
Secretary,
Lead Industries Association,
420 Lexington Avenue,
New York, N. Y.

Dear Mr. Wormser:

I have at hand yours of the 21st enclosing a copy of the minutes of the last meeting of the Lead Industries Association, Lead Pigment Division. I note the amended code as proposed and voted upon. Personally, I am sorry that the base rate should not have been at least 40¢ and the hours somewhat lower. I do not think that we can get by with the schedule we are placing in our code, but hope that when it comes to chiseling with the Governmental authorities that we will come out reasonably well.

I note the probable points that are to come up for discussion at the August 8th meeting. As far as I can tell, these do not apply to lead-in-oil and dry white lead.

I am not certain that it will be possible for me to be in New York on the 8th. I am also uncertain as to what should be added to the list for discussion, because I do not know how broad the discussion will be. One thing I would like to see discussed is, however, the question of an LCL differential. This has been brought up by the National Lead Company on the Pacific Coast and I understand that they are going to charge a differential of one-quarter of a cent for all shipments under five tons. This applies to dry lead only.

With kindest personal regards, I am,

Very truly yours,

F. O. Case,
Manager.

FOC:ajd

1646

Lead Industries Association
420 Lexington Avenue
New York, N. Y.

July 25, 1933.

Members of the Lead Pigments Division:

In order to facilitate consideration and disposition of the problems peculiar to the several products represented in your Division, the Chairman, Mr. F. M. Carter, has appointed the following to act as Chairmen of the Sub-Committees set opposite their names:

Mr. W. E. Maston—Chairman, Lead-in-Oil Committee.
Mr. Harold Rowe—Chairman, Dry White Lead and Lead Oxides Committee.

Each member of this Division becomes automatically a member of one or both of these Sub-Committees, depending upon the pigment or pigments he manufactures.

The forthcoming meeting of the members of the Lead Pigments Division on August 8th at the Lawyers Club, 115 Broadway, New York, will consider first, the problems of the lead oxide group and it is planned to follow this meeting on August 9th with a meeting of the producers of white lead-in-oil & dry white lead.

If you have not already done so it will be very helpful indeed if you will mail to Mr. Carter or myself your views as to what trade practices may properly be included in the discussion on both the 8th and 9th. All suggestions will be summarized and presented for consideration at the meetings.

Very truly yours,
F. E. Wormser,
Secretary.

By Order of the Chairman.

1657 COMMISSION'S EXHIBIT NO. 513.

September 18, 1933.

Mr. W. E. Maston, Vice President
Eagle-Picher Lead Company
Temple Bar Building
Cincinnati, Ohio.

Dear Mr. Maston:

Thank you for the map and list of old freight differentials attached to your letter of September 14th.

Sincerely yours,

....

Secretary.

1658 The Eagle-Picher Lead Company

Producers of
Lead, Zinc and Allied Products
Temple Bar Building
Cincinnati

General Offices
Cincinnati

Thursday
September 14—1933

Mr. F. E. Wormser, Secretary
Lead Industries Association
New York, New York.

Dear Wormser:

Today I am forwarding map and list of old freight differentials to the following members of the Lead in Oil group:

F. O. Case	Anaconda Lead Products Co.
S. B. Coolidge, Jr.	Sherwin-Williams Co.
P. E. Sprague	Euston Lead Company
T. H. Zappert	Euston Lead Company
A. P. Wetherill	Wetherill & Brother

The National Lead Company is fully informed of the details, and are gathering further data on this important matter. When suggestions come in I shall endeavor to get them in shape so that a final report may be submitted for approval of the next group meeting.

For your information file I am sending you a map and list of freight differential points.

Yours very truly,
W. E. Maston,
Chairman,
White Lead-in-Oil Committee.

wem-q

1659 List of Differentials and points to which they apply in territory East of the Mississippi River.

	LCL
Virginia	
¼¢ per lb.	
Norfolk	.64
Richmond	.59
Danville	.78
North Carolina	
½¢ per lb.	
High Point	.93
Charlotte	.91
Winston-Salem	.84
Greensboro	.84
Durham	.84
Wilmington	.95
Raleigh	.84
⅝¢ per lb.	
Asheville	.80
South Carolina	
⅜¢ per lb.	
Charleston	1.03
¾¢ per lb.	
Columbia	.93
Georgia	
½¢ per lb.	
Savannah	1.05
¾¢ per lb.	
Albany	1.00
Athens	.91
Atlanta	.85
Augusta	.96
Columbus	.93
Macon	.93
Rome	.80

Florida	
½¢ per lb.	
Jacksonville	1.13
Alabama	
⅜¢ per lb.	
Mobile	1.06
½¢ per lb.	
Bessemer	.86
Birmingham	.86
Montgomery	.93
Tennessee	
¼¢ per lb.	
Memphis	.80
Nashville	.67
½¢ per lb.	
Chattanooga	.72
Johnson City	.74
Knoxville	.65
Kentucky	
⅛¢ per lb.	
Paducah	.47
Illinois	
⅛¢ per lb.	
Cairo	.47
Galesburg	.48
Moline	.51
Quincy	.51
Rock Island	.51
Michigan	
⅛¢ per lb.	
Escanaba	.75
¼¢ per lb.	
Sault Ste. Marie	.76

1660 List of Differentials and Points to which they apply in territory West of the Mississippi River:

Wisconsin	
⅛¢ per lb.	
Eau Claire	.78
LaCrosse	.74
Superior	.89
Wausau	.73
Minnesota	
⅛¢ per lb.	
Duluth	.89
Mankato	.87
Minneapolis	.86
St. Paul	.86
Winona	.77
North Dakota	
½¢ per lb.	
Fargo	1.09
South Dakota	
¼¢ per lb.	
Sioux Falls	.95
½¢ per lb.	
Aberdeen	1.11
Nebraska	
⅛¢ per lb.	
Lincoln	.94
Omaha	.88
Iowa	
⅛¢ per lb.	
Burlington	.51
Cedar Rapids	.66
Clinton	.50
Council Bluffs	.88
Davenport	.51
Des Moines	.78
Dubuque	.53
Fort Dodge	.83
Keokuk	.52
McGregor	.70
Ottumwa	.67
Sioux City	.92
Waterloo	.72

Kansas	
⅛¢ per lb.	
Atchinson	.81
¼¢ per lb.	
Ottawa	.90
Pittsburg	.94
Topeka	.92
½¢ per lb.	
Salina	1.04
Wichita	1.07
⅝¢ per lb.	
Hutchinson	1.09
Oklahoma	
⅞¢ per lb.	
McAlester	1.18
Oklahoma City	1.21
Tulsa	1.11
Missouri	
⅛¢ per lb.	
Kansas City	.81
St. Joseph	.81
Hannibal	.51
Kirksville	.67
¼¢ per lb.	
Joplin	1.02
Springfield	1.02
Arkansas	
½¢ per lb.	
Little Rock	1.02
Louisiana	
⅜¢ per lb.	
New Orleans	.52
½¢ per lb.	
Shreveport	1.21
Texas	
¾¢ per lb.	
Beaumont	1.42
Galveston	1.47
Houston	1.47
1¢ per lb.	

Amarillo	1.47
Austin	1.52
Brownsville	1.79
Cisco	1.47
Corsicana	1.37
Dallas	1.37
Ft. Worth	1.37
Lubbock	1.52
Paris	1.26
San Antonio	1.52
Sherman	1.32
Sweetwater	1.52
Waco	1.47
Wichita Falls	1.35
1⅛¢ per lb.	
El Paso	1.84
New Mexico	
1⅛¢ per lb.	
Albuquerque	2.48
*Arizona	
1¼¢ per lb.	
Phoenix	2.48
Douglas	2.48
Tucson	2.48

* The advance differential in the State of Arizona is the resale price.

On shipments of 20-ton cars to the above points in Arizona 1¢ advance differential applies.

On shipments of 25-tons carload, ¾¢ advance differential applies.

1662 COMMISSION'S EXHIBIT NO. 514.

Anaconda Lead Products Company
East Chicago, Indiana
Office of General Sales Manager Plant East Chicago, Ind.

September 27th, 1933

Mr. F. E. Wormser,
Secretary,
Lead Industries Association,
420 Lexington Avenue,
New York.

Dear Mr. Wormser:

I am glad to receive yours of the 22nd concerning the debatable Paragraph VII of the tentative Pigment Code. If I read your letter correctly, I understand that selling below cost does not apply to white lead. In other words, Mr. Carters' intention is, that it shall not apply to white lead but to other lead oxide pigments. Reporting of white lead prices is intended to take care of the situation as regards white lead itself.

Would it not be possible to show in the code that white lead is exempted from this provision. I would hesitate to have a joint code drawn up, having only part of it apply to white lead, but to the layman reading it, have it read as if it all applied to every pigment.

This may not be a serious proposition because in our particular case we probably could figure the cost from the ore, and technically get out from under the clause. I see no reason, however, why we should be obliged to go to a lot of trouble to keep from violating the code technically, when others might take a different view and not pay any attention to the clause.

1663 As I understand it, certain provisions in the zinc oxide might be in the same category as Paragraph VII. They are getting around this by showing that they do not apply to certain products. Would it not be possible to handle this clause in this way?

With kindest regards,

Sincerely yours,
F. O. Case,
Manager.

F.O.Case:ed

1664 Copies Sent to Mr. F. M. Carter
Mr. J. C. McCarthy.

September 22, 1933.

Mr. F. O. Case, Manager,
Anaconda Lead Products Company,
East Chicago, Indiana.

Dear Mr. Case:

Supplementing my letter to you of September 19, I am wondering whether I made my thought clear to you that the Committee which considered Paragraph VII of the tentative Pigments Code had in mind the situation which might develop if manufacturers making oxides for their own consumption (there are some today) were to market surplus output at cost or at a very slight margin over cost. This, of course, would tend to demoralize the oxide market.

Regarding your view that any member selling white lead might be guilty of infraction of the Code because of situations created by metal market fluctuations, I have discussed the subject further with Mr. Carter, and he seems to feel that any member selling white lead will undoubtedly dispose of it at a price above the price basis outlined in our paragraph and that inasmuch as the seller would report to the Secretary any sale made below the listing filed, destructive price cutting would thereby be reduced.

No attempt was made at the meeting definitely to establish overhead cost and other expense items, because it would involve setting up accounting systems, probably accompanied by hiring accounting talent, and was considered unnecessary.

As you probably know, the lead oxides have been, and will continue to be, sold to large buyers at a price very little above the cost of production.

When I see you again, I hope to discuss some of these subjects in more detail with you.

With kindest regards,

Sincerely yours,

....

Secretary.

1665 National Lead Company
111 Broadway
F. M. Carter
President

New York
September 21, 1933.

Mr. F. E. Wormser, Secretary
Lead Industries Association
420 Lexington Avenue
New York, N. Y.

Dear Mr. Wormser:

Regarding question raised by Mr. Case as to Paragraph 7 in the Tentative Code. I think Mr. Case will understand the situation better when he knows that the Committee were thinking about the situation which might develop if the battery manufacturer, making black oxides for his own consumption, were to market surplus product at cost, or a very slight margin above cost.

Mr. Case seems to fear that any member selling white lead, for example, might be guilty of infraction because of situations created by wide fluctuations in the metal market. There might be some irregularities develop at such a time, but I am sure the price will always be above the basis as outlined in our paragraph. Furthermore, the seller would be reporting to the Secretary any sale made below the list he had filed. This, I think, is the only feature we need to be concerned about.

It is true that no attempt was made to definitely establish cost, overhead and other expense items. As a matter of fact, oxides have been, and will continue to be, sold to large buyers at a price very little above actual cost of production. It will be impossible to sell this product on a wide margin basis. We are anxious, however, to achieve a basis which will be a little above cost, and that is all that was contemplated in this paragraph.

I am sorry that Mr. Case was offended by actions taken in his absence. As you know, the discussion developed in connection with oxides and (if I remember rightly) when Mr. Case appeared for a short time on the day following the white lead discussion, we told him of all that had been done during his absence.

However, I think when he more clearly understands what happened and the cause of it, he will feel all right about our actions.

Yours very truly,
F. M. Carter,
President.

1666 September 19, 1933.

Mr. F. O. Case, Manager
Anaconda Lead Products Company
East Chicago, Indiana.

Dear Mr. Case:

Thank you for the suggestions contained in your letter of September 15th, relating to the proposed Code for the Pigments Division.

I am sure it was furthest from the thoughts of any of those who attended the recent meetings to introduce anything into the Code which meets with strenuous objections from the members. It so happened that the subject matter of Articles VI and VII in the tentative draft was discussed by the Oxide group and with the intimate tie-up with white lead manufacture on the part of most oxide producers, it was felt that the broad principles expressed in Articles VI and VII, namely, production capacity control, selling below cost, and dumping applied to all the lead pigments.

As you know, we were working and still are under great pressure to perfect the supplementary codes prior to our hearing on September 23rd (now postponed to October 4th) and if another joint meeting of the Division was to be avoided with proper notice to all out of town members, it was essential to draft a preliminary code for immediate submission to and criticism of all interested parties. The draft you received was purely tentative and the criticisms contained in your letter of September 15th and suggestions from other members are precisely what we need in order to perfect the working draft.

I might also point out that Articles VI and VII were mainly my work with legal aid, in carrying out the sense of the meeting of September 7th as I was requested
1667 and authorized to do, and at which meeting these important topics were discussed.

No member has as yet formally approved either of these articles and they await such revision or elimination as may be ultimately decided upon.

With best wishes,

Sincerely yours,

Secretary.

1668 Anaconda Lead Products Company
East Chicago, Indiana

Plant
Office of General Sales Manager East Chicago, Ind.

September 15, 1933.

Mr. F. E. Wormser,
Secretary,
Lead Industries Association,
420 Lexington Avenue,
New York City.

Dear Mr. Wormser:

I am in receipt of the minutes of the last meetings held in New York, by the Pigment Division of the Lead Industries Association. I am also in receipt of the proposed amendment of the Supplementary Code of Fair Competition for the Lead Pigments Division of the Lead Industries Association.

All of this is in agreement with my understanding, with exception of Articles 6 and 7. To my knowledge these were not taken up at the meeting.

Under Article 3, Section C, I might suggest that technical service work be explicitly exempted from this proposition. All of the producers have technical service men, and may, at times, do something for a firm that is really valuable. No doubt, this would not be understood to come under paragraph C, but to prevent any misunderstanding, it might be well to so state it.

Article 6, so far as I know, was not discussed. Perhaps it came under the oxide division, but as lined up here it would also apply to white lead. I see no particular objection to it, but I do see a big objection to including a paragraph not discussed or not voted upon.

Paragraph 7 is very ambiguous, and I am entirely against it as written. It may be just "window dressing", but if so, it may lead to trouble. It will take a great deal better definition of cost to make this paragraph mean anything, than a statement that such costs will include a portion of overhead, selling and administrative expense.

With violent fluctuations in the metal market and a staple price over a fairly long time of pigments such as white lead, we might all conceivably be guilty of infraction of the code. In addition, companies such as our own would have difficulty establishing exact costs and allocating the overhead to the various metals. Of course, we nor
1669 no one else can sell below cost indefinitely or generally without going out of business. Perhaps it is meant that each one shall judge his own interpretation of costs.

In addition to being against this paragraph, I also want to strenuously object to the inclusion of propositions in the code that have not been considered. What is the use in spending time and money to attend meetings and then have the important things run in without consideration?

With kindest personal regards, I am

Yours very truly,
F. O. Case,
Manager.

F.O.Case:vlc

1685 COMMISSION'S EXHIBIT NO. 517.

cc-R. P. Prentys
F. E. Wormser

November 10, 1933

Mr. W. P. Fuller, Jr. President
W. P. Fuller & Co.,
San Francisco, Calif.

Dear Mr. Fuller—

The third draft of the Pigments Section Code of the Lead Industries Association has been approved by the Executive Committee of the L. I. A. and Mr. Wormser has been told to file same as Washington when directed to do so. If so filed, it would come up for a hearing with Lead Industries Code when that hearing has been set by the administration. At the moment, it is impossible to guess how soon that will be.

You have received a copy of this third draft of the Supplemental Code, and it is the conclusion of all who attended the discussions, that it will be desirable to file at Washington. Mr. Wormser discussed with legal counsel the question as to whether, under the Sherman Act, all members of the industry could use a common form of sales contract without violation of said Act. While counsel was not disposed to give a definite and clear go ahead signal, it was concluded that the common use of a contract which established grades, basis for pig lead when differential contracts were being made, duration of contract, and general terms but which left the question of price strictly a matter between buyer and seller, with no agreement among members of the selling industry, there should be no contravention of the Sherman Act. Furthermore, it is believed by all members of the Pigment Section, who were present during the discussions, that it is desirable to have the privilege of using such uniform sales contract embodied as a feature in the code.

As the matter now stands, the Code provisions, aside from the usual features covering misbranding, libeling of competitors, etc., contain only two important paragraphs, one which relates to filing of price lists, reporting exceptions and the other to the use of a uniform sales contract.

It is, therefore, a very simple set up as compared with some of the elaborate codes which have been developed.

While you have been kind enough to give me your proxy in respect to these code matters, I would like, before Mr. Wormser is directed to file the Supplemental Code, to have your definite approval of such action and will therefore appreciate prompt reply.

With my kind regards,

Yours very truly,
F. M. Carter
President

1689 COMMISSION'S EXHIBIT NO. 518.

January 18, 1934

Mr. W. E. Maston, Vice President
Eagle Picher Lead Co.,
Cincinnati, O.

Mr. Harold Rowe, Assistant to the President
National Lead Co.,
Building.

Gentlemen:

Deputy Administrator Janssen suggested as a substitute for the paragraph written in our Code providing for the filing of price lists, the following paragraph:

"Schedules:

Section 3. Each member of the industry, within ten days after the effective date of this Code, shall file with the Secretary of the Code Authority, the price or prices and terms and conditions of sale at which he is offering his products for sale; this original filing to become effective on the date of such filing. Any member of the industry desiring to change the price or prices of his products and terms and conditions of sale shall notify the Code Authority of such intention by filing his revised schedule, which shall become effective ten days thereafter. The revised schedule so filed with the Code Authority shall be immediately distributed among the members of industry. In the event that any member of industry shall not receive sufficient notice of the filing by any other member of revisions in such other member's price, or prices or terms and conditions of sale, as will enable him to meet such revisions of such other member on the effective date thereof, then if such member shall file with the Secretary of the Code Authority such revisions of his price or prices and terms and conditions of sale as may be required to meet the revisions filed by such other member, within 48 hours after the receipt of notice thereof, the revision so filed by such member shall become effective on the same date as the revisions of such other member, or if they be already effective shall become effective immediately."

This paragraph, as you know, differs radically from that agreed upon by your Committee, which read as follows:

"Price Lists

Section 3. Each member of the Code shall file with the Secretary within ten (10) days after the effective date of this Code, his price list, together with terms and con-
1690 ditions of sale. Any change in the said list or terms shall be reported to the Secretary in writing within twenty four (24) hours after the effective date of such change. Any member making a sale or quotation at variance with his price list or terms on file at the time said sale or quotation is made, shall notify the Secretary concerning the variation by letter, mailed within twenty four (24) hours. The information, as reported, shall be reissued by the Secretary to the members at such time, and in such manner as may be determined by the members of the division."

The writer was in Washington on Tuesday, together with Mr. Wormser. We stated to Mr. Janssen that we do not regard the substituted paragraph as providing a workable and practical set-up. The reasons for this will, I am sure, be obvious to you and need not be gone into at this time.

We were told that the principal reason for suggesting a change is due to the delay they anticipate when the Code comes under the scrutiny of the Consumers Advisory Board, and possibly the Legal Division. Reason for this expected delay seems to be due principally to the fact that it is so different from similar provisions coming before these Boards. Mr. Janssen stated that if his recommended paragraph were used, it would go through without trouble, because it is in a form to which these Boards have become accustomed, because it conforms to paragraphs which have been favorably passed upon in other Codes, whereas in the form as we wrote it, a lot of time would be spent looking for the "nigger in the woodpile".

If we insist, I think there is little doubt that we can reinsert our draft of this paragraph, but it is quite possible it could be re-written in a form more acceptable to all interested. It might, for example, be possible to provide for classification of sales and file price lists applying to such classification. This might produce a more stabilized price structure, upon which I expect we are all agreed is a desired result.

I wish you would pass this on to the people interested and when you have your meeting next week, see if we can come to a conclusion in the matter.

Yours very truly,
(Signed) F. M. Carter,
President.

1691 COMMISSION'S EXHIBIT NO. 519.

February 2, 1934.

Mr. W. E. Maston, Vice President
Eagle-Picher Lead Company
Temple Bar Building
Cincinnati, Ohio.

Dear Mr. Maston:

Thank you for mailing me a copy of the Zone Map for the White Lead-in-Oil Industry.

Very truly yours,

Secretary.

1692 The Eagle-Picher Lead Company

Producers of
Lead, Zinc and Allied Products
Temple Bar Building
Cincinnati

General Offices
Cincinnati

Wednesday
January 31, 1934

Mr. F. E. Wormser, Secretary
Lead Industries Association
New York, New York.

Dear Wormser:

I am enclosing Zone Map for the White Lead in Oil industry. I believe you will find it self-explanatory.

When new points are set up or any suggested change in the differential made they can in the future be passed through your office.

From this map we will eventually build up an official freight arrangement for this division of the lead industry.

Yours very,

W. E. Maston.

wem:q

1697 COMMISSION'S EXHIBIT NO. 522.

(Form of Postal Telegraph.)

October 30, 1933.

Mr. F. M. Carter
c/o Palmer House
Chicago, Illinois

Locke Believes Agreement Upon Suggested Uniform Basis Of Sale Pending Approval From Washington To Code Might Place Us On Uncertain Legal Ground And Might Be Embarrassing Later Stop He Suggests One Member Use Uniform Basis And Others Follow Voluntarily

F. E. Wormser,
Secretary Lead Industries Association

1698 October 30, 1933.

Mr. F. M. Carter
c/o Palmer House
Chicago, Illinois

Dear Mr. Carter:

I called on Mr. Locke this afternoon to obtain his opinion with respect to the legality of immediately installing a Uniform Basis of Sale for the Lead Oxides and Dry Products by agreement among the producers. Mr. Locke read the Supplementary Code provisions, Article II, and also the suggested outlines of the Uniform Basis for Sale. Although he noted that stipulations as to price had been omitted from the outlines, he felt that it might be unsafe to have an agreement prior to the approval of our Code as factors other than price in the Uniform Sales Contracts might possibly be picked up by the authorities as having a bearing on price and hence being in restraint of trade.

He suggested that the best practical solution for the moment seemed to be the adoption of the Uniform Basis of Sale by one or more of the interested members, which could be followed voluntarily by the others, without agreement on the subject but merely because it was individually to their best interests to do so.

I wired you the substance of Mr. Locke's views for no doubt you will wish to discuss the subject further with other members who now happen to be in Chicago.

Sincerely yours,

Secretary.

1706 COMMISSION'S EXHIBIT NO. 523.

F. E. Wormser
Same to W. E. Maston
F. O. Case
R. B. Coolidge, Jr.

November 9, 1933

Mr. P. E. Sprague, Vice President
Metals Refining Co.,
Hammond, Indiana.

Dear Mr. Sprague—

While legal counsel did not give Mr. Wormser a go ahead signal on the question as to whether the adoption of a uniform sales contract would be in strict conformity with the Sherman Act, it is our own conclusion that the common use of a contract which sets forth general terms, specifies grades, etc. but is entirely free from any price agreement would not be subject to criticism or involve us in trouble with the Sherman Act, or similar legislation.

The Pigments Section supplemental code as finally agreed upon was submitted to the Executive Committee of Lead Industries Association and was approved. Mr. Wormser was told to await directions with respect to filing. He is ready to file at Washington whenever so told.

I understand it to be the wish of the Committee to have this Supplemental Code filed so that it may be included in the hearing to be given to Lead Industries at some future time.

In order to avoid any possible misunderstanding, would like to have each member of the Committee who has sat in the discussions, confirm the above understanding, which please do by writing a letter to me.

Yours very truly,
F. M. Carter,
President.

1707 COMMISSION'S EXHIBIT NO. 524.

Lead Industries Association
420 Lexington Avenue
New York, N. Y.

Lead Pigments Code
Fourth Draft

Supplemental Code of Fair Competition for the Lead Pigments Division of the Lead Industries Association.

As provided in Art. XIII of the Code of Fair Competition for the Lead Industries, hereinafter termed the "Master Code," this supplementary code is hereby made a part of said Master Code with the same force and effect as any provisions thereof, except that it shall be applicable only to Lead Pigments, as defined in Art. II of said Master Code; i. e., basic carbonate white lead, dry or in oil, basic lead sulphate, dry or in oil, litharge, red lead, dry or in oil, orange mineral and other lead oxides with or without metallic lead content.

Price Lists.

Art. I—Each member of the Code shall file with the Secretary within ten (10) days after the effective date of this Code, his price list, together with terms and conditions of sale. Any change in the said list or terms shall be reported to the Secretary in writing within twenty-four (24) hours after the effective date of such change. After December 31, 1933, any member making a sale or quotation at variance with his price list or terms on file at the time said sale or quotation is made, shall notify the Secretary concerning the variation by letter, mailed within twenty-four (24) hours. The information, as reported, shall be reissued to the members at such time and in such manner as may be determined by them.

Uniform Sales Contracts.

Art. II—Uniform sales contracts specifically designed for use in selling Dry White Lead and Lead Oxides shall be developed as soon as practicable and thereafter used by all members after said contract forms shall have been adopted by a two-thirds vote of members manufacturing the products to which the contracts apply. From time to time, changes in the uniform sales contracts can be made by a two-thirds vote of members manufacturing such products. All sales shall conform to the conditions set forth in the uniform contract forms.

1708 Unfair Trade Practices.

Art. III—The following shall be considered unfair trade practices and are violations of this code:

(a) Misbranding or misrepresentation of lead pigments.

(b) Making or promising to any purchaser or prospective purchaser of lead pigments, or to any officer, employee, agent or representative of any such purchaser or prospective purchaser, any commission, gratuity, or other payment or remuneration, directly or indirectly, except in the case of payments made with the consent of the employer for definite service rendered.

(c) Inducing or in any manner attempting to induce a breach, default or cancellation of a contract between a competitor and his customer during the term of such contract.

(d) Guaranteeing for a definite time the life and/or service of lead pigments.

(e) Making false or derogatory statements with respect to the prices, policies, products, practices, business or credit of any competitor.

(f) Exchanging the products of a member for those of another.

(g) No merchandise shall be sold at a concession in price, or used as an inducement, to influence the sale of any lead product, nor shall any concession be given in the price or terms of sale of a lead product to influence the sale of any other merchandise.

Returned Goods.

Art. IV—No member of the Code shall accept the return of merchandise without first giving consent for its return. On such goods as are accepted for return, a reasonable charge shall be made and freight charges must be prepaid by the shipper returning the merchandise, except in the case of defective products or where in some other way the manufacturer may be responsible.

1709

Lead Industries Association
420 Lexington Avenue
New York, N. Y.

(To be submitted to N. R. A.
with Supplemental Code.)

Suggested Outline of Uniform Basis for Sale of Lead Oxides in Carlots.

"Sale" or "Order" as used herein refers to any transaction whereby a Seller quotes on or becomes obligated to deliver material.

Whatever terminology may be used, the intent and meaning thereof shall conform to the following requirements of sales:

(1) Material—Dry Oxides of lead, or mixtures consisting principally thereof, each grade of material to be specifically designated.

Guarantees as to Pb_3O_4 content of red lead shall be given on only two grades, designated respectively as Grinders Red Lead 95% Pb_3O_4 and Grinders Red Lead 98% Pb_3O_4.

(2) Quantity—As agreed between Buyer and Seller, provided, however, that

(a) Each order or release shall be an amount not less than 20 tons.

(b) Any quantity to be supplied at an average price must be definitely fixed prior to the beginning of the period whose average governs the price thereof.

(3) Period—To be specified.

(4) Packages—To be agreed upon and specified for each grade of material. Special packages required by buyer shall be charged for according to cost.

(5) Price—As agreed between Buyer and Seller.

(6) Delivery—F. o. b. cars Seller's shipping point, or by truck, f. o. b. Buyer's premises.

(7) Transportation Allowance—The actual freight paid by buyer. Cartage may be allowed at warehouse points where it is a practice to make free store-door delivery.

(a) On pick-ups by Buyer's trucks: No allowance.

(b) Shipment via Buyer's boats: Allow the actual amount Seller would have paid for like transportation at published rates in effect on date of shipment up to 40¢ per cwt. after equalization with nearest manufacturing point.

(8) Shipment—As ordered, within 60 days from date of order in carlots with reasonable notice to Seller, provided also.

(a) Deferred shipments are to be billed on the basis originally applicable thereto: Seller may bill orders in excess of 500 tons on basis of pig lead cost therefor on 30 day terms from date of sale.

(b) Shipments at average price shall be made only against orders placed before the beginning of the period whose averages governs the price, each such order to constitute a firm sale.

1710 (c) Shipment by truck must be complete on each carlot quantity the third day from date of shipping the first portions.

(9) Terms—One per cent for cash ten days from date of shipment, net thirty days, subject to Buyer maintaining credit position acceptable to Seller.

(10) Taxes—Any tax or other governmental charge upon the production and/or shipment of goods sold imposed by Federal law, and applicable to this transaction, shall be added to the price and be paid by the Buyer.

(11) Force Majeure—Subject to strikes, fires, floods, delay in transportation and other causes beyond the control of either party; this contract to be deemed suspended so long as such causes prevent or delay its execution.

1711
Lead Industries Association
420 Lexington Avenue
New York, N. Y.

(To be submitted to N. R. A.
with Supplemental Code.)

Suggested Outline of Uniform Basis for Sale of Lead Oxides and Dry White Lead in Less Carload Lots.

"Sale" or "Order" as used herein refers to any transaction whereby a Seller quotes on or becomes obligated to deliver material.

Whatever terminology may be used, the intent and meaning thereof shall conform to the following requirements of sale.

(1) Material—Dry oxides of lead, or mixtures consist-

ing principally thereof, and dry basic carbonated white lead, each grade of material to be specifically designated.

Guarantees as to Pb_3O_4 content of red lead shall be given on only two grades, designated respectively as Grinders Red Lead 95% Pb_3O_4 and Grinders Red Lead 98% Pb_3O_4.

(2) Quantity—Any amount as agreed.

(3) Period—As desired, to be specified.

(4) Packages—As agreed.

(5) Price—(a) Spot sales—Sellers card or quoted price in effect on date of order.

(b) Contract sales—Price to govern will be sellers card or quoted price on date of contract protected against advance or decline on undelivered portions to the end of the current calendar quarter.

(6) Delivery—F. o. b. cars Seller's shipping point, or by truck, f. o. b. Buyer's premises.

(7) Transportation Allowance—The actual freight paid by buyer. Cartage may be allowed at warehouse points where it is a practice to make free store-door delivery.

(8) Shipment—(a) Spot sales—As ordered within 30 days from date of order with reasonable notice to Seller.

(b) Contract sales—As ordered with billing of undelivered portion or cancellation at end of calendar quarter at Buyer's option.

(9) Terms—One per cent for cash in ten days from date of shipment, net 30 days, subject to Buyer maintaining credit position acceptable to Seller.

(10) Taxes—Any tax or other governmental charge upon the production and/or sale and/or shipment of goods sold imposed by Federal law, and applicable to this transaction, shall be added to the price and be paid by the Buyer.

(11) Acceptance—Subject to price changes.

1714 COMMISSION'S EXHIBIT NO. 527.

From File of F. M. C.

2501 Union Central Bldg.
Cincinnati, Ohio,
June 15, 1933

Mr. E. J. Cornish,
Chairman of the Board,
National Lead Company,
New York, N. Y.

Dear Mr. Cornish:

Upon my arrival home, and as soon as I was able to see Mr. Hertenstein, I acquainted him with the gist of our conversation in reference to the Eagle-Picher Lead Company and your present interest in the purchase of the assets of that company.

From him, I learned that the Eagle-Picher Lead Company, within the next two weeks, is to have a stockholders vote upon the reduction of the company's stock from a par of $20.00 to one of $10.00 per share. He is so engrossed with this matter that he does not see how he can take up the matter with Washington, which we discussed in your office, until after the date of this meeting.

He also stated that he thought there would be considerably more difficulty in getting the permission you desired in view of the apparently hostile attitude of the present Administration toward business.

I will keep you posted.

Very truly yours,
/S/ Albert Chatfield.

AC

1715 COMMISSION'S EXHIBIT NO. 528.

From File of F. M. C.

Cincinnati, Ohio,
July 20, 1935.

Mr. F. M. Carter, Pres.,
National Lead Company,
111 Broadway,
New York City.

Dear Mr. Carter:

Since my return, I have been in touch with Mr. Hertenstein in an effort to get together 675,000 shares of the stock of The Eagle-Picher Lead Company, less the 50,000 shares owned by your Company. This, I find, will be a harder job than I anticipated, owing to the fact that after 500,000 shares have been rounded up, the remainder of the stock is held in much smaller lots and it takes considerable time and effort to call upon and explain the matter in question to each stockholder.

However, I am working toward the end you proposed and will acquaint you with the progress I am making from time to time.

Yours very truly,
/S/ Albert Chatfield.

1718 COMMISSION'S EXHIBIT NO. 533.

E. I. Du Pont De Nemours & Company, Inc.
Wilmington, Delaware

March 2, 1938.

National Lead Co.,
111 Broadway,
New York, N. Y.

Gentlemen:

—Mr. Harold Rowe—
Assistant to President.

For the purpose of calculating replacement costs of Dry White Lead and Grinders Lead under our new contract, will you please forward your latest price card, showing the published card price of subject material, and also forward card showing any subsequent changes, addressed to the DuPont Company, care of the following individuals:—

H. S. Risler
2100 Elston Ave.
Chicago, Ill.

W. R. Barrett
Hamilton & St. John Sts.
Flint, Michigan

W. F. Tierman
3500 Gray''s Ferry Rd.
Philadelphia, Pa.

F. J. Griffin
Everett-Station 49
Boston, Mass.

C. W. Clark
Rm. 8024, duPont Bldg.
Wilmington, Del.

D. C. Kennedy
Box 608
South San Francisco,
Cal.

T. F. Burns
Box 188
West Toledo Station
Toledo, Ohio.

Yours very truly,

/S/ E. B. Nelson—smp
Division Purchasing Agent.

E. B. Nelson—smp

1719 COMMISSION'S EXHIBIT NO. 534.

E. I. Du Pont De Nemours & Company, Inc.
Wilmington, Delaware

March 10, 1938

National Lead Co.
111 Broadway
New York, N. Y.

Attention of Mr. Harold Rowe
Assistant to the President

Dear Harold:

In connection with my letter of March 8th and your favorable reply of the 9th, will ask if you do not think it advisable for you to give us a letter at the beginning of every period, covering the price to be in effect for the quarter, subject to any decline changes. In this way we would not depend upon receipt of the card, but would have for our file and transmitting to departments, the exact and definite information.

Yours very truly,
/S/ E. B. Melson,
Division Purchasing Agent.

E. B. Melson :smp

1720 COMMISSION'S EXHIBIT NO. 535.

National Lead Company
111 Broadway
New York

September 13, 1940.

Mr. E. B. Nelson, Div. Pur. Agt.
E. I. du Pont de Nemours & Co., Inc.
Wilmington, Delaware.

Dear Mr. Nelson—

This is to advise you that we are making no change in our prices for Dry White Lead and Basic Lead Sulphate, in barrels, for contracts for the fourth quarter of 1940. Shipments up to and including December 31st will be charged as follows:

For Plants Located in the East and Middle West Territories	C/L Lots	LCL Lots
Dry White Lead	7¢ per pound	7¼¢ per pound
Basic Lead Sulphate	6¼¢ per pound	6½¢ per pound

Pacific Coast prices—¼¢ per pound higher.

Any reduction in our prices during this period will become effective at once.

We are very pleased to have the opportunity to continue to serve your company.

Yours very truly,
/s/ Harold Rowe—K.V.

EH

1721 COMMISSION'S EXHIBIT NO. 538.

National Lead Company
111 Broadway
New York

April 8, 1941.

Mr. J. L. Roque, Ass't. Mgr.
National Lead Company
Chicago Branch.

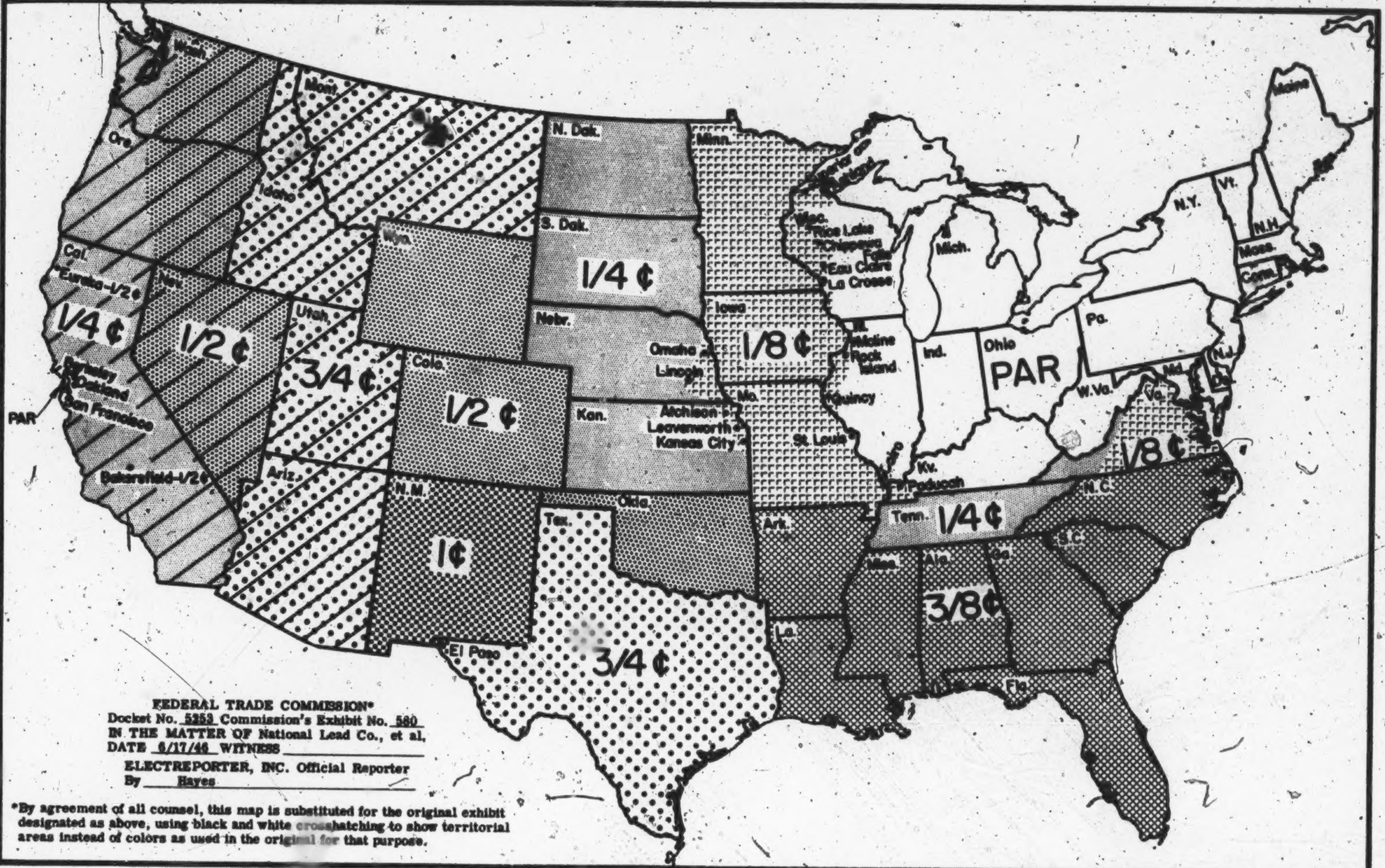
Dear Mr. Roque—

Referring to your letter of April 4th and mine of the 7th regarding cash discounts, I notice an article on page 4 in this week's Oil, Paint & Drug Reporter in which the DuPont Company announces a change in their policy which will become effective on orders received on and after May 1st. Perhaps others in the industry will follow this good example which would make it possible for us to do likewise without too much disturbance among our dealers.

Yours very truly,
/S/ Harold Rowe.

HR:EH

Com. Exhibit 580.


Wash.
Ore.
Mont.
Idaho
N. Dak.
S. Dak.
1/4 ¢
Minn.
Superior and Ashland
Wisc.
Rice Lake
Chippewa Falls
Eau Claire
La Crosse
Mich.
Maine
Vt.
N.H.
N.Y.
Mass.
Conn.
R.I.
Col.
Eureka-1/2 ¢
1/4 ¢
Nev.
1/2 ¢
Utah
3/4 ¢
Wyo.
Nebr.
Omaha
Lincoln
Iowa
1/8 ¢
Ill.
Moline
Rock Island
Ind.
Ohio
PAR
Pa.
N.J.
Md.
Del.
Berkeley
Oakland
San Francisco
PAR
Colo.
1/2 ¢
Kan.
Atchison
Leavenworth
Kansas City
Mo.
Quincy
St. Louis
W. Va.
Va.
1/8 ¢
Bakersfield-1/2 ¢
Ariz.
N.M.
1¢
Okla.
Cairo
Ky.
Paducah
Tenn.
1/4 ¢
N.C.
Tex.
Ark.
S.C.
Miss.
Ala.
Ga.
3/8 ¢
La.
El Paso
3/4 ¢
Fla.

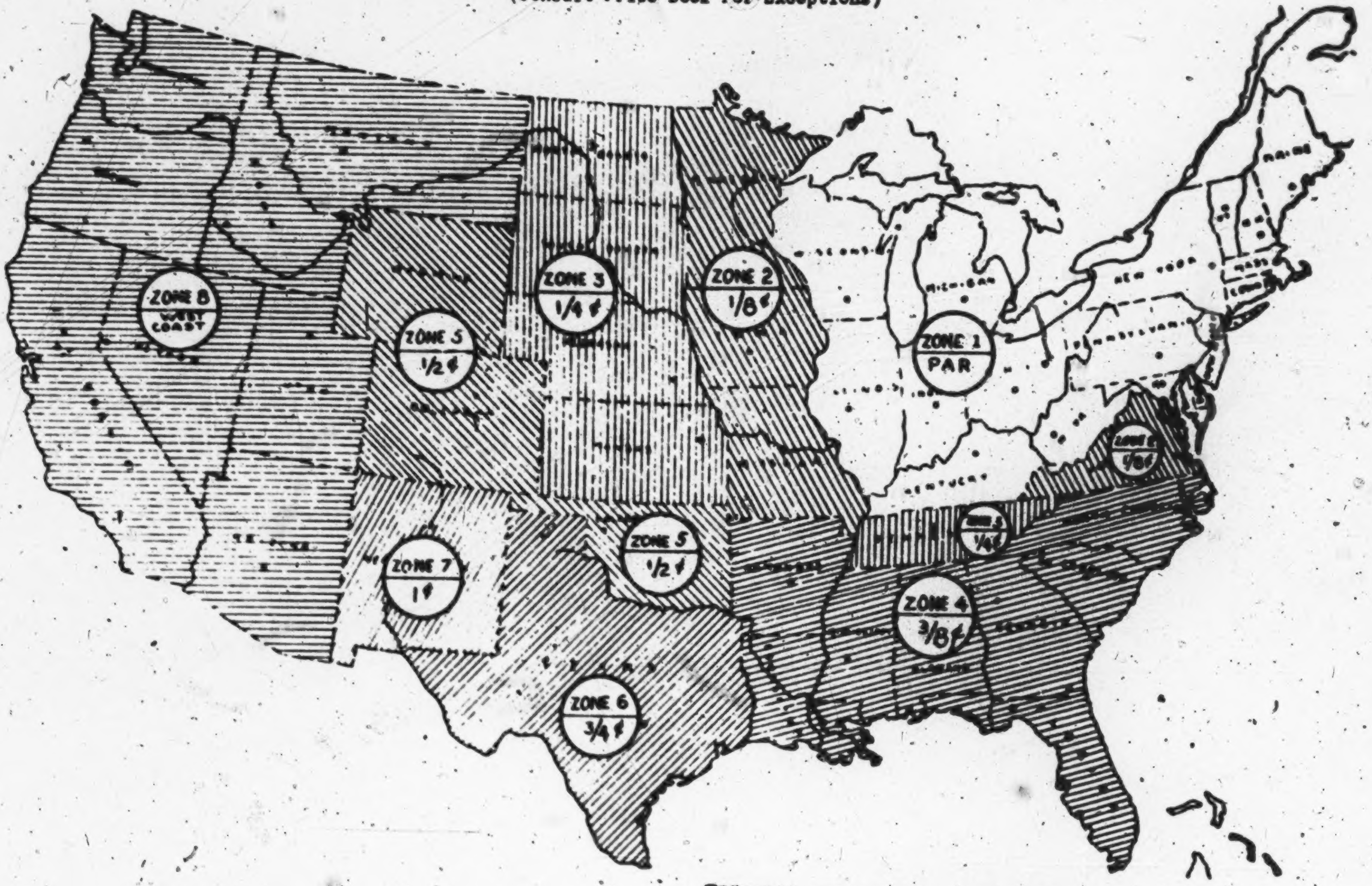
FEDERAL TRADE COMMISSION*
Docket No. 5253 Commission's Exhibit No. 580
IN THE MATTER OF National Lead Co., et al,
DATE 6/17/46 WITNESS ____________
ELECTREPORTER, INC. Official Reporter
By Hayes

*By agreement of all counsel, this map is substituted for the original exhibit designated as above, using black and white crosshatching to show territorial areas instead of colors as used in the original for that purpose.

Comm. Ex. 585

January 1, 1937

MAP SHOWING ZONE BOUNDARIES AND WHITE L/O DIFFERENTIALS
(Consult Price Book For Exceptions)


ZONE 8
WEST COAST
ZONE 5
1/2¢
ZONE 3
1/4¢
ZONE 2
1/8¢
ZONE 1
PAR
ZONE 2
1/8¢
ZONE 3
1/4¢
ZONE 7
1¢
ZONE 5
1/2¢
ZONE 4
3/8¢
ZONE 6
3/4¢

FEDERAL TRADE COMMISSION
DOCKET No. 5253 EXHIBIT NO. 585
IN THE MATTER OF NATL LEAD Co. ET AL
DATE 6-18-46 WITNESS
OFFICIAL REPORTER

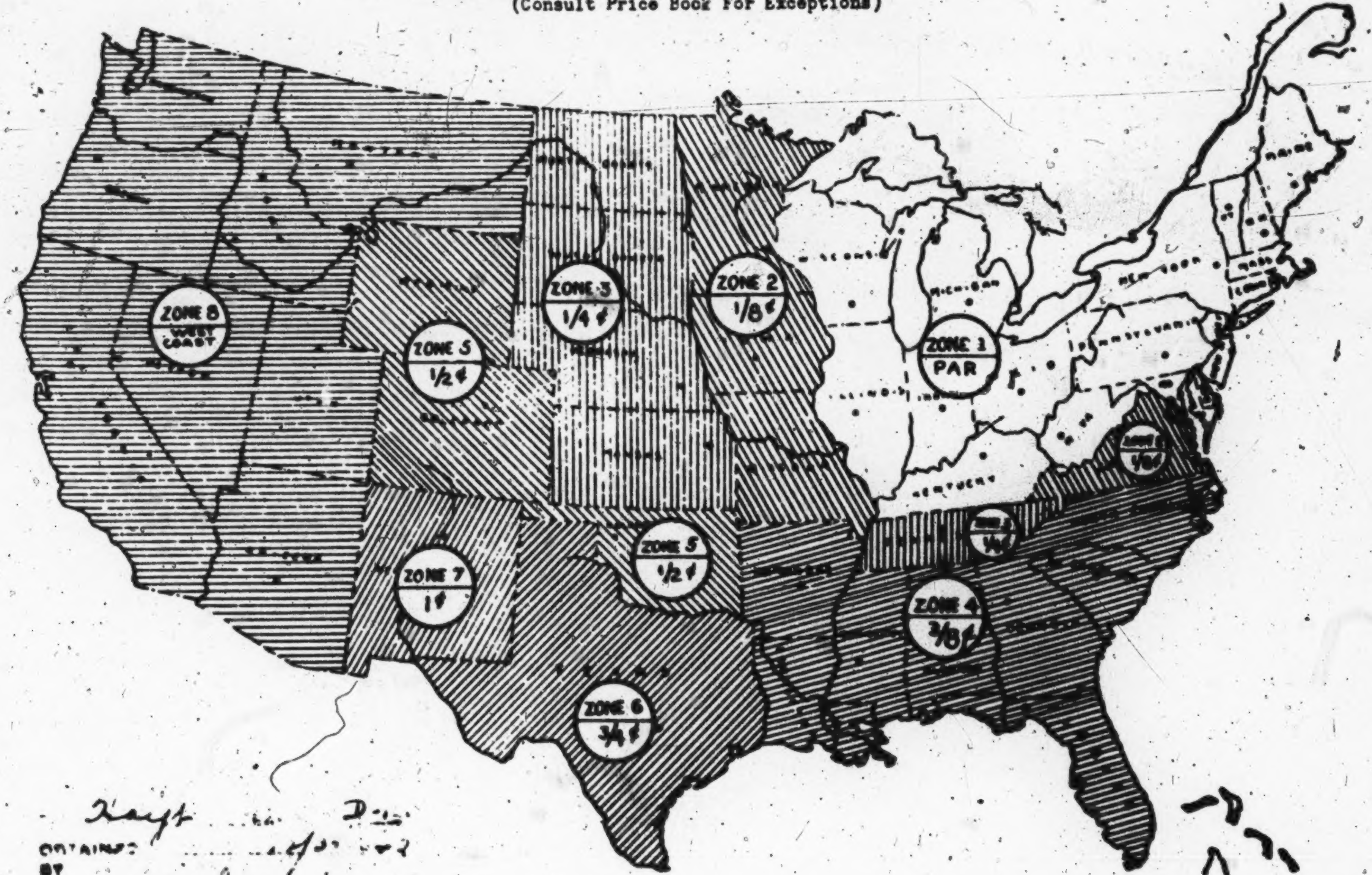
ELECTROPORTGY, INC
BY Noyez

1759

2472

Com. Ex. 586

MAP SHOWING ZONE BOUNDARIES AND WHITE L/O DIFFERENTIALS
(Consult Price Book For Exceptions)


ZONE 8
WEST COAST
ZONE 5
1/2¢
ZONE 3
1/4¢
ZONE 2
1/8¢
ZONE 1
PAR
ZONE 7
1¢
ZONE 5
1/2¢
ZONE 6
3/4¢
ZONE 4
3/8¢
MICHIGAN
KENTUCKY
NEW YORK
PENNSYLVANIA
MAINE
MASS.

Kayt D

OBTAINED BY

Dunn

ATTORNEY

1-1 file

36

1760

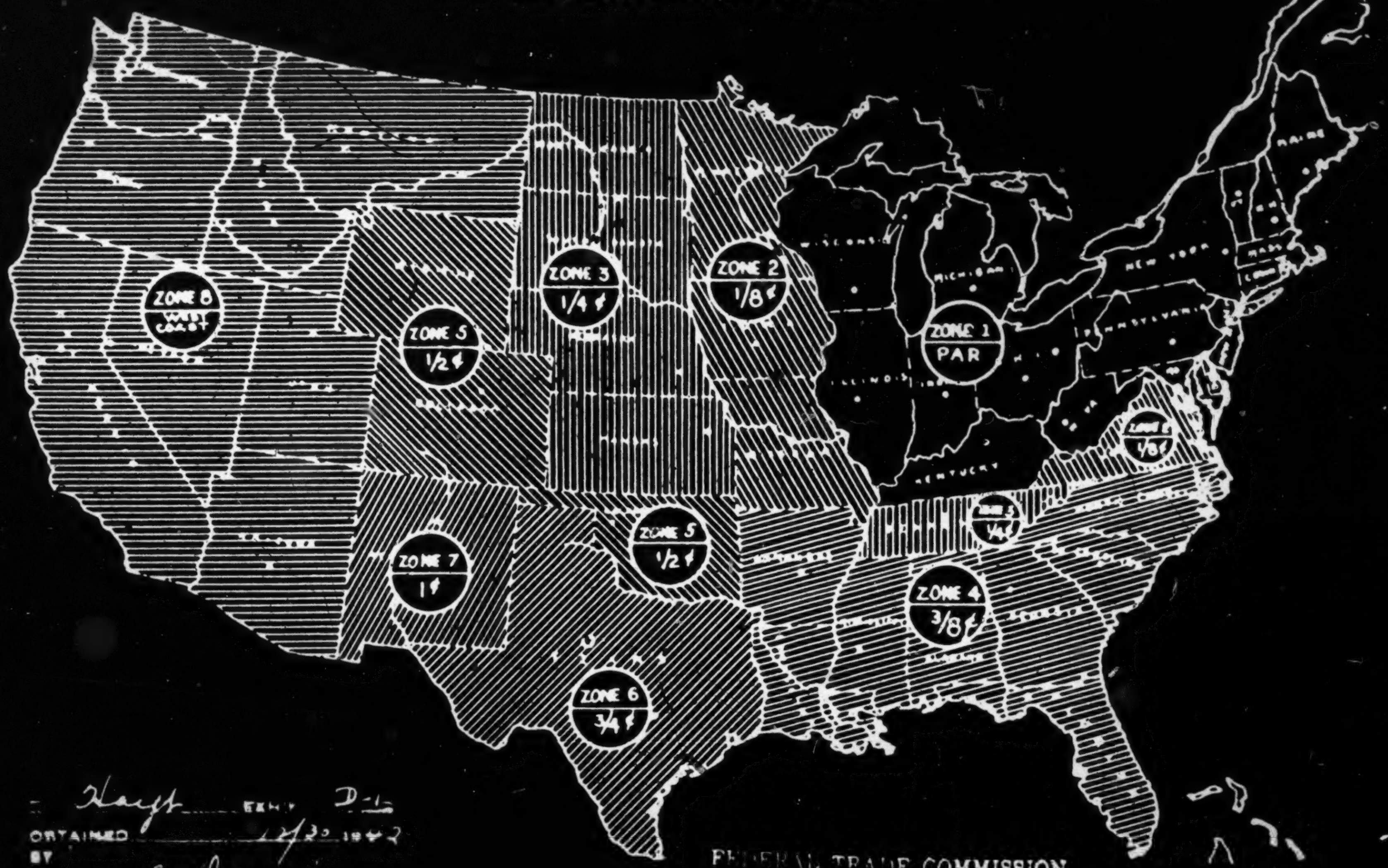
2473

Comm. Ex. 587
R.D.

January 1, 1937

MAP SHOWING ZONE BOUNDARIES AND WHITE L/O DIFFERENTIALS

(Consult Price Book For Exceptions)


ZONE 8
WEST COAST
ZONE 5
1/2¢
ZONE 3
1/4¢
ZONE 2
1/8¢
ZONE 1
PAR
WISCONSIN
MICHIGAN
ILLINOIS
KENTUCKY
NEW YORK
PENNSYLVANIA
MAINE
MASS.
ZONE 2
1/8¢
ZONE 3
1/4¢
ZONE 7
1¢
ZONE 5
1/2¢
ZONE 4
3/8¢
ZONE 6
3/4¢

Hayes EXHIBIT D-1
OBTAINED 12/30 1942
BY
R. J. Dunn
ATTORNEY EXAMINER
1-17116

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 587
IN THE MATTER OF Nat'l Lead Co. et al
DATE 6/18/46
INC. Official Reporter
by Hayes

36

1761

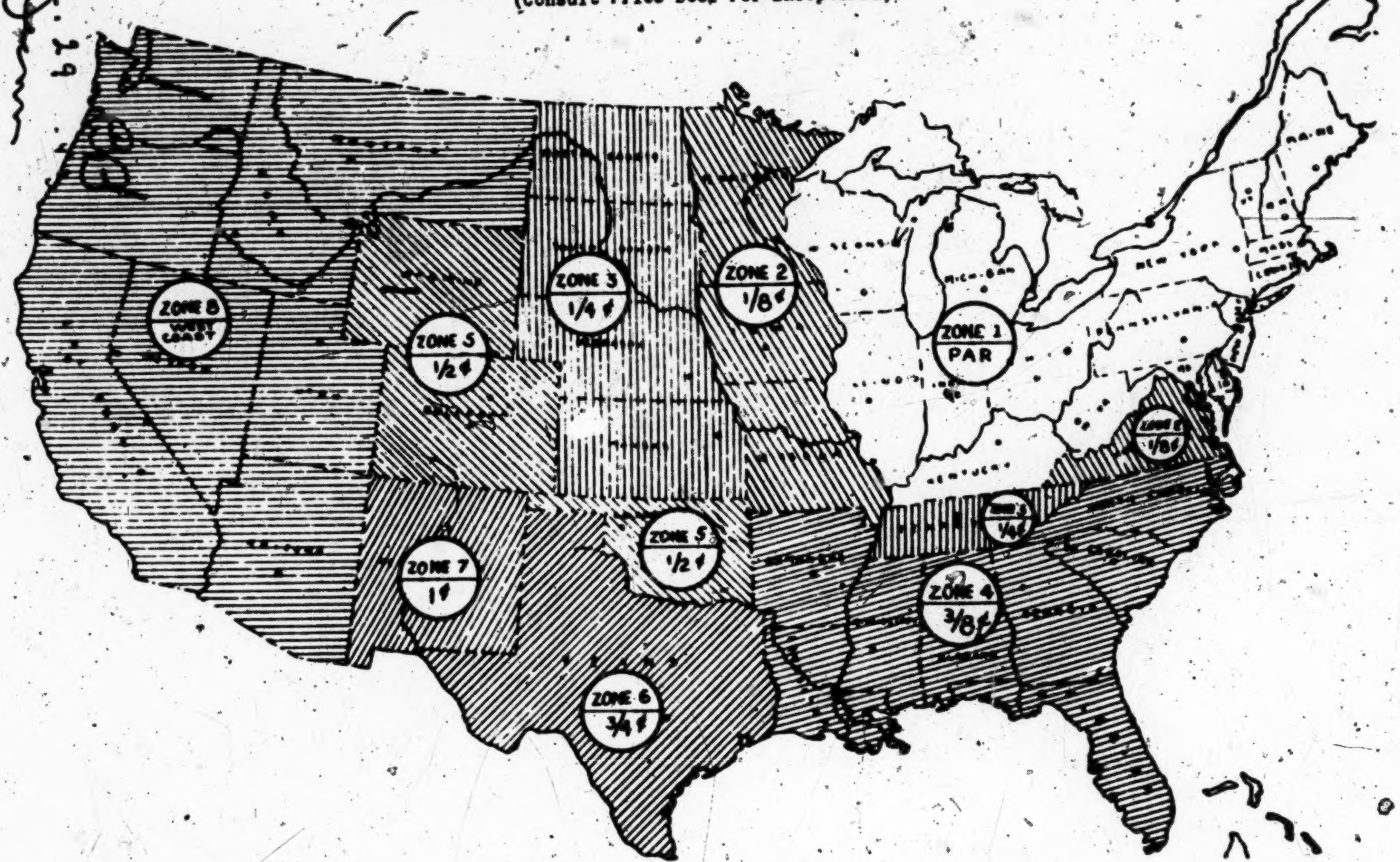
2474

Com. Ex. 588

MAP SHOWING ZONE BOUNDARIES AND WHITE L/O DIFFERENTIALS
(Consult Price Book For Exceptions)

Haight Dec. 29
R. J. Green
1-17-46

January 1, 1937


ZONE 8 WEST COAST
ZONE 5 1/2¢
ZONE 3 1/4¢
ZONE 2 1/8¢
ZONE 1 PAR
ZONE 2 1/8¢
ZONE 3 1/4¢
ZONE 7 1¢
ZONE 5 1/2¢
ZONE 4 3/8¢
ZONE 6 3/4¢

FEDERAL TRADE COMMISSION
DOCKET 5253 EXHIBIT NO. 588
IN THE MATTER OF NAT'L LEAD CO. ET AL
DATE 6/18/46
ELECTROPHONIC, INC. OFFICIAL REPORTER BY ROYER

1762

2475

1763 COMMISSION'S EXHIBIT NO. 589.

The Eagle-Picher Sales Company
General Offices, Cincinnati
Eagle Keg Products.

Explanation of Zones.

Zone 1 (par)

The entire states of:

Maine
Massachusetts
Ohio
New Jersey
Maryland
New Hampshire
Connecticut
Michigan
Delaware
District of Columbia
Indiana
Vermont
Rhode Island
New York
Pennsylvania
West Virginia

Kentucky: except Paducah, Mayfield, Benton and Fulton.

Illinois: except Cairo, Moline, Rock Island, and Metropolis.

Wisconsin: except LaCrosse, Eau Claire, Superior, Menominee, Sparta and Chippewa Falls.

Missouri, following towns only: Kirkwood, Manchester, Maplewood, St. Charles, Webster Groves, St. Louis, Clayton and Ferguson.

Virginia, following counties only: Arlington and Fairfax.

Zone 2 (⅛)

Kentucky, following towns only: Paducah, Mayfield, Benton and Fulton.

Illinois, following towns only: Cairo, Moline, Rock Island, and Metropolis.

Wisconsin, following towns only: LaCrosse, Eau Claire, Superior, Menominee, Sparta and Chippewa Falls.

Missouri, except Kirkwood, Manchester, Maplewood, St. Charles, Webster Groves, St. Louis, Clayton and Ferguson.

Nebraska, following towns only: Lincoln and Omaha.

Kansas, following towns only: Atchison, Kansas City, Galena and Leavenworth.

Minnesota, entire state.

Iowa, entire state.

Virginia: Except Fairfax, Arlington, Bath, Alleghany, Craig, Montgomery, Floyd, Carroll, Pulaski, Giles, Bland, Wythe, Grayson, Smyth, Tazewell, Buchanan, Russell, Washington, Scott, Dickinson, Wise and Lee Counties.

Zone 3 (¼)

Tennessee, entire state.

South Dakota, entire state.

November 1, 1938 Page 5
WL

1764

North Dakota, entire state.

Kansas, entire state: except Atchison, Leavenworth, Kansas City and Galena.

Nebraska, entire state: except Lincoln and Omaha.

Virginia: following counties only: Bath, Alleghany, Craig, Montgomery, Floyd, Carroll, Pulaski, Giles, Bland, Wythe, Grayson, Smyth, Tazewell, Buchanan, Russell, Washington, Scott, Dickenson, Wise and Lee Counties.

Zone 4 (⅜)

Texarkana, Texas.

The entire states of:

Louisiana
Georgia
North Carolina
Arkansas
Mississippi
Alabama
Florida
South Carolina

Zone 5 (½)

The entire states of Oklahoma, Wyoming, Colorado.

Texas: Marshall only.

Zone 6 (¾)

The entire state of Texas, except El Paso, Marshall and Texarkana.

Zone 7 (1¢)

The entire state of New Mexico. Texas: El Paso only.

Zone 8 (Pacific Coast)

The entire states of:

Montana	Utah
Idaho	Nevada
Washington	California
Oregon	Arizona

Note: Check carefully the above Zone Explanation. There have been changes in the Zones themselves and in the differentials. Positively no exceptions to above.

November 1, 1938 Page 6

WL

1765 COMMISSION'S EXHIBIT NO. 590.

The Eagle-Picher Sales Company
General Offices, Cincinnati

Eagle White Lead in Oil (Schedule IV).
Consumers (T8).

Description			FOB	Symbols
Terms: 60 days, 2% cash in 10 days.				
White Lead in Oil.				
Zone 1.				
	Less than 500# lots	500# lots or more		
In 100 # kegs	$13.25	$12.75	(19)	EHIJOQ
50 # "	13.50	13.00	(19)	EHIJOQ
25 # "	13.75	13.25	(19)	EHIJOQ
12½ # "	14.00	13.50	(19)	EHIJOQ
5 # cans	16.25	15.75	(19)	EHIJOQ
1 # "	18.25	17.75	(19)	EHIJOQ
Zones 2, 3, 4, 5, 6 & 7	##	##	(19)	EHIJOQ
Zone 8	**	**	(19)	EHIJOQ

May 1, 1941 Page 11

(Cancels Sheet dated Oct. 1, 1939) WL

1766 Eagle White Lead in Oil (Schedule V).

Miscellaneous Contracting Painters (T16).

Description			FOB	Symbols
Terms: 60 days, 2% cash in 10 days.				
White Lead in Oil.				
Zone 1.				
	Less than 500# lots	500# lots or more		
In 100 # kegs	$12.25	$11.75	(19)	EHIJOQ
50 # "	12.50	12.00	(19)	EHIJOQ
25 # "	12.75	12.25	(19)	EHIJOQ
12½# "	13.00	12.50	(19)	EHIJOQ
Zones 2, 3, 4, 5, 6 &7	##	##	(19)	EHIJOQ
Zone 8	##	##	(19)	EHIJOQ

May 1, 1941. Page 10-A

(Cancels sheet dated Oct. 1, 1939.) WL

1767 Eagle White Lead in Oil (Schedule III).

Preferred Contracting Painters (T15).

Description		FOB	Symbols
Terms: 60 days, 2% cash in 10 days.			
White Lead in Oil.			
Zone 1.			
Lots 5 Tons or Over— 1 Delivery Per Cwt.			
In 100 # kegs	$10.75	(19)	EHIJOQ
50 # "	11.00	(19)	EHIJOQ
25 # "	11.25	(19)	EHIJOQ
12½ # "	11.50	(19)	EHIJOQ
Zones 2, 3, 4, 5, 6 and 7	#	(19)	EHIJOQ
Zone 8	**	(19)	EHIJOQ

Note: Above schedule to be used only with approval of Sales Manager. A majority of the business will be handled direct. In a few rare instances, where a distributor's regular painter customer wishes to purchase five (5) tons at one time, in one delivery, the distributor may participate. His profit will be the difference between his cost ($10.25) per Cwt. and the special five (5) ton price ($10.75) per Cwt. On all such sales Eagle-Picher is to ship direct to contractor.

May 1, 1941 Page 10

(Cancels sheet dated Oct. 1, 1939). WL

1768 **Eagle White Lead in Oil (Schedule II).**

Paint Dealers (T7).

Description			FOB	Symbols
Terms: 60 days, 2% cash in 10 days.				
White Lead in Oil.				
Zone 1.				
	Less than 500# lots	500# lots or more		
In 100 # kegs	$11.50	$11.25	(19)	EHIJOQ
50 # "	11.75	11.50	(19)	EHIJOQ
25 # "	12.00	11.75	(19)	EHIJOQ
12½ # "	12.25	12.00	(19)	EHIJOQ
5 # cans	14.00	13.75	(19)	EHIJOQ
1 # "	15.75	15.50	(19)	EHIJOQ
Zones 2, 3, 4, 5, 6 & 7	#	#	(19)	EHIJOQ
Zone 8	**	**	(19)	EHIJOQ

May 1, 1941 Page 9

(Cancels Sheet dated Oct. 1, 1939) WL

1769 Eagle White Lead in Oil (Schedule I).

Distributors (T14).

Description		FOB	Symbols
Terms: 2%, 15th Prox.			
White Lead in Oil—Any Quantity per Cwt.			
On Consignment.			
Zone 1.			
In 100 # kegs	$10.25	(21)	EJNOPR
50 # "	10.50	(21)	EJNOPR
25 # "	10.75	(21)	EJNOPR
12½ # "	11.00	(21)	EJNOPR
For Direct Sale Only.			
Terms: 60 days, 2% cash in 10 days.			
In 5# cans	$12.25	(21)	EJNOPR
1# "	13.75	(21)	EJNOPR
Zones 2, 3, 4, 5, 6 and 7	#	(21)	EJNOPR
Zone 8	**	(21)	EJNOPR

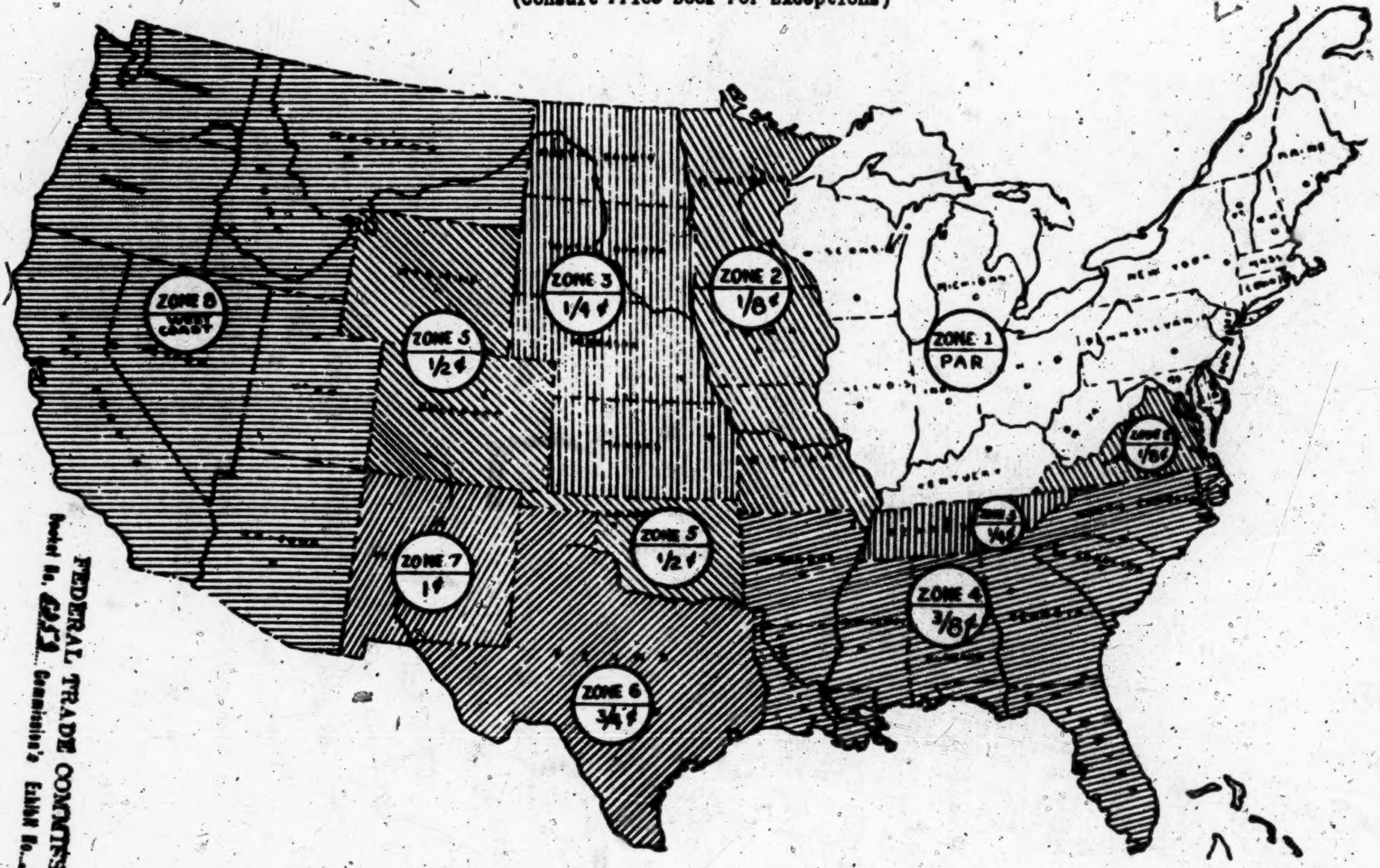
May 1, 1941 Page 8

(Cancels Sheet dated Oct. 1, 1939) WL

Com. Ex. 590-F

January 1, 1937

MAP SHOWING ZONE BOUNDARIES AND WHITE L/O DIFFERENTIALS
(Consult Price Book For Exceptions)


ZONE 8
COAST
ZONE 3
1/4¢
ZONE 2
1/8¢
ZONE 5
1/2¢
ZONE 1
PAR
1/8¢
1/4¢
ZONE 7
1¢
ZONE 5
1/2¢
ZONE 4
3/8¢
ZONE 6
3/4¢
NEW YORK

FEDERAL TRADE COMMISSION
Docket No. 2951 Commission's Exhibit No. 590-F

1770

1771

The Eagle-Picher Sales Company
General Offices, Cincinnati
Eagle Keg Products.

Explanation of Zones.

Zone 1 (par)

The entire states of:

Maine
Massachusetts
Ohio
New Jersey
Maryland
New Hampshire
Connecticut
Michigan
Delaware
District of Columbia
Indiana
Vermont
Rhode Island
New York
Pennsylvania
West Virginia

Kentucky: except Paducah, Mayfield, Benton and Fulton.

Illinois: except Cairo, Moline, Rock Island, and Metropolis.

Wisconsin: except LaCrosse, Eau Claire, Superior, Menominee, Sparta and Chippewa Falls.

Missouri, following towns only: Kirkwood, Manchester, Maplewood, St. Charles, Webster Groves, St. Louis, Clayton and Ferguson.

Virginia, following counties only: Arlington and Fairfax.

Zone 2 ($\frac{1}{8}$)

Kentucky, following towns only: Paducah, Mayfield, Benton and Fulton.

Illinois, following towns only: Cairo, Moline, Rock Island, and Metropolis.

Wisconsin, following towns only: LaCrosse, Eau Claire, Superior, Menominee, Sparta and Chippewa Falls.

Missouri, except Kirkwood, Manchester, Maplewood, St. Charles, Webster Groves, St. Louis, Clayton and Ferguson.

Nebraska, following towns only: Lincoln and Omaha.

Kansas, following towns only: Atchison, Kansas City, Galena and Leavenworth.

Minnesota, entire state.

Iowa, entire state.

Virginia: Except Fairfax, Arlington, Bath, Alleghany, Craig, Montgomery, Floyd, Carroll, Pulaski, Giles, Bland, Wythe, Grayson, Smyth, Tazewell, Buchanan, Russell, Washington, Scott, Dickinson, Wise and Lee Counties.

Zone 3 (¼)

Tennessee, entire state.
South Dakota, entire state.

North Dakota, entire state.

Kansas, entire state: except Atchison, Leavenworth, Kansas City and Galena.

Nebraska, entire state: except Lincoln and Omaha.

Virginia: following counties only: Bath, Alleghany, Craig, Montgomery, Floyd, Carroll, Pulaski, Giles, Bland, Wythe, Grayson, Smyth, Tazewell, Buchanan, Russell, Washington, Scott, Dickenson, Wise and Lee Counties.

Zone 4 (⅜)

Texarkana, Texas.

The entire states of:

Louisiana
Georgia
North Carolina
Arkansas
Mississippi
Alabama
Florida
South Carolina

Zone 5 (½)

The entire states of Oklahoma, Wyoming, Colorado.
Texas: Marshall only.

Zone 6 (¾)

The entire state of Texas, except El Paso, Marshall and Texarkana.

Zone 7 (1¢)

The entire state of New Mexico. Texas: El Paso only.

Zone 8 (Pacific Coast)

The entire states of:

Montana	Utah
Idaho	Nevada
Washington	California
Oregon	Arizona

Note: Check carefully the above Zone Explanation. There have been changes in the Zones themselves and in the differentials. Positively no exceptions to above.

November 1, 1938 Page 6

WL.

1773 Eagle Keg Products.

Identification of Symbols.

T14: Prices shown are available to only those accounts which have been properly approved by Division Manager, and who have subsequently entered into contract with Eagle-Picher which definitely establishes them as an Authorized Distributor.

#—To compute prices, Zones 2, 3, 4, 5, 6, and 7, increase prices per Cwt. shown for Zone 1 as follows:

Zone 2: For all sizes, add 12½¢
Zone 3: For all sizes, add 25¢
Zone 4: For all sizes, add 37½¢
Zone 5: For all sizes, add 50¢
Zone 6: For all sizes, add 75¢
Zone 7: For all sizes, add $1.00

##—To compute prices, Zones 2, 3, 4, 5, 6, and 7, increase prices per Cwt. shown for Zone 1 as follows:

Zone 2: For all sizes, add 13¢
Zone 3: For all sizes, add 25¢
Zone 4: For all sizes, add 38¢
Zone 5: For all sizes, add 50¢
Zone 6: For all sizes, add 75¢
Zone 7: For all sizes, add $1.00

*—Observe special qualifications of these accounts.

**—Quote as instructed by General Office.

E—Prices are net: No customer or quantity discounts.

H—Freight equalized with nearest Authorized Distributor's point on all shipments made to a destination in which no Distributor is located.

I—Freight allowed at not to exceed the established thru rate from nearest stockpoint to any destination in which an Authorized Distributor is located. On shipments to railroads, freight is allowed only to nearest point on buyer's line: to Steamship Lines, freight allowed only to dock. No freight allowance on small quantity shipments which do not equal carrier's minimum lot or rate requirement.

J—Stockpoint warehouses (LCL) quantities: All LCL shipments are to be made from stockpoint which can serve the destination most economically. Stockpoints are located as follows:

Baltimore, Md.
Boston, Mass.
Joplin, Mo.
Kansas City, Kansas.

March 1, 1937. Page 1

(Cancels Sheet Dated January 1, 1937.) WL

1774 Buffalo, N. Y.
Chicago, Ill.
Cincinnati, Ohio
Cleveland, Ohio
Dallas, Texas
Detroit, Mich.
E. St. Louis, Ill.
Milwaukee, Wis.
Minneapolis, Minn.
Newark, N. J.
New Orleans, La.
Pittsburgh, Pa.
Philadelphia

N—Carload quantity defined: 36,000 lbs. All keg products can be shipped in mixed car to secure CL rate. CL shipments are to be made only from Cincinnati, Ohio.

O—Packages: Non-returnable lithographed steel kegs and cans of net weights shown in price schedule. I lb. cans packed 25 pounds to the carton. 5 pound cans packed 10 to the carton. Note: Only White L/O is available in 1 and 5 pound cans.

F.O.B. Points:

(1) Cincinnati, Ohio
(19) Stockpoint Warehouses
(21) Distributor's place of business.

P—Pertinent Information—(Distributors—(T14)

(a) Consignment arrangement (White L/O only): Authorized Distributor must render to Eagle-Picher on last business day of each month a report of all sales during the current month, accompanied by itemized inventory of remaining stock at close of month.

(b) Taxes: Any fee imposed by a governmental agency must be added to the prices shown in this schedule and borne by the Authorized Distributor.

(c) All shipments are made with transportation charges prepaid.

Q—Pertinent Information: (Except Distributors.)

(a) Terms:

To T7, T8 and T16, 2% 10 days. Net 60 days.

To T15: 2% 10 days. Net 30 days.

(b) Taxes: Any fee imposed by a governmental agency must be borne by the purchaser.

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(Cancels Sheet Dated January 1, 1937) WL

1775 (c) On direct sales made to a central purchasing agency which call for small shipments to be made to branches or subsidiaries, the quantity shipped to each destination will govern the price, and in differential territories the differential applicable at point of destination applies; if the point of destination is not a distributor's point and is equalized with the nearest distributor's point, the differential applicable at such distributor's point applies.

(d) If a buyer or distributor picks up his order of White Lead-In-Oil, or other keg products at our stock point warehouse, no allowance for cartage or trucking will be allowed.

R—Special Instructions: (Distributors)

(a) No products other than White L/O may be purchased on a consignment basis.

(b) For full details of consignment arrangement, see contract, "Appointment of ...., as Distributor for Eagle White Lead in Oil."

S—Special Instructions:

(a) Sales to all branches of U. S. Government, quote as instructed by Division Office.

(b) Sales to any State, County, or Municipal Governmental Agency; quote as instructed by Division Office.

(c) Sales to Railroads and Steamship Lines; quote as instructed by Division Office.

(d) Sales of Dry Red Lead and Litharge to Industrials; quote as instructed by Division Office.

January 1, 1937 Page #3 WL

1776 Trade Classifications.

T6—Industrials

Manufacturing firms whose purchases are of such volume that especial prices are provided. No firm is entitled to the classification without approval of Sales Manager.

T7—Paint Dealers

Firms who purchase keg products either directly from Eagle-Picher or from an authorized Distributor for resale to painters or general consumers. Examples: hardware stores, paint stores, etc.

T8—Consumers

Individual private property owners and others not regular buyers of paint products.

T14—Authorized Distributors

Firms engaged in the resale of paint materials who have entered into a contract with Eagle-Picher entitling them to purchase Eagle White L/O on a consignment basis, and to enjoy especial prices on other keg products.

T15—Preferred Contracting Painters

Purchasers of Eagle White L/O in five (5) ton lots by one concern or individual for delivery at one time to one destination. Pooling of orders cannot be permitted.
See Note: Page 10.

T16—Miscellaneous Contracting Painters

Firms (or individuals) who purchase keg products for resale on an applied basis only, but whose purchases do not meet the quantity requirements defined under T15.

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(Cancels Sheet dated January 1, 1937) WL

1778-A COMMISSION'S EXHIBIT NO. 592.

Par zone:

- New York
- Pennsylvania
- Maine
- New Hampshire
- Massachusetts
- Connecticut
- New Jersey
- Rhode Island
- Delaware
- Maryland
- Vermont
- West Virginia
- Kentucky
- Ohio
- Indiana
- Michigan
- Illinois
- Wisconsin

Zone $\frac{1}{8}$¢ differential:

- Virginia
- Minnesota
- Iowa
- Missouri

Zone $\frac{1}{4}$¢ differential:

- Tennessee
- North Dakota
- South Dakota
- Nebraska
- Kansas

Zone $\frac{3}{8}$¢ differential:

- Arkansas
- Louisiana
- Mississippi
- Alabama
- Georgia
- North Carolina
- South Carolina
- Florida

Zone $\frac{1}{2}$¢ differential:

- Oklahoma
- Wyoming
- Colorado

Zone $\frac{3}{4}$¢ differential:

- Texas

Zone 1¢ differential:

- New Mexico

1779-A COMMISSION'S EXHIBIT NO. 593.

F2 10/10/41

Euston White Lead in Oil.

Premium Zones and Price Differentials Applicable Thereto.

This supersedes previous schedule of differential zones.

(a) States in par territory (which take no differential premium): Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Delaware, Ohio, West Virginia, Michigan, Indiana, Illinois, Wisconsin, Kentucky and District of Columbia.

Exceptions: Areas in above States which take ⅛¢ advance:

Kentucky—Mayfield, Paducah and Fulton.
Illinois—Cairo, Moline, Quincy and Rock Island.
Wisconsin—Eau Claire, LaCrosse, Superior, Ashland, Chippewa Falls and Rice Lake.

(b) States taking ⅛¢ advance differential: Minnesota, Iowa, Missouri and Virginia, also certain areas as per (a) above, in Kentucky, Illinois and Wisconsin and certain areas as per (c) below in Nebraska and Kansas.

Exceptions: Areas in above States which take no advance differentials:

Missouri—St. Louis, Clayton, Ferguson, Kirkwood, Manchester, Maplewood, St. Charles and Webster Groves.
Virginia—Arlington County and Fairfax County.

Areas in above States which take ¼¢ advance:

Virginia—Southwestern section of Virginia including the following counties and points west: Bath, Allegheny, Craig, Montgomery, Floyd and Carroll.

(c) States taking ¼¢ advance differential: Tennessee, North Dakota, South Dakota, Nebraska and Kansas. Also certain areas in Virginia as per (b) above.

Exceptions: Areas in above States which take ⅛¢ advance.
Nebraska—Lincoln and Omaha.
Kansas—Atchison, Kansas City and Leavenworth.

(d) States taking ⅜¢ advance differential: North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana and Arkansas.

No exceptions.

(e) States taking ½¢ advance differential: Oklahoma, Colorado and Wyoming.

No exceptions.

(f) States taking ¾¢ advance differential: Texas.

Exceptions: Area in above State which takes a 1¢ differential: El Paso.

(g) States taking 1¢ advance differential: New Mexico.

No exceptions.

1780-A COMMISSION'S EXHIBIT NO. 594.

May 21, 1942.

Sherwin-Williams Products.
Lead and Zilo Price Differentials for S-W Warehouses and Stores.
(Excepting Pacific Coast Districts)

Eastern.

Akron, O.	E
Albany, Ga.	.37½
Albany, N. Y.	E
Alexandria, La.	.37½
Alice, Texas	.75
Altoona, Pa.	E
Amarillo, Texas	.75
Ambridge, Pa.	E
Amsterdam, N. Y.	E
Ann Arbor, Mich.	E
Appleton, Wisc.	E
Asbury, N. J.	E
Asheville, N. C.	.37½
Ashtabula, Ohio	E
Atlanta, Ga.	.37½
Augusta, Ga.	.37½
Aurora, Ill.	E
Austin, Texas	.75
Baltimore, Md.	E

Bangor, Maine	E
Baton Rouge, La.	.37½
Beaumont, Texas	.75
Belleville, Ill.	E
Bethesda, Md.	E
Binghamton, N. Y.	E
Birmingham, Ala.	.37½
Bloomington, Ill.	E
Bloomington, Ind.	E
Boston, Mass.	E
Bridgeport, Conn.	E
Bristol, Va.	.25
Brocton, Mass.	E
Brownsville, Texas	.75
Buffalo, N. Y.	E
Burlington, Vt	E
Butler, Pa.	E
Camden, N. J.	E
Canton, Ohio	E
Cape Girardeau, Mo.	.12½
Cedar Rapids, Ia.	.12½
Champaign, Ill.	E
Charleston, S. C.	.37½
Charleston, W. Va.	E
Charlotte, N. C.	.37½
Chattanooga, Tenn.	.25
Cheyenne, Wyo.	.50
Chicago, Ill.	E
Chickasha, Okla.	.50
Cincinnati, Ohio	E
Clarksburg, W. Va.	E
Cleveland, Ohio	E
Colo. Springs, Colo.	.50
Columbia, Mo.	.12½
Columbia, S. C.	.37½
Columbus, Ohio	E
Columbus, Ga.	.37½
Concord, N. H.	E
Corpus Christi, Texas	.75
Council Bluffs, Ia.	.12½
Dallas, Texas	.75
Danbury, Ill.	E
Danville, Ill.	E
Davenport, Ia.	.12½

Daytona Beach, Fla	.37½
Dearborn, Mich	E
Decatur, Ala	.37½
Decatur, Ga	.37½
Decatur, Ill	E
Denver, Colo	.50
Des Moines, Ia	.12½
Detroit, Mich	E
Dubuque, Ia	E
Duluth, Minn	.12½
Eau Claire, Wisc.	.12½
El Dorado, Ark	.37½
Elmira, N. Y	E
Endicott, N. Y	E
Erie, Pa	E
Evanston, Ill	E
Evansville, Ind	E
Fargo, N. D	.25
Flint, Mich	E
Florence, Ala	.37½
Fort Lauderdale, Fla	.37½
Fort Smith, Ark	.37½
Fort Worth, Tex	.75
Fond du Lac, Wisc	E
Frankfort, Ky	E
Gainesville, Tex	.75
Galveston, Tex	.75
Greeley, Colo	.50
Greenville, Tex	.75
Greensboro, N. C	.37½
Hamilton, O	E
Harlingen, Texas	.75
Hartford, Conn	E
Henderson, Ky	E
Houma, La	.37½
Houston, Tex	.75
Huntington, W. Va	E
Hutchinson, Kan	.25
Indianapolis, Ind	E
Ithaca, N. Y	E
Jackson, Mich	E
Jackson, Miss	.37½
Jacksonville, Fla	.37½
Janesville, Wisc	E

Johnson City, N. Y.	E
Johnson City, Tenn.	.25
Johnstown, Pa.	E
Joplin, Mo.	.12½

1780-B

Kansas City, Mo.	.12½
Kansas City, Kan.	.12½
Knoxville, Tenn.	.25
La Crosse, Wisc.	.12½
Lakeland, Fla.	.37½
Lancaster, O.	E
Lancaster, Pa.	E
Lexington, Ky.	E
Lima, O.	E
Lincoln, Nebr.	.12½
Little Rock, Ark.	.37½
Longview, Tex.	.75
Lorain, O.	E
Louisville, Ky.	E
Lowell, Mass.	E
McKeesport, Pa.	E
Macon, Ga.	.37½
Mansfield, Ohio	E
Marietta, Ga.	.37½
Marietta, O.	E
Marshall, Texas	.75
Mattoon, Ill.	E
Memphis, Tenn.	.25
Miami, Fla.	.37½
Miami Beach, Fla.	.37½
Middletown, O.	E
Milwaukee, Wisc.	E
Minneapolis, Minn.	.12½
Mobile, Ala.	.37½
Moline, Ill.	E
Monroe, La.	.37½
Montgomery, Ala.	.37½
Nashville, Tenn.	.25
Newark, N. J.	E
New Haven, Conn.	E
New Orleans, La.	.37½
Newport News, Va.	.12½
New York, N. Y.	E
Niagara Falls, N. Y.	E

Norfolk, Va..............	.12½
Norristown, Pa............	E
North Platte, Neb..........	.25
Oak Cliff, Texas..........	.75
Okla. City, Okla..........	.50
Omaha, Nebr.............	.12½
Orlando, Fla.............	.37½
Ottumwa, Ia.............	.12½
Owensboro, Ky...........	E
Paducah, Ky.............	.12½
Paris, Texas.............	.75
Pensacola, Fla...........	.37½
Peoria, Ill...............	E
Petersburg, Va...........	.12½
Philadelphia, Pa..........	E
Pine Bluff, Ark...........	.37½
Pittsburgh, Pa...........	E
Poplar Bluffs, Mo.........	.12½
Port Arthur, Tex..........	.75
Port Chester, N. Y........	E
Portland, Me.............	E
Providence, R. I..........	E
Queens Village, L. I.......	E
Quincy, Ill...............	E
Quincy, Mass.............	E
Richmond, Va............	.12½
Rochester, N. Y..........	E
Rochester, Minn..........	.12½
Rockford, Ill.............	E
Rockville Center, N. Y.....	E
Saginaw, Mich............	E
Salem, Mass.............	E
San Antonio, Tex.........	.75
Sandusky, Ohio..........	E
Savannah, Ga............	.37½
Schenectady, N. Y........	E
Scranton, Pa.............	E
Selma, Ala..............	.37½
Sheboygan, Wisc.	E
Sherman, Texas..........	.75
Shreveport, La...........	.37½
Sioux City, Ia............	.12½
Sioux Falls, S. D.........	.25
Spartanburg, S. C........	.37½
Springfield, Ill............	E

Springfield, Mass.	E
St. Louis, Mo.	E
St. Paul, Minn.	.12½
St. Petersburg, Fla.	.37½
Syracuse, N. Y.	E
Tallahassee, Fla.	.37½
Tampa, Fla.	.37½
Texarkana, Tex.	.37½
Toledo, Ohio	E
Tonawanda, N. Y.	E
Topeka, Kan.	.12½
Trenton, N. J.	E
Tulsa, Okla.	.50
Tupelo, Miss.	.37½
Tyler, Texas	.75
Uniontown, Pa.	E
Victoria, Tex.	.75
Waco, Texas	.75
Waltham, Mass.	E
Warren, Ohio	E
Waycross, Ga.	.37½
Waterloo, Ia.	.12½
Wheeling, W. Va.	E
White Plains, N. Y.	E
Wichita Falls, Tex.	.75
Wilkes Barre, Pa.	E
Wilkinsburg, Pa.	E
Worcester, Mass.	E
Yonkers, N. Y.	E
Youngstown, Ohio	E
Zanesville, Ohio	E

1781 COMMISSION'S EXHIBIT NO. 595.

(Letterhead of National Lead Company,
111 Broadway, New York.)

September 8, 1933

To All Branch Managers:

Please prepare as quickly as possible and send to this office a list of all towns in your territory where you think it would be desirable to appoint agents under the Agency System for selling, which is planned to go into effect October 1st.

One of the objectionable features of such a plan of selling is the extent to which money is locked up in consigned stocks scattered over the country. This is one important reason why great care must be used in offering the agency proposal. It should not be extended to accounts of small size, or where the turn over is slow.

In the Atlantic Branch, it was originally held to accounts selling not less than twenty tons per annum and to date there have been, I think, few exceptions to this standard. However, because this Branch has felt the need of securing better co-operation from a class of dealers of somewhat less importance, the revised plan which carries provision for the so-called "B" agents will permit the extension of the offer to smaller accounts, but which, it is hoped, can be developed into active sellers of lead.

The point we are trying to make is we must, at the outset, use care and go slow in the selection of agents; otherwise, we will accumulate too heavy a load of stock to carry. The offer should first be made to that type of account which either already is or in your judgment can be developed into a worthwhile distributor of white lead.

We want, therefore, at this time, and as quickly as possible, a list of those points where, in your judgment, the plan should be instituted. We hope to supply you very soon with a list of such towns which represent the ideas of other corroders. We think it will be desirable at this time to confine not only offers of the agency contract to dealers at these particular points, but also to avoid any mention of the new plan elsewhere.

After these lists have been checked over and considered, it is our thought that a letter should be sent to each account which you consider to be a desirable prospect, stating that on or about October 1st it is your intention to offer a new basis for the sale of white lead and your representative will call and explain the proposal in the immediate future.

At metropolitan points we think it would be very desirable to follow the plan used by the Atlantic Branch and the Philadelphia Branch in talking to important dealers as a group and explaining just what the new deal means and its advantages to the distributors of white lead. There is no need of going into this feature because it was discussed at length at the last meeting of the Sales Committee.

Yours very truly,

President.

1782 COMMISSION'S EXHIBIT NO. 596.

(Letterhead of National Lead Company,
111 Broadway, New York.)

October 21, 1933.

All Branch Managers:

It is possible that a decision may be made within a few days to go ahead with the agency plan for selling lead-in-oil which we had expected to put into effect on October 1st. Word will probably be sent you by wire and you should be prepared to get under way immediately. This letter is for the purpose of making clear some of the points that should be handled in a uniform manner by all branches.

Printed forms of the agency agreement are being made up here and a sufficient quantity to take care of their requirements will be mailed to each branch early next week. Forms for agent's monthly stock reports will be sent out shortly afterward. The latter will not be required before November 30th.

The agents' discounts are as follows—

"A" Agent	10%—10% & 3%.
"B" Agent	10% & 10%.

The Atlantic Branch will attach a rider to the agreement allowing an extra 1% to "A" Agents for tonnage sold and special service rendered. This will read as follows:

"For special service in encouraging the sale and consumption of White Lead by efficient merchandising methods and proper use and display of advertising material supplied by the manufacturer, the agent shall be allowed additional compensation amounting to 1% of the net paid value of the White Lead distributed by such agent provided his total annual sales aggregate .... tons.

"Credit memorandum to cover such additional compensation as may become due, less any amount due the manufacturer, will be issued annually, or semi-annually, or as stipulated by the manufacturer, and neither the whole amount nor any part thereof shall be withheld or deducted by this agent from any remittance made or amount due the manufacturer prior to the actual issuance of said credit."

The tonnage requirement varies, depending upon the locality, but the extra 1% is not given to small accounts.

Sales made by the agent are to be at the full card price with the following exceptions—

	Discount
Painters	10%
Dealers (any quantity)	10% & 4%
Painters) or) Dealers) 1,000 lbs. in one delivery	10% & 6%

1783 Small lots sold direct by you to dealers who are not agents are subject to discount as follows:

500 lb. lots	10% & 4%.
1,000 lb. lots	10% & 6%.

In other words, the agent is permitted to sell a dealer less than 500 pounds at 10% and 4% discount, while you will be obliged to charge the list.

The Atlantic Branch is planning to send out a card to all dealers on their mailing list (agent or otherwise), which will read "Re-print of list issued June 1, 1933" and will show our discount to dealers; namely, the 10% and 4% for 500 pounds, and the 10% and 6% for 1,000 pounds, mentioned above. It would seem desirable that you also do that.

Along with the agency contract should go a card showing the list price, discounts and net prices. The one formerly used by the Atlantic Branch is attached. This card is important because it does away with the possibility of agents using the excuse that they made a mistake in figuring prices. They should not be permitted to give cash discount in spite of the fact that there are some good arguments for their doing so. It has been necessary to put this rule into effect in the Atlantic territory because of the price confusion after it was adopted.

Agents are not permitted to display any price in their stores other than the list. The Atlantic Branch has made up cards of this sort which are distributed to dealers. Mr. McNair believes that they are helpful in establishing the schedule. A sample will be sent to you as early as possible next week with all other printed matter the Atlantic Branch is planning to have made up.

As soon as you receive word to go ahead with the agency plan it will be in order for you to have contracts signed and start selling on consignment. If this occurs prior to November 1st, you should tell the agents that the new discount schedule will go into effect on November 15th.

Please note that the plan applies only to White Lead-in-Oil and does not include Dry White Lead or Oxides.

Owing to the fact that it will take some time for you to contact all customers that you desire to make agents, it will probably be advisable for you to write a letter to the ones you select, explaining briefly the new selling arrangement and telling them that your representative will call on them as soon as possible. Mr. Carter again would like to emphasize the importance of appointing at the start as "A" or "B" agents, only those concerns that you are sure properly qualify. It would be a great mistake to extend the plan too far down the line. Additions can be made easily at a later date.

If you are in doubt about any points, please do not delay in asking us for further information.

Yours very truly,

EMH
Encl.-Card.

1784 COMMISSION'S EXHIBIT NO. 597.

Date: October 26, 1933

To:

From: J. G. C. McNair, Assistant Manager (Atlantic Branch)

At Mr. Carter's request I am confirming a telegram sent to you today reading:

"Agency plan reinstated to go into effect November 15. Resume campaign Monday. Contract forms being mailed Friday. Letter following.

F. M. Carter".

The letter reference pertains to this letter. Mr. Carter requested me to write and advise that you are authorized to go ahead and put into effect the agency plan of selling. Any orders which you may receive from now on from agents that you establish such orders can be sold on consignment but the new price schedule will become effective on November 15. This will give you an opportunity to line a great many agents up so that the new price schedule for White Lead may be put into effect by the distributors simultaneously which is the reason for establishing November 15 as the date when the new schedule becomes effective.

A supply of contract forms will go forward to you via parcel post tomorrow and in the event that an additional supply is required they can be had by sending your request to Mr. Harold Rowe as the printer will keep the form set up. Report pads for distribution to your agents for reporting the stock on hand at the end of the month are now in the hands of the printer and we would thank you to advise us promptly of the approximate number of these pads you will require to distribute to your agents so that they may be sent to you promptly.

In the event that you should ship an order on consignment prior to November 1 it will not be necessary for the agent to report his sales on this consigned stock until the end of November so there will be ample time for you to receive your stock of report forms for distribution to the agents.

The report forms will only cover White Lead in Oil in the various size packages as this is the only product that will be sold on the consigned basis. Orders from agents for Dry White Lead, Litharge, Dry Red Lead, and Red Lead in Oil will be sold to them outright with discounts extended to the agent in accordance with the contract terms.
McN:ABB

1786 COMMISSION'S EXHIBIT NO. 598.

National Lead Company
111 Broadway, New York, N. Y.

The following is carbon copy of telegram sent this day

October 26, 1933

O. H. Greene, National Lead Co., 722 Chestnut St., St. Louis, Mo.
E. A. de Campi, National Lead Co., 900 West 18th Street, Chicago, Illinois
W. A. Dail, National Lead Co., 657 Freeman Ave., Cincinnati, Ohio
C. C. Foerstner, National Lead Co., 720 Superior St., Cleveland, Ohio
W. R. Melville, National Lead Co., 116 Oak St., Buffalo, N. Y.
W. H. Taylor, National Lead and Oil Co., Commonwealth Bldg., Pittsburgh, Pa.
S. F. Reeves, John T. Lewis & Bros. Co., Widener Bldg., Philadelphia, Pa.
A. H. Brodrick, National Boston Lead Co., 800 Albany St., Boston, Mass.

Agency plan reinstated to go into effect November fifteenth Resume campaign Monday Contract forms being mailed Friday Letter following

F M Carter

1787 COMMISSION'S EXHIBIT NO. 599.

National Lead Company
111 Broadway, New York, N. Y.

The following is carbon copy of telegram sent this day

October 26, 1933

W. E. Maston
Eagle Picher Lead Co.
Temple Bar Bldg.
Cincinnati, Ohio

Are wiring branches following Agency plan reinstated to go into effect November fifteenth Resume campaign Monday

F. M. Carter

1789 COMMISSION'S EXHIBIT NO. 601.

Mr. F. M. Carter.

National Lead Company
111 Broadway

New York
November 9, 1933.

To All Branch Managers:

Several questions have been brought up regarding the application of the Agency Plan and it seems advisable to answer them in a general letter to all branches.

1. Objection has been raised to the idea of giving 10% discount on sales to painters in small lots. There are some sections where full list price is being obtained on such sales. It would be a mistake on our part to deprive the dealer of the margin he has been getting. For that reason all of our printed matter showing discounts should read "To the Trade", without mentioning painters. It will be for the dealer to decide who shall be classified as "The Trade". Ordinarily we would assume that the 10% would be allowed to painters who are frequent buyers and perhaps also to some industrial concerns who might be considered as regular purchasers of white lead. In localities where you do

not believe the 10% should be given to painters generally, it will probably be advisable for your representative to have an understanding among the dealers similar to what must now be in effect where prices are not cut.

2. Freight Allowance. All cities where agencies are established will be considered delivery and equalization points. No freight allowance will be made to agents on shipments from their stock to their customers. On quotations made by us direct to buyers other than agents, freight will be equalized with nearest agency point.

3. Cash Discount. Because of their experience the Atlantic Branch has decided to do away with cash discounts on agents' sales over the counter. They will not apply this restriction to charge accounts where bills are rendered by the agent and paid within the discount period. If you do not think it advisable to apply this rule to any sections of your territory, where dealers are in the habit of giving such a discount, you may leave it to them to do so or not as they choose.

4. Price Guarantee. Obviously it will be unnecessary to rebate agents for stocks on hand in case of a decline in price. The question will come up on sales they have made to dealer customers who still have the lead in stock. It has been decided that no allowance whatever will be made.

In the event of an advance in price, agents will probably report a large proportion of their stock sold before the change. The limit of our obligation should be the amount of stock an agent has on hand.

1790 It is not desirable to maintain excessive stocks except where it will be advantageous to ship in carload lots.

5. Insurance. You will receive a letter from Hamlin & Company within a few days explaining that this will be handled from their office.

6. Reports of Sales. On the weekly report—"Deliveries to Trade" (Form 213)—which you render to the Comptroller's office, only such tonnage should be included as has actually been invoiced to your customers.

7. Price, Lists, etc. The forms sent to you by the Atlantic Branch are the ones which they have made up to suit their particular requirements. It is not necessary that you use exact duplicates. For example, the point has been raised that in some territories dealers display a retail price card showing packages under 100 lbs. at an increase

greater than the regular differential which we apply. This can be continued where it is possible for dealers to obtain the extra margin. Please keep this office advised of all notices that you are sending to the trade.

8. Our Prices on Direct Sales to customers other than agents—dealers, painters or consumers—will be as follows:

Less than 500 lbs.	List
500 lbs.	List less 10%
1,000 lbs.	List less 10/6%

No sales in 5-ton or carload lots will be made to dealers who are not agents. Instructions covering direct sales to painters buying large quantities and to industrial concerns were included in our letter of October 23rd.

It should be kept in mind that the purpose of the whole Agency Plan is to control the dealers' selling price of white lead, so that he may be assured of a reasonable profit. It is impossible to lay down a complete and definite set of rules which will be entirely satisfactory for all sections of the country. There will have to be some flexibility permitted and branch managers will be expected to use their own judgment in handling special situations. It is important, however, that you inform this office of any important variations which you contemplate.

Harold Rowe.

1791 COMMISSION'S EXHIBIT NO. 603.

National Lead Company
111 Broadway

Harold Rowe
Asst. to the President

New York
November 21, 1933.

To All Branch Managers:

1. Apparently there has been some misunderstanding regarding the discounts applying on agency agreements. In at least one case the impression has been given that our contracts are limited to two schedules, namely—10/10/4% or 10/10%.

2. It has been our opinion that most all of those accounts who formerly were regular 5-ton buyers would be desirable

agents. In general, they would be considered to qualify as what we have called "A" agents and be entitled to 10/10/3% discount. The 10/10/4% is given only to the larger outlets that previously would have been classified as carload buyers.

3. The 10/10% discount is designed for the smaller dealer who has not been a 5-ton buyer but who gives promise of developing into a good lead account with the encouragement of a slightly greater margin than 10/6%. There will be comparatively few such agents.

4. You are familiar with the Atlantic Branch policy of withholding until a later date the 1% due large distributors in addition to the 10/10/3%. The claim has been made that this is an unfair trade practice because the tonnage requirement tends to shut out other brands of lead. It will be necessary to revise such contracts to carry a straight 10/10/4% discount. Very few of our branches have followed the Atlantic plan and in view of the situation which may develop it would be better for you not to make contracts with extra discount contingent upon tonnage sold.

In the weekly report which you send to the office showing orders received, you should include those from selling agents as well as from other customers.

Yours very truly,

Harold Rowe.

EH

1794 COMMISSION'S EXHIBIT NO. 613.

Appointment of Selling Agent
Dutch Boy White Lead

National Lead Company
Atlantic Branch
111 Broadway New York, N. Y.

1795 National Lead Company

Appointment of Selling Agent
Dutch Boy White Lead

National Lead Company, a New Jersey corporation (hereinafter called the manufacturer), through it's .... Branch, with office at

.... hereby appoints
...., of
(Street) ...., (City) ....,
(State) ...., having branches at No.
(Street) ...., (City) ....,
(State) .... and No. (Street) ....
..............................., (City) ...., (State) ....
(hereinafter called the agent), an agent to sell, for it, Dutch Boy White Lead at price schedules of the manufacturer in effect at the date hereof (a copy of which has been delivered to, and receipt of which is hereby acknowledged by, the agent) or any revised schedule that may become effective during the life of this contract, upon the terms and subject to the conditions herein set forth; and said agent hereby accepts the appointment and agrees to comply with said terms and to perform all conditions hereof:

1. The Agency Hereby Created shall remain in force until terminated as herein provided.

2. The Manufacturer Agrees To Maintain On Consignment in the custody of the agent, to be disposed of as herein provided, a stock of Dutch Boy White Lead. All of the white lead in such consigned stock shall be and remain the property of the manufacturer until the white lead is sold, and the proceeds of all white lead sold shall be held in trust for the benefit and for the account of the manufacturer until fully accounted for as hereinafter provided. The sizes, types and quantity of white lead and the length of time it shall remain in stock are to be at all times determined by the manufacturer; but the intent is to maintain the stock on an average basis of approximately the normal requirements of the agent for a reasonable period. No liability of any nature is assumed or incurred by the manufacturer in the performance of this contract because of its inability to supply white lead required by the agent, arising from circumstances beyond the manufacturer's reasonable control.

All white lead shipped direct to the agent, until it is sold or distributed in accordance with the agent's authority hereunder, shall be stored, housed and displayed for sale only in the agent's regular place or places of business specified above and in such manner as to afford ready inspection and identification by the manufacturer, and any duly authorized representative of the manufacturer shall have access at all times during business hours to the place or places in which said white lead is stored. The agent shall pay all expenses in the storage, cartage, transportation, handling, sale and distribution of white lead hereunder, and all expenses incident thereto and to the accounting therefor and to the collection of accounts created.

The agent shall pay all taxes, excises and charges, which are now, or may hereafter be, levied, imposed or charged (whether by federal, state, municipal or other public authority), with respect to white lead sold by the agent hereunder. The agent shall make all reports required by the public authorities with respect to such sales of white lead. When authorized by the law imposing such tax, excise or charge, the agent may, at his option, increase the price of white lead to the purchaser by an amount equal to such tax, excise or charge.

The agent shall return to the manufacturer at any time when directed by it, all or any part of the consigned stock which has not been sold. The agent shall keep account books and books and records giving complete information covering all of his transactions in connection with the sale and distribution of the manufacturer's white lead, and such books, records and copies of invoices shall be open at all times during business hours to the inspection of any duly authorized representative of the manufacturer.

3. The Agent Is Hereby Authorized to sell from said stock to any dealer or consumer, white lead at the schedule of prices as provided.

The agent has no authority to sell or transfer or in any way dispose of such white lead, except as herein expressly provided. The agent has no authority to accept orders for or commit the manufacturer to the sale or delivery of white lead in excess of the unsold stock at the time in his custody.

Schedules pertaining to prices, discounts, terms and conditions of sale will be supplied agents, each and all of which are subject to change by the manufacturer from time to time. All sales and quotations shall be made only
1796 at such prices, upon such terms and under such conditions as may be established by the manufacturer from time to time and the agent shall at all times observe the manufacturer's sales policy, as may be determined by said manufacturer.

4. The Agent Shall Render To The Manufacturer, on the 25th of every month, on forms provided by the manu-

facturer, a complete itemized report or inventory of all the manufacturer's white lead on hand at the close of business on the 25th of the month and shall render within fifteen days after the termination of this appointment, a similar report of all such white lead on hand at the date of such termination.

5. The Agent Shall Remit To The Manufacturer, not later than the 15th day of each month an amount equal to the total sales value of all white lead sold by said agent during the preceding calendar month less the compensation allowed him as provided in Paragraph 7 below. At the time of rendering his inventory report the agent shall pay the manufacturer for all white lead lost, missing from, or damaged in the aforesaid stock in his custody.

6. The Agent Agrees That Upon Notice From The Manufacturer, specifying other dates than those specified herein for forwarding reports and remittances, he will promptly thereafter forward said reports and remittances on such changed dates.

7. As Compensation for the performance of his obligations, hereunder, the agent shall be allowed the difference between (1) the total value of his sales, and (2) the total value of the merchandise sold calculated at the following schedule of prices per hundred pounds:

If all reports have been forwarded as required in this contract of appointment and if remittance is made not later than the 15th day of each month covering in full for all white lead sold during the preceding calendar month by this agent, whether or not all accounts for such sales may have been collected, such remittance shall be subject to two per cent (2%) discount.

The manufacturer reserves the r[illegible] any time during the term of this appointment, to ch[illegible] any or all rates or bases of compensation of the agent upon written notice, which revised rates or bases of compensation become effective upon issuance of said notice.

If the agent shall be or become insolvent or shall fail to make any report or remittance herein required to be made or shall fail to conduct the business of the agency to the satisfaction of the manufacturer, or shall fail to observe or perform any of the other provisions, terms or conditions herein contained on the part of the agent to be observed or performed, or if the agent shall become involved in any financial difficulty which in the opinion of the manufacturer may impair the agent's ability to properly conduct the business of the agency, then and in any such case the manufacturer may cancel and terminate the agency hereby created by notice in writing to the agent. This agency appointment is personal in its character and the manufacturer reserves the right to cancel the agency in the event of the transfer of the agent's business or the control thereof to parties other than those now in control. This appointment is not assignable by the agent without the written consent of the manufacturer.

Either party to this agreement, by written notice to the other, may at any time terminate the agency hereby created.

The termination of this agency for any reason shall be without prejudice to the rights of the manufacturer against the agent, and shall not relieve the agent of any of his obligations and guarantees hereunder. Immediately upon any such termination, the agent shall deliver to the manufacturer all white lead consigned hereunder which remains unsold and shall fully perform all obligations of the agent which then remain unfulfilled.

9. This Appointment Shall Not Be Binding On The Manufacturer Until Signed for the manufacturer by its duly authorized representative. None of the terms of this appointment shall be deemed to have been waived by the manufacturer unless such waiver be in writing and signed by said duly authorized representative.

10. This appointment applies only to white lead in oil in one hundred, fifty, twenty-five, and twelve and one-half pound packages.

National Lead Company,

By..

.... 194.......

Accepted:

By ....

.... *Agent*

1798 COMMISSION'S EXHIBIT NO. 615.

Price Schedule
Effective April 26, 1941

Railroads—Steamship Lines.

Quantity & Period:

Buyer's requirements up to a stated maximum—for shipment by June 30, 1941.

Delivery:

Railroads—F. O. B. Seller's nearest factory point. Freight allowed to nearest point on Buyer's line.

S/S Lines—Deliveries to dock. No further freight allowance.

Prices:

	White Lead in Oil	Dry White Lead	Red Lead in Oil	Dry Red Lead
100 lb. kegs	10.50	9.50	11.00	10.00

Usual advances for smaller packages.

Terms—30-1-10.

When "nearest point on Buyer's Line" is located outside of par territory, add full differential as shown on white lead-in-oil zone map. (This includes all four of the above items.)

Prices for dry red lead and red lead-in-oil in 100 lb. kegs have been included in the three months' contract. They are intended to apply to lots of less than 5 tons. For large lots you should not make three months' contracts but should quote on specific orders as follows:

Dry Red Lead:

In bbls. (less than 5 tons)—Card price.
Terms—30-1-10. Shipment—30 days.
In bbls. (5-ton lots)—Card price less $\frac{1}{2}$¢ per lb.
Terms—30-1-10. Shipment—30 days.
In bbls. (20-ton lots)—$2.50 per 100 lbs. over the A., S. & R. Co.'s closing price of common lead at New York on the date order is received.
Terms—Net 30 days. Shipment—60 days.

The following small package differentials shall be added to the barrel price:

100 lb. kegs	$1.00 per 100 lbs.
50 lb. kegs	1.25 per 100 lbs.
25 lb. kegs	1.50 per 100 lbs.
12½ lb. kegs	1.75 per 100 lbs.

Except for kegs in lots of less than 5 tons (covered above), zone differentials shall be added in accordance with the oxide zone map.

Red Lead-In-Oil:

In 5-ton lots, 100 lb. kegs—1¢ per lb. over 5-ton price of Dry Red Lead in 100 lb. kegs. Terms—30-1-10.

In 20-ton lots, 100 lb. kegs—1¢ per lb. over 20-ton price of Dry Red Lead in 100 lb. kegs. Terms—Net 30 days.

Litharge:

In all cases—1¢ per pound under Dry Red Lead.

1800

Price Schedule
Effective April 26, 1941

Industrial Accounts (Whom We Sell Direct).

For quarterly contracts ending June 30, 1941.

	White Lead in Oil	Dry White Lead	Red Lead in Oil	Dry Red Lead
100 lb. kegs	10.75	9.75	11.25	10.25

Usual advances for smaller packages.

Terms—30-1-10.

Delivered to destinations in par territory. For deliveries outside of par territory, add full differential as shown on white lead-in-oil zone map. (This includes all four of the above items.)

Prices for dry red lead and red lead-in-oil in 100 lb. kegs have been included in the three months' contract. They are intended to apply to lots of less than 5 tons. For large lots you should not make three months' contracts but should quote on specific orders as follows:

Dry Red Lead:

In bbls. (less than 5 tons)—Card price.
Terms—30-1-10. Shipment—30 days.

In bbls. (5-ton lots)—Card price less ½¢ per lb.
Terms—30-1-10. Shipment—30 days.

In bbls. (20-ton lots)—$2.50 per 100 lbs. over the A. S. & R. Co.'s closing price of common lead at New York on the date order is received.

Terms—Net 30 days. Shipment—60 days.

The following small package differentials shall be added to the barrel price:

100 lb. kegs	$1.00 per 100 lbs.
50 lb. kegs	1.25 per 100 lbs.
25 lb. kegs	1.50 per 100 lbs.
12½ lb. kegs	1.75 per 100 lbs.

Except for kegs in lots of less than 5 tons (covered above), zone differentials shall be added in accordance with the oxide zone map.

Red Lead-In-Oil:

In 5-ton lots, 100 lb. kegs—1¢ per lb. over 5-ton price of Dry Red Lead in 100 lb. kegs. Terms—30-1-10.

In 20-ton lots, 100 lb. kegs—1¢ per lb. over 20-ton price of Dry Red Lead in 100 lb. kegs. Terms—Net 30 days.

Litharge:

In all cases—1¢ per pound under Dry Red Lead.

1802 Government—State—Municipal—W. P. A., Etc.

Minimum Prices Effective April 26, 1941.

Quantity:

As specified in the inquiry.—A definite amount of "requirements" over a period.

Shipment:

As specified in the inquiry.

Delivery:

Prices as outlined below include delivery to destination or to any other pick-up point for which quotation is requested in the inquiry.

Prices and Terms:

White Lead-In-Oil:

Less than 5 tons—In par territory quote on basis of $9.25 for 100 lb. kegs, less 2% cash discount (dropping any fraction of a cent). In other zones, add differentials to $9.25 price and deduct 2%. Terms—Net 30 days.

In lots of 5 tons or over—In par territory quote on basis of $9.00 for 100 lb. kegs, less 2% cash discount (dropping any fraction of a cent). In other zones, add differentials to $9.00 price and deduct 2%. Terms—Net 30 days.

In par territory prices will be:

Less than 5 tons	5 tons or over
100#—9.06 Net	100#—8.82 Net
50#—9.31 Net	50#—9.06 Net
25#—9.55 Net	25#—9.31 Net
12½#—9.80 Net	12½#—9.55 Net

Red Lead-In-Oil:

In par territory quote on basis of $10.50 for 100 lb. kegs, less 2% cash discount (dropping any fraction of a cent). In other zones add differentials to $10.50 price and deduct 2%. Terms—Net 30 days.

Par territory prices will be:

Red Lead-In-Oil
100#—10.29 Net
50#—10.53 Net
25#—10.78 Net
12½#—11.02 Net

Dry White Lead:

(a) In barrels—card price per 100 lbs. with 1% cash discount deducted, dropping any fraction of a cent. Terms—Net 30 days. (Card price in following states is 25¢ per 100 lbs. over par territory:

Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, Wyoming.)

(b) In 100 lb. kegs—Barrel price at point of delivery (1% cash discount deducted, dropping fractions) plus $1.50 per 100 lbs. Terms—Net. Usual advances for smaller sizes.

1804 Dry Red Lead—Litharge:

(a) For Deliveries Of Less Than 20 Tons in One Lot.

(1) In barrels—Card price for state in which delivery is to be made (with usual 50¢ per 100 lbs. deduction for five tons in one delivery).

Terms on all L. C. L. shipments—1% for cash paid within discount period stated on bid (not beyond 30 days). If no period is stated terms shall be 1%—30 days.

The card price used in making quotations shall be the one in effect on the 5th day prior to date of opening. If 5th day is a Sunday or holiday, use closing price of next preceding business day.

States carrying differentials over card price (L. C. L. shipments) are as follows:

25¢ per 100 lbs. in Alabama, Arkansas, California, Florida, Georgia, Louisiana, Mississippi, Oklahoma, Texas, and west of Cascade Mountains in Oregon and Washington.

50¢ per 100 lbs. in Colorado, Montana, New Mexico and Wyoming.

75¢ per 100 lbs. in Arizona, Idaho, Nevada, Utah, and east of the Cascade Mountains in Oregon and Washington.

(2) In small packages—To barrel prices add—

$ .50 per 100 lbs. for 100 lb. kegs.
.75 per 100 lbs. for 50 lb. kegs.
1.00 per 100 lbs. for 25 lb. kegs.
1.25 per 100 lbs. for 12½ lb. kegs.

Terms—same as barrels above.

(b) For Deliveries Of 20 Tons Or Over In One Lot.

(1) In barrels—In par territory a flat price

$2.50 per 100 lbs. for Red Lead
over A. S. & R. Co.'s price of common lead at New York

$1.50 per 100 lbs. for Litharge
over A. S. & R. Co.'s price of common lead at New York

in effect at the close of the market on the 5th day prior to date of opening. If 5th day is a Sunday or holiday, use closing price of next preceding business day.

Terms—Net 30 days.

Add 25¢ per 100 lbs. for deliveries in following states:

Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, Montana, Nevada, New Mexico, Oklahoma, Texas, Utah, Wyoming, and east of Cascade Mountains in Oregon and Washington.

(2) In small packages—To barrel prices add—

$ .50 per 100 lbs. for 100 lb. kegs.
.75 per 100 lbs. for 50 lb. kegs.
1.00 per 100 lbs. for 25 lb. kegs.
1.25 per 100 lbs. for 12½ lb. kegs.

1821 COMMISSION'S EXHIBIT NO. 624.

(Letterhead of National-Boston Lead Company,
Boston, Mass.)

January 19, 1944

To Dutch Boy White Lead Agents.

Because of the present conditions resulting from governmental restrictions on oils, containers, and labor, and as provided for in our Dutch Boy White Lead Agency Agreement, we hereby notify you that as of the close of business on January 25, 1944, we are terminating the Agency Agreement entered into with your firm.

To effect the termination of our agency appointment with you, we will bill you as of January 25th on your agency price basis for all the consigned lead you had on hand December 25, 1943, plus any lead that has been shipped to you on consignment in the interim.

If for any reason you decide not to purchase your present stock of lead, we will adjust the billing when we have arranged a transfer of your stock to another outlet or for its return to us charges collect.

We suggest that our present resale prices to dealers and the consuming paint trade be maintained. All agency agreements in the territory served by the National-Boston

Lead Company are being terminated, at least for the duration, and we sincerely believe that this change will be advantageous to all concerned since it will better enable us to distribute the White Lead available in 1944.

Very truly yours,
National-Boston Lead Company,
Karl Fischer,
Vice President.

1822 National-Boston Lead Co.

January 19, 1944

To Dutch Boy White Lead Distributors.

We are sending the attached letter to all of our Agents today and we believe you will concur with the wisdom of this action at this time.

However, it is our desire to have you continue as a Direct Distributor, and effective this date we quote you the following prices in accord with approved OPA ceilings:

Net Weight Packages	Cents Per Pound One Delivery of not less than 2000 lbs.	1000 lbs.
100 lbs.	10¾	11¼
50 lbs.	11	11½
25 lbs.	11¼	11¾
12½ lbs.	11½	12
5 lbs.	12¾	13¼
1 lb.	14¼	14¾

Terms: Net 60 days less 2% for cash in 10 days, F.O.B. Boston Freight allowed.

As to resale, we are sure you will want to retain the selling schedules already established and we suggest the following prices be continued since they likewise are in accord with established OPA ceilings:

Net Weight Packages	To Dealers	Cents Per Pound to Painters 500 lb. lots	Less than 500 lbs.	List Prices
100 lbs.	11¾	12¼	12¾	13¾
50 lbs.	12	12½	13	14
25 lbs.	12¼	12¾	13¼	14¼
12½ lbs.	12½	13	13½	14½
5 lbs.	13¾	14¼	14¾	15¾
1 lb.	15¼	15¾	16	17¼

We believe this selling plan will help assure you of an adequate supply of Dutch Boy White Lead and enable us to serve you more efficiently.

When you desire to purchase an additional supply of Dutch Boy White Lead, please give us notice as far in advance as possible. Regulations of the Office of Defense Transportation may prevent us from making our usual prompt deliveries.

Should there be any question before our representative makes his next call, please write or phone us. In the meantime we want to thank you for your past cooperation and assure you of our earnest desire to be of all possible service to you during this emergency period.

Very truly yours,
National-Boston Lead Company.

1827 COMMISSION'S EXHIBIT NO. 629.

November 15, 1933

(This form of contract issued November 15, 1933, at time consignment plan was extended to all territories.)

This Copy Is The

Appointment of Distributor for

Eagle White Lead In Oil
The Eagle-Picher Lead Company
Cincinnati, Ohio

1828 Appointment of Distributor For
Eagle White Lead In Oil.

This Agreement made this .... day of ....193....., by and between The Eagle-Picher Lead Company, an Ohio Corporation, with its principal office in Cincinnati, Ohio, (hereinafter for convenience called Manufacturer) and

....

....

(hereinafter for convenience called the Distributor).

Witnesseth:

That in consideration of the mutual promises hereinafter set forth, said parties agree as follows:

1. Manufacturer hereby appoints the Distributor as a selling agent for the sale of Eagle White Lead in Oil at price schedules furnished by the Manufacturer, and in effect at the date hereof, or any revised schedule that Manufacturer may furnish during the life of this contract, upon the terms and subject to the conditions hereinafter set forth. A copy of the price schedule issued by the Manufacturer has heretofore been delivered to the Distributor, and receipt of same by the Distributor is hereby acknowledged. The Distributor hereby accepts said appointment, and agrees to comply with said terms and to perform all the conditions hereof.

2. The Manufacturer agrees to place in the custody of the Distributor a stock of Eagle White Lead in Oil, which shall be and remain the property of the Manufacturer until sold by the Distributor. The sizes, types, and quantity of White Lead in Oil, and the length of time it shall remain in stock are to be at all times determined by the Manufacturer. It is agreed that no liability of any nature is assumed or incurred by the Manufacturer in the performance of this contract because of its inability to supply White Lead in Oil required by the Distributor, arising from circumstances beyond the Manufacturer's reasonable control.

3. The Distributor agrees to store and prominently display in his regular place of business Eagle White Lead in Oil and at all times to use the advertising material and other sales assistance as furnished by the Manufacturer.

4. The Distributor agrees to pay all expenses of storage, transportation, and sales, which are now or may hereafter be levied either by Federal, State, Municipal, or other public authorities.

5. The Distributor shall return to the Manufacturer at any time when directed by it, all or any part of the said stock which has not been sold. The Distributor shall keep account books and records giving complete information covering all its transactions in connection with the sale and distribution of the Manufacturer's White Lead in Oil, and such books, records and copies of invoices shall be open at all times during business hours to the inspection of any duly authorized representative of the Manufacturer.

6. The Distributor is hereby authorized to sell from said stock to any dealer or consumer, Manufacturer's Eagle White Lead in Oil at the schedule of prices as provided by Manufacturer. The Distributor has no authority to sell or

transfer, or in any way dispose of such Eagle White Lead in Oil, except as herein expressly provided. The Distributor has no authority to accept orders for, or commit, the Manufacturer to the sale of Eagle White Lead in Oil in excess of the unsold stock at the time in his custody.

7. The Manufacturer will furnish the Distributor with price and trade discount schedules which are subject to change by the Manufacturer from time to time, upon notice to the Distributor. The Distributor agrees that all quotations and sales will be made only at such prices and upon such terms and conditions as may be established by the Manufacturer.

8. The Distributor shall render to the Manufacturer, on the first business day of every month, a report on forms provided by the Manufacturer, covering its sales of the Manufacturer's White Lead in Oil during the preceding calendar month, and a complete itemized report or inventory of all the Manufacturer's White Lead in Oil on hand at the close of business on the last day of the preceding calendar month, and shall render within fifteen days after termination or expiration of this appointment, a similar report on all such Eagle White Lead in Oil on hand at the date of such expiration or termination.

1829 9. The Distributor agrees that the proceeds of all Eagle White Lead in Oil sold hereunder shall be held in trust for the benefit, and for the account of, the Manufacturer until finally accounted for as herein provided. The Distributor shall pay over to the Manufacturer, not later than the fifteenth day of every month, an amount equal to the total sales value, less the compensation due this Distributor of all White Lead in Oil sold by it during the preceding calendar month. At the time of rendering its monthly inventory report, the agent shall pay to the Manufacturer for all White Lead in Oil lost or missing from, or damaged in, the aforesaid stock in his custody.

10. The compensation allowed the Distributor for the performance of all its obligations hereunder shall be as follows: On all sales reported by the Distributor at the end of each month the amount due and payable will be based on the Manufacturer's list prices applicable to each product and the various sizes sold, subject to a discount of ....%.

11. If all reports are forwarded as required in this contract and remittances are made not later than the fifteenth of the month covering in full all sales made during

the preceding calendar month a further discount of 2% will be allowed.

12. It is the intention of the parties hereto that this appointment shall constitute a special agency only, and the relationship established shall not constitute a general agency, nor in any way authorize the Distributor to affix the name of Eagle-Picher Lead Company to any contract or other instrument, or to obligate Eagle-Picher Lead Company in any manner whatsoever by reason of anything other than herein.

13. Termination. If the Distributor shall be or become insolvent, or shall fail to make any report or remittance herein required to be made, or shall fail to conduct the business of the agency to the satisfaction of the Manufacturer, or shall fail to observe or perform any of the other provisions, terms or conditions herein contained on the part of the Distributor to be observed and performed, or if the Distributor shall become involved in any financial difficulty which in the opinion of the Manufacturer may impair the Distributor's ability to properly conduct the business of the agency, then and in any such case, the Manufacturer may cancel and terminate the agency hereby created by notice in writing to the Distributor.

14. This appointment is personal in its character and the Manufacturer reserves the right to cancel the appointment in the event of the transfer of the Distributor's business or the control thereof to parties other than those now in control.

15. This appointment is not assignable by the Distributor without the written consent of the Manufacturer:

16. If any statement by the Distributor in its application for this agency appointment is found to be incorrect, the Manufacturer may terminate the appointment.

17. It is further agreed that shipments and deliveries by Manufacturer shall be subject to delays in transportation, embargoes, delays caused by strikes, differences with employes, or accidents at plants, war, insurrection, riot, fire, or any other cause beyond the control of Manufacturer.

18. This appointment shall not be binding on the Manufacturer until signed by the Eagle-Picher Lead Company, the Manufacturer, by its President, Vice-President, Treasurer, or Secretary of the company, at the office of the company, Cincinnati, Ohio. This appointment shall not be renewed, nor shall any of its terms be deemed to have been waived by the Manufacturer unless such renewal or waiver

be in writing and signed by the Eagle-Picher Lead Company, by the President, Vice-President, Treasurer, or Secretary.

19. This appointment shall continue for one year from the date hereof and, thereafter, from year to year, beginning at the date of expiration, unless terminated by either of the parties hereto, giving to the other thirty (30) days' notice in writing of their intention to terminate this agreement.

The Eagle-Picher Lead Company
By..

Distributor:

....

....

1879 COMMISSION'S EXHIBIT NO. 647.

The Eagle Picher Sales Company
Distributors of products
manufactured by
The Eagle Picher Companies
Graybar Building
420 Lexington Av., N. Y. City

General offices
Cincinnati

March 9, 1942

Haeberle Lumber Co.
1004 Cedar Avenue
Niagara Falls, N. Y.

Gentlemen:

Lead, a critical war material, is under strict government control. The available production of the raw material (pig lead) and the finished lead products such as White Lead in Oil are considerably less than the existing demand.

The government has carefully checked over the entire lead industry and is regarding with a critical eye the consigned stock selling plan, insofar as it creates non-moving or slow moving inventories of White Lead in Oil at a time when certain districts are in immediate and urgent need of the material.

Your sales of Eagle White Lead in Oil during 1941 totalled 1225 pounds. The amount on consignment with you at this time is, according to our records, 475 pounds. You will agree that this situation is one that might be justly criticized by the government during the war emergency.

We, therefore, request your cooperation in establishing a more satisfactory arrangement during these critical times. This can be done by mutual agreement as to the time that stocks are to remain on consignment during the emergency period.

Provision 2 of your distributor contract reads in part as follows:

"The sizes, types and quantity of White Lead in Oil, and the length of time it shall remain in stock are to be at all times determined by the Seller" (Eagle-Picher).

We ask, please, that you give us permission to

1. Bill you at current distributor prices on last day of this month for all Eagle White Lead in Oil, in various sizes, that is now on consignment with you.
2. To make future shipments with the understanding that we have your authority to automatically bill you on the last day of the month for all shipments made during the month.

Terms as per contract.

Such an arrangement will keep your contract in force during the emergency, will eliminate show moving consigned stocks, and will retain for you the right to buy at distributor prices.

Material ordered by you on this basis will be subject to (1) any necessary delay in shipment, (2) our ability to obtain raw materials and (3) price in effect at date of shipment. Please enter orders in quantities of 500# or more for shipment at one time.

We hope you will go along with us. You may accept by signing below, returning this letter and retaining the duplicate copy for your files. We will handle the rest. Please let us have your decision promptly.

Very truly yours,
The Eagle-Picher Sales Company

PHK:FM P. H. Knappen—White Lead Division

P.S.—Our records show your consigned stock of Eagle White Lead to be 4-12½s, 1-25 and 4-100s.

Accepted at .... this .... day of .... 1942.

.... Distributor

By .... Title ....

1881 COMMISSION'S EXHIBIT NO. 649.

Official News from Headquarters.

Bulletin #MS-238 July 17, 1939

Euston White Lead in Oil Consignment Proposition

We are pleased to announce that the executives of our Company have decided to offer to the trade a new consignment sales agency proposition for the sale of Euston White Lead in Oil, similar to the plan now being used by the other Lead corroders. We must increase our sale of Euston White Lead in Oil and this new plan will make it possible for each Division and Retail Store to approximately double its sale of Euston White Lead.

Consignment Plan.

Attached to this bulletin is a copy of our Euston Distributor Agreement. Read it carefully so that you thoroughly understand all of the conditions of the Agreement. Note carefully, we do not consign sizes smaller than 12½ lb. kegs. Under this Agreement we control the resale price of Euston White Lead in Oil. Should any distributor seriously affect the market by cutting prices we can take up his stock at any time. Be sure the dealer understands he must pay all taxes, insurance, and assume all charges for storage, cartage, handling, etc. We call these conditions to your special attention as we will not approve any changes in our regular sales contract. All contracts must be approved by an executive at Cleveland Headquarters.

Consignment Prices.

To the distributors or dealers that we sell on our new consignment plan our prices will be the same as that of the other corroders. Until further notice these prices will be as follows:

100 lb. kegs	$9.25 per C.
50 lb. kegs	9.50 per C.
25 lb. kegs	9.75 per C.
12½ lb. kegs	10.00 per C.

Outright Sale Prices.

Some of our present dealers, as well as new accounts, may want to continue to buy their Euston White Lead in Oil outright. We will continue to sell these dealers at a lower price, or on the same price schedule we use at the present time. These prices are as follows:

100 lb. kegs	$9.05 per C.
50 lb. kegs	9.30 per C.
25 lb. kegs	9.55 per C.
12½ lb. kegs	9.80 per C.

All of the above prices apply in par territory. In those territories where differentials exist the same differential that has applied to your sales in the past will be applicable at this time.

1883 For orders of full carloads, in one shipment to one destination, we will continue to allow a reduction of 25¢ per 100 pounds less than the foregoing schedule of prices. These two methods make our proposition very flexible and we should very easily and quickly increase our sales of Euston White Lead.

Exclusive Sales Arrangement.

One of the best reasons we offer to the dealer to sell Euston White Lead is because we will give him exclusive sale in markets where it is practical to do so. There are many places where several dealers have consignment stocks of the other corroders and we should make a special drive and go after some of these bigger and better accounts with our Exclusive Sales Contract. Managers and salesmen alike should carefully select the accounts with whom exclusive arrangements are made. It isn't practical or sufficiently productive to offer exclusive sale in the large metropolitan cities but even here the city can be zoned by trading areas and exclusive arrangements can be made accordingly.

Demonstrate Euston White Lead Superior Qualities.

We have more strong selling advantages to offer the dealer because Euston White Lead in Oil is a much whiter product, it is much finer than other white lead, will take more oil, and as a result will make 15 to 20% more finishing paint per hundred pounds. Euston White Lead in Oil is a better tinting base as cleaner toned colors can be made when adding tinting colors. These are distinct advantages over your competition but you must demonstrate to prove these superior qualities and make the dealer see how he can increase his sales with Euston White Lead, and what is still more important, build this business on an exclusive basis. Carry your demonstration outfit with you at all times. Be ready!

Other Euston Lead Products.

The consignment arrangement applies only to Euston White Lead in Oil and does not include our other Euston Lead Products. Painters who use Euston White Lead will also want to use Euston Thinning or Flatting Oil as well as Euston Colors in Oil. Be sure to sell every distributor a complete stock of House Paint Primer, Wall Primer, Colors in Oil and all the other Euston Products. Your Euston Lead Product Portfolio gives you full information, including prices.

Painters Meetings.

We will continue our plan of using a special representative to hold Painters Meetings for important distributors and dealers. Our experience proved that this method is by far the most productive and will create a greater acceptance and usage of Euston White Lead in Oil. We expect, with our new plan, to sell many of the large Lead Distributors and we want to do everything possible to hold and increase their Lead in Oil business. When you offer to hold a Painters Meeting be sure the volume from each account will justify this additional advertising and sales expense. Arrangements for these meetings must be made in advance, so send your requests for dates to Mr. L. A. Radloff at Cleveland. He will give you complete instructions about how to make preparations for these meetings.

1885 Personal Work.

The special representative, as well as the territory salesman, must make personal calls on painters and large users of White Lead in Oil. Calls should be made in advance of the meetings on the most important contractors to make personal demonstrations and also to extend personal invitations to the meetings. The attendance of the better contractors will add to the importance and merit of these meetings. This personal work must be continued immediately following the meetings. Every prospect developed at the meeting should be called on the next day since he will be more receptive and can then be sold. The quick follow-up is the one activity that will really get the business.

Inventories.

With this new plan we will have many inventories. It will be the duty of all representatives to check these inventories regularly and work in close cooperation with the Accounting Department. Mr. H. W. Caton will issue instructions thru your Credit Manager on just what you are to do in looking after these inventories.

Metals Refining Division Salesmen.

The salesmen of the Metals Refining Division will also sell Euston White Lead in Oil to distributors and dealers in Ohio, Michigan, Indiana, Kentucky, Illinois, Missouri and Iowa. We have supplied them with a list of our established accounts in these territories with instructions that they will not be permitted to sell to our old customers. In a like manner, each Glidden salesman has been supplied with a list of towns in which the Metals Refining men work. As new accounts are established the representative in the territory will immediately be informed so as to avoid any confliction or misunderstanding and the account thereafter will be reserved for the salesman who makes the first sale.

Conclusion.

Many of our salesmen and managers have repeatedly stated that if we would give them a Consignment Sales Arrangement the same as offered by other Lead corroders, that they could more than double their business. Well, here it is now and we are certainly expecting each and every one of our men to do just that. This new plan should make it possible to place a stock of Euston White Lead in Oil with every old and established White Lead account, full line agent, and many of our dealers. Go after them now and sign them up quick!

P. L. Lotz.

D
Sent to Reg. Dir.
Sales & Store Mgrs.
Representatives &
Headquarters.

1886 COMMISSION'S EXHIBIT NO. 650.

C. K. Hardware Co.
St. Louis, Mo.

Euston White Lead

Distributor Agreement

The Glidden Company

National Headquarters, Cleveland, O.

1887 Euston White Lead

Distributor Agreement

between

The Glidden Company, an Ohio corporation of Cleveland, Ohio, through its Division located at St. Louis, Missouri, hereinafter called the "Manufacturer," and Carl W. Krauter, Prop., C. K. Hardware Co., of St. Louis, Missouri, hereinafter called the "Distributor,"

In consideration of the mutual promises and agreements hereinafter set forth, the parties hereto agree as follows:

1. The Manufacturer hereby authorizes the Distributor to sell, under the terms hereof, the Manufacturer's Euston brand of White Lead ground in Linseed Oil, hereinafter referred to as "White Lead," in the following described territory which shall not be exclusive: St. Louis.

2. The Manufacturer agrees, subject to conditions beyond its control, to ship a stock of White Lead to the Distributor on consignment, freight allowed, in such amounts, sizes and types as the Manufacturer determines may be necessary for the Distributor to maintain a stock of White Lead adequate to service the trade, which shall be sold by the Distributor as herein provided. Title to said White Lead shall be and remain in the Manufacturer at all times until sold and the proceeds from the sale thereof shall be and remain the property of the Manufacturer and shall be held by the Distributor in trust for the Manufacturer until turned over to the Manufacturer as herein provided.

3. The Distributor shall render to the Manufacturer on the twenty-fifth (25th) day of every month during the term hereof, on the forms prescribed by the Manufacturer, a complete itemized inventory of all said White Lead on hand in said stock at the close of business on the 25th day of such month.

4. The Distributor shall remit to the Manufacturer not later than the fifteenth (15th) day of each month the total sales value of all White Lead sold from said stock, damaged or missing, during the monthly period ending on the 25th day of the preceding month, at the current selling prices established by the Manufacturer, less the compensation allowed the Distributor, determined in accordance with the following paragraph. If said remittance is mailed on or before the 15th day of such month, the Distributor may deduct therefrom, as additional compensation, the cash discount provided in the Manufacturer's current Price List, which is subject to change without notice, applying to sales of White Lead.

5. The compensation allowed the Distributor shall be the difference between the total value of the sales from said stock, including damaged and missing White Lead, and the total value thereof calculated at the following schedule of prices per one hundred pounds:

100 pound keg	$ 9.75
50 pound keg	$10.00
25 pound keg	$10.25
12½ pound keg	$10.50

1888 6. The Manufacturer shall have the right at any time during the term hereof to change any or all rates or bases of said compensation upon written notice to the Distributor and shall have the right to specify other dates than those mentioned herein for forwarding reports and remittances and in the event of any such change or changes, the Distributor agrees to thereafter conform to the same. The Distributor is hereby authorized to make sales from said stock to any dealer or consumer of White Lead at the schedule of prices determined by the Manufacturer, but has no authority to sell, transfer or in any way dispose of White Lead hereunder, except as expressly provided hereby, and has no authority to accept orders for or commit the Manufacturer to the sale of White Lead in excess of the unsold stock thereof in the Distributor's custody under the terms hereof at the time. Schedule of the prices, discounts, terms and conditions of sale of White Lead from said stock, which, however, are subject to change by the Manufacturer at any time during the term hereof, will be supplied the Distributor and all sales from said stock and quotations shall be made only at such prices and upon such terms and conditions and shall be in accordance with the sales policy of the Manufacturer.

7. All said White Lead shipped to the Distributor under the terms hereof shall, while it remains in the Distributor's custody hereunder, be stored, housed and displayed for sale in a careful and proper manner and the Distributor shall exercise due and reasonable care in storing and maintaining the same. The Distributor shall store said stock in such manner as to afford ready inspection thereof by the Manufacturer and its agents who shall have access thereto at all times during regular business hours for the purpose of taking an inventory or making an inspection of said stock. The Distributor shall keep complete records and accounts of all transactions in connection with said stock and such books and records shall be at all times during regular business hours available for inspection by the Manufacturer or its agents.

8. The Distributor will, upon request of the Manufacturer, return to it any or all of said consigned stock then remaining in the possession of the Distributor and the Manufacturer will pay the freight thereon. The Distributor shall pay all expenses in connection with the storage, cartage, transportation, handling, sale and distribution of said White Lead hereunder and all expenses incident thereto and to the accounting therefor and will assume all losses and collection expense resulting from such sales. The Distributor will pay all taxes, excises and charges which are now or may hereafter be levied, imposed or charged by the Federal, State, Municipal or other public authorities with respect to said White Lead in said stock and sold hereunder, and will upon request of the Manufacturer, pay for the insurance placed on said stock in the custody of the Distributor, by the Manufacturer.

9. This agreement shall be continuous subject to the right of termination by either party hereto at any time by giving written notice to the other.

10. This agreement shall not be assigned or transferred by the Distributor without the written consent of the Manu-

facturer and if this agreement is terminated, the Distributor agrees to immediately deliver to the Manufacturer all White Lead remaining in said stock and unsold and shall fully perform all of the obligations of the Distributor remaining to be performed hereunder.

Made and concluded at Cleveland, Ohio this 27 day of May, A. D. 1941.

The Glidden Company, Manufacturer
By L. S. Cullon.
C. K. Hdw. & Pt., Distributor
By Carl W. Krauter.

1906 COMMISSION'S EXHIBIT NO. 655.

A. S. & R. Price of Pig Lead, New York			White Lead In Oil List Price (100# Kegs)—Par Territory	
1930—	2/27	6.10	10/22/29	$14.25
	3/ 3	6.00		
	3/ 6	5.85		
	3/ 7	5.75		
	3/ 8	5.60		
	3/10	5.50		
	3/25	5.65		
	3/26	5.75		
	4/ 4	5.60		
	4/ 7	5.50		
			2/24/30	$13.75
	5/13	5.60		
	5/20	5.50		
	6/17	5.40		
	6/23	5.25		
	2/ 1	5.35		
	8/ 4	5.50		
	10/ 1	5.35		
	10/ 4	5.25		
	10/ 8	5.20		
	10/ 9	5.15		
	10/10	5.10		
1931—			1/ 2/31	$13.25
	1/ 5	5.00		
	1/ 7	4.85		
	1/ 8	4.75		

A. S. & R. Price of Pig Lead, New York			White Lead In Oil List Price (100# Kegs)—Par Territory	
	2/ 3	4.60		
	2/ 4	4.50		
	2/19	4.60		
	3/10	4.50		
	4/23	4.35		
	4/24	4.25		
	4/28	4.10		
	4/29	4.00		
	5/ 8	3.85		
	5/11	3.75		
	6/22	4.00		
	6/23	4.15		
	6/24	4.25		
	6/25	4.40		
	10/ 2	4.25		
	10/ 5	4.00		
	10/20	3.75		
	10/28	4.00		
	11/ 2	3.85		
	11/ 9	3.95		
	11/10	4.05		
	11/19	3.95		
	11/23	3.85		
	12/14	3.75		
			12/28/31	$12.00
1907				
1932—	2-26	3.50		
	3- 1	3.25		
	3-15	3.15		
	3-23	3.00		
	6-29	2.95		
	6-30	2.90		
	7- 5	2.85		
	7- 8	2.80		
	7-11	2.70		
	7-18	2.65		
	7-27	2.80		
	7-28	2.95		
	8- 4	3.00		
	8- 5	3.10		
	8-16	3.20		

A. S. & R. Price of Pig Lead, New York			White Lead In Oil List Price (100# Kegs)—Par Territory	
	8-17	3.30		
	8-23	3.40		
	8-26	3.50		
	8-30	3.60		
	9-20	3.50		
	9-21	3.40		
	9-26	3.30		
	9-27	3.15		
	9-28	3.00		
	10- 3	3.10		
	10- 4	3.25		
	10- 7	3.15		
	10-10	3.00		
	11- 9	3.15		
	11-18	3.00		
			12/30/32	$11.00
1933—	3- 8	3.25		
	3-10	3.35		
	3-21	3.25		
	3-22	3.10		
	3-23	3.00		
	4-11	3.25		
	4-20	3.50		
	5- 8	3.65		
	5-25	3.75		
	5-29	3.90		
	5-31	4.10		
	6- 9	4.20		
	7- 5	4.30		
	7- 7	4.40		
	7-10	4.50		
	10-16	4.40		
	10-17	4.25		
	10-18	4.10		
	10-19	4.00		
	10-25	4.15		
	10-26	4.30		
	11-29	4.15		
	12- 1	4.05		
	12- 4	4.15		
1934—	1- 2	4.00		
	4- 9	4.10		

	A. S. & R. Price of Pig Lead, New York		White Lead In Oil List Price (100# Kegs)—Par Territory
	4-10	4.25	
	5-17	4.15	
	5-18	4.00	
	6-28	3.85	
	6-29	3.75	
	7-20	3.80	
	7-23	3.85	
	7-27	3.75	
	8-24	3.70	
	8-27	3.75	
	9- 6	3.70	
	9-21	3.65	
	9-25	3.60	
	10-17	3.65	
	10-18	3.70	
	11- 5	3.65	
	11- 7	3.60	
	11-16	3.55	
	11-19	3.50	
	12-14	3.60	
	12-17	3.70	
1935—	1-30	3.60	
	2- 1	3.50	
	2-13	3.55	
	3-18	3.60	
	3-28	3.65	
	4-15	3.70	
	4-22	3.75	
	5-13	3.80	
	5-15	3.85	
	5-16	3.90	
	5-20	3.95	
	5-21	4.10	
	5-22	4.25	
	5-27	4.35	
	5-31	4.25	
	6- 3	4.10	
	6- 6	4.00	
	7- 5	4.05	
	7- 8	4.10	
	7- 9	4.15	
	8- 2	4.20	

Pig Lead, New York A. S. & R. Price of		(100# Kegs)—Par Territory White Lead In Oil List Price
8-20	4.25	
8-21	4.30	
8-22	4.35	
9-19	4.50	
10- 7	4.60	
10-10	4.50	
1936— 2-26	4.55	
2-27	4.60	
		4/ 1/36 $11.50
10-27	4.70	
1908		
1936—10-28	4.80	
11- 4	4.90	
11- 5	5.00	
11-10	5.10	
11-16	5.20	
12-11	5.30	
12-14	5.40	
12-15	5.50	
12-21	6.00	
1937—		1/ 1/37 $12.00
2-18	6.25	
2-19	6.50	
		Notices mailed 2/20/37 Effective 3/1/37—$12.50
2-25	7.00	
		Revisions mailed 2/26 Effective 3/1/37—$13.0
3- 8	7.25	
3- 9	7.50	
3-10	7.75	
3-16	7.50	
3-17	7.25	
3-19	7.00	
3-23	6.95	
4- 2	6.90	
4- 7	6.00	
8- 4	6.25	
8- 5	6.50	
9-24	6.25	
9-27	6.00	

Pig Lead, New York A. S. & R. Price of		(100# Kegs)—Par Territory White Lead In Oil List Price	
10-15	5.75		
10-18	5.50		
		10/19/37	$12.50
11- 3	5.25		
11- 4	5.00		
12-16	4.75		
1938— 1- 7	4.85		
		1/10/38	$11.75
1-11	4.90		
2- 8	4.75		
2-10	4.50		
		3/10/38	$11.25
5-23	4.25		
5-27	4.00		
6-22	4.25		
6-23	4.35		
6-24	4.50		
6-30	4.75		
7- 6	4.90		
9-15	5.00		
9-19	5.10		
		9-26-38	$11.75
11-29	5.00		
12- 6	4.85		
12- 9	4.75		
12-19	4.85		
1939— 1-24	4.75		
1-31	4.85		
2-16	4.75		
		2-27-39	$12.25
3- 9	4.85		
4-11	4.75		
6-14	4.80		
6-19	4.85		
7-31	4.95		
8- 3	5.05		
9- 5	5.25		
9- 6	5.50		
		9-26-39	$12.75
1940— 1-29	5.25		
2- 7	5.00		

Pig Lead, New York A. S. & R. Price of			(100# Kegs)—Par Territory White Lead In Oil List Price	
	2-28	5.25		
	3-19	5.15		
	3-27	5.05		
	4- 2	5.00		
	4-10	5.10		
	5- 6	5.00		
	8- 6	4.85		
	8- 9	4.75		
	8-21	4.90		
	9-23	5.00		
	10-10	5.25		
	10-16	5.50		
	11- 6	5.65		
	11- 8	5.80		
	11-28	5.65		
	12- 2	5.50		
1941—	2-10	5.65		
	3- 3	5.75		
	3-26	5.85		
			4-26-41	$13.25
1942—	1-13	6.50		
			1-26-42	$13.75

A. S. & R. Price of	White Lead In Oil List Price
Pig Lead, New York	(100# Kegs)—Par Territory
A. S. & R. Price of	White Lead In Oil List Price
Pig Lead, New York	(100# Kegs)—Par Territory
A. S. & R. Price of	White Lead In Oil List Price
Pig Lead, New York	(100# Kegs)—Par Territory
A. S. & R. Price of	White Lead In Oil List Price
Pig Lead, New York	(100# Kegs)—Par Territory

COMMISSION'S EXHIBIT NO. 656.

WHITE LEAD IN OIL

Date of Price Change	List Price	500#	2000#	10,000#	30,000#
In effect					
2/27/30	$14.25 cwt.	10% discount	10–4%	10–7½%	10–10%
4/24/30	13.75 cwt.	10% discount	10–6%	10–10–3%	10–10–4%
1/ 2/31	13.25 cwt.	10% discount	10–6%	10–10–3%	10–10–4%
12/28/31	12.00 cwt.	10% discount	10–6%	10–10–3%	10–10–4%
12/30/32	11.00 cwt.	10% discount	10–6%	10–10–3%	10–10–4%

AGENCY SELLING PLAN

Date of Price Change	List Price	Agents	Others 500 to 1000#	1000#
11/15/33	$11.00 cwt.	*"A"—10-10-4%	10%	10-6%
		"B"—10-10-3%		
		"C"—10-10%		
			Dealers	Painters
3/ 1/35	$11.00 cwt.	"A"—$8.15	Less than 500#—$10.00	Less than 500#— 10.50
		"B"— 8.30	500#— 9.50	500#— 10.00
		"C"— 8.45	1000#— 9.00	1000#— 9.50
4/ 1/36	$11.50 cwt.	"A"—$8.55	Less than 500#— 10.50	Less than 500#— 11.00
		"B"— 8.70	500#— 10.00	500#— 10.50
		"C"— 8.85	1000#— 9.50	1000#— 10.00
			To the Trade	
1/ 1/37	$12.00 cwt.	$9.25	Less than 500#— 11.50	
			500#— 11.00	
			1000#— 10.75	
3/ 1/37 (Mailed 2/20/37)	$12.50 cwt.	$9.65	Less than 500#— 12.00	
			500#— 11.50	
			1000#— 11.25	
3/ 1/37 (Mailed 2/26/37)	$13.00 cwt.	$10.05	Less than 500#— 12.50	
			500#— 12.00	
			1000#— 11.75	
			Dealers	Painters
9/13/37	$13.00 cwt.	$10.00	$11.00	$12.00
				10.50—5 tons
			Prices for 500 and 1000# lots discontinued	
10/19/37	$12.50 cwt.	$9.50	$10.50	$11.50
				10.00—5 tons
1/10/38	$11.75 cwt.	$8.75	Less than 500#— 10.00	$10.75
			500#— 9.75	9.25—5 tons
3/10/38	$11.25 cwt.	$8.25	Less than 500#— 9.50	$10.25
			500#— 9.25	8.75—5 tons
9/26/38	$11.75 cwt.	$8.75	Less than 500#— 10.00	$10.75
			500#— 9.75	9.25—5 tons

WHITE LEAD IN OIL

Date of Price Change	List Price	Agents	Dealers	Painters
2/27/39	$12.25 cwt.	$9.25	Less than 500#—$10.50	$11.25
			500#— 10.25	9.75—5 tons
9/ 6/39	$12.75 cwt. (Less 500#)	$9.75	Less than 500#—$11.00	Less than 500#—$11.75
	$12.25 cwt. (500#)		500#— 10.75	500#— 11.25
				5 tons— 10.25

1/10/40 Same prices as above with the addition of a ton price to Painters of $10.75.

*"A" Agent—10 tons or more annual sales.

"B" Agent—5-10 tons annual sales.

"C" Agent—Less than 5 tons annual sales.

4/26/41	$13.25 cwt. (Less 500#) $12.75 cwt. (500#)	$10.25	Less than 500#—$11.50 500#— 11.25	Less than 500#—$12.25 500#— 11.75 2000#— 11.25 5 tons— 10.75
1/26/42	$13.75 cwt. (Less 500#) $13.25 cwt. (500#)	$10.75	Less than 500#—$12.00 500#— 11.75	Less than 500#—$12.75 500#— 12.25 2000#— 11.75 5 tons— 11.25

AGENCY SELLING PLAN DISCONTINUED

		Dealers	Painters
1/25/44	$13.75 cwt. (Less 500#) $13.25 cwt. (500#)	Less than 500#—$12.00 500#— 11.75 1000#— 11.25 2000#— 10.75	Less than 500#—$12.75 500#— 12.25 2000#— 11.75 5 tons— 11.25

March 27, 1944 National Lead Company, Chicago

COMMISSION'S EXHIBIT NO. 658.

White Lead-in-Oil

Minimum Prices for Maximum Quantities
Per 100# Keg

Date	List Price	Quantity Discount	Net Price	Type of Sale
12/17/26	14.50	10 and 10%	11.745	Direct Billing
6/16/27	13.75	10 and 10%	11.138	“ “
11/17/27	13.25	10 and 10%	10.733	“ “
2/25/29	13.50	10 and 10%	10.935	“ “
3/19/29	13.75	10 and 10%	11.138	“ “
10/22/29	14.25	10 and 10%	11.542	“ “
4/25/30	13.75	10, 10 and 4%	10.693	“ “
1/ 2/31	13.25	10, 10 and 4%	10.304	“ “
12/28/31	12.00	10, 10 and 4%	9.332	“ “
12/30/32	11.00	10, 10 and 4%	8.554	Beginning of Consignment Sales. New York territory only.
11/15/33	11.00	10, 10 and 4%	8.554	Consignment for all territories.
3/ 1/35	11.00	Beginning Flat Price for Distributors.	8.15	
4/ 1/36	11.50		8.55	
1/ 1/37	12.00		9.25	
3/ 1/37	12.50		10.05	
9/14/37	13.00		10.00	
10/20/37	12.50		9.50	
1/11/38	11.75		8.75	
3/11/38	11.25		8.25	
10/ 1/38	11.75		8.75	
3/ 1/39	12.25		9.25	
10/ 1/39	12.75		9.75	

1915 COMMISSION'S EXHIBIT NO. 659.

Price List

December 28, 1931

Reduction of 1¼¢ per lb. in price list of January 2, 1931

The following prices on our products are in force from this date, subject to change without notice.

White Lead and Oxides

Net Weight Packages	Kegs			*Cans	
Price per Pound	100 Pounds	50 & 25 Pounds	12½ Pounds	5 Pounds	1 Pound
	Cents	Cents	Cents	Cents	Cents
Dutch Boy & Carter White Lead in oil Heavy or Soft Paste	12	12¼	12½	15	17
Dry White Lead	12	12¼	12½		
Dutch Boy Red Lead in oil	13½	13¾	14		
Dry Red Lead and Litharge	12	12¼	12½		

* In Heavy Paste Only.

5 lb. cans packed 50 or 100 lbs. to case; 1 lb. cans packed 25, 50 or 100 lbs. to case.

Terms—60 days net 2% for cash in 15 Days.

National Lead Company
Atlantic Branch
111 Broadway New York City

1917

Price List

December 30, 1932

Reduction in price list of December 28, 1931

White Lead 1¢. Dry Red Lead and Litharge 2½¢

Red Lead in oil 2¢ per lb.

The following prices on our products are in force from this date, subject to change without notice.

White Lead and Oxides

Net Weight Packages	Kegs			*Cans	
Price per Pound	100 Pounds	50 & 25 Pounds	12½ Pounds	5 Pounds	1 Pound
	Cents	Cents	Cents	Cents	Cents
Dutch Boy & Carter White Lead in oil (Heavy or Soft Paste)	11	11¼	11½	14	16
Dry White Lead	11	11¼	11½		
Dutch Boy Red Lead in oil	11½	11¾	12		
Dry Red Lead and Litharge	9½	9¾	10		

* In Heavy Paste Only.

5 lb. cans packed 50 or 100 lbs. to case; 1 lb. can packed 25, 50 or 100 lbs. to case.

Terms—60 days net 2% for cash in 15 Days.

National Lead Company
Atlantic Branch
111 Broadway New York City

1918

National Lead Company
Atlantic Branch

List of Delivery Points

Revised to September 10, 1924

The following is a complete list of our delivery points in force today and until further notice.

Note:—Delivery points are indicated by "D". Equalization points are indicated by "E". Differential points are indicated by a fractional cent per pound in the left-hand column. The indentation of suburban towns under an equalization point indicates free truck delivery to such suburban towns.

Connecticut

D—Bridgeport
E—Hartford
E—New Haven
D—New London
D—Norwich
D—Waterbury

Florida

½ E—Jacksonville

Georgia

¾ E—Augusta
½ E—Savannah
¾ E—Macon

Massachusetts

D—Easthampton
D—Fall River
D—Greenfield
D—Holyoke
D—North Adams
D—Northampton
D—Pittsfield
D—Springfield
D—Westfield

New Jersey—See also delivery list from Perth Amboy

Arlington (See New York City)
Athenia “ “ “ “
Babbitt “ “ “ “
Bayonne “ “ “ “
Belleville “ “ “ “
Bergenfield “ “ “ “ ton lots or over
Bloomfield (See New York City)
Bogota “ “ “ “
Boiling Springs “ “ “ “
Carlstadt “ “ “ “
Carlton Hill “ “ “ “
Cliffside “ “ “ “
Clifton “ “ “ “
Closter “ “ “ “ ton lots or over
Coytesville (See New York City)
Creasskill “ “ “ “

D—Constable Book

Demarest (See New York City)
Dover (Car Loads Only)
Dumont (See New York City)
East Orange (See New York City)
Edgemere “ “ “ “
Edgewater “ “ “ “
Elizabethport “ “ “ “
Englewood “ “ “ “
Fair View “ “ “ “
Fort Lee “ “ “ “
Garfield “ “ “ “
Glen Gardner “ “ “ “ (car loads only)
Glen Ridge (See New York City)
Grantwood “ “ “ “
Guttenberg “ “ “ “
Hackensack “ “ “ “
Harrison “ “ “ “
Hasbrouck Hghts. “ “ “ “

Haworth	"	"	"	"
Highwood	"	"	"	"
Hoboken	"	"	"	"
Homestead	"	"	"	"
Hudson Hghts.	"	"	"	"
Irvington	"	"	"	"
Jersey City	"	"	"	"
Kearny	"	"	"	"
Kingsland	"	"	"	"
Leonia	"	"	"	"
Little Ferry	"	"	"	"
Lodi	"	"	"	"
Long Branch				
Lyndhurst	**(See New York City)**			
Montclair	"	"	"	"
Morsemere	"	"	"	"
Newark	"	"	"	"
D—New Brunswick				
New Milford	**(See New York City)**			
Nordhoff	"	"	"	"
North Arlington	"	"	"	"
Nutley	"	"	"	"
Oradell	"	"	"	"
Orange	"	"	"	"
Palisades Pk.	"	"	"	"
Passaic	"	"	"	"
Paterson	"	"	"	"
Perth Amboy	"	"	"	"
Plainfield	"	"	"	"
D—Point Pleasant				
Ridgefield	**(See New York City)**			
Ridgefield Park	"	"	"	"
Du Bod Park	"	"	"	"

1919		**River Edge**	**(See New York City)**	
		Rochelle Park	**" " " "**	
		Rutherford	**" " " "**	
		Rutherford Jct.	**" " " "**	
		Secaucus	**" " " "**	
	D	**South Amboy**		
		Teaneck	**(See New York City)**	
		Tenafly	**" " " "**	**ton lots or over**
		Town of Union	**" " " "**	
		Union	**" " " "**	
		Union Hill	**" " " "**	
		Upper Montclair	**" " " "**	
		Weehawken	**" " " "**	
		West Englewood	**" " " "**	
		West Hoboken	**" " " "**	
		West Orange	**" " " "**	
		West View	**" " " "**	
		Woodridge	**" " " "**	

New York

E	**Albany**
E	**Binghamton**
D	**College Point**
D	**Lake Placid**
D	**Malone**
E	**Plattsburgh**
D	**Saranac Lake**
D	**Schenectady**
E	**Syracuse**
E	**Troy**
E	**Utica**
D	**Watertown**
D	**New York City (Including all points on Staten Island)**
	Arlington, N. J.

Arverne, N. Y.
Athenia, N. J.
Babbitt, N. J.
Bayonne, N. J.
Bayside, N. Y.
Belle Harbor, N. Y.
Belleville, N. J.
Bergenfield, N. J. (Ton Lots or over)
Bloomfield, N. J.
Bogota, N. J.
Boiling Springs, N. J.
Bronxville, N. Y.
Carlstadt, N. J.
Carlton Hill, N. J.
Cedarhurst, N. Y.
City Island, N. Y.
Cliffside, N. J.
Clifton, N. J.
Closter, N. J. (Ton lots or over)
College Point, N. Y.
Coney Island, N, Y.
Coytesville, N. J.
Cresskill, N. J.
Demarest, N. J.
Dobbs Ferry, N. Y.
Dumont, N. J.
East Orange, N. J.
Edgemere, N. J.
East Rockaway, N. Y.
Edgewater, N. J.
Elizabeth, N. J.
Elizabethport, N. J.
Englewood, N. J.
Fair View, N. J.
Far Rockaway, N. Y.
Floral Park, N. Y.
Flushing, N. Y.
Fort Lee, N. J.
Garfield, N. J.
Glen Ridge, N. J.
Grantwood, N. J.
Guttenberg, N. J.
Hackensack, N. J.
Harrison, N. J.
Hasbrouck Heights, N. J.

Hastings, N. Y.
Haworth, N. J.
Highwood, N. J.
Hoboken, N. J.
Hollis, N. Y.
Homestead, N. J.
Hudson Heights, N. J.
Hulett, N. Y.
Inwood, N. Y.
Irvington, N. J.
Irvington, N. Y.
Jamaica, N. Y.
Jersey City, N. J.
Kearny, N. J.
Kingsland, N. J.
Larchmont, N. Y.
Lawrence, N. Y.
Leonia, N. J.
Little Ferry, N. J.
Little Rock, N. Y.
Lodi, N. J.
Lynbrook, N. Y.
Lyndhurst, N. J.
Mamaroneck, N. Y.
Mineola (Pitt. P. G.)—truck loads
Montclair, N. J.
Morsemere, N. J.
Mount Vernon, N. Y.
Neponsit, N. Y.
Newark, N. J.
New Milford, N. J.
New Rochelle, N. Y.
Nordhoff, N. J.
North Arlington, N. J.
Nutley, N. J.
Oradell, N. J.
Orange, N. J.
Ozone Park, N. Y.
Palisades Park, N. J.
Passaic, N. J.
Paterson, N. J.
Perth Amboy, N. J.
Port Chester, N. Y.
Plainfield, N. J.

Queens, N. Y.
1920 Richmond Hill, N. Y.
Ridgefield, N. J.
Ridgefield Park, N. J.
River Edge, N. J.
Rochelle Park, N. J.
Rockaway Beach, N. Y.
Rockaway Park, N. Y.
Rutherford, N. J.
Rutherford Junction, N. J.
Rye, N. Y.
Secaucus, N. J.
Springfield, N. Y.
Tarrytown, N. Y.
Teaneck, N. J.
Tenafly, N. J.—Ton lots or over
Town of Union, N. J.
Tuckahoe, N. Y.
Union, N. J.
Union Hill, N. J.
Upper Montclair, N. J.
Valley Stream, N. Y.
Weehawken, N. J.
West Englewood, N. J.
West Hoboken, N. J.
West Orange, N. J.
West View, N. J.
White Plains, N. Y.
Whitestone, N. Y.
Woodmere, N. Y.
Woodridge, N. J.
Yonkers, N. Y.

Pennsylvania

D—Pittston
D—Scranton
D—West Pittston

Rhode Island

D—Newport
D—Pawtucket
D—Providence
D—Woonsocket
D—Central Falls
D—Tiverton (6/15/31—McH.)

South Carolina
⅜ E—Charleston
¾ E—Columbia

Vermont
D—Bellows Falls
D—Brattleboro
E—Burlington
D—Montpelier
D—Rutland
D—St. Albans
D—St. Johnsbury

1921

National Lead Company
Boston Branch

List of Delivery Points

Revised to January 1, 1931

The following is a complete list of our delivery points in force today and until further notice:

Note: Delivery points are indicated by "D". Equalization points are indicated by "E". Differential points are indicated by a fractional cost per pound in the left hand column. The indentation of suburban towns under an equalization point indicates free delivery to such suburban towns.

New Hampshire
E—Concord
E—Dover
E—Keene
E—Portsmouth
E—Nashua
E—Woodsville
E—Franklin
E—Manchester

Maine
E—Auburn
E—Augusta
E—Bath

E—Biddeford
E—Brunswick
E—Lewiston
E—Portland
E—Rockland
E—Waterville

Massachusetts

All towns and cities East of Connecticut River

Truck Deliveries and Service

Towns Where Deliveries Are Made Regardless of Quantity

Arlington
Boston
Brookline
Brighton
Belmont
Beverly
Cambridge
Chelsea
Dorchester
Everett
East Boston
Lexington
Medford
North Cambridge
Roxbury
South Boston
Winthrop
Lynn
Malden
Salem
Cliftendale
Deavers
Marblehead
Nahant
Peabody
Revere
Saugus
Swampboutt
Stoughton

1922 Towns where delivery by truck will be made provided minimum load of six tons can be accumulated for delivery in such towns or combination of such towns en route.

Atlantic
Concord
Braintree
Melrose
Nedham
Nettons
Stougham
Wakefield
Waltham
Watertown
Wollaston
The Weymouths
Brockton
Gloucester
Haverhill
Hudson
Lippensee
Lowell
Marlboro
Maynard
Quincy
Taunton
Woburn
Winchester

1923 National Lead Company
Buffalo Branch

List of Delivery Points

Revised to January 28, 1921

The following is a complete list of our delivery points in force today and until further notice:

Note: Delivery points are indicated by "D". Equalization points are indicated by "E". Differential points are indicated by a fractional cent per pound in the left hand column. The indentation of suburban towns under an equalization point indicates free truck delivery to such suburban towns.

New York
- D—Rochester
- D—Elmira
- D—Ithaca
- D—Jamestown

1924

National Lead Company
Chicago Branch

List of Delivery Points

Revised to January 4, 1921.

The following is a complete list of our delivery points in force today and until further notice:

Note: Delivery points are indicated by "D". Equalization points are indicated by "E". Differential points are indicated by a fractional cent per pound in the left hand column. The indentation of suburban towns under an equalization point indicates free truck delivery to such suburban towns.

Illinois
- E—Chicago
    - Blue Island
    - Cicero
    - Evanston
    - Forest Park
    - Maywood

Oak Park
- D—Joliet
- E—Rockford

Wisconsin
- E—Green Bay
- E—Madison
- D—Manitowoc
- D—Marinette
- E—Milwaukee

E—Oshkosh
D—Racine
⅛ D—Wausau

Michigan

E—Bay City
⅛ E—Escanaba
E—Detroit
E—Grand Rapids
⅛ D—Ironwood (not less than 2,000 pounds)
E—Kalamazoo
⅛ E—Menominee
D—Midland
E—Saginaw
¼ D—Sault Ste Marie

1925

National Lead Company
Cincinnati Branch

List of Delivery Points

Revised November 19, 1920

The following is a complete list of our delivery points in force today and until further notice:

Note: Delivery points are indicated by "D". Equalization points are indicated by "E". Differential points are indicated by a fractional cent per pound in the left hand column. The indentation of suburban towns under an equalization point indicates free truck delivery to such suburban towns. Towns marked ** are not in Cincinnati territory but are used as equalization points for shipments in our territory.

Alabama

¾—D—Bessemer
¾—E—Birmingham
(4/17/22) **⅜—E—Mobile
¾—E—Montgomery
¾—E—Selma

Georgia

¾—D—Athens
¾—E—Atlanta

**¾—E—Augusta
¾—D—Columbus
¾—D—Gainsville
¾—E—Rome
**½—E—Savannah
**¾—E—Macon

Indiana
E—Evansville
E—Fort Wayne
E—Indianapolis
Jeffersonville (See Louisville, Ky.)
D—New Albany (See Louisville, Ky.)
D—La Fayette
D—Richmond
E—Terre Haute
E—Vincennes

Kentucky
Bellevue (See Cincinnati)
Covington (" ")
Dayton (" ")
E—Henderson
Latonia (" ")
E—Louisville (Cartage allowance of 5¢ per cwt.)
Jeffersonville, Indiana
New Albany, Ind. (3¢ per cwt. cartage allowance on direct shipment.)
Ludlow (See Cincinnati)
Newport (" ")
E—Owensboro

North Carolina
⅝—D—Asheville
**½—D—High Point

1926

Ohio
Bellaire (See Wheeling, W. Va.)
Bridgeport (" " " ")

E—Cincinnati
Bellevue, Ky.
Carthage
Covington, Ky.

Dayton, Ky.
Elmwood Place
Glendale
Hartwell
Latonia, Ky.
Lockland
Ludlow, Ky.
Madisonville
Newport, Ky.
Norwood
Reading
St. Bernard
Sharonville

E—Columbus
E—Dayton
D—Hamilton
E—Lima
E—Ironton
D—Mansfield
E—Marietta—Martins Ferry (See Wheeling, W. Va.)
D—Pomeroy
E—Portsmouth
E—Springfield
** E—Steubenville
** E—Toledo
E—Zanesville

South Carolina

¾—D—Union
** ¾—E—Chester
** ¾—E—Columbia
** ⅜—E—Charleston

Tennessee

½—D—Bristol
½—E—Chattanooga
½—D—Johnson City
½—E—Knoxville
¼—E—Nashville

Virginia

** ¼—E—Richmond
½—D—Bristol

West Virginia

- E—Charleston
- D—Huntington
- E—Wheeling
  - Benwood
  - Bellaire, Ohio
  - Bridgeport, "
  - Martins Ferry, Ohio

1927

National Lead Company
Cleveland Branch

List of Delivery Points

Revised to January 1, 1921

The following is a complete list of our delivery points in force today and until further notice:

Note: Delivery points are indicated by "D". Equalization points are indicated by "E". Differential points are indicated by a fractional cent per pound in the left hand column. The indentation of suburban towns under an equalization point indicates free truck delivery to such suburban towns.

Ohio

- D—Akron
- D—Cleveland
  - East Cleveland
  - Lakewood
  - Rock River
  - West Park
- D—Toledo

1928 National Lead & Oil Company of Pennsylvania

List of Delivery Points

Revised to December 30, 1920

The following is a complete list of our delivery points in force today and until further notice:

Note: Delivery points are indicated by "D". Equalization points are indicated by "E". Differential points are indicated by a fractional cent per pound in the left hand column. The indentation of suburban towns under an equalization point indicates free truck delivery to such suburban towns.

Pennsylvania

D—Altoona
D—Beaver Falls
D—Beaver
D—Butler
D—Du Bois
D—Clearfield
E—Erie
D—Farrell
D—Freedom
D—Franklin
E—Johnstown
D—Kane
E—Lewisburg
D—Lock Haven
D—Madera
D—McKeesport
D—Monaca
D—Monessen
D—New Brighton
E—New Castle
D—New Kensington
E—Oil City
D—Parnassus
D—Pittsburgh

Freight allowed to suburban towns but not store delivery outside of Pittsburgh proper.

- D—Punxsutawney
- D—Rochester
- D—Sharpsville
- E—Sharon
- D—Sheffield
- D—Tarentum
- D—Titusville
- D—Uniontown
- D—Warren
- D—West Bridgewater
- E—Williamsport

Ohio

- E—Alliance
- E—Barberton
- E—Canton
- D—East Liverpool
- D—Massillon
- D—Niles
- E—Steubenville
- D—Webster
- D—Warren
- E—Youngstown

West Virginia

- E—Clarksburg
- E—Fairmont
- E—Grafton
- D—Morgantown

Maryland

- E—Cumberland

1929

National Lead Company
Philadelphia Branch

List of Delivery Points

Revised to April 6, 1921

The following is a complete list of our delivery points in force today and until further notice:

Note: Delivery points are indicated by "D". Equalization points are indicated by "E". Differential points are indicated by a fractional cent per pound in the left hand column. The indentation of suburban towns under an equalization point indicates free truck delivery to such suburban towns.

Delaware
    E—Georgetown
    E—Wilmington

District Columbia
    E—Washington

Maryland
    E—Baltimore
    E—Bel Aire
    E—Cambridge
    E—Ellicott City
    E—Easton
    E—Forest Hill
    E—Hyattsville
    E—Hagerstown
    E—Laurel
    E—Salisbury
    E—Sykesville

New Jersey
    ~~E—Asbury Park~~
    E—Atlantic City
    Camden (See Phila., Penna.)
    E—Trenton
    E—Vineland
    E—Wildwood

North Carolina

- ½-E—Charlotte

Pennsylvania

- E—Allentown
- E—Ashland
- D—Bethlehem
- E—Bloomsburg
- E—Chester
- E—Conshohocken
- E—Danville
- E—Easton
- E—Hanover
- E—Harrisburg
- E—Hazleton
- D—Jenkintown
- E—Kingston
- E—Lancaster
- E—Lebanon
- E—Mechanicsburg
- E—Media
- E—Mt. Carmel
- E—Morristown
- E—Plymouth
- E—Philadelphia
  Camden, N. J.
- E—Phoenixville
- E—Pottstown
- E—Pottsville
- E—Reading
- E—Rogersford
- E—Shamokin
- E—Wilkes-Barre
- E—York
- D—Carlisle
- D—Columbia
- D—Sunbury

Virginia

- E—Alexandria
- ¼—E—Charlottesville
- ¼—D—Danville
- ¼—E—Lynchburg
- ¼—E—Norfolk

¼—E—Newport News
¼—E—Portsmouth
¼—E—Petersburg
¼—E—Roanoke
¼—E—Richmond
¼—E—Staunton
¼—E—Winchester
¼—D—Lexington
¼—D—Suffolk

North Carolina

½—D—High Point
½—E—Charlotte
½—D—Greensboro
½—D—Winston-Salem
½—E—Fayettesville
½—E—Raleigh
½—E—Wilmington

Other towns have freight equalized with nearest equalization points. In North Carolina, customers will be sold either F. O. B. Richmond or equalized with that point.

* Advised by Beitzel on phone May 23, 1925.

** Beitzel's letter of August 29, 1924.

1930

National Lead Company
St. Louis Branch

List of Delivery Points

Revised to March 15, 1921

The following is a complete list of delievry points in force today and until further notice:

Note: Delivery points are indicated by "D". Equalization points are indicated by "E". Differential points are indicated by a fractional cent per pound in the left hand column. The indentation of suburban towns under an equalization point indicates free truck delivery to such suburban towns.

Alabama

¼—E—Mobile

Arkansas

¾—E—Little Rock

Arizona

1¼—D—Phoenix (C. L. Only)
1¼—D—Tucson

Illinois

⅛—D—Belleville
⅛—E—Bloomington
⅛—E—Cairo
⅛—E—Decatur
East St. Louis (See St. Lo., Mo.)
⅛—E—Galesburg
Granite City (See St. Lo., Mo.)
Madison (See St. Lo., Mo.)
⅛—D—Moline
⅛—E—Peoria
⅛—E—Quincy
⅛—E—Rock Island
⅛—E—Springfield,
Venice (See St. Lo., Mo.)

Iowa

⅛—E—Burlington
⅛—E—Cedar Rapids

$\frac{1}{8}$—E—Clinton
$\frac{1}{8}$—D—Council Bluffs
$\frac{1}{8}$—E—Davenport
$\frac{1}{8}$—E—Des Moines
$\frac{1}{8}$—E—Dubuque
$\frac{1}{8}$—E—Fairfield
$\frac{1}{8}$—E—Fort Dodge
$\frac{1}{8}$—D—Iowa City
$\frac{1}{8}$—E—Keokuk
$\frac{1}{8}$—D—Muscatine
$\frac{1}{8}$—E—McGregor
$\frac{1}{8}$—E—Oskaloosa
$\frac{1}{8}$—E—Ottumwa
$\frac{1}{8}$—E—Sioux City
$\frac{1}{8}$—E—Waterloo

Kansas.

$\frac{1}{8}$—E—Atchison
$\frac{5}{8}$—E—Hutchinson
Kansas City (See Kansas City, Mo.)
$\frac{1}{8}$—D—Leavenworth (Government only)
$\frac{5}{8}$—E—Salina
$\frac{1}{4}$—E—Topeka
$\frac{5}{8}$—E—Wichita

Kentucky

$\frac{1}{8}$—E—Paducah

Louisiana

$\frac{3}{8}$—E—New Orleans (4/17/22)

Minnesota

$\frac{1}{8}$—E—Duluth
$\frac{1}{8}$—E—Minneapolis
$\frac{1}{8}$—E—St. Paul
$\frac{1}{8}$—E—Winona

1931

Mississippi

E—Meridian—taken of April 17, 1922.

Missouri

$\frac{1}{8}$—E—Hanniabal
$\frac{3}{8}$—E—Joplin

⅛—E—Kansas City
Dodson
Independence
Kansas City, Kas.
No. Kansas City

⅛—E—St. Joseph
E—St. Louis
Carondelet
Clayton
East St. Louis, Ill.
Ferguson
Florissant
Granite City, Ill.
Kirkwood
Madison, Ill.
Maplewood
Venice, Ill.
Webster
⅜—E—Springfield

Montana

1¼—D—Anaconda (C. L. only)
1¼—D—Butte "
1¼—D—Great Falls "
1¼—D—Helena "
1¼—D—Lewiston "
1¼—D—Missoula "

Nebraska

⅛—E—Lincoln
⅛—E—Omaha

Oklahoma

⅞—E—McAlester
⅞—E—Oklahoma City
⅞—E—Tulsa

South Dakota

½—E—Aberdeen
¼—E—Sioux Falls

Tennessee

¼—E—Memphis
½—D—Morristown (2/10/22)

Texas

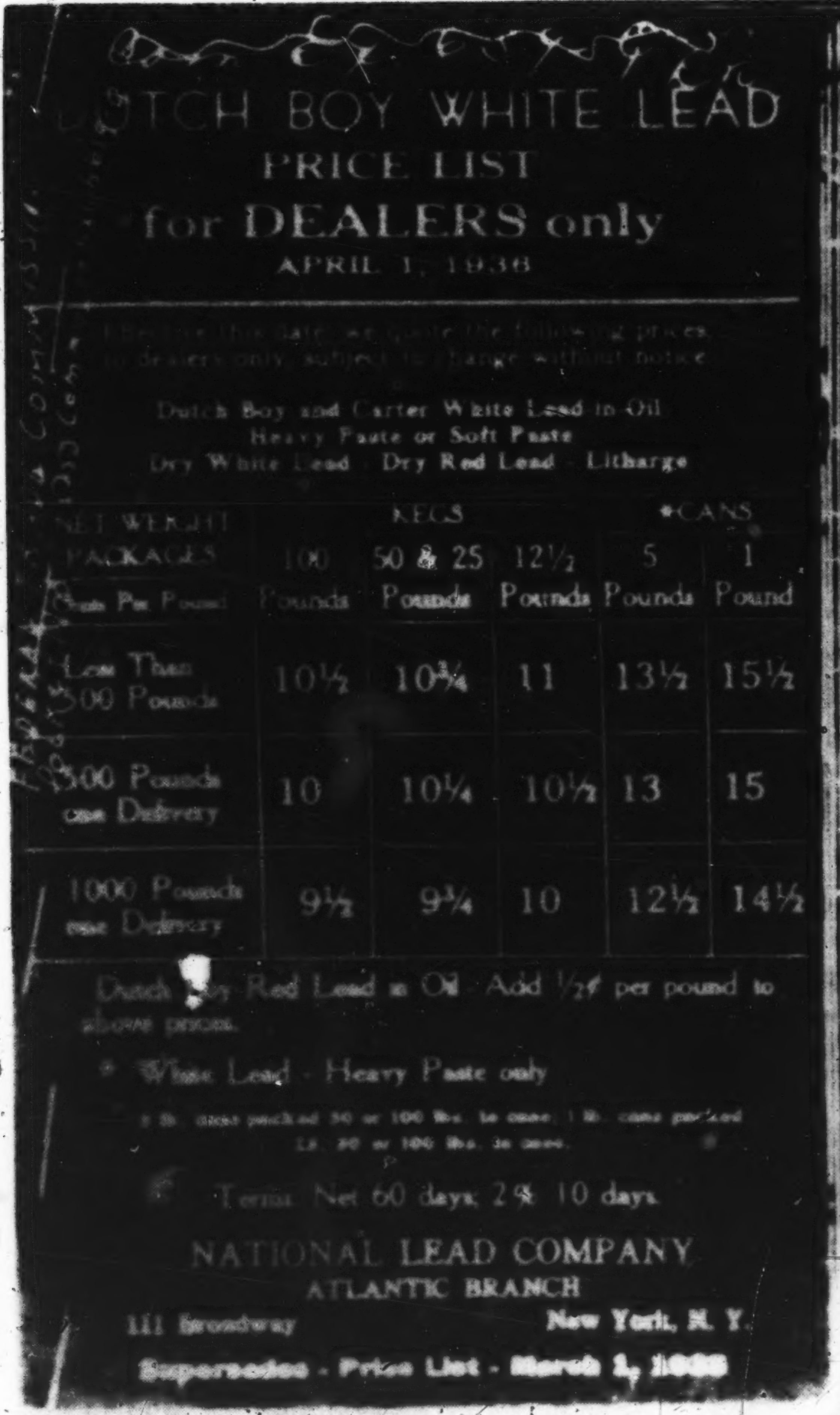
1¢—D—Amarillo (C. L. only)
1¢—D—Austin "
¾—D—Beaumont "
1¢—D—Cisco "
1¢—D—Corsicana " & L. C. L.
1¢—E—Dallas
1¢—E—Fort Worth
¾—D—Galveston "
¾—E—Houston
1¢—D—Paris " & L. C. L.
1¢—E—San Antonio
1¢—D—Sherman " & L. C. L.
1¢—D—Waco "
1¢—D—Wichita Falls "
1⅛—E—El Paso "

Wisconsin

⅛—E—Eau Claire
⅛—E—La Crosse
⅛—D—Superior

Denver, Colorado

equalizes with Kansas City at differential.
⅝—Now K. C.—L. C. L.
⅜— " " —C. L.



Com. Ex. 659-A

DUTCH BOY WHITE LEAD

PRICE LIST
for DEALERS only

APRIL 1, 1938

Effective this date we quote the following prices to dealers only subject to change without notice.

Dutch Boy and Carter White Lead-in-Oil
Heavy Paste or Soft Paste
Dry White Lead - Dry Red Lead - Litharge

NET WEIGHT	KEGS			*CANS	
PACKAGES Cents Per Pound	100 Pounds	50 & 25 Pounds	12½ Pounds	5 Pounds	1 Pound
Less Than 500 Pounds	10½	10¾	11	13½	15½
500 Pounds one Delivery	10	10¼	10½	13	15
1000 Pounds one Delivery	9½	9¾	10	12½	14½

Dutch Boy Red Lead in Oil - Add ½¢ per pound to above prices.

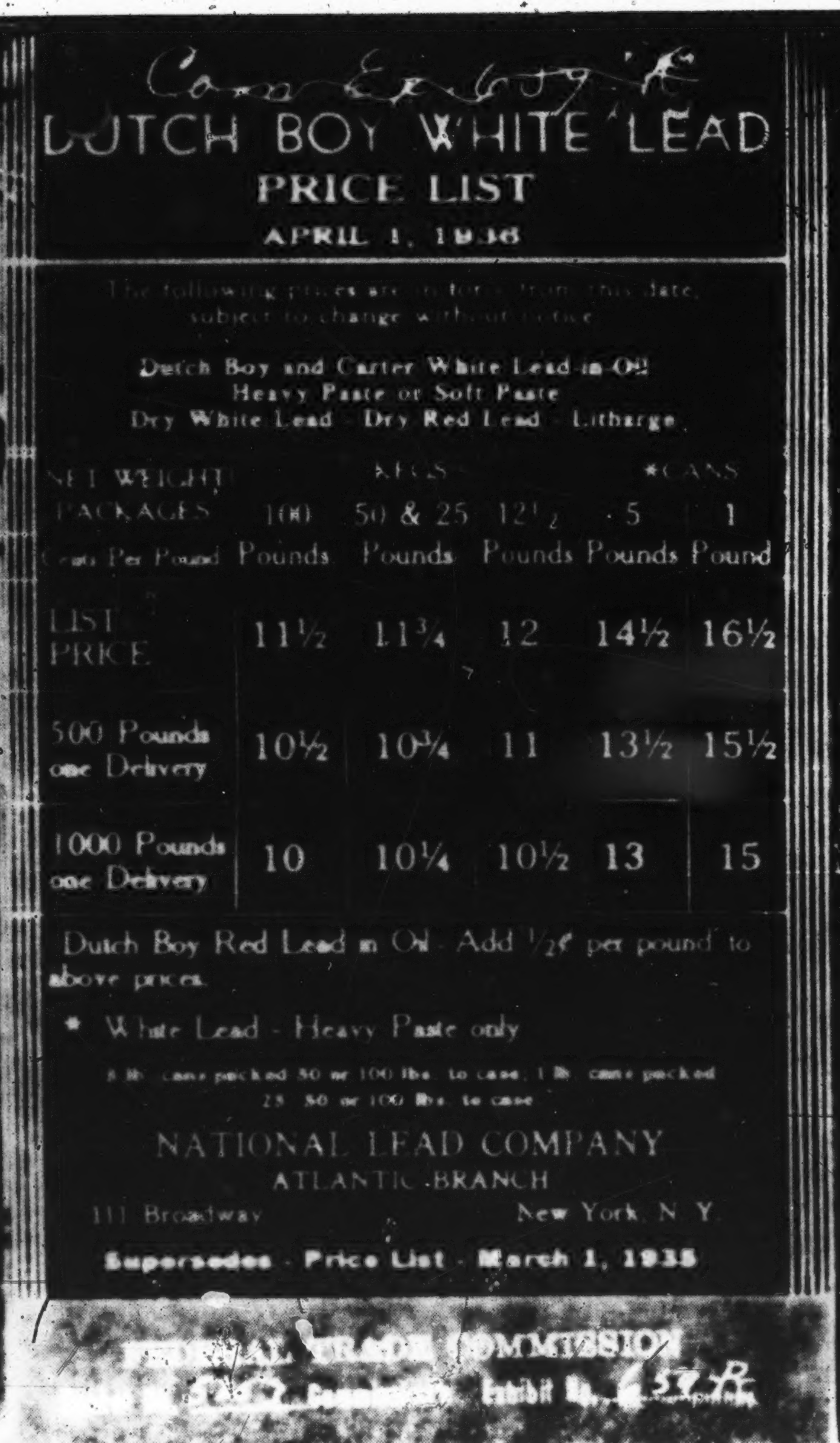
* White Lead - Heavy Paste only

5 lb. cans packed 50 or 100 lbs. to case; 1 lb. cans packed 25, 50 or 100 lbs. to case.

Terms: Net 60 days; 2% 10 days.

NATIONAL LEAD COMPANY
ATLANTIC BRANCH
111 Broadway New York, N. Y.

Supersedes - Price List - March 1, 1935



Com. Ex. 659-B

DUTCH BOY WHITE LEAD

PRICE LIST

APRIL 1, 1938

The following prices are in force from this date, subject to change without notice.

Dutch Boy and Carter White Lead-in-Oil
Heavy Paste or Soft Paste
Dry White Lead - Dry Red Lead - Litharge

NET WEIGHT	KEGS			*CANS	
PACKAGES Cents Per Pound	100 Pounds	50 & 25 Pounds	12½ Pounds	5 Pounds	1 Pound
LIST PRICE	11½	11¾	12	14½	16½
500 Pounds one Delivery	10½	10¾	11	13½	15½
1000 Pounds one Delivery	10	10¼	10½	13	15

Dutch Boy Red Lead in Oil - Add ½¢ per pound to above prices.

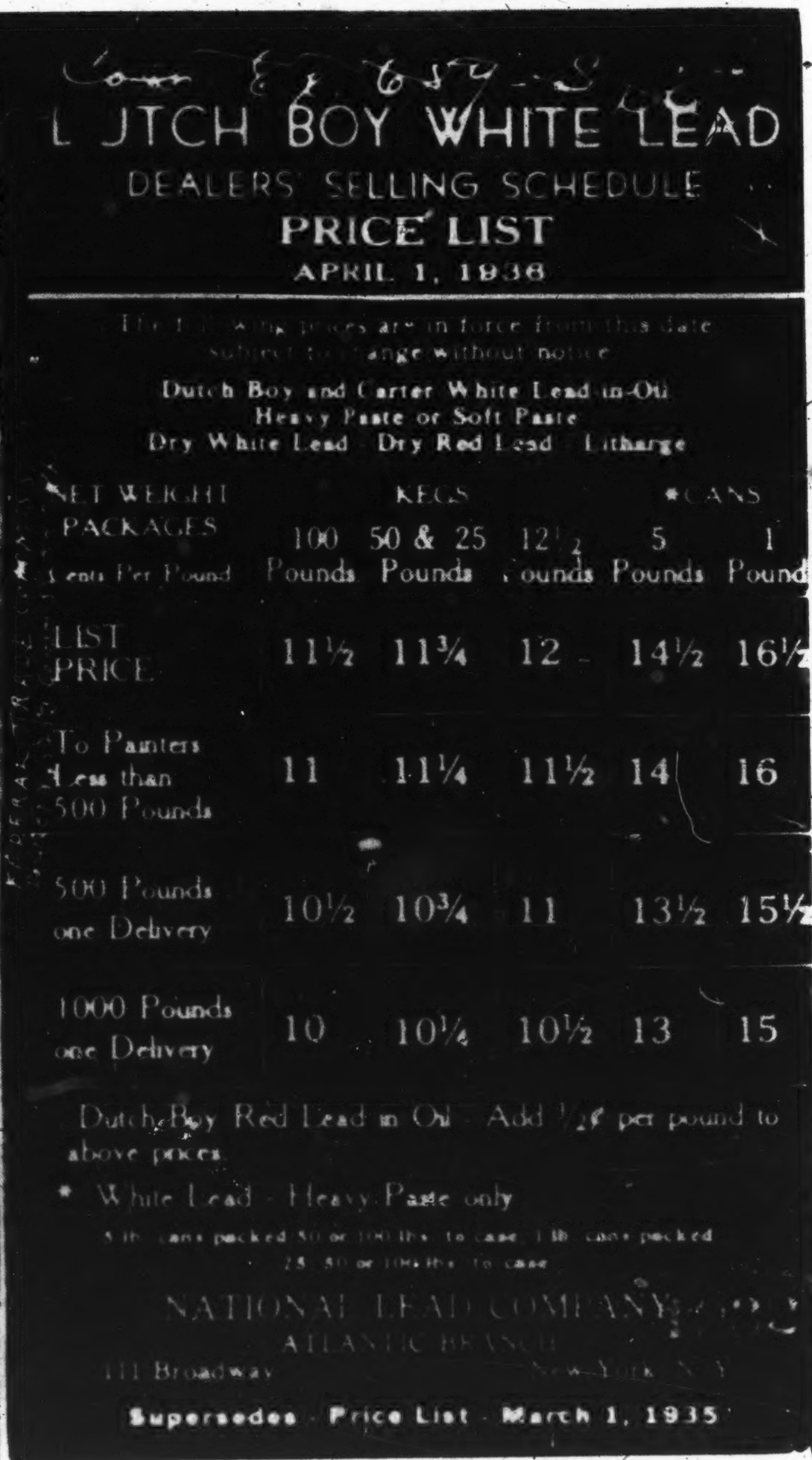
* White Lead - Heavy Paste only

5 lb. cans packed 50 or 100 lbs. to case; 1 lb. cans packed 25, 50 or 100 lbs. to case.

NATIONAL LEAD COMPANY
ATLANTIC BRANCH
111 Broadway New York, N. Y.

Supersedes - Price List - March 1, 1935

FEDERAL TRADE COMMISSION
Docket No. [illegible] Commission's Exhibit No. 659 B



Com. Ex. 659-C

DUTCH BOY WHITE LEAD

DEALERS' SELLING SCHEDULE

PRICE LIST

APRIL 1, 1938

The following prices are in force from this date subject to change without notice.

Dutch Boy and Carter White Lead-in-Oil
Heavy Paste or Soft Paste
Dry White Lead - Dry Red Lead - Litharge

NET WEIGHT	KEGS			*CANS	
PACKAGES Cents Per Pound	100 Pounds	50 & 25 Pounds	12½ Pounds	5 Pounds	1 Pound
LIST PRICE	11½	11¾	12	14½	16½
To Painters Less than 500 Pounds	11	11¼	11½	14	16
500 Pounds one Delivery	10½	10¾	11	13½	15½
1000 Pounds one Delivery	10	10¼	10½	13	15

Dutch Boy Red Lead in Oil - Add ½¢ per pound to above prices.

* White Lead - Heavy Paste only

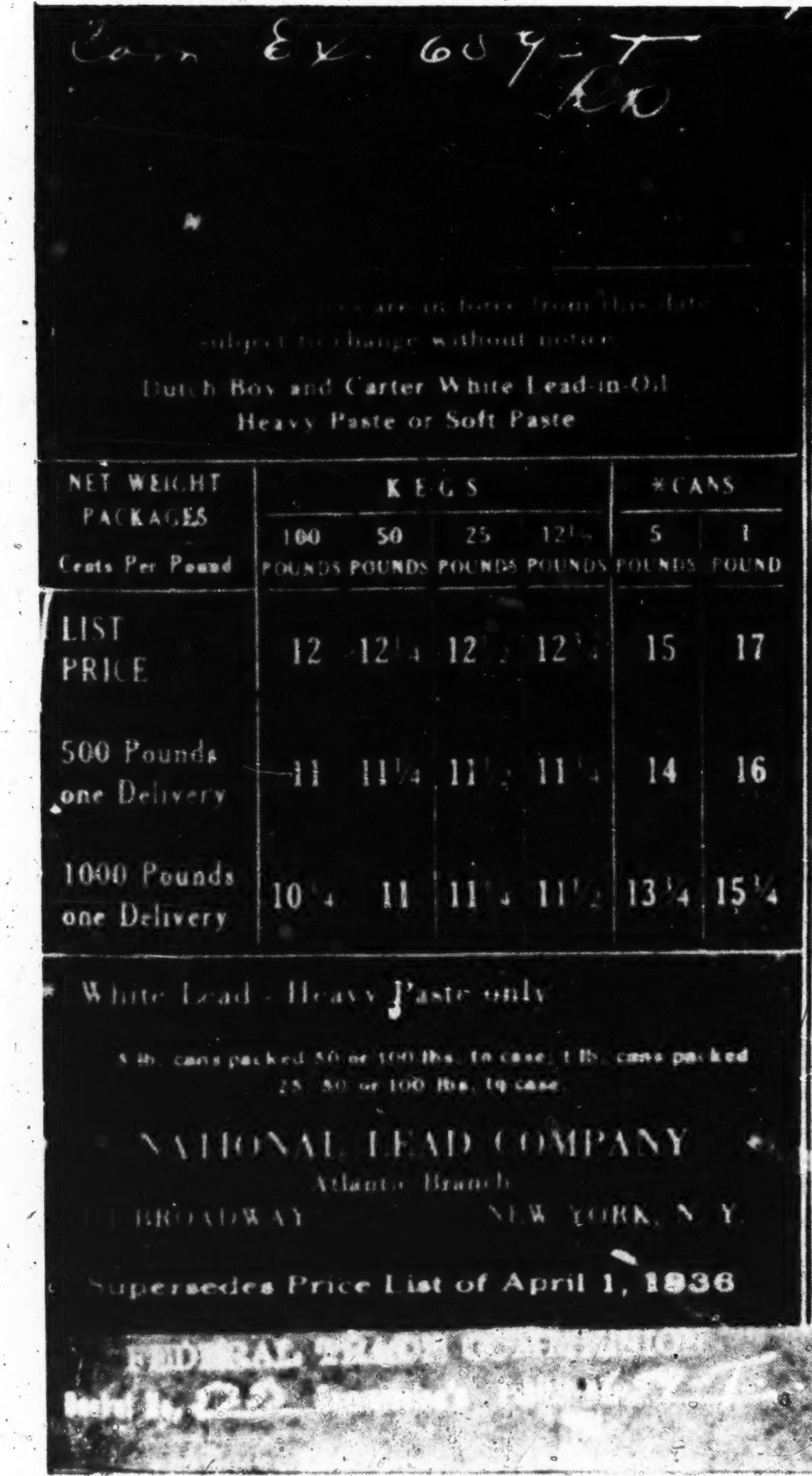
5 lb. cans packed 50 or 100 lbs. to case; 1 lb. cans packed 25, 50 or 100 lbs. to case.

NATIONAL LEAD COMPANY
ATLANTIC BRANCH
111 Broadway New York, N. Y.

Supersedes - Price List - March 1, 1935

Commission's Exhibit No. 659.

Commission's Exhibit No. 659.



Com. Ex. 659-T
Co.

[illegible] are in force from this date
subject to change without notice.

Dutch Boy and Carter White Lead-in-Oil
Heavy Paste or Soft Paste

NET WEIGHT PACKAGES Cents Per Pound	KEGS				*CANS	
	100 POUNDS	50 POUNDS	25 POUNDS	12½ POUNDS	5 POUNDS	1 POUND
LIST PRICE	12	12¼	12½	12¾	15	17
500 Pounds one Delivery	11	11¼	11½	11¾	14	16
1000 Pounds one Delivery	10¾	11	11¼	11½	13¾	15¾

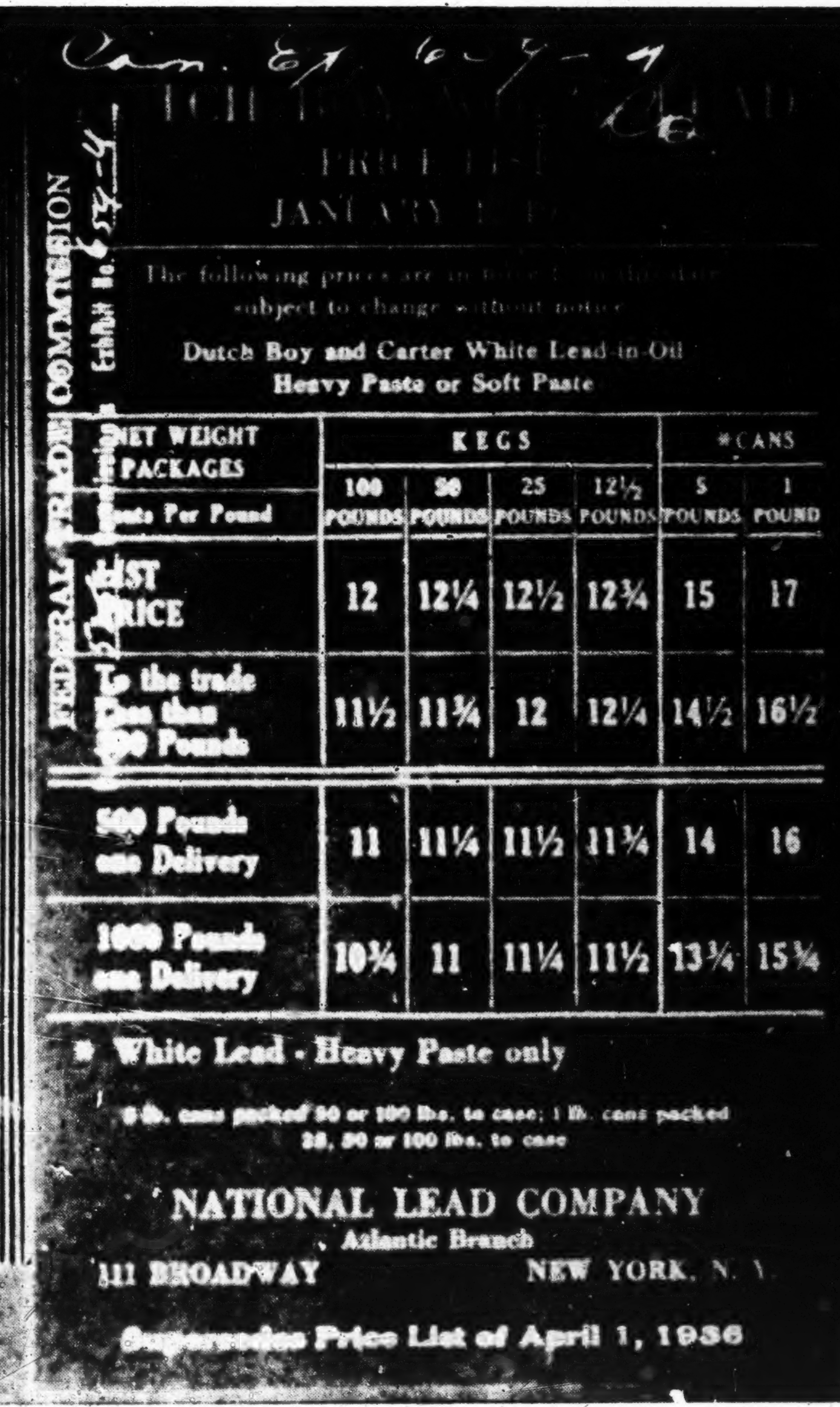
* White Lead - Heavy Paste only

5 lb. cans packed 50 or 100 lbs. to case; 1 lb. cans packed 25, 50 or 100 lbs. to case.

NATIONAL LEAD COMPANY
Atlantic Branch
[illegible] BROADWAY NEW YORK, N. Y.

Supersedes Price List of April 1, 1936

FEDERAL TRADE COMMISSION
Docket No. [illegible] Commission's Exhibit No. [illegible]



Com. Ex. 659-S
Co.

FEDERAL TRADE COMMISSION
Docket No. [illegible] Exhibit No. 654-4

[illegible]TCH BOY WHITE LEAD
PRICE LIST
JANUARY [illegible]

The following prices are in force from this date
subject to change without notice.

Dutch Boy and Carter White Lead-in-Oil
Heavy Paste or Soft Paste

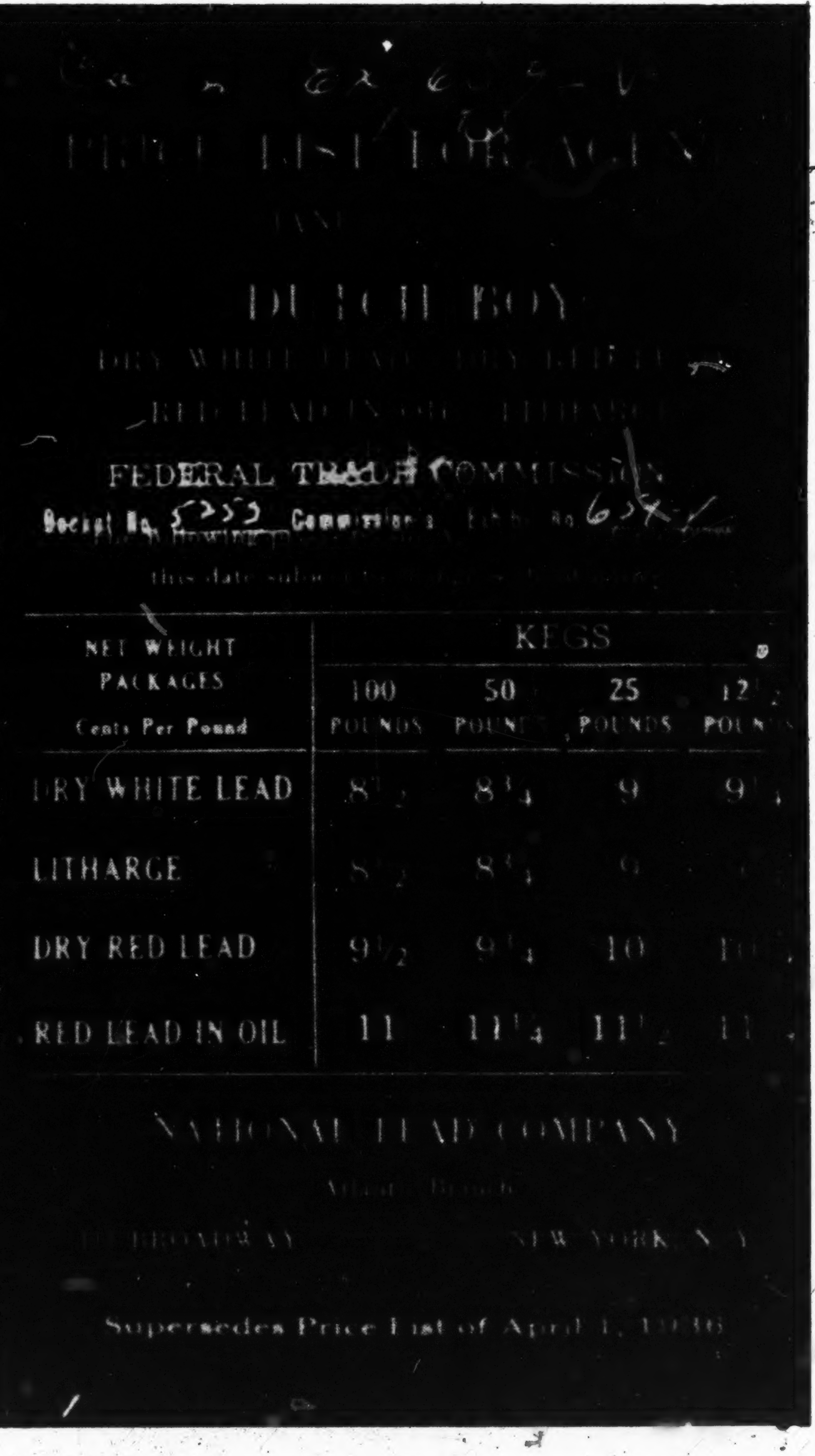
NET WEIGHT PACKAGES Cents Per Pound	KEGS				*CANS	
	100 POUNDS	50 POUNDS	25 POUNDS	12½ POUNDS	5 POUNDS	1 POUND
LIST PRICE	12	12¼	12½	12¾	15	17
To the trade Less than 500 Pounds	11½	11¾	12	12¼	14½	16½
500 Pounds one Delivery	11	11¼	11½	11¾	14	16
1000 Pounds one Delivery	10¾	11	11¼	11½	13¾	15¾

*** White Lead - Heavy Paste only**

5 lb. cans packed 50 or 100 lbs. to case; 1 lb. cans packed 25, 50 or 100 lbs. to case

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

Supersedes Price List of April 1, 1936



Com. Ex. 659-U

PRICE LIST FOR AGENTS
[illegible]

DUTCH BOY
DRY WHITE LEAD [illegible]
RED LEAD IN OIL [illegible]

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 654-1

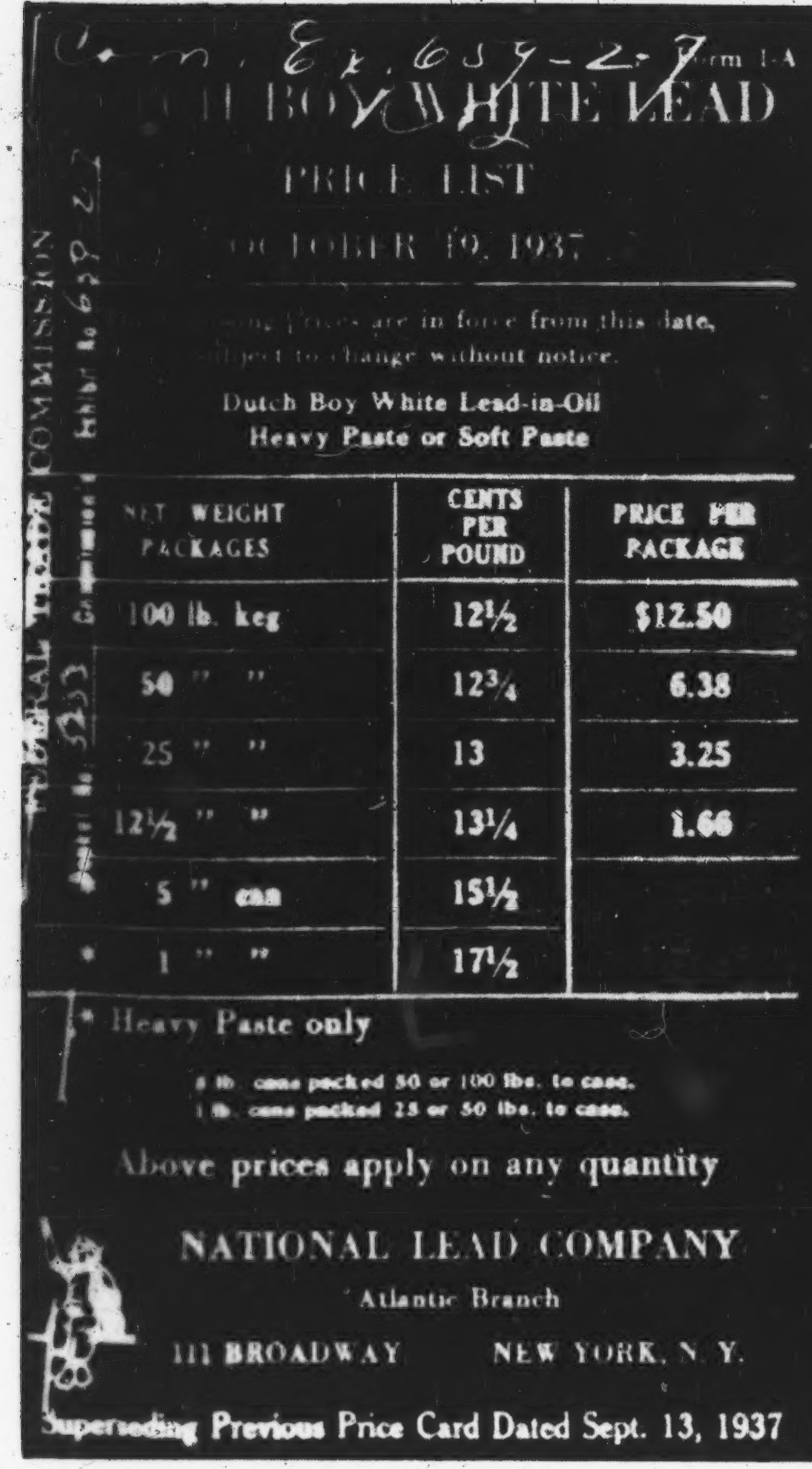
The following prices [illegible]
this date subject to change without notice.

NET WEIGHT PACKAGES Cents Per Pound	KEGS			
	100 POUNDS	50 POUNDS	25 POUNDS	12½ POUNDS
DRY WHITE LEAD	8½	8¾	9	9[illegible]
LITHARGE	8½	8¾	9	[illegible]
DRY RED LEAD	9½	9¾	10	10[illegible]
RED LEAD IN OIL	11	11¼	11½	11[illegible]

NATIONAL LEAD COMPANY
Atlantic Branch
[illegible] BROADWAY NEW YORK, N. Y.

Supersedes Price List of April 1, 1936

Commission's Exhibit No. 659.



Com. Ex. 659-2-7

Form 1-A

FEDERAL TRADE COMMISSION
Commission's Exhibit No. 659-2-7
Docket No. 5253

DUTCH BOY WHITE LEAD

PRICE LIST

OCTOBER 19, 1937

The following prices are in force from this date, subject to change without notice.

Dutch Boy White Lead-in-Oil
Heavy Paste or Soft Paste

NET WEIGHT PACKAGES	CENTS PER POUND	PRICE PER PACKAGE
100 lb. keg	12½	$12.50
50 " "	12¾	6.38
25 " "	13	3.25
12½ " "	13¼	1.66
* 5 " can	15½	
* 1 " "	17½	

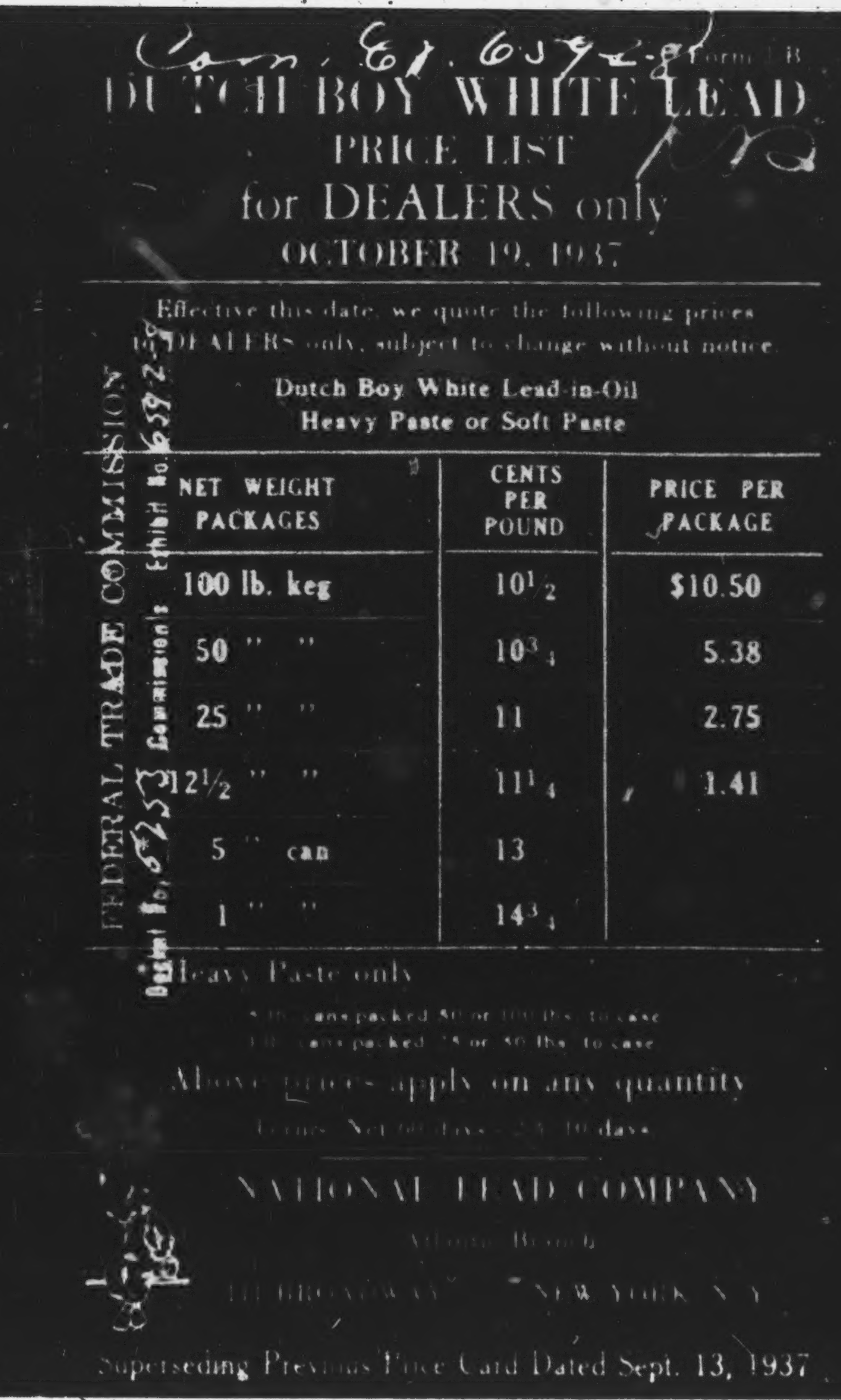
* Heavy Paste only

5 lb. cans packed 50 or 100 lbs. to case.
1 lb. cans packed 25 or 50 lbs. to case.

Above prices apply on any quantity

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

Superseding Previous Price Card Dated Sept. 13, 1937



Com. Ex. 659-2-8

Form 1-B

FEDERAL TRADE COMMISSION
Commission's Exhibit No. 659-2-8
Docket No. 5253

DUTCH BOY WHITE LEAD

PRICE LIST
for DEALERS only

OCTOBER 19, 1937

Effective this date, we quote the following prices to DEALERS only, subject to change without notice.

Dutch Boy White Lead-in-Oil
Heavy Paste or Soft Paste

NET WEIGHT PACKAGES	CENTS PER POUND	PRICE PER PACKAGE
100 lb. keg	10½	$10.50
50 " "	10¾	5.38
25 " "	11	2.75
12½ " "	11¼	1.41
* 5 " can	13	
* 1 " "	14¾	

* Heavy Paste only

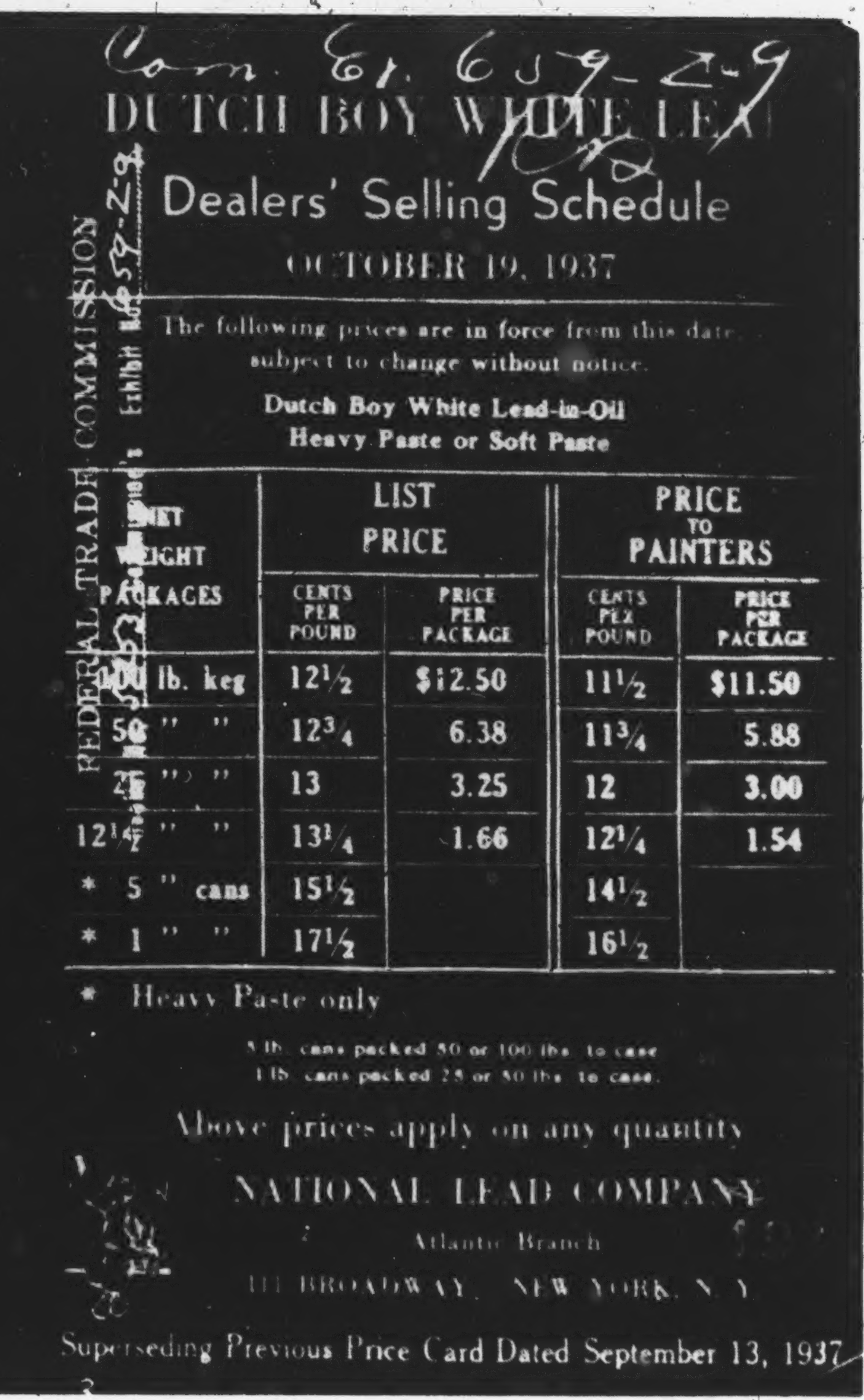
5 lb. cans packed 50 or 100 lbs. to case
1 lb. cans packed 25 or 50 lbs. to case

Above prices apply on any quantity

Terms: Net 60 days - 2% 10 days

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

Superseding Previous Price Card Dated Sept. 13, 1937



Com. Ex. 659-2-9

FEDERAL TRADE COMMISSION
Commission's Exhibit No. 659-2-9
Docket No. 5253

DUTCH BOY WHITE LEAD

Dealers' Selling Schedule

OCTOBER 19, 1937

The following prices are in force from this date, subject to change without notice.

Dutch Boy White Lead-in-Oil
Heavy Paste or Soft Paste

NET WEIGHT PACKAGES	LIST PRICE		PRICE TO PAINTERS	
	CENTS PER POUND	PRICE PER PACKAGE	CENTS PER POUND	PRICE PER PACKAGE
100 lb. keg	12½	$12.50	11½	$11.50
50 " "	12¾	6.38	11¾	5.88
25 " "	13	3.25	12	3.00
12½ " "	13¼	1.66	12¼	1.54
* 5 " cans	15½		14½	
* 1 " "	17½		16½	

* Heavy Paste only

5 lb. cans packed 50 or 100 lbs. to case
1 lb. cans packed 25 or 50 lbs. to case.

Above prices apply on any quantity

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY, NEW YORK, N. Y.

Superseding Previous Price Card Dated September 13, 1937

Com. Ex. 659-Z-10

FORM I-N

Effective October 19, 1937

REVISION OF FIRST PARAGRAPH - SECTION 7
APPOINTMENT OF SELLING AGENT
DUTCH BOY WHITE LEAD

7 - As compensation for the performance of his obligations, hereunder, the AGENT shall be allowed the difference between (1) the total value of his sales, and (2) the total value of the merchandise sold calculated at the following schedule of prices:

PER HUNDRED POUNDS

100 Pound Kegs	$ 9.50
50 " "	9.75
25 " "	10.00
12½ " "	10.25
5 " Cans	11.50
1 " "	13.00

FEDERAL TRADE COMMISSION
Docket No. 5253
Commission's Exhibit No. 659-Z-10

ATTACH THIS TO YOUR COPY OF AGENCY CONTRACT.

1940

Commission's Exhibit No. 659.

Commission's Exhibit No. 659.

Com. Ex. 659-Z-11

NET PRICES FOR AGENTS

JANUARY 10, 1938

Subject to change without notice,
we quote the following prices to our Agents

DUTCH BOY

DRY WHITE LEAD - LITHARGE
DRY RED LEAD - RED LEAD IN OIL

PRODUCTS	NET WEIGHT PACKAGES CENTS PER POUND			
	100 LBS	50 LBS.	25 LBS	12½ LBS
DRY WHITE LEAD	8¼	8½	8¾	9
LITHARGE	8¼	8½	8¾	9
DRY RED LEAD	9¼	9½	9¾	10
RED LEAD IN OIL	10	10¼	10½	10¾

Terms: Net 60 days - 2% 10 days.

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 659-Z-11

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

Supersedes Price List Dated October 19, 1937

Com. Ex. 659-Z-12

RESALE PRICES

(SUGGESTED)

JANUARY 10, 1938

DUTCH BOY

DRY WHITE LEAD - LITHARGE
DRY RED LEAD - RED LEAD IN OIL

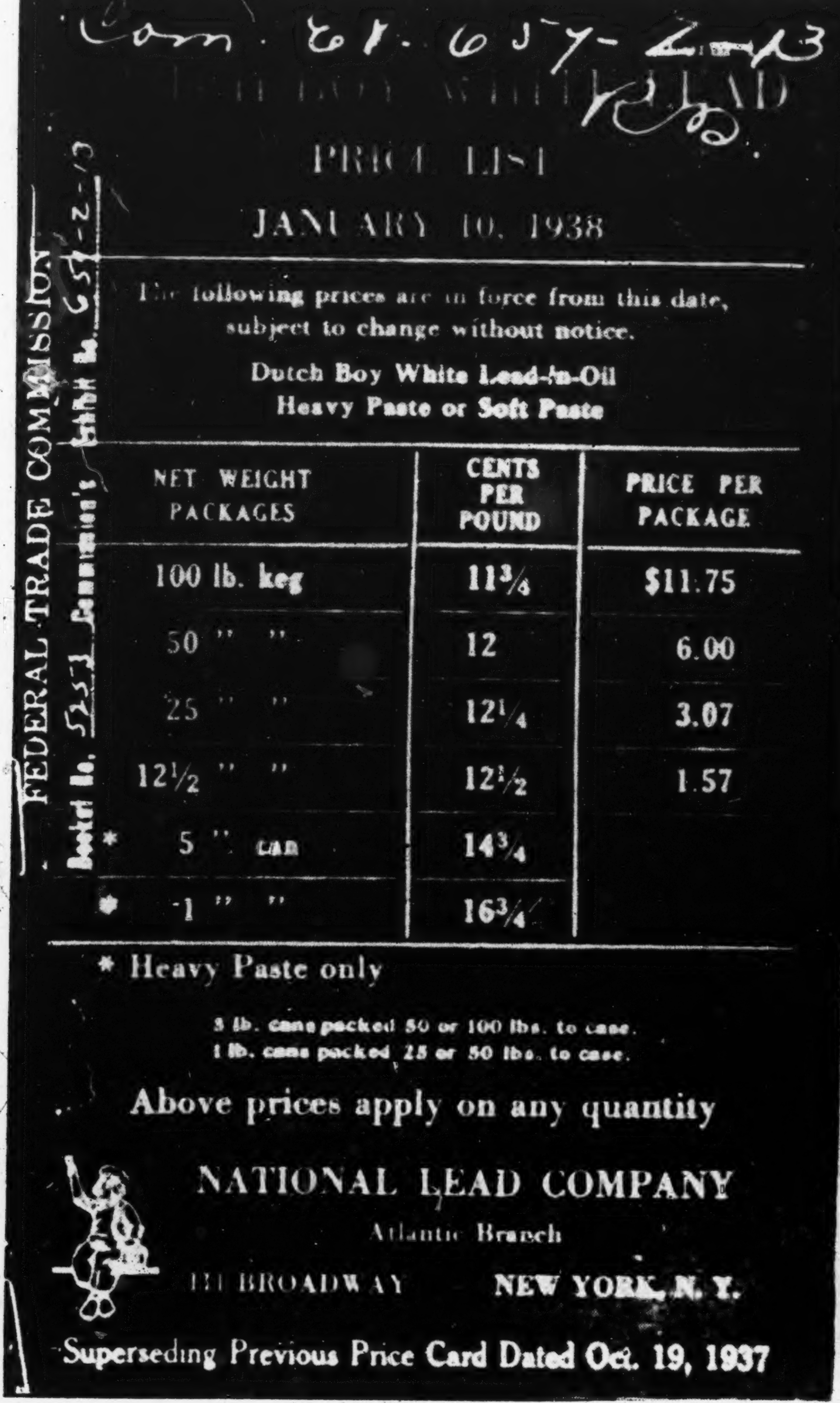
PRODUCTS	NET WEIGHT PACKAGES CENTS PER POUND			
	100 LBS	50 LBS.	25 LBS.	12½ LBS.
DRY WHITE LEAD	10¼	10½	10¾	11
LITHARGE	10¼	10½	10¾	11
DRY RED LEAD	11¼	11½	11¾	12
RED LEAD IN OIL	12	12¼	12½	12¾

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 659-Z-12

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

1941

Commission's Exhibit No. 659.



Com. Ex. 659-Z-13

RD

FEDERAL TRADE COMMISSION

Docket No. 5253 Commission's Exhibit No. 659-Z-13

DUTCH BOY WHITE LEAD

PRICE LIST

JANUARY 10, 1938

The following prices are in force from this date, subject to change without notice.

Dutch Boy White Lead-in-Oil
Heavy Paste or Soft Paste

NET WEIGHT PACKAGES	CENTS PER POUND	PRICE PER PACKAGE
100 lb. keg	11¾	$11.75
50 " "	12	6.00
25 " "	12¼	3.07
12½ " "	12½	1.57
* 5 " can	14¾	
* 1 " "	16¾	

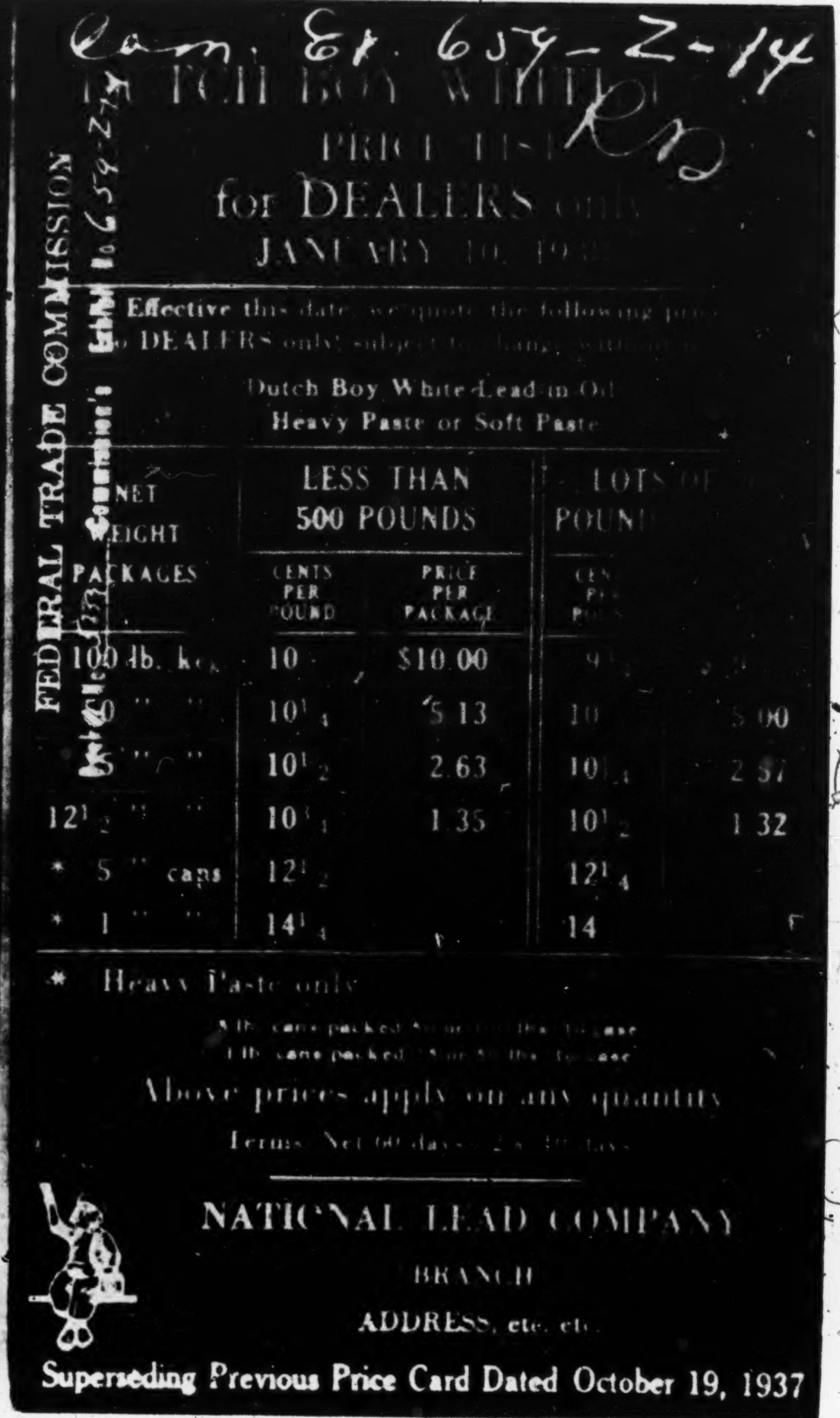
* Heavy Paste only

5 lb. cans packed 50 or 100 lbs. to case.
1 lb. cans packed 25 or 50 lbs. to case.

Above prices apply on any quantity

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

Superseding Previous Price Card Dated Oct. 19, 1937



Com. Ex. 659-Z-14

RD

FEDERAL TRADE COMMISSION

Docket No. 5253 Commission's Exhibit No. 659-Z-14

DUTCH BOY WHITE LEAD

PRICE LIST
for DEALERS only

JANUARY 10, 1938

Effective this date we quote the following prices to DEALERS only, subject to change without notice.

Dutch Boy White Lead-in-Oil
Heavy Paste or Soft Paste

NET WEIGHT PACKAGES	LESS THAN 500 POUNDS		LOTS OF 500 POUNDS	
	CENTS PER POUND	PRICE PER PACKAGE	CENTS PER POUND	PRICE PER PACKAGE
100 lb. keg	10	$10.00	9¾	[illegible]
50 " "	10¼	5.13	10	5.00
25 " "	10½	2.63	10¼	2.57
12½ " "	10¾	1.35	10½	1.32
* 5 " cans	12½		12¼	
* 1 " "	14¼		14	

* Heavy Paste only

5 lb. cans packed 50 or 100 lbs. to case
1 lb. cans packed 25 or 50 lbs. to case

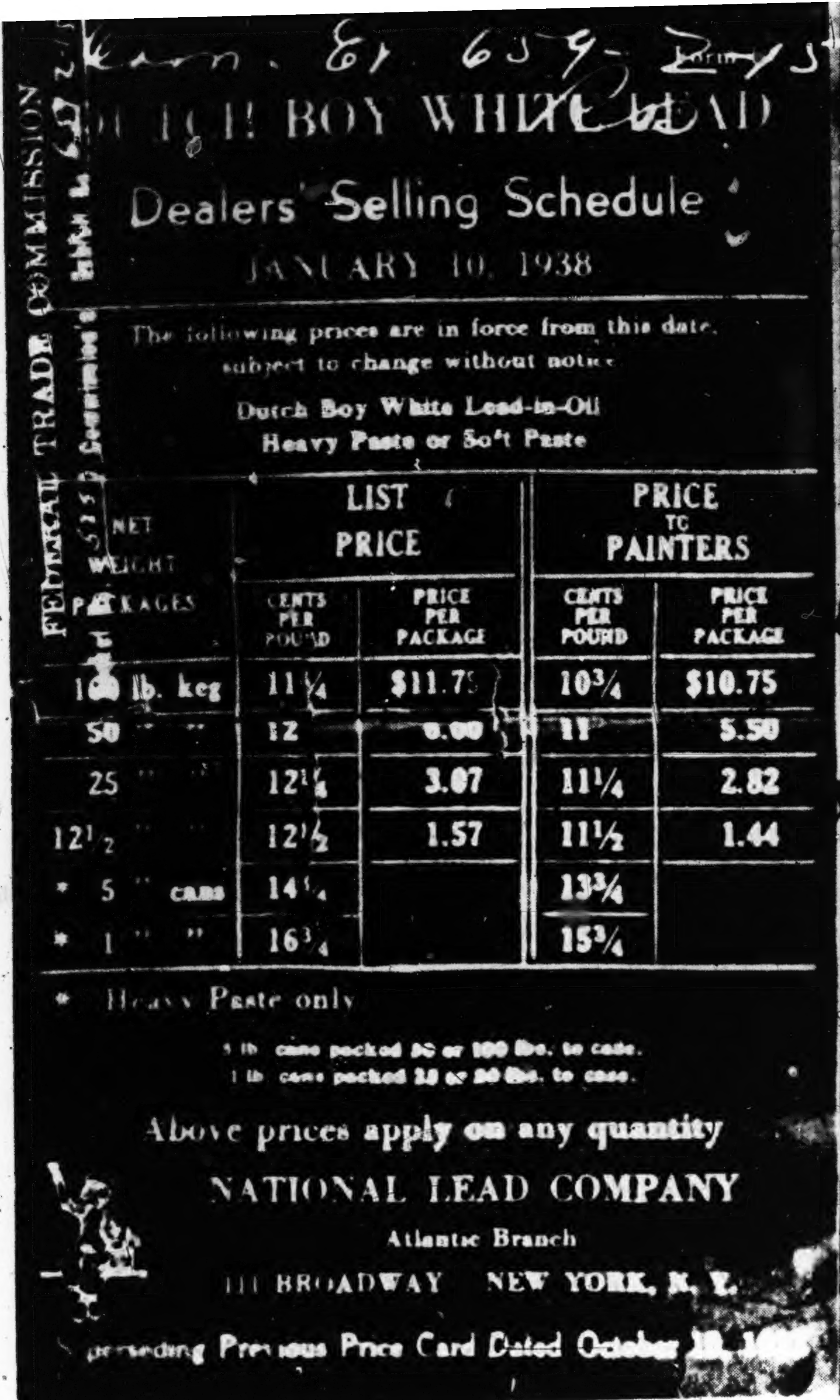
Above prices apply on any quantity

Terms: Net 60 days – 2% 30 days

NATIONAL LEAD COMPANY
BRANCH
ADDRESS, etc. etc.

Superseding Previous Price Card Dated October 19, 1937

Commission's Exhibit No. 659.



Com. Ex. 659-Z-15

FEDERAL TRADE COMMISSION
5155 Commission's Exhibit No. 659 Z-15

DUTCH BOY WHITE LEAD

Dealers' Selling Schedule

JANUARY 10, 1938

The following prices are in force from this date, subject to change without notice

Dutch Boy White Lead-in-Oil
Heavy Paste or Soft Paste

NET WEIGHT PACKAGES	LIST PRICE		PRICE TO PAINTERS	
	CENTS PER POUND	PRICE PER PACKAGE	CENTS PER POUND	PRICE PER PACKAGE
100 lb. keg	11¼	$11.75	10¾	$10.75
50 " "	12	6.00	11	5.50
25 " "	12¼	3.07	11¼	2.82
12½ " "	12½	1.57	11½	1.44
* 5 " cans	14¼		13¾	
* 1 " "	16¾		15¾	

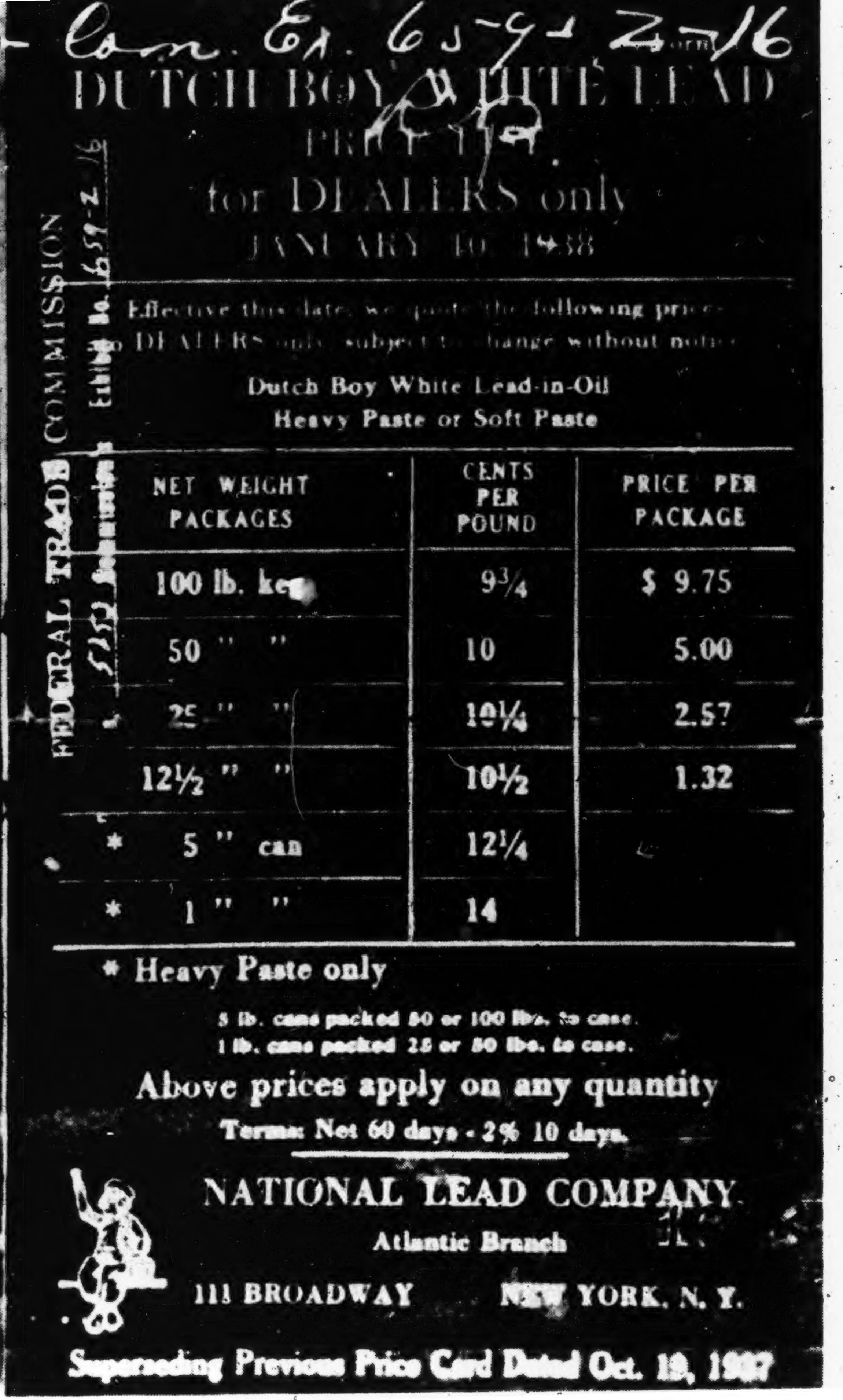
* Heavy Paste only

5 lb. cans packed 50 or 100 lbs. to case.
1 lb. cans packed 25 or 50 lbs. to case.

Above prices apply on any quantity

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

Superseding Previous Price Card Dated October 18, 1937



Com. Ex. 659-Z-16

FEDERAL TRADE COMMISSION
5155 Commission's Exhibit No. 659-Z-16

DUTCH BOY WHITE LEAD

PRICE LIST

for DEALERS only

JANUARY 10, 1938

Effective this date, we quote the following prices to DEALERS only, subject to change without notice

Dutch Boy White Lead-in-Oil
Heavy Paste or Soft Paste

NET WEIGHT PACKAGES	CENTS PER POUND	PRICE PER PACKAGE
100 lb. keg	9¾	$ 9.75
50 " "	10	5.00
25 " "	10¼	2.57
12½ " "	10½	1.32
* 5 " can	12¼	
* 1 " "	14	

* Heavy Paste only

5 lb. cans packed 50 or 100 lbs. to case.
1 lb. cans packed 25 or 50 lbs. to case.

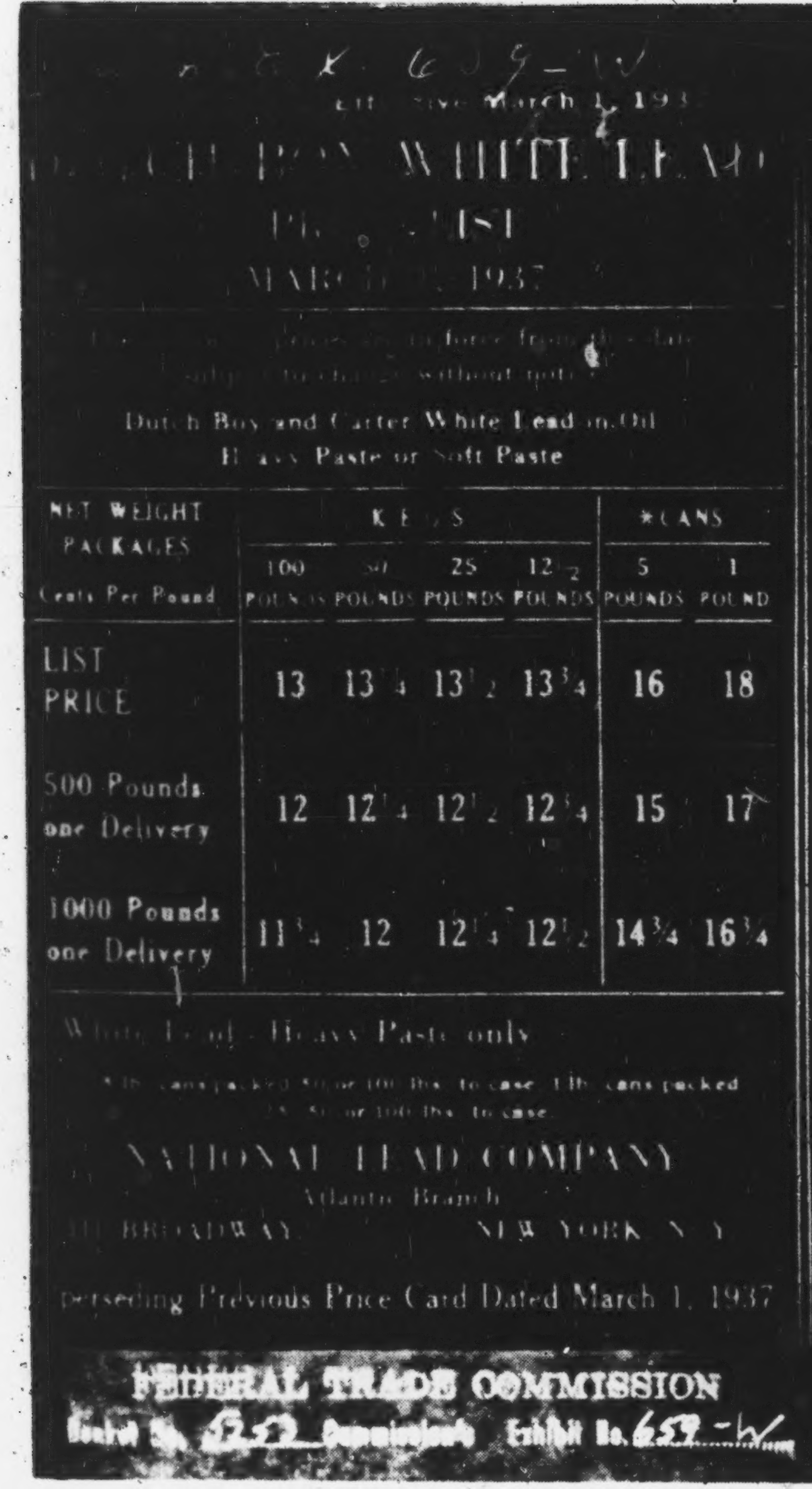
Above prices apply on any quantity

Terms: Net 60 days - 2% 10 days.

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

Superseding Previous Price Card Dated Oct. 18, 1937

Commission's Exhibit No. 659.



n Ex 659-W

Effective March 1, 193

DUTCH BOY WHITE LEAD

PRICE LIST

MARCH 1, 1937

The following prices are in force from this date
subject to change without notice

Dutch Boy and Carter White Lead-in-Oil
Heavy Paste or Soft Paste

NET WEIGHT PACKAGES Cents Per Pound	KEGS				*CANS	
	100 POUNDS	50 POUNDS	25 POUNDS	12½ POUNDS	5 POUNDS	1 POUND
LIST PRICE	13	13¼	13½	13¾	16	18
500 Pounds one Delivery	12	12¼	12½	12¾	15	17
1000 Pounds one Delivery	11¾	12	12¼	12½	14¾	16¼

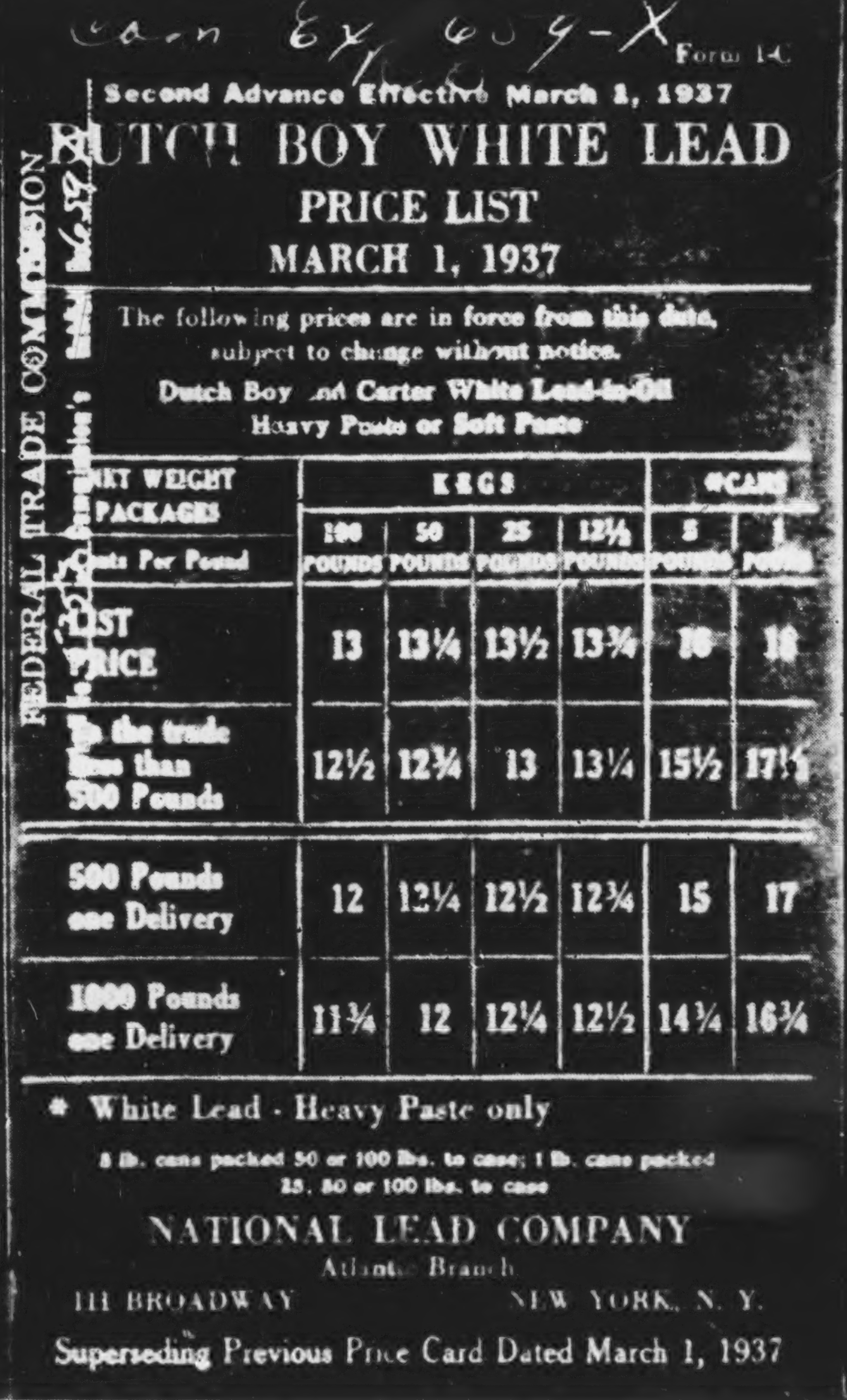
* White Lead - Heavy Paste only

5 lb. cans packed 50 or 100 lbs. to case; 1 lb. cans packed
25, 50 or 100 lbs. to case.

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

Superseding Previous Price Card Dated March 1, 1937

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 659-W



Com Ex 659-X

Form 1C

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 659-X

Second Advance Effective March 1, 1937

DUTCH BOY WHITE LEAD

PRICE LIST

MARCH 1, 1937

The following prices are in force from this date,
subject to change without notice.

Dutch Boy and Carter White Lead-in-Oil
Heavy Paste or Soft Paste

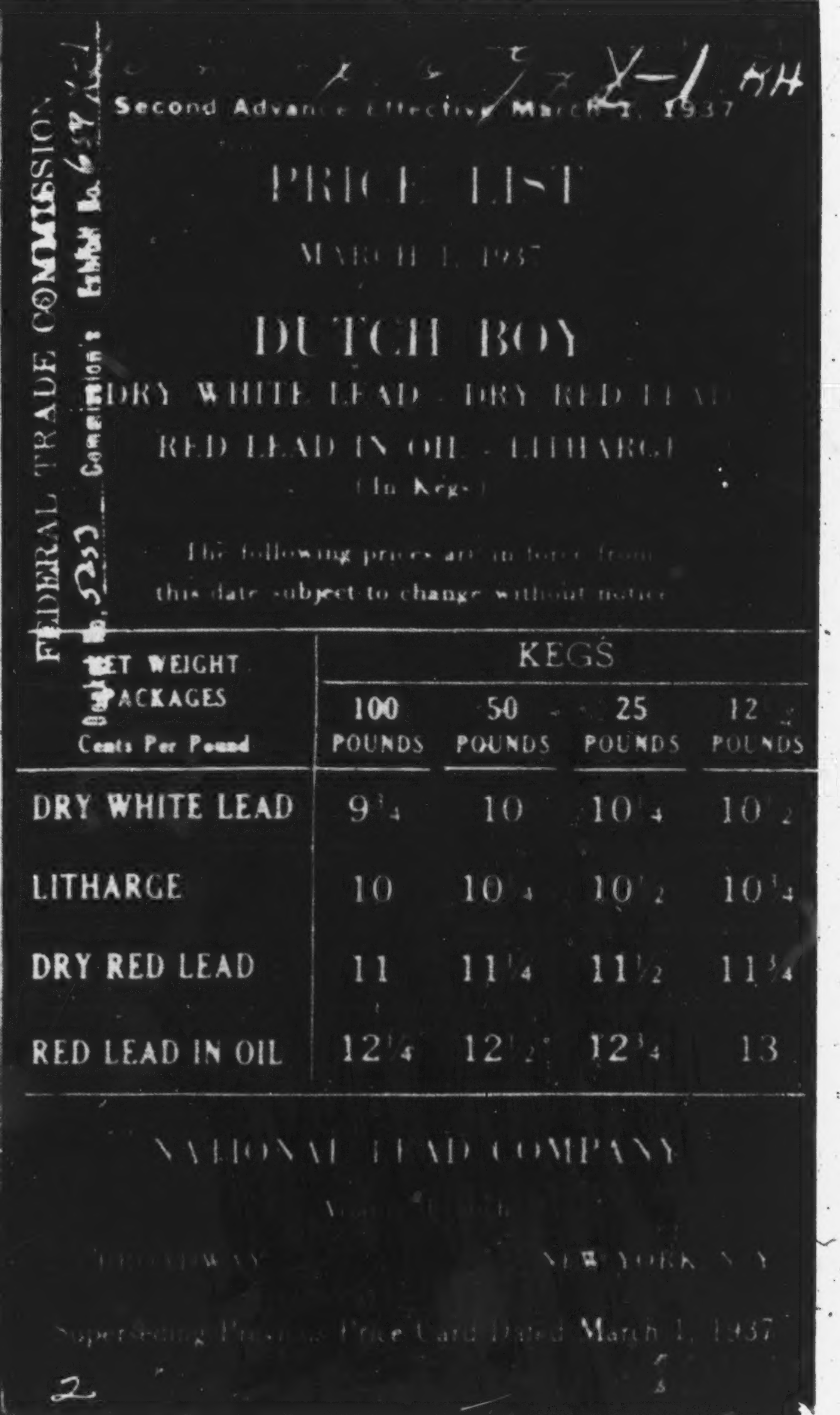
NET WEIGHT PACKAGES Cents Per Pound	KEGS				#CANS	
	100 POUNDS	50 POUNDS	25 POUNDS	12½ POUNDS	5 POUNDS	1 POUND
LIST PRICE	13	13¼	13½	13¾	16	18
To the trade less than 500 Pounds	12½	12¾	13	13¼	15½	17½
500 Pounds one Delivery	12	12¼	12½	12¾	15	17
1000 Pounds one Delivery	11¾	12	12¼	12½	14¾	16¾

# White Lead - Heavy Paste only

5 lb. cans packed 50 or 100 lbs. to case; 1 lb. cans packed
25, 50 or 100 lbs. to case

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

Superseding Previous Price Card Dated March 1, 1937



Ex 659-Y-1 KH

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 659-Y-1

Second Advance Effective March 1, 1937

PRICE LIST

MARCH 1, 1937

DUTCH BOY

DRY WHITE LEAD - DRY RED LEAD
RED LEAD IN OIL - LITHARGE
(In Kegs)

The following prices are in force from
this date subject to change without notice

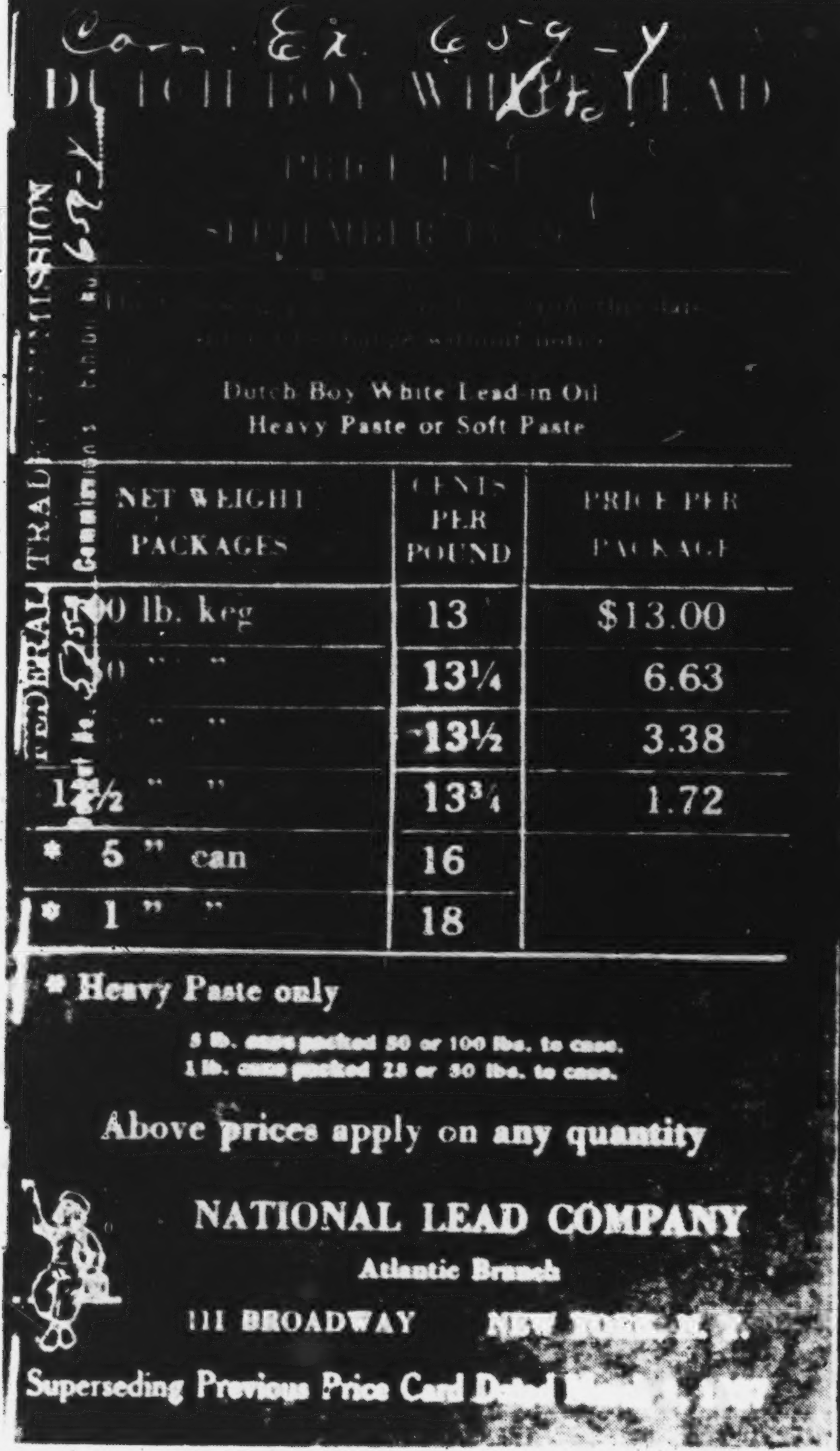
NET WEIGHT PACKAGES Cents Per Pound	KEGS			
	100 POUNDS	50 POUNDS	25 POUNDS	12½ POUNDS
DRY WHITE LEAD	9¾	10	10¼	10½
LITHARGE	10	10¼	10½	10¾
DRY RED LEAD	11	11¼	11½	11¾
RED LEAD IN OIL	12¼	12½	12¾	13

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

Superseding Previous Price Card Dated March 1, 1937

2

Commission's Exhibit No. 659.



Com. Ex. 659-Y

FEDERAL TRADE COMMISSION
Commission's Exhibit No. 659-Y
Docket No. 5253

DUTCH BOY WHITE LEAD

PRICE LIST

SEPTEMBER [illegible]

[illegible]

Dutch Boy White Lead in Oil
Heavy Paste or Soft Paste

NET WEIGHT PACKAGES	CENTS PER POUND	PRICE PER PACKAGE
100 lb. keg	13	$13.00
50 " "	13¼	6.63
[illegible] " "	13½	3.38
12½ " "	13¾	1.72
* 5 " can	16	
* 1 " "	18	

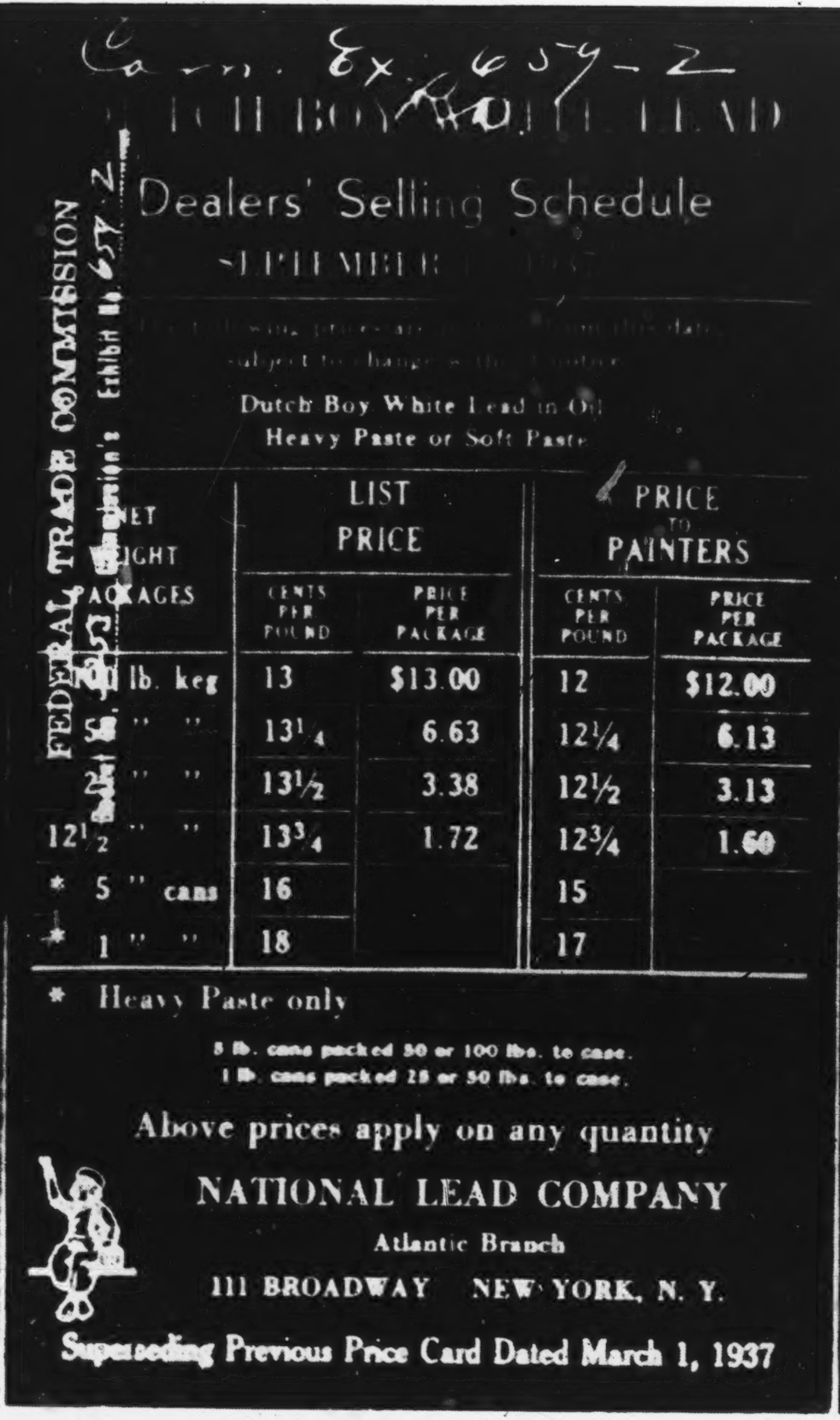
* Heavy Paste only

5 lb. cans packed 50 or 100 lbs. to case.
1 lb. cans packed 25 or 50 lbs. to case.

Above prices apply on any quantity

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

Superseding Previous Price Card Dated [illegible]



Com. Ex. 659-Z

FEDERAL TRADE COMMISSION
Commission's Exhibit No. 659-Z
Docket No. 5253

DUTCH BOY WHITE LEAD

Dealers' Selling Schedule

SEPTEMBER [illegible]

The following prices are [illegible] from this date
subject to change without notice

Dutch Boy White Lead in Oil
Heavy Paste or Soft Paste

NET WEIGHT PACKAGES	LIST PRICE		PRICE TO PAINTERS	
	CENTS PER POUND	PRICE PER PACKAGE	CENTS PER POUND	PRICE PER PACKAGE
100 lb. keg	13	$13.00	12	$12.00
50 " "	13¼	6.63	12¼	6.13
25 " "	13½	3.38	12½	3.13
12½ " "	13¾	1.72	12¾	1.60
* 5 " cans	16		15	
* 1 " "	18		17	

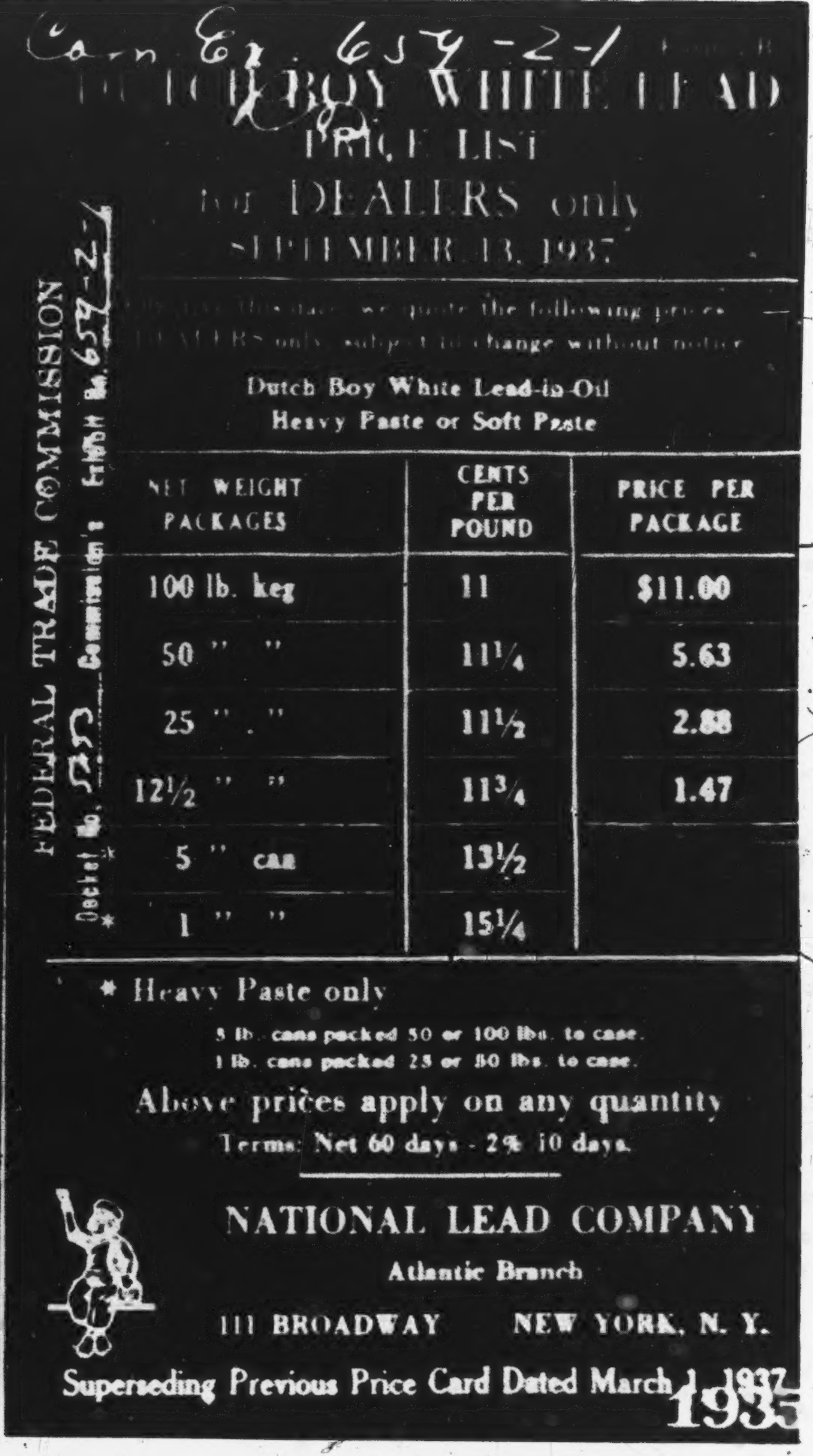
* Heavy Paste only

5 lb. cans packed 50 or 100 lbs. to case.
1 lb. cans packed 25 or 50 lbs. to case.

Above prices apply on any quantity

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

Superseding Previous Price Card Dated March 1, 1937



Com. Ex. 659-Z-1

FEDERAL TRADE COMMISSION
Commission's Exhibit No. 659-Z-1
Docket No. 5253

DUTCH BOY WHITE LEAD

PRICE LIST
for DEALERS only
SEPTEMBER 13, 1937

[illegible] this date we quote the following prices
DEALERS only subject to change without notice

Dutch Boy White Lead-in-Oil
Heavy Paste or Soft Paste

NET WEIGHT PACKAGES	CENTS PER POUND	PRICE PER PACKAGE
100 lb. keg	11	$11.00
50 " "	11¼	5.63
25 " "	11½	2.88
12½ " "	11¾	1.47
* 5 " can	13½	
* 1 " "	15¼	

* Heavy Paste only

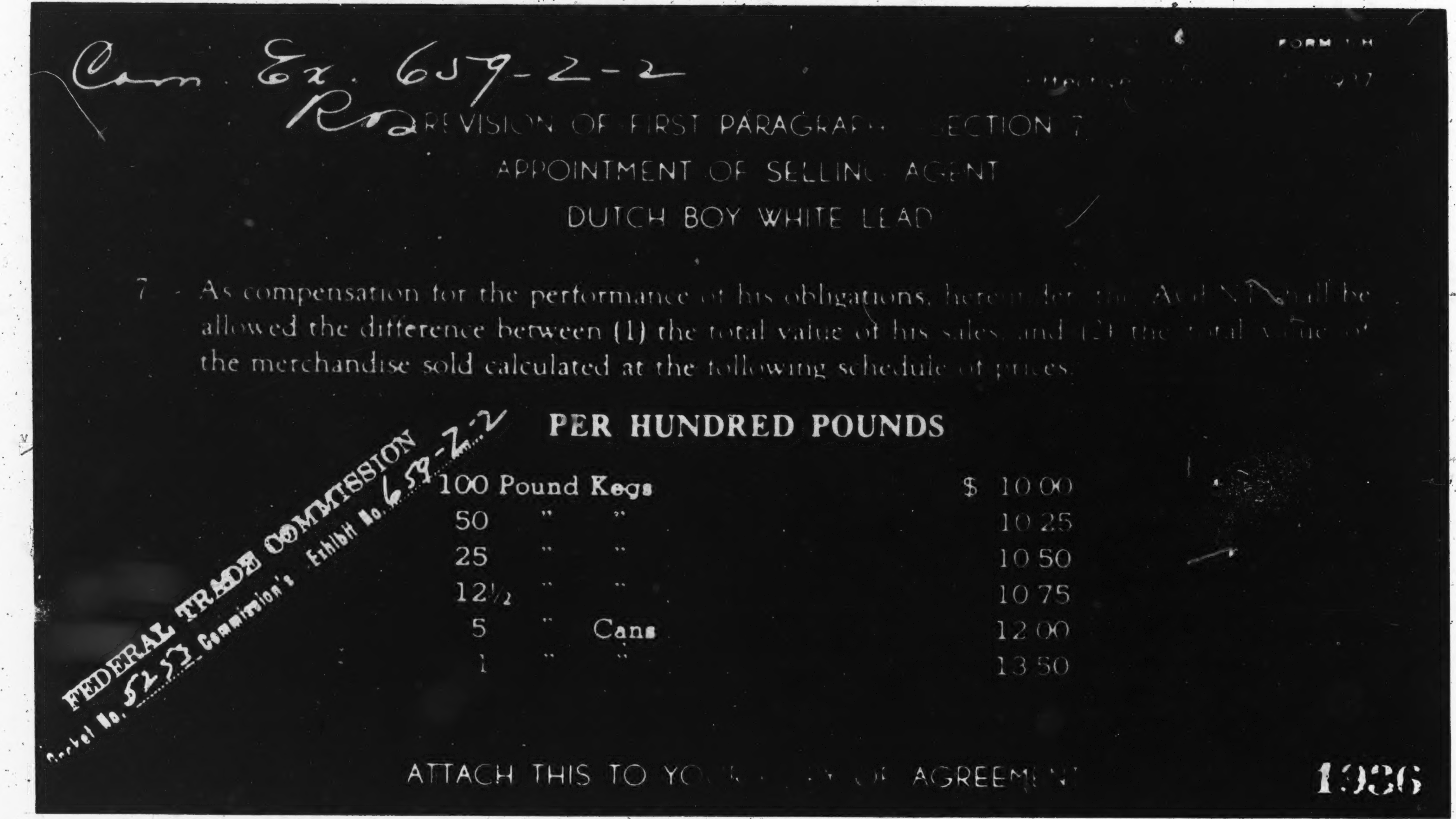
5 lb. cans packed 50 or 100 lbs. to case.
1 lb. cans packed 25 or 50 lbs. to case.

Above prices apply on any quantity
Terms: Net 60 days - 2% 10 days.

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

Superseding Previous Price Card Dated March 1, 1937

1935



Com. Ex. 659-2-2

Ro

FORM 1 H

Effective [illegible] 1937

REVISION OF FIRST PARAGRAPH SECTION 7
APPOINTMENT OF SELLING AGENT
DUTCH BOY WHITE LEAD

7 - As compensation for the performance of his obligations hereunder the AGENT shall be allowed the difference between (1) the total value of his sales, and (2) the total value of the merchandise sold calculated at the following schedule of prices.

PER HUNDRED POUNDS

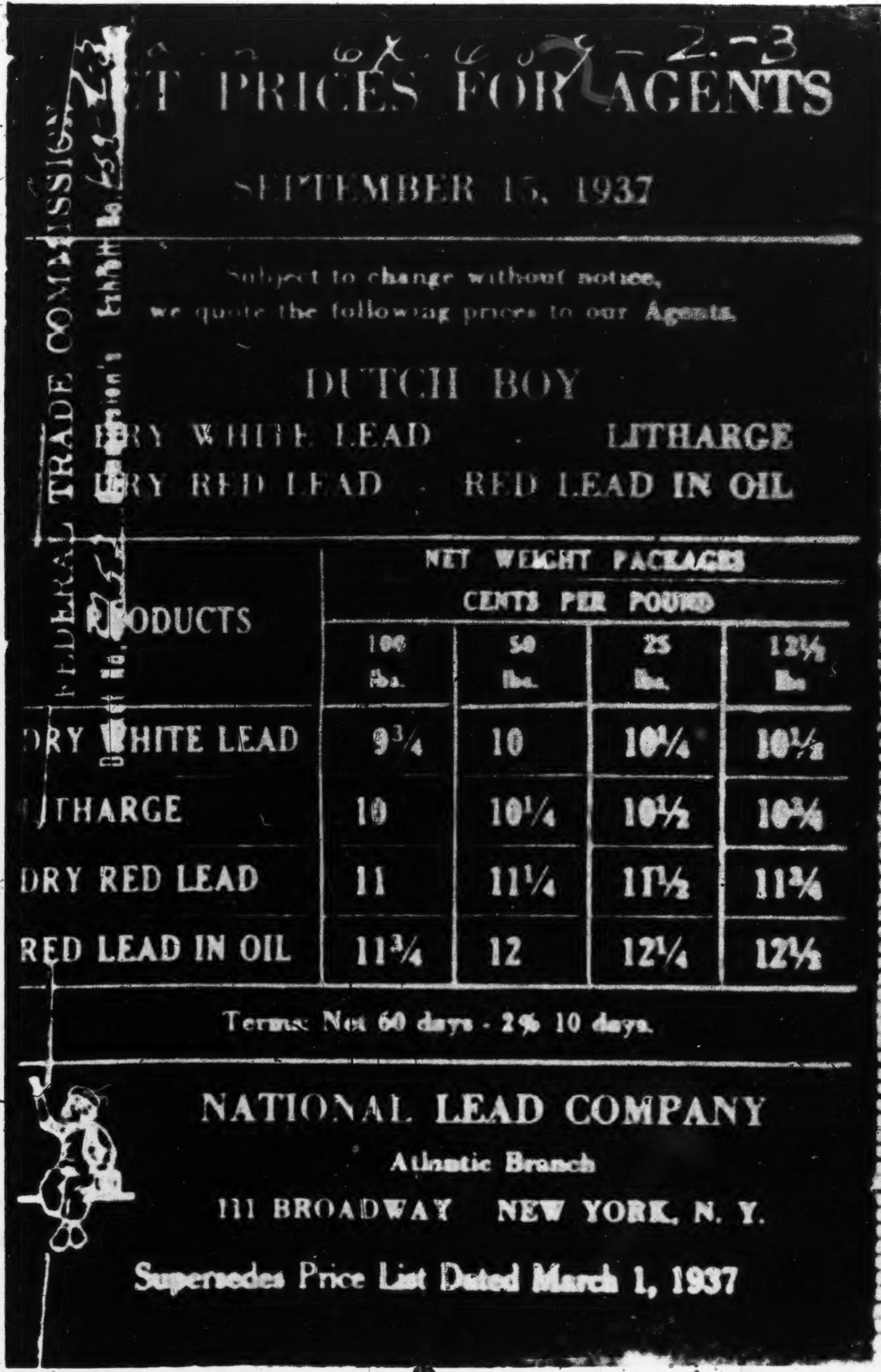
100 Pound	Kegs		$ 10 00
50	"	"	10 25
25	"	"	10 50
12½	"	"	10 75
5	"	Cans	12 00
1	"	"	13 50

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 659-2-2

ATTACH THIS TO YOUR COPY OF AGREEMENT

1936

Commission's Exhibit No. 659.



Com Ex 659-2-3

FEDERAL TRADE COMMISSION
Commission's Exhibit No. 659-2-3

NET PRICES FOR AGENTS

SEPTEMBER 15, 1937

Subject to change without notice,
we quote the following prices to our Agents.

DUTCH BOY

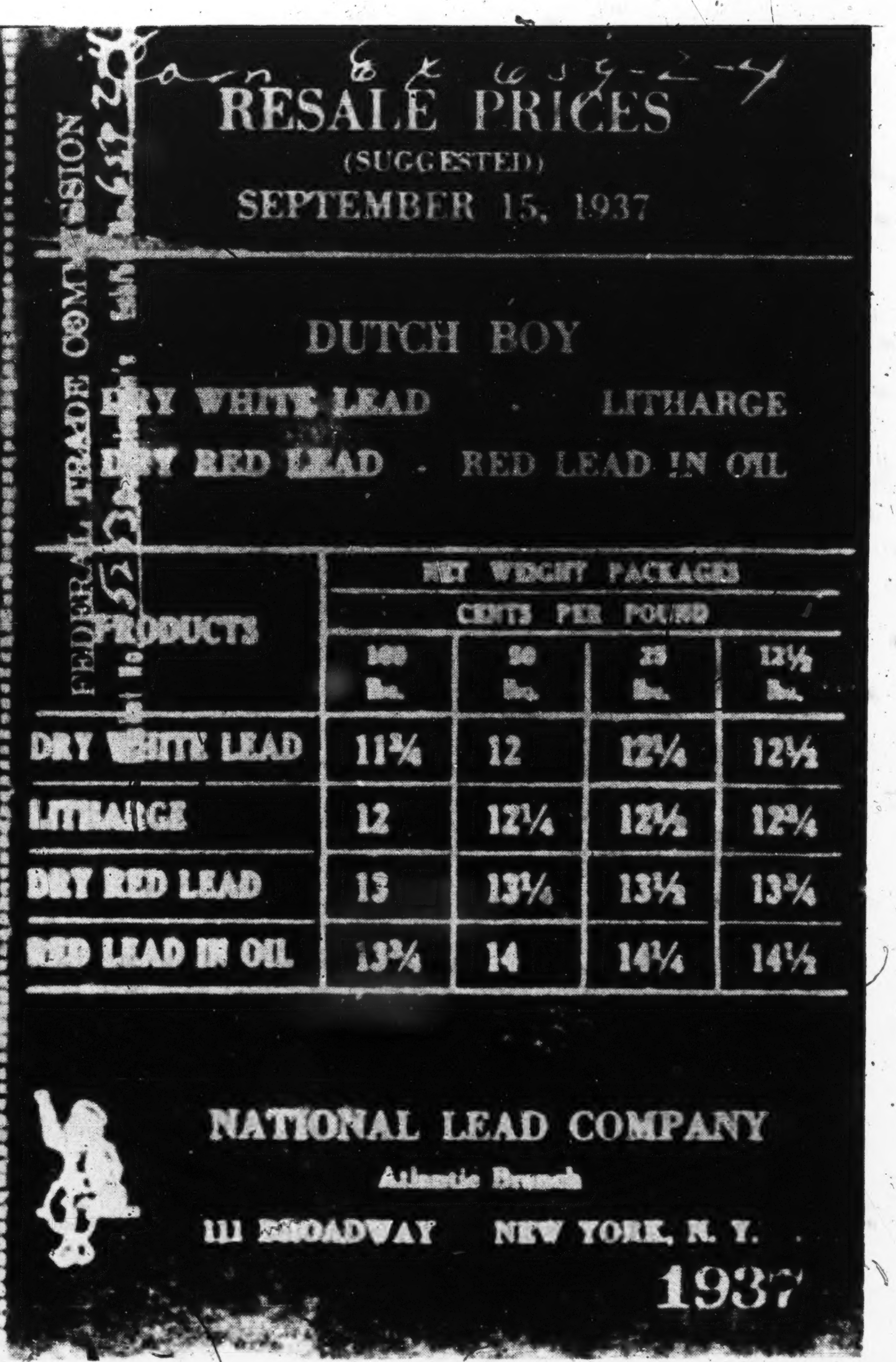
DRY WHITE LEAD - LITHARGE
DRY RED LEAD - RED LEAD IN OIL

PRODUCTS	NET WEIGHT PACKAGES CENTS PER POUND			
	100 lbs.	50 lbs.	25 lbs.	12½ lbs.
DRY WHITE LEAD	9¾	10	10¼	10½
LITHARGE	10	10¼	10½	10¾
DRY RED LEAD	11	11¼	11½	11¾
RED LEAD IN OIL	11¾	12	12¼	12½

Terms: Net 60 days - 2% 10 days.

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

Supersedes Price List Dated March 1, 1937



Com Ex 659-2-4

FEDERAL TRADE COMMISSION
Commission's Exhibit No. 659-2-4

RESALE PRICES

(SUGGESTED)
SEPTEMBER 15, 1937

DUTCH BOY

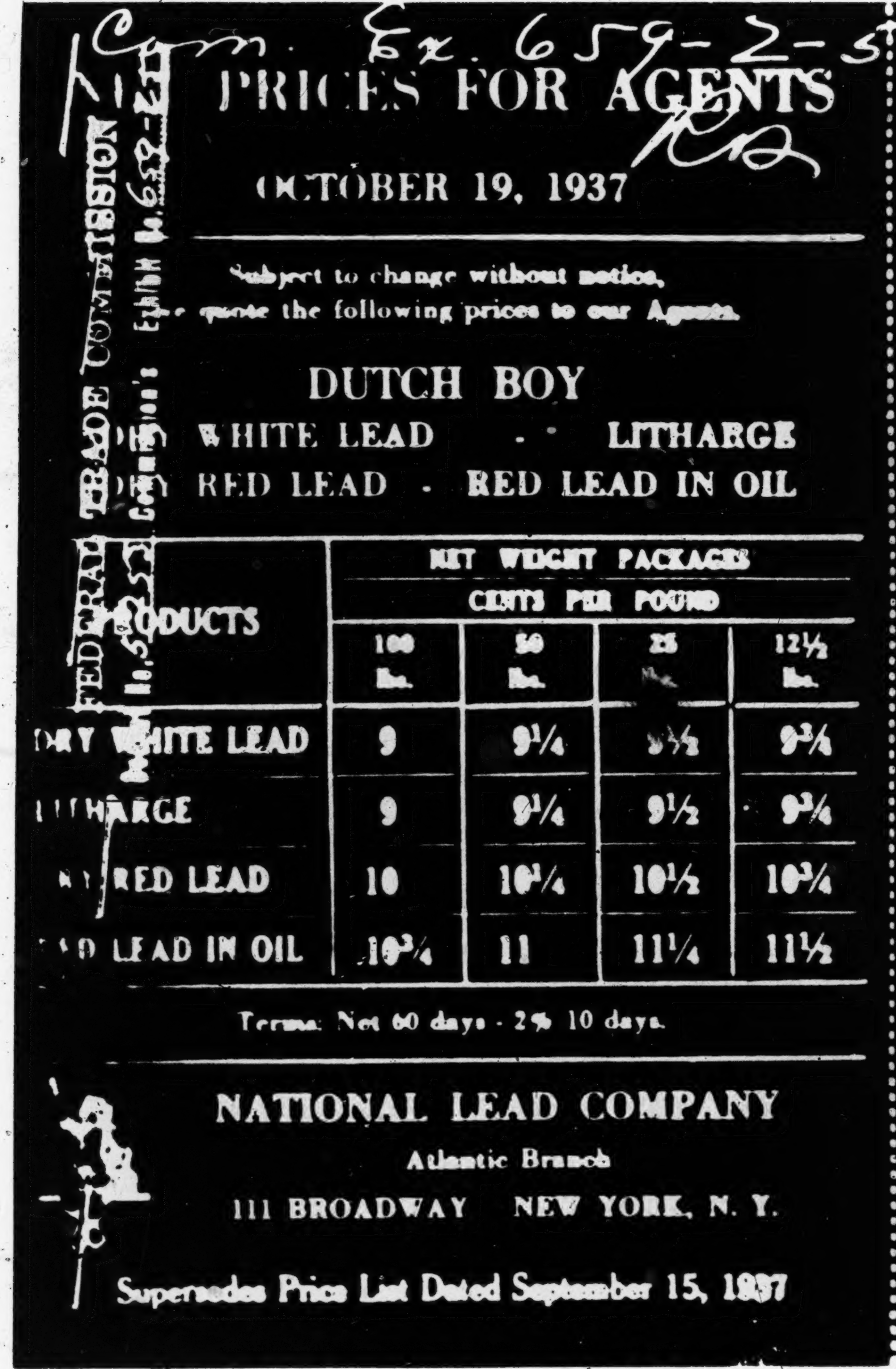
DRY WHITE LEAD - LITHARGE
DRY RED LEAD - RED LEAD IN OIL

PRODUCTS	NET WEIGHT PACKAGES CENTS PER POUND			
	100 lbs.	50 lbs.	25 lbs.	12½ lbs.
DRY WHITE LEAD	11¾	12	12¼	12½
LITHARGE	12	12¼	12½	12¾
DRY RED LEAD	13	13¼	13½	13¾
RED LEAD IN OIL	13¾	14	14¼	14½

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.
1937

Commission's Exhibit No. 659.

Commission's Exhibit No. 659.



Com. Ex. 659-2-5

FEDERAL TRADE COMMISSION

No. 5253 Commission's Exhibit No. 659-2-5

PRICES FOR AGENTS

OCTOBER 19, 1937

Subject to change without notice,
We quote the following prices to our Agents.

DUTCH BOY

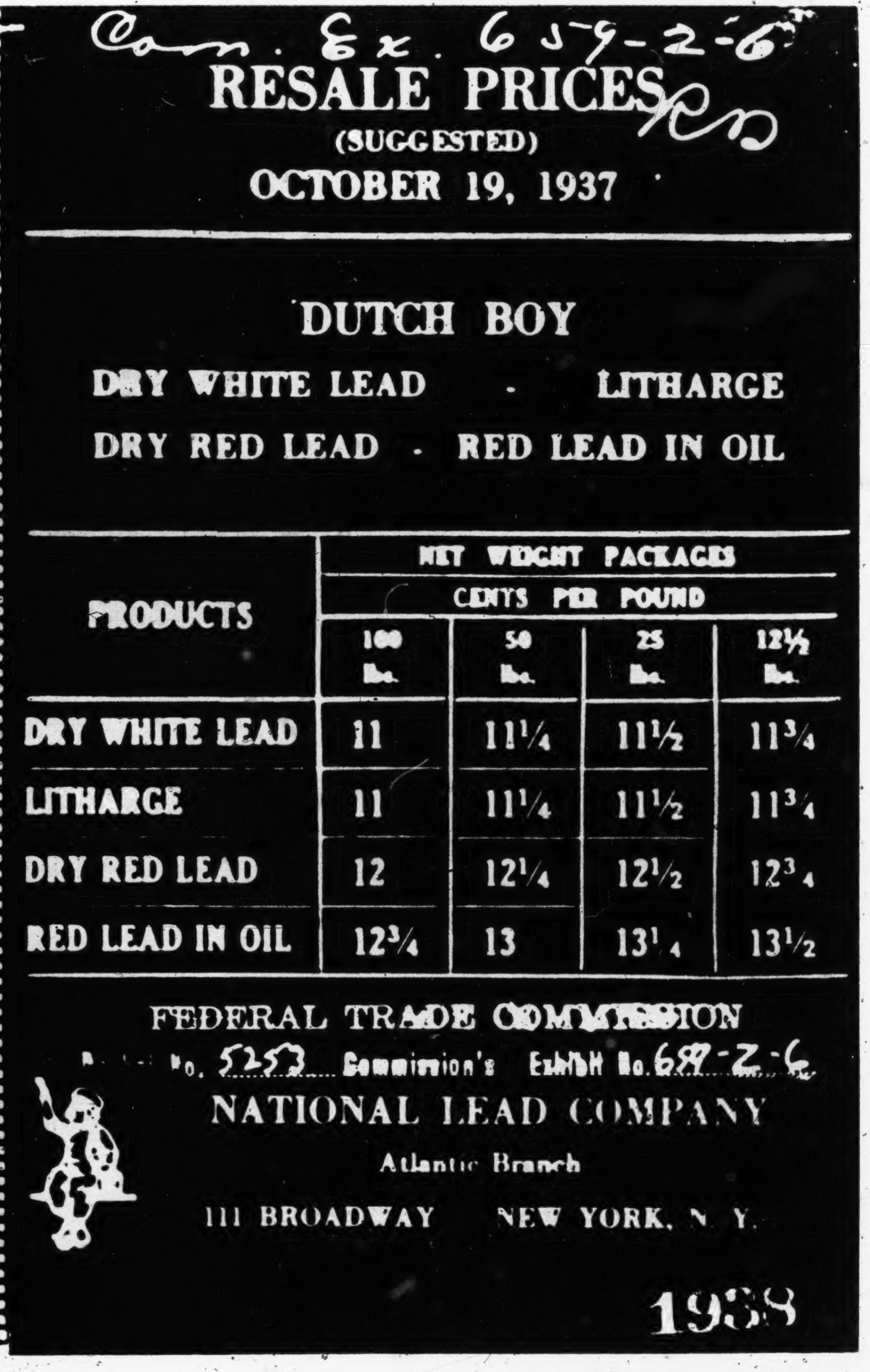
DRY WHITE LEAD - LITHARGE
DRY RED LEAD - RED LEAD IN OIL

PRODUCTS	NET WEIGHT PACKAGES CENTS PER POUND			
	100 lbs.	50 lbs.	25 lbs.	12½ lbs.
DRY WHITE LEAD	9	9¼	9½	9¾
LITHARGE	9	9¼	9½	9¾
DRY RED LEAD	10	10¼	10½	10¾
RED LEAD IN OIL	10¾	11	11¼	11½

Terms: Net 60 days - 2% 10 days.

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

Supersedes Price List Dated September 15, 1937



Com. Ex. 659-2-6

RESALE PRICES
(SUGGESTED)
OCTOBER 19, 1937

DUTCH BOY

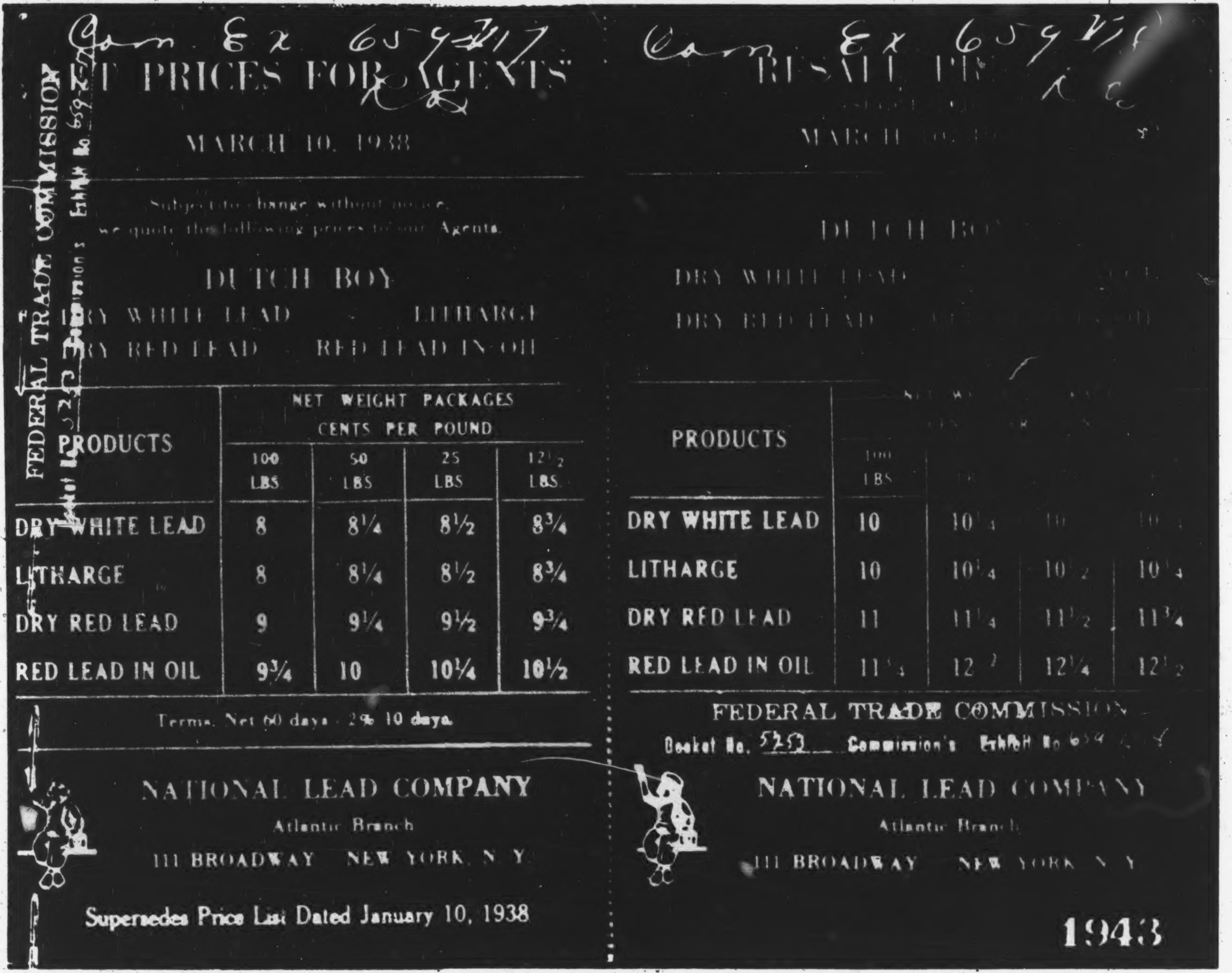
DRY WHITE LEAD - LITHARGE
DRY RED LEAD - RED LEAD IN OIL

PRODUCTS	NET WEIGHT PACKAGES CENTS PER POUND			
	100 lbs.	50 lbs.	25 lbs.	12½ lbs.
DRY WHITE LEAD	11	11¼	11½	11¾
LITHARGE	11	11¼	11½	11¾
DRY RED LEAD	12	12¼	12½	12¾
RED LEAD IN OIL	12¾	13	13¼	13½

FEDERAL TRADE COMMISSION
No. 5253 Commission's Exhibit No. 659-2-6

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

1938



Com Ex 659-Z-17

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 659-Z-17

NET PRICES FOR AGENTS

MARCH 10, 1938

Subject to change without notice,
we quote the following prices to our Agents.

DUTCH BOY

DRY WHITE LEAD — LITHARGE
DRY RED LEAD — RED LEAD IN OIL

PRODUCTS	NET WEIGHT PACKAGES CENTS PER POUND			
	100 LBS.	50 LBS.	25 LBS.	12½ LBS.
DRY WHITE LEAD	8	8¼	8½	8¾
LITHARGE	8	8¼	8½	8¾
DRY RED LEAD	9	9¼	9½	9¾
RED LEAD IN OIL	9¾	10	10¼	10½

Terms. Net 60 days - 2% 10 days.

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

Supersedes Price List Dated January 10, 1938

Com Ex 659 Z-18

RESALE PRICES

MARCH 10, 19[illegible]

DUTCH BOY

DRY WHITE LEAD [illegible]
DRY RED LEAD [illegible]

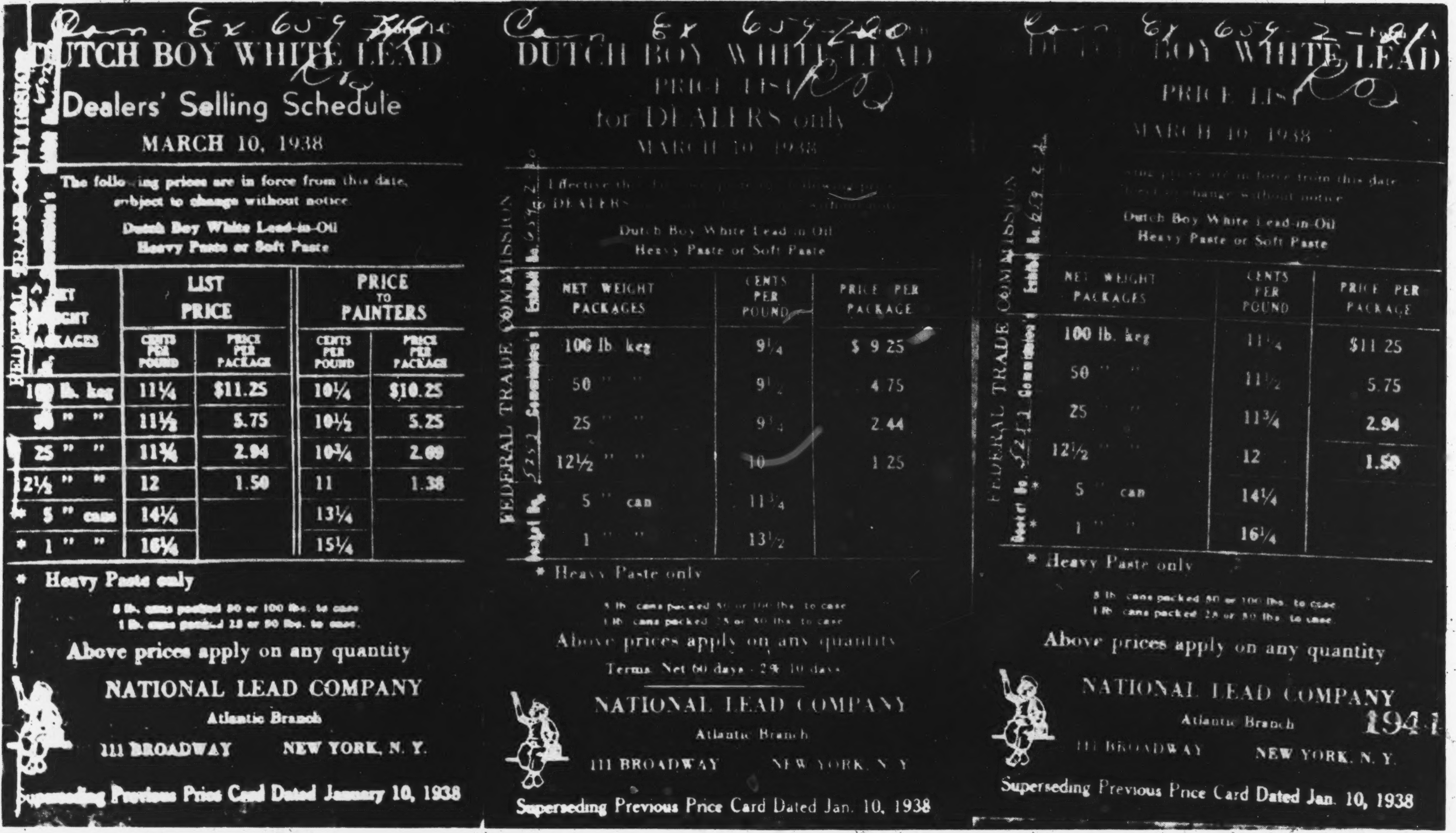
PRODUCTS	[illegible]			
	100 LBS	[illegible]	[illegible]	[illegible]
DRY WHITE LEAD	10	10¼	10[illegible]	10[illegible]
LITHARGE	10	10¼	10½	10¾
DRY RED LEAD	11	11¼	11½	11¾
RED LEAD IN OIL	11¾	12	12¼	12½

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 659-Z-18

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

1943

Commission's Exhibit No. 659.



Com. Ex 659 [illegible]

DUTCH BOY WHITE LEAD

Dealers' Selling Schedule

MARCH 10, 1938

The following prices are in force from this date, subject to change without notice.

Dutch Boy White Lead-in-Oil
Heavy Paste or Soft Paste

NET WEIGHT PACKAGES	LIST PRICE		PRICE TO PAINTERS	
	CENTS PER POUND	PRICE PER PACKAGE	CENTS PER POUND	PRICE PER PACKAGE
100 lb. keg	11¼	$11.25	10¼	$10.25
50 " "	11½	5.75	10½	5.25
25 " "	11¾	2.94	10¾	2.69
12½ " "	12	1.50	11	1.38
* 5 " cans	14¼		13¼	
* 1 " "	16¼		15¼	

* Heavy Paste only

5 lb. cans packed 50 or 100 lbs. to case.
1 lb. cans packed 25 or 50 lbs. to case.

Above prices apply on any quantity

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

Superseding Previous Price Card Dated January 10, 1938

FEDERAL TRADE COMMISSION
Commission's Exhibit No. 659

Com Ex 659-Z-20

DUTCH BOY WHITE LEAD

PRICE LIST
for DEALERS only
MARCH 10, 1938

Effective th[illegible] following pri[illegible] to DEALERS [illegible] without notice

Dutch Boy White Lead in Oil
Heavy Paste or Soft Paste

NET WEIGHT PACKAGES	CENTS PER POUND	PRICE PER PACKAGE
100 lb. keg	9¼	$ 9.25
50 " "	9½	4.75
25 " "	9¾	2.44
12½ " "	10	1.25
* 5 " can	11¾	
* 1 " "	13½	

* Heavy Paste only

5 lb. cans packed 50 or 100 lbs. to case
1 lb. cans packed 25 or 50 lbs. to case

Above prices apply on any quantity

Terms Net 60 days - 2% 10 days

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

Superseding Previous Price Card Dated Jan. 10, 1938

FEDERAL TRADE COMMISSION
Exhibit No. 659 Z 20
Commission's
Docket No. 5253

Com Ex 659-Z-21

DUTCH BOY WHITE LEAD

PRICE LIST
MARCH 10, 1938

The following prices are in force from this date, subject to change without notice

Dutch Boy White Lead-in-Oil
Heavy Paste or Soft Paste

NET WEIGHT PACKAGES	CENTS PER POUND	PRICE PER PACKAGE
100 lb. keg	11¼	$11.25
50 " "	11½	5.75
25 " "	11¾	2.94
12½ " "	12	1.50
* 5 " can	14¼	
* 1 " "	16¼	

* Heavy Paste only

5 lb. cans packed 50 or 100 lbs. to case
1 lb. cans packed 25 or 50 lbs. to case

Above prices apply on any quantity

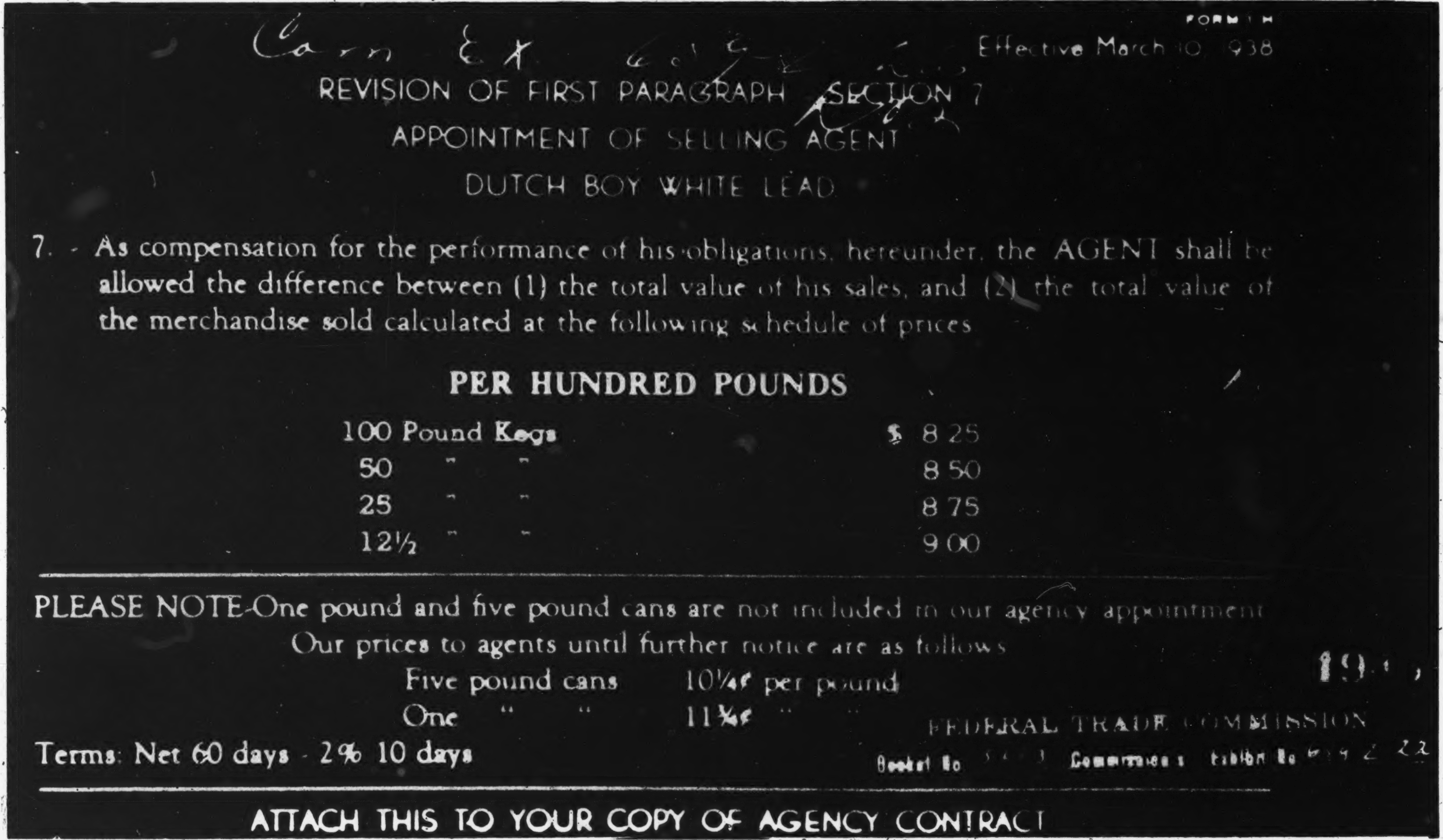
NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

1941

Superseding Previous Price Card Dated Jan. 10, 1938

FEDERAL TRADE COMMISSION
Exhibit No. 659 Z 21
Commission's
Docket No. 5253

Commission's Exhibit No. 659.



Com Ex 659

FORM 1 H

Effective March 10, 1938

REVISION OF FIRST PARAGRAPH SECTION 7

APPOINTMENT OF SELLING AGENT

DUTCH BOY WHITE LEAD

7. - As compensation for the performance of his obligations, hereunder, the AGENT shall be allowed the difference between (1) the total value of his sales, and (2) the total value of the merchandise sold calculated at the following schedule of prices.

PER HUNDRED POUNDS

100	Pound	Kegs	$ 8.25
50	"	"	8.50
25	"	"	8.75
12½	"	"	9.00

PLEASE NOTE-One pound and five pound cans are not included in our agency appointment.

Our prices to agents until further notice are as follows:

Five pound cans	10¼¢ per pound	
One " "	11¾¢ " "	

Terms: Net 60 days - 2% 10 days

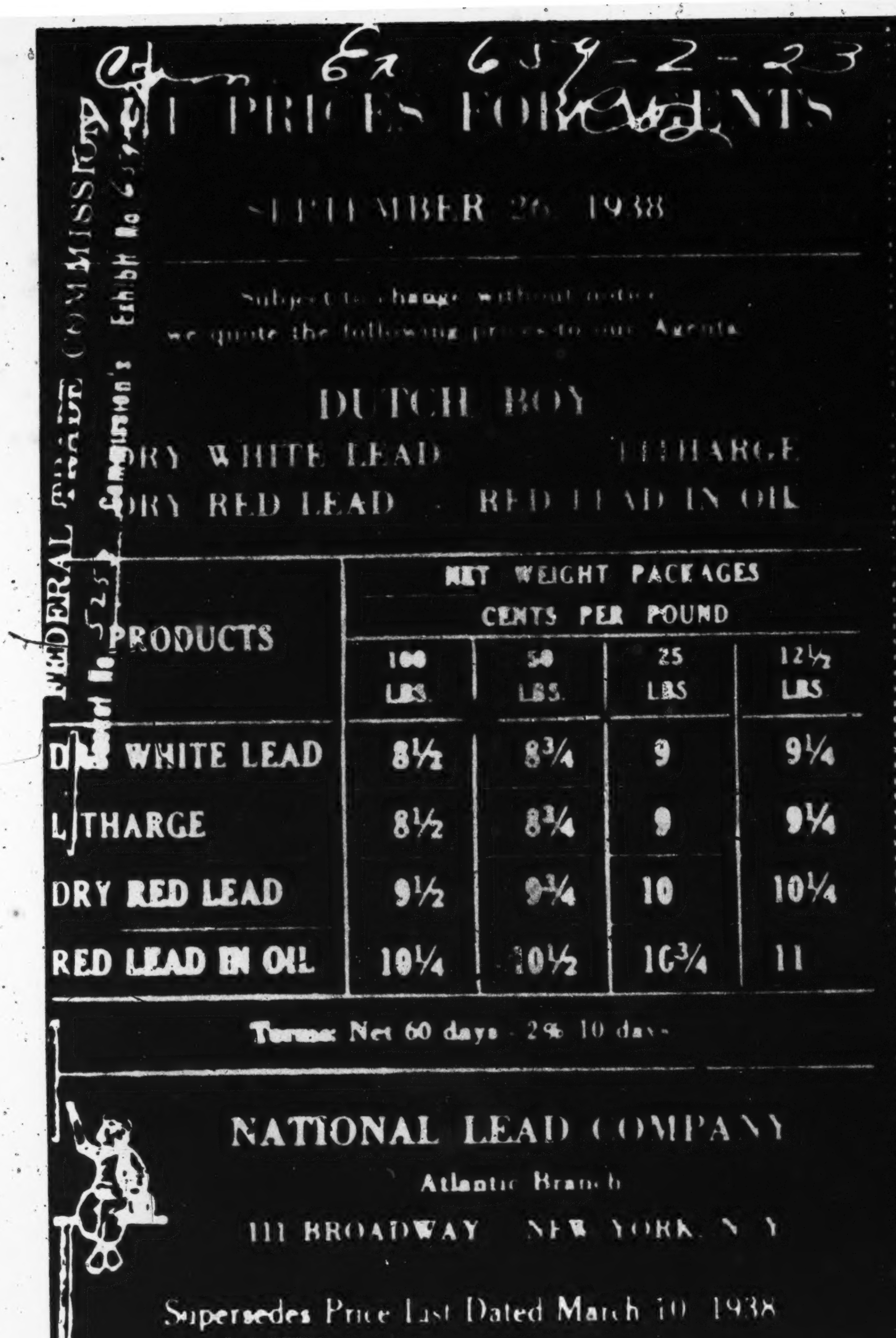
19

FEDERAL TRADE COMMISSION

Docket No. [illegible] Commission's Exhibit No. 659 [illegible]

ATTACH THIS TO YOUR COPY OF AGENCY CONTRACT

Commission's Exhibit No. 659.



Com Ex 659-Z-23

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 659-

NET PRICES FOR AGENTS

SEPTEMBER 26, 1938

Subject to change without notice
we quote the following prices to our Agents.

DUTCH BOY

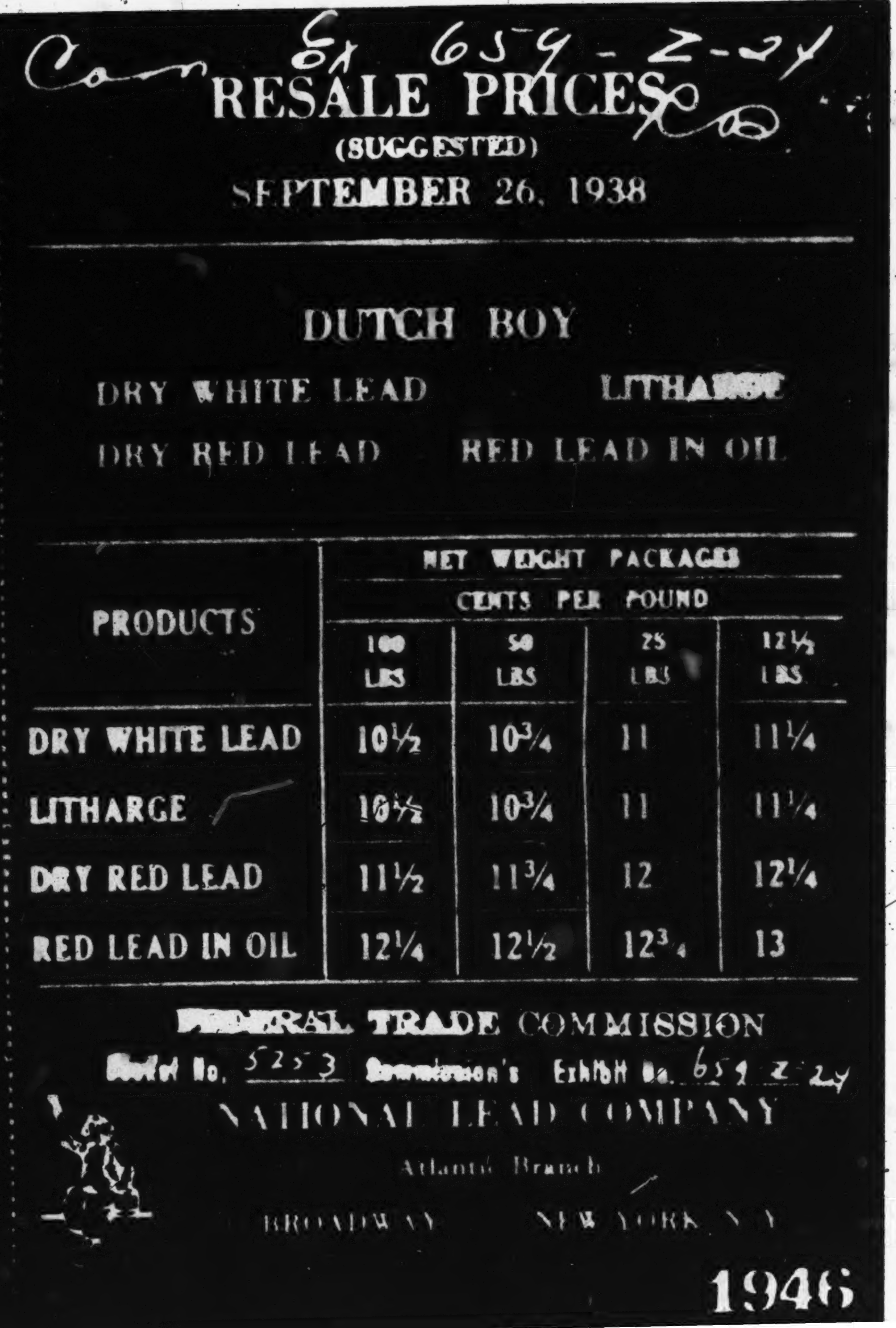
DRY WHITE LEAD LITHARGE
DRY RED LEAD RED LEAD IN OIL

PRODUCTS	NET WEIGHT PACKAGES CENTS PER POUND			
	100 LBS.	50 LBS.	25 LBS.	12½ LBS.
DRY WHITE LEAD	8½	8¾	9	9¼
LITHARGE	8½	8¾	9	9¼
DRY RED LEAD	9½	9¾	10	10¼
RED LEAD IN OIL	10¼	10½	10¾	11

Terms: Net 60 days - 2% 10 days

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

Supersedes Price List Dated March 10, 1938



Com Ex 659-Z-24

RESALE PRICES
(SUGGESTED)

SEPTEMBER 26, 1938

DUTCH BOY

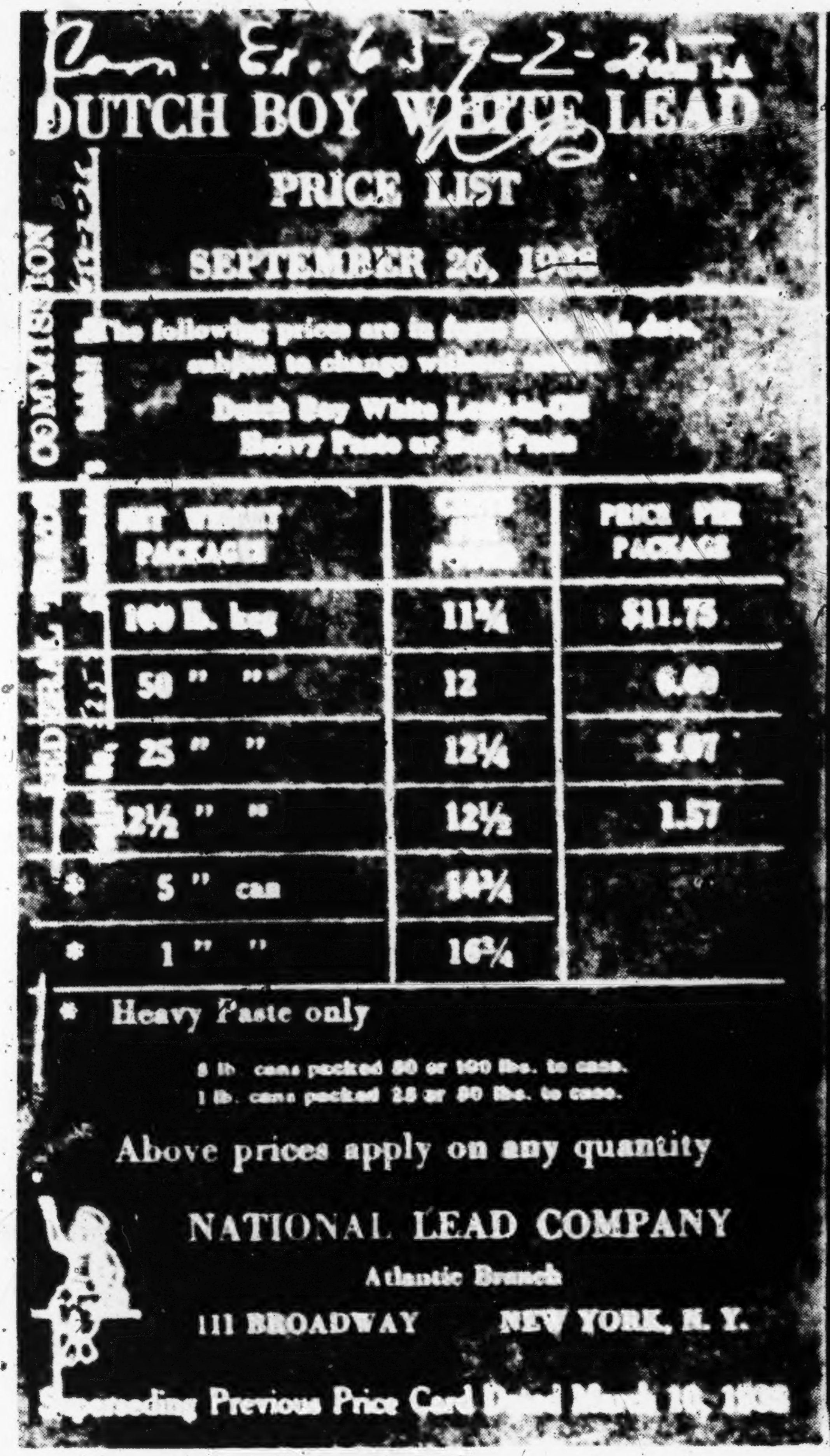
DRY WHITE LEAD LITHARGE
DRY RED LEAD RED LEAD IN OIL

PRODUCTS	NET WEIGHT PACKAGES CENTS PER POUND			
	100 LBS	50 LBS	25 LBS	12½ LBS.
DRY WHITE LEAD	10½	10¾	11	11¼
LITHARGE	10½	10¾	11	11¼
DRY RED LEAD	11½	11¾	12	12¼
RED LEAD IN OIL	12¼	12½	12¾	13

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 659-Z-24

NATIONAL LEAD COMPANY
Atlantic Branch
BROADWAY NEW YORK, N. Y.

1946



Com. Ex. 659-2-[illegible]

DUTCH BOY WHITE LEAD

PRICE LIST

SEPTEMBER 26, 1938

FEDERAL TRADE COMMISSION

The following prices are in force from this date, subject to change without notice.

Dutch Boy White Lead-in-Oil
Heavy Paste or Soft Paste

NET WEIGHT PACKAGES	CENTS PER POUND	PRICE PER PACKAGE
100 lb. keg	11¾	$11.75
50 " "	12	6.00
25 " "	12¼	3.07
12½ " "	12½	1.57
* 5 " can	14¾	
* 1 " "	16¾	

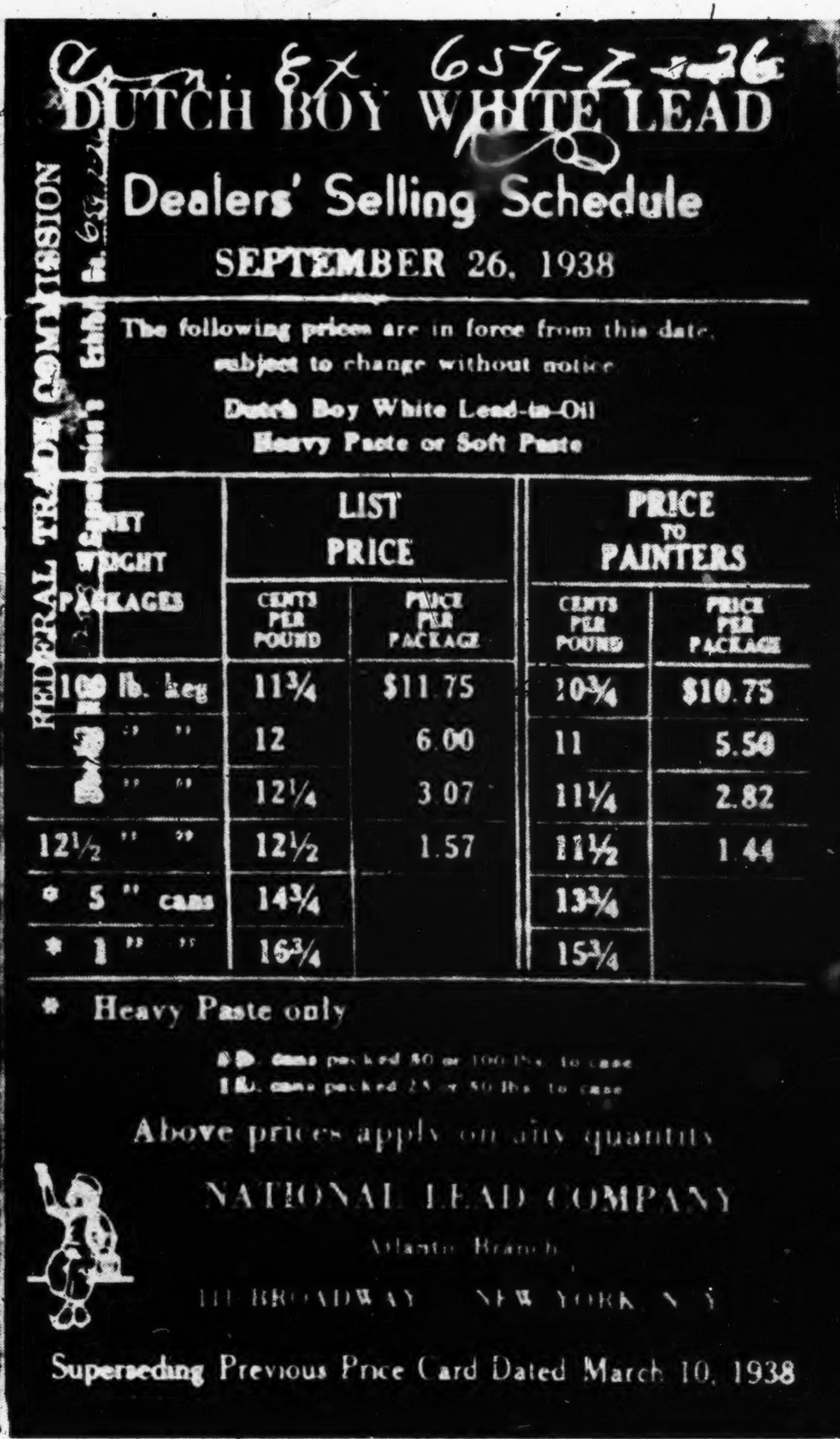
* Heavy Paste only

5 lb. cans packed 50 or 100 lbs. to case.
1 lb. cans packed 25 or 50 lbs. to case.

Above prices apply on any quantity

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

Superseding Previous Price Card Dated March 10, 1938



Com Ex 659-2-26

DUTCH BOY WHITE LEAD

Dealers' Selling Schedule

SEPTEMBER 26, 1938

FEDERAL TRADE COMMISSION
Commission's Exhibit No. 659

The following prices are in force from this date, subject to change without notice.

Dutch Boy White Lead-in-Oil
Heavy Paste or Soft Paste

NET WEIGHT PACKAGES	LIST PRICE		PRICE TO PAINTERS	
	CENTS PER POUND	PRICE PER PACKAGE	CENTS PER POUND	PRICE PER PACKAGE
100 lb. keg	11¾	$11.75	10¾	$10.75
50 " "	12	6.00	11	5.50
25 " "	12¼	3.07	11¼	2.82
12½ " "	12½	1.57	11½	1.44
* 5 " cans	14¾		13¾	
* 1 " "	16¾		15¾	

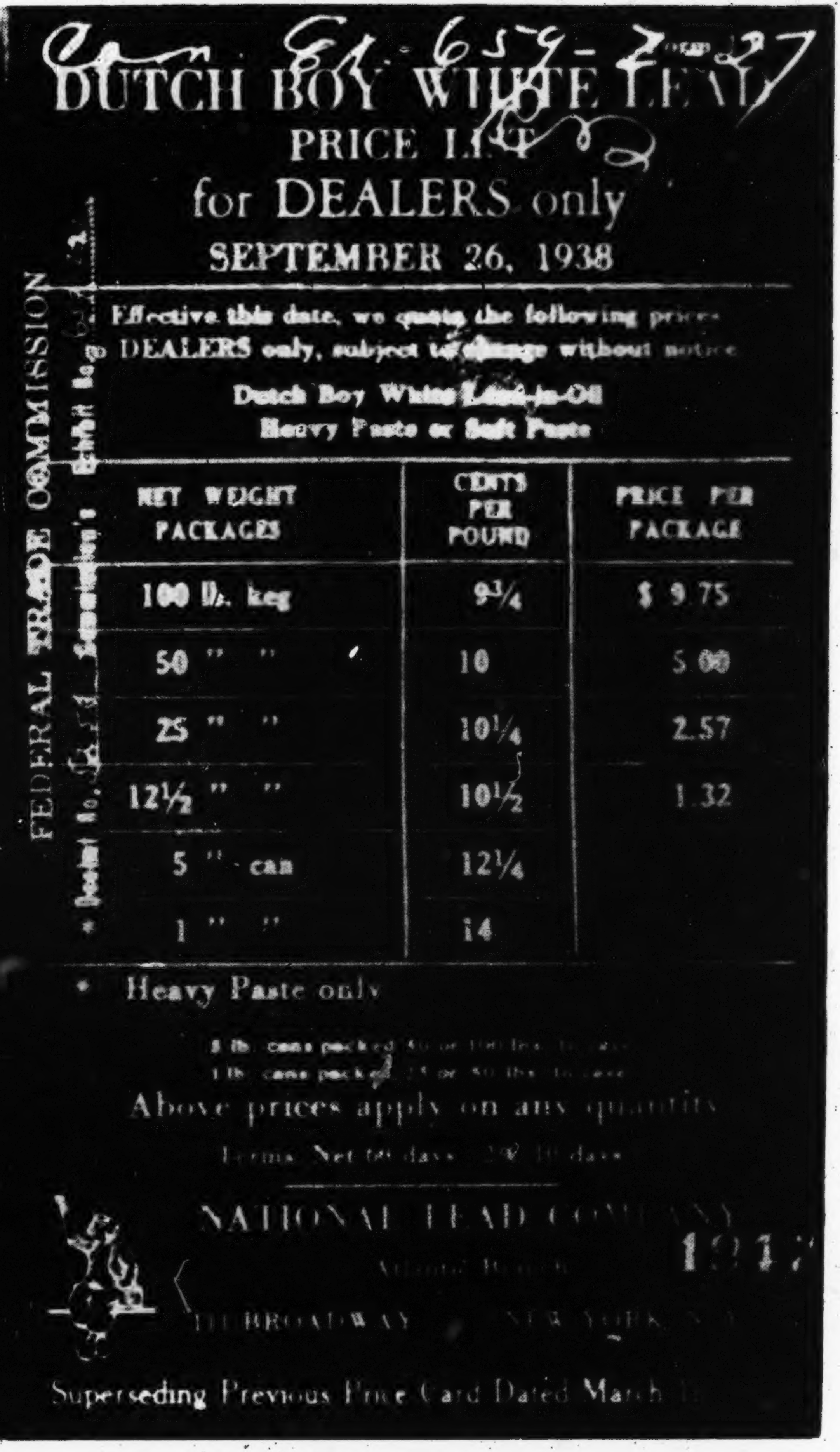
* Heavy Paste only

5 lb. cans packed 50 or 100 lbs. to case.
1 lb. cans packed 25 or 50 lbs. to case.

Above prices apply on any quantity

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

Superseding Previous Price Card Dated March 10, 1938



Com. Ex. 659-2-27

DUTCH BOY WHITE LEAD

PRICE LIST for DEALERS only

SEPTEMBER 26, 1938

FEDERAL TRADE COMMISSION
Docket No. [illegible] Commission's Exhibit No. 659

Effective this date, we quote the following prices to DEALERS only, subject to change without notice.

Dutch Boy White Lead-in-Oil
Heavy Paste or Soft Paste

NET WEIGHT PACKAGES	CENTS PER POUND	PRICE PER PACKAGE
100 lb. keg	9¾	$ 9.75
50 " "	10	5.00
25 " "	10¼	2.57
12½ " "	10½	1.32
* 5 " can	12¼	
* 1 " "	14	

* Heavy Paste only

5 lb. cans packed 50 or 100 lbs. to case.
1 lb. cans packed 25 or 50 lbs. to case.

Above prices apply on any quantity

Terms: Net 60 days, 2% 10 days

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

1917

Superseding Previous Price Card Dated March 1

Commission's Exhibit No. 659.

Com. Ex. 659-2-28

REVISION OF FIRST PAR

APPOINTMENT OF SELLING

DUTCH BOY WHITE

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 659-2-28

7. As compensation for the performance of his
allowed the difference between (1) the total
the merchandise sold calculated at the following

PER HUNDRED POUNDS

100 Pound Kegs
50
25
12

PLEASE NOTE One
Ou

[illegible] 193

4

Commission's Exhibit No. 659.

Com. Ex. 659-Z-29

Form 4-19

DUTCH BOY WHITE LEAD
PRICE LIST
for DEALERS only
FEBRUARY 27, 1939

Effective this date, we quote the following prices to DEALERS only, subject to change without notice.

Dutch Boy White-Lead-in-Oil
Heavy Paste or Soft Paste

NET WEIGHT PACKAGES	CENTS PER POUND	PRICE PER PACKAGE
100 lb. keg	10¼	$10.25
50 " "	10½	5.25
25 " "	10¾	2.69
12½ " "	11	1.38
5 " can	12¾	
1 " "	14½	

Heavy Paste only

5 lb. cans packed 50 or 100 lbs. to case.
1 lb. cans packed 25 or 50 lbs. to case.

Above prices apply on any quantity

Terms: Net 60 days - 2% 10 days.

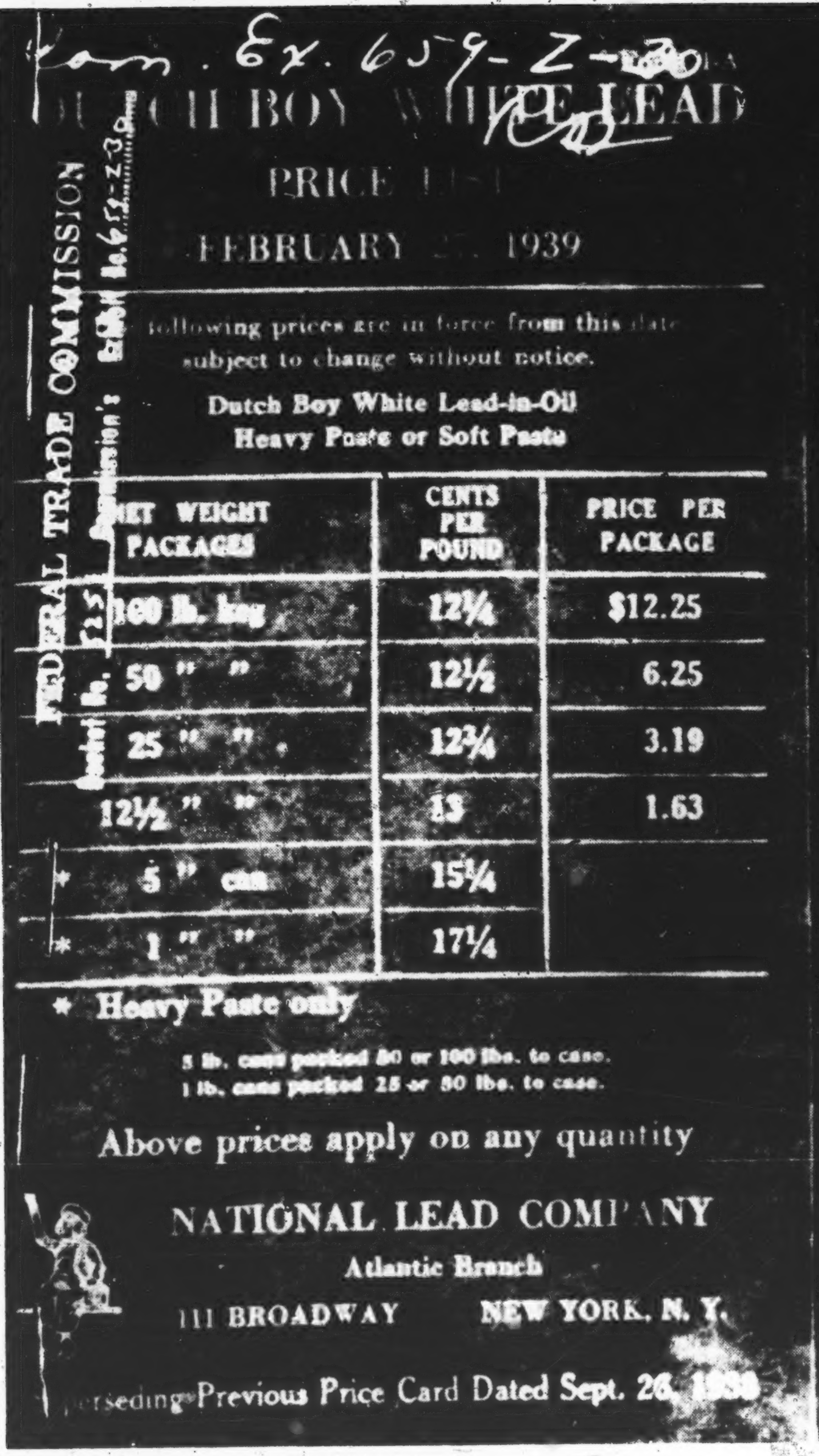
NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

1949

Superseding Previous Price Card Dated Sept. 26, 1938

FEDERAL TRADE COMMISSION
Docket No. 5253
Commission's Exhibit No. 659-Z-29

Commission's Exhibit No. 659.



Com. Ex. 659-Z-30

FEDERAL TRADE COMMISSION
Commission's Exhibit No. 659-Z-30
Docket No. 5253

DUTCH BOY WHITE LEAD

PRICE LIST

FEBRUARY 27, 1939

The following prices are in force from this date
subject to change without notice.

Dutch Boy White Lead-in-Oil
Heavy Paste or Soft Paste

NET WEIGHT PACKAGES	CENTS PER POUND	PRICE PER PACKAGE
100 lb. keg	12¼	$12.25
50 " "	12½	6.25
25 " "	12¾	3.19
12½ " "	13	1.63
* 5 " cans	15¼	
* 1 " "	17¼	

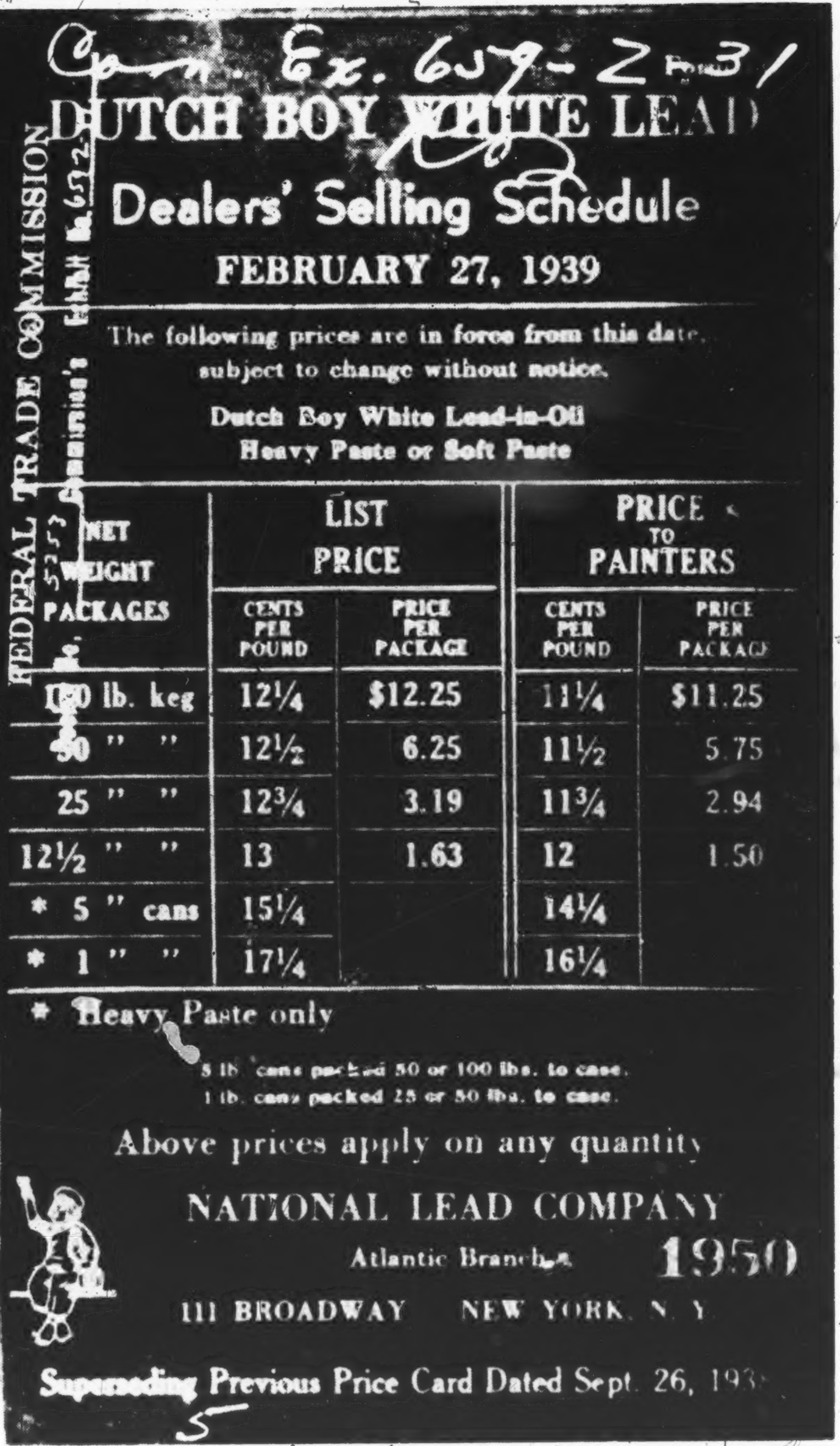
* Heavy Paste only

5 lb. cans packed 50 or 100 lbs. to case.
1 lb. cans packed 25 or 50 lbs. to case.

Above prices apply on any quantity

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

perseding Previous Price Card Dated Sept. 26, 1938



Com. Ex. 659-Z-31

FEDERAL TRADE COMMISSION
Commission's Exhibit No. 659-Z-31
Docket No. 5253

DUTCH BOY WHITE LEAD

Dealers' Selling Schedule

FEBRUARY 27, 1939

The following prices are in force from this date,
subject to change without notice.

Dutch Boy White Lead-in-Oil
Heavy Paste or Soft Paste

NET WEIGHT PACKAGES	LIST PRICE		PRICE TO PAINTERS	
	CENTS PER POUND	PRICE PER PACKAGE	CENTS PER POUND	PRICE PER PACKAGE
100 lb. keg	12¼	$12.25	11¼	$11.25
50 " "	12½	6.25	11½	5.75
25 " "	12¾	3.19	11¾	2.94
12½ " "	13	1.63	12	1.50
* 5 " cans	15¼		14¼	
* 1 " "	17¼		16¼	

* Heavy Paste only

5 lb. cans packed 50 or 100 lbs. to case.
1 lb. cans packed 25 or 50 lbs. to case.

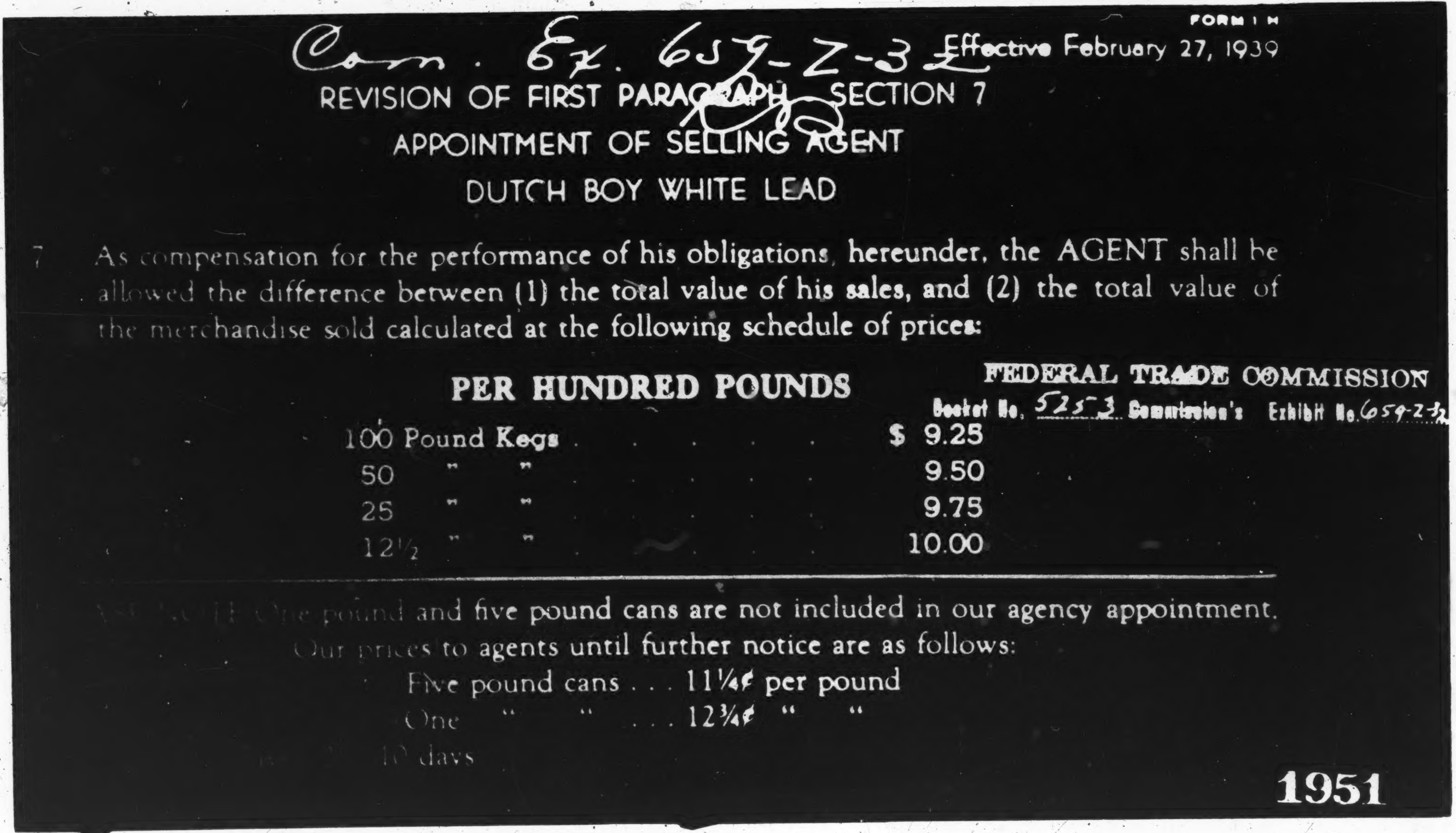
Above prices apply on any quantity

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

1950

Superseding Previous Price Card Dated Sept. 26, 193

5



Com. Ex. 659-Z-32

FORM 1 M

Effective February 27, 1939

REVISION OF FIRST PARAGRAPH SECTION 7
APPOINTMENT OF SELLING AGENT
DUTCH BOY WHITE LEAD

7 As compensation for the performance of his obligations, hereunder, the AGENT shall be allowed the difference between (1) the total value of his sales, and (2) the total value of the merchandise sold calculated at the following schedule of prices:

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 659-Z-32

PER HUNDRED POUNDS

100 Pound Kegs	$ 9.25
50 " "	9.50
25 " "	9.75
12½ " "	10.00

[illegible] NOTE: One pound and five pound cans are not included in our agency appointment. Our prices to agents until further notice are as follows:

Five pound cans . . . 11¼¢ per pound
One " " . . . 12¾¢ " "

[illegible] 10 days

1951

Com. Ex. 659-2-33

T PRICES FOR AGENTS

SEPTEMBER 26, 1939

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 659-2-33

Subject to change without notice
we quote the following prices to our Agents.

DUTCH BOY

RY WHITE LEAD - LITHARGE
RY RED LEAD - RED LEAD IN OIL

PRODUCTS	NET WEIGHT PACKAGES CENTS PER POUND			
	100 LBS.	50 LBS.	25 LBS.	12½ LBS.
DRY WHITE LEAD	9	9¼	9½	9¾
LITHARGE	9	9¼	9½	9¾
DRY RED LEAD	10	10¼	10½	10¾
RED LEAD IN OIL	10¾	11	11¼	11½

Terms: Net 60 days - 2% 10 days.

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

Supersedes Price List Dated September 26, 1938

Com. Ex. 659-2-34

RESALE PRICES

(SUGGESTED)

SEPTEMBER 26, 1939

DUTCH BOY

DRY WHITE LEAD - LITHARGE
DRY RED LEAD - RED LEAD IN OIL

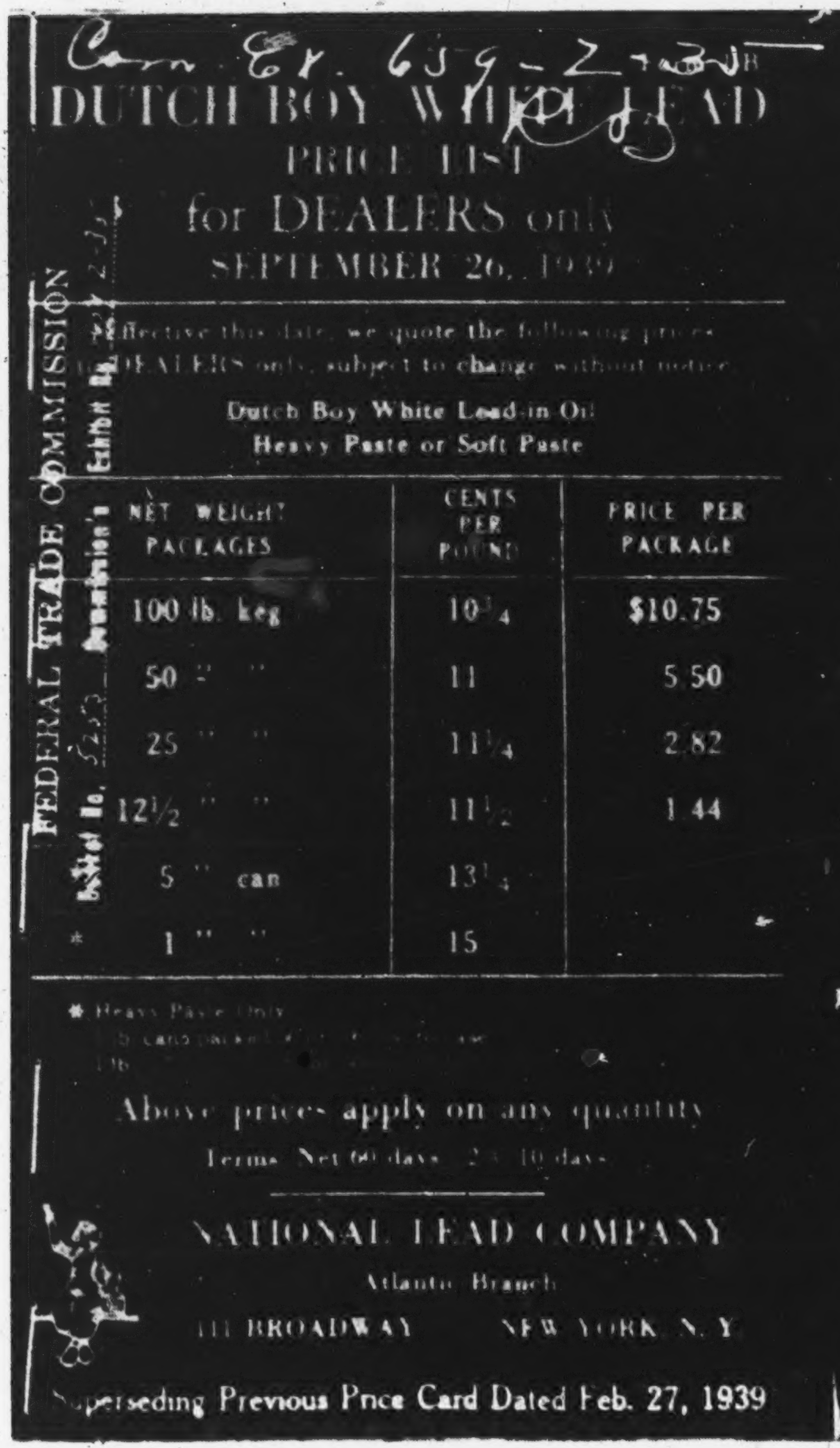
PRODUCTS	NET WEIGHT PACKAGES CENTS PER POUND			
	100 LBS.	50 LBS.	25 LBS.	12½ LBS.
DRY WHITE LEAD	11	11¼	11½	11¾
LITHARGE	11	11¼	11½	11¾
DRY RED LEAD	12	12¼	12½	12¾
RED LEAD IN OIL	12¾	13	13¼	13½

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 659-2-34

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

1952

Commission's Exhibit No. 659.



Com. Ex. 659-Z-35

FEDERAL TRADE COMMISSION
Commission's Exhibit No. 659 Z-35
Docket No. 5253

DUTCH BOY WHITE LEAD

PRICE LIST
for DEALERS only
SEPTEMBER 26, 1939

Effective this date, we quote the following prices to DEALERS only, subject to change without notice.

Dutch Boy White Lead-in-Oil
Heavy Paste or Soft Paste

NET WEIGHT PACKAGES	CENTS PER POUND	PRICE PER PACKAGE
100 lb. keg	10¾	$10.75
50 " "	11	5.50
25 " "	11¼	2.82
12½ " "	11½	1.44
5 " can	13¼	
* 1 " "	15	

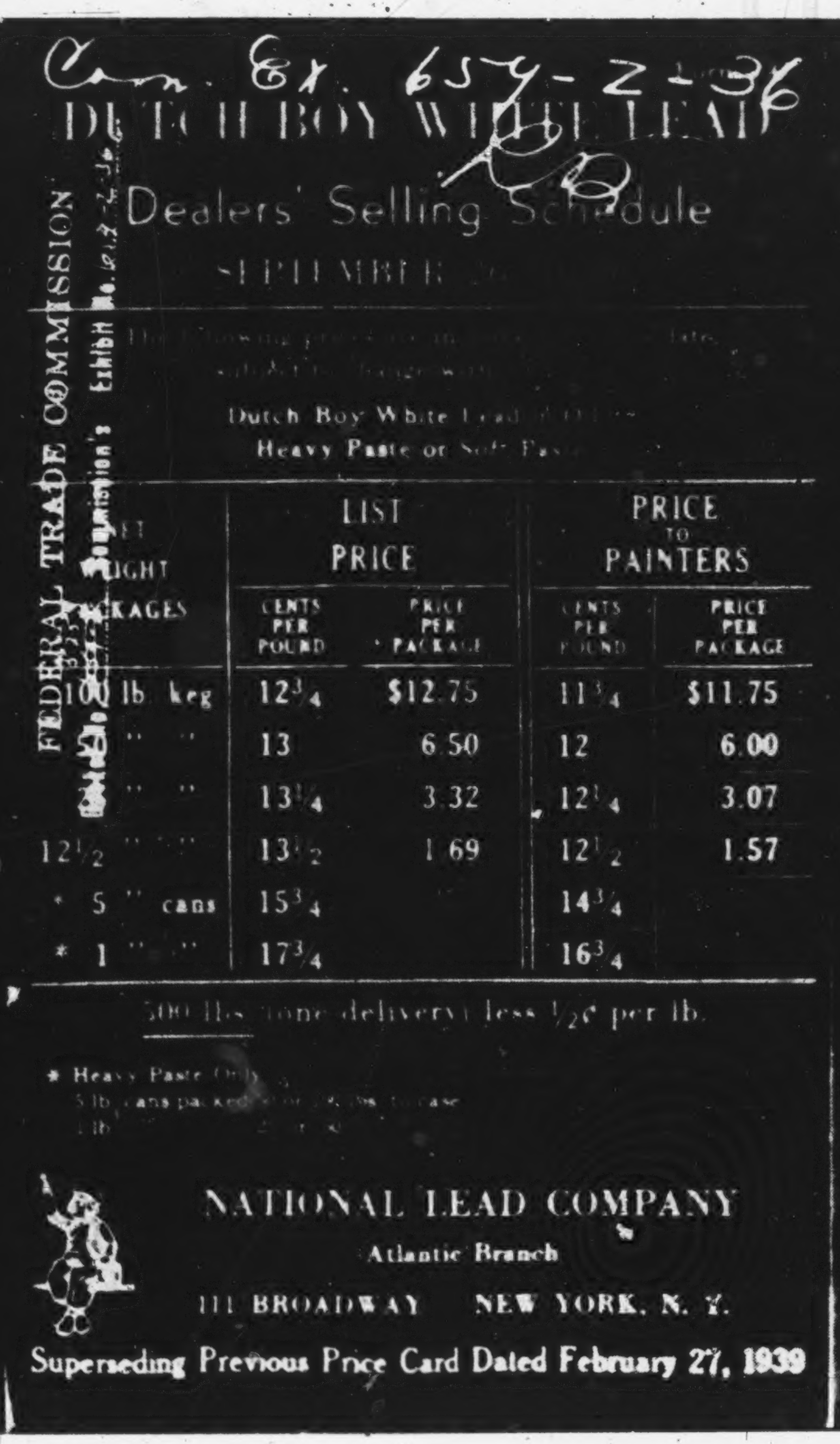
* Heavy Paste Only
5 lb. cans packed [illegible]
1 lb. [illegible]

Above prices apply on any quantity

Terms Net 60 days 2% 10 days

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

Superseding Previous Price Card Dated Feb. 27, 1939



Com. Ex. 659-Z-36

FEDERAL TRADE COMMISSION
Commission's Exhibit No. 659 Z-36
Docket No. 5253

DUTCH BOY WHITE LEAD

Dealers' Selling Schedule
SEPTEMBER 26

The following prices are in force from this date, subject to change without notice.

Dutch Boy White Lead-in-Oil
Heavy Paste or Soft Paste

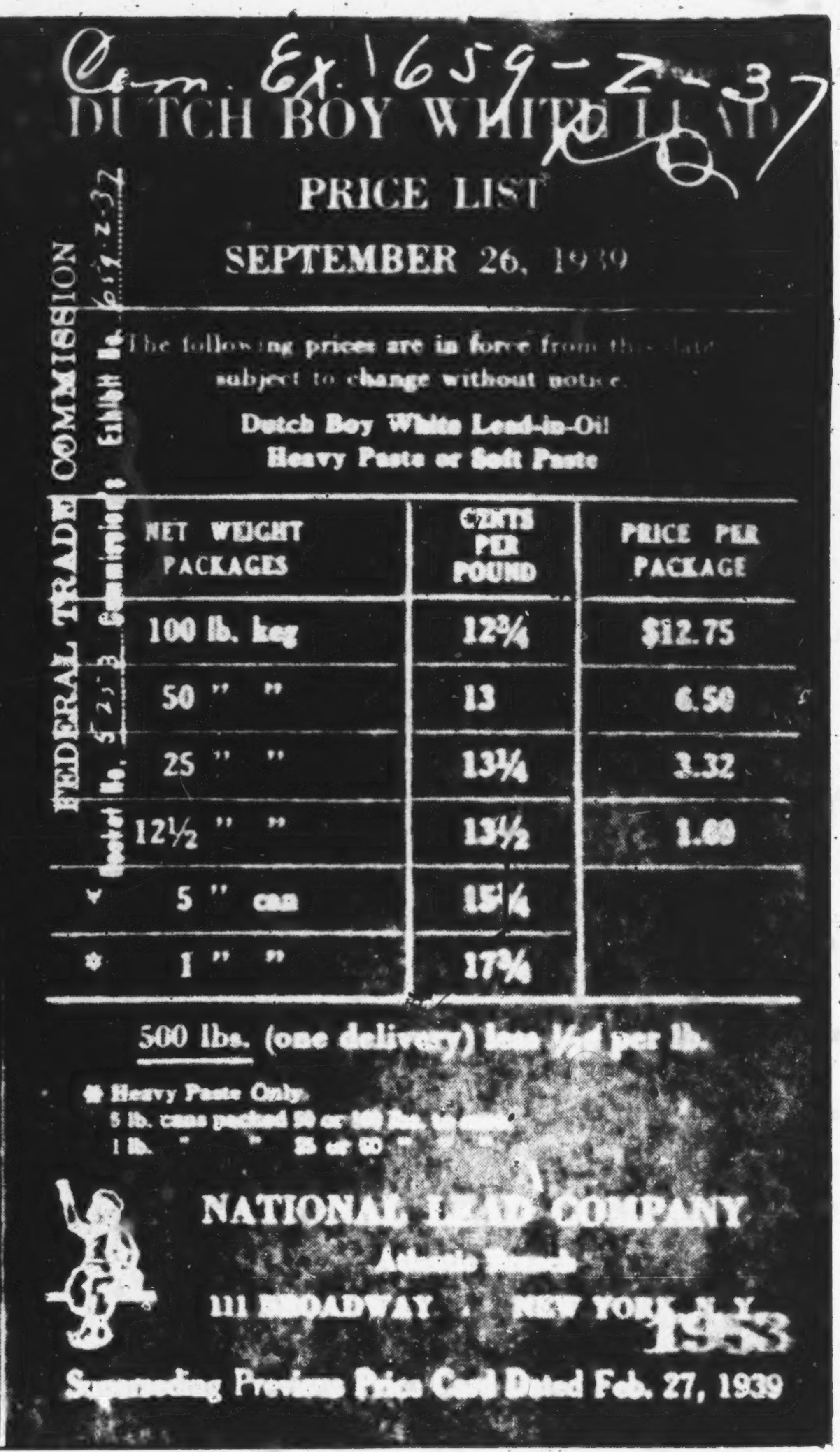
NET WEIGHT PACKAGES	LIST PRICE		PRICE TO PAINTERS	
	CENTS PER POUND	PRICE PER PACKAGE	CENTS PER POUND	PRICE PER PACKAGE
100 lb. keg	12¾	$12.75	11¾	$11.75
50 " "	13	6.50	12	6.00
25 " "	13¼	3.32	12¼	3.07
12½ " "	13½	1.69	12½	1.57
* 5 " cans	15¾		14¾	
* 1 " "	17¾		16¾	

500 lbs. (one delivery) less ½¢ per lb.

* Heavy Paste Only
5 lb. cans packed 50 or 100 lbs. to case
1 lb. " " 25 or 50

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

Superseding Previous Price Card Dated February 27, 1939



Com. Ex. 659-Z-37

FEDERAL TRADE COMMISSION
Commission's Exhibit No. 659 Z-37
Docket No. 5253

DUTCH BOY WHITE LEAD

PRICE LIST
SEPTEMBER 26, 1939

The following prices are in force from this date subject to change without notice.

Dutch Boy White Lead-in-Oil
Heavy Paste or Soft Paste

NET WEIGHT PACKAGES	CENTS PER POUND	PRICE PER PACKAGE
100 lb. keg	12¾	$12.75
50 " "	13	6.50
25 " "	13¼	3.32
12½ " "	13½	1.69
* 5 " can	15¾	
* 1 " "	17¾	

500 lbs. (one delivery) less ½¢ per lb.

* Heavy Paste Only.
5 lb. cans packed 50 or 100 lbs. to case.
1 lb. " " 25 or 50 " "

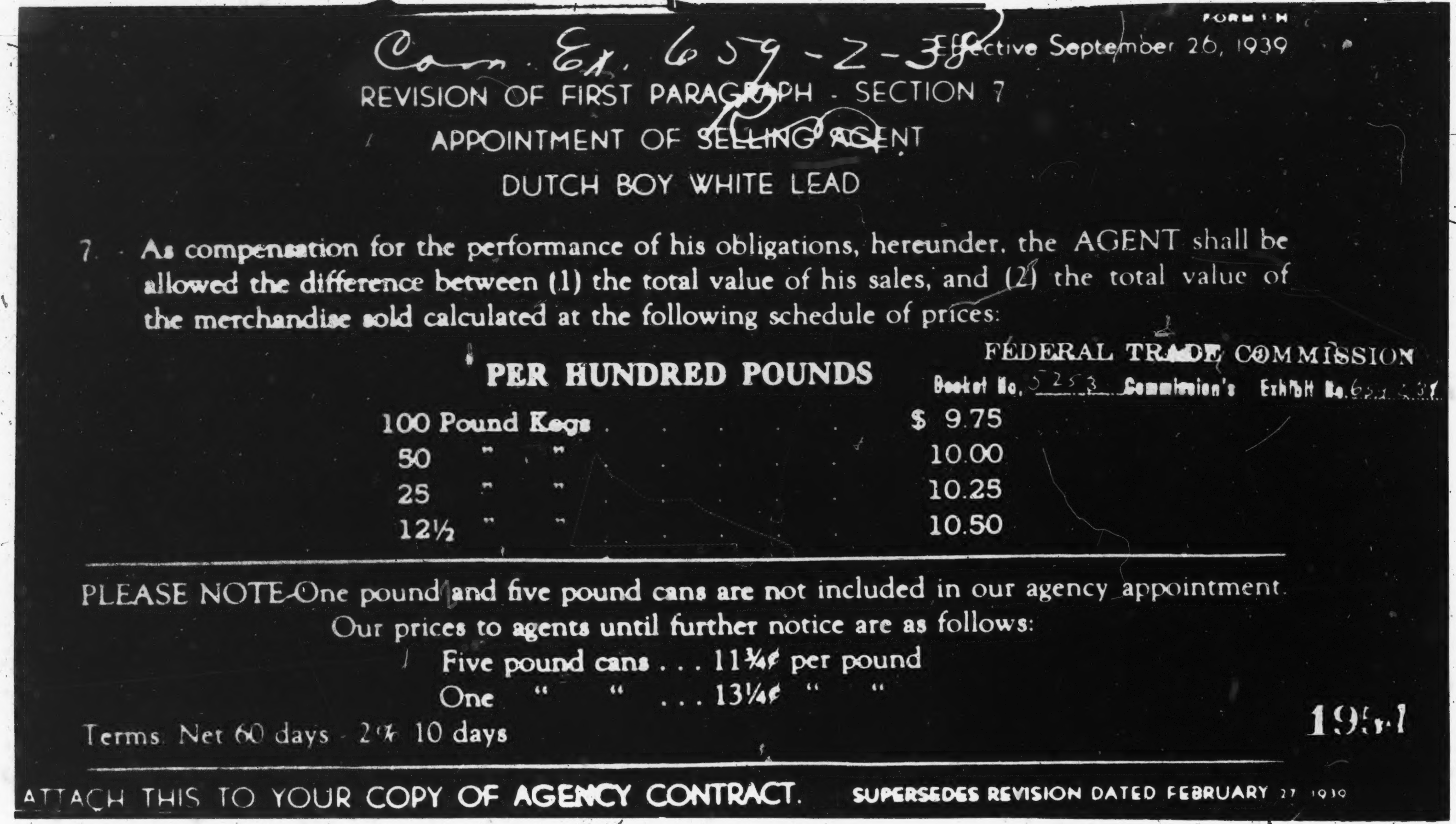
NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

1953

Superseding Previous Price Card Dated Feb. 27, 1939

Commission's Exhibit No. 659.

Commission's Exhibit No. 659.



FORM I-H

Com. Ex. 659-Z-37

Effective September 26, 1939

REVISION OF FIRST PARAGRAPH - SECTION 7

APPOINTMENT OF SELLING AGENT

DUTCH BOY WHITE LEAD

7. - As compensation for the performance of his obligations, hereunder, the AGENT shall be allowed the difference between (1) the total value of his sales, and (2) the total value of the merchandise sold calculated at the following schedule of prices:

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 659-Z-37

PER HUNDRED POUNDS

100 Pound Kegs	$ 9.75
50 " "	10.00
25 " "	10.25
12½ " "	10.50

PLEASE NOTE-One pound and five pound cans are not included in our agency appointment.

Our prices to agents until further notice are as follows:

Five pound cans . . . 11¾¢ per pound
One " " . . . 13¼¢ " "

Terms Net 60 days - 2% 10 days

1954

ATTACH THIS TO YOUR COPY OF AGENCY CONTRACT. SUPERSEDES REVISION DATED FEBRUARY 27 1939

Com. Ex. 659-Z-39

DUTCH BOY WHITE LEAD

PRICE LIST

[illegible] DEALERS [illegible]

APRIL [illegible]

FEDERAL TRADE COMMISSION
Commission's Exhibit No. [illegible]
Docket No. [illegible]

Dutch Boy White Lead [illegible]
Heavy Paste or Soft Paste

NET WEIGHT PACKAGES	CENTS PER POUND	PRICE PER PACKAGE
100 lb. keg	11¼	$11.25
50 " "	11½	5.75
25 " "	11¾	2.94
12½ " "	12	1.50
5 " can	13¾	
* 1 " "	15½	

* Heavy Paste Only
5 lb. cans packed 50 or 100 lbs. to case
1 lb. " " 25 or 50

Above prices apply on any quantity

Terms Net 60 days 2% 10 days

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

Superseding Previous Price Card Dated Sept. 26, 1939

Com. Ex. 659-Z-40

DUTCH BOY WHITE LEAD

PRICE LIST

APRIL [illegible]

FEDERAL TRADE COMMISSION
Commission's Exhibit No. [illegible]
Docket No. [illegible]

Dutch Boy White Lead in Oil
Heavy Paste or Soft Paste

NET WEIGHT PACKAGES	CENTS PER POUND	PRICE PER PACKAGE
100 lb. keg	13¼	$13.25
50 " "	13½	6.75
25 " "	13¾	3.44
12½ " "	14	1.75
5 " can	16¼	
* 1 " "	18¼	

500 lbs. (one delivery) less ½¢ per lb.

* Heavy Paste Only
5 lb. cans packed 50 or 100 lbs. to case
1 lb. " " 25 or 50

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

Superseding Previous Price Card Dated Sept. 26, 1939

Com. Ex. 659-Z-41

DUTCH BOY WHITE LEAD

Dealers' Selling Schedule

APRIL 26, 1941

FEDERAL TRADE COMMISSION
Commission's Exhibit No. [illegible]
Docket No. [illegible]

The following prices are in force [illegible]
subject to change without notice.

Dutch Boy White Lead-in-Oil
Heavy Paste or Soft Paste

NET WEIGHT PACKAGES	LIST PRICE		PRICE TO PAINTERS	
	CENTS PER POUND	PRICE PER PACKAGE	CENTS PER POUND	PRICE PER PACKAGE
100 lb. keg	13¼	$13.25	12¼	$12.25
5[illegible]	13½	6.75	12½	6.25
[illegible]	13¾	3.44	12¾	3.19
12[illegible]	14	1.75	13	1.63
* 5 " cans	16¼		15¼	
* 1 " "	18¼		17¼	

500 lbs. (one delivery) less ½¢ per lb.

* Heavy Paste Only
5 lb. cans packed 50 or 100 lbs. to case
1 lb. " " 25 or 50

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

1955

Superseding Previous Price Card Dated September [illegible]

Commission's Exhibit No. 659.

Commission's Exhibit No. 659.

Com. Ex. 659 - Z - 42

Effective April 26, 1941

REVISION OF FIRST PARAGRAPH - SECTION 7
APPOINTMENT OF SELLING AGENT
DUTCH BOY WHITE LEAD

7. - As compensation for the performance of his obligations, hereunder, the AGENT shall be allowed the difference between (1) the total value of his sales, and (2) the total value of the merchandise sold calculated at the following schedule of prices:

PER HUNDRED POUNDS

100 Pound Kegs	$10 25
50 " "	10 50
25 " "	10 75
12½ " "	11 00

PLEASE NOTE-One pound and five pound cans are not included in our agency appointment.

Our prices to agents until further notice are as follows:

Five pound cans . . . 12¼¢ per pound
One " " . . . 13¼¢ " "

Terms: Net 60 days - 2% 10 days

ATTACH THIS TO YOUR COPY OF AGENCY CONTRACT. SUPERSEDES REVISION DATED [illegible]

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 659-Z-42

Com Ex. 659-Z-43

[illegible] FOR AGENTS

R 02

[illegible] 21, 1941

[illegible] change without notice.
[illegible] following prices to our Agents.

DUTCH BOY

DRY WHITE LEAD - LITHARGE
DRY RED LEAD - RED LEAD IN OIL

PRODUCTS	NET WEIGHT PACKAGES CENTS PER POUND			
	100 LBS.	50 LBS.	25 LBS.	12½ LBS.
DRY WHITE LEAD	9¾	10	10¼	10½
LITHARGE	9½	9¾	10	10¼
DRY RED LEAD	10½	10¾	11	11¼
RED LEAD IN OIL	11¼	11½	11¾	12

Terms, Net 60 days - 2% 10 days.

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 659-Z-43

Com Ex. 659-Z-44

[illegible] PRICES
(SUGGESTED)

R Q

JULY 21, 1941

DUTCH BOY

DRY WHITE LEAD - LITHARGE
DRY RED LEAD - RED LEAD IN OIL

PRODUCTS	NET WEIGHT PACKAGES CENTS PER POUND			
	100 LBS.	50 LBS.	25 LBS.	12½ LBS.
DRY WHITE LEAD	11¾	12	12¼	12½
LITHARGE	11½	11¾	12	12¼
DRY RED LEAD	12½	12¾	13	13¼
RED LEAD IN OIL	13¼	13½	13¾	14

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 659-Z-44

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

1957

Commission's Exhibit No. 659.

Commission's Exhibit No. 659.

Com. Ex. 659-2-45

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 659-2-45

DUTCH BOY WHITE LEAD
PRICE LIST
for DEALERS only

JANUARY 26, 1942

Effective this date, we quote the following prices to DEALERS only, subject to change without notice.

Dutch Boy **White Lead-in-Oil**
Heavy **Paste** or **Soft Paste**

NET WEIGHT PACKAGES	CENTS PER POUND	PRICE PER PACKAGE
100 lb. keg	11¾	$11.75
50 " "	12	6.00
25 " "	12¼	3.07
12½ " "	12½	1.57
* 5 " can	14¼	
* 1 " "	16	

* Heavy Paste Only
5 lb. cans packed 50 or 100 lbs. to case
1 lb. " " 25 or [illegible]

Above prices apply on any quantity

Terms: Net 60 days — 2% 10 days.

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

Superseding Previous Price Card Dated April 26, 1941

Com. Ex. 659-2-46

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 659-2-46

DUTCH BOY W[illegible]
Dealers' Selling Sched[illegible]

JANUAR[illegible]

The following [illegible]
subje[illegible]

Dutch Boy W[illegible]
Heavy Pas[illegible]

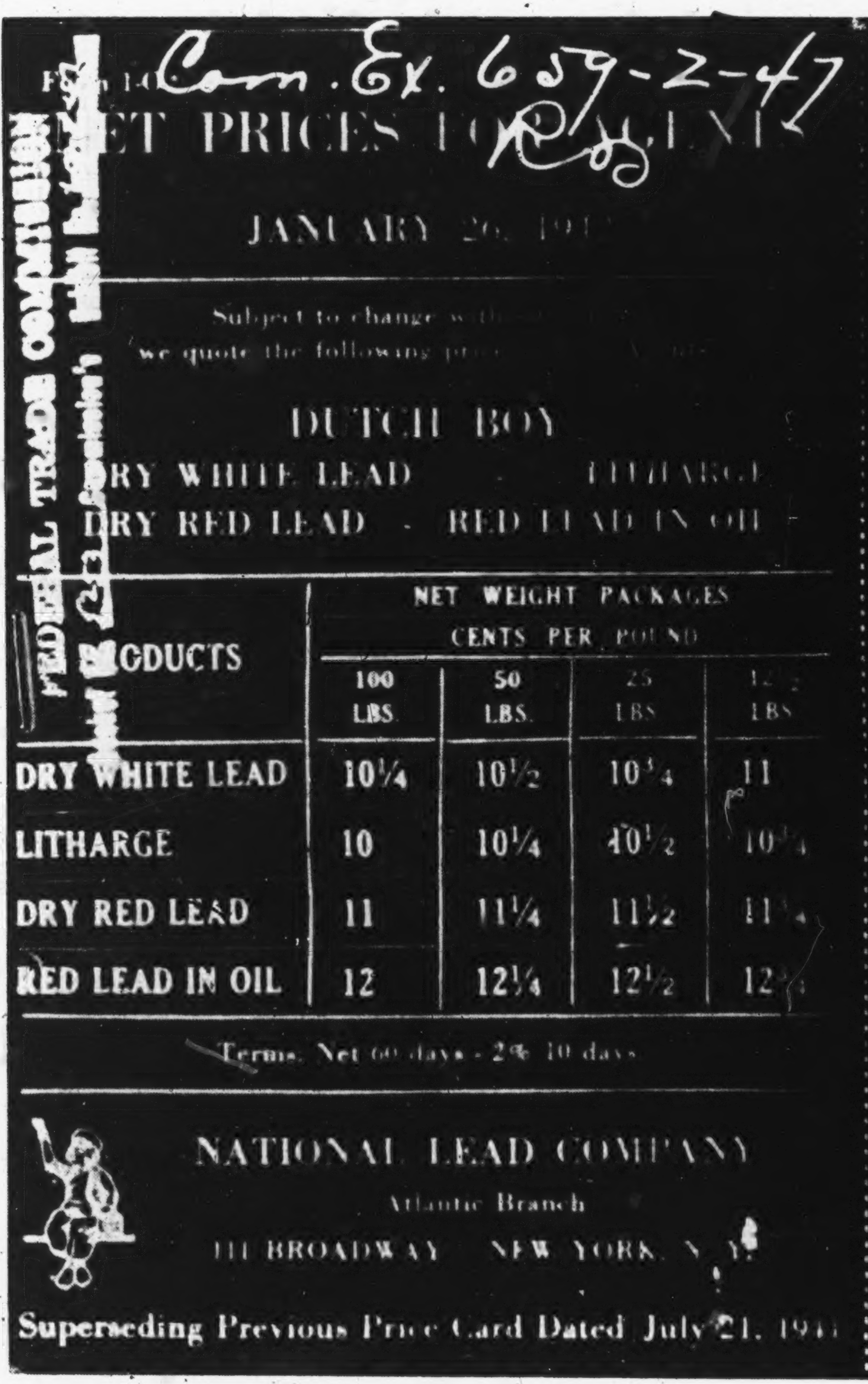
NET WEIGHT PACKAGES	LIST PRICE		PR[illegible] PAIN[illegible]	
	[illegible]	PRICE PER PACKAGE	PER POUND	[illegible]
100 lb. keg	13¾	$13[illegible]	12¾	[illegible]
50 " "	14	7.00	13	[illegible]
25 " "	14¼	3.57	13¼	3.3[illegible]
12½ " "	14½	1.82	13½	1.6[illegible]
* 5 " cans	16¾		15¾	
* 1 " "	18¾		17¾	

500 lbs. (one delivery) less ½¢ per [illegible]

* Heavy Paste Only
[illegible]

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

Superseding Previous Price Card Dated April 26, 1941



FEDERAL TRADE COMMISSION
Docket No. 1253, Commission's Exhibit No. [illegible]

Com. Ex. 659-Z-47
R83

Form 10

NET PRICES TO AGENTS

JANUARY 26, 194[illegible]

Subject to change with[illegible]
we quote the following pri[illegible]

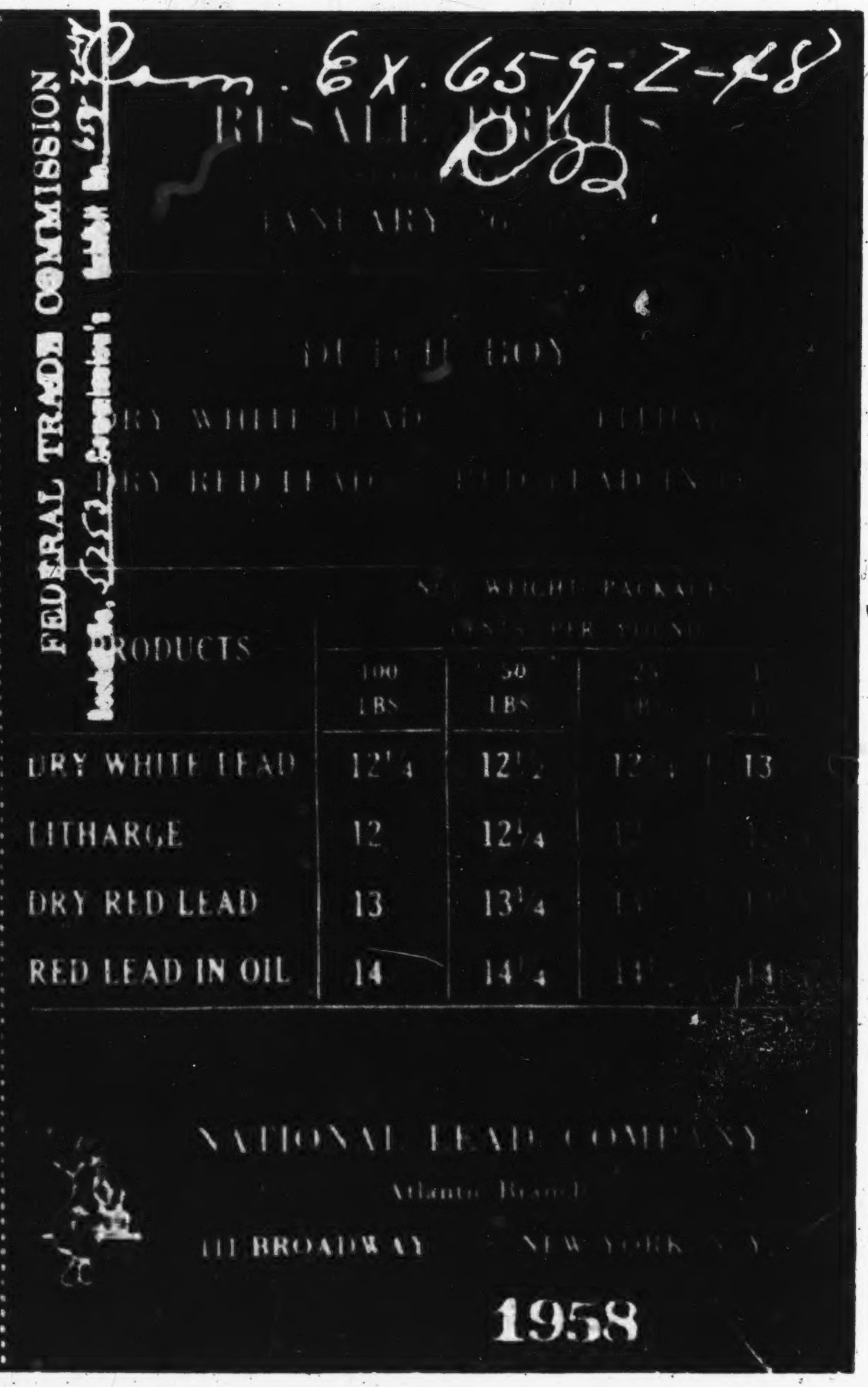
DUTCH BOY
DRY WHITE LEAD - LITHARGE
DRY RED LEAD - RED LEAD IN OIL

PRODUCTS	NET WEIGHT PACKAGES CENTS PER POUND			
	100 LBS.	50 LBS.	25 LBS	12½ LBS
DRY WHITE LEAD	10¼	10½	10¾	11
LITHARGE	10	10¼	10½	10¾
DRY RED LEAD	11	11¼	11½	11¾
RED LEAD IN OIL	12	12¼	12½	12¾

Terms, Net 60 days - 2% 10 days

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

Superseding Previous Price Card Dated July 21, 194[illegible]



FEDERAL TRADE COMMISSION
Docket No. 1253, Commission's Exhibit No. 65[illegible]

Com. Ex. 659-Z-48
R82

RESALE PRICES

JANUARY 26, [illegible]

DUTCH BOY
DRY WHITE LEAD - LITHARGE
DRY RED LEAD - RED LEAD IN OIL

PRODUCTS	NET WEIGHT PACKAGES CENTS PER POUND			
	100 LBS	50 LBS	25 LBS	[illegible] LBS
DRY WHITE LEAD	12¼	12½	12¾	13
LITHARGE	12	12¼	[illegible]	[illegible]
DRY RED LEAD	13	13¼	[illegible]	[illegible]
RED LEAD IN OIL	14	14¼	14[illegible]	14[illegible]

NATIONAL LEAD COMPANY
Atlantic Branch
111 BROADWAY NEW YORK, N. Y.

1958

Commission's Exhibit No. 659.

Com. Ex 659-Z-49

FORM I-H

Effective January 26, 1942

REVISION OF FIRST PARAGRAPH - SECTION 7

APPOINTMENT OF SELLING AGENT

DUTCH BOY WHITE LEAD

7. - As compensation for the performance of his obligations, hereunder, the AGENT shall be allowed the difference between (1) the total value of his sales, and (2) the total value of the merchandise sold calculated at the following schedule of prices:

PER HUNDRED POUNDS

100 Pound Kegs	$10.75
50 " "	11.00
25 " "	11.25
12 " "	11.50

PLEASE NOTE One pound [illegible] agency appointment.

Other [illegible] ows.

Terms [illegible] 2% 10 days

1959

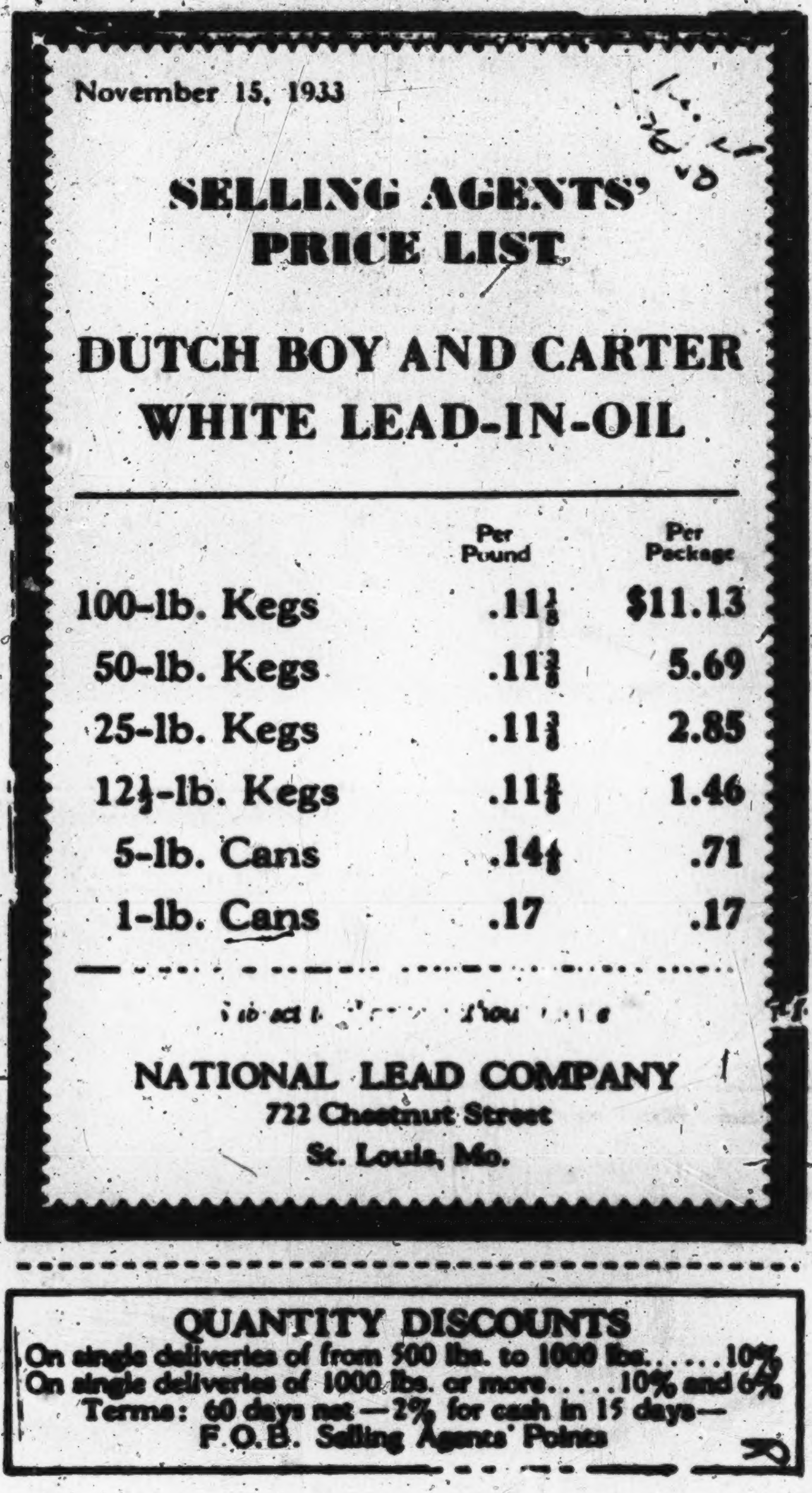
FEDERAL TRADE COMMISSION

Docket No. 5253 Commission's Exhibit No. 659-Z-49

ATTACH THIS TO YOUR COPY OF AGENCY CONTRACT.

SUPERSEDES REVISION DATED APRIL 26, 1941

Commission's Exhibit No. 659.



November 15, 1933

SELLING AGENTS' PRICE LIST

DUTCH BOY AND CARTER WHITE LEAD-IN-OIL

	Per Pound	Per Package
100-lb. Kegs	.11⅛	$11.13
50-lb. Kegs	.11⅜	5.69
25-lb. Kegs	.11⅜	2.85
12½-lb. Kegs	.11⅝	1.46
5-lb. Cans	.14⅛	.71
1-lb. Cans	.17	.17

Subject to change without notice

NATIONAL LEAD COMPANY
722 Chestnut Street
St. Louis, Mo.

QUANTITY DISCOUNTS

On single deliveries of from 500 lbs. to 1000 lbs......10%
On single deliveries of 1000 lbs. or more.....10% and 6%
Terms: 60 days net—2% for cash in 15 days—
F.O.B. Selling Agents' Points

Commission's Exhibit No. 659.

DUTCH BOY
ALL-PURE
SOFT PA
WHITE L
DUTCH BOY
WALL PRIMER

1962 H

REPRINT

PRICE LIST

June 1, 1933

The following prices on our products are in force from this date, subject to change without notice.

WHITE LEAD AND OXIDES

Net Weight Packages Price per Pound	KEGS 100 Pound	KEGS 50 & 25 Pounds	KEGS 12½ Pounds	*CANS 5 Pounds	*CANS 1 Pound
	Cents	Cents	Cents	Cents	Cents
DUTCH BOY & CARTER WHITE LEAD in oil (Heavy or Soft Paste)	11	11¼	11½	14	16
DRY WHITE LEAD	11	11¼	11½		
DUTCH BOY RED LEAD in oil	11½	11¾	12		
DRY RED LEAD and LITHARGE	11	11¼	11½		

* In Heavy Paste Only.

FEDERAL TRADE COMMISSION
Docket No. 3253 Commission's Exhibit No. 659-257

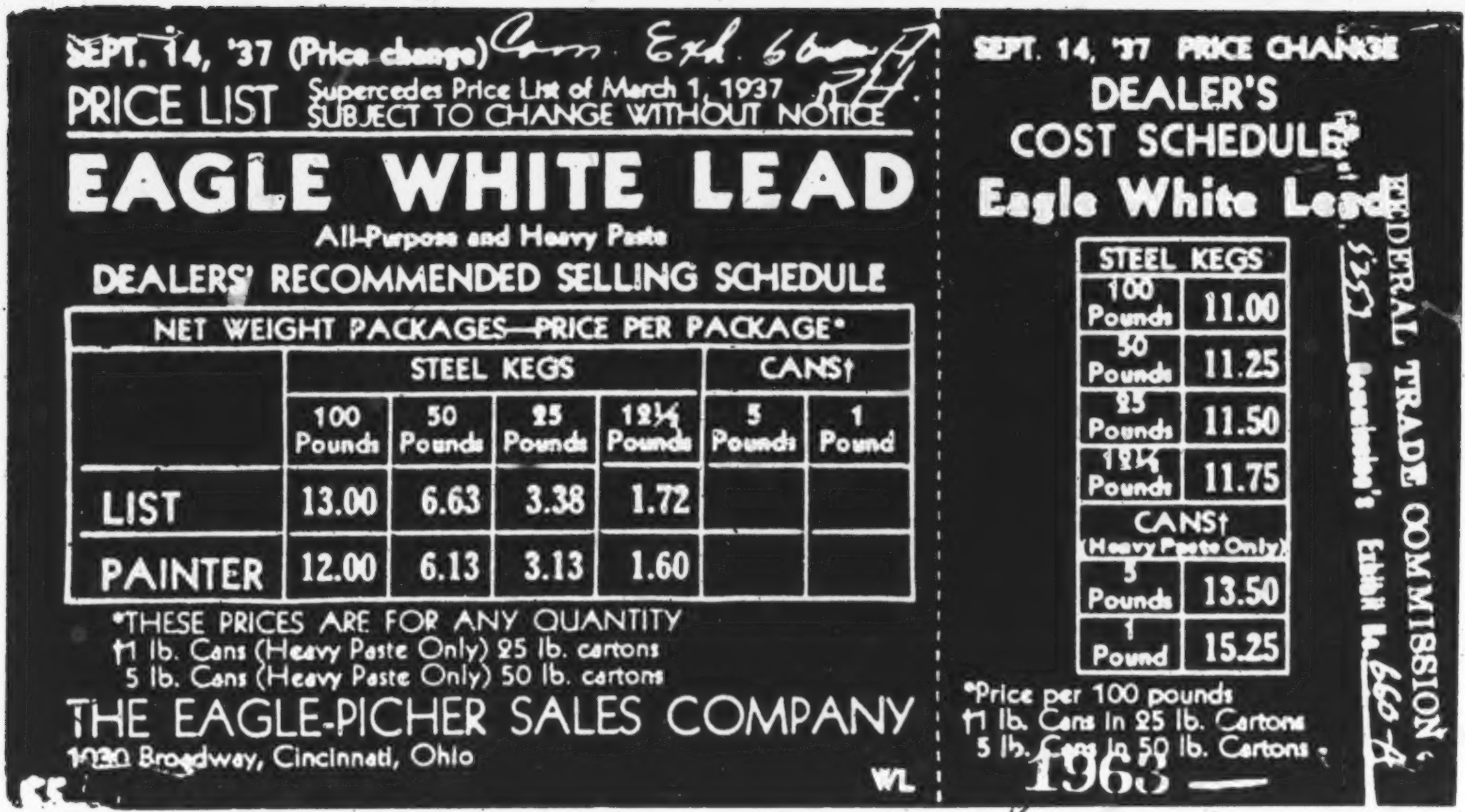
5 or 100 lbs. to case; 1 lb. cans packed 25, 50 or 100 lbs. to case.

NATIONAL LEAD COMPANY
ATLANTIC BRANCH
111 Broadway New York City

Com. 659-257

1961 5

Commission's Exhibit No. 660.



SEPT. 14, '37 (Price change) Com. Exh. 660

PRICE LIST Supercedes Price List of March 1, 1937
SUBJECT TO CHANGE WITHOUT NOTICE

EAGLE WHITE LEAD

All-Purpose and Heavy Paste

DEALERS' RECOMMENDED SELLING SCHEDULE

NET WEIGHT PACKAGES—PRICE PER PACKAGE*						
	STEEL KEGS				CANS†	
	100 Pounds	50 Pounds	25 Pounds	12½ Pounds	5 Pounds	1 Pound
LIST	13.00	6.63	3.38	1.72		
PAINTER	12.00	6.13	3.13	1.60		

*THESE PRICES ARE FOR ANY QUANTITY
†1 lb. Cans (Heavy Paste Only) 25 lb. cartons
5 lb. Cans (Heavy Paste Only) 50 lb. cartons

THE EAGLE-PICHER SALES COMPANY
1030 Broadway, Cincinnati, Ohio

WL

SEPT. 14, '37 PRICE CHANGE

DEALER'S COST SCHEDULE*

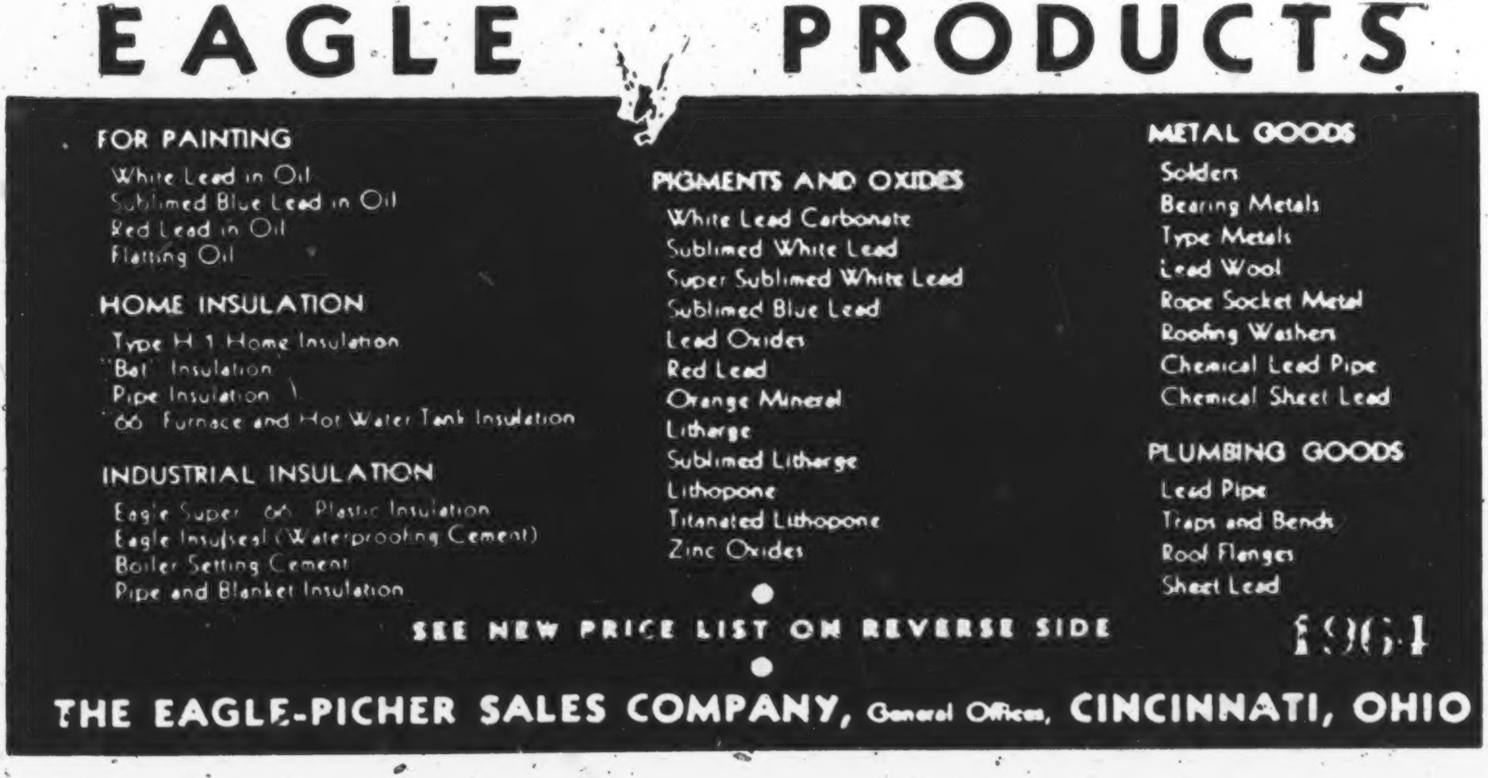
Eagle White Lead

STEEL KEGS	
100 Pounds	11.00
50 Pounds	11.25
25 Pounds	11.50
12½ Pounds	11.75
CANS† (Heavy Paste Only)	
5 Pounds	13.50
1 Pound	15.25

*Price per 100 pounds
†1 lb. Cans in 25 lb. Cartons
5 lb. Cans in 50 lb. Cartons

1963

FEDERAL TRADE COMMISSION
File No. 3253
Commission's Exhibit No. 660-A



EAGLE PRODUCTS

FOR PAINTING
White Lead in Oil
Sublimed Blue Lead in Oil
Red Lead in Oil
Flatting Oil

HOME INSULATION
Type H-1 Home Insulation
"Bat" Insulation
Pipe Insulation
"66" Furnace and Hot Water Tank Insulation

INDUSTRIAL INSULATION
Eagle Super "66" Plastic Insulation
Eagle Insulseal (Waterproofing Cement)
Boiler Setting Cement
Pipe and Blanket Insulation

PIGMENTS AND OXIDES
White Lead Carbonate
Sublimed White Lead
Super Sublimed White Lead
Sublimed Blue Lead
Lead Oxides
Red Lead
Orange Mineral
Litharge
Sublimed Litharge
Lithopone
Titanated Lithopone
Zinc Oxides

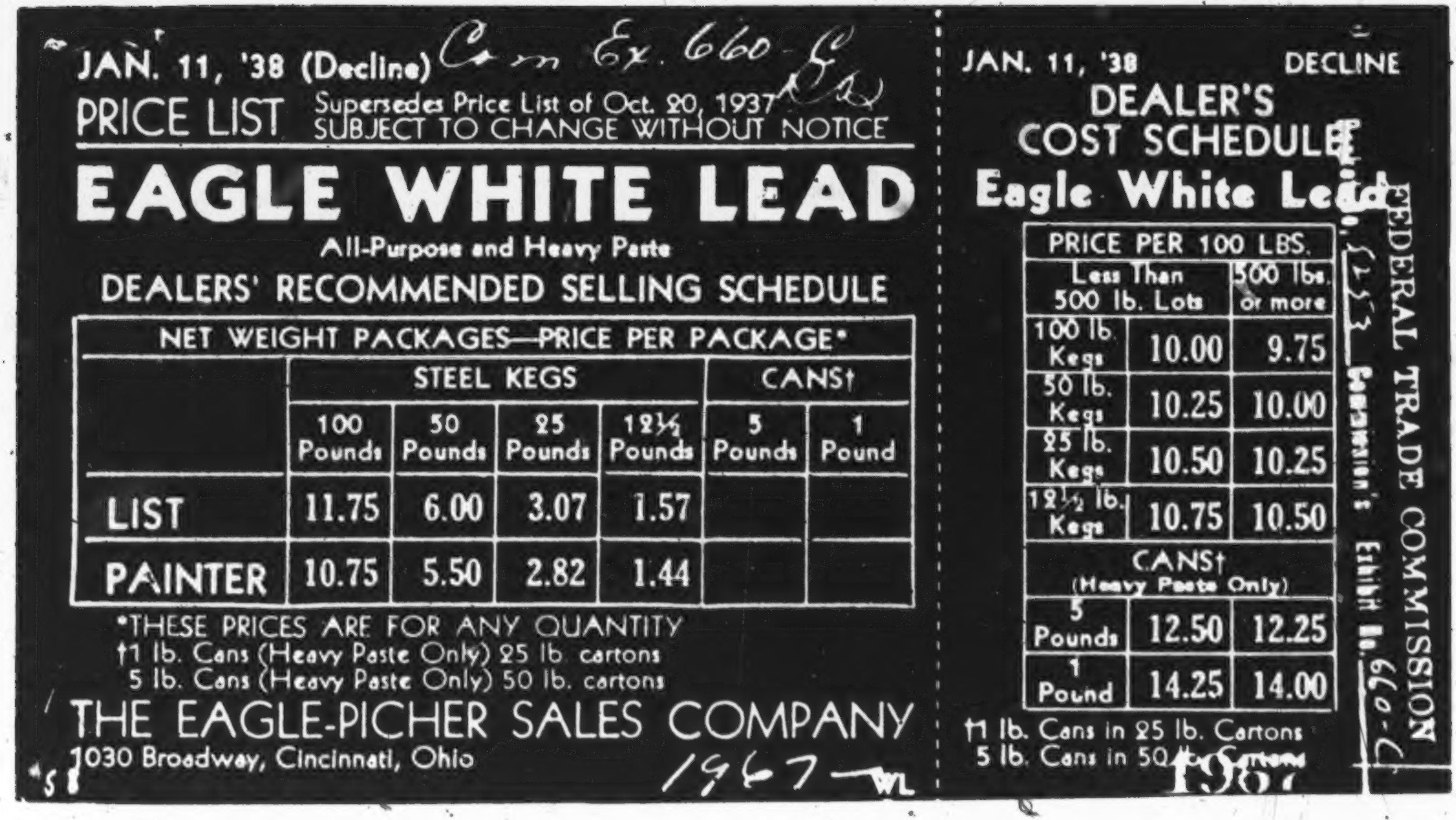
METAL GOODS
Solders
Bearing Metals
Type Metals
Lead Wool
Rope Socket Metal
Roofing Washers
Chemical Lead Pipe
Chemical Sheet Lead

PLUMBING GOODS
Lead Pipe
Traps and Bends
Roof Flanges
Sheet Lead

●
SEE NEW PRICE LIST ON REVERSE SIDE
●

1964

THE EAGLE-PICHER SALES COMPANY, General Offices, **CINCINNATI, OHIO**



JAN. 11, '38 (Decline) Com Ex. 660-C

PRICE LIST Supersedes Price List of Oct. 20, 1937
SUBJECT TO CHANGE WITHOUT NOTICE

EAGLE WHITE LEAD

All-Purpose and Heavy Paste

DEALERS' RECOMMENDED SELLING SCHEDULE

NET WEIGHT PACKAGES—PRICE PER PACKAGE*						
	STEEL KEGS				CANS†	
	100 Pounds	50 Pounds	25 Pounds	12½ Pounds	5 Pounds	1 Pound
LIST	11.75	6.00	3.07	1.57		
PAINTER	10.75	5.50	2.82	1.44		

*THESE PRICES ARE FOR ANY QUANTITY
†1 lb. Cans (Heavy Paste Only) 25 lb. cartons
5 lb. Cans (Heavy Paste Only) 50 lb. cartons

THE EAGLE-PICHER SALES COMPANY
1030 Broadway, Cincinnati, Ohio

1967 — WL

JAN. 11, '38 **DECLINE**

DEALER'S COST SCHEDULE

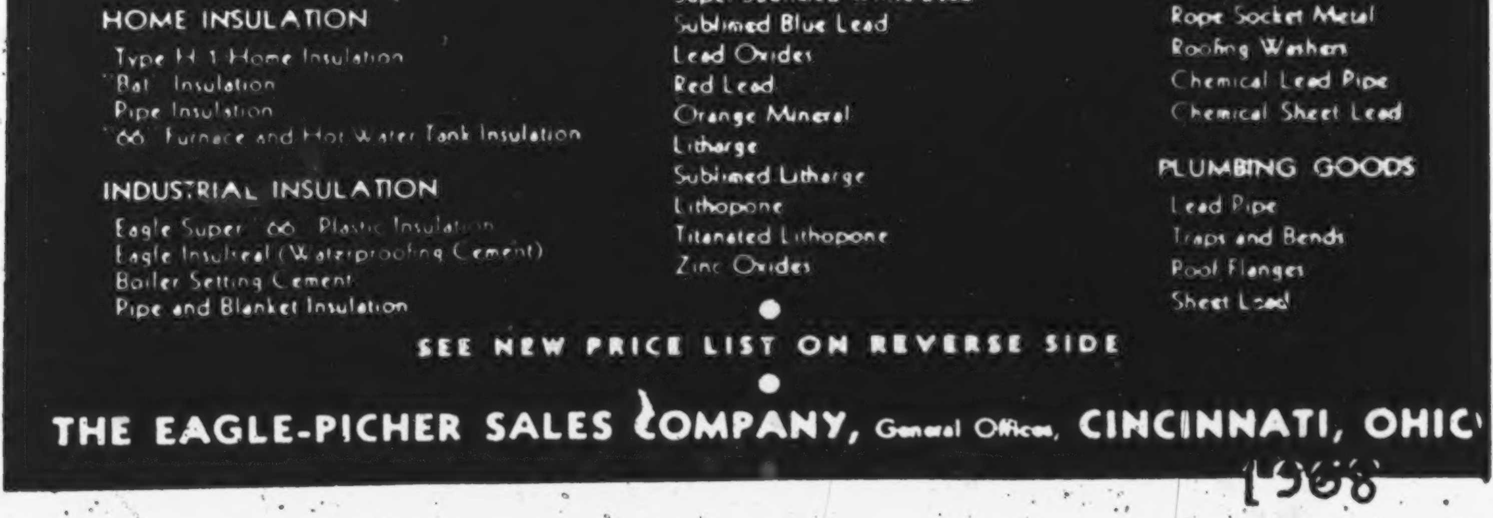
Eagle White Lead

PRICE PER 100 LBS.		
	Less Than 500 lb. Lots	500 lbs. or more
100 lb. Kegs	10.00	9.75
50 lb. Kegs	10.25	10.00
25 lb. Kegs	10.50	10.25
12½ lb. Kegs	10.75	10.50
CANS† (Heavy Paste Only)		
5 Pounds	12.50	12.25
1 Pound	14.25	14.00

†1 lb. Cans in 25 lb. Cartons
5 lb. Cans in 50 lb. Cartons

1967

FEDERAL TRADE COMMISSION
No. 2253
Commission's Exhibit No. 660-C



EAGLE PRODUCTS

FOR PAINTING
- White Lead in Oil
- Sublimed Blue Lead in Oil
- Red Lead in Oil
- Flatting Oil

HOME INSULATION
- Type H-1 Home Insulation
- "Bat" Insulation
- Pipe Insulation
- "66" Furnace and Hot Water Tank Insulation

INDUSTRIAL INSULATION
- Eagle Super "66" Plastic Insulation
- Eagle Insulseal (Waterproofing Cement)
- Boiler Setting Cement
- Pipe and Blanket Insulation

PIGMENTS AND OXIDES
- White Lead Carbonate
- Sublimed White Lead
- Super Sublimed White Lead
- Sublimed Blue Lead
- Lead Oxides
- Red Lead
- Orange Mineral
- Litharge
- Sublimed Litharge
- Lithopone
- Titanated Lithopone
- Zinc Oxides

METAL GOODS
- Solders
- Bearing Metals
- Type Metals
- Lead Wool
- Rope Socket Metal
- Roofing Washers
- Chemical Lead Pipe
- Chemical Sheet Lead

PLUMBING GOODS
- Lead Pipe
- Traps and Bends
- Roof Flanges
- Sheet Lead

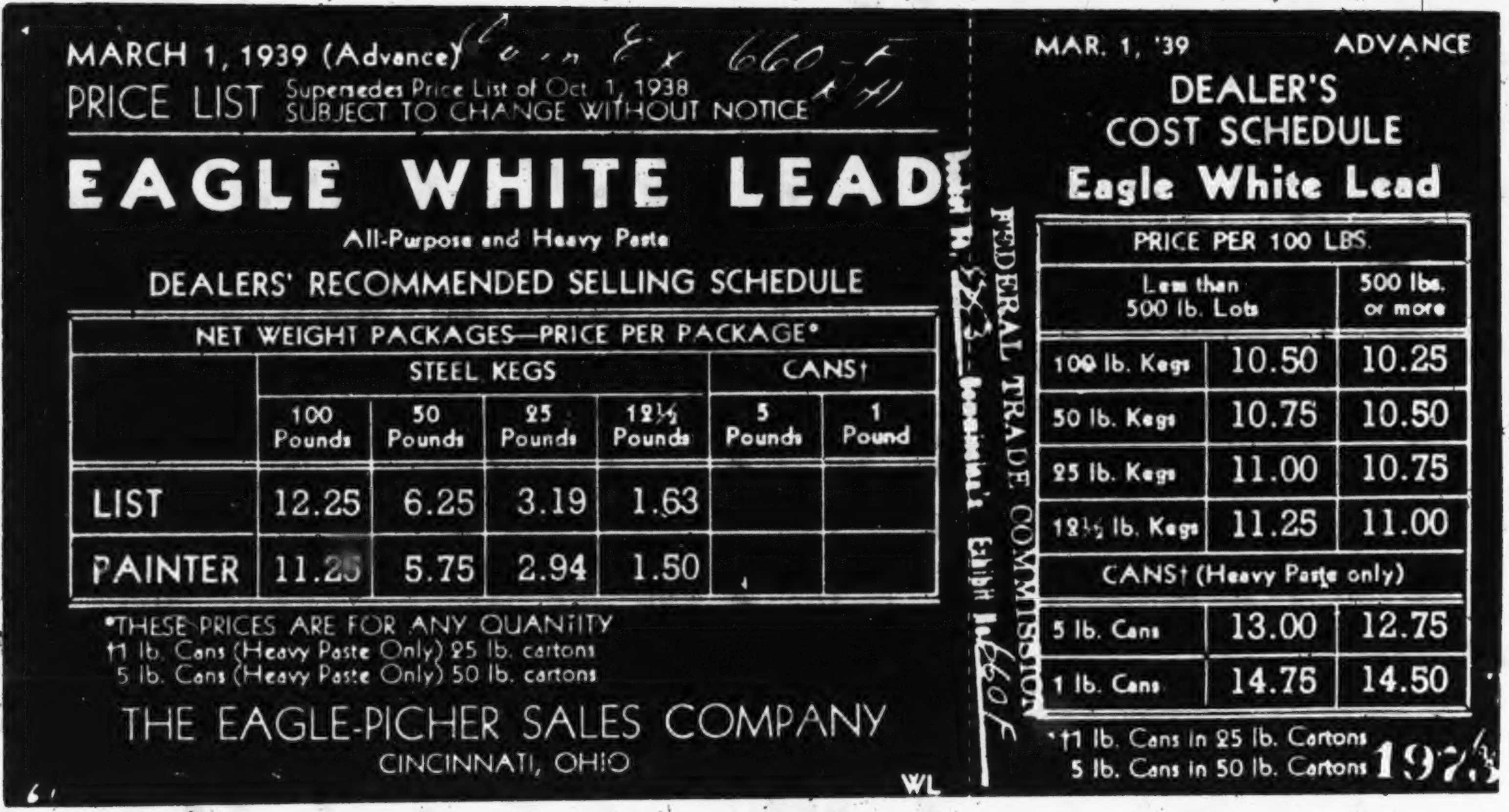
●

SEE NEW PRICE LIST ON REVERSE SIDE

●

THE EAGLE-PICHER SALES COMPANY, General Offices, **CINCINNATI, OHIC**

1968



MARCH 1, 1939 (Advance) Com Ex 660-F

PRICE LIST Supersedes Price List of Oct. 1, 1938
SUBJECT TO CHANGE WITHOUT NOTICE

EAGLE WHITE LEAD

All-Purpose and Heavy Paste

DEALERS' RECOMMENDED SELLING SCHEDULE

NET WEIGHT PACKAGES—PRICE PER PACKAGE*						
	STEEL KEGS				CANS†	
	100 Pounds	50 Pounds	25 Pounds	12½ Pounds	5 Pounds	1 Pound
LIST	12.25	6.25	3.19	1.63		
PAINTER	11.25	5.75	2.94	1.50		

*THESE PRICES ARE FOR ANY QUANTITY
†1 lb. Cans (Heavy Paste Only) 25 lb. cartons
5 lb. Cans (Heavy Paste Only) 50 lb. cartons

THE EAGLE-PICHER SALES COMPANY
CINCINNATI, OHIO

WL

FEDERAL TRADE COMMISSION
Docket No. 3823
Commission's Exhibit No. 660F

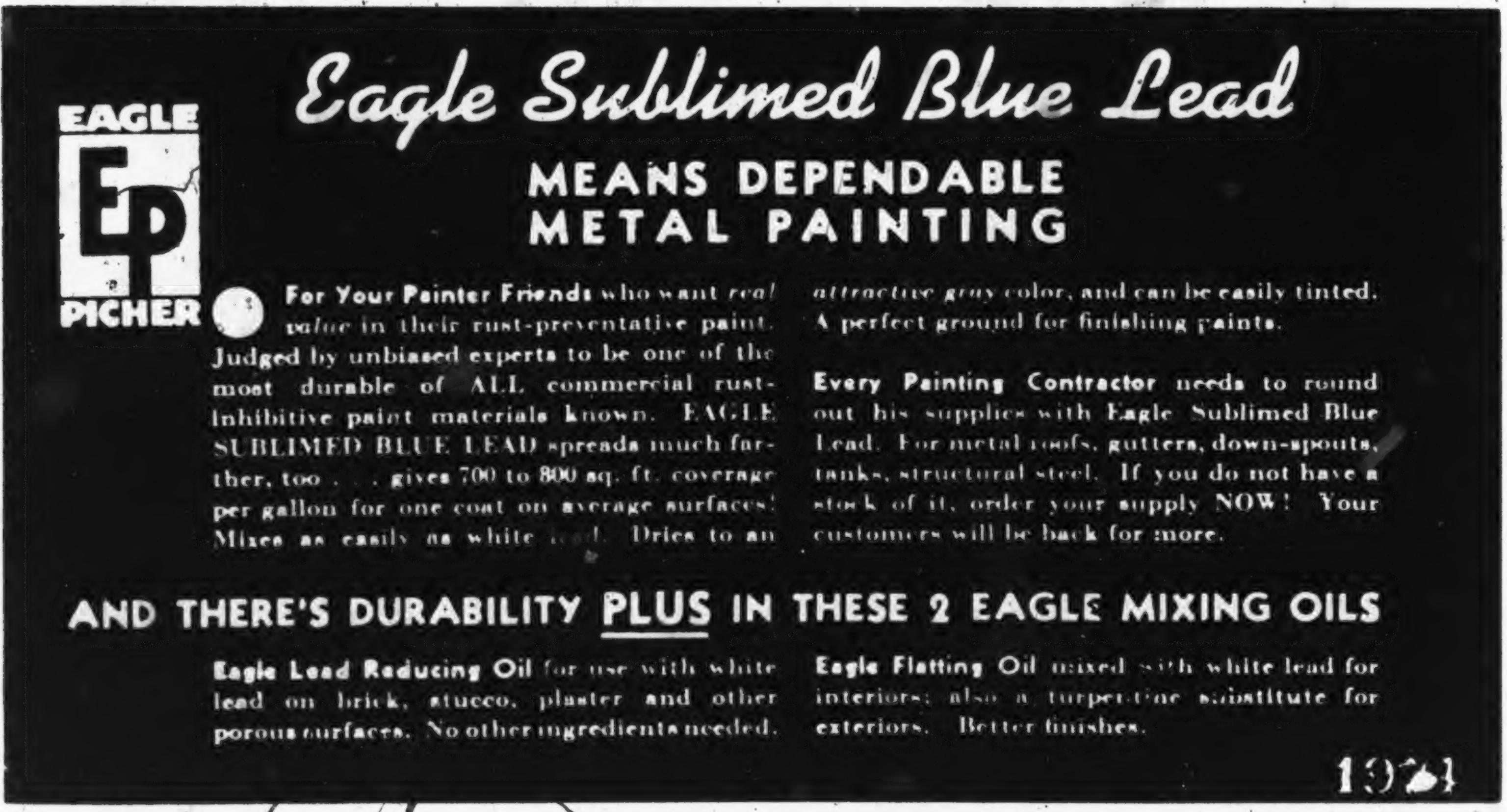
MAR. 1, '39 ADVANCE

DEALER'S COST SCHEDULE
Eagle White Lead

PRICE PER 100 LBS.		
	Less than 500 lb. Lots	500 lbs. or more
100 lb. Kegs	10.50	10.25
50 lb. Kegs	10.75	10.50
25 lb. Kegs	11.00	10.75
12½ lb. Kegs	11.25	11.00
CANS† (Heavy Paste only)		
5 lb. Cans	13.00	12.75
1 lb. Cans	14.75	14.50

†1 lb. Cans in 25 lb. Cartons
5 lb. Cans in 50 lb. Cartons

1973



EAGLE
EP
PICHER

Eagle Sublimed Blue Lead

MEANS DEPENDABLE METAL PAINTING

For Your Painter Friends who want *real value* in their rust-preventative paint. Judged by unbiased experts to be one of the most durable of ALL commercial rust-inhibitive paint materials known. EAGLE SUBLIMED BLUE LEAD spreads much farther, too . . . gives 700 to 800 sq. ft. coverage per gallon for one coat on average surfaces! Mixes as easily as white lead. Dries to an *attractive gray* color, and can be easily tinted. A perfect ground for finishing paints.

Every Painting Contractor needs to round out his supplies with Eagle Sublimed Blue Lead. For metal roofs, gutters, down-spouts, tanks, structural steel. If you do not have a stock of it, order your supply NOW! Your customers will be back for more.

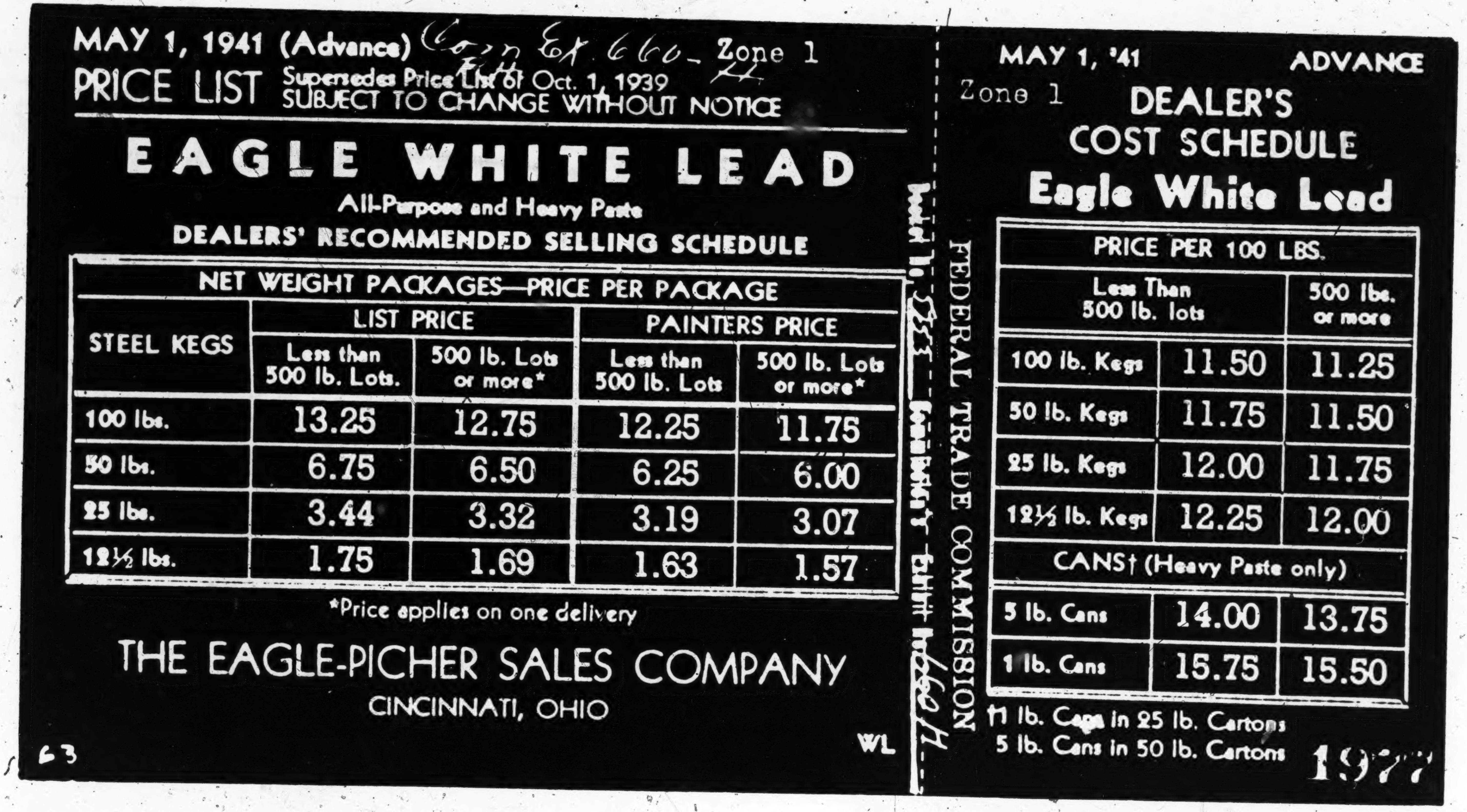
AND THERE'S DURABILITY PLUS IN THESE 2 EAGLE MIXING OILS

Eagle Lead Reducing Oil for use with white lead on brick, stucco, plaster and other porous surfaces. No other ingredients needed.

Eagle Flatting Oil mixed with white lead for interiors; also a turpentine substitute for exteriors. Better finishes.

1974

Commission's Exhibit No. 660.



MAY 1, 1941 (Advance) Com Ex. 660 - Zone 1
H

PRICE LIST Supersedes Price List of Oct. 1, 1939
SUBJECT TO CHANGE WITHOUT NOTICE

EAGLE WHITE LEAD

All-Purpose and Heavy Paste

DEALERS' RECOMMENDED SELLING SCHEDULE

NET WEIGHT PACKAGES—PRICE PER PACKAGE				
STEEL KEGS	LIST PRICE		PAINTERS PRICE	
	Less than 500 lb. Lots.	500 lb. Lots or more*	Less than 500 lb. Lots	500 lb. Lots or more*
100 lbs.	13.25	12.75	12.25	11.75
50 lbs.	6.75	6.50	6.25	6.00
25 lbs.	3.44	3.32	3.19	3.07
12½ lbs.	1.75	1.69	1.63	1.57

*Price applies on one delivery

THE EAGLE-PICHER SALES COMPANY
CINCINNATI, OHIO

63 WL

FEDERAL TRADE COMMISSION

Docket No. 5253 Commission Exhibit No. 660 H

MAY 1, '41 ADVANCE

Zone 1

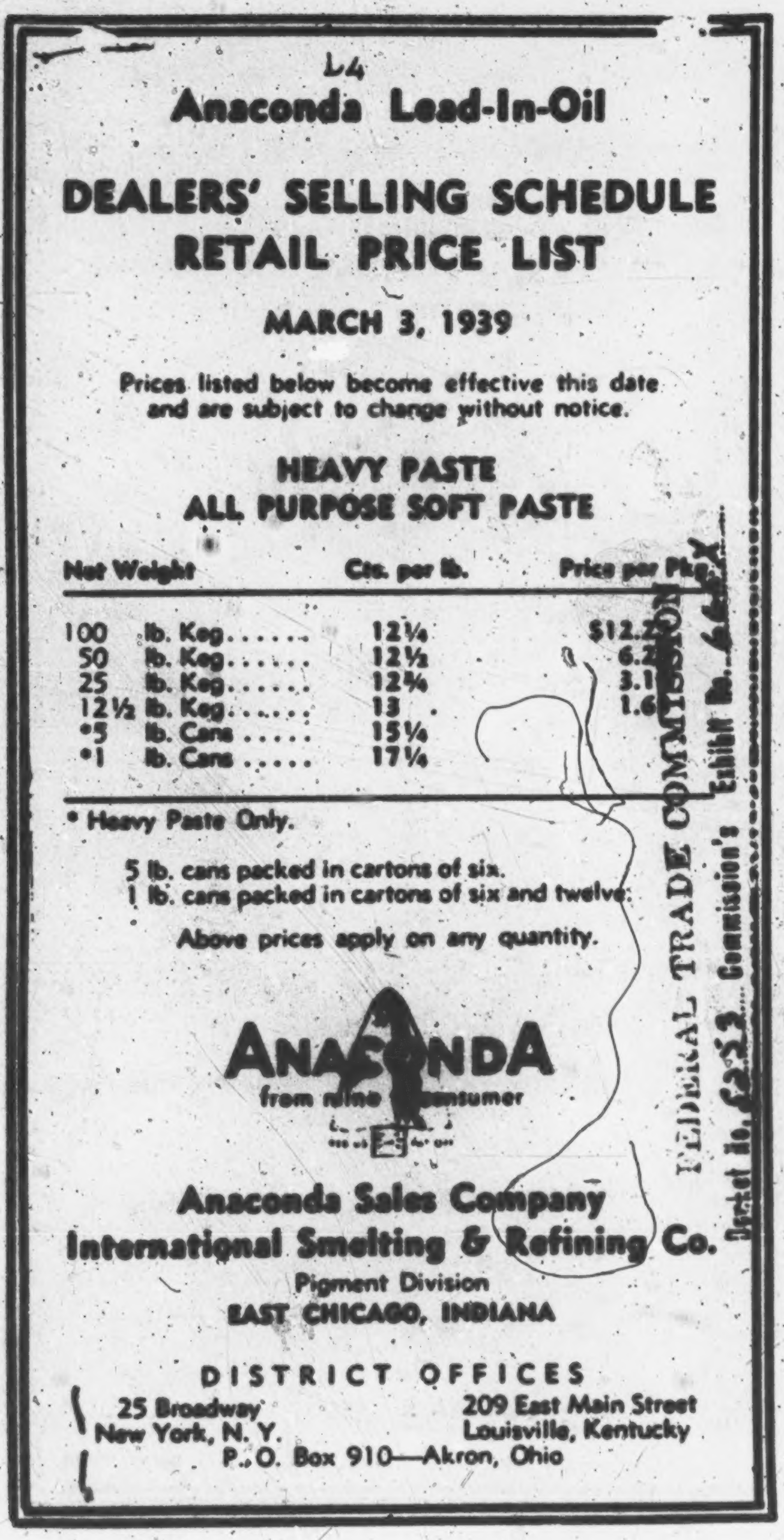
DEALER'S COST SCHEDULE

Eagle White Lead

PRICE PER 100 LBS.		
	Less Than 500 lb. lots	500 lbs. or more
100 lb. Kegs	11.50	11.25
50 lb. Kegs	11.75	11.50
25 lb. Kegs	12.00	11.75
12½ lb. Kegs	12.25	12.00
CANS† (Heavy Paste only)		
5 lb. Cans	14.00	13.75
1 lb. Cans	15.75	15.50

†1 lb. Cans in 25 lb. Cartons
5 lb. Cans in 50 lb. Cartons

1977



L4

Anaconda Lead-In-Oil

DEALERS' SELLING SCHEDULE RETAIL PRICE LIST

MARCH 3, 1939

Prices listed below become effective this date and are subject to change without notice.

HEAVY PASTE
ALL PURPOSE SOFT PASTE

Net Weight		Cts. per lb.	Price per Pkg.
100	lb. Keg.......	12¼	$12.2
50	lb. Keg.......	12½	6.2
25	lb. Keg.......	12¾	3.1
12½	lb. Keg.......	13	1.6
*5	lb. Cans	15¼	
*1	lb. Cans	17¼	

* Heavy Paste Only.

5 lb. cans packed in cartons of six.
1 lb. cans packed in cartons of six and twelve.

Above prices apply on any quantity.

ANACONDA
from mine to consumer

Anaconda Sales Company
International Smelting & Refining Co.
Pigment Division
EAST CHICAGO, INDIANA

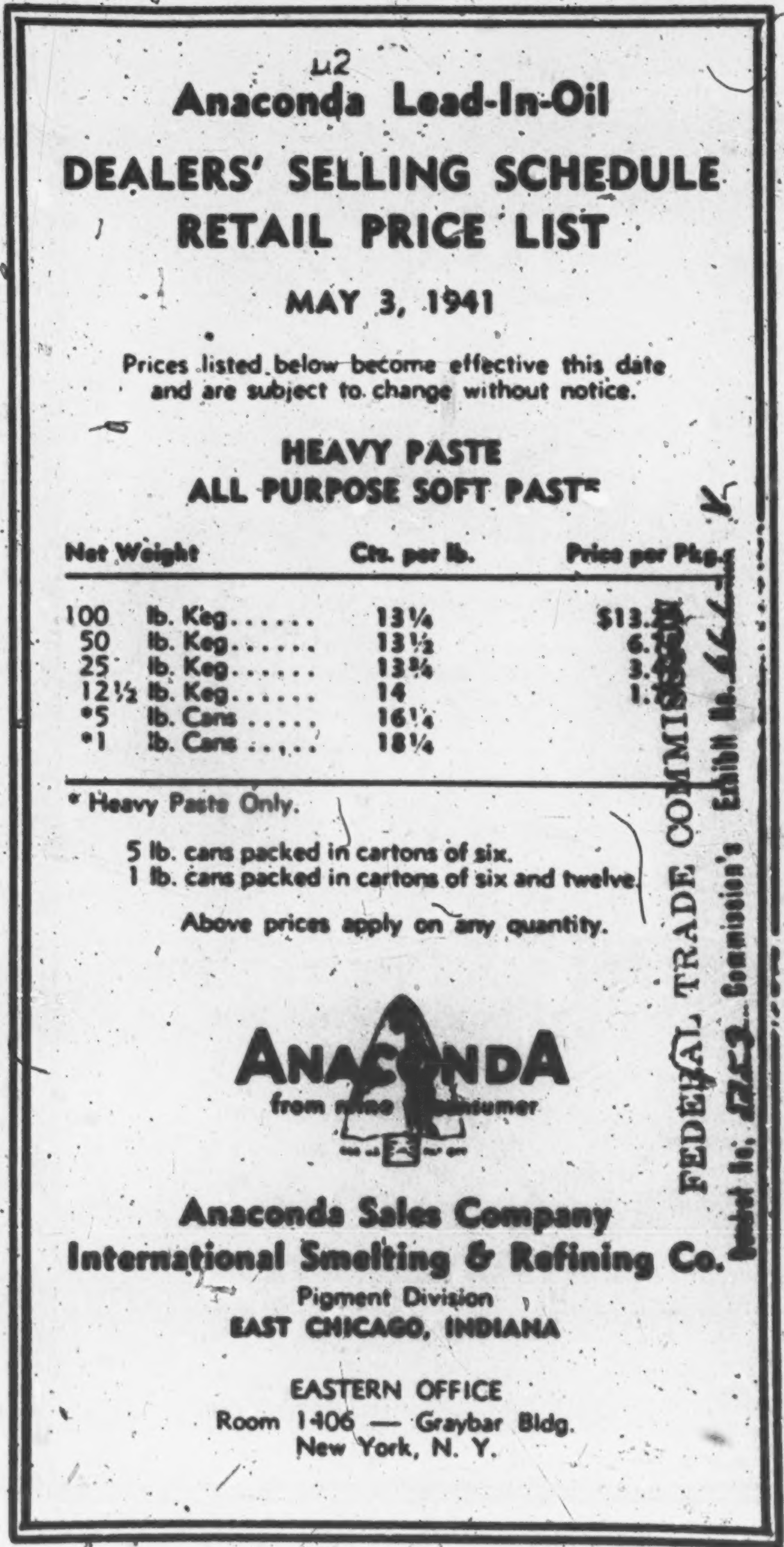
DISTRICT OFFICES

25 Broadway
New York, N. Y.

209 East Main Street
Louisville, Kentucky

P. O. Box 910—Akron, Ohio

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 661X



L2

Anaconda Lead-In-Oil

DEALERS' SELLING SCHEDULE RETAIL PRICE LIST

MAY 3, 1941

Prices listed below become effective this date and are subject to change without notice.

HEAVY PASTE
ALL PURPOSE SOFT PASTE

Net Weight		Cts. per lb.	Price per Pkg.
100	lb. Keg.......	13¼	$13.
50	lb. Keg.......	13½	6.
25	lb. Keg.......	13¾	3.
12½	lb. Keg.......	14	1.
*5	lb. Cans	16¼	
*1	lb. Cans	18¼	

* Heavy Paste Only.

5 lb. cans packed in cartons of six.
1 lb. cans packed in cartons of six and twelve.

Above prices apply on any quantity.

ANACONDA
from mine to consumer

Anaconda Sales Company
International Smelting & Refining Co.
Pigment Division
EAST CHICAGO, INDIANA

EASTERN OFFICE
Room 1406 — Graybar Bldg.
New York, N. Y.

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 661

Commission's Exhibit No. 661.

D7

Anaconda Lead-In-Oil

DEALERS' SELLING SCHEDULE RETAIL PRICE LIST

JANUARY 10, 1938

Prices listed below become effective this date and are subject to change without notice.

HEAVY PASTE ALL PURPOSE SOFT PASTE

Net Weight		Cts. per lb.	Price per Pkg.
100	lb. Keg......	11¾	$11.7
50	lb. Keg......	12	6.0
25	lb. Keg......	12⅛	3.0
12½	lb. Keg......	12½	1.57
*5	lb. Cans.....	14¾	
*1	lb. Cans.....	16¾	

* Heavy Paste Only.

5 lb. cans packed in cartons of six.
1 lb. cans packed in cartons of six and twelve.

Above prices apply on any quantity.

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 661-Z-1

ANACONDA
from mine to consumer

Anaconda Sales Company
International Smelting & Refining Co.
White Lead Department
EAST CHICAGO, INDIANA

DISTRICT OFFICES

25 Broadway
New York, N. Y.

209 East Main Street
Louisville, Kentucky

D9

Anaconda Lead-In-Oil

DEALERS' SELLING SCHEDULE RETAIL PRICE LIST

SEPTEMBER 15, 1937

Prices listed below become effective this date and are subject to change without notice.

HEAVY PASTE ALL PURPOSE SOFT PASTE

Net Weight		Cts. per lb.	Price per Pkg.
100	lb. Keg......	13	$13.0
50	lb. Keg......	13¼	6.
25	lb. Keg......	13½	3.
12½	lb. Keg......	13¾	1.7
*5	lb. Cans.....	16	
*1	lb. Cans.....	18	

* Heavy Paste Only.

5 lb. cans packed in cartons of six.
1 lb. cans packed in cartons of six and twelve.

Above prices apply on any quantity.

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 661-Z-3

ANACONDA
from mine to consumer

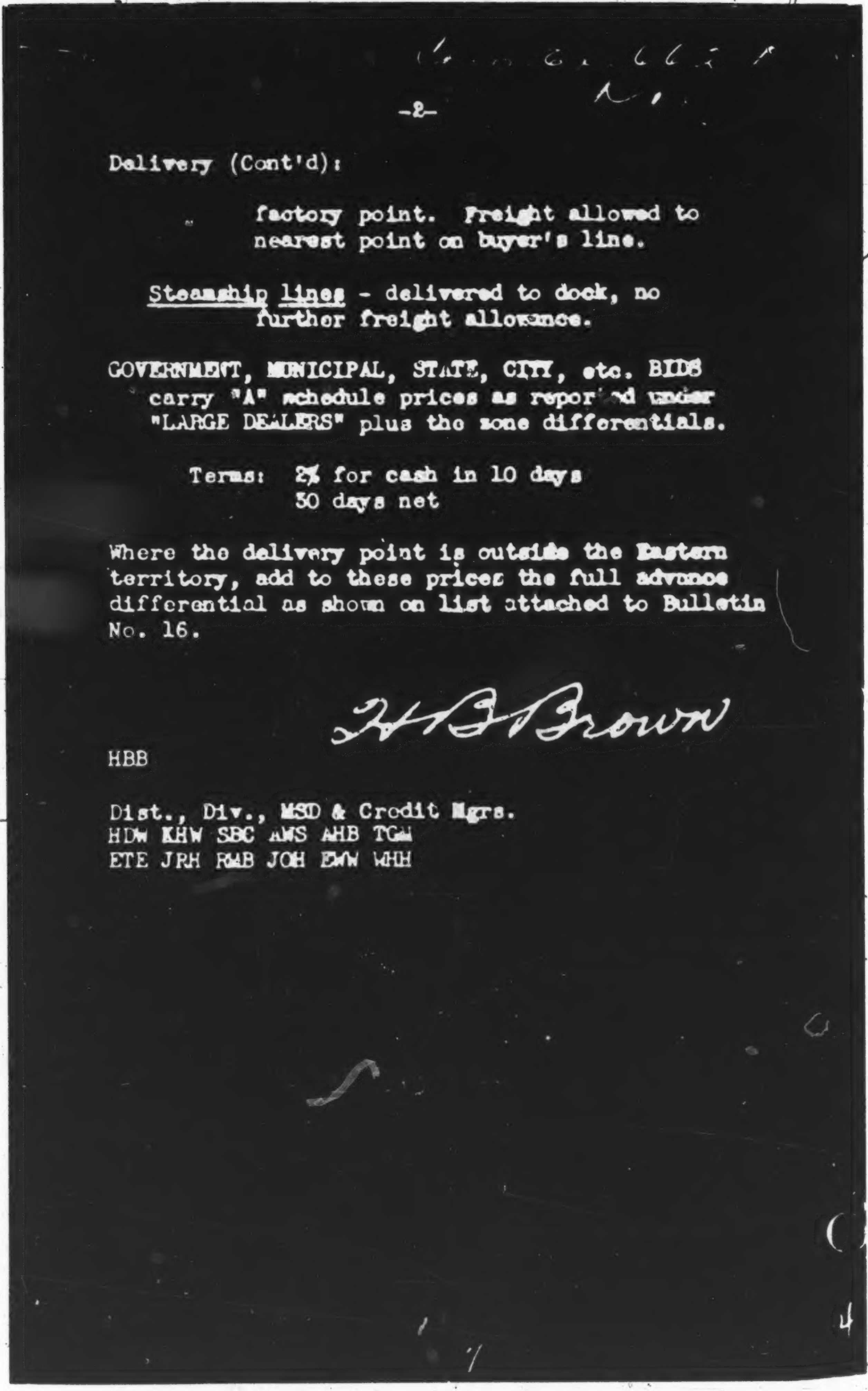
Anaconda Sales Company
International Smelting & Refining Co.
White Lead Department
EAST CHICAGO, INDIANA

DISTRICT OFFICES

25 Broadway
New York, N. Y.

209 East Main Street
Louisville, Kentucky

Commission's Exhibit No. 661.



Com. Ex. 662
No. 1

-2-

Delivery (Cont'd):

factory point. Freight allowed to nearest point on buyer's line.

Steamship lines - delivered to dock, no further freight allowance.

GOVERNMENT, MUNICIPAL, STATE, CITY, etc. BIDS carry "A" schedule prices as reported under "LARGE DEALERS" plus the zone differentials.

Terms: 2% for cash in 10 days
30 days net

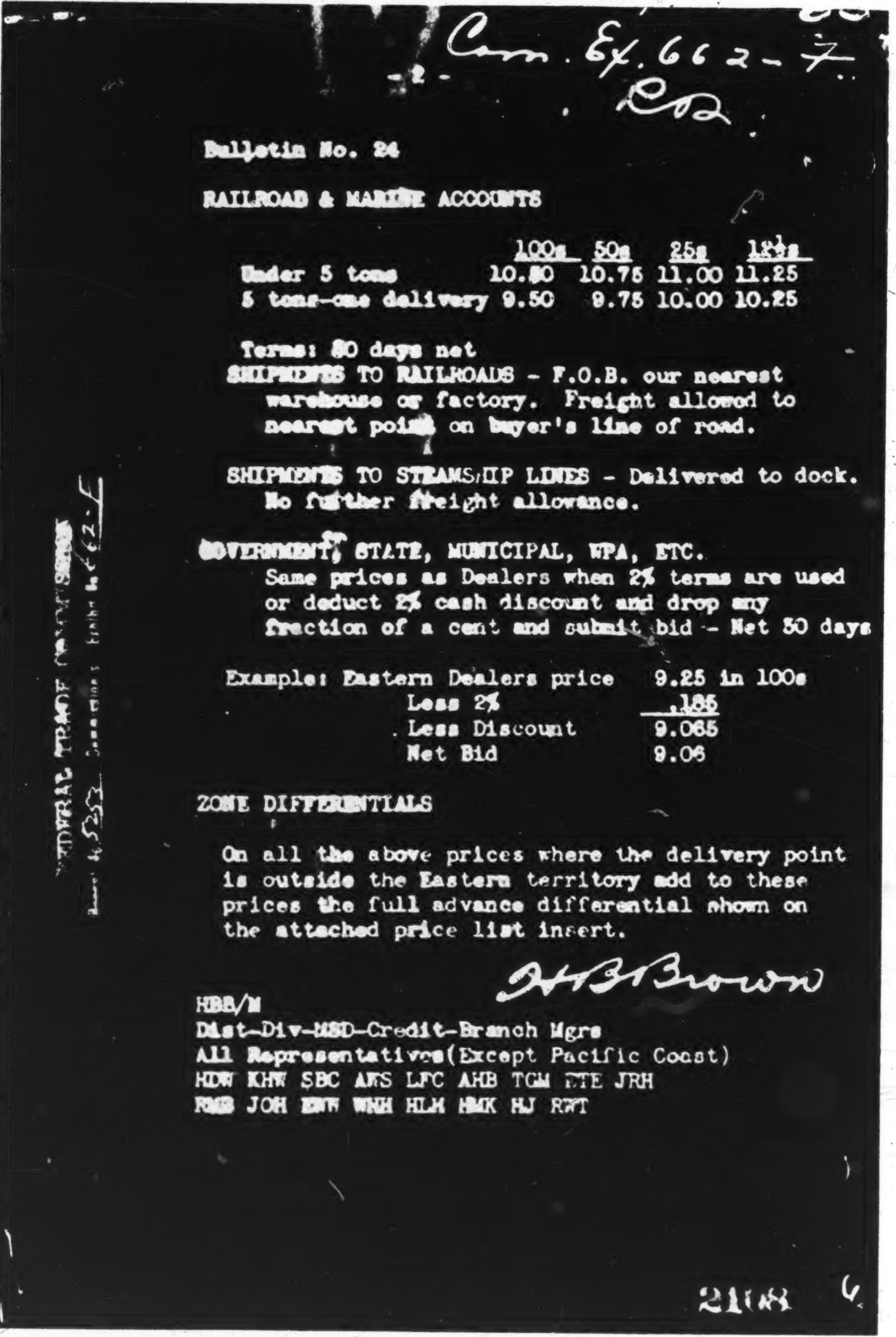
Where the delivery point is outside the Eastern territory, add to these prices the full advance differential as shown on list attached to Bulletin No. 16.

H B Brown

HBB

Dist., Div., MSD & Credit Mgrs.
HDW KHW SBC AWS AHB TGM
ETE JRH RMB JOH EWW WHH

4



Com. Ex. 662-7.

-2-

Bulletin No. 24

RAILROAD & MARINE ACCOUNTS

	100s	50s	25s	12½s
Under 5 tons	10.50	10.75	11.00	11.25
5 tons-one delivery	9.50	9.75	10.00	10.25

Terms: 30 days net

SHIPMENTS TO RAILROADS - F.O.B. our nearest warehouse or factory. Freight allowed to nearest point on buyer's line of road.

SHIPMENTS TO STEAMSHIP LINES - Delivered to dock. No further freight allowance.

GOVERNMENT, STATE, MUNICIPAL, WPA, ETC.
Same prices as Dealers when 2% terms are used or deduct 2% cash discount and drop any fraction of a cent and submit bid - Net 30 days

Example:	Eastern Dealers price	9.25 in 100s
	Less 2%	.185
	Less Discount	9.065
	Net Bid	9.06

ZONE DIFFERENTIALS

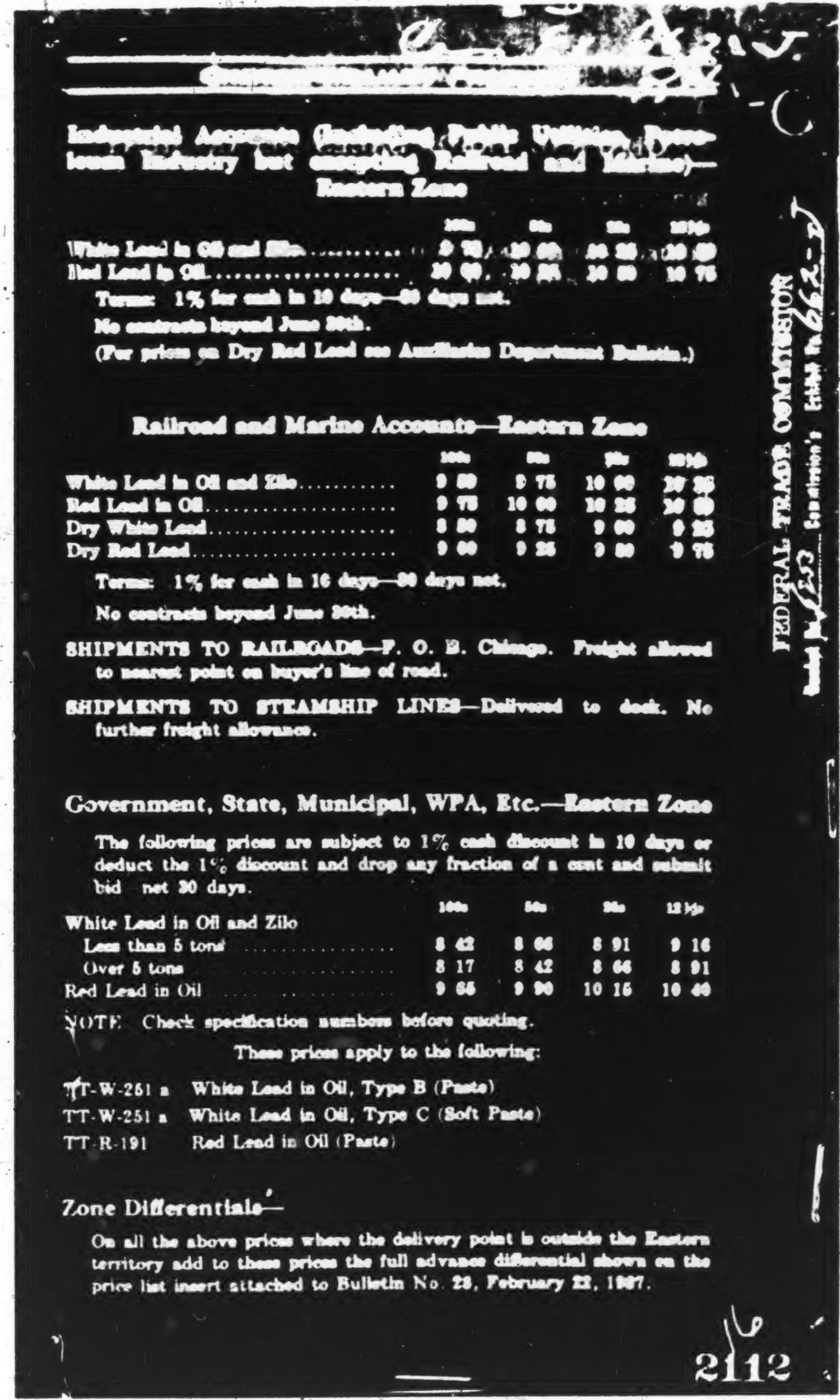
On all the above prices where the delivery point is outside the Eastern territory add to these prices the full advance differential shown on the attached price list insert.

H B Brown

HBB/M
Dist-Div-MSD-Credit-Branch Mgrs
All Representatives(Except Pacific Coast)
HDW KHW SBC AWS LFC AHB TGM ETE JRH
RMB JOH EWW WRH HLM HMK HJ RWT

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 662-E

2168 6



Industrial Accounts (Including Public Utilities, Petroleum Industry but excepting Railroad and Marine)—Eastern Zone

	100s	50s	25s	12½s
White Lead in Oil and Zilo............	9 75	10 00	10 25	10 50
Red Lead in Oil......................	10 00	10 25	10 50	10 75

Terms: 1% for cash in 10 days—30 days net.

No contracts beyond June 30th.

(For prices on Dry Red Lead see Auxiliaries Department Bulletin.)

Railroad and Marine Accounts—Eastern Zone

	100s	50s	25s	12½s
White Lead in Oil and Zilo............	9 50	9 75	10 00	10 25
Red Lead in Oil......................	9 75	10 00	10 25	10 50
Dry White Lead......................	8 50	8 75	9 00	9 25
Dry Red Lead.......................	9 00	9 25	9 50	9 75

Terms: 1% for cash in 10 days—30 days net.

No contracts beyond June 30th.

SHIPMENTS TO RAILROADS—F. O. B. Chicago. Freight allowed to nearest point on buyer's line of road.

SHIPMENTS TO STEAMSHIP LINES—Delivered to dock. No further freight allowance.

Government, State, Municipal, WPA, Etc.—Eastern Zone

The following prices are subject to 1% cash discount in 10 days or deduct the 1% discount and drop any fraction of a cent and submit bid net 30 days.

	100s	50s	25s	12½s
White Lead in Oil and Zilo				
Less than 5 tons	8 42	8 66	8 91	9 16
Over 5 tons	8 17	8 42	8 66	8 91
Red Lead in Oil	9 65	9 90	10 16	10 40

NOTE: Check specification numbers before quoting.

These prices apply to the following:

TT-W-251 a	White Lead in Oil, Type B (Paste)
TT-W-251 a	White Lead in Oil, Type C (Soft Paste)
TT-R-191	Red Lead in Oil (Paste)

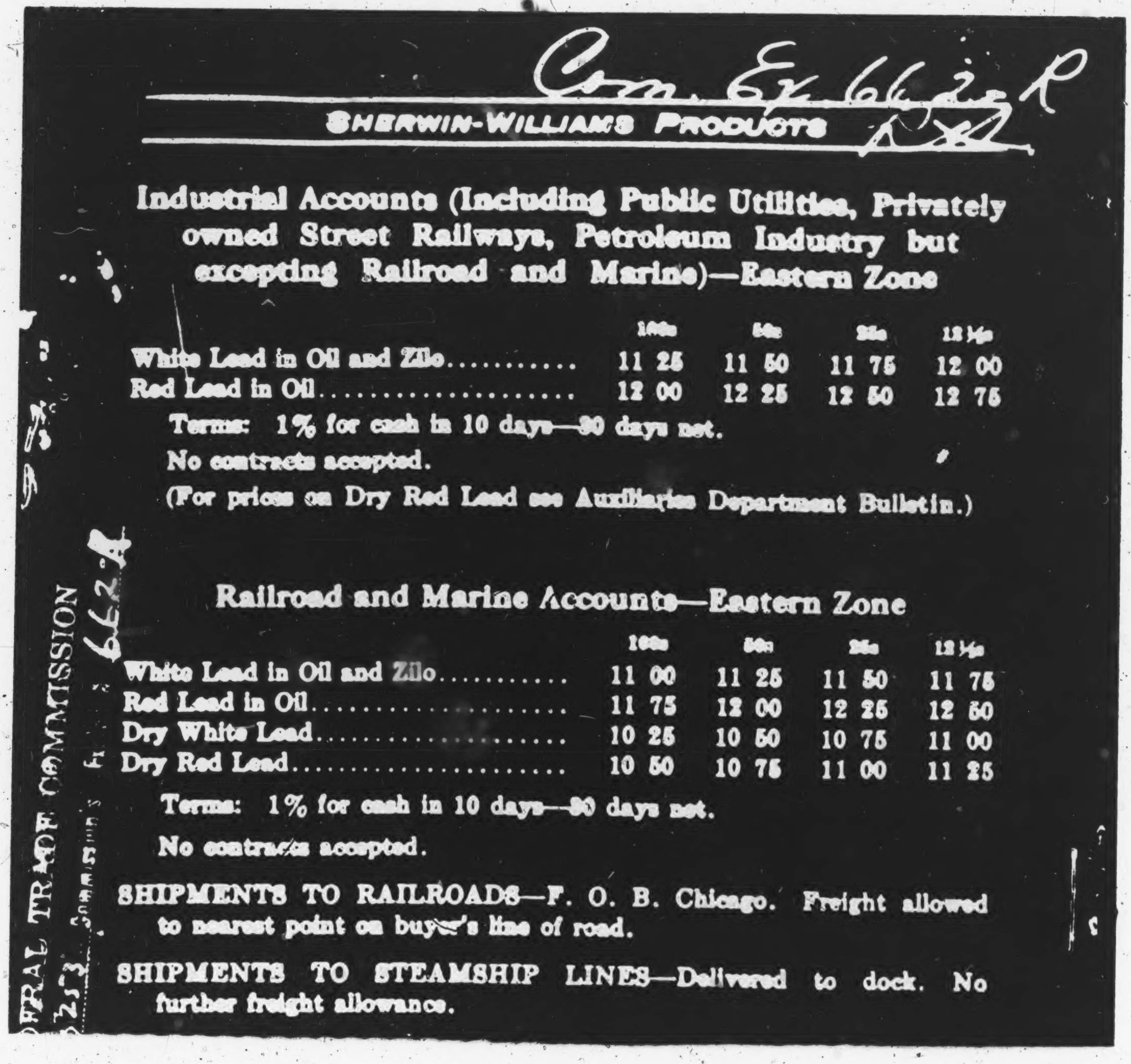
Zone Differentials—

On all the above prices where the delivery point is outside the Eastern territory add to these prices the full advance differential shown on the price list insert attached to Bulletin No. 23, February 22, 1937.

FEDERAL TRADE COMMISSION
Docket No. 2253 Commission's Exhibit No. 662-D

16

2112



Com. Ex. 662 R

FEDERAL TRADE COMMISSION 662-A

3253

SHERWIN-WILLIAMS PRODUCTS

Industrial Accounts (Including Public Utilities, Privately owned Street Railways, Petroleum Industry but excepting Railroad and Marine)—Eastern Zone

	100s	50s	25s	12½s
White Lead in Oil and Zilo..........	11 25	11 50	11 75	12 00
Red Lead in Oil....................	12 00	12 25	12 50	12 75

Terms: 1% for cash in 10 days—30 days net.

No contracts accepted.

(For prices on Dry Red Lead see Auxiliaries Department Bulletin.)

Railroad and Marine Accounts—Eastern Zone

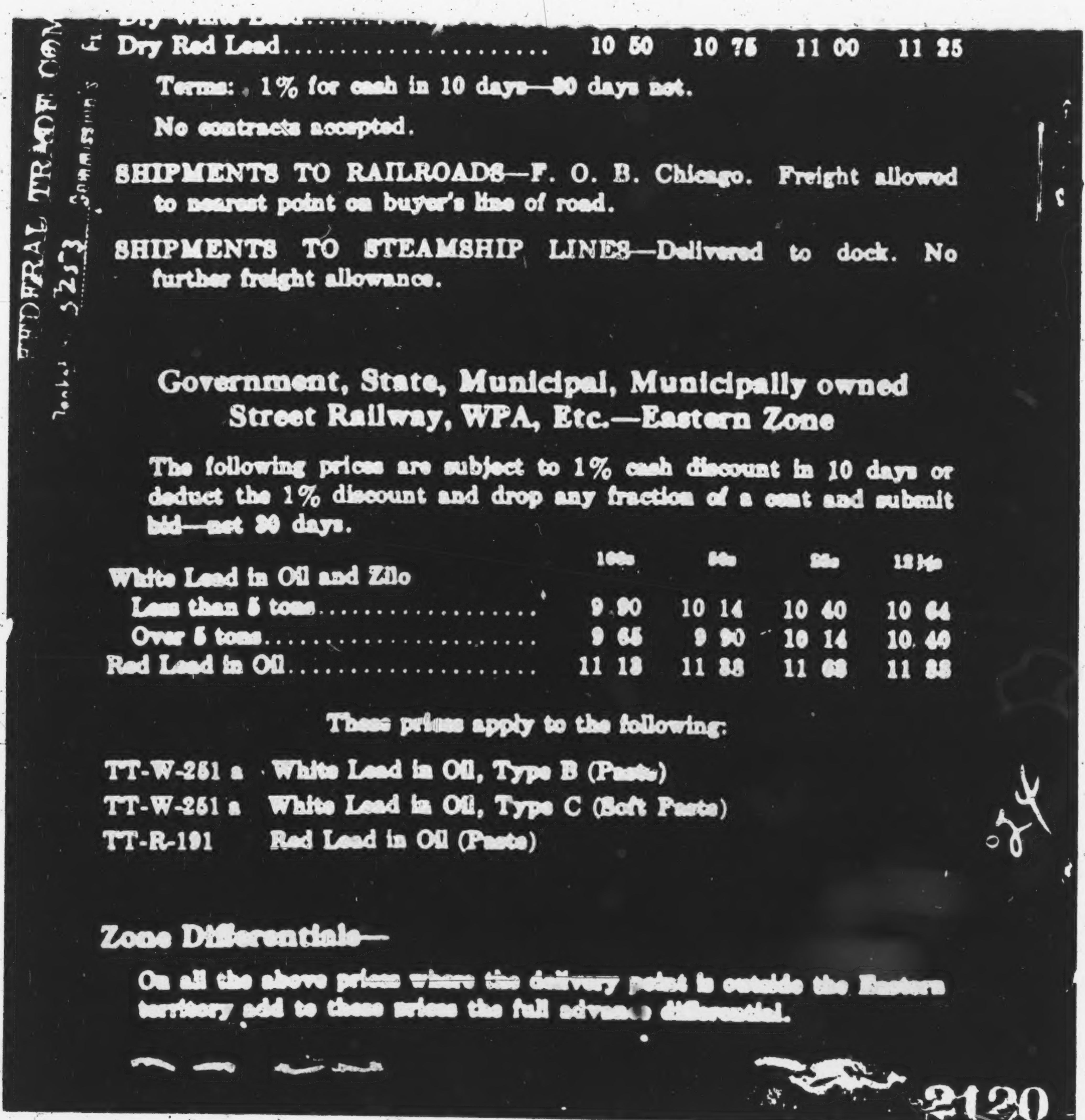
	100s	50s	25s	12½s
White Lead in Oil and Zilo..........	11 00	11 25	11 50	11 75
Red Lead in Oil....................	11 75	12 00	12 25	12 50
Dry White Lead....................	10 25	10 50	10 75	11 00
Dry Red Lead......................	10 50	10 75	11 00	11 25

Terms: 1% for cash in 10 days—30 days net.

No contracts accepted.

SHIPMENTS TO RAILROADS—F. O. B. Chicago. Freight allowed to nearest point on buyer's line of road.

SHIPMENTS TO STEAMSHIP LINES—Delivered to dock. No further freight allowance.



Dry Red Lead...................... 10 50 10 75 11 00 11 25

Terms: 1% for cash in 10 days—30 days net.

No contracts accepted.

SHIPMENTS TO RAILROADS—F. O. B. Chicago. Freight allowed to nearest point on buyer's line of road.

SHIPMENTS TO STEAMSHIP LINES—Delivered to dock. No further freight allowance.

Government, State, Municipal, Municipally owned Street Railway, WPA, Etc.—Eastern Zone

The following prices are subject to 1% cash discount in 10 days or deduct the 1% discount and drop any fraction of a cent and submit bid—net 30 days.

	100s	50s	25s	12½s
White Lead in Oil and Zilo				
Less than 5 tons.................	9 90	10 14	10 40	10 64
Over 5 tons......................	9 65	9 90	10 14	10 40
Red Lead in Oil....................	11 13	11 38	11 63	11 88

These prices apply to the following:

TT-W-251 a	White Lead in Oil, Type B (Paste)
TT-W-251 a	White Lead in Oil, Type C (Soft Paste)
TT-R-191	Red Lead in Oil (Paste)

24

Zone Differentials—

On all the above prices where the delivery point is outside the Eastern territory add to these prices the full advance differential.

2120

SHERWIN-WILLIAMS

(SUGGESTED)

RESALE PRICES

WHITE LEAD and ZILO

September 15, 1937

PRICE PER POUND	100 lb. Kegs	50 lb. Kegs	25 lb. Kegs	12½ lb. Pails	*5 lb. Cans	*1 lb. Cans
CONSUMERS PRICE	13	13¼	13½	13¾	16	18
PAINTERS PRICE	12	12¼	12½	12¾	15	17

*NOTE 1 and 5 pound cans available White Lead in Oil (heavy paste) only.

THE SHERWIN-WILLIAMS CO.
CLEVELAND, OHIO

Com. Ex 662-Z-9

SHERWIN-WILLIAMS Co.

CLEVELAND, OHIO September 15, 1937

NET PRICES FOR AUTHORIZED DEALERS ONLY

Subject to change without notice.

ODP WHITE LEAD IN OIL AND ZILO

PRICE PER 100 POUNDS					
100 lb. Kegs	50 lb. Kegs	25 lb. Kegs	12½ lb. Pails	5 lb. Cans	1 lb. Cans
$9.75	$10.00	$10.25	$10.50	$11.75	$13.25

TERMS

On White Lead, Zilo and other lead products, sixty days net or 2 per cent discount if paid within ten days from date of invoice.

SHIPPING POINTS

The prices printed on this card are f. o. b.:

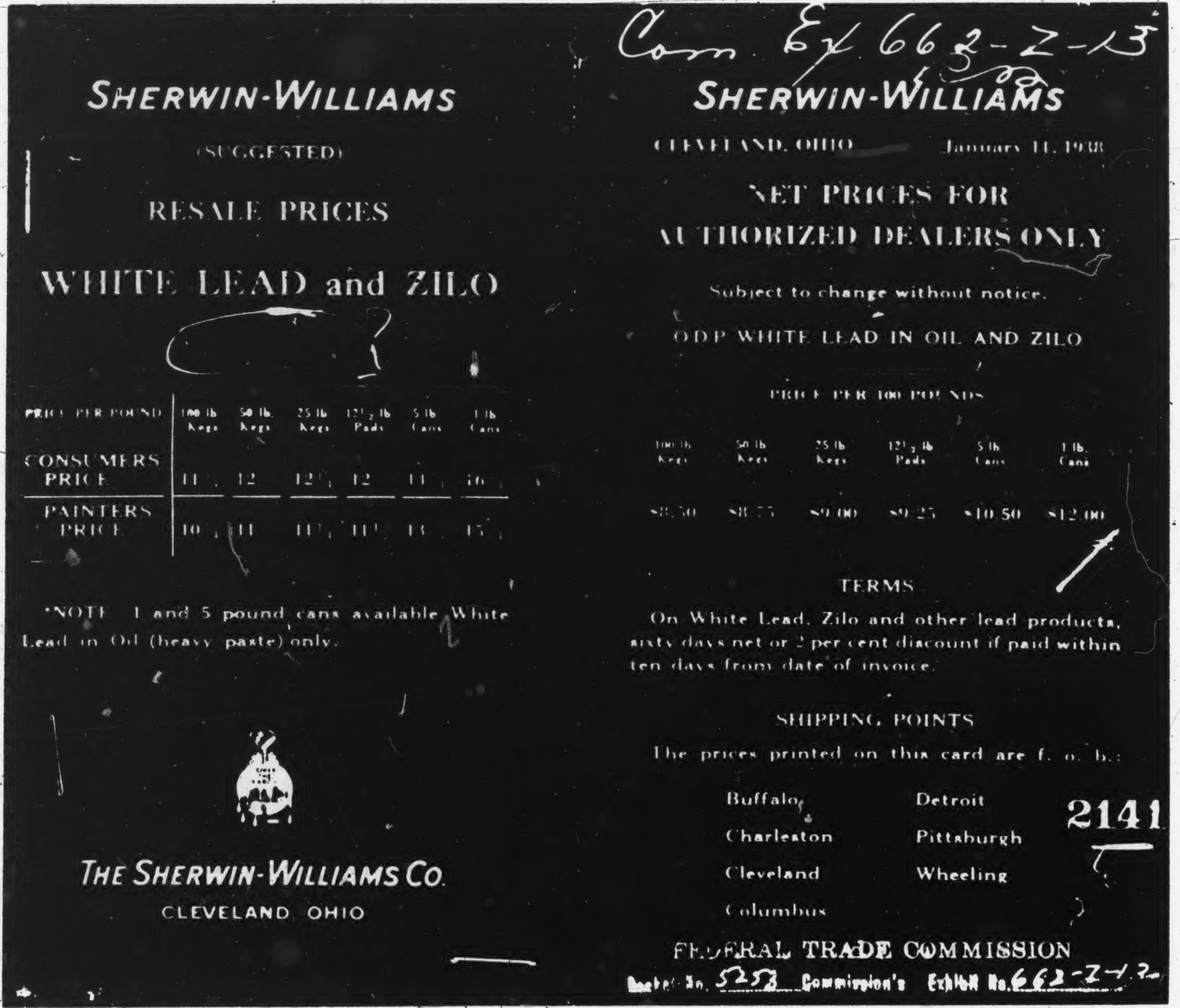
Altoona
Ashtabula
Binghamton
Buffalo
Canton
Charleston
Cleveland
Columbus
Detroit
Elmira
Endicott
Huntington
Johnson City
Mansfield
Pittsburgh
Rochester
Uniontown
Warren
Wheeling
Youngstown

2137

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 662-Z-4

Commission's Exhibit No. 662.

Commission's Exhibit No. 662.



Com Ex 662-Z-13

SHERWIN-WILLIAMS

(SUGGESTED)

RESALE PRICES

WHITE LEAD and ZILO

PRICE PER POUND	100 lb Kegs	50 lb. Kegs	25 lb Kegs	12½ lb Pads	5 lb Cans	1 lb Cans
CONSUMERS PRICE	11¼	12	12¼	12	11¼	16¼
PAINTERS PRICE	10¼	11	11¼	11½	13	15¼

*NOTE 1 and 5 pound cans available White Lead in Oil (heavy paste) only.

THE SHERWIN-WILLIAMS CO.
CLEVELAND OHIO

SHERWIN-WILLIAMS

CLEVELAND, OHIO — January 11, 1938

NET PRICES FOR AUTHORIZED DEALERS ONLY

Subject to change without notice.

ODP WHITE LEAD IN OIL AND ZILO

PRICE PER 100 POUNDS

100 lb Kegs	50 lb Kegs	25 lb Kegs	12½ lb Pads	5 lb Cans	1 lb. Cans
$8.50	$8.75	$9.00	$9.25	$10.50	$12.00

TERMS

On White Lead, Zilo and other lead products, sixty days net or 2 per cent discount if paid within ten days from date of invoice.

SHIPPING POINTS

The prices printed on this card are f. o. b.:

Buffalo	Detroit
Charleston	Pittsburgh
Cleveland	Wheeling
Columbus	

2141

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 662-Z-12

SHERWIN-WILLIAMS

(SUGGESTED)

RESALE PRICES

WHITE LEAD and ZILO

Feb. 23, 1939

PRICE PER POUND	100 lb Kegs	50 lb. Kegs	25 lb Kegs	12½ lb Pails	*5 lb Cans	*1 lb Cans
CONSUMERS PRICE	12¼	12½	12¾	13	15¼	17¼
PAINTERS PRICE	11¼	11½	11¾	12	14¼	16¼

*NOTE 1 and 5 pound cans available White Lead in Oil (heavy paste) only.

THE SHERWIN-WILLIAMS CO.
CLEVELAND, OHIO

Com. Ex 662 2-19

SHERWIN-WILLIAMS

CLEVELAND, OHIO Feb. 23, 1939

NET PRICES FOR AUTHORIZED DEALERS ONLY

Subject to change without notice.

ODP WHITE LEAD IN OIL AND ZILO

PRICE PER 100 POUNDS					
100 lb Kegs	50 lb. Kegs	25 lb Kegs	12½ lb Pails	5 lb Cans	1 lb. Cans
$9.00	$9.25	$9.50	$9.75	$11.00	$12.50

TERMS

On White Lead, Zilo and other lead products, sixty days net or 2 per cent discount if paid within ten days from date of invoice.

SHIPPING POINTS

The prices printed on this card are f. o. b.:

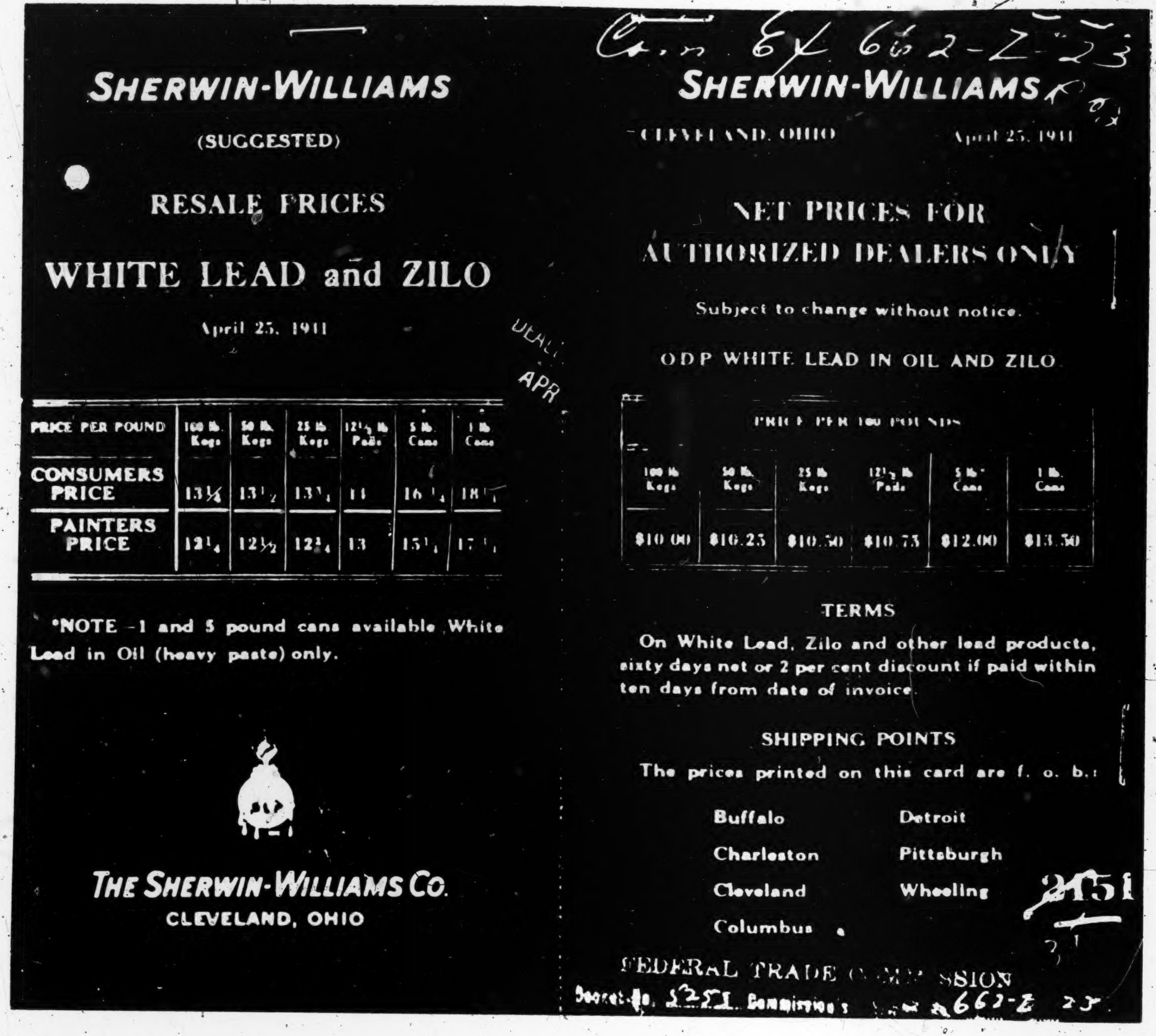
Buffalo	Detroit
Charleston	Pittsburgh
Cleveland	Wheeling
Columbus	

2147 34

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 662-2-19

Commission's Exhibit No. 662.

Commission's Exhibit No. 662.



Com Ex 662-Z-23

SHERWIN-WILLIAMS

(SUGGESTED)

RESALE PRICES

WHITE LEAD and ZILO

April 25, 1911

PRICE PER POUND	100 lb. Kegs	50 lb. Kegs	25 lb. Kegs	12½ lb. Pails	5 lb. Cans	1 lb. Cans
CONSUMERS PRICE	13¼	13½	13¾	14	16¼	18¼
PAINTERS PRICE	12¼	12½	12¾	13	15¼	17¼

*NOTE—1 and 5 pound cans available White Lead in Oil (heavy paste) only.

THE SHERWIN-WILLIAMS CO.
CLEVELAND, OHIO

DEALER
APR

SHERWIN-WILLIAMS

CLEVELAND, OHIO April 25, 1911

NET PRICES FOR AUTHORIZED DEALERS ONLY

Subject to change without notice.

ODP WHITE LEAD IN OIL AND ZILO

PRICE PER 100 POUNDS					
100 lb. Kegs	50 lb. Kegs	25 lb. Kegs	12½ lb. Pails	5 lb. Cans	1 lb. Cans
$10.00	$10.25	$10.50	$10.75	$12.00	$13.50

TERMS

On White Lead, Zilo and other lead products, sixty days net or 2 per cent discount if paid within ten days from date of invoice.

SHIPPING POINTS

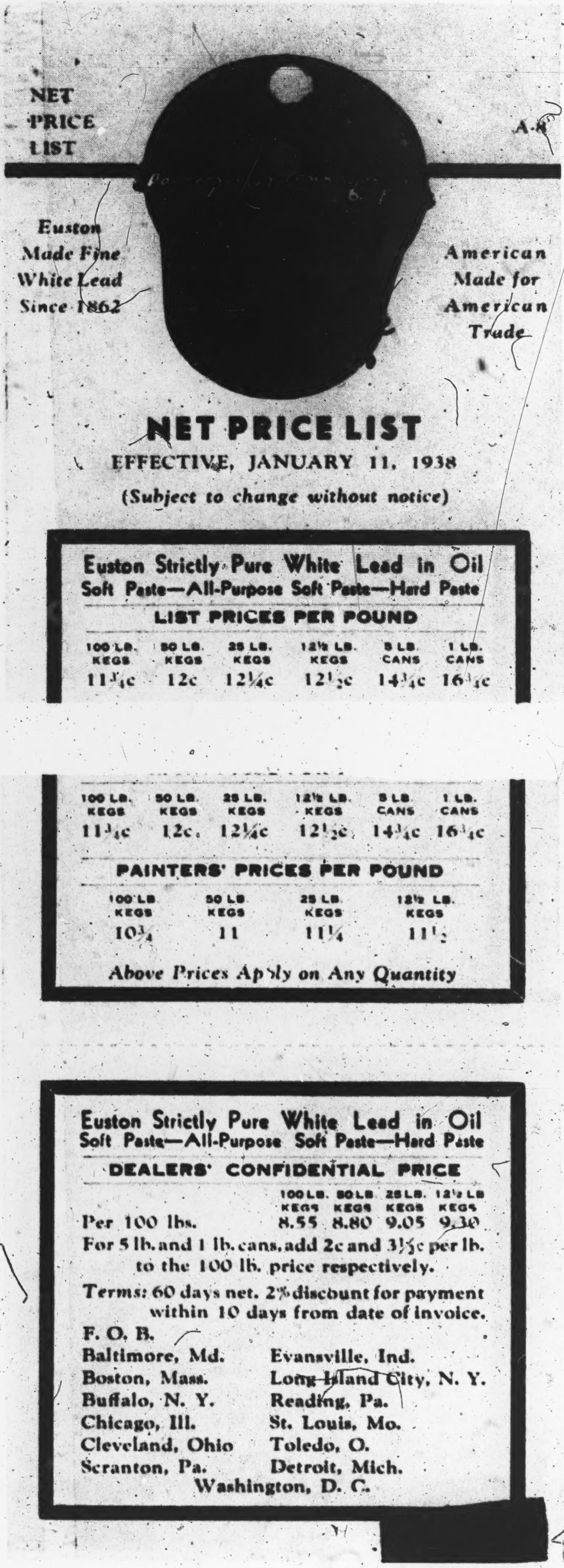
The prices printed on this card are f. o. b.:

Buffalo
Charleston
Cleveland
Columbus

Detroit
Pittsburgh
Wheeling

2151

FEDERAL TRADE COMMISSION
Docket No. 2251 Commission's Exhibit No. 662-Z 23



NET
PRICE
LIST

A-8

[redacted]

Euston
Made Fine
White Lead
Since 1862

American
Made for
American
Trade

NET PRICE LIST

EFFECTIVE, JANUARY 11, 1938

(Subject to change without notice)

Euston Strictly Pure White Lead in Oil
Soft Paste—All-Purpose Soft Paste—Hard Paste

LIST PRICES PER POUND

100 LB. KEGS	50 LB. KEGS	25 LB. KEGS	12½ LB. KEGS	5 LB. CANS	1 LB. CANS
11¾c	12c	12¼c	12½c	14¾c	16¾c

100 LB. KEGS	50 LB. KEGS	25 LB. KEGS	12½ LB. KEGS	5 LB. CANS	1 LB. CANS
11¾c	12c	12¼c	12½c	14¾c	16¾c

PAINTERS' PRICES PER POUND

100 LB. KEGS	50 LB. KEGS	25 LB. KEGS	12½ LB. KEGS
10¾	11	11¼	11½

Above Prices Apply on Any Quantity

Euston Strictly Pure White Lead in Oil
Soft Paste—All-Purpose Soft Paste—Hard Paste

DEALERS' CONFIDENTIAL PRICE

	100 LB. KEGS	50 LB. KEGS	25 LB. KEGS	12½ LB KEGS
Per 100 lbs.	8.55	8.80	9.05	9.30

For 5 lb. and 1 lb. cans, add 2c and 3⅓c per lb. to the 100 lb. price respectively.

Terms: 60 days net. 2% discount for payment within 10 days from date of invoice.

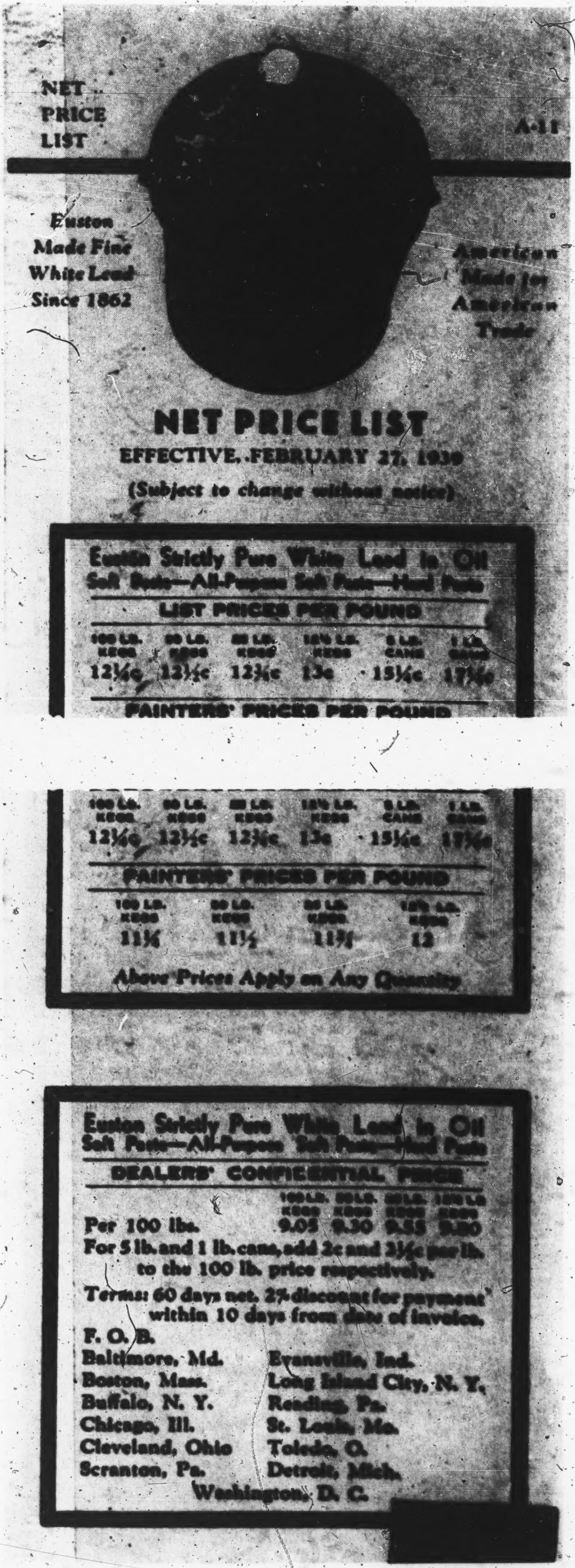
F. O. B.

Baltimore, Md.
Boston, Mass.
Buffalo, N. Y.
Chicago, Ill.
Cleveland, Ohio
Scranton, Pa.

Evansville, Ind.
Long Island City, N. Y.
Reading, Pa.
St. Louis, Mo.
Toledo, O.
Detroit, Mich.

Washington, D. C.

[redacted]



NET
PRICE
LIST

A-11

Euston
Made Fine
White Lead
Since 1862

American
Made for
American
Trade

NET PRICE LIST

EFFECTIVE, FEBRUARY 27, 1939

(Subject to change without notice)

Euston Strictly Pure White Lead in Oil
Soft Paste—All-Purpose Soft Paste—Hard Paste

LIST PRICES PER POUND

100 LB. KEGS	50 LB. KEGS	25 LB. KEGS	12½ LB. KEGS	5 LB. CANS	1 LB. CANS
12¼c	12½c	12¾c	13c	15¼c	17¾c

PAINTERS' PRICES PER POUND

100 LB. KEGS 50 LB. KEGS 25 LB. KEGS 12½ LB. KEGS 5 LB. CANS 1 LB. CANS
12¼c 12½c 12¾c 13c 15¼c 17¾c

PAINTERS' PRICES PER POUND

100 LB. KEGS	50 LB. KEGS	25 LB. KEGS	12½ LB. KEGS
11¼	11½	11¾	12

Above Prices Apply on Any Quantity

Euston Strictly Pure White Lead in Oil
Soft Paste—All-Purpose Soft Paste—Hard Paste

DEALERS' CONFIDENTIAL PRICE

	100 LB. KEGS	50 LB. KEGS	25 LB. KEGS	12½ LB. KEGS
Per 100 lbs.	9.05	9.30	9.55	9.80

For 5 lb. and 1 lb. cans, add 2c and 3½c per lb. to the 100 lb. price respectively.

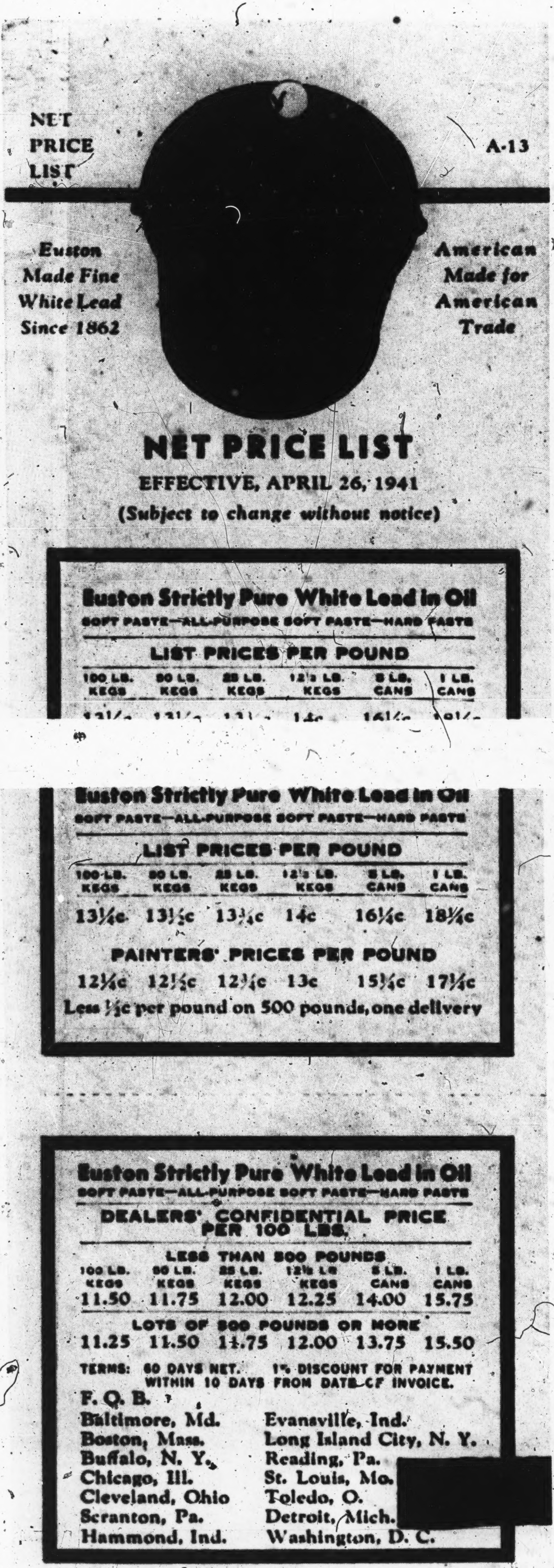
Terms: 60 days net. 2% discount for payment within 10 days from date of invoice.

F. O. B.

Baltimore, Md.	Evansville, Ind.
Boston, Mass.	Long Island City, N. Y.
Buffalo, N. Y.	Reading, Pa.
Chicago, Ill.	St. Louis, Mo.
Cleveland, Ohio	Toledo, O.
Scranton, Pa.	Detroit, Mich.

Washington, D. C.

[redacted]



NET
PRICE
LIST

A-13

*Euston
Made Fine
White Lead
Since 1862*

*American
Made for
American
Trade*

NET PRICE LIST

EFFECTIVE, APRIL 26, 1941

(Subject to change without notice)

Euston Strictly Pure White Lead in Oil

SOFT PASTE—ALL-PURPOSE SOFT PASTE—HARD PASTE

LIST PRICES PER POUND

100 LB. KEGS	50 LB. KEGS	25 LB. KEGS	12½ LB. KEGS	5 LB. CANS	1 LB. CANS

Euston Strictly Pure White Lead in Oil

SOFT PASTE—ALL-PURPOSE SOFT PASTE—HARD PASTE

LIST PRICES PER POUND

100 LB. KEGS	50 LB. KEGS	25 LB. KEGS	12½ LB. KEGS	5 LB. CANS	1 LB. CANS
13¼c	13½c	13¾c	14c	16¼c	18¼c
PAINTERS' PRICES PER POUND					
12¼c	12½c	12¾c	13c	15¼c	17¼c

Less ½c per pound on 500 pounds, one delivery

Euston Strictly Pure White Lead in Oil

SOFT PASTE—ALL-PURPOSE SOFT PASTE—HARD PASTE

DEALERS' CONFIDENTIAL PRICE PER 100 LBS.

100 LB. KEGS	50 LB. KEGS	25 LB. KEGS	12½ LB. KEGS	5 LB. CANS	1 LB. CANS
LESS THAN 500 POUNDS					
11.50	11.75	12.00	12.25	14.00	15.75
LOTS OF 500 POUNDS OR MORE					
11.25	11.50	11.75	12.00	13.75	15.50

TERMS: 60 DAYS NET. 1% DISCOUNT FOR PAYMENT WITHIN 10 DAYS FROM DATE OF INVOICE.

F. O. B.

Baltimore, Md.
Boston, Mass.
Buffalo, N. Y.
Chicago, Ill.
Cleveland, Ohio
Scranton, Pa.
Hammond, Ind.

Evansville, Ind.
Long Island City, N. Y.
Reading, Pa.
St. Louis, Mo.
Toledo, O.
Detroit, Mich.
Washington, D. C.

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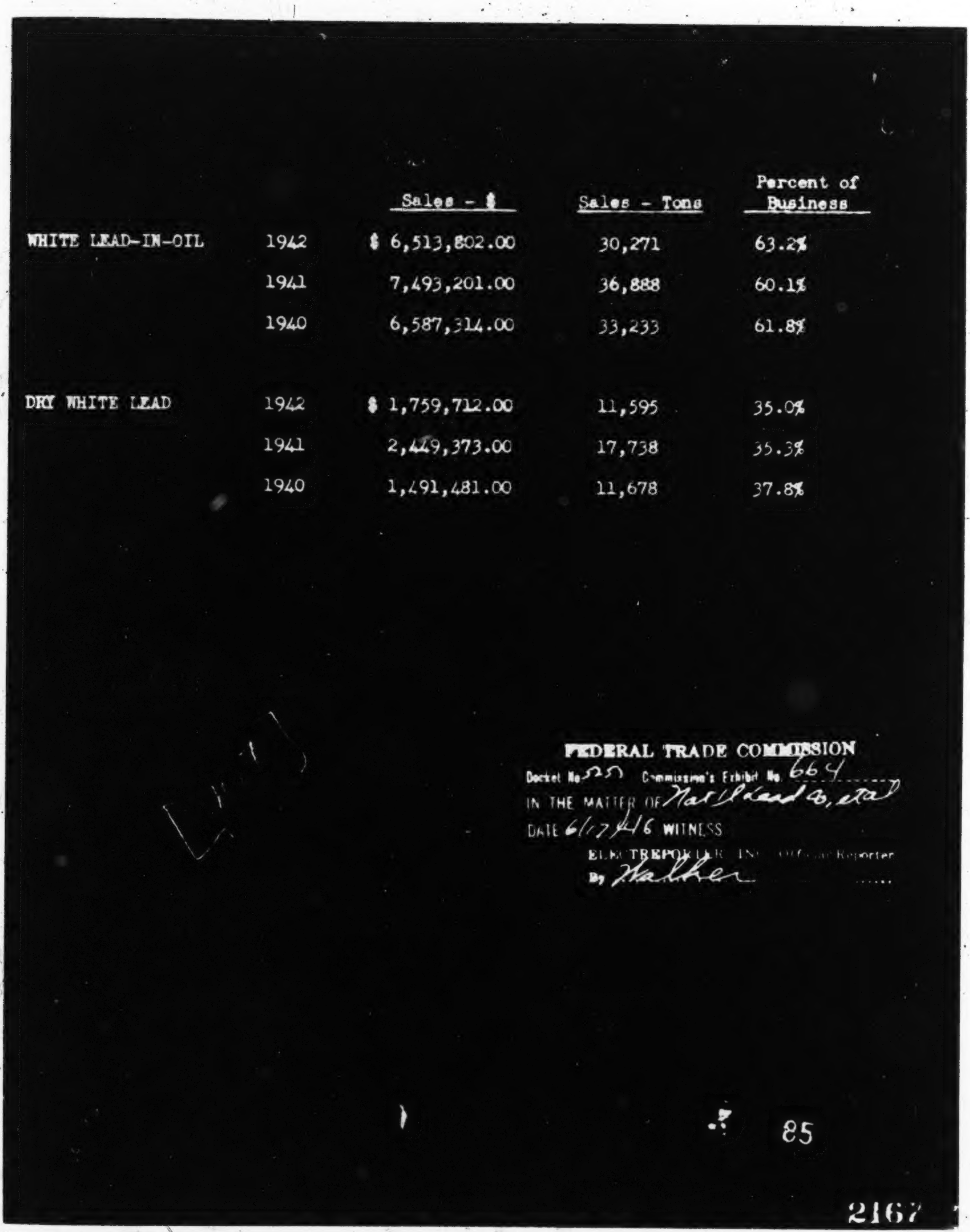
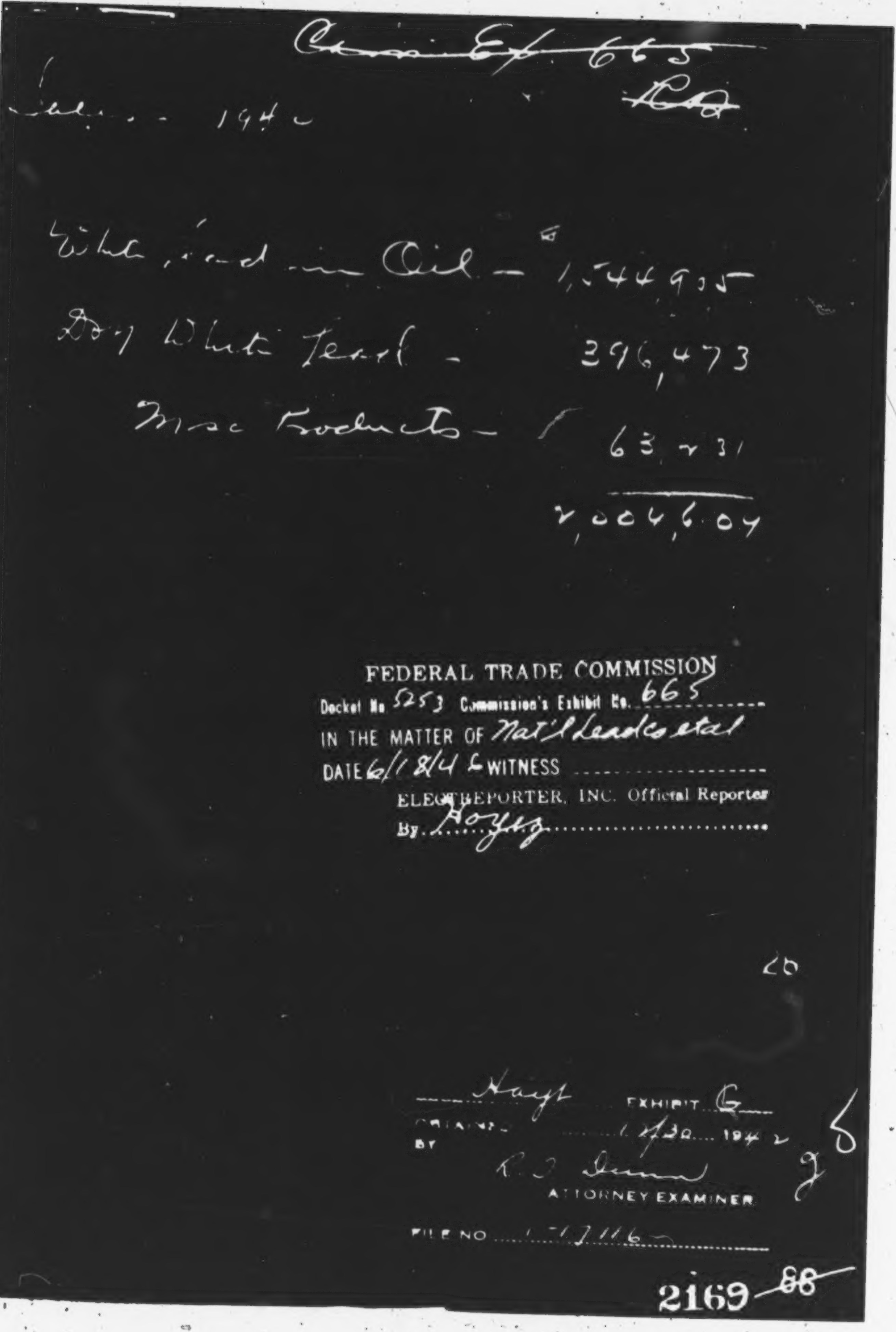


		Sales - $	Sales - Tons	Percent of Business
WHITE LEAD-IN-OIL	1942	$ 6,513,802.00	30,271	63.2%
	1941	7,493,201.00	36,888	60.1%
	1940	6,587,314.00	33,233	61.8%
DRY WHITE LEAD	1942	$ 1,759,712.00	11,595	35.0%
	1941	2,449,373.00	17,738	35.3%
	1940	1,491,481.00	11,678	37.8%

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 664
IN THE MATTER OF Nat'l Lead Co, et al
DATE 6/17/46 WITNESS
ELECTREPORTER, INC. Official Reporter
By Walker

85



~~Com. Ex. 665~~

Sales – 1940

White Lead in Oil –	1,544,905
Dry White Lead –	396,473
Misc Products –	63,231
	2,004,604

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 665
IN THE MATTER OF Nat'l Lead Co et al
DATE 6/18/42 WITNESS
ELECTREPORTER, INC. Official Reporter
By Hoyt

20

Hoyt EXHIBIT G
ORIGINAL 1/30 1942
BY
R. J. Dunn
ATTORNEY EXAMINER
FILE NO 1-1-7116

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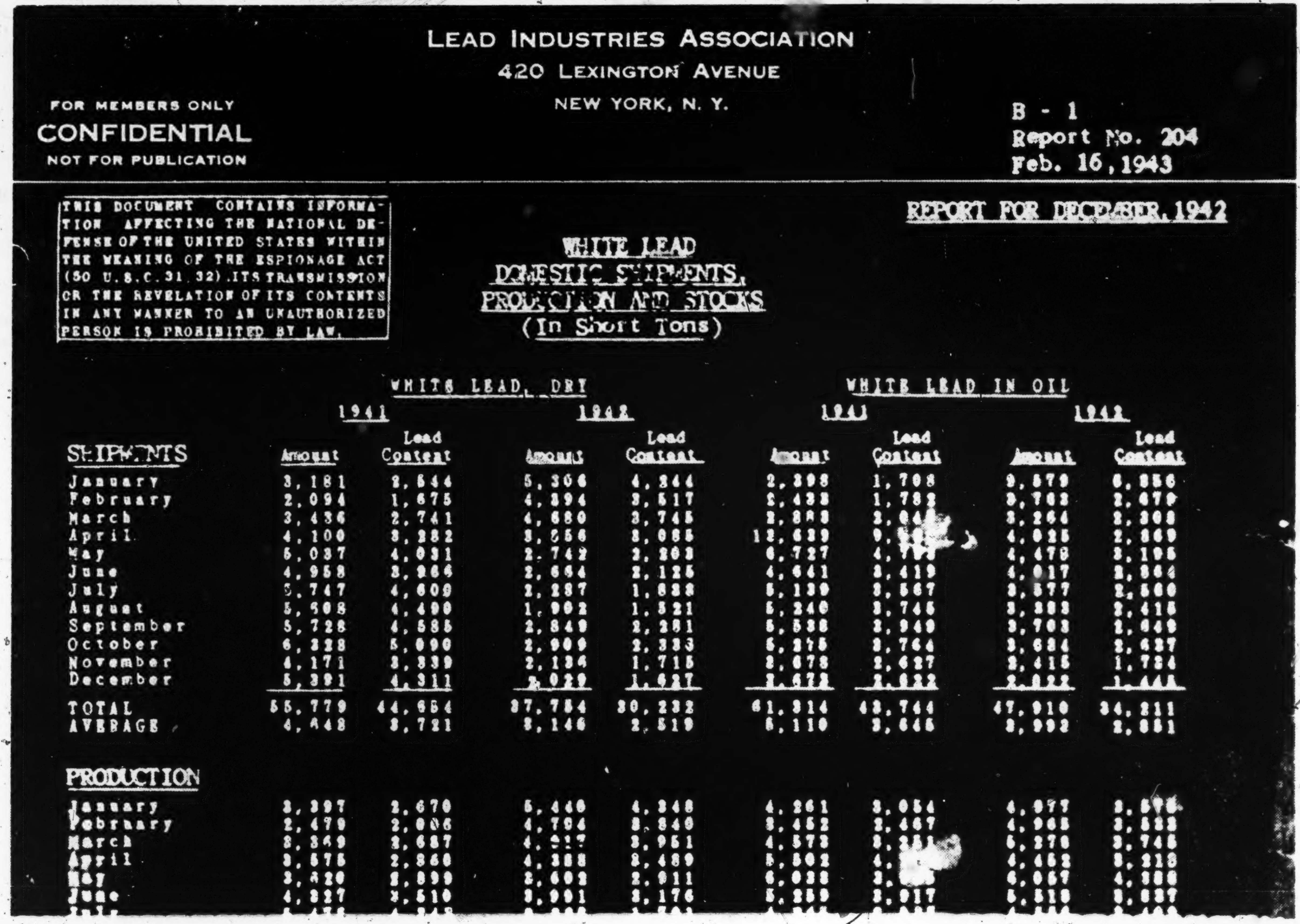

LEAD INDUSTRIES ASSOCIATION
420 LEXINGTON AVENUE
NEW YORK, N. Y.

FOR MEMBERS ONLY
CONFIDENTIAL
NOT FOR PUBLICATION

B - 1
Report No. 204
Feb. 16, 1943

THIS DOCUMENT CONTAINS INFORMATION AFFECTING THE NATIONAL DEFENSE OF THE UNITED STATES WITHIN THE MEANING OF THE ESPIONAGE ACT (50 U.S.C. 31, 32). ITS TRANSMISSION OR THE REVELATION OF ITS CONTENTS IN ANY MANNER TO AN UNAUTHORIZED PERSON IS PROHIBITED BY LAW.

REPORT FOR DECEMBER, 1942

WHITE LEAD
DOMESTIC SHIPMENTS, PRODUCTION AND STOCKS
(In Short Tons)

	WHITE LEAD, DRY				WHITE LEAD IN OIL			
	1941		1942		1941		1942	
	Amount	Lead Content	Amount	Lead Content	Amount	Lead Content	Amount	Lead Content
SHIPMENTS								
January	3,181	2,544	5,306	4,244	2,398	1,708	9,579	6,856
February	2,094	1,675	4,394	3,517	2,433	1,782	3,703	2,679
March	3,436	2,741	4,680	3,745	2,883	2,[illegible]	3,264	2,303
April	4,100	3,282	3,656	3,085	12,629	9,[illegible]	4,025	2,869
May	5,037	4,031	2,742	2,203	6,727	4,[illegible]	4,478	3,195
June	4,958	3,266	2,654	2,125	4,641	3,419	4,017	2,864
July	5,747	4,609	2,287	1,838	5,139	3,567	3,577	2,560
August	5,508	4,490	1,902	1,521	5,240	3,745	3,383	2,415
September	5,728	4,585	2,849	2,281	5,538	3,949	3,703	2,649
October	6,328	5,090	2,909	2,333	5,275	3,764	3,634	2,637
November	4,171	3,339	2,134	1,715	2,678	2,627	3,415	1,734
December	5,391	4,311	2,029	1,627	2,672	2,822	2,822	1,441
TOTAL	55,779	44,654	37,754	30,232	61,314	48,744	47,910	34,211
AVERAGE	4,648	3,721	3,146	2,519	5,110	3,645	3,992	2,851
PRODUCTION								
January	3,397	2,670	5,440	4,348	4,261	3,054	4,977	3,57[illegible]
February	2,479	2,006	4,794	3,840	3,452	2,467	4,965	3,533
March	3,369	2,687	4,917	3,951	4,573	3,[illegible]	5,270	3,745
April	3,575	2,860	4,388	3,489	5,502	4,[illegible]	4,463	3,218
May	3,620	2,899	2,602	2,911	6,033	3,[illegible]	6,057	4,388
June	4,327	3,510	3,991	3,176	5,259	3,917	5,519	3,837

2622

TABLE 1.

Shipments of White Lead Pigments

	White Lead-Dry		White Lead in Oil		Basic Lead Sulphate		Leaded ZnO ***	TOTAL
	Amt.	Lead Cont.	* Amt.	Lead Cont.	** Amt.	Lead Cont.		
1930	34,421	27,520	78,438	56,408	11,636	8,395	6,908	131,403
1931	31,992	25,620	71,912	51,844	9,809	7,245	7,428	121,141
1932	20,945	16,768	52,568	37,698	6,202	4,480	5,720	85,435
1933	25,334	20,243	53,476	38,164	8,283	6,060	9,144	96,237
1934	22,329	17,882	50,587	43,391	7,157	5,267	8,200	44,273
1935	28,186	22,603	77,665	55,615	8,392	6,245	11,988	126,231
1936	33,976	27,209	91,028	65,063	9,096	6,800	16,204	150,305
1937	32,062	25,687	68,684	48,947	11,187	8,372	16,136	128,069
1938	29,597	23,690	74,885	53,393	6,176	4,526	15,284	125,942
1939	29,264	23,416	71,942	51,276	5,636	4,130	17,640	124,482
1940	30,536	24,475	53,765	38,329	6,266	4,565	18,144	108,711
1941 (6 mos.)	34,161	27,329	43,150	30,782	6,250	4,572	15,000	98,561

Above figures have been obtained from records of Lead Industries Association with expection of Leaded ZnO, which figures are from Bureau of Mines - Mineral Yearbook.

* Combined weight of dry lead and oil.

** Beginning with March 1938 shipments of Basic Lead Sulphate sold for reprocessing in manufacture of other materials, is not included.

*** Calculated on the basis of 40% of total leaded Zinc Oxide production.

FEDERAL TRADE COMMISSION
DOCKET NO. 5555 COMMISSION'S EXHIBIT NO. 666
IN THE MATTER OF National Lead
DATE 6-5-46 WITNESS Warner
ELECTREPORTER, INC. Official Reporter
By

87

2170

Commission's Exhibit No. 666.

TABLE 2.

- Value of White Lead Pigments -
(At plant - exclusive of container)

	Dry Lead		Lead in Oil		Lead Sulphate		*Leaded Zinc Oxide		TOTAL
	Price per ton		Price per ton		Price per ton		Price per ton		
**1941	@137	$7,019,880.	@207	$13,398,595.	@126	$1,218,672.	@114	$2,565,000.	$24,202,248.
1940	@137	4,114,785.	@207	10,421,586.	@12[illegible]	692,769.	@114	2,075,008.	17,304,148.
1939	@138	4,196,462.	@205	13,896,4[illegible]	@125	585,616.	@114	1,954,588.	20,633,13[illegible]
1938	@123	3,681,052.	@164	11,517,656.	@110	555,203.	@107	1,628,968.	17,382,879.
1937	@140	4,57[illegible],337.	@190	12,466,396.	@130	973,214.	@104	1,6[illegible]6,380.	19,692,327.
1936	@126	4,367,337.	@170	14,200,617.	@11[illegible]	863,268	@[illegible]7	1,403,470.	20,834,[illegible]92
1935	@124	3,4[illegible]1,9[illegible]8	@174	1[illegible],957,171.	@ 96	727,004	@ 93	1,116,723.	17,282,[illegible]
1934	@126	2,838,709.	@178	10,002,820	@10[illegible]	677,897.	@[illegible]	[illegible]07,574.	14,327,[illegible]
1933	@112	2,753,630	@173	[illegible],372,689.	@101	736,404.	@[illegible]	804,704.	12,677,427.
1932	@117	2,329,876	@191	[illegible],939,422	@ 94	534,369	@ 91	51[illegible],430	12,322,097.
1931	@124	3,824,813.	@209	13,902,[illegible]7	@113	995,385.	@115	856,345.	19,579,[illegible]
1930	@140	4,[illegible]72,[illegible]	@223	15,505,195	@128	1,321,339.	@120	828,878.	22,228,051.

Above figures obtained from the Bureau of Mines - Mineral Yearbook.

**. Projected total for the year based on volume for the first 8 months calculated at the 1940 value. Average actual value for 1941 will undoubtedly be substantially higher than 1940 average values

* Represents 40% of total value

FEDERAL TRADE COMMISSION
DOCKET NO. 5553 COMMISSION'S EXHIBIT NO. 667
IN THE MATTER OF National Lead Co
DATE 6/25/46 WITNESS Wormser
ELECTREPORTER, INC., Official Reporter
By

2172

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Commission's Exhibit No. 667.

Commission's Exhibit No. 669.

SHIPMENTS

WHITE LEAD, DRY AND IN OIL

By Percentage

	Total	National	Eagle-Picher	Int. S. & R.	Fuller	MacGregor	Other
1938	Dry 29,597 Oil 74,885 Total 104,482	58.8%	14.3%	6.6%	3.2%	-	17.1%
1939	Dry 29,264 Oil 71,942 Total 101,206	55.9%	13.8%	7.2%	3.2%	1.6%	18.3%
1940	Dry 30,536 Oil 53,765 Total 84,301	54.6%	12.8%	7.9%	3.3%	-	21.4%
1941	Dry 55,779 Oil 61,314 Total 117,093	53.0%	12.5%	8.8%	3.2%	3.2%	19.3%

Notes: "Other" includes Euston Lead Co. (Glidden) and Sherwin Williams.

Shipments by MacGregor in 1938 and 1940 are included in "Other."

FEDERAL TRADE COMMISSION
DOCKET NO. 5553 EXHIBIT 66
IN THE MATTER OF National Lead Co
DATE 6/5/46 WITNESS
ELECTREPORTER, INC., Official Rep
By

133

July	5,747	4,609	2,287	1,8[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
August	5,508	4,490	1,902	1,521	5,240	3,745	3,383	2,415
September	5,728	4,585	2,840	2,281	5,538	2,949	3,703	2,649
October	6,328	5,090	2,909	2,386	5,275	3,764	3,684	2,637
November	4,171	3,339	2,136	1,715	3,678	2,627	3,415	1,734
December	5,391	4,311	[illegible]	1,627	3,672	2,022	2,822	1,448
TOTAL	55,779	44,654	37,754	30,232	61,314	43,744	47,910	34,211
AVERAGE	4,648	3,721	3,146	2,519	5,110	3,645	3,993	2,851

PRODUCTION

January	3,397	2,670	5,440	4,248	4,261	3,054	4,977	3,676
February	2,479	2,006	4,794	3,840	3,452	2,467	4,965	3,533
March	3,369	2,687	4,917	3,951	4,573	3,2[illegible]	6,278	3,745
April	3,575	2,860	4,388	3,489	5,502	4,[illegible]	4,452	3,218
May	3,820	2,899	3,602	2,911	6,033	2,[illegible]	4,057	4,380
June	4,327	3,510	3,991	3,176	5,259	3,917	5,518	3,837
July	6,478	4,343	2,228	1,791	4,[illegible]	2,937	4,554	3,409
August	5,579	4,548	2,244	1,800	3,[illegible]	2,690	6,190	3,543
September	6,189	4,945	2,380	1,903	5,[illegible]	3,677	3,947	2,832
October	6,066	4,887	3,142	2,531	5,687	4,056	3,251	3,328
November	4,336	3,471	2,773	2,210	4,324	3,093	2,424	1,739
December	5,585	4,472	[illegible]	[illegible]	[illegible]	[illegible]	2,229	1,484
TOTAL	54,098	43,298	42,372	33,998	[illegible]7,599	41,048	52,946	37,797
AVERAGE	4,508	3,608	3,531	2,833	4,7[illegible]	3,[illegible]	4,412	3,150

STOCKS

			1942		1942	1942		1942	
January	1	3,077	2,464	7,710	6,224	20,339	14,[illegible]	[illegible]	[illegible]
February	1	3,212	2,569			15,738	11,2[illegible]		
March	1	3,409	2,892			16,940	12,6[illegible]		
April	1	3,840	3,097			18,955	13,526		
May	1	4,377	3,503			19,382	13,971		
June	1	5,243	4,213			20,958	15,060		
July	1	6,565	5,260			22,461	16,035		
August	1	6,507	5,216			22,440	16,923		
September	1	6,849	5,494			25,246	18,010		
October	1	6,360	5,115			25,490	18,182		
November	1	6,613	5,311			25,058	17,875		
December	1	7,249	5,808			25,069	17,878		

WHITE LEAD IN PROCESS*

		1942	1943			1942	1943			1942	1943
Jan.	1	22,233	17,081	May	1	22,900		Sept.	1	20,975	
Feb.	1	21,717		June	1	21,902		Oct.	1	20,337	
Mar.	1	21,927		July	1	21,747		Nov.	1	19,064	
Apr.	1	22,281		Aug.	1	21,664		Dec.	1	18,158	

*Lead Content Only.

224

FEDERAL TRADE COMMISSION
DOCKET NO. 5253 COMMISSION'S EXHIBIT NO. 628
IN THE MATTER OF National Lead.
DATE 6/25/46 WITNESS
ELECTREPORTER, INC., Official Reporter
By

91

2178

~~528~~

2197 COMMISSION'S EXHIBIT NO. 684.

The Eagle-Picher Lead Company.
New York.

To Cincinnati General Office,
Atten: Mr. W. E. Maston.

Date August 17, 1933.

Dear Mr. Maston:

The attached is a copy of a circular letter sent out by the National Lead Company which you will no doubt be interested in reading in case you have not already seen it.

Sincerely yours,
J. Stranad.

js k

2198 COMMISSION'S EXHIBIT NO. 685.

National Lead Company.

July 26, 1933.

Dutch Boy Agents.

Our new sales plan whereby you were appointed agent, and under which plan you have received stock from us on consignment, has now been in effect for six months. We believe this six months period has enabled you to form some very definite opinions regarding the value of this sales plan, not only as it has affected your business, but also as it has affected the general sale of Dutch Boy White Lead.

Previous to the present consigned stock agency arrangement that is now in effect, you can undoubtedly recall some very definite opinions you had regarding the resale of Dutch Boy White Lead. Having had this merchandising experience under these two different arrangements, you are in a position to be of very valuable assistance by telling us frankly just what you think of the two different methods, or sales policies, for Dutch Boy White Lead.

To enable us to determine whether or not our present consignment plan of merchandising shall be continued, we need your frank criticism of this sales plan. You have been on the firing line under two different sales plans, and it is your opinion of these two different sales methods that will enable us to reach an intelligent decision as to whether the consignment arangement is to be continued by us.

For the convenience of your prompt reply, for which we thank you in advance, a self-addressed envelope is enclosed.

Yours very truly,
National Lead Company,
Atlantic Branch.

2199 COMMISSION'S EXHIBIT NO. 686.

Monday,
August 21, 1933.

New York Office,
Mr. J. Stranad.

Dear Joe:

Thanks very much for sending me copy of letter of National Lead Company to the trade regarding the Agency plan.

They told us about this letter and showed it to us together with a number of replies, all of which were favorable to the continuance of the plan.

Yours truly,

wem-q

2202 COMMISSION'S EXHIBIT NO. 691.

November 29, 1940.

Mr. Carlton H. Rose,
National Lead Company,
105 York Street,
Brooklyn, N. Y.

Dear Carlton:

We feel that every means should be resorted to in order to make it harder on the chiselers and others who go out and get Flatting Oil business on bids based upon specifications. One way of doing this is to raise the non-volatile content. Therefore, we will recommend that this be raised to a minimum of 12% which will be satisfactory to you. We would, therefore, like to have you make a similar recommendation regarding the proposed Federal Specifications for Flatting Oil, dated August 20, 1940.

Yours very truly,
The Eagle-Picher Sales Company,
Frank L. Chinery,
Chief Chemist,
White Lead Division.

FLC:lh

2203 COMMISSION'S EXHIBIT NO. 692.

National Lead Company.
Research Laboratories.
105 York Street,
Brooklyn, N. Y.

November 20, 1940.

Mr. F. L. Chinery, Chief Chemist,
White Lead Division,
The Eagle-Picher Sales Company,
1030 Broadway,
Cincinnati, Ohio.

Dear Frank:

This is in reply to your letter of November 15th regarding the proposed Federal Specification for Flatting Oil, dated August 20, 1940.

The specifications require a minimum of 11% non-volatile matter. You have suggested that this be raised 3%. Our own Dutch Boy Flatting Oil would be excluded if the minimum requirement for non-volatile matter would be raised to 14%.

We, therefore, would prefer that the minimum be maintained at 11%. However, if you would like it to be increased even a small amount it would be satisfactory to us to have the minimum raised to 12%.

At the present time we are considering this specification and in the near future we will send whatever comments we may have to Mr. Hickson. If you would like to have us recommend that the non-volatile be raised to 12% would you kindly advise us.

Very truly yours,
(signed) Carlton H. Rose.

CHR:AH

2204 COMMISSION'S EXHIBIT NO. 695.

The Eagle-Picher Sales Company.
359 Guilford Avenue,
Baltimore, Maryland.

April 15, 1937.

To Eagle White-Lead-in-Oil Distributors:

When the plan of marketing Eagle White Lead-in-Oil on a consigned basis went into effect in 1934, a special contract was drawn up which all Eagle distributors voluntarily signed at the time they were appointed.

For your protection and that of all Eagle distributors, the following cause was included in this contract:

"The Distributor agrees that all quotations and sales will be made only at such prices and upon such terms and conditions as may be established by the Seller".

Complete observance of the letter and spirit of our contract have added profits to your sales of Eagle White Lead-in-Oil. Everything considered, there is undoubtedly more profit in this product for you than any other line you carry.

To the distributor who deviates from the terms of this contract, we wish to say that he is actually throwing profit away that he could rightfully have. Whether he makes concessions, because of his belief in the stories of lower prices spread by his customers, or whether he reduces his list in the misguided hope that he will attract additional business, the effect can only be destructive.

This plan has been a practical success and, in fairness to you, we are determined that it shall continue. Your cooperation is, of course, most necessary and we are confident you will agree that neither you nor ourselves can therefore countenance any deviations from any of the terms of our Agreement.

The consignment plan of selling was designed to help you make more profits, and therefore, it is to your best interest to help us protect it.

Yours very truly,
The Eagle-Picher Sales Company,
/s/ H. Bendelari,
White-Lead-in-Oil Division.

2206 COMMISSION'S EXHIBIT NO. 696.

Letterhead of Eagle-Picher Lead Company, Cincinnati.

November 16, 1937.

Mr. F. E. Wormser, Secretary,
Lead Industries Association,
420 Lexington Avenue,
New York, N. Y.

My dear Felix:

It was very kind of you to take me to the Miners Club for luncheon with Messrs. Wilson and Martino last Friday.

I fear that the conversation may not have been very interesting to you, because the trend which it took involved National Lead and Eagle policies more than industry problems. I certainly appreciate your making it possible for me to meet these two gentlemen in such a pleasant manner and also your making an appointment for me at St. Joe.

I am writing Willard and asking him to loan you his copy of the report of the International Statistical Bureau when he receives it.

With best regards.

Sincerely yours,

W. R. Dice,

Executive Vice President.

WRD:br

2208 COMMISSION'S EXHIBIT NO. 697

November 19, 1937.

Mr. W. R. Dice, Vice President,
Eagle-Picher Lead Company,
Temple Bar Building,
Cincinnati, Ohio.

My dear Bill:

Many thanks for your kind note of November 10th. I am glad that events turned out as they did so that you were able to meet Messrs. Wilson and Martino.

On the contrary, I was extremely interested in the conversation that took place for I feel that if we had more of them in our industry quite a few of our problems would disappear.

If there is anything I can do for you pending your next visit to New Your please let me know.

With kindest regards,

Cordially yours,

Secretary.

2210 COMMISSION'S EXHIBIT NO. 700.

June 4, 1943.

Mr. Robert T. Dunn,
Federal Trade Commission,
45 Broadway,
New York City.

Dear Mr. Dunn:

In harmony with your request, we are attaching a transcript made from the records of our Stock Transfer Agent covering the transactions in The Eagle-Picher Lead Company common stock registered in the name of Edw. J. Cornish from August 6, 1930 to February 17, 1943, and subsequent in the name of The National Lead Company.

Under date of February 17, 1943, a balance of 3,500 shares, registered in the name of Edw. J. Cornish, then deceased, was submitted for transfer to the name of The National Lead Company. In requesting this transfer, affidavits from the executors of the estate of Edw. J. Cornish and from officers of The National Lead Company were submitted, stating that The National Lead Company was the beneficial owner of the stock in question, and that Edw. J. Cornish appeared only as nominee.

Very truly yours,
The Eagle-Picher Lead Company,
Carl A. Geist,
Vice President-Treasurer.

CAG:Z

COMMISSION'S EXHIBIT NO. 700.

		In	Out	Balance
8-6-30	Edw. J. Cornish	500		
10-15-30	Edw. J. Cornish	300		
10-23-30	Edw. J. Cornish	1,000		
10-24-30	Edw. J. Cornish	200		
10-24-30	Edw. J. Cornish	500		
12-23-30	Edw. J. Cornish	1,000		
12-24-30	Edw. J. Cornish	1,000		
1-8-31	Edw. J. Cornish	1,000		
1-21-31	Edw. J. Cornish	500		
1-27-31	Edw. J. Cornish	500		
3-4-31	Edw. J. Cornish	500		
3-11-31	Edw. J. Cornish	500		
3-24-31	Edw. J. Cornish	1,000		
3-26-31	Edw. J. Cornish	500		
5-1-31	Edw. J. Cornish	18,400		
5-11-31	Edw. J. Cornish	7,000		
5-28-31	Edw. J. Cornish	2,000		
2-10-32	Edw. J. Cornish	1,000		
2-25-32	Edw. J. Cornish	4,000		
4-11-32	Edw. J. Cornish	500		
5-18-32	Edw. J. Cornish	1,000		
6-1-32	Edw. J. Cornish	1,000		
6-9-32	Edw. J. Cornish	1,000		44,900
2-10-37	Edw. J. Cornish		10,000	
2-15-37	Edw. J. Cornish		11,900	
2-19-37	Edw. J. Cornish		100	
2-24-37	Edw. J. Cornish		4,000	
2-25-37	Edw. J. Cornish		12,000	
3-1-37	Edw. J. Cornish		1,000	
3-2-37	Edw. J. Cornish		1,500	
3-8-37	Edw. J. Cornish		100	
3-10-37	Edw. J. Cornish		800	3,500
2-17-43	Edw. J. Cornish		3,500	
2-17-43	National Lead Co.	3,500		3,500

2212 COMMISSION'S EXHIBIT NO. 701

Postal Telegraph
Calif. 12 945A
1941 Mar. 12 PM 1:15

W. H. Hayt, Eagle Picher Lead Co.,
Templebar Bldg.

Effective immediately prices Manila white lead in oil and red lead dry in twenty five pound kegs increased half cent now ten and a half cents CIF terms net 60 days.

National Lead Co. Scott.

2217 COMMISSION'S EXHIBIT NO. 705.

The Willard Hotel.
Washington, D. C.
Tuesday Morning.

Dear Bende:

Yesterday a set-up was approved by the American Paint & Var. Mfgrs. Assc. and the National Paint, Oil and Varnish Ass'c directors for the amalgamation of these two groups at the Chicago Convention next month. Upon my return I shall be glad to give you more of the details.

All afternoon (and some of the groups well into the night) the joint group, numbering some 40 members worked over the final draft of the Paint, Varnish and Lacquer Code which is up for hearing this morning before General Williams.

Quite a few objections are on file in writing and some
2218 half dozen large companies are scheduled for a verbal hearing among them Sears, Roebuck Company of Chicago and the Davis Paint Co. of Kansas City—both mail order houses and our customers.

The big stumbling block in the Code is the consignment clause—and there is trouble ahead. Unfortunately neither Mr. Cornish or Mr. Carter appeared before the group meeting of the Industry. Mr. Carter was reported sick and unable to leave his home. The subject was opened wide. The correspondence was read and the letter of Mr. Cornish dated the 22nd made a part of the records. (Mr. Marks is manager of their Milwaukee plant and office and sat in as a member of the Executive Committee of the N. P. O. He asked to be excused from making any comment.)

This placed me on the spot—so I just had to do the best I possibly could to state our position—take a firm stand that we were not ready to tie in with their code or
2219 alter our position to extend the Agency plan of selling when and as we saw fit. Naturally I tried to do this without stirring up ill-will or resentment of this important group towards the Lead Industry.

I was successful in getting them to state the facts to the Administrator for their code and thus keep the door open for any further plans either group may care to develop. This was written in last night.

The way is now open without our getting roped in under the Paint Code regardless of our own wishes in the matter.

Mr. Marks made some notes to pass along to Mr. Carter. We went over them together and as they tell the high spots I have asked him for a copy which I am enclosing
2220 along with letter from Mr. Carter and Cornish's letter to Mr. Trigg.

I will be in Philadelphia Wednesday, New York office Thursday and Friday.

Will try to have visit with Carter and see what plans we must make to meet the situation which I can assure you is quite important and by no means solved.

If things go as now planned I will be in the Cincinnati office Saturday morning next.

Sincerely,
Willard.

2221 COMMISSION'S EXHIBIT NO. 706.

Letterhead of National Lead Company, New York.
September 22, 1933.

Mr. Willard Maston,
Willard Hotel,
Washington, D. C.

Dear Mr. Maston:

I am enclosing copy of letter written by Mr. Cornish to Mr. Trigg and which I read to you over the 'phone. I do not think there is anything else to say.

I take it for granted that the Paint Industry Code will be filed as now written, and which does not specifically mention lead-in-oil as a product—although by implication and by interpretation by the paint people of the definition in their code, they are, I think, a unit in considering that it should cover lead-in-oil.

If the Lead Industries Code comes up for a hearing on October 4th, as now expected, the paint industry may appear and protest; but that is a bridge which we do not yet have to cross and such situation may not arise. We should, however, I think, prepare beforehand to combat it if such an effort is made.

In the interim we will not plan to do anything in respect to introducing the agency plan with the trade, but we do expect to start up again just as soon as Lead Industries Code has been heard and the way is clear.

Yours very truly,
F. M. Carter,
President.

(Enclosure)

2222 Draft of letter to Mr. Trigg.

Sept. 22/33

Following Wednesday's informing and interesting interview with you and Mr. Matlack, I find that the National Lead Company is in an embarrassing position.

For many, many years it has been the policy of the National Lead Company not to appear before any government officer, United States Senator or Congressman, either asking or resisting any legislation. This policy has been in vogue for twenty-five years to my knowledge. In the matter of codes, as the owner of lead mines in Missouri and the West and as a member of the Lead Industries Association, we have gone along with that Association, in general assent with such code provisions as the membership wished to adopt.

Corroders of white lead, burners of red lead, litharge and orange mineral all logically and naturally treated themselves as a part of the Lead Industries Association, of which they were all members. We also manufacture lead products, including sheet lead, lead pipe, traps and bends, type metal and plumbers' supplies. We therefore lined up with the Metallic Products Division of the Lead Industries Association.

We also manufacture titanium pigments, which logically and naturally became associated with the Chemical Industry. We also manufacture linseed oil, and therefore properly joined the Linseed Oil Manufacturing Industry of the

United States. We also manufacture journal bearings, consisting of copper, lead, zinc and tin, and therefore logically and properly have joined that Association.

We also make calcium carbide. I have not heard yet if such an Association is being formed, but if such is formed, we would logically become a member of that. These Associations all have one thing in common; namely, reducing the hours of labor and increasing wages; to which the National Lead Company has acquiesced, endeavoring to con-
form to such other restrictions or codes as the other
2223 people interested may desire, but under no circum-
stances do anything that would be a crime if the Sherman Law were still in force.

We are engaged, as you know, in the manufacture of ready-to-use paints in California. In addition, we manufacture colors in oil and a few paint specialties. We have not attended any of your meetings; expecting that whatever you considered necessary or desirable would not apply to the National Lead Company, excepting as to the above activities, and in no case include lead-in-oil.

It therefore seems to be absolutely necessary to limit our association with the manufacturers of ready-to-use paints to the ready-to-use products above referred to.

I would be sorry to engage in any discussion attempting to establish rules for any industries that are to some extent competitive with the National Lead Company. For instance, we sell to the manufacturers of prepared paints a very large percentage of our white lead (both dry and in oil), titanium pigments and lead sulphate. We do not establish exclusive agencies, but sell to wholesalers, retailers, painters and the general public. In many cities, manufacturers of ready-to-use paints have exclusive agencies from some of which our products are excluded.

If we were to take any hand in forming codes, we would like very much to abolish exclusive agencies and leave all dealers free to buy their products from anyone whom they saw fit.

Of course, I recognize that white lead-in-oil, or sublimed lead-in-oil, or zinc-in-oil can be looked upon as a paint, and yet no white lead that we sell is usable without further preparation. I hope, therefore, that any code adopted by the paint, varnish and lacquer manufacturers will not contain any matter which would limit the activities of the National Lead Company, excepting where we are engaged in the same similar business.

If the code you are preparing is so limited, the National Lead Company will most certainly fall in line. But if you attempt in the code to limit the Business of the Na-
2224 tional Lead Company, which in some respects is competitive with prepared paints, we feel that you would be doing us an injustice.

There are a great many customs that have grown up in the ready-to-use paint business that we would like to correct; but, as stated in the beginning of this letter, it has long been the policy of the National Lead Company to accept whatever laws are passed, and conform to them without ourselves endeavoring to influence anybody either one way or the other.

For instance: The products of the National Lead Company have been extensively advertised for fifty years and their quality and price well known. There has grown up an unethical practice to use Dutch Boy brands of white lead as a leader, sold without a profit as a means of selling other products such as colors, brushes, painters' supplies, to the great annoyance, irritation and injury of everyone doing ethical business. We have, therefore, for many years attempted to correct this evil.

To that end we have been experimenting with agency agreements (never exclusive agencies), by means of which we can discourage the use of our products in a way to injure us or the other distributors thereof. Our efforts in that respect have been approved by all distributors of white lead-in-oil, both wholesalers and retailers; and have been especially valuable to small dealers in competition with those attempting to sell over large areas to ultimate consumers. It has been injurious to no one and has been advantageous to the industry at large.

You should not embarrass us by saying that our efforts in this connection are improper.

Very respectfully,
E. J. Cornish,
Chairman.

Copy to Mr. Matlack.

2230 COMMISSION'S EXHIBIT NO. 708.

(Letterhead of National Lead Company, Chicago.)

July 30, 1940.

Mr. William H. Hayt, General Manager,
White Lead Division,
The Eagle-Picher Sales Company,
1030 Broadway,
Cincinnati, Ohio.

Dear Bill:

Thank you ever so much for yours of the 26th with which you enclosed labels for your Primer and Finish Coat white lead paint, also for the price set up which you list in your letter.

All of this is very interesting, but the most interesting will be the reaction, in the trade, to your experiment. You have my wishes for the best of luck.

When you get to the city again I hope we can get together for lunch. Remember, the next one is on me!

Kindest regards.

Sincerely,
(Illegible)
Assistant Manager.

2231 COMMISSION'S EXHIBIT NO. 709.

(Inter-Company Letterhead of The Eagle-Picher Lead Company, New York)

September 25th, 1933.

To Cincinnati Office,
Attention Mr. A. E. Bendelari, President.

Dear Mr. Bendelari,

Zinc Code.

The Zinc Code was finished last night and will be presented the end of the week. Mr. Roosevelt got in touch with Miss Reeves, Mr. H. O. King's secretary in Washington, on Saturday afternoon and asked her to tell Mr. King that it would be ready by the end of the week. (Miss Reeves used to be secretary to Nicholas Longworth.) She says she will keep Mr. King in a good humor in this connection.

Lead Code.

Mr. Roosevelt has been working with Mr. Carter, Mr. Rowe and Mr. Wormser all afternoon on the Lead Pigments code. They will meet tomorrow for further conference. Mr. Carter shows every evidence of not desiring to put in any supplementary codes on any lead products. Metallic Lead Products.

Mr. Roosevelt asks me to tell you that he does not know at the present moment whether he will have time to do anything on the Metallic Lead Products code or not.

Yours very truly,
E. B. Pettes,
Secretary to Mr. Roosevelt.

ep

cc to Mr. Potter, Joplin Office.

2232 COMMISSION'S EXHIBIT NO. 710.

July 26, 1940.

Mr. John L. Reque,
National Lead Company,
900 W. 18th Street,
Chicago, Illinois.

Dear John:

Regarding our telephone conversation, the new white lead paint which we are trying out is still very much on an experimental basis, not experimental from the standpoint of the quality of the product but rather from the marketing angle. We are offering it in five gallon kits only and pushing it as a painters product. I am enclosing two labels, one from the Primer Sealer and on from the Finish Coat, which just about tell the whole story. The price is the same for either product.

The list price is $3.25 per gallon in five gallon kits. Quantity prices to dealers and painters are as follows:

	Dealer	Painter
5 to 25 gallons	$2.25	$2.70
30 to 95 gallons	2.15	2.65
100 gallons and over	2.10	2.60

Terms 2-15-60.

These products are not sold on consignment.

I was very sorry to get your report that Harold Rowe is still under the weather and not expected back on the job for some little time. If you see him or have occasion to write to him, please be sure to give him my best wishes.

With kindest regards to yourself.

Sincerely,
The Eagle-Picher Sales Company.
W. H. Hayt,
General Manager,
White Lead Division.

WHH:lh

COMMISSION'S EXHIBIT NO. 712.

(Intra-Company Letterhead of Eagle-Picher Lead Company, Cincinnati.)

Thursday, September 14, 1933.

To Cincinnati Office,
Attention Mr. A. E. Bendelari, President.

White Lead in Oil—August sales showed seasonal decline when compared with June and July tonnage. August '33 compared with August '32 is 615 tons against 546 tons, an increase of 12½%. Buying in anticipation of an advance in price was not evident during the month. September started slowly. There are no definite signs that fall painting will be better than for the same period last year.

Now Product—In August we started introducing our new Eagle "All-Purpose" White Lead. This product is a semi-paste weighing 30 pounds to the gallon, and put up in attractive quart and gallon cans. It is quickly reduced to painting consistency by the addition of an equal volume of thinner. Pure White Lead has always sold by the pound. We want to learn if it can be sold by gallon measure and carry better profit margins.

We expect that the new "All-Purpose" White Lead will be a means of recovering the small town distributor of paint, who as a class, has about given up any serious attempt to sell White Lead in Oil. This new product has very real possibilities, and we intend to develop them.

Eagle Distributors. Shortly after the first of the year our company and the National experimented with a consignment plan of selling in the East (New York and Washington). It is the only legal means of controlling the resale price of White Lead and preserve a profit to dealers.

Both companies agree that it has proven a success in the East, and it should be possible to extend it throughout the country in the near future.

The only competitive company likely to follow this plan is Anaconda. Sherwin-Williams, Glidden, DuPont and Wetherill are likely to continue the straight sales basis. Fuller on the West Coast is doubtful.

During the next few months we will probably shed our old methods of marketing White Lead in Oil. Our aim and hope is to develop a sales plan whereby distributors will make a profit handling this merchandise. If we are successful in doing this the industry will start pulling itself free of a dangerous situation which has for a long time threatened to engulf it completely.

* * * * * *

Willard E. Maston.

COMMISSION'S EXHIBIT NO. 741.

FEDERAL TRADE COMMISSION

Field Report

File No. 1-17116.

EC-Jr:vf
3/28/44

Frank H. Hurless,
Sales Manager, Pigment Division,
International Smelting and Refining Company,
420 East 151st Street,
East Chicago, Indiana.
Date: March 20, 1944
Place of interview:
By telephone.

Informant called the writer to say that he had ascertained the percentage of White Lead-in-Oil business done by his company as compared with the industry. He furnished the following figures:

1937	3.25%
1938	3.12%
1939	3.79%
1940	4.03%
1941	3.83%
1942	3.80%
1943	3.05%

These figures were from statistics supplied by Lead Industries Association, informant stated.

Respectfully submitted,
Eugene Carmichael, Jr.,
Attorney Examiner.

National Lead Company (D-5253)

White Lead Sources of Supply for 67 Cities Covered by F. T. C. Sales Analysis.

Selected Cities Served	Directly From Factory Located In:	Through Warehouse In:
Aberdeen, S. D.	St. Louis	—
Alexandria, Va.	Philadelphia	—
Amarilla, Texas	—	Dallas
Atlanta, Ga.	Chicago	Atlanta
Baltimore, Md.	Philadelphia	—
Bismark, N. D.	St. Louis	—
Boston, Mass.	New York	Boston
Bristol, Tenn-Va.	Philadelphia	—
Buffalo, N. Y.	—	Buffalo
Charleston, S. C.	Philadelphia	—
Chicago, Ill.	Chicago	—
Cincinnati, Ohio	Chicago	Cincinnati
Cleveland, Ohio	Chicago	Cleveland
Council Bluffs, Ia.	—	Omaha
Cour d' Alene, Ida.	—	Spokane
Dallas, Texas	—	Dallas
Danville, Va.	Philadelphia	—
Davenport, Ia.	St. Louis	—
Denver, Colo.	St. Louis	—
Detroit, Mich.	Chicago	Detroit
Des Moines, Ia.	St. Louis	—
Duluth, Minn.	—	St. Paul
El Paso, Texas	—	Dallas
Fargo, N. D.	St. Louis	—
Fort Worth, Texas	—	Dallas
Houston, Texas	—	Dallas
Indianapolis, Ind.	Chicago	—
Jacksonville, Fla.	New York	—
Kansas City, Mo.	—	Kansas City
Knoxville, Tenn.	Chicago	—
Lincoln, Nebr.	St. Louis	—
Los Angeles, Calif.	—	Los Angeles
Louisville, Ky.	Chicago	—
Miami, Fla.	New York	—

Milwaukee, Wis.	Chicago	—
Minneapolis, Minn.	—	St. Paul
Nashville, Tenn.	Chicago	—
New York, N. Y.	New York	—
Ogden, Utah	—	Salt Lake City
Oklahoma City, Okla.	St. Louis	—
Omaha, Nebr.	—	Omaha
Philadelphia, Pa.	Philadelphia	—
Phoenix, Ariz.	—	Phoenix
Pittsburgh, Pa.	—	Pittsburgh
Portland, Ore.	—	Portland
Pueblo, Colo.	St. Louis	—
Raleigh, N. C.	Philadelphia	—
Reno, Nev.	Melrose	—
Richmond, Va.	Philadelphia	—
Salt Lake City, Utah	—	Salt Lake City
San Francisco, Calif.	—	San Francisco
Santa Fe, N. M.	St. Louis	—
Seattle, Wash.	—	Seattle
Sioux City, Ia.	St. Louis	—
Sioux Falls, S. D.	St. Louis	—
Spokane, Wash.	—	Spokane
St. Louis, Mo.	St. Louis	—
St. Paul, Minn.	—	St. Paul
Tacoma, Wash.	—	Tacoma
Texarkana, Tex-Ark.	St. Louis	—
Union City, Tenn.	St. Louis	—
Walla Walla, Wash.	—	Portland
Washington, D. C.	Philadelphia	—
Whealing, W. Va.	Chicago	—
Wichita, Kas.	St. Louis	—
Wichita Falls, Tex.	St. Louis	—
	—	Portland

2314 COMMISSION'S EXHIBIT NO. 755.

Directory of Divisions & Stores.

5-1-45.

2315 Paint and Varnish Divisions.

No. 1 The Glidden Company, 1396 Union Commerce
Building, Cleveland 14, Ohio.

Adrian D. Joyce—President.
R. H. Horsburgh—Executive Vice-President.

R. W. Levenhagen—Vice-President.
W. J. O'Brien—Vice-President.
Dwight P. Joyce—Vice-President.
P. E. Sprague—Vice-President.
C. M. Kolb—Secretary.
N. B. Betzold—General Sales Mgr.—
Food Package Prod. Div.
C. E. Carney—Patent Division—
Legal Department.
Glenn Davidson—General Production Mgr.—
Food Divisions.
J. H. Lathe—Sales Mgr.—Chemical &
Pigment Divisions.
J. B. Shepler—Director of Personnel.
J. M. Stadter—General Purchasing Agent.

The Glidden Company, 11001 Madison Avenue,
Cleveland 2, Ohio.

J. A. Peters—Treasurer.
C. L. Cole—Controller.
Alex. D. Duncan—General Manager—
Paint & Varnish Div.
W. W. Conant—Assistant Secretary.
J. H. Weeks—Assistant Controller.
H. W. Caton—General Credit Manager.
C. A. Leach—Insurance Manager.
F. R. Hysell—General Traffic Manager.
B. W. Maxey—Chief Cost Accountant.
J. L. Noon—Manager—Industrial &
Transportation Sales.
L. S. Fulton—Director of Regional
Distribution.
E. L. Weber—Advertising & Sales
Promotion Manager.
L. A. Radloff—Manager of Specialty Sales.
N. C. Martin—Headquarters Manager—
Maintenance Sales.
G. H. Mutersbaugh—General Superintendent
Paint Divisions.
Ed Schulte—Technical Director.
L. H. Wismar—General Stockkeeper.
E. C. Shurtleff—Manager—Industrial Sales
(Cleveland).
R. J. Cusick—Manager—North Central
Trade Sales.

R. J. Kucklick—Manager—South Central Trade Sales.
R. E. Payne—Credit Manager (Cleveland Division)
N. W. Haviland—Superintendent.

No. 2 The A. Wilhelm Company, Third & Bern Streets, Reading, Penna.
F. B. Wickham—Regional Director.
G. B. Work—Eastern Direct Sales Manager.
P. L. Seyler—Trade Sales Manager.
J. E. Fehl—Syndicate Sales Manager.
E. J. Hildebrand—Dry Color Sales Manager.
S. W. Loose—Accountant.
J. L. Sloat—Credit Manager.
R. T. Woomer—Office Manager.
J. W. Ford—Purchasing.
W. F. Heberle—Production Manager.
L. F. Wagner—Technical Director.
Harry E. Graul—Superintendent.
New York Office, Room No. 802, 52 Vanderbilt Ave., New York 17, N. Y.

2316 No. 4 American Paint Works, 424 Josephine Street, New Orleans 8, La.
W. G. Smart—Regional Director.
B. H. Read—Credit Manager.
L. H. Hutchison—Accountant, Cost Accountant.
F. J. Hepting—Purchasing.
H. A. Richard—Superintendent.
W. S. Herner—Assistant Superintendent.

No. 5 Campbell Paint & Varnish Company, Main and Gratiot Sts., St. Louis 2, Mo.
H. L. Slaughter—Regional Director.
R. J. Sandmeyer—Assistant Sales Manager.
F. R. Farris—Office Manager.
Bertha Ridley—Credit Manager.
Roberta Van Doren—Accountant.
Alma Mueller—Cost Accountant.
E. W. Clark—Superintendent.

No. 6 The Glidden Company, 1901 E. Hennepin Ave., Minneapolis 13, Minn.
T. J. Weigand—Regional Director.
B. K. Douglas—Credit Manager, Accountant.
Cora C. Sommer—Cost Accountant.
James B. Small—Superintendent.

No. 9 Nubian Paint & Varnish Co., 1856 No. LeClaire Ave., Chicago 39, Ill.
C. C. Johnson—Regional Director.
Nat Armel—Sales Manager.
Bertel Jonson—Credit Manager.
J. T. Radix—Accountant.
Mrs. A. Tomasek—Cost Accountant.
H. E. Miles—Superintendent.
W. N. Hill—Assistant Superintendent.
C. G. Moore—Manager, Research Laboratory.

No. 12 The Glidden Company, Limited, 382 Wallace Ave., Toronto 9, Ont., Canada.
Charles Morrison—Acting Managing Director.
Harold G. Noonan—Sales Manager.
William A. Kyle—Manager—Industrial Sales.
Frederick R. Stephan—Office and Personnel Manager.
Alexander Sharp—Credit Manager.
H. V. Summers—Accountant.
Wm. J. Boyd—Purchasing.
H. L. Sandford—Superintendent.

No. 14 The Glidden Company, 1300 Seventh Street, San Francisco 7, Calif.
Earl Ehrke—Regional Director.
G. L. Lampman—Sales Manager.
John C. Sparks—Office Manager.
C. W. Hartford—Credit Manager.
R. T. Hall, Jr.—Accountant.
J. N. Cooper—Purchasing.
Sam Uhler—Superintendent.

No. 15 The Glidden Company, 650 Beacon Street, Boston 15, Mass.
R. J. Cushman—Manager.
Miss Dorcas J. Byrnes—Accountant.
E. J. Powers—Credit Manager.

2317 No. 16. The Glidden Company, 4201-11 Tonnelle Ave., North Bergen, N. J.
F. J. Roche—Manager.
Ray Mahr—Credit Manager.

No. 17 Adams & Elting Co., 1833 S. Normal Ave., Chicago 16, Illinois.
Z. G. Peck—Regional Director.
H. V. Zeidler—Office Manager, Credit Manager.

Mildred Gisiner—Accountant.
Moss Jaeger—Sales Manager.
T. Struckmeier—Cost Accountant.
W. A. Beck—Superintendent.
George Wilson—Sales Manager—
Aviation Division.

No. 68 The Glidden Company, 324 Marietta St., N. W., Atlanta 3, Ga. Southeastern Division.
J. L. Beauchamp—Regional Director.
J. L. Davis—Regional Credit Manager,
Accountant.
C. B. Wright—Sales Manager.
Food Divisions.

No. 13 Durkee Famous Foods, Elston Ave. and Logan Blvd., Chicago 47, Illinois.
G. N. Bruce—Manager.
W. L. Dickinson—Oil Buyer and Jobbing Mgr.
H. K. Heath—Credit Manager.
R. C. Elliott—Accountant.
R. A. Lahann—Cost Accountant.
C. D. Couch—Traffic Manager.
L. A. Spielman—Superintendent.

No. 19 Durkee Famous Foods, 2736 N. W. Front St., Portland 10, Oregon.
J. Wymetalek—Superintendent.
Hazel M. Rice—Office Manager.

No. 21 Durkee Famous Foods, 1303 Shelby St., Louiville 1, Ky. (P. O. Box 958).
G. F. Atkinson—Manager.
E. J. DeSpain—Credit Manager.
Charles Dean—Accountant.
C. B. Evans—Cost Accountant.
C. J. Pilson—Traffic Manager.
M. A. Beck—Superintendent.
C. S. Meyer—Sales Manager.

No. 22 Durkee Famous Foods, 2900 Fifth Street, Berkeley 2, Calif.
Newell Beatty—General Manager.
V. H. Creek—Office Manager.
E. C. Arbogast—Credit Manager.
P. L. Brothers, Jr.—Sales Manager—
Refinery & Package Prod.
J. Russell Smith—Sales Manager—
Meal & Crude Oils.

C. E. McMichael—Plant Superintendent.
L. M. Fites—Traffic Manager.

2318 No. 23 Durkee Famous Foods, Corona Ave. and 94th St., Elmhurst, L. I., N. Y.
L. Y. Pulliam—Manager.
E. C. Van Gorder—Credit Manager.
K. L. Overley.—Accountant.
Wm. Crawford—Cost Accountant.
Morris Palmer—Superintendent.
P. D. Hursh—Sales Manager (Package Prod. Divn.).
J. R. Miller—Traffic Manager.
A. Thomas Arpaia—Sales Manager (Shortening & Cottonseed Oil).
Harry Scott Davis—Sales Manager (Cocoanut Oil).
George Main—Assistant Sales Manager, Condiment Dept.
C. R. Spiller—Merchandise Mgr. (Condiment & Cocoanut Divn.).

No. 24 Durkee Famous Foods, 3702 Iron St., Chicago 9, Illinois.
J. A. Califf—Manager.
E. J. Simonek—Office Mgr., Accountant, Cost Accountant.
W. B. McCabe—Credit Manager.
Wm. H. Wunluck—Sales Mgr.—Shortening & Oil.
C. W. Widmer—Sales Mgr. Margarine.
E. W. Miles—Superintendent.

No. 26 Durkee Famous Foods, Norwalk, Ohio.
R. J. Spangler—Sales Mgr.—Spices and Condiments.
L. F. Betzold—Sales Mgr.—Margarine & Shortening.
A. D. Henry—Office Manager, Credit Manager.
A. L. Ruffing—Superintendent.
F. W. Keysor—Accountant.

Chemical and Lead Divisions.

No. 10 The Chemical and Pigment Company, 6401 St. Helena Ave., St. Helena 22, Baltimore, Maryland.
John P. Ruth—Manager.
G. W. Fisher—Accountant.

R. B. Quelos—Sales Manager.
M. A. Palle—Purchasing Agent.

No. 33 The Chemical and Pigment Company, 766 50th Ave., Oakland 1, Calif.
E. L. Ralston—Manager.
W. C. Benson—Accountant.

No. 35 The Chemical and Pigment Company. P. O. Box 191, Collinsville, Ill.
E. R. Williams—Manager.
W. P. Hadley—Accountant, Credit Manager.

No. 27 Metals Refining Company, P. O. Box 309, Hammond, Indiana.
David N. Burruss, Jr.—Manager.
Stella Anderson—Accountant.
Mrs. Charlotte Esslinger—Credit Manager.
Wm. C. Roddy—Sales Manager.
C. W. Wilson—Superintendent.

No. 28 Euston Lead Company, 500 Penn Avenue, Scranton 3, Penna.
A. R. Knight—Manager.
M. R. Ammerman—Accountant, Credit Manager.
R. W. Kreinberg—Superintendent.

2319 No. 37 The Glidden Company, 5165-67 West Moffat Street, Chicago 39, Illinois, Soya Products Division.
P. A. Olson—Manager,
P. L. Julian—Manager—Fine Chemicals Div.,
J. G. Stephan—Office Manager,
W. M. Bain—Sales Manager—Alpha Protein,
A. G. Engstrom—Sales Manager—Hormone Div. and Alpha Protein—Industrial,
R. R. Stigler—Sales Manager—Edible Prod.,
E. A. Buelens—Production Superintendent,
R. A. Doyle—Purchasing.
I. O. Wyberg—Traffic Manager.

No. 38 The Glidden Company, 1160 W. 18th Street, Indianapolis 6, Indiana, Feed Mill Division.
Cecil F. Marsh—General Sales Manager,
W. L. Christman—Assistant Manager, Purchasing,
L. C. Lindenberg—Office Manager,

Earl W. Stark — Superintendent — Edible Dept.,
Carl McWilliams — Superintendent — Feed Dept.

No. 71 Southern Pine Chemical Company, P. O. Box 389, Jacksonville 1, Florida.
E. W. Colledge—Regional Director,
F. R. Ward—Office Manager, Credit Manager,
A. M. Hayes—Accountant.

No. 75 The Glidden Company, Hansen Ave. at Firestone Blvd., Buena Park, Calif., Vegetable Oil Division.
L. C. Barlow—Manager.

No. 76 Nelio Resin Processing Corporation, P. O. Box 389, Jacksonville 1, Florida.
E. W. Colledge—Regional Director,
T. N. Stewart—Auditor.
Nelio Resin Processing Corporation, P. O. Box 799, Valdosta, Georgia.
Carey Speer—Resident Manager,
M. G. O'Neil—Accountant, Office Manager.

No. 77 Yadkin Valley Ilmenite Company, Box 815, Lenoir, N. C.
H. L. Rhodes—Manager.

No. 78 The Chemical and Pigment Company, 6401 St. Helena Ave., St. Helena 22, Baltimore, Maryland, Mining Division.
John P. Ruth—Manager.
G. W. Fisher—Accountant.

No. 79 The Glidden Company, Cartersville, Georgia—Black Ash Division.
H. L. Rhodes—Manager.

2320 The Glidden Company.
Retail Stores.

No. 40 Atlanta 3, Georgia—82 Broad St., N. W.
A. T. Baumgartner—Manager.

No. 41 Birmingham 3, Alabama—2016 First Avenue, North.
F. L. Hambaugh—Manager,
A. M. Rhodes—Credit Manager.

No. 42 Evansville 2, Indiana—10-16 Main Street.
J. R. Giles—Manager,
Miss M. Ritter—Credit Manager.

No. 43 Scranton 3, Penna.—224 Wyoming Avenue.
W. W. Edgerly—Manager,
V. Seamans—Cashier.

No. 44 Miami 32, Florida—55 N. W. First Street.
George D. Sheehan—Manager.

No. 45 West Palm Beach, Florida—300 S. Olive St.
L. C. Driggers—Manager.

No. 46 Oklahoma City 2, Okla.—310 N. W. Second St.
W. H. Evans—Manager.

No. 47 Dallas 2, Texas—1029 Elm Street.
W. L. Woodfin—Manager,
Faye Breashear—Credit Manager.

No. 48 El Paso, Texas—113 N. Stanton Street.
T. A. Lewis—Manager,
Nellie Flanagin—Cashier.

No. 49 Houston 2, Texas—700-2 Travis Street.
H. A. Pace—Manager,
C. H. Powell—Credit Manager.

2321 No. 50 San Antonio 5, Texas—216 W. Commerce Street.
Elgin Klaerner—Manager.

No. 51 St. Petersburg 4, Florida—869 Central Avenue.
J. G. Cunningham—Manager.

No. 52 Jacksonville 2, Florida—50 West Bay Street.
A. E. Swader—Manager.

No. 53 Washington 5, D. C.—1013 12th Street, N. W.
C. E. Caltrider—Manager,
Miss A. R. Bender—Cashier.

No. 54 Fort Worth 2, Texas—605 Throckmorton Street.
W. C. Williams—Manager.

No. 55 Knoxville 10, Tenn.—319 Wall Avenue.
L. H. Williams, Jr.—Manager.

No. 56 Cleveland 12, Ohio—13538 Euclid Avenue.
Frank Harding—Manager.

No. 57 Columbus 15, Ohio—131 E. Long Street.
R. G. Stinchcomb—Manager.

No. 58 Honolulu, T. H.—1235 So. Beretania Street.
W. J. Wilbert—Manager.

No. 59 Baltimore 1, Md.—21 No. Liberty Street.
R. W. Kilcollins—Manager,
Mrs. Virginia B. Daffin—Cashier.

No. 60 Richmond 19, Virginia—109 E. Grace Street.
C. P. O'Connell—Manager.

No. 61 Tampa 2, Florida—815 Florida Avenue.
J. C. Brown—Manager.

2322 No. 62 Buffalo 4, New York—733-735 Main Street.
R. H. Stofer—Manager.

No. 63 Toledo 4, Ohio—201 Summit Street.
Clarence M. Myers—Manager.

No. 64 Detroit 2, Michigan—7502-7506 Woodward Avenue.
J. B. Gillespie—Manager.
F. X. Grimmer—Credit Manager.

No. 65 Orlando, Florida—228 N. Orange Avenue.
R. M. Grover—Manager.

No. 66 Charlotte 2, N. C.—312 S. Tryon Street.
A. L. Metts—Manager.
E. R. Wilson—Cashier.

No. 67 Mobile 12, Alabama—77 Dauphin Street.
J. M. Hull—Manager.

No. 69 Huntington Park, Calif.—6350 Pacific Blvd.
H. K. Hanna—Manager.
Montreal, Quebec—1622 St. Catherine St., W. (The Glidden Company, Limited).
Albert Fauteux—Manager.
C. Sodo—Credit Manager.

2323 COMMISSION'S EXHIBIT NO. 756.

The Glidden Company.

Progress File No. 1945.

1917.

Factories—The Glidden Company, Cleveland, Ohio; The Glidden Company, Ltd., Toronto, Ontario, Canada.

Warehouses—The Glidden Company, Chicago, Illinois; The Glidden Company, New York, N. Y.

Factories.

Paint.

The Glidden Company, Cleveland, Ohio,
The A. Wilhelm Company, Reading, Pennsylvania,
The American Paint Works, New Orleans, Louisiana,
The Campbell Paint & Varnish Co., St. Louis, Missouri,
The Glidden Company, Minneapolis, Minnesota,

Nubian Paint & Varnish Company, Chicago, Illinois,
The Glidden Company, Ltd., Toronto, Ontario, Canada,
The Glidden Company, San Francisco, California,
Adams & Elting Company, Chicago, Illinois.

Food.

Durkee Famous Foods, Elston Avenue, Chicago, Illinois,
Durkee Famous Foods, Iron Street, Chicago, Illinois,
Durkee Famous Foods, Portland, Oregon,
Durkee Famous Foods, Louisville, Kentucky,
Durkee Famous Foods, Norwalk, Ohio,
Durkee Famous Foods, Berkeley, California,
Durkee Famous Foods, Elmhurst, Long Island, New York.

Chemicals, Pigments & Metals.

The Chemical & Pigment Company, St. Helena (Baltimore), Maryland,
The Chemical & Pigment Company, Oakland, California,
The Chemical & Pigment Company, Collinsville, Illinois,
Metals Refining Company, Hammond, Indiana,
Euston Lead Company, Scranton, Pennsylvania.

Naval Stores.

The Glidden Company, Jacksonville, Florida,
Southern Pine Chemical Company, Jacksonville, Florida,
Southern Pine Chemical Company, Pensacola, Florida,
Nelio Resin Processing Corporation, Collins, Georgia,
Nelio Resin Processing Corporation, Jacksonville, Florida,
Nelio Resin Processing Corporation, Valdosta, Georgia.

Soya Products.

The Glidden Company, Chicago, Illinois.

Feed Mill.

The Glidden Company, Indianapolis, Indiana.

Vegetable Oils.

The Glidden Company, Buena Park, California,
The Glidden Company, Berkeley, California,
The Glidden Company, Portland, Oregon.

Mines.

The Glidden Co. Barytes Mines, Battle Mountain, Nevada,
The Chemical & Pigment Company, Micalith Division, Hoke Station, Pennsylvania,
Yadkin Valley Ilmenite Company, Lenoir, North Carolina.

Offices & Warehouses.

Food.

Durkee Famous Foods, Cleveland, Ohio,
Durkee Famous Foods, Pittsburgh, Pennsylvania.
The Glidden Company, Cleveland, Ohio,
The Glidden Company, Boston, Massachusetts,
The Glidden Company, North Bergen, New Jersey,
The Glidden Company, New York, N. Y.

Retail Paint Stores.

Atlanta, Georgia
Birmingham, Alabama
Evansville, Indiana
Scranton, Pennsylvania
Miami, Florida
West Palm Beach, Florida
Oklahoma City, Oklahoma
Dallas, Texas
El Paso, Texas
Houston, Texas
San Antonio, Texas
St. Petersburg, Florida
Jacksonville, Florida
Washington, D. C.
Fort Worth, Texas
Knoxville, Tennessee
Cleveland, Ohio
Columbus, Ohio
Honolulu, Hawaii
Baltimore, Maryland
Richmond, Virginia
Tampa, Florida
Buffalo, New York
Toledo, Ohio
Detroit, Michigan
Orlando, Florida
Charlotte, North Carolina
Mobile, Alabama
Montreal, Quebec
Huntington Park, California
Boston, Massachusetts.

2325 COMMISSION'S EXHIBIT NO. 757.

Euston White Lead in Oil

Premium Zones and Price Differentials Applicable Thereto.

This supersedes previous schedule of differential zones and is effective January 1, 1937.

(a) States in par territory (which take no differential premium) Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Delaware, Ohio, West Virginia, Michigan, Indiana, Illinois, Wisconsin, Kentucky, and District of Columbia.

Exceptions:—Areas in above States which take ⅛¢ advance: Kentucky—Mayfield, Paducah, and Fulton; Illinois—Cairo, Moline, Quincy, and Rock Island; Wisconsin—Eau Claire, LaCrosse, and Superior.

(b) States taking ⅛¢ advance differential—Minnesota, Iowa, Missouri, and Virginia.

Exceptions:—Areas in above States which take no advance differential: Missuori—St. Louis, Clayton, Ferguson, Kirkwood, Manchester, Maplewood, St. Charles, and Webster Groves; Virginia—Arlington County and Fairfax County. Areas in above States which take ¼¢ advance: Virginia—Southwestern section of Virginia including the following counties and points west: Bath, Alleghany, Craig, Montgomery, Floyd, and Carroll.

(c) States taking ¼¢ advance differential. Tennessee, North Dakota, South Dakota, Nebraska, and Kansas.

Exceptions:—Areas in above States which take ⅛¢ advance: Nebraska—Lincoln and Omaha; Kansas—Atchison, Kansas City, and Leavenworth.

(d) States taking ⅜¢ advance differential. North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana and Arkansas.

No exceptions.

(e) States taking ½¢ advance differential. Oklahoma, Colorado and Wyoming.

No exceptions.

(f) State taking ¾¢ advance differential. Texas.

Exceptions:—Area in above State which takes a 1¢ differential: Texas—El Paso.

(g) State taking 1¢ advance differential. New Mexico.

No exceptions.

2382 COMMISSION'S EXHIBIT NO. 768.

January 1st, 1941.

Montgomery Ward & Company,
Chicago Avenue & Larrabee Street,
Chicago, Illinois.

Gentlemen:

We desire to confirm our arrangement with you whereby we agree to sell and ship and you agree to purchase and accept 300 tons (2,000 pounds to the ton) of our Strictly Pure White Lead in Oil in lithographed kegs or cans during the period from January 1, 1941, to December 31, 1941, at the following prices, freight prepaid on shipments of 100 pounds or more, and f.o.b. our warehouse on shipments of less than 100 pounds. Terms are net thirty days.

Prices—On shipments into the base zones shown on the attached sheet showing the zones and price differentials hereto attached and marked "Exhibit A:"

In lithographed kegs and cans		In black kegs labeled	
100# kegs	$ 8.80 per 100#	100# kegs	$ 8.75 per 100#
50# kegs	9.05 per 100#	50# kegs	9.00 per 100#
25# kegs	9.30 per 100#	25# kegs	9.15 per 100#
5# cans	10.75 per 100#		
1# cans	12.20 per 100#		

The above prices will be increased by the differentials shown on "Exhibit A" when shipments are made into zones other than the base zones.

We will invoice said White Lead in Oil to your stores and warehouses at the following base prices to which will be added the zone differentials shown on the attached "Exhibit A."

100# kegs	$ 9.55 per 100#
50# kegs	9.80 per 100#
25# kegs	10.05 per 100#
5# cans	11.55 per 100#
1# cans	13.05 per 100#

We will credit your account as soon as possible after the close of each month with the difference between the price at which said White Lead in Oil is invoiced to your stores and warehouses and our direct base selling price to you.

The direct base selling price to you and the base selling price to your stores and warehouses shall be subject to change at all times during the life of this contract, either up or down, in accordance with the standard lead companies' prices.

We will make shipments under this arrangement from the following factories and warehouses:

Cleveland, Ohio
New Orleans, Louisiana
Houston, Texas
Minneapolis, Minnesota
Chicago, Illinois
St. Louis, Missouri
Scranton, Pennsylvania

It is understood between us that you will furnish us with written specifications within thirty days showing the proportion of 150 tons that will be packed in 100, 50 and 25 pound kegs, five and one pound cans, and specifications for the balance by July 1, 1941, and if our output of White Lead in Oil is not oversold during the period from January 1, 1941, to December 31, 1941, we will sell you up to 50 tons of our Strictly Pure White Lead in Oil in addition to the 300 tons specified herein on the same terms and conditions.

2383 It is understood that if for any reason this contract is not completed by you, all empty kegs and cans bearing your label will be purchased by you at our actual cost of said kegs and cans. It is provided, however, that you will not be required to accept empty kegs or cans in any amount in excess of quantity agreed upon in this contract.

It is also understood that if this arrangement is not renewed you will buy from us all empty cans and kegs bearing your label at termination of this contract provided, however, that said amount does not exceed 20% of your 1940 purchases, and that you will purchase from us all the stock of your specially labeled lead located in our warehouses listed above up to 40 tons.

It is also understood that fires, strikes, accidents and all other causes beyond our control will absolve us from making any and all shipments under this arrangement while such disability exists, and that you will refrain from referring to us or our division, Euston Lead Company, as the producers of said White Lead in Oil. It is also understood that if for any reason we are unable to make shipments to you, you will then be entitled to order your lead elsewhere and deduct from the 300 ton contract requirements of the amount of lead which you are forced to order elsewhere.

It is also understood that any tax or other governmental charge upon the production and/or sale and/or shipment of said White Lead in Oil imposed by the Federal, State or Municipal authorities and hereafter becoming effective within the life of this contract shall be added to the price herein provided and shall be paid by you unless otherwise agreed in writing.

If the arrangement, as outlined in this letter, is satisfactory to you, we will appreciate your signing and returning the attached copy of this letter.

Yours very truly,
Heath & Milligan Manufacturing Company
(Division of The Glidden Company)
By Z. G. Peck,
Regional Director.

Agreed and Accepted: Montgomery Ward & Company.
By C. D. Ryan,
Vice President.

COMMISSION'S EXHIBIT NO. 769.

December 29, 1942.

Montgomery Ward & Company,
Chicago Avenue & Larrabee Street,
Chicago, Illinois.

Gentlemen:

In confirmation of our arrangement with you whereby we agree to sell and ship and you agree to purchase and receive 300 tons (2,000 pounds to the ton) of our Strictly Pure White Lead in Oil manufactured for sale in lithographed kegs or cans or other available packages either furnished by you or of the same general type and kind as we may be using for our own business, during the period from January 1, 1943 to December 31, 1943, at the following prices, freight prepaid on shipments of 100 pounds or more, and f.o.b. our warehouse on shipments of less than 100 pounds. Terms are net thirty days.

Prices—On shipments into the base zones shown on the attached sheet showing the zones and price differentials hereto attached and marked "Exhibit A:"

In lithographed kegs and cans

100# kegs	$ 9.80 per 100#
50# kegs	10.05 per 100#
25# kegs	10.30 per 100#
5# cans	11.75 per 100#
1# cans	13.20 per 100#

Such stocks of White Lead in Oil filled in black kegs, labeled, as we now have on hand at Scranton, Pennsylvania and at our branch warehouse points, will be supplied at the following prices:

In black kegs labeled

100# kegs	$ 9.75 per 100#
50# kegs	10.00 per 100#
25# kegs	10.15 per 100#

The above prices will be increased by the differentials shown on "Exhibit A" when shipments are made into zones other than the base zones.

We will invoice said White Lead in Oil to your stores and warehouses at the following base prices to which will be added the zone differentials shown on the attached "Exhibit A".

100# kegs	$10.55 per 100#
50# kegs	10.80 per 100#
25# kegs	11.05 per 100#
5# cans	12.55 per 100#
1# cans	14.05 per 100#

We will credit your account as soon as possible after the close of each month with the difference between the price at which said White Lead in Oil is invoiced to your stores and warehouses and our direct base selling price to you.

The direct base selling price to you and the base selling price to your stores and warehouses quoted above shall be subject to change at all times during the period from
2385 the date of this letter to December 31, 1943, either up
or down, in accordance with the standard lead companies' prices and changes in our standard base prices generally, and shall be adjusted on a proportional basis.

We will make shipments under this arrangement from the following factories and warehouses:

Cleveland, Ohio
New Orleans, Louisiana
Houston, Texas
Chicago, Illinois
St. Louis, Missouri
Scranton, Pennsylvania
Minneapolis, Minnesota,

It is understood between us that you will furnish us with written specifications within thirty days showing the proportion of 150 tons of said White Lead in Oil, that will be packed in 100, 50, and 25 pound bags, five and one pound cans, and specifications for the balance by July 1, 1943, and if our output of White Lead in Oil is not oversold during the period from January 1, 1943, to December 31, 1943, we will sell you up to 50 tons of our Strictly Pure White Lead in Oil in addition to the 300 tons specified herein on the same terms and conditions. It is understood also that we shall be under no obligation to ship more than a pro rata quantity during any one month.

It is understood that if for any reason this contract is not completed by you, all empty kegs, cans, or packages bearing your label will be purchased by you at our actual cost of said kegs, cans, or packages, provided, however, that you will not be required to accept empty kegs, cans, or packages in any amount in excess of quantity agreed upon in this contract.

It is also understood that if this arrangement is not renewed you will buy from us all empty kegs, cans, and packages bearing your label at termination of this contract provided, however, that said amount does not exceed 20% of your 1942 purchases, and that you will purchase from us all the stock of your specially labeled lead located in our warehouses listed above up to 100 tons.

It is also understood that fires, strikes, floods, the elements, explosion, war, riot, insurrection, embargoes, acts of God or the public enemy, labor troubles, delays of vendors or in transportation, inability to obtain or produce said White Lead in Oil or the material from which it is manufactured, inability to obtain containers for said White Lead in Oil or transportation facilities, accidents, acts of Governmental authorities and all other causes beyond our control will absolve you and ourselves from liability for failure to make shipments or receive the same under this arrangement while such disability exists and the quantities which were to be delivered or received during such contingency may be cancelled by either of us without affecting the validity of this contract or deliveries to be made or received after the contingency is past.

It is also understood that you will refrain from referring to us or our Division, Euston Lead Company, as the producers of the White Lead in Oil. It is also understood that if for any reason we will be unable to make shipment to you, you will be entitled to order your lead elsewhere and deduct from the 300 ton contract the amount of lead you are forced to order elsewhere.

This contract shall be subject to all of the priorities, orders and regulations of the United States Government or any of its agencies and the Seller, subject to the conditions hereof, shall have the right at its option to modify this contract to conform therewith in any respect, including an increase in the prices provided for herein to the maximum prices fixed by the Government or any agency thereof, provided, however, that it is understood that we will at
no time charge you more than the ceiling price of
2386 said White Lead in Oil, however, nothing herein contained shall require us to sell and ship you White Lead in Oil if the ceiling price therefor would result in our making such sales at a loss.

It is also understood that any tax or other governmental charge upon the production and/or sale and/or shipment of said White Lead in Oil imposed by the Federal, State, Municipal or other government authorities and hereafter becoming effective within the life of this contract shall be added to the prices herein provided and shall be paid by you unless otherwise agreed in writing.

If the arrangement, as outlined in this letter, is satisfactory to you, we will appreciate your signing and returning the attached copy of this letter.

Yours very truly,
Heath & Milligan Manufacturing Company
(Division of The Glidden Company),
By Z G P,
Regional Director.

Agreed and Accepted:
Montgomery Ward & Company,
By C. D. Ryan,
Vice President.
RHB-12/29/42-5

2404 COMMISSION'S EXHIBIT NO. 773.

Cleveland, Ohio June 26, 1945

Mr. John C. Sparks
San Francisco

Dear Mr. Sparks:

The examiner for the Federal Trade Commission has gone through the copies of the invoices which you sent to me covering sales of white lead, and has asked me to return the enclosed copies to you. He would like to have you note on the face of each of the enclosed invoices the gross weight, the freight rate and the total amount of freight on the white lead shipped in each instance.

If possible, this information should be taken from the actual freight bills. If the freight bills are not available, the rate and amount should be figured and a notation made "No Freight Bill".

Please also state whether the shipment was made by rail or by truck.

Where the shipment comprises a local delivery from one of our warehouses or stores, kindly make the notation on the invoice, "No Freight—Local Delivery from Warehouse or Store" as the case may be.

In the case of local deliveries, please state if the delivery was made in our own truck, or by trucking companies hired for the purpose, and to what account the expense of making delivery was charged.

Please send me your price lists on white lead and oil for the following periods:

First quarter—1941
Last quarter—1941
First quarter—1943

These price lists should cover the entire Pacific coast area that you are serving, and should show prices to distributors, dealers, painters, maintenance accounts, railroads, government and any other classes of customers.

We are very anxious to turn these invoices over to the Federal Trade Commission as soon as possible, and will appreciate your giving this matter your early attention. I realize that this is causing you a lot of inconvenience, and I want to thank you for your cooperation.

Clifton M. Kolb.

CMK:LG

2405 COMMISSION'S EXHIBIT NO. 774.

San Francisco July 6, 1945 Mr. Clifton M. Kolb
Cleveland, Ohio

Answering Letter of June 26, 1945

We are enclosing the invoices that you returned to us. We have marked each invoice either with the freight rate, the method of shipment, the gross weight, the amount of the freight bill or have indicated that it is a local delivery or shipped on a Government bill of lading. We have no freight bills on hand at San Francisco so all these rates were obtained from various trucking and railway companies. In the case of local deliveries, the expense paid to us by the trucking companies which are hired for this purpose is charged to the Selling Expense Account Cartage.

We have been unable to find the Price List for the first quarter 1941 and the last quarter 1941 but we are enclosing a copy of our price list for the first quarter 1943.

J. C. Sparks.

JCS/ed

(Due to the fact that we have been unable to find any price list for the first and last quarter 1941, Mr. Ehrke suggested that you may want the National Lead Price List for Pacific Coast Branch which was effective May 28, 1940. He says these prices were the same as ours.)

2511 COMMISSION'S EXHIBIT NO. 797.

(Letterhead of E. I. du Pont de Nemours & Company,
Wilmington 98, Delaware.)

June 21, 1946.

Mr. James D. Ewing
Alexander & Green
120 Broadway
New York, N. Y.

Re: In the Matter of National Lead
Co. et al. FTC Docket No. 5253

Dear Mr. Ewing:

Mr. Joseph Wright of the Federal Trade Commission has advised that return on the subpoena duces tecum served upon William Richter, formerly General Manager of our Fabrics and Finishes Department, could be made by our making available to you for production at the hearing the documents called for therein, together with a statement as to those which cannot be found.

Pursuant to this advice, we submit the following:

Specification No. I: After a diligent search we are unable to locate the original letter dated September 8, 1933 from F. M. Carter, President of National Lead Company, 111 Broadway, New York, New York, addressed to William Richter, or any copy thereof. In view of the date of the letter we believe it was destroyed pursuant to a routine destruction of old correspondence.

Specification No. II: There is enclosed the original contract entered into on February 3, 1938, between National Lead Company and E. I. du Pont de Nemours & Co., Inc., concerning the manufacture and packaging of white-lead-in-oil by National Lead Company for E. I. du Pont de Nemours & Co., Inc.; together with a copy of letter agreement dated January 31, 1940 extending the contract of February 3, 1938 to February 28, 1942 (after diligent search we are unable to locate an original thereof); a letter agreement dated June 26, 1942 amending the contract of February 3, 1938 and extending the term thereof to June 30, 1944; and a letter agreement dated June 26, 1944 extending the said agreement, as amended, to June 30, 1945.

2512 Specification No. III: There is enclosed the original of a letter agreement dated May 4, 1945 extending the agreement of February 3, 1938, as amended on June 26, 1942, for a further twelve months' period, ending June 30, 1946, and which is the contract presently in force between National Lead Company and E. I. du Pont de Nemours & Co., Inc. concerning the manufacture and packaging of white-lead-in-oil by National Lead Company for E. I. du Pont de Nemours & Co., Inc.

Specification No. IV: Our records indicate that the original memoranda and attachments concerning costs of producing white-lead-in-oil by National Lead Company under contract with E. I. du Pont de Nemours & Co., Inc., dated January 6, 1938, prepared by W. F. Malloch were given to one Robert T. Dunn of the Federal Trade Commission by Mr. Richter on July 16, 1943. In any event after a diligent search we are unable to find the originals of said memoranda, and we are enclosing carbon copies thereof.

There are also enclosed photostatic copies of each of the attached documents, it being my understanding with Mr. Wright that it will be agreeable to put the photostatic copies into the record, if they are otherwise admissible, so that the originals may be returned to our files.

We greatly appreciate the cooperation of you and Mr. Wright in this matter, and if we can be of further assistance please advise.

Very truly yours,

Oscar A. Provost.

OAP:D-encls.
CC:

Joseph Wright, Esq.
Federal Trade Commission
Washington, D. C.

Mr. William Richter

2513 E. I. du Pont de Nemours & Co., Inc., Wilmington, Del., as Buyer, hereby agrees to purchase and receive, and National Lead Company, New York, N. Y., as Seller, to manufacture and ship Buyer's total requirements of white lead-in-oil, as specified below, during the period beginning Feb. 3, 1938, and ending Two Years afterward in accordance with the following conditions:

1. The white lead-in-oil furnished under this contract shall be the type known as Heavy Paste or that known as Soft Paste, as order by Buyer. The pigment content of both pastes shall consist of basic lead carbonate, 50% Dutch process and 50% Carter process.

2. For the manufacture of white lead-in-oil Buyer shall supply the required quantity of the materials listed below delivered freight prepaid to Seller's plants:

a. Pig Lead, Corroding grade.

b. Raw Linseed Oil, for the refining of which a charge of 1¢ per pound net shall be made by Seller.

c. Turpentine. To be supplied at Buyer's option. If not so supplied, it shall be furnished by Seller and the quantity used in the white lead-in-oil shipped each month shall be separately invoiced at the end of each month at the Seller's net cost for the month of shipment.

d. Packages. For shipment of all white lead-in-oil covered by this contract.

3. Seller agrees to convert the pig lead supplied by Buyer into basic lead carbonate by the Dutch and the Carter processes of corrosion, furnishing 120 pounds of lead carbonate for each 100 pounds of pig lead so supplied. At the end of each month Seller shall invoice Buyer at the rate of $1.05 for each 100 pounds of lead carbonate shipped during that month from Seller's plants at Brooklyn, N. Y., and West Pullman, Ill., and at the rate of $1.30 for each 100 pounds of lead carbonate shipped during that month from Seller's plant at Melrose, Calif. The lead carbonate content shall be considered as 91% of the net weight of heavy paste, and 89% of soft paste.

2514 4. Seller shall mix and grind the white lead, linseed oil and turpentine in accordance with Buyer's specifications and shall pack and store the white lead-in-oil for shipment as directed by Buyer. For these services Seller shall charge Buyer at the following rates, invoices to be rendered as of the date of actual shipment:

For every 100# of white lead-in-oil packed in	600	lb.	packages	$ .178
	500	"	"	.178
	250	"	"	.195
	100	"	"	.23
	50	"	"	.30
	25	"	"	.40
	12½	"	"	.575
	5	"	"	2.58
	1	"	"	4.60

F. O. B. Seller's manufacturing plants at Brooklyn, N. Y., West Pullman, Ill., or Melrose, Calif., as ordered by Buyer, freight and/or cartage to be paid by Buyer.

5. Payment of all charges against Buyer hereunder shall be made on or before the 10th day of the calendar month next following that in which Seller's invoices are rendered.

6. Fires, strikes, accidents and other causes beyond the control of either party, while operative, shall relieve the party affected thereby from buying or selling hereunder, and corresponding quantities may be cancelled at the option of either upon written notice to the other.

Each delivery shall stand and be treated as a separate sale and if payment is not made in accordance with the terms of this contract, Seller to have the option to cancel the undelivered portion thereof.

The Seller may add to the price or prices stated herein any increase in Seller's cost of the commodities sold hereunder (including increased cost of materials used in the manufacture thereof) caused by (a) taxes or other charges imposed by governmental authority upon the production, sale or transportation of said commodities or materials, (b) compliance with agreements, codes or licenses made or issued pursuant to Federal or State legislation. If Buyer is unwilling to accept any such increase as computed by Seller, Buyer shall have the right to terminate this contract by giving Seller written notice within ten days after receipt of Seller's notice of increase in price.

National Lead Company,
By Harold Rowe,
Asst. to Pres.
Date Feb. 3, 1938.

E. I. du Pont de Nemours & Company, Inc.,
By E. H. Hawkins,
Pur. Agt.

Date Feb. 3, 1938.

2515 (Original Letter With Basic Lead Carbonate, Dry and Basic Lead Carbonate, Grinders'.)

National Lead Company
111 Broadway
New York

Harold Rowe
Vice President

January 31, 1940.

E. I. duPont de Nemours & Co., Inc.
Wilmington, Delaware

Attention of Mr. E. B. Melson, Div. Pur. Agt.

Gentlemen:

On February 3, 1938, contracts were executed by your company and ours under which we have been supplying, since that date, your requirements of Basic Lead Carbonate—Dry, Basic Lead Carbonate—Grinders', and White Lead-in-Oil. These agreements expire on February 2, 1940.

As stated to you in our recent conversation, we shall be pleased to renew the contracts for the period beginning February 3, 1940 and ending February 28, 1942. It is our understanding that this is your desire.

If agreeable to you we shall consider acknowledgment and acceptance of this letter as evidence that the contracts shall continue in effect until February 28, 1942, all other terms and conditions remaining unchanged.

We wish to take this opportunity to express our appreciation of the privilege of serving your company. Please be assured that a relationship covering a period of so many years which has built up such a feeling of confidence and friendship is highly valued by us.

Yours very truly,
National Lead Company,
(s) Harold Rowe,
Vice President.

E. I. duPont de Nemours & Co.,
E. H. Hawkins,
Purchasing Agent.

J.P.E.
2/1/40

2516

National Lead Company
111 Broadway
New York

Harold Rowe
Vice President

June 26, 1942.

Mr. E. B. Melson, Div. Pur. Agt.
E. I. du Pont de Nemours & Co., Inc.
Wilmington, Delaware.

Dear Mr. Melson—

This is to confirm the agreement arrived at in our conference yesterday with Mr. Richter and Mr. Elliott with reference to the contracts under which National Lead Company has been furnishing E. I. du Pont de Nemours & Co., Inc., their requirements of white lead products since February 3, 1938. It is our understanding that those contracts are now to continue in force up to and including June 30, 1944, the terms and conditions to remain as originally written with the exception of certain minor changes noted below.

Contract Covering White Lead-in-Oil in Kegs.

The following paragraphs shall be substituted for those bearing corresponding numbers in the original contract.

1. The white lead-in-oil furnished under this contract shall be the type known as Heavy Paste or that known as Soft Paste, as ordered by Buyer. The pigment content of both pastes shall consist of basic lead carbonate of the same quality as Seller furnishes to its own trade.

2-c. Turpentine or Mineral Spirits, as specified by Buyer. To be supplied at Buyer's option. If not so supplied, it shall be furnished by Seller and the quantity used in the white lead-in-oil shipped each month shall be separately invoiced at the end of each month at the Seller's net cost for the month of shipment.

4. Seller shall mix and grind the white lead, linseed oil and turpentine (or mineral spirits) in accordance with Buyer's specifications, and shall pack and store the white lead-in-oil for shipment as directed by Buyer. For
2517 **these services Seller shall charge Buyer at the following rates:**

June 26, 1942

Mr. E. B. Malson, Div. Pur. Agt.
E. I. du Pont de Nemours & Co., Inc.,
Wilmington, Delaware.

For every 100# of white lead-in-oil packed in

600 lb. packages	$ .178
500 " "	.178
250 " "	.195
100 " "	.23
50 " "	.30
25 " "	.40
12½ " "	.575
5 " "	2.58
1 " "	4.60

F. O. B. Seller's manufacturing plants at Brooklyn, N. Y., West Pullman, Ill., or Melrose, Calif., as ordered by Buyer, freight and/or cartage to be paid by Buyer.

Memorandum invoices shall be rendered as of the date of shipment, and one bill with extensions at the end of each month covering all deliveries made during that month.

5. Payment of all charges against Buyer hereunder shall be made on or before the 15th day of the calendar month next following that for which Seller's invoices are rendered.

6. Fires, strikes, accidents and other causes beyond the control of either party, while operative, shall relieve the party affected thereby from buying or selling hereunder, and corresponding quantities may be cancelled at the option of either upon written notice to the other.

Each delivery shall stand and be treated as a separate sale and if payment is not made in accordance with the terms of this contract, Seller to have the option to cancel the undelivered portion thereof. The Buyer shall reimburse the Seller for all taxes, excises or other charges which the Seller may be required to pay to any Government (national, state or municipal) upon the sale, production or transportation of the commodities sold hereunder.

Contract Covering Dry White Lead and Grinders' Lead.

The only change is revising Section 5 to read the same as Section 6 in the "White Lead-in-Oil in Kegs" contract mentioned above.

Local deliveries of DuPont white lead-in-oil from our Brooklyn Plant are frequently made by our trucks. It has been our practice to charge cartage on the gross weight at

12¢ per pound for Greater New York and 13¢ per pound for Newark. In order to cut down clerical work in your 2518 office and ours we suggest that from July 1st the rate on all such deliveries be 13¢ per pound on the net weight. That will do away with the necessity of showing gross weights on our monthly invoice and your having to check them.

We trust that all the above is in accordance with your understanding. If so will you kindly approve one of the two copies and return it for our file. The changes will then be put into effect on July 1, 1942. We look forward to a continuation of the association which has been such a pleasant one for us during the past many years.

Yours very truly,
Harold Rowe,
Vice President.

E. I. Du Pont de Nemours & Company,
Theo. Mottig,
Director of Purchases.

EBM 7/8/42
HR:EH
JPE 7/6/42

2519 National Lead Company
111 Broadway
New York
Zone 6

Harold Rowe
Vice President

June 26, 1944.

Mr. E. B. Melson, Div. Pur. Agt.
E. I. du Pont de Nemours & Co., Inc.
Wilmington 98, Delaware.

Dear Mr. Melson—

Referring to our conversation at your office on June 23rd regarding the contract between E. I. duPont deNemours & Company, Inc., and National Lead Company, covering your requirements of white lead products, this letter is to confirm our offer to continue for the twelve months' period beginning July 1, 1944, and ending June 30, 1945, the agreement which has been in effect for the past two years as outlined in our letter to you of June 26, 1942, and accepted in your reply of July 8, 1942. We understand that it is satisfactory to your company to make the extension in this manner without the necessity of writing a new contract. If such is the case will you kindly let us have your acknowledgment.

We are pleased to have the opportunity to furnish your white lead for the coming year and regret that under present conditions we are unable to commit ourselves beyond that time. Assuring you of our appreciation of your many courtesies,

Yours very truly,

Harold Rowe.

E. I. du Pont de Nemours & Company,
E. H. Hawkins,
Purchasing Agent.

HR: EH

Accepted 6/29/44

JOE 6/25/44 AKB 6/28/44

2520

National Lead Company.
111 Broadway.
New York, Zone 6.

May 4, 1945.

Harold Rowe, Vice-President.

Mr. E. B. Melson, Div. Pur. Agt.,
E. I. du Pont de Nemours & Co., Inc.,
Wilmington 98, Delaware.

Dear Mr. Melson—

On June 26, 1942, we wrote you outlining the terms of the contracts under which it would be agreeable for National Lead Company to furnish E. I. du Pont de Nemours & Company, Inc., with its requirements of white lead products, such contracts to continue in force up to June 30, 1944. Your acceptance was sent to us under date of July 8, 1942. This arrangement was extended for the current twelve months' period ending June 30, 1945, as per our letter of June 26, 1944, and yours of the 29, 1944.

This will confirm our telephone conversation this morning in which we offered to continue the present contracts for the year beginning July 1, 1945, and ending June 30, 1946. If that is in accordance with your wishes will you kindly approve and return to us the duplicate copy of this letter which is attached.

Assuring you of our appreciation of the opportunity to supply your requirements,

Yours very truly,
Harold Rowe.

Accepted 5-9-45.
E. I. du Pont de Nemours & Company,
E. H. Hawkins,
Director of Purchases.

HR:EH
J.P.E. 5/9/45

2[illegible]21 January 6, 1938.

White Lead Contracts.
National Lead Company.

Introduction:

Late in the Summer of 1937, it was agreed between Mr. Richter and representatives of the National Lead Company that new contracts for basic carbonate white lead, dry and in oil, would be written which would increase payments to National over those which would have been made under the 1924 contract by not more than $25,000 per year on the basis of materials equivalent to 2500 tons of dry basic carbonate being taken.

National proposed two contracts—one in which dry lead and the dry lead content of grinders lead in oil would be billed at the card price; the other in which keg lead for sales would be furnished on a straight conversion contract involving a corroding charge of $1.34 per hundred pounds of dry carbonate as against $0.885 under the 1924 contract and an increase of 15 per cent in the differentials for milling, packaging and warehousing.

Execution of the new contracts has been delayed by prolonged discussions as to a practicable method of guaranteeing the $25,000 limitation.

The purpose of this memorandum is to indicate the effect the proposed contracts would have on our cost as compared with what would have resulted under the 1924 contract.

Conclusions:

1. If, as was intended for comparison, it is assumed

that takings of the three types of product under the proposed contracts will be distributed in the same proportions as were the 2367 tons of dry carbonate taken in 1936, corresponding cost increases per year would be as follows:

	Based on 1936 prices		Based on 1937 prices	
	2367 Tons	2500 Tons	2367 Tons	2500 Tons
Dry carbonate	$10,250	$10,826	$ 9,379	$ 9,906
Grinders lead in oil	10,239	10,814	9,022	9,529
Keg lead (paste)	13,799	14,574	13,799	14.574
Total	$34,288	$36,214	$32,200	$34,009

Supporting data and calculations are shown on the following attachments to this memorandum:

Detail I—Synopsis of Proposed Contracts.

Detail II—Distribution of Takings by Types of Product.

2522 Detail III-A—Calculation of Cost Increases Based on 1936 Prices.

B—Calculation of Cost Increases Based on 1937 Prices.

Detail IV—1936 Average Prices—Pig Lead, Dry Carbonate C/L Card Prices and Differential.

Detail V—1937 Average Prices—Pig Lead, Dry Carbonate C/L Card Prices and Differential.

2. If it is assumed that the differential between the prices per hundred pounds for common pig lead and basic carbonate white lead will be the same during the period of these contracts as existed in 1936 and the proposed 15 per cent increase in the differentials for milling, packaging and warehousing is granted, the corroding charge in the proposed conversion contract for keg lead should be no more than $0.96 per hundred pounds of dry carbonate content. Based on the 1937 differential, the corroding charge should be no more than $1.03 per hundred pounds of dry carbonate content of keg lead. Calculations showing how these figures were arrived at are set out in Detail VI attached.

3. Assuming 2500 tons as the total dry carbonate to be taken and that this is distributed among the three classes of product in the same proportions as the actual takings of 2367 tons were distributed in 1936, the increased cost under the proposed contracts over that which would have

resulted under the 1924 contract can be quickly calculated from any assumed prices for pig lead and dry carbonate by the formulae given here:

Let A=C/L card price of dry basic carbonate per one hundred pounds

B=price of corroding quality pig lead per one hundred pounds

C=price of common pig lead per one hundred pounds

Then,

Starting with the price of dry carbonate and the price of common pig lead, the total cost increase in dollars will be

$$IC=20620A-17183C-17503$$

Starting with the price of dry carbonate and the price of corroding quality pig lead, the total cost increase in dollars will be

$$IB=20620A-17183B-15785$$

2523 Derivations of the foregoing formulae are indicated in Detail VII attached.

4. If it is desired to determine what the total dollar increase will be under the proposed contracts as against the 1924 contract for any assumed prices for the dry carbonate and for common or corroding quality pig lead, the cost increase per one hundred pounds or per ton of the dry carbonate content of each of the three types of product involved can first be determined from the formulae given herein. The unit increases so determined may then be weighted by multiplying the unit increase in each case by the ratio that the carbonate content of the type under consideration is to the total equivalent carbonate which it is assumed will be taken and then adding these three results to obtain the unit increase per one hundred pounds or per ton, as the case may be, by which the total equivalent dry carbonate can then be multiplied to obtain the total dollar increase under the assumed conditions.

The formulae for the increase in unit price for each of the types are as follows:

Let A=C/L card price of dry basic carbonate per one hundred pounds.

B=price of corroding quality pig lead per one hundred pounds.

C=price of common pig lead per one hundred pounds

Then,

$$B=C+0.10$$

and the unit increases are

a. Dry Carbonate
Per 100 pounds dry carbonate $= A-0.833C-1.348$
Per ton dry carbonate $=20A-16.67C-26.96$
b. Grinders Lead in Oil
Per 100 pounds dry carbonate $= A-0.833C-1.701$
Per ton dry carbonate $=20A-16.67C-34.02$
c. Keg Lead (Paste)
Per 100 pounds dry carbonate $=$ 0.496
Per ton dry carbonate $=$ 9.920

Derivations of these formulae are shown in detail VIII attached.

2524 5. The following additional conclusions may be drawn:

a. For each change of $0.25 in the price per 100 lbs. of dry carbonate, the cost increase varies directly by $5155;

b. For each change of $0.25 in the price per 100 lbs. of pig lead, the cost increase varies inversely by $4295.

c. For the 1936 distribution between types of product and accepting the proposed 15 per cent increase in milling, packaging and warehousing charges, the permissible corroding charge to limit the increased expense under the proposed contracts to any predetermined amount above the 1924 contract is given by:

$$K=1.936+0.0000341+0.585C-0.702A$$

where,

K=permissible corroding charge
I=the permissible total cost increase (heretofore agreed on as $25,000)
A=C/L card price of dry basic carbonate per 100 lbs.
C=price of common pig lead per 100 lbs.

and when the increase is definitely limited to $25,000, this formula becomes

$$K=2.786+0.585C-0.702A$$

Detail IX attached shows, by examples, application of the formulae heretofore developed and the method of arriving at conclusions herein stated.

W. F. Malloch.

WFM:BL

2525

Detail I

White Lead Contracts—National Lead Company
Synopsis of Proposed Contracts

1. Dry carbonite—Card price f. o. b. National's nearest manufacturing plant; freight allowed to destination, except for South San Francisco a differential of ¼ cent per pound will be added. Barrels included in card price.

2. Grinders lead in oil—Dry carbonate content to be at card price less a package allowance for standard dry lead barrel. Linseed oil and packages to be furnished by du Pont f. o. b. National's plant. Freight allowed to destination on grinders lead in oil.

3. Keg lead (paste)—Dry carbonate content to be 50% Dutch process and 50% Carter process.

Heavy paste—91% total carbonate.

Soft paste—89% total carbonate.

Du Pont to furnish pig lead, linseed oil, turpentine and packages. Carbonate to be supplied at rate of 120 lbs. for each 100 lbs. of pig lead.

Corrosion charge for 100 lbs. of dry carbonate to be $1.34. Milling, packaging an warehousing charges are 15% higher than in previous contract.

WFM:BL
1/6/38.

2526

DETAIL II

WHITE LEAD CONTRACTS—NATIONAL LEAD COMPANY

DISTRIBUTION OF TAKINGS

Product	1936						12 months ending Oct. 31, 1937—Du Pont		
	National			Du Pont					
	Gross Tons	Net Carbonate		Gross Tons	Net Carbonate		Gross Tons	Net Carbonate	
		Tons	%		Tons	%		Tons	%
Dry carbonate.....	408	408	17.84	408.5	408.5	17.14	411.6	411.6	18.39
Grinders lead in oil.	668	568	24.00	669.8	568.9	23.87	569.5	481.1	21.49
Keg lead (Paste)...	1557	1391	58.76	1555.4	1405.7	58.99	1499.8	1345.9	60.12
Totals............		2367	100.00		2383.1	100.00		2238.6	100.00

WFM:BL
1/6/38

2527

DETAIL III

WHITE LEAD CONTRACTS—NATIONAL LEAD COMPANY
CALCULATION OF COST INCREASES

A.—Using 1936 average prices for pig lead and for the card price of dry carbonate.		
1. Dry Carbonate:		
a. Proposed basis—408 tons dry carbonate @ $6.53 per 100 lbs. (C/L card price)		**$53,285**
b. Previous basis		
Lead—340 tons corroding quality lead @ $4.81 per 100 lbs.	**$32,708**	
Corroding charge—340 tons pig lead @ $21.25 per ton	**7,225**	
Milling, packaging, and warehousing—408 tons dry carbonate @ $0.04 per 100 lbs.	**326**	
Packages—408 tons dry carbonate @ $0.1712 per 100 lbs.	**1,397**	
Freight—408 tons dry carbonate @ $0.169 per 100 lbs. (rate includes tare)	**1,379**	
Total of items involved	**$43,035**	**43,035**
c. Indicated increased cost		**$10,250**
2. Grinders Lead in Oil:		
a. Proposed basis:		
Dry carbonate—568 tons @ $6.53 per 100 lbs.		**$74,181**
Less barrel cost—568 tons dry carbonate @ $0.1712 per 100 lbs.		**1,945**
		$72,236
b. Previous basis:		
Lead—Corroding quality, per 100 lbs.	**$ 4.81**	
Corroding charge, per 100 lbs.	**1.0625**	
Total per 100 lbs. pig lead	**$ 5.8725**	
Per 100 lbs. carbonate	**$ 4.893**	
Dry carbonate—568 tons @ $4.893 per 100 lbs.	**55,584**	
2528		
Milling, packaging, and warehousing—668 tons lead in oil @ $0.155 per 100 lbs.	**2,071**	
Freight—668 tons lead in oil @ $0.325 per 100 lbs. (rate includes tare and return freight on empties)	**4,342**	
Total of items involved	**$61,997**	**61,997**
c. Indicated increased cost		**$10,239**
3. Keg Lead (Paste):		
a. Proposed basis:		
Corroding charge—1391 tons carbonate @ $1.34 per 100 lbs.		**$37,279**
Milling, packaging, and warehousing—1557 tons keg lead @ $0.2837 per 100 lbs. (15% increase over previous)		**8,834**
Total of items involved		**$46,113**

b. Previous basis:		
Corroding charge—1391 tons carbonate @ $0.8854 per 100 lbs.	$24,632	
Milling, packaging, and warehousing—1557 tons keg lead @ $0.2467 per 100 lbs.	7,682	
Total of items involved	$32,314	32,314
c. Indicated increased cost		$13,799
4. Summary of increased costs:		
Dry carbonate	$10,250	
Grinders lead in oil	10,239	
Keg lead (paste)	13,799	
Total	$34,288	

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B.—Using ~~1937~~ average prices for pig lead and for the card price of dry carbonate.

1. Dry Carbonate:		
a. Proposed basis—408 tons dry carbonate @ $7.54 per 100 lbs. (C/L card price)		$61,526
b. Previous basis:		
Lead—340 tons corroding quality lead @ $6.15 per 100 lbs.	$41,820	
Corroding charge—340 tons pig lead @ $21.25 per ton	7,225	
Milling, packaging, and warehousing—408 tons dry carbonate @ $0.04 per 100 lbs.	326	
Packages—408 tons dry carbonate @ $0.1712 per 100 lbs.	1,397	
Freight—408 tons dry carbonate @ $0.169 per 100 lbs. (rate includes tare)	1,379	
Total of items involved	$52,147	52,147
c. Indicated increased cost		$ 9,379
2. Grinders Lead in Oil:		
a. Proposed basis:		
Dry carbonate—568 tons @ $7.54 per 100 lbs.		$85,654
Less barrel cost—568 tons dry carbonate @ $0.1712 per 100 lbs.		1,945
		$83,709
b. Previous basis:		
Lead—Corroding quality, per 100 lbs.	$ 6.15	
Corroding charge, per 100 lbs.	1.0625	
Total per 100 lbs. pig lead	$ 7.2125	
Per 100 lbs. carbonate	$ 6.01	
Dry carbonate—568 tons @ $6.01 per 100 lbs.	$68,274	

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Milling, packaging, and warehousing—668 tons lead in oil @ $0.155 per 100 lbs.	2,071	
Freight—668 tons lead in oil @ $0.325 per 100 lbs. (rate includes tare and return freight on empties)	4,342	
Total of items involved	$74,687	74,687
c. Indicated increased cost		$ 9,022

3. **Keg Lead (Paste):**
Since relative market prices of pig lead and carbonate, do not affect comparison of costs under previous and proposed contracts, the indicated increase for keg lead remains at.................. **$13,799**

4. **Summary of increased costs:**

Dry carbonate	$ 9,379
Grinders lead in oil	9,022
Keg lead (paste)	13,799
Total	$32,200

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DETAIL IV

WHITE LEAD CONTRACTS—NATIONAL LEAD COMPANY

1936 AVERAGE PRICES

PIG LEAD, DRY CARBONATE C/L CARD PRICE AND DIFFERENTIAL

Inclusive Dates 1936 From	To	Unit Price Common Pig Lead Per 100 lbs.	Dry Carbonate Per 100 lbs.— C/L	Differential
Jan. 1	Feb. 25	$4.50	$6.50	$2.00
Feb. 26		4.55		1.95
Feb. 27	Oct. 26	4.60		1.90
Oct. 27		4.70		1.80
Oct. 28	Nov. 3	4.80		1.70
Nov. 4		4.90		1.60
Nov. 5	Nov. 9	5.00		1.50
Nov. 10	Nov. 15	5.10		1.40
Nov. 16	Nov. 19	5.20		1.30
Nov. 20	Dec. 10		6.75	1.55
Dec. 11	Dec. 13	5.30		1.45
Dec. 14		5.40		1.35
Dec. 15	Dec. 20	5.50		1.25
Dec. 21	Dec. 31	6.00		0.75
Averages		$4.71	$6.53	$1.82
Add corroding quality differential		0.10		
Average price corroding pig lead		$4.81		

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DETAIL V

WHITE LEAD CONTRACTS—NATIONAL LEAD COMPANY

1937 AVERAGE PRICES

PIG LEAD, DRY CARBONATE C/L CARD PRICE AND DIFFERENTIAL

Inclusive Dates 1937		Unit Price Common Pig Lead Per 100 lbs.	Dry Carbonate Per 100 lbs.—C/L	Differential
From	To			
Jan. 1	Feb. 17	$6.00	$7.25	$1.25
Feb. 18		6.25		1.00
Feb. 19	Feb. 22	6.50		0.75
Feb. 23	Feb. 24		7.75	1.25
Feb. 25	Mar. 7	7.00	8.25	1.25
Mar. 8		7.25		1.00
Mar. 9		7.50		0.75
Mar. 10	Mar. 15	7.75	9.00	1.25
Mar. 16		7.50		1.50
Mar. 17	Mar. 18	7.25		1.75
Mar. 19	Mar. 22	7.00		2.00
Mar. 23	Apr. 1	6.95		2.05
Apr. 2	Apr. 6	6.90		2.10
Apr. 7		6.00		3.00
Apr. 8	Aug. 3		7.25	1.25
Aug. 4		6.25		1.00
Aug. 5	Aug. 30	6.50		0.75
Aug. 31	Sept. 23		8.00	1.50
Sept. 24	Sept. 26	6.25		1.75
Sept. 27	Oct. 14	6.00		2.00
Oct. 15	Oct. 17	5.75		2.25
Oct. 18		5.50		2.50
Oct. 19	Nov. 2		7.50	2.00
Nov. 3		5.25		2.25
Nov. 4	Nov. 29	5.00		2.50
Nov. 30	Dec. 15		6.75	1.75
Dec. 16	Dec. 21	4.75		2.00
Averages		$6.05	$7.54	$1.49
Add corroding quality differential		0.10		
Average price corroding pig lead		$6.15		

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DETAIL VI

WHITE LEAD CONTRACTS—NATIONAL LEAD COMPANY

PERMISSIBLE INCREASE IN CORRODING CHARGE TO LIMIT COST INCREASE TO $25,000

In these calculations, it is assumed that the costs for dry carbonate as such and for grinders lead in oil will be as covered by the latest contract proposal for these items and that, in the conversion contract for keg lead, the differentials for milling, packaging and warehousing will be as covered by the latest proposal for that product; i. e., 15 per cent greater than in the 1924 contract.

Starting with the permissible increase of $25,000 and deducting the indicated increases for dry carbonate, grinders lead in oil and the milling, packaging and warehousing, the balance is the amount remaining which can be applied to the corroding charge in the conversion contract.

All figures have been computed on the basis of 2500 tons of dry carbonate per year.

	Based on 1936 prices		Based on 1937 prices	
Permissible increase		$25,000		$25,000
Deduct:				
Dry carbonate increase	$10,826		$ 9,906	
Grinders lead in oil increase	10,814		9,529	
Keg lead increase, excluding corroding charge	1,217		1,217	
Totals, these increases	$22,867	22,867	$20,652	20,652
Balance of permissible increase available for increased corroding cost for 1469 tons carbonate content of keg lead		$ 2,133		$ 4,348
Corroding cost, previous basis		26,016		26,016
Total available for corroding 1469 tons of dry carbonate required for keg lead		$28,149		$30,364
Corroding charge per 100 lbs., available if increased cost of all lead is limited to $25,000 based on 2500 tons of dry carbonate per year				
$\frac{\$28,149}{20 \times 1469} =$		$ 0.96		
$\frac{\$30,364}{20 \times 1469} =$				$ 1.03
Corroding charge proposed by National Lead Co. per 100 lbs. dry carbonate in keg lead		$ 1.34		$ 1.34

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DETAIL VII

WHITE LEAD CONTRACTS—NATIONAL LEAD COMPANY

DERIVATION OF FORMULAE FOR DETERMINING INCREASED COSTS UNDER PROPOSED CONTRACTS vs. 1924 CONTRACT

These formulae are based on total takings of the three types of product being equivalent to 2500 tons of dry basic carbonate and the total quantity being distributed among the three types of product in the same proportions as during the calendar year 1936.

The constants used to cover charges for corroding, milling, packaging, warehousing, packages and freight are those indicated in Detail II, A and B, adjusted to the basis of 2500 tons total.

In these derivations, let

A = C/L card price of dry basic carbonate, per 100 lbs.

B = Price of corroding quality pig lead, per 100 lbs.

C = Price of common pig lead, per 100 lbs.

from which,

$$B = C + 0.10$$

Distribution of quantities involved is as follows:

Commodity.	1936 Actual Commodity, Tons	1936 Actual Equivalent Dry Carbonate Tons	1936 Actual Equivalent Dry Carbonate %	2500 Tons of Equivalent Dry Carbonate
Dry carbonate	408	408	17.24	431
Grinders lead in oil......	668	568	24.00	600
Keg lead (paste).......	1469	1391	58.76	1469
	2545	2367	100.00	2500

A.—Formula for working directly from prices of common pig lead and dry carbonate.

1. Dry Carbonate:

a. Proposed basis—$431 \times 20 \times A = 8620\,A$

b. Previous basis

Lead content — $\dfrac{431 \times 20 \times (C + 0.10)}{1.2} = 7183C + 718$

Corroding	7225
Milling, packaging and warehousing	326
Packages	1397
Freight	1379
Total processing, etc.	10327

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Pro-rating to 2500 tons $= \dfrac{2500 \times 10327}{2367} =$ 10,907

Total all items affected $= 7183C + 11{,}625$

c. Increase $= 8620A - 7183C - H625$

2. Grinders Lead in Oil:

a. Proposed basis

$$\begin{array}{lcl} \text{Dry carbonate} & -\ 600 \times 20 \times A = & 12\,000\,A \\ \text{Less barrel cost} & -\ \dfrac{2500 \times 1945}{2367} = & 2\,054 \end{array}$$

Net of these items $= 12000\,A + 2054$

b. **Proposed basis**

Lead—Corroding quality, per 100 lbs. = B = C + 0.10

Corroding charge, per 100 lbs. = 1.0625

Total per 100 lbs. of pig lead = C + 1.1625

Per 100 lbs. of carbonate—

$$\frac{C + 1.1625}{1.2} = 0.8333C + 0.9688$$

Dry carbonate—

600 x 20 x (0.8333 C + 0.9688) = 10000C + 11,625

Milling, packaging and warehousing 2071

Freight 4342

Total processing, etc. 6413

$$\text{Pro-rating to 2500 tons} = \frac{2500 \times 6413}{2367} = 6733$$

Total all items affected = 10000C + 18398

c. Increase = 12000A — 10000C — 20452

3. Keg Lead (Paste):

Increase for 2367 tons (Detail III) = 13799

$$\text{Pro-rating to 2500 tons} = \frac{2500 \times 13799}{2367} = 14574$$

4. Total Increase:

Dry carbonate	=	8620 A — 7183C — 11625
Grinders lead in oil	=	12000 A — 10000C — 20452
Keg lead (paste)	=	+ 14574
Total increase	=	20620 A — 17183C — 17503

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B.—Formula for working directly from prices of corroding quality pig lead and dry carbonate.

1. Dry Carbonate:

a. Proposed basis— 431 x 20 x A = 8620 A

b. Previous basis

$$\text{Lead content—} \quad \frac{431 \times 20 \times B}{1.2} = 7183\ B$$

Total processing, etc., pro-rated to 2500 tons as in A-1-6, above = 10907

Total all items affected = 7183 B + 10,907

c. Increase = 8620 A — 7183B — 10907

2. Grinders Lead in Oil:

a. Proposed basis

Dry carbonate— 600 x 20 x A = 12000 A

Less barrel cost as in A-2-a, above = 2054

Net of these items = 12000 A — 2054

b. Previous basis

Lead—Corroding quality, per 100 lbs. = B

Corroding charge, per 100 lbs. = 1.0625

Total per 100 lbs. of pig lead = B + 1.0625

Per 100 lbs. of carbonate—

$$\frac{B + 1.0625}{1.2} = 0.8333B + 0.8521$$

Dry carbonate—
600 x 20 x (0.8333B + 0.8521) = 10000B + 10625
Total processing, etc., pro-rated to 2500 tons as in A-2-b, above = 6773
Total all items affected = 10000B + 17398

c. Increase = 12000A — 10000B — 19452

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3. Keg Lead (Paste):
Increase pro-rated to 2500 tons as in 3 above = 14574

4. Total increase:

Dry carbonate	=	8620 A — 7183 B — 10907
Grinders lead in oil	=	12000 A — 10000 B — 19452
Keg lead (paste)	=	+ 14574
Total increase	=	20620 A — 17183 B — 15785

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DETAIL VIII

WHITE LEAD CONTRACTS—NATIONAL LEAD COMPANY

DERIVATION OF FORMULAE FOR INCREASED UNIT COSTS UNDER PROPOSED CONTRACTS vs. 1924 CONTRACT

Let A = C/L card price of dry basic carbonate, per 100 lbs.
B = Price of corroding quality pig lead, per 100 lbs.
C = Price of common pig lead, per 100 lbs.
from which,

$$B = C + 0.10 \quad \text{or} \quad C = B - 0.10$$

1. Dry Carbonate:
a. Proposed basis—
b. Previous basis
Lead— $\frac{B}{1.2} = 0.8333B$
Total processing, etc.— $\frac{10{,}907}{431 \times 20} = 1.265$
Total all items affected = 0.8333 B + 1.265
c. Increase, per 100 lbs. carbonate = A — 0.8333B — 1.265

2. Grinders Lead in Oil:
a. Proposed basis
Dry carbonate = A
Less barrel cost = $\frac{2054}{600 \times 20} = 0.171$
Net of these items = A — 0.171

b. **Previous basis**

Lead— = B

Corroding charge = 1.0625

Total per 100 lbs. of corroding lead = B + 1.0625

Per 100 lbs. of carbonate—

$$\frac{B + 1.0625}{1.2} = 0.8333\ B + 0.8521$$

Total processing, etc.—

$$\frac{6773}{600 \times 20} = 0.5644$$

Total all items affected = 0.8333 B + 1.417

c. **Increase, per 100 lbs. carbonate** = A — 0.8333 B — 1.618

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3. **Keg Lead (Paste):**

Increase, per 100 lbs. carbonate =

$$\frac{14574}{1469 \times 20} = 0.496$$

4. **Summary of Increases:**

a. **Using corroding quality pig lead price**

(1) **Per 100 lbs. dry carbonate**

Dry carbonate = A — 0.8333 B — 1.265

Grinders lead in oil = A — 0.8333 B — 1.618

Keg lead (paste) = 0.496

(2) **Per Ton dry carbonate**

Dry carbonate = 20 A — 16.67 B — 25.30

Grinders lead in oil = 20 A — 16.67 B — 32.36

Keg lead (paste) = 9.92

b. **Using common pig lead price (from a, above, and B = C + 0.10)**

(1) **Per 100 lbs. dry carbonate**

Dry carbonate = A — 0.833 C — 1.348

Grinders lead in oil = A — 0.833 C — 1.701

Keg lead (paste) = 0.496

(2) **Per Ton dry carbonate**

Dry carbonate = 20 A — 16.67 C — 26.96

Grinders lead in oil = 20 A — 16.67 C — 34.02

Keg lead (paste) = 9.92

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DETAIL IX

WHITE LEAD CONTRACTS—NATIONAL LEAD COMPANY

EXAMPLES OF APPLICATION OF THE FORMULAE

Example I—Effect of a change of $0.25 per 100 lbs. in the differential on the increased cost under the proposed contracts.

Increase, I = 20,620A — 17183C — 17503 (see Detail VIII—A-4).

		1.	2.	3.	4.
Dry carbonate	A =	7.54	7.54	7.29	7.64
Corroding Pig Lead	B =	6.15	5.90	6.15	6.00
Common Pig Lead	C =	6.05	5.80	6.05	5.90
Differential	A-C =	1.49	1.74	1.24	1.74
20620 A	=	$155,475	$155,475	$150,320	$157,537
17183 C	=	103,957	99,661	103,957	101,380
		17,503	17,503	17,503	17,503
17183 C + 17503	=	$121,460	$117,164	$121,460	$118,885
Cost Increase	I =	$ 34,015	$ 38,311	$ 23,860	$ 38,654

Note that,

1. For each change of $0.25 in the price per 100 lbs. of dry carbonate, the cost increase varies directly by $5155;

2. For each change of $0.25 in the price per 100 lbs. of pig lead, the cost increase varies inversely by $4295.

Example II—Determination of the permissible corroding charge per 100 lbs. of dry carbonate in keg lead (paste) in the proposed contracts to arrive at any predetermined cost increase of the total takings under the proposed contracts over which the total cost would have been under the 1924 contract.

Cost Increase = 20,020A — 17183C — 17503 (See Detail VII—A-4).

By referring to the derivation of this formula in Detail VII—A-4, it will be seen that the only element which is affected by a change in the corroding charge for the keg lead portion is the constant 17503.

It will be noted that this constant is the algebraic sum of three constants, as follows:

Dry carbonate	— 11625
Grinders lead in oil	— 20452
Keg lead (paste)	+ 14574
Total	— 17503

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and that any change in the numerical value of the constant for the keg lead portion changes the numerical value of the total constant inversely by the same amount

The constant for the keg lead portion (from Detail II—3-B, pro-rated up to the 2500-ton basis) is made up as follows:

$$\frac{2500\ (37{,}279 - 24{,}632)}{2367} = 13{,}357$$

Corroding—

Milling, packaging, and warehousing—.

$$\frac{2500\ (8{,}834 - 7{,}682)}{2367} = 1{,}217$$

Total = 14,574

The corroding portion is,

$$= \frac{2500\ (1391 \times 20 \times K)}{2367} - \frac{2500 \times 24632}{2367}$$

$$= (1469 \times 20 \times K) - 26016$$

$$= 29380\ K - 26016$$

then, the total constant $= 29380\ K - 24799$

where, K = the corroding charge per 100 lbs. of carbonate in keg lead in the proposed contracts.

The cost increase under the proposed contracts over the cost under the 1924 contract then becomes

$$I = 20620A - 17183C - 11625 - 20452 + 29380K - 24799$$

$$29380K = I - 20620A + 17183C + 56876$$

Then, corroding charge,

$$K = 0.000034I - 0.702A + 0.585C + 1.936$$

$$= 1.936 + 0.000034I + 0.585C - 0.702A$$

		1	2	3	4
Dry carbonate	A =	7.54	7.54	7.29	7.64
Common pig lead	C =	6.05	5.80	6.05	5.90
Differential	A-C =	1.49	1.74	1.24	1.74
If I = $25,000,					
		$ 1.936	$ 1.936	$ 1.936	$ 1.936
0.000034I		.850	.850	.850	.850
0.585C		3.539	3.393	3.539	3.452
Total		$ 6.325	$ 6.179	$ 6.325	$ 6.238
0.702A		5.293	5.293	5.118	5.363
Permissible corfoding charge per 100 lbs. dry carbonate	K =	$ 1.032	$ 0.886	$ 1.207	$ 0.875

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		5	6	7	8
Dry carbonate,	A =	6.53	6.53	6.28	6.63
Common pig lead,	C =	4.71	4.46	4.71	4.56
Differential,	A-C =	1.82	2.07	1.57	2.07
If I = $25,000					
		$ 1.936	$ 1.936	$ 1.936	$ 1.936
0.000034I	=	.850	.850	.850	.850
0.585C	=	2.755	2.609	2.755	2.668
Total		$ 5.541	$ 5.395	$ 5.541	$ 5,454
0.702A	=	4.584	4.584	4.409	4.654
Permissible corroding charge per 100 lbs. of dry carbonate,	K =	$ 0.957	$ 0.811	$ 1.132	$ 0.800

For $25,000 increase, K = 2.786 + 0.585C — 0.702A

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2637 COMMISSION'S EXHIBIT NO. 799.

Lead Pigments Division.

New York, N. Y. July 20, 1933.

A meeting of the Lead Pigments Division of the Lead Industries Association was held at the Lawyers Club, New York City, on Thursday, July 20, 1933 at 9:30 A. M. The following were present:

Present:

F. M. Carter, Chairman. Representing: National Lead Company.

A. E. Bendelari. Representing: Eagle-Picher Lead Company.

R. M. Roosevelt. Representing Eagle-Picher Lead Company.

T. H. Zappert. Representing Euston Lead Company.

R. M. Evans. Representing Evans Lead Company.

W. Parmer Fuller, Jr. Representing W. P. Fuller & Company.

Wm. Wilke, Jr. Representing Hammond Lead Products, Inc.

P. E. Sprague. Representing Metals Refining Company.

Harold Rowe. Representing National Lead Company.

F. E. Wormser, Secretary.

The Chairman expressed his opinion that in view of the opportunity presented by the attendance of out of town members, a discussion of suitable trade practices to incorporate in the Supplementary Code for the Lead Pigments Division would be of great value.

In the discussion which followed some of the subjects presented were, (1) the practice of mailing contracts for lead oxides signed by the seller but not subject to immediate acceptance, (2) accepting contracts for delivery of oxides beyond 30 days after acceptance of the order, or beyond the period in which orders might be covered in the pig lead market, (3) selling old prices on the day of advance in the pig lead market.

So many suggestions were made that the Chairman appointed Mr. R. M. Roosevelt, Mr. Harold Rowe and the Secretary, a Committee to collect additional comment from the members of the Lead Pigments Division within the next twelve days, and called a regular meeting of the Lead Pigments Division for Tuesday, August 8, at the Lawyers Club at 9:45 A. M.

Meeting adjourned at 12 noon.

F. M. Carter,
Chairman,
F. E. Wormser,
Secretary.

2638 COMMISSION'S EXHIBIT NO. 800.

Lead Pigments Division.
Dry Products Committee.

New York, N. Y. August 8, 1933.

A meeting of the Dry Products Committee of the Lead Pigments Division of the Lead Industries Association was held at the Lawyers Club, New York, N. Y., on Tuesday, August 8, 1933 at 10:30 A. M. The following were present:

Present:

Harold Rowe, Chairman. Representing National Lead Company.
J. R. MacGregor. Representing: Eagle-Picher Lead Company.
R. M. Roosevelt. Representing: Eagle-Picher Lead Company.
R. M. Evans. Representing: Evans Lead Company.
P. E. Sprague. Representing: Metals Refining Company.
F. M. Carter. Representing: National Lead Company.
S. B. Coolidge, Jr. Representing Sherwin-Williams Company.
F. E. Wormser, Secretary.
R. L. Ziegfeld, Assistant Secretary.

Mr. Harold Rowe occupied the chair.

A summary of suggestions previously offered by members for consideration and a tentative draft of a Code of Fair Competition for dry pigments compiled by Mr. Sprague were submitted for consideration.

Mr. Roosevelt suggested that the simplest method would be to formulate a code requiring that each member file a price list of his selling practices with the Secretary of the Lead Industries Association to be effective ten days after filing and immediately published to all members by the Secretary, allowing other members to file a new list immediately, effective at the same time, if they so desired, and providing that any deviation from the filed lists be violations of the Code.

The other suggestions were then considered in detail and the following paragraphs to be included in a Code of Fair Competition were tentatively adopted to apply to Lead Oxides:

1. Red lead over 90% true red lead shall be sold at the following premiums over grades with lower true red lead content:

90% to 98% true red lead	$.25 per cwt.
98% and over true red lead	$.50 per cwt.

2. Only two grades of guaranteed red lead shall be sold, i. e., grinders red lead guaranteed 95% and red lead guaranteed 98%. Under 95% red lead may be labeled as desired.

2639 3. Price shall be a differential over the lead market in effect on (a) the date sale is made, or (b) some future date, or (c) the average during some future period, the basis to govern to be specified at the time each sale is made.

4. American Smelting & Refining Company's official price shall govern all spot sales, but either the A. S. & R. or Engineering and Mining Journal price may be used for average price contracts. The metal basis for spot orders on any day shall be the A. S. & R. price in effect at the close of business on the previous day.

5. Carload sales shall consist of at least one minimum carlot as defined in freight tariffs in effect on date of sale for freight movements from Members' shipping point to point where Buyer accepts delivery. Trust delivery of carload orders must be completed within three days from start of delivery.

6. On spot sales delivery or billing shall be complete in 30 days from date of sale.

7. As agreed between Member and Buyer, always with reasonable notice to Member, and in the case of sales on an average market basis, Member shall require Buyer to specify amount to be supplied on said basis prior to the beginning of the period whose average governs the price, and such sale is to constitute a firm sale. Deferred deliveries are to be billed on the basis originally applicable to the sale and additional requirements are to take the spot price.

8. Terms shall be 1% for cash not beyond 10 days from date of shipment and net cash 30 days from date of shipment.

9. Delivery place shall be F. O. B. Member's shipping point.

10. Freight shall be equalized with the nearest manufacturing point, with allowance of actual carload rate up to 40¢ per 100 lbs., rail tariffs to govern.

11. Any tax or other governmental charge upon the production and/or sale and/or shipment of products of this Division imposed by the Federal authorities and hereafter becoming effective within the life of a sales contract shall be added to the price provided in the contract and shall be paid by the buyer.

12. The price paid for l. c. l. shipments shall be a flat price established by the seller.

13. Nothing in any part of the Code shall be deemed to hamper full freedom of action of any Member in settling accounts or extending delivery with buyers whose credit position may require special action or adjustment.

14. Maximum allowance to customers using their own carriers shall be the regular tariff rate.

15. No allowance shall be made for warehousing in customer's warehouses unless they are recognized commercial warehouses.

16. No allowance shall be made for cartage in excess of 10¢ per 100 lbs. except in New York metropolitan district and any in excess of this amount shall be reported to the Secretary.

2640 17. No rebate on customers' stocks shall be allowed on account of price decline.

18. Options given to bidders on bid business shall be contingent upon award of the contract to the bidder.

19. On Government bids and on railroad (and industrial) business the following package differentials over l. c. l. barrel prices are hereby established:

100 lb. kegs	$0.50
50 lb. kegs	$0.75
25 lb. kegs	1.00

Consignment accounts were discussed. The general sense of the meeting was to abolish consignment accounts, but the explanation of one member for his use of consignments in certain inaccessible localities caused this question to be passed over for further consideration.

There was a difference of opinion as to whether no allowance or a limited allowance should be made on returnable packages.

It was felt that in the case of off-grade material sold as such, a satisfactory differential below the standard grades should be developed.

It was the sense of the meeting that grave danger for the lead oxide business existed in the manufacture of the oxides by the users themselves, this being particularly true of large battery manufacturers who now are manufacturing black oxide for their own use. It was felt that it would be contrary to the spirit of the N. R. A. for users of the oxides to install their own oxide manufacturing equipment when the capacity of the industry is already in excess of requirements and so long as oxides can be purchased at a fair price. Such a procedure could not increase employment and would be contrary to the declared purpose of the Act "to promote the fullest possible utilization of the present productive capacity of industries." It was felt that some means of licensing new productive equipment might be sought as provided for in the cotton textile and other codes.

The question of combining the purchase of old battery plates with sales of oxides was passed over for further consideration.

It was felt that more detailed or useful credit information than now available would depend upon the establishment of a credit bureau, and that this was beyond consideration at present.

Mr. Evans and Mr. Sprague were delegated to draw up a form of sales contract embodying the features agreed upon at this meeting.

The Committee recessed at 11:45 P. M. until the following day.

Harold Rowe,
Chairman,
F. E. Wormser,
Secretary.

2641 COMMISSION'S EXHIBIT NO. 801.

Dry Products Committee.

Lead Pigments Division.

New York, N. Y. September 7, 1933.

A meeting of the Dry Products Committee of the Lead Pigments Division of the Lead Industries Association was held at the Commodore Hotel, New York, N. Y., on September 7, 1933, at 10:15 A. M.

Present:

F. M. Carter, Chairman. Representing: National Lead Co.
A. P. Knapp. Representing: Andrews Lead Co.
J. R. MacGregor. Representing: Eagle-Picher Lead Co.
W. E. Maston. Representing: Eagle-Picher Lead Co.
F. W. Potts. Representing: Eagle-Picher Lead Co.
R. M. Evans. Representing: Evans Lead Co.
P. E. Sprague. Representing: Metals Refining Co.
Harold Rowe. Representing: National Lead Co.
S. B. Coolidge, Jr. Sherwin-Williams Co.
A. P. Wetherill. Representing: Wetherill & Bro.
F. E. Wormser, Secretary.

Mr. F. M. Carter occupied the chair.

The Chairman called attention to the problem facing Lead Oxide manufacturers in the threat of additional competition from new facilities, despite the fact that existing capacity was large enough to supply all requirements for lead oxides. He also spoke of the danger to the oxide business in the possibility of consumers who were now manufacturing their own requirements dumping their surplus production in competition with independent manufacturers.

After discussion, it was the unanimous feeling that articles providing for these contingencies should be incorporated into the Supplementary Code for the Lead Pigments Division, and the Secretary was authorized to draw up suitable paragraphs for inclusion in its Code and to draw upon legal advice as required.

The Secretary was requested to read the price list paragraph which had been adopted by the Dry White Lead group.

Whereupon it was regularly moved, seconded and carried that the same paragraph be adopted for the Lead Oxide group of the Dry Products Committee.

The unfair trade practices accepted by the Dry Products Committee in earlier session were also adopted as 2642 being applicable to oxide manufacture.

The next subject discussed was the one of uniform sales contracts.

Whereupon it was regularly moved, seconded and carried that the lead oxide group endorse the sales contract paragraph as adopted by the Dry Products Committee at its meeting on September 6, with the addition of the following sentence:

"All sales shall conform to the conditions set forth in the uniform sales contract forms."

The meeting adjourned at 12:30 P. M.

F. M. Carter,
Division Chairman,
Harold Rowe,
Committee Chairman,
F. E. Wormser,
Secretary.

2643 COMMISSION'S EXHIBIT NO. 802.

September 26, 1933.

Second Draft.

Supplementary Code of Fair Competition for the Lead Pigments Division of the Lead Industries Association.

As provided in Art. XIII of the Code of Fair Competition for the Lead Industries hereinafter termed the "Master Code" this supplementary code is hereby made a part of said Master Code with the same force and effect as any provisions thereof, except that it shall be applicable only to Lead Pigments, as defined in Art. II of said Master Code; i. e., basic carbonate white lead, dry or in oil, basic lead sulphate, dry or in oil, litharge, red lead, dry or in oil, orange mineral and other lead oxides with or without metallic lead content.

Price Lists.

Art. I—Each member of the Code shall file with the Secretary within ten (10) days after the effective date of this Code, his price list, together with terms and conditions of sale. Any change in the said list or terms shall be reported to the Secretary in writing within twenty-four (24) hours after the effective date of such change. After December 31, 1933, any member making a sale or quotation at variance with his price list or terms on file at the time said sale or quotation is made, shall notify the Secretary concerning the variation by letter, mailed within twenty-four (24) hours. The information, as reported, shall be reissued to the members at such time, and in such manner as may be determined by them.

Uniform Sales Contracts.

Art. II—Uniform sales contracts specifically designed for use in selling Dry White Lead and Lead Oxides shall be developed as soon as practicable and thereafter used by all members after said contract forms shall have been adopted by a two-thirds vote of members manufacturing the products to which the contracts apply. From time to time, changes, in the uniform sales contracts can be made by a two-thirds vote of members manufacturing such products. All sales shall conform to the conditions set forth in the uniform contract forms.

Unfair Trade Practices.

Art. III—The following shall be considered unfair trade practices and are violations of this Code:

(a) Misbranding or misrepresentation of lead pigments.

(b) Making or promising to any purchaser or prospective purchaser of lead pigments, or to any officer, employee, agent or representative of any such purchaser or prospective purchaser, any commission, gratuity, or other payment or remuneration, directly or indirectly, except in the case of payments made with the consent of the employer for a definite service rendered.

(c) Inducing or in any manner attempting to induce a breach, default or cancellation of a contract between a competitor and his customer during the term of such contract.

2644 (d) Guaranteeing for a definite time the life and/or service of lead pigments.

(e) Making false or derogatory statements with respect to the prices, policies, products, practices, business or credit of any competitor.

(f) Exchanging the products of a member for those of another.

(g) No product shall be sold at a concession in price in order to influence the sale of any lead product.

Returned Goods.

Art. IV—No member of the Code shall accept the return of merchandise without first giving consent for its return. On such goods as are accepted for return, a reasonable charge shall be made and freight charges must be prepaid by the shipper returning the merchandise, except in the case of defective products or where in some other way the manufacturer may be responsible.

Taxes.

Art. V—Any sales tax uniformly applicable upon all sellers shall be for buyer's account and shall be added to the selling price to be paid by the buyer.

Selling Below Cost and Dumping.

Art. VI—It is the consensus of opinion in the Lead Pigments Division of the Lead Industries Association that the sale of the product of any manufacturer of lead pigments, as defined in Art II of the Master Code and reenumerated in the preamble hereof, in competition with the product of other manufacturers of such pigments, at a price less than actual cost of production and delivery, such cost to include a fairly apportioned share of total general overhead, selling and administrative expense, is subversive to the best interests of the industry as a whole and of the purpose of Title I of the N. I. R. A. The Lead Pigments Division is hereby empowered to take such steps as may be necessary to define the method of determining the said actual cost of production and delivery. No manufacturer of lead pigments shall sell or offer for sale, in competition with the product of other manufacturers of such pigments, any product at a price less than the cost so determined. The provisions of this Article shall apply to all persons whose manufacture of lead pigments is incidental to the manufacturer of other products not embraced within the Lead Industries, as well as to those primarily engaged in the manufacture and sale of lead pigments.

2645 COMMISSION'S EXHIBIT NO. 803.

Lead Pigments Division.

White Lead-in-Oil Committee.

New York, N. Y. January 23, 1934.

A meeting of the White Lead-in-Oil Committee of the Lead Pigments Division of the Lead Industries Association was held at the Commodore Hotel, New York City, on Tuesday, January 23, 1934 at 10:00 A. M.

Present:
F. M. Carter, Chairman, Representing National Lead Company
F. O. Case, Representing Anaconda Lead Products Co.
W. E. Maston, Representing Eagle-Picher Lead Company
R. M. Roosevelt, Representing Eagle-Picher Lead Company
A. D. Joyce, Representing Euston Lead Co.
P. E. Sprague, Representing Euston Lead Co.
T. H. Zappert, Representing Euston Lead Co.
Harold Rowe, Representing National Lead Co.
H. G. Sidford, Representing National Lead Co.
S. B. Coolidge, Jr., Representing Sherwin-Williams Company
F. E. Wormser, Secretary.

Mr. F. M. Carter occupied the chair.

The Chairman called attention to the changes that had been suggested in the Trade Practices for the Lead Pigments Division of the Lead Industries Association in the Lead Code and after discussion, it was agreed that the following paragraph be submitted in lieu of the Price Schedule paragraph previously drafted in Washington by the Administration and his advisors:

Each member of the industry engaged in the manufacture and sale of lead pigments shall file with the Secretary within ten (10) days after the effective date of this Code, a list of the prices at which his products will be sold and a memorandum of any of his conditions of sale at variance with those set forth in Schedule "A" attached. Any change in prices or conditions of sale shall be reported to the Secretary in such manner as to reach his office within twenty-four (24) hours after the effective date of such change. Any member making a sale or quotation, which does not conform to the bases he then has on file, shall notify the Secretary in detail by letter mailed within twenty-four (24) hours. The information supplied the Secretary shall be re-issued immediately to the reporting members.

It was also agreed to make changes in the Lead Code in Schedule A for White Lead, as submitted in the attached copy.

Meeting adjourned at 5:00 P. M.

F. M. Carter,
Chairman.
F. E. Wormser,
Secretary.

2646 COMMISSION'S EXHIBIT NO. 804.

January 27, 1934.

Schedule "A".

Art. II. Standard Conditions for Sale of Basic Lead Carbonate (Dry White Lead).

A. "Sale" or "Order" as used herein includes any transaction whereby a member of the industry makes a quotation on or becomes obligated to sell and deliver material.

B. Whatever terminology may be used, the intent and meaning thereof shall conform to the following requirements of sale.

(1) Quantity—Any amount as agreed between buyer and seller.

(2) Period—As desired, to be specified.

(3) Packages—As agreed between buyer and seller.

(4) Price — (a) Spot Sales — Seller's card or quoted price in effect on date order is received.

(b) Contract Sales—1. Seller's price on date contract is made with protection against advance or decline on the undelivered portion to the end of the current calendar quarter.

2. On contracts extending beyond the current calendar quarter, the price applying to subsequent deliveries shall be seller's price in effect on the first day of the calendar quarter in which they are made, with protection against advance or decline on the undelivered portion to the end of each quarter.

(c) The price for minimum 20 ton lots for one buyer to one destination, shipped by rail in one carload, or delivered by truck within a period of three days, shall be ¼¢ per pound less than that charged for smaller quantities.

(d) Emergency shipments may be made at the 20 ton price only to those customers for whom the Seller has a 20 ton order on hand for the same material for immediate shipment or a carload (20 tons) en route to the same destination.

(5) Delivery—F. O. B. cars Seller's shipping point, or by truck, F. O. B. Buyer's premises.

(6) Transportation Allowance—Since transportation is included in the Seller's price, the actual freight paid by Buyer shall be allowed as deduction. No cartage allowance shall be made to Buyer for use of his own truck.

(7) Shipment—(a) Spot Sales—Within thirty days from date order is received.

(b) Contract Sales—Within the period covered by the contract.

(8) Terms—Net thirty days, less 1 per cent for cash in ten days from date of shipment.

(9) Taxes—Any tax or other charge imposed by Federal Law upon the production and/or sale and/or shipment of lead oxides shall be added to the price to be paid by the Buyer on any transaction to which such charge is applicable.

2647 COMMISSION'S EXHIBIT NO. 805.

Lead Pigments Division.
Dry Products Committee.

New York, N. Y. January 24, 1934.

A meeting of the Dry Products Committee of the Lead Pigments Division of the Lead Industries Association was held at the Commodore Hotel, New York City, on Wednesday, January 24, 1934 at 10:00 A. M.

Present:

Harold Rowe, Chairman, Representing National Lead Company
Bob Andrews, Representing Andrews Lead Company
J. R. MacGregor, Representing Eagle-Picher Lead Co.
W. E. Maston, Representing Eagle-Picher Lead Company
Miles Zoller, Representing Eagle-Picher Lead Co.
R. M. Evans, Representing Evans Lead Co.
H. Wilke, Representing Hammond Lead Products, Inc.
Wm. Wilke, Jr., Representing Hammond Lead Products, Inc.
P. E. Sprague, Representing Metals Refining Co.

F. M. Carter, Representing National Lead Company
H. G. Sidford, Representing National Lead Company
S. B. Coolidge, Jr., Representing Sherwin-Williams Co.
F. E. Wormser, Secretary.

Mr. Harold Rowe occupied the chair.

The Chairman called attention to the changes that had been suggested in the Trade Practices for the Lead Pigments Division of the Lead Industries Association in the Lead Code and after discussion it was agreed that the paragraph on Price Schedules adopted at the White Lead-in-Oil Meeting be submitted in lieu of the Price Schedule paragraph previously drafted in Washington by the Administrator and his advisors.

It was also agreed to make changes in the Lead Code in Schedule A for Lead Oxides as submitted in the attached copy.

Meeting adjourned at 5:00 P. M.

Harold Rowe,
Chairman.
F. E. Wormser,
Secretary.

2648 January 27, 1934.

Schedule "A".

Article I. Standard Conditions for Sale of Lead Oxides.

A. "Sale" or "Order" as used herein includes any transaction whereby a member of the industry makes a quotation on, or becomes obligated to sell and deliver material.

B. Whatever terminology may be used, the intent and meaning thereof shall conform to the following requirements of sale.

(1) Material—Dry Oxides of lead, or mixtures consisting principally thereof, each grade of material to be specifically designated.

(2) Quantity—Any amount as agreed between buyer and seller.

(3) Packages—As agreed between buyer and seller.

(4) Price—(a) Seller's card or quoted price in effect on date order is received with allowances as follows:

(1) Not more than ½¢ per pound for minimum shipment of 5 tons for one buyer at one time to one destination.

(2) Not more than ¾¢ per pound for minimum shipment of 20 tons for one buyer to one destination by:

(A) Rail in one carload.

(B) Truck within a period of three days.

(b) These allowances may also be applied to emergency shipments of smaller quantities only when seller has an order on hand for five (5) tons or twenty (20) tons for immediate shipment, or such quantity en route to the same destination.

(c) No protection against decline in Seller's price may be given.

(d) Red Lead containing 97 per cent or 98 per cent Pb_3O_4 shall be so marked on the package and shall be sold at ⅛¢ and ⅜¢ per pound, respectively, over Seller's price for grades of lower Pb_3O_4 content.

(5) Delivery—F. O. B. cars Seller's shipping point, or by truck, F. O. B. Buyer's premises.

(6) Transportation Allowance—(a) Since transportation is included in the Seller's price, the actual freight paid by Buyer shall be allowed as a deduction. No cartage allowance shall be made to Buyer for use of his own truck.

(b) If shipment is made by Buyer's boat, Seller may allow actual amount he would have paid for like transportation at minimum published tariffs in effect on date of shipment.

(7) Shipment—Shall be made at least within thirty (30) days from date order is received.

2649 (8) Terms—Net thirty days, less 1 per cent for cash in ten days from date of invoice.

(9) Taxes—Any tax or other charge imposed by Federal Law upon the production and/or sale and/or shipment of lead oxides shall be added to the price to be paid by the Buyer on any transaction to which such charge is applicable.

2689 COMMISSION'S EXHIBIT NO. 809.

Approved Code No. 442 Registry No. 1217—8—01

National Recovery Administration

Code of Fair Competition for the Lead Industry
As Approved on May 24, 1934
(NRA Cut)
United States Government Printing Office
Washington: 1934

2690 This publication is for sale by the Superintendent of Documents, Government Printing Office, Washington, D. C., and by district offices of the Bureau of Foreign and Domestic Commerce.

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2691 Approved Code No. 442

Code of Fair Competition for the Lead Industry As Approved on May 24, 1934

ORDER

Code of Fair Competition for the Lead Industry

An application having been duly made pursuant to and in full compliance with the provisions of Title I of the National Industrial Recovery Act, approved June 16, 1933, for approval of a Code of Fair Competition for the Lead Industry, and hearings having been duly held thereon and the annexed report on said Code, containing findings with respect thereto, having been made and directed to the President:

Now, therefore, on behalf of the President of the United States, I, Hugh S. Johnson, Administrator for Industrial Recovery, pursuant to authority vested in me by Executive Orders of the President, including Executive Order No. 6543-A, dated December 30, 1933, and otherwise; do hereby incorporate by reference said annexed report and do find that said Code complies in all respects with the pertinent provisions and will promote the policy and purposes of said Title of said Act; and do hereby order that said Code of Fair Competition be and it is hereby approved.

Hugh S. Johnson,
Administrator for Industrial Recovery.

Approval recommended:
K. M. Simpson,
Division Administrator.
Washington, D. C.,
May 24, 1934.

2692 Report to the President

The President,
The White House.

Sir: The original Code of Fair Competition for the Lead Industry was submitted on August 3rd, 1933, by the Lead Industries Association, and unincorporated membership society organized in 1928 representing 90% of the known members of the Industry in volume of production.

Several revisions of the Code were made prior to the public hearing held on December 22nd, 1933. The Code was revised during the recess of this hearing and submitted in its final form for approval. Every person who requested an appearance was properly heard in accordance with statutory and regulatory requirements.

The Lead Industries includes the development, mining, concentrating, smelting, and refining of lead-bearing ores, and the utilization of the products. By far the largest product of the refining process is pig lead, normally about 97% of total mine production. A small amount of pigments are made direct from ore.

The major products of the lead industries are pig lead, antimonial pig lead, lead pigments, manufactured metallic lead products, and manufactured metallic foil products.

The lead code covers the Lead Industries in every phase enumerated above except storage battery plates and lead covered cable. The storage battery plate business came in with the addition of starters for automobiles but has become a revolving supply, as was prophesied at its inception, the use of new lead for battery plates per year not representing over 10% of the lead used at present for that purpose. The quantity of lead covered cable used is dependent on the status of telephone and electric companies.

Lead pigments, used in the paint and varnish business, are made from ores, pig lead, and scrap, but chiefly from pig lead. Lead pigments are sold in highly competitive field with zinc pigments, titanium oxide paint, and stainless alloy steels. Foil has to meet the competition of cellophane.

Undesilvered soft pig lead containing relatively high copper is extremely resistant to corrosion by acids and is known to the trade as chemical lead; it is used chiefly in the manufacture of cable, pipe and sheets.

Lead mining and smelting is mainly located in the states west of the Mississippi River and, with the exception of the district in southeast Missouri, is closely associated with the mining of other metals. Consequently, code provisions for lead, zinc, and copper, will often be closely inter-related.

All the lead industries included in the Code have suffered greatly during the depression, particularly the mining industry, which has witnessed a drop in the price of pig lead in the United States, carrying it in 1932 to a lower level than has been observed for at least fifty years, namely, 2.65¢ per pound, New York.

2693 From 1929 to 1932, the contribution of the United States to the total world output of primary refined lead decreased from 36% to 22%. As the United States is a small net importer of lead, the actual and relative decline was primarily due to a decrease in domestic consumption.

Lead is a comparatively low-priced metal whose major uses are for pigments, cable covers, storage batteries, building, ammunition and various alloys. Its principal competitor is zinc, particularly in the pigment industries. About 20% of total normal consumption is destroyed in use; the remainder represents possible ultimate recovery and re-use. The recovery of secondary lead is an important factor in demand for new lead. The rapid development of the storage battery demand for lead served to stimulate mine capacity and new production, but more recently the annual recovery of lead, so used, has reduced the demand for new lead for this purpose to a relatively small factor.

Total consumption of lead in 1933 was only about 40% of the 1929 demand. In spite of a rapid decline in mine production, stocks have been built up until they may be considered excessive in view of the present low rate of consumption.

The number employed in the lead industries is about 50% of the total for 1929, or a decrease of some 14,000. The amount of work for those actually employed has decreased, due to the spreading of available work. Increased employment is dependent on improvement in the construction, automobile and electrical industries.

The production of refined primary lead in the United States declined from 637,000 metric tons in 1920 to 251,000 tons in 1932, or from 36% of the world production to 22%. The decline in production for the rest of the world in the same period was from 1,149,000 metric tons to 906,000 tons. The corresponding percentage of world total showed an increase from 64% to 78%. In other words, the major decline in world output occurred in the United States.

Since the United States has no net export of lead but is a comparatively small net importer, the real cause of the decline in United States' production is due primarily to a decline in domestic consumption.

Under the tariff provision of 1922, still in force, a duty of 1½¢ per pound of lead content was placed on imported ores, 2⅛¢ per pound on lead bullion, 2⅜¢ per pound on lead sheets, and duties ranging from 2½¢ to 3¢ per pound on lead pigments.

The tariff protects the lead industry of the United States from heavy imports from Mexico and Canada. Because of competition within the United States, the price differential at New York over London exceeds the tariff on ores but does not reach the tariff on lead bullion, lead sheets, and lead pigments.

From a standpoint of labor at refineries, the decrease in exports is likewise reflected in the decrease of imported ores and base bullion, meaning less refinery capacity used. The United States formerly imported much lead in various forms, principally in ore and base bullion, and continues to import small quantities. Some of it entered for immediate consumption; most of it, however, is entered for warehouse, is smelted and refined in bond, and is then reexported as refined pig lead or in manufactured products.

2694 These relatively large former exports have been captured by Australia and Canada by the imposition of a 10% tariff on non-British lead imported into Great Britain. United States' exports of lead have dropped from 116,260 tons of pigs, bars, and secondary in 1928 to 22,500 tons in 1933.

The quantity of lead in all forms consumed by domestic industry, as estimated by the American Bureau of Metal Statistics, was 548,000 short tons in 1919, had reached 901,000 tons in 1926, was 972,000 tons in 1929, and steadily declined to 400,000 tons in 1932.

The three principal uses of lead in the United States are cable covering, storage batteries and white lead. In 1929, according to the American Bureau of Metal Statistics, these three outlets used: cable covering, 206,000 tons; storage batteries, 210,000 tons; white lead, 119,700 tons; total of the three 535,700 tons of a total of 930,00 tons used for all purposes; in 1932, cable coverings used were 55,000 tons; storage batteries, 138,000 tons; white lead, 54,500 tons; total of the three, 247,500 tons of a total of 400,000 tons used for all purposes. Revival of the market for lead-covered cable cannot be expected until there is a renewed expansion in the use of the telephone and electric industries.

Large stocks of lead have been accumulated during the depression and now amount to more than a year's supply at present rate of consumption. These unsold accumulations are tangible evidence of the strenuous efforts and

great financial sacrifices mining and smelting companies have made to keep their employees at work.

Mining companies have keenly realized their responsibilities in sharing work among their employees and relieving suffering in the mining camps, especially where mines are the only source of employment. The lead mines never cut wages to the extent justified by the extraordinary low price obtained for lead in 1932 and 1933 and after the enactment of the N. I. R. A., spread work still further, making wage increases which they hoped would be justified by the development of the Administration's Recovery program.

The mining industry, as a result of a distressed lead market, is working approximately 46% of its 1929 rate of production and there is no prospect of any increase in this rate unless the price of lead should advance.

In 1929 the member mining companies in the Lead Industries Association employed 8,450 persons. In 1933, despite the low rate of production, they were engaging 5,500 employees, a number which was increased to 5,650 after the P. R. A. program was put into effect.

As reported by the American Bureau of Metal Statistics, and quoted by the U. S. Bureau of Mines, stocks of refined lead and antimonial lead have risen steadily from 51,050 short tons at the end of 1929 to 103,000 tons at the end of 1930, to 152,000 tons at the end of 1931, to 176,000 tons at the end of 1932, and to 203,000 tons at the end of 1933. These stocks (four times as much at the end of 1933 as at the end of 1929) represent at least a six-months' supply on the basis of the best figures obtainable of the consumption of lead for the year 1932; and have accumulated despite a progressive decrease in mine production of recoverable lead from mines from 648,000 tons in 1929 to 558,000 in 1930; to 405,000 tons in 1931; to 293,000 tons in 1932; and to 274,000 tons in 1933.

2695 The total employment in the Lead Industries coming under this Code, was approximately 28,000 in 1929. About three-fourths of the total are employed in the closely associated mining and smelting operations.

Division	Total employed	Wage earners
Mining and milling	15,004	14,007
Smelting and Refining (primary)	5,690	4,819
Fabricating	6,873	.....
Total	27,567	.....

The general level of operations in the Industry, judged by production and consumption data, fell in 1933 to about 40% of the rate in 1929. Labor requirements probably declined in about the same proportion, but the actual number employed at the end of 1933 was about 50% of the number in 1929 (according to the results of a survey, made by the Lead Industries' Association), which covered from 85% to 90% of the Industry.

The Code, as written, follows the latest standard code provisions. It contains no open price clause for Pig Lead and Metallic Lead products and no provisions relating to cost of production in relation to selling price. No definite control of production or stabilization of the industry is set up, although provision is made in Article VI, Section 6, Paragraph G, that such proposals may be recommended, after voluntary agreement, to the Administrator.

A basic maximum 8 hour day and 40 hour week is provided, with such standard exceptions as are common to other codes or as may be essential to the peculiar character of the mineral industries. These exceptions are generally further safeguarded by the provision of time and one-half for overtime. Fundamentally, the code week of 5 eight-hour days represents a change from a standard week of 7 eight-hour days in 1929. Considering the present restricted output of the industry and the effort to spread employment by staggering such work as is available, little immediate increase in employment will result. However, with any substantial gain in production, there should be a material increase in total employment.

Notwithstanding the depressed condition of the industry, even to the point of having the price of lead drop to an all time low for a 50 year period of 2.65¢ per pound, F. O. B. New York, the industry has made a sincere effort to spread employment. This sincere desire is evidenced by their past performance as indicative not only of their sincerity in drafting their code but also the further high standard they will maintain in adhering to the provisions and functioning of their code.

Article I. Purposes.—States the purpose of the Code.

Article II. Definitions.—Accurately defines specific terms applicable to the Lead Industry.

Article III. Hours.—The maximum hours are limited to forty hours per week for employees engaged in the processing of products and labor incident thereto. Watchmen may be permitted to work 56 hours in any one week period,

provided that such employees shall have at least one day's rest in each seven day period. Office, salaried and
2696 other employees not covered above who receive less
than $35.00 per week shall not be permitted to work in excess of an average of forty hours per week during any one month, nor more than 48 hours in any one week. Employees engaged in an executive, managerial or supervisory capacity who receive $35.00 per week, or more, are not subject to any hourly limitations. The maximum hours shall not apply in cases of emergencies or repairs where safety of life or health or protection of property necessitates longer hours.

Article IV. Wages.—In the Mining Division the minimum rate for totally unskilled or common labor shall not be less than 40¢ per hour above ground or 47½¢ per hour underground. The minimum wages for employees engaged in the processing of products or any labor incident thereto shall be 35¢ per hour for the Lead Smelting and Refining Division, 40¢ for the Lead Pigments Division, and 35¢ for the Metallic Lead Products and Metallic Lead Foil Products Division, provided that as to the Smelting and Refining Division in the Southern District the minimum hourly rate shall be 30¢ per hour. The minimum rates for the several divisions named are in accord with those established in approved codes of related industries. The minimum rates provided for hereinabove shall be construed as the hiring rates applying to totally unskilled or common labor both above and below ground in the mining divisions, and totally unskilled or common labor in the other divisions of the Industry. The established minimum rate of pay for the work performed in any pay period shall apply irrespective of whether an employee is actually compensated on a time rate, piece rate, or other basis. Provision is also made for the employing of handicapped persons. No person employed in clerical or office work shall be paid less than at the rate of $15.00 per week, except that office boys and girls and messengers may be paid at a rate not less than 80% of the minimum paid office employees.

Article V. General Labor Provisions.—Provides that no person under 18 years of age shall be employed except in clerical, office, sales, service, technical and engineering departments, and no person under 16 years of age shall be employed in any capacity. This Article also sets forth the mandatory provision respecting the rights of employees to organize and bargain collectively. This Article also provides for matters having to do with reclassification of employees, standards for safety and health, the observance of state laws and the posting of complete copies of this Code so that they are accessible to employees.

Article VI. Administration.—Establishes a Code Authority consisting of the members of the Executive Committee of the Lead Industries Association, the Secretary of said Association, and such division chairmen who have respectively been elected to such office by such divisions in an equitable manner, approved by the Administrator, so as to be truly representative of such divisions respectively, and who are not members of the Executive Committee; in addition to membership as above provided there may be one to three members, without vote and without compensation by the Industry, to be appointed by the Administrator to serve for such terms from the date of appointment as he may specify. On the effective date of this Code the voting members of the Code Authority shall consist of eleven members, but such number is subject to variation due to the contents of the foregoing provision. 2697

Article VII. Sets forth the Trade Practice Rules for the Lead Pigments Division, and also sets forth open price schedules which are effective immediately after filing.

Article VIII. Sets forth the Trade Practice Rules for the Metallic Lead Products Division.

Article IX. Sets forth the Trade Practice Rules for the Metallic Foil Products Division.

Article X. No provision of this Code relating to price or terms of selling, shipping or marketing, shall apply to export trade or sales or shipments for export trade, or transactions in the foreign commerce of the United States.

Article XI. Sets forth the application of this Code to operations with other Codes wherein other metals are produced.

Article XII. Makes provision for modifications of this Code.

Article XIII. No provision of this Code shall be so applied as to promote monopolies or monopolistic practices, or to eliminate, oppress, or discriminate against small enterprises.

Article XIV. Covers the effective date.

There are also appended to this Code and made a part thereof conditions for sale of lead oxides in lots less than twenty tons and lots of at least twenty tons, and also conditions of sale for basic lead carbonate (dry white lead).

The Deputy Administrator in his final report to me on said Code having found as herein set forth and on the basis of all the proceedings in this matter;

I find that:

(a) Said Code is well designed to promote the policies and purposes of Title I of the National Industrial Recovery Act, including removal of obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof and will provide for the general welfare by promoting the organization of Industry for the purpose of cooperative action among the trade groups, by inducing and maintaining united action of labor and management under adequate governmental sanctions and supervision, by eliminating unfair competitive practices, by promoting the fullest possible utilization of the present productive capacity of Industries, by avoiding undue restriction of production (except as may be temporarily required), by increasing the consumption of industrial and agricultural products through increasing purchasing power, by reducing and relieving unemployment, by improving standards of labor, and by otherwise rehabilitating Industry.

(b) Said Industry normally employs not more than 50,000 employees; and is not classified by me as a major Industry.

(c) The Code as approved complies in all respects with the pertinent provisions of said Title of said Act, including without limitation Subsection (a) of Section 3, Subsection (a) of Section 7, and Subsection (b) of Section 10 thereof; and that the applicant Association is an Industrial Association truly representative of the aforesaid Industry; and that said Association imposes no inequitable restrictions on admission to membership therein.

2698 (d) The Code is not designed to and will not permit monopolies or monopolistic practices.

(e) The Code is not designed to and will not eliminate or oppress small enterprises and will not operate to discriminate against them.

(f) Those engaged in other steps of the economic process have not been deprived of the right to be heard prior to approval of said Code.

For these reasons, therefore, this Code has been approved.

Respectfully,

Hugh S. Johnson,
Administrator.

May 24, 1934.

2699 CODE OF FAIR COMPETITION FOR THE LEAD INDUSTRY.

Article I—Purposes.

To effectuate the policies of Title I of the National Industrial Recovery Act, this Code is established as a Code of Fair Competition for the Lead Industry and its provisions shall be the standards of fair competition for such Industry and are binding upon every member thereof.

Article II—Definitions.

Wherever used in this Code, or any supplement appertaining thereto, the terms enumerated in this Article shall have the meanings herein defined unless the context shall otherwise clearly indicate.

Section 1. The terms "President", "Act", and "Administrator" means respectively the President of the United States, Title I of the National Industrial Recovery Act, approved by the President June 16, 1933, and any amendments thereto, and the Administrator for Industrial Recovery.

Section 2. The term "Member of Industry" includes all those engaged in the Industry either as an employer or on his or its own behalf.

Section 3. The term "Employee" means and includes anyone engaged in the Industry in any capacity receiving compensation for his services, irrespective of the nature or method of payment of such compensation, except a member of the Industry.

Section 4. The term "Employer" means and includes anyone by whom any such employee is compensated or employed.

Section 5. The term "Apprentice" as used herein means an individual (usually a minor), bound by indenture, executed in compliance with the laws of the state where the service provided for therein is to be performed, to serve an employer for a term of years at a predetermined wage, for the period of the indenture in order to learn a trade, art or craft.

Section 6. The term "Industry" as used herein includes the mining of lead ore and/or the concentrating thereof, the smelting of lead ore, and/or lead concentrates, and/or lead bearing scrap, the refining of lead and/or lead bearing scrap, and/or drosses, the manufacturing of pig lead, antimonial pig lead, lead pigments, metallic antimony, metallic lead products, allied products defined hereinafter as "metallic lead products" and/or "metallic foil products", and the original sale of such products by the member of Industry producing or manufacturing the same either directly or indirectly through subsidiary and/or affiliated companies.

(a) "Lead Ore and Lead Concentrates" as used herein is defined to mean ore and the concentrates thereof, containing lead as the principal commercially recoverable constituent.

(b) "Lead Mining" as used herein is defined to mean the mining and concentrating of lead ore and any further beneficiation thereto prior to the shipment to the smelter.

2700 (c) "Lead Smelting and Refining" as used herein is defined to mean metallurgical and/or chemical treatment of lead ore, lead concentrates, lead bearing scrap, and/or drosses, and/or any other lead bearing material into "Pig Lead" and/or "Antimonial Pig Lead."

(d) "Antimonial Pig Lead".—Inasmuch as antimony is a common constituent of most lead ores and a by-product of Lead Mining and Smelting and Refining—metallic antimony and antimonial alloy products (antimonial pig lead) shall be included within the provisions of this Code.

(e) "Lead Pigments" as used herein is defined to mean basic carbonate white lead (dry or in oil), basic lead sulphate (dry or in oil), litharge, red lead (dry or in oil), orange mineral or any other lead oxides, with or without metallic lead content.

(f) "Metallic Lead Products" as used herein is defined to mean extruded, rolled, cast or otherwise fabricated lead or lead alloy products (except storage battery plates and lead covered cable), produced by Members of Industry and kindred products of metallic tin and tin alloy, or other metal or metal alloy products, which are produced by the same Members of Industry on the same type of machinery and under similar labor and fabricating conditions.

(g) "Metallics Foil Products" as used herein is defined to mean lead and/or tin, and/or zinc, or their alloys, or combinations thereof, rolled to a thickness of .006 of an inch or less, whether attached or affixed to other materials or not.

Section 7. The term "Division" as used herein includes respectively the several parts of the Industry as enumerated below:

1. Lead Mining Division
2. Lead Smelting and Refining Division
3. Lead Pigments Division
4. Metallic Lead Products Division
5. Metallic Foil Products Division

and such other and further divisions as may hereafter be created pursuant to the provisions of this Code.

Section 8. The term "Association" as used herein includes the "Lead Industries Association", an unincorporated membership society organized under the laws of the State of New York and having its principal office at 420 Lexington Avenue, New York City, and such other trade associations as may hereafter participate in the activities under this Code or in the selection of the Code Authority.

Section 9. The term "Executive Committee" as used herein shall mean the Executive Committee of the Lead Industries Association.

Section 10. The term "Secretary" as used herein shall mean the Secretary of the Lead Industries Association, who also shall be the Secretary of the Code Authority.

Section 11. The term "Southern District" as used herein shall include the States of Texas, Mississippi, Alabama, Louisiana and Florida.

Article III—Hours of Labor.

Maximum Hours.

Section 1. No employee shall be permitted to work in any
division of the Industry in excess of forty (40) hours
2701 per week, or in excess of eight (8) hours in any
twenty-four (24) hour period except as herein otherwise provided. A normal work day shall not exceed eight (8) hours.

The interpretation of the eight (8) hour provision for the Mining Division in each state shall be in accordance with any laws of such state pertaining to the eight (8) hour day on mining operations.

The Code Authority shall study the operation of the eight (8) hour provision for the Mining Division and not later than ninety (90) days from the effective date shall report fully to the Administrator the results of such study. The Administrator may, at his discretion, appoint an impartial investigator who shall review the conditions in the Mining Division of the Industry concerning the operation of the eight (8) hour provision and shall report thereon to the Administrator not later than ninety (90) days from the effective date and forward a copy of such report to the Code Authority.

Hours for Clerical and Office Employees.

Section 2. No person employed in clerical or office work shall be permitted to work in excess of forty (40) hours in any one (1) week, except that during any one (1) week in a one (1) month period such employee shall be permitted to work a maximum of forty-eight (48) hours in any such week. A normal work day shall not exceed eight (8) hours.

Exceptions as to Hours.

Section 3. The limitation as to hours of labor as specified in Sections 1, 2 and 4 of this Article III shall not apply to the following:

(a) To employees engaged in emergency maintenance, or emergency repair work, involving breakdown or protection of life or property; provided that in such special cases not less than one and one-half (1½) times the normal wage rate for any employee so employed shall be paid for all hours worked in excess of forty (40) hours in any one (1) week.

(b) Nor in the case of the Mining Division shall it apply to hoist men, power house men, or pump men, provided the total working hours of such employees shall not exceed forty-eight (48) hours in any one (1) week.

(c) Nor to employees receiving not less than Thirty-Five (35) Dollars per week in a managerial, executive or supervisory capacity, or to technical staffs; nor to outside sales or service employees.

(d) Watchmen may be permitted to work fifty-six (56) hours in any one (1) week period, provided that such employees shall have at least one (1) day's rest in each seven (7) day period.

(e) There may be a tolerance of 10% additional hours over the forty (40) hours in any one (1) week for employees engaged in the preparation, care and maintenance of machinery and production facilities, stock and shipping clerks and truckmen engaged in outside delivery and pick-up service; provided, however, that at least one and one-half (1½) times the normal wage rate for any employee so employed shall be paid for all hours worked in excess of forty (40) hours in any one (1) week, or eight (8) hours in any one (1) day.

2702 (f) The limitation as to maximum hours of work shall not apply to very special cases where restriction of hours of labor of skilled workers in continuous processes would unavoidably reduce or interrupt production because of demands inherent and peculiar within the process itself provided, however, that such employees in such special cases shall not work more than forty-eight (48) hours in any one week, and provided that in such special cases at least one and one-half times the normal wage rate shall be paid to any employee so employed for hours worked above forty (40) hours per week, or eight (8) hours per day. Such special cases, however, shall be reported to the Code Authority. The limitation of hours does not apply where one employee is acting in temporary relief for a fellow employee in continuous processes.

(g) During any period in which a concentrated demand upon any division of the Industry, except mining, shall place an unusual and temporary burden for production work upon its facilities or to meet seasonal peak requirements or emergencies, an employee of any such division may be permitted to work not more than forty-eight (48) hours per week in not more than six (6) weeks in six (6) months of any calendar year, provided that not less than one and one-half times the normal wage rate shall be paid to any employee so employed for hours worked above forty (40) hours per week or eight (8) hours per day. All such overtime worked shall be reported to the Code Authority.

Standard Week.

Section 4. No employee shall be permitted to work more than six (6) days in any seven (7) day period.

Employment by Several Employers.

Section 5. No employer shall knowingly permit any employee to work for any time which, when totalled with that already performed with another employer or employers in this Industry, exceeds the maximum permitted herein.

Article IV—Wages.

Minimum.

Section 1. The minimum wage for each division of this Industry shall be as follows:

	Cents per hour	
	Surface	Underground
1. Lead mining division	40¢	47½¢
2. Lead smelting and refining division	35	
3. Lead pigments division	40	
4. Metallic lead products division	35	
5. Metallic foil products division	35	

2703 provided that, as to the Smelting and Refining Division, in the Southern District, the minimum hourly rate shall be thirty (30) cents per hour. Minimum wages in all divisions of the Industry in effect on July 1st, 1933, which were above the minimum specified, shall in no case be reduced.

The minimum rates provided for hereinabove shall be considered as the lowest hiring rates applying to totally unskilled labor or common labor above ground in the Mining Division and totally unskilled labor or common labor in the other divisions of the Industry. In the Mining Division, the minimum hiring rate for underground common labor shall be not less than forty-seven and one-half (47½) cents per hour. Other classes of labor shall be compensated at rates above such minimums.

Clerical and Office Employees.

Section 2. No accounting, clerical, office, sales, or service employees shall be paid less than Fifteen (15) Dollars per week of forty (40) hours; provided, however, that office boys and girls and messengers may be paid at a rate not less than 80% of such minimum, and provided further that the number of such boys and girls and messengers so paid shall constitute not more than 5% of the total number of such employees of any one (1) office of any one (1) em-

ployer, but in any case each employer shall be entitled to at least one (1) such employee. Part time employees shall **be paid an hourly rate which shall not be less than the pro rata amount of the wages specified hereinabove.**

Piecework Compensation—Minimum Wages.

Section 3. This Article establishes a minimum rate of pay which shall apply, irrespective of whether an employee is actually compensated on a time rate, piecework, or other basis.

Female Employees.

Section 4. Female employees performing substantially the same work as male employees shall receive the same rate of pay as male employees, and, when they displace male employees they shall receive the same rate of pay as the men they displace.

Wages Above the Minimum.

Section 5. Equitable adjustments in all pay schedules of employees above the minimum fixed in this Code shall be made within thirty (30) days after the effective date of this Code by any employer who has not heretofore made such adjustments under the National Industrial Recovery Act. In no event, however, shall hourly rates be reduced. Within sixty (60) days after the effective date of this Code, each member of the Industry shall make a report of such adjustments whether made prior to or subsequent to the date of approval of this Code to the Code Authority.

2704 Handicapped Persons.

Section 6. A person whose earning capacity is limited because of age, physical or mental handicap, or other infirmity, may be employed on light work at a wage below the minimum established by this Code if the employer obtains from the State Authority, designated by the United States Department of Labor, a certificate authorizing such person's employment at such wages and for such hours as shall be stated in the certificate. Such authority shall be guided by the instructions of the United States Department of Labor in issuing certificates to such persons. Each employer shall file monthly with the Code Authority a list of all such persons employed by him, showing the wages paid to, and the maximum hours of work for such employee.

Apprentices.

Section 7. Employment of apprentices at rates of compensation below the minimum provided herein shall be permitted where they are apprenticed to an employer by an indenture made pursuant to the laws of the state in which such service is to be performed, under any apprentice system established and maintained by such employer, provided such indenture agreements are filed with the Code Authority. Employers shall not be allowed to have apprentices exceeding 5% of the total number of skilled craftsmen of their special class, except that each employer shall be entitled to employ at least one such employee. In no case shall an apprentice be paid less than the minimum wage provided in Section 1 of Article IV in states which do not have laws governing apprentices.

Payment of Wages.

Section 8. An employer shall make payment of all wages in lawful currency, or by negotiable check therefor, payable on demand. These wages shall be exempt from any payments for pensions, insurance or sick benefits other than those voluntarily paid by the wage earners or required by the State Laws. Pay periods for wages shall be at least semi-monthly and for salaries at least once per month. Employers shall not withhold wages except as otherwise provided for by law.

Article V—General Labor Provisions.

Child Labor.

Section 1. On and after the effective date of this Code, no person under 18 years of age shall be employed in the Lead Industry except in clerical, office, sales, service, technical and engineering departments, and no person under 16 years of age shall be employed in any capacity. In any state, an employer shall be deemed to have complied with this provision as to age of employees if he shall have on file a certificate or permit duly signed by the Authority in such state empowered to issue employment or age certificates or permits, showing that the employee is of the required age.

2705

Provisions from the Act.

Section 2. (a) Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(b) No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing, and

(c) Employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment approved or prescribed by the President.

Reclassification of Employees.

Section 3. No employer shall reclassify employees or duties of occupations performed or engage in any other subterfuge for the purpose of defeating the purposes or provisions of the Act or of this Code.

Standards for Safety and Health.

Section 4. Every employer shall make reasonable provision for the safety and health of his employees at the place and during the hours of their employment. Standards of safety and health for each division of the Industry shall be submitted to the Administrator by the Code Authority within six (6) months after approval of this Code.

State Laws.

Section 5. No provision in this Code shall supersede any State or Federal Law which imposes on employers more stringent requirements as to age of employees, wages, hours of work, or as to safety, health, sanitary or general working conditions, or insurance or fire protection, than are imposed by this Code.

Posting.

Section 6. All employers shall post and keep posted complete copies of this Code and all amendments thereto in conspicuous places accessible to employees.

Company Town and Stores.

Section 7. Employees other than maintenance or supervisory men, or those necessary to protect property, shall not be required as a condition of employment, to live in homes rented from the employer. No employee shall be required as a condition of employment, to trade at a store owned or specified by an employer.

2706 Dismissal for Complaint.

Section 8. No employee shall be dismissed by reason of making a complaint or giving evidence with respect to a violation of a Code.

Article VI—Organization, Powers and Duties of the Code Authority.

Organization and Constitution.

Section 1. A Code Authority is hereby constituted and shall consist of the members of the Executive Committee of the Lead Industries Association, the Secretary of said Association, and such division chairmen who have respectively been elected to such office by such divisions in an equitable manner, approved by the Administrator, so as to be truly representative of such divisions respectively, and who are not members of the Executive Committee. In addition to membership as above provided there may be one to three members, without vote and without compensation by the Industry, to be appointed by the Administrator to serve for such terms from the date of appointment as he may specify. On the effective date of this Code the voting members of the Code Authority shall consist of eleven members but such number is subject to variation due to the contents of the foregoing provision. It is contemplated that supplementary codes of fair competition not inconsistent with this basic Code will be adopted for each division of the Industry. When and if such supplementary codes are submitted and approved they shall contain provisions for a Divisional Code Authority selected in an equitable manner so as to be truly representative of such division of the Industry subject to the approval of the Administrator, to administer the provisions of this basic Code which relates to such division, and the provisions of such supplementary Code, and in addition this basic Code Authority may delegate such of its powers and duties as it deems necessary to such division Code Authority of such supplementary Code, provided, however, that any interested party shall have a right of appeal from any act or decision of such divisional Code Authority to the Code Authority of this basic Code.

Section 2. Each trade or industrial association directly or indirectly participating in the selection or activities of the Code Authority shall, (1), impose no inequitable restrictions on membership and, (2), submit to the Administrator true copies of its Articles of Association, By-Laws, Regulations and any amendments when made thereto, together with such other information as to membership, organization and activities as the Administrator may deem necessary to effectuate the purposes of the Act.

Section 3. In order that the Code Authority shall at all times be truly representative of the Industry and in other respects comply with the provisions of the Act, the Administrator may prescribe such hearing as he may deem proper, and thereafter, if he shall find that any basic Code Authority or divisional Code Authority is not truly representative or does not in other respects comply with the provisions of the Act, may require an appropriate modification in the method of selection of such Code Authority.

2707 Section 4. Members of the Industry shall be entitled to participate in and share the benefits of the activities of the Code Authority and to participate in the selection of the members thereof by assenting to and complying with the requirements of this Code and sustaining their reasonable share of the expenses of its administration. Such reasonable share of the expenses of administration shall be determined by the Code Authority, subject to review and approval by the Administrator, on the basis of volume of business and/or such other factors as may be deemed equitable.

Section 5. Nothing contained in this Code shall constitute the members of the Code Authority partners for any purpose. Nor shall any member of the Code Authority be liable in any manner to anyone for any act of any other member, officer, agent or employee of the Code Authority. Nor shall any member of the Code Authority exercising reasonable diligence in the conduct of his duties hereunder, be liable to anyone for any action or omission to act under this Code, except for his own wilful misfeasance or nonfeasance.

Powers and Duties.

Section 6. Subject to such rules and regulations as may be issued by the Administrator, the Code Authority shall have the following further powers and duties, the exercise of which shall be reported to the Administrator and shall be subject to his right, on review, to disapprove, after such hearing as he may prescribe, any action taken by the Code Authority. If the Administrator shall determine at any time that any action of the Code Authority or any agency thereof is unfair or unjust or contrary to the public interest, the Administrator may require that such action be suspended to afford an opportunity for investigation of the merits of such action and further consideration by such Code Authority or agency pending final action which shall not be effective unless the Administrator approves or unless he shall fail to disapprove after thirty days' notice to him of intention to proceed with such action in its original or modified form.

(a) To insure the execution of the provisions of this Code and provide for the compliance of the Industry with the provisions of the Act, subject to such rules and regulations as the Administrator may prescribe, and receive complaints of violations of this Code and disputes arising thereunder, except as otherwise hereinafter provided for in subsection (h) of this section, make investigations thereof at their own instance, provide hearings thereon, adjust such complaints and make such decisions as are necessary thereon and to interpret the provisions of the Code and to bring violations of this Code to the attention of the Administrator for prosecution, recommendation and other action.

(b) To adopt by-laws and rules and regulations for its procedure and for the administration and enforcement of the Code. The Code Authority shall promptly furnish to the Administrator true copies of the by-laws, rules and regulations adopted pursuant to this paragraph.

(c) To obtain from members of the Industry, through a confidential agency, such statistical information and reports as are required for the administration of the
2708 Code and to provide for submission by members of the Industry of such statistical information and reports as the Administrator may deem necessary for the purposes recited in Section 3 (a) of the Act, which information and reports shall be submitted by members of the Industry to such Federal and/or State agencies as the Ad-

ministrator may designate; provided that nothing in this Code shall relieve any member of the Industry of any existing obligations to furnish reports to any government agency. No individual reports submitted to the Administrator and/or such government agencies as the Administrator may designate, shall be disclosed to any other member of the Industry or any other party except to such government agencies as may be directed by the Administrator.

(d) To use such trade associations and other agencies as it deems proper for the carrying out of any of its activities provided for herein, provided that nothing herein shall relieve the Code Authority of its duties or responsibilities under this Code and that such trade associations and agencies shall at all times be subject to and comply with the provisions hereof.

(e) To make recommendations to the Administrator for the coordination of the administration of this Code with such other Codes, if any, as may be related to the Industry.

(f) To cooperate with the Administrator in regulating the use of any N. R. A. insignia solely by those members of the Industry who have assented to, and are complying with, this Code.

(g) To call meetings of any division of the Lead Industry to consider control of production through voluntary agreement, and to recommend to the Administrator such measures as have been voluntarily agreed upon covering fair trade practices, industrial planning and production control, including stabilization of employment and conservation of natural resources.

(h) Within ninety days after the effective date of this Code, the Code Authority shall submit to the Administrator for his approval a plan for the establishment of a National Industrial Relations Board for the Industry, consisting of an equal number of representatives of employers and employees. Provision shall be made in such plan for division of the country into districts and the creation of regional industrial relations boards to comprise an equal number of representatives of employers and employees truly representative of such districts. The creation and functioning of these boards, including the selection of representatives of employees, shall be in accordance with Section 7 of the Act. Provision shall also be made for the appointment of an impartial person on each board, national and regional, to vote only where such board is unable to render a majority

decision. This plan shall provide that the regional boards shall have the authority to hear and adjudicate all complaints and disputes arising out of Articles III, IV and V of the Code, and the National Industrial Relations Board shall pass on all appeals from the regional boards solely on the basis of the record as certified by the Regional Boards to the National Industrial Relations Board. Before any such plan is approved, it shall be submitted to the Labor Advisory Board of the National Recovery Administration for their consideration and recommendations. The Administrator shall have the right, after such notice and hearing as he may specify, to review, disapprove
2709 or modify such plan and the plan shall become effective as a part of this Code when and as approved by him.

Article VII—Trade Practice Rules for Lead Pigments Division.

Section 1. The following described acts shall be deemed unfair competition for Division 3 (Lead Pigments), and shall constitute a violation of this Code.

(a) Misbranding or misrepresentation of lead pigments.

(b) No member of the Industry shall give, permit to be given, or directly offer to give, anything of value for the purpose of influencing or rewarding the action of any employee, agent, or representative of another in relation to the business of the employer of such employee, the principal of such agent or the represented party, without the knowledge of such employer, principal or party. This commercial bribery provision shall not be construed to prohibit free and general distribution of articles commonly used for advertising, except so far as such articles are actually used for commercial bribery as hereinabove defined.

(c) Inducing or in any manner attempting to induce a breach, default or cancellation of a contract between a competitor and his customer during the term of such contract.

(d) Guaranteeing for a definite time the life and/or service of lead pigments.

(e) Making false and derogatory statements with respect to the prices, policies, products, practices, business or credit of any competitor.

(f) No merchandise shall be sold at a concession, or used as an inducement, to influence the sale of any lead products, nor shall any concession be given in the price or terms of sale of a lead product to influence the sale of any other merchandise.

Section 2. Each member of the Industry engaged in the manufacture and sale of lead pigments shall file with the Secretary within ten (10) days after the effective date of this Code, a list of the prices at which his products will be sold and a memorandum of any of his conditions of sale at variance with those set forth in Schedule "A" attached hereto and which is made a part hereof. Any change in prices or conditions of sale shall be reported to the Secretary in such manner as to reach his office within twenty-four (24) hours after the effective date of such change. Any member making a sale or quotation, which does not conform to the basis he then has on file, shall notify the Secretary in detail by letter mailed within twenty-four (24) hours. The information supplied the Secretary shall be reissued immediately to the reporting members.

Section 3. Each member of the Lead Pigments Industry, as defined in Article II, shall submit promptly to the Secretary the following periodic reports for compilation and reissuance in such manner as may be determined by the Division:

(a) Monthly reports of total production.

(b) Stocks on hand of finished merchandise at the beginning of each month.

(c) Monthly reports of total shipments.

2710 Article VIII—Trade Practice Rules For Metallic Lead Products Division.

Section 1. The following described acts shall be deemed unfair competition for Division 4 (Metallic Lead Products), and shall constitute a violation of this Code:

(a) No member of the Industry shall give, permit to be given, or directly offer to give, anything of value for the purpose of influencing or rewarding the action of any employee, agent or representative of another in relation to the business of the employer of such employee, the principal of such agent or the represented party, without the knowledge of such employer, principal or party. This commercial bribery provision shall not be construed to prohibit free and general distribution of articles commonly used for advertising, except so far as such articles are actually used for commercial bribery as hereinabove defined.

(b) Making allowance for sales promotion and advertising in excess of actual amount expended, or making excessive expenditures on behalf of or for the benefit of a customer.

(c) Misbranding or misrepresenting the percentage or quality of various metals in any products.

(d) No member of the Division shall secretly offer or make any payment or allowance of a rebate, refund, commission, credit, unearned discount or excess allowance, whether in the form of money or otherwise.

(e) Accepting orders guaranteed against a decline in price.

(f) Making false and derogatory statements with respect to competitors' prices, policies, products, practices, business or credit.

(g) Giving any other product at a concession in price or giving it away free, in order to influence the sale of any lead product.

(h) Changing prices after the award of a contract and specifically, but without limitation, canceling any undelivered portion of a contract for the purpose of effectuating a new contract with the buyer when the purpose of such cancelation is to create an unfair price advantage for a Member of Industry.

(i) Contracting for unspecified quantities at a fixed price or giving options at fixed prices for unspecified quantities.

(j) Inducing or in any manner attempting to induce a breach, default or cancellation of a contract, between a competitior and his customer, during the term of such contract.

(k) Taking back obsolete material or material damaged not by the vendor's fault at any value other than its value as secondary material.

Section 2. The following unfair trade practices apply to the Type Metal Business only:

(a) Attaching drum tags to competitors' dross drums without receiving authority to do so from the prospect or customer.

(b) Failing to return competitors' drums to their owner within a period not exceeding thirty days from time of their receipt.

2711 Article IX—Trade Practice Rules for Metallic Foil Products Division

Section 1. The following described acts shall be deemed unfair competition for Division 5 (Metallic Foil Products) and shall constitute a violation of this Code:

(a) No member of the Division shall publish untruthful advertising nor shall any member in any way misrepresent any goods or credit terms.

(b) No member of the Division shall knowingly withhold from or insert in any quotation or invoice any statement that makes it inaccurate in any particular.

(d) No member of the Division shall secretly offer or made any payment or allowance of a rebate, refund, commission, credit, unearned discount or excess allowance, whether in the form of money or otherwise.

Article X—Export Trade.

No provision of this Code relating to prices or terms of selling, shipping or marketing, shall apply to export trade or sales or shipments for export trade, or transactions in the foreign commence of the United States.

Article XI—Application of Code to Operations Wherein Other Metals Are Produced

Section 1. If any member of the Industry is also a member of any other Industry, provisions of this Code shall apply only to that portion of its business which is a part of the Lead Industry.

Section 2. Where there is any question as to whether lead is the major production from the operations which do or which might produce lead, zinc, copper, gold, silver or other materials, then in any and every such event the question as to which Code of Fair Competition shall govern such operations of any such member of this Industry, shall be referred to a Coordination Committee. This Coordination Committee shall be composed of two members to be appointed by each of the Code Authorities for such industries as may be involved in each particular question. In the event such Committee is unable to reach a majority conclusion, then either the Committee shall elect an additional impartial member or upon their failure so to agree on such additional impartial member, the Administrator then may appoint such additional impartial committee member. Any member of the Industry, the operations of which may raise such a question, shall file a statement of fact with the Code Authority for its Industry, and such statement shall contain a statement of its preference as to the Code it would prefer to have such operations be governed by, and such preference shall be granted unless such Coordination Committee shall find that the granting thereof would be unfair in view of the rights of others or that it would have a tendency contrary to the effectuation of the policies of the Act. Any action taken by the Coodination Committee shall be referred to the Administrator and shall be subject to his disapproval.

2712 Section 3. Within ten (10) days after the effective date of this Code, any member of this Industry may file such a statement of fact and preference as to being governed by any of such other Codes which may at that time be in effect. Thereafter upon any such other Code becoming effective, such statement may then be filed; provided, however, that until any such statement is filed and decision is made thereon by such Coordination Committee, such operation of such member of this Industry shall be governed by the provisions of this Code.

Section 4. From time to time thereafter if conditions change, members of this Industry shall be entitled to file such statements of fact and preference as to change of a portion of their operations from the jurisdiction of one Code to the jurisdiction of another, and in such event they shall be handled in the same manner as provided for above.

Section 5. The foregoing Sections 1 to 4 inclusive of this Article XI, shall not be effective until Codes of Fair Competition for the copper and zinc industries, containing an Article substantially the same as this Article XI, have been approved, and are in effect, and certified copies of such approved codes have been filed with the Code Authority for this Industry.

Article XIII—Monopolies

Section 1. This Code and all the provisions thereof are expressly made subject to the right of the President, in accordance with the provisions of Subsection (b) of Section 10 of the Act, from time to time to cancel or modify any order, approval, license, rule, or regulation issued under said Act and specifically, but without limitation, to the right of the President to cancel or modify his approval of this Code or any conditions imposed by him upon his approval hereof.

Section 2. Such of the provisions of this Code as are not required to be included therein by the Act may, with the approval of the Administrator, be amended as provided in Section 3 hereof, in such manner as may be indicated by the needs of the public, by changes in circumstances, or by experience; all the provisions of this Code, unless so modified or eliminated, shall remain in effect until the expiration of Title I of the Act.

Section 3. An amendment to this Code or any Codes supplemental thereto affecting or pertaining to the several divisions of the Lead Industry, may be proposed by any interested party either to the divisional Code Authority, the Basic Code Authority, or directly by or to the Administrator. All such proposed amendments shall be referred to the division affected or interested and then shall be submitted by said division to the Basic Code Authority, who shall give Members of the Industry an opportunity to be heard thereon, and thereafter the Code Authority may make such recommendations thereon as are deemed proper; provided, however, that when approved by the Administrator as necessary to effectuate the policies of the Act, after such notice and hearing as he may prescribe, any proposed amendment shall thereupon become effective as a part of this Code

2713 Article XIII—Monopolies

No provision of this Code shall be so applied as to promote monopolies or monopolistic practices, or to eliminate, oppress, or discriminate against small enterprises.

Article XIV—Effective Date

This Code shall become effective beginning the second Monday after its approval by the Administrator.

Approved Code No. 442.
Registry No. 1217-8-01.

2714 Schedule A

Article I—Conditions For Sale of Lead Oxides in Lots of Less Than Twenty Tons

A. "Sale" or "Order" as used herein includes any transaction whereby a Member of the Industry makes a quotation on, or becomes obligated to sell and deliver material.

B. Whatever terminology may be used, the intent and meaning thereof shall conform to the following requirements of sale:

(1) Material.—Dry Oxides of Lead, or mixtures consisting principally thereof, each grade of material to be specifically designated.

(2) Quantity.—Any amount as agreed between Buyer and Seller.

(3) Packages.—As agreed between Buyer and Seller. Special packages required by Buyer shall be charged for according to cost.

(4) Price.—(a) Seller's card or quoted price in effect on date order is received with allowance as follows:

(1) Not more than one-half cent (½¢) per pound for minimum shipment of five (5) tons for one buyer at one time to one destination.

(b) Emergency shipments of smaller quantities may be made at the 5-ton price only to a customer for whom the Seller has a 5-ton order on hand for the same material for immediate shipment, or five (5) tons en route to the same destination.

(c) No protection against decline in Seller's price may be given.

(d) Red Lead containing ninety-seven per cent (97%) or ninety-eight per cent (98%) Pb_3O_4 shall be so marked on the package and shall be sold at not less than one-quarter cent (¼¢) and one-half cent (½¢) per pound, respectively, over Seller's price for grades of lower Pb_3O_4 content.

(5) Delivery.—F.O.B. cars Seller's shipping point, or by truck F.O.B. Buyer's premises.

(6) Transportation Allowance.—(a) Since transportation is included in the Seller's price, the actual freight paid by Buyer shall be allowed as deduction. No cartage allowance shall be made to Buyer for use of his own truck.

(b) If shipment is made by Buyer's boat, Seller may allow actual amount he would have paid for like transportation at minimum published tariffs in effect on date of shipment.

(7) Shipment.—Shall be made at least within thirty (30) days from date order is received.

(8) Terms.—Net thirty (30) days, less one per cent (1%) for cash in ten (10) days from date of shipment.

(9) Taxes.—Any tax or other charge imposed by Federal Law upon the production and/or sale and/or shipment of Lead Oxides shall be added to the price to be paid by the Buyer on any transaction to which such charge is applicable.

Article II—Conditions for Sale of Lead Oxides in Lots of at Least Twenty Tons

A. "Sale" or "Order" as used herein refers to any transaction whereby a Seller quotes on or becomes obligated to deliver material.

B. Whatever terminology may be used, the intent and meaning thereof shall conform to the following requirements of sale:

(1) Material.—Dry Oxides of Lead, or mixtures consisting principally thereof, each grade of material to be specifically designated.

(2) Quantity.—As agreed between Buyer and Seller; provided, that each order or release shall be an amount not less than twenty (20) tons to one destination and for account of not more than one Buyer.

(3) Period.—As specified.

2715 (4) Packages.—As agreed between Buyer and Seller. Special packages required by Buyer shall be charged for according to cost.

(5) Price.—(a) Shall be determined by adding a differential, as agreed upon by Buyer and Seller, to the price of common Lead at New York, the Lead price applying to each order to be specified by the Buyer at the time order is placed, as:

(1) The American Smelting & Refining Company's quotation at the close of the market on the day the order is received by Seller

or

(2) The American Smelting & Refining Company's quotation at the close of the market on a future date definitely agreed upon by Buyer and Seller when order is accepted

or

(3) The average quotation, as reported in one of the publications known as the American Metal Market and the Engineering & Mining Journal, for a future period definitely agreed upon by Buyer and Seller when the order is accepted. If the Lead price is determined by the method

herein outlined, Seller must require Buyer to specify before the beginning of the governing period the exact quantity of material to be priced in this manner. Deferred shipments shall be billed on the basis originally applicable thereto. Additional quantities required during the governing period shall be considered as new orders and shall be priced in accordance with (1) or (2) above.

(b) Emergency shipments of smaller quantities may be made on the twenty (20) ton price basis only to a customer for whom the Seller has a twenty (20) ton order on hand for the same material for immediate shipment, or twenty (20) tons en route, to the same destination.

(c) No protection against decline in Seller's price may be given.

(d) Red Lead containing ninety-seven per cent (97%) or ninety-eight per cent (98%) Pb_3O_4 shall be so marked on the package and shall be sold at not less than one-quarter cent (¼¢) and one-half cent (½¢) per pound, respectively, over Seller's price for grades of lower Pb_3O_4 content.

(6) Delivery.—(a) F.O.B. cars Seller's shipping point

or

(b). By truck complete within three (3) days, F.O.B. Buyer's premises.

(7) Transportation Allowance.—(a) Since transportation is included in the Seller's price, the actual freight paid by Buyer shall be allowed as a deduction. No cartage allowance shall be made to Buyer for use of his own truck.

(b) If shipment is made by Buyer's boat, Seller may allow actual amount he would have paid for like transportation at minimum published tariffs in effect on date of shipment.

(8) Shipment.—Shall be made at least within sixty (60) days from,

(a) The date on which the price of pig lead governs the sale,

or

(b) The beginning of the period during which the average price of Pig Lead governs the sale.

(9) Terms.—Net thirty (30) days.

(10) Taxes.—Any tax or other charge imposed by Federal Law upon the production and/or sale and/or shipment of Lead Oxides shall be added to the price to be paid by the Buyer on any transaction to which such charge is applicable.

Article III—Conditions for Sale of Basic Lead Carbonate (Dry White Lead)

A. "Sale" or "Order" as used herein includes any transaction whereby a Member of the Industry makes a quotation on or becomes obligated to sell and deliver material.

B. Whatever terminology may be used, the intent and meaning thereof shall conform to the following requirements of sale:

(1) Quantity.—Any amount as agreed between Buyer and Seller.

2716 (2) Period.—As desired, to be specified.

(3) Packages.—As agreed between Buyer and Seller.

(4) Price—(a) Spot Sales.—Seller's card or quoted price in effect on date order is received.

(b) Contract Sales.—1. Seller's price on date contract is made with protection against advance or decline on the undelivered portion to the end of the current calendar quarter.

2. On contracts extending beyond the current calendar quarter, the price applying to subsequent deliveries shall be seller's price in effect on the first day of the calendar quarter in which they are made, with protection against advance or decline on the undelivered portion to the end of each quarter.

(c) The price for minimum twenty (20) ton lots for one Buyer to one destination, shipped by rail in one carload, or delivered by truck within a period of three (3) days, shall be not more than one-quarter cent (¼¢) per pound less than that charged for smaller quantities.

(d) Emergency shipments of smaller quantities may be made at the twenty (20) ton price only to those customers for whom the Seller has a twenty (20) ton order on hand for the same material for immediate shipment, or a carload (twenty (20) tons) en route, to the same destination.

(5) Delivery.—F.O.B. cars Seller's shipping point, or by truck F.O.B. Buyer's premises.

(6) Transportation Allowance.—Since transportation is included in the Seller's price, the actual freight paid by Buyer shall be allowed as deduction. No cartage allowance shall be made to Buyer for use of his own truck.

(7) Shipment—(a) Spot Sales.—Within thirty (30) days from date order is received.

(b) Contract Sales.—Within the period covered by the contract.

(8) Terms.—Net thirty (30) days, less one per cent (1%) for cash in ten (10) days from date of shipment.

(9) Taxes.—Any tax or other charge imposed by Federal Law upon the production and/or sale and/or shipment of white lead shall be added to the price to be paid by the Buyer on any transaction to which such charge is applicable.

3403 COMMISSION'S EXHIBIT NO. 836.

Memorandum of Facts Covering Production of Lead Pigments at East Chicago, Indiana by International Smelting and Refining Company and Its Predecessors.

The production of dry white lead was begun by the Anaconda Lead Products Company at East Chicago, Indiana, in 1919. The first sales were made on January 15, 1920, and regular production began in February 1920.

The Anaconda Lead Products Company first began to manufacture white lead-in-oil at East Chicago, Indiana in 1931, its first sales of that product being made in March of that year, although regular production did not get underway until December.

In 1919, the Anaconda Copper Mining Company owned 75% of the stock of the Anaconda Lead Products Company. The remaining 25% was acquired in 1936 and on October 31, 1936, it was dissolved and all of its assets and property were transferred to the International Smelting and Refining Company.

Following the acquisition of the assets and property of the Anaconda Lead Products Company in 1936, the International Smelting and Refining Company continued the manufacture of both dry white lead and white lead-
3404 in-oil through its Pigment Division until the latter
part of July, 1946.

On June 1, 1946, the International Smelting and Refining Company addressed a communication to the dry pigment trade (a copy of which is attached hereto, marked "Exhibit A"), stating that, because of shortage of labor and supplies, higher prices for both of these, quotas which reduced volume and automatically increased production costs and restrictions for prices on finished products, it had been decided to discontinue operations permanently.

On June 20, 1946, notice was addressed to the lead-in-oil trade (a copy of which is attached hereto, marked "Exhibit B"), stating that it had been decided to permanently suspend operations at the East Chicago, Indiana plant of the International Smelting and Refining Company and discontinue the business.

Production of dry white lead stopped on July 16, 1946, and that of lead-in-oil on July 23, 1946.

No further orders for dry white lead or white lead-in-oil were accepted after August 1, 1946, and all such materials on hand were shipped to customers by the end of that month.

3405 The Anaconda Sales Company, which is a wholly owned subsidiary of the Anaconda Copper Mining Company, has acted as a sales agency for both the Anaconda Lead Products Company and the International Smelting and Refining Company in selling dry white lead and white lead-in-oil. The International Smelting and Refining Company also sold directly to the trade dry white lead and white lead-in-oil through its Pigment Division.

The International Smelting and Refining Company, Pigment Division, allowed the Anaconda Sales Company one-fourth (¼) of 1% commission on the gross business booked by it.

The Anaconda Copper Mining Company has never engaged in the manufacture or sale of dry white lead or white lead-in-oil.

The principal source of supply of pig lead, which was used in the production of lead pigments, was lead bullion smelted by the International Smelting and Refining Company at Tooele, Utah, and refined at East Chicago, Indiana. A small amount of pig lead was secured through the treatment of secondary lead at East Chicago, which was purchased on the open market.

The territory in which business was solicited, and where most of the sales were made, was generally east of the Mississippi River. Some business was indirectly solicited, mainly through manufacturer's agents, in Kansas City, Dallas, Houston and on the Pacific Coast.

3406 The products in question were shipped direct to customers and also warehoused. Shipments to warehouses were generally in carload quantities, although occasionally less than a carload shipment was made because of an emergency or because of some special reason. The warehouses serviced the territory in their immediate vicinity and were located at various times in the following cities: Boston, Brooklyn, Newark, Philadelphia, Akron, Indianapolis, Detroit, St. Louis, Louisville, Minneapolis, Kansas City, Dallas, Houston, Los Angeles, San Francisco, Oakland, Portland and Seattle. Shipments made direct to customers from East Chicago were made on both written and verbal orders of customers and also on written and verbal instructions from International's agents.

Dry white lead has never been sold under consignment and white lead-in-oil has only been sold under consignment contract in the State of Wisconsin where it was employed to protect the Company under the local laws covering the insolvency of vendors. In other states, sales were made through what was known as a consignment arrangement. By means of this, materials were delivered to dealers and about the 25th of each month a form was sent to them, on which the dealers inserted the amount of white lead-in-oil on hand at the time of the previous re-
3407 port and the amount presently in stock the difference between the two being the amount which had been sold during the preceding 30 days, and the dealers were invoiced for this upon the receipt of the reports, the usual terms being 2% 10 days, net 60. In computing the time on these discounts, the date used was that of the mailing of the invoices to the customer. This dealer arrangement was commenced in November of 1932. A copy of the consignment contract used in Wisconsin is attached hereto marked "Exhibit C."

When the Anaconda Lead Products Company first commenced making and selling white lead-in-oil, there were no price cards or selling information published; neither was there a map dividing the country in zones and it cannot be ascertained when a zone map was first used. The first time that it clearly appears that the present map and differentials were used was at the time of the price change on January 1, 1937. From that date until the International Smelting and Refining Company discontinued the lead pigment business, the various zones, as hereinafter set forth, were used in the sale of white lead-in-oil.

The par zone consisted of the states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Dela-
3408 ware, Maryland, West Virginia, Ohio, Kentucky (less the western tip), Indiana, Michigan, Illinois (less

the northwestern border) and Wisconsin (less the western edge).

The ⅛¢ over par zone consisted of the states of Virginia (less the western one-third), Minnesota, Iowa, Missouri (less St. Louis and the immediate vicinity) and the western tip of Kentucky, the northwestern border of Illinois and the western edge of Wisconsin. Also included in this zone were the cities of Lincoln, Omaha, Kansas City, Leavenworth and Atchison.

The ¼¢ over par zone consisted of the states of North Dakota, South Dakota, Nebraska (less Lincoln and Omaha), Kansas (less Kansas City, Leavenworth and Atchison), Tennessee and the western one-third of Virginia.

The ½¢ over par zone consisted of Wyoming, Colorado and Oklahoma.

The ¾¢ over par zone consisted of the state of Texas (less the western tip embracing the El Paso District).

The 1¢ over par zone consisted of the state of New Mexico, plus the western tip of Texas embracing the El Paso District.

3409 The pricing in the Pacific Coast area was based on a par territory surrounding San Francisco, with differentials over par for the rest of the state and for the other states in that district. There are hereinafter set forth the states and districts included in those differentials: California: Par territory: San Francisco and south to San Jose, inclusive; Oakland; Berkeley; Richmond to Hayward, inclusive. ¼¢ over par: Stockton; Sacramento; Fresno; Modesto; Los Angeles: metropolitan Los Angeles district, which includes Santa Monica, San Pedro, Wilmington, Long Beach, Pasadena, Glendale, Burbank, North Hollywood and intermediate towns; San Diego. ½¢ over par: Eureka, Bakersfield. Idaho: ¾¢ over par: Boise; Lewiston; Pocatello; Twin Falls. Montana: ¾¢ over par: Anaconda; Kalispell; Butte; Billings; Great Falls; Helena; Missoula. Nevada: ½¢ over par: Reno. Oregon: ¼¢ over par: Portland. Utah: ¾¢ over par: Salt Lake City; Ogden. Washington: ¼¢ over par: Seattle; Tacoma. ½¢ over par: Spokane; Walla Walla; Yakima. (The price bases over par apply only to the terminal points listed. For instance, in Nevada the only terminal point is Reno at ½¢ per pound over par. All other towns in the state of Nevada would be f.o.b. par territory, or ½¢ over par, f.o.b. Reno.)

White lead-in-oil was sold in kegs and cans and there

was a difference in price, in addition to the differen-
3410 tials that apply in the various zones, depending upon
the size of the kegs and cans. For the par territory
using the January 26, 1942 card, this is shown as follows:

Net Weight	Cents per lb.	Price per pkg.
100 lb. keg	10½	$10.50
50 lb. keg	10¾	5.38
25 lb. keg	11	2.75
12½ lb. keg	11¼	1.41
*5 lb. keg	12½	
*1 lb. keg	14	

*Heavy Paste only.

All of the above prices applied to any quantity of the various size containers except carload lots.

International's 5 and 1 pound cans came in heavy paste only. The 5 pound cans were packaged in cartons of 6 and the 1 pound cans were packaged in cartons of either 6 or 12.

The position of International with relation to the total per cent. of white lead-in-oil sold annually by the industry from 1937 through 1945 is hereinafter set forth:

	1937	3.24%
	1938	3.12%
	1939	3.79%
3411	1940	4.03%
	1941	3.82%
	1942	3.78%
	1943	3.08%
	1944	3.20%
	1945	3.8%

Dry white lead was never sold on any zone basis comparable to that used for the sale of white lead-in-oil. All prices for dry white lead were f.o.b. East Chicago, Indiana, or nearest warehouse, with freight or cartage allowed. A discount of ¼¢ per pound was given for carload lots consisting of 20 tons in one delivery and on one invoice.

The first date on which it can be definitely determined that a zone system was used in the sale of dry white lead was on October 1, 1935, and no changes were made in that zone system from then until the time the International Smelting and Refining Company discontinued the lead pigment business. The country was divided into a par zone and the Pacific Coast area. An additional charge of ¼¢

per pound over the par price was made for sales in the Pacific Coast area, which embraced the states of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming.

3412 The position of International with relation to the total per cent. of dry white lead sold annually by the industry from 1937 through 1945 is hereinafter set forth:

1937	19.34%
1938	15.42%
1939	15.52%
1940	14.60%
1941	13.79%
1942	12.56%
1943	10.49%
1944	11.38%
1945	11.9%

The Anaconda Lead Products, the Anaconda Sales Company and the International Smelting and Refining Company have generally adhered to their published and announced prices, terms and conditions of sale on lead pigments. Statistics as to monthly and annual production, stocks and shipments of lead pigments have been furnished to the Lead Industries Association and, in turn, similar information has been received from said Association covering the operations of the industry as a whole.

3413 "Exhibit A."

Letterhead of

International Smelting and Refining Company,
East Chicago, Indiana.

June 1st, 1946

To the Trade:

Our operations at East Chicago have been seriously affected by the troubles with which every concern has to contend. We refer principally to shortages of labor and supplies, higher prices for both of these, quotas which reduce volume and automatically increase production costs and restrictions on prices for finished products.

Because of these conditions operations at East Chicago have been unsatisfactory for some time. Since it appears unlikely that there will be sufficient relief reasonably soon it has been decided that operations will be discontinued permanently.

We expect to fulfill any second quarter obligations to our regular customers that we may have. All available tonnage will be distributed equitably and the regular grades will be furnished to the extent that this is possible.

We appreciate the consideration the trade has shown us during the many years we have been in business. We regret this action is necessary but feel no other course is open to us.

International Smelting and Refining Company

3414 "Exhibit B."

Letterhead of

International Smelting and Refining Company,
East Chicago, Indiana.

June 20, 1946

To the Trade:

It has been decided to permanently suspend operations at the East Chicago Plant of the International Smelting and Refining Company and discontinue the business.

We appreciate the consideration the trade has shown us during the many years we have been in business. We regret this action is necessary but feel no other course is open to us.

International Smelting and Refining Company

3415 "Exhibit C."

Consignment Agreement.

This agreement made this .... day of ...., 193..., by and between the International Smelting and Refining Company, Pigment Division, a corporation, of East Chicago, Indiana, hereinafter referred to as the "Manufacturer" and .... Company having a principal place of business and office at ...., state of ...., hereinafter referred to as the "Consignee":

1. The Manufacturer shall from time to time consign to the Consignee at its place of business on consignment, Anaconda Lead-in-Oil in cans of 100#, 50#, 25#, 12½#, 5#, and/or 1# size, which bear the caption Anaconda

White Lead, in quantities, which shall be desired by the Consignee and agreed to by the Manufacturer, such goods to be billed to the Consignee on memorandum invoice.

2. It is agreed that the Consignee shall exercise due care in maintaining the condition of these goods and that it will be responsible to the Manufacturer for their loss, theft, or damage according to the price schedules at which they were consigned. The Consignee agrees to carry the consigned stock at its own expense and in its regular place of business at the above designated location in such a manner that it can be readily identified as the property of the Manufacturer. The consigned stock shall be at all times until sold by the Consignee the property of the Manufacturer and open to the inspection of its officers and agents.

3. The Consignee is to report to the Manufacturer on the .... day of each month for the merchandise which it holds on consignment and remit to the Manufacturer for the proceeds realized from the sale of consigned merchandise in accordance with the prices and terms as set forth in the price cards which will be furnished by the Manufacturer periodically to the Consignee. The price of the consigned merchandise will be that of the latest price card furnished by the Manufacturer and the Consignee agrees that upon the receipt of notice of change in current prices, it will furnish the Manufacturer with a detailed report of the consigned stocks on hand.

4. It is understood and agreed that the Consignee is not the agent of the Manufacturer and has no power to bind or contract for the Manufacturer in any way whatsoever. All sales made from the consigned stock shall be for the account of the Consignee and not the Manufacturer.

5. This agreement may be terminated by either party on thirty days' notice and at the option of the Manufacturer in the event of the insolvency of the Consignee without prejudice to any rights it may have against the Consignee. Upon the termination of this agreement for any cause, the Manufacturer's merchandise held by the Consignee shall be returned on the demand or request of the Manufacturer.

3416 6. Unless terminated by either party as hereinbefore provided, this agreement shall continue in full force and effect until one year from the date hereof and thereafter from year to year until written notice of termination is given by either of the parties to the other as hereinbefore provided.

7. Should the Consignee herein at any time become insolvent or make an assignment for the benefit of creditors, or a voluntary or involuntary petition in bankruptcy be filed against said Consignee, all goods of the Consignor, then in possession of the Consignee, shall upon demand, be immediately returned to the Consignor.

In Witness Whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

International Smelting and Refining Company
Pigment Division
By ....

....
Consignee
By ....

4573 COMMISSION'S EXHIBIT NO. 851.

Lead Production and Consumption in the United States.
(In tons of 2,000 lb.)

Year	I Receipts in U. S. Ore	II Shipments ex Primary Refineries	III Consumption Computed by Industries	IV Percentages Furnished Primary Refiners	V Percentages Correlated with Domestic Ore	VI Lead exported with Drawback
1930	564,770	637,384	768,600	82.9	73.5	12,161
1931	404,976	429,949	567,700	75.7	71.3	10,503
1932	288,276	317,261	416,700	76.1	69.2	7,220
1933	274,389	347,156	449,500	77.2	61.0	6,508
1934	292,730	379,807	488,000	77.8	60.0	7,472
1935	328,842	433,456	538,900	80.4	61.0	8,995
1936	369,311	513,361	633,550	81.0	58.3	8,312
1937	468,800	575,933	678,700	84.9	69.1	8,679
1938	367,791	421,625	546,000	77.2	67.4	9,061
1939	411,269	555,074	667,000	83.2	61.7	10,379
Totals, 1930-1939	3,771,154	4,611,006	5,754,650	80.1	65.5	89,290
1940	451,202	640,000	782,000	81.8	57.7	15,604
1941	460,191	964,000	1,050,000	91.8	43.8	14,293 (a)
1942	491,676		1,000,000		49.2	
1943	456,991		1,100,000		41.5	

(a) January-September only.

In the above table receipts of lead in ore are the annual aggregates of monthly reports, reflecting the lead content computed as recoverable. Shipments ex refineries are also the annual aggregates of the monthly reports. Into those shipments a large quantity of secondary lead has already entered. Consumption computed by industries is as given annually in this Year Book, and is inclusive of soft lead and hard lead, both primary and secondary. Column IV is II ÷ III. Annual variations above and below the 10-year average of 80% are possibly associated with the price for lead, the percentage being minus in the period of low price and plus in the period of higher price. Column V is I ÷ III. The wide range in these annual percentages is associated with plus or minus in stocks of ore, scrap and base bullion. The quantities given in column VI are included in column III and represent manufactures from imported lead on which duty was paid and subsequently refunded. The comments hereinbefore refer to conditions prior to 1940, in which year and subsequently conditions have been confused by the importation into U. S. A. of large tonnages of refined lead from foreign countries, out of which shipments have been made into domestic consumption. Such shipments are included in the second column.

Some American Manufactures of Lead

Year	Litharge (a)	Red Lead (a)	White Lead, Dry (a)	White Lead in Oil (a)	Lead Pipe and Sheet (b)
1934	62,767	24,356	18,555	45,922	31,000
1935	70,953	25,880	22,582	57,589	34,200
1936	78,772	30,860	25,183	60,294	40,000
1937	74,762	32,469	30,563	55,469	45,500
1938	62,014	26,018	21,218	49,912	36,000
1939	78,738	35,520	23,644	51,304	43,000
1940	81,681	38,270	23,742	41,693	51,000
1941	109,750	47,087	43,298	41,048	77,000
1942	82,325	44,604	33,993	37,797	90,000
1943	98,551	45,946	30,393	16,921	100,000

(a) As reported by the Lead Industries Association, expressed as lead content. These manufactures appear in the accounting for lead consumption on page 41, but the analysis here is different, and apparently some small productions under the several heads are omitted. (b) Estimated; including sundry extruded products and fittings.

Use of Lead in the United States (a)
(In tons of 2,0[illegible] lb.)

Purpose	1934	1935	1936	1937	1938	1939	1940	1941	1942	1943
White Lead	64,500	80,000	85,500	86,000	71,000	75,000	65,500	85,000	75,000	50,000
Red lead and litharge (b)	42,000	47,500	54,000	57,000	43,000	57,200	59,400	89,100	68,000	79,000
Storage batteries	163,000	175,000	191,000	192,000	167,000	198,000	220,200	245,000	215,600	257,000
Cable covering	35,200	38,900	61,400	90,000	60,000	74,400	107,400	173,000	165,000	132,000
Building (c)	30,000	32,000	40,000	45,000	36,000	50,000	65,000	95,000	110,000	62,000
Automobiles	7,300	10,000	11,100	12,000	6,000	8,900	11,000	12,000	3,000	1,000
Ammunition	34,800	29,200	32,500	39,500	31,200	42,300	56,000	71,500	83,000	178,000
Terne plate	2,600	4,700	6,200	6,400	4,300	6,000	6,000	8,700	4,900	5,000
Foil	16,200	15,900	28,500	21,700	22,000	21,800	23,500	45,000	7,700	13,000
Bearing metal	12,100	13,000	16,500	15,900	9,000	12,800	14,000	25,000	20,000	23,000
Solder	16,000	20,000	22,000	22,000	15,000	20,000	24,000	36,000	38,000	38,000
Typemetal	13,000	15,000	17,000	17,000	12,000	14,000	16,800	20,000	20,000	17,000
Calking	10,000	12,000	13,500	15,000	12,000	16,000	19,200	31,000	40,000	30,000
Castings	5,000	5,000	5,750	6,000	6,000	7,500	9,000	14,000	(e)	(e)
Other uses (d)	36,300	40,700	48,600	54,100	51,500	63,100	85,000	99,700	149,800	215,000
Totals	488,000	538,900	633,550	678,700	546,000	667,000	782,000	1,050,000	1,000,000	1,100,000

(a) Includes antimonial lead. (b) Exclusive of oxides for storage batteries. (c) Under the head of building is included the lead used in chemical construction, (d) Among "Other Uses" the largest item in recent years has been the manufacture of lead-tetraethyl for tempering gasoline. Also included are lead for brass making, collapsible tubes, lead-lined pipe, lead-headed nails, railway equipment, shipbuilding and many miscellaneous uses. The figures for 1942-43 include lead exported. (e) Included in "Other Uses."

Commission's Exhibit No. 851.

Note.—We estimate that about 75% of the lead that goes into storage batteries returns into production of soft and hard lead, which production is not accounted fully in prior tables owing to omission of most of the secondary smelters. For this reason the totals in the above accounting are in excess of shipments reported ex-primary refineries.

In the accounting for the use of lead in 1941 the allocation to ammunition does not include the use for that purpose in the government arsenals, and also omitted are consignments of refined pig lead for governmental use otherwise. For these reasons the total of the accounting falls short of the computational consumption of lead by difference in the introductory page of this section; and for the same and similar reasons a percentage computation of uses in 1941-43 is omitted.

Use of Lead in the United States by Percentage

Purpose	1931	1932	1933	1934	1935	1936	1937	1938	1939	1940
White lead	13.65	13.08	13.15	13.22	14.85	13.50	12.67	13.00	11.24	8.38
Red lead and litharge	3.17	7.68	8.45	8.61	8.81	8.52	8.40	7.87	8.58	7.59
Storage batteries	27.66	33.12	32.70	33.40	32.47	30.15	28.29	30.59	29.69	28.16
Cable covering	20.61	13.32	6.99	7.21	7.22	9.69	13.26	10.99	11.15	13.73
Building	7.05	5.28	5.78	6.15	5.94	6.31	6.63	6.59	7.50	8.31
Automobiles	1.06	.84	1.11	1.50	1.86	1.75	1.77	1.10	1.33	1.41
Ammunition	5.23	5.59	7.19	7.13	5.42	5.13	5.82	5.71	6.34	7.16
Foil	3.52	3.36	5.01	3.32	2.95	4.50	3.20	4.03	3.27	3.00
Bearing metal	2.11	2.40	2.54	2.48	2.41	2.61	2.21	1.65	1.92	1.79
Solder	3.61	3.36	3.56	3.28	3.71	3.47	3.24	2.75	3.00	3.07
Typemetal	2.54	2.59	2.45	2.66	2.78	2.68	2.50	2.20	2.10	2.15
Calking	2.64	2.40	2.67	2.05	2.23	2.13	2.21	2.20	2.40	2.46
Other uses	7.15	6.98	8.40	8.99	9.35	9.56	9.80	11.32	11.48	12.79
Totals	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00

4577 COMMISSION'S EXHIBIT NO. 852.

Letterhead of Strange, Myers, Hinds & Wight,
New York City.

December 18, 1946.

Joseph S. Wright, Esq.,
Trial Attorney,
Federal Trade Commission,
Washington, D. C.

Dear Mr. Wright:

Re: F. T. C. *vs.* National Lead Co. et al.

As requested in your letter of the 29th, The Glidden Company has prepared, and I enclose herewith, a list of storage battery manufacturers who purchased lead oxides from its Metals Refining Company Division at Hammond, Ind. from Oct. 1, 1941 to Dec. 31, 1941, and at the next hearing I shall be willing to stipulate these facts, subject of course to correction and to objections as to materiality and relevancy, though waiving any objection as to the competency of the evidence.

One of the Glidden employees informs us that Glidden's terms of sale at that time were "f.o.b. Hammond, Ind. freight allowed", and if desired that fact also will be stipulated with the same conditions.

I trust that the foregoing will serve your purpose. If not, please let me know immediately so that if anything further is required I can make an effort to get it for you before the hearing on January 7th.

With kindest regards, I am

Very sincerely yours,

Roger Hinds.

RH:ML
CC: Mr. Duncan,
Mr. Knight.

852-B

LIST OF STORAGE BATTERY MANUFACTURERS WHO PURCHASED LEAD OXIDES FROM METALS REFINING COMPANY, HAMMOND, INDIANA
From October 1, 1941 to December 31, 1941

CUSTOMER	SHIPPED FROM	SHIPPED TO	SHIPPED VIA	FREIGHT RATE	
CARLOAD LOTS					
Philco Corp. (Storage Battery Div.) Philalphia	Hammond	Trenton, N.J.	IHB, Penn R.R.	41¢	CWT
Gibbs Battery Co., Inc. Corydon, Iowa	Hammond	Corydon	Truck	38¢	"
Bowers Battery Mfg. Co., Reading, Pa.	Hammond	Readin	IHB, NYC RR	38¢	"
Federal Storage Battery Co., Chicago	Hammond	Chicago	Truck	11¢	"
FIVE TON LOTS					
Batteries, Inc., Detroit, Mich.	Hammond	Detroit	Truck	46¢	"
Federal Storage Battery Co., Chicago	Hammond	Chicago	Truck	15¢	"
Merrimac Battery Plate Co., Louisville, Ky.	Hammond	Louisville	Truck	48¢	"
Wagg Battery & Mfg. Co., Wapello, Iowa	Hammond	Wapello	Truck	46¢	"
Wonch Battery Co., Okemos, Michigan	Hammond	Okemos	Truck	42¢	"
Apex Battery Mfg. Co., Chicago	Hammond	Chicago	Truck	15¢	"
Wagg Battery Mfg. Co., Wapello, Iowa	Hammond	Wapello	Truck	46¢	"
LESS THAN FIVE TON LOTS					
Quaker Battery Co., Berwyn, Illinois	Hammond	Berwyn	Truck	15¢	"
Shurstart Battery Co., Chicago	Hammond	Chicago	Truck	15¢	"
Ace Battery Company, Chicago	Hammond	Chicago	Truck	15¢	"
Red Diamond Batteries, Peoria, Ill.	Hammond	Peoria	Truck	37¢	"
Parkwood Battery Co., Cleveland, Ohio	Cleveland	Cleveland	Truck		
Cleveland Storage Battery, Cleveland, Ohio	Cleveland	Cleveland	Truck		
Crown Battery Co., Fremont, Ohio	Hammond	Fremont	Truck	45¢	"
Crystal Battery Mfg. Co., Cedar Rapids, Iowa	Hammond	Cedar Rapids	Truck	49¢	"
Gem Battery Company, Peoria, Illinois	Hammond	Peoria	Truck	37¢	"
Wentworth Battery Mfg. Co., Pensacola, Fla.	Hammond	Pensacola	R.R.	1.19	"

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 852-B

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Commission's Exhibit No. 852.

852-C

CUSTOMER	SHIPPED FROM	SHIPPED TO	SHIPPED VIA	FREIGHT RATE
LESS THAN FIVE TON LOTS (Cont'd.)				
American Battery Company, Chicago	Hammond	Chicago	Truck	15¢ CWT
Hawkeye Storage Battery Co., St. Olaf, Iowa	Hammond	St. Olaf	R.R.	53¢ "
M. J. Fitzgerald Company, Madison, Wisc.	Hammond	Madison	Truck	34¢ "
C S Battery Company, Chicago	Hammond	Chicago	Truck	15¢ "
Gantt Battery Company, Rock Hill, S.C.	Hammond	Rock Hill	R.R.	$1.12 "
F & H Battery Company, Scranton, Pa.	Scranton	Scranton	R.R.	76¢ "
Standard Battery Company, Baltimore, Md.	Hammond	Baltimore	B&O,RR	77¢ "
Solar Corp., Milwaukee, Wisc.	Hammond	Milwaukee	Truck	29¢ "
Henry C. Franke, Dolton, Illinois	Hammond	Dolton	Truck	19¢ "
J. B. Jaeger, Madison, Wisc.	Hammond	Campbells Port, Wisc.	Truck - RR	3[illegible]¢ "
Penn Storage Battery Co., Erie, Pa.	Hammond	Erie	Truck	57¢ "
Cramer Storage Battery Co., Scranton, Pa.	Hammond	Scranton	Erie	76¢ "
Illinois Battery & Elec. Company, Chicago	Hammond	Chicago	Truck	15¢ "
Abbotsford Battery Mfg. Co., Abbotsford, Wisc.	Hammond	Abbotsford	Truck	60¢ "

FEDERAL TRADE COMMISSION
Docket No. [illegible]
Commission's Exhibit No. 852-C

Commission's Exhibit No. 852.

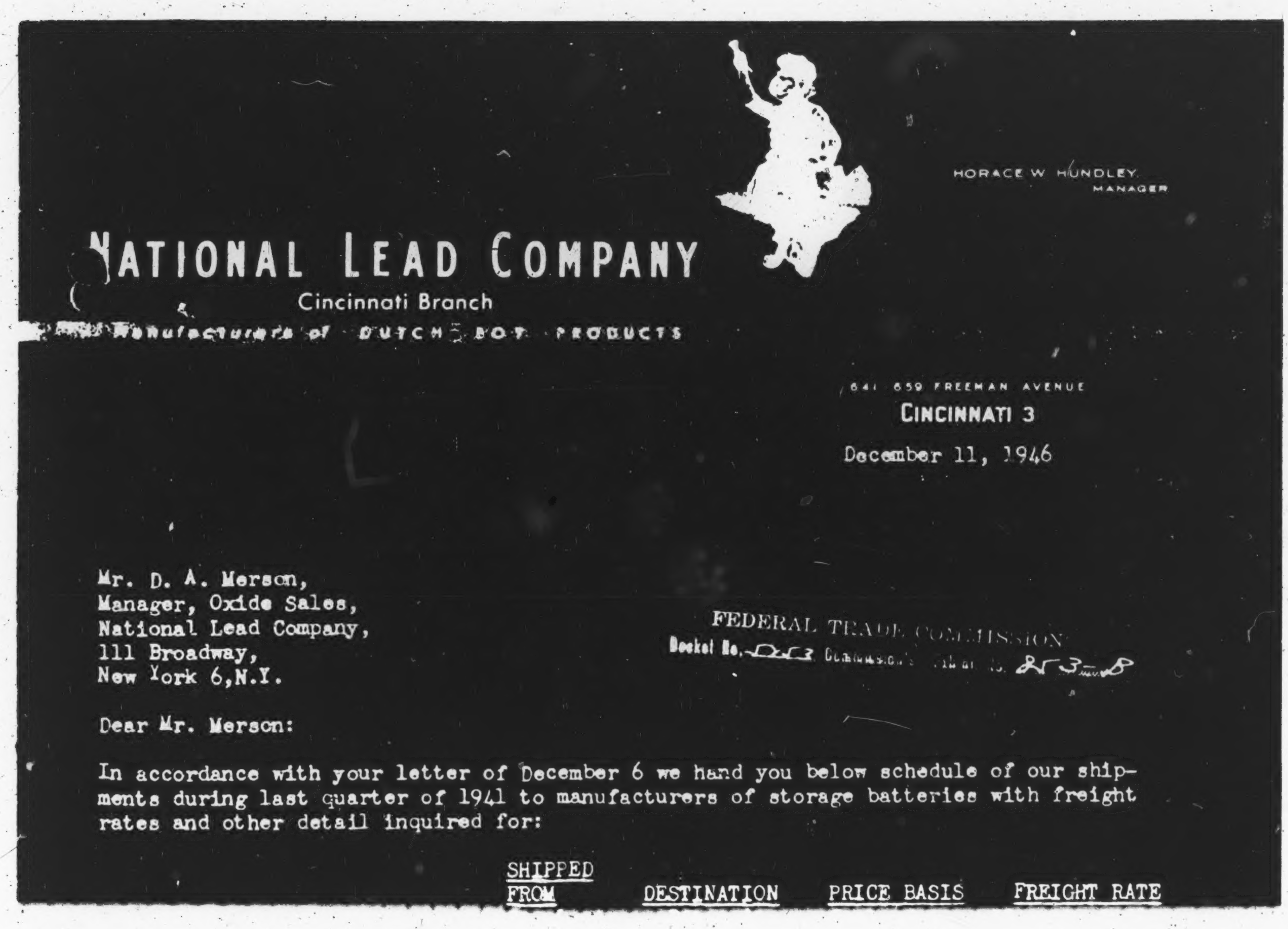
853-A

LIST OF MANUFACTURERS OF STORAGE BATTERIES WHO PURCHASED LEAD OXIDES AND WERE INVOICED BY THE NATIONAL LEAD COMPANY - CHICAGO BRANCH

During the last quarter of 1941.

Customer	Destination	Shipped From	Via	Price Basis	Freight or Truck Rates
A-Plus Storage Battery Co.	Chicago, Ill.	Chicago	Truck	C/L	Local truck-load rate of 6¢ per cwt.
Batteries, Inc.	Detroit, Mich.	Detroit	Truck	C/L	Local truck-load rate of 8¢ per cwt.
Coliseum Battery Co.	Chicago, Ill.	Chicago	Truck	C/L	Local truck-load rate of 6¢ per cwt.
Coyle Batteries Ltd.	Vancouver, Canada	St. Louis, Mo.	Rail	C/L	Rail rate 76¢ per cwt. plus 7% surcharge
Excel Battery Co.	Chicago, Ill.	Chicago	Truck	C/L	Local truck-load rate of 6¢ per cwt.
Franklin Storage Battery Co.	Chicago	Chicago	Truck	5 Ton	Local 5 ton Truck rate 8¢ per cwt.
Globelite Batteries	Winnipeg, Can.	St. Louis	Rail	C/L	Rail rate 97¢ per cwt. plus 7% surcharge
Globe - Union, Inc.	Atlanta, Ga.	Atlanta, Ga.	Rail	C/L	F.O.B. our Plant - Local Switch rate $6.19 per car
" " "	Dallas, Texas	Dallas, Tex.	Rail	C/L	" " " -Local Switch rate $10.73
" " "	Los Angeles, Cal.	Los Angeles	Truck	C/L	" " " -Local Truck rate 5¢ per cwt
" " "	Memphis, Tenn.	St. Louis, Mo.	Rail	C/L	" " " -Rail Rate - 33¢ per cwt.
" " "	Milwaukee, Wis.	St. Louis, Mo.	Rail	C/L	" " " -Rail Rate - 16¢ per cwt.
" " "	Philadelphia, Pa.	Phila. Pa.	Truck	C/L	" " " -Local truck rate 5¢ per cwt
" " "	Seattle, Wash.	San Francisco	Rail	C/L	" " " -Rail Rate - 44¢ per cwt.
Grant & Mayer	Detroit, Mich.	Detroit	Truck	C/L	Local Truck-load rate of 8¢ per cwt.
K. W. Battery Co.	Chicago, Ill.	Chicago	Truck	C/L	Local Truck-load rate of 6¢ per.cwt.
La Salle Lead Products	Windsor, Canada	Detroit	Truck	5 Ton	Local truck rate of 10¢ per cwt.
Michigan Lead Company	Detroit, Michigan	Detroit	Truck	C/L	Local truck-load rate of 8¢ per cwt.
Solar Corp.	Los Angeles, Cal.	Los Angeles	Truck	C/L	Local truck-load rate of 5¢ per cwt.
Sun Battery Company	Detroit, Michigan	Detroit	Truck	Less than 5 Ton	Local truck rate of 10¢ per cwt.
Volta Battery Company	Chicago, Illinois	Chicago	Truck	5 Ton	Local 5 ton Truck rate of 8¢ per cwt.
Wisconsin Storage Battery Co.	Racine, Wisconsin	St. Louis	Rail	C/L	Rail rate 16¢ per cwt.

FEDERAL TRADE COMMISSION
Docket No. 5253 COMMISSION'S Exhibit No. 853-A
RESPONDENT'S
IN THE MATTER OF National Lead
DATE 1-7-47 WITNESS
REPORTER



HORACE W. HUNDLEY
MANAGER

NATIONAL LEAD COMPANY
Cincinnati Branch
Manufacturers of DUTCH BOY PRODUCTS

641-659 FREEMAN AVENUE
CINCINNATI 3

December 11, 1946

Mr. D. A. Merson,
Manager, Oxide Sales,
National Lead Company,
111 Broadway,
New York 6, N.Y.

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 853-a

Dear Mr. Merson:

In accordance with your letter of December 6 we hand you below schedule of our shipments during last quarter of 1941 to manufacturers of storage batteries with freight rates and other detail inquired for:

SHIPPED FROM	DESTINATION	PRICE BASIS	FREIGHT RATE

Commission's Exhibit No. 853.

RECD7

27 1$8 27 SER

TG ST LOUIS MO JAN 3 1144A

D A MERCON, NATIONAL LEAD CO

8√3-C

FEDERAL TRADE COM ISSION
Docket No. 5253 Commission's Exhibit No. 853-

RETEL MR BURLEY FTC TRUCK RATES DELIVERIES IN ST LOUIS 7 CENTS CWT ST LOUIS TO FERGUSON 20 CENTS CWT DELIVERIES IN KANSAS CITY 8 CENTS CWT

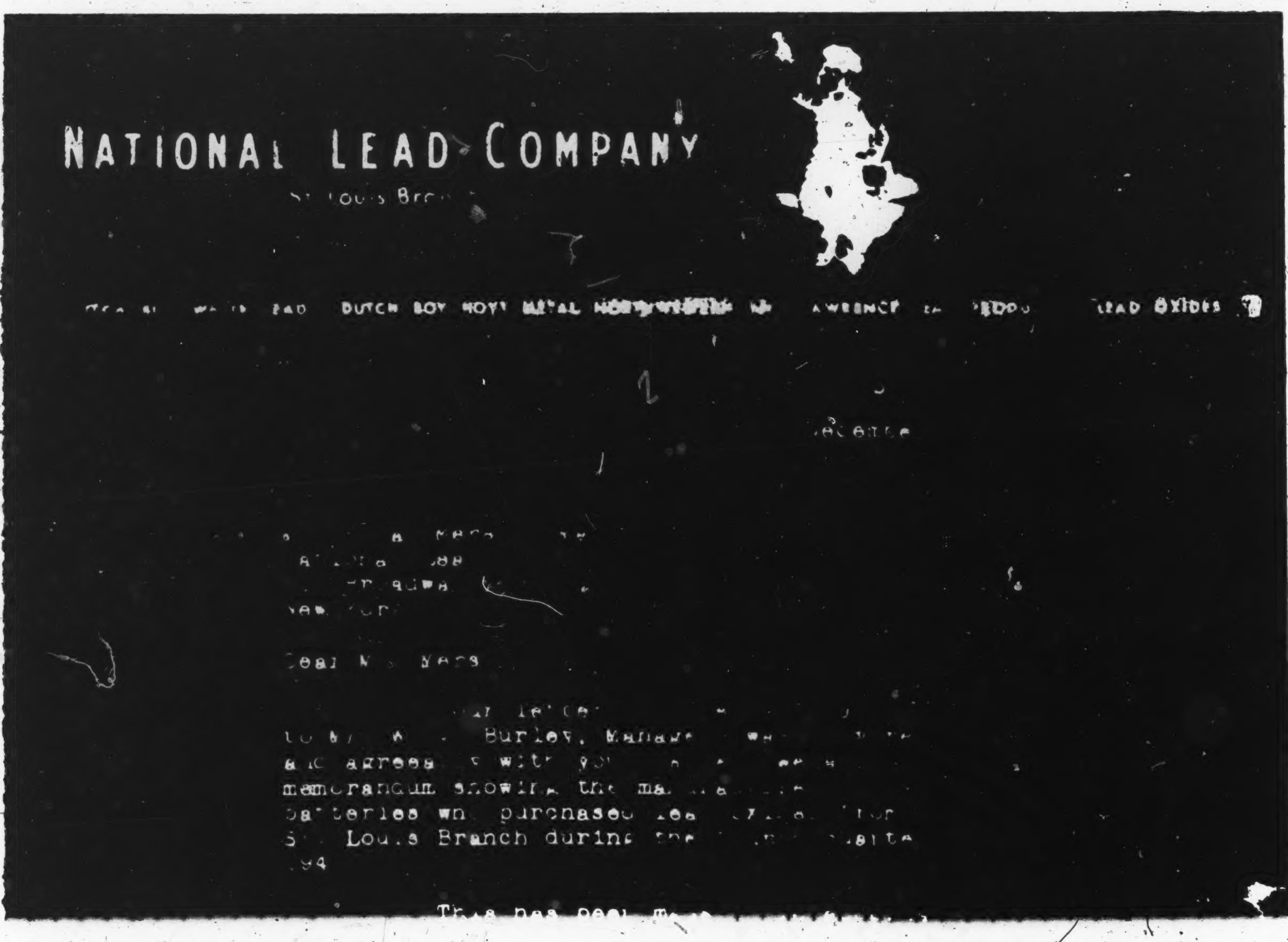
NATIONAL LEAD CO HIGGINS.

149P..

RECD8

4582

Commission's Exhibit No. 853.



NATIONAL LEAD COMPANY
St. Louis Bran[illegible]

[illegible] DUTCH BOY [illegible] LEAD OXIDES

[illegible] December [illegible]

[illegible] Meyers [illegible]
[illegible]
[illegible] Broadway [illegible]
New York

Dear Mr. Meyers

[illegible] letter [illegible] to Mr. W. [illegible] Burley, Manager [illegible] and agrees [illegible] with you [illegible] memorandum showing the [illegible] batteries who purchased lead [illegible] from St. Louis Branch during the [illegible] 94

This has been [illegible]

853-E

FEDERAL TRADE COMMISSION
Docket No. 853 Commission Exhibit

853-E

Commission's Exhibit No. 853.

MANUFACTURERS OF STORAGE BATTERIES PURCHASING LEAD OXIDES DURING THE LAST QUARTER OF 1941 FROM NATIONAL LEAD COMPANY, ST. LOUIS

Shipped To		Price Basis	Shipped From		Freight Rates Rail	Truck
ALABAMA						
Mobile :	Gulf Coast Bat. Mfg. Co..	Less Than 5-Ton	St. Louis	l/c/l	$1.00 Cwt.	
ILLINOIS						
Albers :	U. S. Battery Exchange...	" " "	" "	l/c/l	.24 "	
Quincy :	Edjol Storage Bat. Co....	" " "	" "	l/c/l	.35 "	
Springfield :	Staab Bat. Mfg. Co.......	Carload	" "	l/c/l	(Truckloads)	.16 Cwt.
Warsaw :	Grant Storage Bat. Co.... (Acct. Same, Mpls., Minn.)	" "	" "	c/l	.19 "	
IOWA						
Co. Bluffs :	Reliance Bat. Prod. Co...	" "	" "	c/l	.29 "	
Des Moines :	Diller Bat. Co...........	" "	" "	c/l	.32½ "	
LOUISIANA						
Shreveport :	Red Ball Bat. Co.........	Less Than 5-Ton	Dallas	l/c/l	.68 "	
MINNESOTA						
Minneapolis :	Grant Storage Bat. Co....	Carload	St. Louis	c/l	.34 "	
St. Paul :	Oxidite Bat. Mfg. Co.....	Carload	St. Louis	c/l	.34 "	

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Shipped To			Price Basis	Shipped From		Freight Rates Rail	Truck
MISSOURI							
Ferguson	:	Moline Storage Bat. Co.....	Less Than 5-Ton	St. Louis			Our Truck
Flat River	:	J. W. Melton & Sons	" " "	" "	l/c/l	$.26 Cwt.	
Kansas City	:	Becker-Florence Elec. Co.	" " "	Kansas City			Our Truck
Monett	:	Reinsmith Bat. Co........	" " "	St. Louis	l/c/l	.52 "	
St. Louis	:	Acme Bat. Co.............	" " "	" "			Our Truck
		Electro. Bat. Mfg. Co.....	5-Ton	" "			" "
		Power-Plus Bat. & Sup. Co.	Less Than 5-Ton	" "			" "
		Sidney Bat. Mfg. Co.......	5-Ton	" "			" "
NEBRASKA							
Hastings	:	Hastings Bat. Factory.....	Less Than 5-Ton	Omaha	l/c/l	.47 "	
Omaha	:	Grant Storage Bat. Co..... (Acct. Same, Mpls., Minn.)	Carload	St. Louis	c/l	.29 "	
NORTH DAKOTA							
Minot	:	Northwest Bat. Co.........	Less Than 5-Ton	St. Paul	l/c/l	.99 "	
TEXAS							
Dallas	:	Vitallic Bat. Co., Inc....	Carload	Dallas		8.80 per car (Switching charge)	
San Antonio	:	L. C. Beals Bat. Co.......	Less Than 5-Ton	"	l/c/l	.78 Cwt.	
		Standard Elec. Co., Inc...	Carload	"	c/l	.28 "	

FEDERAL TRADE COMMISSION
Docket No. 853 Commission
853-F

Commission's Exhibit No. 853. 2755

Mr. D. A. Merson,
Manager, Oxide Sales,
National Lead Company,
111 Broadway,
New York 6,N.Y.

FEDERAL TRADE COMMISSION
Docket No. [illegible] Commission's Exhibit No. 853-B

Dear Mr. Merson:

In accordance with your letter of December 6 we hand you below schedule of our shipments during last quarter of 1941 to manufacturers of storage batteries with freight rates and other detail inquired for:

	SHIPPED FROM	DESTINATION	PRICE BASIS	FREIGHT RATE
Berman Bros. Iron & Metal Co.	St. Louis	B'ham.Ala.	Carload	52¢ cwt. Rail
New Life Battery Company,	"	"	5 Ton	87¢ " Truck
Battery Distributing Company,	"	Lou. Ky.	Less 5 Ton	46¢ " "
Lyon Battery Works,	"	"	"	[illegible] " "
American Battery Company,	"	Nashville,	Carload	41¢ " "
Cumberland Battery Mfg. Co.	"	"	"	41¢ " Rail
Hester Battery Company,	"	"	"	41¢ " Truck
Auto-Lite Battery Corp.	Atlanta	East Point	"	$6.19 per car (Switching Chg.) Rail

Yours very truly,

Manager.

HWH-/S.

853-B

4581

853-J

Shipped To		Price Basis	Shipped From		Freight Rates Rail	Truck
INDIANA						
Indianapolis :	Prest-O-Lite Co., Inc.... (Acct. Elec. Auto Light Co., Toledo, Ohio)	Carload	St. Louis	c/1	$.2[illegible] Cwt.	
Muncie :	Delco-Remy Div., G.M.C... (Acct. Same, Anderson, Ind.)	"	" "	c/1	.24 "	
NEW YORK						
Niagara Falls :	U. S. L. Bat. Co......... (Acct. Elec. Auto Light Co., Toledo, Ohio)	"	" "	c/1	.3[illegible] "	
OKLAHOMA						
Oklahoma City :	U. S. L. Bat. Corp....... (Acct. Same, Toledo, Ohio)	"	Dallas	c/1	.16 "	

Commission's Exhibit No. 853.

[illegible]
[illegible]
[illegible]roadway
New York

Dear Mr. [illegible]yers

[illegible] your letter [illegible] to Mr. W. [illegible] Burley, Manager [illegible] and agreeable with you [illegible] memorandum showing the ma[illegible] batteries which purchased lea[illegible] St. Louis Branch during the [illegible] [illegible]94

This has been made [illegible] with the information requested [illegible] your [illegible]. If further information is desired please [illegible] us know

Very truly yours

Assistant Manager.

JRH:GC
Enc.

FEDERAL TRADE COMMISSION
Docket No. 5553 Commission [illegible] 853-D

Commission's Exhibit No. 853.

(Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern and Western Classification Territories, March 15, 1922, as amended August 1, 1930.)

THIS MEMORANDUM is an acknowledgment that a Bill of Lading has been issued and is not the Original Bill of Lading, nor a copy or duplicate, covering the property named herein, and is intended solely for filing or record.

Shipper's No. 57119

Agent's No. H.

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 853-6-1

CLYDE-MALLORY LINES

A DIVISION OF AGWILINES, INC.

RECEIVED, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading,

at BKLYN, NY SEPT. [illegible] TH, 1941

from NATIONAL LEAD COMPANY -ATLANTIC BRANCH

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to WILLIAMS AUTO SERVICE 23RD & MAIN STS.,

Destination JACKSONVILLE State of FLA. County of

Route CLYDE NY PIER

Delivering Carrier Car Initial Car No.

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS AND EXCEPTIONS	*WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN

CLYDE MALLORY LINES
DIVISION OF AGWILINES, Inc.
N. R. NEW YORK
2 1941

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all

NATIONAL LEAD [redacted] COMPANY
of Pennsylvania
DUTCH BOY PRODUCTS

P. O. BOX 716
1378 RIVER AVENUE
PITTSBURGH 30

December 10,1946

Mr. D. A. Merson, Manager,
Oxide Sales,
National Lead Co.,
New York, N.Y.

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's

H
853-H
853-H

Dear Mr. Merson:

As requested in your letter of December 6 we are pleased to enclose herewith the requested information.

Yours truly,

NATIONAL LEAD COMPANY OF PA.

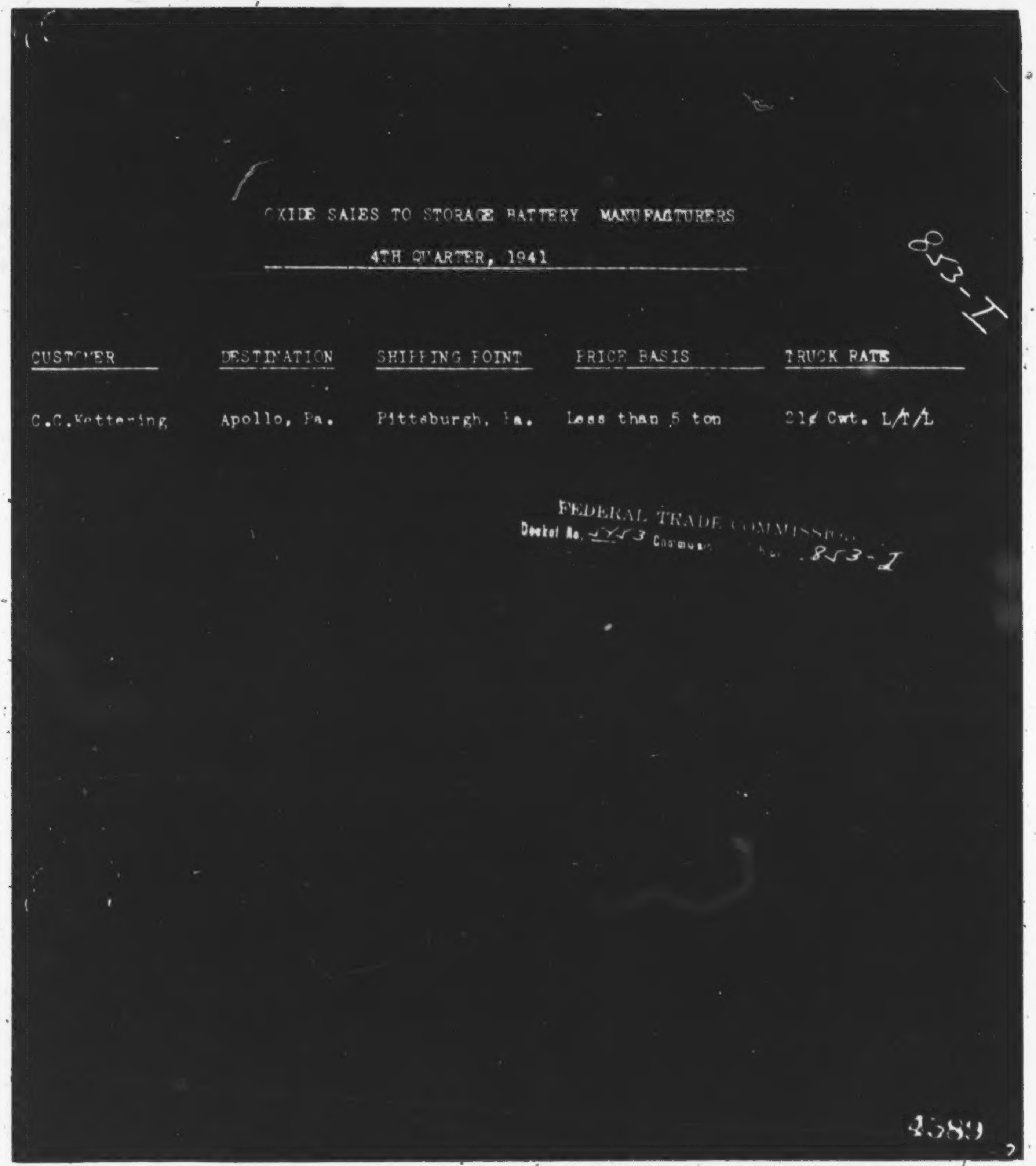
J.H. Gaertner

J.H.GAERTNER, VICE PRESIDENT.

A
Enc

Commission's Exhibit No. 853.

Commission's Exhibit No. 853.



853-I

OXIDE SALES TO STORAGE BATTERY MANUFACTURERS

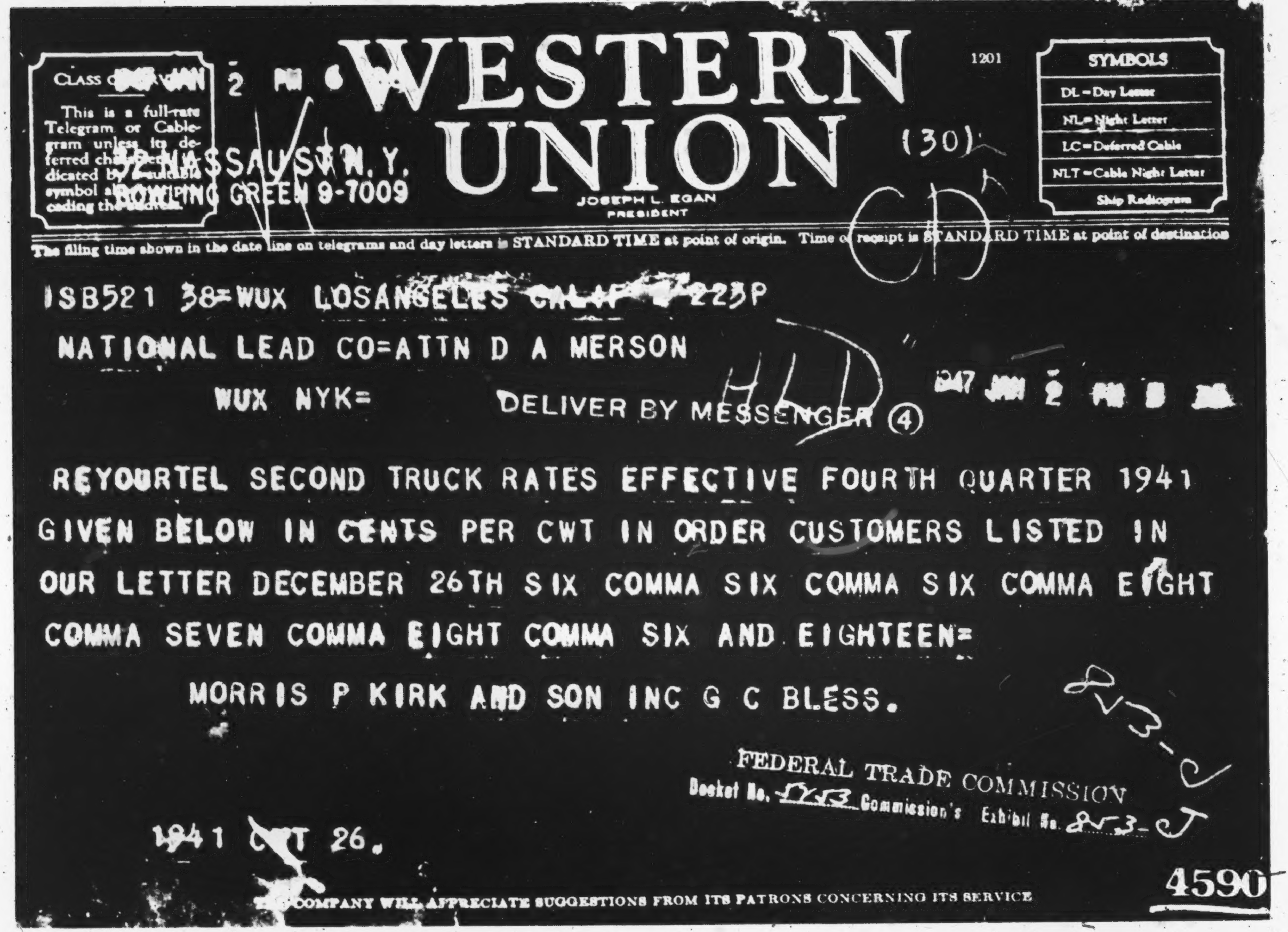
4TH QUARTER, 1941

CUSTOMER	DESTINATION	SHIPPING POINT	PRICE BASIS	TRUCK RATE
C.C.Kettering	Apollo, Pa.	Pittsburgh, Pa.	Less than 5 ton	21¢ Cwt. L/T/L

FEDERAL TRADE COMMISSION
Docket No. 4553 Commission [illegible] No. 853-I

4589

Commission's Exhibit No. 853.



CLASS OF SERVICE

This is a full-rate Telegram or Cablegram unless its deferred character is indicated by a suitable symbol above or preceding the address.

JAN 2 PM 6

WESTERN UNION

JOSEPH L. EGAN
PRESIDENT

1201

SYMBOLS

DL	Day Letter
NL	Night Letter
LC	Deferred Cable
NLT	Cable Night Letter
	Ship Radiogram

52 NASSAU ST. N.Y.
BOWLING GREEN 9-7009

(30)

CP

The filing time shown in the date line on telegrams and day letters is STANDARD TIME at point of origin. Time of receipt is STANDARD TIME at point of destination

ISB521 38=WUX LOSANGELES CALIF 2 225P

NATIONAL LEAD CO=ATTN D A MERSON

WUX NYK=   DELIVER BY MESSENGER ④

HLD

1947 JAN 2 PM 5

REYOURTEL SECOND TRUCK RATES EFFECTIVE FOURTH QUARTER 1941 GIVEN BELOW IN CENTS PER CWT IN ORDER CUSTOMERS LISTED IN OUR LETTER DECEMBER 26TH SIX COMMA SIX COMMA SIX COMMA EIGHT COMMA SEVEN COMMA EIGHT COMMA SIX AND EIGHTEEN=

MORRIS P KIRK AND SON INC G C BLESS.

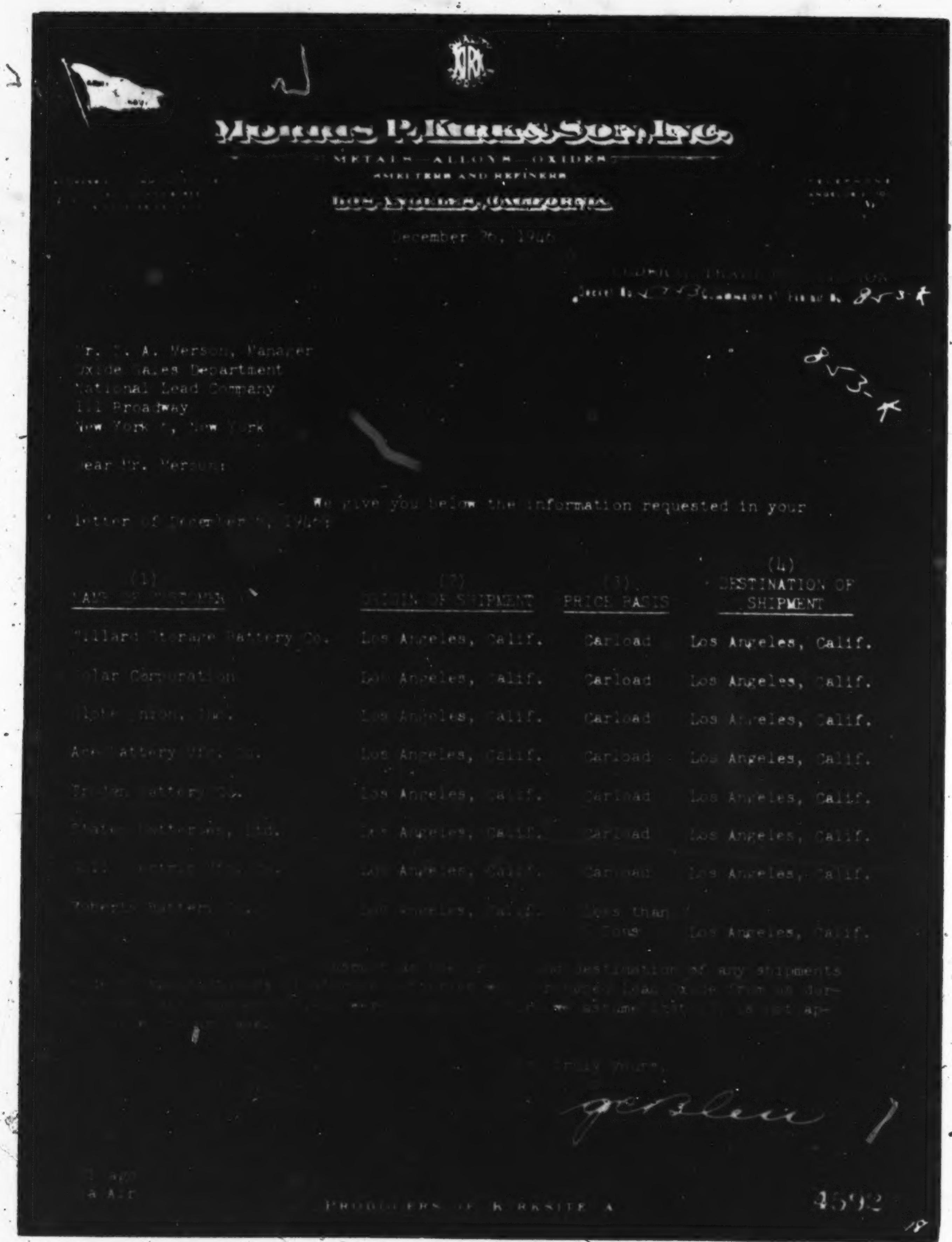
853-J

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 853-J

1941 OCT 26.

4590

THE COMPANY WILL APPRECIATE SUGGESTIONS FROM ITS PATRONS CONCERNING ITS SERVICE



MORRIS P. KIRK & SON, INC.
METALS—ALLOYS—OXIDES
SMELTERS AND REFINERS
LOS ANGELES, CALIFORNIA

December 26, 1946

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 853-K

853-K

Mr. [illegible] A. Merson, Manager
Oxide Sales Department
National Lead Company
111 Broadway
New York [illegible], New York

Dear Mr. Merson:

We give you below the information requested in your letter of December [illegible], 1946:

(1) NAME OF CUSTOMER	(2) ORIGIN OF SHIPMENT	(3) PRICE BASIS	(4) DESTINATION OF SHIPMENT
Willard Storage Battery Co.	Los Angeles, Calif.	Carload	Los Angeles, Calif.
Solar Corporation	Los Angeles, Calif.	Carload	Los Angeles, Calif.
Globe-Union, Inc.	Los Angeles, Calif.	Carload	Los Angeles, Calif.
Ace Battery Mfg. Co.	Los Angeles, Calif.	Carload	Los Angeles, Calif.
Trojan Battery Co.	Los Angeles, Calif.	Carload	Los Angeles, Calif.
States Batteries, Ltd.	Los Angeles, Calif.	Carload	Los Angeles, Calif.
[illegible]	Los Angeles, Calif.	Carload	Los Angeles, Calif.
Roberts Battery Co.	Los Angeles, Calif.	Less than [illegible] Tons	Los Angeles, Calif.

[illegible] as to the [illegible] destination of any shipments [illegible] lead oxide from us dur- [illegible] we assume that [illegible] is not ap- [illegible]

Very truly yours,

[illegible]
[illegible] Air

PRODUCERS OF KIRKSITE A

4592

18

whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to WILLIAMS AUTO SERVICE 23RD & MAIN STS.,

Destination JACKSONVILLE State of FLA. County of

Route CLYDE NY PIER

Delivering Carrier Car Initial Car No.

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS AND EXCEPTIONS	*WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN
2	STEEL DRUMS RED LEAD DRY (LEAD OXIDE)	1324		

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$

CLYDE MALLORY LINES
DIVISION OF AGWILINES, Inc.
PIER 34, N. R. NEW YORK
REC. OCT. 2 1941
BRAZOS

10 BAL
OCT 3 1941
Agent

This Shipment is correctly described
Subject to verification by the
According to

NATIONAL LEAD COMPANY
Atlantic Branch

S.S. BRAZOS

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

("This shipment is ... subject to the terms and conditions of the Consolidated Uniform Bill of Lading, effective June 15th, 1941.") ... specifically in writing the ... value of the property. ... the shipper to be not exceeding

per

NATIONAL LEAD COMPANY Shipper Agent's Signature Agent

Per 85 JAY STR. Per

Permanent post-office BROOKLYN, N. Y.

3 12

CLASS OF SERVICE

This is a full-rate Telegram or Cablegram unless its deferred character is indicated by a suitable symbol above or preceding the address.

WESTERN UNION

JOSEPH L. EGAN
PRESIDENT

1201

Co

SYMBOLS

DL = Day Letter
NL = Night Letter
LC = Deferred Cable
NLT = Cable Night Letter
Ship Radiogram

The filing time shown in the date line on telegrams and day letters is STANDARD TIME at point of origin. Time of receipt is STANDARD TIME at point of destination

FC36 NL PD=SANFRANCISCO CALIF 2

1947 JAN 3 AM 5 14

NATIONAL LEAD COMPANY, D A MERSON=
WUX CD NYK=

RETEL SAN FRANCISCO TRUCKING RATES 13 CENTS PER CWT MINIMUM CHARGE 77 CENTS APPLIES ON SAN FRANCISCO SH[illegible]TS WITH FOLLOWING EXCEPTIONS SHIPMENTS INVOICES 47863 48838 50288 RATE 9 CENTS PER CWT. SHIPMENT INVOICE 47817 RATE 14 CENTS PER CWT MINIMUM 83 CENTS=

NATIONAL LEAD COMPANY CARUTH.

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 853-L

853-L

13 77 47863 48838 50288 9 47817 14 83.

4593

THE COMPANY WILL APPRECIATE SUGGESTIONS FROM ITS PATRONS CONCERNING ITS SERVICE

Commission's Exhibit No. 853.

NATIONAL LEAD COMPANY
PACIFIC COAST BRANCH
2240 TWENTY FOURTH STREET
SAN FRANCISCO 10, CAL.

December 9, 1946

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission Exhibit No. 853-A

853-A

AIR MAIL

Mr. D. A. Merson,
Manager, Oxide Sales
National Lead Company
111 Broadway
New York 6, N. Y.

Dear Dave: Re: List of Lead Oxide Sales to Battery Manufacturers During Last Quarter 1941

This will acknowledge your letter of December 6, addressed to Mr. J. L. Caruth, and let you know that the matter referred to therein is having our attention. As soon as we have compiled the data you requested it will be forwarded to you.

Very truly yours

Orr
P. S. Orr

(4596)

NATIONAL LEAD COMPANY
PACIFIC COAST BRANCH
2240 TWENTY-FOURTH STREET
SAN FRANCISCO 10, CAL.

December 15, 1946

A I R M A I L

Mr. D. A. Merson,
Manager, Oxide Sales
National Lead Company
111 Broadway
New York 5, N. Y.

FEDERAL TRADE COMMISSION
Docket No. [illegible] Commiss.

8-3-N

8-3-N

Dear Dave:

With reference to your letter of December 6, which we acknowledged on December 9, our records at this office indicate only two storage battery manufacturers purchased lead oxides during the last quarter of 1941. The data regarding these purchases is outlined on the attached list.

It is our practice to retain such records for a certain length of time and then destroy them, and in accordance with this practice the Oakland and Seattle records have already been destroyed. The records at the Portland office disclose that no sales of lead oxides were made during the period in question.

Very truly yours,

P. S. Orr

Enc.

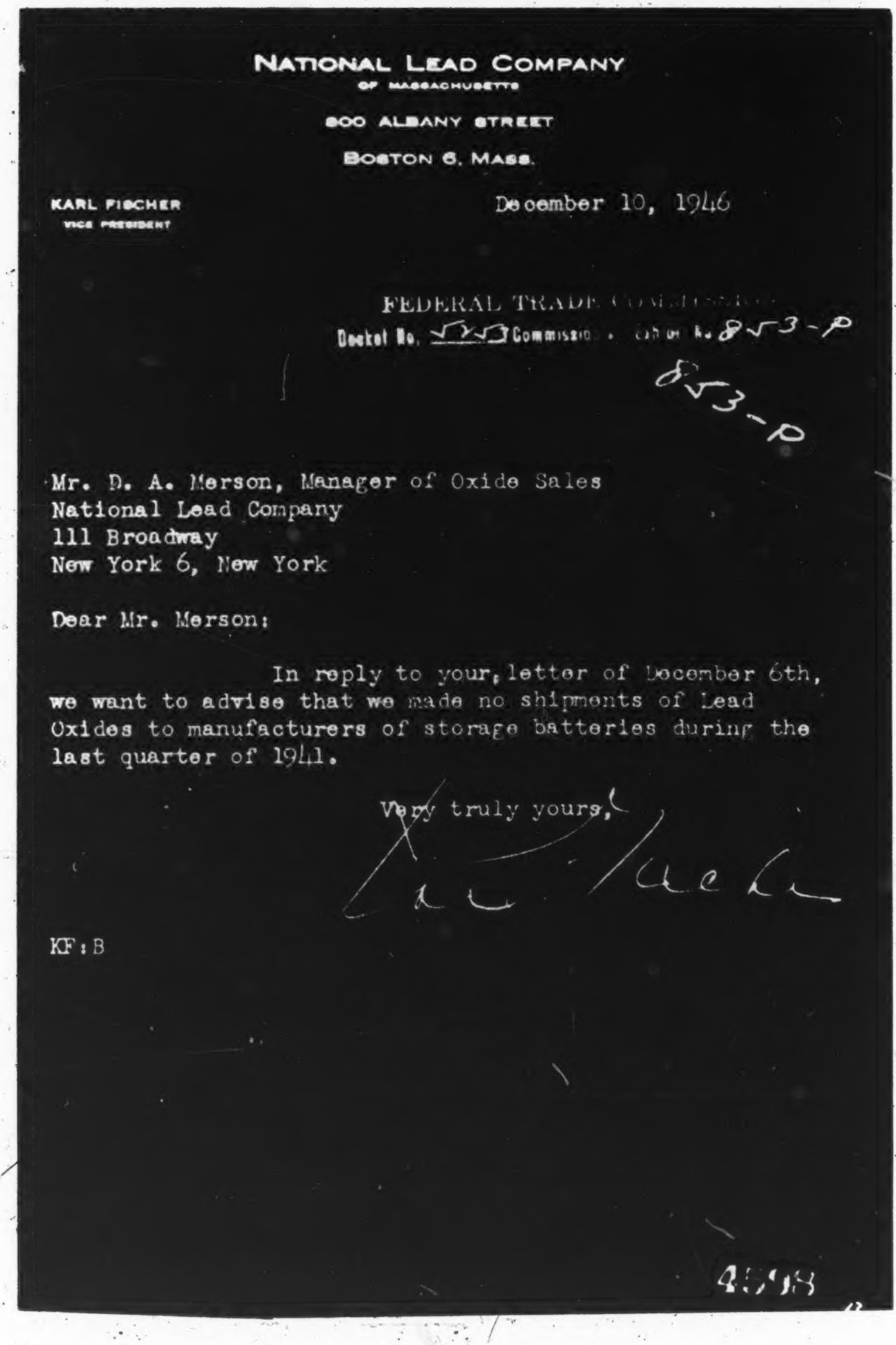
Manufacturer	Shipped From	Destination	Price Basis
CBS Batteries 464 Linden Ave., San Francisco	San Francisco Warehouse	San Francisco	five ton - no freight charge
Merry Bean Co. 18th & Potrero Ave. San Francisco	San Francisco Warehouse	San Francisco	Carload - no freight charge

853-0

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission Exhibit No. 853-0

National Lead Company
Pacific Coast Branch
12/16/46

Commission's Exhibit No. 853.



NATIONAL LEAD COMPANY
OF MASSACHUSETTS
800 ALBANY STREET
BOSTON 6, MASS.

KARL FISCHER
VICE PRESIDENT

December 10, 1946

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 853-P

853-P

Mr. D. A. Merson, Manager of Oxide Sales
National Lead Company
111 Broadway
New York 6, New York

Dear Mr. Merson:

In reply to your letter of December 6th, we want to advise that we made no shipments of Lead Oxides to manufacturers of storage batteries during the last quarter of 1941.

Very truly yours,

Karl Fischer

KF:B

4598

AS 106 12-46 50M

NATIONAL LEAD COMPANY
ATLANTIC BRANCH
111 BROADWAY NEW YORK 6

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 853

SUBJECT STORAGE BATTERY OXIDE CUSTOMERS - Fourth Quarter, 1941

DATE January 2, 1947

TO Mr. D. A. Merson, Manager, Lead Oxide Sales

FROM H. J. Whitson, Sales Manager, Dry Pigments

IN REPLY TO

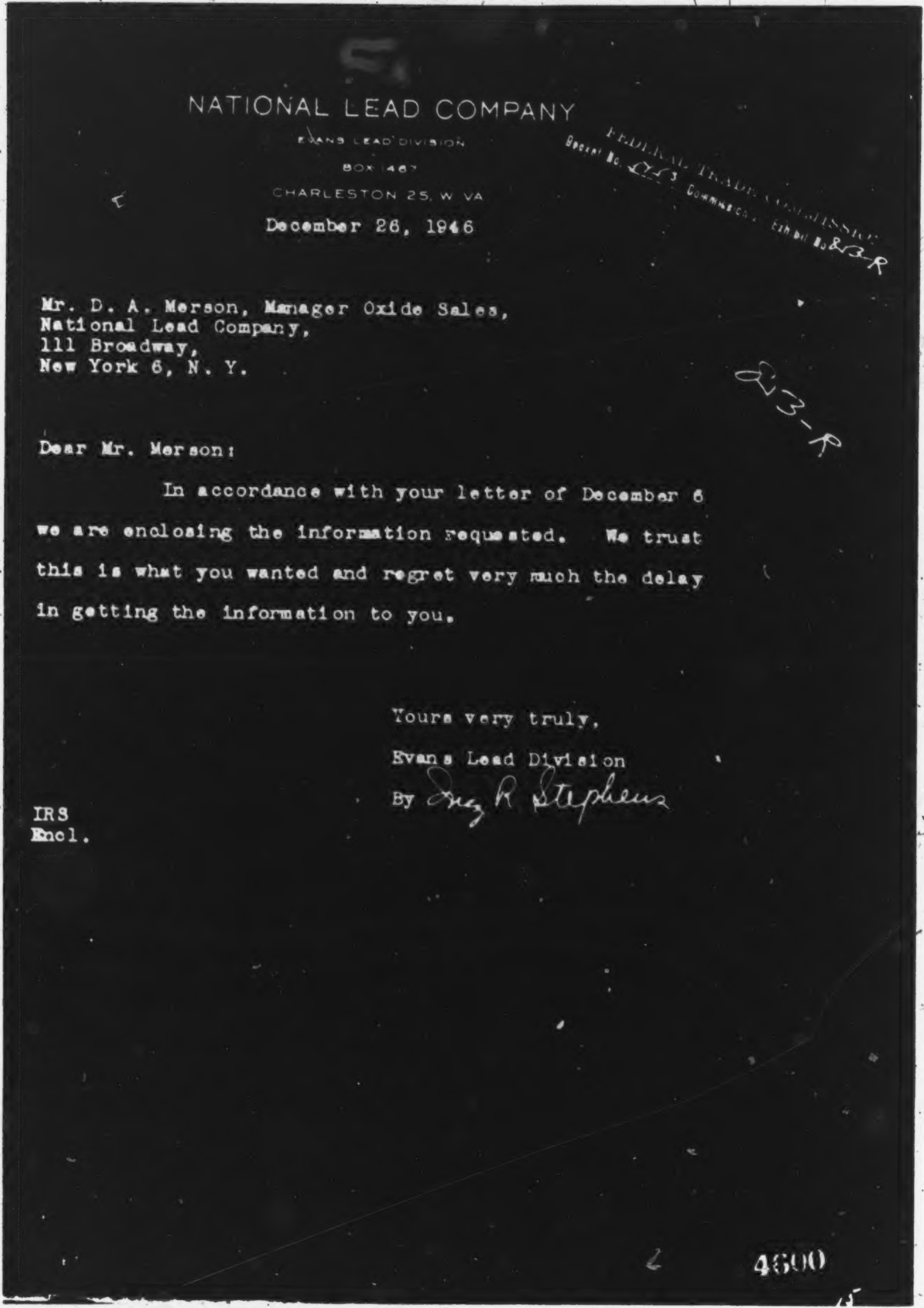
853-2

Replying to your letter of December 6th to Mr. McNair, the Atlantic Branch shipped Storage Battery Oxides to the following customers during the fourth quarter of 1941:

Customer	Destination	Price Basis	Shipped By	Rate
Carr Battery Mfg.Co.	Bridgeport, Conn.	5 Ton	Truck	25¢/100 lb.
Delco Remy Div. of General Motors Corp.	Bloomfield, N. J.	Carload	Truck	8¢/100 lb.
Alfred DeMaris (Service Btry. Co.)	Providence, R. I.	5 Ton	Steamer	34¢/100 lb.
Thos. A. Edison, Inc.	Kearny, N. J.	Carload	Truck	8¢/100 lb.
Harvey L. Gillette	Syracuse, N. Y.	Less than 5 T.	Truck	40¢/100 lb.
Milligan Btry. Wks.	Central Village, Conn.	5 Ton	Truck	42¢/100 lb.
Union Btry. Mfg. Co.	Miami, Fla.	5 Ton	Steamer	69½¢/100 lb.
Waterbury Mfg. Co.	Waterbury, Conn.	Carload	Truck	23¢/100 lb.
W. H. Letterman	Baldwinsville, N. Y.	Less than 5 T.	Rail	49¢/100 lb.
D. J. Bogle	Brewster, N. Y.	" " " "	Truck	34¢/100 lb.
McLoughlin Service	Bronx, N. Y.	" " " "	Truck	15¢/100 lb.
Todd Electric Co.	Tampa, Fla.	Carload	Steamer	46¢/100 lb.

Henry J. Whitson

HJW:EJW



NATIONAL LEAD COMPANY
EVANS LEAD DIVISION
BOX 1467
CHARLESTON 25, W VA

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 853-R

December 26, 1946

Mr. D. A. Merson, Manager Oxide Sales,
National Lead Company,
111 Broadway,
New York 6, N. Y.

853-R

Dear Mr. Merson:

In accordance with your letter of December 6 we are enclosing the information requested. We trust this is what you wanted and regret very much the delay in getting the information to you.

Yours very truly,
Evans Lead Division
By Inez R Stephens

IRS
Encl.

4600

(4601)

FEDERAL TRADE COMMISSION
Docket No. 5753 Commission's Exhibit No. 853-5

853-5

EVANS LEAD DIVISION

CUSTOMERS	DESTINATION	BASIS OF PURCHASE	SHIPPED BY	RATE
Norwalk Tire & Rubber	Norwalk, Conn.	Carload	Rail	37¢
Royal Battery Corporation	New Burnswick, N.J.	Carload	Rail	33¢
Penn Battery Mfg. Company	New York, N. Y.	Carload	Rail	33¢
Nik-O-Life Battery	Indianapolis, Ind.	-5 Ton	Truck	49¢
Aywon Stg. Battery Company	Quincy, Mass	-5 Ton	Rail	78¢
Royal Mfg. & Sales Company	Cleveland, Ohio	-5 Ton	Truck	48¢
Parkwood Battery Company	Cleveland, Ohio	-5 Ton	Truck	48¢
Oil City Battery Mfg. Co.	Oil City, Pa.	-5 Ton	Rail	48¢
Ball Battery Mfg. Co.	Charleston, W.Va.	5 Ton	Truck	.075
Penn Storage Battery Co.	Erie, Pa.	-5 Ton	Truck	52¢
Douglas Battery Mfg. Co.	Winston Salem, N.C.	Carload	Rail	37½¢
Surrette Storage Battery Co.	Salem Mass	Carload	Rail	39¢
Delaney Battery Mfg. Co.	St. Albans, W.Va.	-5 Ton	Truck	18¢
Keystone Storage Battery	Saugus, Mass	Carload	Rail	39¢
Starter Batteries Inc.	Brooklyn, N.Y.	-5 Ton	Truck	67¢
Viking Battery Mfg. Co.	Fitchburg, Mass	-5 Ton	Truck	78¢
F & H Battery Company	Scranton, Pa.	Carload	Rail	31¢
Standard Battery Service	Bethlehem, Pa.	-5 Ton	Rail	63¢
Carlile & Doughty, Inc.	Conshohocken, Pa.	Carload	Rail	31¢
Seneca Battery Corp.	Buffalo, N. Y.	5 Ton	Rail	40¢
Perkins Battery Company	York, Pa.	5 Ton	Truck	60¢
Merrimac Battery Plate	Louisville, Ky.	-5 Ton	Truck	47¢
B & O Battery Company	Huntington, W.Va.	-5 Ton	Truck	25¢

(4602)

W. ROBERT MELVILLE
Manager

W. A. MICHAEL
Cashier

Dutch Boy White-Lead

NATIONAL LEAD COMPANY
Buffalo Branch
COR CLINTON AND OAK STREETS
BUFFALO, N. Y. (3)

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 853-T

853-T

December 12, 1946

Mr. D. A. Merson, Mgr. Oxide Sales
National Lead Co.
111 Broadway
New York 6, N. Y.

Dear Mr. Merson:

As requested in your letter of the 6th we are pleased to give you the required information:

(1) Purchaser
National Battery Co.
Plant from which shipped
J. T. Lewis, Philadelphia
Basis of purchase
carload price
Destination of shipment
Depew, N. Y.

(2) Freight rate
Rail - c/l - 28¢ cwt.

Yours very truly,

W. A. Michael
CASHIER

WAM:LR

4602

(4603)

NATIONAL LEAD COMPANY

Manufacturers of DUTCH BOY PRODUCTS • METALS • PIGMENTS • OXIDES • OILS

TELEPHONE
PROSPECT 4060

215 WEST THIRD STREET
CLEVELAND 13

December 9, 1946

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 853-U

853-U

Mr. D. A. Merson
Manager, Oxide Sales
National Lead Company
111 Broadway
New York 6, New York

Dear Mr. Merson:

The answers to the questions in yours of December 6 regarding the Federal Trade Commission are as follows:

(1) Willard Storage Battery Company, Cleveland, Ohio
Carload price basis
Shipped from Philadelphia, Pennsylvania

Electro Battery Manufacturing Company, Cleveland, Ohio
Less-than-five ton price basis
Shipped from Cleveland Warehouse

(2) The Philadelphia-Cleveland carload movement was prepaid. Consequently, our records do not show this rate. We are endeavoring to determine this rate and will forward it to you as soon as possible.

Local cartage rates during the last quarter of 1941 in Cleveland were 9¢ per cwt. or a minimum charge of 45¢.

Sincerely yours,

Ellis Busse

EEB:GP
AIR MAIL

4603

WESTERN UNION

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 853-Y

WU CD9 47

WUX PHILADELPHIA PENN [illegible] JAN 3 224P

D A MERSON, MANAGER OXIDE SALES NATIONAL LEAD CO

853-Y

RETEL YESTERDAY AND OUR MEMORANDUM DECEMBER SIXTEENTH FEDERAL TRADE COMMISSION REQUIRED TRUCKING RATES LAST QUARTER 1944 ARE: ALCO TWENTY CENTS, CARLILE AND DOUGHTY FOURTEEN, ANTHRACITE TWENTY, EXIDE TEN, GENERAL LEAD NINETEEN, LANDIS 31, MYERS 31, PHILCO FOURTEEN, RUH TWENTY, ZIEHLER TWELVE, WILBUR 26, ALL PLUS THREE PERCENT

JOHN T LEWIS AND BROS CO GARDINER.

410P.

4604

Commission's Exhibit No. 853.

Commission's Exhibit No. 853.

Philadelphia

FEDERAL TRADE COMMISSION
Docket No. 5553 Commission's Exhibit No. 853-W

853-W

Alco Battery Sales Company, 3410 Kensington Avenue, Philadelphia, Pa.	Less than 5 ton price	Our truck
Carlile & Doughty, Inc., Conshohocken, Pa.	Carload price	" "
Anthracite Battery Co., 2715 E. Westmoreland Street, Philadelphia, Pa.	Less than 5 ton price	" "
Electric Storage Battery Co. Rising Sun and Adams Avenue and 19th & Allegheny Avenue, Philadelphia	Contract	" "
Electric Storage Battery 129 Belmont Blvd., Kansas City, Mo.	Carload	Rail - 63½¢ cwt.
General Lead Batteries Newark, N. J.	Carload price	Our truck
Landis Battery Co. Atlantic City, N. J.	5-ton price	" "

Com. Ex 854 A

2774

Commission's Exhibit No. 854.

THE EAGLE-PICHER SALES COMPANY
STORAGE BATTERY OXIDE SALES FOR THE LAST QUARTER OF 1941
(REQUESTED BY FEDERAL TRADE COMMISSION)

CUSTOMER	DESTINATION	SHIPPING POINT	PRICE BASIS LESS THAN FIVE TONS	FIVE TONS	CARLOAD	FREIGHT RATE PER CWT.
Ajax Storage Battery Co.	Passaic, New Jersey	Newark, New Jersey		X		.12
Alabama Electric Battery Co.	Birmingham, Alabama	E. St. Louis, Ill.	X			.87
Alberta Battery Co., Ltd.	Calgary, Alberta, Can.	Minneapolis, Minn.		X		.65
American Battery Co.	Nashville, Tennessee	Joplin, Missouri			X	.53½
American Battery Co.	Kansas City, Mo.	Joplin, Missouri			X	.20
Barrett Battery Company	Toledo, Ohio	Cleveland, Ohio	X			.37
Berlin Battery Manufacturing Co.	Berlin, Pennsylvania	Pittsburgh, Pa.	X			.38
R. Berman c/o Aero Battery Co.	Birmingham, Alabama	Joplin, Missouri			X	.62½
Blairsville Battery Works	Blairsville, Pa.	Pittsburgh, Pa.	X			.25
Beem Battery Company	Sioux Falls, S.Dak.	Minneapolis, Minn.	X			.58
The Cleveland Storage Battery Co.	Cleveland, Ohio	Cleveland, Ohio		X		.08
Comet Battery Company	Minneapolis, Minn.	Minneapolis, Minn.	X			.07
Crescent Battery & Light Co.	New Orleans, La.	Joplin, Missouri			X	.45
Crown Battery Company	Fremont, Ohio	Cleveland, Ohio	X			.34
Cumberland Battery Mfg. Co.	Nashville, Tenn.	Joplin, Missouri			X	.53½
J. W. Daniels Battery Company	Stotts City, Mo.	Joplin, Missouri	X			.25
Frank W. Dillin Organizations	Los Angeles, Cal.	Joplin, Missouri			X	.66
Douglas Battery Mfg. Co.	Winston Salem, N.Car.	Newark, New Jersey			X	.44
Dubois Electric Storage Battery	Dubois, Pennsylvania	Newark, New Jersey			X	.27
Dyno Battery Company	Seattle, Washington	Joplin, Missouri			X	.71
Thomas A. Edison, Inc.	Kearny, New Jersey	Newark, New Jersey	X			.15
The Electric Storage Battery Co.	Philadelphia, Pa.	Newark, New Jersey	X			.35
Empire Battery Company	Cincinnati, Ohio	Cincinnati, Ohio	X			.10
Estes Battery Company	Los Angeles, Cal.	Los Angeles, Cal.	X			.12½
Ex-Cel Batteries, Ltd.	Winnipeg, Canada	Minneapolis, Minn.	X			.65
Globe Union, Inc.	Madisonville, Ohio	Joplin Plant			X	.29
Great Northern Battery Company	Milwaukee, Wisconsin	Joplin, Missouri			X	.26½
Grant Storage Battery Company	Minneapolis, Minn.	Joplin, Missouri			X	.38
Grant Storage Battery Company	Omaha, Nebraska	Joplin, Missouri			X	.19½
Hobbs Battery Company	Los Angeles, Cal.	Joplin, Missouri			X	.66
Hobbs Battery Company	San Francisco, Cal.	Joplin, Missouri			X	.66
Jasee Battery Company	Los Angeles, Cal.	Los Angeles, Cal.	X			.12½
Kelly Battery Company	Detroit, Michigan	Detroit, Mich.		X		.07
K. W. Battery Company	Chicago, Illinois	Chicago, Illinois	X			.11

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 854-A
IN THE MATTER OF National Lead Co.
DATE 1-8-47 WITNESS
REPORTER, INC. Official Reporters
By

4606

C854B

FEDERAL TRADE COMMISSION
Docket 5253. [illegible] 854-B

SHEET NO. 2

CUSTOMER	DESTINATION	SHIPPING POINT	PRICE BASIS LESS THAN FIVE TONS	PRICE BASIS FIVE TONS	PRICE BASIS CARLOAD	FREIGHT RATE PER CWT.
Laher Battery Company	Oakland, California	Joplin, Missouri			X	.66
LaSalle Battery Company	Cleveland, Ohio	Cleveland, Ohio		X		.08
The Lead Products Company	Parsons, Kansas	Joplin, Missouri	X			.25
Leeth Brothers, Inc.	Washington, D. C.	Newark, New Jersey		X		.44
Oscar F. Long	Finlay, Ohio	Cleveland, Ohio	X			.25
Lutz Battery & Supply Company	Denver, Colorado	Joplin, Missouri		X		1.29
Marlatt Battery & Mfg. Co.	Danville, Illinois	Chicago, Illinois			X	.26½
McClanahan, Coffman & Adcook	Rio Vista, Texas	Dallas, Texas	X			.33
MilleLacs Battery Company	Wahkon, Minnesota	Minneapolis, Minn.	X			.36
Mitchell Battery Company	Minneapolis, Minn.	Minneapolis, Minn.		X		.07
Nass Battery Company	Council Bluffs, Iowa	Joplin, Missouri	X			.76
Nass Battery Company	Council Bluffs, Iowa	Kansas City, Kansas	X			.66
National Battery Company	Chicago Hts., Ill.	Joplin, Missouri			X	.26½
National Battery Company	Dallas, Texas	Joplin, Missouri			X	.35
National Battery Company	Depew, New York	Newark, New Jersey			X	.27
National Battery Company	Depew, New York	Joplin, Missouri			X	.37
National Battery Company	East Point, Georgia	Joplin, Missouri			X	.67
National Battery Company	East Point, Georgia	Chicago, Illinois			X	.63
National Battery Company	East Point, Georgia	Cincinnati, Ohio			X	.51
National Battery Company	Leavenworth, Kansas	Joplin, Missouri			X	.14
National Battery Company	Los Angeles, Cal.	Joplin, Missouri			X	.66
National Battery Company	North Bergen, N. J.	Newark, New Jersey			X	.09
National Battery Company	St. Paul, Minnesota	Joplin, Missouri			X	.38
National Battery Company	St. Paul, Minnesota	Minneapolis, Minn.			X	.07
National Lead Company	Chicago, Illinois	Joplin, Missouri			X	.26½
Oakland Battery Company	Oakland, California	Oakland, California	X			.12½
Okeene Battery Station	Okeene, Oklahoma	Joplin, Missouri	X			.73
Overing Battery Company	New Orleans, La.	New Orleans, La.	X			None
Parkwood Battery Company	Cleveland, Ohio	Cleveland, Ohio		X		.11
Patterson And Hicks	Tulsa, Oklahoma	Joplin, Missouri	X			.44
Patterson Manufacturing Company	NewPhiladelphia, Ohio	Chicago, Illinois		X		.53
Patterson Manufacturing Company	NewPhiladelphia, Ohio	Cleveland, Ohio	X	X		.34
Patterson Manufacturing Company	New Philadelphia, O.	Pittsburgh, Pa.		X		.31
Penn Battery Manufacturing Co.	New York, New York	Newark, New Jersey	X			.20
Perrine Quality Products Co.	Waltham, Massachusetts	Newark, New Jersey			X	.23
Philco Corp.Storage Battery Div.	Trenton, New Jersey	Joplin, Missouri			X	.50
Philco Corp.Storage Battery Div.	Trenton, New Jersey	Newark, New Jersey			X	.14

Commission's Exhibit No. 854.

C 854 C

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 854-C

SHEET NO. 3

CUSTOMER	DESTINATION	SHIPPING POINT	PRICE BASIS LESS THAN FIVE TONS	PRICE BASIS FIVE TONS	PRICE BASIS CARLOAD	FREIGHT RATE PER CWT.
The Power Cell Sales Company	Columbus, Ohio	Chicago, Illinois	X			.48
Price Battery Corporation	Hamburg, Pennsylvania	E. St. Louis, Ill.			X	.86
Price Battery Corporation	Hamburg, Pennsylvania	Newark, New Jersey			X	.23
Reading Batteries, Inc.	Reading, Pennsylvania	Newark, New Jersey			X	.21
Red Bar Battery Company	Dayton, Ohio	Cleveland, Ohio			X	.30
Red Bar Battery Company	Dayton, Ohio	Joplin, Missouri			X	.30
Reliance Battery Products Co.	Plano, Illinois	Chicago, Illinois	X			.26
Riga And Company	Tampa, Florida	Newark, New Jersey			X	.45
Roberts Battery Company	Los Angeles, Cal.	Los Angeles, Cal.	X			.12½
Royal Battery Corporation	New Brunswick, N.J.	Newark, New Jersey			X	.20
Frank Schultz	Cleveland, Ohio	Cleveland, Ohio	X			.07
Seneca Battery Company	Buffalo, New York	Cleveland, Ohio	X			.45
Skatbert Battery Company	Mayville, North Dakota	Minneapolis, Minn.	X			.74
Smith Batteries, Ltd.	Calgary, Canada	Minneapolis, Minn.		X		.65
Solar Corporation	Milwaukee, Wis.	Chicago, Illinois			X	.32
Solar Corporation	Milwaukee, Wis.	Joplin, Missouri			X	.26½
Southwest Wheel, Inc.	Dallas, Texas	Joplin, Missouri			X	.35
The Square Deal Electric Company	Akron, Ohio	Cleveland, Ohio	X			.25
The Square Deal Electric Company	Akron, Ohio	Cleveland, Ohio		X		.22
States Batteries, Ltd.	Los Angeles, Cal.	Joplin, Missouri			X	.66
States Batteries, Ltd.	Portland, Oregon	Joplin, Missouri			X	.71
States Batteries, Ltd.	San Francisco, Cal.	Joplin, Missouri			X	.66
States Batteries, Ltd.	Seattle, Washington	Joplin, Missouri			X	.71
Stevens Corporation	Portland, Oregon	Joplin, Missouri			X	.71
Storage Battery Exchange	Detroit, Michigan	Detroit, Michigan	X			.10
Surrette Storage Battery Company	Salem, Massachusetts	Newark, New Jersey			X	.23
Twin Life Battery Mfg. Co.	Washington, D. C.	Newark, New Jersey	X			.44
United Battery Mfg. Co.	Los Angeles, Cal.	Joplin, Missouri			X	.66
Vitalic Battery Company, Inc.	Dallas, Texas	Joplin, Missouri			X	.35
Western Battery & Supply Company	Denver, Colorado	Joplin, Missouri			X	.58
Western Battery & Supply Company	Kansas City, Mo.	Joplin, Missouri			X	.14
Wilkins Battery Company	Greenville, S.Car.	Newark, New Jersey	X			.94
The Willard Storage Battery Co.	Cleveland, Ohio	Joplin, Missouri			X	.36
The Willard Storage Battery Co.	Collinwood, Ohio	Joplin, Missouri			X	.36
The Willard Storage Battery Co.	Collinwood, Ohio	Newark, New Jersey			X	.32
The Willard Storage Battery Co.	Dallas, Texas	Joplin, Missouri			X	.35
The Willard Storage Battery Co.	Los Angeles, Cal.	Joplin, Missouri			X	.66
Willo Battery Company	Jacksonville, Fla.	Newark, New Jersey	X			.61

4608

C 854 D

FEDERAL TRADE COMMISSION
Docket No. 5253 [illegible] 854 D

SHEET NO. 4

CUSTOMER	DESTINATION	SHIPPING POINT	PRICE BASIS LESS THAN FIVE TONS	FIVE TONS	CARLOAD	FREIGHT RATE PER CWT.
Willo Battery Company,	Jacksonville, Fla.	Tampa, Florida	X			.57
Wonch Battery Company	Okemos, Michigan	Chicago, Illinois	X			.42

PLANTS: Joplin, Missouri And Newark, New Jersey

All other shipping points are from warehouse stocks

PIGMENT DIVISION
December 6, 1946

Commission's Exhibit No. 854.

Rising Sun and Adams Avenue and 19th & Allegheny Avenue, Philadelphia	Contract	" "
Electric Storage Battery 129 Belmont Blvd., Kansas City, Mo.	Carload	Rail - 63½¢ cwt.
General Lead Batteries Newark, N. J.	Carload price	Our truck
Landis Battery Co. Atlantic City, N. J.	5-ton price	" "
Jarvis Battery & Elec. Co. Winston-Salem, N. C.	Less than 5-ton price	Rail - 69¢ cwt.
Chas. W. Myers, Lancaster, Pa.	" " " "	Our truck
Philco Corp. Trenton, N. J.	Carload	Our truck
Henry C. Ruh, 1029 W. Glenwood St. Philadelphia, Pa.	Less than 5-ton price	" "
Ziehler Bros. 15th & Wood Streets, Philadelphia	5-ton price	" "
Wilbur Battery & Radio Co. Trenton, N. J.	Less than 5-ton price	" "

Commission's Exhibit No. 864.

Tabulation of Bids received on
BASIC CARBONATE WHITE LEAD for the Years 1932-1944, inclusive.

All bids are on the basis of furnishing in 100# containers and on brands of the bidders' own manufacture unless otherwise indicated.
Terms are Net-30 Days unless otherwise indicated.

Year	Ref. No.	National Lead Co.	Eagle Picher Sales Co.	Sherwin Williams Co.	Foy Paint Co.	Perry & Derrick Co.	Buehl Paint Co.	The Cook Paint & Varnish C	The Theo Paint & Glass Co.	Pittsburgh Plate Glass Co.	Acme White Lead & Color Works	The Sterling Varnish Co.	Glidden Co. (Cleveland, Ohio)	Monolith Carbon Paint Co. (Scranton, Pa.)
1932	256			$.0914	*$.086	*$.0902	*$.0994							
1933	158			.079	.0852			*$.10	*$.0852	*$.0952				
1934	1334			.0825										
1935	3740	$.095	$.095				.095							
	5331	.0798	.0798	.0798							*$.0825	*$.0798		
	6243	.0798	.0798	.0798			.0891				* .0815			
1936	4230	.0837	.0837	.0837										
1937	3254	.0984	.0984	.0984										
	4154	.0944	.0944	.0984							* .098			
1938	3144	.0784	.0808	.0808										
	4069	.0784		.0784							* .08			
	6884	.0784	.0784	.0784							** .0792			
	6999	.0784	.0784	.0784							** .0792			
	8689	.0784	.0784	.0784							** .0792			
1939	734	.0784	.0784	.0784							** .0792			
	1857	.0784	.0838	.0833							** .0792			
	6130			.0833	.1015									
	6610	.0833	.0833	.0833							** .0842			
	6627	.0833	.0833	.0833							** .0842			
1940	6028	.0906	.0882	.0882							.0891		$.0882	
	7120	.0857	.0857	.0857										
1941	3443	.0882	.0857	.0862										
	6113	.0906											.1050	
1942	1862	.098	.0955											
1943	1552	.0955	.098	* .099										
1944	1280	.0955	.1004										* .098	.0975
				* - 1%	* Brand - National or Eagle	*Brand - Anaconda	*Brand - Dutch Boy	*Brand - Eagle Pitcher or Dutch Boy	* Brand- Johnstons	*Brand - Eagle Pitcher or Dutch Boy	* - 2% ** - 1%		* - 1%	

CEx 864

FEDERAL TRADE COMMISSION
Docket No. 5253 ~~[illegible]~~ Exhibit No. 864
In the Matter of [illegible]
Date 11/14/47 Witness
REPORTER FEDERAL REPORTING CO.
By [illegible]

JAN 23

QUOTATION SUMMARY

Quotation No. 395

Commodity WHITE LEAD

Date 9/25/39

REQ. NO.	QUANTITY	DESCRIPTION	UNIT	T. C. ESSER COMPANY PRICE	NATIONAL LEAD COMPANY PRICE	SHERWIN WILLIAMS CO. PRICE	PRICE	PRICE	PRICE	PRICE	PRICE	PRICE	PRICE
0829 Br.& Bldgs. 528 W. Fraser St.	5,000	lbs. Lead - White - in Oil (100# pails) Old Dutch Process	cwt.	9.49	8.33	8.33							
		DISCOUNT..........		1% Net	Net	Net							
		DELIVERY..........		Immed.	5 days	10 days							

Cm Frost

CX 865-A

FEDERAL TRADE COMMISSION
Docket No. 5253 COMMISSION Exhibit No. 865-A
In the matter of National Lead Co. et al
Date 11/24/47 WITNESS
REPORTER: FEDERAL REPORTING CO.
Braud

MILWAUKEE-NKMASON EXHIBIT 1
OBTAINED JAN. 3 1945
BY MILW. BOARD PURCHASES LETTER OF JAN 3, '45
P.C. Kolinski
ATTORNEY-EXAMINER
FILE NO. 1-17

Milwaukee
Tr 4096

314

4665

Commission's Exhibit No. 865.

Commission's Exhibit No. 865.

QUOTATION SUMMARY

Commodity WHITE LEAD

Date 5/23/40

Quotation No. 224

REQ NO	QUANTITY	DESCRIPTION	UNIT	DU PONT, E. I. DE NEMOURS & COMPANY PRICE	EAGLE-PICHER SALES CO. PRICE	HOOKER GLASS & PAINT MFG. CO. PRICE	K[illegible] CO. INC. PRICE	[illegible] PRICE	[illegible] WILLIAMS CO. PRICE	PRICE	Last Price 1/18/40 PRICE	PRICE	PRICE	PRICE
	12,000 (approx)	lbs. WHITE LEAD- Ground in Oil-Soft Paste (in 100 lb. containers) per specs.	cwt.	10.[illegible]4	8.57	10.75	10.[illegible]5	8.57	.57		8.57			
		DISCOUNT.........		1%	Net	1%	1%	--	--					
		DELIVERY.........		7 days	[illegible]	Immed.	[illegible]	[illegible]	[illegible]					
		(Delivery of 200# at once and balance over period of 6 mos. from date of award)												
		BRAND.........		Du[illegible]t Herri- [illegible]on	[illegible]	Dutch Boy or [illegible]le	Dutch	[illegible]	In[illegible]					

CE 865B

FEDERAL TRADE COMMISSION
Docket No. 5253 Exhibit No. 865-B

JAN 3 45

C. Kolinski

QUOTATION SUMMARY

Commodity WHITE LEAD

Date 7/3/40

Quotation No. 289

SEQ NO	QUANTITY	DESCRIPTION	UNIT	DU PONT, E. I. DE NEMOURS & COMPANY PRICE	EAGLE-PICHER SALES CO. PRICE	KNUDSEN BROS. INC. PRICE	NATIONAL LEAD COMPANY PRICE	PATEK BROTHERS INC. PRICE	PITTSBURGH PLATE GLASS CO. PRICE	SHERWIN-WILLIAMS CO. PRICE	PRICE	PRICE	PRICE
40500 Bridge Shop 528 W. Fraser St.	10,000#	WHITE LEAD-Ground in oil-Soft Paste (in 100 lb.containers) as per specs.	cwt.	10.54	8.57	9.50	8.57	10.75	10.75	8.57			
		DISCOUNT..........		1%	--	1%	Net	2%	2%	Net			
		NET PRICES........per cwt		10.4346	8.57	9.405	8.57	10.535	10.535	8.57			
		DELIVERY..........		7 days	3 days	rec.	2-3 da.	Immed.	10 days	3 days			
		BRAND NAME........		DuPont "Harrison"	Eagle		Dutch Boy	Dutch Boy	Dutch Boy	Old Dutch			

C865-C

FEDERAL TRADE COMMISSION
Docket No. 5253 Exhibit No. 865-C

3

OBTAINED ... 3.

BY ... BOARD ...

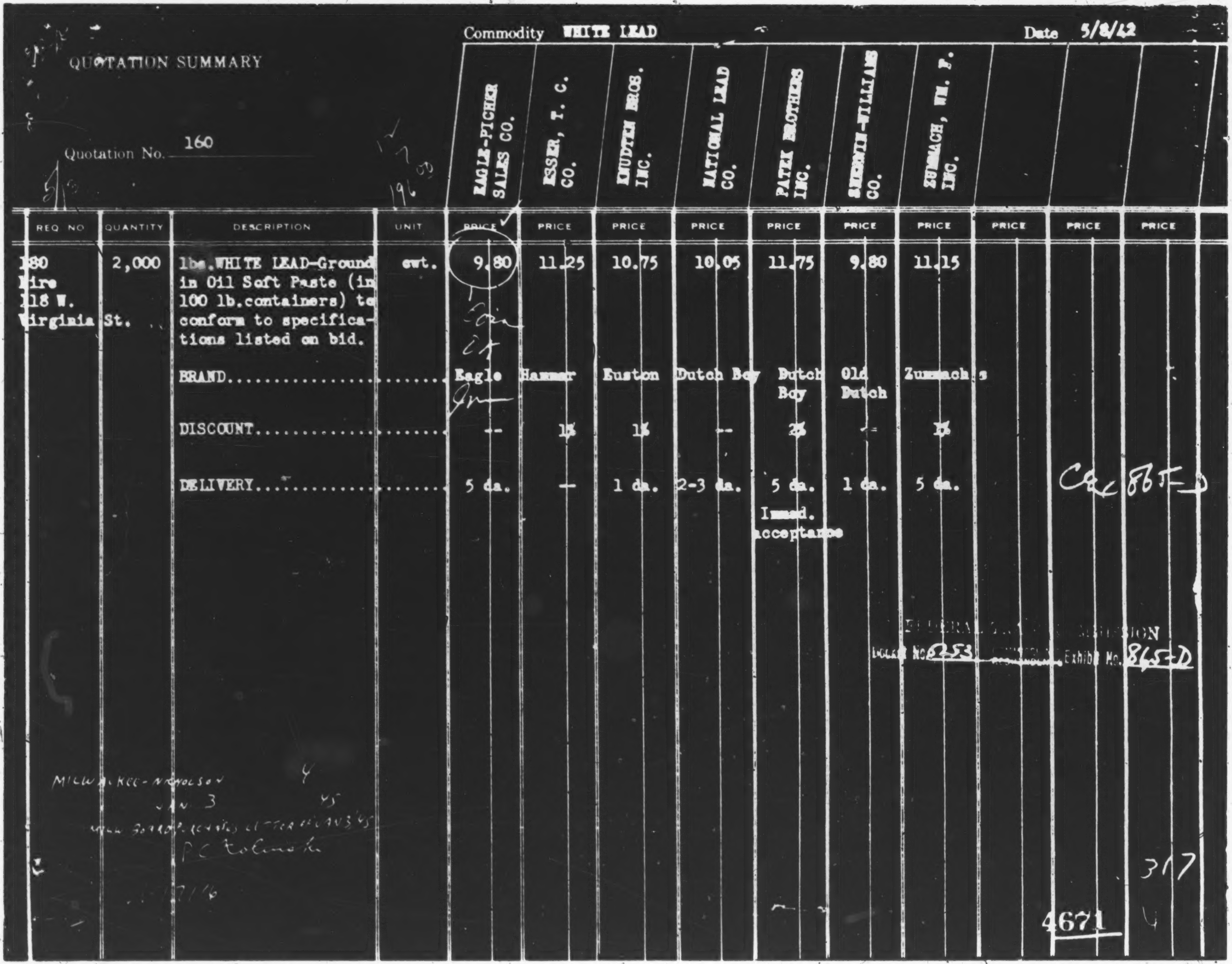
D C Kolinski

FILE No. 1-1716

4669

Commission's Exhibit No. 865.

Commission's Exhibit No. 865.



QUOTATION SUMMARY

Commodity WHITE LEAD

Date 5/8/42

Quotation No. 160

REQ. NO.	QUANTITY	DESCRIPTION	UNIT	EAGLE-PICHER SALES CO. PRICE	ESSER, T. C. CO. PRICE	KNUDTEN BROS. INC. PRICE	NATIONAL LEAD CO. PRICE	PATEK BROTHERS INC. PRICE	SHERWIN-WILLIAMS CO. PRICE	ZUMMACH, WM. F. INC. PRICE	PRICE	PRICE	PRICE
180 Fire 118 W. Virginia St.	2,000	lbs. WHITE LEAD-Ground in Oil Soft Paste (in 100 lb. containers) to conform to specifications listed on bid.	cwt.	9.80	11.25	10.75	10.05	11.75	9.80	11.15			
		BRAND		Eagle	Hammar	Euston	Dutch Boy	Dutch Boy	Old Dutch	Zummach's			
		DISCOUNT		--	1%	1%	--	2%	--	1%			
		DELIVERY		5 da.	—	1 da.	2-3 da.	5 da. Immed. acceptance	1 da.	5 da.			

Cec 865-D

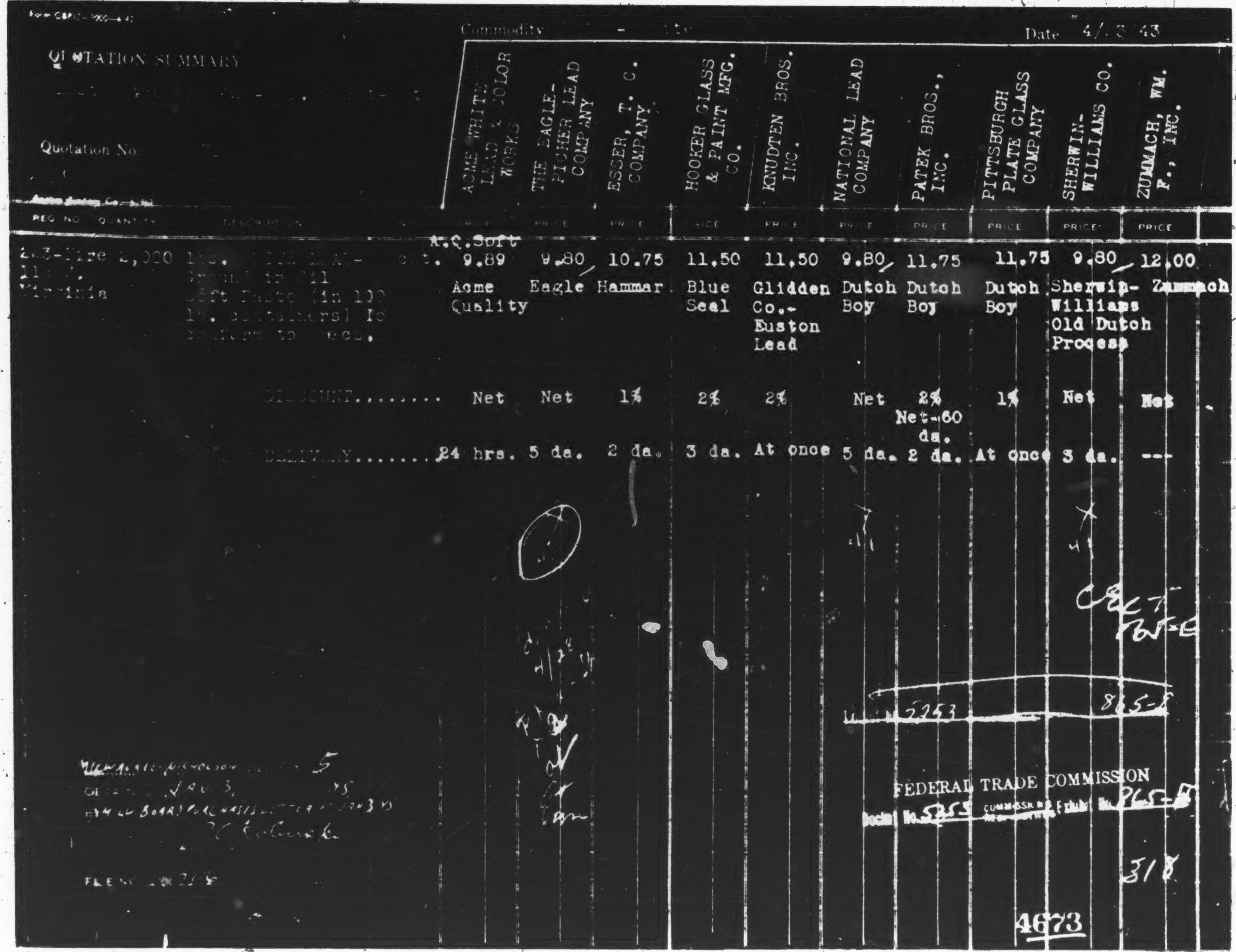
FEDERAL TRADE COMMISSION
Docket No. 253 Exhibit No. 865-D

MILWAUKEE-NICHOLSON 4
JAN 3 45
MILW BOARD P. [illegible] LETTER OF JAN 3 '45
P C Kolinski

317

4671

Commission's Exhibit No. 865.



Form C&P[illegible]—4-41

QUOTATION SUMMARY

Commodity - [illegible]

Date 4/3/43

Quotation No. [illegible]

REQ. NO.	QUANTITY	DESCRIPTION	UNIT	ACME WHITE LEAD & COLOR WORKS PRICE	THE EAGLE-PICHER LEAD COMPANY PRICE	ESSER, T. C. COMPANY PRICE	HOOKER GLASS & PAINT MFG. CO. PRICE	KNUDTEN BROS. INC. PRICE	NATIONAL LEAD COMPANY PRICE	PATEK BROS., INC. PRICE	PITTSBURGH PLATE GLASS COMPANY PRICE	SHERWIN-WILLIAMS CO. PRICE	ZUMMACH, WM. F., INC. PRICE
2[illegible]3-Fire 11[illegible] Virginia	2,000 lbs.	[illegible] LEAD- Ground in Oil Soft Paste (in 100 lb. containers) To conform to specs.	cwt.	A.C.Soft 9.89	9.80	10.75	11.50	11.50	9.80	11.75	11.75	9.80	12.00
				Acme Quality	Eagle	Hammar	Blue Seal	Glidden Co.-Euston Lead	Dutch Boy	Dutch Boy	Dutch Boy	Sherwin-Williams Old Dutch Process	Zummach
		DISCOUNT........		Net	Net	1%	2%	2%	Net	2% Net-60 da.	1%	Net	Net
		DELIVERY........		24 hrs.	5 da.	2 da.	3 da.	At once	5 da.	2 da.	At once	3 da.	---

[illegible]-Nicholson [illegible] 5
OR[illegible] JAN 3, [illegible]
[illegible] BOARD PURCHASING [illegible] JAN 3 [illegible]
[illegible]

FILE NO. [illegible]

[illegible] 5253 865-E

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission's Exhibit No. 865-E

318

4673

4675 COMMISSION'S EXHIBIT NO. 866.

National Lead Company,
111 Broadway, New York.

May 12, 1931.

To the/
President and Board of Directors of the
Eagle-Picher Lead Company,
Cincinnati, Ohio.

Gentlemen:

I am empowered by the Board of Directors of the National Lead Company to make to you the following propositions:

1. The National Lead Company will buy all of the net assets of every kind and description owned by the Eagle-Picher Lead Company, including lands, plants, inventories, bills receivable, patents, secret processes, good will, investments, and all other properties or interest in properties belonging to the Eagle-Picher Lead Company.

2. This proposition is based upon the annual statement issued by the Eagle-Picher Lead Company as of the date of December 31, 1930, of which a copy has been given to the National Lead Company, and upon which statement the National Lead Company relies as an accurate statement as of that date in making this proposition.

3. The meaning of the term net assets in the first paragraph hereof includes all of said assets, less what is included at that time under the item of current liabilities in said statement.

4. We will pay to you for said properties the sum of ten million dollars ($10,000,000.00), subject to the following adjustments:

(a) All assets (except property described under the heading of "Fixed Assets" in said statement) and current liabilities to be audited and determined as of the date which shall be fixed for the execution of this agreement, if accepted. The inventories to be brought down to such date at the then current market prices for raw materials. Materials in process of manufacture or finished to be invoiced at current market for metal contents, plus actual cost of manufacturing to their present condition.

(b) Value of notes, accounts and bills receivable to be deducted from above purchase price, but collected by National Lead Company without charge and proceeds remitted to you as promptly as collected. Any notes, accounts or bills receivable not collected within three months after the transfer of the property shall be transferred to you for such action as you may desire.

4676 (c) In case the current assets as described in said statement, as so adjusted, are more or less than shown in said statement dated December 31, 1930, or the current liabilities as adjusted are more or less than shown in said statement, then the purchase price above stated shall be adjusted accordingly.

(d) In other words:— If the current assets of the company shall be less than the amount stated in the balance sheet of December 31, 1930, the amount of such decrease in value shall be deducted from the $10,000,000.00 offered for said properties. In like manner, if the current liabilities are more than shown in said statement, then the amount of excess shall be deducted from said $10,000,000.00 purchase price. And, on the contrary, if the assets are more when adjusted as aforesaid, then the amount of such excess value shall be added to the purchase price of $10,000,000.00. If the current liabilities as reported in said statement are less, then the amount of such decrease shall be added to the $10,000,000.00 on the readjustment made on the auditing of the account. The amount of the payment for said properties to be varied by such adjustment, after auditing.

(d) The property described in said statement under the heading "Deferred Items" should be adjusted to conform to the facts on date fixed for the purpose; and in case the item "Purchase Option Deposit" has no present value, it shall be deducted from the purchase price as herein stated.

(e) This proposition shall be accepted and approved by the Board of Directors of the Eagle-Picher Lead Company within one month from the date hereof; and thereafter the transaction shall be submitted to the stockholders of the Eagle-Picher Lead Company, under and pursuant to the laws of the State of Ohio, with such speed as the necessity of complying with the laws and giving the proper notices will permit.

5. Payment for said properties shall be made in cash.

Very respectfully,

(Signed) E. J. Cornish
President.

4704 RESPONDENT'S EXHIBIT NO. 1.

Constitution and By-Laws
Lead Industries Association
Dated as of November 14, 1928

4705 Constitution of the Lead Industries Association

We, the undersigned subscribers, being severally identified with the lead mining, smelting, refining and/or manufacturing industries, mutually agree to form an association for the object, and under the plan, set forth below. By causing our names to be subscribed thereto we agree to the provisions of this

Constitution.

Article 1

Name

The name of this association shall be the Lead Industries Association.

Article 2

Objects

The purpose of the Lead Industries Association shall be:

To collect and publish statistical information relating to the production, distribution, marketing, consumption and use of lead and lead products;

To disseminate accurate information regarding lead products and how they best may be used;

To develop methods for the improvement of the welfare
of those engaged in the lead industries, or in the use
4706 of its product; and for such other purposes as, from
time to time, may be of benefit to the lead industries.

In general to promote the serviceability of the lead industries to the community at large.

Article 3

Limitations

No agreement, understanding, combination or arrangement or any form of concerted action to curtail production, fix prices, suppress competition, or in any other manner to restrain trade or commerce, or to monopolize, or attempt to monopolize any part of the trade or commerce of the country shall be permitted in the Lead Industries Association, nor any other act or acts which may be in contravention of law or good business practice. Each member of the association shall be wholly free to conduct its business without legal or moral accountability to the association or to any member thereof.

Article 4

Inspection of Records

The books and records shall reflect the complete details of all the activities of the Lead Industries Association, and shall be open to inspection at all times by the departments or bureaus of government interested. All reports of general interest distributed to the members shall be furnished to others desiring them for such consideration as may be regularly established by the association.

Article 5

Non-Profit Organization

The affairs of the Lead Industries Association shall not be conducted for profit.

4707

Article 6

Membership

Any individual, company, firm or corporation, engaged in the mining, smelting, refining and/or manufacturing of lead or lead products, or using lead products, is eligible for membership. Acceptance of election to membership shall imply subscription to the provisions of this constitution.

Article 7

Management

The management and control of the Lead Industries Association shall be vested in a board of directors, and in an executive committee of the board of directors empowered to act, ad interim, in accordance with the provisions of the by-laws.

Article 8

Officers

The officers of the Lead Industries Association shall be a president, one or more vice-presidents, and a chairman of the board of directors, all elected by the board of directors, and a secretary and a treasurer appointed by the executive committee. The same person may be both secretary and treasurer. The duties and powers of the officers shall be defined in the by-laws.

Article 9

Expenses

The expenses of the Lead Industries Association shall be borne by contributions from the members apportioned according to the provisions of the by-laws.

4708

Article 10

By-Laws and Amendments

The by-laws of the Lead Industries Association shall provide the rules and regulations governing the management and conduct of the organization not otherwise provided by the constitution. This constitution, and the by-laws, may be amended at any meeting of the board of directors by a majority vote in person or by written consent, provided two (2) weeks' notice of the meeting shall have been given together with a copy of the proposed amendment. Until amended the by-laws shall be of the terms and tenor of the by-laws attached hereto, bearing even date herewith.

In Witness Whereof, we have caused our names to be subscribed hereto, by our respective proper officers thereunto duly authorized, as of the 14th day of November, 1928.

4709

By-Laws of the Lead Industries Association Dated as of November 14th, 1928

Article I

Membership

Section 1. Application for membership shall be in writing on forms provided by the Secretary, duly executed by the applicant, and shall state:

(a) The name of the individual, firm, company or corporation applying;

(b) The branch of the lead mining, smelting, refining and/or manufacturing or consuming industry in which the individual, firm, company or corporation is engaged;

(c) The name of the applicant's representative.

Applications for membership in the Lead Industries Association shall be acted upon, following their receipt, at the next meeting of the board of directors or the executive committee. A majority vote shall elect an applicant
4710 to membership. (The applicant shall signify acceptance of election by subscribing his or its name to the Constitution and By-Laws.)

Sec. 2. Any member may withdraw at any time from membership in the Lead Industries Association by giving formal notice of such withdrawal to the Secretary, and fulfilling all obligations to the association incurred by that member to the time of withdrawal.

Sec. 3. Each member shall have one vote and all members shall have the same status.

Article II

Meetings of Members

Sec. 1. A regular meeting of the members shall be held annually on the third Wednesday in February of each year for the purpose of electing directors and for such other business as shall be placed before the meeting. Special meetings may be called at any time by the President or the Chairman of the board of directors. Notice of the time and place of all meetings shall be given to each member in writing or by telegraph at least ten days before the meeting.

Article III

Board of Directors

Sec. 1. The board of directors of the Lead Industries Association shall consist of representatives of the members elected at the annual meeting and shall not exceed fifteen (15) in number. Representation by proxy is permissible.

4711 Sec. 2. The board of directors shall have power to hold meetings at such times and places as it deems proper. It shall be empowered to elect new members; to appoint an executive committee, and other standing committees, with such duties, consistent with the Constitution and By-Laws, as it may prescribe; to elect officers; and to have such other functions and authority as may be necessary to carry out the purposes of this association.

Sec. 3. Regular meetings of the board of directors shall be held quarterly on the third Wednesday of February, May, August and November of each year. Special meetings may be held upon the call of the Chairman at any time upon the expiration of two days' notice.

Sec. 4. Five (5) members of the board of directors shall constitute a quorum.

Article IV

Executive Committee

Sec. 1. The executive committee shall consist of five (5) directors elected by the board of directors. The executive committee may act on behalf of the association in any matter upon which the board of directors is qualified to act, when the board is not in session. The executive committee shall appoint the Secretary and Treasurer, and such clerks or other assistants required, and may provide in general for the detailed administration of the association. The board of directors in electing members of the executive committee shall designate one such member to serve as chairman of the executive committee.

4712 Sec. 2. Directors who are not members of the executive committee shall have the privilege of attending in person, or by proxy, all meetings of the executive committee, and to join in discussions, but without vote.

Sec. 3. Meetings of the executive committee shall be at the call of the chairman upon at least one day's previous notice.

Article V

Officers

Sec. 1. The duties of the officers shall be those usually pertaining to their respective positions.

It shall be the special duty of the chairman of the board of directors to enforce Article 3 of the constitution.

Sec. 2. The Secretary shall represent the executive committee as an administrative official, and keep a complete

and detailed record of all meetings of the board of directors and executive committee.

Sec. 3. The treasurer may be required to give bond in such sum and with such sureties as the executive committee may require. He shall have custody of and shall receive and disburse all the funds of the association.

Sec. 4. The officers shall be elected annually at the first regular meeting of the board of directors.

Sec. 5. Any vacancy caused by disability, resignation or otherwise, may be filled at any time by the executive committee.

4713

Article VI

Expenses and Assessments

Sec. 1. The expense of conducting the Lead Industries Association shall be apportioned among the members and shall be based upon the lead production or consumption of the members reduced to units of metallic lead. In the case of the mining, smelting and refining branches of the lead industries, the lead produced in ores and concentrates, or lead bullion and pig lead, respectively, shall be the basis of the assessment; in the case of the manufacturing, reselling or consuming branches of the lead industries, the lead consumed, whether virgin or secondary, shall be the basis. A schedule of assessments shall be drawn up based upon the four major divisions represented in the association, i. e., (a) mining, (b) smelting and refining, (c) manufacture of lead product, (d) consumption of lead which is not resold. Assessments shall be apportioned among members in each of the above divisions according to the following ratio per ton: (a) 4, (b) 1, (c) 2, (d) ½. Some members may be assessable in two or more divisions. Foreign production or consumption to be assessed upon the same ratio but given a deduction of 50 per cent from the total assessment. Contributions shall be based upon the previous year's record of production and consumption, and shall be made quarterly.

The minimum fee for membership in the Lead Industries Association shall be $100.00 per year, effective July 1, 1933.

4737 RESPONDENT'S EXHIBIT NO. 6.

Third Meeting

Code Authority Meeting

New York, N. Y. July 27, 1934.

A meeting of the Code Authority for the Lead Industry was held on Friday, July 27, 1934, at 10:00 A. M., in the Board Room of the National Lead Company, 111 Broadway, New York, N. Y.

Present

Members	Alternates
Clinton H. Crane, Chairman	H. M. Brush
F. M. Carter	D. A. Callahan
W. Y. C. Hunt	I. H. Cornell
F. Y. Robertson	Clarence Glass
P. E. Sprague	R. G. McKay
	F. S. Mulock
	E. L. Newhouse, Jr.
	H. Y. Walker

G. W. Farny, Administration Member
Carroll Wetzell, N. R. A. Legal Dept. New York
F. E. Wormser, Secretary, Treasurer.

The minutes of the second meeting of June 18 were approved.

Without objection, the Secretary was instructed to insert in the record Administrative Order No. 442-6, recognizing the members of the Code Authority for the Lead Industry, which appears as Exhibit "A" attached.

Without objection, the Secretary was instructed to insert in the record the following formal notification from the National Recovery Administration, appointing Major George W. Farny Administration Member:

"Kindly be advised that Mr. George W. Farny of Morris Plains, N. J., has been appointed, by Administrative Order, as Administrative member on the Code Authority of the Lead Industry. Mr. Farny is a mining engineer by profession and has a background of both national and international experience, and I believe that he will make a desirable member on the Code Authority.

Signed: W. A. Janssen, Deputy Administrator, Metals and Mining Section, July 3, 1934."

4738 Without objection, the Secretary was instructed to insert in the record the formal notification from the

National Recovery Administration, granting temporary exemption from Section 2 of Article VII, and Schedule "A" of the Lead Code, which appears as Exhibit "B" attached.

Without objection, the Secretary was instructed to insert in the record formal notification from the National Recovery Administration, approving the By-Laws of the Code Authority, as follows:

"The By-Laws of the Code Authority for the Lead Industry submitted by you with your letter of June 14, 1934, have been examined and are hereby approved.

Signed: C. E. Adams, Division Administrator, June 29, 1934."

The Secretary was requested to report the balloting, by letter, for alternates to serve for Code Authority members and he stated that the Mining Division had elected Alternate 1, Mr. A. G. Mackenzie and Alternate 2, Mr. Paul H. Hunt, to serve for Mr. George W. Lambourne, by letter ballot mailed on June 15, eleven out of fourteen ballots having been received.

The Smelting and Refining Division had elected Mr. Clarence Glass alternate for Mr. John A. McCarthy, by letter ballot mailed on June 14, fifteen out of nineteen ballots having been received.

The Pigments Division had elected Alternate 1, Mr. W. E. Maston and Alternate 2, Mr. J. R. MacGregor, to serve for Mr. R. M. Roosevelt, by letter ballot mailed on June 21, eight out of ten ballots having been received.

The Metallic Lead Products Division had elected Mr. E. L. Newhouse, Jr., to serve for Mr. P. E. Sprague, by letter ballot mailed on June 16, twenty out of twenty-nine ballots having been received.

The Secretary was requested to notify the National Recovery Administration of the election of these alternates in order to procure the approval of the Administrator.

The Secretary reported that the investigation of the eight-hour day, as ordered by the Code, was nearing completion and that he expected to make a full report at an early meeting of the Code Authority.

He also stated that the various divisions of the Code were studying the drafting of suitable standards of safety and health for their respective Divisions but that the subject was such a large one that considerable time would yet elapse before any reports could be expected.

4739 The same comment was made with respect to the study of the regional industrial relations boards, at least the Division being confused with the relationship now existing between the newly formed Labor Relations Board and those industrial relations boards which were being set up by various codes. Mr. Callahan suggested that to avoid duplication of effort it would be desirable to obtain from the National Recovery Administration information as to the scope or jurisdiction of the National Labor Relations Board and the Regional Labor Boards to be set up under the Lead Code. The Administration representative said he understood the Labor Advisory Board was considering the situation and the Legal National Recovery Administration representative suggested the matter be laid on the table pending the receipt of further advice from Washington, stating that there would be no question of the extension of time that might be required to perfect the Lead Code labor plans occasioned by the delay."

Whereupon it was regularly moved, seconded and carried, that the Secretary be instructed to communicate with the Administration in order to determine what, if any, change the creation of the newly formed National Labor Relations Board would be brought about in planning for regional industrial relations boards for the Lead Industry and to request, if available, some definition as to the functions of each.

Mr. Sprague presented to the Code Authority the difficulties which the Metallic Lead Products Division encountered in attempting to devise adequate standards of safety and health for the Division, there being an overlap between the Smelting and Refining processes and actual manufacturing processes as conducted by numerous members of the Division. He suggested it might be wise to establish a new arm of the Code Authority to consider specially safety and health problems.

The Secretary was requested to circularize Code Authority members for a definite expression of their views on the safety and health problem. Mr. Walker recommended, and without objection the Chair ruled, that in the meantime each Division continue as it is doing and that ultimately the various Division Chairmen consult with each other on the safety and health program. The Chairman brought up the close inter-relationship between the standards of safety and health for the Lead Industry and the Copper Industry as well as other metal industries.

4740 The Secretary reported that he had circulated labor questionnaires on which members could report overtime under the provisions of Article III, Section 3, or the number of handicapped employees under Article IV, Section 6. These forms are attached as Exhibit "C".

The Secretary also stated that he had distributed questionnaires among the members of the Mining and Smelting and Refining Divisions (Exhibit "D" attached) which were a continuation of the questionnaires sent earlier in the year under the auspices of the Lead Industries Association, in order to obtain fundamental labor statistics for these Divisions. He expressed a desire to have the cooperation of the Chairman of the Pigments, Metallic Lead Products and Foil Divisions in order to devise and circulate suitable labor questionnaires among those Divisions respectively.

A letter from Deputy Administrator Janssen, dated July 21, with reference to amending the Lead Code so as to make assessments under the Code mandatory was presented. (Exhibit "E" attached.) Discussion which ensued indicated that there was much to be said in favor of making the contributions to the Code Authority voluntary and, likewise, on a mandatory basis. As some members desired to give the subject further study action on the letter was put over to the next meeting.

The Chairman presented a request from Deputy Administrator Janssen, dated July 10, urging the Code Authority to establish a Trade Practice Complaints Committee. (Exhibit "F" attached.) The Code Authority, in its discussion, weighed the desirability of constituting a trade practice complaints committee from only those Code Authority members who had a direct interest in the fair trade practices outlined in the Code, or constituting the entire Code Authority a trade practice complaints committee and

It was finally moved, seconded and carried, that the Code Authority for the Lead Industry constitute the Trade Practice Complaints Committee and that the Secretary confer with Mr. Wetzell of the National Recovery Administration to draft a suitable plan in accordance with the instructions provided by Deputy Janssen, circulating this plan among the Code Authority members before submitting it to Washington.

The Chairman presented a petition from the American Metal Co., Ltd., for an exemption from the Lead Code labor provisions for its operations at Carteret, N. J., as

per copy of letters dated July 17 and July 25 (Exhibit
4741 "G" in two pages). Discussion followed relative to the relationship between the American Metal Company's petition and that of the American Smelting & Refining Company, which had previously been endorsed, also the general situation as it affected the similar operations of the members of industry who had to operate under two or more codes. As a similar petition was pending in Washington

It was moved, seconded and carried that the request from the American Metal Co., Ltd., for exemption from the Lead Code labor provisions at its operations at Carteret, N. J., be tabled pending action by the Administrator on a similar petition from the American Smelting and Refining Company.

The Chairman presented a request from the Nassau Smelting and Refining Company, for guidance in handling a Compliance Certificate, as copy of letter of July 18. (Exhibit "H" attached.) The Government representative, Mr. Farny, suggested that the problem be submitted to the National Recovery Administration for assistance. Mr. Glass read a legal opinion which his Company had received in an effort to be helpful.

Whereupon it was suggested that the Code Authority approve a standard Certificate of Compliance, which could be submitted to the National Recovery Administration for its approval. Mr. Wetzell pointed out that the National Recovery Administration would probably be reluctant to become involved in a matter which concerned the P. W. A., or other Government Departments outside the N. R. A. The Secretary was instructed by the Chairman to communicate with Messrs. Earl, Fleming and Wolff to prepare a Certificate of Compliance which would meet the requirements of the Government and yet be adequate for industry.

The Chairman noted a request for an interpretation from the Metals Refining Company, dated July 2, 1934, with relation to Article VIII, Section 1 (i) as follows:

"'A Seller of antimonial lead makes a contract with a Buyer of antimonial lead to supply the Buyer's requirements of antimonial lead of grades specified, said requirements to consist of a minimum of 200 tons and a maximum of 300 tons per month, at a price of $1.00 per ton below the cost of metals contained, using the St. Louis Lead market for the lead and the New York Antimony market for the

balance of weight, the governing markets being those
4742 in effect at Buyer's option, to be declared when orders
are placed, either (a) on date of shipment, or (b)
monthly average for month of shipment.

'Is the tender and completion of the above transaction a violation of the clause quoted?' "

and referred it to Mr. Sprague, as Chairman of the Metallic Lead Products Division.

The Chairman presented a request for information from the Anaconda Lead Products Company, dated June 28, as follows:

"Our men working five days per week frequently decide they would like to work ten days straight and have four days off, or they might work fifteen days straight and have six days off. They would average forty hours per week and simply work this schedule out between themselves so that they could really have a vacation and go some place in the four or six days that they are off. There is no difference in the money involved nor the hours of labor over a reasonable length of time. Of course, this would be provided for under the averaging agreement.

"Naturally we would not pay them overtime on any such an arrangement outlined above. The net result is that the men only suffer, we do not have any more employment and yet we have more friction. Will you please be kind enough to clarify the situation for us?"

The Code Authority saw no objection in the Code to a working schedule being arranged so that an employee might work ten days straight with a four day lay-off immediately following this period of employment, provided not more than 40 hours employment per week be given, but that it would be a violation of the Code to work 15 days straight with 6 days off. The Government representative was inclined to favor this construction of the Code.

The Chairman presented a letter from the Hecla Mining Company, dated June 29, as follows:

"The Lead Code provides for exceptions as to hours under Article III, Section 3 (c):

" 'Nor to employees receiving less than Thirty-Five (35)
Dollars per week in a managerial, executive or super-
4743 visory capacity, or to technical staffs, nor to outside
sales or service employees.

"The question has arisen with us as to whether or not our mine surveyors—men who work in the engineering office—would be classed as part of the technical staff. I will appreciate it if you can give me any information on this point."

It was the sense of the Code Authority that mine surveyors, men who work in the Engineering Office, were to be classed as part of technical staffs under Article III, Section 3 (c) of the Lead Code.

The Chairman next presented a petition from the Bunker Hill and Sullivan Mining and Concentrating Company and the Hecla Mining Company, dated July 10, as follows:

"The undersigned members of the Lead Industry, especially on behalf of certain of their employees, respectfully request an exception from the provisions of Article III of the Code of Fair Competition for the Lead Industry, as approved May 24, 1934, so as to permit these employees to arrange their schedule of work to their better advantage and comfort. The employees referred to are those who are on continuous operations such as running mine pumps, operatives in power houses, etc., some of whom, under the Code, work forty-eight hours per week. These men greatly prefer to work continuously for two or three weeks, then lay off two or three days as the case may be and then resume their work on another shift, but in no instance would they exceed an average of forty or forty-eight hours per week as the case may be during any thirteen weeks-period.

"This is practically the same plan as is embodied in the Copper Code forty hours per week over a three months period; there is no change in the number of hours worked but their distribution is changed to a more convenient and popular plan. To hold these men rigidly down to a forty or forty-eight hour working time in any seven day week is inconvenient, and especially at the request of a number of employees are we making this request. If necessary formal petition for such a change can be had from a large number of our employees and an endorsement of the plan will be made by local labor unions. Bunker Hill & Sullivan Mining & Concentrating Co. By Stanly A. Easton, Pres. Hecla Mining Company, by James F. McCarthy, Pres."

4744 In view of the fact that the exemption requested referred to mine employees on continuous operations, such as powerhousemen and pumpmen, and that the petition was presented at the request of a number of employees of Bunker Hill and Hecla Mining Companies, and that an endorsement of the plan would be made by the local labor unions, the Code Authority approved the aforesaid petition and instructed the Secretary to transmit it to the Administrator with its endorsement.

Mr. Sprague stated that the Solder Section of the Metallic Lead Products Division had met to interpret Article VIII, Section 1 (i) but that opinion had not been unanimous on an interpretation. The Chairman therefore requested that the minutes of the Solder meeting, at which this interpretation was discussed, be distributed to the members of the Code Authority so that the Code Authority could act on this interpretation at the next meeting.

At the suggestion of Major Farny, the Chairman announced that the next meeting of the Code Authority would be held on Monday, August 20, at a time and place to be announced later.

The meeting thereupon adjourned.

Secretary.

4745 Exhibit "B." Third Code Authority Meeting—

July 27, 1934.

Copy

Code of Fair Competition for the Lead Industry.

Order Granting Temporary Exemption from the Trade and Marketing Provisions for the Lead Pigments Division of the Lead Industry.

An application having been duly made by the Members of Industry of the Lead Pigments Division of the Lead Industry for a temporary exemption from the provisions of Section 2 of Article VII, Schedule A, which is a part thereof, of the above described Code of Fair Competition, and the Deputy Administrator having recommended that such application be granted to the extent hereinafter set, and it appearing that the granting of such exemption is necessary to effectuate the policies of Title I of the National Industrial Recovery Act:

Now, Therefore, pursuant to the authority vested in me by Executive Orders of the President and Orders of the Administrator for Industrial Recovery, it is hereby ordered that the Members of Industry of the Lead Pigments Division of the Lead Industry be and hereby are granted an exemption from the provisions of Section 2 of Article VII and Schedule A of said Code of Fair Competition for a period of three months from the date hereof, provided, that such exemption be granted without prejudice to further extension beyond three months if at the end it shall appear to the Administrator that the Industry has been unable to determine upon either the execution of Section 2 of Article VII and Schedule A which is a part thereof or upon the modification thereof.

C. E. Adams,
Division Administrator.

Approval recommended:
W. A. Janssen,
Deputy Administrator.
June 27, 1934.

4746 RESPONDENT'S EXHIBIT NO. 7.

(NRA Cut)

National Recovery Administration
Washington, D. C.
July 16, 1934.

In Reply Refer To Code No. 442

Lead Industry Code Authority,
Mr. W. E. Wormser, Secretary,
420 Lexington Avenue,
New York, New York

Dear Sir:

There is transmitted herewith certified copy of Administrative Order No. 442-3, granting the Lead Pigments Division of the Lead Industry temporary exemption from the provisions of Section 2 of Article VII, Schedule A of the Code of Fair Competition for the Lead Industry, such Order having been approved on June 27, 1934.

Very truly yours,
H. Rose,
Chief, Code Record Section.

Enclosure:
Copy as above.

4747 UNITED STATES OF AMERICA

(NRA Cut)

National Recovery Administration

To all to whom these presents shall come, Greeting:

By virtue of authority vested in me by an order of The President, dated November 18, 1933, I, Hugh S. Johnson, Administrator for Industrial Recovery, certify that the attached copy of Administrative Order No. 442-3, granting the Lead Pigments Division of the Lead Industry temporary exemption from the provisions of Section 2 of Article VII, Schedule A of the Code of Fair Competition for the Lead Industry,—is a true and correct copy of the original, now in my custody, as approved on the 27th day of June, 1934, pursuant to the provisions of the National Industrial Recovery Act, approved June 16, 1933, Public, No. 67, 73d Congress.

In testimony whereof, I, Hugh S. Johnson, Administrator, have hereunto caused my name to be subscribed and the seal of the National Recovery Administration affixed by the Official Certification Clerk, at the City of Washington, in the District of Columbia, this 16th day of July, 1934.

Hugh S. Johnson,
Administrator for Industrial Recovery.
Winidred A. Evers,
Asst. Official Certification Clerk.

No. 24942

4748 Code of Fair Competition for the Lead Industry

Order No. 442-3

Order Granting Temporary Exemption From the Trade and Marketing Provisions for the Lead Pigments Division of the Lead Industry.

An application having been duly made by the Members of Industry of the Lead Pigments Division of the Lead Industry for a temporary exemption from the provisions of Section 2 of Article VII, Schedule A, which is a part thereof, of the above described Code of Fair Competition, and the Deputy Administrator having recommended that such application be granted to the extent hereinafter set, and it appearing that the granting of such exemption is necessary to effectuate the policies of Title I of the National Industrial Recovery Act;

Now, Therefore, pursuant to the authority vested in me by Executive Orders of the President and Orders of the Administrator for Industrial Recovery, it is hereby ordered that the Members of Industry of the Lead Pigments Division of the Lead Industry be and hereby are granted an exemption from the provisions of Section 2 of Article VII and Schedule A of said Code of Fair Competition for a period of three months from the date hereof, provided, that such exemption be granted without prejudice to further extension beyond three months if at the end it shall appear to the Administrator that the Industry has been unable to determine upon either the execution of Section 2 of Article VII and Schedule A which is a part thereof or upon the modification thereof.

C. E. Adams,
Division Administrator.

Approval recommended:
W. H. Janssen,
Deputy Administrator.

June 27, 1934.

4749 RESPONDENT'S EXHIBIT NO. 8.

Code Authority for the Lead Industry
420 Lexington Avenue
New York, N. Y.

Memorandum No. 8.
June 28, 1934.

To Members of the Code Authority:

Subject: Petition Lead Pigments Division.

We have been advised by Deputy Administrator Janssen, under date of June 27, that the application of the members of the Lead Pigments Division of the Lead Industry, for temporary exemption from Section 2 of Article VII and Schedule A, which is a part thereof, of the Code of Fair Competition for the Lead Industry, has been granted. A copy of the order covering this temporary exemption is attached.

Very truly yours,
F. E. Wormser,
Secretary.

P. S. Request for this exemption was made prior to the formation of our Code Authority and was made through the Lead Industries Association.

F. E. W.

4750 Code of Fair Competition for the Lead Industry

Order Granting Temporary Exemption from the Trade and Marketing Provisions for the Lead Pigments Division of the Lead Industry.

An application having been duly made by the Members of Industry of the Lead Pigments Division of the Lead Industry for a temporary exemption from the provisions of Section 2 of Article VII, Schedule A, which is a part thereof, of the above described Code of Fair Competition, and the Deputy Administrator having recommended that such application be granted to the extent hereinafter set, and it appearing that the granting of such exemption is necessary to effectuate the policies of Title I of the National Industrial Recovery Act:

Now, Therefore, pursuant to the authority vested in me by Executive Orders of the President and Orders of the Administrator for Industrial Recovery, it is hereby ordered that the Members of Industry of the Lead Pigments Division of the Lead Industry be and hereby are granted an exemption from the provisions of Section 2 of Article VII and Schedule A of said Code of Fair Competition for a period of three months from the date hereof, provided, that such exemption be granted without prejudice to further extension beyond three months if at the end it shall appear to the Administrator that the Industry has been unable to determine upon either the execution of Section 2 of Article VII and Schedule A which is a part thereof or upon the modification thereof.

C. E. Adams,
Division Administrator.

Approval recommended:
W. A. Janssen,
Deputy Administrator.

June 27, 1934.

4751 **RESPONDENT'S EXHIBIT NO. 9.**

Fifth Meeting

Code Authority Meeting

New York, N. Y. September 25, 1934.

A meeting of the Code Authority for the Lead Industry was held on Tuesday, September 25, 1934, at 10:00 A. M., in the Board Room of the National Lead Company, 111 Broadway, New York, N. Y.

Present

Members	Alternates.
Clinton H. Crane, Chairman	H. M. Brush
F. M. Carter	F. F. Colcord
W. Y. C. Hunt	I. H. Cornell
R. M. Roosevelt	Clarence Glass
P. E. Sprague	R. G. McKay
	F. S. Mulock

G. W. Farny, Administration Member
F. E. Wormser, Secretary, Treasurer.
By Invitation
W. Hochschild
F. Laist
S. H. Levison

The minutes of the fourth Code Authority meeting of August 20 were approved.

Equitable Wage Adjustment Reports

The Secretary reported the receipt of numerous statements from members setting forth equitable adjustments made by them under the provisions of Article IV, Section 5, but reported that many statements were still outstanding. As some uncertainty existed with reference to the responsibilities and duties of the Code Authority in procuring compliance with Section 5 of Article IV, and as the Code Authority had not had an opportunity to scrutinize the individual reports submitted, without objection the Secretary was instructed to prepare a digest of the reports that had been received, mailing copies of the reports to the Code Authority members and sending letters to those members who had not yet responded, urging them to furnish

their reports at once. The Secretary was also directed to ascertain from counsel the duties of the Code Authority under Article IV, Section 5.

4752 Safety and Health Program

The Secretary reported progress among the various Divisions in comparing Safety and Health Standards, as required by Article V, Section 4.

Eight-Hour Day Report

The report on the Operation of the Eight-Hour Day for the Mining Division, as submitted to the Administrator under date of September 1, and the Supplementary report of September 18, were approved and are attached hereto as Exhibit "A".

Plan for Safe-Guarding Code Authority Funds

The Plan for the Safe-Guarding of Code Authority Funds, as submitted to the Administrator under date of September 18 was approved and appears in these minutes as Exhibit "B", together with correspondence on the budget with Deputy Administrator Janssen, letters being dated as follows:

Exhibit B-1 W. A. Janssen's letter—July 27, 1934
Exhibit B-2 F. E. Wormser's letter—Aug. 2, 1934, with enclosure
Exhibit B-3 W. A. Janssen's letter—Aug. 10, 1934.

Petition for Exemption—Lead Pigment Division

As the Lead Pigments Division was desirous of procuring an extension of exemption from the provisions of Section 2, Article VII and Schedule A, the Secretary reported the submission to the Administrator, under date of September 18, of a formal request for such extension. The letter mailed the National Recovery Administration under date of September 18, on behalf of the Pigments Division, was formally approved by the Code Authority and appears as follows:

"Under date of June 27, 1934, an order granting temporary exemption from the trade and marketing provisions for the Lead Pigments Division of the Lead Industry, particularly in reference to the provisions of Section 2 of Article VII and Schedule A was granted by the Adminis-

trator for a period of three months from that date, pro-
vided 'that such exemption be granted without prejudice
to further extension beyond three months if at the end it
shall appear to the Administrator that the Industry
4753 has been unable to determine upon either the execu-
tion of Section 2 of Article VII and Schedule A, which
is a part thereof or upon modification thereof.'

"Inasmuch as the Lead Pigments Division has not yet been unable to determine upon the modification of Article VII, Section 2 it desires, a further extension for a period of at least three months granting temporary exemption from the provisions of Section 2, Article VII and Schedule A is respectfully requested."

Industrial Relations Board Plan Overtime Reports

The letter from Deputy Administrator Janssen, dated August 31, granting an extension of time for the submission of an Industrial Relations Board Plan and outlining the policy of the National Recovery Administration, with regard to Overtime Reports, was inserted in the record as follows:

"Receipt is acknowledged of a copy of the Minutes of the Fourth Meeting of your Code Authority, held August 20, 1934, and of your letter dated August 23, regarding reports on overtime. There are no objections to referring these reports to the Administration Member for his review. This, however, is not necessary and has not been required in view of the policy to divorce administration members from as much detail work as possible.

"I note on page 2 of the Minutes that the Code Authority requests an extension of time to November 4, 1934, for the submission of a plan for Regional Industrial Relations Boards. In view of the fact that a detailed procedure for handling labor complaints and labor disputes has not yet been developed, it will be satisfactory to delay the submission of this plan until such time as our policies in this regard are more definite."

Definition of "Week"

The Secretary reported the receipt of and read a letter from Deputy Administrator Janssen on the meaning of "week" and inasmuch as this was a matter which some Code Authority members desired to give further study, consideration was postponed to a subsequent meeting.

4754 **Trade Practice Complaints Committee Plan**

A Trade Practice Complaints Committee Plan, as prepared by the Code Authority Members especially interested, was presented by the Chairman for consideration. Formal action upon the Plans was deferred to a later meeting.

Certificates of Compliance

Two forms of Certificates of Compliance, which had been circulated among Code Authority Members, were presented for consideration and are attached herewith as Exhibit "C". The Chairman reported that the Code Authority had been advised by two members of the committee of three as counsel to study the subject, that only the longer form of Certificate complied with the President's Order but that this did not, however, prejudice members against the use of any form of certificate which they felt served their requirements.

Status of Antimonial Lead

The Chairman of the Metallic Lead Products Division, having requested an official interpretation of the status of antimonial lead, as follows, Code Authority members present were invited to express their views:

"Article II, Section 6, Paragraph (c) of the Code defines lead smelting and refining, Paragraph (d) defines antimonial pig lead, and Paragraph (f) defines metallic lead products.

"We have all along been proceeding on the assumption that manufacturers of antimonial pig lead were properly included in the Metallic Lead Products Division, and, as you know, we have set up within that Division a Section devoted to antimonial lead, the leading members of which are the manufacturers of antimonial pig lead rather than manufacturers of extruded, rolled, or otherwise fabricated lead products.

"The more I study the terminology of the Code above referred to, the more it appears to me that antimonial pig lead properly is included in and belongs under the Lead Smelting and Refining Division and not under the Metallic Lead Products Division.

"Would you please ask the Code Authority to interpret the following point, therefore:

"Are manufacturers of antimonial pig lead included in the Metallic Lead Products Division of the Code?"

Signed: P. E. Sprague.

4755 The Secretary read a letter from Deputy Administrator Janssen, dated September 13, on the subject, as follows:

"This comes as an acknowledgment to your Memorandum No. 38, under date of September 8, asking for an interpretation of the status of antimonial pig lead.

"Antimonial pig lead is a product of the Lead Smelting and Refining Division and logically comes under that Division and not under the Metallic Lead Products Division.

"The Metallic Lead Products Division was meant to cover finished or semi-finished products of Industry rather than such 'raw materials' as pig lead or 'antimonial lead'".

It was pointed out, however, that the answer to the problem was not simple because there were really two kinds of antimonial lead involved, one a crude antimonial lead produced by the primary smelters of antimony bearing materials and the other a finished antimonial product produced to exact specification for the storage battery manufacturers.

The Chairman requested Mr. Sprague, representing the Metallic Lead Products Division, and Mr. H. M. Brush, representing the Smelting and Refining Division, to act as a Committee to draft a definition of Antimonial Lead for submission to the Code Authority at its next meeting.

Executive Order No. 6767.

With reference to the letter from Mr. Leon Henderson, Director of Division of Research and Planning of the National Recovery Administration, dated September 17, inquiring as to the effects of Executive Order No. 6767, which is attached as Exhibit "D", the Secretary was instructed to advise Mr. Henderson that as the Lead Code had no pricing provisions in it that were in effect today, that no information could be supplied in answer to his inquiry.

Speakers' Bureau.

The Chairman read a communication from the Speakers' Bureau, as follows, requesting assistance in furnishing speakers on behalf of the National Recovery Administration:

4756 "I have been asked by Mr. Charles F. Horner, Public Relations Director of the NRA, to organize a Speakers' Bureau in the City of New York, to be composed of representatives from all local Code Authorities.

"This Speakers' Bureau will function as the Educational

Advisory Group of the NRA in the State of New York and it will be the duty of these speakers to accept assignments to speak before business groups, civic groups and philanthropic groups. We are naturally anxious to have men and women who understand the purposes of the NRA and who, at the same time, are equipped to talk about their particular industry.

"Will you therefore, give this your very serious consideration, and advise me at the earliest possible moment the name of the person whom you wish to designate on this Speakers' Bureau."

Signed: Lawrence Craner,
Publicity Director.

Major Farny volunteered his services to assist the Speakers' Bureau.

The meeting adjourned to reconvene on Tuesday, October 23, 1934.

Secretary.

4759 RESPONDENT'S EXHIBIT NO. 11.

Seventh Meeting.

Code Authority Meeting.

New York, N. Y. November 16, 1934.

A meeting of the Code Authority for the Lead Industry was held on Friday, November 16, 1934, at 10:00 A. M., in the Board Room of the National Lead Company, 111 Broadway, New York, N. Y.

Present.

Members	Alternates
Clinton H. Crane, Chairman	W. C. Beschorman
F. M. Carter	H. M. Brush
W. Y. C. Hunt	F. F. Colcord
R. M. Roosevelt	Clarence Glass
P. E. Sprague	R. G. McKay

G. W. Farny, Administration Member
F. E. Wormser, Secretary-Treasurer.
By Invitation
S. H. Levison

The minutes of the sixth meeting of the Code Authority of October 26th were approved.

Vacancy—Chairman, Smelting & Refining Division.

There being a vacancy on the Code Authority due to the death of Mr. John A. McCarthy, Chairman of the Smelting and Refining Division, the Secretary was authorized to hold an election, by letter ballot or by formal meeting of the Members of the Smelting and Refining Division, to choose a successor to serve as Chairman of the Smelting and Refining Division and, ipso facto, a member of the Code Authority, and further to elect an alternate or alternates for the Chairman of the Smelting and Refining Division.

Equitable Wage Adjustment Reports.

The Secretary presented Supplementary Report No. 2 on Equitable Wage Adjustments, furnished by Members of Industry, and without objection, the report was inserted in the record as per Exhibit "A" attached.

4760 Application for Exemption From Lead Code Provisions.

Westinghouse Electric and Manufacturing Company.

The application of the Westinghouse Electric and Manufacturing Company, for exemption from the provisions of the Lead Code, was read, as per Exhibit "B" attached and after discussion

It was moved, seconded and carried that the application of the Westinghouse Electric and Manufacturing Company, for exemption from the provisions of the Lead Code, be transmitted to the Administrator with the endorsement of the Code Authority, provided that the Westinghouse Company maintains its manufacturing operations at its present size, with respect to the production of products defined by the Lead Code.

Posting of Labor Provisions.

The posting of labor provisions of the Lead Code was tabled for consideration at a later meeting.

Interpretation of Article III, Section 1 on Change of Shifts.

The Chairman presented a request for an interpretation of Article III, Section 1 on Change of Shifts, by the Eagle-Picher Lead Company, which appears as Exhibit "C" attached. In this connection, the Secretary read some correspondence on the subject he had had with

Deputy Administrator Janssen, which is made a part of said Exhibit.

In view of the necessity of giving careful consideration to all phases of the problem, and to make sure that the Administration would not misconstrue the reasons for an interpretation as to changes of shifts, the Code Authority unanimously decided to prepare a letter setting forth its attitude, to be approved and transmitted to the Administrator at a subsequent meeting.

Trade Practice Complaints Committee.

The Chairman requested information as to whether any trade practice complaints had been received by the Chairmen of the manufacturing divisions of the Lead Code, and there having been none, the Trade Practice Complaints Committee Plan was deferred for a subsequent meeting. At this point Major Farny stated that he believed action should be taken to perfect a plan for handling trade practice complaints.

4761 Report of the Secretary-Treasurer.

The Secretary-Treasurer requested the advice of the Code Authority in sending out requests for subscriptions to the support of the Code Authority, together with the forms essential to procure the labor data on which the Code Authority subscriptions would be based. As a result of these suggestions, it was decided to eliminate clerical help data from the employment information required for subscription purposes. The Treasurer's letter and the resulting labor forms appear as Exhibit "D" attached.

Standards of Safety and Health.

The Chairman noted that as a result of a conference between representatives of the Copper Code Authority and the Lead Code Authority, a tenative draft of proposed Safety and Health Standards had been prepared for the consideration of both Code Authorities. After considerable discussion, the draft was amended to read as in Exhibit "E" attached, but some members feeling the need of giving the subject further study.

It was moved, seconded and carried that the Secretary circulate the latest revised draft of Standards of Safety and Health among Members of the Code Authority, requesting their suggestions within ten days and immediately thereafter circulating a new draft, with the suggestions submitted, in the meantime notifying the Administrator that the complete draft of the Safety and Health Standards is nearly ready for submission and requesting an extension of time beyond November 24, the date upon which the report on Safety and Health Standards becomes due.

Consideration of Action of Paint Recovery Board to Procure Transfer of Lead-In-Oil to Paint Code.

The Code Authority next considered the action which had been taken by the Paint Recovery Board, to secure a transfer of white lead-in-oil from the jurisdiction of the Lead Code to the Paint Code. Knowledge of this action had been obtained from Mr. Carter, who had been advised by Mr. Trigg that the Paint Recovery Board was making a move, through the National Recovery Administration, to procure jurisdiction over white lead-in-oil. Copy of Mr. Trigg's letter appears later in the minutes. The Code Authority, being unanimously of the opinion that the action of the Paint Recovery Board should be opposed, passed the following resolution:

4762 Whereas the Code Authority for the Lead Industry has been informed that the Paint Recovery Board has requested an interpretation from the National Recovery Administration as follows:

"All manufacturers of lead-in-oil are governed by the provisions of the Code of Fair Competition for the Paint, Varnish and Lacquer Manufacturing Industry".

Be It Hereby Resolved that the Code Authority for the Lead Industry is strongly opposed to said interpretation and that the Secretary be instructed to write a letter of protest to the National Recovery Administration and to prepare a brief in support of the position of the Code Authority for the Lead Industry, to be used as necessary.

The Code Authority thereupon composed the following letter which the Secretary was authorized to transmit to the National Recovery Administration:

November 19, 1934.

"The Paint Industry Recovery Board, which is the Code Authority for the Paint Industry, has requested your interpretation to the effect that 'All manufacturers of lead-in-oil are governed by the provisions of the Code of Fair Competition for the Paint, Varnish and Lacquer Manufacturing Industry.'

"We wish, at this time, to enter an emphatic protest against the Paint Industry Recovery Board's interpretation as the Code of Fair Competition for the Lead Industry already specially provides, under the provisions of Article II, Section 6 (e), a place for white lead-in-oil.

"The Paint Code contains an elaborate 'Selling Below Cost' provision. The Lead Code contains no cost or price-fixing provisions and the present attempt of the Paint Industry to have white lead-in-oil transferred to its own Code, if successful, would bring white lead-in-oil under the strict costing provisions of the Paint Code and thereby force upward the price of white lead-in-oil.

4763 "The white lead-in-oil labor provisions are more stringent, therefore, more favorable to labor than the corresponding provisions in the Paint Code. The wages being the same, obviously this is not an issue.

"The original decision of the N.R.A. was equitable to labor, consumer and the white lead industries and, therefore, in the light of the above, we are sure that you will reaffirm the fact that white lead-in-oil belongs in the Code of Fair Competition for the Lead Industry, where it was originally placed by the Administrator, and refuse to entertain the interpretation of the Paint Recovery Board."

Major Farny stated that he had written a letter to Deputy Administrator Janssen, dated October 31, 1934, on the subject, as follows:

"Mr. F. E. Wormser submitted to me a great deal of information in regard to the Paint Industry Recovery Board's desire to have lead-in-oil subjected to its Code of Fair Competition.

"A letter of Mr. E. T. Trigg, President of the Paint Industry Recovery Board, to Mr. F. N. Carter, President of the National Lead Company, a copy of which has been sent to you, states that the Board has submitted to the National Recovery Administration an interpretation to the effect that 'All manufacturers of lead-in-oil are governed by the provisions of the Code of Fair Competition for the Paint, Varnish and Lacquer Manufacturing Industry.'

"In the light of the information submitted to me, I see no reason whatever why such interpretation be considered and I strongly endorse the point of view taken by the National Recovery Administration that lead-in-oil belongs under the Code of Fair Competition for the Lead Industry."

The Secretary stated he had notified Mr. Janssen of the Paint Recovery Board's action with respect to white lead-in-oil as follows:

4764 October 29, 1934.

"I am enclosing copy of a letter written by Mr. Ernest T. Trigg, President of the Paint Industry Recovery Board, dated October 27, to Mr. F. M. Carter, President of the National Lead Company, one of our members, in which he states that he is submitting to the National Recovery Administration an interpretation (presumably of the Paint Code) to the effect that 'All manufacturers of lead-in-oil are governed by the provision of the Code of Fair Competition for the Paint, Varnish and Lacquer Manufacturing Industry.'

"This is the communication about which I spoke to you on the phone this afternoon."

* * * * *

October 27, 1934.

Mr. F. M. Carter, President
National Lead Company
New York, N. Y.

Dear Mr. Carter:

In view of our numerous conversations, we are today submitting to the National Recovery Administration an Interpretation to the effect that "all manufacturers of lead-in-oil are governed by the provisions of the Code of Fair Competition for the Paint, Varnish and Lacquer Manufacturing Industry."

Before submitting this, I discussed it with our Deputy Administrator who has advised this course, looking to a definite, and I hope, final clarification of this situation.

Yours very truly,

Signed: E. T. Trigg, President.

* * * * *

Study of Code Administration.

Without objection, a letter from Deputy Administrator Janssen, dated November 7, with reference to a study of Code Administration, was inserted in the record and is attached as Exhibit "F", and the Chairman's reply follows:

4765 November 7, 1934.

"I have your letter of November 7 in regard to a survey of local code administration as conducted by Local Code Authority Agencies, and this will advise that we will cooperate with the various people any way we can."

Planning and Adjustment Activities.

Without objection a letter from Deputy Administrator Janssen, dated November 12, with reference to planning and adjustment activities was included in the record and is attached as Exhibit "G". The Code Authority was of the opinion that a complete report on all activities was being currently furnished the Administrator in the minutes of the Code Authority meetings.

The meeting adjourned at 12:00 A. M. to reconvene on Monday, December 10, 1934.

Secretary.

4766 RESPONDENT'S EXHIBIT NO. 12.

Approved Code No. 71 Registry No. 619—1—03

National Recovery Administration

Code of Fair Competition for the Paint, Varnish and Lacquer Manufacturing Industry as Approved on October 31, 1933 by President Roosevelt.

(NRA Cut)

1. Executive Order
2. Letter of Transmittal
3. Code

United States Government Printing Office
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Approved Code No. 71

Code of Fair Competition for the Paint, Varnish, and Lacquer Manufacturing Industry as Approved on October 31, 1933 by President Roosevelt.

Executive Order

An application having been made, pursuant to and in full compliance with the provisions of Title I of the National Industrial Recovery Act, approved June 16, 1933, for my approval of a Code of Fair Competition for the Paint, Varnish, and Lacquer Manufacturing Industry, and hearings having been held thereon and the Administrator having rendered his report containing an analysis of the said code of fair competition together with his recommendations and findings with respect thereto, and the Administrator having found that the said code of fair competition complies in all respects with the pertinent provisions of Title I of said Act and that the requirements of clauses (1) and (2) of subsection (a) of Section 3 of the said Act have been met:

Now, Therefore, I, Franklin D. Roosevelt, President of the United States, pursuant to the authority vested in me by Title I of the National Industrial Recovery Act, approved June 16, 1933, and otherwise, do adopt and approve the report, recommendations, and findings of the Administrator and do order that the said code of fair competition be and it is hereby approved.

Franklin D. Roosevelt.

Approval Recommended:
Hugh S. Johnson,
Administrator.
The White House,
October 31, 1933.

29937—296-171—34 (169)

4769 October 27, 1933.

The President,
The White House.

Sir: This is a report of the hearing on the Code of Fair Competition for the Paint, Varnish, and Lacquer Manufacturing Industry conducted in Washington on the 26th of September, 1933, in accordance with the provisions of the National Industrial Recovery Act.

Economic Effect of the Code

Paint is a manufactured product used in part for new production of industrial and consumers goods, and in part as a maintenance material. The quantity required for the former purpose bears a positive relation to general manufacturing activity. For the latter purpose, where the need may be deferred, the current financial condition of the owner of the property has considerable bearing upon the quantity of paint used. For this latter purpose also the cost of the paint is a factor of considerable importance.

The quality of paint in general may be judged by the effectiveness of the covering produced, either as protection or appearance, or both, and the life of that covering. These qualities are not only a function of the ingredients of the paint, but also are a function of the method of preparation of the ingredients and their mixing. It is possible, therefore, to produce paint of varying degrees of quality through a wide scale of costs, and the public is not necessarily in a position to judge quality other than by price. As a consequence of this condition, many practices involving the sale of cheap paint have grown up in the Industry, which, coupled with the financial situation of the last few years, has tended to cause demoralization.

The Code, as submitted herewith, contains in Part Two an unusual number of trade practices which are considered detrimental to the Industry and consequently are prohibited. In the form in which they now stand they meet the approval of the Consumers' Advisory Board.

The provisions contained in this Code as to minimum wages and maximum hours are generally in line with approved codes employing labor of the same quality and under similar conditions.

The reduction in the number of hours from 47.5 of June, 1933, to a maximum of 41.2 average for a six months' period provided by the Code will mean an increase in employment of approximately 25 percent. It is estimated that at the low point of employment there were approximately 18,000 workers in early 1933, and that the provisions of this Code, even under present conditions, should increase the number employed to nearly 25,000.

The wages set up in the Code will increase the pay of only about 20 percent of the workers in the Northern 4770 area and 30 percent of the workers in the Southern area, but the resulting increase in purchasing power, when coupled with the increase in number of workers in the Industry, will be material.

Findings

The Administrator finds that—

(a) The Code as recommended complies in all respects with the pertinent provisions of Title I of the Act, including, without limitation, subsection (a) of Section 7 and subsection (b) of Section 10 thereof; and that

(b) The applicant group imposes no inequitable restrictions on admission to membership therein and is truly representative of the Paint, Varnish, and Lacquer Manufacturing Industry; and that

(c) The Code as recommended is not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them and will tend to effectuate the policy of Title I of the National Industrial Recovery Act.

It is recommended, therefore, that this Code be immediately adopted.

Respectfully,
Hugh S. Johnson,
Administrator.

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Code of Fair Competition for the Paint, Varnish, and Lacquer Manufacturing Industry

Article I—Purpose.

For the purpose of effectuating the policy of Title I of the Act of June 16, 1933, known as the National Industrial Recovery Act, the following provisions are established as a Code of Fair Competition for the Paint, Varnish, and Lacquer Manufacturing Industry.

Article II—Definitions.

The term "The Industry" means all persons in the continental United States engaged in the manufacture of paint, kalsomine and water paint, varnish, including shellac varnish lacquer, and kindred products, including putty, semifinished base materials for lacquers, thinners, and diluents (when such semifinished base materials are sold or offered for sale in competition with the finished products of this Industry), liquid and plastic roof coatings and roof cements, and artists' colors; and/or such branches or subdivisions thereof as may from time to time be included under the provisions of this Code, provided that if any member of the Industry also manufactures products of any other industry, the provisions of this Code shall apply only to that part of his business which is included in this Code. The term "Export Trade" means any business transacted with any purchaser for shipment of products of the Industry outside of the continental United States.

The term "employee" as used herein includes any person engaged in any phase of the Industry in any capacity in the nature of employee irrespective of the method of payment of his compensation. The term "employer" as used herein includes anyone for whose benefit such an employee is so engaged. The term "member of The In-

dustry" includes any manufacturer who shall be subject to this Code. The term "member of the Code" includes any member of The Industry who shall expressly signify assent to this Code. The term "Association" herein means the American Paint and Varnish Manufacturers' Association, Inc., and the National Paint Oil and Varnish Association, Inc., or their successor or successors. The term "Association Headquarters" means the office maintained jointly by the Associations at 2201 New York Avenue, NW., Washington, D. C. The term "Trade Sales" as used herein means all sales to jobbers, dealers, painters, automotive refinishing shops, and sales made directly to the consumer, with the exception of such sales as are hereinafter defined as "Industrial Sales." The term "Industrial Sales" as used herein means all sales to the following classes of buyers, covering products of The Industry used by such buyers on their products or for the finishing of
their equipment and for the painting, upkeep, and
4772 maintenance of their plants, equipment, tenements,
and for any other purpose.

Industrial plants of all kinds (such as automobile manufacturers, implement manufacturers, furniture manufacturers, etc., etc.).

Transportation companies (including street railways, bus, and air transportation companies).

Car and locomotive builders.

Public service companies.

Oil refineries and pipe-line companies.

Packing houses.

Steel manufacturers and those who fabricate their own products.

Bridge builders and bridges.

Coal or other mining operations.

Steamship lines, shipyards, wharves, and docks.

All departments of any State, County, Municipal, or other political subdivisions, but only for the following products: traffic paint; road paint; products used on bridges, trucks, and machinery; automobile license tag coatings; or materials for finishing furniture, or any other products manufactured in prisons or reformatories. All other business from State, County, Municipal, and other political subdivisions, such as products used on buildings, institutions, etc., to be classified as "Trade Sales."

All Departments of the United States Government, regardless of usage.

Article III—Industry Law and Effective Date.

On and after the fifteenth calendar day after the President of the United States shall have approved this Code, the provisions hereof shall constitute standards of fair competition for The Industry and shall be automatically binding upon all members of The Industry, except that all articles of this Code which are included in Part 2 hereof shall not apply to export trade.

Article IV—Collective Bargaining.

In accordance with Section 7 (a) of the Act of June 16, 1933, known as the National Industrial Recovery Act, it is agreed: (1) that employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from interference, restraint, or coercion of employers of labor or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment approved or prescribed by the President.

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Article V—Minimum Wages and Maximum Hours.

(a) No employee engaged in accounting, clerical, office, or delivery service in any office or in any other place or manner, excepting employees in retail stores and excepting outside salesmen, shall work or be permitted to work in excess of 40 hours per week for 20 weeks and 48 hours per week for 6 weeks in any 26-week period.

(b) No factory or mechanical worker or artisan shall work or be permitted to work more than 40 hours in one week nor more than 8 hours in any one day; provided, however, that during any 6 weeks of a 26-week period (the first period to begin on the effective date of this Code) employees may work not more than 45 hours a week nor more than 9 hours in any one day, with the exception of (1) supervisory staff (including foremen), (2) maintenance workers, engineers, and firemen, which excepted employees may not work in excess of the maximum hours stated above except by payment of one and one-third rate for overtime if such employees are compensated on an hourly basis. Each week during any 26-week period shall be considered as a complete unit of employment for the purpose of paying for overtime to excepted employees. If an excepted employee on an hourly basis works more than 40 hours and not more than 45 hours in any one week, the employer shall compensate him at the end of said week for the hours worked in excess of 40 hours at the extra rate or shall declare to the employee that such week will be considered as one of the 6 weeks in which a maximum of 45 hours is permitted. This does not, however, mean that an excepted employee, when necessary, may not work more than 45 hours at the extra compensation. If such excepted employees are paid by the week, month, or on a yearly basis and enjoy vacation periods, sick leaves, and other benefits granted to salaried workers they shall not be paid an additional amount for any reasonable overtime work.

(c) The maximum hours fixed in the foregoing Paragraphs (a) and (b) shall not apply to watchmen, janitors, or other caretakers; nor to employees in a managerial, executive, or other capacity who receive $35.00 per week or more; provided that with respect to the exceptions in this Paragraph and in Paragraphs (a) and (b) of this Article there shall be no evasion of this Code by reclassification of the function of workers. A worker shall not be included in any one of the above exceptions unless the identical functions which he performs were identically classified on June 16, 1933.

(d) The provisions for maximum hours set forth in Paragraphs (a) and (b) of this Article establish a maximum number of hours of labor per 26-week period for each employee so that under no circumstances shall any employee knowingly be employed or permitted to work for one or more employers in The Industry in the aggregate in excess of the prescribed number of hours.

(e) Employers in The Industry, subject to the exception provided in Paragraph (h) of this Article, shall not pay any of the classes of employees covered by Paragraph (a) less than $15.00 per week in any city of over 500,000 population, or in the immediate trade area of such city; nor less than $14.50 per week in any city between 250,000

and 500,000 population, or in the immediate trade area of such city; nor less than $14.00 per week in any city or town of less than 250,000 population, or in the im-
4774 mediate trade area of such city or town; provided that employers in The Industry may pay to any class of employees covered by Paragraph (a) who perform the work of office boys and office girls not less than 80 per cent of the minimum wage designated by this Paragraph, provided that the number so excepted shall not exceed 5 per cent of the total employees of the employer and provided, further, that each employer may have at least one such employee. Population for the purposes of this Code shall be determined by reference to the 1930 Federal Census.

(f) Employers in The Industry, subject to the exception provided in Paragraph (h) of this Article, shall not pay any employee of the classes covered by Paragraph (b), or employees excepted therein, namely, supervisory staff (including foremen), maintenance workers, engineers, and firemen, less than 40 cents per hour to male employees, or less than 35 cents per hour to female employees. The foregoing distinction in minimum rates between male and female employees is not a discrimination by reason of sex but because of a difference in the work done. Where female employees do the same kind and amount of work as male employees they shall receive the same wages. It is agreed that this Paragraph establishes a guaranteed minimum rate of pay regardless of whether the employee is compensated on the basis of a time rate or on piecework performance.

(g) The provisions of Paragraphs (e) and (f) of this Article shall not apply to any employee partially incapacitated through are or otherwise, who has served not less than 10 years in the continuous employment of the employer, provided that the number so excepted shall not exceed 5 per cent of the total employees of the employer, and provided that each employer may have at least one such employee, and provided further that the minimum wage paid to such employee shall not be less than 30 cents per hour.

(h) Employers in The Industry shall not pay less than 90 per cent of the minimum wages provided in Paragraphs (e) and (f) of this Article, to employees in the Southern states. For the purpose of this Article, the Southern states are defined as—

Alabama
Arkansas
Florida
Georgia
Kentucky
Louisiana
Mississippi
North Carolina
Oklahoma
South Carolina
Tennessee
Texas
Virginia

(i) No person under the age of 16 shall be employed in The Industry.

Article VI—Presidential Authority.

As required by Section 10 (b) of Title I of the National Industrial Recovery Act, the following provision is contained in this Code: The President may from time to time cancel or modify any order, approval, license, rule, or regulation issued under Title I thereof.

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Article VII—Monopolies.

No provision in this Code shall be interpreted or applied in such a manner as to: (1) Promote monopolies; (2) Permit or encourage unfair competition; (3) Eliminate, oppress, or discriminate against small enterprises.

Article VIII—State Laws.

Within each state, members of The Industry shall comply with any laws of such state imposing more stringent requirements, regulating the age of employees, wages, hours of work, or general working conditions, than under this Code.

Article IX—Reports.

The Paint Industry Recovery Board, through Association Headquarters, shall collect and provide all reports required by the Administrator under the National Industrial Recovery Act. Every member of The Industry shall furnish such reports as are required pursuant to such requirements.

In addition to information required to be submitted through the Paint Industry Recovery Board, there shall be furnished to government agencies such statistical information as the Administrator may deem necessary for the purpose recited in Section 3(a) of the National Industrial Recovery Act.

Article X—Administration.

After this Code shall have been approved by the President of the United States, it shall be administered through the Association by a board to be immediately created and to be known as the "Paint Industry Recovery Board."

This Board shall be composed of the following members: Not more than 3 members without voting power to be appointed by the President, the 8 members of the present General Code Committee, 20 members, representing commodity groups, 20 members representing communities.

The members of the Board representing commodity groups shall be elected as follows: 5 members to be elected by paint manufacturers, 5 members to be elected by varnish manufacturers, 5 members to be elected by lacquer manufacturers, 5 members to be elected by kalsomine and water-paint manufacturers.

Provided that each of these groups shall contain 2 members from the Eastern States, 1 member from the States in or west of the Rocky Mountains and 2 members from the remaining States. Nominations for election to the Board for said Commodity groups shall be made by members of The Industry at large, regardless of membership in any association, and the nominations so made shall be submitted to a mail vote of all members of The Industry throughout the United States and those receiving the highest number of votes in each Group shall be declared to have been elected to represent the Commodity groups. The members of the Board representing communities shall be elected in the following manner: 1 each to be elected by the members of The Industry doing business in the logical trading areas of the following cities, which manufacturers shall be called together for the purpose of
4776 election by the President of the Local Paint Club,
or local paint manufacturers' association if any such exists:

Atlanta-New Orleans
Baltimore
Boston
Buffalo
Chicago
Cincinnati
Cleveland
Dallas-Houston
Denver
Detroit
Kansas City
Los Angeles
Louisville
Minneapolis-St. Paul
New York
Philadelphia
Pittsburgh
St. Louis
San Francisco
Seattle-Tacoma-Portland

No person shall be eligible for membership on this Board who is not directly engaged in the manufacture of products of The Industry, except the members to be appointed by the President of the United States. Furthermore, no company or group of affiliated companies shall have more than one representative on this Board. Vacancies which may occur in the Board for any reason whatsoever shall be filled by election in the same manner as hereinbefore provided. This Board, subject to the approval of the Administrator, shall elect its own Chairman, adopt its own rules of procedure (not in conflict with any other provisions herein contained), appoint such committees as may to it seem necessary from time to time, and may delegate its authority to such committees. A majority of the Board shall have the power to recommend to the Administrator for his approval the addition of representatives of other groups or communities to its membership; provided that such additional members shall be elected in the same manner as above described.

The staff, Association Headquarters, and other facilities of the Association shall be employed in carrying out the work of the Paint Industry Recovery Board. Such funds as may be required for the work of this Board shall be subject to appropriation by the Budget and Finance Committee of the Association. All members of the Industry or groups thereof who qualify as such under this Code are eligible to membership in the American Paint & Varnish Manufacturers' Association, Inc., or its successor, without payment of initiation fee, which has been temporarily waived. If group membership, such groups shall pay into the Treasury of the American Paint and Varnish Manufacturers' Association, Inc., a total amount equal to the dues of each member of such group as if each member were a direct member of the American Paint and Varnish Manufacturers' Association, Inc. If for any reason an eligible manufacturer does not desire to join this Association he may, nevertheless, receive all of its benefits, including participation in this Code, by paying a fee to its Treasurer equal to the dues, provided that should any member of this Code desire not to become a member of the Association and desire not to pay to its Treasurer a sum equal to the dues, he shall nevertheless pay his proportionate share of the amounts required to pay the cost of assembly, analysis and publication of necessary reports and data and of the maintenance of this administrative

authority and its activities and the Paint Industry Recovery Board shall assess each such member of the Industry with his proportionate share based upon the
4777 value of sales or otherwise as the Paint Industry Recovery Board may prescribe subject to the approval of the Administrator.

The Paint Industry Recovery Board shall have full responsibility for its expenditures within the limits of such appropriations as are made from time to time, provided that no traveling or other expenses of Board members shall be paid out of the Association funds when attending Board meetings, but actual expenses of members of the Board when engaged in the business of the Board, other than attendance at Board meetings, may be paid out of such funds provided prior authority for such expenditure or expenditures has been given by the Board.

Article XI—Amendments.

Such of the provisions of this Code as are not required to be included therein by the National Industrial Recovery Act of June 16, 1933, may, with the approval of the President, be modified or eliminated as changes and circumstances may indicate. It is contemplated that from time to time supplementary provisions to this Code will be submitted for the approval of the President to prevent unfair competition in price and other unfair and destructive competitive practices and to effectuate the other purposes and policies of Title I of the National Industrial Recovery Act, consistent with the provisions hereof. Members of The Industry or a local paint manufacturers' association, if any such exists, shall submit desired amendments of this Code to the Paint Industry Recovery Board through Association Headquarters. By agreement of a majority of the Board, an amendment, so received or one initiated by the Board itself, shall be referred to The Industry in the following manner: those members of the Board who represent the commodity groups shall submit the proposed amendment to their respective groups, if in their opinion it is germane to the interests of such groups; those members of the Board who represent manufacturers from the several cities shall call meetings of the manufacturers in their communities. The several Board members shall then submit individual reports to Association Headquarters, which shall collate them and submit a full report to the

Board. Thereafter the Board shall vote on submitting the Amendment to the Government and shall so submit it if at least two-thirds of the Board vote to do so, provided that the proponent of any amendment shall have the right to submit such amendment direct to the National Recovery Administration for its consideration.

By presenting this Code the members of The Industry do not thereby consent to any modifications thereof and reserve the right to object individually or jointly to any such modifications.

Part 2—Trade Practices.

Article XII—Misbranding, Mislabelling, and False Advertising.

Misbranding, mislabelling, and false, deceptive, and misleading advertising are prohibited by this Code.

4778 Article XIII—Gifts to Employees of Another

It shall be a violation of this Code for any person engaged in The Industry, to offer or give—or to permit any representative of his to offer or give—any commission, gratuity, or other thing of substantial value to employees of his customers or prospective customers, except in the case of payments made with the consent of the employer for a definite service rendered.

Article XIV—Manufacturing Restrictions.

It shall be a violation of this Code for any manufacturer to fail ~~to~~ abide by the manufacturing restrictions as set out in Schedule A which is attached hereto and made a part of this Code, provided that this Article shall not apply to export trade and provided further that Paragraphs 2, 4, 5, and 6 of Schedule A shall not apply to products commonly known as 5-, 10-, and 25-cent merchandise which is sold at retail to the consumer at not more than 25 cents per package.

Article XV—Exchange of Goods.

The practice of taking in exchange for one's own goods, Industry products of another manufacturer, distributor, or dealer, is unethical, unfair, and is hereby prohibited. It shall be a violation of this Code for any manufacturer in the Industry to take or allow to be taken in exchange for his own products, any product of the Industry, or to give or permit the giving of any advice or assistance in facilitating such exchange or replacement, or to make or permit to be made any concessions, allowances, or gifts of any kind to promote or facilitate such exchange.

Every member of the Industry is required to enter into a written agreement with his jobbers and/or distributors whereby such jobbers and/or distributors agree to refrain from the practice prohibited by this Article. It shall be a violation of this Code for any member of the Industry to deal or continue to deal with any jobber and/or distributor who shall have acted contrary to such agreement, provided that no member of the Industry shall be held responsible for such dealings as he may have engaged in prior to the time he has received notice of the breach of such agreement by a jobber and/or distributor, and provided that no member of the Industry shall be held responsible for such dealings after the Paint Industry Recovery Board has given approval for further dealings with a jobber and/or distributor who may have violated such an agreement. The Paint Industry Recovery Board may require each member of the Industry to file a copy of each agreement which he may make with a jobber and/or distributor.

Article XVI—Standard Terms of Cash Discount.

On and after the effective date the terms granted by manufacturers, excluding export trade, shall not exceed: Trade sales accounts, 2 per cent for cash in 10 days, net 60 days; industrial sales accounts, 1 per cent for cash in 10 days, net 30 days; except that the discount to 4779 trade sales accounts may be extended to the 10th day of the month following purchase and the discount to industrial sales accounts may be extended to the 20th day of the month following purchase to customers who regularly discount in the month following purchase, and provided that no discount shall be allowed after the discount date.

Article XVII—Datings.

Except as specifically provided by this Article, members of The Industry shall not grant any datings on the sales of any Industry products.

(a) Spring Stock Orders.—Datings on orders to established dealer and/or jobber accounts, excluding export trade, shall be limited to datings on Spring Stock Orders shipped at the manufacturer's convenience after October 15, with an April 1 dating and regular terms; one order to an account.

(b) New Accounts.—The maximum dating on trade sales stock orders (initial stock order only) to new dealer and/or jobber accounts, excluding export trade, shall be limited to four months from the date of shipment and with standard terms, provided that orders shipped between October 15 and December 1 in any year may be with an April 1 dating and with regular terms.

(c) Roof Coatings and Cements.—A maximum dating of four months may be given on a carload of not less than 40,000 lbs. of liquid and plastic roof coatings and/or roof cements, not including other products, whenever the lowest published less-than-carload freight rate (by rail or water) is more than 50 cents per cwt.

(d) Anticipated Discount.—If any dating shall be permitted under this Article, an anticipated discount may be allowed to the extent of one-half of one per cent a month.

Article XVIII—Guarantees.

(a) Price Guarantees.—Guarantees against price decline shall be prohibited except in the case of an order on which a dating has been allowed under Article XVII, when such a price guarantee may be given for a time not to exceed the dating period granted.

(b) Time Guarantee—Definite time guarantees on the life and/or service of the products of The Industry are hereby prohibited.

Article XIX—Consignment.

The practice of supplying accounts on consignment and/or trust certificate agreements, except as hereinafter provided, is prohibited. This also includes consignments which are sometimes made under so-called "warehouse agreements" but does not prohibit manufacturers from carrying a stock of their goods in a public or private warehouse at their own expense in any section of the United States, provided that such stocks must not be warehoused with or for the account of any person, firm, or corporation dealing in or handling (as a merchant) or using (as a painter) products of the industry. Every manufacturer who has any such consignment stocks in the hands of buyers on the effective date of this Code may continue the same but he shall file a detailed list of such accounts within 60 days of the effective date of this Code with Association Headquarters and/or the office of a local paint manufacturers' association, if any such exists, where reference may be made to it at any reasonable time by interested parties. Until such time as an account as listed above is discontinued, such accounts may be similarly supplied by any manufacturer in the Industry. The Paint Industry Recovery Board shall, subject to the approval of the Administrator, develop such plans as will effectuate the ultimate elimination of consignments from the Industry. This Article shall not apply to export trade.

Article XX—Free Deals.

Except as otherwise provided herein, free deals in or connected with Industry products are prohibited. "Free deals" for the purpose of this Code means all forms of marketing devices, including the gift or loan of spraying or other valuable equipment, whether the full cost thereof or only a part of said cost is borne by the manufacturer, whereby the said manufacturer furnishes goods of any kind other than such of his own products as have been contracted for on his usual terms: Provided that the term "Free Deals" shall not apply to the furnishing of advertising accessories of small value, such as the usual circulars, color cards, window displays, display racks, and posters which accompany paint and varnish products as a description thereof, nor shall it apply to novelties of small value such as caps, yardsticks, paddles, etc.

Furthermore, the term "Free Deals" shall not be construed to include any advertising allowance which is made for a definite service rendered and for which there is a proper accounting that is auditable as a direct charge for cooperative advertising.

Illustrative of the practices which are prohibited are included the following;

(a) Premiums (gifts of unrelated merchandise) such as blankets, articles of furniture, etc.

(b) Prizes and awards. This does not refer to prizes and awards given within a manufacturer's own organization.

(c) Free Goods (extra amounts of one's own products).

(d) Merchandising practices of the type commonly known as "One-cent sales."

(e) Free Samples. (But the term "Free Deals" does not apply to samples given for test purposes; neither does it apply to trade-sale samples given for demonstration purposes, provided that no size larger than 5-lb. samples of water-paint goods in dry form or 1/32 gallons of other industry products shall be so used and that such samples are plainly labeled "Samples.")

(f) The sale of alcohol, turpentine, linseed oil, or any other products not manufactured by The Industry at prices less than the resale market price.

Article XXI—Discontinuance of Shades and Colors.

When it becomes necessary and advisable for any manufacturer to discontinue certain shades or colors in any trade-sales line, he shall give his dealer and/or jobber customers who purchase such lines six months' ad-
4781 vance notice prior to discontinuing the manufacture
of such shades or colors, providing that this Article shall not apply to export trade.

Article XXII—Selling Below Cost.

Products of The Industry shall not be sold at less than cost as herein defined:

(1) The cost of Lacquer Thinners in full tank cars or tank wagons containing not less than one thousand-gallon quantity, when sold and delivered to one purchaser, shall be not less than the sum total of the current market replacement price of each and every ingredient in the completed Thinner.

The cost of all other products shall include the following:

(2) The seller's total market replacement cost of raw materials (based on cost furnished monthly, or oftener if necessary, by authority of the Paint Industry Recovery Board through Association Headquarters, subject to approval by the Administrator); and if any raw materials are used (such as varnishes, japans, driers, etc., purchased in finished form by the seller) for which costs are not furnished monthly or oftener, as herein provided, the cost used for such item or items shall be the seller's total current delivered replacement cost.

(3) Containers and/or packages.

(4) Cost of Processing.—To include all direct costs (such as power and labor), depreciation figured in accord-

ance with provisions of the Federal Income Tax laws, plus a proper proportion of all indirect factory expenses (excepting interest on investment), in accordance with the share each product should bear, provided that the distribution of indirect factory expense per unit of production shall be on the basis of the average rate of utilization of plant facilities of profit making producers during the years 1928 to 1932 inclusive, and provided that such average rate shall not include any plants not in operation.

(5) There shall also be included in the cost a proportion of the general and administrative expenses, such proportion to be determined and to be recommended by the Paint Industry Recovery Board to the Administrator for approval.

(6) Transportation charges when goods are sold f.o.b. destination.

In the case of any complaint by an interested party that a manufacturer is violating the above cost provisions the burden of proof of compliance shall rest upon the accused manufacturer. If the Code Authority or the Administrator is not satisfied by the proof furnished by the defendant manufacturer the matter is to be referred to the Federal Trade Commission who shall audit the cost accounting of the defendant and review his allocation of burden; and the report of that Commission shall be final regarding the costs of the defendant manufacturer.

Article XXIII—Competitive Relations.

**(a) Inducing Breach of Contract.—No manufacturer
either directly or indirectly or through his salesmen,
4782 representatives, or agents shall encourage any pur-
chaser of the products of The Industry to disregard
or fail to live up to his commitment to another member of
The Industry.**

(b) Disparagement of Competitors.—The use of or participation in the publishing or the disseminating of any false statement, representation or insinuation which disparages the business of a competitor, or attacks the reputation, goods, prices, service, or advertising of any competitor or of any other industry, is an unfair and uneconomic practice and is prohibited.

(c) Enticing Employees.—Members of The Industry shall recognize the right of employees to use all honorable and reasonable efforts to better their conditions, but shall refrain from directly or indirectly soliciting or bidding

for the services of the employee of another member. Only when such an employee takes the initiative shall a member of The Industry have the right to negotiate with him about prospective employment.

Article XXIV—Returned Goods.

No member of The Industry shall accept the return of merchandise from any customer without having given prior consent to the return thereof. On such goods as are accepted for return a reasonable charge shall be made and the freight charges must be charged to the shipper returning the merchandise, except in the case of defective products or where in some other way the manufacturer may be responsible.

Approved Code No. 71.
Registry No. 619/1/03.

4783

Schedule A.

Manufacturing Restrictions.—Industry products, excepting those for export trade, shall not be manufactured for the purpose of marketing them as trade sales goods in containers of sizes and types prohibited by this rule, nor shall they be produced in tints or shades to a greater number than allowed by this rule, subject to Article XXII hereof, provided that Paragraphs 2, 4, 5, and 6 hereof shall not apply to products commonly known as 5-, 10-, and 25-cent merchandise which is sold to the consumer at not more than 25 cents per package.

1. (a) No two-pound cans in any line, except floor wax.
(b) No three-pound cans in any line.

2. (a) No sizes less than quarter-gallon in barn and roof paint.
(b) No sizes less than gallon cans in shingle stain.

3. No half-gallon cans in the following products: Aluminum paints, barn paints, roof paints, auto-top dressing, wagon and carriage paints and enamels, oil stains, spirit stains, and varnish stains.

4. No half-pint cans in first-grade house paints.

5. No half-pint cans in first-grade flat paints.

6. No quarter-pint cans in all house paint and flat paint.

7. No oblong or square varnish cans in sizes smaller than one-half gallon for any product, excepting shellac varnishes, carriage and automotive finishes (clear and colors), lacquers, lacquer thinners, liquid wax, liquid polish, varn-

ish remover, bronzing liquid, Japan and Liquid driers, penetrating stains and spirit stains.

8. No shades or tints in excess of the following maximum numbers for each brand and/or color card:

Interior floor paints and floor enamels	10
House Paints	32
Flat Wall Paints	20
Enamels	18
Porch Paints	8
Roof and Barn Paints	4
Shingle Stains	14
Wagon and Carriage Paints or Enamels	10
Oil Stains	10
Varnish Stains	8
Spirit and Penetrating Stains	14
(All the foregoing exclusive of black and white.)	
Oil Colors	32
(Including black, but counting the several shades of a single color as one color.)	

8. (a) The maximum number of grades for the following products shall be:

Architectural and Marine Varnishes (Interior and exterior.)	10
Other Varnishes (Including all not previously specified, such as Japan Driers, Asphaltum, etc.)	28

9. No oil colors in other than liquid measure or in other than three sizes, namely, gallons, quarts, and half-pints, with the exception of tubes, and excepting also glass jars when sold as a part of a sales unit with white base paint to be tinted with such colors in oil in glass jars to standard colors, which sales unit has been especially developed for this purpose by the manufacturer.

4784 Manufacturing Restrictions for Kalsomine and Water Paints.—No shades or tints in excess of the following numbers for each color card:

*Kalsomine (Hot Water)	20
*Kalsomine (Cold Water)	20

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* Means material commonly known and described by this term:

Water Paint, interior non-washable	White only
Exterior water-mixed paints washable paste and powder form	20

Interior Water-Mixed Paints washable paste and powder form	20
Fresco or Positive, Art or Deep Colors	20
Plastic Paints	8
Cement and/or Lime Water Mixed Paint	16

11. Kalsomine (Hot or Cold) in the following sizes only: Barrels weighing not less than 300 lbs. net, except for the Pacific Coast, where the 280 lb. barrel is authorized; kegs containing 100 lbs. net weight; 25 lb. net weight packages; 5 lb. net weight containers.

(Existing contracts covering Kalsomine in containers differing in weight content from standards covered herein shall be completed prior to December 31, 1933, provided that should a purchaser, now under contract with a manufacturer extending beyond that date, decline to accept a readjustment of his contract to bring the packages into line with these provisions, the manufacturer party to the contract shall refer the matter to the Paint Industry Recovery Board prior to December 31, 1933, for such amicable adjustments as the Board may be able to work out with the parties at interest.)

12. Interior Cold Water Paint, powder form, nonwashable. Barrels weighing not less than 350 lbs. net, 25 and 100 lb. containers, 5 lb. net weight containers; to be made in White only.

13. Plastic or Texture Paints (Dry), in the following sizes only: 5, 10, 25, 50, and 100 lb. net weight containers and not less than 300 lb. net weight barrels.

Paste form in same size containers as First Grade Flat Paints.

14. Patching Plaster to be sold in sizes as now marketed.

15. Interior and Exterior Water-Mixed Paints, Washable, in the following sizes only:

(a) Dry Powder Form.—5 lb., 25 lb., and 100 lb. containers; barrels of 300 lbs. net, or more.

(b) Paste Form.—1 quart, 1 and 5 gallon cans and 30 gallon drums.

16. Cement and/or lime Bound Water Mixed Paints in the following sizes only: 5 and 10 lb. containers, 50 and 100 lb. containers, barrels of 300 lbs. net, or more.

17. Fresco Colors (Positive, Deep, or Art Colors) to be packed in the following sizes only:

(a) Powder Form.—1 lb. cartons or cans, 25 and 100 lb. containers, barrels of 300 lbs. net or more.

(b) Paste Form.—To be packed in ½ pint, quart, and 1 gallon cans only.

18. Dry Sizes, Water-Mixed. To be packed in the following sizes only: 1 lb. cartons, 100 lb. containers, and 300 lb. net barrels, or more.

4785 RESPONDENT'S EXHIBIT NO. 13.

Eleventh Meeting
(Informal)

(No Official Status)

Code Authority Meeting

New York, N. Y. June 11, 1935.

A meeting of the members of the former Code Authority for the Lead Industry was held on Tuesday, June 11, 1935, at 2:00 P.M., in the Board Room of the National Lead Company, 111 Broadway, New York, N. Y.

Present

Members	Alternates
Clinton H. Crane, Chairman	W. C. Beschorman
F. H. Brownell	H. M. Brush
F. M. Carter	D. A. Callahan
W. Y. C. Hunt	F. F. Colcord
P. E. Sprague	F. S. Mulock
F. E. Wormser, Secretary	

The Chairman announced that this was an informal and unofficial meeting of the members of the former Code Authority for the Lead Industry to consider the status of the Code Authority's affairs.

Communications from Deputy Administrator Janssen, dated June 3 and June 7, as attached to these minutes, were read.

The Treasurer was requested to report on the financial status of the Code Authority, as of June 1, and submitted his report, as attached to these minutes.

It was thereupon moved, seconded and unanimously carried that the Treasurer be directed to wind up the financial affairs of the Code Authority, paying obligations owing the Lead Industries Association as advanced for operating expense, and paying the underwriters the credit balances due them respectively on the books of the Code Authority as of June 1.

It was also moved, seconded and carried that the Chairman be authorized to have an independent audit made of the books of the Code Authority, to be paid for from the funds remaining in the Treasury.

It was furthermore moved, seconded and carried that in compliance with the recommendation of Deputy
4786 Administrator Janssen of June 7, the Secretary return to each member of industry, respectively, the labor statistics furnished from time to time at the request of the Code Authority.

The meeting thereupon adjourned.

Secretary.

4787 National Recovery Administration

Washington, D. C.

June 3, 1935.
In Reply Refer to Basic
Materials Division.

Mr. F. E. Wormser,
420 Lexington Avenue,
New York, N. Y.

Dear Mr. Wormser:

We give you herein our judgment concerning certain consequences of the Schechter case in regard to code authorities. This reflects our desire to assist code authorities in their present circumstances as far as consistent with the legal limitations imposed by the Schechter case. In our judgment:

1. Code authorities no longer have any official status or official existence. Their past actions taken in good faith under an innocent misconception concerning the validity of the law, leave certain legal questions of relationship and responsibility which must be adjusted. We think you should rely upon guidance of private legal counsel in this connection.

2. No further disbursements of code authority funds should be made except in accordance with advice of counsel.

3. Steps should be taken to work out, with the advice of counsel, an orderly and equitable plan for the liquidation of funds on hand. In the ordinary case, such a plan would presumably involve either submission to and ap-

proval by a court of competent jurisdiction, or consent by parties in interest, or both.

You will receive such further advices as seem appropriate from time to time.

Very truly yours,
W. A. Janssen (Signed)
Deputy Administrator
Mining Section.

4788 National Recovery Administration
Washington, D. C.

June 7, 1935.

Mr. F. E. Wormser,
420 Lexington Avenue,
New York, N. Y.

Dear Mr. Wormser:

If the records of the Code Authority for the Lead Industry contain confidential information, that was submitted by industry members in accordance with any provision of the Code, it is important that the confidential nature of this information should be preserved.

It is, therefore, recommended that the original records, together with any copies or reports in which such information is contained in identifiable form, be promptly sent by express, collect, to the Chief Clerk of the National Recovery Administration, Department of Commerce Building, Washington, D. C. If any special conditions were placed on the information submitted by any industry member, we should be so advised in order that these conditions may be respected.

If there is good reason why the above recommendation cannot be followed, it is suggested as an alternative that all such information be returned directly to the industry members who submitted it or sent to the National Recovery Administration by express, collect, in bulk form, in order that the National Recovery Administration may return it to the various industry members.

Yours very truly,
W. A. Janssen (Signed)
Deputy Administrator.

4946 RESPONDENT'S EXHIBIT 50.

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Numerous suggestions for an appropriate reply having been received, the Secretary was finally instructed to dispatch the following answer:

October 2, 1935.

Mr. L. C. Marshall, Director
Division of Review
National Recovery Administration
Washington, D. C.

Dear Sir:

Pursuant to your letter of August 27, I have conferred with the members of the former Code Authority for the Lead Industry and submit the following information which I hope will be useful to you in your survey.

At the time the National Industrial Recovery Act was adopted, the lead industry was in a depressed condition due almost wholly to the greatly reduced consumption of lead and lead products by the consuming industries. The price of lead was low, due to the fact that lead is a basic world commodity and the price of lead in the United States follows the world lead price with a differential determined by the United States tariff on lead. The world price for lead was likewise low, due to decreased world consumption of lead and lead products. In the domestic market, price cutting, unfair trade practices, etc., were either absent or of relatively little importance.

Some lead mines in the United States felt compelled to shut down, due to the low price of lead. Certain other companies continued to operate at reduced rates of production in order to give employment to their employees, even though this continuation of operations resulted in the tying up of large amounts of money in stocks of refined lead which could not be marketed. The employees in general appreciated this action on the part of these companies and there was little or no unrest among employees, the principal complaint heard being of the fact that they could not work full time. Wages, while below the 1929 peak, were on a reasonable and fair basis. Conditions in the manufacturing divisions of the industry were quite similar to those in the mining division.

In general, the members of the lead industry were not of the opinion that a code under the National Industrial Recovery Act would materially help the lead industry but pursuant to urgent representations by National Recovery Administration officials, steps were taken to draft a code for the industry. While this code was being drafted, the President's Reemployment Agreement was promulgated and this Agreement as modified for the lead industry, was subscribed to by most of the members of the lead industry. The Lead Code as finally approved was essentially an enlargement of the President's Re-employment Agreement as modified for the lead industry with fair trade practices included for three of the manufacturing divisions of the industry, namely, the Pigment, Metallic Lead Products and Foil Divisions.

No difficulties were met in organizing for the drafting of the code, in organizing for code administration or in financing code administration. There were practically no complaints of code violation and the principal duty of the Code Authority was in connection with the interpretation of code provisions and in attempting to secure Na-

4947 Page 8.

tional Recovery Administration approval of such interpretations as were in line with long standing usages in the lead industry.

The concensus of opinion of the former Code Authority members, who obviously reflect the opinions of the members of the lead industry, is that the lead code under the National Industrial Recovery Act accomplished little or nothing of value for the lead industry. On the contrary, it increased costs of production of lead and lead products, making for decreased consumption of these materials. Such statistics as were collected by the Lead Code Authority under the National Industrial Recovery Act were of no value to the lead industry, the industry being adequately served by the Lead Industries Association, a voluntary, non-profit organization composed of producers and consumers, by government organizations such as the United States Bureau of Mines, United States Geological Survey, etc., and by the American Bureau of Metal Statistics.

The lead code was essentially a labor code but the effect of the code on labor was relatively small, wages in the industry having in general been above the N.R.A. minima for similar employments and hours in general within eight per day. While some employees in the industry were on a seven-day schedule prior to the N.I.R.A., the great majority had been on part time. Not only did the latter remain on part time after the adoption of the lead code but in addition, the possible working time of many of these part time employees was further cut by various rules and regulations of the National Recovery Administration. In the attempt to fit all industries into much the same mold as far as labor regulations were concerned, the National Recovery Administration made restrictions, rules and interpretations which violated established customs in the industry, which customs were accepted and desired by the employees and were satisfactory to the employers, thus causing a certain amount of dissatisfaction and unrest among employees without doing any good to anyone.

With the above facts in mind, the former members of the Lead Code Authority feeling that neither labor nor industry benefited through the operation of the lead code, would not be favorably inclined to the formation of a new code or the continuance of the old.

Yours very truly,
Signed: F. F. Wormser,
Secretary.

Correspondence—Committee to Report on Changes in Labor and Trade Practice Standards

The Chairman also reported the receipt of a letter from the Committee to Report on Changes in Labor and Trade Practice Standards of the N.R.A., dated September 28, 1935, as follows:

4950 Page 11.

October 1, 1935.

Mr. W. A. Janssen
Hotel Occidental
Washington, D. C.

Dear Mr. Janssen:

Answering your telephone query as to the reason for the suspension in the operation of Section 2 of Article VII of the Lead Code, you will recall the history of this particular section.

The Pigments Division had mixed feelings from the start about the advisability, or need, of incorporating an open price provision in the Code. The Section was included only, I think it fair to state, at the insistence of N.R.A., which strongly endorsed the proposal. Upon approval of the Code, however, the Pigments Division felt that the lukewarmness of some members made it desirable to postpone the establishment of this practice and to request a suspension, until full agreement had been reached.

Very truly yours,

Signed: F. E. Wormser,
Secretary.

October 1, 1935.

Mr. W. A. Janssen
Hotel Occidental
Washington, D. C.

Dear Mr. Janssen:

In response to your telephonic request, as to the value of certain lead products produced in the United States during 1933, specifically (1) pig lead, (2) lead pigments, (3) metallic lead products and (4) metallic foil products, as defined by the Lead Code, I am pleased to give you the following data:

Value of Production.

1933	Pig Lead (Primary and Secondary)*		$34,552,000
1933	Lead Pigments (White lead, Basic lead sulphate, litharge, red lead, orange mineral)**		20,820,000
1931	Metallic Lead Products:		22,620,000
	Antifriction Bearings	$ 3,783,000	
	Solder	10,166,000	
	Type Metal	3,538,000	
	Sheet Lead	2,227,000	
	Lead Pipe	2,906,000	
1931	Metallic Foil Products (Lead, tin, aluminum and composition)		12,226,000

* From American Bureau of Metal Statistics and Lead Industries Association data.

** From data of U. S. Bureau of Mines.

5125 RESPONDENT'S EXHIBIT NO. 77.

Executive Committee Meeting.

New York, N. Y. July 28, 1933.

A meeting of the Executive Committee of the Lead Industries Association was held in the Board Room of the American Smelting and Refining Company, New York City, on July 28, 1933 at 10:00 A. M.

Present	Representing
Mr. Clinton H. Crane, Chairman	St. Joseph Lead Co.
F. H. Brownell	American Smelting & Refining Co.
H. Y. Walker	American Smelting & Refining Co.
W. C. Beschorman	National Lead Co.
F. M. Carter	National Lead Co.
I. H. Cornell	St. Joseph Lead Co.
Fred Laist	United Metals Selling Co.
J. A. McCarthy	United Metals Selling Co.
F. F. Colcord	United States Smelting Refining & Mining Co. Inc.
F. Y. Robertson	
F. E. Wormser, Secretary.	

The Chairman stated that a great number of replies had been received to telegrams which were sent members as authorized at the meeting of July 24th and that compliance with the President's suggested form of agreement would work hardship on many members. After discussion it appeared to be the feeling of the Executive Committee that it was preferable for the Lead Industries Association to submit its own code to the National Recovery Administration, if it could be done.

It was thereupon moved, seconded and carried that the Executive Committee proceed with the drafting of its own code.

5126 The Chairman submitted a Tentative Draft of a Master Code as approved by the Lead Pigments Division of the Lead Industries Association which was then studied article by article until satisfactory to the Executive Committee.

As this Code mainly dealt with wages and hours of employment, it was regularly moved, seconded and carried that

Based upon the data available to the Lead Industries Association, the Code specify 40 hours as a maximum in Article VI for all divisions.

(Mr. R. M. Roosevelt was unavoidably absent in Washington and if present would have voted for a 42 hour maximum so as not to run the risk of any interference with the Zinc Code which specified 42 hours.)

It was also regularly moved, seconded and carried that 35¢ an hour be adopted as a minimum wage for each division of the Lead Industries Association under Article VII.

The Secretary was authorized to submit this Code to Washington to the Recovery Administration, after writing each member requesting authorization to append their signatures to the Code and provided sufficient support from the membership was obtained.

Applications for membership having been received from the following companies, and each one qualifying, it was regularly moved, seconded and carried that they be admitted to membership and that the Secretary advise them of this action:

National Recovery Administration.

Proposed Code of Fair Competition for the Lead Industry as submitted on August 31, 1933.

(NRA Cut)

The Code for the Lead Industry in its present form merely reflects the proposal of the above-mentioned industry, and none of the provisions contained therein are to be regarded as having received the approval of the National Recovery Administration as applying to this industry.

United States Government Printing Office.
Washington: 1933.

For sale by the Superintendent of Documents,
Washington, D. C. . . . . Price 5 cents

5128 Submitted by

Lead Industries Association

(II)

5128 Code of Fair Competition for the Lead Industries

The subscribers to this code, submitted by the Lead Industries Association for its members, represent 90 percent of the active lead mining, 90 percent of the lead smelting and refining, 100 percent of the lead pigments, and more than 85 percent of the metallic lead products, and 100 percent of the metallic lead and tin foil products industries by tonnage in the United States of America. The Lead Industries Association affirms that it imposes no inequitable restrictions on admission to membership and participation in its activities, and that it is truly representative as a national trade association of the lead industry in its several branches.

Article I—Purpose

The declared purpose of this code is to effectuate the policy of Title I of the National Industrial Recovery Act, during the period of the emergency, by reducing and relieving unemployment in the lead industries, by improving the standards of labor therein, by eliminating destructive competitive practices, and by maintaining a reasonable balance between production and consumption of the products of these industries.

Article II—Definitions.

(a) "Lead industries" as used herein is defined to mean all those engaged in the mining, smelting, and refining of lead and lead scrap, and in the manufacture of lead pigments, metallic lead products, allied products defined under "metallic lead products", and metallic foil products.

(b) "Lead ore and Ore Concentrates" as used herein is defined to mean ore containing lead as the principal commercially recoverable constituent.

(c) "Lead mining" as used herein is defined to mean the mining and concentrating of ore containing lead and other treatment to the time of shipment to the smelters.

(d) "Lead smelting and refining" as used herein is defined to mean the processing of lead ore, concentrates, lead scrap, and other lead-bearing material into pig lead or antimonial lead.

(e) "Lead pigments" as used herein defined to mean basic carbonate white lead, basic lead sulphate, litharge, red lead, orange mineral, and other lead oxides with or without metallic lead content.

(f) "Metallic lead products" as used herein is defined to mean extruded, rolled, cast, or otherwise worked lead or lead alloy products, or metallic tin, tin alloy, or other metal or metal alloy products which are produced by the members of the Lead Industries Association on the same type of machinery and under similar labor conditions.

5129 (g) "Metallic foil products" as used herein is defined to mean lead, tin, aluminum, zinc, or their alloys or combinations, rolled to a thickness of .006 in. or less; or other metals or their alloys or combinations rolled on similar machinery to the same thickness, or less; whether attached or affixed to other materials or not.

(h) "Persons" as used herein includes any individual, firm, partnership, or corporation.

(i) "Employees" as used herein shall include all persons employed in the conduct of the respective operations, except executives and their immediate assistants, supervising, technical, maintenance, and engineering staffs.

(j) "Division" as used herein refers to the several sections of the lead industries as enumerated below:

1. Lead-mining division.
2. Lead-smelting and refining division.
3. Lead-pigments division.
4. Metallic lead-products division.
5. Metallic foil-products division.

Article III—Effective Date.

This code shall be in effect beginning the second Monday after its approval by the President.

Article IV—Labor Provisions.

Employers in the lead industries engaged in the production and manufacture of lead and lead products shall comply with the requirements of the National Industrial Recovery Act as follows: "(1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President.

Article V—Minimum Age.

On and after the effective date, employers shall not employ any person under the age of 16 years, engaged directly or indirectly in production.

Article VI—Hours of Labor.

On and after the effective date of this code employers in the several divisions of the lead industry shall not operate on a schedule of hours of labor for their employees exceeding the equivalent of the number of hours per week listed below when averaged over the period from the effective date of this code until October 1, 1933, or over any of the successive thirteen-week periods ending, respectively, December 31, 1933, April 1, 1934, and July 1, 1934, etc., nor a total of more than 520 hours in any of these thirteen-week periods.

	Hours
1. Lead mining division	40
2. Lead smelting and refining division.....	40
3. Lead pigments division	40
4. Metallic lead products division	40
5. Metallic foil products division	40

Such maximum working hours shall not apply in the case of accidents or emergencies where the safety of the men or the preservation of the property necessitates temporarily longer hours; nor in the case of the mining division shall it apply to hoistmen, power-house men or pump men. It is also recognized that in various divisions there are individual circumstances which may call for special consideration and the working of a greater number of hours than herein specified which shall be permitted on approval by the National Recovery Administration.

Article VII—Minimum Wages.

The minimum wage for each division shall be as follows:

		Per Hour
1. Lead mining division	cents	35
2. Lead smelting and refining division	cents	35
3. Lead pigments division	cents	35
4. Metallic lead products division	cents	35
5. Metallic foil products division	cents	35

unless the hourly rate for the same class of work on July 15, 1929, was less than thirty-five cents (35¢) per hour, in which latter case not to be less than the hourly rate of July 15, 1929, and in no event less than thirty cents (30¢) per hour; except for cleaners, watchmen, and outside labor, whose minimum wage shall be at the rate of thirty cents (30¢) per hour, but in no case shall the number of cleaners, watchmen, and outside labor in the above classes exceed five percent (5%) of the total number of employees.

Article VIII—Administration.

Lead Industries Association is hereby designated the agency for administering, supervising, and promoting the performance of the provisions of this code by the members of the lead industries. The Association shall be divided into five division as defined in Ar. II. Each division is to function as a separate unit, and shall be self-governing, and may draft a supplementary code of fair competition not inconsistent with this agreement. The Executive Committee, together with each division chairman, the Secretary of the Lead Industries Association, and such representatives of the Administrator as he may care to appoint, are designated to cooperate with Administrator in the administering of this code with respect to the several divisions.

5130

Article IX—Reports.

To inform the President as to the observance of the provisions of this code by its subscribers and as to the steps the lead industries are taking to effectuate the declared policy of the National Industrial Recovery Act, each person engaged in the industry shall provide certified statements at the end of each period referred to under Article 6 to the effect that the employer has complied with the maximum hours and minimum rates of wages prescribed herein.

Article X—Fees.

Each subscriber to this code shall pay his proportionate share of the cost of conducting the Lead Industries Association as prescribed in the Constitution and By-Laws, as amended, of that Association.

Article XI—Cancellation or Modification.

This code or any of its provisions shall be cancelled or modified and any approved rule issued thereunder shall be ineffective to the extent necessary to conform to any action by the President under Section 10 (b) of the National Industrial Recovery Act in cancellation or modification of any order, approval, license, rule, or regulation pertaining thereto.

Article XII—Monopolies.

(a) This code is not designed to promote monopolies and shall not be availed of for that purpose.

(b) The provisions of this code shall not be so interpreted or administered as to eliminate or oppress small enterprises or to discriminate against them.

Article XIII—Additions of Amendments.

Additions or amendments to this code, or supplemental codes affecting or pertaining to the several divisions of the lead industries may be submitted to the Executive Committee of the Lead Industries Association, and, upon approval by the Committee, after two weeks notice to the members, may be submitted to the Administrator of the National Industrial Recovery Act and will become a part of this code and have the same force and effect as any other provision of this code when approved by the Administrator.

5162 **RESPONDENT'S EXHIBIT NO. 81**

Executive Committee Meeting.

New York, N. Y. September 21, 1933.

A meeting of the Executive Committee of the Lead Industries Association was held on Thursday, September 21, 1933, at 2:30 P.M. at the offices of the St. Joseph Lead Company, 250 Park Avenue, New York City.

Present	Representing
Clinton H. Crane, Chairman	St. Joseph Lead Company
E. A. Behr	American Smelting & Refining Co.
F. M. Carter	National Lead Company
C. M. Chapin, Jr.	St. Joseph Lead Company
I. H. Cornell	St. Joseph Lead Company
F. Y. Robertson	United States Smelting Refining & Mining Co. Inc.

F. E. Wormser, Secretary.

Mr. Clinton H. Crane occupied the chair.

The Chairman called the attention of the Executive Committee to a letter received from the Administration as follows:

"In conversation with you on September 11, it was our understanding that you would file supplemental codes to the Basic Lead Code, not later than September 16.

"We beg to advise that, up to this date, we have not received these supplementals and are asking that you give this your prompt attention.

"By direction of H. O. King, Deputy Administrator.
Signed: C. F. Elliott,
Special Assistant."

The Chairman felt that in replying to this letter a question of policy was involved with respect to the filing of Supplementary Codes, which the Committee, as a whole, should act upon. After discussion it was agreed that the following letter should be sent by the Secretary to the N. R. A.:

5163 "Acknowledging your letter of September 18th: Although we are not ready yet with our Supplementary Codes, we do not wish to delay the final hearing on our Master Code as it has been filed with you and are anxious to expedite matters by an early hearing.

"We have been working steadily and intensively on the Supplementary Codes of the Basic Lead Code and regret exceedingly that they have not yet been perfected to a point where they are suitable for submission to the N. R. A."

The Chairman stated that inasmuch as the newly formed Foil Division of the Lead Industries Association had no representation on either the Directorate or on the Executive Committee, it was only fair that some provision immediately be made to remedy this situation.

Accordingly, the Chairman proposed, with the concurrence of the Executive Committee, to call a Special Meeting of the Members for the purpose of electing a member of the Foil Division to the Board.

Mr. Carter outlined the serious conflict of interest between the Paint Code and the position of the White Lead-in-Oil industry which desired to operate under the Code of the Lead Industries Association and felt that later on this conflict of interest might require urgent attention on the part of the Lead Industries Association.

The Secretary stated that he had made a practice of distributing the minutes of the meetings of the various Divisions and Committees to all the members in the group
in question, whether a representative of the Company
5164 attended the meeting in person or not, and requested
the advice of the Executive Committee as to this procedure, particularly as some members felt that only those who attended the meetings in person should receive a copy of the minutes. The action of the Secretary was approved.

The meeting adjourned at 4:00 P.M.

Clinton H. Crane,
Chairman,
F. E. Wormser,
Secretary.

5170 RESPONDENT'S EXHIBIT NO. 83

Executive Committee Meeting.

New York, N. Y. November 22, 1933.

A meeting of the Executive Committee of the Lead Industries Association was held on Wednesday, November 22, 1933 at 3:15 P.M. in the Board Room of the National Lead Company, 111 Broadway, New York City.

Present	Representing
Clinton H. Crane, Chairman	St. Joseph Lead Co.
F. H. Brownell	American Smelting & Refining Co.
R. M. Roosevelt	Eagle-Picher Lead Co.
W. C. Besehorman	National Lead Co.
F. M. Carter	National Lead Co.
E. J. Cornish	National Lead Co.
W. Y. C. Hunt	Reynolds Metals Co.
I. H. Cornell	St. Joseph Lead Company
J. A. McCarthy	United Metals Selling Co.
F. F. Colcord	United States Smelting Refining & Mining Co.
G. W. Metcalfe	
F. E. Wormser, Secretary.	

Mr. Clinton H. Crane occupied the chair.

The Chairman presented a draft of the Code of Fair Competition for the Lead Industry which the Secretary brought back with him from Washington after consultation with Deputy Administrator Janssen, who had recommended a great many changes and additions to the Basic Code. Copy of this Code is attached (Exhibit "A").

The Executive Committee agreed to proceed with a
consideration of the Code for the purpose of revising it so
as to retain the form in which the Administration desired
the Code to be submitted, and so as to embody the
5171 combined views of the Committee. Accordingly, the
Code was considered paragraph by paragraph and
finally drafted as Exhibit "B" attached hereto.

Meeting adjourned at 5:00 P. M.

Clinton H. Crane,
Chairman,
F. E. Wormser,
Secretary.

5172 Exhibit "A".

Code "D"

The Code of Fair Competition for the Lead Industries.

Article I.

Purposes.

To effect the policies of Title I of the National Industrial Recovery Act, this Code is submitted as a Code of Fair Competition for the Lead Industries and upon approval by the President, its provisions shall be the standards of fair competition for such Industry and shall be binding upon every member thereof.

Article II.

Definitions.

The terms "President", "Act", and "Administrator" shall mean respectively the President of the United States, the National Industrial Recovery Act, and the Administrator of said Act.

The term "Industry" means and includes the business of producing and selling in the United States any or all industry products.

The terms "Member" and/or "Member of the Industry" means and includes any person, firm, association, or corporation engaged in the business of the Industry as defined herein.

The term "Employee" means and includes anyone engaged in the industry in any capacity receiving compensation for his services, irrespective of the nature or method of payment of such compensation.

The term "Employer" means and includes anyone by whom any such employee is compensated or employed.

The term "Apprentice" means a person, usually a minor, who agrees to serve an employer for a certain stated period of time at predetermined wages for the period in order to learn the trade.

The term "Learner" means an employee without previous mechanical experience engaged to become competent on one or more machine operations but who shall not be so classified after ninety days' experience.

The term "Industry Products" means and includes all products as hereinafter enumerated and defined under

"Divisions", and such other products as may be enumerated and defined in divisional supplemental codes which are or may be attached to and made a part of this code.

5173 (a) "Lead Industries" as used herein is defined to mean all those engaged in mining, smelting, and refining of lead and lead scrap, and in the manufacture and sale of lead pigments, metallic lead products, alloid products defined under "Metal Lead Products", and "Metallic Foil Products".

(b) "Lead Ore and Lead Concentrates" as used herein is defined to mean ore and the concentrates thereof, containing lead as the principal commercially recoverable constituent.

(c) "Lead Mining", as used herein is defined to mean the mining and concentrating of ore containing lead and any further beneficiation thereto prior to the shipment to the smelter.

(d) "Lead Smelting and Refining", as used herein is defined to mean metallurgical and/or chemical treatment of lead ore, lead concentrates, lead scrap, and any other lead bearing material into "Pig Lead", and/or "Antimonial Pig Lead".

(e) "Lead Pigments" as used herein is defined to mean basic carbonate white lead (dry or in oil), basic lead sulphate (dry or in oil), litharge, red lead (dry or in oil), orange mineral or any other lead oxides, with or without metallic lead content.

(f) "Metallic Lead Products" as used herein is defined to mean extruded, rolled, cast or otherwise fabricated lead or lead alloy products, or kindred products of metallic tin, tin alloy or other metal or metal alloy products, which are produced by members on the same type of machinery and under similar labor and fabricating conditions.

(g) "Metallic Foil Products", as used herein is defined to mean lead and/or tin or their alloys or combinations thereof rolled to a thickness of .006 of an inch or less, whether attached or affixed to the materials or not.

(h) The term "Divisions" means and includes the several parts of the Industry which are (or may be) established, and are (or may be) defined in the divisional supplemental codes.

"Division" as used herein refers to the several sections of the lead industries as enumerated below:

1. Lead mining division.
2. Lead smelting and refining division.
3. Lead pigments division.
4. Metallic lead products division.
5. Metallic foil products division.

5174 (i) The term "Lead Industries Association" as used herein shall mean an association of members of the Lead Industry who represent 90% of the active mining, 90% of the lead smelting and refining, 100% of the lead pigments and more than 85% of the metallic lead products and 90% of the metallic lead allied foil products industry by tonnage in the U. S.

(j) The term "Executive Committee" as used herein shall mean the Executive Committee of the Lead Industries Association, duly elected and qualified to serve under the by-laws of such association, organized in New York City, New York, Nov. 14, 1928.

Article III.

Hours of Labor.

Maximum Hours.

Section 1.

On and after the effective date of this Code employers in the several divisions of the lead industry shall not operate on a schedule of hours of labor for their employees exceeding the equivalent of the number of hours per week listed below when averaged over the period from the effective date of this code until October 1, 1933 or over any of the successive thirteen-week periods ending, respectively, December 31, 1933, April 1, 1934, and July 1, 1934, etc., nor a total of more than 520 hours in any of these thirteen-week periods.

1. Lead mining division	40 hours
2. Lead smelting and refining division	40 hours
3. Lead pigments division	40 hours
4. Metallic lead products division	40 hours
5. Metallic foil products division	40 hours

Such maximum working hours shall not apply in the case of accidents, or emergencies where the safety of the men or the preservation of the property necessitates temporarily longer hours; nor in the case of the mining division shall it apply to hoistmen, power-house men or pump men who are paid $35.00 a week or more. It is also recognized that in various divisions there are individual circumstances which may call for special consideration and the working of a greater number of hours than herein specified which shall be permitted on approval by the National Recovery Administration.

Hours for Clerical and Office Employees.

Section 2.

No employer shall work any accounting, clerical, office,
inside sales, or other employee not provided for in
5175 this Article III, who receives less than $35.00 per
week, more than an average of 40 hours per week
during a six months' period, nor more than 48 hours per
week in any one week.

Exceptions as to Hours.

Section 3.

The limitation as to hours of labor in any 24 hours shall not apply to very special cases where restriction of hours of labor of highly skilled workers in continuous processes would unavoidably reduce production, provided, however, that employees in such cases shall not work more than 48 hours in any one week.

Standard Week.

Section 4.

The limitation as to hours of labor shall not apply (a) to outside sales or sales-service men, technicians (highly skilled factory workers are not to be classed as technicians), nor to persons in a managerial, executive, or supervisory capacity who receive more than $35 per week (foremen regularly engaged in manual labor shall not be considered to be in such supervisory capacity), nor (b) to employees engaged in emergency maintenance or repair work necessary because of breakdowns or involving danger to life and property, providing that such emergency overtime work in excess of 48 hours in any one week shall be paid for at the rate of time and one third.

To care for requirements peculiar to certain divisions of the lead industry, the Code permits maximum hours to be averaged over a six months' period, also for an allowance (above 48 hours maximum) of not more than six hours per week in the time worked by the operating class of employees.

Article IV.

Wages.

Minimum.

The minimum wage for each division shall be as follows:

	Cents per Hour
1. Lead mining division	35
2. Lead smelting and refining division	35
3. Lead pigments division	35
4. Metallic lead products division	35
5. Metallic foil products division	35

unless the hourly rate for the same class of work on July
15, 1929, was less than thirty-five cents (35¢) per
5176 hour, in which latter case not to be less than the
hourly rate of July 15, 1929, and in no event less
than thirty cents (30¢) per hour; except for cleaners, watchmen, and outside labor, whose minimum wage shall be at the rate of thirty cents (30¢) per hour, but in no case shall the number of cleaners, watchmen, and outside labor in the above classes exceed five per cent (5%) of the total number of employees.

Piecework Compensation—Minimum Wages.

Section 2.

This article establishes a minimum rate of pay which shall apply, irrespective of whether an employee is actually compensated on a time rate, piecework, or other basis.

Minimum Wage Rates by Locality/Occupation.

Section 3.

After the approval of this Code, the Code authority may present for approval to the Administrator, after notice and hearing, recommendations as to upward adjustments in minimum wages for specified localities or occupations, in order to effectuate the purposes of the Act.

Wages Above Minimum.

Section 4.

There shall be an equitable adjustment of all wages above the minimum after the effective date, if such adjustment has not already been made, and to that end, within (............ days or months) from the approval of this Code, the Code Authority may review the existing wage rates and submit for the approval of the Administrator a proposal for adjustment in wages. Upon approval by the Administrator, after such hearing as he may prescribe, such proposal shall become binding as a part of this Code, provided, however, that in no event shall hourly rates of pay be reduced.

Female Employees.

Section 5.

Female employees, if, as and when performing substantially the same work as male employees shall receive the same rate of pay as male employees.

Handicapped Persons.

Section 6.

A person whose earning capacity is limited because of age or physical or mental handicap may be employed 5177 on light work at a wage below the minimum established by this Code if the employer obtains from the State authority designated by the United States Department of Labor a certificate authorizing his employment at such wages and for such hours as shall be stated in the certificate. Each employer shall file with the Code Authority a list of all such persons employed by him.

Article V.

General Labor Provisions.

Child Labor.

Section 1. No person under sixteen (16) years of age shall be employed in the Industry. No person under eighteen (18) years of age shall be employed at operations or occupations which are hazardous in nature or dangerous to health. The Code Authority shall submit to the Administrator before .... (date) a list of such operations or occupations. In any State an employer shall be deemed to have complied with this provision as to age if he shall have on file a certificate or permit duly signed by the Authority in such State empowered to issue employment or age certificates or permits showing that the employee is of the required age.

Provisions From the Act (Inclusion obligatory).

Section 2. In compliance with Section 7(a) of the Act it is provided:

(a) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(b) That no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing, and

(c) That employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment approved or prescribed by the President.

Reclassification of Employees.

Section 3. No employer shall reclassify employees or duties of occupations performed or engage in any other subterfuge for the purpose of defeating the purposes or provisions of the Act or of this Code.

5178 Exhibit "A".

Standards for Safety and Health.

Section 4. Every employer shall make reasonable provision for the safety and health of his employees at the place and during the hours of their employment. (Provision may be inserted requiring the Code Authority to submit proposed minimum standards for safety and health of employees).

State Laws.

Section 5. No provision in this Code shall supersede any State or Federal Law which imposes on employers more stringent requirements as to age of employees, wages, hours of work, or as to safety, health, sanitary or general working conditions, or insurance, or fire protection, than are imposed by this Code.

Posting.

Section 6. All employers shall post complete copies of this Code in conspicuous places accessible to employees.

Article VI.

Organization, Powers and Duties of the Code Authority—Organization and Constitution.

Lead Industries Association is hereby designated the agency for administering, supervising, and promoting the performance of the provisions of this Code by the members of the lead industries. The Association shall be divided into five divisions as defined in Article II. Each division is to function as a separate unit, and shall be self-governing, and may draft a supplementary code of fair competition not inconsistent with this agreement. The Executive Committee, together with each division chairman, The Secretary of the Lead Industries Association, and such representatives of the Administrator as he may care to appoint, are designated as code authority to cooperate with the Administrator in the administering of this code with respect to the several divisions.

Section 1. There shall be forthwith constituted a Code Authority consisting of .... persons to be selected in the following manner:

(Here shall be stated the manner in which the members of the Code Authority shall be elected. Provision should be made so that the Code Authority will be truly representative of the various majority, minority, and other interests in the industry. If, however, by reason of conditions peculiar to the industry, selection by the industry is impossible, it may be provided that appointment shall be by the Administrator.)

5179 Section 2. In addition to membership as above provided, there may be .... members, without vote, to be appointed by the Administrator, to serve for term of .... months from the date of appointment.

Section 3. Each trade or industrial association directly or indirectly participating in the selection or activities of the Code Authority shall

(1) impose no inequitable restrictions on membership, and (2) submit to the Administrator true copies of its articles of association, by-laws, regulations, and any amendments when made thereto, together with such other

information as to membership, organization, and activities as the Administrator may deem necessary to effectuate the purposes of the Act.

Section 4. In order that the Code Authority shall at all times be truly representative of the industry and in other respects comply with the provisions of the Act, the Administrator may prescribe such hearings as he may deem proper; and thereafter if he shall find that the Code Authority is not truly representative or does not in other respects comply with the provisions of the Act, may require an appropriate modification in the method of selection of the Code Authority.

Section 5. Members of the industry shall be entitled to participate in and share the benefits of the activities of the Code Authority and to participate in the selection of the members thereof by assenting to and complying with the requirements of this Code and sustaining their reasonable share of the expenses of its administration. Such reasonable share of the expenses of administration shall be determined by the Code Authority, subject to review by the Administrator, on the basis of volume of business and/or such other factors as may be deemed equitable.

Section 6. Nothing contained in this Code shall constitute the members of the Code Authority partners for any purpose. Nor shall any member of the Code Authority be liable in any manner to anyone for any act or any other member, officer, agent, or employee of the Code Authority. Nor shall any member of the Code Authority, exercising reasonable diligence in the conduct of his duties hereunder, be liable to anyone for any action or omission to act under this Code, except for his own willful misfeasance or nonfeasance.

Powers and Duties.

Section 7. The Code Authority shall have the following further powers and duties, the exercise of which shall be reported to the Administrator and shall be subject to his
right, on review, to disapprove or modify any action
5180 taken by the Code Authority.

(a) To insure the execution of the provisions of this Code and provide for the compliance of the industry with the provisions of the Act.

(b) To adopt by-laws and rules and regulations for its procedure and for the administration and enforcement of the Code.

(c) To obtain from members of the industry such information and reports as are required for the administration of the Code and to provide for submission by members of such information and reports as the Administrator may deem necessary for the purposes recited in Section 3(a) of the Act, which information and reports shall be submitted by members to such administrative and/or government agencies as the Administrator may designate; provided that nothing in this Code shall relieve any member of the industry of any existing obligations to furnish reports to any government agency. No individual reports shall be disclosed to any other member of the industry or any other party except to such governmental agencies as may be directed by the Administrator.

(d) To use such trade associations and other agencies as it deems proper for the carrying out of any of its activities provided for herein, provided that nothing herein shall relieve the Code Authority of its duties or responsibilities under this Code and that such trade associations and agencies shall at all times be subject to and comply with the provisions hereof.

(e) To make recommendations to the Administrator of the coordination of the administration of this Code with such other codes, if any, as may be related to the industry.

(f) To secure from members of the industry an equitable and proportionate payment of the reasonable expenses of maintaining the Code Authority and its activities.

(g) To cooperate with the Administrator in regulating the use of any N. R. A. insignia solely by those members of the industry who have assented to, and are complying with this Code.

(h) To recommend to the Administrator further fair trade practice provisions to govern members of the industry in their relations with each other or with other industries and to recommend to the Administrator measures for industrial planning, including stabilization of employment.

(i) "The Code Authority shall have power on its own initiative or on the complaint of any member of the Code to investigate any destructive price competition," and for the purpose of investigation thereof, to require such member to furnish such information concerning the cost of manufacturing such product as the Code Authority

5181 shall deem necessary or proper for such purposes.

If the Code Authority after such investigation shall determine that such price is an unfair price for such product and that the maintenance of such unfair price may result in unfair competition in the industry, the Code Authority may require that the member of the code file a new list showing a fair price for such product which fair price shall become immediately effective upon the filing thereof.

Article VII.

Trade Practices.

For all purposes of this Code the following described acts as well as those elsewhere enumerated in this Code shall be deemed unfair competition and shall constitute a violation of this Code.

Rule 1. Inaccurate Advertising.

No member of the Industry shall publish advertising (whether printed, radio, display or of any other nature), which is misleading or inaccurate in any material particular, nor shall any member in any way misrepresent any goods, (including but without limitation its use, trademark, grade-quality, quantity, origin, size, substance, character, nature, finish, material, content or preparation) or credit terms, values, policies, services, or the nature or form of the business conducted.

Rule 2. False Billing.

No member of the industry shall knowingly withhold from or insert in any quotation or invoice any statement that makes it inaccurate in any material particular.

Rule 3. Inaccurate Labelling.

No member of the industry shall brand or mark or pack any goods in any manner which is intended to or does deceive or mislead purchasers with respect to the brand, grade, quality, quantity, origin, size, substance, character, nature, finish, material content or preparation of such goods.

Rule 4. Inaccurate References to Competitors, etc.

No member of the industry shall publish advertising which refers inaccurately in any material particular to any competitors or their goods, prices, values, credit terms, policies or services.

Rule 5. Selling Below Cost.

(Provisions may be inserted against selling below cost based upon principles of costing formulated by the Code Authority and approved by the Administrator. Such
5182 provisions should be applicable to the individual industry and should take into consideration the necessity of selling below cost to meet competition, to dispose of distress merchandise, etc.)

Rule 6. Threats of Law Suits.

No member of the industry shall publish or circulate unjustified or unwarranted threats of legal proceedings which tend to or have the effect of harassing competitors or intimidating their customers. Failure to prosecute in due course shall be evidence that any such threat is unwarranted or unjustified.

Rule 7. Secret Rebates.

No member of the industry shall secretly directly offer or make any payment or allowance of a rebate, refund, commission, credit, unearned discount or excess allowance, whether in the form of money or otherwise, nor shall a member of the industry secretly offer to extend to any customer any special service or privilege not extended to all customers of the same class, for the purpose of influencing a sale.

Rule 8. Selling on Consignment.

No member of the industry shall ship goods on consignment except under circumstances to be defined by the Code Authority, where peculiar circumstances of the industry require the practice.

Rule 9. Bribing Employees.

No member of the industry shall give, permit to be given or directly offer to give, anything of value for the purpose of influencing or rewarding the action of any employee, agent or representative of another in relation to the business of the employer of such employee, the principal of such agent or the represented party, without the knowledge of such employer, principal or party.

Rule 10. Interference with Another's Contracts.

No member of the industry shall attempt to induce a breach of an existing contract between a competitor and his employee of customer or source of supply; nor shall any such member interfere with or obstruct the performance of such contractual duties or services.

Rule 11. Coercion.

No member of the industry shall require that the purchase or lease of any goods be a prerequisite to the purchase or lease of any other goods.

5183 Rule 12. Blacklisting.

No member of the industry shall join or participate with other members of the industry who with such member constitute a substantial number of members of the industry or who together control a substantial percent of the business in any specific product or products of the industry, in any transaction known in law as a black list, including any practice or device (such as a white list), which accomplishes the purpose of a black list.

Article VIII.

Trade Practice Rules for Lead Pigments Division.

The trade practice rules outlined in Article VII in a general way are of particular application to divisions number 1, 2, 4 and 5 of the lead industries. Because of the very nature of the product of division 3 "Lead Pigments" of the lead industry, a separate set of trade practice rules for this division is noted in this Article VIII.

Unfair Trade Practices.

The following shall be considered unfair trade practices and are violations of this code with particular reference to Division 3 (Lead Pigments).

(a) Misbranding or misrepresentation of lead pigments.

(b) Making or promising to any purchaser or prospective purchaser of lead pigments, or to any officer, employee, agent or representative of any such purchaser or prospective purchaser, any commission, gratuity, or other payment or remuneration, directly or indirectly, except in the case of payments made with the consent of the employer for a definite service rendered.

(c) Inducing or in any manner attempting to induce a breach, default or cancellation of a contract between a competitor and his customer during the term of such contract.

(d) Guaranteeing for a definite time the life and/or service of lead pigments.

(e) Making false or derogatory statements with respect to the prices, policies, products, practices, business or credit of any competitor.

(f) Exchanging the products of a member for those of another.

(g) No merchandise shall be sold at a concession in price, or used as an inducement, to influence the sale of any lead products, nor shall any concession be given in the price or terms of a lead product to influence the sale of any other merchandise.

Returned Goods.

No member of the Code shall accept the return of merchandise without first giving consent for its return. 5184 On such goods as are accepted for return, a reasonable charge shall be made and freight charges must be prepaid by the shipper returning the merchandise, except in the case of defective products or where in some other way the manufacturer may be responsible.

Price Lists.

Each member of the Code shall file with the Secretary within ten (10) days after the effective date of this Code, his price list, together with terms and conditions of sale. Any change in the said list or terms shall be reported to the Secretary in writing within twenty-four (24) hours after the effective date of such change. After December 31, 1933, any member making a sale or quotation at variance with his price list or terms on file at the time said sale or quotation is made, shall notify the Secretary concerning the variation by letter, mailed within twenty-four (24) hours. The information, as reported, shall be reissued to the members at such time, and in such manner as may be determined by them.

Uniform Sales Contracts.

Uniform sales contracts specifically designed for use in selling Dry White Lead and Lead Oxides shall be developed as soon as practicable, and thereafter used by all members after said contract forms shall have been adopted by a two-thirds vote of members manufacturing the products to which the contracts apply and after the uniform contract forms have received the approval of the Administrator. From time to time, changes in the uniform sales contracts can be made by a two-thirds vote of members manufacturing such products, subject to the approval of the Administrator.—All sales shall conform to the conditions set forth in the uniform contract forms.

Article IX.

Export Trade.

Section 1. No provision of this Code relating to prices or terms of selling, shipping or marketing, shall apply to export trade or sales or shipments for export trade.

Section 2. Subject to the approval of the Code Authority, the exceptions established by this section shall apply also to sales or shipments of materials actually used in manufacture for export trade.

A provision may be introduced into the administrative section of the Code providing that questions relating to production for export and sale for export, not enumerated in the above section, may be submitted by any member of the industry for the consideration of the Code Authority, and that its decision thereon shall be submitted to the Administrator and shall not be effective unless and until approved by him. 5185

Article X.

Cancellation or Modification.

This code or any of its provisions shall be cancelled or modified and any approved rule issued thereunder shall be ineffective to the extent necessary to conform to any action by the President under Section 10 (b) of the National Industrial Recovery Act in cancellation or modification of any order, approval, license, rule, or regulation pertaining thereto.

Article XI.

Monopolies.

(a) This Code is not designed to promote monopolies and shall not be availed of for that purpose.

(b) The provisions of this Code shall not be so interpreted or administered as to eliminate or oppress small enterprises or to discriminate against them.

Article XII.

Additions or Amendments.

Additions or amendments to this Code, or supplemental codes affecting or pertaining to the several divisions of the lead industries may be submitted to the Executive Committee of the Lead Industries Association, and, upon approval by the Committee, after two weeks notice to the members, may be submitted to the Administrator of the National Industrial Recovery Act and will become a part of this Code and have the same force and effect as any other provision of this Code when approved by the Administrator.

Article XIII.

Reports.

To inform the President as to the observance of the provisions of this Code by its subscribers and as to the steps the lead industries are taking to effectuate the declared policy of the National Industrial Recovery Act, each person engaged in the industry shall provide certified statements at the end of each period referred to under Article VI to the effect that the employer has complied with the maximum hours and minimum rates of wages prescribed herein.

5186

Article XIV.

Fees.

The Lead Industries Association having been constituted the agency to administer this Code, all persons in the lead industry covered by this Code, shall pay an equitable pro-rata share of the expenses of administration of said Association, as assessed by the Executive Committee.

Article XV.

Effective Date.

This Code shall be in effect beginning the second Monday after its approval by the President.

5187 Exhibit "B".

Code "E".

The Code of Fair Competition for the Lead Industries.

Article I.

Purposes.

To effect the policies of Title I of the National Industrial Recovery Act, this Code is submitted as a Code of Fair Competition for the Lead Industries and upon approval by the President, its provisions shall be the standards of fair competition for such Industry and shall be binding upon every member thereof.

Article II.

Definitions.

The terms "President", "Act", and "Administrator" shall mean respectively the President of the United States, the National Industrial Recovery Act, and the Administrator of said Act.

The term "Industry" means and includes the business of producing and selling in the United States any or all industry products.

The terms "Member" and/or "Member of the Industry" means and includes any person, firm association, or corporation engaged in the business of the Industry as defined herein.

The term "Employee" means and includes anyone engaged in the industry in any capacity receiving compensation for his services, irrespective of the nature or method of payment of such compensation.

The term "Employer" means and includes anyone by whom any such employee is compensated or employed.

The term "Apprentice" means a person, usually a minor, who agrees to serve an employer for a certain stated period of time at predetermined wages for the period in order to learn the trade.

The term "Learner" means an employee without previous mechanical experience engaged to become competent on one or more machine operations but who shall not be so classified after ninety days' experience.

5188 The term "Industry Products" means and includes all products as hereinafter enumerated and defined under "Divisions", and such other products as may be enumerated and defined in divisional supplemental codes which are or may be attached to and made a part of this code.

(a) "Lead Industries" as used herein is defined to mean all those engaged in mining, smelting, and refining of lead and lead scrap, and in the manufacture and sale of lead pigments, metallic lead products, allied products defined under "Metal Lead Products", and "Metallic Foil Products".

(b) "Lead Ore and Lead Concentrates" as used herein is defined to mean ore and the concentrates thereof, containing lead as the principal commercially recoverable constituent.

(c) "Lead Mining" as used herein is defined to mean the mining and concentrating of lead ore and any further beneficiation thereto prior to the shipment to the smelter.

(d) "Lead Smelting and Refining" as used herein is defined to mean metallurgical and/or chemical treatment of lead ore, lead concentrates, lead scrap and any other lead bearing material into "Pig Lead", and/or "Antimonial Pig Lead".

(e) "Lead Pigments" as used herein is defined to mean basic carbonate white lead (dry or in oil), basic lead sulphate (dry or in oil), litharge, red lead (dry or in oil), orange mineral or any other lead oxides, with or without metallic lead content.

(f) "Metallic Lead Products" as used herein is defined to mean extruded, rolled, cast or otherwise fabricated lead or lead alloy products, or kindred products of metallic tin, tin alloy or other metal or metal alloy products, which are produced by members on the same type of machinery and under similar labor and fabricating conditions.

(g) "Metallic Foil Products" as used herein is defined to mean lead and/or tin or their alloys or combinations thereof rolled to a thickness of .006 of an inch or less, whether attached or affixed to the materials or not.

(h) The term "Divisions" means and includes the several parts of the Industry which are (or may be) established, and are (or may be) defined in the divisional supplemental codes.

"Division" as used herein refers to the several sections of the lead industries as enumerated below.

1. Lead mining division.
2. Lead smelting and refining division.

3. Lead pigments division.
4. Metallic lead products division.
5. Metallic foil products division.

(i) The term "Lead Industries Association" as used herein is an association of members of the Lead Industry who represent approximately 90% of the active mining,
90% of the lead smelting and refining, 100% of the
5189 lead pigments and more than 85% of the metallic lead
products and 90% of the metallic lead allied foil products industry by tonnage in the United States.

(j) The term "Executive Committee" as used herein shall mean the Executive Committee of the Lead Industries Association, duly elected and qualified to serve under the by-laws of such association, organized in New York City, November 14, 1928.

Article III.

Hours of Labor.

Maximum Hours.

Section 1. On and after the effective date of this Code employers in the several divisions of the lead industry shall not operate on a schedule of hours of labor for their employees exceeding the equivalent of the number of hours per week listed below when averaged over the period from the effective date of this code until October 1, 1933, or over any of the successive thirteen-week periods ending, respectively, December 31, 1933, April 1, 1934, and July 1, 1934, etc., nor a total of more than 520 hours in any of these thirteen-week periods.

1.	Lead mining division	40	hours
2.	Lead smelting and refining division	40	"
3.	Lead pigments division	40	"
4.	Metallic lead products division	40	"
5.	Metallic foil products division	40	"

Such maximum working hours shall not apply in the case of accidents, or emergencies where the safety of the men or the preservation of the property necessitates temporarily longer hours; nor in the case of the mining division shall it apply to hoistmen, power-house men or pump men. It is also recognized that in various divisions there are individual circumstances which may call for special consideration and the working of a greater number of hours than herein specified which shall be permitted on approval by the National Recovery Administration.

Hours for Clerical and Office Employees.

Section 2. No employer shall work any accounting, clerical, office, inside sales, or other employee not provided for otherwise in this Article III, who receives less than $35.00 per week, more than an average of 40 hours per week during a six months' period, nor more than 48 hours per week in any one week.

5190 Exceptions as to Hours.

Section 3. Any limitation as to hours of labor shall not apply to very special cases where restriction of hours of labor of highly skilled workers in continuous processes would unavoidably reduce production, provided, however, that employees in such cases shall not work more than 48 hours in any one week.

Standard Week.

Section 4. The limitation as to hours of labor shall not apply (a) to outside sales or sales-service men, technicians (highly skilled factory workers are not to be classed as technicians), nor to persons in a managerial, executive, or supervisory capacity who receive more than $35.00 per week, nor (b) to employees engaged in emergency maintenance or repair work necessary because of break-downs or involving danger to life and property, nor (c) shall it apply to truckmen.

To care for requirements peculiar to certain divisions of the lead industry, the code shall permit maximum hours to be averaged over a six months' period, also for an allowance (above 48 hour maximum) of not more than six hours per week in the time worked by the operating class of employees.

Article IV.

Wages.

Minimum.

Section 1. The minimum wage for each division shall be as follows:

	Cents per hour
1. Lead mining division	35
2. Lead smelting and refining division .	35
3. Lead pigments division	35
4. Metallic lead products division	35
5. Metallic foil products division	35

unless the hourly rate for the same class of work on July 15, 1929 was less than thirty-five cents (35¢) per hour, in which latter case, not to be less than the hourly rate of July 15, 1929, and in no event less than thirty cents (30¢) per hour; except for cleaners and watchmen, whose minimum wage shall be at the rate of thirty cents (30¢) per hour, but in no case shall the number of cleaners and watchmen in the above classes exceed five per cent (5%) of the total number of employees.

5191 Piecework Compensation—Minimum Wages.

Section 2. This article established a minimum rate of pay which shall apply, irrespective of whether an employee is actually compensated on a time rate, piece-work, or other basis.

Handicapped Persons.

Section 3. A person whose earning capacity is limited because of age or physical or mental handicap may be employed on light work at a wage below the minimum established by this Code if the employer obtains from the State authority designated by the United States Department of Labor a certificate authorizing his employment at such wages and for such hours as shall be stated in the certificate. Each employer shall file with the Code Authority a list of all such persons employed by him.

Article V.

General Labor Provisions.

Child Labor.

Section 1. On and after the effective date, no person under eighteen (18) years of age shall be employed in the lead industry except in clerical, office, sales, service, technical and engineering departments, or as outside labor, and no person under sixteen (16) years of age shall be employed in any capacity.

Provisions from the Act.

Section 2. In compliance with section 7 (a) of the Act, it is provided:

(a) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(b) That no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing, and

(c) That employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment approved or prescribed by the President.

5192 Reclassification of Employees.

Section 3. No employer shall reclassify employees or duties of occupations performed or engage in any other subterfuge for the purpose of defeating the purposes or provisions of the Act or of this Code.

Standard for Safety and Health.

Section 4. Every employer shall make reasonable provision for the safety and health of his employees at the place and during the hours of their employment.

State Laws.

Section 5. No provision in this Code shall supersede any State or Federal Law which imposes on employers more stringent requirements as to age of employees, wages, hours of work, or as to safety, health, sanitary or general working conditions, or insurance, or fire protection, than are imposed by this Code.

Posting.

Section 6. All employers shall post complete copies of this Code in conspicuous places accessible to employees.

Article VI.

Organization, Powers and Duties of the Code Authority—Organization and Constitution.

Section 1. Lead Industries Association is hereby designated the agency for administering, supervising, and promoting the performance of the provisions of this Code by the members of the lead industries. The Association shall be divided into five divisions as defined in Article II. Each division is to function as a separate unit, and shall be self-governing, and may draft a Supplementary Code of fair competition not inconsistent with this agreement.

Section 2. The Executive Committee, together with each division chairman, the Secretary of the Lead Industries Association, and such representatives of the Administrator as he may care to appoint, are designated as code authority to cooperate with the Administrator, without cost to the industry, in the administering of this code with respect to the several divisions.

5193 Section 3. The Lead Industries Association shall

(a) impose no inequitable restrictions on membership and

(b) submit to the Administrator true copies of its articles of association, by-laws, regulations, and any amendments when made thereto, together with such other information as to membership, organization, and activities as the Administrator may deem necessary to effectuate the purposes of the Act.

Section 4. In order that the Code Authority shall at all times be truly representative of the industry and in other respects comply with the provisions of the Act, the Administrator may prescribe such hearings as he may deem proper; and thereafter if he shall find that the Code Authority is not truly representative or does not in other respects comply with the provisions of the Act, may require an appropriate modification in the method of selection of the Code Authority.

Section 5. Members of the industry shall be entitled to participate in and share the benefits of the activities of the Code Authority and to participate in the selection of the members thereof by assenting to and complying with the requirements of this Code and sustaining their reasonable share of the expenses of its administration. Such reasonable share of the expenses of administration shall be determined by the Code Authority, subject to review by the Administrator, on the basis of volume of business and/or such other factors as may be deemed equitable.

Section 6. Nothing contained in this Code shall constitute the members of the Code Authority partners for any purpose. Nor shall any member of the Code Authority be liable in any manner to anyone for any act of any other member, officer, agent, or employee of the Code Authority. Nor shall any member of the Code Authority, exercising reasonable diligence in the conduct of his duties hereunder, be liable to anyone for any action or omission to act under this Code, except for his own willful misfeasance or non-feasance.

Powers and Duties.

Section 7. The Code Authority shall have the following further powers and duties, the exercise of which shall be reported to the Administrator and shall be subject to his right, on review, to disapprove any action taken by the Code Authority.

(a) To insure the execution of the provisions of this Code and provide for the compliance of the industry with the provisions of the Act.

5194 (b) To adopt by-laws and rules and regulations for its procedure and for the administration and enforcement of the Code.

(c) To obtain from members of the industry such information and reports as are required for the Administration of the Code and to provide for submission by members of such information and reports as the Administrator may deem necessary for the purposes recited in Section 3 (a) of the Act, which information and reports shall be submitted by members to such administrative and/or government agencies as the Administrator may designate; provided that nothing in this Code shall relieve any member of the industry of any existing obligations to furnish reports to any Government Agency.

(d) To use such trade associations and other agencies as it deems proper for the carrying out of any of its activities provided for herein, provided that nothing herein shall relieve the Code Authority of its duties or responsibilities under this Code and that such trade associations and agencies shall at all times be subject to and comply with the provisions hereof.

(e) To make recommendations to the Administrator for the coordination of the administration of this Code with such other codes, if any, as may be related to the industry.

(f) To secure from members of the industry an equitable and proportionate payment of the reasonable expenses of maintaining the Code Authority and its activities.

(g) To cooperate with the Administrator in regulating the use of any N. R. A. insignia solely by those members of the industry who have assented to, and are complying with, this Code.

(h) To recommend to the Administrator further fair trade practice provisions to govern members of the industry in their relations with each other or with other industries and to recommend to the Administrator measures for industrial planning, production control, including stabilization of employment.

Article VII.

Trade Practice Rules for Lead Pigments Division.

Section 1. The following described acts shall be deemed unfair competition for Division 3 (Lead Pigments), and shall constitute a violation of this Code.

(a) Misbranding or misrepresentation of lead pigments.

(b) Making or promising to any purchaser or prospective purchaser of lead pigments, or to any officer, employee, agent or representative of any such purchaser or prospective purchaser, any commission, gratuity, or
5195 other payment or remuneration, directly or indirectly,
except in the case of payments made with the consent of the employer for a definite service rendered.

(c) Inducing or in any manner attempting to induce a breach, default or cancellation of a contract between a competitor and his customer during the term of such contract.

(d) Guaranteeing for a definite time the life and/or service of lead pigments.

(e) Making false or derogatory statements with respect to the prices, policies, products, practices, business or credit of any competitor.

(f) Exchanging the products of a member for those of another.

(g) No merchandise shall be sold at a concession in price, or used as an inducement, to influence the sale of any lead products, nor shall any concession be given in the price or terms of sale of a lead product to influence the sale of any other merchandise.

Returned Goods.

Section 2. No member of the Code shall accept the return of merchandise without first giving consent for its return. On such goods as are accepted for return, a reasonable charge shall be made and freight charges must be prepaid by the shipper returning the merchandise, except in the case of defective products or where in some other way the manufacturer may be responsible.

Price Lists.

Section 3. Each member of the Code shall file with the Secretary within ten (10) days after the effective date of this Code, his price list, together with terms and conditions of sale. Any change in the said list or terms shall be reported to the Secretary in writing within twenty-four (24) hours after the effective date of such change. After December 31, 1933, any member making a sale or quotation at variance with his price list or terms on file at the time said sale or quotation is made, shall notify the Secretary concerning the variation by letter, mailed within twenty-four (24) hours. The information, as reported, shall be reissued to the members at such time, and in such manner as may be determined by them.

Uniform Bases for Sale.

Section 4. Uniform bases for sale specifically designed for use in selling Dry White Lead and Lead Oxides shall be developed as soon as practicable, and thereafter used by all members after said bases shall have been adopted by a two-thirds vote of members manufacturing the 5196 products to which the uniform bases for sale apply, and after the uniform bases for sale have received the approval of the Administrator. From time to time, changes in the uniform bases for sale may be made by a two-thirds vote of members manufacturing such products, subject to the approval of the Administrator. All sales shall conform to the conditions set forth in the uniform bases for sale.

Article VIII.

Export Trade.

Section 1. No provision of this Code relating to prices or terms of selling, shipping or marketing, shall apply to export trade or sales or shipments for export trade.

Section 2. Subject to the approval of the Code Authority, the exceptions established by this section shall apply also to sales or shipments of materials actually used in manufacture for export trade.

A provision may be introduced into the administrative section of the Code providing that questions relating to production for export and sale for export, not enumerated in the above section, may be submitted by any member of the industry to the consideration of the Code Authority, and that its decision thereon shall be submitted to the Administrator and shall not be effective unless and until approved by him.

Article IX.

Cancellation or Modification.

This Code shall be subject to the provisions of Section 10(b) of the Act, as follows:

"The President may, from time to time, cancel or modify any order, approval, license, rule or regulation issued under this title; and each agreement, code of fair competition, or license, approved, prescribed, or issued under this title, shall contain an express provision to that effect."

Article X.

Monopolies.

(a) This Code is not designed to promote monopolies and shall not be availed of for that purpose.

(b) The provisions of this Code shall not be so interpreted or administered as to eliminate or oppress small enterprises or to discriminate against them.

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Article XI.

Additions or Amendments.

Additions or amendments to this Code, or supplemental codes affecting or pertaining to the several divisions of the Lead Industries shall be initiated by the Division affected or interested and then may be submitted to the Executive Committee of the Lead Industries Association, and, upon approval by the Committee, after two weeks notice to the members, may be submitted to the Administrator of the National Industrial Recovery Act and will become a part of this Code and have the same force and effect as any other provision of this Code when approved by the Administrator.

Article XII.

Reports.

To inform the President as to the observance of the provisions of this Code by its subscribers and as to the steps the lead industries are taking to effectuate the declared policy of the National Industrial Recovery Act, each person engaged in the industry shall provide certified statements at the end of each period referring to under Article VI to the effect that the employer has complied with the maximum hours and minimum rates of wages prescribed herein.

Article XIII.

Fees.

The Lead Industries Association having been constituted the agency to administer this Code, all persons in the lead industry covered by this Code, shall pay an equitable prorata share of the expenses of administration of said Association, as assessed by the Executive Committee.

Article XIV.

Constitutional Rights.

Nothing contained in this Code shall be construed to be a waiver of constitutional rights by any of those assenting hereto.

Article XV.

Modification.

By presenting this Code, those assenting hereto do not thereby consent to any modification thereof.

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Article XVI.

Termination.

This Code and all Supplementary Provisions thereto shall expire on June 30, 1934, or on the earliest date prior thereto on which the President shall by proclamation, or the Congress shall by Joint Resolution, declare that the emergency recognized by Title I of the Act has ended; provided, that in the absence of such proclamation or declaration, the Executive Committee may prescribe that the Code and any or all Supplementary Provisions thereto may be continued in effect beyond June 30, 1934 but not later than June 16, 1935.

Article XVII.

Effective Date.

This Code shall be in effect beginning the second Monday after its approved by the President.

5237 RESPONDENT'S EXHIBIT NO. 85.

Executive Committee Meeting.

New York, N. Y. February 6, 1934.

A meeting of the Executive Committee of the Lead Industries Association was held on Tuesday, February 6, 1934, at 2:00 P. M., in the Board Room of the National Lead Company, 111 Broadway, New York, N. Y.

Present	Representing
R. M. Roosevelt,	Eagle-Picher Lead Company
Chairman	American Metal Co., Ltd.
Heath Steele	American Smelting & Refining Co.
H. Y. Walker	Federated Metals Corp.
E. L. Newhouse, Jr.	National Lead Company
W. C. Beschorman	National Lead Company
F. M. Carter	Reynolds Metals Co.
R. G. McKay	St. Joseph Lead Co.
Andrew Fletcher	St. Joseph Lead Co.
I. H. Cornell	United Metals Selling Co.
J. A. McCarthy	United States Smelting Refining &
F. S. Mulock	Mining Co., Inc.
F. E. Wormser, Secretary	

Vice President R. M. Roosevelt presided.

The Chairman stated that in order to provide a status in the Lead Industries Association for members not eligible under the change made by the Board of Directors on January 19, in membership qualifications, it would be desirable to modify the provision passed by the Board on January 19, establishing associate memberships. Accordingly, the following resolution was proposed:

Any individual, company, firm or corporation or other form of enterprise, producing or using lead or lead products, which is ineligible, under the terms of this Article, for full membership, is eligible for associate membership. Associate members shall have all the rights and privileges of other members except the right to vote.

as a substitute for the following:

Any individual, company, firm or corporation using lead products, or manufacturing lead products not otherwise specified in this Article, is eligible for associate membership.

Associate members shall have all the rights and privileges of other members except the right to vote.

5238 Motion carried.

The Chairman stated that an invitation had been received from Mr. Cleveland Dodge, to meet with the copper labor committee at the offices of the Phelps Dodge Corporation, on February 7, to confer on common code matters, an invitation extended also to the American Zinc Institute.

It was moved and seconded that a Committee be appointed to confer with the labor committee of the Copper Companies, with a view to presenting a united front on code labor matters.

Motion was lost.

The Secretary was requested to read the telegrams he had received from the Utah and Idaho mining companies, favoring proceeding with the adoption of the Lead Code without reference to the copper and zinc codes.

Without objection, and as a courtesy to the Copper Code Labor Committee, the Chairman appointed the Secretary as a representative of the Lead Industries Association, to explain the status of the Lead Code.

The new draft of the Code, dated February 6, was then read so far as all changes made from the previous draft of January 27 were concerned. All the changes made were approved by the Committee with Mr. McCarthy voting "No" on the changes in Article IV, Wages and Article VI, Code Authority, Section 6 (a), and Article XII, Modification, Section 2.

Mr. Steele did not vote.

In view of the common interest of copper, lead and zinc in the new Article XI "Application of the Code to Operations Wherein Other Metals are Produced", the Chairman appointed Messrs. Walker, McCarthy and the Secretary to confer with the copper interests, from whose proposed code the article had been lifted.

It was then regularly moved and seconded that the entire code, with the exception of Article XI, as represented by the draft of February 6, be approved.

Unanimously carried.

The National Recovery Administration, having requested a resolution from the Lead Industries Association, authorizing the presentation of its Code, the following resolution was presented and carried:

5239 Resolved That the submission to the National Recovery Administration of the Proposed Code of Fair Competition for the Lead Industries by the Secretary on August 1, 1933, as authorized in the Minutes of the Executive Committee Meeting in New York City on July 28, 1933, and the successive submission of revised drafts of said Code, dated November 25, 1933 and December 8, 1933 respectively, together with the submission of the draft of said Code dated December 13, 1933, for presentation at a public hearing, together with the post-hearing revised drafts of January 6 and February 6, 1934, be hereby approved and

Be It Further Resolved That the President, or Vice President, or the Secretary of this Association be and they are hereby authorized to treat with the Administration in the conduct of the negotiations with the National Recovery Administration and to finally approve the Code of Fair Competition for the Lead Industries, as written in draft of February 6, 1934.

Meeting adjourned at 5:00 P. M.

F. E. Wormser,
Secretary.

5240 Code "H" January 27, 1934.

Code of Fair Competition for the Lead Industries.

Article I.

Purposes.

To effectuate the policies of Title I of the National Industrial Recovery Act, this Code is submitted as a Code of Fair Competition for the Lead Industries and upon approval by the President, its provisions shall be the standards of fair competition for such Industry and shall be binding upon every member thereof.

Article II.

Definitions.

Wherever used in this code, or any supplement appertaining thereto, the terms enumerated in this Article shall have the meanings herein defined unless the context shall otherwise clearly indicate.

Section 1. The terms "President," "Act," and "Administrator" shall mean respectively the President of the

United States, the National Industrial Recovery Act, and the Administrator of Title I of said Act.

Section 2. The term "Member of Industry" includes all those engaged in the industry either as an employer or on his or its own behalf.

Section 3. The term "Employee" means and includes anyone engaged in the industry in any capacity receiving compensation for his services, irrespective of the nature or method of payment of such compensation, except a member of the industry.

Section 4. The term "Employer" means and includes anyone by whom any such employee is compensated or employed.

Section 5. The term "Apprentice" as used herein means an individual (usually a minor), bound by indenture executed in compliance with the laws of the State where the service provided for therein is to be performed to serve an employer for a term of years at a predetermined wage for the period of the indenture in order to learn a trade, art or profession.

Section 6: The term "Industry" as used herein includes the mining of lead ore and/or the concentrating thereof, the smelting of lead ore and/or lead concentrates and/or lead bearing scrap, the refining of lead and/or lead bearing scrap and/or drosses, the manufacturing of pig lead, antimonial pig lead, lead pigments, metallic antimony, metallic lead products, allied products defined hereinafter as "metallic lead products" and/or "Metallic foil products", and the original sale of such products by the member of industry producing or manufacturing the same either directly or indirectly through subsidiary and/or affiliated companies.

5241 (a) "Lead Ore and Lead Concentrates" as used herein is defined to mean ore and the concentrates thereof, containing lead as the principal commercially recoverable constituent.

(b) "Lead Mining", as used herein is defined to mean the mining and concentrating of lead ore and any further beneficiation thereto prior to the shipment to the smelter.

(c) "Lead Smelting and Refining" as used herein is defined to mean metallurgical and/or chemical treatment of lead ore, lead concentrates, lead bearing scrap, and/or drosses and/or any other lead bearing material into "Pig Lead", and/or "Antimonial Pig Lead."

(d) "Antimonial Pig Lead"—Inasmuch as antimony is a common constituent of most lead ores and a by-product of Lead Mining and Smelting and Refining—metallic antimony and antimonial alloy products (antimonial pig lead) shall be included within the provisions of this Code.

(e) "Lead Pigments" as used herein is defined to mean basic carbonate white lead (dry or in oil), basic lead sulphate (dry or in oil), litharge, red lead (dry or in oil), orange mineral or any other lead oxides, with or without metallic lead content.

(f) "Metallic Lead Products" as used herein is defined to mean extruded, rolled, cast or otherwise fabricated lead or lead alloy products (except storage battery plates and lead covered cable), kindred products of metallic tin and tin alloy or other metal or metal alloy products, which are produced by members of industry on the same type of machinery and under similar labor and fabricating conditions.

(g) "Metallic Foil Products" as used herein is defined to mean lead and/or tin and/or zinc or their alloys or combinations thereof rolled to a thickness of .006 of an inch or less, whether attached or affixed to other materials or not.

Section 7. The term "Division" as used herein includes respectively the several parts of the industry as enumerated below:

1. Lead mining division
2. Lead smelting and refining division
3. Lead pigments division
4. Metallic lead products division
5. Metallic foil products division

and such other and further divisions as may hereafter be created pursuant to the provisions of this Code.

Section 8. The term "Association" as used herein includes the "Lead Industries Association," an unincorporated membership society organized under the laws of the State of New York and having its principal office at 420 Lexington Avenue, New York City, and such other trade association as may hereafter participate in the activities under this code or in the selection of the code authority.

5242 Section 9. The term "Executive Committee" as used herein shall mean the Executive Committee of the Lead Industries Association.

Section 10. The term "Secretary" as used herein shall mean the Secretary of the Code Authority, who also shall be the Secretary of the Lead Industries Association.

Section 11. The term "Southern District" as used herein shall include the States of Texas, Mississippi, Alabama, Louisiana, and Florida.

Article III.

Hours of Labor.

Maximum Hours—Section 1.

Effective on and after the second Monday following the effective date of this Code, no employee shall be permitted to work in any division of the industry in excess of 40 hours in any one week or in excess of 8 hours in any 24 hour period except as herein otherwise provided.

Hours for Clerical and Office Employees—Section 2.

No person employed in clerical or office work shall be permitted to work in excess of 40 hours in any one week, except that during any one week in a one month period such employee shall be permitted to work a maximum of 48 hours in any such week. A normal day shall not exceed 8 hours.

Exceptions as to Hours—Section 3.

The limitation as to hours of labor as specified in Sections 1, 2 and 4 of this Article III shall not apply to the following:

(a) To employees engaged in emergency maintenance, or emergency repair work, involving breakdown or protection of life or property; provided that in such special cases not less than one and one-half times the normal wage rate for any employee so employed shall be paid for all hours worked in excess of 40 hours in any one week; provided that this overtime provision shall not apply in case of catastrophies involving loss of life. Such special cases, however, shall be reported to the Code Authority.

(b) Nor in the case of the Mining Division shall it apply to hoist men, power house men, or pump men, provided the total working hours of such employees shall not exceed 48 hours in any one week.

(c) Nor to outside sales or sales service men, nor to persons in a managerial, executive or supervisory capacity, who receive more than $35.00 per week.

(d) Watchmen, according to the nature of their responsibilities, may be permitted to work either 84 hours in any two-week period, or 48 hours in any one-week period, provided that such employees shall have at least one day's rest in each seven day period.

5243 (e) There may be a tolerance of 10% additional hours over the 40 hours in any one week for employees engaged in the preparation, care and maintenance of machinery and production facilities, stock and shipping clerks and truck men engaged in outside delivery and pick-up service; provided, however, that at least one and one half times the normal wage rate for any employee so employed shall be paid for all hours worked in excess of 40 hours in any one week.

(f) The limitation as to maximum hours of work shall not apply to very special cases where restriction of hours of labor of skilled workers in continuous processes would unavoidably reduce or interrupt production because of demands inherent and peculiar within the process itself, provided, however, that such employees in such special cases shall not work more than forty-eight (48) hours in any one week, and provided that in such special cases at least one and one half times the normal wage rate shall be paid to any employee so employed, for hours worked above 40 hours per week. Such special cases, however, shall be reported to the Code Authority. Such special cases do not apply where one employee is acting in temporary relief for a fellow employee in continuous processes.

(g) During any period in which a concentrated demand upon any division of the industry, except mining, shall place an unusual and temporary burden for production work upon its facilities or to meet seasonal peak requirements or emergencies, an employee of any such division may be permitted to work not more than forty-eight (48) hours per week and not more than eight (8) hours in any one day in not more than eight (8) weeks in the first or last six (6) months of any calendar year.

Standard Week—Section 4.

No employee shall be permitted to work more than six days in any seven day period.

Employment by Several Employers—Section 5.

No employer shall knowingly permit any employee to work for any time which when totalled with that already performed with another employer or employers in this industry exceeds the maximum permitted herein.

Article IV.

Wages.

Minimum—Section 1.

The minimum wage for each division of this industry shall be as follows:

		Cents per Hour
1.	Lead mining division	40
2.	Lead smelting and refining division	35
3.	Lead pigments division	40
4.	Metallic lead products division	35
5.	Metallic foil products division	35

5244 provided that, as to the Smelting and Refining Division, in the Southern District, the minimum hourly rate shall be 30¢ per hour. Provided, however, that minimum wages in effect on July 1, 1933, which were above the minimum specified, shall in no case be reduced.

The minimum rates provided for hereinabove shall be considered as hiring rates applying to totally unskilled labor ~~or~~ common labor above ground in the Mining Division and totally unskilled labor or common labor in the other divisions of the industry. In the Mining Division, the minimum hiring rate for underground common labor shall be not less than 45¢ per hour. Other classes of labor shall be compensated at rates above such minimums.

Clerical and Office Employees—Section 2.

No accounting, clerical, office, sales, or service employees working on a weekly basis in any office shall be paid less than at the rate of $15.00 per week; provided, however, that office boys and girls and messengers shall be paid at a rate not less than 80% of the minimum hereinabove specified, and provided further that the number of such boys and girls and messengers so paid shall constitute not more than 5% of the total number of such employees ~~of any one office of~~ any one employer, but in any case such employer shall be entitled to one ~~such employee.~~

Piecework Compensation-Minimum Wages—Section 3.

This article establishes a minimum rate of pay which shall apply, irrespective of whether an employee is actually compensated on a time rate, piecework, or other basis.

Female Employees—Section 4.

Female employees performing substantially the same work as male employees shall receive the same rate of pay as male employees.

Wages Above Minimum—Section 5.

If an equitable adjustment of wages above the minimum fixed in this Code has not been made since July 1, 1933, there shall then be an equitable adjustment made within 60 days from date of the approval of this Code. Such equitable adjustment shall mean that the differentials existing prior to the formulation of this Code shall be maintained for employees other than persons engaged in managerial, executive or supervisory capacity who receive more than $35.00 per week, provided, however, that in no event shall hourly rates of pay be reduced. If such equitable adjustment has not been made, the Code Authority shall submit for the approval of the Administrator a proposal for adjustment of wages above the minimum. Upon the approval by the Administrator, after such hearing as he may prescribe, such adjustments shall become effective.

5245 Handicapped Persons—Section 6.

A person whose earning capacity is limited because of age or physical or mental handicap may be employed on light work at a wage below the minimum established by this Code if the employer obtains from the State Authority designated by the United States Department of Labor a certificate authorizing his employment as such wages and for such hours as shall be stated in the certificate; such authority shall be guided by the instructions of the U. S. Department of Labor in issuing such certificates; each employer shall file with the Code Authority a list of all such persons employed by him.

Apprentices—Section 7.

The use of apprentices shall be permitted where they are apprenticed to an employer by an indenture made pursuant to the laws of the state in which such service is to be performed, under any apprentice system established and maintained by such employer, provided such indenture agreements are filed with the Code Authority. Employers shall not be allowed to have apprentices in number exceeding 5% of the total number of skilled craftsmen of their special class, except that each employer shall be entitled to employ at least one such employee and in no case shall they be paid less than the minimum wage provided in Section 1 of Article IV.

Payments—Section 8.

An employer shall make payment of all wages due in lawful currency or by negotiable check therefor, payable on demand. These wages shall be exempt from any payments for pensions, insurance or sick benefits other than those voluntarily paid by the wage earners or required by the State laws. Wages shall be paid at least semimonthly and salaries at least at the end of every month. No employer shall withhold wages.

Article V.

General Labor Provisions.

Child Labor—Section 1.

On and after the effective date, no person under 18 years of age shall be employed in the Lead Industry except in clerical, office, sale, service, technical and engineering department, and no person under 16 years of age shall be employed in any capacity.

Provisions From the Act—Section 2.

(a) Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpurpose of collective bargaining or other mutual aid or protection.

5246 (b) No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing, and

(c) Employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment approved or prescribed by the President.

Reclassification of Employees—Section 3.

No employer shall reclassify employees or duties of occupations performed or engage in any other subterfuge for the purpose of defeating the purposes or provisions of the Act or of this Code.

Standards for Safety and Health—Section 4.

Every employer shall make reasonable provision for the safety and health of his employees at the place and during the hours of their employment. Standards of safety and health for each division of the industry shall be submitted to the Administrator within six (6) months after approval of the Code.

State Laws—Section 5.

No provision in this Code shall ~~supersede any~~ State or Federal Law which imposes on employers more stringent requirements as to age of employees, wages, hours of work, or as to safety, health, sanitary or general working conditions, or insurance or fire protection, than are imposed by this Code.

Posting—Section 6.

All employers shall keep posted complete copies of this Code and all amendments thereto in conspicuous places accessible to employees.

Company Town and Stores—Section 7.

Employees other than maintenance or supervisory men, or those necessary to protect property, shall not be required as a condition of employment, to live in homes rented from the employer. No employee shall be required as a condition of employment, to trade at the store owned or specified by an employer.

Labor Agreements—Section 8.

Labor agreements now in force between members of the Industry and their employees shall be affected only by such provisions in this Code as may prescribe higher wages and shorter hours than are provided for in such agreements.

Dismissal for Complaint—Section 9.

No employee shall be dismissed by reason of making a complaint or giving evidence with respect to a violation of a code.

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Article VI.

Organization, Powers and Duties of the Code Authority.

Organization and Constitution—Section 1.

A Code Authority to administer this Code is hereby established and shall consist of the members of the Executive Committee of the Lead Industries Association, the Secretary of said Association, and such division chairmen who have respectively been elected to such office by such divisions in an equitable manner, approved by the Administrator, so as to be truly representative of such divisions respectively, and who are not members of the Executive Committee; in addition to membership as provided there may be one to three members, without vote and without expense to the industry, to be appointed by the Administrator to serve for terms of six or twelve months from the date of appointment. On the effective date of this Code the voting members of the Code Authority shall consist of eleven members but such number is subject to variation due to the contents of the foregoing provision. It is contemplated that supplementary codes of fair competition not inconsistent with this Basic Code will be adopted for each division of the industry. When and if such supplementary codes are submitted and approved they shall contain provisions for a sub-code authority selected in an equitable manner so as to be truly representative of such division of the industry subject to the approval of the Administrator, to administer the provisions of this Basic Code and the provisions of such supplementary code, and in addition this Basic Code Authority may delegate such of its powers and duties as it deems necessary to such division code authority of such supplementary code, provided, however, that any interested party shall have a right of appeal from any act or decision of such sub-code authority to the code authority of this Basic Code.

Section 2. Each trade or industrial association directly or indirectly participating in the selection or activities of the Code Authority shall (1) impose no inequitable restrictions on membership and (2) submit to the Administrator true copies of its Articles of Association, By-Laws, Regulations and any amendments when made thereto, together with such other information as to membership, organization and activities as the Administrator may deem necessary to effectuate the purposes of the Act.

Section 3. In order that the Code Authority shall at all times be truly representative of the industry and in other respects comply with the provisions of the Act, the Administrator may prescribe such hearings as he may deem proper; and thereafter if he shall find that any basic Code Authority or Sub-Code Authority is not truly representative or does not in other respects comply with the provisions of the Act, may require an appropriate modification in the method of selection of such Code Authority.

Section 4. Members of the Industry shall be entitled to participate in and share the benefits of the activities of the Code Authority and to participate in the selection of the members thereof by assenting to and complying with the requirements of this Code and sustaining their reasonable share of the expenses of its administration. Such reasonable share of the expenses of administration shall be determined by the Code Authority, subject to review by the Administrator, on the basis of volume of business and/or such other factors as may be deemed equitable.

5248 Section 5. Nothing contained in this Code shall constitute the members of the Code Authority partners for any purpose. Nor shall any member of the Code Authority be liable in any manner to anyone for any act of any other member, officer, agent or employee of the Code Authority. Nor shall any member of the Code Authority exercising reasonable diligence in the conduct of his duties hereunder, be liable to anyone for any action or omission to act under this Code, except for his own wilful misfeasance or non-feasance.

Powers and Duties—Section 6.

The Code Authority shall have the following further powers and duties, the exercise of which shall be reported to the Administrator and shall be subject to his right, on review, to disapprove or modify, after such hearing as he may prescribe, any action taken by the Code Authority. Subsequently if the Administrator shall determine that any action of a Code Authority or any agency thereof is unfair or unjust or contrary to the public interest, the Administrator may require that such action be suspended for a period of not to exceed thirty (30) days to afford an opportunity for investigation of the merits of such action and further consideration by such code authority or agency pending final action, which shall be taken only upon approval by the Administrator.

(a) To insure the execution of the provisions of this Code and to provide for the compliance of the industry with the provisions of the Act. To receive complaints of violations of this Code and disputes arising thereunder, except as otherwise hereinafter provided for in subdivision (h) of this section, make investigations thereof, provide hearings thereon, adjust such complaints and make such decisions as are necessary thereon and to interpret the provisions of the Code and to bring violations of this Code to the attention of the Administrator for prosecution, recommendation and other action.

(b) To adopt by-laws and rules and regulations for its procedure and for the administration and enforcement of the Code.

(c) To obtain from members of the industry such information and reports as are required for the administration of the Code and to provide for submission by members of such information and reports as the Administrator may deem necessary for the purposes recited in Section 3 (a) of the Act, which information and reports will be submitted by members to such administrative and/or government agencies as the Administrator may designate; provided that nothing in this Code shall relieve any member of the industry of any existing obligations to furnish reports to any Government agency. No individual reports submitted to the Administrator and/or such Government agencies as the Administrator may designate, shall be disclosed to any other member of the industry or any other party except to such Government agencies as may be directed by the Administrator.

(d) To use such trade associations and other agencies as it deems proper for the carrying out of any of its activities provided for herein, provided that nothing herein shall relieve the Code Authority of its duties or responsibilities under this Code and that such trade associations and agencies shall at all times be subject to and comply with the provisions hereof.

5249 (e) To make recommendations to the Administrator for the coordination of the administration of this Code with such other codes, if any, as may be related to the industry.

(f) To cooperate with the Administrator in regulating the use of any N. R. A. insignia solely by those members of the industry who have assented to, and are complying with, this Code.

(g) To call meetings of any division of the Lead Industries to consider control of production through voluntary agreement, and to recommend to the Administrator such measures as have been voluntarily agreed upon covering fair trade practices, industrial planning, and production control, including stabilization of employment and conservation of natural resources.

(h) Within ninety days after the effective date of this Code the Code Authority shall submit to the Administrator for his approval a plan for the establishment of a National Industrial Relations Board for the industry, consisting of an equal number of representatives of employers and employees. Provision shall be made in such plan for division of the country into districts and the creation of regional industrial relations board to comprise an equal number of representatives of employers and employees truly representative of such districts. The creation and functioning of these boards, including the selection of representatives of employees, shall be in accordance with Section 7 of the Act. Provision shall also be made for the appointment of an impartial person on each board, national and regional, to vote only where such board is unable to render a majority decision. This plan shall provide that the regional boards shall have the authority to hear and adjudicate all complaints and disputes arising out of Articles III, IV and V of the Code, and the National Industrial Relations Board shall pass on all appeals from the regional boards solely on the basis of the record as certified by the Regional Boards to the National Industrial Relations Board. Before any such plan is approved, it shall be submitted to the Labor Advisory Board of the National Recovery Administration for their consideration and recommendations. The Administrator shall have the right, after such notice and hearing as he may specify, to review, disapprove or modify such plan and the plan shall become effective as a part of this Code when and as approved by him.

Article VII.

General Trade Practice Provisions.

The Code Authority shall take all steps necessary to prevent any member of the industry engaging in any unfair trade practice; however, due to the nature of the industry, unfair trade practices have not constituted a problem in the past except as to certain divisions of the industry. Therefore, in Articles VII, IX and X hereof, there are established trade practice rules for the Lead Pigments Division, Metallic Lead Products Division and Metallic Foil Products Division respectively, and it is contemplated that trade practice rules applicable to the industry as a whole and separate rules for other divisions of the industry will later be established by amendment as hereinafter provided.

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Article VIII.

Trade Practice Rules for Lead Pigments Division.

Section 1. The following described acts shall be deemed unfair competition for Division 3 (Lead Pigments), and shall constitute a violation of this Code:

(a) Misbranding or misrepresentation of lead pigments.

(b) No member of the industry shall give, permit to be given, or directly offer to give, anything of value for the purpose of influencing or rewarding the action of any employee, agent, or representative of another in relation to the business of the employer of such employee, the principal of such agent or the represented party, without the knowledge of such employer, principal or party. This commercial bribery provision shall not be construed to prohibit free and general distribution of articles commonly used for advertising, except, so far as such articles are actually used for commercial bribery as herein above defined.

(c) Inducing or in any manner attempting to induce a breach, default or cancellation of a contract between a competitor and his customer during the term of such contract.

(d) Guaranteeing for a definite time the life and/or service of lead pigments.

(e) Making false or derogatory statements with respect to the prices, policies, products, practices, business or credit of any competitor.

(f) No merchandise shall be sold at a concession, or used as an inducement, to influence the sale of any lead products, nor shall any concession be given in the price or terms of sale of a lead product to influence the sale of any other merchandise.

Returned Goods—Section 2.

No member of the industry shall permit the return of merchandise without first giving consent for its return. On such goods as are accepted for return, a reasonable charge shall be made and freight charges must be prepaid by the shipper returning the merchandise, except in the case of defective products or where in some other way, the manufacturer may be responsible.

Price Schedules—Section 3.

Each member of the industry engaged in the manufacture and sale of lead pigments shall file with the Secretary within ten (10) days after the effective date of this Code, a list of the prices at which his products will be sold and a memorandum of any of his conditions of sale at variance with those set forth in Schedule "A" attached. Any change in prices or conditions of sale shall be reported to the Secretary in such manner as to reach his office
5251 within twenty-four (24) hours after the effective
date of such change. Any member making a sale or quotation, which does not conform to the bases he then has on file, shall notify the Secretary in detail by letter mailed within twenty-four (24) hours. The information supplied the Secretary shall be re-issued immediately to the reporting members.

Reports—Section 4.

Each member of the Lead Pigments Industry, as defined in Article II, shall submit promptly to the Secretary the following periodic reports for compilation and re-issuance in such manner as may be determined by the Division.

(a) Monthly reports of total production.

(b) Stocks on hand of finished merchandise at the beginning of each month.

(c) Monthly reports of total shipments.

Article IX.

Trade Practice Rules for Metallic Lead Products Division.

Section 1. The following described acts shall be deemed unfair competition for Division 4 (Metallic Lead Products), and shall constitute a violation of this Code.

(a) No member of the Industry shall give, permit to be given, or directly offer to give, anything of value for the purpose of influencing or rewarding the action of any employee, agent or representative of another in relation to the business of the employer of such employee, the principal of such agent or the represented party, without the knowledge of such employer, principal or party. This commercial bribery provision shall not be construed to prohibit free and general distribution of articles commonly used for advertising, except so far as such articles are actually used for commercial bribery as herein above defined.

(b) Giving excessive entertainment or making allowance for sales promotion and advertising in excess of actual amount expended.

(c) Misbranding or misrepresenting the percentage or quality of various metals in any products.

(d) Giving of secret rebates or refunds of any kind.

(e) Accepting orders guaranteed against a decline in price.

(f) Making false or derogatory statements with respect to competitors' prices, policies, products, practices, business or credit.

(g) Giving any other product at a concession in price or giving it away free, in order to influence the sale of any lead product.

(h) Changing prices after the award of a contract.

(i) Contracting for unspecified quantities at a fixed price or giving options at fixed prices for unspecified quantities.

5252 (j) Inducing or in any manner attempting to induce a breach, default or cancellation of a contract between a competitor and his customer during the term of such contract.

(k) Taking back obsolete or damaged material at any value other than its value as secondary material.

(l) To cancel any undelivered portion of a contract for the purpose of effectuating a new contract with the buyer.

Section 2. The following unfair trade practices apply to the Type Metal Business only:

(a) Attaching drum tags to competitors' dross drums without receiving authority to do so from the prospect or customer.

(b) Failing to return competitors' drums to their owner within a period not exceeding thirty days from time of their receipt.

Article X.

Trade Practice Rules for Metallic Foil Products Division.

Section 1. The following described acts shall be deemed unfair competition for Division 5 (Metallic Foil Products) and shall constitute a violation of this Code:

(a) No member of the Division shall publish untruthful advertising nor shall any member in any way misrepresent any goods or credit terms.

(b) No member of the Division shall knowingly withhold from or insert in any quotation or invoice any statement that makes it inaccurate in any particular.

(c) No member of the Division shall secretly offer to make any payment or allowance of a rebate, refund, commission, credit, unearned discount or excess allowance, whether in the form of money or otherwise.

Article XI.

Export Trade.

No provision of this Code relating to prices or terms of selling, shipping or marketing shall apply to export trade or sales or shipments for export trade.

Article XII.

Modification.

Section 1. This Code and all the provisions thereof are expressly made subject to the right of the President, in accordance with the provisions of sub-section (b) of Section 10 of the Act, from time to time to cancel or modify any order, approval, license, rule or regulation issued under said Act.

5253 Section 2. This Code, except as to provisions required by the Act, may be modified on the basis of experience or changes in circumstances, such modifications to be based upon application to the Administrator and such notice and hearing as he shall specify, and to become effective upon the approval of the Administrator.

Section 3. Additions or amendments to this Code, or supplemental Codes affecting or pertaining to the several divisions of the lead industries, may be proposed by any interested party and shall be referred to the Division affected or interested, which shall pass upon the said proposal in accordance with the rules established for said Division. Should the Division approve of the said proposed amendment or addition to the Code, it shall be then forwarded by the said Division to the Executive Committee of the Lead Industries Association, which shall give two weeks' notice to its members of a hearing. Thereafter, if the proposed addition or amendment is approved by the said Executive Committee by a vote of the entire Committee, with not more than one member dissenting or absent, the proposed addition or amendment shall be submitted to the Administrator and after such notice and hearing as the Administrator may prescribe and when approved by him, such additions or amendments shall become a part of this Code and have the same force and effect as any other provision of this Code. Nothing in this section shall be construed to prevent the right of any interested party to appeal directly to the Administrator for a modification of this Code.

Article XIII.

Monopolies.

No provision of this Code shall be so applied as to permit monopolies or monopolistic practices, or to eliminate, oppress, or discriminate against small enterprises.

Article XIV.

Effective Date.

This Code shall be in effect beginning ten (10) days after its approval by the Administrator.

5254 Schedule "A".

Article I. Standard Conditions for Sale of Lead Oxides.

A. "Sale" or "Order" as used herein includes any transaction whereby a member of the industry makes a quotation on, or becomes obligated to sell and deliver material.

B. Whatever terminology may be used, the intent and meaning thereof shall conform to the following requirements of sale.

(1) Material—Dry Oxides of lead, or mixtures consist-

ing principally thereof, each grade of material to be specifically designated.

(2) Quantity—Any amount as agreed between buyer and seller.

(3) Packages—As agreed between buyer and seller.

(4) Price—

(a) Seller's card or quoted price in effect on date order is received with allowances as follows:

(1) Not more than ½¢ per pound for minimum shipment of 5 tons for one buyer at one time to one destination.

(2) Not more than ¾¢ per pound for minimum shipment of 20 tons for one buyer to one destination by:

(A) Rail in one carload.

(B) Truck within a period of three days.

(b) These allowances may also be applied to emergency shipments of smaller quantities only when seller has an order on hand for five (5) tons or twenty (20) tons for immediate shipment, or such quantity en route to the same destination.

(c) No protection against decline in Seller's price may be given.

(d) Red Lead containing 97 per cent or 98 per cent Pb_3O_4 shall be so marked on the package and shall be sold at ⅛¢ and ⅜¢ per pound, respectively, over Seller's price for grades of lower Pb_3O_4 content.

(5) Delivery—F. O. B. cars Seller's shipping point, or by truck, F. O. B. Buyer's premises.

(6) Transportation Allowance—

(a) Since transportation is included in the Seller's price, the actual freight paid by Buyer shall be allowed as a deduction. No cartage allowance shall be made to Buyer for use of his own truck.

(b) If shipment is made by Buyer's boat, Seller may allow actual amount he would have paid for like transportation at minimum published tariffs in effect on date of shipment.

5255 (7) Shipment—Shall be made at least within thirty (30) days from date order is received.

(8) Terms—Net thirty days, less 1 per cent for cash in ten days from date of shipment.

(9) Taxes—Any tax or other charge imposed by Federal Law upon the production and/or sale and/or shipment of lead oxides shall be added to the price to be paid by the Buyer on any transaction to which such charge is applicable.

5256 Article II. Standard Conditions for Sale of Basic Lead Carbonate (Dry White Lead).

A. "Sale" or "Order" as used herein includes any transaction whereby a member of the industry makes a quotation on or becomes obligated to sell and deliver material.

B. Whatever terminology may be used, the intent and meaning thereof shall conform to the following requirements of sale.

(1) Quantity—Any amount as agreed between buyer and seller.

(2) Period—As desired, to be specified.

(3) Packages—As agreed between buyer and seller.

(4) Price—

(a) Spot Sales—Seller's card or quoted price in effect on date order is received.

(b) Contract Sales—

(1) Seller's price on date contract is made with protection against advance or decline on the undelivered portion to the end of the current calendar quarter.

(2) On contracts extending beyond the current calendar quarter, the price applying to subsequent deliveries shall be seller's price in effect on the first day of the calendar quarter in which they are made, with protection against advance or decline on the undelivered portion to the end of each quarter.

(c) The price for minimum 20 ton lots for one buyer to one destination, shipped by rail in one carload, or delivered by truck within a period of three days, shall be ¼¢ per pound less than that charged for smaller quantities.

(d) Emergency shipments may be made at the 20 ton price only to those customers for whom the Seller has a 20 ton order on hand for the same material for immediate shipment or a carload (20 tons) en route to the same destination.

(5) Delivery—F. O. B. cars Seller's shipping point, or by truck, F. O. B. Buyer's premises.

(6) Transportation Allowance—Since transportation is included in the Seller's price, the actual freight paid by the Buyer shall be allowed as deduction. No cartage allowance shall be made to Buyer for use of his own truck.

5257 (7) Shipment—

(a) Spot Sales—Within thirty days from date order is received.

(b) Contract Sales—Within the period covered by the contract.

(8) Terms—Net thirty days, less 1 per cent for cash in ten days from date of shipment.

(9) Taxes—Any tax or other charge imposed by Federal Law upon the production and/or sale and/or shipment of lead oxides shall be added to the price to be paid by the Buyer on any transaction to which such charge is applicable.

5258 Code "I" February 6, 1934.

Code of Fair Competition for the Lead Industries.

Article I.

Purposes.

To effectuate the policies of Title I of the National Industrial Recovery Act, this Code is established as a Code of Fair Competition for the Lead Industries and its provisions shall be the standards of fair competition for such Industry and shall be binding upon every member thereof.

Article II.

Definitions.

Wherever used in this code, or any supplement appertaining thereto, the terms enumerated in this Article shall have the meanings herein defined unless the context shall otherwise clearly indicate.

Section 1. The terms "President", "Act", and "Administrator" shall mean respectively the President of the United States, the National Industrial Recovery Act, and the Administrator of Title I of said Act.

Section 2. The term "Member of Industry" includes all those engaged in the industry either as an employer or on his or its own behalf.

Section 3. The term "Employee" means and includes any one engaged in the industry in any capacity receiving compensation for his services, irrespective of the nature or method of payment of such compensation except a member of the industry.

Section 4. The term "Employer" means and includes anyone by whom any such employee is compensated or employed.

Section 5. The term "Apprentice" as used herein means an individual (usually a minor), bound by indenture executed in compliance with the laws of the State where the service provided for therein is to be performed to serve an employer for a term of years at a predetermined wage for the period of the indenture in order to learn a trade, art or profession.

Section 6. The term "Industry" as used herein includes the mining of lead ore and/or the concentrating thereof, the smelting of lead ore and/or lead concentrates and/or lead bearing scrap, the refining of lead and/or lead bearing scrap and/or drosses, the manufacturing of pig lead, antimonial pig lead, lead pigments, metallic antimony, metallic lead products, allied products defined hereinafter as "metallic lead products" and/or "metallic foil products," and the original sale of such products by the member of industry producing or manufacturing the same either directly or indirectly through subsidiary and/or affiliated companies.

(a) "Lead Ore and Lead Concentrates" as used herein is defined to mean ore and the concentrates thereof, containing lead as the principal commercially recoverable constituent.

5259 (b) "Lead Mining", as used herein is defined to mean the mining and concentrating of lead ore and any further beneficiation thereto prior to the shipment to the smelter.

(c) "Lead Smelting and Refining" as used herein is defined to mean metallurgical and/or chemical treatment of lead ore, lead concentrates, lead bearing scrap, and/or drosses and/or any other lead bearing material into "Pig Lead", and/or "Antimonial Pig Lead."

(d) "Antimonial Pig Lead"—Inasmuch as antimony is a common constituent of most lead ores and a by-product of Lead Mining and Smelting and Refining—metallic antimony and antimonial alloy products (antimonial pig lead) shall be included within the provisions of this Code.

(e) "Lead Pigments" as used herein is defined to mean basic carbonate white lead (dry or in oil), basic lead sulphate (dry or in oil), litharge, red lead (dry or in oil), orange mineral or any other lead oxides, with or without metallic lead content.

(f) "Metallic Lead Products" as used herein is defined to mean extruded, rolled, cast or otherwise fabricated lead or lead alloy products, (except storage battery plates and lead covered cable) kindred products of metallic tin and tin alloy or other metal or metal alloy products, which are produced by members of industry on the same type of machinery and under similar labor and fabricating conditions.

(g) "Metallic Foil Products" as used herein is defined to mean lead and/or tin and/or zinc or their alloys or combinations thereof rolled to a thickness of .006 of an inch or less, whether attached or affixed to other materials or not.

Section 7. The term "Division" as used herein includes respectively the several parts of the industry as enumerated below:

1. Lead mining division.
2. Lead smelting and refining division.
3. Lead pigments division.
4. Metallic lead products division.
5. Metallic foil products division

and such other and further divisions as may hereafter be created pursuant to the provisions of this Code.

Section 8. The term "Association" as used herein includes the "Lead Industries Association", an unincorporated membership society organized under the laws of the State of New York and having its principal office at 420 Lexington Avenue, New York City, and such other trade associations as may hereafter participate in the activities under this code or in the selection of the code authority.

Section 9. The term "Executive Committee" as used herein shall mean the Executive Committee of the Lead Industries Association.

Section 10. The term "Secretary" as used herein shall mean the Secretary of the Code Authority, who also shall be the Secretary of the Lead Industries Association.

5260 Section 11. The term "Southern District" as used herein shall include the states of Texas, Mississippi, Alabama, Louisiana, and Florida.

Article III.

Hours of Labor.

Maximum Hours—Section 1.

Effective on and after the second Monday following the effective date of this Code, no employee shall be permitted to work in any division of the industry in excess of 40 hours in any one week or in excess of 8 hours in any 24 hour period except as herein otherwise provided.

Hours for Clerical and Office Employees—Section 2.

No person employed in clerical or office work shall be permitted to work in excess of 40 hours in any one week, except that during any one week in a one month period such employee shall be permitted to work a maximum of 48 hours in any such week. A normal day shall not exceed 8 hours.

Exceptions as to Hours—Section 3.

The limitation as to hours of labor as specified in Sections 1, 2 and 4 of this Article III shall not apply to the following:

(a) To employees engaged in emergency maintenance, or emergency repair work, involving breakdown or protection of life or property; provided that in such special cases not less than one and one-half times the normal wage rate for any employee so employed shall be paid for all hours worked in excess of 40 hours in any one week; provided that this overtime provision shall not apply in case of catastrophies involving loss of life. Such special cases, however, shall be reported to the Code Authority.

(b) Nor in the case of the Mining Division shall it apply to hoist men, power house men, or pump men, provided the total working hours of such employees shall not exceed 48 hours in any one week.

(c) Nor to outside sales or sales service men, nor to persons in a managerial, executive or supervisory capacity, who receive $35.00 per week or more.

(d) Watchmen, according to the nature of their responsibilities, may be permitted to work 56 hours in any one-week period, provided that such employees shall have at least one day's rest in each seven day period.

(e) There may be a tolerance of 10% additional hours over the 40 hours in any one week for employees engaged in the preparation, care and maintenance of machinery and production facilities, stock and shipping clerks and truck men engaged in outside delivery and pick-up service; provided, however, that at least one and one-half times the normal wage rate for any employee so employed shall be paid for all hours worked in excess of 40 hours in any one week.

5261 (f) The limitation as to maximum hours of work shall not apply to very special cases where restriction of hours of labor of skilled workers in continuous processes would unavoidably reduce or interrupt production because of demands inherent and peculiar within the process itself, provided, however, that such employees in such special cases shall not work more than forty-eight (48) hours in any one week, and provided that in such special cases at least one and one-half times the normal wage rate shall be paid to any employee so employed for hours worked above 40 hours per week. Such special cases, however, shall be reported to the Code Authority. The limitation of hours does not apply where one employee is acting in temporary relief for a fellow employee in continuous processes.

(g) During any period in which a concentrated demand upon any division of the industry, except mining, shall place an unusual and temporary burden for production work upon its facilities or to meet seasonal peak requirements or emergencies, an employee of any such division may be permitted to work not more than forty-eight (48) hours per week and not more than eight (8) hours in any one day in not more than six (6) weeks in six (6) months of any calendar year, provided that not less than time and one-half the normal rate shall be paid to any employee so employed for hours worked above forty (40) hours per week or eight (8) hours per day. All such overtime worked shall be reported to the Code Authority.

Standard Week—Section 4.

No employee shall be permitted to work more than six days in any seven day period.

Employment by Several Employers—Section 5.

No employer shall knowingly permit any employee to work for any time which when totalled with that already performed with another employer or employers in this industry exceeds the maximum permitted herein.

Article IV.

Wages.

Minimum—Section 1.

The minimum wage for each division of this industry shall be as follows:

	Cents per hour
1. Lead mining division	Surface—40 Underground—45
2. Lead smelting and refining division	35
3. Lead pigments division	40
4. Metallic lead products division	35
5. Metallic foil products division	35

provided that, as to the Smelting and Refining Division, in the Southern District, the minimum hourly rate shall be 30¢ per hour. Minimum wages in all divisions of the industry in effect on July 1, 1933, which were above the minimum specified, shall in no case be reduced.

5262 The minimum rates provided for hereinabove shall be considered as hiring rates applying to totally unskilled labor or common labor above ground in the Mining Division and totally unskilled labor or common labor in the other divisions of the industry. In the Mining Division, the minimum hiring rate for underground common labor shall be not less than 45¢ per hour. Other classes of labor shall be compensated at rates above such minimums.

Clerical and Office Employees—Section 2.

No accounting, clerical, office, sales, or service employees working on a weekly basis in any office shall be paid less than at the rate of $15.00 per week; provided, however, that office boys and girls and messengers shall be paid at a rate not less than 80% of the minimum hereinabove specified, and provided further that the number of such boys and girls and messengers so paid shall constitute not more than 5% of the total number of such employees of any one office of any one employer, but in any case each employer shall be entitled to one such employee.

Piecework Compensation—Minimum Wages—Section 3.

This article establishes a minimum rate of pay which shall apply, irrespective of whether an employee is actually compensated on a time rate, piecework, or other basis.

Female Employees—Section 4.

Female employees performing substantially the same work as male employees shall receive the same rate of pay as male employees.

Wages Above Minimum—Section 5.

If an equitable adjustment of wages above the minimum fixed in this Code has not been made since July 1, 1933, there shall then be an equitable adjustment made within 60 days from date of the approval of this Code. Such equitable adjustment shall mean that the differentials existing prior to the formulation of this Code shall be maintained for employees other than persons engaged in managerial, executive or supervisory capacity who receive $35.00 per week or more, provided, however, that in no event shall hourly rates of pay be reduced. If such equitable adjustment has not been made, the Code Authority shall submit for the approval of the Administrator a proposal for adjustment of wages above the minimum. Upon the approval by the Administrator, after such hearing as he may prescribe, such adjustments shall become effective.

Handicapped Persons—Section 6.

A person whose earning capacity is limited because of age or physical or mental handicap may be employed on light work at a wage below the minimum established by this Code if the employer obtains from the State Authority designated by the United States Department of Labor a certificate authorizing his employment at such wages and for such hours as shall be stated in the certificate; such authority shall be guided by the instructions of the U. S. Department of Labor in issuing such certificate; each employer shall file with the Code Authority a list of all such persons employed by him.

5263 Apprentices—Section 7.

The use of apprentices shall be permitted where they are apprenticed to an employer by an indenture made pursuant to the laws of the state in which such service is to be performed, under any apprentice system established and maintained by such employer, provided such indenture agreements are filed with the Code Authority. Employers shall not be allowed to have apprentices in number exceeding 5% of the total number of skilled craftsmen of their special class, except that each employer shall be entitled to employ at least one such employee and in no case shall they be paid less than the minimum wage provided in Section 1 of Article IV.

Payments—Section 8.

An employer shall make payment of all wages due in lawful currency or by negotiable check therefor, payable on demand. These wages shall be exempt from any payments for pensions, insurance or sick benefits other than those voluntarily paid by the wage earners or required by the State laws. Wages shall be paid at least semimonthly and salaries at least at the end of every month. No employer shall withhold wages.

Article V.

General Labor Provisions.

Child Labor—Section 1.

On and after the effective date, no person under 18 years of age shall be employed in the Lead Industry except in clerical, office, sale, service, technical and engineering departments, and no person under 16 years of age shall be employed in any capacity. In any State, an employer shall be deemed to have complied with this provision as to age of employees if he shall have on file a certificate or permit duly signed by the Authority in such State empowered to issue Employment or Age Certificates or permits showing that the employee is of the required age.

Provisions From the Act—Section 2.

(a) Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(b) No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing, and

(c) Employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment approved or prescribed by the President.

5264 Reclassification of Employees—Section 3.

No employer shall reclassify employees or duties of occupations performed or engage in any other subterfuge for the purpose of defeating the purposes or provisions of the Act or of this Code.

Standards for Safety and Health—Section 4.

Every employer shall make reasonable provision for the safety and health of his employees at the place and during the hours of their employment. Standards of safety and health for each division of the industry shall be submitted to the Administrator within six (6) months after approval of the Code.

State Laws—Section 5.

No provision in this Code shall supersede any State or Federal Law which imposes on employers more stringent requirements as to age of employees, wages, hours of work, or as to safety, health, sanitary or general working conditions, or insurance or fire protection, than are imposed by this Code.

Posting—Section 6.

All employers shall keep posted complete copies of this Code and all amendments thereto in conspicuous places accessible to employees.

Company Town and Stores—Section 7.

Employees other than maintenance or supervisory men, or those necessary to protect property, shall not be required as a condition of employment, to live in homes rented from the employer. No employee shall be required as a condition of employment, to trade at the store owned or specified by an employer.

Dismissal for Complaint—Section 8.

No employee shall be dismissed by reason of making a complaint or giving evidence with respect to a violation of a code.

Article VI.

Organization, Powers and Duties of the Code Authority.

Organization and Constitution—Section 1.

A Code Authority to administer this Code is hereby established and shall consist of the members of the Executive Committee of the Lead Industries Association, the Secretary of said Association, and such division chairmen who have respectively been elected to such office by such divisions in an equitable manner, approved by the Administrator, so as to be truly representative of such divisions respectively, and who are not members of the Executive Committee; in addition to membership as above provided there may be one to three members, without vote and without expense to the industry, to be appointed by 5265 the Administrator to serve for terms of six or twelve months from the date of appointment. On the effective date of this Code the voting members of the Code Authority shall consist of eleven members but such number if subject to variation due to the contents of the foregoing provision. It is contemplated that supplementary codes of fair competition not inconsistent with this Basic Code will be adopted for each division of the industry. When and if such supplementary codes are submitted and approved they shall contain provisions for a Divisional Code Authority selected in an equitable manner so as to be truly representative of such division of the industry subject to the approval of the Administrator, to administer the provisions of this Basic Code and the provisions of such supplementary code, and in addition this Basic Code authority may delegate such of its powers and duties as it deems necessary to such division code authority of such supplementary code, provided, however, that any interested party shall have a right of appeal from any act or decision of such Divisional Code Authority to the code authority of this Basic Code.

Section 2. Each trade or industrial association directly or indirectly participating in the selection or activities of the Code Authority shall (1) impose no inequitable restrictions on membership and (2) submit to the Administrator true copies of its Articles of Association, By-Laws, Regulations and any amendments when made thereto, together with such other information as to membership, organization and activities as the Administrator may deem necessary to effectuate the purpose of the Act.

Section 3. In order that the Code Authority shall at all times be truly representative of the industry and in other respects comply with the provisions of the Act, the Administrator may prescribe such hearings as he may deem proper; and thereafter if he shall find that any basic Code Authority or Divisional Code Authority is not truly representative or does not in other respects comply with the provisions of the Act, may require an appropriate modification in the method of selection of such Code Authority.

Section 4. Members of the Industry shall be entitled to participate in and share the benefits of the activities of the Code Authority and to participate in the selection of the members thereof by assenting to and complying with the requirements of this Code and sustaining their reasonable share of the expenses of its administration. Such reasonable share of the expenses of the administration shall be determined by the Code Authority, subject to review by the Administrator, on the basis of volume of business and/or such other factors as may be deemed equitable.

Section 5. Nothing contained in this Code shall constitute the members of the Code Authority partners for any purpose. Nor shall any member of the Code Authority be liable in any manner to anyone for any act of any other member, officer, agent or employee of the Code Authority. Nor shall any member of the Code Authority exercising reasonable diligence in the conduct of his duties hereunder, be liable to anyone for any action or omission to act under this Code, except for his own wilful misfeasance or non-feasance.

5266 Powers and Duties—Section 6.

The Code Authority shall have the following further powers and duties, the exercise of which shall be reported to the Administrator and shall be subject to his right, on review, to disapprove, after such hearing as he may prescribe, any action taken by the Code Authority. Subsequently if the Administrator shall determine that any action of a Code Authority or any agency thereof is unfair or unjust or contrary to the public interest, the Administrator may require that such action be suspended for a period of not to exceed thirty (30) days to afford an opportunity for investigation of the merits of such action and further consideration by such code authority or agency pending final action, which shall be taken only upon approval by the Administrator.

(a) Subject to such rules and regulations as may be issued by the Administrator to insure the execution of the provisions of this Code and provide for the compliance of the industry with the provisions of the Act; and receive complaints of violations of this Code and disputes arising thereunder, except as otherwise hereinafter provided for in subdivision (h) of this section, make investigations thereof, provide hearings thereon, adjust such complaints and make such decisions as are necessary thereon and to interpret the provisions of the Code and to bring violations of this Code to the attention to the Administrator for prosecution, recommendation and other action.

(b) To adopt by-laws and rules and regulations for its procedure and for the administration and enforcement of the Code.

(c) To obtain from members of the industry such information and reports as are required for the administration of the Code and to provide for submission by members of such information and reports as the Administrator may deem necessary for the purposes recited in Section 3(a) of the Act, which information and reports shall be submitted by members to such administrative and/or government agencies as the Administrator may designate; provided that nothing in this Code shall relieve any member of the industry of any existing obligations to furnish reports to any Government agency. No individual reports submitted to the Administrator and/or such Government agencies as the Administrator may designate, shall be disclosed to any other member of the industry or any other party except to such Government agencies as may be directed by the Administrator.

(d) To use such trade associations and other agencies as it deems proper for the carrying out of any of its activities provided for herein, provided that nothing herein shall relieve the Code Authority of its duties or responsibilities under this Code and that such trade associations and agencies shall at all times be subject to and comply with the provisions hereof.

(e) To make recommendations to the Administrator for the coordination of the administration of this Code with such other codes, if any, as may be related to the industry.

5267 (f) To cooperate with the Administrator in regulating the use of any N.R.A. insignia solely by those members of the industry who have assented to, and are complying with, this Code.

(g) To call meetings of any division of the Lead Industries to consider control of production through voluntary agreement, and to recommend to the Administrator such measures as have been voluntarily agreed upon covering fair trade practices, industrial planning, and production control, including stabilization of employment and conservation of natural resources.

(h) Within ninety days after the effective date of this Code the Code Authority shall submit to the Administrator for his approval a plan for the establishment of a National Industrial Relations Board for the industry, consisting of an equal number of representatives of employers and employees. Provision shall be made in such plan for division of the country into districts and the creation of regional industrial relations boards to comprise an equal number of representatives of employers and employees truly representative of such districts. The creation and functioning of these boards, including the selection of representatives of employees, shall be in accordance with Section 7 of the Act. Provision shall also be made for the appointment of an impartial person on each board, national and regional, to vote only where such board is unable to render a majority decision. This plan shall provide that the regional boards shall have the authority to hear and adjudicate all complaints and disputes arising out of Articles III, IV and V of the Code, and the National Industrial Relations Board shall pass on all appeals from the regional boards solely on the basis of the record as certified by the Regional Boards to the National Industrial Relations Board. Before any such plan is approved, it shall be submitted to the Labor Advisory Board of the National Recovery Administration for their consideration and recommendations. The Administrator shall have the right, after such notice and hearing as he may specify, to review, disapprove or modify such plan and the plan shall become effective as a part of this Code when and as approved by him.

Article VII.

Trade Practice Rules for Lead Pigments Division.

Section 1. The following described acts shall be deemed unfair competition for Division 3 (Lead Pigments), and shall constitute a violation of this Code:

(a) Misbranding or misrepresentation of lead pigments.

(b) No member of the industry shall give, permit to be given, or directly offer to give, anything of value for the purpose of influencing or rewarding the action of any employee, agent or representative of another in relation to the business of the employer of such employee, the principal of such agent or the represented party, without the knowledge of such employer, principal or party. This commercial bribery provision shall not be construed to prohibit free and general distribution of articles commonly used for advertising, except, so far as such articles are actually used for commercial bribery as hereinabove defined.

5268 (c) Inducing or in any manner attempting to induce a breach, default or cancellation of a contract between a competitor and his customer during the term of such contract.

(d) Guaranteeing for a definite time the life and/or service of lead pigments.

(e) Making false or derogatory statements with respect to the prices, policies, products, practices, business or credit of any competitor.

(f) No merchandise shall be sold at a concession, or used as an inducement, to influence the sale of any lead products, nor shall any concession be given in the price or terms of sale of a lead product to influence the sale of any other merchandise.

Section 2. Each member of the industry engaged in the manufacture and sale of lead pigments shall file with the Secretary within ten (10) days after the effective date of this Code, a list of the prices at which his products will be sold and a memorandum of any of his conditions of sale at variance with those set forth in Schedule "A" attached. Any change in prices or conditions of sale shall be reported to the Secretary in such manner as to reach his office within twenty-four (24) hours after the effective date of such change. Any member making a sale or quotation, which does not conform to the basis he then has on file, shall notify the Secretary in detail by letter mailed within twenty-four (24) hours. The information supplied the Secretary shall be re-issued immediately to the reporting members.

Section 3. Each member of the Lead Pigments Industry, as defined in Article II, shall submit promptly to the Secretary the following periodic reports for compilation and re-issuance in such manner as may be determined by the Division.

(a) Monthly reports of total production.

(b) Stocks on hand of finished merchandise at the beginning of each month.

(c) Monthly reports of total shipments.

Article VIII.

Trade Practice Rules for Metallic Lead Products Division.

Section 1. The following described acts shall be deemed unfair competition for Division 4 (Metallic Lead Products), and shall constitute a violation of this Code:

(a) No member of the Industry shall give, permit to be given, or directly offer to give, anything of value for the purpose of influencing or rewarding the action of any employee, agent or representative of another in relation to the business of the employer of such employee, the principal of such agent or the represented party, without the knowledge of such employer, principal or party. This commercial bribery provision shall not be construed to prohibit free and general distribution of articles commonly used for advertising, except so far as such articles are actually used for commercial bribery as hereinabove defined.

5269 (b) Making allowance for sales promotion and advertising in excess of actual amount expended, or making excessive expenditures on behalf of or for the benefit of a customer.

(c) Misbranding or misrepresenting the percentage or quality of various metals in any products.

(d) No member of the Division shall secretly offer or make any payment or allowance of a rebate, refund, commission, credit, unearned discount or excess allowance, whether in the form of money or otherwise.

(e) Accepting orders guaranteed against a decline in price.

(f) Making false or derogatory statements with respect to competitors' prices, policies, products, practices, business or credit.

(g) Giving any other product at a concession in price or giving it away free, in order to influence the sale of any lead product.

(h) Changing prices after the award of a contract.

(j) Inducing or in any manner attempting to induce a breach, default or cancellation of a contract between a competitor and his customer during the terms of such contract.

(i) Contracting for unspecified quantities at a fixed price or giving options at fixed prices for unspecified quantities.

(k) Taking back obsolete or damaged material at any value other than its value as secondary material.

(l) To cancel any undelivered portion of a contract for the purpose of effectuating a new contract with the buyer.

Section 2. The following unfair trade practices apply to the Type Metal Business only:

(a) Attaching drum tags to competitors' dross drums without receiving authority to do so from the prospect or customer.

(b) Failing to return competitor's drums to their owner within a period not exceeding thirty days from time of their receipt.

Article IX.

Trade Practice Rules for Metallic Foil Products Division.

Section 1. The following described acts shall be deemed unfair competition for Division 5 (Metallic Foil Products) and shall constitute a violation of this Code:

(a) No member of the Division shall publish untruthful advertising nor shall any member in any way misrepresent any goods or credit terms.

5270 (b) No member of the Division shall knowingly withhold from or insert in any quotation or invoice any statement that makes it inaccurate in any particular.

(c) No member of the Division shall secretly offer or make any payment or allowance of a rebate, refund, commission, credit, unearned discount or excess allowance, whether in the form of money or otherwise.

Article X.

Export Trade.

No provision of this Code relating to prices or terms of selling, shipping or marketing, shall apply to export trade or sales or shipments for export trade.

Article XI.

Application of Code to Operations Wherein Other Metals Are Produced.

Section 1. If any member of the industry is also a member of any other industry, provisions of this Code can apply only to that portion of its business which is a part of the lead industry.

Section 2. Where there is any question as to whether lead is the major production from the operations which do or which might produce lead, zinc, copper, gold, silver or other materials, then in any and every such event the question as to which Code of Fair Competition shall govern such operations of any such member of this industry, shall be referred to a Coordination Committee. This Coordination Committee shall be composed of two members to be appointed by each of the Code Authorities for such industries as may be involved in each particular question. In the event such Committee is unable to reach a majority conclusion, then either the Committee shall elect an additional impartial member or upon their failure so to agree on such additional impartial member, the Administrator then may appoint such additional impartial committee member. Any member of the industry, the operations of which may raise such a question, shall file a statement of fact with the Code Authority for its industry, and such statement shall contain a statement of its preference as to the Code it would prefer to have such operations be governed by, and such preference shall be granted unless such Coordination Committee shall find that the granting thereof would be unfair in view of the rights of others or that it would have a tendency contrary to the effectuation of the policies of the Act.

Section 3. Within ten (10) days after the effective date of this Code, any member of this industry may file such a statement of fact and preference as to being governed by any of such other Codes which may at that time be in effect. Thereafter upon any such other Code becoming effective, such statement may then be filed; provided, however, that until any such statement is filed and decision is made thereon by such Coordination Committee, such operation of such member of this industry shall be governed by the provisions of this Code.

5271 Section 4. From time to time thereafter if conditions change, members of this industry shall be entitled to file such statements of fact and preference as to change of a portion of their operations from the jurisdiction of one Code to the jurisdiction of another, and in such event they shall be handled in the same manner as provided for above.

Article XII.

Modification.

Section 1. This Code and all the provisions thereof are expressly made subject to the right of the President or delegated agent, in accordance with the provisions of subsection (b) of Section 10 of the Act, from time to time to cancel or modify any order, approval, license, rule or regulation issued under said Act, and specifically, but without limitation, to the right of the President to cancel or modify his approval of this Code, or any conditions imposed by him upon his approval hereof.

Section 2. Such of the provisions of this Code as are not required to be included therein by the Act may, with the approval of the Administrator, be modified or eliminated in such manner as may be indicated by the needs of the public, by changes in circumstances, or by experience; all the provisions of this Code, unless so modified or eliminated, shall remain in effect until June 16, 1935.

Section 3. An amendment to this Code or any codes supplemental thereto affecting or pertaining to the several divisions of the Lead Industries may be proposed by any interested party either to the Divisional Code Authority, the Basic Code Authority, or directly by or to the Administrator. All such proposed amendments shall be referred to the Division affected or interested and then shall be submitted by said Division to the Basic Code Authority who shall give members of the Industry an opportunity to be heard thereon, and thereafter the Code Authority may make such recommendations thereon as are deemed proper; provided, however, that when approved by the Administrator as necessary to effectuate the policies of the Act, after such notice and hearing as he may prescribe, any proposed amendment shall thereupon become effective as a part of this Code.

Article XIII.

Monopolies.

No provision of this Code shall be so applied as to permit monopolies or monopolistic practices, or to eliminate, oppress, or discriminate against small enterprises.

Article XIV.

Effective Date.

This Code shall be in effect beginning ten (10) days after its approval by the Administrator.

5272 ## Schedule "A."

Code of Fair Competition for the Lead Industries.

Article I—Standard Conditions for Sale of Lead Oxides.

A. "Sale" or "Order" as used herein includes any transaction whereby a member of the industry makes a quotation on, or becomes obligated to sell and deliver material.

B. Whatever terminology may be used, the intent and meaning thereof shall conform to the following requirements of sale:

(1) Material—Dry Oxides of lead, or mixtures consisting principally thereof, each grade of material to be specifically designated.

(2) Quantity—Any amount as agreed between buyer and seller.

(3) Packages—As agreed between buyer and seller.

(4) Price—

(a) Seller's card or quoted price in effect on date order is received with allowances as follows:

(1) Not more than ½¢ per pound for minimum shipment of 5 tons for one buyer at one time to one destination.

(2) Not more than ¾¢ per pound for minimum shipment of 20 tons for one buyer at one time to one destination by:

(a) Rail in one carload.

(b) Truck within a period of three days.

(b) These allowances may also be applied to emergency shipments of smaller quantities only when seller has an order on hand for five (5) tons or twenty (20) tons for immediate shipment, or such quantity enroute to the same destination.

(c) No protection against decline in Seller's price may be given.

(d) Red Lead containing 97 per cent or 98 per cent Pb_3O_4 shall be so marked on the package and shall be sold at not less than ⅛¢ and ⅜¢ per pound, respectively over Seller's price for grades of lower Pb_3O_4 content.

(5) Delivery—F.O.B. cars Seller's shipping point, or by truck, F.O.B. Buyer's premises.

(6) Transportation Allowance—

(a) Since transportation is included in the Seller's price, the actual freight paid by Buyer shall be allowed as a deduction. No cartage allowance shall be made to Buyer for use of his own truck.

(b) If shipment is made by Buyer's boat, Seller may allow actual amount he would have paid for like transportation at minimum published tariffs in effect on date of shipment.

5273 (7) Shipment—Shall be made at least within within thirty (30) days from date order is received.

(8) Terms—Net thirty days, less 1 per cent for cash in ten days from date of shipment.

(9) Taxes—Any tax or other charge imposed by Federal Law upon the production and/or sale and/or shipment of lead oxides shall be added to the price to be paid by the Buyer on any transaction to which such charge is applicable.

5274 Article II—Standard Conditions for Sale of Basic Lead Carbonate (Dry White Lead).

A. "Sale" or "Order" as used herein includes any transaction whereby a member of the industry makes a quotation on or becomes obligated to sell and deliver material.

B. Whatever terminology may be used, the intent and meaning thereof shall conform to the following requirements of sale:

(1) Quantity—Any amount as agreed between buyer and seller.

(2) Period—As desired, to be specified.

(3) Packages—As agreed between Buyer and Seller.

(4) Price—

(a) Spot Sales—Seller's card or quoted price in effect on date order is received.

(b) Contract Sales—

(1) Seller's price on date contract is made with protection against advance or decline on the undelivered portion to the end of the current calendar quarter.

(2) On contracts extending beyond the current calendar quarter, the price applying to subsequent deliveries shall be seller's price in effect on the first day of the calendar quarter in which they are made, with protection against

advance or decline on the undelivered portion to the end of each quarter.

(c) The price for minimum 20 ton lots for one buyer to one destination, shipped by rail in one carload, or delivered by truck within a period of three days, shall be not more than ¼¢ per pound less than that charged for smaller quantities.

(d) Emergency shipments may be made at the 20 ton price only to those customers for whom the Seller has a 20 ton order on hand for the same material for immediate shipment or a carload (20 tons) enroute to the same destination.

(5) Delivery—F.O.B. cars Seller's shipping point, or by truck, F.O.B. Buyer's premises.

(6) Transportation Allowance—Since transportation is included in the Seller's price, the actual freight paid by Buyer shall be allowed as deduction. No cartage allowance shall be made to Buyer for use of his own truck.

(7) Shipment—

(a) Spot Sales—Within thirty days from date order is received.

(b) Contract Sales—Within the period covered by the contract.

5275 (8) Terms—Net thirty days, less 1 per cent for cash in ten days from date of shipment.

(9) Taxes—Any tax or other charge imposed by Federal Law upon the production and/or sale and/or shipment of white lead shall be added to the price to be paid by the Buyer on any transaction to which such charge is applicable.

5318 RESPONDENT'S EXHIBIT NO. 92.

Executive Committee Meeting.

New York, N. Y. November 22, 1935.

A meeting of the Executive Committee of the Lead Industries Association was held on Friday, November 22, 1935, at 12:30 P. M., at the Down Town Association, New York City.

Present	Representing
Clinton H. Crane, Chairman	St. Joseph Lead Company
F. H. Brownell	American Smelting & Refining Co.
W. C. Beschorman	National Lead Company
F. M. Carter	National Lead Company
F. Y. Robertson	United States Smelting Refining & Mining Co. Inc.
Directors Present	
B. N. Zimmer	American Metal Co. Ltd.
Clarence Glass	Anaconda Sales Company
W. E. Maston	Eagle-Picher Lead Company
F. E. Wormser, Secretary.	

Mr. Clinton H. Crane occupied the chair.

The Chairman brought to the attention of the Committee a letter of November 7, 1935 from Mr. George L. Berry, giving details of a Washington conference scheduled for December 9, from which it appeared that the conference would be conducted in a manner different from that originally indicated by Mr. Berry's letter of October 9, and also that the machinery set up for conducting the conference was such as possibly to place the lead industry in a position whereby it might sponsor a movement to which it was opposed. Telegrams and letters from various members on the subject were read.

It also developed that the United States Copper Association had taken a strong stand in opposition to the conference and had declined the invitation to attend.

After discussion, it was regularly moved, seconded and unanimously carried that the following resolution be forwarded to Mr. Berry:

Whereas, the Lead Industries Association was invited, under date of October 9, 1935, to attend a conference in

Washington, called by Mr. George L. Berry, Coordinator for Industrial Cooperation, "for the purpose of conferring upon the advisability of developing a permanent structure contemplating the furtherance of prosperity and stability in our industrial life," and "for consideration of the best means of accelerating industrial recovery, eliminating unemployment and maintaining business and labor standards"; and

Whereas, the Lead Industries Association in reply declared itself as opposed to the aforesaid governmental conference at this time as tending to confuse and disturb industry, although indicating a willingness to send a representative if desired; and

5319 Whereas, Mr. Berry's letter of November 7, 1935, giving details of the conference, undisclosed by the invitation of October 9, from which it appears that the meeting will be so conducted that representatives of the Lead Industries Association might be held to have committed the industry and its members to a program adopted at the conference because of participation in it; and

Whereas, majority action upon matters placed before the conference might by implication bind an unwilling minority; and

Whereas, the Lead Industries Association basically represents a natural resource industry, producing diversified lead products from mine to finished material, with mining and smelting operations generally conducted in remote localities under operating conditions dissimilar to those usually found in other industries, and with problems peculiarly its own; and

Whereas, the lead industry has made greater progress out of the depression from the standpoint of both employer and employee since the termination of N. R. A. than it did before;

Now, Therefore, Be It Resolved, that it is undesirable for the lead industry as a unit to send a representative to the meeting called by Mr. George L. Berry, to be held in Washington on December 9, 1935.

The Chairman then called upon the Committee to consider the budget for 1936, and upon explanation of the Secretary, the following budget was presented and unanimously adopted:

Ordinary Budget 1936.

Furniture, Fixtures and Equipment	$ 500
Salaries	25,000
Rent and Light	2,650
Telephone and Telegraph	900
Books and Subscriptions	250
Printing	7,700
Mailing	6,000
Illustration	500
Traveling Expenses	1,500
Medical Research	2,000
Office Expense Miscellaneous	1,500
Technical Research	1,500
	$50,000

The Secretary stated that owing to the expected cash balance which the Lead Industries Association would have at the end of the year 1935, it would not be necessary to draw upon the membership for the full amount of the proposed budget but that $10,000.00 could be appropriated from the expected balance remaining on January 1, 1936 of about $20,000.00.

It was moved, seconded and carried that the Secretary's salary cut be restored, effective as of December 1, 1935.

5320 A letter from Mr. Manfred Bowditch, Director of the Division of Occupational Hygiene, Department of Labor and Industries, of the State of Massachusetts, dated November 20, 1935, referring to the use of lead for painting children's toys was inserted in the record as follows, and the Secretary was authorized to assist Mr. Bowditch in discouraging the use of white lead, or any lead paint in painting children's toys and furniture:

"You may recall our contact and exchange of correspondence in 1933 in connection with the clause relative to infant lead poisoning in the painting code of this department.

"We have recently run across a manufacturer of toys in greater Boston, who is using lead colors in painting the toys. We have pointed out to him the hazard involved, but are apparently unable to make much impression on him. Is the Lead Industries Association willing to take any sort of hand in such a situation? The statement embodied in the second paragraph of your letter to me of April 28, 1933, leads me to believe that it may be. I hope that some form of cooperation may be possible in this situation.

"I enclose for your information a recent statement relative to the work of this newly formed division, which you will note is advisory rather than of an enforcement nature."

The meeting adjourned at 2:00 P. M.

F. E. Wormser,
Secretary.

5698 RESPONDENT'S EXHIBIT NO. 127.

Minutes of the Meetings of the Code Authority for the Lead Industry.

5699A Code Authority Members.

Executive Committee.

Members	Alternates
Clinton H. Crane	1. I. H. Cornell
F. H. Brownell	2. A. Fletcher
F. M. Carter	3. C. M. Chapin, Jr.
F. Y. Robertson	4. E. V. Peters
James F. McCarthy	1. H. A. Guess
	2. R. W. Strauss
	3. H. Y. Walker
	4. H. M. Brush
	5. K. C. Brownell
	6. E. A. Behr
	1. W. C. Beschorman
	2. Harold Rowe
	1. C. A. Hight
	2. D. D. Muir
	3. F. S. Mulock
	4. F. F. Colcord
	1. D. A. Callahan
	2. S. A. Easton
	3. L. E. Hanley
	4. I. H. Cornell

Division Chairmen.

Mining Division.

George W. Lambourne
1. A. G. Mackenzie
2. P. H. Hunt

Smelting & Refining Division

John A. McCarthy*
1. Clarence Glass

Lead Pigments Division.

R. M. Roosevelt
1. W. E. Maston
2. J. R. MacGregor

Metallic Lead Products Division.

P. E. Sprague
1. E. L. Newhouse, Jr.

Metallic Foil Products Division.

W. Y. C. Hunt
1. R. G. McKay

W. A. Janssen, Deputy Administrator.
George W. Farny, Administration Member.
F. E. Wormser, Secretary and Treasurer.

* Died—Clarence Glass appointed with R. E. Dwyer & F. Laid alternates.

5699B First Meeting.

Code Authority Meeting.

June 7, 1934.

New York, N. Y.

A meeting of the Code Authority for the Lead Industry was held on Thursday, June 7, 1934, at 10:30 A. M., in the Board Room of the National Lead Company, 111 Broadway, New York, N. Y.

Present:

F. M. Carter, Clinton H. Crane, F. Y. Robertson, R. M. Roosevelt, P. E. Sprague, F. H. Brownell by H. M. Brush, James F. McCarthy by D. A. Callahan, W. Y. C. Hunt by R. G. McKay. Also: I. H. Cornell, F. S. Mulock, F. E. Wormser, Secretary.

Mr. Clinton H. Crane occupied the chair as temporary Chairman and Mr. F. E. Wormser acted as Secretary.

The Chairman read the following telegram from Deputy Administrator Walter A. Janssen, and the Secretary was ordered to make it a part of the minutes of this meeting:

"The plan of election and the selection of Members of the Code Authority for the Lead Industries, together with the minutes of the meetings meets with the approval of the Administrator."

The Chairman then requested from the Secretary certified copies of the Minutes of the meeting of members of the Lead Industries Association as of June 5, 1934, at which a representative Board of Directors was elected. He also requested certified copies of the Minutes of the Meeting of the Board of Directors of the Lead Industries Association held on June 5, 1934 at which an Executive Committee was elected. He also requested certified copies of the minutes of the Smelting and Refining, Lead Pigments, Metallic Lead Products and Metallic Foil Products Divisions' meetings held on June 5 and certified copies of the minutes of the Mining Division held on June 7, at which Chairmen were elected for each Division respectively. These appear as Exhibit A-1 to A-7 attached.

5700 The Chairman stated that, inasmuch as the Code of Fair Competition for the Lead Industry in Article VI, Section 1 provided for the composition of the Code Authority to consist of the Executive Committee of the Lead Industries Association and five Division Chairmen, the Code Authority nominees as detailed in the minutes of the Board of Directors of the Lead Industries Association, and in the minutes of the five divisions of the Lead Industries noted above, and approved by the Administrator would constitute the Code Authority for the Lead Industry, as follows:

Executive Committee: Clinton H. Crane, F. H. Brownell, F. M. Carter, F. Y. Robertson, James F. McCarthy.

Division Chairmen: G. W. Lambourne, Mining Division; John A. McCarthy, Smelting & Refining; R. M. Roosevelt, Lead Pigments Div.; P. E. Sprague, Metallic Lead Products; W. Y. C. Hunt, Metallic Foil Products.

F. E. Wormser, Secretary and Treasurer.

The Chairman next proposed that the Code Authority proceed to the election of officers, whereupon Mr. Clinton H. Crane was nominated as Chairman, F. H. Brownell and F. M. Carter as Vice Chairmen, respectively, and F. E. Wormser as Secretary and Treasurer.

There were no further nominations and the officers as nominated were elected without dissenting vote.

The Chairman stated that, in accordance with Article VI, Section 6 (b), it was one of the duties of the Code Authority, "To adopt By-Laws and rules and regulations for its procedure * * *" and requested the Secretary to distribute to Code Authority members a draft which had been prepared, with the aid of counsel, as suitable for the Code Authority. After detailed examination had been made of the draft submitted and numerous changes suggested,

It Was Regularly Moved, and seconded and carried that the By-Laws of the Code Authority for the Lead Industry, as shown in Exhibit B attached to these minutes be adopted and submitted to the Administrator for his approval.

The next order of business was the preparation of a budget to cover the Code Authority expenses during the ensuing twelve months. Several members of the Code Authority expressed the view that a budget large enough to insure adequate funds for the thorough administration of the Code should be provided for all of the numerous industries embraced by the Lead Code and

5701 It was regularly moved, seconded and carried that a Code Authority budget for the Lead Industry, as shown in Exhibit C attached to these minutes, in the total sum of $40,000, be submitted to the Administrator for his approval.

It was further resolved that the Code Authority select a man-shift basis for the basis of assessment to be used in obtaining code authority funds.

It was further resolved that Code Authority members be entitled to their actual transportation expenses in attending Code Authority meetings, plus a per diem allowance of $5.00 a day for subsistence while absent from the city in which their headquarters ar located.

Motion carried.

It was next moved and seconded that the Secretary apply to the National Recovery Administration for permission to distribute N. R. A. insignia to members of industry covered by the Code of Fair Competition for the Lead Industry.

Motion carried.

The Chairman called attention to the numerous investigations ordered by the Code, the first one being as outlined in Article III, Section 1 as follows:

"No employee shall be permitted to work in any division of the Industry in excess of forty (40) hours per week, or in excess of eight (8) hours in any twenty-four (24) hour period except as herein otherwise provided. A normal work day shall not exceed eight (8) hours.

"The interpretation of the eight (8) hour provision for the Mining Division in each state shall be in accordance with any laws of such state pertaining to the eight (8) hour day on mining operations.

"The Code Authority shall study the operation of the eight (8) hour provision for the Mining Division and not later than ninety (90) days from the effective date shall report fully to the Administrator the results of such study. The administrator may, at his discretion, appoint an impartial investigator who shall review the conditions in the Mining Division of the Industry concerning the op-
5702 eration of the eight (8) hour provision and shall report thereon to the Administrator not later than ninety (90) days from the effective date and forward a copy of such report to the Code Authority."

It was moved, seconded and carried that the Chairman refer the study of the operation of the eight-hour provision mentioned in the above extract from the Lead Code to the Chairman of the Mining Division, with authority to select his own committee for the purpose and to report the results of his investigation to the Code Authority.

Inasmuch as Article V, Section 4, requires the submission to the Administrator, by the Code Authority, of standards of safety and health for each Division,

It was regularly moved, seconded and carried that the Chairman be authorized to appoint Committees from the five Divisions to prepare a report under the provisions of Section 4 of Article V on Standards for Safety and Health.

With reference to the duties of the Code Authority under Article VI, Section 6 (h) requiring them to submit a plan for the establishment of the National Industrial Relations Board for the Industry, to the Administrator,

It was regularly moved, seconded and carried that the chair be authorized to call a special meeting of the Code Authority to consider this subject after the approval of the Administrator of the By-Laws of the Code Authority.

The Secretary noted the receipt of a telegram dated June 1 from O. N. Friendly of the Park Utah Consolidated Mines Company with reference to the labor provisions of the Lead Code and a letter from Mr. H. P. Henderson, President of the Texas Mining and Smelting Company on the inclusion of antimony, asking for exemptions from, exceptions to, or modification of the Lead Code.

It was moved that the Secretary be authorized to circularize these communications among the Code Authority for consideration at the next meeting.

It was further moved that the Secretary communicate with the American Mining Congress, asking them for information as to their knowledge of the Texas Mining and Smelting Company, and its operations.

Motions seconded and carried.

5708 The Chairman presented a lead sales allocation agreement, as per Exhibit D, attached hereto, which he had prepared under the provisions of Code Article VI, Section 6 (g) and stated that he desired to have the opinion of the consumer members of the Code Authority on this plan which was designed to stabilize the lead market and to carry out the purposes of Title I of the National Industrial Recovery Act.

The meeting thereupon adjourned.

Secretary.

5798 RESPONDENT'S EXHIBIT NO. 134.

Lead Pigments Division.

July 19, 1933.

New York, N. Y.

A meeting of the Lead Pigments Division of the Lead Industries Association was held at the Lawyers Club, New York City, on Wednesday, July 19, 1933, at 10:30 A. M. The following were present:

Present:	Representing:
F. M. Carter, Chairman	National Lead Company
F. O. Case	Anaconda Lead Products Company
A. E. Bendelari	Eagle-Picher Lead Company
R. M. Roosevelt	Eagle-Picher Lead Company
T. H. Zappert	Euston Lead Company
R. M. Evans	Evans Lead Company
W. Parmer Fuller, Jr.	W. P. Fuller & Company
Wm. Wilke, Jr.	Hammond Lead Products, Inc.
P. E. Sprague	Metals Refining Company
W. C. Beschorman	National Lead Company
E. J. Cornish	National Lead Company
H. J. Hain	Sherwin-Williams Company
A. P. Wetherill	Wetherill & Bro.
F. E. Wormser, Secretary.	

Mr. F. M. Carter occupied the chair.

The Chairman stated that the purpose of the meeting was to draft a Code of Fair Competition which would meet the requirements of the Lead Pigments Division of the Lead Industries Association and stated that the Secretary had prepared a Tentative Draft of a Code, purely with the idea of presenting something for the members as a basis to work upon.

The Tentative Draft was read paragraph by paragraph, changes being made wherever they represented the unanimous expression of those present, so that finally the Code appeared as attached copy.

It was regularly moved and seconded.

That forty-two hours of employment, as averaged over a 13 week period, be adopted by the Lead Pigments Division of the Lead Industries Association as the maximum hours of employment to appear in their Supplementary

Code, or in the Master Code opposite their Division, together with a minimum wage rate of 35¢ per hour for common labor.

Unanimously carried.

It was regularly moved and seconded.

That the basic code as presented herewith be adopted by the Lead Pigments Manufacturers of the Lead Industries Association and be referred to the Executive Committee for reconcilement with the codes of the other divisions.

5799 Motion carried.

It was further moved and seconded

That the action on the Supplementary Code, so far as it related to lead products, or any other subject other than labor or wages in the Lead Pigments Industries, be postponed pending the accumulation of data on the items properly to be included.

A recess was declared at 5:00 P. M., until 9:30 A. M. July 20, 1933.

F. M. Carter,
Chairman,
F. E. Wormser,
Secretary.

5800 Supplementary Code of Fair Competition for the Lead Pigments Division of the Lead Industries Association.

As provided in Art. XIII of the Code of Fair Competition for the Lead Industries hereinafter termed the "Master Code" this supplementary code is hereby made a part of said Master Code with the same force and effect as any provisions thereof, except that it shall be applicable only to the Lead Pigments Division of the Lead Industries as defined in Art. II of said Master Code; i.e., the manufacture of basic carbonate white lead, dry or in oil, basic lead sulphate, dry or in oil, litharge, red lead, dry or in oil, orange mineral and other lead oxides with or without metallic lead content.

Price Lists.

Art. I—Members of the Lead Pigments Division shall file with the Secretary their price lists together with terms and conditions of sale. Any change in the said lists and terms shall be reported promptly to the Secretary. Upon making a sale or quotation at variance with the previously reported price list or terms, each member shall notify the Secretary in writing promptly concerning the variation.

Uniform Sales Contracts.

Art. II—Uniform sales contracts specifically designed for use in selling Dry White Lead and Lead Oxides shall be developed as soon as practicable and thereafter used by all members after said contract forms shall have been adopted by a two-thirds vote of members manufacturing the products to which the contracts apply. From time to time changes in the uniform sales contracts can be made by a two-thirds vote of members manufacturing such products. All sales shall conform to the conditions set forth in the uniform contract forms.

Unfair Trade Practices.

Art. III—The following shall be considered unfair trade practices and are violations of this Code.

(a) Misbranding, mislabeling, and false advertising—Transactions known to the law as misbranding, mislabeling and false advertising are specifically prohibited by this Code, and, after the effective date, shall be punishable as a violation thereof in addition to any other penalties imposed by any other law.

(b) Guaranteeing Paint Jobs—Definite time guarantee on the life and/or service of the products of the Industry is hereby prohibited.

(c) Gifts to Employees of Another—It shall be a violation of this Code for any person engaged in the Industry to offer or give—or permit any representative of his to offer or give—any commission, gratuity, or other thing of substantial value to employees of his customers or prospective customers, except in the case of payments made with the consent of the employer for a definite service rendered.

(d) Exchange of Goods—No manufacturer shall exchange his goods for those of another.

5801 (e) Inducing Breach of Contracts—No manufacturer either directly or indirectly or through his salesmen, representatives, or agents, shall encourage any purchaser of the products of the Industry to disregard or fail to live up to his commitment to another member of the Industry.

(f) Disparagement of Competitors—The use of or participation in the publishing or the disseminating of any false statement, representation or insinuation which disparages the business of a competitor, or attacks the reputation, goods, prices, credit, service or advertising of any competitor or of any other industry, is an unfair and uneconomic practice and is prohibited.

(g) No product shall be sold at a concession in price in order to influence the sale of any lead product.

Returned Goods.

Art. IV—No merchandise shall be returned without first securing the consent of the manufacturer. On such goods as are accepted for return, a reasonable charge shall be made and freight must be prepaid by the shipper returning the merchandise, except in the case of defective products or where in some other way the manufacturer may be responsible.

Taxes.

Art. V—Any sales tax uniformly applicable upon all sellers shall be for buyer's account and shall be added to the selling price and paid by the buyer.

Production and New Capacity.

Art. VI—It is the consensus of opinion in the Lead Pigments Division of the Lead Industries Association that for the purpose of effectuating the policy of Title I of the National Industrial Recovery Act existing capacities for the production of lead pigments as defined in Art. II of the Master Code and reenumerated in the preamble hereof, should not be increased until such time as the fullest possible use of such existing facilities shall have proven inadequate to satisfy the demand for such pigments. Accordingly, unless and until this Supplementary Code shall have been so amended as to permit it, no present or prospective manufacturer of lead pigments shall construct or install any additional plant or equipment for such manufacture beyond that existing at the date of approval of this Supplementary Code by the President. The President may, however, at any time, suspend the operation of the provisions of this article.

Selling Below Cost and Dumping.

Art. VII—It is further the consensus of opinion in the Lead Pigments Division of the Lead Industries Association that the sale of the product of any manufacturer of lead pigments, as defined in Art. II of the Master Code and reenumerated in the preamble hereof, in competition with the product of other manufacturers of such pigments, at a price less than actual cost of production, such cost of production to include a fairly apportioned share of total general overhead, selling and administrative expense, is subversive to the best interests of the industry as a whole and of the purpose of Title I of the N. I. R. A. Accordingly, unless and until this Supplementary Code shall have been so amended as to permit it, no present or prospective manufacturer of lead pigments shall sell or offer for sale, in competition with the product of other manufacturers of such pigments, any part of his product at a price less than actual cost of production as hereinabove defined. The provisions of this Article shall apply
5802 to all persons whose manufacture of lead pigments
is incidental to the manufacture of other products not embraced within the Lead Industries, as well as to those primarily engaged in the manufacture and sale of lead pigments. The President may, however, at any time suspend the operation of the provisions of this Article.

5803 RESPONDENT'S EXHIBIT NO. 135.

Lead Pigments Division,
Dry Products Committee.

New York, N. Y. August 9, 1933

A meeting of the Dry Products Committee of the Lead Pigments Division of the Lead Industries Association was held at the Lawyers Club, New York, N. Y., on Wednesday, August 9, 1933 at 10:15 A.M. The following were present:

Present:	Representing:
Harold Rowe, Chairman	National Lead Company
J. R. MacGregor	Eagle-Picher Lead Company
W. E. Maston	Eagle-Picher Lead Company
P. E. Sprague	Euston Lead Company
T. H. Zappert	Euston Lead Company
F. M. Carter	National Lead Company
J. G. McNair	National Lead Company
S. B. Coolidge, Jr.	Sherwin-Williams Company
R. L. Ziegfeld, Assistant Secretary.	

Mr. Harold Rowe occupied the chair.

Dry White Lead.

The following paragraphs were tentatively adopted for inclusion in a Code of Fair Competition.

1. Contracts shall be made for a definite amount and to terminate at the end of each calendar quarter, with protection against decline on undelivered portions of contracts, to be billed at the expiration date; buyer to have the privilege of making spot purchases at the old price in the event of a price rise for an amount to be ordered and billed immediately on regular terms and shipped within 30 days from date of order.

2. No product shall be sold at a concession in price in order to influence the sale of any lead product.

3. Terms shall be 1% 10 days, net cash 30 days. Discount date may be extended to the 10th prox.

4. A list of consignment accounts shall be filed with the Secretary of the Lead Industries Association.

5. Off-grade dry white lead shall not be sold.

Nos 9, 11, 14, 15, 16, 17, 18, 19 and 20 as adopted for oxides and reported in the August 8 minutes shall also apply to dry white lead.

It was decided that differential contracts and sale of Grinders' Lead-In-Oil should be discussed at a later meeting when the names of differential customers would be submitted.

5804 The question of mixed cars carrying carload prices on small quantities was put over until it could be determined how this question would be treated by manufacturers of ZnO, lithopone, etc. It was felt that the practice should be eliminated.

Meeting adjourned at 2:30 P. M.

Harold Rowe,
Chairman,
Robert L. Ziegfeld,
Assistant. Secretary.

5805 RESPONDENT'S EXHIBIT NO. 136.

Dry Products Committee,

Lead Pigments Division.

New York, N. Y. September 6, 1933.

A meeting of the Dry Products Committee of the Lead Pigments Division of the Lead Industries Association was held at the Commodore Hotel, New York City, on Wednesday, September 6, 1933 at 5:30 P. M.

Present:	Representing:
Harold Rowe, Chairman	National Lead Co.
F. O. Case	Anaconda Lead Products Co.
J. R. MacGregor	Eagle-Picher Lead Co.
W. E. Maston	Eagle-Picher Lead Co.
F. W. Potts	Eagle-Picher Lead Co.
T. H. Zappert	Euston Lead Co.
P. E. Sprague	Metals Refining Co.
J. G. C. McNair	National Lead Co.
F. M. Carter	National Lead Co.
S. B. Coolidge, Jr.	Sherwin-Williams Co.
A. P. Wetherill	Wetherill & Bro.
F. E. Wormser, Secretary.	

Mr. Harold Rowe occupied the chair.

In order to facilitate matters, the Chairman suggested that the Committee study the unfair trade practices listed in the Paint Code and also those approved by the White Lead-In-Oil Committee so as to select the ones desirable to include in a Code of Fair Competition for the Dry Products Committee group.

It was agreed to adopt the provisions accepted by the White Lead-In-Oil Committee on September 6 as follows: Guaranteeing Paint Jobs; Misbranding, mislabeling and false advertising; Gifts to Employees of Another; Exchange of Goods; Inducing Breach of Contracts; Disparagement of Competitors; Returned Goods.

On motion duly made, seconded and carried, it was agreed to adopt the Price List paragraph accepted by the White Lead-In-Oil Committee on September 6 as follows:

The members of this group shall file with the Secretary their price lists together with terms and conditions of sale. Any change in the said lists and terms shall be reported promptly to the Secretary. Upon making a sale or quotation at variance with the previously reported price list or terms, each member shall notify the Secretary in writing promptly concerning the variation.

It was also agreed that the following interpretation should apply to the foregoing article on price lists:

5806 (1) On Dry White Lead differential contracts now in existence, the names only of customers, not the differentials, are to be reported to the Secretary. Any such contracts that may be made from this date forward are to be reported fully to the Secretary.

(2) Exceptions to the card prices are to be filed with the Secretary.

(3) New business would be reported immediately after the adoption of the above paragraphs.

It was also regularly moved, seconded and carried that the following paragraph on Sales Contracts be adopted for a Code of Fair Competition.

Uniform sales contracts specifically designed for use in selling Dry White Lead and Lead Oxides shall be developed as soon as practicable and thereafter used by all members after said contract forms shall have been adopted by a two-thirds vote of members manufacturing the products to which the contracts apply. From time to time changes in the uniform sales contracts may be made by a two-thirds vote of members manufacturing such products. All sales shall conform to the conditions set forth in the uniform sales contract forms.

Meeting adjourned at 8:00 P. M.

F. M. Carter,
Division Chairman.

Harold Rowe,
Committee Chairman,
F. E. Wormser,
Secretary.

5807 RESPONDENT'S EXHIBIT NO. 137.

Lead Oxide Committee,

Lead Pigments Division.

Chicago, Illinois. December 14 and 15, 1933.

A meeting of the Lead Oxide Committee of the Lead Pigments Division of the Lead Industries Association was held at the Stevens Hotel, Chicago, on December 14 and 15, 1933.

Present:	Representing:
Harold Rowe, Chairman	National Lead Co.
J. R. MacGregor	Eagle-Picher Lead Co.
E. H. Butzow	Hammond Lead Products, Inc.
Erwin Wilke	Hammond Lead Products, Inc.
Wm. Wilke	Hammond Lead Products, Inc.
P. E. Sprague	Metals Refining Co.
W. P. Carroll	National Lead Co.
S. B. Coolidge	Sherwin-Williams Company

F. E. Wormser, Secretary.

Mr. Harold Rowe occupied the chair.

After considerable discussion, it was agreed that ninety day contracts should be discontinued because it had become a general practice in the trade not to enforce delivery and on that account they were really only options to buy. It was decided that an outline for the sale of oxides on the basis of manufacturer's card price should be drawn up including certain conditions agreeable to all concerned. In this connection some of the points considered were:

(1) Additional price for red leads containing 95%, 97% and 98% Pb_3O_4.

(2) Protection against decline on orders for shipment within thirty days.

(3) Allowance for deliveries to one destination in 5-ton and in 20-ton lots.

It was the opinion of all present that the practice of selling oxides at a differential over pig lead had spread to such an extent that it had become one of the most serious abuses in the trade. It was voted to have presented at the next meeting a basis for sale at the card price and also one at differentials over lead, one of the conditions of the latter to be that spot sales shall be based on pig lead at the close of the market on the date they are made.

5808 Pending the adoption of our code, it was decided that no new commitments would be made:

(1) On card price beyond February 28, 1934.

(2) On differential basis beyond 60 days. (After January 1, 1934, the limit becomes February 28.)

....
Chairman,
F. E. Wormser,
Secretary.

5809 RESPONDENT'S EXHIBIT NO. 138.

Lead Oxide Committee,

Lead Pigments Division.

Chicago, Illinois. December 27-28, 1933.

A meeting of the Lead Oxide Committee of the Lead Pigments Division of the Lead Industries Association was held at the Stevens Hotel, Chicago, on December 27 and 28, 1933.

Present:	Representing:
Harold Rowe, Chairman	National Lead Company
R. M. Evans	Evans Lead Company
J. R. MacGregor	Eagle-Picher Lead Company
E. H. Butzow	Hammond Lead Products, Inc.
Wm. Wilke	Hammond Lead Products, Inc.
J. G. McGreevy	Metals Refining Company
P. E. Sprague	Metals Refining Company
W. P. Carroll	National Lead Company
S. B. Coolidge	Sherwin-Williams Company

Mr. Harold Rowe occupied the chair.

There was further discussion of the advisability of making quarterly contracts with small buyers. It was decided that these should be eliminated. The basis for sale at card price was submitted and approved in the form attached. Consideration was given to the question of establishing zones in the West and South where manufacturers would make a uniform addition of their base prices to compensate for the high freight rates. It was suggested that all members investigate this matter so that action might be taken at the next meeting.

Regarding the clause in the code covering filing of price schedules, etc., it was agreed that exceptions reported to the Secretary should include all details and that in re-issuing the information to members of the group he shall give only the names of the buyer and the seller.

A basis for sale at differentials over lead was agreed upon but it was felt that there was no need of filing it with the code because all buyers in that classification would be considered as exceptions.

Harold Rowe,
Chairman,
F. E. Wormser,
Secretary.

5810 Schedule "A." January 6, 1934.

Outline of Basis for Sale of Lead Oxides.

A. "Sale" or "Order" as used herein refers to any transaction whereby a member of the industry quotes on, or becomes obligated to sell and deliver material.

B. Whatever terminology may be used, the intent and meaning thereof shall conform to the following requirements of sale:

(1) Material—Dry oxides of lead, or mixtures consisting principally thereof, each grade of material to be specifically designated.

(2) Quantity—Any amount as agreed between buyer and seller.

(3) Packages—As agreed between buyer and seller.

(4) Price—Seller's card or quoted price in effect on date order is received with allowance as follows:

(a) ½¢ per pound for minimum shipment of 5 tons at one time to one destination.

(b) ¾¢ per pound for minimum shipment of 20 tons to one destination by

(1) Rail in one carload.

(2) Truck within a period of three days.

Protection against decline in Seller's price may be given on less than five ton deliveries only, and shall not extend beyond the date of shipment.

Red Lead containing 97 per cent or 98 per cent Pb_3O_4

shall be so marked on the package and shall be sold at ⅛¢ and ⅜¢ per pound, respectively, over Seller's price for grades of lower Pb_3O_4 content.

(5) Delivery—F.O.B. cars Seller's shipping point, or by truck, F.O.B. Buyer's premises.

(6) Transportation Allowance—The actual freight paid by Buyer. No cartage allowance shall be made to Buyer for use of his own truck.

If shipment is made by Buyer's boat, Seller may allow actual amount he would have paid for like transportation at published rates in effect on date of shipment except that such allowance shall not exceed 40¢ per 100 pounds.

(7) Shipment—Within thirty days from date order is received.

(8) Terms—Net thirty days, less 1 per cent for cash in ten days from date of invoice.

(9) Taxes—Any tax or other charge imposed by Federal law upon the production and/or sale and/or shipment of lead oxides shall be added to the price to be paid by the Buyer on any transaction to which such charge is applicable.

TABLE 3.—PRODUCTS, BY CLASS, QUANTITY, AND VALUE, FOR THE UNITED STATES: 1925 TO 1931—Continued

[See note at head of this table]

CLASS	1931	1929	1927	1925
Paints, varnishes, and related products—Con.				
Pigments (colors) made for sale—Con.				
Whiting:				
Pounds	152,324,924	202,207,936	221,137,263	236,483,656
Value	$1,088,751	$1,513,634	$1,669,874	$1,979,964
Other dry colors (including barytes):				
Pounds	160,202,686	211,161,362	201,677,719	157,051,386
Value	$10,651,656	$14,697,886	$13,348,441	$8,536,358
Pulp colors, sold moist:				
Pounds	10,463,690	15,612,502	14,407,341	16,191,512
Value	$1,028,515	$1,389,690	$1,301,858	$1,381,461
Paints, total value	$154,004,708	$232,000,991	$221,538,902	$218,719,633
In paste form:				
Total pounds	242,528,011	401,546,094	408,722,058	434,583,529
Total value	$26,190,760	$46,665,995	$49,553,502	$55,706,427
White lead in oil:				
Pounds	139,106,356	232,938,353	252,743,419	280,193,429
Value	$13,063,287	$24,891,319	$28,083,217	$32,048,906
Combination whites:				
Pounds	41,617,117	61,762,830	53,927,072	48,923,460
Value	$3,641,661	$5,660,990	$5,348,046	$4,772,169
Red lead in oil:				
Pounds	4,222,648	6,980,118	4,671,988	4,787,224
Value	$461,797	$905,146	$892,329	$639,172
Zinc oxide in oil:				
Pounds	2,582,567	4,450,208	6,175,082	7,083,414
Value	$301,192	$496,317	$783,155	$907,803
Colors in oil:				
Pounds	28,536,847	33,194,913	32,819,211	
Value	$4,674,255	$8,900,814	$6,442,477	
Colors in japan:				
Pounds	1,520,880	2,635,976	3,441,324	113,596,002
Value	$452,681	$1,012,843	$1,411,939	$17,338,377

CLASS	1931	1929	1927	1925
Pounds	4,222,648	6,980,118	4,671,988	4,787,224
Value	$461,797	$905,146	$892,329	$639,172
Zinc oxide in oil:				
Pounds	2,582,567	4,450,208	6,175,082	7,083,414
Value	$301,192	$496,317	$783,155	$907,803
Colors in oil:				
Pounds	28,536,847	33,194,913	32,819,211	
Value	$4,674,255	$8,900,814	$6,442,477	
Colors in japan:				
Pounds	1,520,880	2,635,976	3,441,324	113,596,002
Value	$452,681	$1,012,843	$1,411,939	$17,338,377

CLASS	1931	1929	1927	1925
Other paints in paste form:				
Pounds	29,641,587	59,583,696	54,944,012	
Value	$3,564,587	$7,108,588	$6,992,330	
Water paints and kalsomines, dry and in paste form:				
Pounds	122,828,417	155,810,548	122,455,836	110,618,207
Value	$5,286,219	$7,098,017	$6,321,003	$4,626,380
Plastic paints:				
Pounds	14,561,424	(3)	(3)	(3)
Value	$1,398,044			
Mixed, ready for use:				
Total gallons	78,249,055	106,165,398	94,070,895	87,639,481
Total value	$121,155,680	$175,241,979	$165,684,398	$158,376,846
Paints in oil:				
Gallons	37,709,502	53,054,219	53,108,399	(3)
Value	$52,522,576	$86,732,014	$97,769,426	
Undercoatings and primers:				
Gallons	6,764,541	12,089,640	7,196,418	
Value	$9,237,456	$17,315,189	$11,342,928	
Wall paints and mill whites, flat and gloss:				
Gallons	15,933,330	19,460,773	15,357,289	
Value	$24,361,397	$31,946,834	$26,525,797	
Other ready-mixed and semipaste paints:				
Gallons	17,841,673	21,650,766	18,408,789	
Value	$34,033,253	$32,247,942	$30,034,247	
Varnishes, japans, and lacquers (including enamels), total value	$126,290,753	$204,881,492	$178,281,107	$149,855,191
Oleoresinous varnishes:				
Gallons	27,074,107	39,943,289	38,389,282	39,418,014
Value	$39,870,415	$47,749,398	$62,628,196	$48,374,888
Spirit varnishes, not turpentine:				
Gallons	5,887,087	7,379,820	6,816,421	7,117,396
Value	$7,422,589	$12,324,989	$12,449,814	$12,281,769
Varnishes other than oleoresinous and spirit:				
Gallons	5,394,463	8,476,396	8,736,443	4,651,394
Value	$6,900,923	$10,612,279	$12,757,922	$6,972,398

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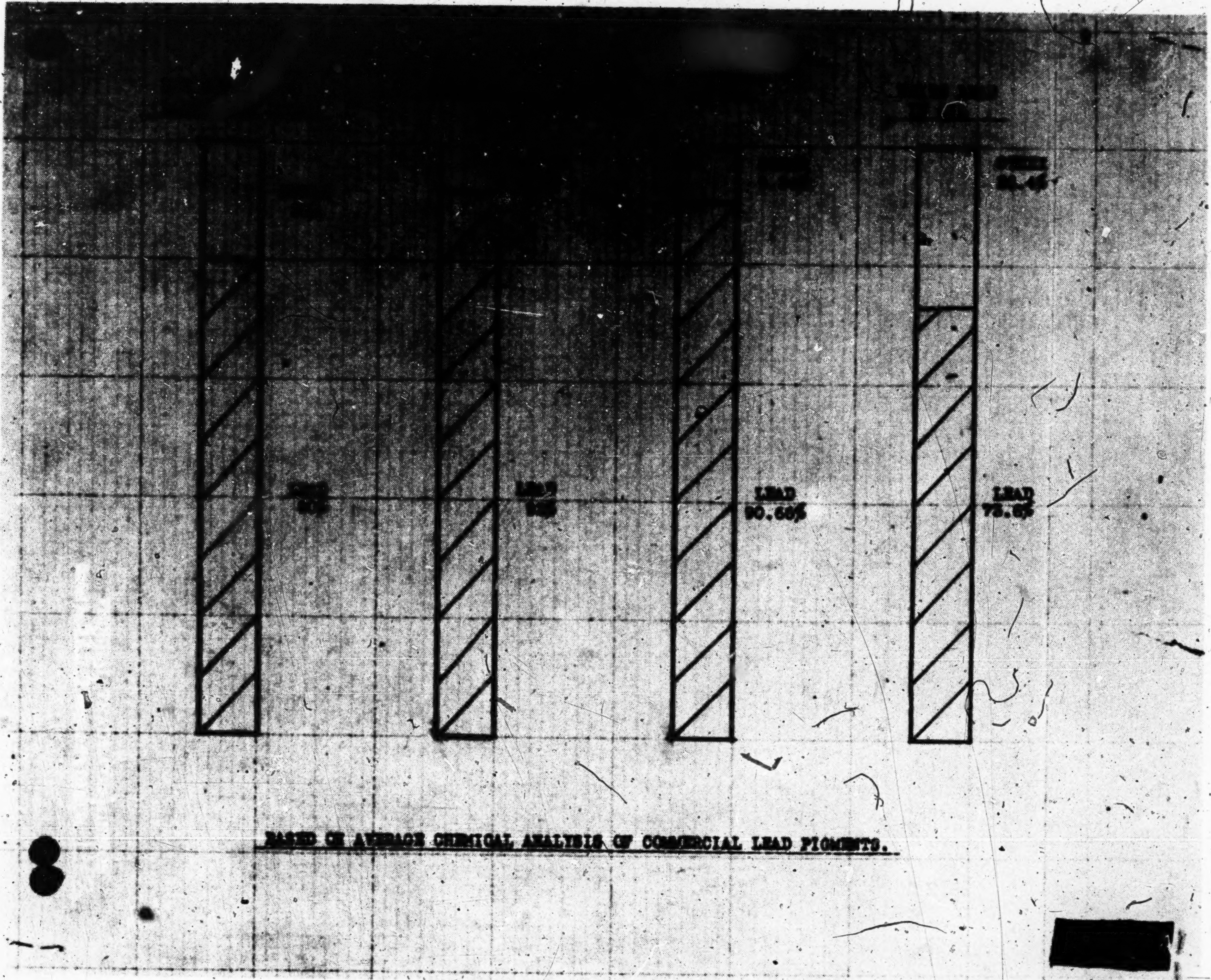
[3] Not reported separately.

FEDERAL TRADE COMMISSION
Docket No. 5253 Respondent's Exhibit No. 140
In the matter of Nat'l L
DATE 4/12 WITNESS
ELECTROREPORTER INC. OFFICIAL REPORTER
BY

Note:

Page 2947
is on card
46



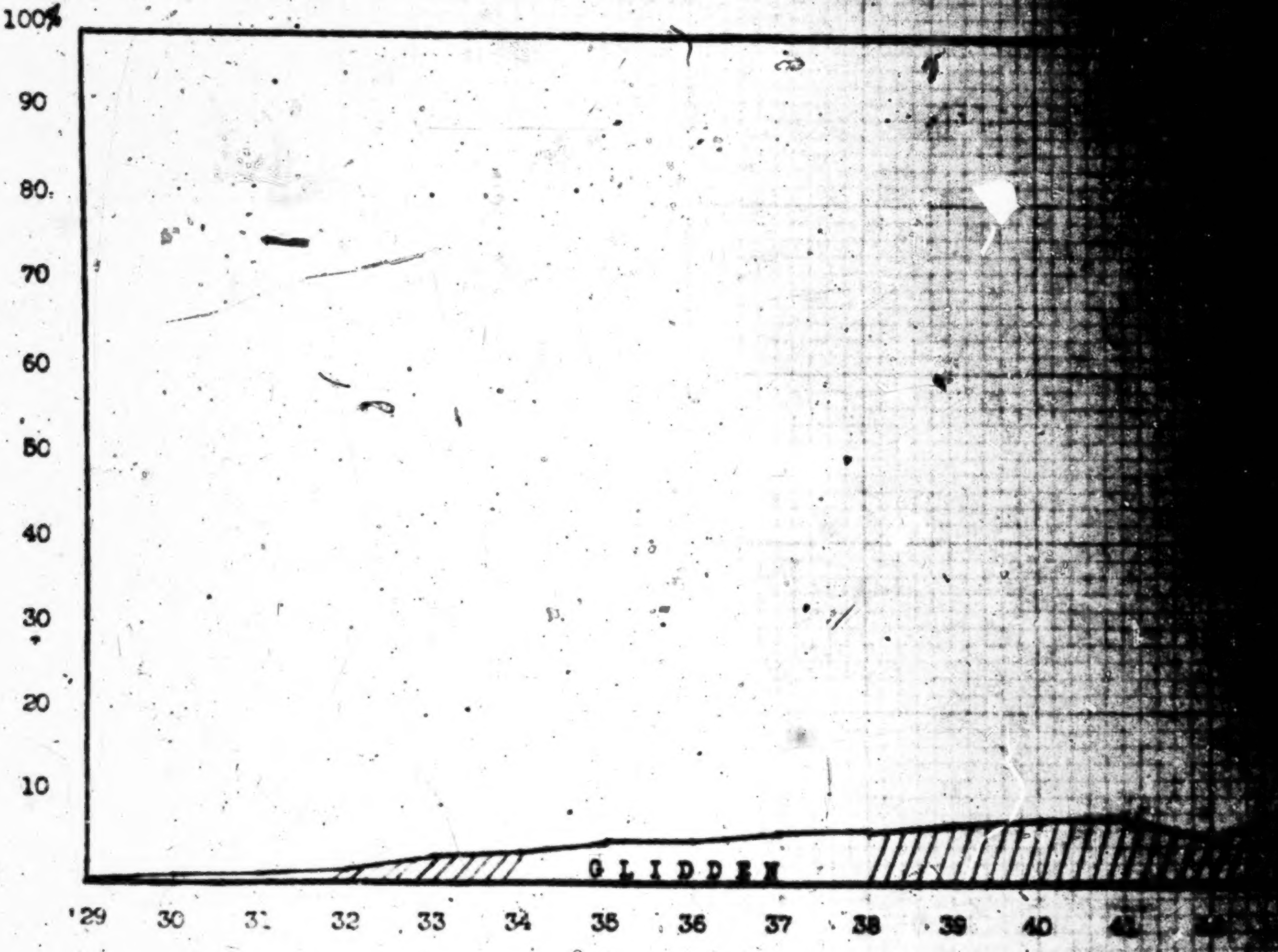
BASED ON AVERAGE CHEMICAL ANALYSIS OF COMMERCIAL LEAD PIGMENTS.

[redacted]

Respondent's Exhibit No. 142.

FEDERAL TRADE [illegible]
[illegible] 5253 Respondent's Exh. No. 144
In Re National Lead
5/13/47 Witness Sprague
[illegible] Reporter [illegible]
[illegible] Rehak [illegible]

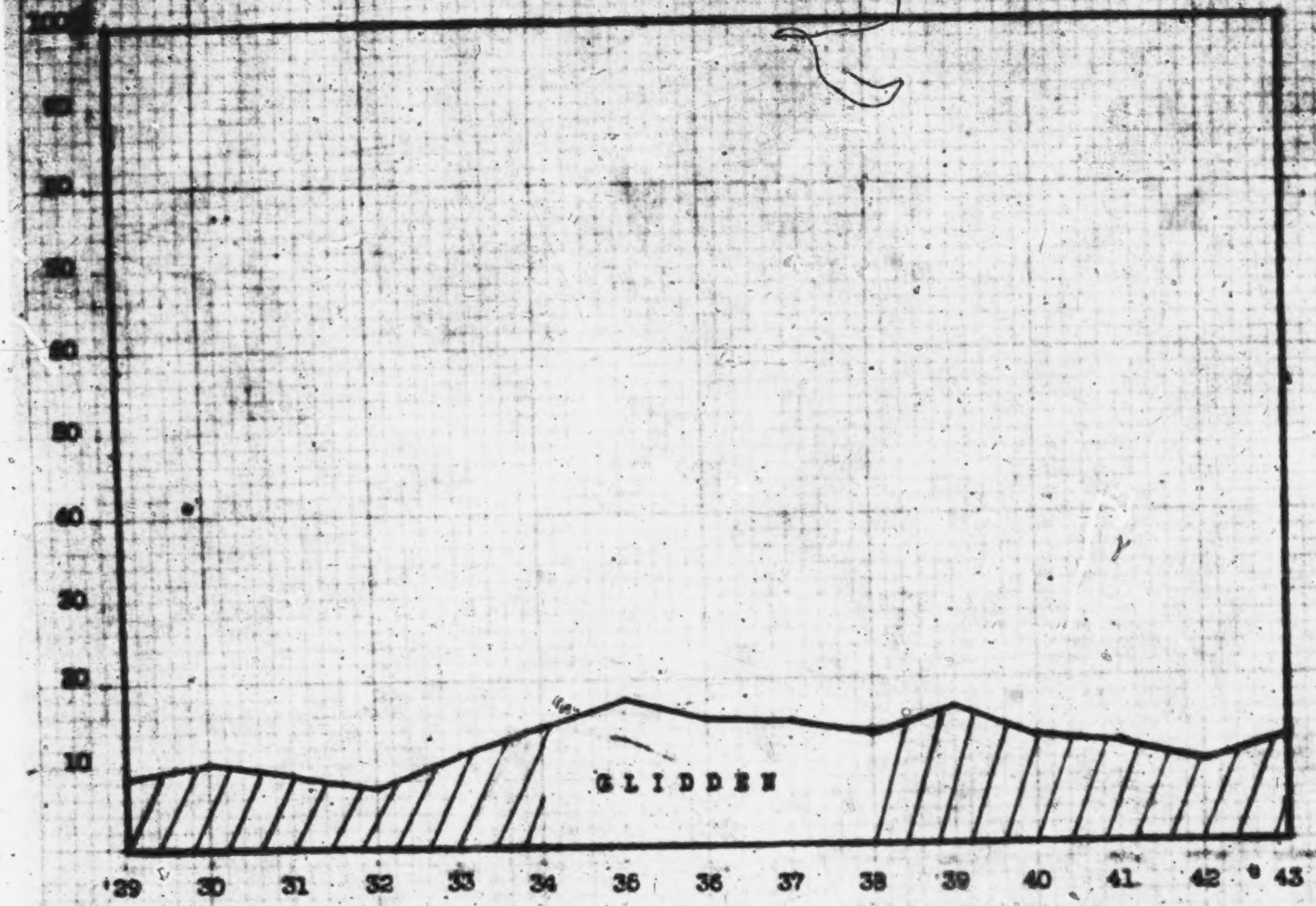
SALES OF WHITE LEAD IN OIL BY GLIDDEN IN RELATION [illegible]



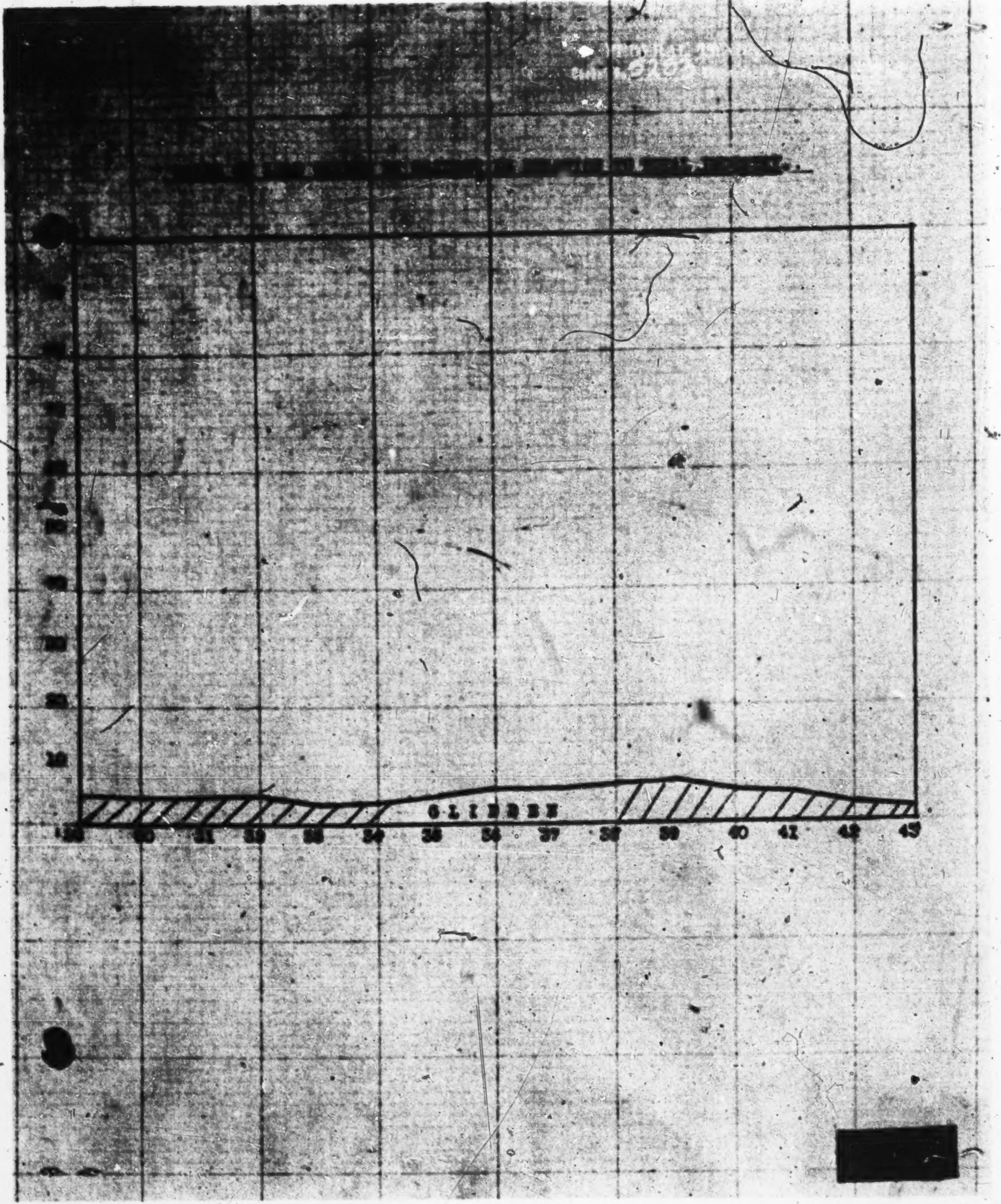
(5318)

FEDERAL TRADE COMMISSION

SALES OF DRY WHITE LEAD (BASIC CARBONATE) BY GLIDDEN IN RELATION TO TOTAL INDUSTRY



Respondent's Exhibit No. 146.



[redacted]

5821 RESPONDENT'S EXHIBIT NO. 148.

National Lead Company.

The following shows the differentials charged at all delivery and equalization points under the old system of selling white lead-in-oil, as compared to the differentials charged in supplying the same cities under our present zone system:

Delivery & Equalization Points	Differential Per Cwt. "Old System"	Differential Per Cwt. "Zone System"
Alabama		
Bessemer	$ .75	$ .375
Birmingham	.75	.375
Montgomery	.75	.375
Selma	.75	.375
Mobile	.25	.375
Arkansas		
Little Rock	.75	.375
Colorado		
Denver	.50	.50
Florida		
Jacksonville	.50	.375
Georgia		
Athens	.75	.375
Atlanta	.75	.375
Augusta	.75	.375
Columbus	.75	.375
Gainesville	.75	.375
Rome	.75	.375
Macon	.75	.375
Savannah	.50	.375
Iowa		
Burlington	.125	.125
Cedar Rapids	.125	.125
Clinton	.125	.125
Council Bluffs	.125	.125
Davenport	.125	.125
Des Moines	.125	.125
Dubuque	.125	.125
Fairfield	.125	.125

Delivery & Equalization Points	Differential Per Cwt. "Old System"	Differential Per Cwt. "Zone System"
Fort Dodge	.125	.125
Iowa City	.125	.125
Keokuk	.125	.125
Muscatine	.125	.125
McGregor	.125	.125
Oskaloosa	.125	.125
Ottumwa	.125	.125
Sioux City	.125	.125
Waterloo	.125	.125
Illinois		
Belleville	.125	Par
Bloomington	.125	Par
Cairo	.125	.125
Decatur	.125	Par
Galesburg	.125	Par
Moline	.125	.125
Peoria	.125	Par
Quincy	.125	Par
Rock Island	.125	.125
Springfield	.125	Par
Kansas		
Atchison	.125	.125
Leavenworth	.125	.125
Topeka	.25	.25
Hutchinson	.625	.25
Kansas City	.625	.125
Salina	.625	.25
Wichita	.625	.25
Kentucky		
Paducah	.125	.125
Louisiana		
New Orleans	.375	.375
Michigan		
Bay City	Par	Par
Detroit	Par	Par
Grand Rapids	Par	Par
Kalamazoo	Par	Par
Midland	Par	Par
Saginaw	Par	Par

Respondent's Exhibit No. 148.

Delivery & Equalization Points	Differential Per Cwt. "Old System"	Differential Per Cwt. "Zone System"
Escanaba	.125	Par
Ironwood	.125	Par
Menominee	.125	Par
Minnesota		
Duluth	.125	.125
Minneapolis	.125	.125
St. Paul	.125	.125
Winona	.125	.125
Missouri		
Hannibal	.125	.125
Kansas City	.125	.125
St. Joseph	.125	.125
St. Louis	Par	Par
Joplin	.375	.125
Springfield	.375	.125
Nebraska		
Lincoln	.125	.125
Omaha	.125	.125
North Carolina		
High Point	.50	.375
Charlotte	.50	.375
Greensboro	.50	.375
Winston-Salem	.50	.375
Fayetteville	.50	.375
Raleigh	.50	.375
Wilmington	.50	.375
Asheville	.875	.375
Oklahoma		
McAlester	.875	.50
Oklahoma City	.875	.50
Tulsa	.875	.50
South Carolina		
Charleston	.375	.375
Chester	.75	.375
Columbia	.75	.375
Union	.75	.375
South Dakota		
Aberdeen	.50	.25
Sioux Falls	.25	.25

Delivery & Equalization Points	Differential Per Cwt. "Old System"	Differential Per Cwt. "Zone System"
Texas		
Beaumont	$ .75	$ .75
Galveston	.75	.75
Houston	.75	.75
Amarillo	1.00	.75
Austin	1.00	.75
Cisco	1.00	.75
Corsicana	1.00	.75
Dallas	1.00	.75
Fort Worth	1.00	.75
Paris	1.00	.75
San Antonio	1.00	.75
Sherman	1.00	.75
Waco	1.00	.75
Wichita Falls	1.00	.75
El Paso	1.125	1.00
Virginia		
Charlottesville	.25	.125
Danville	.25	.125
Lynchberg	.25	.125
Norfolk	.25	.125
Newport News	.25	.125
Portsmouth	.25	.125
Petersberg	.25	.125
Roanoke	.25	.125
Richmond	.25	.125
Staunton	.25	.125
Winchester	.25	.125
Lexington	.25	.125
Suffolk	.25	.125
Bristol	.50	.25
Wisconsin		
Eau Claire	.125	.125
La Crosse	.125	.125
Superior	.125	.125
Wansan	.125	Par
* Average Differential Per Cwt. 123 Cities	.397	.254

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* In changing over to present zone system, differentials charged 71 of the 123 Cities listed were decreased, 51 were unchanged and 1 (Mobile, Alabama) was increased.

RESPONDENT'S EXHIBIT NO. 149.

National Lead Company.

The following is a comparison of the differentials charged under the old system of delivery and equalization points and under the present zone system in supplying white lead-in-oil to the 67 cities *covered by F. T. C. Sales Analysis:

Selected Cities Served	Differential Per Cwt. "Old System"	Differential Per Cwt. "Zone System"
Aberdeen, S. D.	$ .50	$ .25
Alexandria, Va.	.25	.125
Amarillo, Texas	1.00	.75
Atlanta, Ga.	.75	.375
Baltimore, Md.	Par	Par
Bismark, N. D.	.50	.25
Boston, Mass.	Par	Par
Bristol, Tenn.	.50	.25
Buffalo, N. Y.	Par	Par
Charleston, S. C.	.375	.375
Chicago, Ill.	Par	Par
Cincinnati, Ohio	Par	Par
Cleveland, Ohio	Par	Par
Council Bluffs, Ia.	.125	.125
Cour d'Alene, Ida.	*	*
Dallas, Texas	1.00	.75
Danville, Va.	.25	.125
Davenport, Ia.	.125	.125
Denver, Colo.	.50	.50
Detroit, Mich.	Par	Par
Des Moines, Ia.	.125	.125
Duluth, Minn.	.125	.125
El Paso, Texas	1.125	1.00
Fargo, N. D.	.50	.25
Fort Worth, Texas	1.00	.75
Houston, Texas	.75	.75
Indianapolis, Ind.	Par	Par
Jacksonville, Fla.	.50	.375
Kansas City, Mo.	.125	.125
Knoxville, Tenn.	.50	.25
Lincoln, Nebr.	.125	.125
Los Angeles, Cal.	*	*
Louisville, Ky.	Par	Par

Respondent's Exhibit No. 149.

Selected Cities Served	Differential Per Cwt. "Old System"	Differential Per Cwt. "Zone System"
Miami, Florida	.50	.375
Milwaukee, Wisc.	Par	Par
Minneapolis, Minn.	.125	.125
Nashville, Tenn.	.25	.25
New York, N. Y.	Par	Par
Ogden, Utah	*	*
Oklahoma City, Okla.	.875	.50
Omaha, Nebr.	.125	.125
Philadelphia, Pa.	Par	Par
Phoenix, Ariz.	*	*
Pittsburgh, Pa.	Par	Par
Portland, Ore.	*	*
Pueblo, Colo.	.50	.50
Raleigh, N. C.	.50	.375
Reno, Nevada	*	*
Richmond, Va.	.25	.125
Salt Lake City, Utah	*	*
San Francisco, Cal.	*	*
Santa Fe, N. M.	*	*
Seattle, Wash.	*	*
Sioux City, Ia.	.125	.125
Sioux Falls, S. D.	.25	.25
Spokane, Wash.	*	*
St. Louis, Mo.	Par	Par
St. Paul, Minn.	.125	.125
Tacoma, Wash.	*	*
Texarkana, Texas	1.00	.75
Union City, Tenn.	.25	.25
Walla Walla, Wash.	*	*
Washington, D. C.	Par	Par
Wheeling, W. Va.	Par	Par
Wichita, Kans.	.625	.25
Wichita Falls, Texas	1.00	.75
Yakima, Wash.	*	*
** Average Differential Per Cwt. 37 Cities	.466	.344

* Cities designated by asterisks are located in our Pacific Coast Branch and since there is no record to show whether or not the "old method" was followed in that Branch territory, no comparison was possible.

** Par and Pacific Coast Branch Cities not included.

RESPONDENT'S EXHIBIT NO. 150.

Branch	States	White Lead Tons	Paint Gals.
Boston	Maine	188	4,635
	New Hampshire	100	7,373
	Massachusetts	1,682	53,331
	Totals	1,970	65,339
	Report	2,016	65,018
St. Louis	Alabama	23.3	290
	Arkansas	140.0	4,558
	Colorado	83.9	570
	Florida	116.0	364
	Illinois	631.2	21,541
	Iowa	719.9	25,536
	Kansas	165.7	8,690
	Kentucky	15.4	823
	Louisiana	291.6	4,214
	Minnesota	361.0	20,933
	Mississippi	109.3	3,249
	Missouri	1,066.6	37,489
	Nebraska	238.3	6,873
	New Mexico	15.6	164
	North Dakota	12.0	175
	Oklahoma	75.0	5,759
	South Dakota	28.5	1,669
	Tennessee	172.8	406
	Texas	409.2	11,972
	Wisconsin	44.4	1,659
	Wyoming	21.0	158
	Totals	4,740.7	157,092
	Report	4,691	139,368

Branch	States	White Lead Tons	Paint Gals.
Atlantic	Connecticut	765.25	22,236
	Rhode Island	365.75	3,511
	Massachusetts	195.00	4,222
	New Jersey	2,082.25	40,373
	New York	3,221.00	71,670
	Pennsylvania	157.00	1,579
	Vermont	60.00	1,062
	Georgia	41.25	616
	Florida	69.25	48
	Totals	6,956.75	145,317
	Report	7,393	119,521
Pittsburgh	Maryland	11	200
	Ohio	295	12,213
	Pennsylvania	1,262	25,970
	West Virginia	56	2,120
	Totals	1,624	40,503
	Report	OK	38,354

5827

Branch	States	White Lead Tons	Paint Gals.
Philadelphia	Delaware	64.2	1,982
	Georgia	14.0	102
	Maryland	415.7	3,281
	New Jersey	363.1	4,489
	North Carolina	364.9	6,542
	Pennsylvania	1,543.0	34,190
	South Carolina	122.7	1,610
	Virginia	1,029.4	5,640
	Washington, D. C.	689.7	5,667
	Totals	4,606.7	63,503
	Report	4,613	63,461
Chicago	Michigan	855	38,159
	Illinois	2,285	96,203
	Indiana	104	7,797
	Wisconsin	866	15,217
	Totals	4,110	157,376
	Report	OK	OK

Branch	States	White Lead Tons	Paint Gals.
Cincinnati	Alabama	86	2,117
	Georgia	105	665
	Indiana	361	16,324¾
	Kentucky	172	4,195½
	North Carolina	48	1,768
	Ohio	627	24,823
	South Carolina	10	203
	Tennessee	132	1,728½
	Virginia	9	357
	W. Virginia	56	1,545
	Totals	1,606	53,726¾
	Report	872	53,278
Buffalo	New York	718	8,303
Cleveland	Ohio	1,679	29,638

% Company's 1942 Sales of White Lead-in-Oil by States and Branches, Except Pacific Coast.

Branches	States	% White Lead Sales
Atlantic	Connecticut	2.731
	Florida	.243
	Georgia	.147
	Massachusetts	.696
	New Jersey	7.433
	New York	11.499
	Pennsylvania	.561
	Rhode Island	1.305
	Vermont	.214
	Total Atlantic Branch	24.829
Boston	Maine	.671
	Massachusetts	6.004
	New Hampshire	.357
	Total Boston Branch	7.032

Branches	States	% White Lead Sales
Buffalo	New York	2.563
	Total Buffalo Branch	2.563
Chicago	Illinois	8.157
	Indiana	.370
	Michigan	3.052
	Wisconsin	3.091
	Total Chicago Branch	14.670
Cincinnati	Alabama	.307
	Georgia	.374
	Indiana	1.290
	Kentucky	.614
	North Carolina	.171
	Ohio	2.238
	South Carolina	.035
	Tennessee	.472
	Virginia	.032
	West Virginia	.200
	Total Cincinnati Branch	5.733
Cleveland	Ohio	5.994
	Total Cleveland Branch	5.994
Philadelphia	Delaware	.229
	Georgia	.051
	Maryland	1.484
	New Jersey	1.296
	North Carolina	1.303
	Pennsylvania	5.588
	South Carolina	.438
	Virginia	3.675
	Washington, D. C.	2.462
	Total Philadelphia Branch	16,446

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Branches	States	% White Lead Sales
Pittsburgh	Maryland	.039
	Ohio	1.053
	Pennsylvania	4.505
	West Virginia	.199
	Total Pittsburgh Branch	5.796

Branches	States	% White Lead Sales
St. Louis	Alabama	.083
	Arkansas	.499
	Colorado	.299
	Florida	.417
	Illinois	2.253
	Iowa	2.570
	Kansas	.591
	Kentucky	.055
	Louisiana	1.041
	Minnesota	1.288
	Mississippi	.390
	Missouri	3.807
	Nebraska	.850
	New Mexico	.055
	North Dakota	.042
	Oklahoma	.267
	South Dakota	.101
	Tennessee	.616
	Texas	1.460
	Wisconsin	.159
	Wyoming	.074
	Total St. Louis Branch	16.917
	Total Nine Branches	99.980

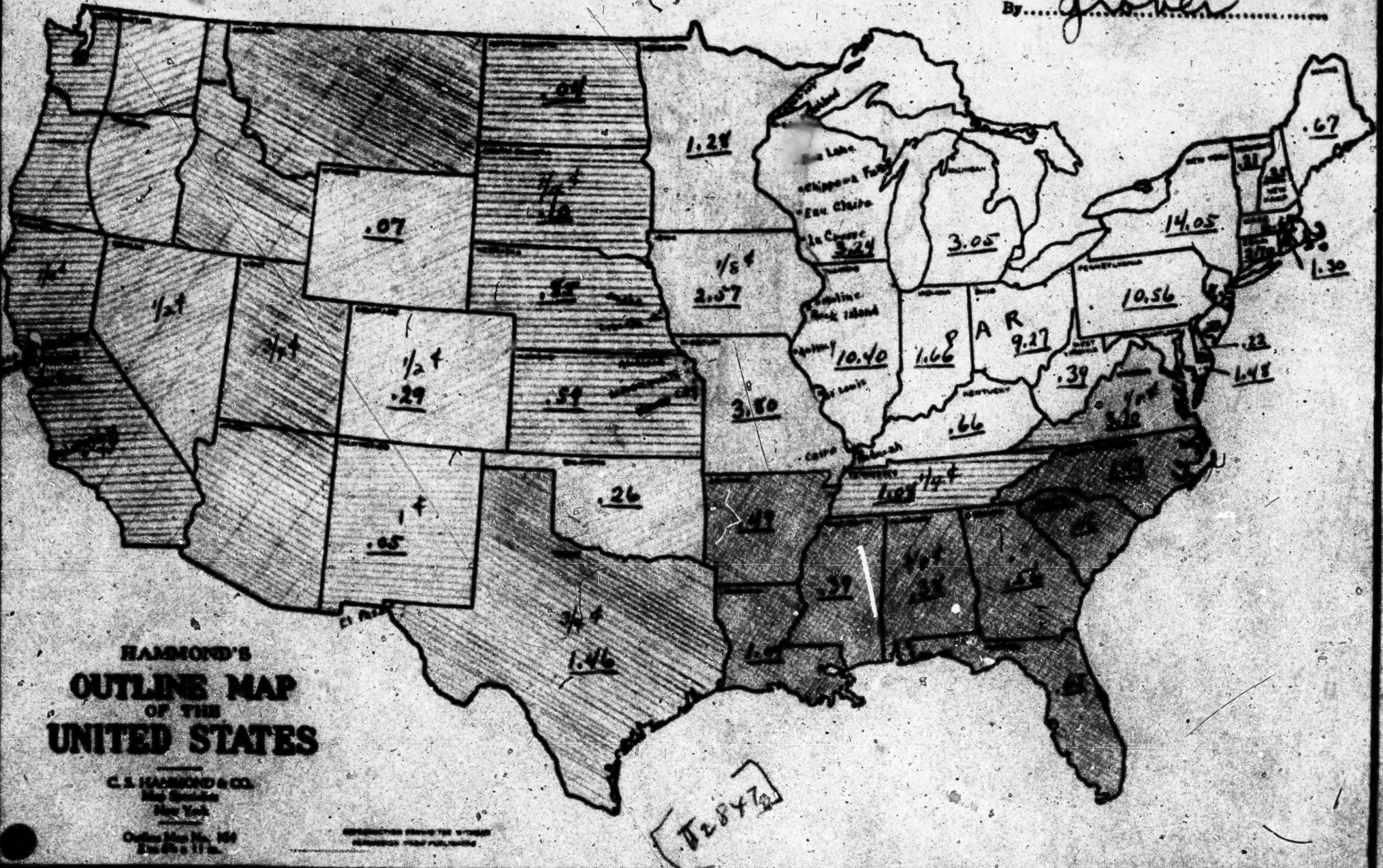
Resp 152-1d

ORIGINAL EXHIBIT
to be returned to
FEDERAL TRADE COMMISSION

2-14
5253-4

SEC. C
Space 1

FEDERAL TRADE COMMISSION
Docket No. 5253 Respondent's Exhibit No. 152
IN THE MATTER OF National Lead
DATE 6/10/47 WITNESS Tibbetts
ELECTREPORTER, INC. Official Reporter
By.....grover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.07
1/2¢
.10
1/2¢
1/8¢
2.57
.85
1/2¢
3/4¢
1/2¢
.29
.54
3.80
Bay Lake
Chippewa Falls
Eau Claire
La Crosse
3.24
3.05
14.05
.67
.31
1.30
10.56
Moline
Rock Island
Quincy
St Louis
10.40
1.66
A R
9.27
.39
.22
1.48
.66
1/2¢
3.10
Cairo
Paducah
1.09
1/4¢
1¢
.65
.26
.49
.39
1/2¢
.38
.53
3/4¢
1.46
El Paso
HAMMOND'S
OUTLINE MAP
OF THE
UNITED STATES
C. S. HAMMOND & CO.
Map Specialists
New York
Outline Map No. 101
Size 8½ x 11 in.

II 2847

Respondent's Exhibit No. 152.

RESPONDENT'S EXHIBIT NO. 153.

NATIONAL LEAD COMPANY

Branch Percentages of Company White Lead Paste Sales

Years 1920-1941

Years	Total Tons	Atlantic	Boston	Buffalo	Chicago	Cincinnati	Cleveland	J. T. Lewis	Pittsburgh	St. Louis	San Francisco
1920	78,002	21	4	2	31	4	3	11	4	13	7
1921	119,366	25	4	2	30	5	3	10	3	12	6
1922	123,450	26	4	2	29	4	3	10	3	12	7
1923	100,359	27	5	3	26	4	3	11	3	11	7
1924	109,218	28	5	2	27	5	3	11	3	10	6
1925	89,428	28	5	3	28	4	3	10	3	10	6
1926	87,233	29	5	2	28	4	3	11	3	10	5
1927	90,835	27	6	2	28	5	3	11	3	11	4
1928	85,071	29	6	2	17	6	4	12	4	15	5
1929	80,640	29	6	3	17	6	4	12	4	14	5
1930	55,314	28	7	2	18	5	4	11	5	15	5
1931	51,025	30	9	3	15	5	4	12	4	14	4
1932	37,179	31	9	3	14	5	4	12	4	14	4
1933	34,941	30	9	3	14	6	4	12	4	14	4
1934	39,774	28	8	2	13	6	5	15	5	14	4
1935	50,1[illegible]	25	8	3	15	6	5	14	5	15	4
1936	58,536	27	7	2	14	6	5	15	5	14	5
1937	42,672	22	8	2	14	6	5	14	6	17	6
1938	48,808	25	8	3	14	6	4	14	5	16	5
1939	46,183	25	8	2	13	6	5	14	5	16	6
1940	33,233	25	9	2	14	5	4	15	5	15	6
1941	36,857	27	8	2	13	5	5	15	5	14	6

Respondent's Exhibit No. 153.

5832

RESPONDENT'S EXHIBIT NO. 154.

NATIONAL LEAD COMPANY

Price Changes Per Cwt. in Dollars

Dates		Pig Lead	Paste White Lead	Paste Red Lead	Dry White Lead	Lead Sulphate	Dry Red Lead	Litharge
1920								
Dec.	22	4.75						
1921								
Jan.	7				8.00	7.25	9.25	8.75
Feb.	15	4.60						
"	18	4.50						
"	19	4.40						
"	24	4.20						
"	25	4.00						
Mar.	28	4.10						
"	31	4.25						
Apr.	26	4.35						
"	27						8.75	8.25
"	28	4.50						
May	4	4.75						
"	10	5.00						
June	6	4.75						
"	10	4.50						
"	22	4.40						
July	27		12.25	13.75	7.25	6.75	8.00	7.50
Sept.	2	4.50						
"	9	4.60						
"	20	4.65						
"	23	4.70						
1922								
Mar.	30	4.80						
Apr.	3	4.90						
"	7	5.00						
"	20	5.10			7.50	7.00	8.25	7.75
"	24	5.25						
"	25						8.50	8.00
May	16	5.35						
"	18	5.50					8.75	8.25
"	29	5.65						
"	31		12.50	14.00	7.75	7.25	9.00	8.50
June	7	5.75						
Aug.	21	5.90						
Sept.	14	6.00						
"	19	6.10						
"	21		12.75	14.25	8.00	7.50	9.50	9.00
"	22	6.25						
"	26	6.35						
Oct.	6	6.50					9.65	9.15
Nov.	1	6.75						
"	2	7.00	13.25	14.75				
"	3				8.50	8.00	10.15	9.65
"	24	7.10						
Dec.	19	7.25						
"	26		13.50	15.00	8.75	8.25	10.40	9.90

Respondent's Exhibit No. 154.

NATIONAL LEAD COMPANY

Price Changes Per Cwt. in Dollars

Dates	Pig Lead	Paste White Lead	Paste Red Lead	Dry White Lead	Lead Sulphate	Dry Red Lead	Litharge
1923							
Jan. 9	7.40						
" 10	7.50						
" 11		13.75	15.25	9.00	8.50	10.65	10.15
" 22	7.75						
" 23	8.00	14.25	15.75	9.50	9.00	11.15	10.65
Feb. 23	8.10						
Mar. 1	8.15						
" 2	8.25	14.50	16.00	9.75	9.25	11.40	10.90
Apr. 19	8.00						
" 28	7.75						
May 2	7.50						
" 9	7.25						
June 21	7.00						
" 28	6.85						
July 2	6.65			9.25	8.75	10.90	10.40
" 3	6.50						
" 5	6.35						
" 6	6.25						
" 9	6.10						
" 10	6.00						
" 23	6.25						
" 27	6.50						
Aug. 27	6.75						
Sept. 13	6.85						
Oct. 25	6.75						
Nov. 13	6.85						
Dec. 1	7.00						
" 5	7.25						
" 19	7.40						
" 29	7.50						
1924							
Jan. 2	7.75						
" 8		14.25	15.75	9.50	9.00	11.15	10.65
" 10	7.90						
" 18	8.00						
" 31		14.50	16.00	9.75	9.25	11.50	11.00
Feb. 1	8.15						
" 7	8.25						
" 14	8.40						
" 15	8.50						
" 21	8.70	14.75	16.25	10.00	9.50	11.75	11.25
" 27	8.90						
" 28	9.00	15.00	16.50	10.25	9.75	12.00	11.50
Apr. 3	8.75						
" 9	8.50						
" 11	8.25						
" 24	8.00						

Respondent's Exhibit No. 154.

NATIONAL LEAD COMPANY

Price Changes Per Cwt. in Dollars

Dates		Pig Lead	Paste White Lead	Paste Red Lead	Dry White Lead	Lead Sulphate	Dry Red Lead	Litharge
May	5	7.75						
"	7	7.50						
"	15	7.25						
"	22	7.00						
June	10						10.50	10.00
"	19		14.50	16.00	9.75	9.25		
July	23	7.25						
"	29	7.50						
Aug.	11	7.75						
"	12						11.00	10.50
"	20		14.75	16.25	10.00	9.50		
Oct.	20	8.25						
"	23	8.40	15.00	16.50	10.25	9.75	11.50	11.00
"	25	8.50						
"	27	8.65						
"	28		15.25	16.75	10.50	10.00	11.75	11.25
Dec.	8	8.75						
"	10	8.90						
"	11	9.00					12.25	11.75
"	15	9.25						
"	16		15.50	17.00	10.75	10.25	12.50	12.00
"	18	9.35						
"	19		15.75	17.25	11.00	10.80	12.75	12.25
"	23	9.50						
"	26	9.60						
1925								
Jan.	2	9.75						
"	5	10.00						
"	6		16.25	17.75	11.50	11.00	13.25	12.75
"	8	10.25						
"	12	10.50						
"	14		16.75	18.25	12.00	11.50	13.75	13.25
"	21	10.00						
"	30	9.75						
"	31		16.25	17.75	11.50	11.00	13.25	12.75
Feb.	13	9.50						
"	17	9.20						
Mar.	3	9.00	16.00	17.50	11.25	10.75	13.00	12.50
"	26	8.75						
"	31	8.50						
Apr.	7	8.25	15.75	17.25	10.75	10.25	11.75	11.25
"	16	8.00						
"	18	7.85						
"	21	7.75						
May	14	7.90						
"	19	8.00						
"	22	8.15						
"	25	8.25						
"	28	8.40						

NATIONAL LEAD COMPANY

Price Changes Per Cwt. in Dollars

Dates		Pig Lead	Paste White Lead	Paste Red Lead	Dry White Lead	Lead Sulphate	Dry Red Lead	Litharge
June	18	8.30						
"	24	8.20						
"	26		15.25	16.75	10.25	9.50	11.50	11.00
"	29	8.10						
"	30	8.00						
July	20	8.10						
"	21	8.20						
"	30	8.30						
Aug.	3	8.50						
"	5	8.75						
"	8	8.90						
"	11	9.00						
"	13	9.15						
"	14	9.25						
"	17				10.75	10.00	12.00	11.50
"	19	9.40						
"	26	9.50						
Sept.	17						12.25	11.75
Nov.	2	9.75						
"	30	9.50						
Dec.	8	9.25						
1926								
Feb.	11	9.15						
"	25	9.00						
Mar.	1	8.90						
"	3	8.75						
"	8	8.60						
"	10	8.40						
"	12	8.20						
Apr.	7	8.00						
"	19	7.85						
May	11	7.75						
"	21	7.65						
June	10	7.80						
"	11	8.00						
"	15	8.15						
"	17	8.25						
July	13	8.40						
"	14	8.50					11.75	11.25
"	23	8.65						
"	26	8.75					12.00	11.50
"	30	8.90						
Sept.	14	8.75						
Oct.	1	8.65						
"	4	8.50					11.75	11.25
"	14	8.35						
"	25	8.25					11.50	11.00
Nov.	1	8.10						
"	3	8.00					11.25	10.75
"	18				10.25	9.75		
"	22					9.50		

Respondent's Exhibit No. 154.

NATIONAL LEAD COMPANY

Price Changes Per Cwt. in Dollars

Dates		Pig Lead	Paste White Lead	Paste Red Lead	Dry White Lead	Lead Sulphate	Dry Red Lead	Litharge
Dec.	5	7.90						
"	15	7.80						
"	16		14.50	16.00	9.75	9.00		
1927								
5835								
Jan.	6	7.65					11.00	10.50
"	20	7.50					10.75	10.25
"	25	7.40						
Mar.	2	7.55						
"	3	7.65						
"	23	7.55						
"	25	7.45						
"	29	7.35						
Apr.	4	7.25					10.50	10.00
"	18	7.15						
"	20	7.00					10.25	9.75
"	29	6.85						
May	2	6.75					10.00	9.25
"	16	6.65						
"	19	6.50						9.00
"	26	6.40						
June	16		13.75	15.25	9.00	8.25	10.00	9.00
July	1	6.30						
"	7	6.20					9.75	8.75
"	20	6.30						
"	21	6.40						
"	22	6.50					10.00	9.00
"	29	6.60						
Aug.	3						10.25	9.25
"	4	6.75						
"	24	6.60						
"	30	6.50					10.00	9.00
Sept.	6	6.40						
"	9	6.25					9.75	8.75
Nov.	17		13.25	14.75	8.50	7.75		
"	28	6.30						
"	29	6.40						
Dec.	1	6.50					10.00	9.00
1928								
Feb.	10	6.35						
"	20	6.25					9.75	8.75
"	27	6.15						
"	29	6.00					9.50	8.50
Apr.	2	6.10						
May	25	6.20						
"	29	6.30					9.75	8.75
July	9	6.20						
Aug.	23	6.30						
"	27	6.40						

Respondent's Exhibit No. 154.

NATIONAL LEAD COMPANY

Price Changes Per Cwt. in Dollars

Dates	Pig Lead	Paste White Lead	Paste Red Lead	Dry White Lead	Lead Sulphate	Dry Red Lead	Litharge
Sept. 17	6.50					10.00	9.00
Nov. 9	6.35						
" 20				8.25			
Dec. 3	6.50						
1929							
Jan. 2	6.65						
" 17				8.50	8.00		
Feb. 6	6.75					10.25	9.25
" 11	6.85						
" 19	6.95						
" 23		13.50	15.00	8.75	8.25		
" 27	7.10					10.50	9.50
Mar. 6	7.25					10.75	9.75
" 19	7.50	13.75	15.25	9.00	8.50	11.00	10.00
" 20	7.75					11.25	10.25
" 21	7.50						
Apr. 4						11.00	10.00
" 8	7.25					10.75	9.75
" 10	7.15						
" 15	7.00					10.50	9.50

Dates	Pig Lead	Paste White Lead	Paste Red Lead	Dry White Lead	Lead Sulphate	Dry Red Lead	Litharge
July 5	6.90						
" 10	6.75					10.25	9.25
Sept. 5	6.90						
Oct. 22		14.25	15.25				
" 29	6.75						
" 31	6.50					10.00	9.00
Nov. 6	6.35						
" 7	6.25					9.75	8.75
1930							
Jan. 3				8.25	8.75		
Feb. 27	6.10						
Mar. 3	6.00					9.50	8.50
" 6	5.85						
" 7	5.75					9.25	8.25
" 8	5.60						
" 10	5.50						
" 25	6.65						
" 26	5.75						
Apr. 4	5.60						
" 7	5.50					9.00	8.00
" 24		13.75	15.25	7.75	7.25		
May 12	5.60						
" 20	5.50						
June 17	5.40						
" 23	5.25					8.75	7.75
Aug. 1	5.35						
" 4	5.50					9.00	8.00

Respondent's Exhibit No. 154.

NATIONAL LEAD COMPANY

Price Changes Per Cwt. in Dollars

Dates		Pig Lead	Paste White Lead	Paste Red Lead	Dry White Lead	Lead Sulphate	Dry Red Lead	Litharge
Oct.	1	5.35						
“	4	5.25					8.75	7.75
“	7	5.20						
“	8	5.15						
“	10	5.10						
Dec.	1				7.25	6.75		
1931								
Jan.	2		13.25	14.75				
“	5	5.00					8.50	7.50
“	7	4.85						
“	8	4.75					8.25	7.25
Feb.	3	4.60						
“	4	4.50					8.00	7.00
“	19	4.60						
Mar.	10	4.50						
Apr.	23	4.35						
“	24	4.25					7.75	6.75
“	28	4.10						
“	29	4.00					7.50	6.50
May	8	3.85						
“	11	3.75					7.25	6.25
June	22	4.00					7.50	6.50
“	23	4.15						
“	24	4.25					7.75	6.75
“	25	4.40						
Oct.	2	4.25						
“	5	4.00					7.50	6.50
“	20	3.75					7.25	6.25
“	28	4.00					7.50	6.50
Nov.	2	3.85						
“	10	4.05						
“	19	3.95						
“	23	3.85						
Dec.	14	3.75					7.25	6.25
“	28		12.00	13.50	6.50	6.00	6.75	5.75
1932								
Feb.	26	3.50						
Mar.	1	3.25						
“	15	3.15						
“	23	3.00						
June	29	2.95						
July	1	2.90						
“	5	2.85						
“	8	2.80						
“	11	2.70						
“	12						6.25	5.25
“	18	2.65						
“	27	2.80						
“	28	2.95					6.50	5.50

5837

Respondent's Exhibit No. 154.

NATIONAL LEAD COMPANY

Price Changes Per Cwt. in Dollars

Dates	Pig Lead	Paste White Lead	Paste Red Lead	Dry White Lead	Lead Sulphate	Dry Red Lead	Litharge
Aug. 4	3.00						
" 5	3.10						
" 16	3.20					6.75	5.75
" 17	3.30						
" 23	3.40						
" 26	3.50					7.00	6.00
" 30	3.60						
Sept. 20	3.50						
" 21	3.40						
" 26	3.30						
" 27	3.15						
" 28	3.00					6.50	5.50
Oct. 3	3.10						
" 4	3.25					6.75	5.75
" 7	3.15						
" 10	3.00						
Nov. 9	3.15						
" 18	3.00						
Dec. 30		11.00	11.50	6.00	5.50		
1933							
Mar. 8	3.25					6.75	5.75
" 10	3.35						
" 21	3.25						
" 22	3.10						
" 23	3.00					6.50	5.50
Apr. 11	3.25					6.75	5.75
" 20	3.50					7.00	6.00
May 8	3.65						
" 25	3.75					7.25	6.25
" 29	3.90						
" 31	4.10					7.50	6.50
June 1				6.50	6.00		
" 9	4.20						
July 5	4.30					7.75	6.75
" 7	4.40						
" 10	4.50					8.00	7.00
Oct. 16	4.40						
" 17	4.25					7.75	6.75
" 18	4.10						
" 19	4.00					7.50	6.50
" 25	4.15						
" 26	4.30					7.75	6.75
Nov. 29	4.15						
Dec. 1	4.05						
" 4	4.15						

5838

Dates	Pig Lead	Paste White Lead	Paste Red Lead	Dry White Lead	Lead Sulphate	Dry Red Lead	Litharge
1934							
Jan. 1				6.75	6.25		
" 2	4.00						

Top line is Market Card Price White Lead-in-Oil at New York in 100 lb. kegs.
Middle line is Market Card Carlot Price Dry White Lead (Basic Carbonate) at New York.
Bottom line is Common Pig Lead Market at New York.
All commodity quotations principally taken from New York Journal of Commerce

1926
1927
1928
Dry 10.66
Pig 8.42
Dif 7.24
Sprd 393
Dry 9.20
Pig 6.75
Dif 2.45
Sprd 3.80
Dry 8.25
Pig 6.31
Dif 1.94
Sprd = 2.20
Sprd = 2.20
JANUARY
FEBRUARY
MARCH
APRIL
MAY
JUNE
JULY
AUGUST
SEPTEMBER
OCTOBER
NOVEMBER
DECEMBER
5 10 15 20 25
12
11
10
9
8
7
6

5813

2-13 SEC. C
5253-1, Shelf 1

ORIGINAL EXHIBIT
to be returned to
FEDERAL TRADE COMMISSION

FEDERAL TRADE COMMISSION
Docket No. 5253 Respondent's Exhibit No. 147
IN THE MATTER OF Natl Lead
DATE 6/10/47 WITNESS Tibbetts
ELECTREPORTER, INC. Official Reporters
By Grove

BRITISH COLUMBIA
ALBERTA
SASKATCHEWAN
MANITOBA
ONTARIO
QUEBEC
NEW BRUNSWICK
DOMINION OF CANADA
WASHINGTON
OREGON
CALIFORNIA
NEVADA
IDAHO
MONTANA
WYOMING
UTAH
ARIZONA
COLORADO
NEW MEXICO
N. DAKOTA
S. DAKOTA
NEBRASKA
KANSAS
OKLAHOMA
TEXAS
MINNESOTA
IOWA
MISSOURI
ARKANSAS
LOUISIANA
WISCONSIN
ILLINOIS
INDIANA
OHIO
KENTUCKY
TENNESSEE
MISSISSIPPI
ALABAMA
GEORGIA
FLORIDA
SOUTH CAROLINA
VIRGINIA
PENNSYLVANIA
NEW YORK
MAINE
LAKE SUPERIOR
PACIFIC OCEAN
ATLANTIC OCEAN
GULF OF MEXICO
MEXICO
SONORA
CHIHUAHUA
COAHUILA
NUEVO LEON
TAMAULIPAS
DURANGO
SINALOA
LOWER CALIFORNIA
GULF OF CALIFORNIA
1/4¢
1/2¢
3/4¢
1¢
NEW YORK AND EASTERN PENNSYLVANIA DISTRICT
PITTSBURGH DISTRICT
LOWER NEW ENGLAND
Scale of Miles
0
50
100
150

CLEARTYPE MAP
of the
UNITED STATES
With Portions of
Southern Canada and Northern Mexico

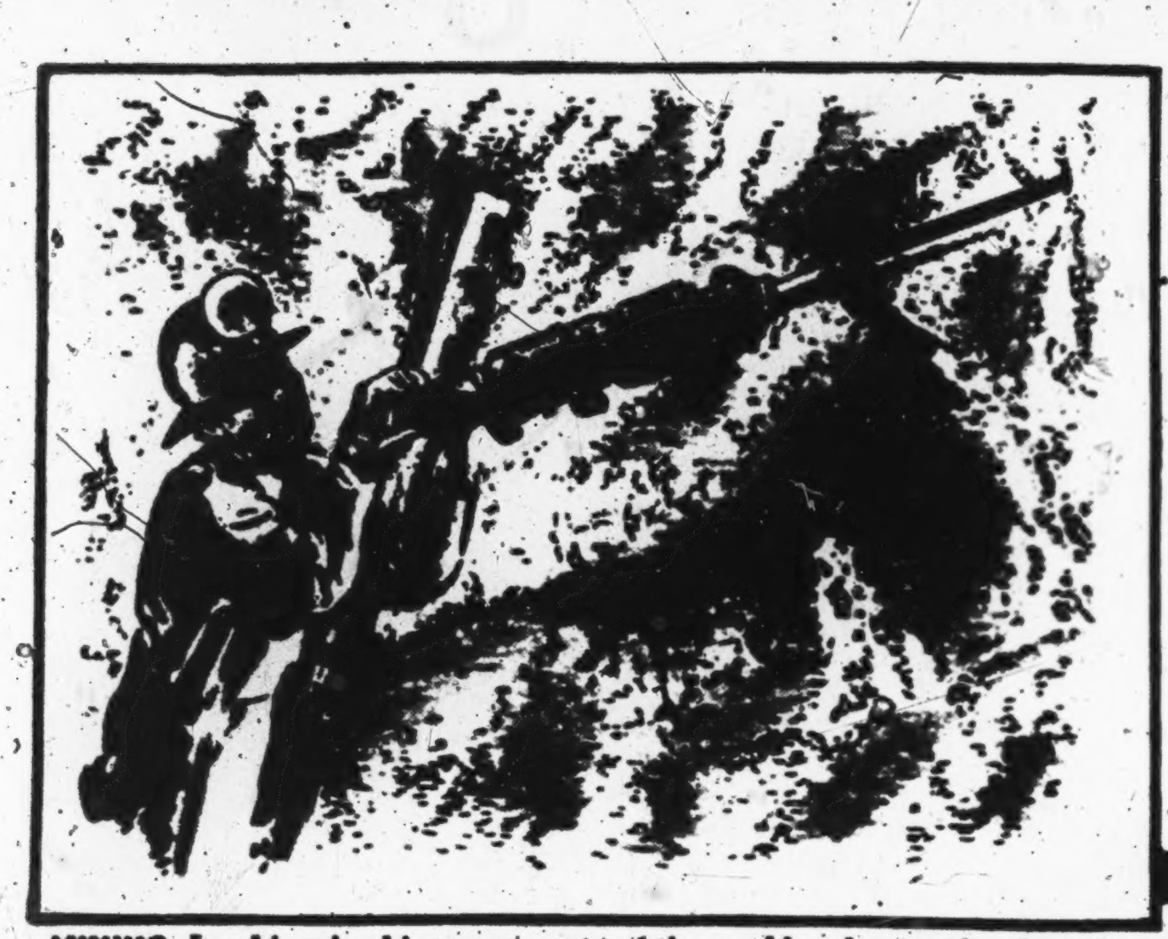
AMERICAN MAP COMPANY
MAP MAKERS CLEARTYPE MAPS PUBLISHERS
NEW YORK

MAP NO. 283-A

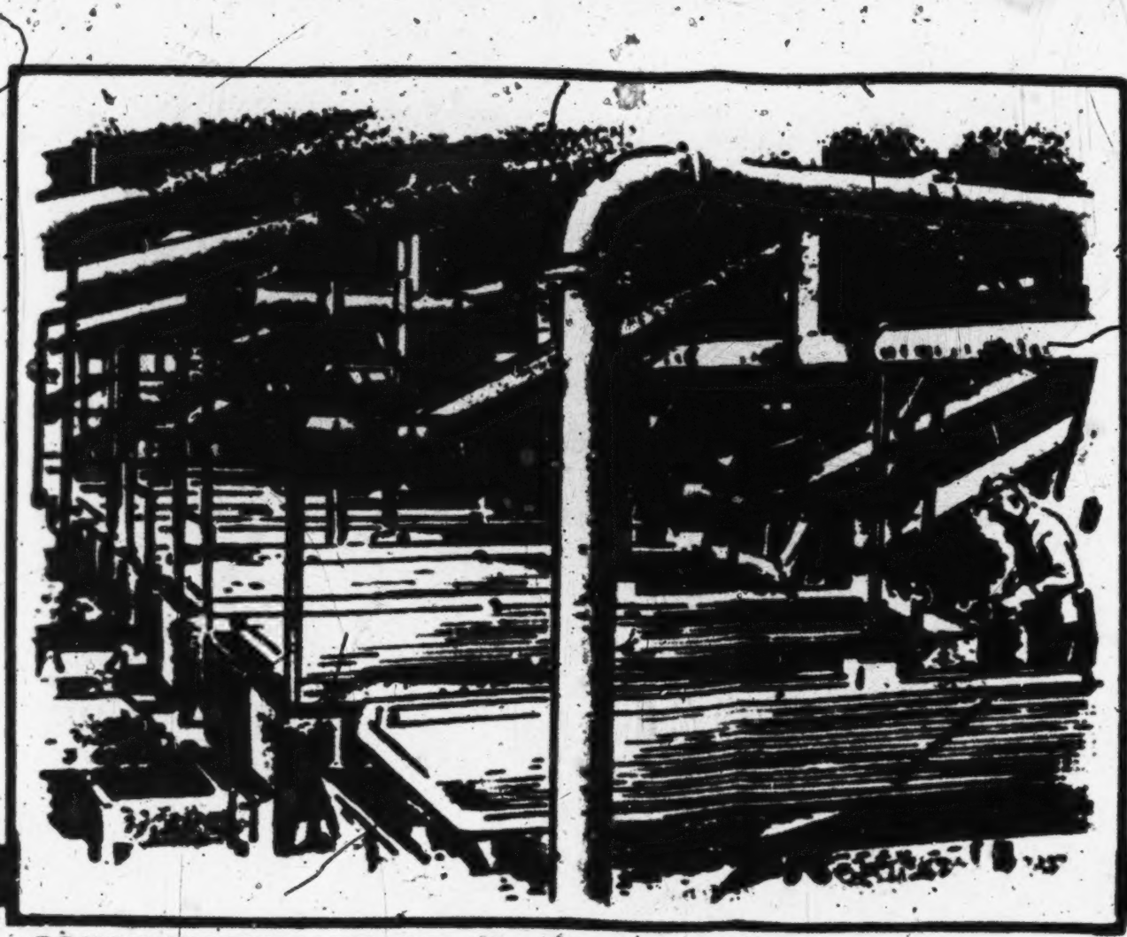
Copyright
American Map Company, New York

HOW WHITE LEAD AND RED LEAD ARE MANUFACTURED

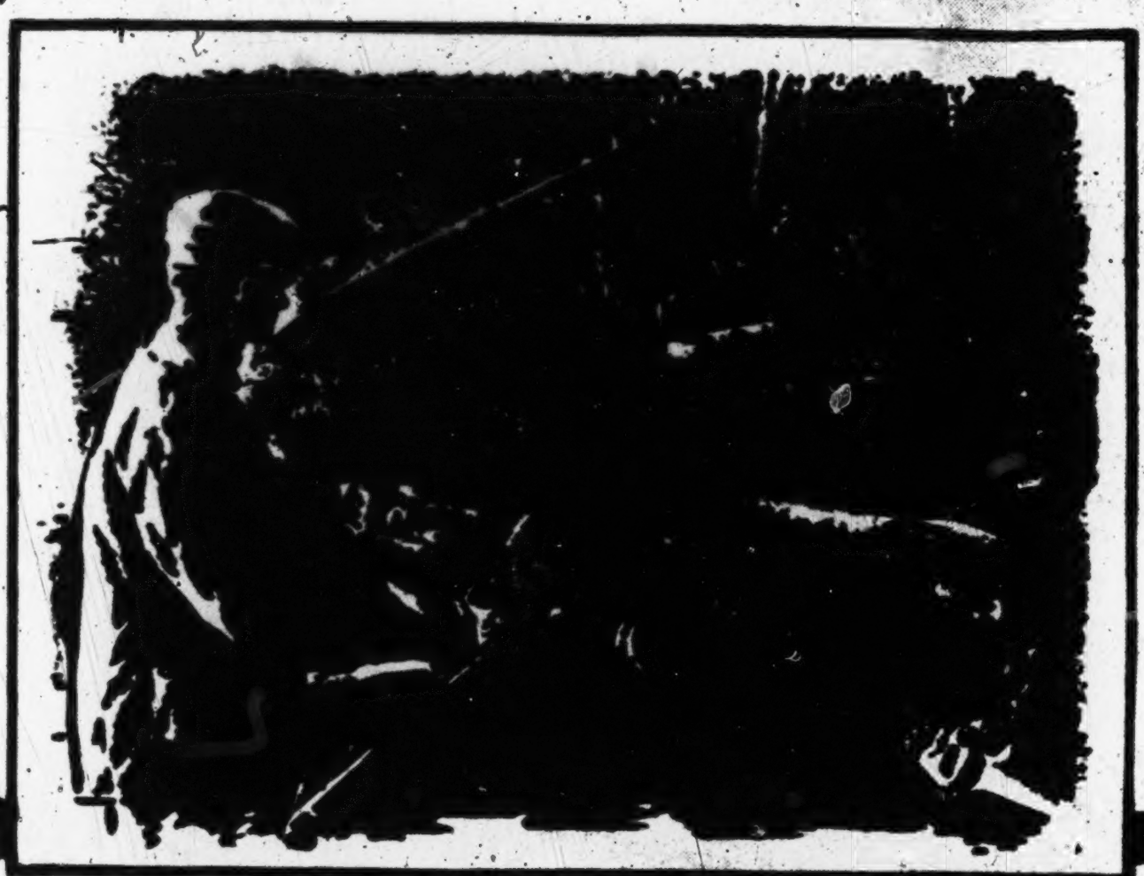
Respondent's Exhibit No. 156.



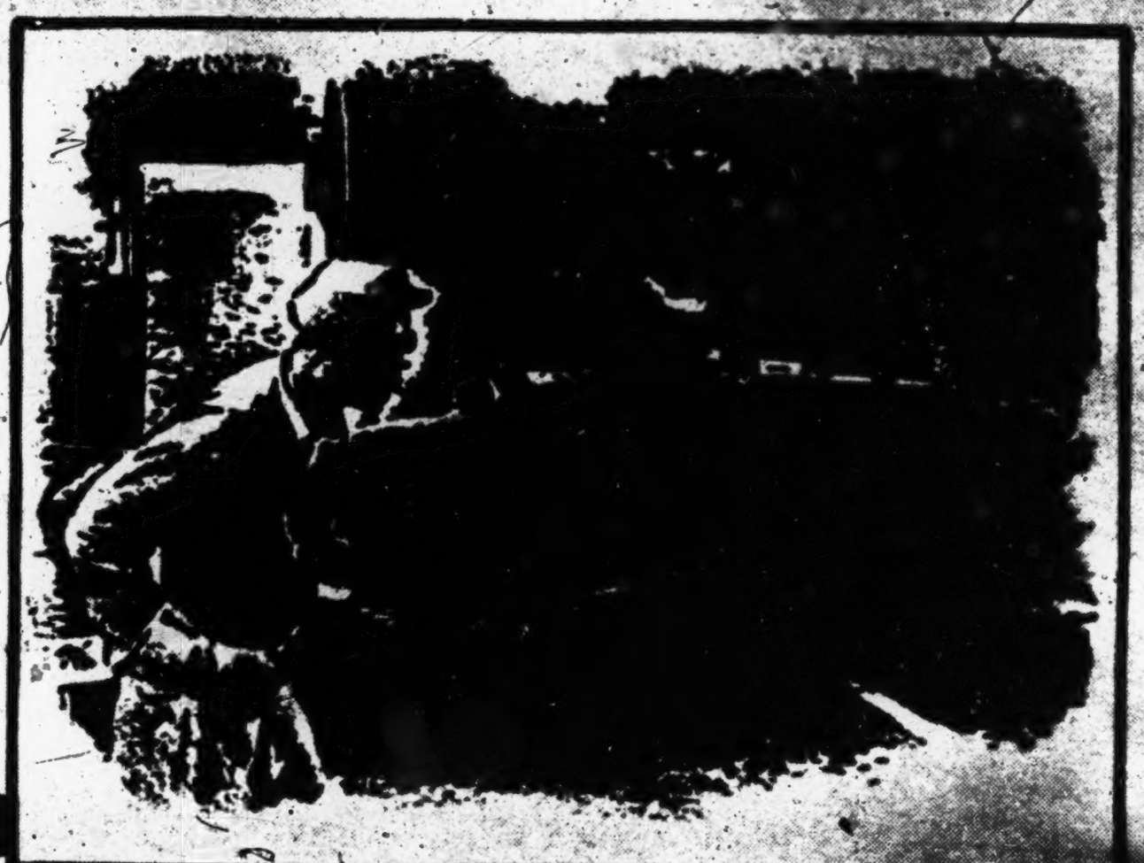
MINING: Lead is mined in many parts of the world and extensive deposits exist in this country, Canada, Mexico and South America. Chiefly, lead ore is found in the form of galena (lead sulphide) and is frequently associated with silver and zinc ores. Most of the lead mines are deep and only in a few is the ore located near the surface.



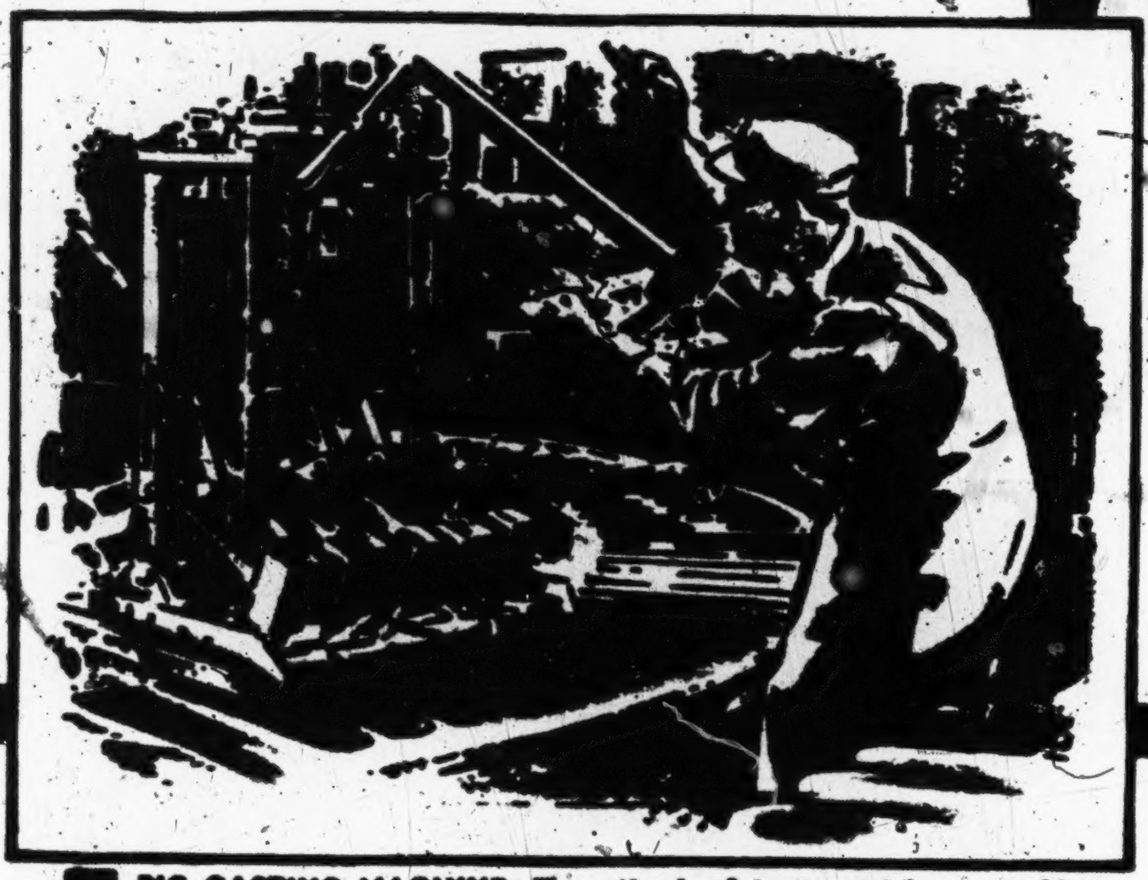
CONCENTRATION SYSTEM: After the ore is mined in chunks of various sizes it is broken up in huge crushers. When about the size of coarse sand the ore is mixed with water and placed on a riffle table like those shown above. The table vibrates with a jerky motion and is so constructed that the flowing water combined with the motion brings about the separation of the heavy lead-bearing particles and the lighter rock.



SMELTING: The concentrate is placed in a furnace where the sulphur is burned out, then charged into a blast furnace and reduced to a molten state. This separates the lead from the slag or worthless residue and the former can be poured out into a huge wheeled pot, as shown above.



DESILVERIZING KETTLE: The molten lead is transferred to this large kettle where slabs of zinc are thrown in. The zinc quickly melts, alloys with the silver and floats to the top where the alloy is skimmed off. After further refining the lead is ready for the next and final step.



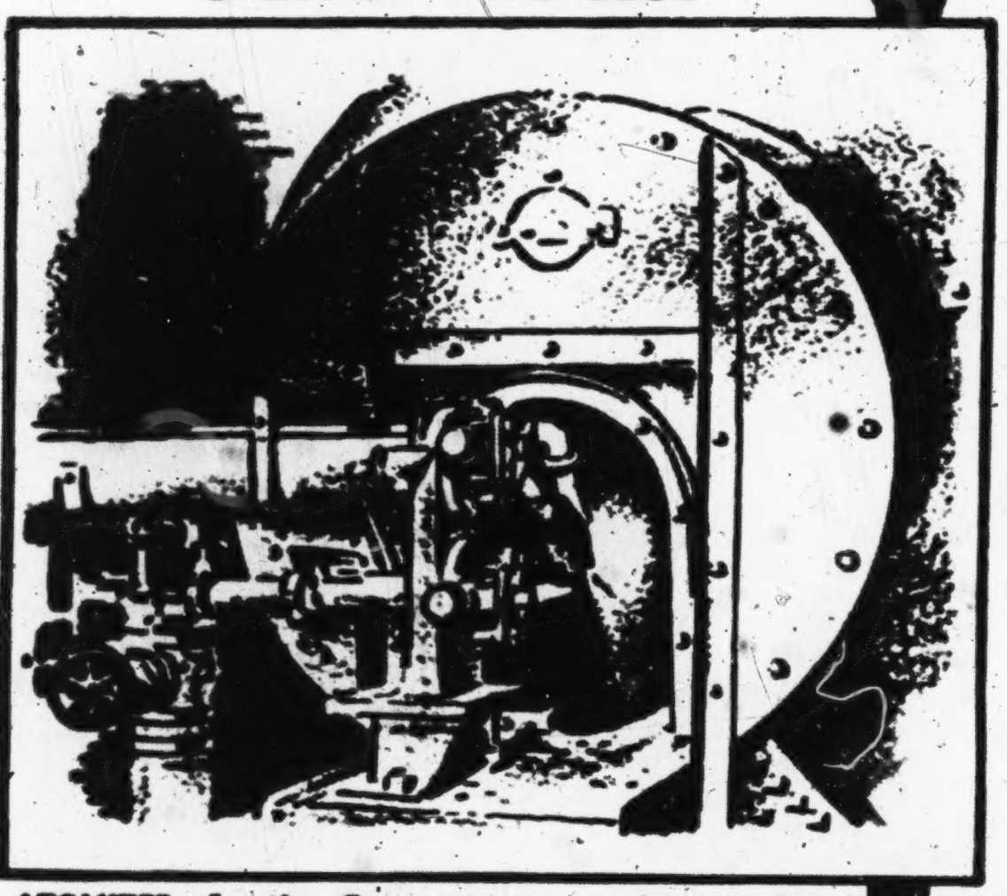
PIG CASTING MACHINE: Here the lead is poured into moulds to cool and form blocks about 4 by 5 by 22 inches and weighing about 90 pounds each. These pigs are the smelter's finished product and it is in this form that lead goes to the various manufacturers of lead products.

WHITE LEAD MANUFACTURE

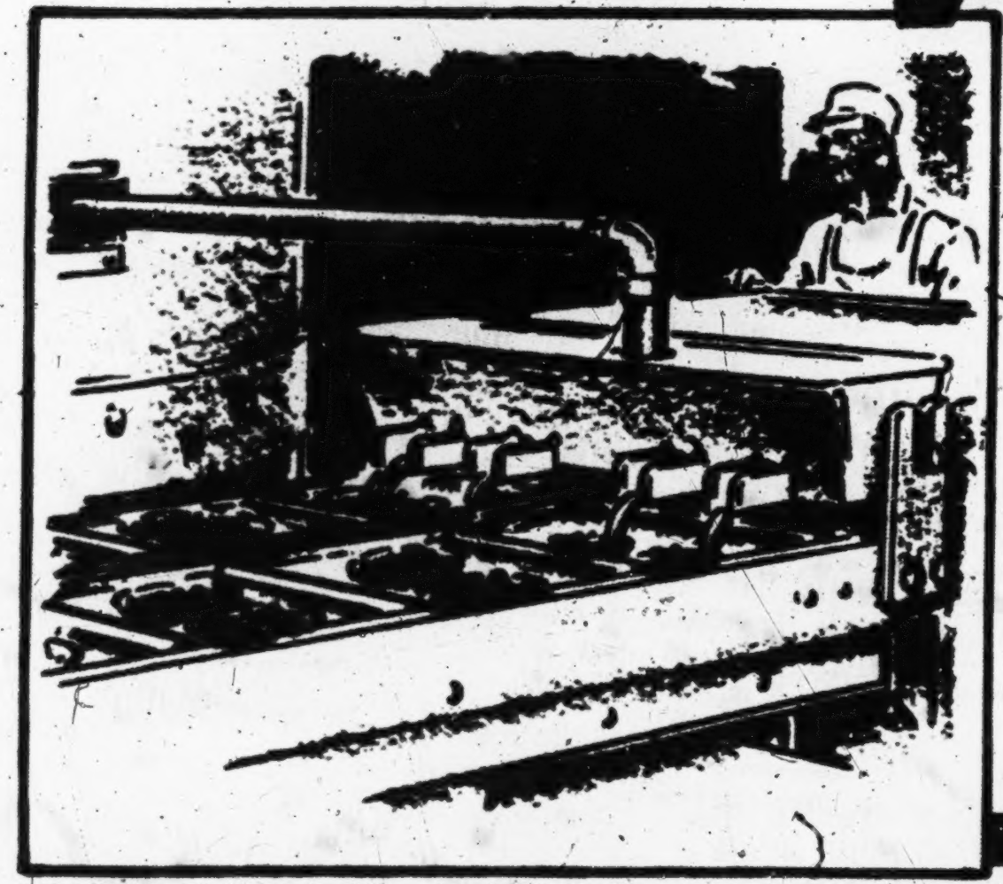
CARTER PROCESS

DUTCH PROCESS

RED LEAD MANUFACTURE

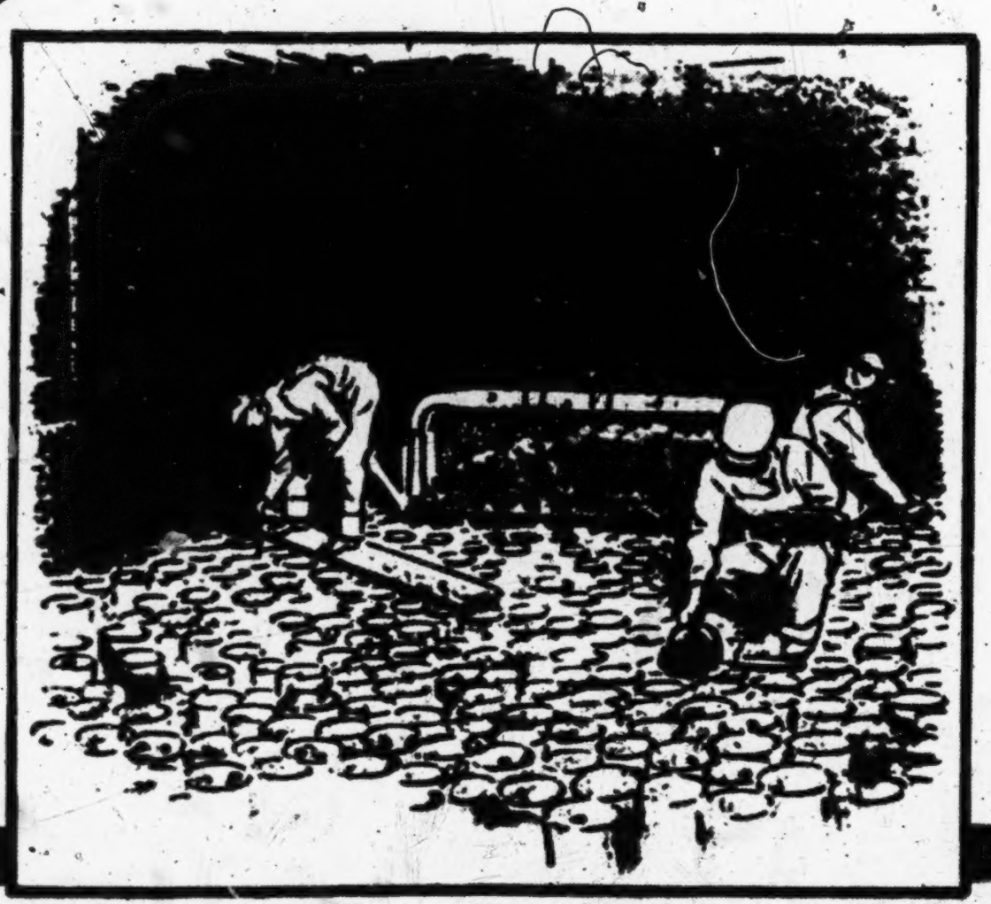


ATOMIZER: In the Carter process molten lead is atomized to very small particles by allowing it to flow through a nozzle into an air stream formed by compressed air. The finely powdered lead particles are then placed on the bottom of a cylinder.

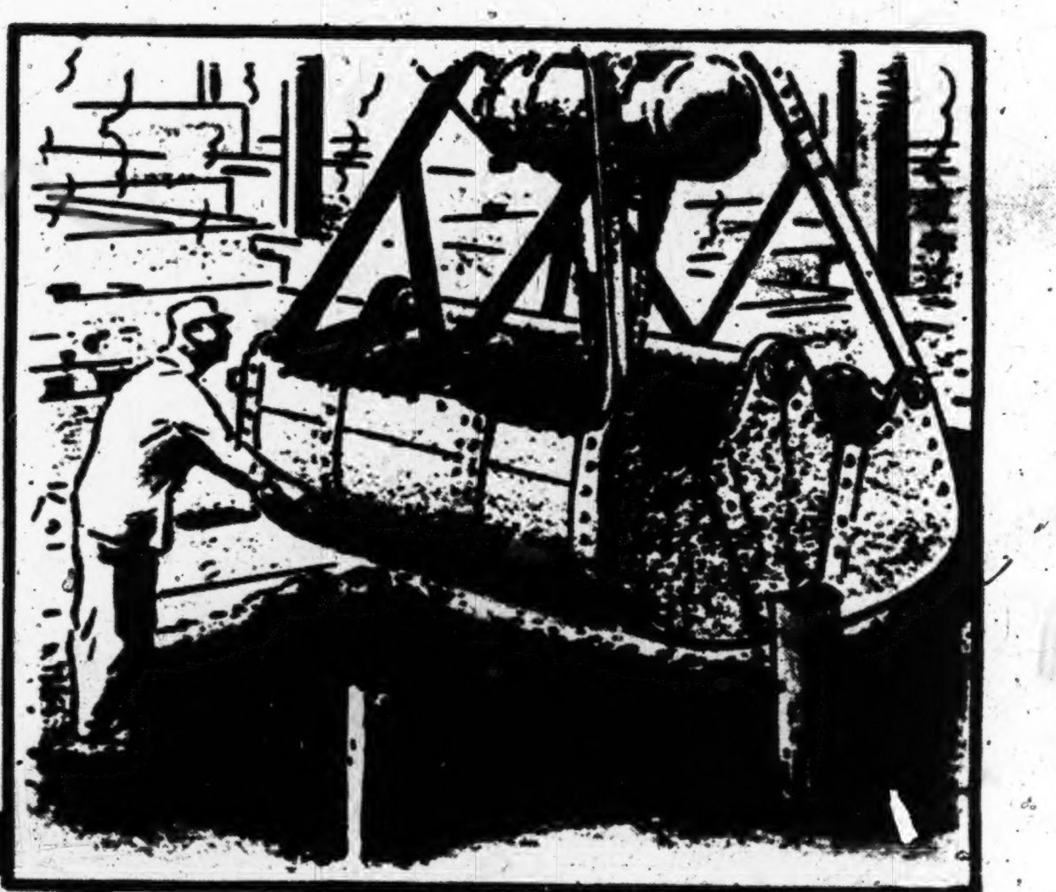


CASTING BUCKLES: The pig lead is first cast into buckles.* This is done in molds linked together in an endless chain. As the molds pass under spouts they are filled with molten lead which quickly solidifies so that the finished buckle is ejected from the mold as it passes over the pulley for the return trip.

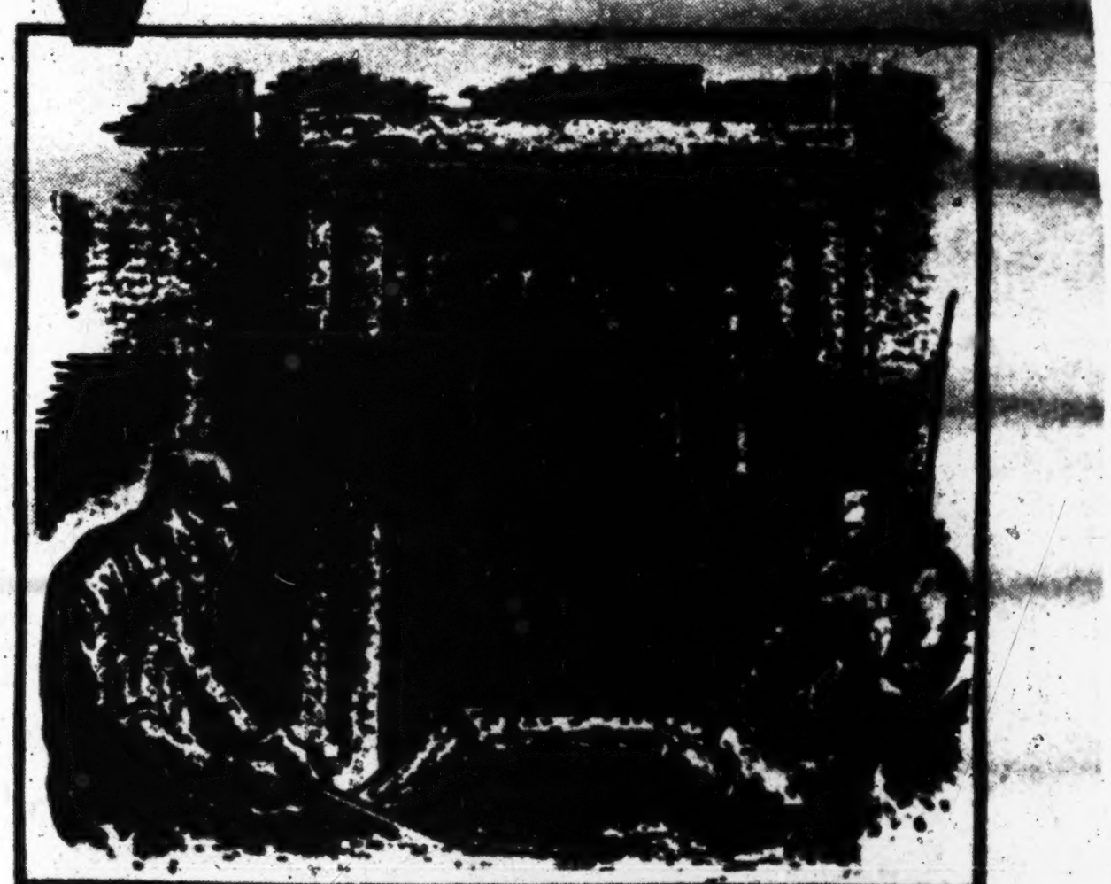
*Originally so named because of their fancied resemblance to the shoe buckles of Colonial times.



BUILDING A STACK: The metallic lead buckles are placed in a corroding stack about 20 feet square. The corrosion takes place in earthenware pots which have a well in the bottom to hold about a half pint of weak acetic acid and a shoulder above the well to support from 10 to 14 buckles. A layer of pots filled as

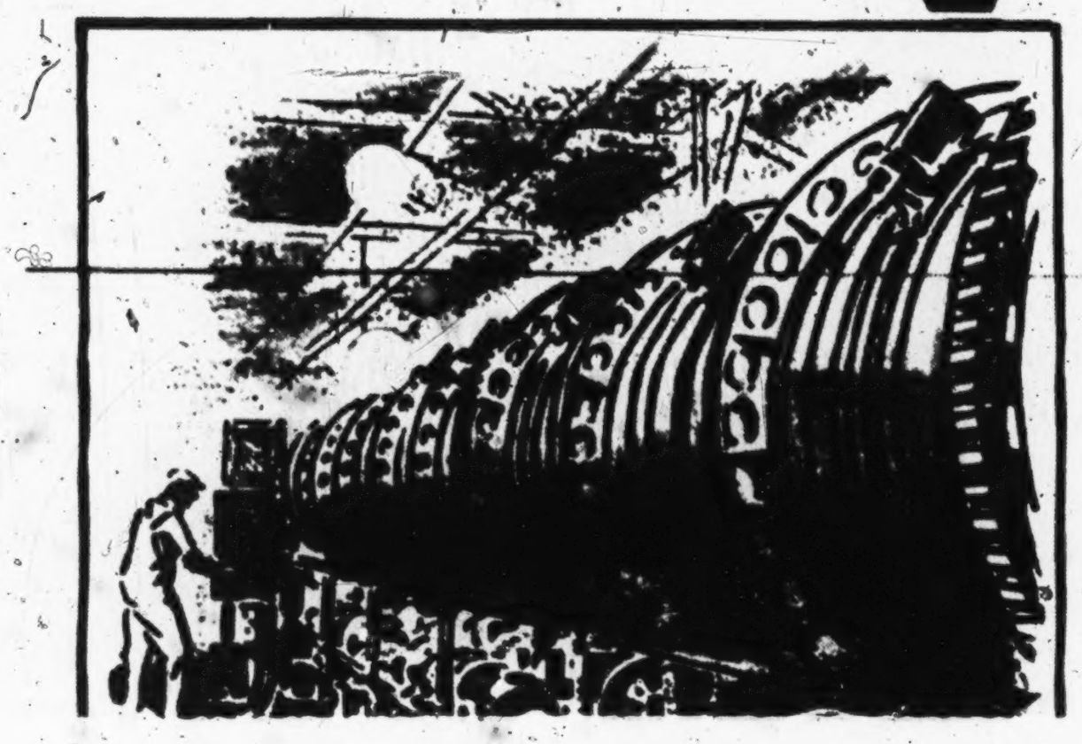


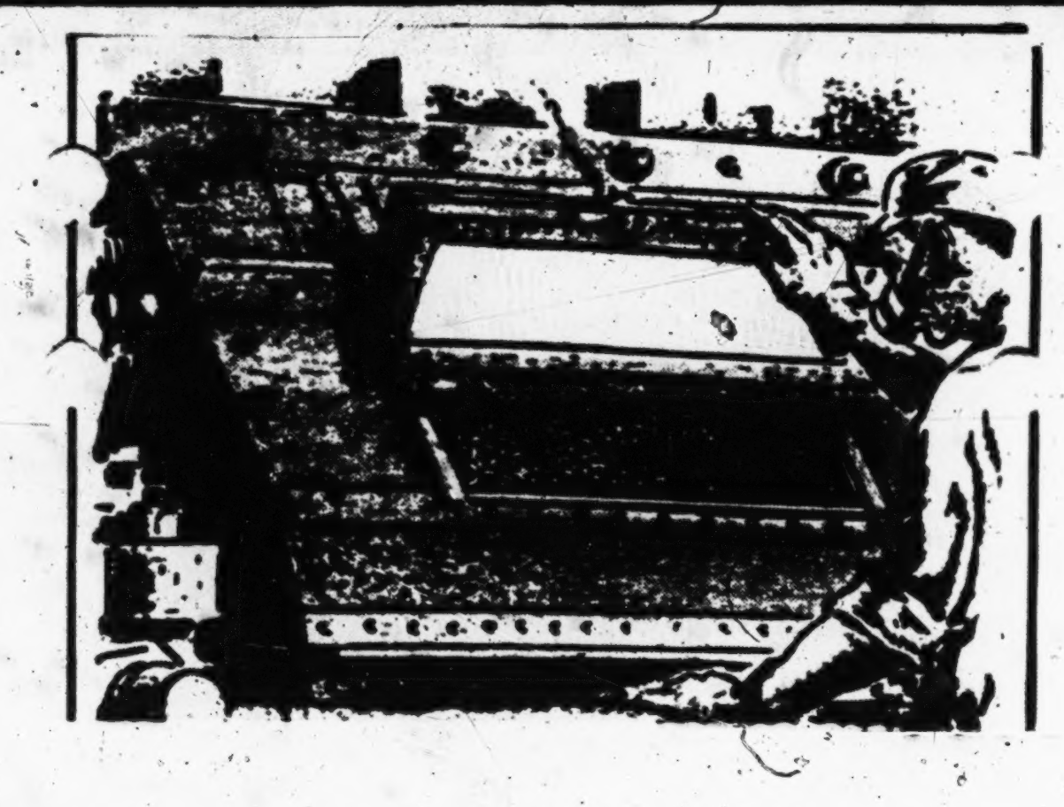
described is placed on a layer of tanbark. Then a layer of planks and another layer of tanbark, a layer of pots and so on to a height of about 30 feet. A flue connecting each layer runs up through the stack for the escape of fumes. The heat generated (160°-180° F.) volatizes the acid and in from 100 to 120 days the metallic lead becomes white lead (basic lead carbonate).

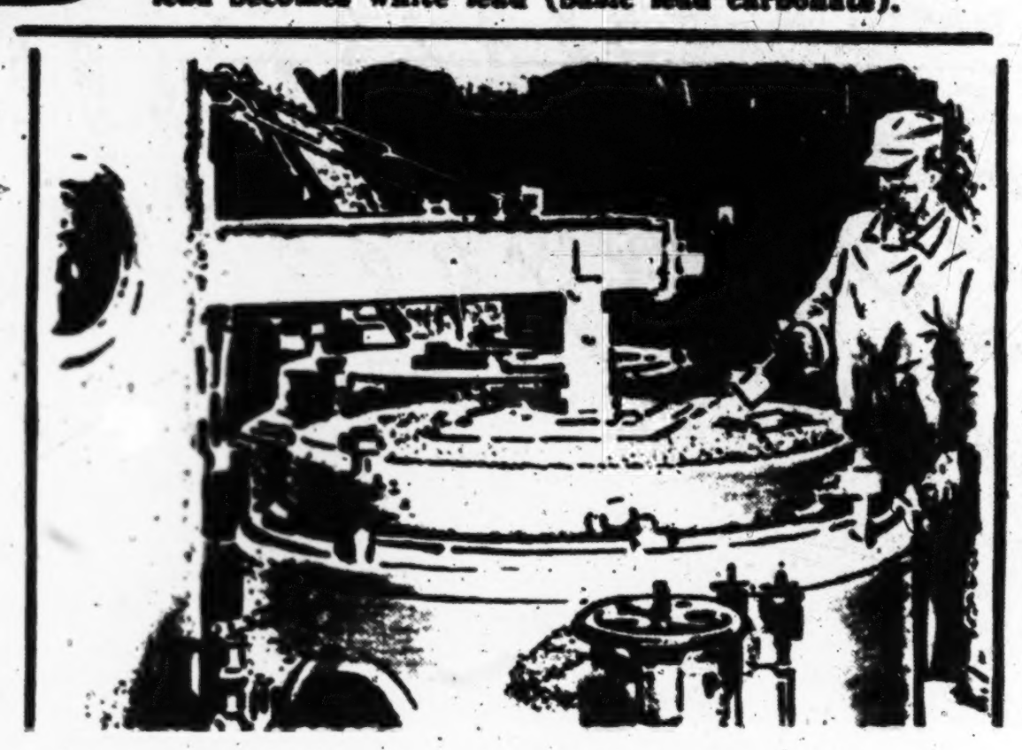


FURNACE: Pure metallic lead is heated to a high temperature in the presence of air which changes it to litharge (PbO).* This yellowish material is finely ground and reintroduced into the furnace. With further heating and oxidation it turns to red lead (Pb_3O_4).

*Large quantities of litharge are used in the plates of electric storage batteries.







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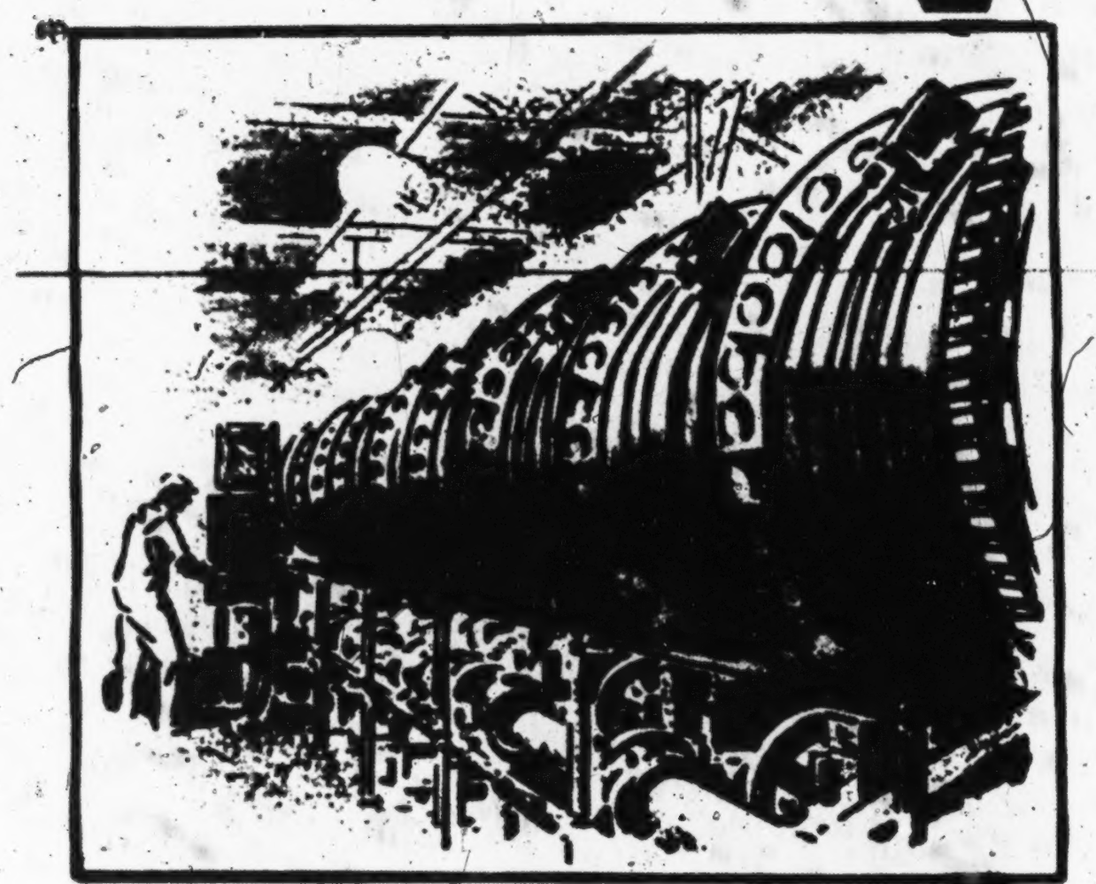
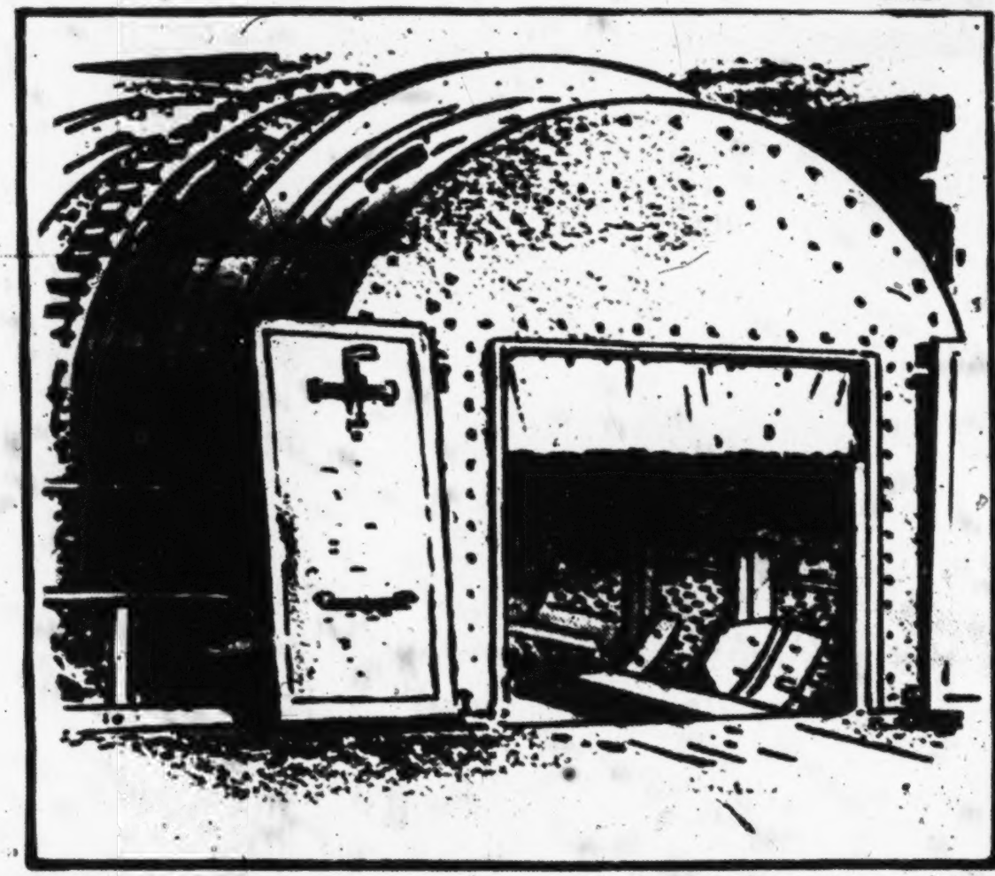
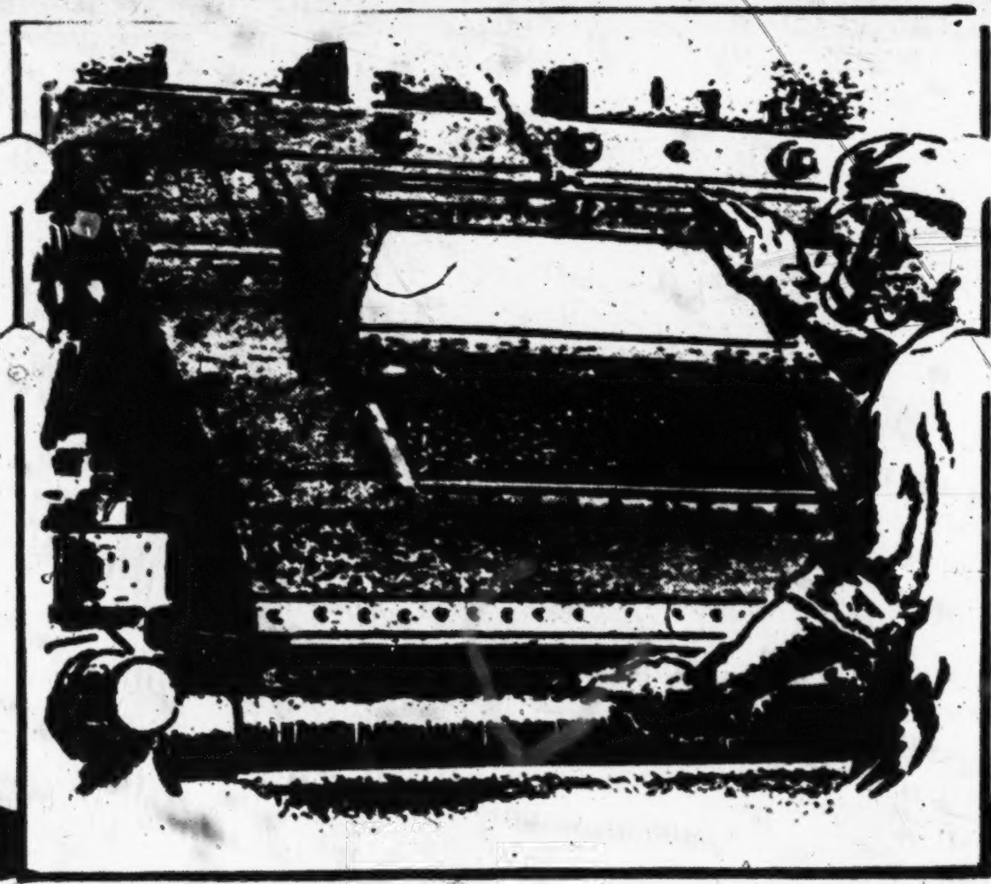


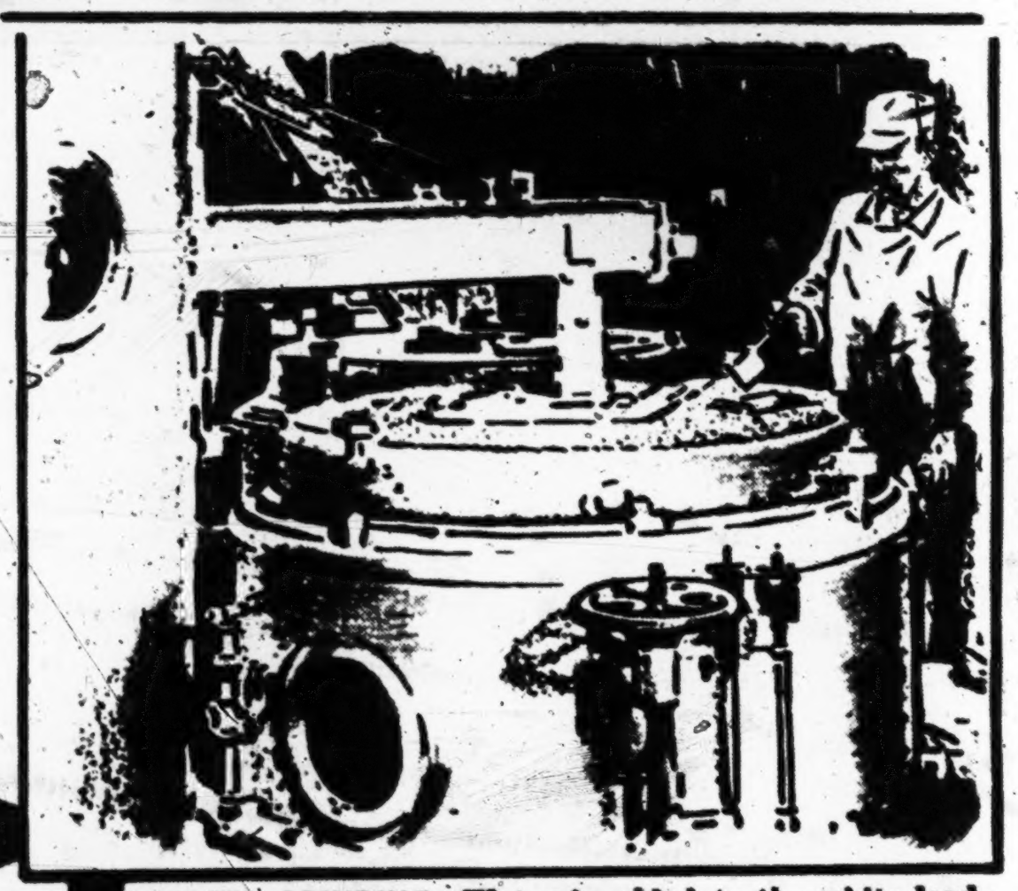
CARTER CYLINDER: This is a slowly revolving wooden drum equipped with water and acetic acid sprays and connections for circulating carbon dioxide gas through the entire cylinder. The combination of acid and gas converts the lead to white lead ($2PbCO_3 \cdot Pb(OH)_2$—basic lead carbonate) in about 10 days. The white lead then goes to the drag box.



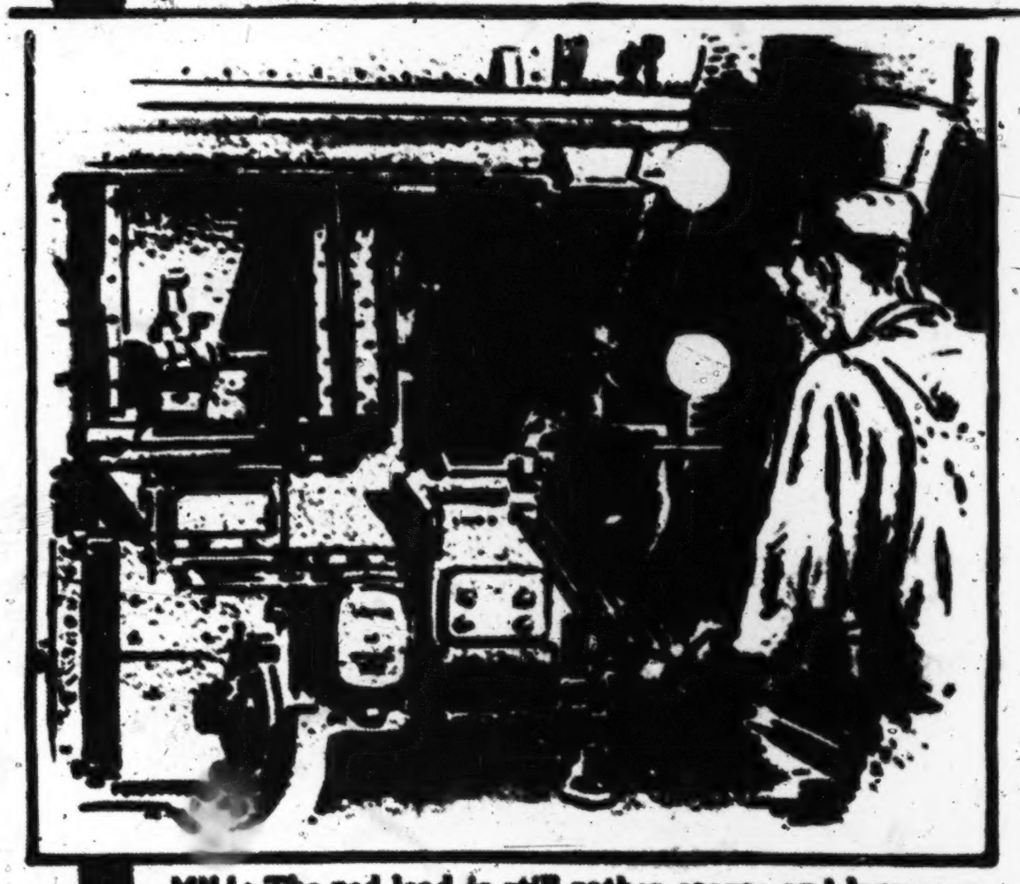
BUCKLE BEATER: When the stack is dismantled the buckles have become white and very brittle. Placed in the buckle beater—a large revolving cylindrical screen—they are broken up and any large pieces of uncorroded lead separated out.



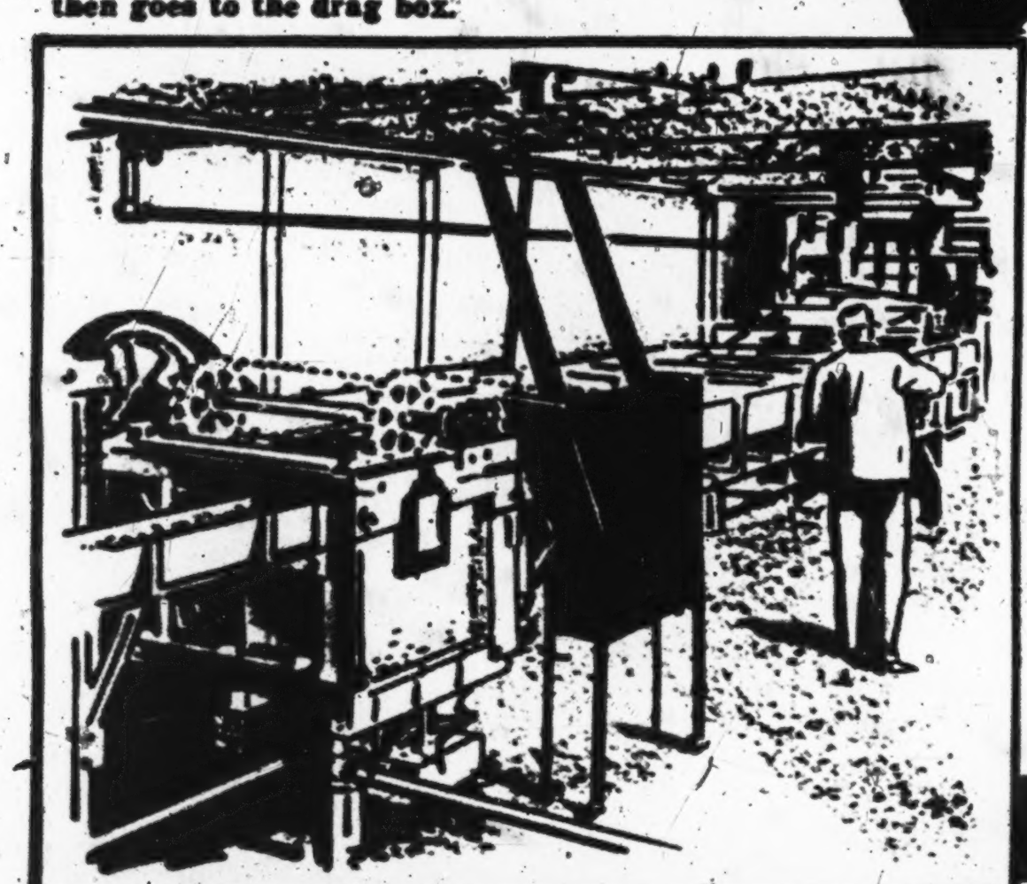
CRUSHER: From the buckle beater the corroded particles go into a crushing mill to be further reduced in size and then into a series of cylindrical screens for sifting out whatever metallic lead remains. At this stage the white lead is about like fine white sand, but not nearly fine enough for paint.



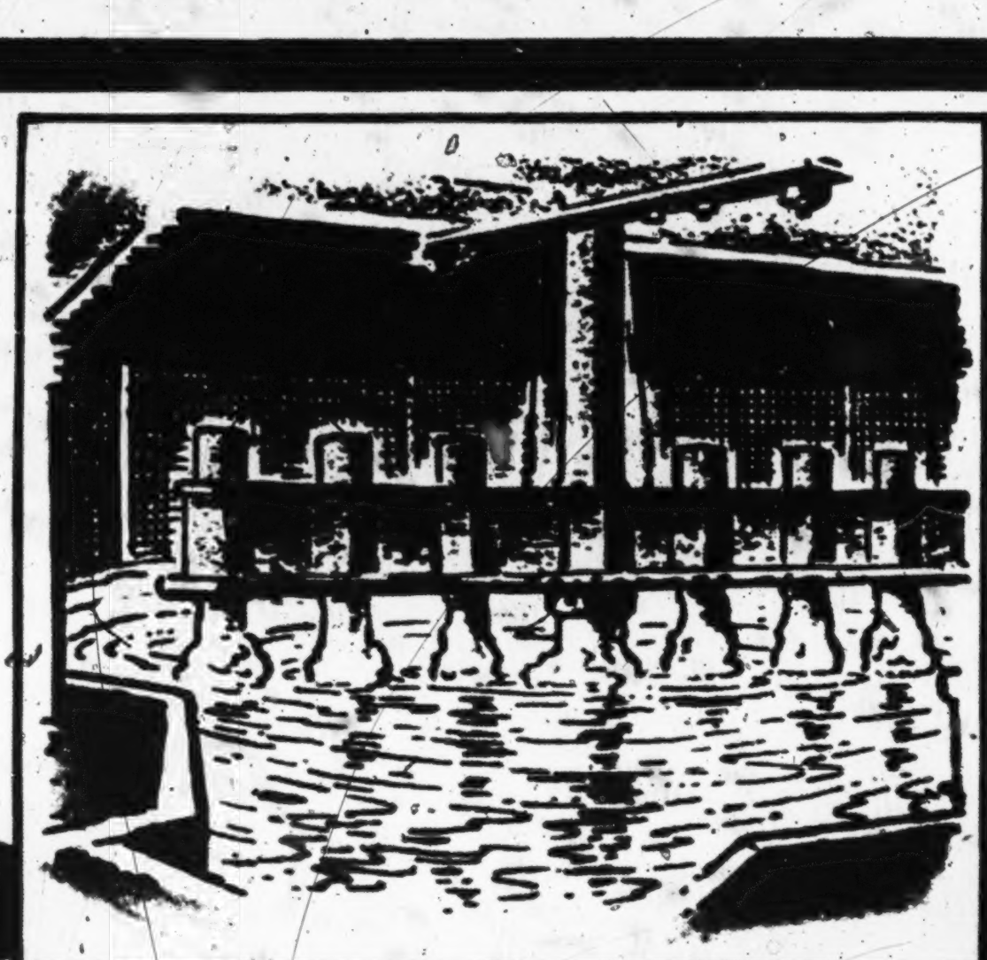
WATER GRINDING: Water is added to the white lead and the mixture is passed between heavy revolving stones. These stones reduce the particle size still further until most of the white lead is fine enough for use in paint. The coarse particles must be separated out and for this the mixture first goes to the drag box.



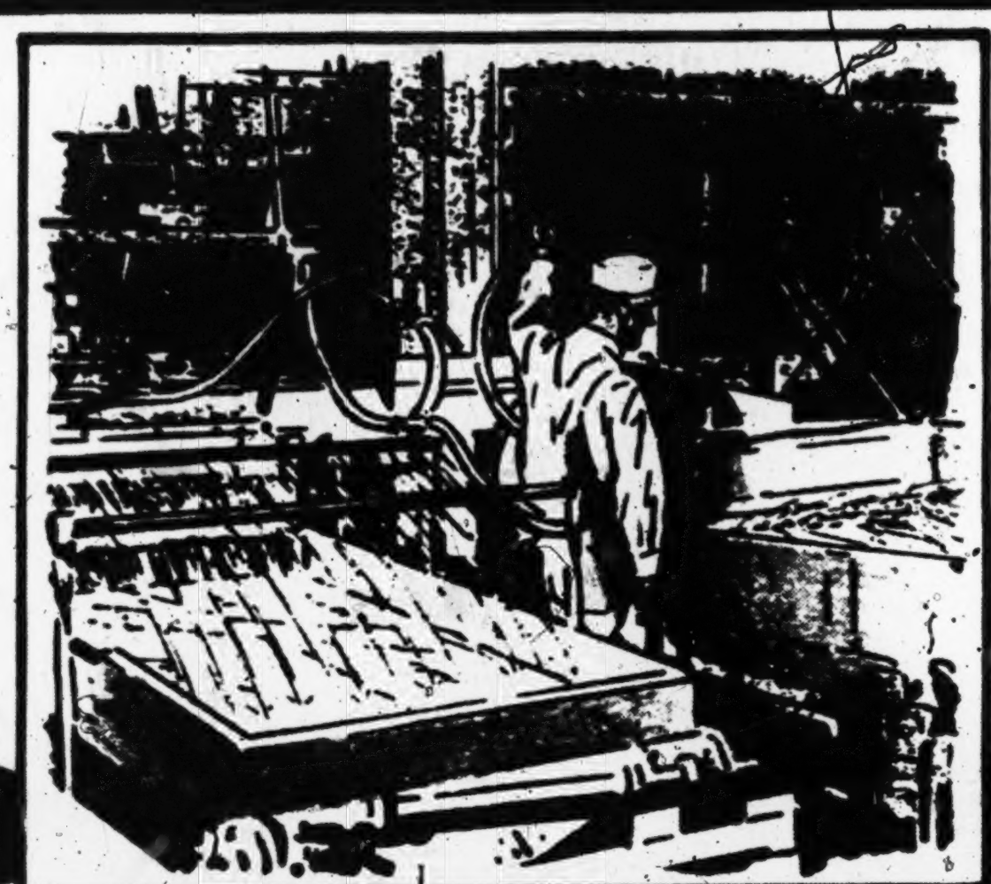
MILL: The red lead is still rather coarse and lumpy so the next step is thorough milling followed by screening.



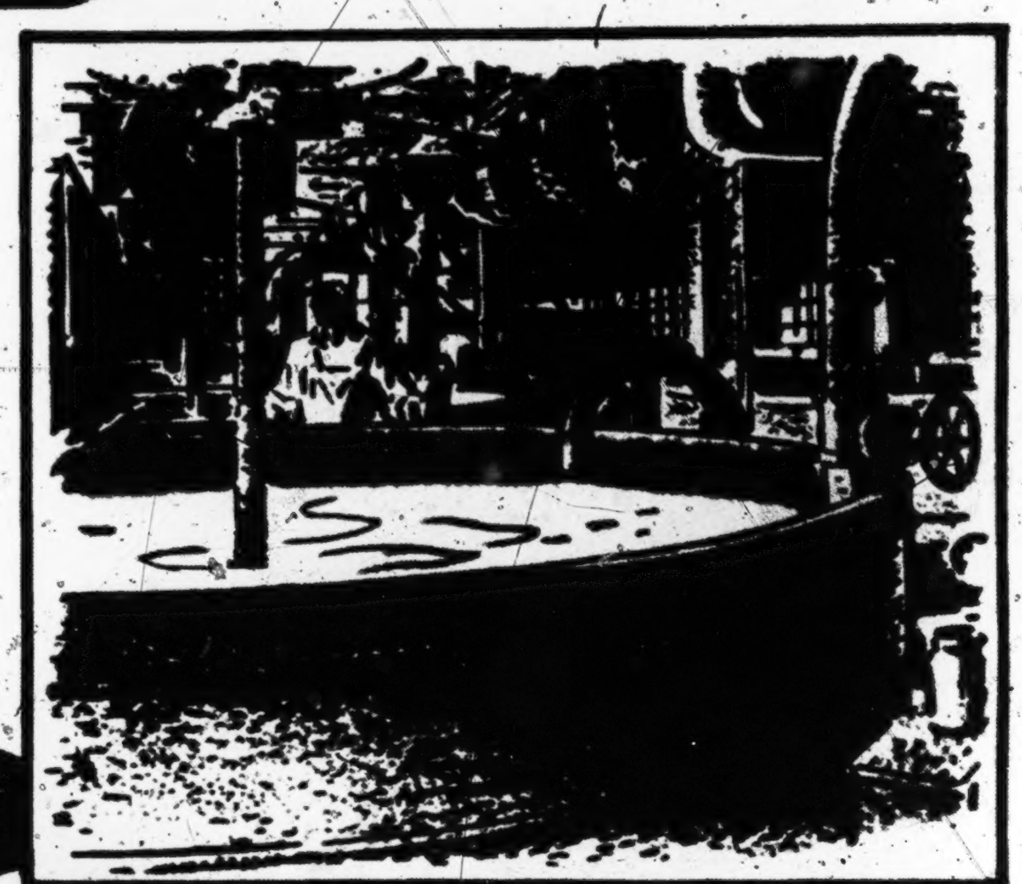
DRAG BOX: This is a water-tight oblong tank about 25 feet long. The bottom is inclined so the mixture flows down to one end where the smaller and lighter particles overflow. The remaining mixture, mostly coarse particles, is dragged back up by cleats fastened on two endless chains. This separating process continues until particles too large for use are finally discarded.



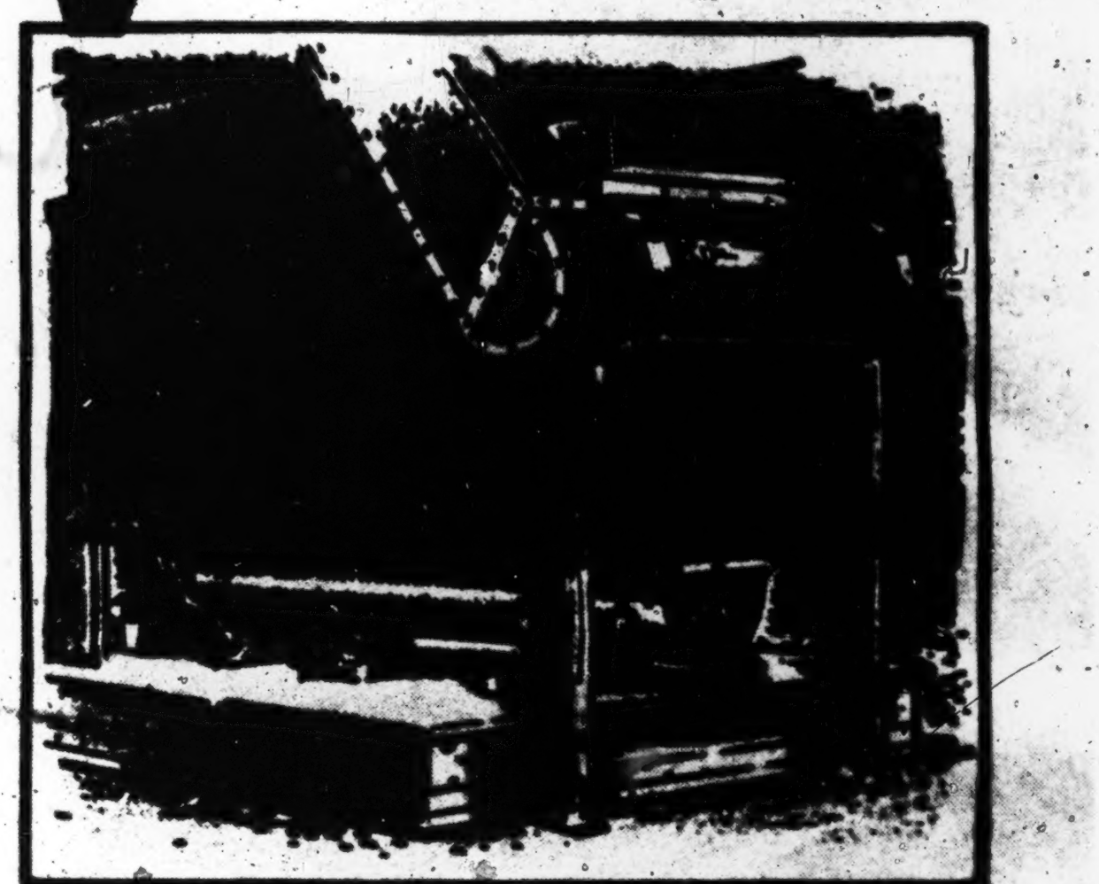
RAKE TUB: The milky mixture, or slurry, coming from the lower end of the drag box is put in a large tank equipped with a revolving rake-like stirrer. As the slurry is agitated the heavier and larger particles work down to the bottom for later removal and grinding. The finest particles float to the top and are drawn off to the shaker screen.



SHAKER SCREEN: Made of silk bolting cloth so finely woven that there are 27,000 openings to the square inch. Only the white lead particles that pass through these vibrating screens are fine enough to make paint. This watery mixture is now put in the settling tub.

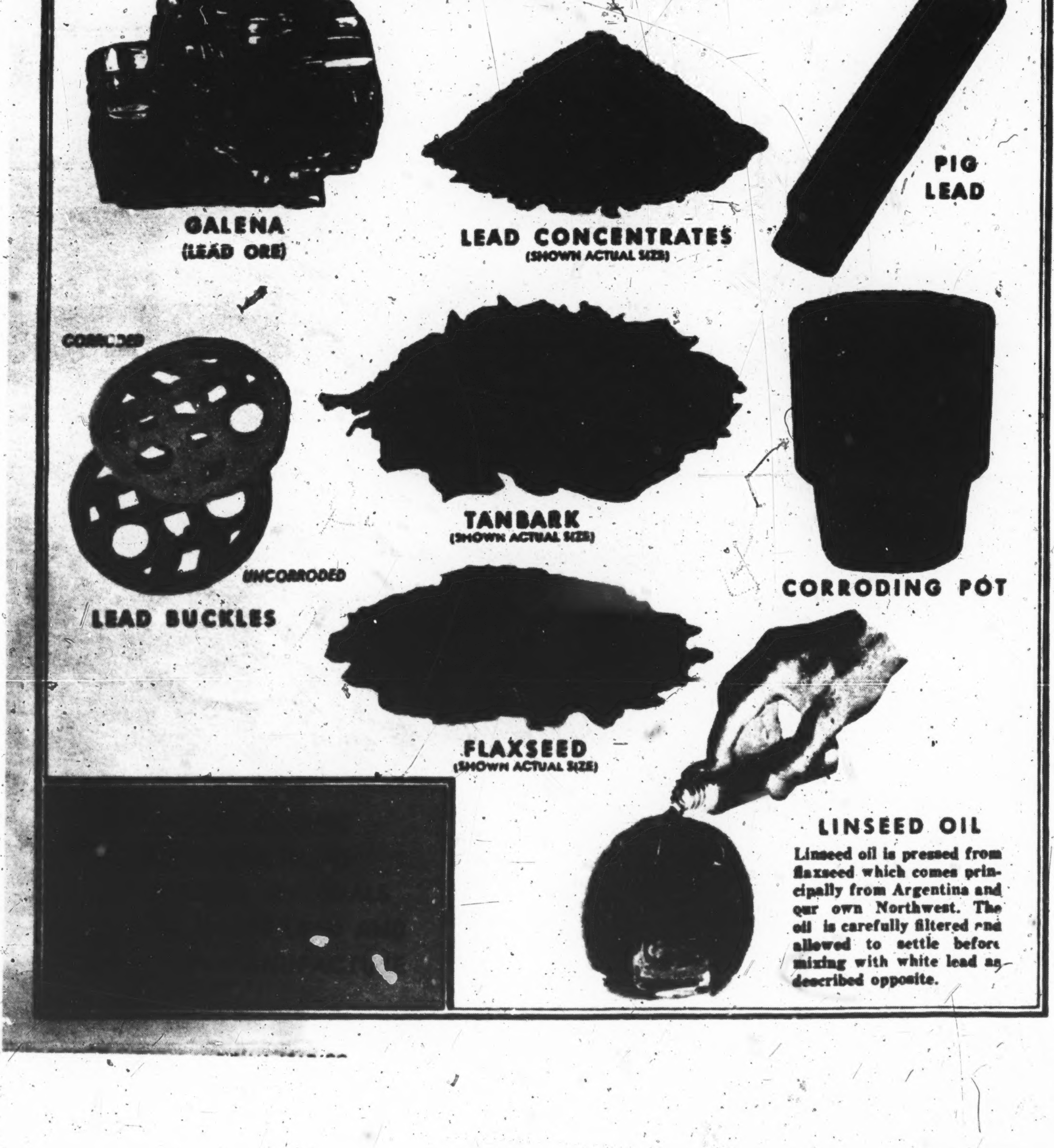


SETTLING TUB: Here the white lead settles gradually, after which most of the water can be siphoned off from the top. The pulpy mass remaining still contains water, however, and to remove this it is put through the pulping machine.



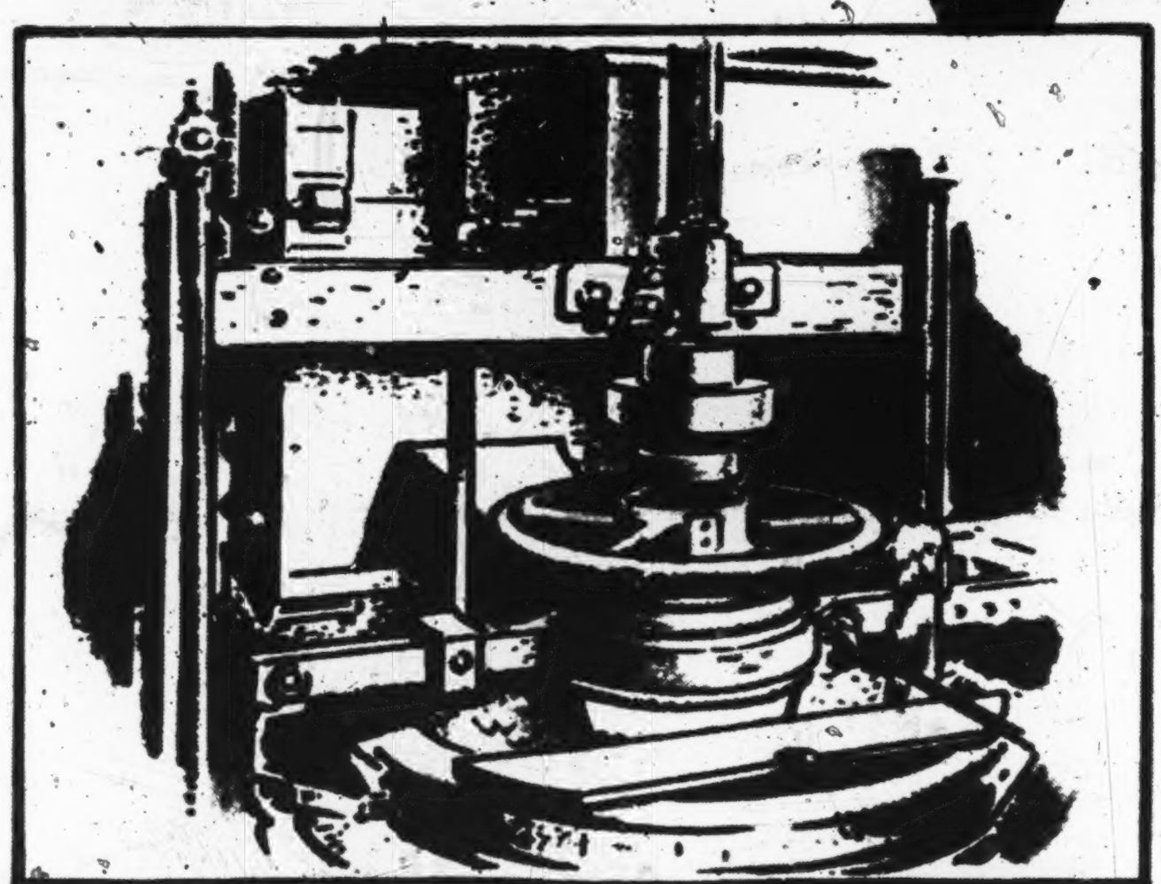
SCREENING: This step takes out all the lumps from the dry red lead. Some of the red lead goes directly to market in this form to be used for paint and for storage batteries. Other paint users prefer their red lead in paste or paint form and for this trade the dry red lead is ground in oil by placing it in a chaser.

MATERIALS

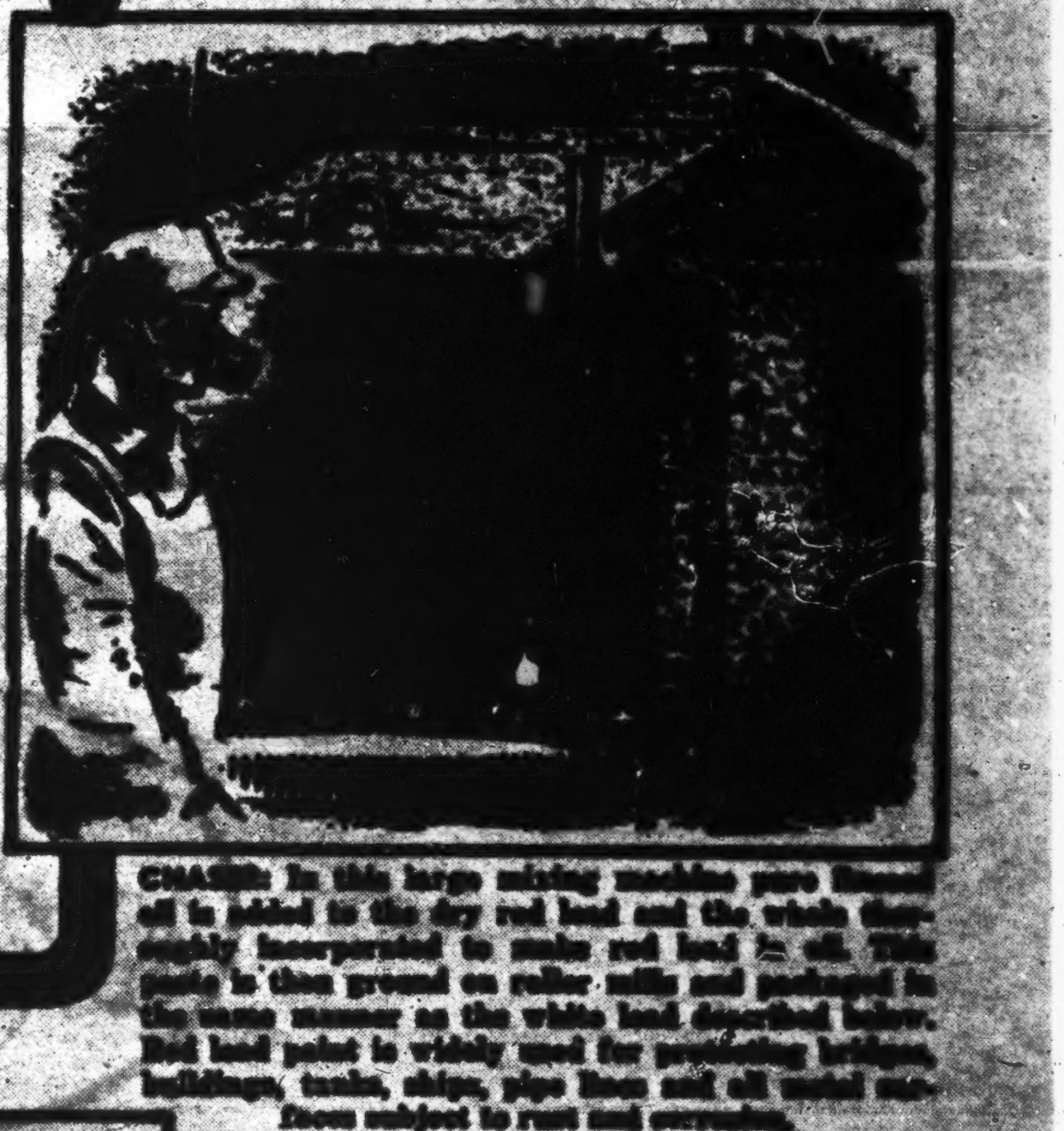


LINSEED OIL

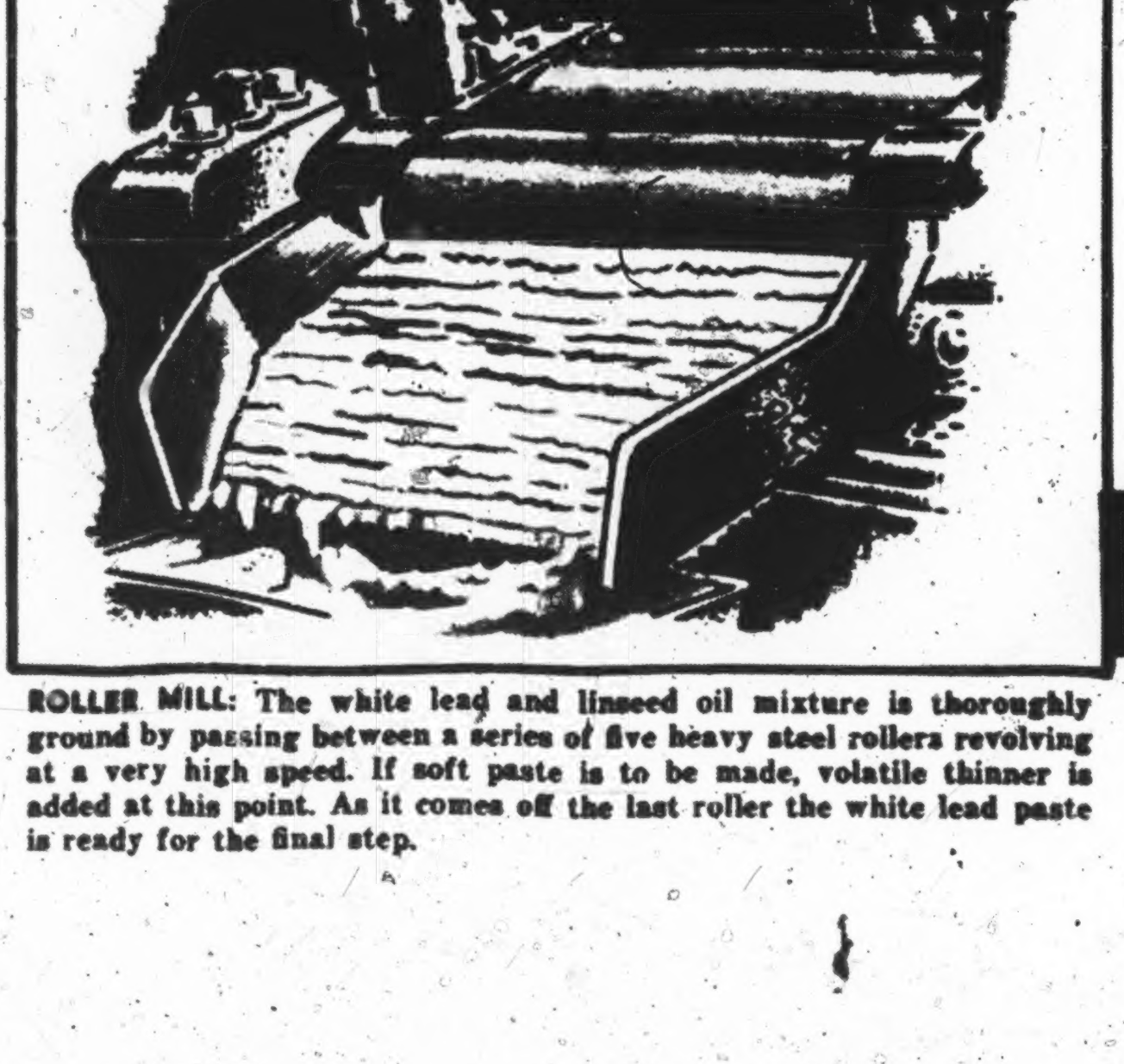
Linseed oil is pressed from flaxseed which comes principally from Argentina and our own Northwest. The oil is carefully filtered and allowed to settle before mixing with white lead as described opposite.



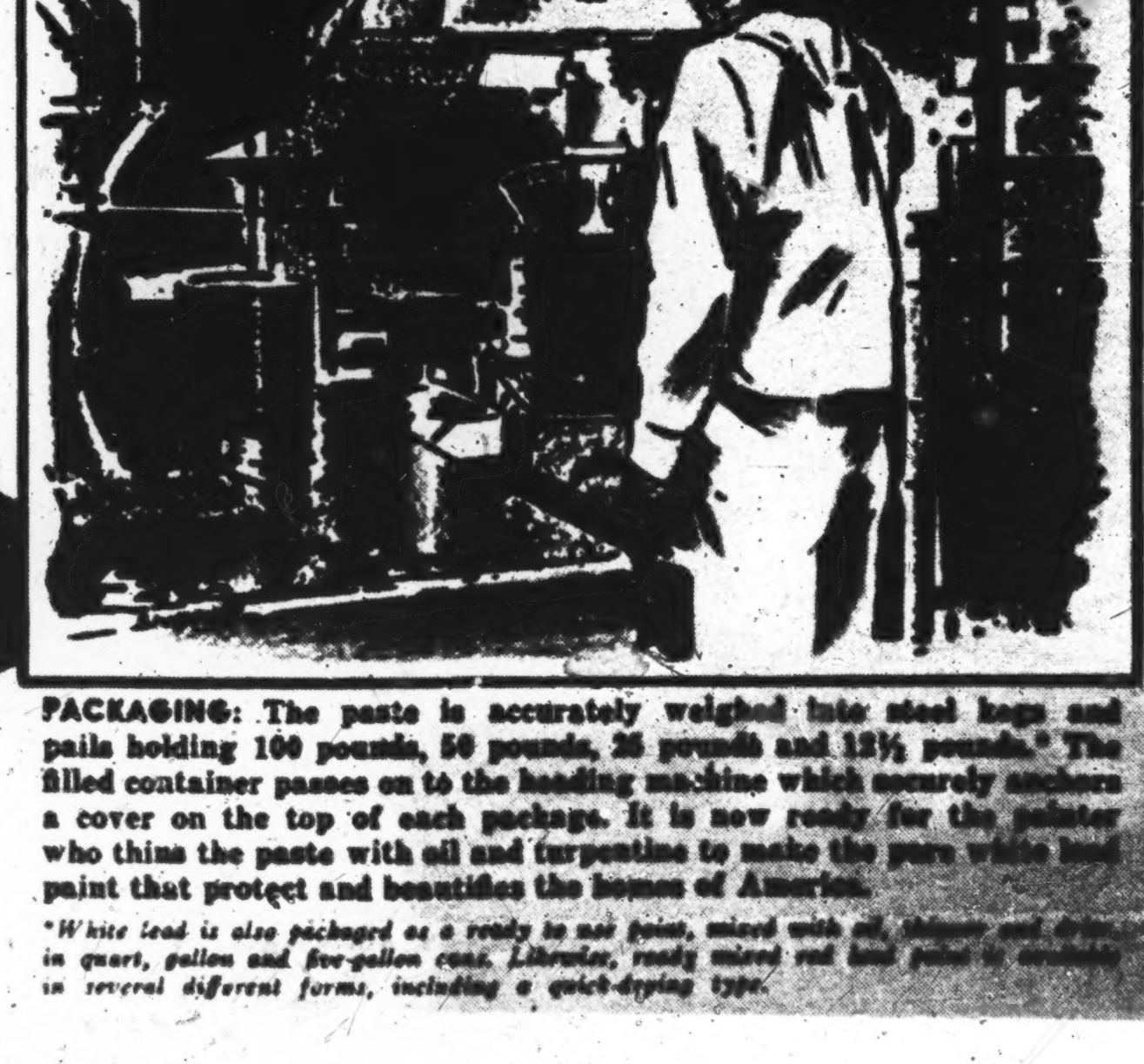
PULPING MACHINE: A measured weight of white lead pulp, containing water, is fed into the top of a cylindrical tank, about 5 feet in diameter and 15 feet high. A carefully measured quantity of pure linseed oil is added. The mass is then steam heated and thoroughly agitated with large paddles. As this goes on each white lead particle unites with linseed oil so closely the water is driven out, comes to the top and is drawn off.



CHASER: In this large mixing machine pure linseed oil is added to the dry red lead and the whole thoroughly incorporated to make red lead in oil. This paste is then ground on roller mills and packaged in the same manner as the white lead described below. Red lead paint is widely used for protecting bridges, buildings, tanks, ships, pipe lines and all metal surfaces subject to rust and corrosion.

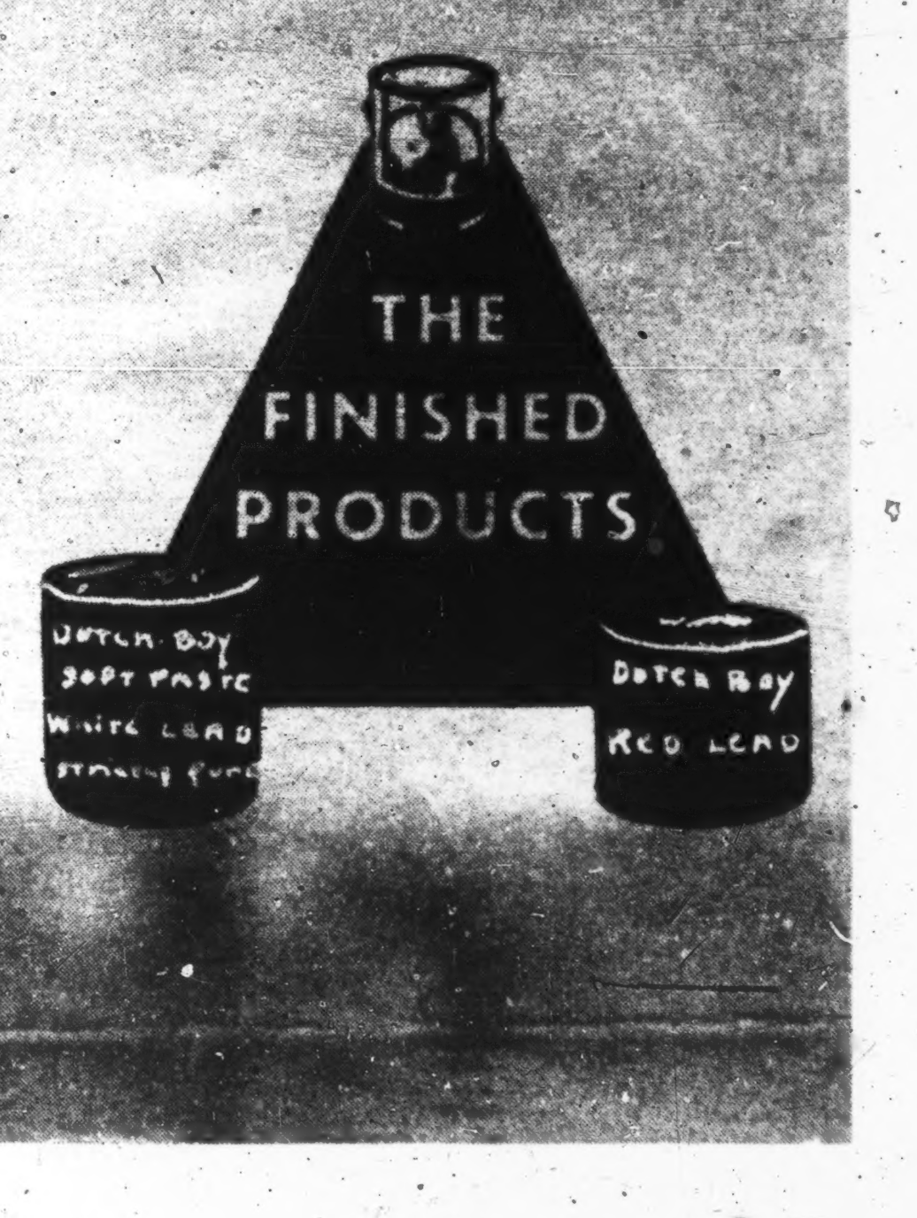


ROLLER MILL: The white lead and linseed oil mixture is thoroughly ground by passing between a series of five heavy steel rollers revolving at a very high speed. If soft paste is to be made, volatile thinner is added at this point. As it comes off the last roller the white lead paste is ready for the final step.



PACKAGING: The paste is accurately weighed into steel kegs and pails holding 100 pounds, 50 pounds, 25 pounds and 12½ pounds.* The filled container passes on to the heading machine which securely anchors a cover on the top of each package. It is now ready for the painter who thins the paste with oil and turpentine to make the pure white lead paint that protect and beautifies the homes of America.

*White lead is also packaged as a ready to use paint, mixed with oil, thinner and drier, in quart, gallon and five-gallon cans. Likewise, ready mixed red lead paint is available in several different forms, including a quick-drying type.



Respondent's Exhibit No. 154.

NATIONAL LEAD COMPANY

Price Changes Per Cwt. in Dollars

Dates	Pig Lead	Paste White Lead	Paste Red Lead	Dry White Lead	Lead Sulphate	Dry Red Lead	Litharge
Apr. 9	4.10						
" 10	4.25						
May 17	4.15						
" 18	4.00						
" 28						7.50	6.50
June 28	3.85						
" 29	3.75					7.25	6.25
July 20	3.80						
" 23	3.85						
" 27	3.75						
Aug. 24	3.70						
" 27	3.75						
Sept. 6	3.70						
" 21	3.65						
" 25	3.60						
Oct. 17	3.65						
" 18	3.70						
Nov. 5	3.65						
" 7	3.60						
" 16	3.55						
" 19	3.50					7.00	6.00
Dec. 14	3.60						
" 17	3.70						
1935							
Jan. 30	3.60						
Feb. 1	3.50						
" 13	3.55						
" 18	3.60						
" 28	3.65						
Apr. 15	3.70						
" 22	3.75					7.25	6.25
May 13	3.80						
" 15	3.85						
" 16	3.90						
" 20	3.95						
" 21	4.10					7.50	6.50
" 22	4.25					7.75	6.75
" 27	4.35						
" 31	4.25						
June 3	4.10						
" 6	4.00					7.50	6.50
July 5	4.05						
" 8	4.10						
" 9	4.15						
Aug. 2	4.20						
" 20	4.25					7.75	6.75
" 21	4.30						
" 22	4.35						
Sept. 10						8.00	7.00
" 19	4.50						
Oct. 7	4.60						
" 10	4.50						

Respondent's Exhibit No. 154.

NATIONAL LEAD COMPANY

Price Changes Per Cwt. in Dollars

Dates	Pig Lead	Paste White Lead	Paste Red Lead	Dry White Lead	Lead Sulphate	Dry Red Lead	Litharge
1936							
Feb. 26	4.55						
" 27	4.60						
Apr. 1		11.50	12.00				
Oct. 27	4.70						
" 29	4.80					8.25	7.25
Nov. 4	4.90						
" 5	5.00					8.50	7.50
" 10	5.10						
" 16	5.20						
" 20				7.00	6.25		
Dec. 11	5.30					8.75	7.75
" 14	5.40						
" 15	5.50					9.00	8.00
" 21	6.00					9.50	8.50
1937							
Jan. 1		12.00		7.50	6.75		
Feb. 18	6.25					9.75	8.75
" 19	6.50					10.00	9.00
" 23				8.00	7.25		
" 25	7.00			8.50	7.75	10.50	9.50
Mar. 1		13.00					
" 8	7.25					10.75	9.75
" 9	7.50					11.00	10.00
" 10	7.75			9.25	8.75		
" 16	7.50						
" 17	7.25					10.75	9.75
" 19	7.00						
" 23	6.95						
Apr. 2	6.90						
" 3						10.50	9.50
" 7	6.00					9.50	8.50
" 8				7.75	7.25		
Aug. 4	6.25					9.75	8.75
" 5	6.50					10.00	9.00
" 31				8.25	7.75		
Sept. 13		13.00	13.75 (Sept. 15)				
" 24	6.25					9.75	8.75
" 27	6.00					9.50	8.50
Oct. 15	5.75					9.25	8.25
" 18	5.50					9.00	8.00
" 19		12.50	12.75	7.75	7.25		
Nov. 3	5.25					8.75	7.75
" 4	5.00						
" 30				7.00	6.50		
Dec. 7						8.50	7.50
" 16	4.75					8.25	7.25

Respondent's Exhibit No. 154.

NATIONAL LEAD COMPANY

Price Changes Per Cwt. in Dollars

Dates	Pig Lead	Paste White Lead	Paste Red Lead	Dry White Lead	Lead Sulphate	Dry Red Lead	Litharge
1938							
Jan. 7	4.85						
" 10		11.75	12.00				
" 11	4.90						
Feb. 8	4.75						
" 10	4.50					8.00	7.00
Mar. 10		11.25	11.75	6.50	6.00		
May 23	4.25					7.75	6.75
" 27	4.00					7.50	6.50
June 15				6.25	5.50		
" 22	4.25					7.75	6.75
" 23	4.35						
" 24	4.50					8.00	7.00
" 30	4.75					8.25	7.25
July 6	4.90						
" 12				7.00	6.25		
Sept. 15	5.00					8.50	7.50
" 19	5.10						
" 26		11.75	12.25				
Nov. 29	5.00						
" 30				7.25	6.50		
Dec. 6	4.85						
" 9	4.75					8.25	7.25
" 19	4.85						
1939							
Jan. 24	4.75						
" 31	4.85						
Feb. 16	4.75						
" 27		12.25	12.25				
Mar. 9	4.85						
Apr. 11	4.75						
June 14	4.80						
" 19	4.75						
July 31	4.95						
Aug. 3	5.05					8.50	7.50
Sept. 5	5.25					8.75	7.75
" 6	5.50					9.00	8.00
" 26		12.75	12.75				
1940							
Jan. 29	5.25					8.75	7.75
Feb. 7	5.00					8.50	7.50
" 28	5.25					8.75	7.75
Mar. 19	5.15						
" 27							
Apr. 2	5.00					8.50	7.50
" 10	5.10						
May 6	5.00						

Respondent's Exhibit No. 154.

NATIONAL LEAD COMPANY

Price Changes Per Cwt. in Dollars

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Aug. 6	4.85						
“ 9	4.75					8.25	7.25
“ 21	4.90						
Sept. 23	5.00					8.50	7.50
Oct. 10	5.25					8.75	7.75
“ 16	5.50					9.00	8.00
Nov. 1				7.50	6.75		
“ 6	5.65						
“ 8	5.80					9.25	8.25
“ 28	5.65						
Dec. 2	5.50					9.00	8.00
1941							
Jan. 2				7.75	6.50		
Feb. 10	5.65						
Mar. 3	5.75					9.25	8.25
“ 26	5.85						
Apr. 26		13.25					
July 21			13.25				
1942							
Jan. 14	6.50					10.00	9.00
“ 26		13.75	14.00				
“ 30				8.50	7.50		
Apr. 1				8.50	7.75		
May 11				8.50	7.50		

Rx-156-id

The STORY OF DUTCH BOY

FEDERAL TRADE COMMISSION
Docket No. 5253 Respondent's Exhibit No. 156
IN THE MATTER OF National Lead
DATE 6/10/47 WITNESS Mc [illegible]
[illegible], INC. Official Reporter
By Graves

HOW WHITE LEAD AND RED LEAD ARE MANUFACTURED

19

★

The Enclosed Chart

is designed to portray graphically the manufacturing story of Dutch Boy white lead and Dutch Boy red lead. It is presented to you with the hope that you will find it useful.

NATIONAL LEAD COMPANY

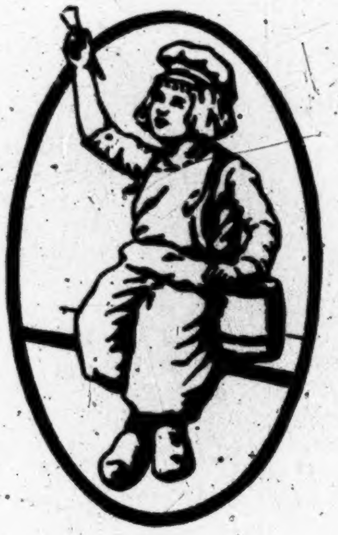
New York, Buffalo, Chicago, Cincinnati, Cleveland, St. Louis, Seattle, Portland, Oregon, San Francisco, Los Angeles, Boston (Chadwick-Boston Lead Company), Pittsburgh (National Lead & Oil Company of Pennsylvania), Philadelphia (John T. Lewis & Bros. Company).

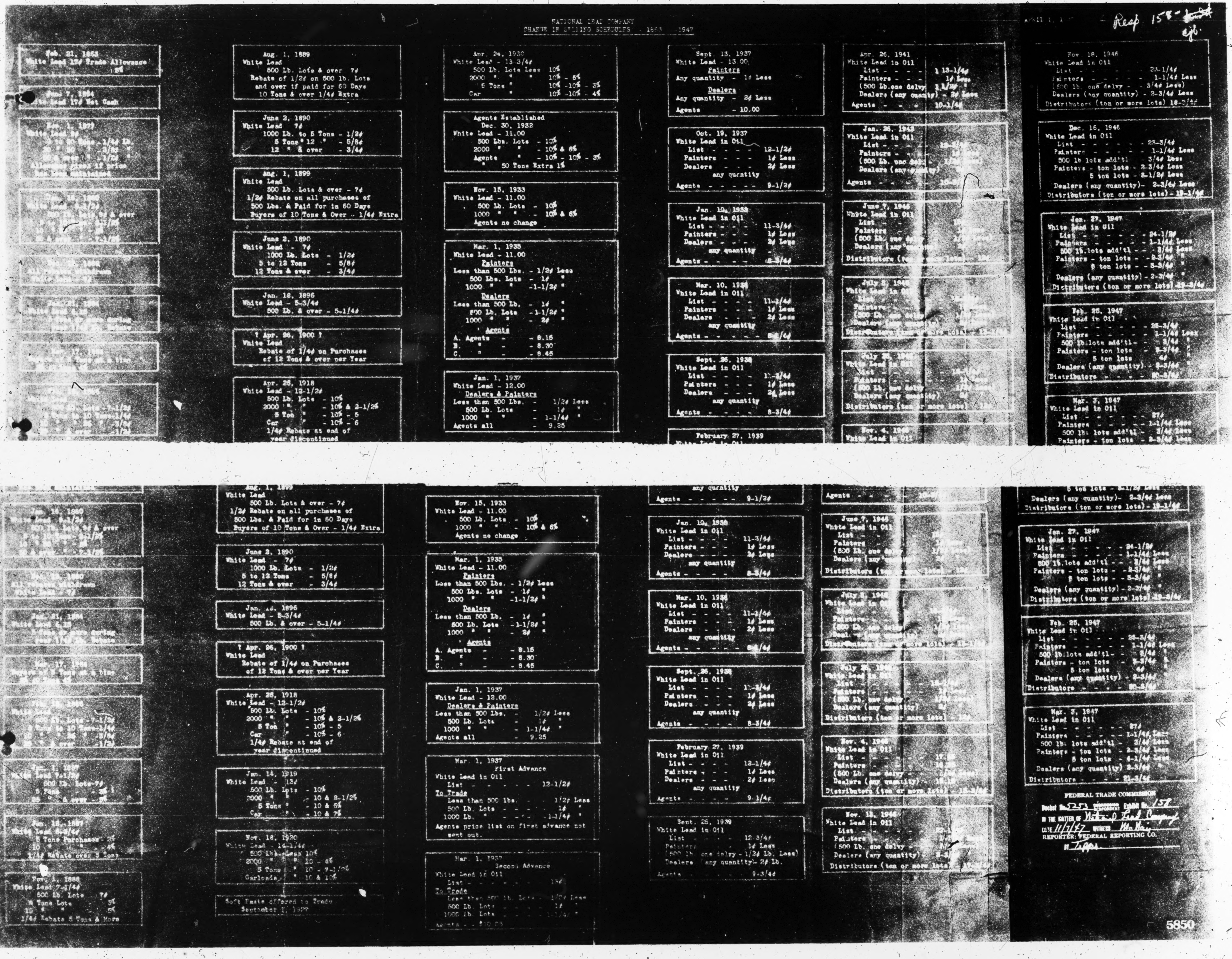
5841-13

Note:

Page 2959 is on card 47

Respondent's Exhibit No. 156.





NATIONAL LEAD COMPANY
CHANGE IN SELLING SCHEDULES 1853 – 1947

April 1, 19[illegible]

Resp 158 - ~~[illegible]~~
ejb.

Feb. 21, 1853
White Lead 12¢ Trade Allowance
5%

June 7, 1864
White Lead 17¢ Net Cash

Nov. 1, 1877
White Lead 9¢
[illegible] Tons - 1/4¢ Lb.
[illegible] - 3/8¢ "
[illegible] & over - 1/2¢ "
Allowance given if price
has been maintained

[illegible] 1880
White Lead 8-1/2¢
500 Lb. Lots 8¢ & over
[illegible]

[illegible] 1882
All rebates withdrawn
White Lead - 7¢

Jan. 21, 1884
White Lead 6.25
[illegible] tons or more during
year 1/4¢ Lb. Rebate

Mar. 17, 1884
Buyers of 5 Tons at a time
[illegible]

Feb. 15, 1886
White Lead
500 Lb. Lots - 7-1/2¢
5 Tons to 10 Tons - 1/4¢
10 " " 25 " - 3/8¢
25 " & over - 1/2¢

Jan. 1, 1887
White Lead 7-1/2¢
500 Lb. Lots - 7¢
5 Tons - 3%
25 " & over - 5%

Jan. 18, 1887
White Lead 6-3/4¢
5 Tons Purchases - 3%
10 " " - 4%
1/4¢ Rebate over 5 Tons

Nov. 1, 1888
White Lead 7-1/4¢
500 Lb. Lots 7¢
5 Tons Lots - 3%
10 " " - 5%
1/4¢ Rebate 5 Tons & More

Aug. 1, 1889
White Lead
500 Lb. Lots & over 7¢
Rebate of 1/2¢ on 500 lb. Lots
and over if paid for 60 Days
10 Tons & over 1/4¢ Extra

June 2, 1890
White Lead 7¢
1000 Lb. to 5 Tons - 1/2¢
5 Tons " 12 " - 5/8¢
12 " & over - 3/4¢

Aug. 1, 1899
White Lead
500 Lb. Lots & over - 7¢
1/2¢ Rebate on all purchases of
500 Lbs. & Paid for in 60 Days
Buyers of 10 Tons & Over - 1/4¢ Extra

June 2, 1890
White Lead - 7¢
1000 Lb. Lots - 1/2¢
5 to 12 Tons - 5/8¢
12 Tons & over - 3/4¢

Jan. 18, 1896
White Lead - 5-3/4¢
500 Lb. & over - 5-1/4¢

? Apr. 26, 1900 ?
White Lead
Rebate of 1/4¢ on Purchases
of 12 Tons & over per Year

Apr. 26, 1918
White Lead - 12-1/2¢
500 Lb. Lots - 10%
2000 " " - 10% & 2-1/2%
5 Ton " - 10% - 5
Car " - 10% - 6
1/4¢ Rebate at end of
year discontinued

Jan. 14, 1919
White Lead - 13¢
500 Lb. Lots - 10%
2000 " " - 10 & 2-1/2%
5 Tons " - 10 & 6%
Car " - 10 & 7%

Nov. 18, 1920
White Lead - 14-1/4¢
500 Lb. Less 10%
2000 " " 10 - 4%
5 Tons " 10 - 7-1/2%
Carloads " 10 & 10%

Soft Paste offered to Trade
September 1, 1927

Apr. 24, 1930
White Lead - 13-3/4¢
500 Lb. Lots Less 10%
2000 " " " 10% - 6%
5 Tons " 10% - 10% - 3%
Car " 10% - 10% - 4%

Agents Established
Dec. 30, 1932
White Lead - 11.00
500 Lbs. Lots - 10%
2000 " " - 10% & 6%
Agents " - 10% - 10% - 3%
" 50 Tons Extra 1%

Nov. 15, 1933
White Lead - 11.00
500 Lb. Lots - 10%
1000 " " - 10% & 6%
Agents no change

Mar. 1, 1935
White Lead - 11.00
Painters
Less than 500 Lbs. - 1/2¢ Less
500 Lbs. Lots - 1¢ "
1000 " " - 1-1/2¢ "
Dealers
Less than 500 Lb. - 1¢ "
500 Lb. Lots - 1-1/2¢ "
1000 " " - 2¢ "
Agents
A. Agents - - 8.15
B. " - - 8.30
C. " - - 8.45

Jan. 1, 1937
White Lead - 12.00
Dealers & Painters
Less than 500 Lbs. - 1/2¢ Less
500 Lb. Lots - 1¢ "
1000 " " - 1-1/4¢ "
Agents all - 9.25

Mar. 1, 1937
First Advance
White Lead in Oil
List - - - - - 12-1/2¢
To Trade
Less than 500 lbs. - - 1/2¢ Less
500 Lb. Lots - - - - 1¢ "
1000 Lb. " - - - - 1-1/4¢ "
Agents price list on first advance not
sent out.

Mar. 1, 1937
Second Advance
White Lead in Oil
List - - - - - - 13¢
To Trade
Less than 500 lb. Lots - 1/2¢ Less
500 Lb. Lots - - - - 1¢ "
1000 Lb. Lots - - - - 1-1/4¢ "
Agents - - $10.05

Sept. 13, 1937
White Lead - 13.00
Painters
Any quantity - 1¢ Less
Dealers
Any quantity - 2¢ Less
Agents - 10.00

Oct. 19, 1937
White Lead in Oil
List - - - - 12-1/2¢
Painters - - - 1¢ Less
Dealers - - - 2¢ Less
any quantity
Agents - - - - - - 9-1/2¢

Jan. 10, 1938
White Lead in Oil
List - - - - 11-3/4¢
Painters - - - 1¢ Less
Dealers - - - 2¢ Less
any quantity
Agents - - - - 8-3/4¢

Mar. 10, 1938
White Lead in Oil
List - - - - 11-1/4¢
Painters - - - 1¢ Less
Dealers - - - 2¢ Less
any quantity
Agents - - - - - 8-1/4¢

Sept. 26, 1938
White Lead in Oil
List - - - - 11-3/4¢
Painters - - - 1¢ Less
Dealers - - - 2¢ Less
any quantity
Agents - - - - 8-3/4¢

February 27, 1939
White Lead in Oil
List - - - - 12-1/4¢
Painters - - - 1¢ Less
Dealers - - - 2¢ Less
any quantity
Agents - - - - 9-1/4¢

Sept. 26, 1939
White Lead in Oil
List - - - - 12-3/4¢
Painters - - - 1¢ Less
(500 lb. one delvy - 1/2¢ Lb. Less)
Dealers (any quantity) - 2¢ Lb.
Agents - - - - 9-3/4¢

Apr. 26, 1941
White Lead in Oil
List - - - - 13-1/4¢
Painters - - - 1¢ Less
(500 Lb. one delvy 1/2¢ ")
Dealers (any quantity) - 2¢ Less
Agents - - - 10-1/4¢

Jan. 26, 1942
White Lead in Oil
List - - - - 13-3/4¢
Painters - - - 1¢ Less
(500 Lb. one delvy - 1/2¢ Less)
Dealers (any quantity) 2¢
Agents - - - - 10-3/4¢

June 7, 1946
White Lead in Oil
List - - - - 15¢
Painters - - 1¢ Less
(500 Lb. one delvy 1/2¢ Less)
Dealers (any quantity) 2¢ "
Distributors (ton or more lots) - 12¢

July 8, 1946
White Lead in Oil
List - - - - [illegible]
Painters - - - 1¢ Less
(500 Lb. one delvy - 1/2¢ Less)
Dealers (any quantity) 2¢ Less
Distributors (ton or more lots) - [illegible]

July 26, 1946
White Lead in Oil
List - - - - - [illegible]
Painters - - - - - 1¢ Less
(500 Lb. one delvy - 1/2¢ Less)
Dealers (any quantity) 2¢ "
Distributors (ton or more lots) - 12¢

Nov. 4, 1946
White Lead in Oil
List - - - - - 17.85
Painters - - - - - 16.85
(500 Lb. one delvy - - [illegible])
Dealers (any quantity) - 15.85
Distributors (ton or more lots) - 15-3/4¢

Nov. 12, 1946
White Lead in Oil
List - - - - - - [illegible]
Painters - - - - - - [illegible] Less
(500 Lb. one delvy - [illegible])
Dealers (any quantity) - [illegible]
Distributors (ton or more lots) - [illegible]

Nov. 18, 1946
White Lead in Oil
List - - - - - - 23-1/4¢
Painters - - - - - 1-1/4¢ Less
(500 lb. one delvy - - 3/4¢ Less)
Dealers (any quantity) - 2-3/4¢ Less
Distributors (ton or more lots) 18-3/4¢

Dec. 16, 1946
White Lead in Oil
List - - - - - - 23-3/4¢
Painters - - - - - 1-1/4¢ Less
500 lb lots add'tl - 3/4¢ Less
Painters - ton lots - 2-3/4¢ Less
5 ton lots - 3-1/2¢ Less
Dealers (any quantity) - 2-3/4¢ Less
Distributors (ton or more lots) - 19-1/4¢

Jan. 27, 1947
White Lead in Oil
List - - - - - - 24-1/2¢
Painters - - - - - 1-1/4¢ Less
500 lb. lots add'tl - - 3/4¢ Less
Painters - ton lots - - 2-3/4¢ "
5 ton lots - - 3-3/4¢ "
Dealers (any quantity) - 2-3/4¢ "
Distributors (ton or more lots) 19-3/4¢

Feb. 25, 1947
White Lead in Oil
List - - - - - - 25-3/4¢
Painters - - - - - 1-1/4¢ Less
500 lb. lots add'tl - - 3/4¢ "
Painters - ton lots - 2-3/4¢ "
5 ton lots 4¢ "
Dealers (any quantity) - 2-3/4¢ "
Distributors - - - - 20-3/4¢

Mar. 3, 1947
White Lead in Oil
List - - - - - - 27¢
Painters - - - - - 1-1/4¢ Less
500 lb. lots add'tl - 3/4¢ Less
Painters - ton lots - 2-3/4¢ Less
5 ton lots - 4-1/4¢ Less
Dealers (any quantity) 2-3/4¢ "
Distributors - - - - 21-3/4¢

FEDERAL TRADE COMMISSION
Docket No. 5253 ~~COMMISSION~~ RESPONDENT Exhibit No. 158
IN THE MATTER OF National Lead Company
DATE 11/7/47 WITNESS McNair
REPORTER: FEDERAL REPORTING CO.
BY Tipps

5850

Respondent's Exhibit No. 159.

FEDERAL TRADE COMMISSION
DOCKET NO. 5253 EXHIBIT NO. 159-A
IN THE MATTER OF NATIONAL LEAD
DATE 6-11-47 WITNESS McKAIG
REPORTER Groner
ELECTROREPORTER INC OFFICIAL REPORTER

NATIONAL LEAD COMPANY
111 BROADWAY
NEW YORK

June 9, 1934.

TO ALL BRANCH MANAGERS:

Please refer to our general letter of May 11th to which was attached Conditions for Sale, etc., of Oxides and Dry White Lead. Since that date the zone differentials for oxides in the territory served by the Pacific Coast have been determined and a change has been made in New Mexico, Colorado, Wyoming and Montana applying to less carload lots.

On dry white lead there has also been a change from our original instructions, in that a differential of 1/4¢ a pound has been added to the par price in those four states.

The new zone schedules are as follows -

OXIDES

For lots of less than 20 tons add differentials as shown to par card prices

1/4¢ per pound in Florida, Georgia, Alabama, Mississippi, Louisiana, Arkansas, Texas, Oklahoma. California and west of Cascade Mountains in Oregon and Washington.

1/2¢ per pound in New Mexico, Colorado, Wyoming and Montana.

3/4¢ per pound in Arizona, Idaho, Nevada, Utah and east of Cascade Mountains in Oregon and Washington.

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1/2¢ per pound in New Mexico, Colorado, Wyoming and Montana.

3/4¢ per pound in Arizona, Idaho, Nevada, Utah and east of Cascade Mountains in Oregon and Washington.

For 20-ton lots add 1/4¢ per pound in Florida, Georgia, Alabama, Mississippi, Louisiana, Arkansas, Texas, Oklahoma, New Mexico, Colorado, Wyoming, Montana. Idaho, Utah, Arizona, Nevada and east of Cascade Mountains in Oregon and Washington.

DRY WHITE LEAD

For lots of 20 tons and for smaller quantities add 1/4¢ per pound in New Mexico, Colorado, Wyoming, Montana, Arizona, Utah, Idaho, Nevada, California, Oregon and Washington.

We appreciate that the whole zone set-up is very confusing, particularly in view of the fact that there is a different arrangement for oxides, dry white lead and white lead-in-oil. Fortunately you are only concerned with the states in your territory. It seems important, however, that you should have full information available in your office. In the hope that it will help to simplify this complicated matter we are planning to make up colored maps for each product which will be sent to you as soon as they can be completed.

[redacted]

Yours very truly,

Harold Rowe 9

RH

Please be particularly careful that this information is not given to any one in the trade before May 21st.

NATIONAL LEAD COMPANY
111 BROADWAY
NEW YORK

FEDERAL TRADE COMMISSION
Docket No. 5253 Respondent's Exhibit No. 159-B

May 11, 1934.

TO BRANCH MANAGERS:

Enclosed herewith are copies of the Conditions for Sale of Lead Oxides and Dry White Lead which have been included in the Lead Code as finally submitted to the N. R. A. for approval. We have postponed putting the oxide schedules into effect for several weeks in the hope that our code would be signed. Rather than wait any longer we have decided to adopt them for orders taken after May 31st. The necessary changes in the Conditions for Sale of Dry Lead were made on January 1st.

It is planned to have those branches which issue oxide price cards send out on May 21st a notice similar to the one attached. (On such notices as are sent to customers in states carrying the extra 1/4¢ differential all prices listed will be 1/4¢ higher.) In many cases it probably will be advisable to notify customers by letter or through your salesmen.

The most important changes are -

(1) The requirement of 20 tons in one lot to obtain a differential price

and (2) The adoption of a price for 5-ton lots.

We appreciate that the new basis will not be entirely satisfactory to every buyer of oxides, but we believe it to be more reasonable and fair than the practices of the past which have led us into many inequitable arrangements

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The most important changes are -

(1) The requirement of 20 tons in one lot to obtain a differential price

and (2) The adoption of a price for 5-ton lots.

We appreciate that the new basis will not be entirely satisfactory to every buyer of oxides, but we believe it to be more reasonable and fair than the practices of the past which have led us into many inequitable arrangements

for which the only justification was that they were forced on us by competition. Buying on differential, originally limited to the largest accounts, has spread to such an extent as to include some customers whose tonnage would scarcely amount to a carload a year. The 5-ton price is being introduced to take care of the medium sized buyer who is unable to meet the 20-ton requirement, but who is entitled to something better than the occasional user of a single barrel.

Along with this letter we are sending you interpretations of several of the clauses in "Schedule A", and some instructions which we hope will answer the questions that naturally will arise. If you are in doubt on any points please write us at once.

Orders may be taken between May 21st and 31st on the present basis for shipment up to June 30th. The new conditions of sale will apply to all orders received on and after June 1st.

Yours very truly,

EH
Encls.

Respondent's Exhibit No. 159.

FEDERAL TRADE COMMISSION
Docket No. 2943 Respondent's Exhibit No. 159

GENERAL INSTRUCTIONS

On Carload & L C L Lots

No change will be made in existing contracts until they expire. In cases where buyers have old contracts with competitors, not calling for all of their requirements, you are privileged to quote on the same basis, but do not do so without first taking the matter up with this office

Bona fide trial lots may be supplied at buyer's usual quantity price bas-

Special arrangements may be made with agents handling oxides for re-sale, but must include an understanding that they will not quote below our schedule. Please advise us before entering into any new agreements of that sort.

If any shipments are made on consignment the price applying to withdrawals shall be that for the quantity taken out of stock at one time.

On direct sales of small packages to industrial accounts you may use as a minimum basis the barrel price applying on the quantity shipped at one time plus the following differentials:

100# kegs............	1/2¢ per lb.
50# "	3/4¢ " "
25# "	
12½# "	1¢ " "

On such sales terms shall be 30-1-10.

Prices to railroads will be the same as for other buyers except that freight will be allowed from our nearest factory point to the nearest point on buyer's line. No decision has been made as yet regarding contracts for the third quarter

In the case of steamship lines delivery will be to dock with no further freight allowance.

Notices will be sent to you later regarding prices for federal, state, municipal governments, etc.

FEDERAL TRADE COMMISSION
Docket No. 5253 Respondent's Exhibit No. 159-D

(REFERRING TO SCHEDULE "A" - 1 - - - LOTS OF LESS THAN TWENTY TONS)

In the following states the card prices will be 1/4¢ a pound higher than those shown on the card enclosed:

Florida, Georgia, Alabama, Mississippi, Louisiana, Arkansas, Texas, Oklahoma, New Mexico, Colorado, Wyoming and Montana. (Schedules for states served by Pacific Coast not yet determined.)

All sellers have agreed to discontinue the old 90-day card price contracts. Firm orders will be accepted for shipment up to 30 days. Any customer wishing to protect himself on a definite commitment for a longer period may do so with the understanding that

(a) Total quantity unshipped after 30 days will be billed on standard terms at the price in effect on the date of purchase, shipment to be made at buyer's convenience. Unless it is agreed that all deliveries will be in 5-ton lots the price applying should be that for smaller quantities with the understanding that 1/2¢ a pound allowance will be made for any shipments of 5 tons at one time.

or (b) After 30 days from date of order interest will be added to the selling price at the rate of 1/2% per month up to date of shipment.

(4) Price - (c). You will note that no protection against decline may be given. This is a point on which there was a great deal of discussion and it was finally decided to make a definite rule which is intended to mean that the price to apply on any order is that "in effect on date order is received".

(5) Delivery and (6) Transportation Allowance should be considered together and simply mean that all prices are on a delivered basis. Please note particularly that no cartage allowance may be made to a buyer for use of his own truck.

(7) Shipment. The words "at least" were put in at the request of the N. R. A., which is also responsible for some of the other phraseology in the schedules. Any order taken at the prevailing price must be for shipment within 30 days.

(8) Terms. Cash discount may be allowed to buyers who make a practice of paying bills on the 10th or 15th proximo. We are anxious that this concession should be given only to accounts that request it and have a good reason for doing so. We ask that you limit prox. terms to as small a number of accounts as you reasonably can.

On small packages sold through dealers at the prices shown on the white lead-in-oil cards you may continue your present terms permitting 2% cash discount.

FEDERAL TRADE COMMISSION
Docket No. 5253 Respondent's Exhibit No. 159-E

(REFERRING TO SCHEDULE "A" - 2 - - - TWENTY TON LOTS)

The differentials, which will apply to 20-ton lots, will be as follows in par territory:-

$1.50 for Litharge and Special Negative Battery Oxide
$1.75 for Special Positive Battery Oxide
$2.50 for Red Lead up to and including 98%.

There will be an advance of 1/4¢ a pound for shipments to Florida, Georgia, Alabama, Mississippi, Louisiana, Arkansas, Texas, Oklahoma, New Mexico, Colorado, Wyoming and Montana. (Schedules for states served by Pacific Coast not yet determined.)

(3) Period. Contracts complying with all the requirements of this schedule may be made on a differential basis for deliveries up to December 31, 1934. Any which are now in effect and which expire before that date should be renewed on the new basis and run to December 31st only. Please note particularly the clauses under (5) Price and (8) Shipment.

(5) Price. The buyer is given the option of three methods of determining the price of pig lead applying -

(1) is to cover spot sales and is intended to prevent the practice of booking at the old price after an advance in metal. We appreciate the objections which will be raised because of a customer's inability to obtain a definite price until the close of the market. It will be necessary to explain that the A S & R Co.'s price governing their sales of metal is the closing for the day regardless of what time it is changed. An oxide buyer booking an order with us in the morning will receive the benefit of any reduction which may take place in the afternoon. Differential sales are made on such a small margin it is only fair that we should have an opportunity to buy pig lead against them. With all sellers conforming to this practice

There will be an advance of 1/4¢ a pound for shipments to Florida, Georgia, Alabama, Mississippi, Louisiana, Arkansas, Texas, Oklahoma, New Mexico, Colorado, Wyoming and Montana. (Schedules for states served by Pacific Coast not yet determined.)

(3) **Period.** Contracts complying with all the requirements of this schedule may be made on a differential basis for deliveries up to December 31, 1934. Any which are now in effect and which expire before that date should be renewed on the new basis and run to December 31st only. Please note particularly the clauses under (5) Price and (8) Shipment.

(5) **Price.** The buyer is given the option of three methods of determining the price of pig lead applying -

(1) is to cover spot sales and is intended to prevent the practice of booking at the old price after an advance in metal. We appreciate the objections which will be raised because of a customer's inability to obtain a definite price until the close of the market. It will be necessary to explain that the A S & R Co.'s price governing their sales of metal is the closing for the day regardless of what time it is changed. An oxide buyer booking an order with us in the morning will receive the benefit of any reduction which may take place in the afternoon. Differential sales are made on such a small margin it is only fair that we should have an opportunity to buy pig lead against them With all sellers conforming to this practice we believe it will not be very long before the buyers will become accustomed to it.

(2) covers agreements on which the lead price used is that of some future date such as the date of shipment.

(3) is for average price contracts and is similar to those we have made in the past except that seller must specify before the 1st of the month how much oxide he will take at the average. This shall be considered a firm order. If delivery of any part of the quantity booked is postponed beyond the end of the month, there shall be no adjustment of the price. Additional quantities required during the month cannot be accepted on average basis.

(8) **Shipment.** (b) Taken literally this would mean that a buyer could specify by June 30th a tonnage to be priced on July average for shipment between July 1st and August 31st. There would be no objection to this but in actual practice most average price deliveries probably will be made within 30 days

There are a few very large customers who occasionally wish to cover their requirements for a considerable period by having us buy lead for them In such cases the pig lead shall be billed on the date of purchase -- terms net 30 days

FEDERAL TRADE COMMISSION
Docket No. 5253 Respondent's Exhibit No. 152-F

Sheet 2.

(REFERRING TO SCHEDULE "A" - 2 - - - TWENTY TON LOTS) - Continued.

Other carload buyers wishing to protect themselves on a definite quantity for shipment beyond 60 days may do so with the understanding that

(a) Total quantity unshipped after 60 days will be billed on net 30 day terms.

or (b) After 60 days from date of order interest will be added to the selling price at the rate of 1/2% per month up to date of shipment.

FEDERAL TRADE COMMISSION
Docket No. 5253 Respondent's Exhibit No. 159G.

"J"

SCHEDULE "A" - 1.

ARTICLE I. CONDITIONS FOR SALE OF LEAD OXIDES IN LOTS OF LESS THAN TWENTY TONS.

A. "Sale" or "Order" as used herein includes any transaction whereby a member of the industry makes a quotation on, or becomes obligated to sell and deliver material.

Whatever terminology may be used, the intent and meaning thereof shall conform to the following requirements of sale.

(1) Material - Dry Oxides of Lead, or mixtures consisting principally thereof, each grade of material to be specifically designated.

(2) Quantity - Any amount as agreed between buyer and seller.

(3) Packages - As agreed between buyer and seller. Special packages required by buyer shall be charged for according to cost.

(4) Price - (a) Seller's card or quoted price in effect on date order is received with allowance as follows:

(1) Not more than 1/2¢ per pound for minimum shipment of 5 tons for one buyer at one time to one destination.

(b) Emergency shipments of smaller quantities may be made at the 5-ton price only to a customer for whom the Seller has a 5-ton order on hand for the same material for immediate shipment, or five tons en route to the same destination.

(c) No protection against decline in Seller's price may be given.

(3) Packages - As agreed between buyer and seller. Special packages required by buyer shall be charged for according to cost.

(4) Price - (a) Seller's card or quoted price in effect on date order is received with allowance as follows:

(1) Not more than 1/2¢ per pound for minimum shipment of 5 tons for one buyer at one time to one destination.

(b) Emergency shipments of smaller quantities may be made at the 5-ton price only to a customer for whom the Seller has a 5-ton order on hand for the same material for immediate shipment, or five tons en route to the same destination.

(c) No protection against decline in Seller's price may be given.

Arrange with Mr. Creagh on this markings

(d) Red Lead containing 97 per cent or 98 per cent Pb_3O_4 shall be so marked on the package and shall be sold at not less than 1/4¢ and 1/2¢ per pound, respectively, over Seller's price for grades of lower Pb_3O_4 content.

(5) Delivery - F.O.B. cars Seller's shipping point, or by truck F.O.B. Buyer's premises.

(6) Transportation Allowance - (a) Since transportation is included in the Seller's price, the actual freight paid by Buyer shall be allowed as deduction. No cartage allowance shall be made to Buyer for use of his own truck.

(b) If shipment is made by Buyer's boat, Seller may allow actual amount he would have paid for like transportation at minimum published tariffs in effect on date of shipment.

(7) Shipment - Shall be made at least within thirty (30) days from date order is received.

(8) Terms - Net thirty days, less 1 per cent for cash in ten days from date of shipment.

(9) Taxes - Any tax or other charge imposed by Federal Law upon the production and/or sale and/or shipment of lead oxides shall be added to the price to be paid by the Buyer on any transaction to which such charge is applicable.

FEDERAL TRADE COMMISSION
Docket No. 5253 Respondent's Exhibit No. 159-H

"J"

SCHEDULE "A" - 2.

ARTICLE II. CONDITIONS FOR SALE OF LEAD OXIDES IN LOTS OF AT LEAST TWENTY TONS.

A. "Sale" or "Order" as used herein refers to any transaction whereby a Seller quotes on or becomes obligated to deliver material.

Whatever terminology may be used, the intent and meaning thereof shall conform to the following requirements of sale.

(1) Material - Dry oxides of lead, or mixtures consisting principally thereof, each grade of material to be specifically designated.

(2) Quantity - As agreed between Buyer and Seller, provided that each order or release shall be an amount not less than 20 tons to one destination and for account of not more than one Buyer.

(3) Period - As specified.

(4) Packages - As agreed between buyer and seller. Special packages required by Buyer shall be charged for according to cost.

(5) Price - (a) Shall be determined by adding a differential, as agreed upon by Buyer and Seller, to the price of common lead at New York, the lead price applying to each order to be specified by the Buyer at the time order is placed as:

(1) The American Smelting & Refining Company's quotation at the close of the market on the day the order is received by Seller
or
(2) The American Smelting & Refining Company's

and for account of not more than one Buyer.

(3) Period - As specified.

(4) Packages - As agreed between buyer and seller. Special packages required by Buyer shall be charged for according to cost.

(5) Price - (a) Shall be determined by adding a differential, as agreed upon by Buyer and Seller, to the price of common lead at New York, the lead price applying to each order to be specified by the Buyer at the time order is placed as:

(1) The American Smelting & Refining Company's quotation at the close of the market on the day the order is received by Seller
or

(2) The American Smelting & Refining Company's quotation at the close of the market on a future date definitely agreed upon by Buyer and Seller when order is accepted
or
(3) The average quotation, as reported in one of the publications known as the "American Metal Market" and the "Engineering & Mining Journal", for a future period definitely agreed upon by Buyer and Seller when the order is accepted. If the lead price is determined by the method herein outlined, Seller must require Buyer to specify before the beginning of the governing period the exact quantity of material to be priced in this manner. Deferred shipments shall be billed on the basis originally applicable thereto. Additional quantities required during the governing period shall be considered as new orders and shall be priced in accordance with (1) or (2) above.

(b) Emergency shipments of smaller quantities may be made on the 20-ton price basis only to a customer for whom the Seller has a 20-ton order on hand for the same material for immediate shipment, or 20 tons en route, to the same destination.

(c) No protection against decline in Seller's price may be given.

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FEDERAL TRADE COMMISSION
Docket No. 5253 Respondent's Exhibit No. 159-4

"J"

- 2 -

SCHEDULE "A" - 3.

ARTICLE II. CONDITIONS FOR SALE OF LEAD OXIDES IN LOTS OF AT LEAST TWENTY TONS.

(d) Red Lead containing 97 per cent or 98 per cent Pb_3O_4 shall be so marked on the package and shall be sold at not less than 1/4¢ and 1/2¢ per pound, respectively, over Seller's price for grades of lower Pb_3O_4 content.

(6) Delivery

(a) F.O.B. cars Seller's shipping point
or
(b) By truck complete within three days, F.O.B. Buyer's premises.

(7) Transportation Allowance - (a) Since transportation is included in the Seller's price, the actual freight paid by Buyer shall be allowed as a deduction. No cartage allowance shall be made to Buyer for use of his own truck.

(b) If shipment is made by Buyer's boat, Seller may allow actual amount he would have paid for like transportation at minimum published tariffs in effect on date of shipment.

(8) Shipment - Shall be made at least within sixty (60) days from

(a) The date on which the price of pig lead governs the sale,
or
(b) The beginning of the period during which the average price of pig lead governs the sale.

(9) Terms - Net 30 days.

(10) Taxes - Any tax or other charge imposed by Federal Law upon the production and/or sale and/or shipment of lead oxides shall be added to the price to be paid by the Buyer on any transaction to which such charge is applicable.

"J"

SCHEDULE "A" - 4.

ARTICLE III. CONDITIONS FOR SALE OF BASIC LEAD CARBONATE (DRY WHITE LEAD)

A. "Sale" or "Order" as used herein includes any transaction whereby a member of the industry makes a quotation on or becomes obligated to sell and deliver material.

Whatever terminology may be used, the intent and meaning thereof shall conform to the following requirements of sale.

(1) Quantity - Any amount as agreed between buyer and seller.

(2) Period - As desired, to be specified.

(3) Packages - As agreed between buyer and seller.

(4) Price - (a) Spot Sales - Seller's card or quoted price in effect on date order is received.

(b) Contract Sales - 1. Seller's price on date contract is made with protection against advance or decline on the undelivered portion to the end of the current calendar quarter.

2. On contracts extending beyond the current calendar quarter, the price applying to subsequent deliveries shall be seller's price in effect on the first day of the calendar quarter in which they are made, with protection against advance or decline on the undelivered portion to the end of each quarter.

(c) The price for minimum 20 ton lots for one buyer to one destination, shipped by rail in one carload, or delivered by truck within a period of three days, shall be ~~not more~~ than 1/4¢ per pound less than that charged for smaller quantities.

of smaller quantities

(4) Price - (a) Spot Sales - Seller's card or quoted price in effect on date order is received.

(b) Contract Sales - 1. Seller's price on date contract is made with protection against advance or decline on the undelivered portion to the end of the current calendar quarter.

2. On contracts extending beyond the current calendar quarter, the price applying to subsequent deliveries shall be seller's price in effect on the first day of the calendar quarter in which they are made, with protection against advance or decline on the undelivered portion to the end of each quarter.

(c) The price for minimum 20 ton lots for one buyer to one destination, shipped by rail in one carload, or delivered by truck within a period of three days, shall be ~~not more~~ than 1/4¢ per pound less than that charged for smaller quantities.

of smaller quantities

(d) Emergency shipments/may be made at the 20 ton price only to those customers for whom the Seller has a 20 ton order on hand for the same material for immediate shipment, or a carload (20 tons) enroute, to the same destination.

(5) Delivery - F.O.B. cars Seller's shipping point, or by truck F.O.B. Buyer's premises.

(6) Transportation Allowance - Since transportation is included in the Seller's price, the actual freight paid by Buyer shall be allowed as deduction. No cartage allowance shall be made to Buyer for use of his own truck.

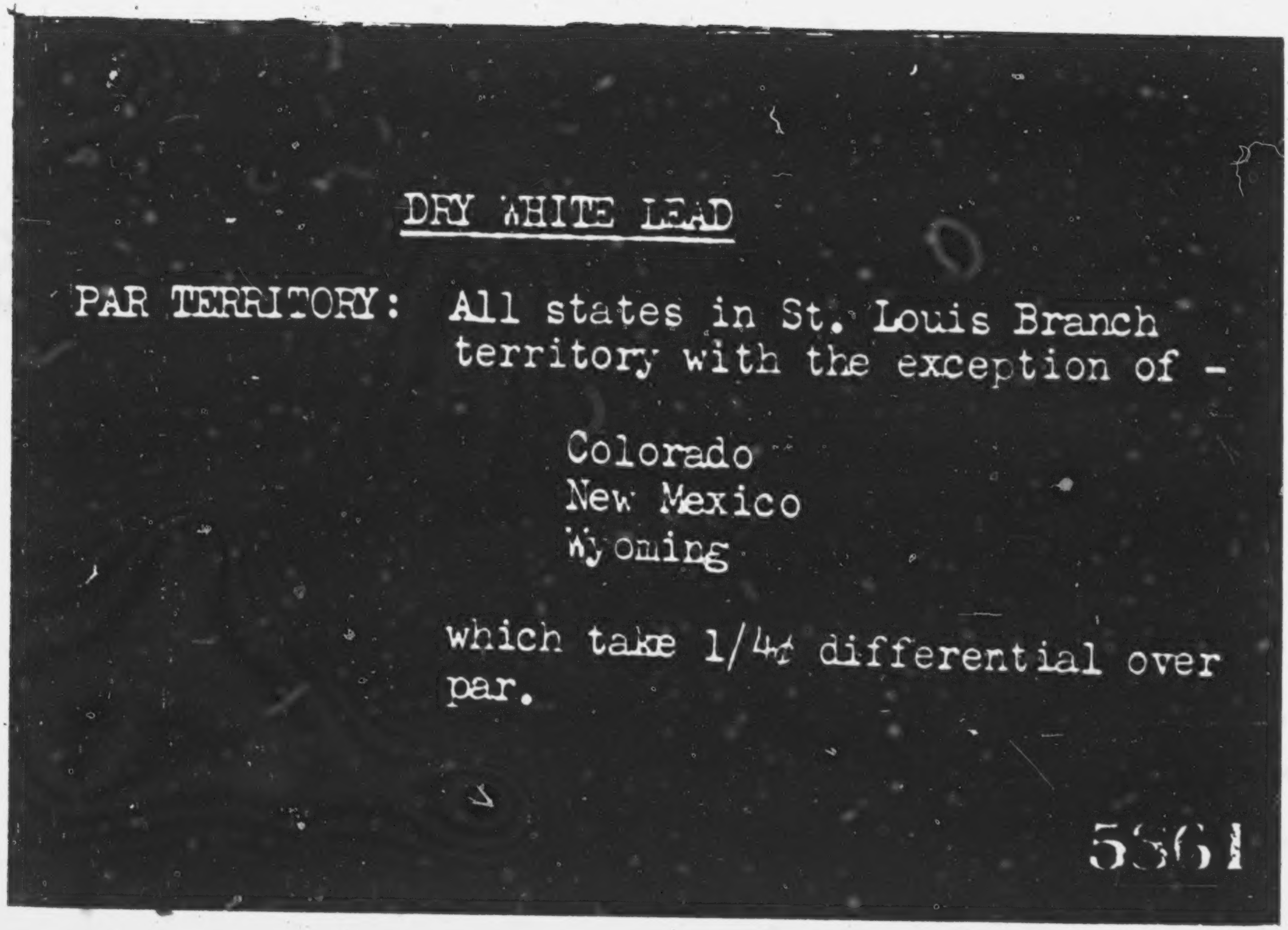
(7) Shipment - (a) Spot Sales - Within thirty days from date order is received.

(b) Contract Sales - Within the period covered by the contract.

(8) Terms - Net thirty days, less 1 per cent for cash in ten days from date of shipment.

(9) Taxes - Any tax or other charge imposed by Federal Law upon the production and/or sale and/or shipment of white lead shall be added to the price to be paid by the Buyer on any transaction to which such charge is applicable.

Respondent's Exhibit No. 162.



DRY WHITE LEAD

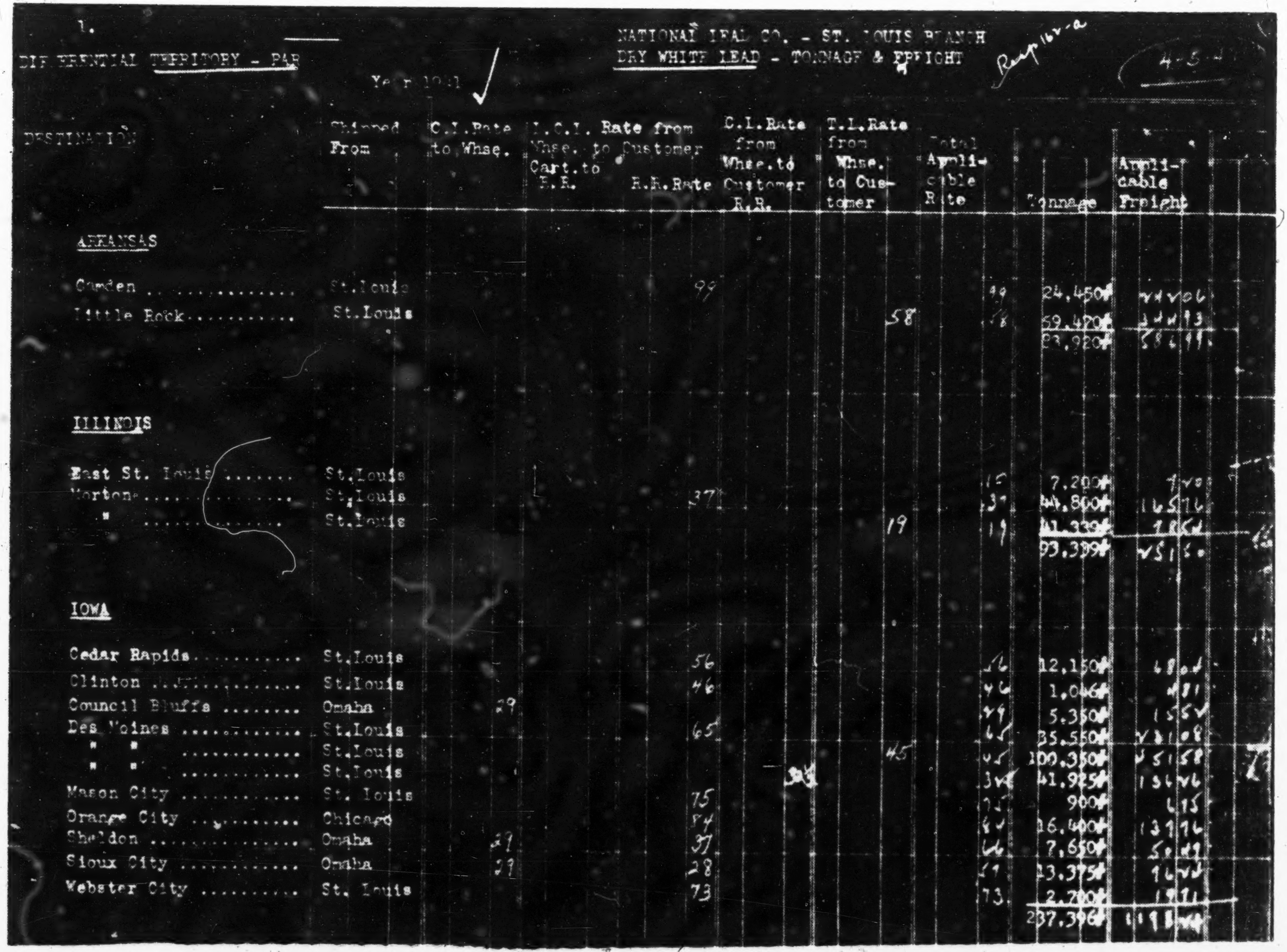
PAR TERRITORY: All states in St. Louis Branch territory with the exception of -

Colorado
New Mexico
Wyoming

which take 1/4¢ differential over par.

5361

Respondent's Exhibit No. 162.



1.

Resp 162-a

4-5-4

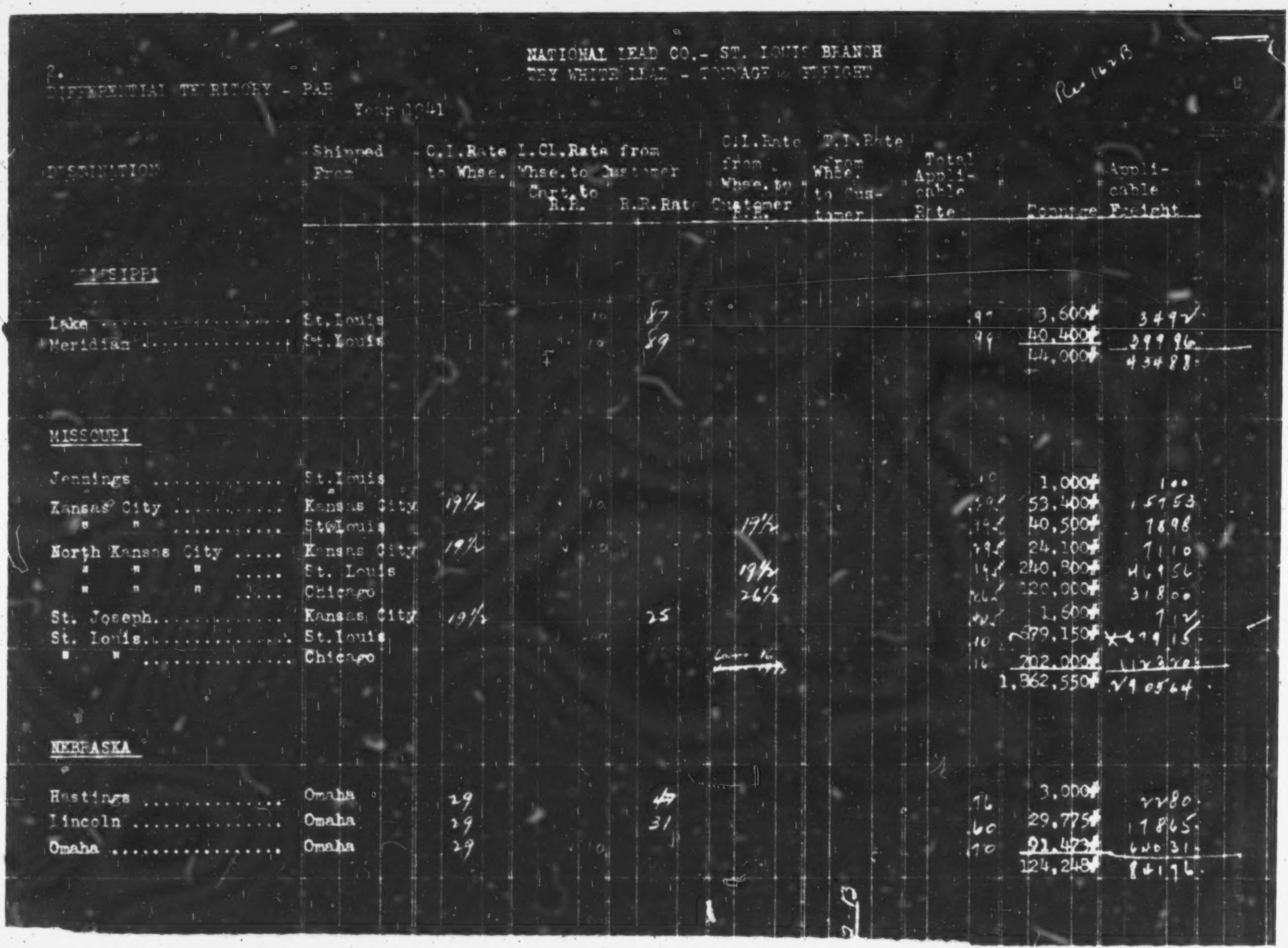
DIFFERENTIAL TERRITORY - PAR

NATIONAL LEAD CO. - ST. LOUIS BRANCH
DRY WHITE LEAD - TONNAGE & FREIGHT

Year 1941 ✓

DESTINATION	Shipped From	C.L. Rate to Whse.	L.C.L. Rate from Whse. to Customer: Cart. to R.R.	L.C.L. Rate from Whse. to Customer: R.R. Rate	C.L. Rate from Whse. to Customer R.R.	T.L. Rate from Whse. to Customer	Total Applicable Rate	Tonnage	Applicable Freight
ARKANSAS									
Camden	St. Louis			99			99	24,450#	242 06
Little Rock	St. Louis					58	58	59,470#	344 93
								83,920#	586 99
ILLINOIS									
East St. Louis	St. Louis						15	7,200#	10 80
Morton	St. Louis			37			37	44,800#	165 76
"	St. Louis					19	19	41,339#	78 54
								93,339#	254 10
IOWA									
Cedar Rapids	St. Louis			56			56	12,150#	68 04
Clinton	St. Louis			46			46	1,046#	4 81
Council Bluffs	Omaha	29					29	5,350#	15 52
Des Moines	St. Louis			65			65	35,550#	231 08
" "	St. Louis					45	45	100,350#	451 58
" "	St. Louis				[illegible]		[illegible]	41,925#	156 26
Mason City	St. Louis			75			75	900#	6 75
Orange City	Chicago			84			84	16,400#	137 76
Sheldon	Omaha	29		37			66	7,650#	50 49
Sioux City	Omaha	29		28			57	13,375#	76 24
Webster City	St. Louis			73			73	2,700#	19 71
								237,396#	[illegible]

Respondent's Exhibit No. 162.



2\.

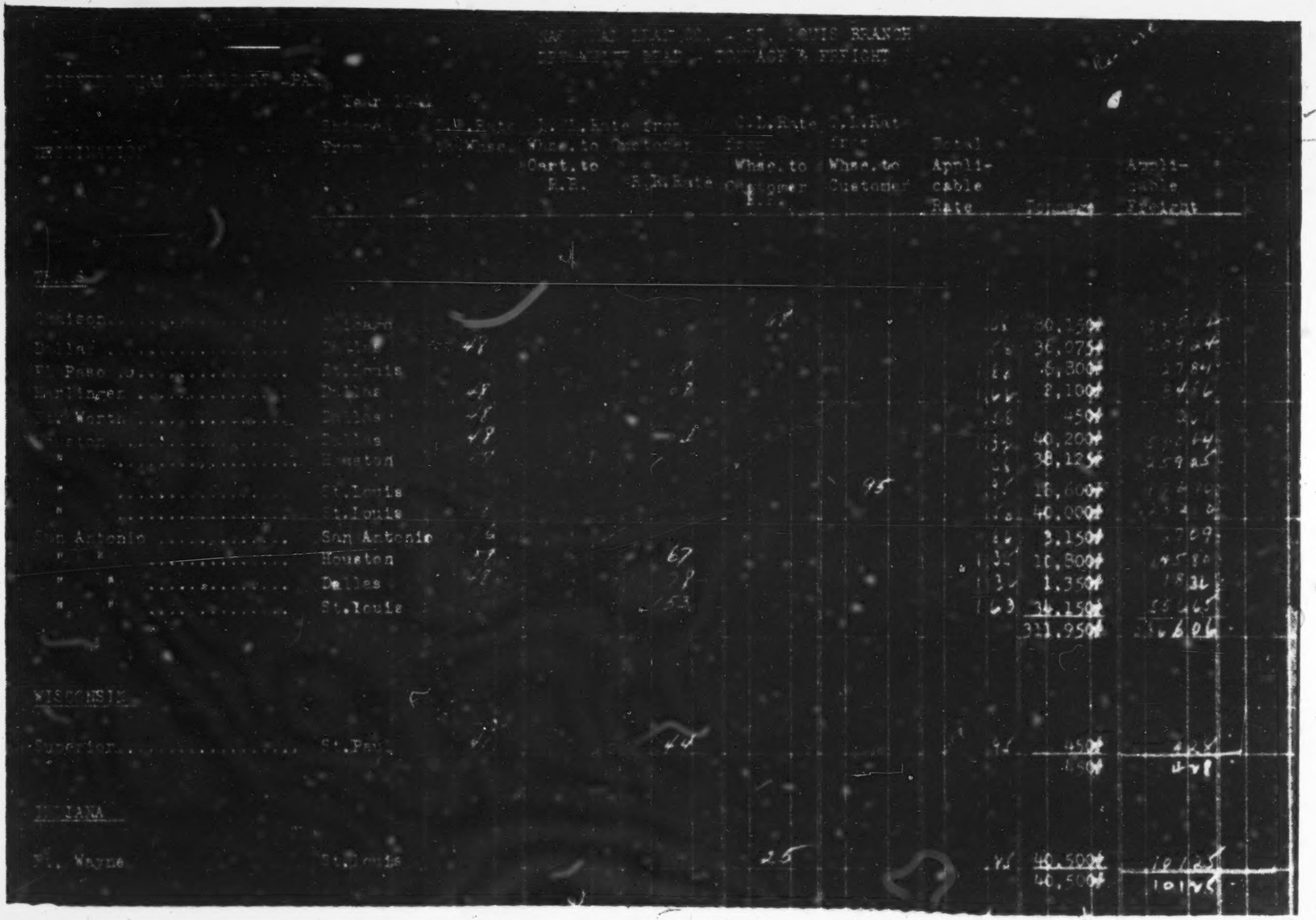
DIFFERENTIAL TERRITORY - PAR

Year 1941

NATIONAL LEAD CO.- ST. LOUIS BRANCH
DRY WHITE LEAD - TONNAGE & FREIGHT

Re 162B

DESTINATION	Shipped From	C.I.Rate to Whse.	I.Cl.Rate from Whse. to Customer Cart to R.R.	I.Cl.Rate from Whse. to Customer R.R. Rate	C.I.Rate from Whse. to Customer R.R.	T.I.Rate from Whse. to Customer	Total Applicable Rate	Tonnage	Applicable Freight
MISSISSIPPI									
Lake	St. Louis		10	87			.97	3,600#	34 92 ✓
Meridian	St. Louis		10	89			.99	40,400#	399 96
								44,000#	434 88
MISSOURI									
Jennings	St. Louis						.10	1,000#	1 00
Kansas City	Kansas City	19½	10				.29½	53,400#	157 53
" "	St. Louis				19½		.19½	40,500#	78 98
North Kansas City	Kansas City	19½	10				.29½	24,100#	71 10
" " "	St. Louis				19½		.19½	240,800#	469 56
" " "	Chicago				26½		.26½	120,000#	318 00
St. Joseph	Kansas City	19½		25			.44½	1,600#	7 12 ✓
St. Louis	St. Louis						.10	379,150#	379 15
" "	Chicago				Lane 16		.16	202,000#	323 20
								1,062,550#	✓1805 64
NEBRASKA									
Hastings	Omaha	29		47			.76	3,000#	22 80
Lincoln	Omaha	29		31			.60	29,775#	178 65
Omaha	Omaha	29					.70	91,473#	640 31
								124,248#	841 76



[illegible] ST. LOUIS BRANCH
[illegible] TONNAGE & FREIGHT

[illegible]

Year [illegible]

Destination	Shipped From	L.L. Rate to Whse.	L.L. Rate from Whse. to Customer: Cart. to R.R.	L.L. Rate from Whse. to Customer: R.R. Rate	C.L. Rate from Whse. to Customer R.R.	C.L. Rate from Whse. to Customer	Total Applicable Rate	Tonnage	Applicable Freight
[illegible]									
Denison	[illegible]				[illegible]		[illegible]	30,150#	[illegible]
Dallas	Dallas	47					[illegible]	36,075#	[illegible]
El Paso	St.Louis			[illegible]			[illegible]	6,300#	27 84
Harlingen	Dallas	48		[illegible]			[illegible]	2,100#	[illegible]
Ft. Worth	Dallas	48					[illegible]	450#	[illegible]
Houston	Dallas	49		[illegible]			[illegible]	40,200#	[illegible]
"	Houston	[illegible]					[illegible]	38,125#	[illegible]
"	St.Louis					95	[illegible]	16,600#	[illegible]
"	St.Louis						[illegible]	40,000#	[illegible]
San Antonio	San Antonio	[illegible]					[illegible]	3,150#	[illegible]
" "	Houston	47		67			[illegible]	10,800#	[illegible]
" "	Dallas	47		78			[illegible]	1,350#	[illegible]
" "	St.Louis			153			[illegible]	34,150#	[illegible]
								311,950#	[illegible]
WISCONSIN									
Superior	St.Paul	[illegible]		44			[illegible]	450#	[illegible]
								450#	[illegible]
INDIANA									
Ft. Wayne	St.Louis				25		[illegible]	40,500#	101 25
								40,500#	101 25

Jany 41

Resp 165-A

FEDERAL TRADE COMMISSION
Docket No. 5253 Respondents Exhibit No. 165-A
IN THE MATTER OF National Lead
DATE 10/29/47 WITNESS [illegible]
REPORTER: FEDERAL REPORTING CO.
BY [illegible]

Voucher	Par	1/8	3/8	Voucher	Par	1/8	3/8	Voucher	Par	1/8	3/8
8325	189			8462			788	8634	209		
"	252			8465	361			"	903		
"	151			8466	2763			"	464		
8327		585		8468	59			"	3521		
"		235		"	402			8694			958
"		147		"	184			8677			742
"		354		"	143			8704	764		
"		557		8482		948		8706	36		
"		[illegible]		"		167		8708		965	
"		2022		"		374		8710	735		
"		961		"			1108	8715	426		
"		1175	164	"		1032		8729	315		
"		362	95	"			432	8721	504		
"		1677	183	8497	122			8751	195		
"		715	63	8535	158			"	3483		
"		1008	419	8581		557	1290	8759			2978
"		145	1114	"			1158	"			13761
"		2155	452	8583	171			8762		2969	
"			575	8580	1127			"		5248	
"			432	"	1198			"			1045
"			675	8615	528			"			632
8358	630			"	906	Gm 9908		"		644	563
"	293			"	398			8763	98		
[illegible]	267			"	462			"	110		
	47			"	567			"	588		
"	[illegible]			8617			728	8761	403		
8443	211			"			90	"	179		
8452	62			"			1863	"	477		
8328	238			"			563	"	55		
[illegible]	75			"			1852	8686	544		
[illegible]	131			"		60	166	"	1346		
8448			11780	"			140	8940		917	
"			423	8619	599						
8451	419			"	593			Total	40677	36127	55436
[illegible]	763			"	38						
[illegible]	45			8621	631						
[illegible]	50			8628	297						
[illegible]	61			"	1834						
[illegible]	127			8683			569				
[illegible]	110			"			399				
	132			"			1589	Cartage	741		
	3.71			"		4047	47				
							1472				

5569

100

Respondent's Exhibit No. 165.

2980

East St. Louis	St. Louis							
Morton	St. Louis		37			37	44,800#	[illegible]
"	St. Louis				19	19	41,339#	[illegible]
							93,339#	[illegible]

IOWA

Cedar Rapids	St. Louis		56			56	12,150#	[illegible]
Clinton	St. Louis		46			46	1,046#	[illegible]
Council Bluffs	Omaha	29				29	5,350#	[illegible]
Des Moines	St. Louis		65			65	35,550#	[illegible]
" "	St. Louis				45	[illegible]	100,350#	[illegible]
" "	St. Louis			34		34	41,925#	[illegible]
Mason City	St. Louis		75			75	900#	[illegible]
Orange City	Chicago		84			84	16,400#	[illegible]
Sheldon	Omaha	29	37			66	7,650#	[illegible]
Sioux City	Omaha	29	28			57	13,375#	[illegible]
Webster City	St. Louis		73			73	2,700#	[illegible]
							237,396#	[illegible]

KANSAS

Hays	Kansas City	19½	74			93½	600#	5.61

LOUISIANA

Angola	New Orleans	58	59			1.17	1,100#	[illegible]
New Orleans	New Orleans	58				66	19,075#	[illegible]
" "	St. Louis			58		58	80,000#	[illegible]
							100,175#	[illegible]

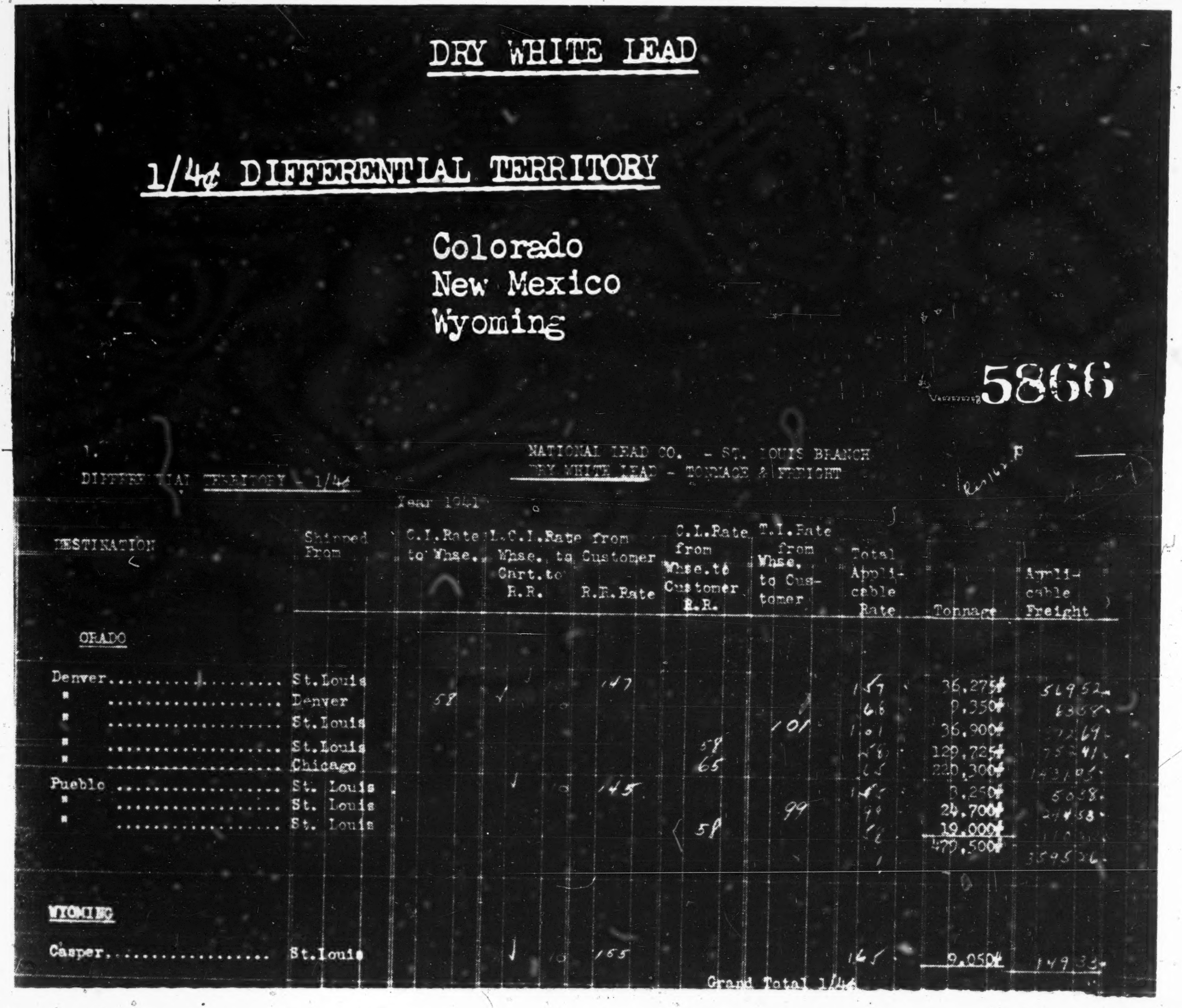
MINNESOTA

Albert Lea	St. Paul	34	38			72	1,700#	[illegible]
Duluth	St. Paul	34	44			78	8,975#	[illegible]
Hutchinson	St. Paul	34	50			84	1,800#	[illegible]
Mankato	St. Paul	34	34			68	2,550#	[illegible]
Minneapolis	St. Paul	34	18			52	103,575#	[illegible]
"	St. Louis			34		34	161,150#	[illegible]
St. Paul	St. Paul	34				44	111,500#	[illegible]
" "	Chicago			34½		34½	161,150#	[illegible]
Virginia	St. Paul	34	50			84	3,575#	[illegible]
							555,975#	[illegible]

FEDERAL TRADE COMMISSION
Docket No. 5253 Respondent Exhibit No. 162-R
Exhibit of [illegible]
4/13/57
KELLER FEDERAL REPORTING CO.
by [illegible]

6862-A

Respondent's Exhibit No. 162.



DRY WHITE LEAD

1/4¢ DIFFERENTIAL TERRITORY

Colorado
New Mexico
Wyoming

5866

1.

DIFFERENTIAL TERRITORY - 1/4¢

NATIONAL LEAD CO. - ST. LOUIS BRANCH
DRY WHITE LEAD - TONNAGE & FREIGHT

Res 162 P

Year 1941

DESTINATION	Shipped From	C.L. Rate to Whse.	L.C.L. Rate from Whse. to Customer Cart. to R.R.	R.R. Rate	C.L. Rate from Whse. to Customer R.R.	T.L. Rate from Whse. to Customer	Total Applicable Rate	Tonnage	Applicable Freight
ORADO									
Denver....................	St.Louis		10	147			157	36,275#	569.52
"	Denver	58	✓ 10				68	9,350#	63.58
"	St.Louis					101	101	36,900#	372.69
"	St.Louis				58		58	129,725#	752.41
"	Chicago				65		65	220,300#	1431.95
Pueblo	St. Louis		✓ 10	145			155	3,250#	50.38
"	St. Louis					99	99	24,700#	244.53
"	St. Louis				58		58	19,000#	110.20
								479,500#	3595.26
WYOMING									
Casper....................	St.Louis		✓ 10	165			165	9,050#	149.33

Grand Total 1/4¢

Kansas City	Kansas City	19½	10			29½	53,400#	157 53
" "	St.Louis			19½		19½	40,500#	78 98
North Kansas City	Kansas City	19½	10			29½	24,100#	71 10
" " "	St. Louis			19½		19½	240,800#	469 56
" " "	Chicago			26½		26½	120,000#	318 00
St. Joseph.............	Kansas City	19½	25			44½	1,600#	7 12
St. Louis..............	St.Louis		10			10	379,150#	[illegible]9 15
" "	Chicago			Lake 16		16	202,000#	323 20
							1,862,550#	[illegible]905 64
NEBRASKA								
Hastings	Omaha	29	47			76	3,000#	22 80
Lincoln................	Omaha	29	31			60	29,775#	178 65
Omaha	Omaha	29	10			70	91,473#	640 31
							124,248#	841 76
NORTH DAKOTA								
Grand Forks	St.Paul	34	49			83	600#	4 98
							600#	4 98
OKLAHOMA								
Oklahoma City...........	St.Louis		108			1.08	2,200#	23 76
Sapulpa	St.Louis		96			96	6,600#	63 36
Tulsa	St.Louis		94			94	10,900#	102 46
							19,700#	189 58
SOUTH DAKOTA								
Sioux Falls	Omaha	29	52			81	3,800#	30 78
							3,800#	30 78
TENNESSEE								
Memphis	Memphis	41				51	37,950#	191 51
"	St.Louis		68			68	4,500#	30 60
"	St.Louis				54	54	55,300#	[illegible]
							97,850#	[illegible]

FEDERAL TRADE COMMISSION
Docket No. 5253 ~~COMMISSION~~ RESPONDENT'S Exhibit No. 662-13

"	St.Louis	95	[illegible]	18,600#	[illegible]
"	St.Louis		68	40,000#	23[illegible]
San Antonio	San Antonio	6	86	3,150#	27 09
" "	Houston	67	135	10,800#	145 80
" "	Dallas	7	136	1,350#	18 36
" "	St.Louis	23	163	34,150#	55 65
				311,950#	[illegible]6 04

WISCONSIN

Superior	St.Paul	44	92	450#	4 18
				450#	4 18

INDIANA

Ft. Wayne	St.Louis	25	25	40,500#	101 25
				40,500#	101 25

Grand Total Par .... 3,577,055# 17793 54

FEDERAL TRADE COMMISSION
Docket No. ______ Exhibit No. 282-C

Plus Cartage:

St. Louis	3765 54	5[illegible]
Kansas City	49 79	
New Orleans	12 04	
Dallas	79 55	
Omaha	54 76	
St Paul	74 24	
Total	13607 97	13,5[illegible]

Actual

Less	St. Louis	Cartage	679 15 *
	New Orleans	190.75 x .10	19 08
	Kansas City	741.00 x .10	74 10
	Dallas	360.75 x .10	36 00
	Omaha	914.73 x .10	91 47
	St Paul	1115.00 x .10	111 50
			961 30

12546 67

[illegible] 53.72 [illegible]

[illegible]

53.72

$12,559.39

5864 2 2

Respondent's Exhibit No. 165.

3/8
Jan

```
 1.64 -
  .05 -
 1.83 -
  .63 -
 2.19 -
11.14 -
 4.52 -
 5.75 -
 4.32 -
 6.75 -
118.80 -
 2.23 -
 7.88 -
11.08 -
 4.32 -
12.90 -
11.58 -
 7.28 -
  .90 -
18.63 -
 5.63 -
18.55 -
 1.66 -
  .40 -
 5.69 -
 3.09 -
18.89 -
 6.72 -
14.72 -
 9.58 -
 7.42 -
70.78 -
137.61 -
10.45 -
 6.32 -
 5.63 -

559.36 *
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5870

1/8
Jan

```
 8.85 -
 2.35 -
 1.47 -
 3.54 -
 5.87 -
20.22 -
 9.61 -
11.75 -
 3.62 -
16.77 -
 7.15 -
10.08 -
 1.45 -
21.55 -
 9.48 -
 1.67 -
 3.74 -
10.32 -
 5.87 -
99.08 -
  .60 -
 9.65 -
28.69 -
52.48 -
 6.44 -
 9.17 -

361.47 *
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5871

Par.
Jan.

```
 1.89 -
 2.52 -
 1.51 -
 6.30 -
 2.93 -
 2.67 -
  .47 -
15.76 -
 2.11 -
  .64 -
 2.38 -
  .75 -
 1.31 -
 4.19 -
 2.63 -
  .75 -
  .50 -
  .60 -
 1.27 -
 1.14 -
 1.32 -
 3.71 -
 3.61 -
59.63 -
  .59 -
 2.02 -
 1.84 -
 1.63 -
 1.22 -
 1.58 -
 1.71 -
11.47 -
11.98 -
 3.28 -
 9.06 -
 3.88 -
 4.62 -
 5.67 -
 5.09 -
 5.03 -
  .36 -
 6.31 -
 2.07 -
18.34 -
 2.09 -
 9.03 -
44.64 -
31.51 -
```

```
 7.65 -
  .36 -
 7.38 -
 4.26 -
 3.15 -
 5.05 -
 1.05 -
32.83 -
  .06 -
 1.10 -
 5.28 -
 4.03 -
 1.79 -
 2.77 -
  .55 -
 5.25 -
13.46 -

400.77 *
```

5872

"	St. Louis		58	1/2	19,000#	[illegible]
					479,500#	359526.

WYOMING

Casper..................	St.Louis	√ 10	165	165	9,050#	149 33.
			Grand Total 1/4¢ Differential		488,550#	37449

FEDERAL TRADE COMMISSION

Docket No. 5253 ~~COMMISSION~~ RESPONDENT Exhibit No. 162-B

IN THE MATTER OF National Lead

DATE________ WITNESS________

REPORTER: FEDERAL REPORTING CO

BY________

5867

FEDERAL TRADE COMMISSION
Docket No. 5253 RESPONDENT'S Exhibit No. 165-B

Res 165B

Feby 41

Voucher	Par	1/8	3/8
8953	166		
"	79		
8954	1276		
"	215		
8960	116		
"	1304		
"	231		
"	193		
8961	5269		
8962			723
"			14123
8964	306		
"	464		
8967	3695		
"	3477		
8974	1271		
8981	253		
8985	210		
8987	997		
8994	72		
"	836		
"	256		
"	525		
8995	917		
8997	39		
9026		126	758
		569	705
		607	1290
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"			131
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"			1288
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Voucher	Par	1/8	3/8
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9073	502		
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9081			958
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9102	1051		
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"			1299
"			236
9179	158		
"	760		
"	615		
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9186	274		
9192	16		

Voucher	Par	1/8	0/8
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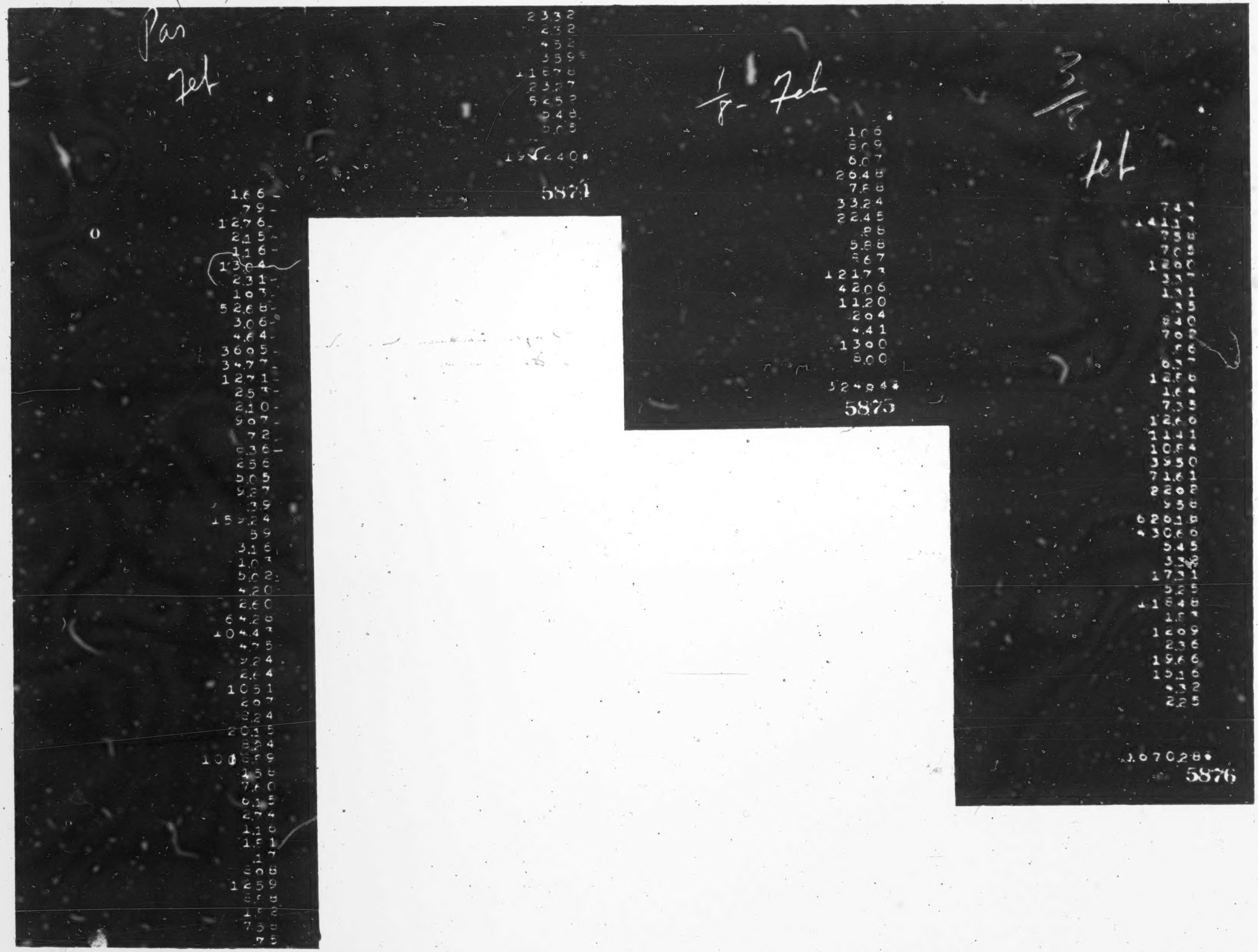
161



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1/8 Fel

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3/8 Fel

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2.25
1670.28 *
5876

Respondent's Exhibit No. 165.

Mar 41

Rep 165c

FEDERAL TRADE COMMISSION
Docket No. 5253 RESPONDENT'S Exhibit No. 165 c

Voucher	Par	1/8	3/8
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			458
			713
			1303

Voucher	Par	1/8	3/8
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9679	126		
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9683	1964		
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9693	1517		
9711	255		
9719	305		
9721	1529		
9726	446		
9727	756		
9731	962		
9734	2844		
9739	1137		
9740	150		
9744	2023		
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9782	55		
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"	4400		
"	72		
9830			1053
9832		1865	911
"		226	1389
			139
			108
			1349
			378

Voucher	Par	1/8	3/8
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"			593
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"		56	
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9853	527		
9862	653		
9863	737		
9864	318		
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9865	1053		
9866	337		
9867	1637		
9880	183		
9883	70		
9919	164		
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9921	105		
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9626			5404
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"		504	645
"			122
9936	529		
"	328		
9966	4937		
9969	9855		
"	5552		
"	1457		
9970	844		
"	420		
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"	972		
10005		937	
10157	307		
"	360		
"	256		

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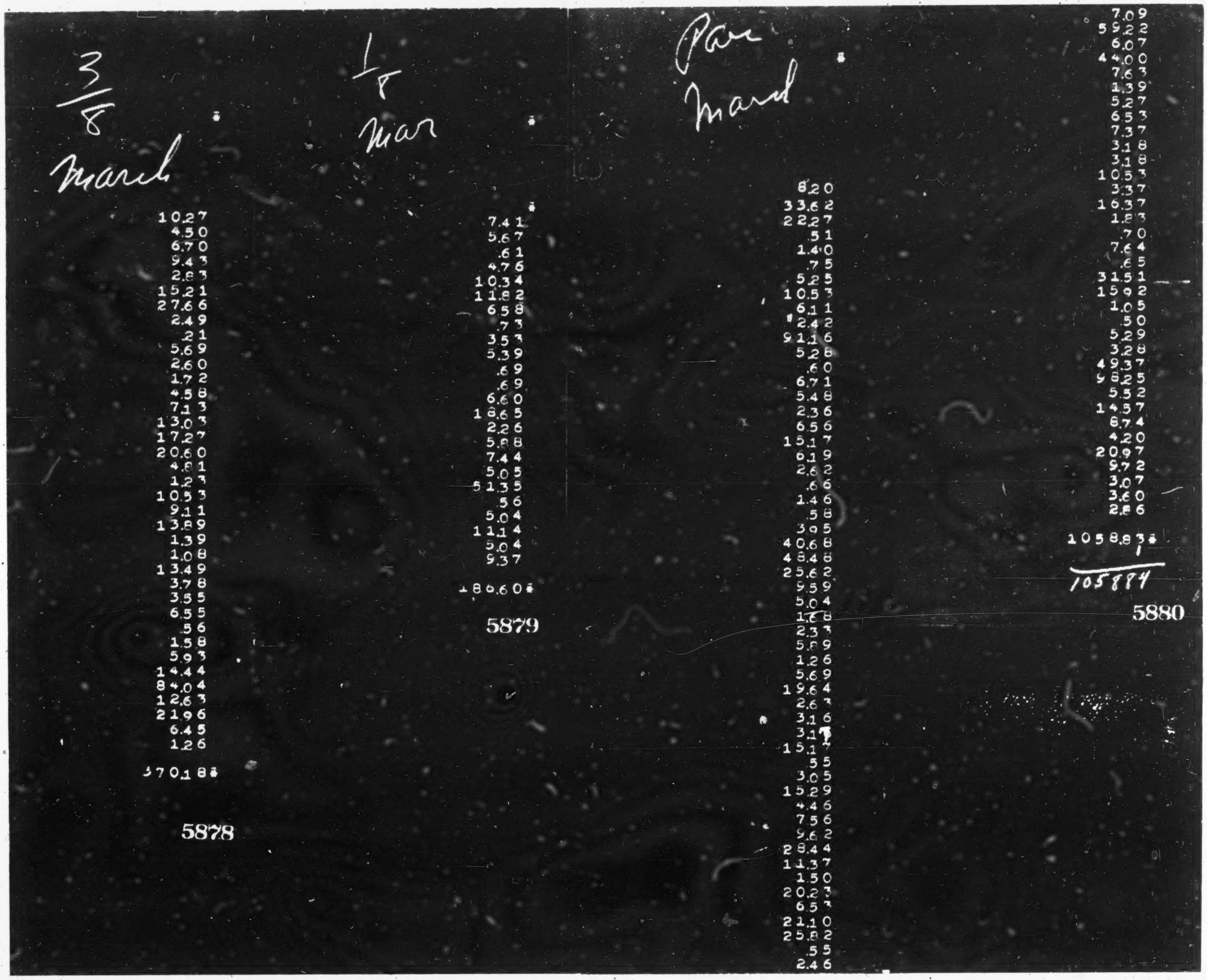
5877

103

2984 — Respondent's Exhibit No. 165.



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  5.69
  2.60
  1.72
  4.58
  7.13
 13.03
 17.27
 20.60
  4.81
  1.23
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  9.11
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  1.39
  1.08
 13.49
  3.78
  3.55
  6.55
   .56
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370.18*
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5878

1/8 Mar

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 11.14
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  9.37

186.60*
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5879

Pave March

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  5.28
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 105884
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5880

Respondent's Exhibit No. 165.

FEDERAL TRADE COMMISSION
Docket No. 5253 ~~COMMISSION~~ RESPONDENT'S Exhibit No. 165-D

Resp 165 D

April 41

Voucher	Reg	1/8	1/8
10164	269		
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10178		534	
10180	356		
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		294	1525
		377	568
		81	411
			345
			3098
			2346
			311
			766
			6952
			2892
			645
10190	737		
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10199	224		
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	710		
	708		
	526		
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10226	52		
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10350	2566		

Voucher	Oper	1/8	3/8
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10352			1516
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"		38	790
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"			2032
10488	25		
"		14521	

Voucher	Par	1/8	3/8
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10501	5985		
10502			1727
10503	95 172		
10513	132		
10514	239 168		
10532	694		
10533	159 328		
10534	2019		
10536	1533 525 923		
10538	722 152 305		
10541	651		
10542	356 356		
10545	163		
10549		962 192 5163 928 927	1060 395 1262 2003 964 422
"		941	1137
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"	1996		
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"	158		
"	893		
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10679			1438

Resp 165E

FEDERAL TRADE COMMISSION
Docket No. 5253 Respondent's Exhibit No. 165-E

April 41

Voucher	Par	1/8	38
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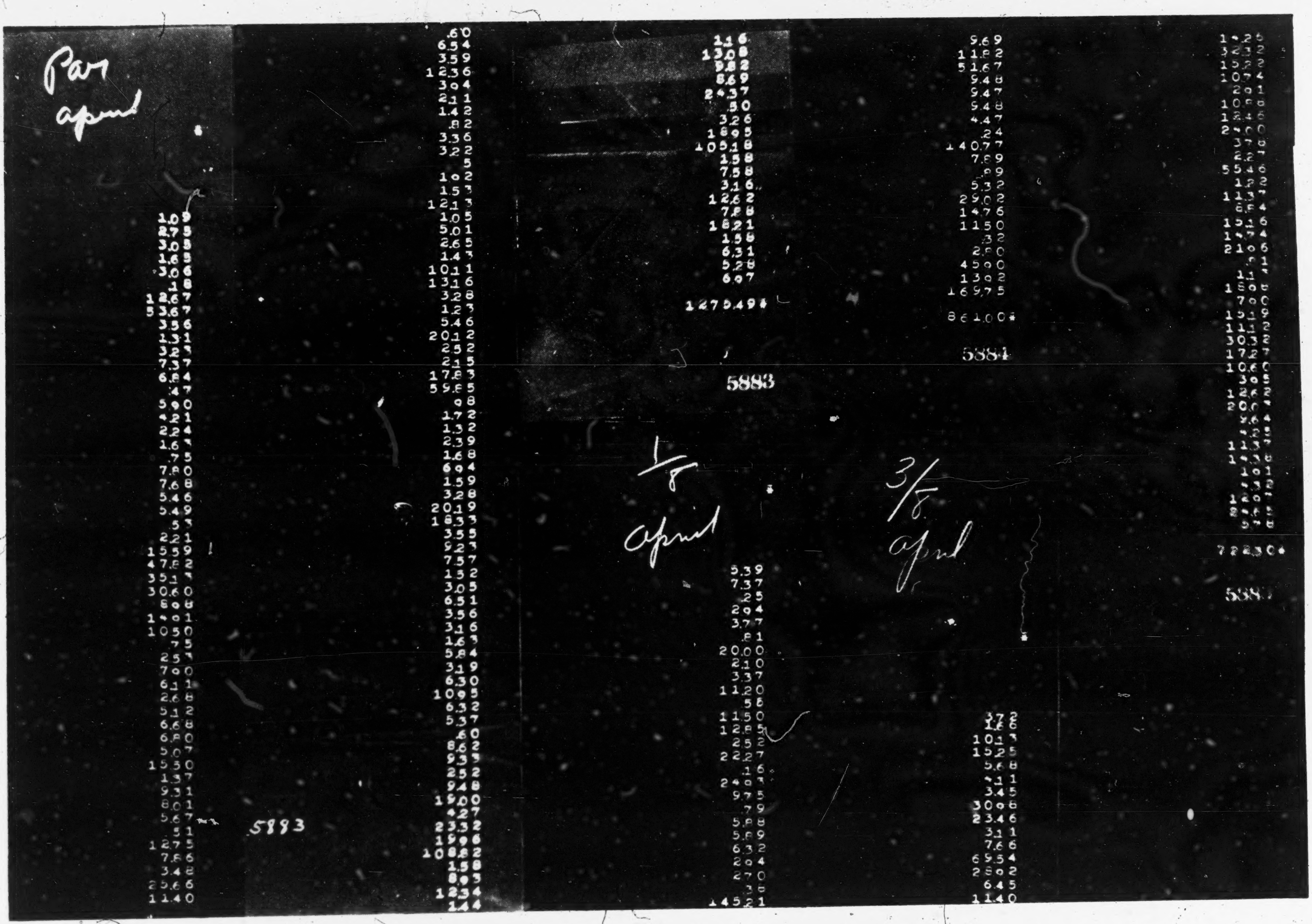
Cartage	75201		

104

Respondent's Exhibit No. 165.



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5883

1/8 april

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5884

3/8 april

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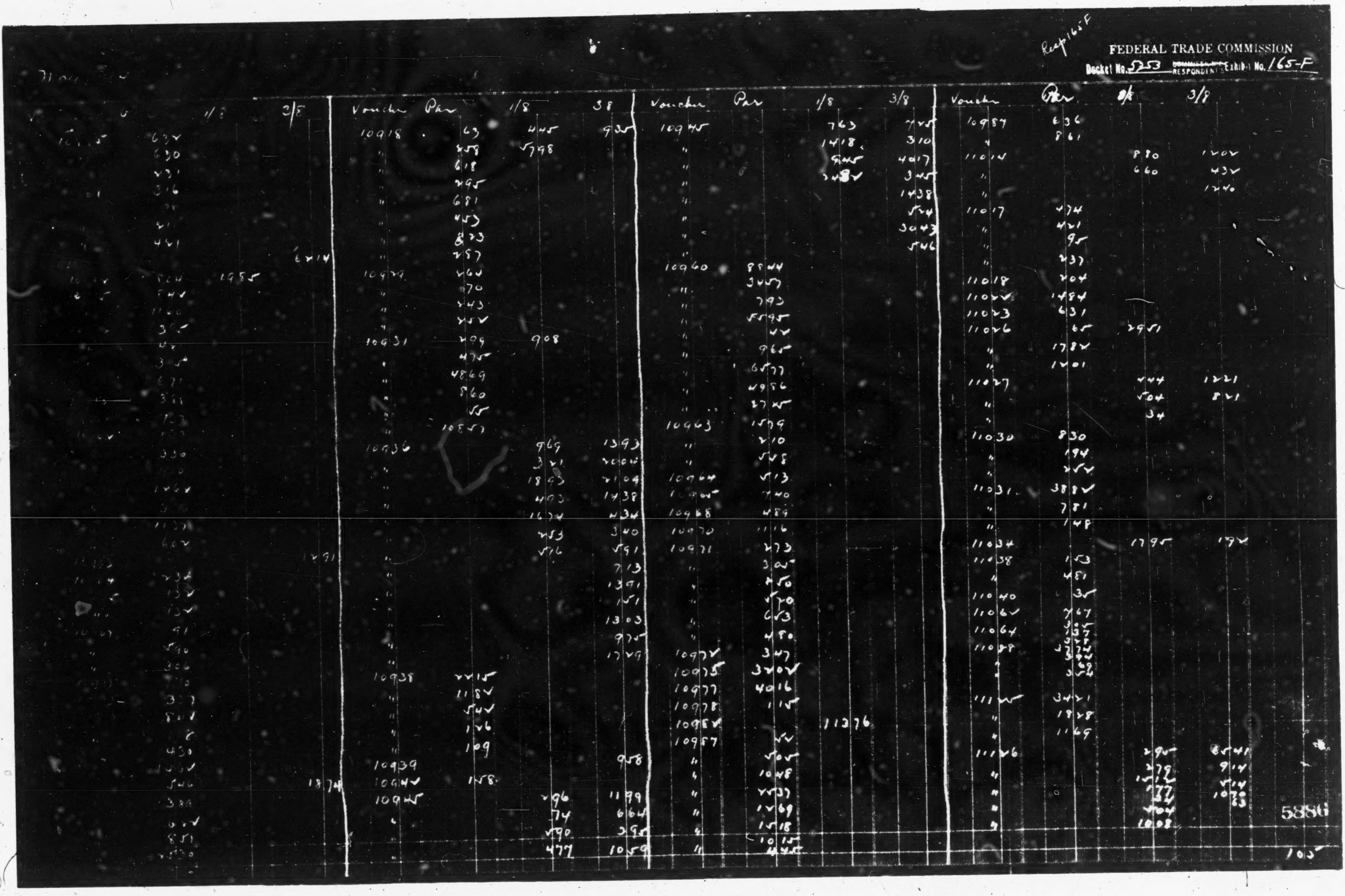
Resp 165F

FEDERAL TRADE COMMISSION
Docket No. 5253 ~~COMMISSION'S~~ RESPONDENT'S Exhibit No. 165-F



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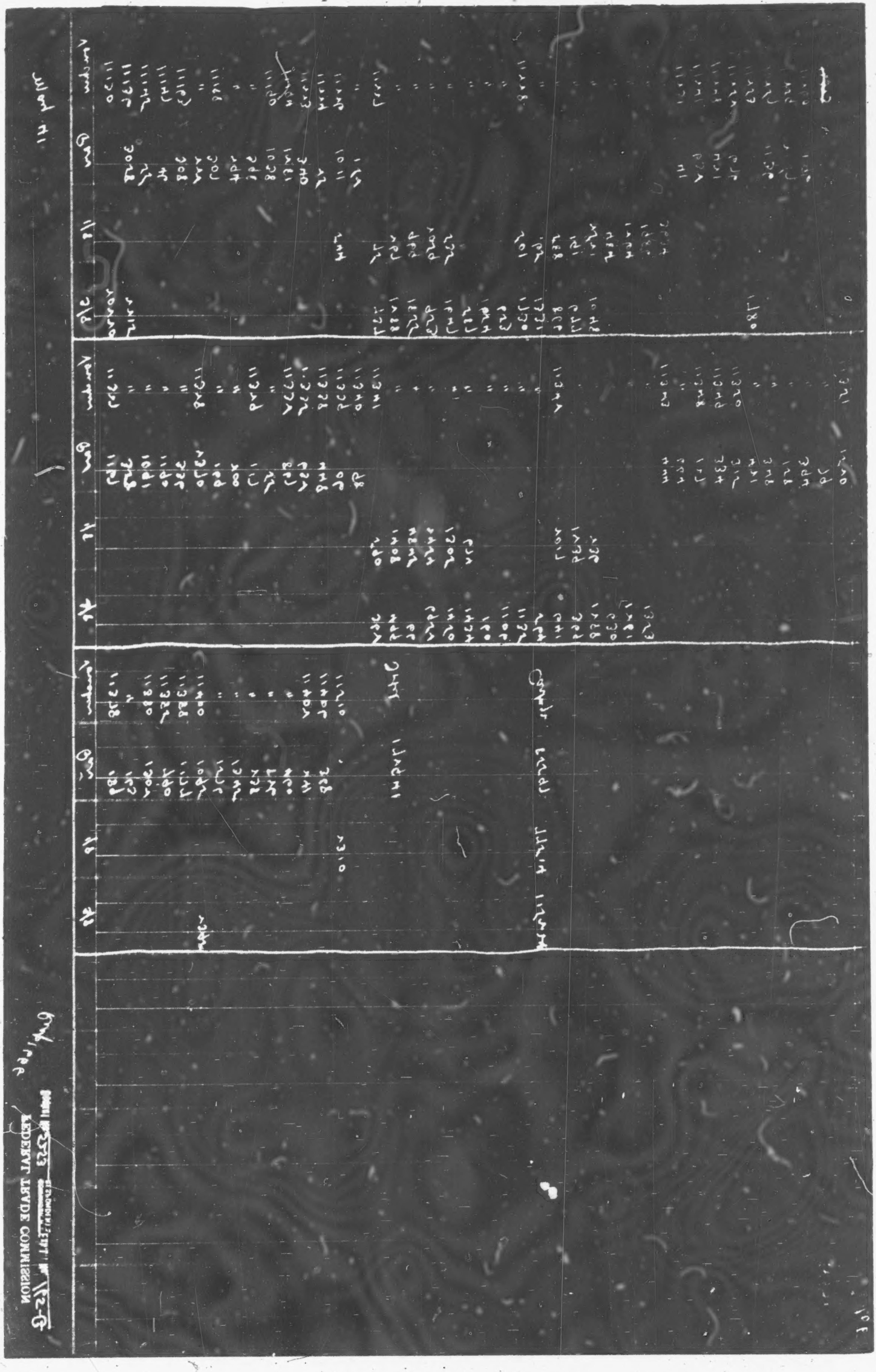
5886

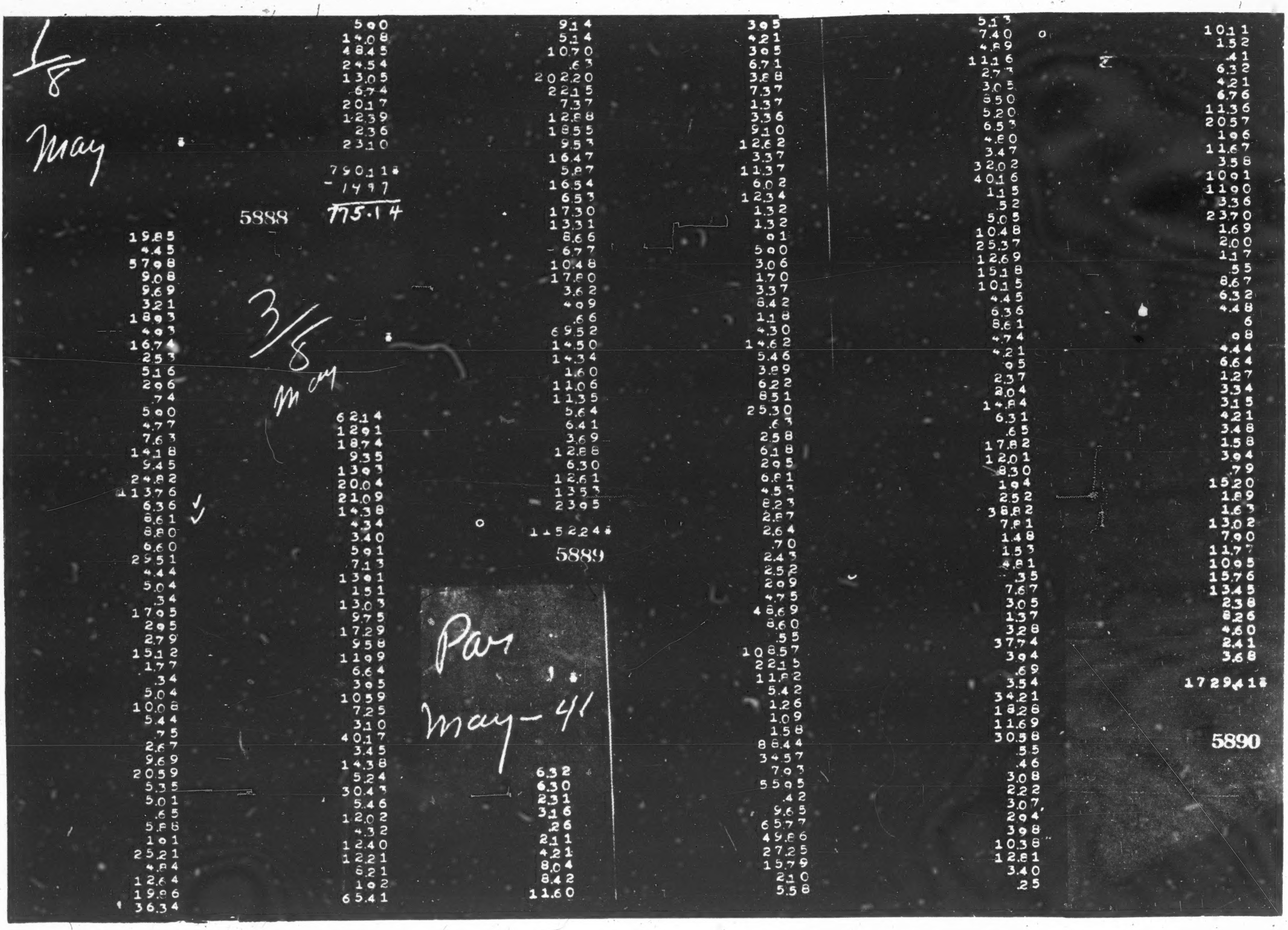
105

Respondent's Exhibit No. 165.

Respondent's Exhibit No. 165.



Respondent's Exhibit No. 165.



1/8
May

```
 19.85
  4.45
  5798
  9.08
  9.69
  3.21
  1893
   493
 16.74
  2.53
  5.16
   296
   .74
   500
  4.77
  7.63
 14.18
  9.45
 24.82
 11376
  6.36 ✓
  8.61 ✓
  8.80
  6.60
  2951
  4.44
  5.04
   .34
  1705
   295
  2.79
 15.12
  1.77
   .34
  5.04
 10.08
  5.44
   .75
  2.67
  9.69
 20.59
  5.35
  5.01
   .65
  5.88
   101
 25.21
  4.84
 12.64
 19.86
 36.34
```

```
   500
 14.08
 48.45
 24.54
 13.05
  6.74
 20.17
 12.39
  2.36
 23.10

 790.11*
```

-1497

775.14

5888

3/8
May

```
 62.14
  1291
 18.74
  9.35
  1303
 20.04
 21.09
 14.38
  4.34
  3.40
   591
  7.13
  1301
   151
 13.03
  9.75
 17.29
   958
  1199
  6.64
   395
  1059
  7.25
  3.10
 40.17
  3.45
 14.38
  5.24
 30.43
  5.46
 12.02
  4.32
 12.40
 12.21
  8.21
   102
 65.41
```

```
   9.14
   5.14
  10.70
    .63
 202.20
  22.15
   7.37
  12.88
  18.55
   9.53
  16.47
   5.87
  16.54
   6.53
  17.30
  13.31
   8.66
   6.77
  10.48
  17.80
   3.62
    409
    .66
  69.52
  14.50
  14.34
   1.60
  11.06
  11.35
   5.64
   6.41
   3.69
  12.88
   6.30
  12.61
   1353
   2305

 115224*
```

5889

Par
May-41

```
  6.32
  6.30
  2.31
  3.16
   .26
  2.11
  4.21
  8.04
  8.42
 11.60
```

```
    395
   4.21
    305
   6.71
   3.88
   7.37
   1.37
   3.36
   9.10
  12.62
   3.37
  11.37
   6.02
  12.34
   1.32
   1.32
     01
    500
   3.06
   1.70
   3.37
   8.42
   1.18
   4.30
  14.62
   5.46
   3.89
   6.22
   8.51
  25.30
    .63
   2.58
   6.18
    295
   6.81
   4.53
   8.23
   2.87
   2.64
    .70
   2.43
   2.52
    209
   4.75
  48.69
   8.60
    .55
 108.57
  22.15
  11.82
   5.42
   1.26
   1.09
   1.58
  88.44
  34.57
    703
   5595
    .42
   9.65
  65.77
  49.86
  27.25
  15.79
   2.10
   5.58
```

```
  5.13
  7.40
  4.89
 11.16
  2.73
  3.05
   850
  5.20
  6.53
  4.80
  3.47
 32.02
 40.16
  1.15
   .52
  5.05
 10.48
 25.37
 12.69
 15.18
 10.15
  4.45
  6.36
  8.61
  4.74
  4.21
    05
  2.37
  8.04
 14.84
  6.31
   .65
 17.82
 12.01
  8.30
   194
  2.52
 38.82
  7.81
  1.48
  1.53
  4.81
   .35
  7.67
  3.05
  1.37
  3.28
 37.74
   394
   .69
  3.54
 34.21
 18.28
 11.69
 30.58
   .55
   .46
  3.08
  2.22
  3.07
   294
   398
 10.38
 12.81
  3.40
   .25
```

```
   10.11
    1.52
     .41
    6.32
    4.21
    6.76
   11.36
    2057
     196
   11.67
    3.58
    1001
    1190
    3.36
   23.70
    1.69
    2.00
    1.17
     .55
    8.67
    6.32
    4.48
       6
      08
    4.44
    6.64
    1.27
    3.34
    3.15
    4.21
    3.48
    1.58
     394
     .79
   15.20
    1.89
    1.63
   13.02
     790
   11.77
    1005
   15.76
   13.45
    2.38
    8.26
    4.60
    2.41
    3.68

 1729.41*
```

5890

Respondent's Exhibit No. 165.

FEDERAL TRADE COMMISSION
Docket No. 5253 Respondent's Exhibit No. 165-H

Rep 165 H

June 41

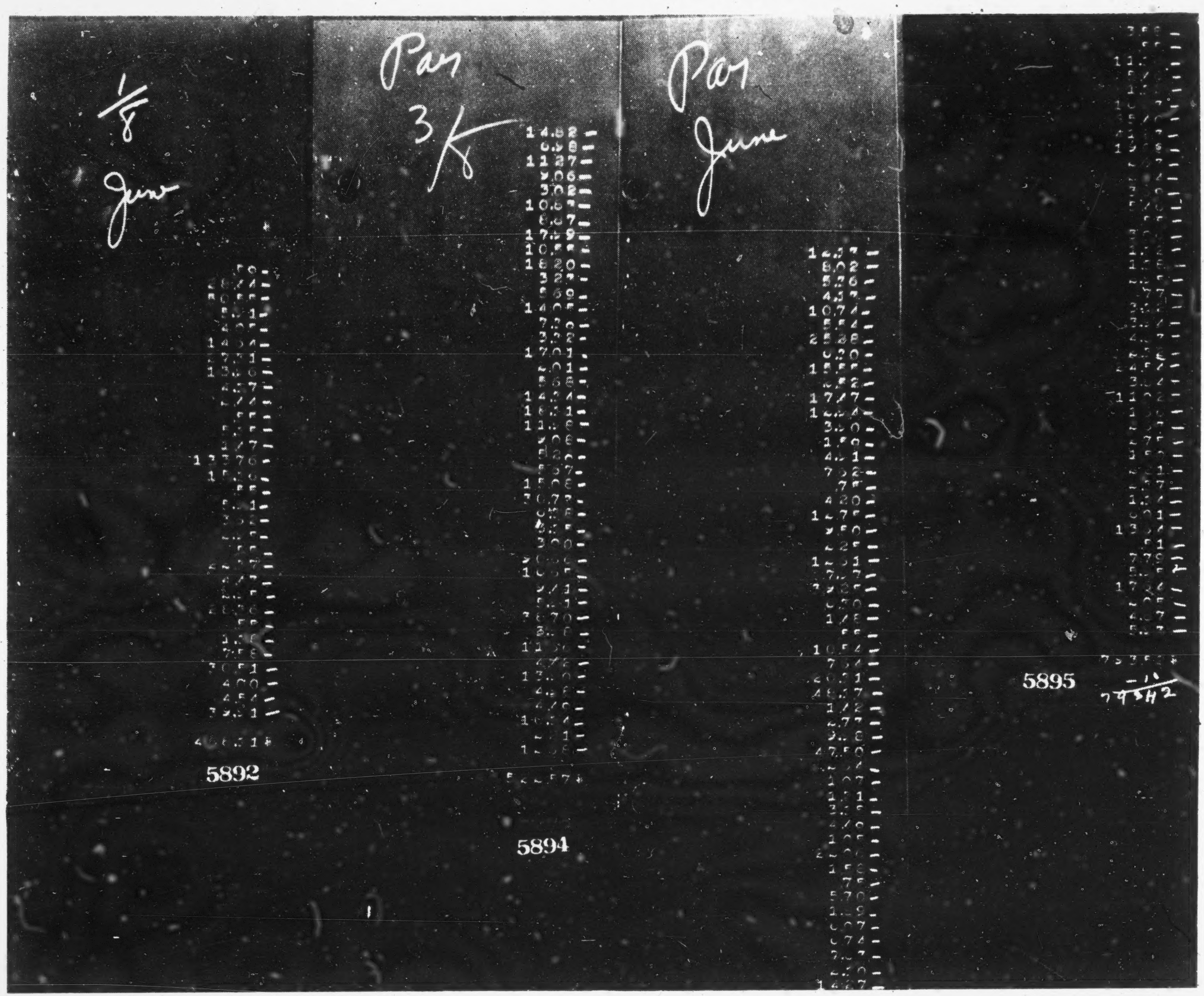
Voucher	Par	1/8	3/8
11575		59	148
"		2544	698
"		5055	1127
		591	906
		405	302
			1083
			584
11577	1213		
11558	802		1799
"	536		
11591	413		
11596	1074		
"	554		
"	2528		
11606		1464	1025
"		2731	1820
"		1346	323
"			269
"			1405
11620	630		739
	1555		
	455		
11695	1727		
11610	1214		
	390		
	159		
	4[illegible]		
	762		
[illegible]		417	33
"		244	
		55	
		515	
		141	
11631	95		
1162[illegible]			1701
			201
			568
			1434
[illegible]	410		
11634	1125		
"	950		

Voucher	Par	1/8	3/8
11637	225		
11641	1261		
11642			1811
11657	797	13276	
11683	3925		
11704			1198
11707	630		
11708		1516	908
"		55	549
"		591	567
"			1508
"			3473
11720		362	
11721	148		
"	55		
11744	1054		
11748	762		
11749		495	438
"		455	315
"		2437	300
"		443	
"		295	
"		2836	
11751	2031		
11752	4817	55	9066
"	142		
"	473		
"	998		
"	4720		
11793	264		
11794	107		
11795	121		
11809	315		
11811	449		
"	105		
"	2206		
11814	148		
"	75		
11828	570		
11720	159		
11830	607		

Voucher	Par	1/8	3/8
11842	674		
"	713		
11846	210		
11847	1427		
11849	358		
11851	55		
11856	1116		
11858		118	1665
"			941
"			591
"			3870
"			398
11862	546		
"	132		
11865	1623		
11866			1166
11867	6520		
"	4123		
11868	1928		
"	263		
"	264		
"	369		
11873			442
"			1390
"			498
11874	546		
11879	55		
"	306		
"	112		
"	138		
11881	295		
11882	77		
11886	302		
"	392		
11910	482		
11927		728	
11929	432		
11928	2423		449
"	352		
11949	1122		
11953	166		
11958			1012

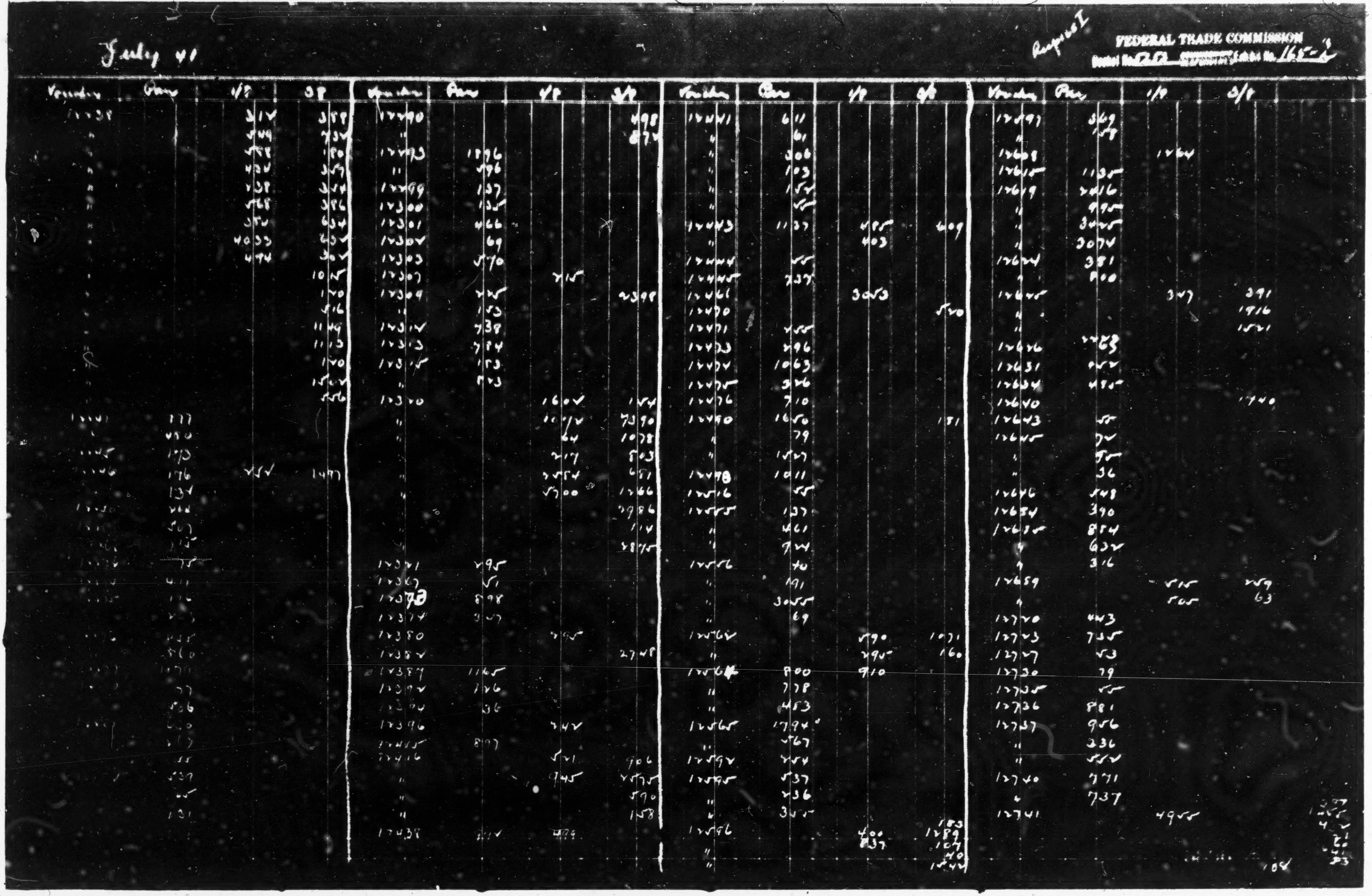
Voucher	Par	1/8	3/8
11960	263		
11962			221
"			1268
11963		3051	
11957	275		
"	150		
12056	221		
"	237		
12096	1123 }		
"	601 }		
12112	1364		
12130		400	
12135	51	225	
"	779		
"	575		
12139	1724		
12150	225		
12152		3951	
11562	457		
"	593		
Total	75572	4811	52257
Cartage	2249		

5831


1/8 June
Par 3/8
Par June
5892
5894
5895
79342

Respondent's Exhibit, No. 165.

Respondent's Exhibit No. 165.



July 41

Request I

FEDERAL TRADE COMMISSION
Docket No. [illegible] Respondent's Exhibit No. 165-[illegible]

Vendor	Pcs	1/8	3/8	Vendor	Pcs	1/8	3/8	Vendor	Pcs	1/8	3/8	Vendor	Pcs	1/8	3/8
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

Resp 165-J

FEDERAL TRADE COMMISSION

Docket No. 5253 ~~Commission's~~ Respondent's Exhibit No. 165-J

July 41

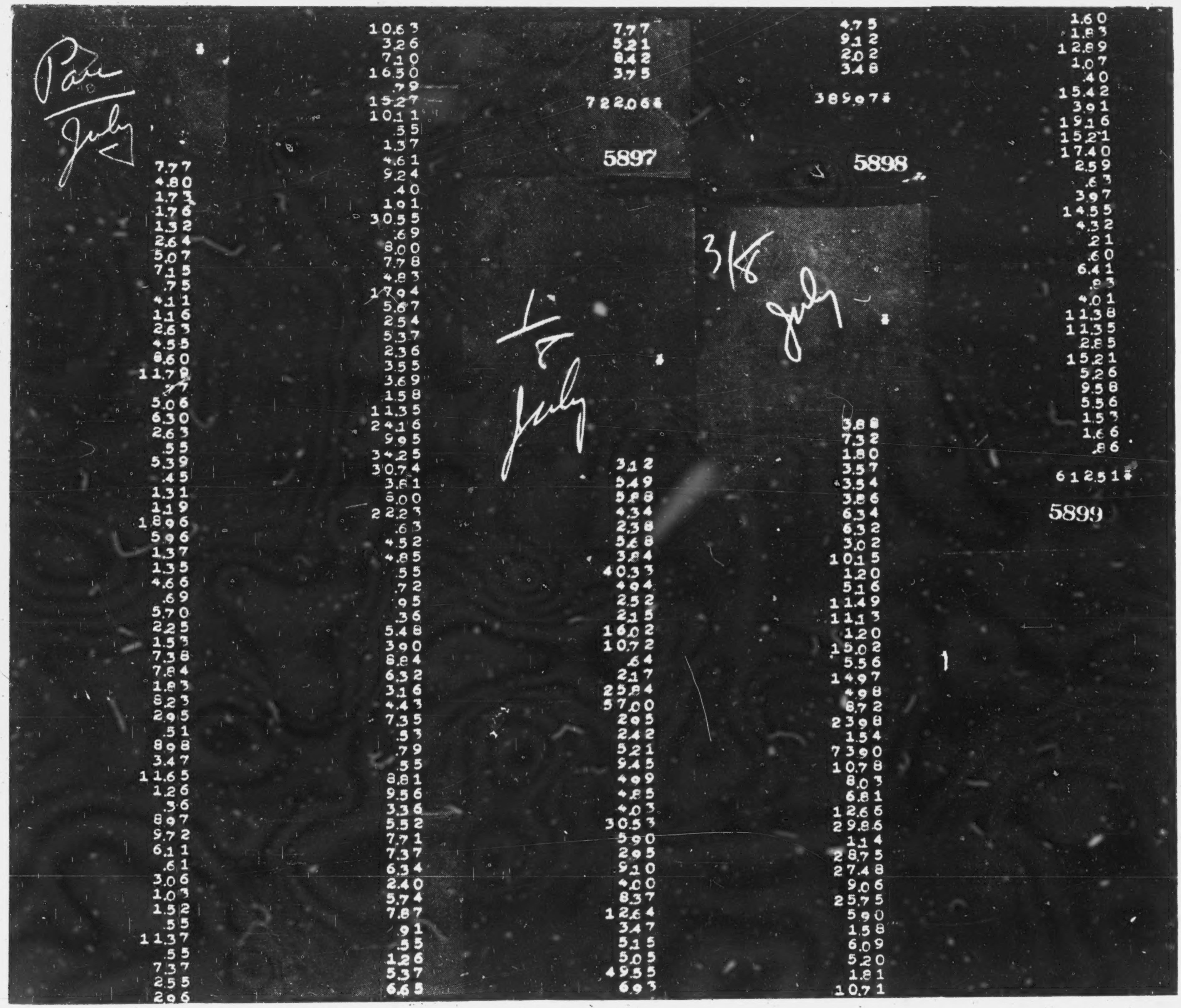
Voucher	Bar	1/8	3/8
12744	634	-	
12754		643	1134
"		425	1185
"		918	255
"		404	1541
"		348	546
"			958
			556
			153
12745			166
12746			86
12748	400		
"	574		
12750	777		
12758	91		
12704	55		
"	106		
12813	537		
"	665		
12814	777		
"	521		
"	844		
"			
12851	325		
Total	9406	38497	61451

Castings. 38820

5896.

109

Respondent's Exhibit No. 165.



Pan
July

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4.80
1.73
1.76
1.32
2.64
5.07
7.15
.75
4.11
1.16
2.63
4.55
8.60
11.79
.77
5.06
6.30
2.63
.55
5.39
.45
1.31
1.19
18.96
5.96
1.37
1.35
4.66
.69
5.70
2.25
1.53
7.38
7.84
1.83
8.23
2.95
.51
8.98
3.47
11.65
1.26
.36
8.97
9.72
6.11
.61
3.06
1.03
1.52
.55
11.37
.55
7.37
2.55
2.96

10.63
3.26
7.10
16.50
.79
15.27
10.11
.55
1.37
4.61
9.24
.40
1.01
30.55
.69
8.00
7.78
4.83
17.94
5.67
2.54
5.37
2.36
3.55
3.69
1.58
11.35
24.16
9.95
34.25
30.74
3.61
8.00
22.23
.63
4.52
4.85
.55
.72
.95
.36
5.48
3.90
8.84
6.32
3.16
4.43
7.35
.53
.79
.55
8.81
9.56
3.36
5.52
7.71
7.37
6.34
2.40
5.74
7.87
.91
.55
1.26
5.37
6.65

7.77
5.21
8.42
3.75

722.06*

5897

1/8
July

3.12
5.49
5.88
4.34
2.38
5.68
3.84
40.33
4.94
2.52
2.15
16.02
10.72
.64
2.17
25.84
57.00
2.95
2.42
5.21
9.45
4.99
4.85
4.03
30.53
5.90
2.95
9.10
4.00
8.37
12.64
3.47
5.15
5.05
49.55
6.93

4.75
9.12
2.02
3.48

389.07*

5898

3/8
July

3.88
7.32
1.80
3.57
3.54
3.86
6.34
6.32
3.02
10.15
1.20
5.16
11.49
11.13
1.20
15.02
5.56
14.97
4.98
8.72
23.98
1.54
73.90
10.78
8.03
6.81
12.66
29.86
1.14
28.75
27.48
9.06
25.75
5.90
1.58
6.09
5.20
1.81
10.71

1.60
1.83
12.89
1.07
.40
15.42
3.91
19.16
15.21
17.40
2.59
.63
3.97
14.55
4.32
.21
.60
6.41
.83
4.01
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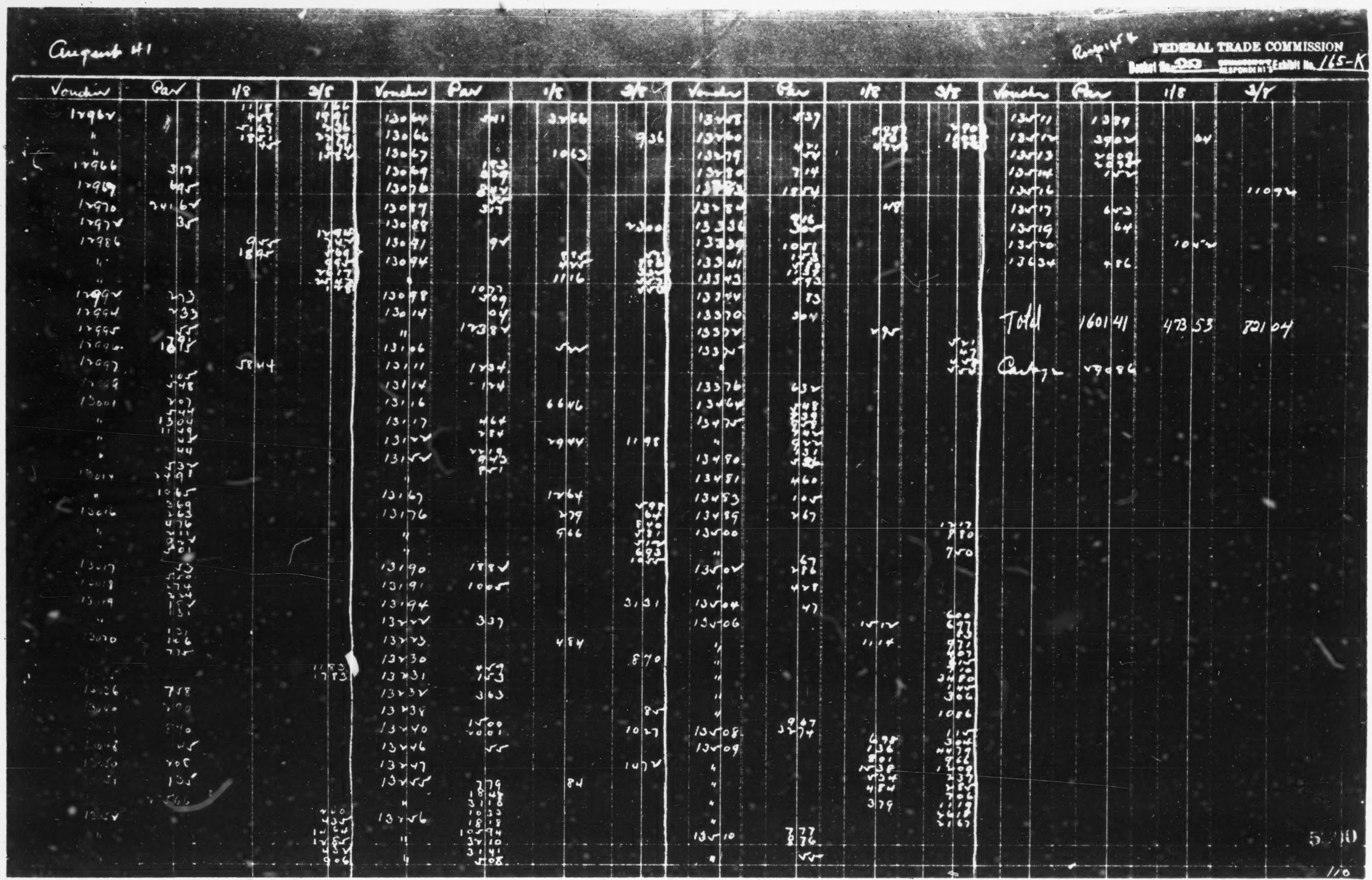
1.53
1.66
.86

612.51*

5899



August 41

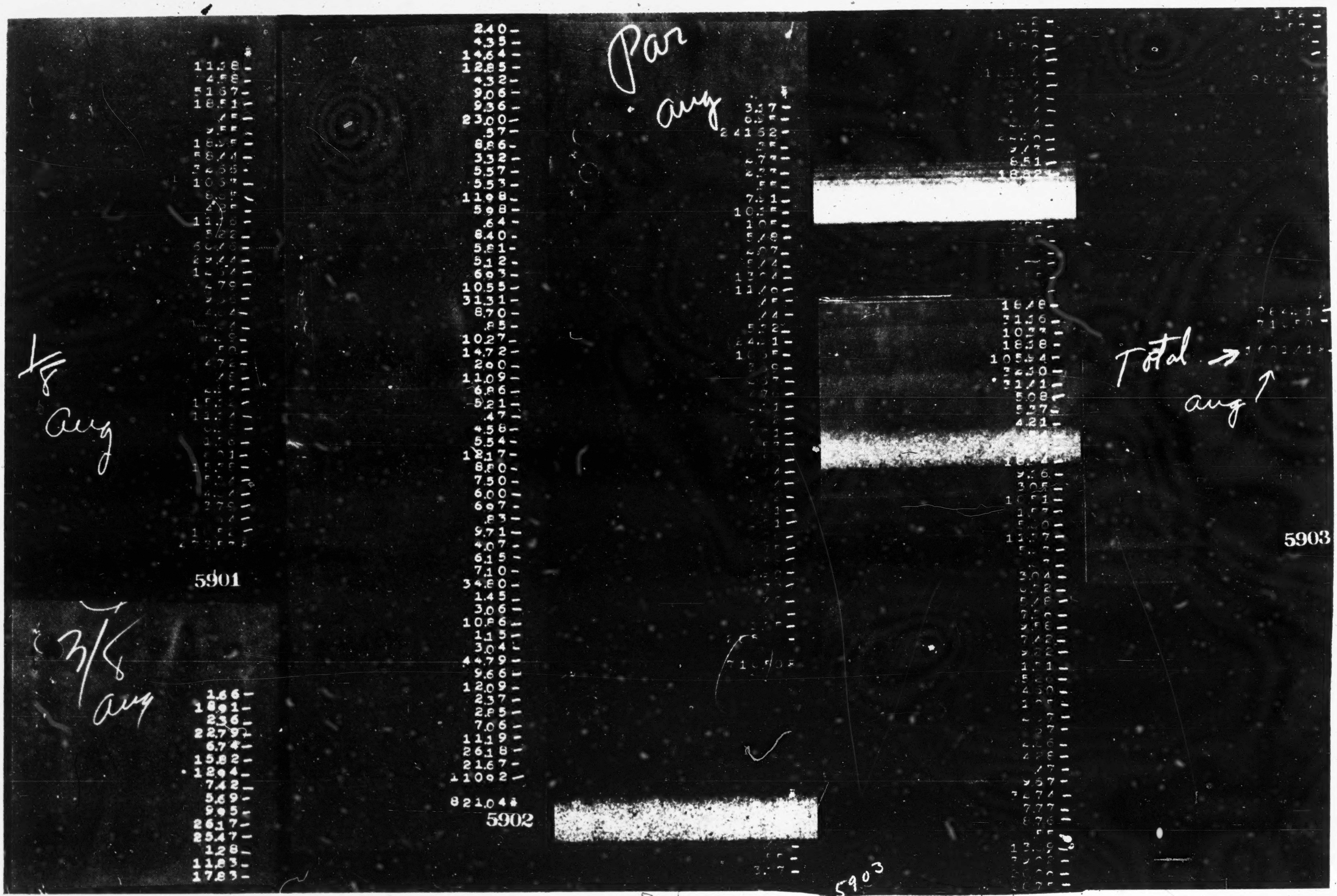
Receipts

FEDERAL TRADE COMMISSION
Docket No. 20 RESPONDENT'S Exhibit No. 165-K

Voucher	Par	1/8	3/8
Total	1601 41	473 53	821 04
Cartage	29 84		

110

Respondent's Exhibit No. 165.


Par
aug
1/8
aug
3/8
aug
Total →
aug ↑
5901
5902
5903
5903

```
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 18.91-
  2.36-
 22.79-
  6.74-
 15.82-
 12.94-
  7.42-
  5.69-
  9.95-
 26.17-
 25.47-
  1.28-
 11.83-
 17.83-
```

```
   2.40-
   4.35-
  14.64-
  12.85-
   4.32-
   9.06-
   9.36-
  23.00-
    .57-
   8.86-
   3.32-
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  31.31-
   8.70-
    .85-
  10.27-
  14.72-
   2.00-
  11.09-
   6.86-
   5.21-
    .47-
   4.58-
   5.54-
  12.17-
   8.80-
   7.50-
   6.00-
   6.97-
    .83-
   9.71-
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   6.15-
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  11.19-
  26.18-
  21.67-
 110.92-

 821.04*
```

Respondent's Exhibit No. 165.

Resp 165 L

FEDERAL TRADE COMMISSION
Docket No. 5253 RESPONDENTS Exhibit No. 165-L

[illegible] 1924

Voucher	Par	1/8	3/8
13650	576 375	268	
13651	198 779		
"	674 629	0	
13652	338 358		2875
"	1833		198
"	812	175	1352
13653		170 672	772
"		697	62
"		119 1013	472
"		51	427
13655	60	0	
13656	105		
13660	253 523		
13661	100 1328		
"	358		
"	815		
13668	105		
13673	674		
13675	658 918		
"	575 2134		
13676	1629		
13692	262		
13694	263		
13695			1687
13697	50		
13699		462	
13700	126 60		
13701			
13702	645	355	
13705	229		
13712	3160		
13713	430 233		
13718	84 152		
"	316		
"	119		
13720		6174	753 1158
"		485	[illegible]
"		60	[illegible]
"			[illegible]
"			[illegible]
"			[illegible]

Voucher	Par	1/8	3/8
13727			5687
13794			223
13795	622 28		
13796		1494	122 369 1137
"		562	233 637
"			2281
13798	429 700		7991
"	94		
13807	1399		
13808	733		
13809			1104 674 116
"			3696
13812	367		
13813			1614
13824	384		
13827		2881	
13837	64 525 155		
13838	378 421 112		
"			
13839	25		
13843	1877 39	3259	
"	434		
13844	201		
13845	105		
13874	326		
13875			
13877	1246		
13878			1417
13882	106		
13896	221 6969		25773
13914	1126		
13930	486		
13931	10476		
13933	2619		
13936	152		
"	765		
13938	861		
13939	868		
13973	143		
13976	1751		
13977	98		

Voucher	Par	1/8	3/8
13978		1673 20	622 766 1505 1592
"		200 484	
"		2055 1677 647	1393
"			
"		952	
13980	305		
14005			27802
14008	1556		
14009			1050
14010	1113		
14011	180		
14015		6671	
14020	133		
14023			362
14025	630 5898	3472	
14027		145	
"	556 [illegible]		
14028	[illegible]		
14029	[illegible]		
14037	396		
14039	653		
14043	413 153 342		
"			
14047		56	
14048	191		
14049	912 1102		3293
14050		761	2383 174
"		800	3234
"			1899
"			438
14058	1080		
14060	352 352		
14063	4113		329
14132	134		
14147		3082	
14175	552		
Total	849 47	477 70	1281 51
[illegible]	[illegible]		

5904

1/8 Sept

```
 5.68 -
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 1.73 -
 6.12 -
 6.07 -
 1.19 -
10.77 -
  .55 -
 4.62 -
 3.55 -
61.74 -
 2.85 -
  .60 -
14.94 -
 5.62 -
58.81 -
32.59 -
16.73 -
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 4.00 -
 4.84 -
50.55 -
14.04 -
 6.07 -
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66.71 -
34.72 -
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 8.00 -
30.82 -

477.70 *
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5905-A

Bar Sept

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 1.96 -
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 6.74 -
 6.29 -
 7.38 -
 5.36 -
18.33 -
 8.12 -
  .60 -
 1.05 -
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 6.74 -
 6.58 -
 9.18 -
 5.75 -
21.34 -
16.29 -
 2.62 -
 2.63 -
  .50 -
 1.26 -
  .60 -
 6.45 -
 2.29 -
31.60 -
 6.30 -
 2.37 -
  .84 -
 1.27 -
 3.16 -
 1.19 -
 6.32 -
  .88 -
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  .94 -
13.99 -
 7.33 -
 3.67 -
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  .64 -
  .55 -
 1.25 -
 3.78 -
 4.21 -
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  6.34 -
  2.01 -
  1.05 -
  3.26 -
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  1.06 -
  2.21 -
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  1.11 -
  1.52 -
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  1.43 -
 17.51 -
   .99 -
   .70 -
  3.05 -
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  1.80 -
  1.33 -
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 11.02 -
 10.80 -
  3.52 -
  8.80 -
 41.13 -
  1.34 -
   .55 -
```

5905-B 849.50 *

849.50

3/8 Sept

```
  28.75 -
   8.98 -
  13.52 -
   7.72 -
   6.62 -
   6.72 -
   9.57 -
  16.87 -
   7.53 -
  11.88 -
   2.79 -
   3.68 -
  10.36 -
   3.45 -
  14.74 -
  11.27 -
   2.75 -
  13.47 -
  30.33 -
  20.93 -
  56.87 -
   2.23 -
   1.22 -
   3.69 -
  11.37 -
   9.33 -
   7.90 -
   6.39 -
  35.81 -
  79.91 -
  11.04 -
   6.74 -
   1.16 -
  36.96 -
  16.14 -
  12.17 -
 257.73 -
   6.54 -
   7.66 -
  15.05 -
  15.95 -
  13.33 -
 278.05 -
  10.50 -
   3.62 -
  32.93 -
  23.83 -
   1.74 -
  32.34 -
   9.47 -
  18.99 -
  12.85 -
   6.78 -
   3.29 -

1281.51 * ✓
```

5906

Resp165M

FEDERAL TRADE COMMISSION
Docket No. 5253 RESPONDENT'S Exhibit No. 165-M

October 41

Voucher	Par	1/8	3/8
14321	[illegible]		
14323		253	632 1014
"			453
14324	236 190		
14325	800 525		
"	1524		
14327	258		
14328	201		
14329			1813
14331	305 1155		
"	420 664		
14332	715		
14336	199 253		
14337	842 1172		
14339	336		
14341	457		
14343	82		
14360	60		
14366	1348		
14372		1656 488 1063	853 837 [illegible] 1159 1132
"			289 221
"	3261		
14402	25 544		
14403	305 245 321		
"	443		
14405		609 470	166 356 642 4159 635 433 920 1474
"			
14407	120 85		
14416	653		
14425	3155		
14436		262 564 1922 1452 436 557	852 1454 477 853
"			
[illegible]	204 270 189		
14437			
14439		552 693 258 2645 855	466 [illegible]
"			

Voucher	Par	1/8	3/8
14462	80		
14482			7200
14485	331		
14488	337		
14490	894		
14498			11790
14499	216 356 534		
14500	1180		
14505	461		
14506	1645		
14507			517
14518	630 674		
14521	945		
14527	395		
14532	396 758 525		
"			
14536	462 102		
14539	898		
14540	388	1822	1497
"	674 328		
14541	2857		
"	2294		
14542			640
14544	57 782 683		
"			
14545		494 5166 523 136	
"			
14546	2101 840		
14595		174 523 2611	518 1471 637 390 1580 1465 790 3620 1897 2605
"			
"			
"			
14607		422	
14614	85		
14615	7		
14616	55		
14619		497	1457 1059 1152 1960 1639
"			
"			
14621	82		

Voucher	Par	1/8	3/8
14622	625 306		
14624	105 126 68		
14625			
14627	615		
14629		5522	
14635	539		
14650	4831		
14668	505		
14675	116		
14679	50		
14685	250		
14690	716		
14695	818		
14710	421		
14713			3722
14714	86		
14715			514 1626 565 1053 1683 4447
"			
"			
14808	55		
14809	401 497 896		
"			
14811		882	2844 1726 2242 [illegible] 6925 165
"			
"			
14812	474		
14813	29		
14814	315		
14815	504 737		
14816	336 789 291 319 421		
"			
14824	1020		
14825	778 338 15		
"			
14827	263		
"	305		
14830	922		
14849	963 62		
14850	285 894 1246		
"			
14854	757		
14858	346		

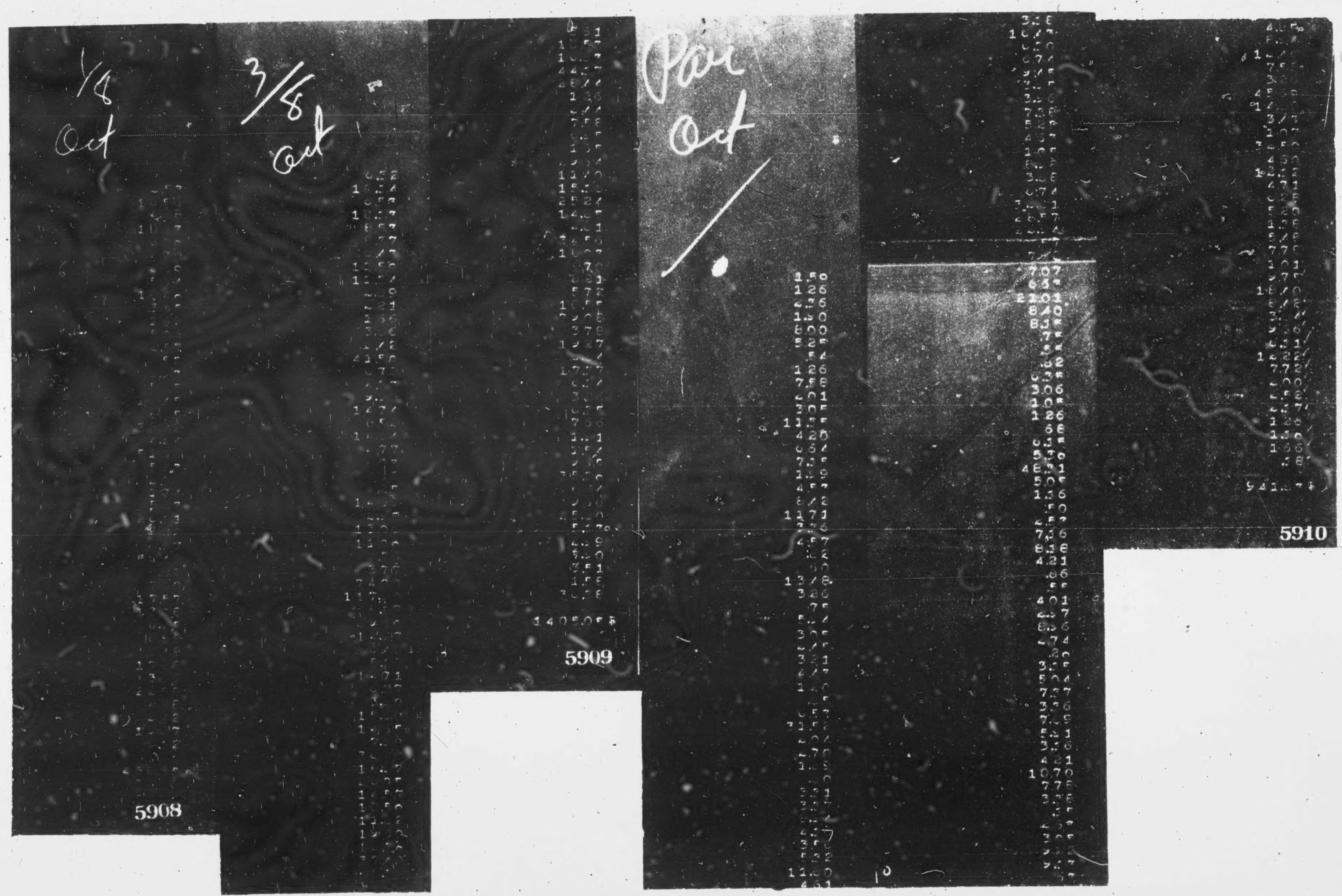
Voucher	Par	1/8	3/8
14859	[illegible] 1429		
14860	343		
14864		760 1727	2964 1120 1516 2522 1452 481 2526 1803 70
"			
"			
"			
"			
14866		1305 885 348	891 5724 1055
"			
14883	1525 3260		
14891			
"	1254 2571 628 538		
14941			
"			
14948		1728 368	7905 825 1925 684 1737 644 326 635 766 191 144 965 3539 824 966
"			
"			
"			
"			
"			
"			
"			
"			
14959	548 778 101 975	2258 428	
"			
14963		242	
14965			2280
14966	1840		
14957	542 384		
14969	966 611 1422 772		
"			
"			
14971	200		
14972		1927	
14973	222 217 126 119 162		
"			
"			
14975		612	513 295 796 356 156 3638
"			
"			
14984	18		
Total	94183		
[illegible]	57162	46065	140505

[illegible]

112

Respondent's Exhibit No. 165.

Respondent's Exhibit No. 165.


1/8 Oct
3/8 Oct
Pai Oct
5908
5909
5910

November 41

Rep[illegible] Cart 12747

FEDERAL TRADE COMMISSION
Docket No. 5253 ~~Commission's~~ RESPONDENT'S Exhibit No. 165-A

Vo. No.	Par	1/8	3/8
[illegible]		[illegible]	
15157			139
15160	60		544
[illegible]	[illegible]		
15164	54		
"	491 1068		
15165	76 75		
"	188 546		
"	59 463		
15166	131		
[illegible]	435		
15173	229		
15176	1767		
[illegible]			2106 2277
15191	1475		544 938
[illegible]	45		
15193	334 158		
15196	196		
15197		711 1040	2781 848
15199	1686		
15200	43		
15206	259		
15208	1158		
15212	244 3257		
15213	1151		
15215		4824	
15217		92	
15218	2252 57		
"	778 735		
15220	225		
15221	254		
15227	329		
15240		1607	
15250	6108		
15254		676 936	1963 [illegible]
"		1673	1820
15255	2000		
15260	55		
15263	131		
15264		1123	
15301	55		
15302	570		

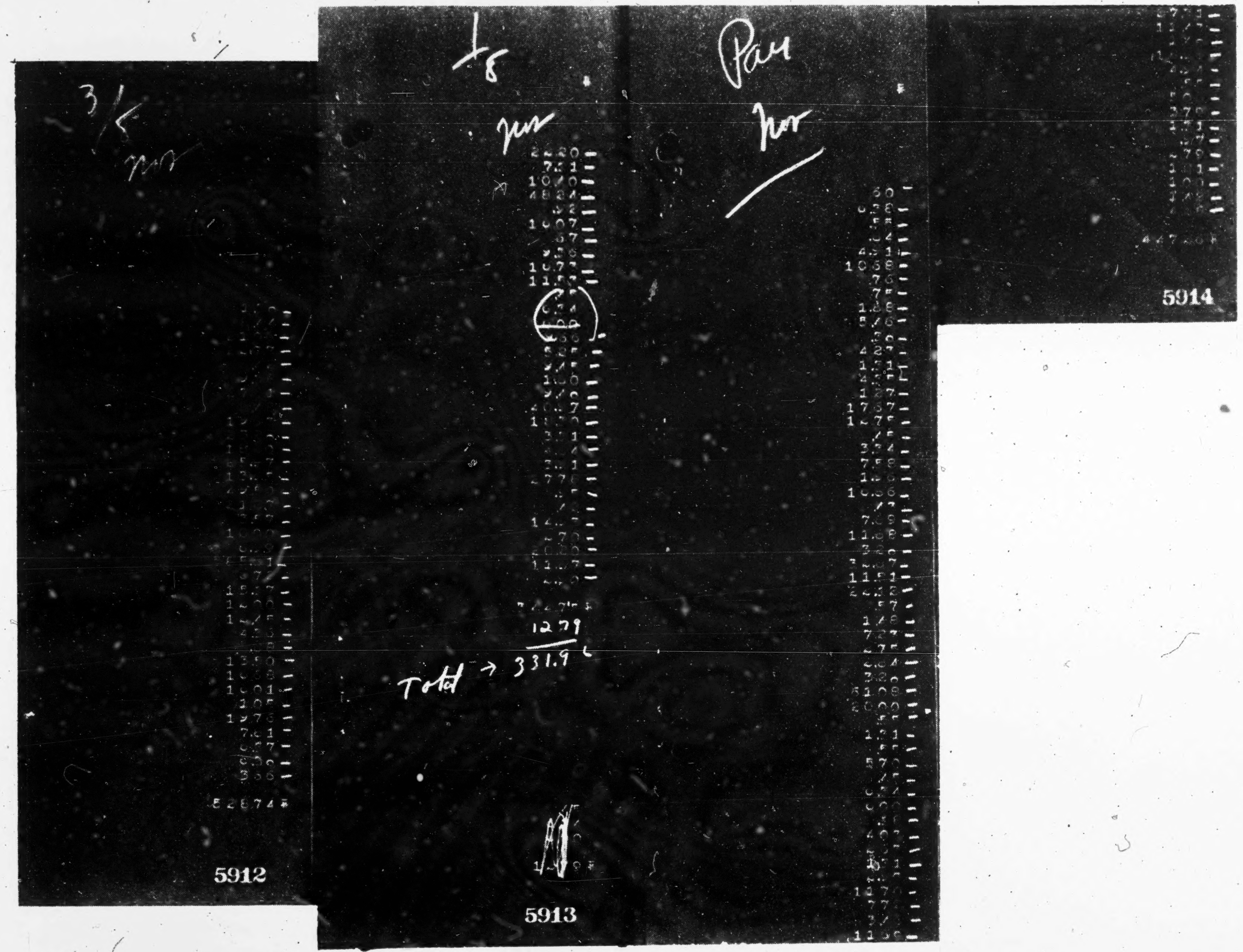
Voucher	Par	1/8	3/8
15304	45		
15306	634		
15317	600		
15323		966	
15335			2597
15341		525 945	1395
"		180	4450
15397		949 4097	2127 357
"			
15398	18		
15405			1000
15411	403		
15413	263		
15428	131		
15461	293		699
15462		1830	8581
"		331	472
15474	1170 772		
15475	346		
15484			1527 1520
15486	1169	484	1225
"	2731		436
15495	1143		
15501	149		
15513	1896	391	88
"		2778	1350
"			1668
"			1601
15518	494 55		
15521	506		
15527	379		
15530		95	
15542	131		
15544			105
15587	97	42	1976
15591	279		
15595	121		
15635		1293	
15765	100		
15803	142		781
15804	425	270 2525 1187 290	232 338 362

Voucher	Par	1/8	3/8
Total	447 26	331 96	528 74
Cartage	12747		

5511

Respondent's Exhibit No. 165.

Respondent's Exhibit No. 165.


3/8
1/8
Par
1279
Total → 331.9
5912
5913
5914

Resp 1650

FEDERAL TRADE COMMISSION

Docket No. 5253 ~~COMMISSION'S~~ RESPONDENT'S Exhibit No. 165-0

December 41

Voucher	Par	1/8	3/8
15806	327		
15808	50		
15811	1329		
15814	1248		
15817	1077 4044		
"	493		
15818		590 680	600 1629
15819	612		
15820	1695		
15822	23		
15823	135 395		
"	739		
"	265		
"	557 528		
"	658		
15825	50		
15826	1285		
15836	197		
15857	4337		
15868	158	1674 1068 1807	1255 482
"			114 1126
"			267 295
"			582
15877	243 324 274		
15879	548		
15881	153		
15882	1012		
15885	463		
15889	564		
15890	610		1089
15891		295	
15893	65		
15894	397		
15897			305
15901	1053		
15902	520		
15905	255		
15909	137		
15912	698	258	
15914	216	102 294	205 412
"		279	
15922		1118	

Voucher	Par	1/8	3/8
15976	236		560 1348
"			205 103
"			1120 1870
15998	186		
16001	368		
16002	630		
16003	273		
16009	148		
"	533		
"	520		
16007		504	
16027			479
16054	55		
16069	687		
16070	19		
16072	70		
16077	75		
16080			4937
16082	101	30	1198
"	421		202
"			373
16083	1185		
16084			2030
16088	96		
16097	1368		
16098	583		
16102	105		
16103		622	
16129			
16130	653		
16154		645	732
"		5055	
16172	176		
"	1096		
16175		6373	
16183	06	1137	
16184	425		
16186			403
16194	52		
16197	779		
16198	305		

Voucher	Par	1/8	3/8
16204	521		
16255	315		
16261	457		
16264	163		
16281		236	684
16282	55		
"	1135		
16308		961	
"		590	
16309	475		
16331	117	527	349
16338	922		
16347		59.16	
16350	315		
16405	478		
16406			1060
16407		948	2341
[illegible]			1811
16409		85	
16411	1366		
16412	220		
16413	127		
16519		2414	

Cartage 17610

Checked

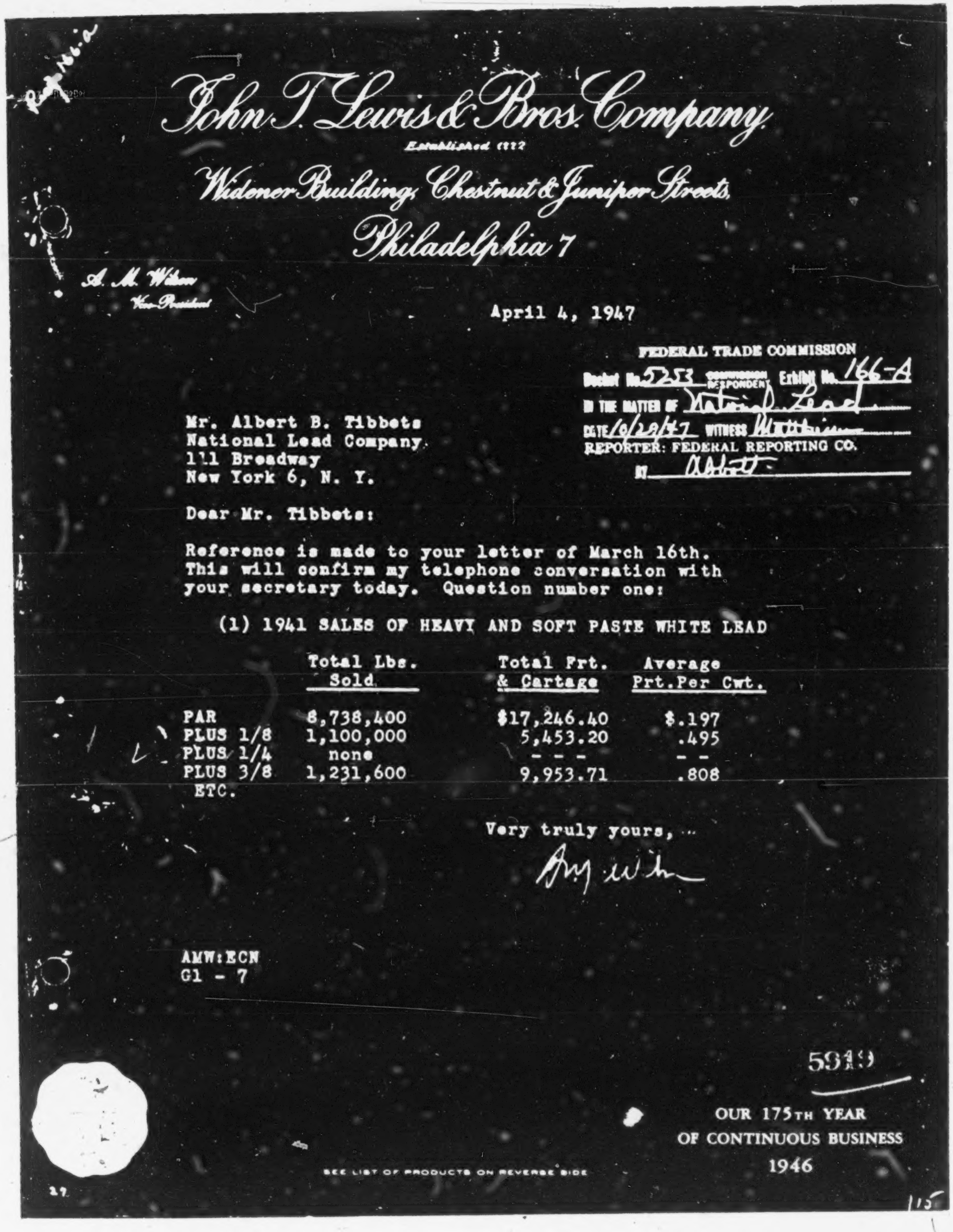
5915

124

Respondent's Exhibit No. 165.

Respondent's Exhibit No. 165.

Par Dec
3/8 Dec
1/8 Dec
5916
5917
5918



Resp 166-a

John T. Lewis & Bros. Company
Established 1772
Widener Building, Chestnut & Juniper Streets,
Philadelphia 7

A. M. Wilson
Vice-President

April 4, 1947

FEDERAL TRADE COMMISSION
Docket No. 5253 ~~COMMISSION~~ RESPONDENT Exhibit No. 166-A
IN THE MATTER OF National Lead
DATE 10/29/47 WITNESS Wilson
REPORTER: FEDERAL REPORTING CO.
BY Abbott

Mr. Albert B. Tibbets
National Lead Company
111 Broadway
New York 6, N. Y.

Dear Mr. Tibbets:

Reference is made to your letter of March 16th. This will confirm my telephone conversation with your secretary today. Question number one:

(1) 1941 SALES OF HEAVY AND SOFT PASTE WHITE LEAD

	Total Lbs. Sold	Total Frt. & Cartage	Average Frt. Per Cwt.
PAR	8,738,400	$17,246.40	$.197
PLUS 1/8	1,100,000	5,453.20	.495
PLUS 1/4	none	- - -	- -
PLUS 3/8	1,231,600	9,953.71	.808
ETC.			

Very truly yours,

A M Wilson

AMW:ECN
G1 - 7

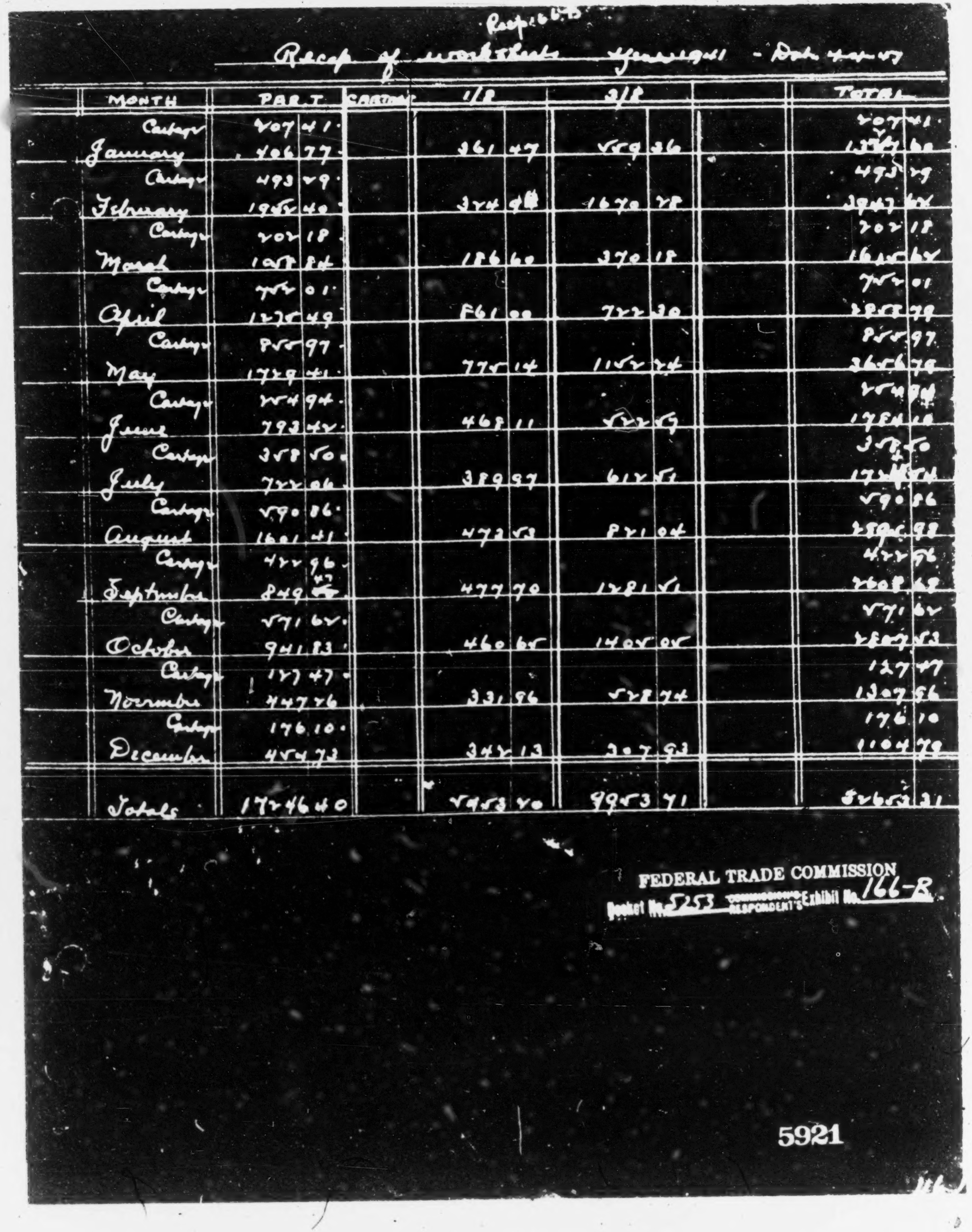
5919

OUR 175TH YEAR
OF CONTINUOUS BUSINESS
1946

SEE LIST OF PRODUCTS ON REVERSE SIDE

27

115

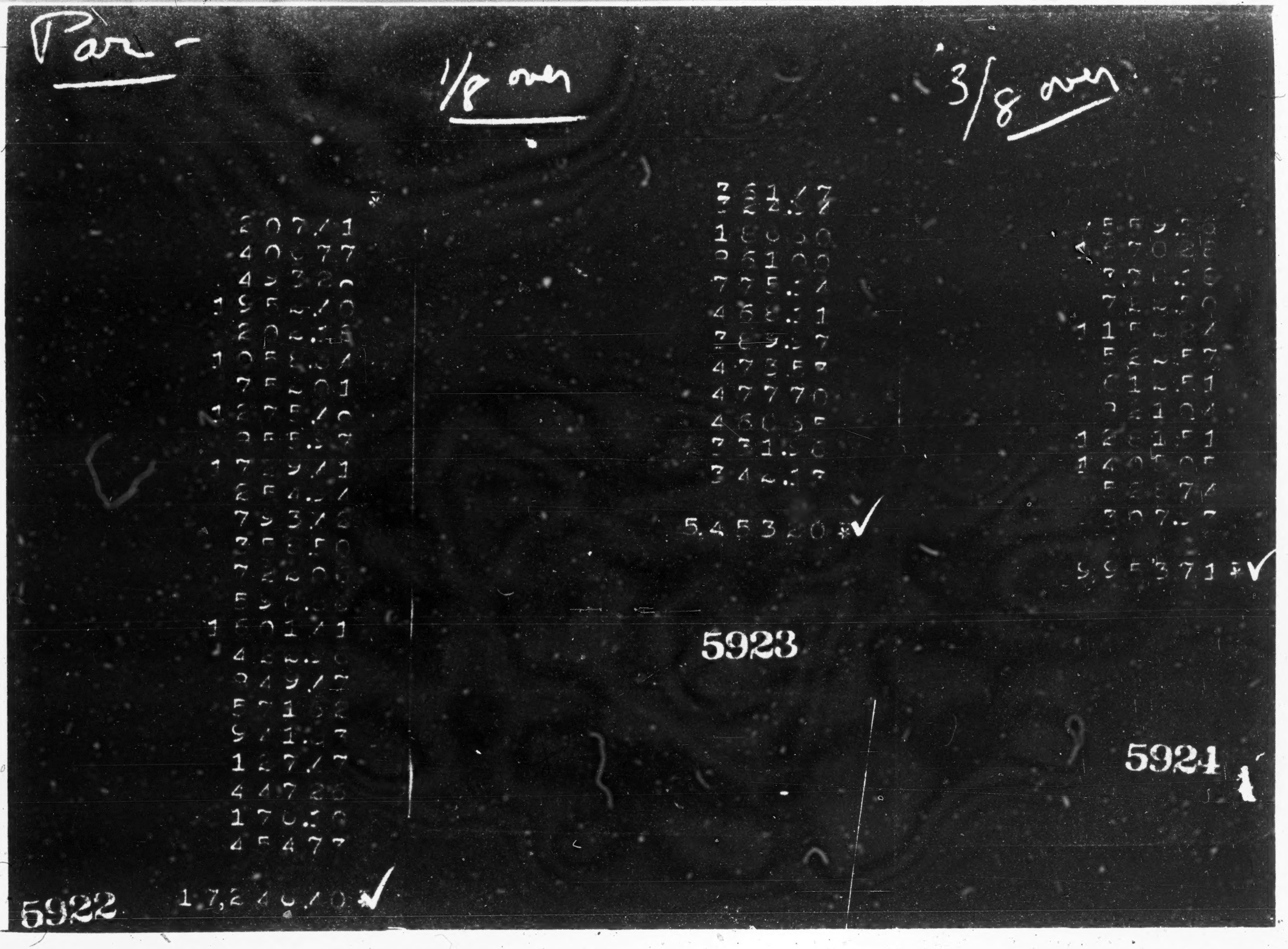


Recap 166-B

Recap of worksheets January 1941 - Dec 1941

MONTH	PART	CARTING	1/8	3/8		TOTAL
Cartage	207 41					207 41
January	406 77		361 47	529 36		1297 60
Cartage	493 29					493 29
February	1952 40		374 [illegible]	1670 78		3997 62
Cartage	202 18					202 18
March	1058 84		186 60	370 18		1615 62
Cartage	722 01					722 01
April	1275 49		861 00	722 30		2858 79
Cartage	855 97					855 97
May	1729 41		775 14	1152 24		3656 79
Cartage	254 94					254 94
June	793 42		468 11	522 57		1784 10
Cartage	358 50					358 50
July	722 06		389 97	612 51		1724 54
Cartage	590 86					590 86
August	1601 41		472 53	821 04		2894 98
Cartage	422 96					422 96
September	849 47		477 70	1281 51		2608 68
Cartage	571 62					571 62
October	941 83		460 65	1405 05		2807 53
Cartage	127 47					127 47
November	447 76		331 96	528 74		1307 56
Cartage	176 10					176 10
December	454 73		342 13	307 93		1104 79
Totals	17246 40		5953 20	9953 71		32653 31

FEDERAL TRADE COMMISSION
Docket No. 5253 ~~COMMISSION'S~~ RESPONDENT'S Exhibit No. 166-B


Par –

1/8 over

3/8 over

17,246.70 ✓

5922

5,453.20 * ✓

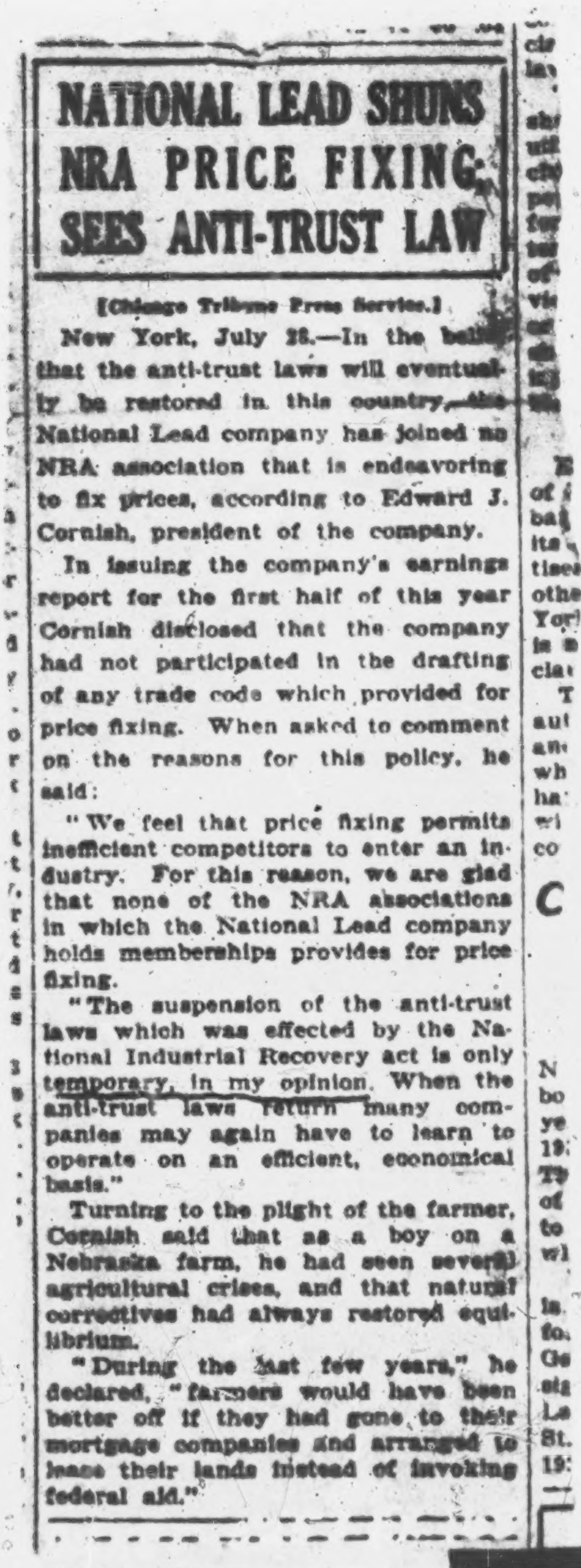
5923

9,953.71 * ✓

5924

Respondent's Exhibit No. 166.

Respondent's Exhibit No. 168.



NATIONAL LEAD SHUNS NRA PRICE FIXING; SEES ANTI-TRUST LAW

[Chicago Tribune Press Service.]

New York, July 25.—In the belief that the anti-trust laws will eventually be restored in this country, the National Lead company has joined no NRA association that is endeavoring to fix prices, according to Edward J. Cornish, president of the company.

In issuing the company's earnings report for the first half of this year Cornish disclosed that the company had not participated in the drafting of any trade code which provided for price fixing. When asked to comment on the reasons for this policy, he said:

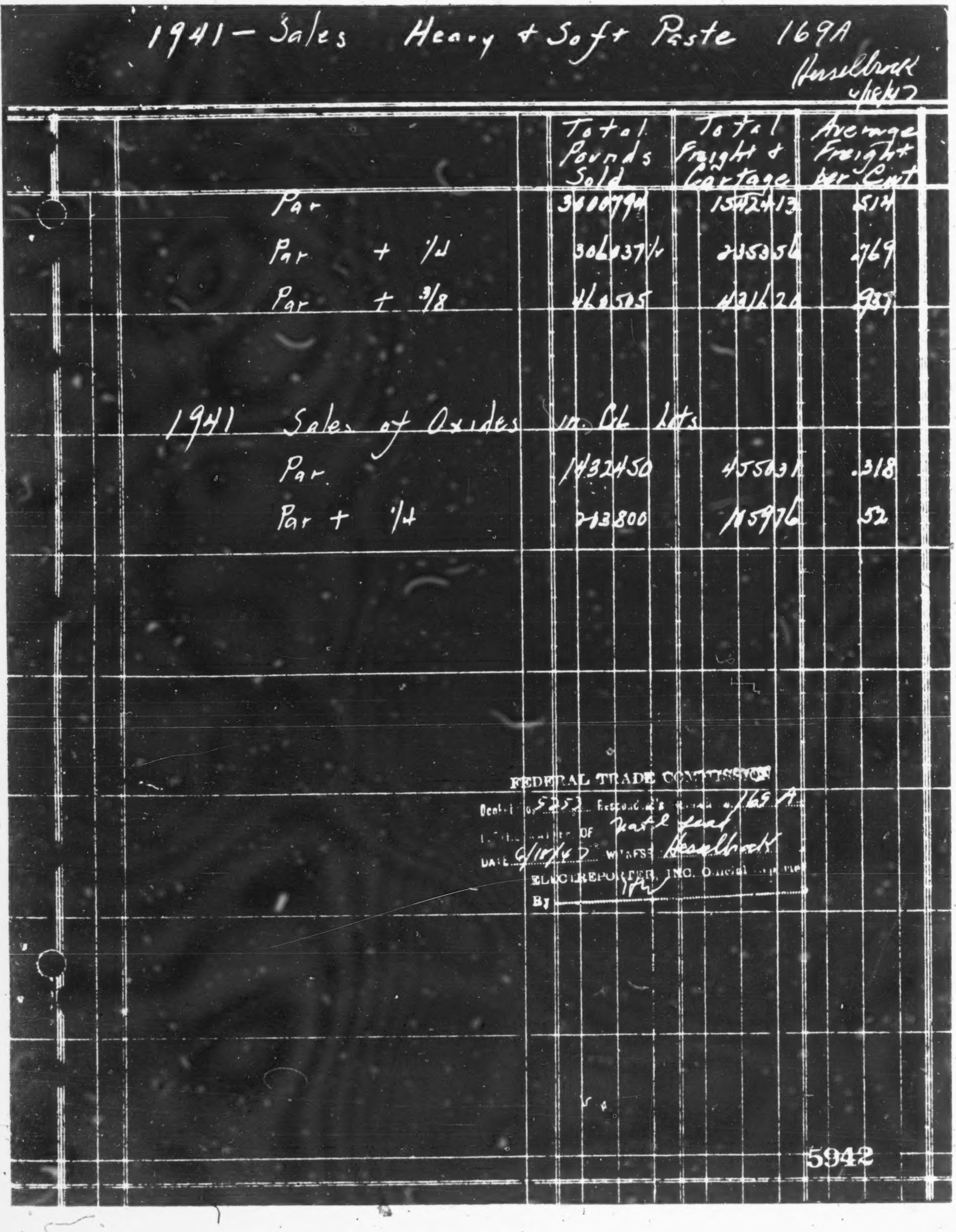
"We feel that price fixing permits inefficient competitors to enter an industry. For this reason, we are glad that none of the NRA associations in which the National Lead company holds memberships provides for price fixing.

"The suspension of the anti-trust laws which was effected by the National Industrial Recovery act is only temporary, in my opinion. When the anti-trust laws return many companies may again have to learn to operate on an efficient, economical basis."

Turning to the plight of the farmer, Cornish said that as a boy on a Nebraska farm, he had seen several agricultural crises, and that natural correctives had always restored equilibrium.

"During the last few years," he declared, "farmers would have been better off if they had gone to their mortgage companies and arranged to lease their lands instead of invoking federal aid."

[redacted]



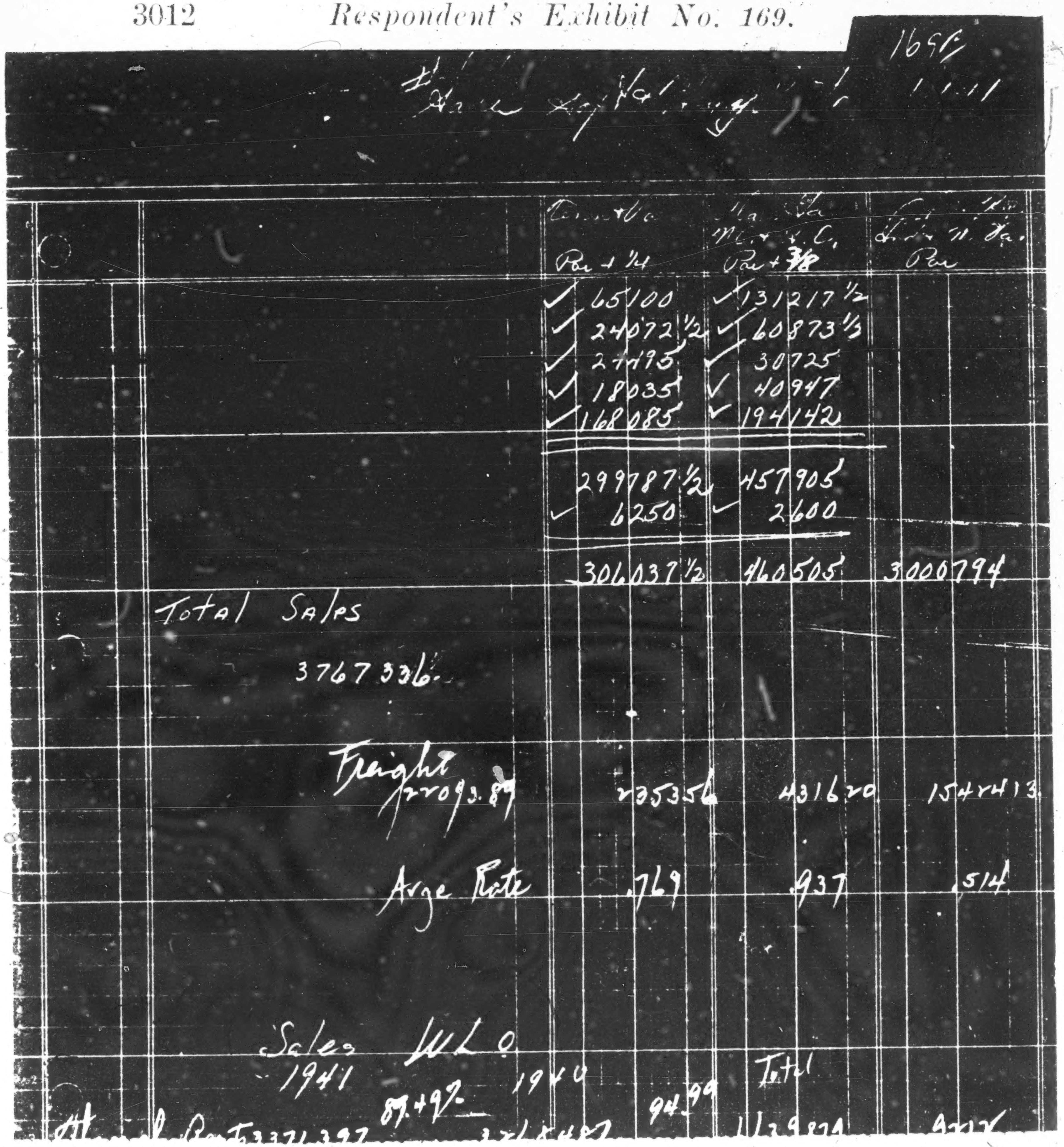
1941 – Sales Heavy & Soft Paste 169A

Hasselbrock 6/18/47

	Total Pounds Sold	Total Freight & Cartage	Average Freight per Cwt
Par	3000794	1542413	.514
Par + 1/4	306037½	235356	.769
Par + 3/8	460505	43162	.937
1941 Sales of Oxides in C.L. Lots			
Par	1432450	455031	.318
Par + 1/4	223800	115976	.52

FEDERAL TRADE COMMISSION
Docket No. 5253 Respondent's Exhibit No. 169 A
In the matter of Nat'l Lead
DATE 6/18/47 WITNESS Hasselbrock
ELECTREPORTER, INC. Official Reporter
By

5942



	Par + 1/4	Par + 3/8	Par
	✓ 65100	✓ 131217 1/2	
	✓ 24072 1/2	✓ 60873 1/3	
	✓ 24495	✓ 30725	
	✓ 18035	✓ 40947	
	✓ 168085	✓ 194142	
	299787 1/2	457905	
	✓ 6250	✓ 2600	
	306037 1/2	460505	3000794
Total Sales 3767336			
Freight 2209.89	2353.56	4316.20	15424.13
Arge Rate	.769	.937	.514

Sales WLO

1941	87.49%	1940	94.99	Total

Total Sales

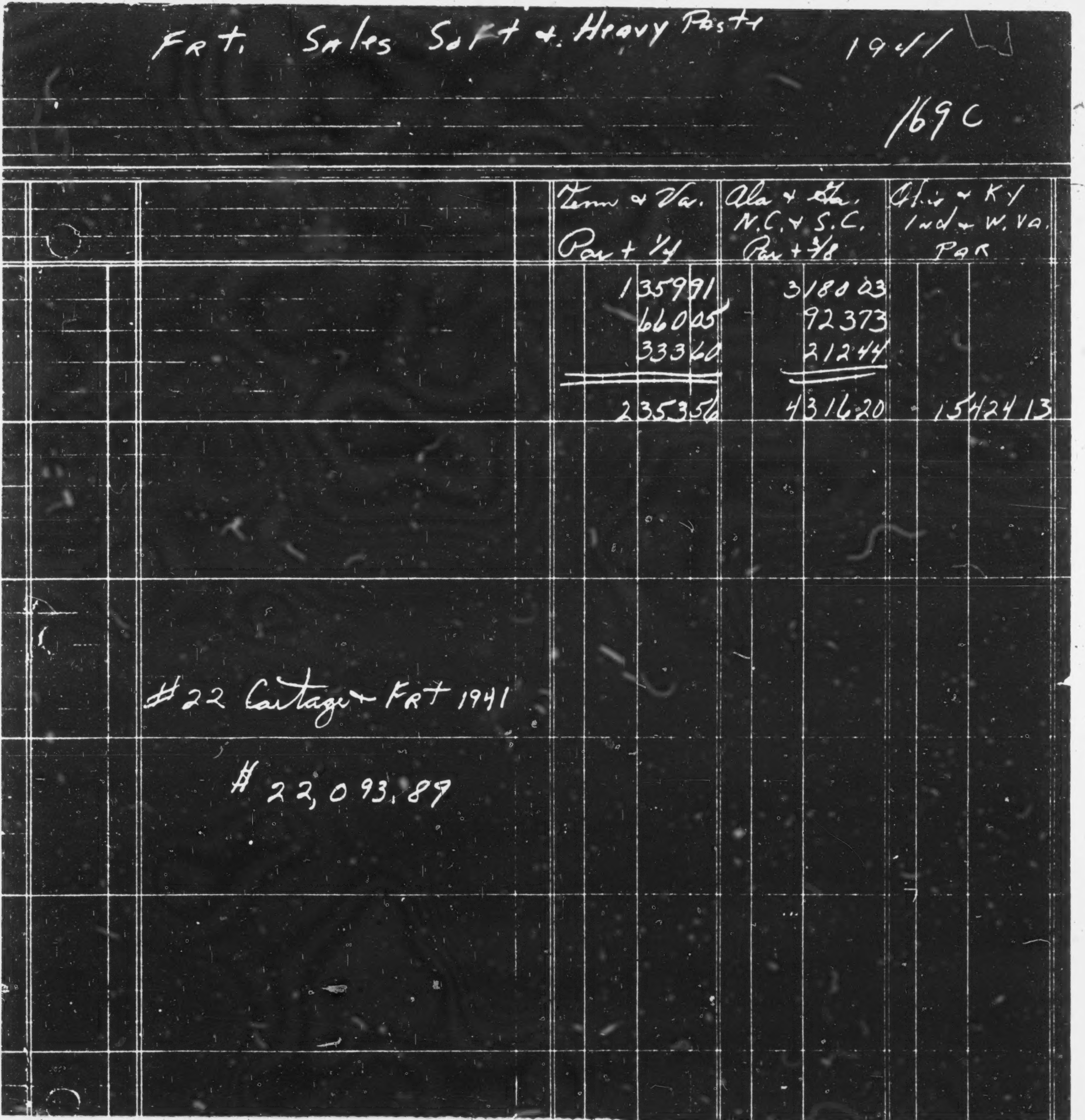
3767336.

Freight	222093.89	235356	431620	1542413.
Arge Rate		.769	.937	.514

Sales WLO

	1941		1940		Total	
Through Agents	3371397	89.49%	3268482	94.99	6639879	9212
Other	395939½	10.51%.	172263	5'	568202	7.88
	3767336.		3440745.		7208081	

FEDERAL TRADE COMMISSION
Dock... 5253 Respondent's ... 169-B
IN THE MATTER OF
DATE WITNESS
ELECTREPORTER, INC.
By



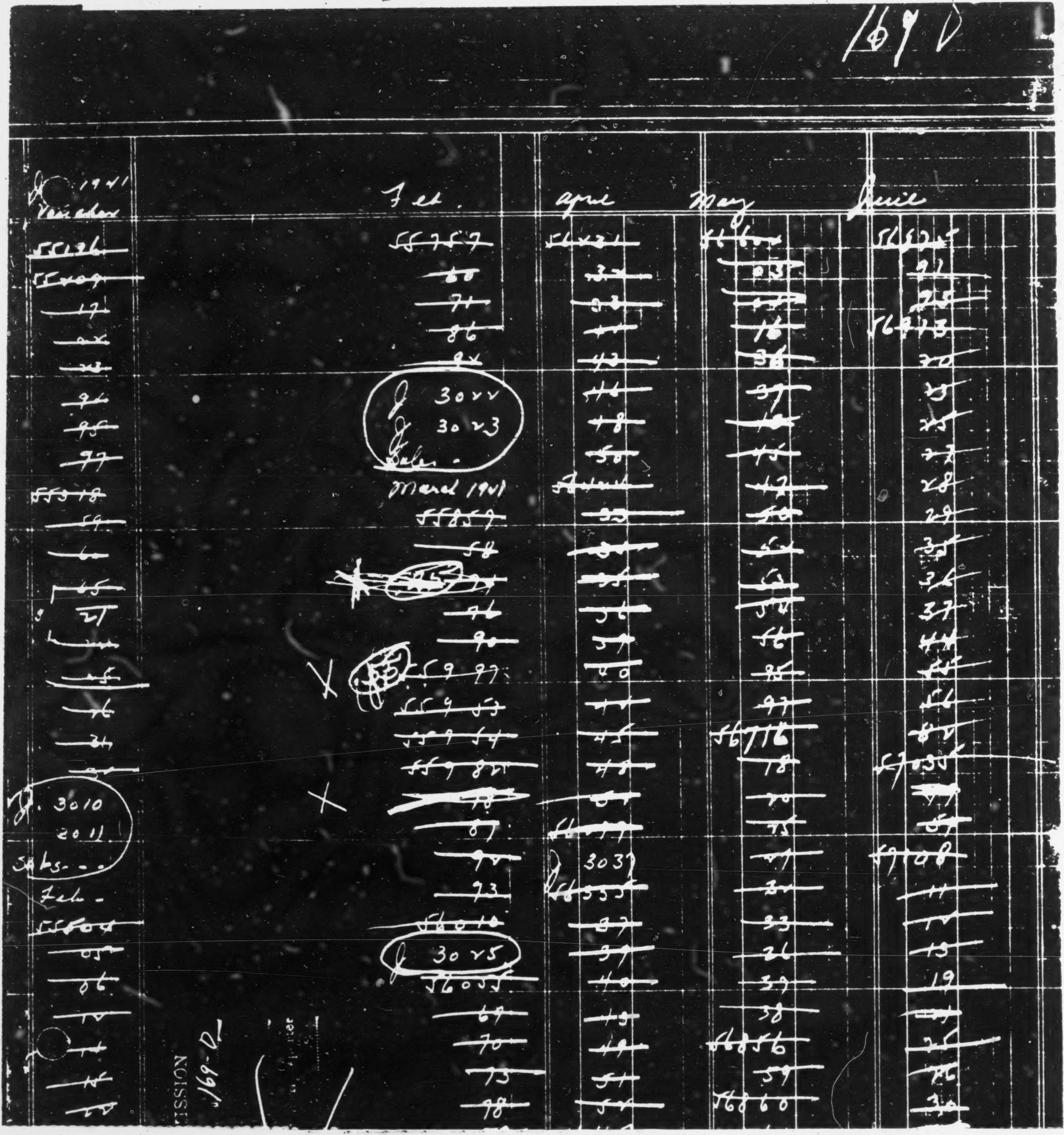
FRT. Sales Soft & Heavy Paste 1941

169C

Tenn & Va. Par + 1/4	Ala & Ga. N.C. & S.C. Par + 3/8	Ohio & KY Ind & W. Va. PAR
1359 91	3180 03	
660 05	923 73	
333 60	212 44	
2353 56	4316 20	15424 13

#22 Cartage & FRT 1941

$ 22,093.89



169 D

J 1941
Voucher
~~55136~~
~~55209~~
~~17~~
~~22~~
~~23~~
~~94~~
~~95~~
~~97~~
~~55318~~
~~59~~
~~60~~
~~65~~
27
~~[illegible]~~
~~75~~
~~76~~
~~84~~
~~[illegible]~~
J. 3010
3011
Sales - - -
Feb -
~~55604~~
~~05~~
~~06~~
~~10~~
~~14~~
~~18~~
~~22~~

Feb.
~~55757~~
~~60~~
~~71~~
~~86~~
~~92~~
J 3022
J 3023
Sales -
March 1941
~~55857~~
~~58~~
~~[illegible]~~
~~76~~
~~90~~
~~55997~~
~~55953~~
~~55954~~
~~55982~~
~~78~~
~~87~~
~~92~~
~~73~~
~~56010~~
J 3025
~~56055~~
~~67~~
~~70~~
~~75~~
~~78~~

April
~~[illegible]~~
~~32~~
~~33~~
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~~42~~
~~46~~
~~48~~
~~50~~
~~[illegible]~~
~~35~~
~~[illegible]~~
~~[illegible]~~
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~~37~~
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~~[illegible]~~
~~45~~
~~48~~
~~[illegible]~~
~~[illegible]~~
J 3037
~~56555~~
~~87~~
~~97~~
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~~43~~
~~[illegible]~~
~~51~~
~~[illegible]~~

May
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~~03~~
~~[illegible]~~
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~~36~~
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~~[illegible]~~
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~~56860~~

June
~~[illegible]~~
~~21~~
~~25~~
~~56723~~
~~20~~
~~23~~
~~25~~
~~27~~
~~28~~
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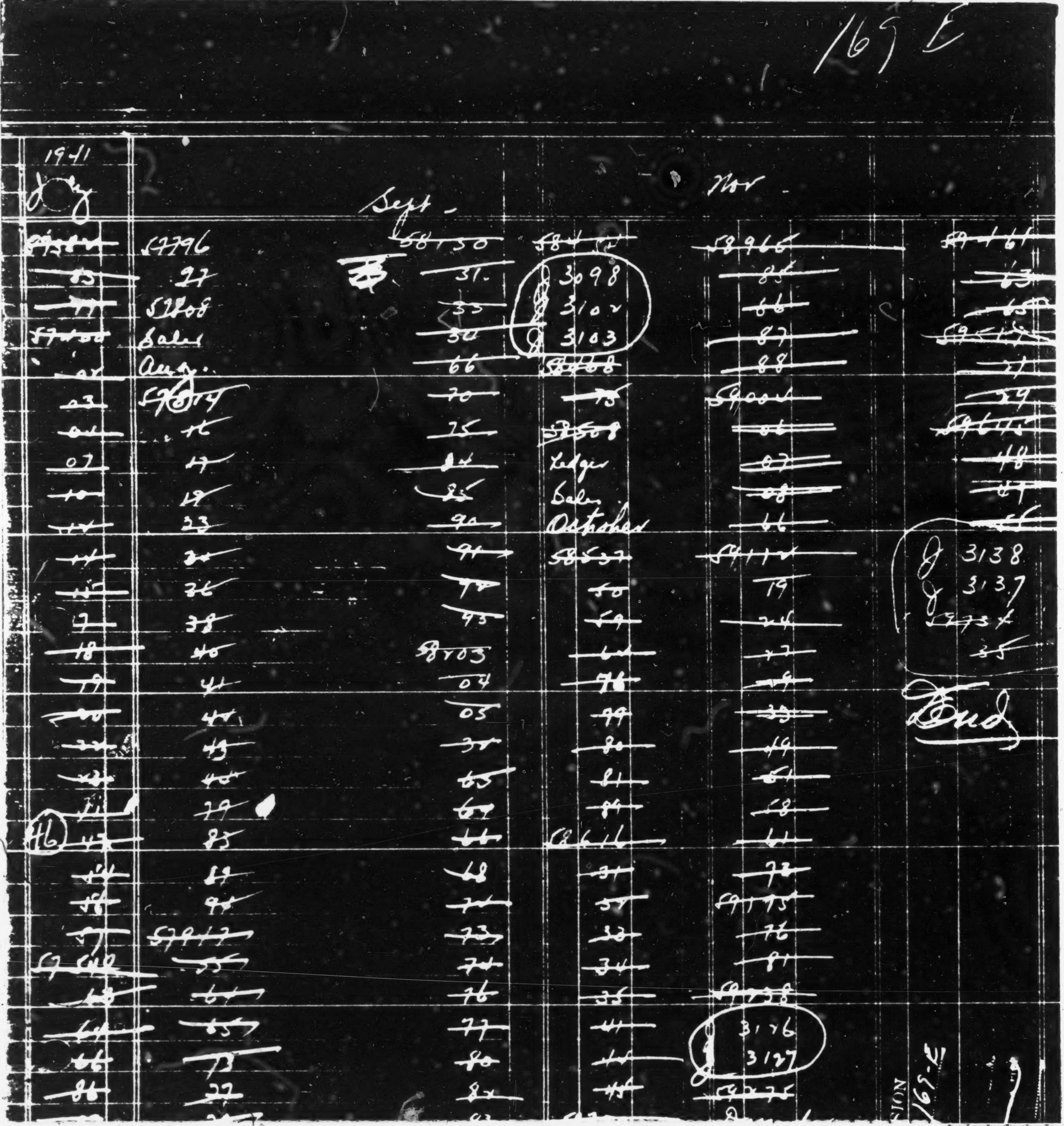
~~26~~
~~30~~

169-D

Respondent's Exhibit No. 169.



169 E

1941
July
~~[illegible]~~
~~85~~
~~97~~
~~57800~~
~~02~~
~~03~~
~~04~~
~~07~~
~~10~~
~~11~~
~~14~~
~~15~~
~~17~~
~~18~~
~~19~~
~~20~~
~~22~~
~~23~~
~~24~~
46 ~~45~~
~~54~~
~~56~~
~~57~~
~~57 60~~
~~63~~
~~64~~
~~66~~
~~86~~

57796
97
57808
Sales
Aug.
~~57814~~
~~16~~
~~17~~
~~19~~
23
~~30~~
~~36~~
~~38~~
~~40~~
~~41~~
~~44~~
~~45~~
~~48~~
~~79~~
85
~~89~~
~~95~~
~~57917~~
~~55~~
~~61~~
~~65~~
73
77

Sept –
~~58250~~
~~31~~
~~33~~
~~34~~
~~66~~
~~70~~
~~75~~
~~84~~
~~85~~
~~90~~
~~91~~
~~[illegible]~~
~~95~~
58303
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~~584[illegible]~~
J 3098
J 3102
J 3103
~~58468~~
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~~58508~~
Ledger
Sales
October
~~58537~~
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Cahill
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Nov –
~~58966~~
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~~591[illegible]~~
19
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~~72~~
~~59175~~
~~76~~
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~~59238~~
J 3126
J 3127
~~59275~~

~~59161~~
~~63~~
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~~59[illegible]~~
~~71~~
~~79~~
~~59[illegible]~~
~~48~~
~~47~~
~~[illegible]~~
J 3138
J 3137
~~59234~~
~~35~~
End

169-E

Sales Soft & Heavy Pots 169 F ✓

	Tenn & Va Pos + ¼	
	300	150
	25	150
	100	300
	250	350
	1800	25
	425	1775
	300	50
	125	25
	250	
Jan	112½	36737½ #
	300	
	50	July 700
	25	300
	12½	5037½
	925	100
		612½
	11875	300
	300	675
	62½	250
Feb.	100	87½
	175	50
	437½	300
	75	1337½
	25	150
	75	912½
	62½	175
	850	10000
	1750	400
	125	75
	1500	2287½
	1650	325
	237½	100
	175	25
	25	150
	200	475
	1675	1737½
Mar.	25	500
	100	100
	12½	1200
	75	
	350	65100
	800	
	150	
	112½	
	25	
Apr.	175	
	25	
	2950	
	100	
	37½	
	12½	
	300	
	62½	
	200	
	775	

	Ala., Ga.,	N.C. &	S.C. Pos + 3/8	
	350	50	25	550
	200	1862½	650	375
	225	1025	575	1087½
		150	500	975
	300	150	100	650
	125	400	725	800
	100	50	400	25
	112½	637½	1075	50
	1350	187½	137½	50
	162½	462½	512½	187½
	112½	300	612½	112½
	1375	450	500	400
	62½	175	325	512½
	337½	300	2000	800
	800	300	3025	550
Jan	300	300	1425	2125
	1725	350	100	2525
	187½	Mar 2000	3337½	462½
	837½	162½	3300	500
	412½	825	587½	775
	125	625	1387½	2325
	662½	2225	1512½	562½
	12½	662½	1012½	500
	12½	287½	11000	50
	50	187½	200	500
	250	300	200	550
	525	512½	9000	
	300	162½	450	131217½
		612½	800	
	500	175	1350	
	100	350	500	
Feb.	575	25	50	
	150	212½	100	
	225	912½	150	
	62½	162½		
	250	300	102267½	
	500	537½	200	
	475	350	July 2000	
	100	2775	100	
	312½	50	150	
	2775	150	1387½	
	312½	150	87½	
	125	300	575	
	1212½	912½	1600	
	62½	150	12½	
	100	700	587½	
	425	Oct 450	112½	
	1800	500	737½	
	50	350	175	
	112½	1875	300	
	175	100	400	
	2087½	600	575	
	375	75	1400	
	287½	75	300	
	150	200	450	

~~…AL TRADE COMMISSION~~
~~Docket No. 5253 Respondent's Exhibit No. 169 F~~
~~DATE~~
~~…, INC. …~~

3016

Respondent's Exhibit No. 169.

Sales Soft & Heavy Paste

169 G. ✓

Tenn & Va Pos + 1/4		Ala, Ga. N.C. & S.C. Pos + 3/8			
100	200	175	125	50	125
1850	25	1500	400	512 1/2	225
350	600	50	450	225	- 3100
1000	100	300	[illegible]7 1/2	100	262 1/2
125	60	325	625	952 1/2	112 1/2
100	985 ✓	400	300	150	105
25		1600	750	950	580
200		25	262 1/2	150	130
25		2525	100	450	250
12 1/2		528 1/2	3000	475	4890 ✓
275		287 1/2	2650	1550	
100		1112 1/2	8695 ✓	- 130	
- 50		500		162 1/2	
1087 1/2		- 325		200	
212 1/2		15000		100	
400		312 1/2		150	
562 1/2		2562 1/2		200	
100		650		575	
275		2075		250	
225		412 1/2		150	
100		1200		150	
400		400		400	
15000		300		25	
262 1/2		1237 1/2		100	
200		300		150	
23087 1/2 ✓		125		862 1/2	
		850		175	
		125		250	
		2800		35	
		200		9020 ✓	
		25			
		38228 1/2 ✓			

TOTAL OF TEN + VA
24072 1/2 ✓

TOTAL OF ALA GA N.C. & S.C.
60873 1/2

5753 169 G
Date
By

Respondent's Exhibit No. 169.

#22 Cartage + FRT 1941

$22,093.89

FEDERAL TRADE COMMISSION
Docket No. 5253 Respondent's Exhibit No. 169-C
~~In the matter of~~
~~Witness~~
~~Date~~
~~ELECTREPORTER, INC. Official Reporters~~
~~By~~

~~10~~
~~15~~
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~~22~~
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~~31~~
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J. 3010
2011
Sales - -
Feb. -
~~55604~~
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FEDERAL TRADE COMMISSION
No. 5253
169-D
IN THE MATTER OF
v.
DATE
ELEC
By

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~~90~~
~~559 97~~
~~559 53~~
~~559 54~~
~~559 82~~
~~78~~
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~~90~~
~~93~~
~~56010~~
J 3025
~~56055~~
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~~84~~
~~56158~~
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J 3034
J 3035
561.78
Ledger,
Sale
April - 1941
~~56007~~
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~~56477~~
J 3037
~~56553~~
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~~56647~~
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~~56513~~
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J 3048
J 3049
Sale. -

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~~56803~~
~~56876~~
J 3058
~~56870~~
~~977~~
Sale
Ledger

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J 3067
J 3068
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Sale

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[illegible]
J 3078
3080

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[illegible]
J 3089
3090
~~58123~~

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58703
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~~58871~~
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~~58910~~
J 3114
~~58948~~
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Bell

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~~81~~
~~59238~~
J 3126
3127
~~59278~~
December
[illegible]

J 3137
~~59734~~
~~35~~

End

TRADE COMMISSION
Docket 5253 Respondent's Exh. No. 165-E
IN THE MATTER OF
DATE
WITNESS
ELECTREPORTER, INC.
By

Respondent's Exhibit No. 169.

Sales Soft & Heavy Paints 1st year 1941   169 H ✓

Tenn & Va.
Par + 1/4

200	575
2375	400
162½	200
1625	24473
975	2
575	24495 ✓
437½	
782½	
100	
600	
950	
862½	
13000	
375	
500	
25	
75	

24495
75
850
87½
225
850
100
100
300
550
175
400
200
25
50
125
100
25
112½
37½
150
287½
375
200
200
100

30745
24495

6250

Ala. Ga. N.C. & S.C.
Par + 3/8

1400	25	262½	1012½
1000	475	1450	160
1700	3575	725	30722
1900	500	500	3
2450	225	50	30725
462½	225	150	
150	425	175	
50	75	150	
312½	450	100	
500		1712½	
650		750	
1175		400	
662½		400	

30725

300
100
200
200
950
112½
500
25
12½
50
150

33325
30725

2600

5253   169 H.

SALES SOFT + HEAVY PASTE

1691

	TENN +	VA	ALA.	GA.,	NC +	SC.
	PAR +	1/4		PAR +	3/8	
MAY - 1941	5475	50	525	800	600	3700
	137 1/2	50	500	105	1037 1/2	1075
	887 1/2	337 1/2	112 1/2	225	1462 1/2	400
	50	25	887 1/2	175	1562 1/2	762 1/2
	1162 1/2	850	50	100	512 1/2	712 1/2
	525	360	200	6037 1/2	300	5125
	3037 1/2	437 1/2	1312 1/2	937 1/2	237 1/2	225
	500	350	62 1/2	100	500	1137 1/2
	200	300	105	1150	1437 1/2	250
	400	100	2262 1/2	575	2200	100
	100	2700	2262 1/2	2262 1/2	125	275
	10		100	100	100	75
			512	100		
		18035				40947

~~FEDERAL TRADE COM[illegible]~~
~~5753 169 i~~
~~WITNESS~~
~~ELECTREPORTER, INC.~~

Respondent's Exhibit No. 169.

Sales Soft & Heavy Coats August 1941 169-L April / Sept

Tenn & Va. Pre + 1/4			Ala., Ga., N.C., & S.C. Pre + 3/8		
100	100	1700	600	300	25
3425	1350	200	3800	200	1250
325	3625	50	5700	200	1137½
725	350	600	1800	2000	150
2300	50	675	600	2000	200
137½	150	50	405	200	925
562½	50	200	1400	2000	200
1010	6712½	20000 Non Valent ct	925	6750	100
800	4337½	100	1100	200	500
1175	5975	150	2500	2650	700
250	75	100	225	900	1575
475	1775	75	762½	3087½	1900
812½	1775	168085	1000	750	112½
1100	2287½		105	1000	75
750	762½		1862½	75	787½
500	7405		400	1200	525
287½	25		1500		1787½
150	475		2000	250	2162½
337½	1800		300	8250	2850
500	5850		212½	2537	1000
400	2912½		1000	525	137½
3600	150		175	1725	737½
150	95		2462½	2475	567½
375	75		1937½	600	62½
125	1237½		4050	825	287½
12½	150		812½	850	250
162½	987½		1475	1000	400
410	650		425	325	125
1050	100		925	1412½	775
1000	100		775	50	387½
100	50		137½	[illegible]	75
50	150		2050	450	187½
800	1450		175	2125	1125
1100	75		1900	1175	50
200	650		1100	1312½	75
1125	7150		1000	4237½	12½
375	62½		112½	475	12½
350	850		725	800	125
100	1625		450	1625	1887½
100	525		1500	8625	10000
	225		75	450	25
5400	2325		300	275	225
362½	550		800	512½	1000
3050	100		50	1200	500
[illegible]	135		75	3075	75
635	1125		450	2412½	1712½
2425	350		250	37½	2000
762½	225		1875	1000	19442
1325	225		337½	2000	
250	350		312½	175	
3850	1525		375	3600	
5000	75		400	25	
25	6000		1200	2652½	
13200	1087½		750	1575	
975	7200		1250	5	

COMMISSION
169-L
5253
ELECTREPORTER, INC.

3020

Respondent's Exhibit No. 169.

fit

Sales Soft & Heavy Part # year 1941

169 K ✓

freight

Tenn & Va Par + 1/4		Ala Ga. NC & SC Par + 3/8		
1051	1439	698	1762	1290
1432	1737	970	660	880
722	961	1187	5721	1596
16	486	142	1625	1402
720	401	671	2300	515
1422	639	3427	1878	2309
2037	2423	1922	2262	2222
5372	1880	1402	787	577
1702	4429	1755	445	1160
1738	2004	983	826	2226
2367	282	825	96	601
7489	686	1277	290	1422
1601	921	1587	1292	102
1550	2618	222	232	223
55	297	36	1806	3307
156	59	1790	3940	1028
798	1252	11822	2326	631
1737	1759	4129	10268	671
1922	2688	2002	1758	258
823	754	1583	1843	1029
303	1900	943	2268	2976
89	3577	1722	1402	2023
661	642	33643	875	1562
512	192	1629	2545	1628
373	3402	1180	2062	1268
965	1200	1393	1622	318003
437	428	192	1455	
2652	784	3323	2226	
2407	125	1552	10820	
3750	1152	1326	166	
1877	135991	1190	2323	
2347		3647	2727	
1615		1132	1362	
89		2650	605	
1455		4223	2263	
59		1629	842	
94		2322	1631	
559		192	2317	
1128		96	4243	
722		1225	11186	
83		2542	9477	
2606		1583	3324	
2085		147	264	
3206		832	1292	
1602		2352	1520	
863		57	1171	
962		927	3735	
1597		1032	642	
103		2586	1160	
478		4129	3742	
990		190	2962	
778		1665	7622	
2267		1814	1410	
683		750	1069	
461		2109	2236	

FEDERAL TRADE COMMISSION
5753 169 K
of
DATE
REPORTER
By

fit Sales Soft & Heavy Paste 169 L ✓

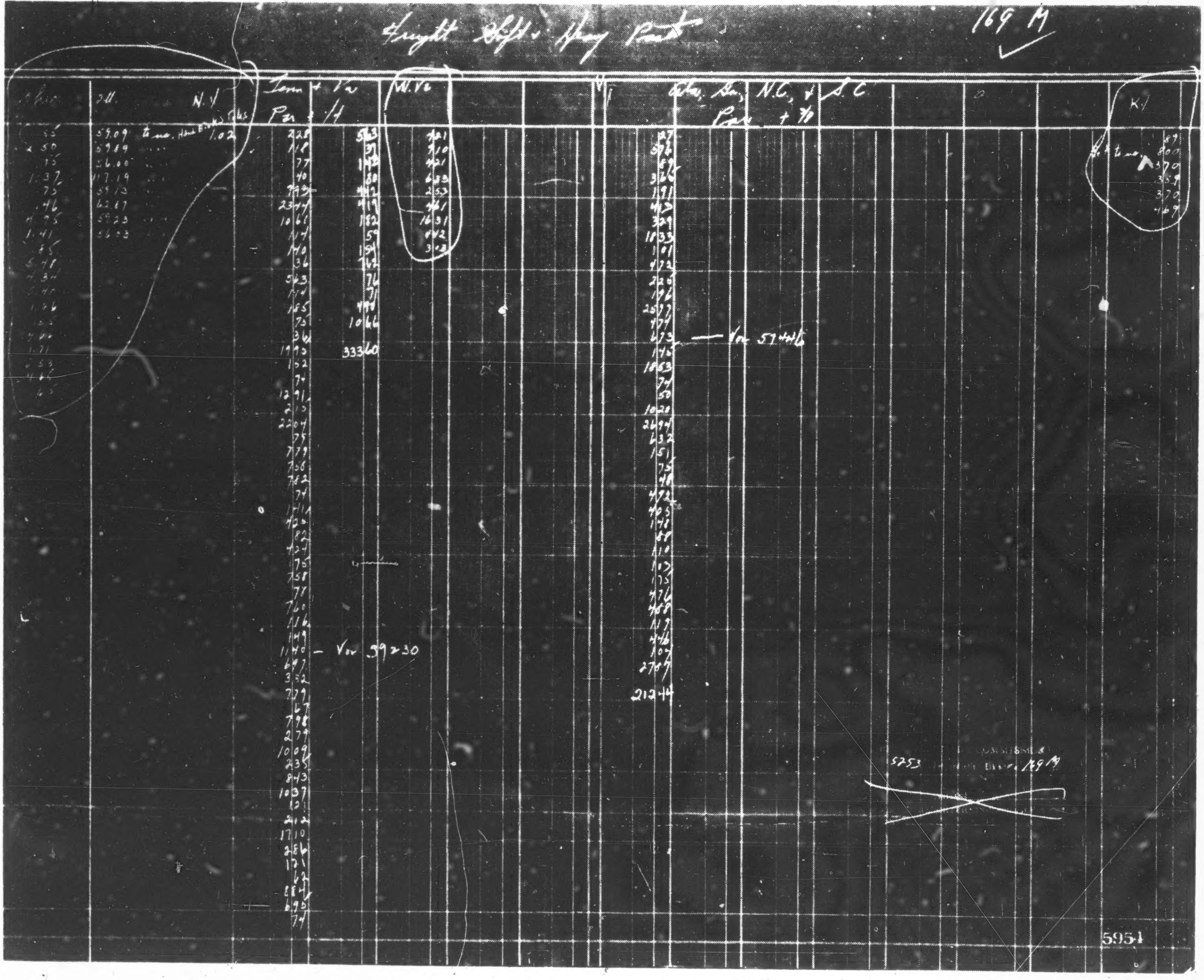
Tenn & Part	Va 1/4	X	Ala-Tenn Part 3/8		NC	& Se
56 68	1 79		22 59	28 26	16 32	27 94
19 10	[illegible]		9 47	34 66	3 80	(25 24
9 37	572 21		84 35		15 20	13 32
18 74	27		38 [illegible]		79	6946 11
99 25	149		47 [illegible]		1 [illegible]	169
14 10	172		5 [illegible]		2 38	346
8 05	168		77 [illegible]		20 42	83
20 30	76		28 95		16 [illegible]	87
19 38	154		165 44		16 36	416
199 66	1417		28 43		20 86	164
19 87	1140		16 59		12 68	151
35 71	740		24 94			209
16 43	143		17 18			147
19 50	708		5 24			319
5 99	1345		51 67			107
16 01	76					[illegible]
40 07	769					923 73
	1763					
	12					
	660 08					

FEDERAL TRADE COMMISSION
Dkt 5253 169 L
~~ELECTREPORTER INC. Official Reporter~~

3022

Respondent's Exhibit No. 169.

5953



Freight [illegible] + [illegible] Point

169 M ✓

Ohio	Ill.	N.Y.	Tenn + Va Pa + 1/4		W. Va	Ala, Ga, N.C, + S.C Pa + 3/10	K.Y.
.55	59.09	to me. Hd Bks Tabs 1.02	228	563	421	127	89
2.50	59.89	....	118	37	310	576	to me 800
.75	56.00	....	77	142	421	59	370
1.37	117.19	....	40	80	623	316	359
.73	59.13	....	799	442	253	191	370
.46	62.67	....	2344	419	461	413	469
4.95	59.23	....	1061	182	1631	329	
1.41	56.03	....	114	59	442	1833	
.85			140	154	323	101	
5.48			36	162		472	
4.34			563	74		226	
[illegible]			174	71		196	
1.66			165	440		2577	
[illegible]			73	1066		477	
4.44			36			673 — Vou 57446	
1.71			1990	33360		146	
0.53			162			1853	
4.44			74			74	
.65			1291			50	
			210			1020	
			2204			2694	
			75			632	
			779			151	
			756			75	
			782			48	
			74			472	
			1411			405	
			426			148	
			82			68	
			424			110	
			75			107	
			758			175	
			77			476	
			760			458	
			116			117	
			149			446	
			1140 — Vou 59230			107	
			687			2707	
			352				
			779			21244	
			67				
			798				
			279				
			1009				
			235				
			843				
			1037				
			121				
			212				
			1710				
			286				
			171				
			62				
			884				
			695				
			74				

5753 [illegible] Exh. 169 M

5954

Respondent's Exhibit No. 169.

Oxides in Carload lots

169A

	Boyertown Pa. Wt	frt	Pa. Penn Wt	frt		Pa. Wt	frt
Sch. [illegible]	40500	[illegible]	40550	17115	[illegible]	40000	7650
"	41700	[illegible]	40550	17115		[illegible]	7650
	40200	[illegible]	40500	17200		[illegible]	[illegible]
	41200	[illegible]	41550	17115		[illegible]	7650
	40200	[illegible]	40550	17115	[illegible]	[illegible]	
	203800	[illegible]	40550	17115		40000	[illegible]
			40500	17072		40000	7650
			40500	17250	[illegible]	[illegible]	
			40550	17115		[illegible]	5103
	Rate .54		40550	17115		19800	[illegible]
			41550	17115		[illegible]	5106
			40550	17115		[illegible]	[illegible]
			40550	17115		[illegible]	7650
			40500	17036		40060	7658
			40750	16975		40000	7650
			40750	17025		40010	7638
			40750	17125		40000	7650
			690050	291344	L.	60000	13861
						40000	7638
						40000	7650
			Rate X			40010	7638
						40000	7650
						742400	163687
						690050	291344
						1432450	455031

Rate .318

Rate X

FEDERAL TRADE COMMISSION
Docket 5753 Exhibit No. 169A
~~Of~~
~~DATE Witness~~
~~REPORTERS, INC. Official Reporter~~
~~By~~

R170-A Baum
6/18/47

1941 Sales of Heavy & Soft Paste White Lead — and Oxides

Atlantic Branch

	HEAVY AND SOFT PASTE WHITE LEAD			OXIDES		
	TOTAL LBS SOLD	TOTAL FRT & CART	AVE FRT PER CWT	TOTAL LBS SOLD	TOTAL FRT & CART	AVG FRT PER CWT
Va.	19652165	~~[illegible]~~ 4264349	~~[illegible]~~ .2170	55568061	8220236	.1479
Flora 1/3	—			—	—	—
Flora 1/4	—			—	—	—
Flora 3/5	221733	183180 ~~188505~~	.8273 ~~.9519~~	—	—	—
	19873893	4447529	.2238	58568061	8220236	.1479

Use Present Rates to Georgia & Florida - 1941
per J. Ryan

No Carbonate lead Shipped to Georgia & Florida per H. J. White
Check on the following
Ool Conference on [illegible]

FEDERAL TRADE COMMISSION
Docket No. 5253
...'s Exhibit No. 170-A
In the Matter of Nat'l Lead
DATE 6/18/47 Witness Baum
ELECTREPORTER, INC. Official Reporter
By

Respondent's Exhibit No. 170.

FEDERAL TRADE COMMISSION
Docket No. 5253 Respondent's Exhibit No. 170-B

R 170-B

Heavy and Soft Paste White Lead in Oil Sales year 1941 – By Towns

6/18/47

Florida	in lbs.	Reduced Rate	Original Rate		Gross Wt. Shipped 6%	Rate Carload [illegible] C.L.		Carload Weight	Calculation Based on Actual Weight [illegible] Reduced Calculation	Amount		Freight Gross Weight Calculated on Carload Rate		Calculation Based on One Carload Shipment to Each Point of Destination
Daytona	100	.89	1.15	W	106	68	L	36000	~~1.04~~	~~1 38~~		72		244 80
Gainesville	3537	1.00	1.12	W	3749	90	–	36000	40 31	~~45 51~~		33 74		324 00
Jacksonville	46897		61	W	49711	46	x	24000		347 23	x	272 66	x	131 64
Key West	1302		77½	W	1380	59½	L	36000		11 92		8 21		214 20
Miami	34512		68		36583	59½	x	24000		281 14	x	250 04	x	164 04
Ocala	2012	1.00	1.15	W	2133	77	L	36000	23 22	~~24 06~~		16 42		277 20
Orlando	237	1.02	1.23	W	251	78	–	36000	2 75	3 31		1 96		280 80
St Petersburg	2900	1.06	1.25	W	3074	84	–	36000	35 30	~~40 07~~		25 82		302 40
Tallahassee	762		1.03	W	808	84	–	36000		[illegible]		6 79		302 40
Tampa	25705		61	W	27247	46	x	24000		190 32	x	149 45	x	131 64
West Palm Bch	3327	1.05	~~1.35~~	W	3527	68		24000	40 15	~~47 49~~		23 98		163 20
Total Fla.	121295				128569			348000	913.11 ~~[illegible]~~			[illegible]		2536 32
Georgia														
Adel	575		1.00	W	610	80	L	36000		6 64		4 88		288 00
Albany	2825		1.05	W	2995	84	–	36000		[illegible]		25 16		302 40
Americus	675		1.05	W	716	84	–	36000		[illegible]		6 01		302 40
Brunswick	4912		66	W	5207	61	x	24000		34 37	x	31 16	x	146 40
Cordele	1500	.95	~~1.00~~	W	1590	80	L	36000	16 31	~~17 49~~		12 72		288 00
Douglas	400		1.00	W	424	80	–	36000		4 61		3 39		288 00
Dublin	821	.95	1.11	W	870	78	–	36000	9 06	~~[illegible]~~		6 79		280 80
Macon	29810	.95	1.07	W	31599	81	–	36000	322.16	~~344 [illegible]~~		255 95		291 60
Milledgeville	1250	.95	1.10	W	1325	81	–	36000	13 76	~~14 58~~		10 73		291 60
Moultrie	1000		1.03	W	1060	84	–	36000		12 07		8 90		302 40
Sandersville	187		1.17	W	198	78	–	36000		2 16		1 54		280 80
Savannah	29999		61	W	31799	46	x	24000		222 12	x	144 42	x	131 64
Statesboro	1400		94	W	1484	75	L	36000		13 26		11 13		270 00
Thomasville	3317		1.05	W	3516	84	–	36000		40 03		29 53		302 40
Tifton	587		1.00	W	622	80	–	36000		6 77		4 98		288 00
Valdosta	3688		1.00	W	3909	80	–	36000		42 35		31 27		288 00
Waycross	4660	.85	.95	W	4940	78	–	36000	47 84	~~52 48~~		38 53		280 80
Total Ga	87609				92864			588000	848 69	~~[illegible]~~		657 07		4620 48
Grand Total	208904				221433			936000		~~1845 [illegible]~~	1.53	1446 88	.76	7156 80
									8273	1831 50				

AS 108 12-45 50M

NATIONAL LEAD COMPANY
ATLANTIC BRANCH
111 BROADWAY NEW YORK 6

SUBJECT FEDERAL TRADE COMMISSION

DATE 6-5-47

TO Mr. Albert B. Tibbets, Manager, Sales Promotion Department

FROM E. L. Baum, for Comptroller

IN REPLY TO

FEDERAL TRADE ... 171
5253
OF Nat'l Lead
Baum
DATE 6/18/47 WITNESS
REPORTER, INC.
BY TW

The information requested in your General Letter of March 26th is as follows:

1941 Sales of Heavy & Soft Paste White Lead

	Total Pounds Sold	Total Freight and Cartage	Average Freight Per Cwt.
Par	19,652,155	42,643.49	.2170
Plus 3/8	221,433	1,831.80	.8273

1941 Sales of Oxides

Par	55,568,061	82,202.36	.1479
Plus 3/8	None	None	None

A calculation was also made using the same quantities and destinations but based on carload shipments and rates and the result follows:

	Total Pounds Sold	Total Freight and Cartage	Average Freight Per Cwt.
Par	19,652,155	43,028.41	.2190
Plus 3/8	221,433	1,446.88	.6534

The freight rate based on a single carload shipment to each point of destination in the "Plus 3/8" Zone during 1941 would average .7646 per cwt.

E. L. Baum

ELB:EMc

Respondent's Exhibit No. 173.

R173 DONDORF

6/19/49

PIG LEAD PURCHASES

(Tons)

	1936	1937	1938	1939	1940	1941
A. S. & R. Company	48,422	51,113	39,126	41,819	47,885	77,010
St. Joseph Lead Company	53,217	58,305	43,181	48,623	53,734	51,994
St. Joseph Lead Company (Mine La Motte)	-	-	-	-	-	871
Bunker Hill Smelter	-	-	3,000	4,806	4,175	5,133
St. Louis Smelting & Refining Works	10,263	7,282	2,269	11,791	8,624	5,112
Cerro De Pasco	-	-	1,624	2,750	3,480	11,270
Others	9,920	13,131	7,820	12,415	15,297	* 60,005
TOTALS	121,822	129,831	97,020	122,204	133,195	211,395

*	
Anaconda Sales Co.	5,000
U.S. Smelting	2,000
American Metal Co.	8,000
C. Tennant Sons & Co.	45,005

FEDERAL TRADE COMMISSION
Docket No. 5353 Respondent's Exhibit No. 173
IN THE MATTER OF Nat'l Lead
DATE 6/19/47 WITNESS Dondorf
ELECTREPORTER, INC. Official Reporters
By HW

April 2, 1947

41720
40700
41700
46800
203800

105[illegible]

Rate .54

40500
41550
40550
40550
40500
40500
40550
40550
41550
40550
40550
40500
40550
40750
40750
690050

17200
17115
17115
17115
17070
17350
17115
17115
17115
17115
17115
17115
16975
17005
17197
291344

Rate [illegible]

[illegible]

40000
40000
40000
40000
40000
19800
40000
19800
40000
40000
40000
40600
40000
60000
40000
40000
40600
40000
742400

7612
9654
22010
9654
5103
4959
5706
4954
9657
7638
9654
7638
9654
13841
7638
9654
7638
9654
163687

690050
1432450

291344
455031

Rate .318

FEDERAL TRADE COMMISSION
5793 1692
OF
DATE WITNESS
REPORTERS, INC. Official Reporter

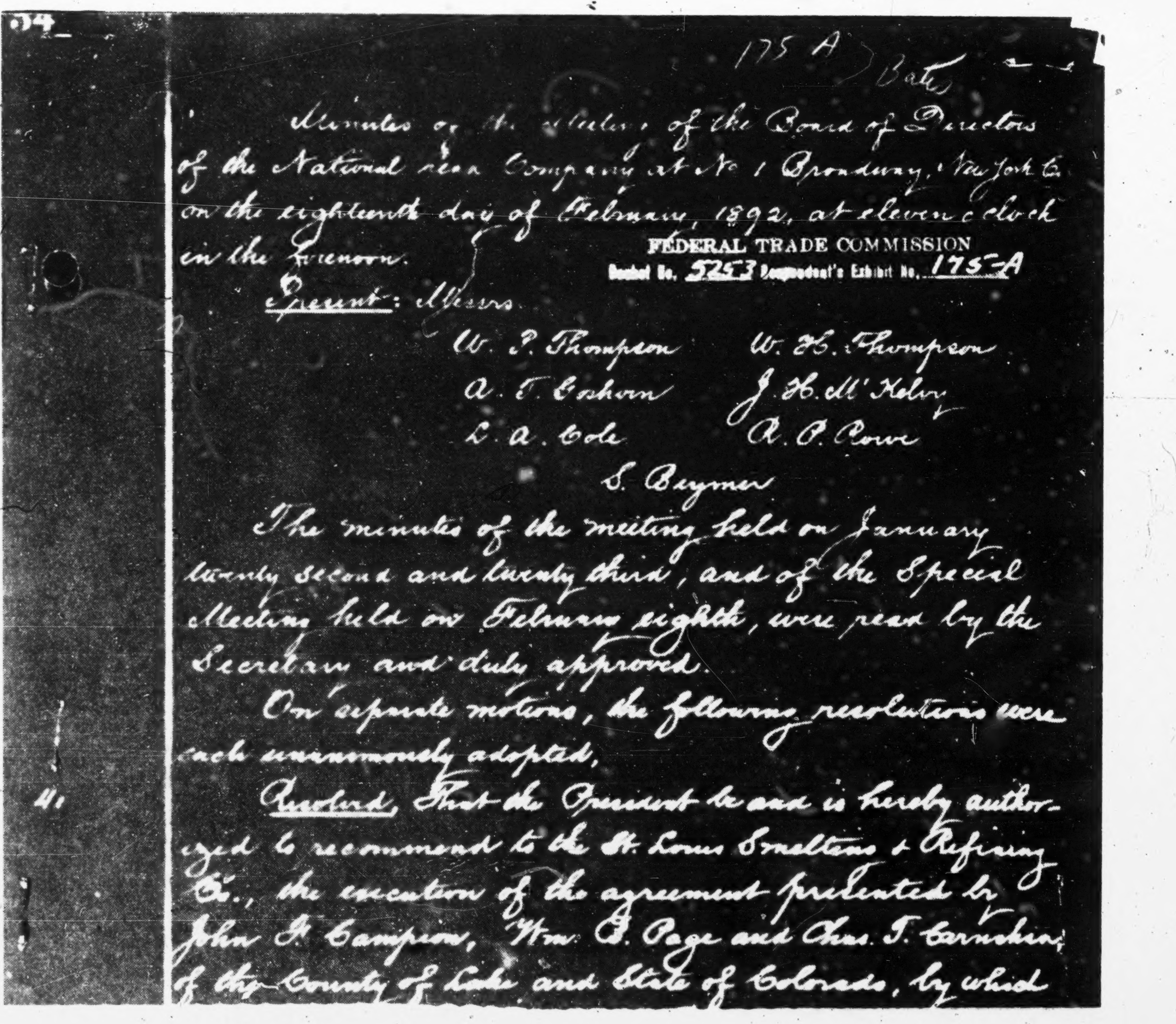
Fla	19652165	~~[illegible]~~ 4264349	~~[illegible]~~ .2170	55568061	8220236	.1479
Plus 1/3	—			—	—	—
Plus 1/4	—	1831.80	.8273	—	—	—
Plus 3/8	221433	~~[illegible]~~	~~[illegible]~~	—	—	—
	198735[illegible]3	4447529	.2238	58568061	8220236	.1479

Use Correct Rates to Georgia & Florida - 1941
per J. C. Young

No Carload Rate Shipped to Georgia & Florida per H J Whitson
Check on the following
Oil Conference on [illegible]

FEDERAL TRADE COMMISSION
Docket No. 5253 ...'s Exhibit No. 170-A
In the Matter of [illegible]
DATE 6/18/57 Witness [illegible]
ELEC REPORTER, INC. O...
By

Respondent's Exhibit No. 175.



175 A

Bates

Minutes of the Meeting of the Board of Directors of the National Lead Company at No 1 Broadway, New York City on the eighteenth day of February, 1892, at eleven o'clock in the forenoon.

FEDERAL TRADE COMMISSION
Docket No. 5253 Respondent's Exhibit No. 175-A

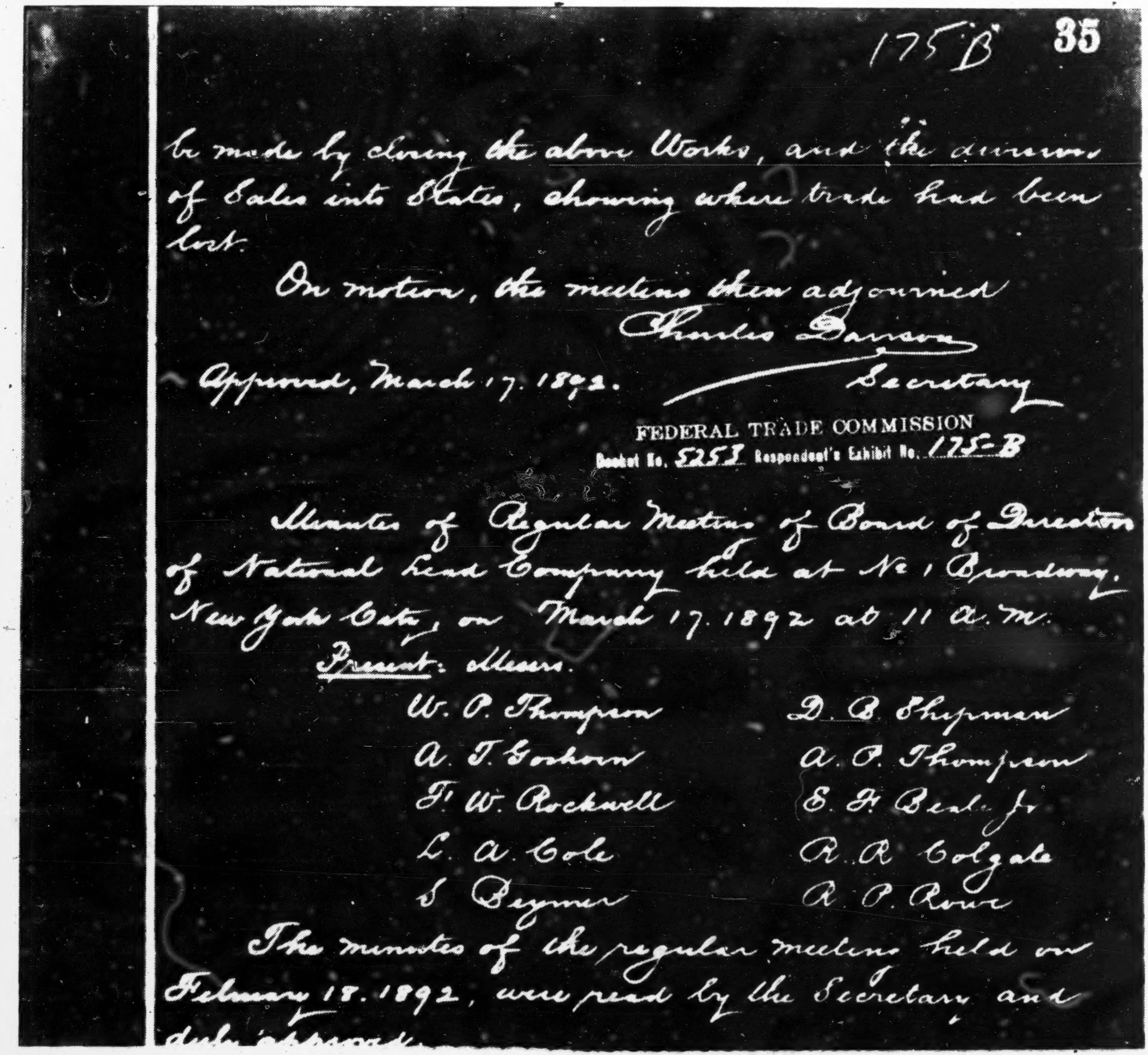
Present: Messrs.

W. P. Thompson W. H. Thompson
A. T. Eshorn J. H. McKelvy
L. A. Cole R. P. Rowe
S. Beymer

The minutes of the meeting held on January twenty second and twenty third, and of the Special Meeting held on February eighth, were read by the Secretary and duly approved.

On separate motions, the following resolutions were each unanimously adopted,

41 Resolved, That the President be and is hereby authorized to recommend to the St. Louis Smelting & Refining Co., the execution of the agreement presented by John F. Campion, Wm. B. Page and Chas. T. Carruthers, of the County of Lake and State of Colorado, by which



175 B 35

be made by closing the above Works, and the divisions of Sales into States, showing where trade had been lost.

On motion, the meeting then adjourned

Charles Davison
Secretary

Approved, March 17. 1892.

FEDERAL TRADE COMMISSION
Docket No. 5253 Respondent's Exhibit No. 175-B

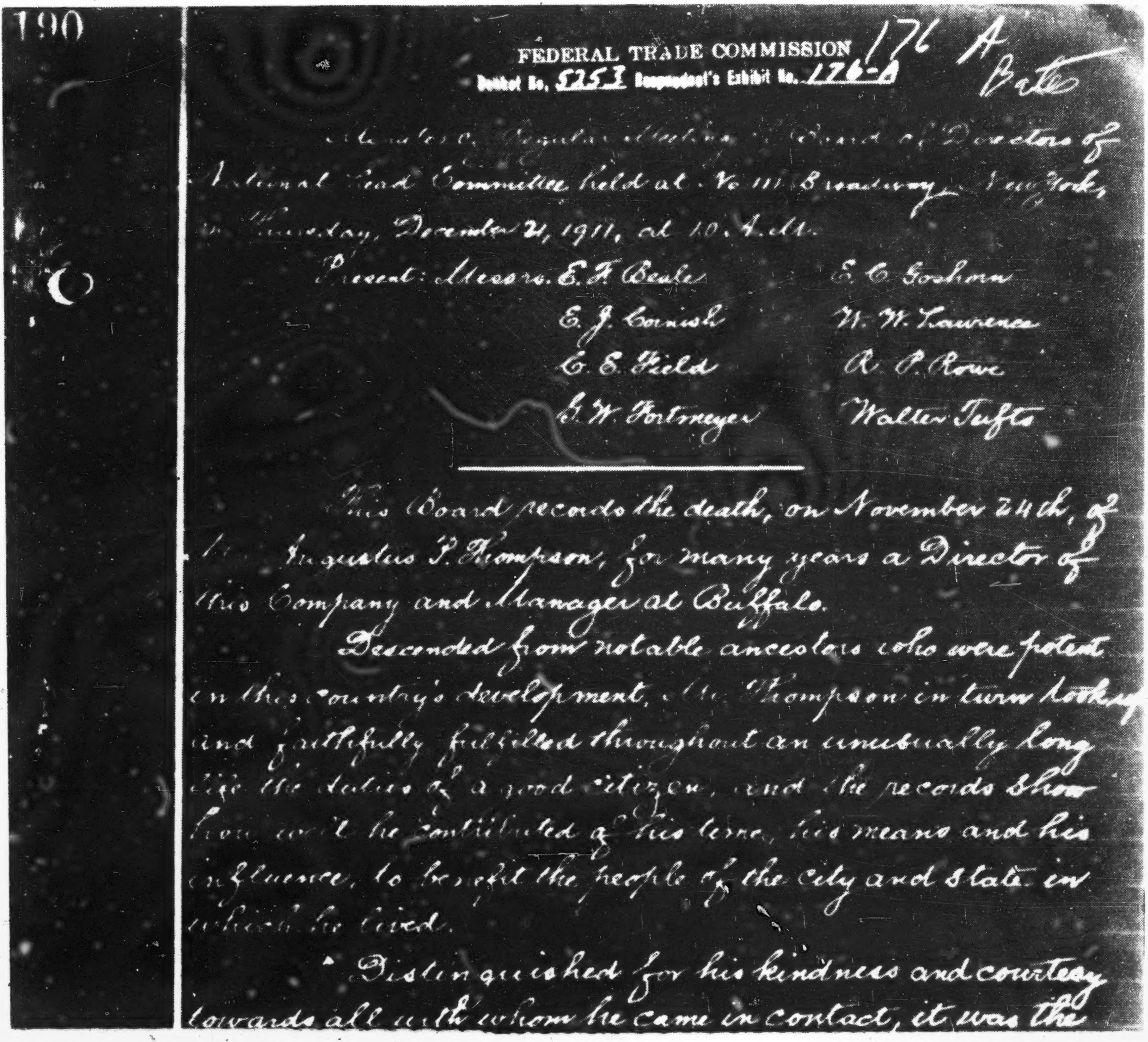
Minutes of Regular Meeting of Board of Directors of National Lead Company held at No 1 Broadway, New York City, on March 17. 1892 at 11 A.M.

Present: Messrs.

W. P. Thompson
A. T. Goshorn
F. W. Rockwell
L. A. Cole
S. Beymer

D. B. Shipman
A. P. Thompson
E. F. Beale Jr
R. R. Colgate
R. P. Rowe

The minutes of the regular meeting held on February 18. 1892, were read by the Secretary and duly approved.



190

FEDERAL TRADE COMMISSION 176 A
Docket No. 5253 Respondent's Exhibit No. 176-A
Bate

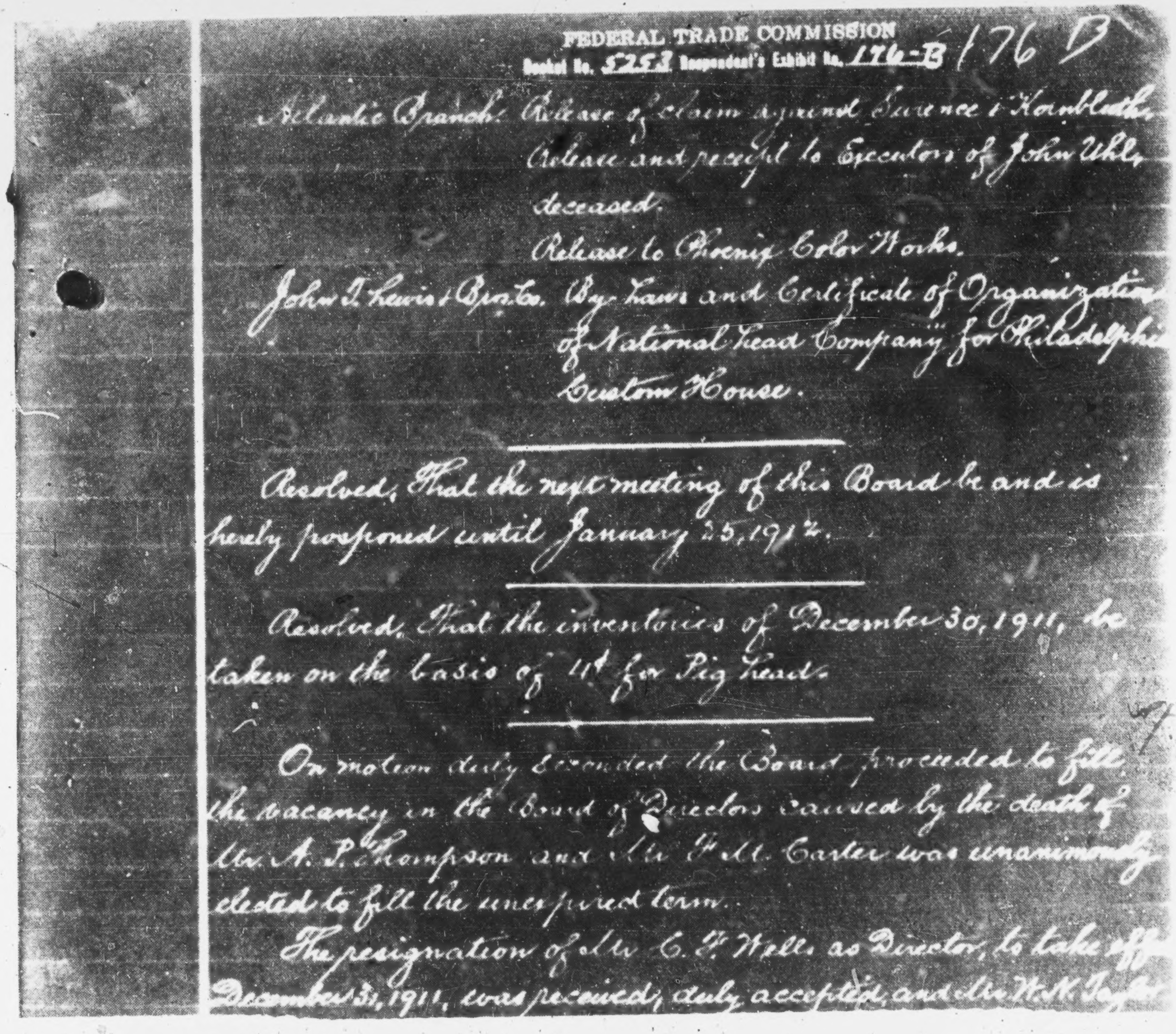
Minutes of Regular Meeting of Board of Directors of National Lead Committee held at No. 111 Broadway, New York, on Thursday, December 21, 1911, at 10 A.M.

Present: Messrs. E. F. Beale, E. C. Goshorn
E. J. Cornish, W. W. Lawrence
C. E. Field, R. P. Rowe
G. W. Fortmeyer, Walter Tufts

This Board records the death, on November 24th, of Mr. Augustus P. Thompson, for many years a Director of this Company and Manager at Buffalo.

Descended from notable ancestors who were potent in this country's development, Mr. Thompson in turn took up and faithfully fulfilled throughout an unusually long life the duties of a good citizen, and the records show how well he contributed of his time, his means and his influence, to benefit the people of the City and State in which he lived.

Distinguished for his kindness and courtesy towards all with whom he came in contact, it was the



FEDERAL TRADE COMMISSION
Docket No. 5253 Respondent's Exhibit No. 176-B 176 B

Atlantic Branch: Release of claim against Lawrence & Kornbluth
Release and receipt to Executors of John Uhler deceased.
Release to Phoenix Color Works.

John T. Lewis & Bros. Co. By-Laws and Certificate of Organizatio of National Lead Company for Philadelphi Custom House.

Resolved, That the next meeting of this Board be and is hereby postponed until January 25, 1912.

Resolved, That the inventories of December 30, 1911, be taken on the basis of 4¢ for Pig Lead.

On motion duly seconded the Board proceeded to fill the vacancy in the Board of Directors caused by the death of Mr. A. P. Thompson and Mr. F. M. Carter was unanimously elected to fill the unexpired term.

The resignation of Mr. C. F. Wells as Director, to take eff December 31, 1911, was received, duly accepted, and Mr. W. N. Taylor

5970 RESPONDENT'S EXHIBIT NO. 177.

Minutes of Regular Meeting of the Board of Directors of National Lead Company held at 111 Broadway, New York City, on Thursday, May 19, 1927, at 10 o'clock A. M.

Present: Messrs. Beale, Beschorman, Brodrick, Carter, Cornish, Dorsey, Field, Gregg, Rockwell, Sidford, Taylor, Thompson and Wettstein.

Absent: Messrs. Carpenter and McCarty.

The minutes of the regular monthly meeting and of the Annual Meeting held April 21, 1927, were read and duly approved.

On separate motions the following resolutions were each unanimously adopted, the roll being called where the expenditure of money was involved.

Resolved, that the following actions of the Executive Committee be and they hereby are approved.

Approving expenditure of	
$28,060.00	by Metallurgical and Chemical Corporation for permanent installation of Newnam hearth and purchase and installation of "Dracco" dust collector at its Matawan Plant.
$ 3,126.25	by John T. Lewis & Bros. Co. for the purchase of an electric industrial tiering truck for the Oxide Department at its Philadelphia Plant.

Appropriating	
$ 656.90	for purchase and installation of a new apron coal conveyor at St. Louis Lead & Oil Works, St. Louis Branch.
$ 482.06	in addition to amount previously appropriated for the purpose, to cover cost of installation of motor drive for two mechanical furnaces in Oxide Department, St. Louis Lead & Oil Works, St. Louis Branch.
$ 600.00	to cover cost of repainting steel sash in several buildings of Atlantic Works, Atlantic Branch.

Co., the execution of the agreement presented by John G. Campion, Wm. E. Page and Chas. T. Carnahan, of the County of Lake and State of Colorado, by which the said St. Louis Smelting & Refining Co. agree to pay a Royalty for the use and advantages to be gained by said Company in consideration of the said parties driving, or procuring to be driven, a tunnel from a point at or near Malta, in the County of Lake and State of Colorado, to a point in the vicinity of the intersection of Harrison Avenue and Second Street, in the City of Leadville, in said County and State, which shall not be less than five hundred (500) feet beneath the surface of said Avenue, where it passes under same, for the purpose of exploring, developing and draining the adjacent territory.

42 Resolved, That the Executive Committee are hereby requested to report at the next meeting of the Board of Directors on the advisability of discontinuing the Manufacture of White Lead at The J. H. Morley Lead Works and of grinding lead in oil at the Cornell Lead Works.

A number of papers were read by Col. Thompson referring to Manufacturing Costs, the same that [illegible]

The minutes of the regular meeting held on February 18. 1892, were read by the Secretary and duly approved.

43 Mr. Rockwell, Chairman of the Special Committee appointed by the Executive Committee to perfect a plan for making certain changes in conducting the sales of this Company, presented the following report of his Committee, which was ordered to be placed on file and transcribed in the minutes of this meeting:

" W. P. Thompson President

The Committee appointed to recommend some changes in our plan of selling our products, submit the following:

Division of Territory. We have divided the territory into sections or districts, each tributary to one of our factory points and arranged with a view to its geographical relation to and, as far as possible, its trade relations with the factory point. Following are the boundary lines for the several districts.

Sales Managers. We would appoint one selling management at each factory point, who should have immediate charge of its details of the trade in his district, representing Comp influence, to benefit the people of the City and State in which he lived.

Distinguished for his kindness and courtesy towards all with whom he came in contact, it was the further privilege of his associates and friends to see and admire those sterling qualities of heart and mind which found their highest expression in his daily life.

Those who seek for a monument commemorating the virtues of this Christian gentleman will find it in the hearts of his family, his associates and his friends, where his memory is lovingly enshrined.

The minutes of meeting held November 16, 1911, were read and duly approved.

On separate motions the following resolutions were each unanimously adopted, the roll being called where the expenditure of money was involved:

Reducing price list on White Lead and Oxides and accepting orders to be taken up to April 1, 1912, subject to usual conditions in case of an advance.

Reducing price list between Branches.

Establishing differentials to be charged for Linseed Oil in new cans.

The resignation of Mr C. F. Wells as Director, to take eff
December 31, 1911, was received, duly accepted, and Mr W. K. Tayl
was unanimously elected to fill the unexpired term.

The resignation of Mr Edward Brush as Director was received, duly accepted, and Mr A. J. Moir was unanimously elected to fill the unexpired term.

The resignation of Mr Daniel Guggenheim as Director wa
received, duly accepted, and Mr G. D. Dorsey was unanimously elected to fill the unexpired term.

The resignation of Mr Murry Guggenheim as Director wa
received and duly accepted.

Messrs. Carter, Moir and Dorsey were then introduced, taking their seats as Directors of National Lead Company.

Mr J. M. Peters was duly appointed as Assistant Manag
of the Atlantic Branch, to date from January 1, 1912.

On separate motions the following resolutions [illegible]
each unanimously adopted, the poll being called wher[illegible]
expenditure of money was involved:

Resolved, That the sum of $2,000 be and is hereby [illegible]
[illegible] the fund of the Linseed Oil Cons[illegible]

5972 Resolved, that the President be and he hereby is requested to procure and submit from time to time for the current information of this Board at its monthly meetings monthly reports of important expenditures by and developments in the businesses of its various subsidiary companies.

Resolved, that effective today the minimum differential prices, not subject to discount, on contracts for the sale of oxides in barrels be and they hereby are fixed at 1½¢ per pound for litharge and 2½¢ per pound for red lead above the New York A. S. & R. price of common pig lead ruling at date of receipt of order, except that at St. Louis and Chicago and territories supplied therefrom the St. Louis instead of New York price of common pig lead may be used as a base; and that the differential card prices on the same products, subject to 2% discount for cash, be and they hereby are fixed at 2½¢ for litharge and 3½¢ for red lead above the New York A. S. & R. price of common pig lead ruling on date of receipt of order, provided, however, that changes in said card prices shall not be made except upon a change of ¼¢ per pound up or down in the New York A. S. & R. price of common pig lead as compared with a base price of 6½¢ per pound, that it shall be optional with Branches to issue or not to issue price cards, but that all sales made subject to a 2% discount for cash shall be made at not less than the differential card prices hereby established.

On motion the meeting then adjourned.

W. O. Cole,
Secretary.

5973 RESPONDENT'S EXHIBIT NO. 179.

—17—

First Annual Meeting of Stockholders of National Lead Company, held at No. 1 Exchange Place, Jersey City, N. J., at twelve o'clock noon on Thursday, February 16, 1893.

Meeting was called to order, President Thompson in the chair.

In the absence of Mr. G. W. Flack, Jr., one of the inspectors of election, elected at the previous meeting Mr. J. B. Frothingham was duly elected in his place. The polls were then declared open for one hour, commencing at 12:15

P. M., which was afterwards extended, on motion duly seconded and unanimously adopted, to an hour and a quarter, during which time the polls remained open.

The minutes of the meeting of stockholders held on December 8, 1891, were read by the Secretary and duly approved.

The first Annual Report to the Stockholders of National Lead Company was then read by President Thompson, and on motion, duly seconded and unanimously adopted, it was resolved that the same be accepted, placed on file and made part of this record.

5974 —18—

It is as follows:

National Lead Company,

1 Exchange Place, Jersey City, N. J.

Report presented to the Stockholders of National Lead Company at their first annual meeting, February 16th, 1893, for the fiscal year ending December 31st, 1892.

To the Stockholders of National Lead Company:

On the 7th day of December, 1891, this Company was organized for the purpose of taking over all of the assets of The National Lead Trust.

The National Lead Trust had acquired properties the value of which was as originally assessed $22,356,025.00 upon which they had issued certificates on the basis of four for one of real value, amounting to $89,424,100.00. The net earnings of the Trust up to the first day of January, 1892 (when the properties were assumed by National Lead Company), after payment of the expenses of the Trustees, and the reorganization expenses, and deducting the distributions that had been made to certificate holders, increased the value of the Net Assets to $24,938,001.53 as follows:

Plant Investment	$18,081,472.77
Other Investments	406,821.33
Stock on hand—Manf'd, in process & raw...	5,468,170.88
Cash in Banks..........................	285,920.46
Notes Receivable	339,916.45
Accounts Receivable	1,414,229.48
	$25,996,531.37

Liabilities.

Accounts Payable	$707,165.59	
Mortgages	351,364.25	1,058,529.84
Net Assets		$24,938,001.53

By the terms of the agreement between the shareholders of The National Lead Trust, the capital of National Lead Company was authorized to be $30,000,000 ($15,000,000

5975 —19—

each of Common and Preferred) the shareholders surrendering six shares of The National Lead Trust Certificates for one each of Common and Preferred Stock,

which produced	298,081 shares
In addition there was sold for cash	13 "
Making a total issue of	298,084 shares

Divided and representing values as follows:

149,040 shares Preferred Stock, par value.	$14,904,000
149,054 shares Common Stock, par value.	14,905,400
Total	$29,809,400

The issue of the remaining shares each Common and Preferred to make the total of $30,000,000, and their sale for cash, was authorized, but it being unnecessary to dispose of them, they remain in the treasury.

A revaluation of the Plant Investment was made to adjust values to the authorized issue of $30,000,000 of Stock of National Lead Company, which revaluation increased the Plant Investment by $4,870,098.47, as appears by the initial Balance Sheet of National Lead Company of the date it commenced business, January 1, 1892, as follows:

here insert omission, copied on Page 22

At the close of the fiscal year, or on January 1, 1893, the financial condition of the Company as shown by the following Balance Sheet:

Assets.

Plant Investment		$23,241,920.58 ~~22,951,571.24~~
Other Investments		431,526.40 ~~406,821.33~~
Stock on hand—Manufactured, in process & raw		5,492,999.54 ~~5,468,170.88~~
Treasury Stock—Common	$94,600.00	
Preferred	96,000.00	190,600.00
Cash in Banks		444,140.57 ~~287,220.46~~
Notes Receivable		202,849.18 ~~339,916.45~~
Accounts Receivable		1,287,262.42 ~~1,414,229.48~~
		$31,291,298.69

Liabilities.

Capital Stock—Common	$15,000,000.00	
Preferred	15,000,000.00	
	30,000,000.00	
Surplus, 1892	863,706.36	
Mortgages	153,728.25	
Accounts Payable	273,864.08	
		$31,291,298.69

It will be noted that the Mortgage Account, which at the inception of the business was $351,364.25, has been reduced by payments amounting during the year 1892 to $197,686 and on January 1, 1893, but $153,728.25 of this account remained unpaid.

Authority was given by the Shareholders to the Directors to issue $3,000,000 of Debenture Bonds "for the purpose of providing for the redemption of $ (figures illegible) mortgages on different parts of the real estate $ (figures illegible) to be used to reimburse the Trustees for cash moneys paid for properties acquired since the organization of the Trust, and the balance to be held in the Treasury of the New Jersey Corporation, to be disposed of to acquire additional capital for carrying on the various businesses.

So far it has not been deemed expedient or necessary to issue any portion of these bonds, the better conditions prevailing in the present form of management rendering it unnecessary to use additional amounts of capital. It was also concluded that it would be better to pay off the mortgages gradually.

The Company is to be congratulated on the liquidation of the very large indebtedness of The National Lead Trust during its existence. The Accounts Payable of this Company January 1, 1893 practically represent ores, bullion and supplies of various kinds, in transit.

The volume of business for the year exhibits a gratifying increase over the preceding years. A large amount of money was expended by The National Lead Trustees, and since by the National Lead Company, in perfecting the smelting and refining interests, practically rebuilding all its great furnaces. White lead factories disadvantageously located, or unable, from any cause, to make their goods on an economic basis, have been discontinued, while others have been greatly enlarged so that the capacity for production of all classes of goods manufactured by the Company has been decidedly increased. The progress of improvement in perfecting machinery to produce better goods on a cheaper basis has been continued, and is meeting with most gratifying results.

The entire country has been redistricted and placed in charge of thoroughly competent managers, trade has been

5977 —21—

solicited and cared for by experienced salesmen, the relations between the Company and its customers have been most kindly. Prices have been equitable, both to the Company and its customers, and the progress in all directions has been thoroughly satisfactory.

Having smelters in New Mexico, Colorado and Missouri, factories for manufacture in all the great cities and commercial points, forming a continuous chain through the country from St. Louis and Chicago to New York and Boston, we are advantaged by each locality and can deliver our goods at a minimum of expense for transportation and other charges.

There has been and always will be competition in each class of goods manufactured by this Company. It does not aim to obtain monopoly. By continuous efforts for improvement in quality of goods, economies in manufacture and distribution, earnest zeal in aiding our customers, uniform and fair prices, large stocks of material on hand (constantly improving with age) to meet every emergency of trade, gradual orientation of other branches to fully round up our manufacturing interests, the better understanding by the public of the superiority of our manufacture over that possible by others by reason of the association in this business of the best trained talent in friendly rivalry to secure the very best results, we believe we have passed the period of hazard, and feel assured of maintaining our strong position, and can reasonably expect increased business with commensurate profits.

No longer menaced by hostile legislation, the attention of the officers of the Company can be directed to further economies, and to the commercial expansion of the business on the lines already laid down, which cannot fail, under the improved discipline and energetic direction of the managers of the different branches throughout the country, to produce continuing favorable results.

I am gratified to be able to state to the stockholders

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that all the old certificate holders of The National Lead Trust have converted their certificates into stock of the National Lead Company, excepting 3720 shares, or four-tenths of one per cent.

The large proportion of Cash Assets, as shown by the Balance Sheet, will undoubtedly give great satisfaction to the shareholders, being quite one-fourth of the entire Capital Stock.

Respectfully,
W. P. Thompson,
President.

Omission, to be inserted on Page 19.

Assets.

Plant Investment		$22,951,571.24
Other Investments		406,821.33
Stock on hand—Manf'd, in process and raw.		5,468,170.88
Treasury Stock—Common	$94,600.00	
Preferred	96,000.00	190,600.00
Cash in Banks		287,220.46
Notes Receivable		339,916.45
Accounts Receivable		1,414,229.48
		$31,058,529.84

Liabilities.

Capital Stock—Common	$15,000,000.00	
Preferred	15,000,000.00	
	$30,000,000.00	
Mortgages	351,364.25	
Accounts Payable	707,165.59	
		$31,058,529.84

The following is a statement of the Profit and Loss Account for the year 1892:

Net Earnings		$1,906,986.36
Out of which were paid four quarterly dividends, as follows:		
Preferred Dividend, No. 1	$260,820	
Preferred Dividend, No. 2	260,820	
Preferred Dividend, No. 3	260,820	
Preferred Dividend, No. 4	260,820	
		$1,043,280.00
Leaving a balance to the credit of Profit & Loss Account of		$ 863,706.36

At the close of the fiscal year, or on January 1, 1893, the financial condition of the Company is shown by the following Balance Sheet:

Mr. Geo. A. Frederick, of Baltimore, Md., offered a resolution, which, after amendment, was seconded and unanimously adopted as follows:

Resolved, That for the better information and understanding of the stockholders of National Lead Company at their Annual Meeting, the President be directed to prepare his annual report sufficiently in advance to permit a copy of the same to be mailed, and that such copy be mailed to each stockholder of record at least five days prior to the time for the annual meeting provided for in Article 2 of the By-Laws.

Mr. Frederick also offered a resolution that quarterly statements of the gross and net earnings of the Company be issued but on a vote being taken, this was laid on the table.

At 1:30 P. M. the Polls, having remained open an hour and a quarter, were declared closed and after a count of the votes, the inspectors made the following report, which was ordered to be made part of the minutes of this meeting:

Jersey City, N. J., Feb. 16, 1893.

The undersigned, duly appointed and qualified as Inspectors of Election for the Annual Meeting of Stockholders of National Lead Company for the Election of Directors hereby submit their report.

The polls were opened at 12:15 P. M. and closed at 1:30 P. M.

The total number of votes cast personally and by proxies was 188,555, all of which were cast for

R. P. Rowe, E. F. Beale, Jr., G. O. Carpenter, Jr. and J. H. McKelvy to hold office until the third Thursday in February, 1896.

J. L. McBirney and W. H. Thompson to fill vacancies and to hold office until the third Thursday in February, 1894.

A. T. Goshorn and D. B. Shipman to fill vacancies and to hold office until the third Thursday in February, 1895.

John B. Frothingham,
Isaac F. Goldenhorn.

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Mr. Veiller then offered the following resolution which was duly seconded and unanimously adopted:

Resolved, That the thanks of the stockholders be extended to the officers of the Company for their successful efforts in the management of the National Lead Company during the past year.

There being no further business, on motion the meeting then adjourned.

Charles Davison,
Secretary.

Second Annual Meeting of Stockholders of National Lead Co. held at No. 1 Exchange Place, Jersey City, N. J., at twelve o'clock noon on Thursday, February 15, 1894.

The meeting was duly called to order, President Thompson in the chair.

The minutes of the First Annual Meeting of Stockholders held February 16, 1893, were read by the Secretary and duly approved.

The polls were then declared open and to remain open for one hour, from 12:15 P. M. to 1:15 P. M.

The Second Annual Report to the Stockholders of National Lead Company was submitted by the President and was as follows:

National Lead Company

1 Exchange Place, Jersey City, N. J.

Report presented to the stockholders of National Lead Company at their Second Annual Meeting, February 15, 1894 for the fiscal year ending December 30, 1893:

To the Stockholders of National Lead Company:

The last Annual Report presented details of the organization of the Company and its operations for the fiscal year of 1892. The Balance Sheet showing condition of the Company on December 30, 1893, is as follows:

5981 RESPONDENT'S EXHIBIT NO. 180.

Minutes of Fourteenth Annual Meeting of Stockholders of National Lead Company held at No. 1 Exchange Place, Jersey City, N. J., at twelve o'clock noon on Thursday, April 19, 1906.

The meeting was called to order, President Cole in the chair.

The polls were declared open at 12:05 p. m. and closed at 1:23 p. m.

The minutes of the thirteenth annual meeting held April 20, 1905, and of the special meeting held June 26, 1905, of stockholders, were read and duly approved.

The Fourteenth Annual Report to Stockholders of National Lead Company was submitted by the President and was as follows:

National Lead Company.

1 Exchange Place, Jersey City, N. J.

Report presented to the Stockholders at their Fourteenth Annual Meeting, April 19, 1906, for the fiscal year ending December 31, 1905.

To the Stockholders of National Lead Company:

The following Balance Sheet shows the condition of the Company on December 31, 1905:

ASSETS.

Plant Investment		24,104,513.19
Other Investments		979,813.42
Stock on hand, manufactured, in process and raw		6,104,601.54
Treasury Stock—		
Common	94,600.00	
Preferred	96,000.00	190,600.00
Cash in Banks		818,300.75
Notes Receivable		133,354.55
Accounts Receivable		1,434,075.82
		$33,765,258.27

LIABILITIES.

Capital Stock—				
Common ..	**25,000,000.00**			
Unissued .	**10,000,000.00**	**15,000,000.00**		
Preferred .	**25,000,000.00**			
Unissued .	**10,000,000.00**	**15,000,000.00**		
			30,000,000.00	
Surplus, December 30th, 1905			**3,554,596.20**	
Mortgages			**12,603.25**	
Notes Payable			**67,000.00**	
Accounts Payable			**131,058.82**	**$33,765,258.27**

A comparison with the preceding year is given in the following statement:

5982 Inspectors' Oath.

State of New Jersey, } ss.
County of Hudson. }

John B. Frothingham and H. W. Naudain being severally sworn upon their respective oaths, do promise and swear that they will faithfully, honestly and impartially perform the duties of Inspectors of Election, and will to the best of their skill and ability conduct the election to be held this day for directors of the National Lead Company, and a true report make of the same.

John B. Frothingham,
H. W. Naudain.

Subscribed and sworn to this 19th day of April, A. D. 1906, before me

Francis V. Many,
Master in Chancery of New Jersey.

Inspectors' Certificate.

We, the Subscribers, Inspectors of Election, of the National Lead Company, duly appointed and sworn to a faithful discharge of our duties, do report that we did receive the votes of the stockholders by ballot; that 297,689 votes representing 297,689 shares of the capital stock of said Company (being more than a majority of the stock of said Company issued and outstanding) were cast; that the following persons received the number of votes set opposite their respective names, to wit:

For Directors.		
R. R. Colgate	Number of Votes 297,689	Full term 3 years to 3d Thursday in April 1909
A. P. Thompson		
Walter Tufts		
H. M. McChesney		
Daniel Guggenheim		
Murry Guggenheim		2 year to 3d Thursday in April 1908
Edward Brush		1 year to 3d Thursday in April 1907

Polls opened at 12:05.

Polls closed at 1:23.

All of which is respectfully submitted this 19th day of April, A. D. 1906, at Jersey City, N. J.

John B. Frothingham,
H. W. Naudain,
Inspectors.

5983 RESPONDENT'S EXHIBIT NO. 181.

Minutes of Meeting of Executive Committee held January 14, 1932.

Present: Messrs. Beschorman, Carter, Cornish, Rockwell, Bidford, Thompson and McCarty.

The minutes of the meeting held December 10, 1931, were duly approved.

On separate motions the following resolutions were each unanimously adopted.

Resolved, that the proposed expenditure of the sum of $10,500 by The Robertson Lead Manufacturing Company, Ltd., for completing the construction of an eighty foot extension to its Montreal Plant, in conformity with letter of Mr. James A. Taylor, General Manager, dated December 28, 1931, be and it hereby is approved.

Resolved, that the proposed expenditure of the sum of $1,400 (U. S. currency) by The Robertson Lead Manufacturing Company, Ltd., for Lead Mill at its Montreal Plant, in conformity with letter of Mr. James A. Taylor, General Manager, dated December 21, 1931, be and it hereby is approved.

Resolved, that the sum of $3,479.43, in addition to the amount previously appropriated for the purpose by resolution of this Committee adopted January 30, 1930, be and it hereby is appropriated to cover cost of extending pig casting machine building, etc., at Perth Amboy Plant, Atlantic Branch, in conformity with letter of Mr. Martin Newcomer, Production Manager, Atlantic Branch Metal Department, dated January 7, 1932.

Resolved, that the sum of $792.81 be and it hereby is appropriated to cover cost of experimental and development work in devising method and machine for manufacturing Dick combination lead bend and brass ferrule at Perth Amboy Plant, Atlantic Branch, in conformity with letter of Mr. Martin Newcomer, Production Manager, Atlantic Branch Metal Department, dated January 7, 1932.

5984 Resolved, that the action of the President, after consultation with and approval by the members of this Committee, in ordering a reduction of 1¼¢ per pound, effective December 28, 1931, in the published card prices of white lead in oil and red lead in oil, and of dry white lead and oxides in kegs, for delivery after January 1st and up to March 31, 1932, with usual protection to dealers and distributors against loss by reason of any reduction in said prices prior to June 30, 1932, in respect of any balance of stocks shipped during said period remaining unsold at the date of such reduction, and with authority to allow advance dating of invoices up to March 31, 1932, where necessary or advisable; and in ordering a reduction of ¾¢ per pound, effective the same date, in published card prices of dry white lead and basic sulphate in bbls.; and in ordering a reduction of ½¢ per pound effective the same date in the differential over usual pig lead prices for dry red lead and litharge in less than carload lots, and in changing the regular selling terms for said products from net 60 days, 2% 15 days, to net 30 days, 1% 10 days; be and it hereby is, and said changes in prices and terms are, approved, ratified and confirmed.

Resolved, that the action of the officers of the Company in entering into a certain Agreement in its name and behalf with The Virginia Smelting Company dated December 23, 1931, for the acquisition of a controlling interest in the secondary lead business of said Virginia Company at Norfolk, Virginia, to be transferred to a new corporation to be organized in which this Company shall own a 60% stock interest, in consideration of the loan by this Company to said new corporation of the purchase price of the assets to be transferred to it, as specified in said Agreement, and necessary working capital, not to exceed in the aggregate $100,000 at any time outstanding, be and it hereby is and said Agreement is in all respects approved, ratified and confirmed.

Resolved, that the action of the officers of the Company in consenting in its name and behalf, as a stockholder of the Newton Die Casting Corporation, to the sale of the assets of said Die Casting Corporation to Doehler Die Casting Co. for the considerations and upon the terms specified in an Agreement between said two companies dated January 9, 1932, said consideration consisting of 15,000 shares of the Common Stock without par value of said Doehler Company and cash to the amount of the value of the inventories of said Newton Company as specified in said Agreement, and in executing in the name and behalf of this Company a further Agreement with said

Doehler Company dated January 9, 1932, to refrain from competition with said Doehler Company in the die casting business to the limited extent and for the limited period specified in said Agreement, and from disposing prior to May 15, 1932, of any shares of said Common Stock of said Doehler Company to be received by this Company as a creditor or stockholder of said Newton Company, be and it hereby is and said Agreements are in all respects approved, ratified and confirmed.

On motion the meeting then adjourned.

W. O. Cole,
Secretary.

5985 RESPONDENT'S EXHIBIT NO. 182.

Minutes of Meeting of Executive Committee held June 6, 1935.

Present: Messrs. Beschorman, Cornish, Rockwell, Sidford and Thompson.

The minutes of the meeting held May 29, 1935 were duly approved.

On separate motions the following resolutions were each unanimously adopted.

Resolved, that the proposed expenditure of the sum of $617.00 by Titanium Pigment Company, Inc., for the purchase of spare parts for the copperas filters at its Sayreville Plant, in conformity with letter of Mr. C. F. Garesche, Vice President, dated May 29, 1935, be and it hereby is approved.

Resolved, that this Company recommends to its affiliated corporations American Bearing Corporation, American Lead Corporation, Combined Metals Reduction Company, Morris P. Kirk & Son, Inc., and Master Metals, Inc., that they respectively adopt a plan for the provision of death benefits to their respective employees substantially similar to the Death Benefits Plan of this Company now in effect.

Resolved, that the proposed action by National Lead Company S. A., of Argentina, in terminating its participation in the Death Benefits Plan of this Company and in adopting in lieu thereof an independent Death Benefits Plan of its own substantially similar in its provisions to that of this Company, be and it hereby is approved.

Mr. Cornish submitted to the Committee a copy of his letter to Branches dated June 4, 1935, advising that the Executive Committee felt that no change in Company policy had been made necessary or advisable by the recent decisions of the United States Supreme Court declaring unconstitutional certain provisions of the National Industrial Recovery Act, and said letter was unanimously approved.

On motion the meeting then adjourned.

W. O. Cole,
Secretary.

RESPONDENT'S EXHIBIT NO. 183.

[redacted]

EAGLE-PICHER LEAD COMPANY

COMMON STOCK

PURCHASED				SOLD			
No. of Shares	Date	Purchase Price	Cost	No. of Shares	Date	Sale Price	Proceeds
100	7-29-30	@ 8.65	$ 865.00				
400	7-30-30	8.65	3,460.00				
300	10-10-30	7¾	2,325.00				
1,000	10-23-30	7.15	7,150.00				
700	10-24-30	6½	4,550.00				
1,000	12-23-30	5¼	5,250.00				
1,000	12-24-30	5¼	5,250.00				
1,000	1- 8-31	5¼	5,250.00				
500	1-21-31	5.65	2,825.00				
400	1-27-31	5.65	2,260.00				
600	3- 2-31	5.45	3,270.00				
500	3- 9-31	5.40	2,700.00				
1,000	3-20-31	5¼	5,250.00				
500	3-25-31	5.20	2,600.00				
18,400	5- 4-31	5	92,000.00	10,000	2- 8-37	25	$ 249,950.00
3,000	5-13-31	5	15,000.00	11,900	2-11-37	25	297,440.50
4,000	5-23-31	5	20,000.00	1,000	2-11-37	27 -27¼	26,929.44
2,000	6- 1-31	5	10,000.00	2,800	2-23-37	25¾	71,554.00
1,000	2-15-32	5	5,000.00	12,000	2-24-37	25	299,940.00
3,000	2-29-32	5	15,000.00	700	2-25-37	27 -27⅜	18,938.09
1,000	3- 3-32	5	5,000.00	1,500	2-26-37	26½-27¾	40,381.67
500	4-13-32	3¾	1,875.00	700	3- 2-37	27¼-27⅜	18,950.61
1,000	5-20-32	3¼	3,250.00	300	3- 4-37	27	8,041.34
1,000	6- 3-32	3¼	3,250.00	500	3- 5-37	27 -27⅛	13,427.22
1,000	6-13-32	3¼	3,250.00	3,500	6/12-6/15-44	11¾	40,461.16
44,900			$226,630.00	44,900			$1,086,014.03

PREFERRED STOCK

No. of Shares	Date	Purchase Price	Cost	No. of Shares	Date	Sale Price	Proceeds
50	4-13-32	52	$ 2,600.00	50	2-27-37	104	$ 5,197.50

Respondent's Exhibit No. 183.

6017 RESPONDENT'S EXHIBIT NO. 188.

6018 The Eagle-Picher Company
Cincinnati, Ohio
Pigment Division

Technical Service Department

• • • •

Suggested Formulations For
The Use Of
Eagle Sublimed Blue Lead

and

Basic Silicate Dry White Lead
in
Primers For
Metal Protective Paints

• • • •

6020 Foreword.

The suggested formulations contained in this bulletin have been selected from a large number of extensive tests. Most of them were tested under laboratory supervision. The remainder were given actual service tests. These formulations represent the best of a large number based on exposure of various types. All the details of these tests are available to the prospective manufacturer who may wish to go further,—possibly under different conditions or for special uses.

The type or brand of pigment, or resin used in the vehicles is designated or specified in each formulation.

Descriptive data for the varnishes used follow the suggested formulations. These all have A to C viscosity on the Gardner-Holt scale. It has been found that varnishes with higher viscosities do not perform as well with some of the formulations, so the suggested viscosities should be followed for best results.

All the paints have satisfactory brushing characteristics, although the varnish vehicle paints naturally are not as easy to apply as oil vehicle paints.

The recorded drying times were determined in an air-conditioned laboratory, 20%-40% relative humidity; 75°F-80°F, so they may not be confirmed exactly in practice. However, they are believed to be relative.

Viscosity determinations were made 18 to 24 hours after the paint was ground and again after one week. If there was perceptable change in one week, the paint formulation was modified. If no change occurred, the paints were thinned to the viscosity noted on the formulation sheets.

The opportunity of answering any questions about these formulations or their components will be welcomed.

6021

OUTLINE OF TEST CONDITIONS.

For Several Types of Exposure.

	Atmospheric	Fresh Water	Salt Water Tide Range	Salt Water Continuous
Type and Size of Exposure	Vertical South Joplin, Mo.	Large area of structures, such as dam gates.	Ocean Water N. Daytona Beach, Fla.	Submerged Same
Type and Preparation of Panel	18 Gauge cold Rolled Auto Steel	Sand blasted	Pickled	Pickled
Application and Film Thickness	Brush—approx. 1.75-2 mils per coat.	Same	Same	Same
System	Two coats primer One top coat	Same	Same	Same
Top Coats	1) 2 lbs. Aluminum pigment paste in 1 gal JV-37 varnish vehicle 2) Black oleo-resinous paint 3) White Lead-Zinc-Titanium-Inert in Linseed Oil. Pigment—68% Basic Sul. W. L. 63% Zinc Oxide 20% Titanium Dioxide A-NC 7% Mag. Sil. 10% 100% Vehicle—32% Ref. Lin. Oil 85% Q-Body Lin. Oil 9% Turp. & Drier 6% 100% 4) Green Pigment—72% Basic Sul. W. L. 66% Zinc Oxide 10% Chromium Oxide 14% Mag. Sil. 10% 100% Vehicle—38% Raw Lin. Oil 86% Varnish JV-41 8% Turp. & Driers 6% 100%	1) Same as primer and 2) 2 lbs. aluminum pigment paste in 1 gal of a 25 gal 100% phenolic 60 CWO 40 Linseed Oil.	U. S. Maritime Com. 52-MC-6 (Alkyd Vehicle	U. S. Maritime Com. Anti-fouling paint, 52-MC-B-1, Class II, Aug. 28, 1939.

6022 Eagle Sublimed Blue Lead

Eagle Sublimed Blue Lead is a chemical compound-complex produced by subliming Galena (Lead Ore) in specially constructed and operated Scotch Hearth type of furnace.

Physical and Chemical Characteristics

Formula—Composition

Lead Sulphate—$PbSO_4$	45%	Min.
Lead Oxide—PbO	30%	Min.
Lead Sulphide—PbS	12%	Max.
Lead Sulphite—$PbSo_3$	5%	Max.
Zinc Oxide—ZnO	5%	Max.
Carbon and Undetermined Matter	5%	Max.
Specific Gravity	6.80	
Weight—Lbs. per solid gallon	56.64	
Bulking—gallons per pound	.0177	
ASTM Oil Absorption	12.7	
Gardner-Coleman Oil Absorption	23.0	
pH in water slurry	7.65	
Median Radius	.09	Microns
Through a 325-mesh Sieve	99%	Min.

Meets Federal Specification TT-B-486 and ASTM Standard D405-41.

6023 Eagle Basic Silicate Dry White Lead No. 202

Eagle Basic Silicate White Lead No. 202 is a fine white pigment, the first silicate type of lead pigment to be offered for use in paint formulations. It is suggested for use in formulating metal protective paints for ferrous metals. The use of this pigment is not limited to metal protective paints, but at the present time this particular use has been developed to the point where suggested formulations can be made.

Of the white lead pigments, Basic Silicate White Lead has the highest corrosion inhibitive properties. It can be satisfactorily used in formulations for atmospheric exposure, high humidity conditions; and either fresh or salt water exposures.

Physical and Chemical Characteristics

Formula 2 $PbSiO_3.Pb(OH)_2$

Specific Gravity	5.8
Weight—lbs. per solid gallon	48.31
Bulking Value—Gallons per lb.	.0207
ASTM Oil Absorption	20.4
Gardner-Coleman Oil Absorption	29.5
Median Radius (average)	.30 Microns
Through a 325 Mesh Sieve	99% Min.

Hiding Power—equivalent to Basic White Lead Sulphate.

6024 Primer PM-5-21—For Atmospheric Exposure

Formulation		**Total Weight %**	**Pounds Per 100 Gal.**	**Bulking Value**	**Gals.**
Pigment—60.3%					
Sublimed Blue Lead	**60%**	**36.18**	**542.84**	**.0177**	**9.61**
Zinc Chromate*	**20%**	**12.06**	**180.95**	**.0326**	**5.90**
Asbestine	**15%**	**9.05**	**135.79**	**.0421**	**5.72**
Diatomaceous Silica	**5%**	**3.01**	**45.16**	**.0515**	**2.32**
Vehicle—39.7%					
Raw Linseed Oil	**97.07%**	**38.54**	**578.26**	**.1288**	**74.48**
Pb Naphthenate 24%	**1.63%**	**.64**	**9.60**	**.1042**	**1.00**
Co Naphthenate 6%	**.65%**	**.26**	**3.90**	**.1250**	**.49**
Mn Naphthenate 6%	**.65%**	**.26**	**3.90**	**.1234**	**.48**
		100.00	**1500.40**		**100.00**

Weight per Gallon—15.00#
P.V.R.—24.0

Consistency—80 K. U.

Suggested Roller Mill Grind

542#	13 oz.	Sublimed Blue Lead
180#	15 oz.	Zinc Chromate
135#	13 oz.	Asbestine
45#	3 oz.	Diatomaceous Silica
236#		Raw Linseed Oil

Reduce With

342#	4 oz.	Raw Linseed Oil	
9#	10 oz.	Pb Naphthenate	24%
3#	14 oz.	Co. "	6%
3#	14 oz.	Mn "	6%
1500#	6 oz.	or approximately 100 gallons	

Drying Time

Dust-free	6 hours
Re-coat	24 hours

Notes: This paint with an all oil vehicle will give long service but not as long as some paints made with varnish type vehicles. However, an oil vehicle is sometimes preferred. In general straight oil vehicle paints brush easier and wet the surface (spread) better, particularly if the surface is rough, than do varnish vehicle paints.

Dries with high gloss.

*** Federal Specification TT-Z-415, Type I (Low Chloride and Sulphate).**

6025 Primer PM-7-9—For Atmospheric Exposure

Formulation		**Total Weight %**	**Pounds Per 100 Gal.**	**Bulking Value**	**Gals.**
Pigment—55%					
Sublimed Blue Lead	**60%**	**33.00**	**456.42**	**.0177**	**8.08**
Zinc Chromate*	**20%**	**11.00**	**152.14**	**.0326**	**4.96**
Asbestine	**15%**	**8.25**	**114.10**	**.0421**	**4.80**
Diatomaceous Silica	**5%**	**2.75**	**38.03**	**.0515**	**1.96**
Vehicle—45%					
Raw Linseed Oil	**89.6%**	**40.32**	**557.65**	**.1288**	**71.83**
JV-41 Varnish	**8.3%**	**3.74**	**51.73**	**.1342**	**6.94**
Pb Naphthenate 24%	**1.5%**	**.67**	**9.27**	**.1042**	**.96**
Co Naphthenate 6%	**.6%**	**.27**	**3.73**	**.1250**	**.47**
		100.00	**1383.07**		**100.00**

Weight per Gallon—13.83#
P.V.R.—20.8

Consistency—72 K. U.

Suggested Roller Mill Grind

456#	7 oz.	Sublimed Blue Lead
152#	2 oz.	Zinc Chromate
114#	2 oz.	Asbestine
38#		Diatomaceous Silica
244#		Raw Linseed Oil

Reduce With

313#	10 oz.	Raw Linseed Oil
51#	12 oz.	JV-41 Varnish
9#	4 oz.	Pb Naphthenate 24%
3#	12 oz.	Co Naphthenate 6%
1383#	1 oz.	or approximately 100 gallons

Drying Time

Dust-free	8 hours
Re-coat	18 hours

Notes: Tests of this primer on Eagle-Picher test fences are not completed. However, this primer has shown good service in actual use on highway bridges. The added varnish is for quicker setting than is possible in a straight oil vehicle.

Dries with a high gloss.

*** Federal Spec. TT-Z-415, Type I (Low Chloride and Sulphate).**

6026 Primer PM-5-3—For Atmospheric Exposure

Formulation		Total Weight %	Pounds Per 100 Gal.	Bulking Value	Gals.
Pigment—54.26%					
Sublimed Blue Lead	54%	29.30	384.52	.0177	6.81
Zinc Chromate*	18%	9.77	128.17	.0326	4.18
Eagle Zinc Oxide #417	8%	4.34	56.96	.0213	1.21
Asbestine	15%	8.14	106.81	.0421	4.50
Diatomaceous Silica	5%	2.71	35.60	.0515	1.83
Vehicle—45.74%					
JV-55 Varnish	97.5%	44.60	585.25	.1353	79.18
Mineral Spirits	2.5%	1.14	15.01	.1525	2.29
		100.00	1312.32		100.00

Weight per Gallon—13.12#
P.V.R.—33.90

Consistency—76 K. U.

Suggested Roller Mill Grind

384#	8 oz.	Sublimed Blue Lead
128#	3 oz.	Zinc Chromate
56#	15 oz.	Zinc Oxide
106#	13 oz.	Asbestine
35#	10 oz.	Diatomaceous Silica
225#		JV-55 Varnish

Reduce With

360#	4 oz.	JV-55 Varnish
15#		Mineral Spirts
1312#	5 oz.	or approximately 100 gallons.

Drying Time

Dust-free	2¼ hours
Re-coat	3½ hours

Notes: This paint, having a relatively low RMC, has shown excellent durability. It is the preferred formulation of the varnish vehicle paints. The varnish resin is scraped Beta. Oil length—25 gallons.

Dries to a flat finish.

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* Federal Spec. TT-Z-415, Type I (Low Chloride and Sulphate).

6027 Primer PM-7-32—For Atmospheric Exposure

Formulation		Total Weight %	Pounds Per 100 Gal.	Bulking Value	Gals.
Pigment—55.16%					
Sublimed Blue Lead	57.4%	31.86	452.36	.0177	8.01
Zinc Chromate*	19.1%	10.53	150.45	.0326	4.90
Eagle Zinc Oxide #417	8.5%	4.69	67.01	.0213	1.43
Asbestine	10.0%	5.52	78.88	.0421	3.32
Diatomaceous Silica	5.0%	2.76	39.44	.0515	2.06
Vehicle—44.84%					
Alkyd Resin Soln**	59.7%	26.77	382.50	.1212	46.36
Raw Linseed Oil	22.3%	10.00	142.88	.1288	18.40
Hi-Flash Naphtha	15.6%	7.00	100.02	.1380	13.80
Pb Naphthenate 24%	1.4%	.63	9.00	.1042	.94
Co Naphthenate 6%	.5%	.22	3.14	.1250	.39
Mn Naphthenate 6%	.5%	.22	3.14	.1234	.39
		100.00	1428.82		100.00

Weight per Gallon—14.29#
P.V.R.—29.0
Consistency—71 K. U.

Suggested Roller Mill Grind

452#	6 oz.	Sublimed Blue Lead
150#	7 oz.	Zinc Chromate
67#		Zinc Oxide
78#	14 oz.	Asbestine
39#	7 oz.	Diatomaceous Silica
50#		Alkyd Resin Solution
142#	14 oz.	Raw Linseed Oil

Reduce With

332#	8 oz.	Alkyd Resin Solution
100#		Hi-Flash Naphtha
9#		Pb Naphthenate 24%
3#	2 oz.	Co Naphthenate 6%
3#	2 oz.	Mn Naphthenate 6%
1428#	12 oz.	or approximately 100 gallons.

Drying Time

Dust-free	2 hours
Re-coat	3 hours

Notes: This is an example of an alkyd-linseed oil vehicle. It combines the dry of an alkyd with the flexibility of an oil vehicle. The linseed oil content improves wetability.

Dries to a medium gloss finish.

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* Federal Spec. TT-Z-415, Type I (Low Chloride and Sulphate).

** Long oil oxidizing type alkyd resin—27% Phthalic Anhydride, based on solids. Linseed oil acids modification.

6028 Primer PM-5-17—For Atmospheric Exposure

Formulation		Total Weight %	Pounds Per 100 Gal.	Bulking Value	Gals.
Pigment—60%					
Sublimed Blue Lead	60%	36.00	529.99	.0177	9.38
Zinc Chromate*	20%	12.00	176.66	.0326	5.76
Asbestine	15%	9.00	132.50	.0421	5.58
Diatomaceous Silica	5%	3.00	44.16	.0515	2.27
Vehicle—40%					
Alkyd Resin Soln**	80.0%	32.00	471.10	.1299	61.20
Butyl Cellosolve	7.2%	2.88	42.40	.1330	5.64
Hi-Flash Naphtha	11.4%	4.56	67.13	.1380	9.26
Pb Naphthenate 24%	1.0%	.40	5.89	.1042	.61
Co Naphthenate	.4%	.16	2.36	.1250	.30
		100.00	1472.19		100.00

Weight per Gallon—14.72#
P.V.R.—47.5

Consistency—75 K. U.

Suggested Roller Mill Grind

530#		Sublimed Blue Lead
176#	11 oz.	Zinc Chromate
132#	8 oz.	Asbestine
44#	3 oz.	Diatomaceous Silica
375#		Alkyd Resin Solution

Reduce With

96#	2 oz.	Alkyd Resin Solution
42#	6 oz.	Butyl Cellosolve
67#	2 oz.	Hi-Flash Naphtha
5#	14 oz.	Pb Naphthenate 24%
2#	6 oz.	Co Naphthenate 6%
1472#	4 oz.	or approximately 100 gallons.

Drying Time

Dust-free	½ hour
Re-coat	1 hour

Notes: This alkyd primer has shown good durability in an atmospheric marine exposure. Where an alkyd vehicle with a high phthalic anhydride content and quick-drying are desired, it should prove very satisfactory.

Dries to a flat finish.

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* Federal Spec. TT-Z-415, Type I (Low Chloride and Sulphate).

** Medium long oil type pure alkyd—oxidizing type, linseed oil modification, 35% Phthalic Anhydride, solids basis.

6029 Federal Specification TT-P-20

Paint, Blue Lead Base; Basic Sulphate Linseed Oil Ready-Mixed for Atmospheric Exposure

Formulation		**Total Weight %**	**Pounds Per 100 Gal.**	**Bulking Value**	**Gals.**
Pigment—72.2%					
Sublimed Blue Lead.....	**100%**	**72.20**	**1475.51**	**.0177**	**26.12**
Vehicle—27.8%					
Raw Linseed Oil	**90.20%**	**25.08**	**512.55**	**.1288**	**66.01**
Mineral Spirits	**7.32%**	**2.03**	**41.49**	**.1525**	**6.33**
Pb Naphthenate 24%....	**1.88%**	**.52**	**10.63**	**.1042**	**1.11**
Co Naphthenate 6%....	**.60%**	**.17**	**3.47**	**.1250**	**.43**
		100.00	**2043.65**		**100.00**

Weight per Gallon—20.44#
P.V.R.—28.35
Consistency—97 K. U.

Suggested Roller Mill Grind

1475#	8 oz.	Sublimed Blue Lead
260#		Raw Linseed Oil

Reduce With

252#	9 oz.	Raw Linseed Oil
41#	8 oz.	Mineral Spirts
10#	10 oz.	Pb Naphthenate 24%
3#	8 oz.	Co. Naphthenate 6%
2041#	11 oz.	or approximately 100 gallons.

Drying Time

Dust-free	15 hours
Re-coat	18 hours

Notes: This formulation is a standard linseed oil, rust inhibitive, ready-mixed paint, conforming to Federal Specification TT-P-20.

Dries to a high gloss.

6030. Federal Specification TT-P-20, Amendment I

Paint, Blue Lead, Basic Sulphate, Linseed Oil, Ready-Mixed for Atmospheric Exposure

Formulation		**Total Weight %**	**Pounds Per 100 Gal.**	**Bulking Value**	**Gals.**
Pigment—72.5%					
Sublimed Blue Lead......	**99.7%**	**72.28**	**1444.47**	**.0177**	**25.57**
Aluminum Stearate	**.3%**	**.22**	**4.40**	**.1190**	**.52**
Vehicle—27.5%					
Raw Linseed Oil.........	**44.20%**	**12.16**	**243.01**	**.1288**	**31.30**
Z-2 Linseed Oil...........	**23.80%**	**6.54**	**130.70**	**.1242**	**16.23**
Mineral Spirits	**30.13%**	**8.29**	**165.67**	**.1525**	**25.27**
Pb Naphthenate 24%.....	**1.41%**	**.39**	**7.79**	**.1042**	**.81**
Co Naphthenate 6%.....	**.45%**	**.12**	**2.40**	**.1250**	**.30**
		100.00	**1998.44**		**100.00**

Weight per Gallon—19.98#
P.V.R.—35.44

Consistency—90 K. U.

Suggested Roller Mill Grind

1444#	8 oz.	Sublimed Blue Lead
4#	6 oz.	Aluminum Stearate
125#		Raw Linseed Oil
130#	11 oz.	Z-2 Linseed Oil.

Reduce With

118#		Raw Linseed Oil
165#	11 oz.	Mineral Spirits
7#	13 oz.	Pb Naphthenate 24%
2#	6 oz.	Co Naphthenate 6%
1998#	7 oz.	or approximately 100 gallons

Drying Time

Dust-free	15 hours
Re-coat	18 hours

Notes: The same notes apply to this formulation as to Federal Specifications TT-P-20. It has a short oil content of 3.73 pounds of linseed oil to the gallon. Aluminum stearate helps suspension in the package.

Dries to a lower gloss than paint made with high oil content.

6031 Primer PM-5-14—For Fresh Water Immersion

Formulation		Total Weight %	Pounds Per 100 Gal.	Bulking Value	Gals.
Pigment—60%					
Sublimed Blue Lead	80%	48.0	743.62	.0177	13.16
Basic Silicate Dry White Lead—Eagle #202-A	20%	12.0	185.90	.0207	3.85
Vehicle—40%					
JV-41 Varnish	99%	39.6	613.49	.1342	82.33
Guaiacol	1%	.4	6.20	.1064	.66
		100.0	1549.21		100.00

Weight per Gallon—15.49#
P.V.R.—28.9

Consistency—80 K. U.

Suggested Roller Mill Grind

743# 10 oz. Sublimed Blue Lead
185# 14 oz. Silicate White Lead
180# JV-41 Varnish

Reduce With

433# 8 oz. JV-41 Varnish
6# 3 oz. Guaiacol

1549# 3 oz. or approximately 100 gallons.

Drying Time

Dust free	1 hour
Re-coat	2 hours

Notes: The phenolic-tung oil varnish in this paint raises the RMC with the higher cost being justified in good performance. It has shown excellent performance on large test areas.

Dries to a high gloss.

6032 Primer PM-5-19—For Fresh Water Immersion

Formulation		Total Weight %	Pounds Per 100 Gal.	Bulking Value	Gals.
Pigment—58.3%					
Sublimed Blue Lead	60%	34.98	491.40	.0177	8.70
Zinc Chromate*	20%	11.66	163.80	.0326	5.34
Asbestine	15%	8.75	122.92	.0421	5.17
Diatomaceous Silica	5%	2.91	40.88	.0515	2.11
Vehicle—41.7%					
JV-41-L Varnish	99%	41.28	579.90	.1346	78.05
Guaiacol	1%	.42	5.89	.1064	.63
		100.00	1404.79		100.00

Weight per Gallon—14.05#
P.V.R.—34.9

Consistency—78 K. U.

Suggested Roller Mill Grind

491#	6 oz.	Sublimed Blue Lead
163#	13 oz.	Zinc Chromate
122#	15 oz.	Asbestine
40#	14 oz.	Diatomaceous Silica
340#		JV-41-L Varnish

Reduce With

339#	14 oz.	JV-41-L Varnish
5#	14 oz.	Guaiacol
1404#	12 oz.	or approximately 100 gallons.

Drying Time

Dust-free	2 hours
Re-coat	5 hours

Notes: This paint has shown good life on large surfaces. It has kerosene in the varnish which slows the drying somewhat but improves the brushing and leveling. Dries with a low gloss.

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* Federal Spec. TT-Z-415, Type I (Low Chloride and Sulphate).

6033 Primer PM-5-20—For Fresh Water Immersion

Formulation		Total Weight %	Pounds Per 100 Gal.	Bulking Value	Gals.
Pigment—60%					
Sublimed Blue Lead	60%	36.00	530.05	.0177	9.38
Basic Silicate Dry White Lead—Eagle #202-A	20%	12.00	176.68	.0207	3.66
Asbestine	15%	9.00	132.51	.0421	5.58
Diatomaceous Silica	5%	3.00	44.17	.0515	2.27
Vehicle—40%					
JV-41-L Varnish	99%	39.60	583.06	.1346	78.48
Guaiacol	1%	.40	5.89	.1064	.63
		100.00	1472.36		100.00

Weight per Gallon—14.72#
P.V.R.—34.3
Consistency—79 K. U.

Suggested Roller Mill Grind

530#	1 oz.	Sublimed Blue Lead
176#	11 oz.	Silicate White Lead
132#	8 oz.	Asbestine
44#	3 oz.	Diatomaceous Silica
230#		JV-41-L Varnish

Reduce With

353#	1 oz.	JV-41-L Varnish
5#	14 oz.	Guaiacol
1472#	6 oz.	or approximately 100 gallons.

Drying Time

Dust-free	2 hours
Re-coat	5 hours

Notes: This paint has the same vehicle as PM-5-19, and has shown good performance. A large number of exposures have shown Basic Silicate White Lead to be advantageous for water immersion exposure, so this paint is somewhat superior in performance to PM-5-19.

Dries with a low gloss.

6034 Primer PM-1-20—For Intermittent or Tide Level Salt Water Exposure

Formulation		Total Weight %	Pounds Per 100 Gal.	Bulking Value	Gals.
Pigment—58.5%					
Sublimed Blue Lead	60.0%	35.10	506.86	.0177	8.97
Basic Silicate Dry White Lead—Eagle #202-A	15.0%	8.77	126.64	.0207	2.62
Eagle Zinc Oxide #417	10.0%	5.85	84.48	.0213	1.80
Asbestine	7.5%	4.39	63.39	.0421	2.67
Diatomaceous Silica	7.5%	4.39	63.39	.0515	3.26
Vehicle—41.5%					
JV-161 Varnish	90.87%	37.71	544.55	.1333	72.59
Mineral Spirits	8.19%	3.40	49.10	.1525	7.49
Guaiacol	.94%	.39	5.63	.1064	.60
		100.00	1444.04		100.00

Weight per Gallon 14.44#
P.V.R.—34.7
Consistency—74 K. U.

Suggested Roller Mill Grind

506#	14 oz.	Sublimed Blue Lead
126#	10 oz.	Silicate White Lead
84#	8 oz.	Zinc Oxide
63#	6 oz.	Asbestine
63#	6 oz.	Diatomaceous Silica
270#		JV-161 Varnish

Reduce With

274#	9 oz.	JV-161 Varnish
49#	2 oz.	Mineral Spirits
5#	10 oz.	Guaiacol
1444#	1 oz.	or approximately 100 gallons.

Drying Time

Dust-free	½ hour
Re-coat	1 hour

Notes: This primer with a 15 gallon oil length vehicle has proved the most satisfactory of any in various tests for above exposures. It has given excellent service in tests at tide livel.

Dries to a flat finish.

6035 Primer PM-1-1—For Intermittent or Tide Level Salt Water Exposure or For Continuous Salt Water Immersion

Formulation		Total Weight %	Pounds Per 100 Gal.	Bulking Value	Gals.
Pigment—58.58%					
Sublimed Blue Lead	60.0%	35.15	505.00	.0177	8.94
Basic Silicate Dry White Lead—Eagle #202-A	15.0%	8.79	126.25	.0207	2.61
Eagle Zinc Oxide #417	10.0%	5.86	84.17	.0213	1.79
Asbestine	7.5%	4.39	63.12	.0421	2.66
Diatomaceous Silica	7.5%	4.39	63.12	.0515	3.25
Vehicle—41.42%					
JV-41 Varnish	89.67%	37.14	533.64	.1342	71.62
Mineral Spirits	9.44%	3.91	56.18	.1525	8.57
Guaiacol	.89%	.37	5.30	.1064	.56
		100.00	1436.78		100.00

Weight per Gallon—14.37#
P.V.R.—34.61

Consistency—75 K. U.

Suggested Roller Mill Grind

505#		Sublimed Blue Lead
126#	4 oz.	Silicate White Lead
84#	3 oz.	Zinc Oxide
63#	2 oz.	Asbestine
63#	2 oz.	Diatomaceous Silica
250#	8 oz.	JV-41 Varnish
5#	5 oz.	Guaiacol

Reduce With

283#	2 oz.	JV-41 Varnish
56#	3 oz.	Mineral Spirits
1436#	13 oz.	or approximately 100 gallons.

Drying Time

Dust-free	1 hour
Re-coat	2 hours

Notes: This primer is similar to Primer PM-1-20 except that it has a longer oil length—33 gallons. It has shown good durability and should give greater flexibility where such is desired.

Dries to a low gloss.

6036 Primer PM-1-4—For intermittent or Tide Level Salt Water Exposure

Formulation		Total Weight %	Pounds Per 100 Gal.	Bulking Value	Gals.
Pigment—55.5%					
Sublimed Blue Lead	60.0%	33.30	447.57	.0177	7.92
Zinc Chromate*	20.0%	11.10	149.19	.0326	4.86
Asbestine	15.0%	8.32	111.83	.0421	4.71
Diatomaceous Silica	5.0%	2.78	37.36	.0515	1.93
Vehicle—44.5%					
JV-161 Varnish	90.4%	40.23	540.71	.1333	72.08
Mineral Spirits	8.7%	3.87	52.01	.1525	7.93
Guaiacol	.9%	.40	5.38	.1064	.57
		100.00	1344.05		100.00

Weight per Gallon—13.44#
P.V.R.—35.0

Consistency—72 K. U.

Suggested Roller Mill Grind

447#	9 oz.	Sublimed Blue Lead
149#	3 oz.	Zinc Chromate
111#	13 oz.	Asbestine
37#	6 oz.	Diatomaceous Silica
210#		JV-161 Varnish

Reduce With

330#	11 oz.	JV-161 Varnish
52#		Mineral Spirits
5#	6 oz.	Guaiacol
1344#		or approximately 100 gallons.

Drying Time

Dust-free	30 min.
Re-coat	1 hour

Notes: This primer in a 15 gallon oil length vehicle has shown good durability but not as good as Primer PM-1-20. It is included as a primer where Zinc Chromate content is desired. It is one of only a few pigmentations containing Zinc Chromate that performs well in this type of exposure.

Dries to a flat finish.

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* Federal Spec. TT-Z-415, Type I (Low Chloride and Sulphate).

6037 Primer PM-1-2—For Continuous Immersion In Salt Water

Formulation		**Total Weight %**	**Pounds Per 100 Gal.**	**Bulking Value**	**Gals.**
Pigment—54.6%					
Sublimed Blue Lead	**60.0%**	**32.760**	**441.98**	**.0177**	**7.82**
Basic Silicate Dry White Lead—Eagle #202-A	**15.0%**	**8.190**	**110.50**	**.0207**	**2.29**
Eagle Zinc Oxide #417	**10.0%**	**5.460**	**73.66**	**.0213**	**1.57**
Asbestine	**7.5%**	**4.095**	**55.25**	**.0421**	**2.33**
Diatomaceous Silica	**7.5%**	**4.095**	**55.25**	**.0515**	**2.84**
Vehicle—45.4%					
JV-40 Varnish	**89.5%**	**40.633**	**548.20**	**.1342**	**73.57**
Mineral Spirits	**9.7%**	**4.404**	**59.42**	**.1525**	**9.06**
Guaiacol	**.8%**	**.363**	**4.90**	**.1064**	**.52**
		100.000	**1349.16**		**100.00**

Weight per Gallon—13.49#
P.V.R.—31.2

Consistency—70 K. U.

Suggested Roller Mill Grind

442#		Sublimed Blue Lead
110#	8 oz.	Silicate White Lead
73#	11 oz.	Zinc Oxide
55#	4 oz.	Asbestine
55#	4 oz.	Diatomaceous Silica
210#		JV-40 Varnish

Reduce With

338#	3 oz.	JV-40 Varnish
59#	7 oz.	Mineral Spirits
4#	14 oz.	Guaiacol
1349#	3 oz.	or approximately 100 gallons

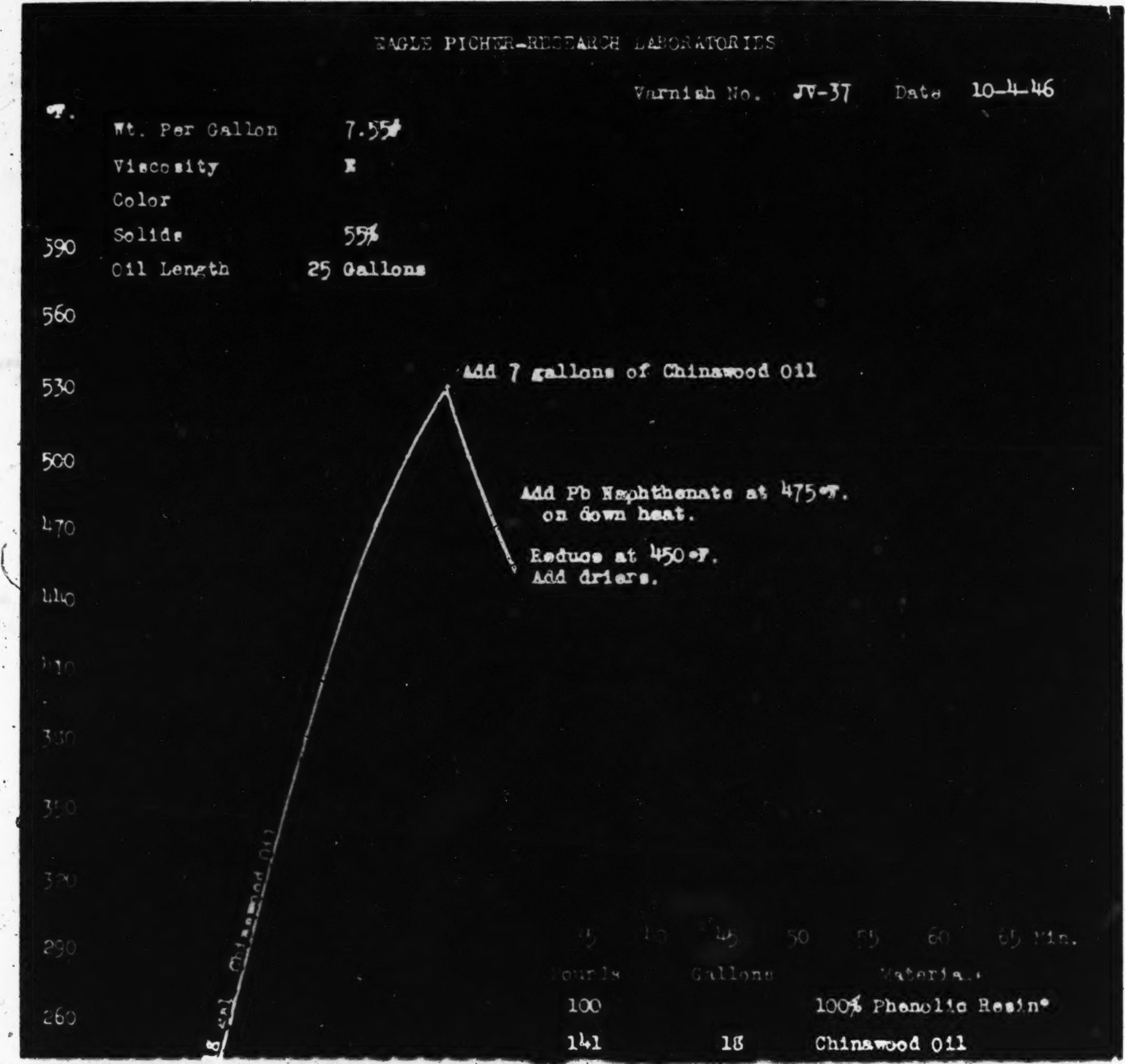
Drying Time

Dust-free	20 minutes
Re-coat	1 hour

Notes: This is the best primer for continuous submerged exposure in salt water in our experience. The vehicle is a 25 gallon phenolic-tung oil varnish.

Dries to a flat finish.

Respondent's Exhibit No. 188.



EAGLE PICHER-RESEARCH LABORATORIES

Varnish No. JV-37 Date 10-4-46

Wt. Per Gallon	7.55#
Viscosity	E
Color	
Solids	55%
Oil Length	25 Gallons

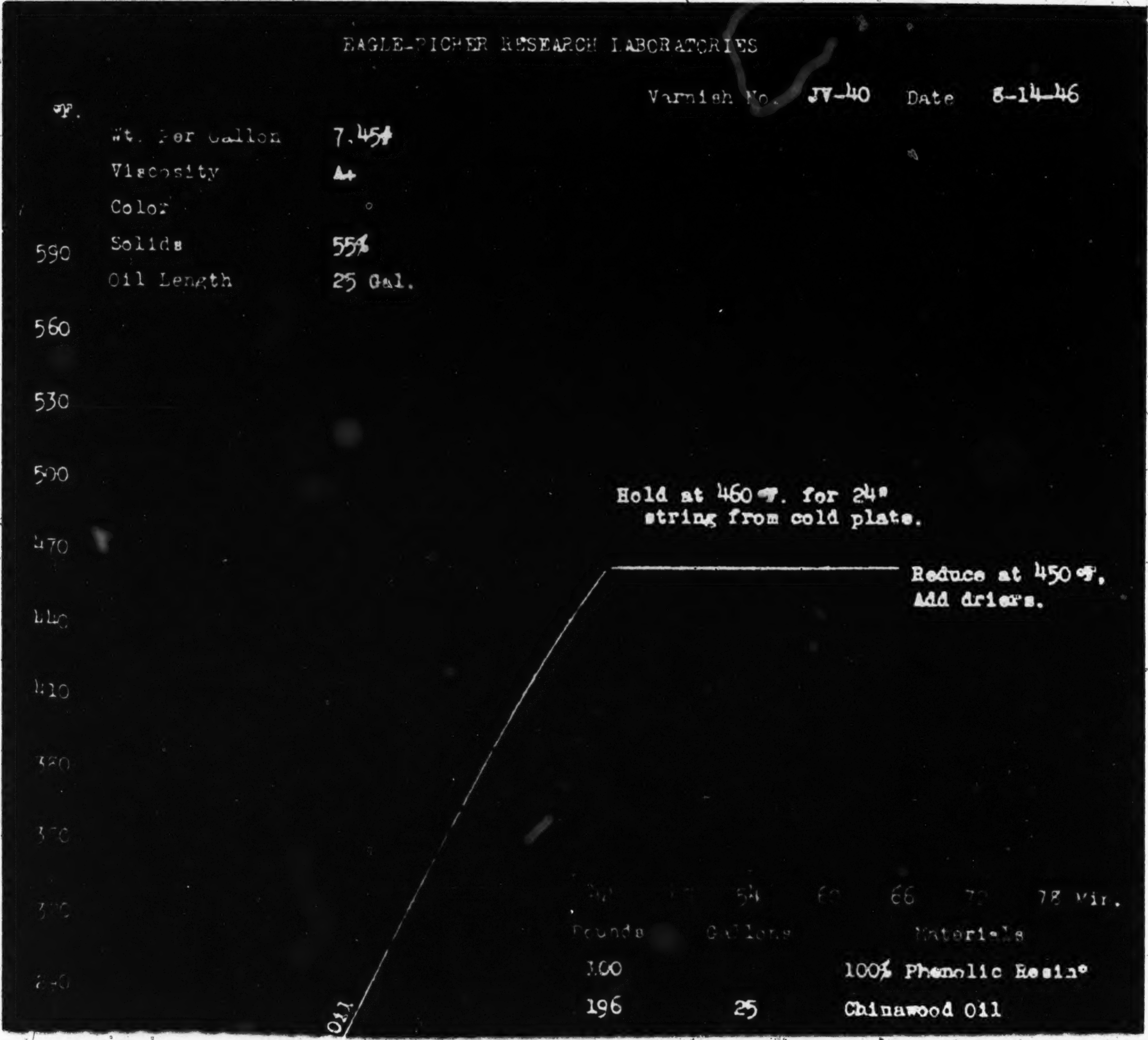
Add 7 gallons of Chinawood Oil

Add Pb Naphthenate at 475 °F. on down heat.

Reduce at 450 °F. Add driers.

Pounds	Gallons	Materials
100		100% Phenolic Resin*
141	18	Chinawood Oil

Respondent's Exhibit No. 188.



EAGLE-PICHER RESEARCH LABORATORIES

Varnish No. JV-40 Date 8-14-46

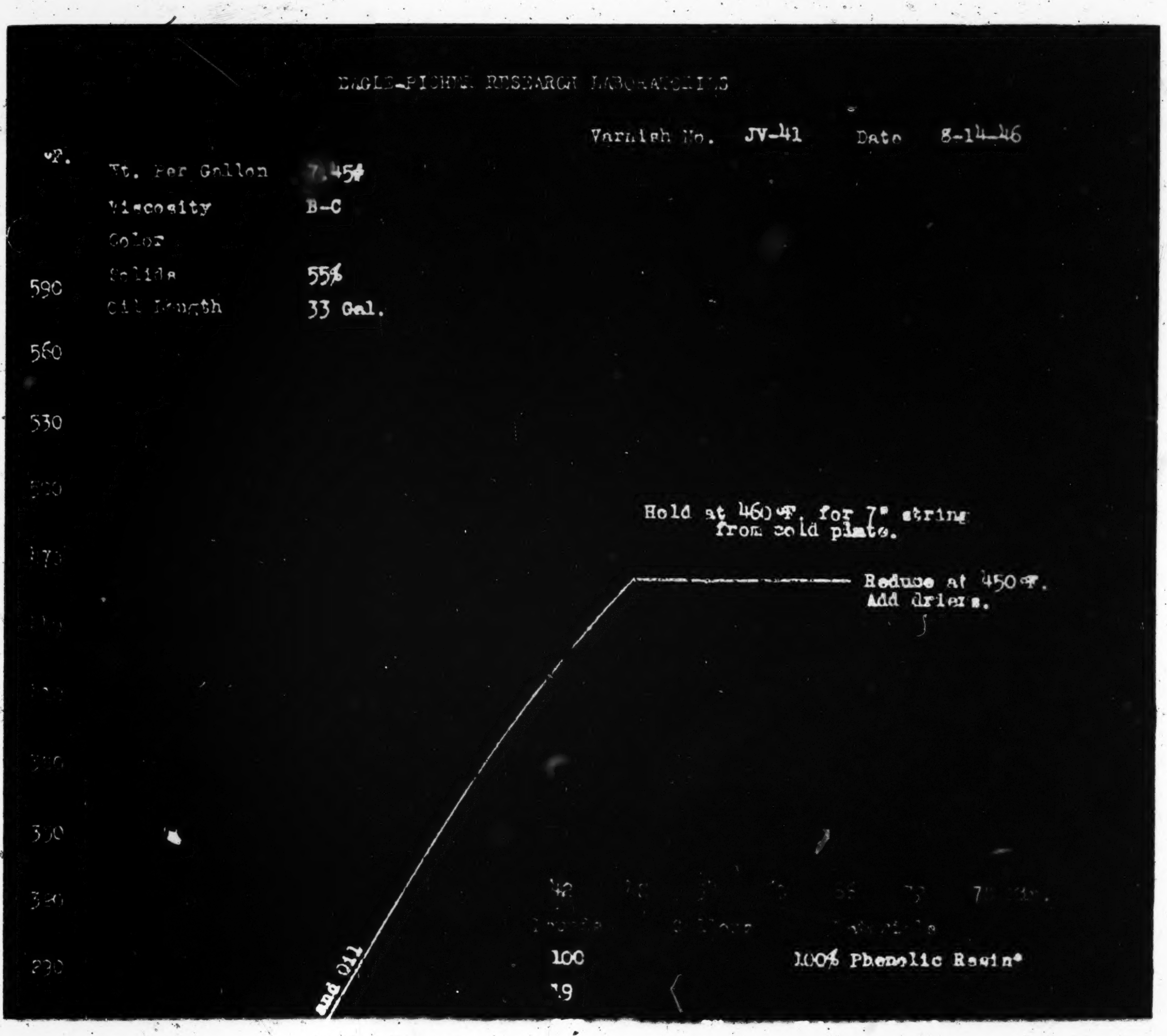
Wt. Per Gallon	7.45#
Viscosity	A+
Color	
Solids	55%
Oil Length	25 Gal.

Hold at 460 °F. for 24" string from cold plate.

Reduce at 450 °F. Add driers.

Pounds	Gallons	Materials
100		100% Phenolic Resin°
196	25	Chinawood Oil

Respondent's Exhibit No. 188.



EAGLE-PICHER RESEARCH LABORATORIES

Varnish No. JV-41 Date 8-14-46

Wt. Per Gallon 7.45#
Viscosity B-C
Color
Solids 55%
Oil Length 33 Gal.

Hold at 460°F. for 7" string from cold plate.

Reduce at 450°F. Add driers.

100 100% Phenolic Resin*
19

6038 Primer PM-1-21—For Continuous Salt Water Immersion

Formulation		Total Weight %	Pounds Per 100 Gal.	Bulking Value	Gals.
Pigment—59.3%					
Sublimed Blue Lead......	60%	35.58	534.63	.0177	9.46
Basic Silicate Dry White Lead—Eagle #202-A...	20%	11.86	178.21	.0207	3.69
Asbestine	15%	8.90	133.73	.0421	5.63
Diatomaceous Silica	5%	2.96	44.48	.0515	2.29
Vehicle—40.7%					
JV-137 Varnish	94.55%	38.48	578.20	.1282	74.13
Mineral Spirits	4.45%	1.81	27.20	.1525	4.15
Guaiacol	1.00%	.41	6.16	.1064	.65
		100.00	1502.61		100.00

Weight per Gallon—15.03#

P.V.R.—35.0 Consistency—72 K. U.

Suggested Roller Mill Grind

534#	10 oz.	Sublimed Blue Lead
178#	3 oz.	Silicate White Lead
133#	12 oz.	Asbestine
44#	8 oz.	Diatomaceous Silica
280#		JV-137 Varnish

Reduce With

298#	3 oz.	JV-137 Varnish
27#	3 oz.	Mineral Spirits
6#	3 oz.	Guaiacol
1502#	10 oz.	or approximately 100 gallons.

Drying Time

Dust-free	30 minutes
Re-coat	2 hours

Notes: This primer has a 6½ gallon oil length vehicle and has given good service, though it is not as long-lived, as Primer PM-1-2.

Dries to a low gloss.

6039

Top Coats

The choice of a top coat depends upon the conditions to which the paint system will be subjected. The primers are designed as part of a paint system designed for the several types of exposures indicated.

For atmospheric Exposure—normal conditions:

1. Multiple Pigment—Lead, Zinc, Titanium, Inert in Linseed Oil Vehicle.

A. Pigment—68%

Basic Sulphate White Lead	63%
Zinc Oxide	20%
Titanium Dioxide	7%
Magnesium Silicate	10%
	100%

Vehicle—32%

Refined Linseed Oil	85%
Q Body Linseed Oil	9%
Turp. and Driers	6%
	100%

B. Green Paint

Pigment—72%

Basic Sulphate White Lead	66%
Zinc Oxide	10%
Chromium Oxide	14%
Magnesium Silicate	10%
	100%

Vehicle—38%

Raw Linseed Oil	86%
Varnish JV-41	8%
Turp. and Driers	6%
	100%

C. TT-P-40, Class A, LZTI

Type I, White
Type II, Tints
Class B, White Lead Paints

D. Two pounds of Aluminum Paste in one gallon
   1. JV-37
   2. Fed. Spec. Varnish, TT-V-81a, Type II
   3. Aluminum Paste in long oil oxidizing type alkyd 30% glycerol phthalate based on solids.

E. Black Bridge Paint
   1. Oleoresinous Type Vehicle
   2. Fed. Spec. TT-P-61a

6040 F. Multiple pigment, alkyd vehicle of long oil oxidizing type with approximately 30% glycerol phthalate content, based on solids.

Abnormal conditions: For abnormal conditions such as acid or alkaline exposure:

Sublimed Blue Lead	60%	60%
Basic Silicate Dry White Lead	20%	15%
Zinc Oxide		10%
Magnesium Silicate	15%	7.5%
Diatomaceous Silica	5%	7.5%
	100%	100.0%

In 1) a 25-33 gal. tung oil phenolic resin varnish vehicle; or 2) 15 gal. tung oil phenolic vehicle. Pigment approximately 60%; Vehicle approximately 40%.

Note: The addition of 2% Carbon Black and 1% Benzoic Acid ground in linseed oil to stiff paste, based on pigment content, is suggested for better tint retention.

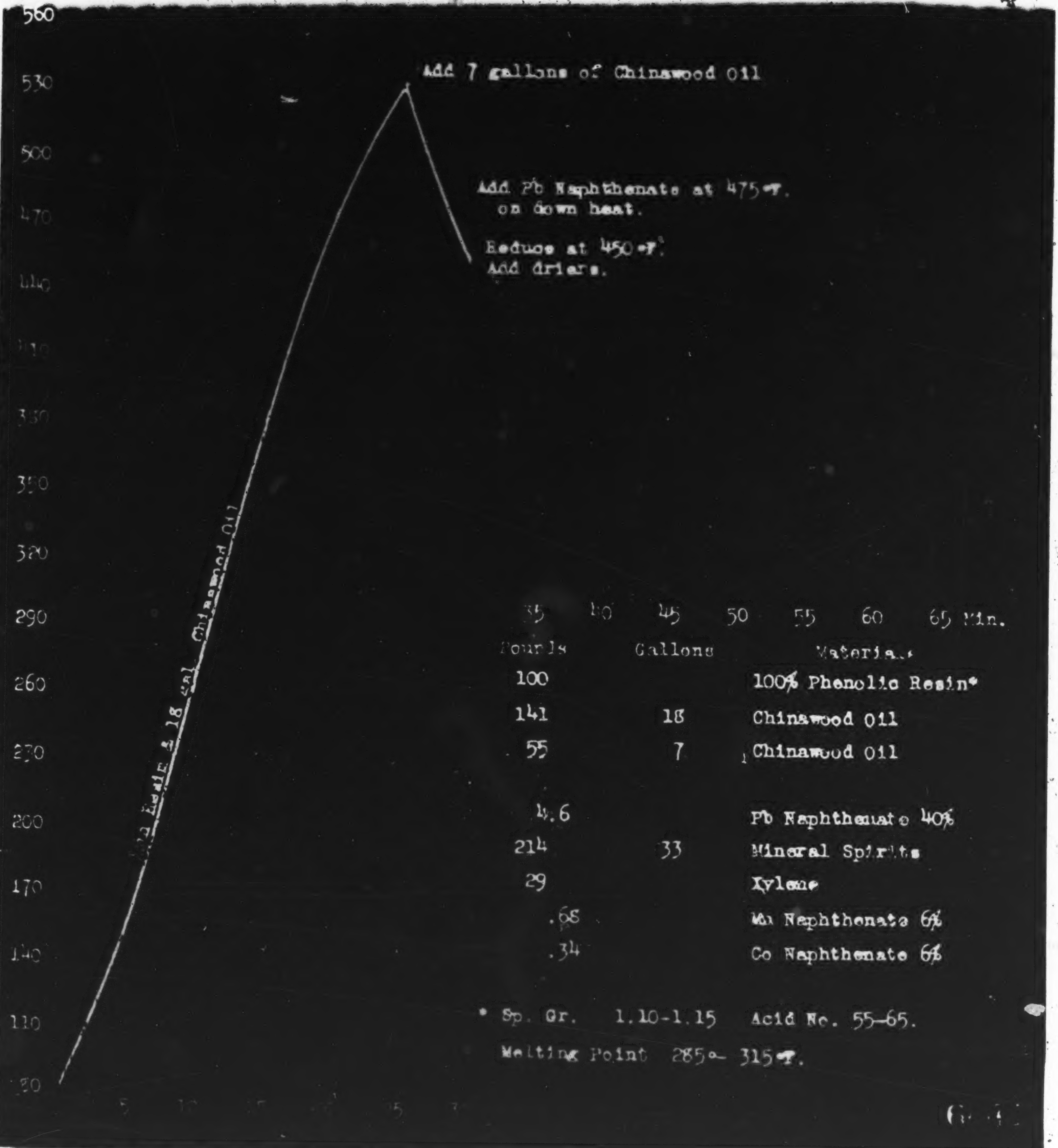
For Fresh Water Exposure:

Topcoat may be the same as the primer or aluminum paint—two pounds of aluminum paste to one gallon varnish—25 gallons 100 parapheny phenyl, phenolic, 60% tung oil, 40% linseed oil.

For Salt Water Exposure:

Intermittent or Tide Range—These primers may be used under boot topping paint. In these tests a top coat of U. S. Maritime Commission 52-MC-6, was found satisfactory (succeeding specification is suggested for use as this specification covers a more durable paint because of lower P.V.R.).

Continuous Exposure—Such exposures usually require protection against marine growth fouling. Therefore, an anti-fouling paint such as is used in these tests is suggested—U. S. Maritime Commission 52-MC-61, Class II, August 28, 1939, or succeeding specification—52-MC-503.



Add 7 gallons of Chinawood Oil

Add Pb Naphthenate at 475 °F. on down heat.

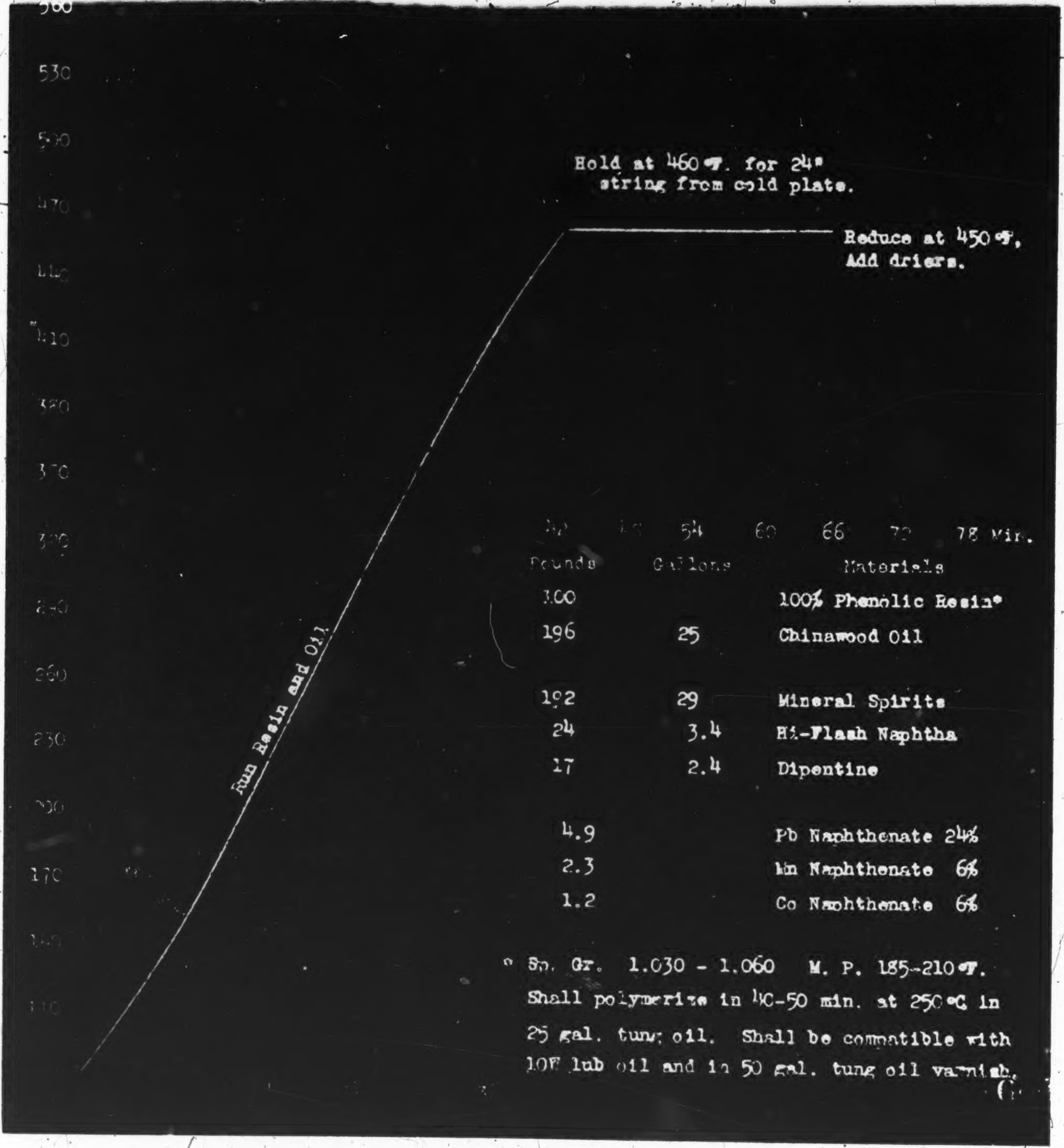
Reduce at 450 °F. Add driers.

Pounds	Gallons	Materials
100		100% Phenolic Resin*
141	18	Chinawood Oil
55	7	Chinawood Oil
4.6		Pb Naphthenate 40%
214	33	Mineral Spirits
29		Xylene
.68		Mn Naphthenate 6%
.34		Co Naphthenate 6%

* Sp. Gr. 1.10-1.15 Acid No. 55-65.

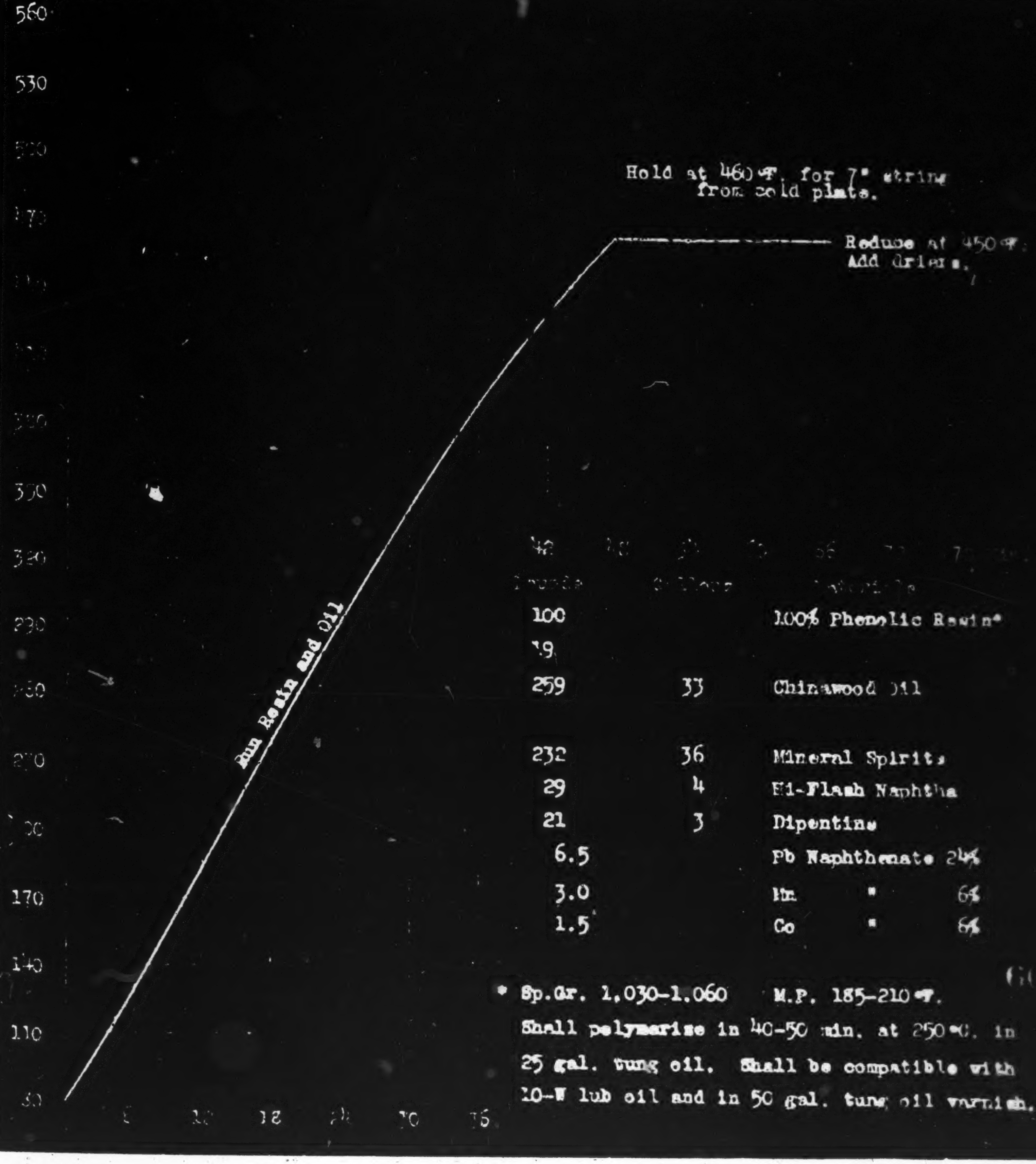
Melting Point 285 - 315 °F.

G-4[illegible]



Pounds	Gallons	Materials
100		100% Phenolic Resin*
196	25	Chinawood Oil
192	29	Mineral Spirits
24	3.4	Hi-Flash Naphtha
17	2.4	Dipentine
4.9		Pb Naphthenate 24%
2.3		Mn Naphthenate 6%
1.2		Co Naphthenate 6%

* Sp. Gr. 1.030 - 1.060 M. P. 185-210 °F. Shall polymerize in 40-50 min. at 250 °C in 25 gal. tung oil. Shall be compatible with 10W lub oil and in 50 gal. tung oil varnish.



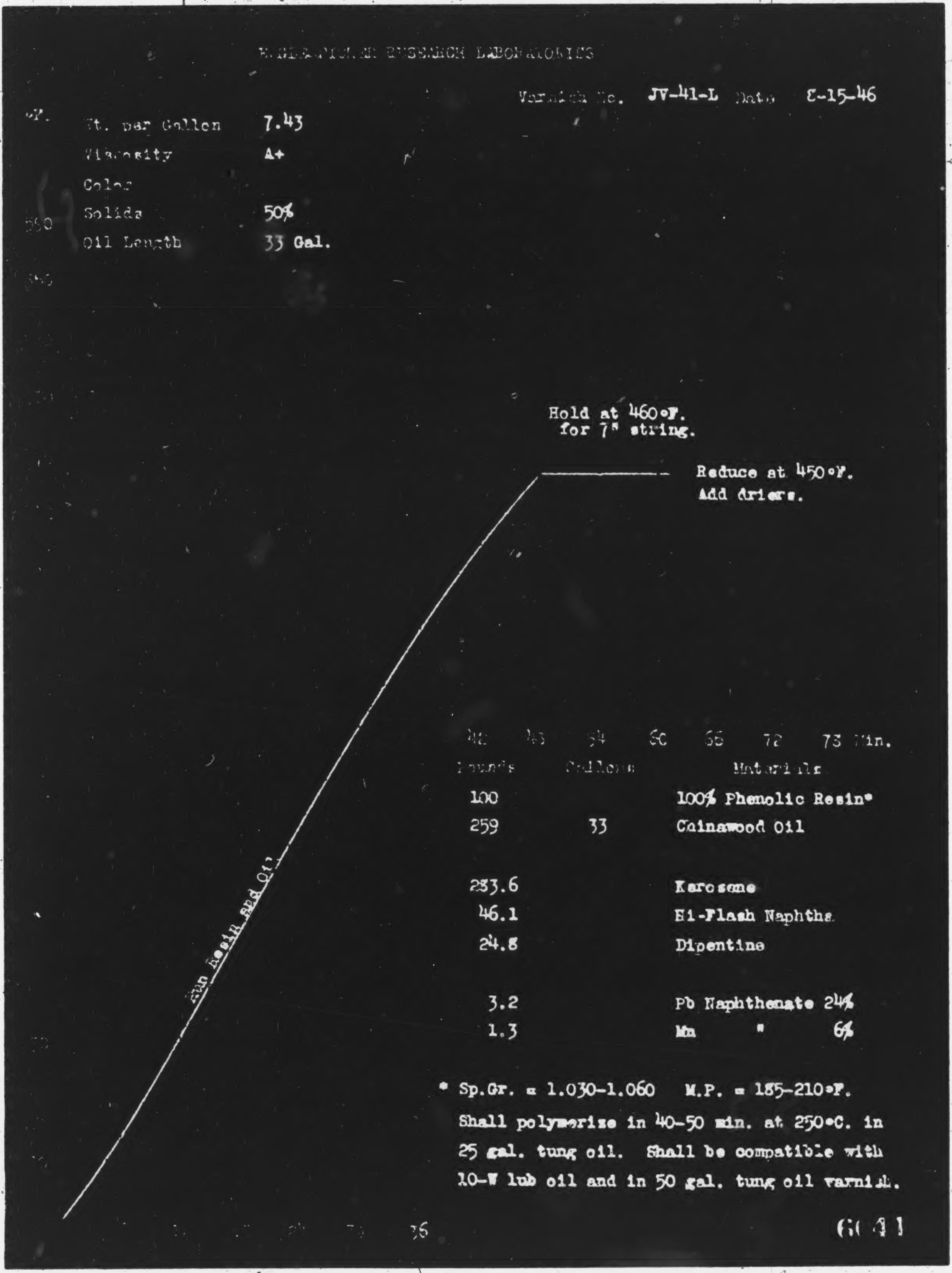
Hold at 460 °F. for 7" string from cold plate.

Reduce at 450 °F; Add driers.

Pounds	Gallons	Materials
100		100% Phenolic Resin*
19		
259	33	Chinawood Oil
232	36	Mineral Spirits
29	4	Hi-Flash Naphtha
21	3	Dipentine
6.5		Pb Naphthenate 24%
3.0		Mn. " 6%
1.5		Co " 6%

* Sp.Gr. 1.030-1.060 M.P. 185-210 °F. Shall polymerize in 40-50 min. at 250 °C. in 25 gal. tung oil. Shall be compatible with 10-W lub oil and in 50 gal. tung oil varnish.

Respondent's Exhibit No. 188.



EAGLE-PICHER RESEARCH LABORATORIES

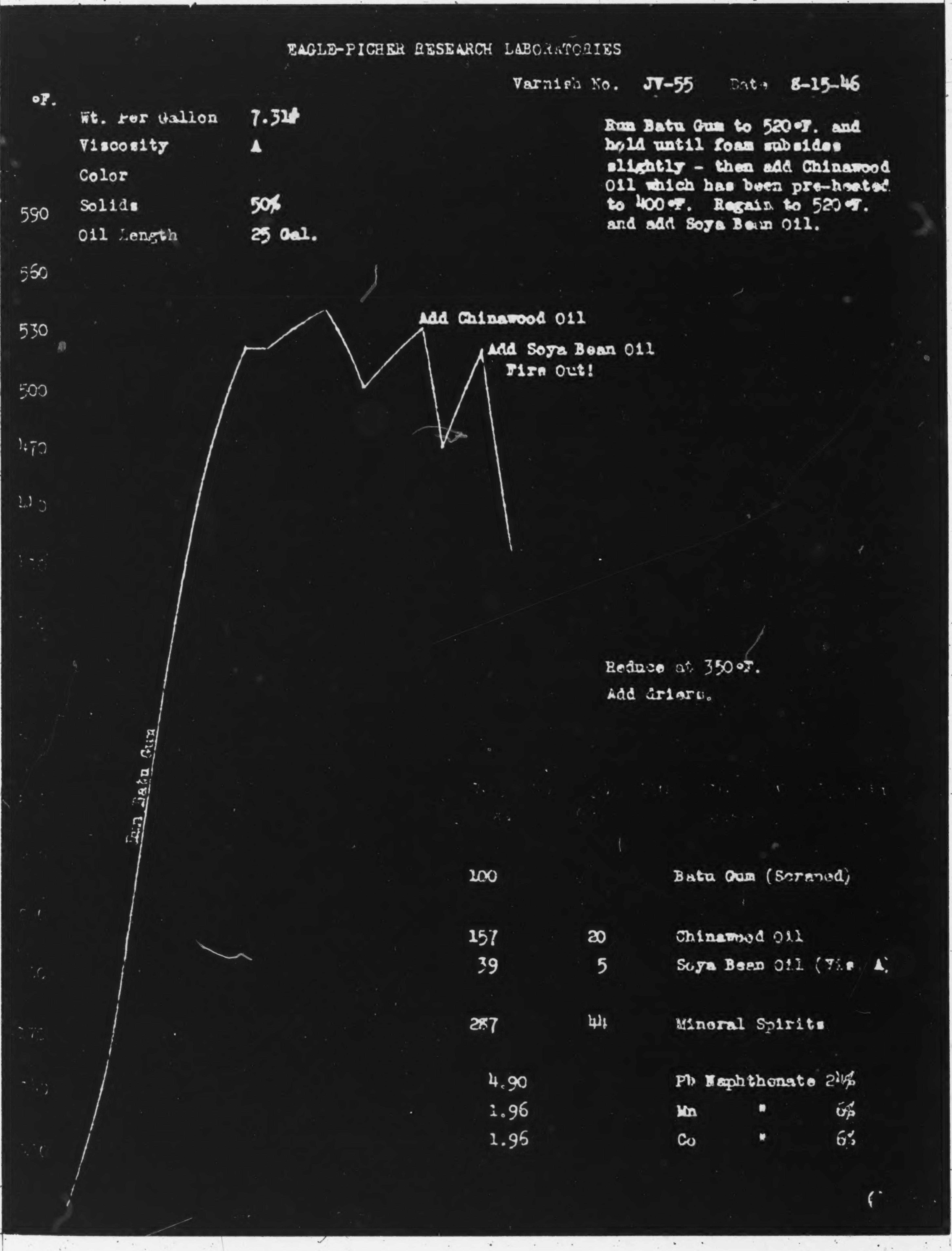
Varnish No. JV-41-L Date 8-15-46

Wt. per Gallon	7.43
Viscosity	A+
Color	
Solids	50%
Oil Length	33 Gal.

Pounds	Gallons	Materials
100		100% Phenolic Resin*
259	33	Chinawood Oil
233.6		Kerosene
46.1		Hi-Flash Naphtha
24.8		Dipentine
3.2		Pb Naphthenate 24%
1.3		Mn " 6%

* Sp.Gr. = 1.030-1.060 M.P. = 185-210°F. Shall polymerize in 40-50 min. at 250°C. in 25 gal. tung oil. Shall be compatible with 10-W lub oil and in 50 gal. tung oil varnish.

6041



EAGLE-PICHER RESEARCH LABORATORIES

Varnish No. JV-55 Date 8-15-46

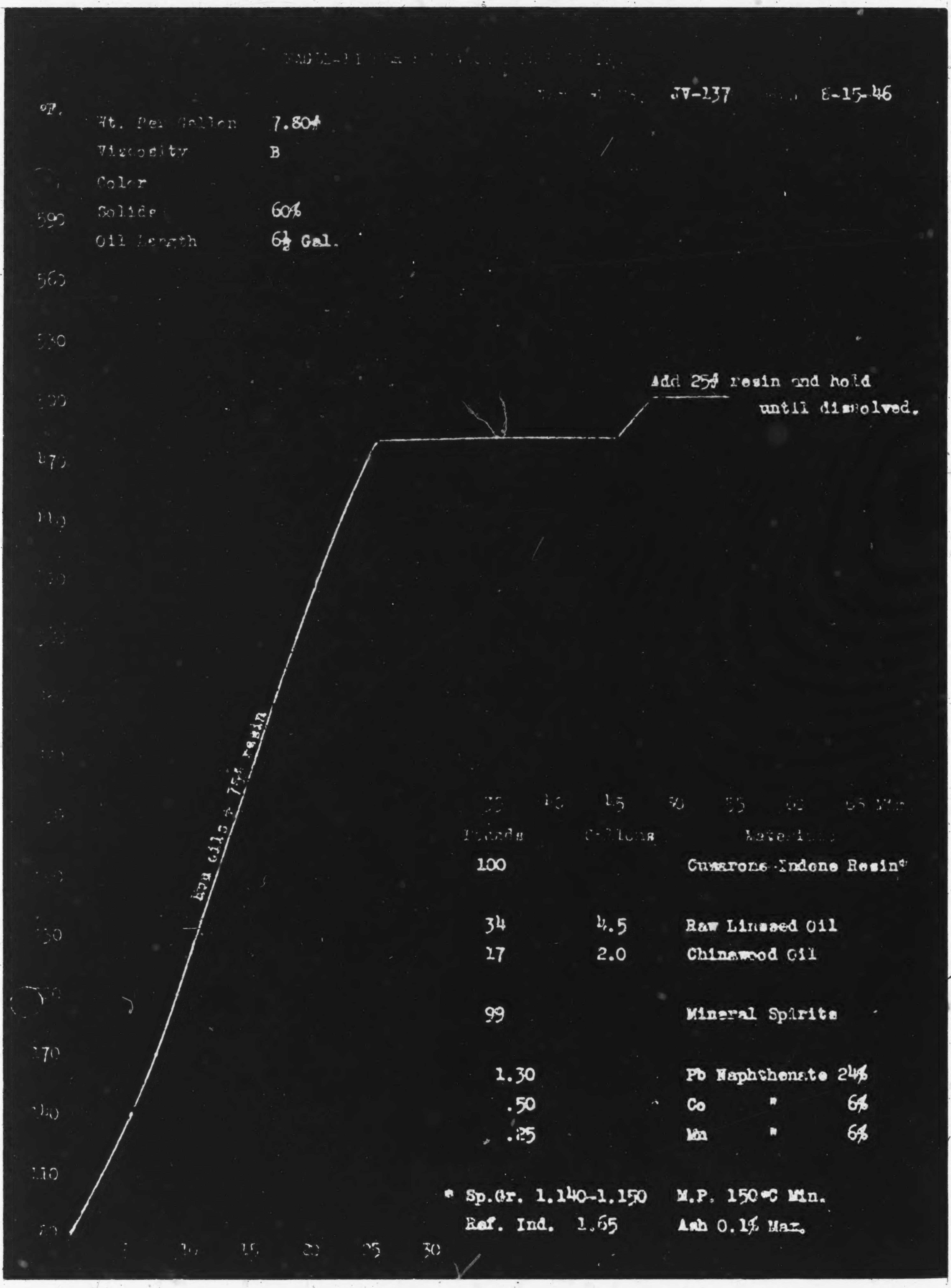
Wt. Per Gallon	7.31#
Viscosity	A
Color	
Solids	50%
Oil Length	25 Gal.

Run Batu Gum to 520°F. and hold until foam subsides slightly - then add Chinawood Oil which has been pre-heated to 400°F. Regain to 520°F. and add Soya Bean Oil.

Reduce at 350°F.
Add driers.

100		Batu Gum (Screened)
157	20	Chinawood Oil
39	5	Soya Bean Oil (Vis A)
287	44	Mineral Spirits
4.90		Pb Naphthonate 24%
1.96		Mn " 6%
1.96		Co " 6%

°F.
590
560
530
500
470
440
Add Chinawood Oil
Add Soya Bean Oil
Fire Out!
Run Batu Gum



[illegible]

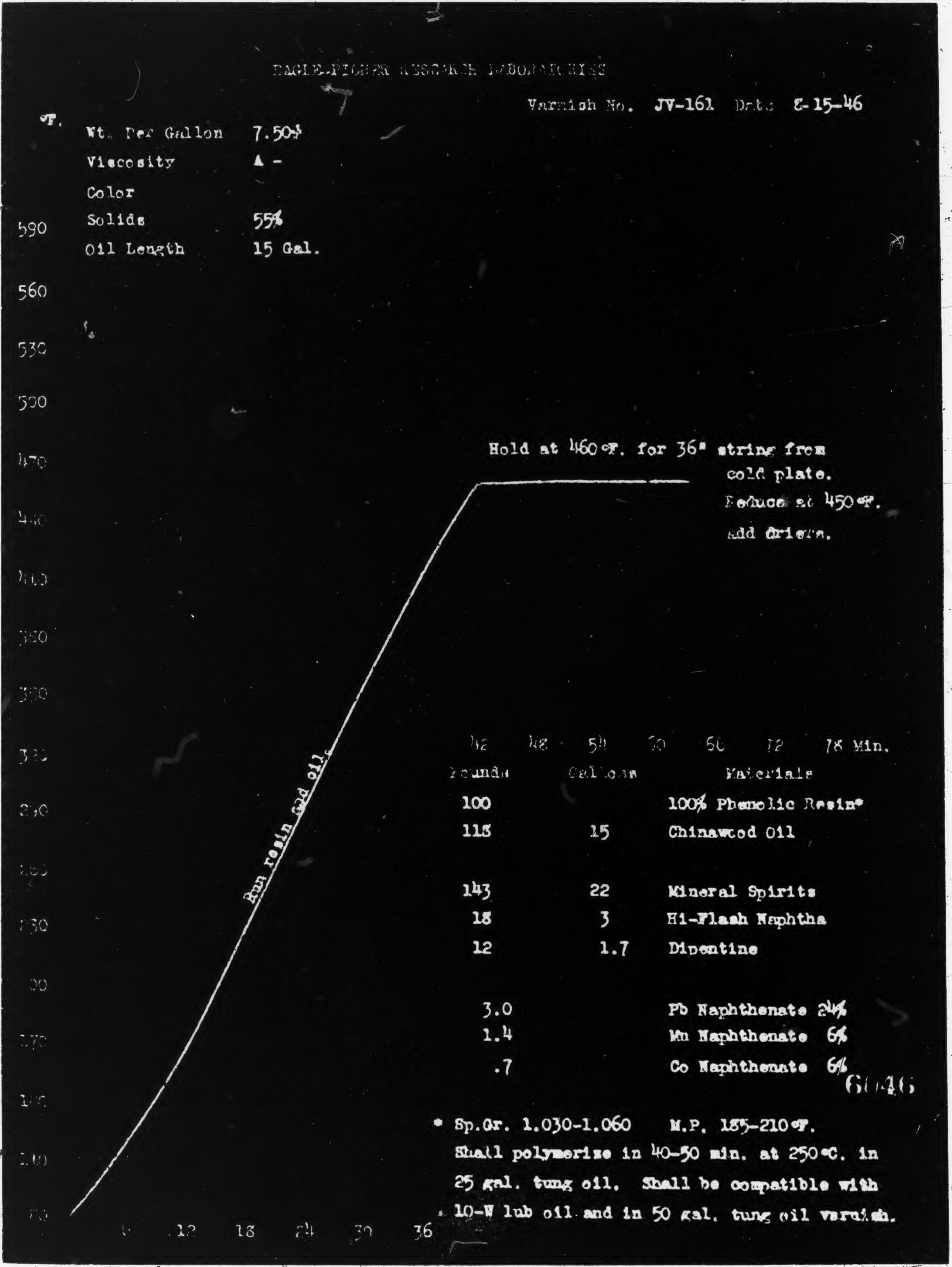
[illegible] JV-137 [illegible] 8-15-46

Wt. Per Gallon	7.80#
Viscosity	B
Color	
Solids	60%
Oil Length	6½ Gal.

Pounds	Gallons	Materials
100		Cumarone-Indene Resin*
34	4.5	Raw Linseed Oil
17	2.0	Chinawood Oil
99		Mineral Spirits
1.30		Pb Naphthenate 24%
.50		Co " 6%
.25		Mn " 6%

* Sp.Gr. 1.140-1.150 M.P. 150°C Min.
Ref. Ind. 1.65 Ash 0.1% Max.

Respondent's Exhibit No. 188.



EAGLE-PICHER RESEARCH LABORATORIES

Varnish No. JV-161 Date 8-15-46

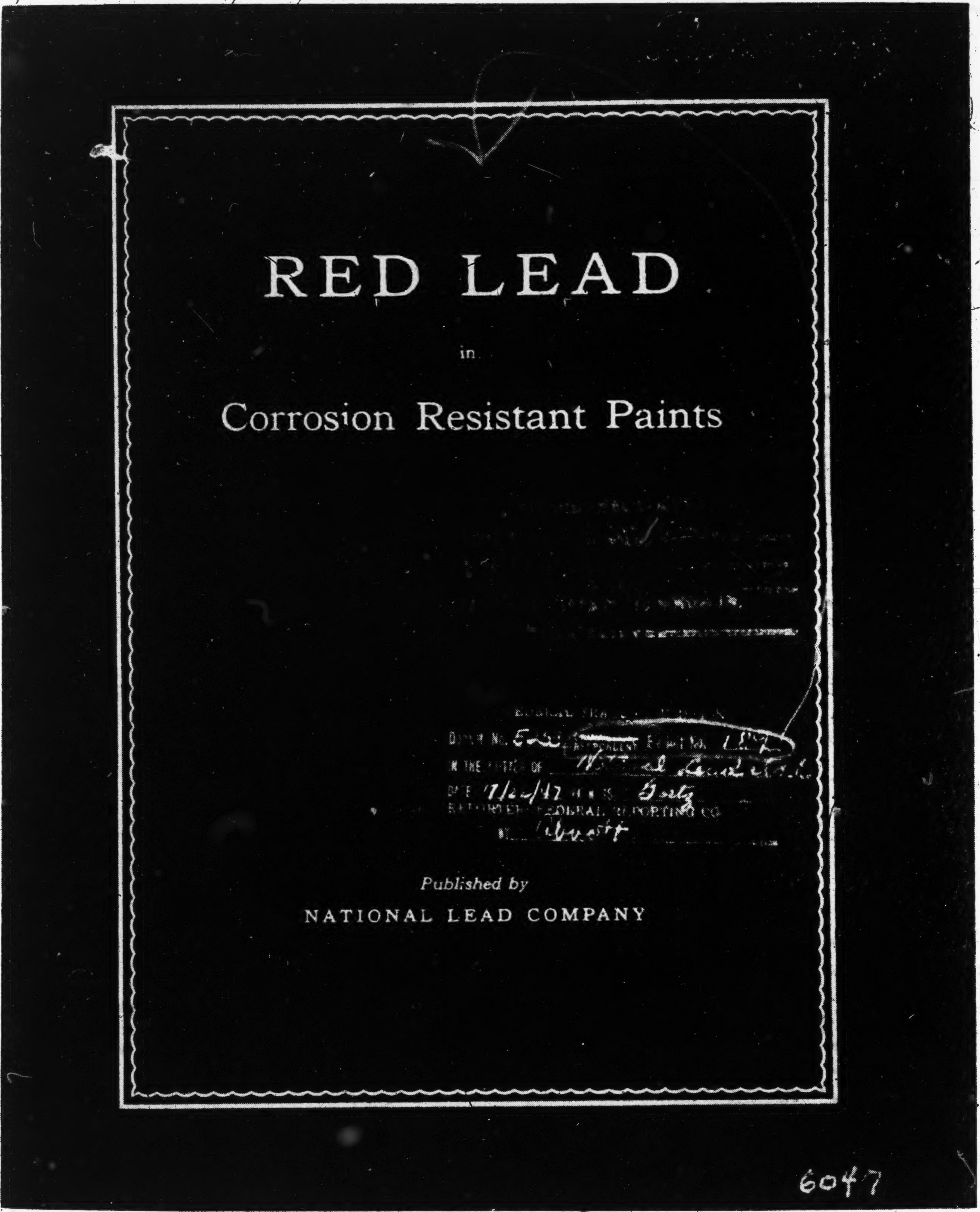
Wt. Per Gallon	7.50#
Viscosity	A -
Color	
Solids	55%
Oil Length	15 Gal.

Hold at 460°F. for 36" string from cold plate. Reduce at 450°F. add driers.

Pounds	Gallons	Materials
100		100% Phenolic Resin*
115	15	Chinawood Oil
143	22	Mineral Spirits
18	3	Hi-Flash Naphtha
12	1.7	Dipentine
3.0		Pb Naphthenate 24%
1.4		Mn Naphthenate 6%
.7		Co Naphthenate 6%

6046

* Sp.Gr. 1.030-1.060 M.P. 185-210°F. Shall polymerize in 40-50 min. at 250°C. in 25 gal. tung oil. Shall be compatible with 10-W lub oil and in 50 gal. tung oil varnish.



RED LEAD

in

Corrosion Resistant Paints

FEDERAL TRADE COMMISSION
DOCKET NO. [illegible] RESPONDENT EXHIBIT NO. 189
IN THE MATTER OF National Lead Co.
DATE 7/24/47 WITNESS Getz
REPORTER FEDERAL REPORTING CO.
BY [illegible]

Published by
NATIONAL LEAD COMPANY

6047

Respondent's Exhibit No. 189.

Alvin W. Goetz.

FOREWORD

AS a guide to those responsible for formulating and specifying paint for structural iron and steel, we have set forth in this booklet the various characteristics of red lead, its function in paint, and formulas for a representative group of general purpose and specification paint primers. It is hoped that this data will assist both the paint manufacturer and the consumer in selecting the best paint for a lasting and durable job.

The services of our technical staff are available at any time to those with paint formulation problems. Information regarding the formulation of red lead pigmented paints may be had by contacting any one of our offices.

CHAPTER I

Properties and Advantages of RED LEAD

THE essential properties and functions of a metal protective primer that will provide maximum protection are: (1) the inclusion of a constituent which inhibits and stifles corrosion by preventing the reactions causing corrosion; (2) the formation of a continuous film to exclude from the metal the environment which can cause corrosion; (3) the maintenance of flexibility in the film so that it can conform with the stresses set up by temperature changes; and (4) the retention of good bonding properties so that adhesion of the paint film will be maintained, not only initially but for a maximum period of time.

Red lead, used either as a single pigment or combined with other paint pigments, possesses properties which enable it to fulfil the requirements of each one of these specifications. It ranks high as an inhibitor pigment and it also imparts additional qualities to a paint which promote adhesion, toughness, and elasticity in the paint film. In fact, red lead's durability and long service under difficult conditions has become a generally accepted standard of performance for metal protective paints the world over.

Red Lead – An Inhibitor Pigment

Authorities agree that, for the priming coat or coats, a paint should be rust inhibitive if it is to give satisfactory performance.

There have been many tests conducted, both in the field and in the laboratory, to show very definitely and conclusively that red lead is an inhibitive pigment and its presence, therefore, imparts important protective qualities to a paint for metal.

Two members of the Bell Telephone Laboratories, H. E. Haring and R. B. Gibney, have conducted a series of laboratory experiments which seem to confirm this theory of passivity and support their expressed belief that the action of red lead in the priming coat is essentially chemical.

Experiments conducted by K. G. Lewis* also show this inhibitive effect of red lead on metal surfaces. Lewis used the scratch-coat method in which he painted metal with red lead and linseed oil, and when the film was dry made a standard scratch through it exposing the bare metal. A drop of sodium chloride solution placed on this scratch and protected against evaporation caused no corrosion, rusting or softening of the paint film in the case of red lead.

The reasons for the creation of a passive state on red leaded metal surfaces is attributed by some to its basic or alkaline nature. This is on the theory that when steel is attacked, the iron goes into solution at the anodic areas, and the rate of solution is inversely proportional to the alkalinity of the medium in immediate contact with the metal.

It is further held by other authorities that corrosion is prevented if a protective layer of oxide is formed in direct contact with the metal surface. This takes place when the ferrous ions formed at the anodic areas are quickly oxidized to the ferric state. Certainly the presence of an active oxidizing agent, such as red lead, will promote the formation of this protective oxide shield and arrest the process of corrosion.

Red lead is doubly fortunate in that it possesses in such degree both of these chemical properties which authorities agree are responsible for preventing metal corrosion. As has been stated by Dr. Ulick R. Evans,** of Cambridge (England) University, "An inhibitive pigment should be included in the lowest (priming) coat of paint so as to keep the metal passive . . . "

Red Lead Soaps — Their Effect on the Paint Film

When red lead is mixed with most of the paint vehicles in common use, some organic compounds of lead are formed. This reaction has been demonstrated by many independent investigators and is now a generally accepted fact.

K. G. Lewis and U. R. Evans, Journal Soc. Chem. Ind. 1934.

U. R. Evans, Metallic Corrosion Passivity and Protection (Edward Arnold & Co.) 1937, p. 594.

The products of this phenomenon are commonly referred to as lead "soaps" and there has been a great deal of experimentation and research relating to both the formation of these metallic soaps and their effect upon the life and character of the paint film.

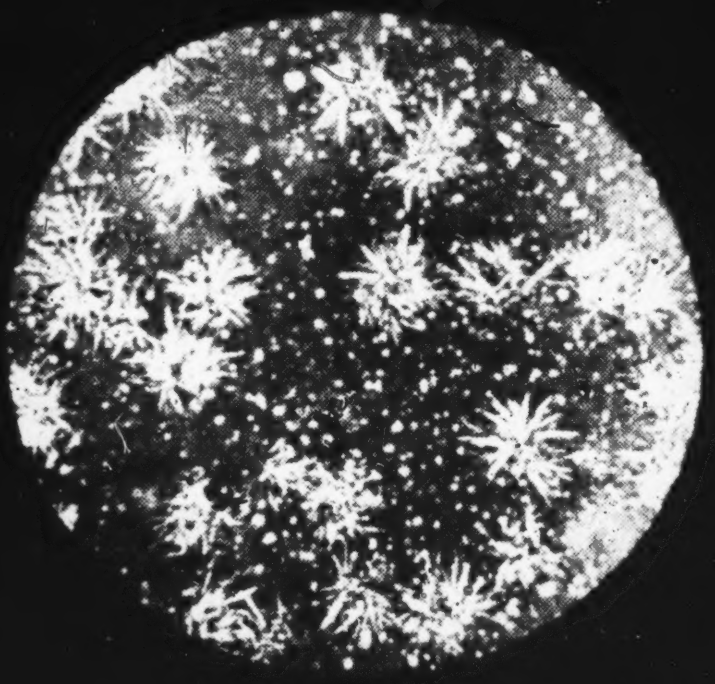


FIGURE 2

Lead soap formations in the early stages of their particle growth.

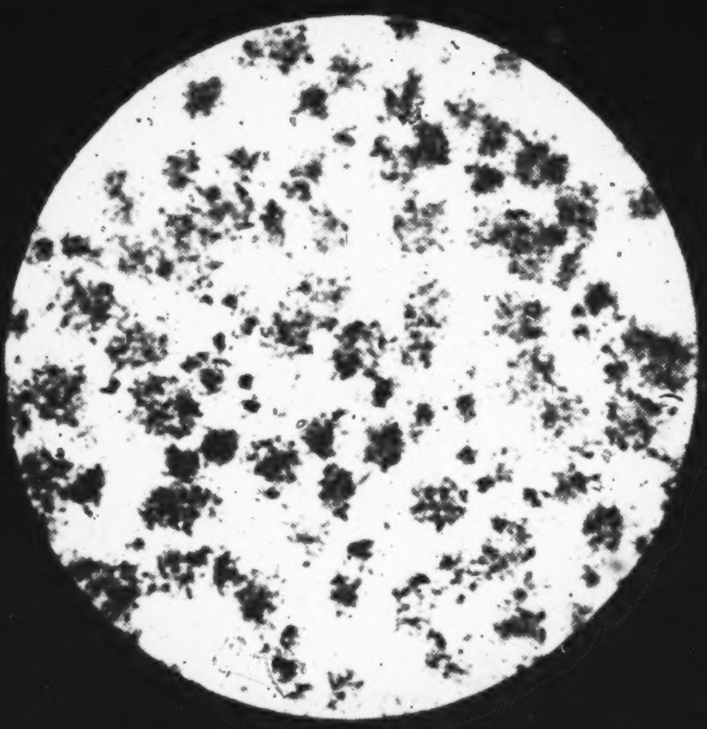


FIGURE 3

This photo, taken under polarized light, more clearly shows the character of lead soaps. Note particularly the fibrous structure.

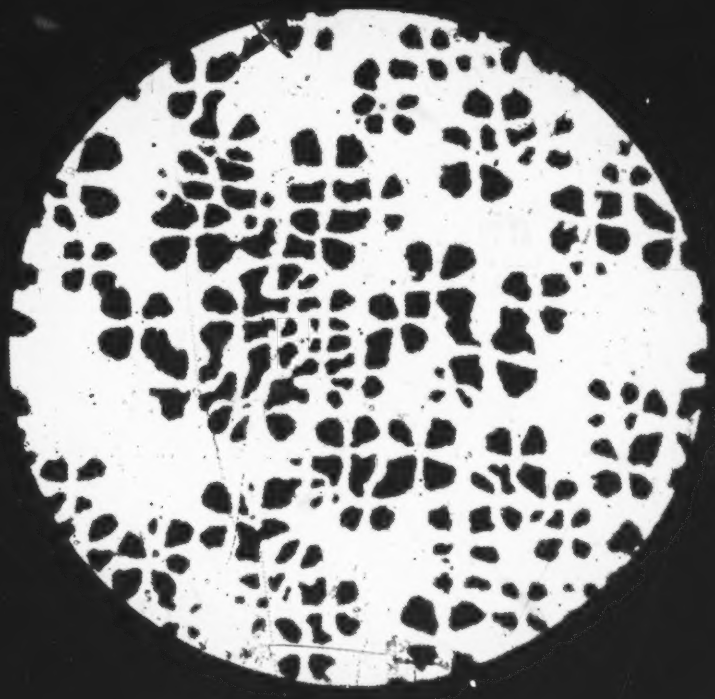


FIGURE 4

An example of a soap produced with another basic pigment. Note the solid, crystalline-like structure of this soap in contrast to the fibrous and rod-like lead soaps.

Not all paint pigments are capable of forming metallic soaps but lead pigments form them readily. The lead soaps are also distinctive in their form and in their effect.

In general, lead soaps form as a series of projections radiating out from a central core. This is shown in the photomicrographs, Figures 2 and 3. There are other metallic soaps that are more solid and crystalline and lack the elasticity and integral strength of the fiber-like spherulites in the lead paints. Such an example is shown in Figure 4.

Furthermore, it has been shown that the development of soap formations continues in the red lead paint film after the surface coating has dried. This continuous growth has even been photographed in a motion picture. Of course, the growth of soap crystals is a slow process and a picture which takes but a few seconds to show on the screen must be made over a period of many weeks.

Lead Soaps Contribute to Impermeability of Paint Film

The formation and presence of lead soap compounds in a paint film is not merely a chemical curiosity. The reaction has a very definite practical effect on the life and performance of the paint.

The composition of the soaps gives a clue to one of the reasons that red lead is an efficient guard against such corrosive factors as air and moisture. Among the products formed with linseed oil are lead linoleate, lead stearate, complex compounds of lead monoxide (litharge) with triglycerides, and basic lead soaps. All of these are highly water-resistant and unquestionably contribute to low moisture permeability. Confirmation of this is contained in a paper* by Manfred Ragg, a German investigator. He characterizes paint films containing red lead "as brick walls, built of comparatively large, impermeable bricks which are bound together with a water-tight mortar." Further evidence is contributed by a moisture permeability test quoted by Burns and Schuh.** The red lead paint film outranked all other pigments tested, fifteen in all, in resistance to moisture passage through the coating.

Add Toughness and Elasticity

Examination of the shape and character of lead soaps shows that they contribute also to the toughness and elasticity of the paint film.

It is very evident from a photomicrograph (See Figure 5) how the particles intertwine and mechanically reinforce the paint film. This type of particle growth is somewhat analogous to fibers in cloth. Individually the cloth fibers have little strength but once they are woven together their mechanical strength is increased many thousand times.

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*Transactions, The Electrochemical Society, 1933

**Burns & Schuh, Protective Coatings for Metals (Reinhold Publishing Corp.) 1939, p. 323

It is also a characteristic of lead soaps that they allow movement all along the projecting fingers. This is very beneficial to the life of the paint, as once the elastic limit of both the dried oil film and the soap particles is exceeded, the soap particles will give in this manner. This action effectively prevents the ruptures to which a hard, unyielding paint film is subject.

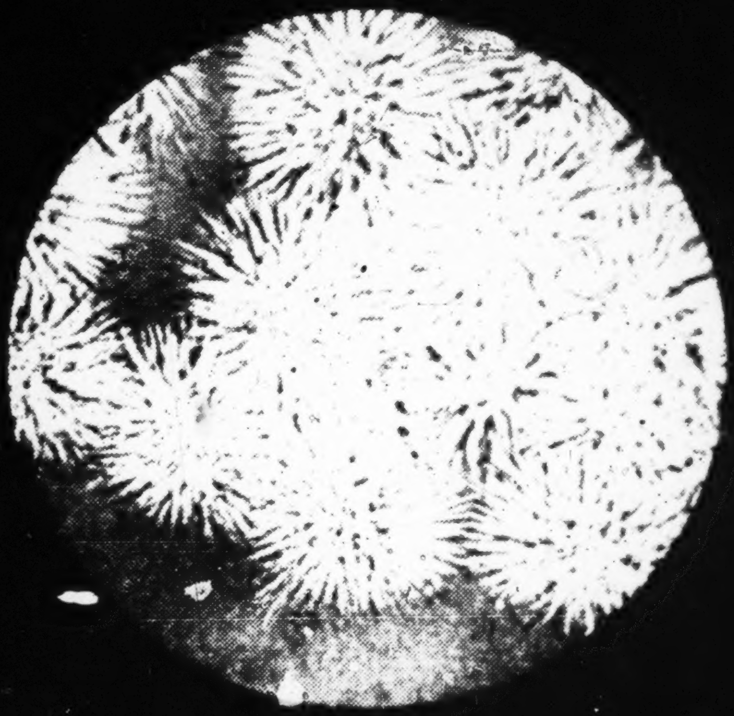


FIGURE 5

This photograph of more fully developed lead soap formations clearly indicates the mechanical reinforcement they give to the paint film.

Adhesion

Those who have carefully studied lead soap formations and their chemical components also believe that they are in great part responsible for the unique adhesiveness of red lead paint.

Of course, the inhibitive action of red lead also contributes to the tight bond between metal and paint. The fact that red lead has the ability to render the metal passive prevents rusting under the paint film which might expand and break the bond between the paint and the metal surface.

Durability of Red Lead

The wide acceptance of red lead as a protective pigment for metal rests on a sure foundation, namely, actual performance in service under all conditions plus numerous tests that have been conducted in all parts of the world.

Among the more important of these tests is the one conducted by a joint committee of The British Iron and Steel Federation and The Iron and Steel Institute

One of the more recent tests of red lead's inhibitiveness is reported by A. H. Stuart.* As a part of his testing, Dr. Stuart wanted to determine whether the red lead itself was responsible for rust inhibition. To do this he immersed a steel rod in a thin paste of red lead and water for one hour. The rod was then removed, thoroughly washed to remove all pigment, and tested along with an untreated rod. The treated rod, although all trace of red lead had been removed, showed decidedly greater resistance to rusting, as measured electrically, than did the untreated rod. Also the protective action, while it steadily diminished, had not entirely disappeared after forty hours. This is shown graphically in Figure 1.

Dr. Stuart's interpretation of this result is that red lead forms a thin film of oxide on the metal surface, thus creating a passive state. His conclusion, after this and other tests, is that red lead definitely maintains a passive state on a metal surface subject to rusting and that therefore "the faith in red lead as a primer rests on sure foundations."

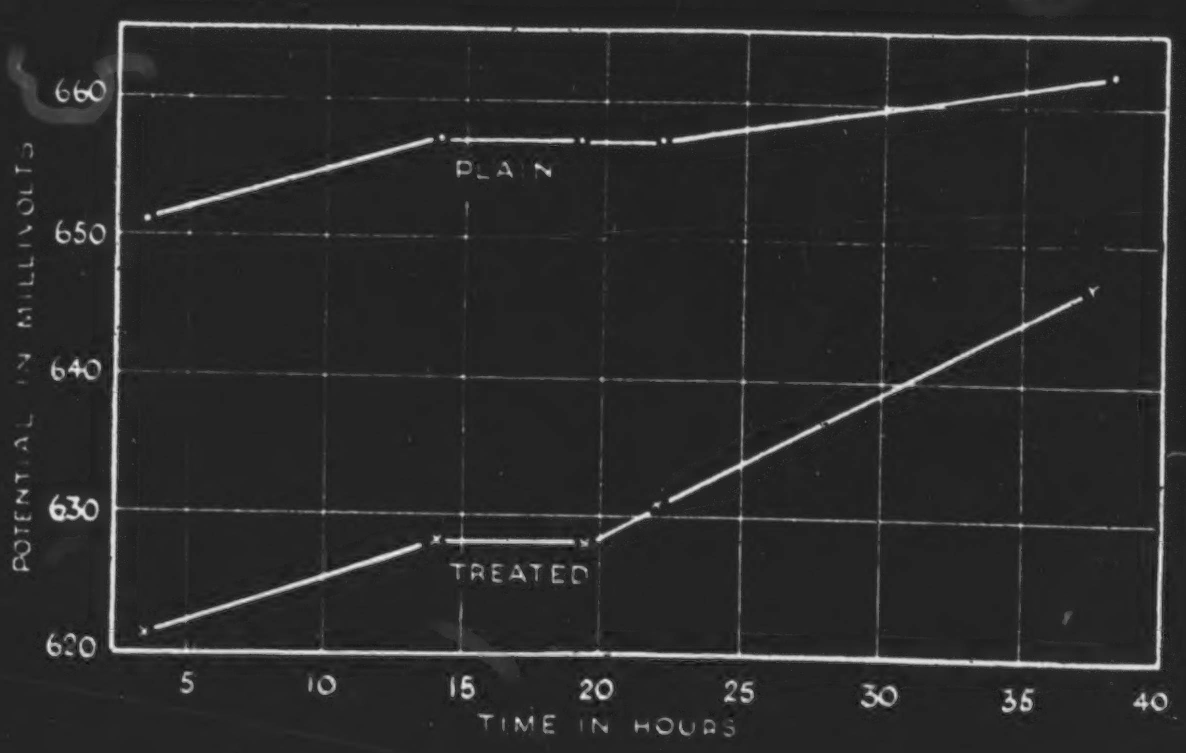
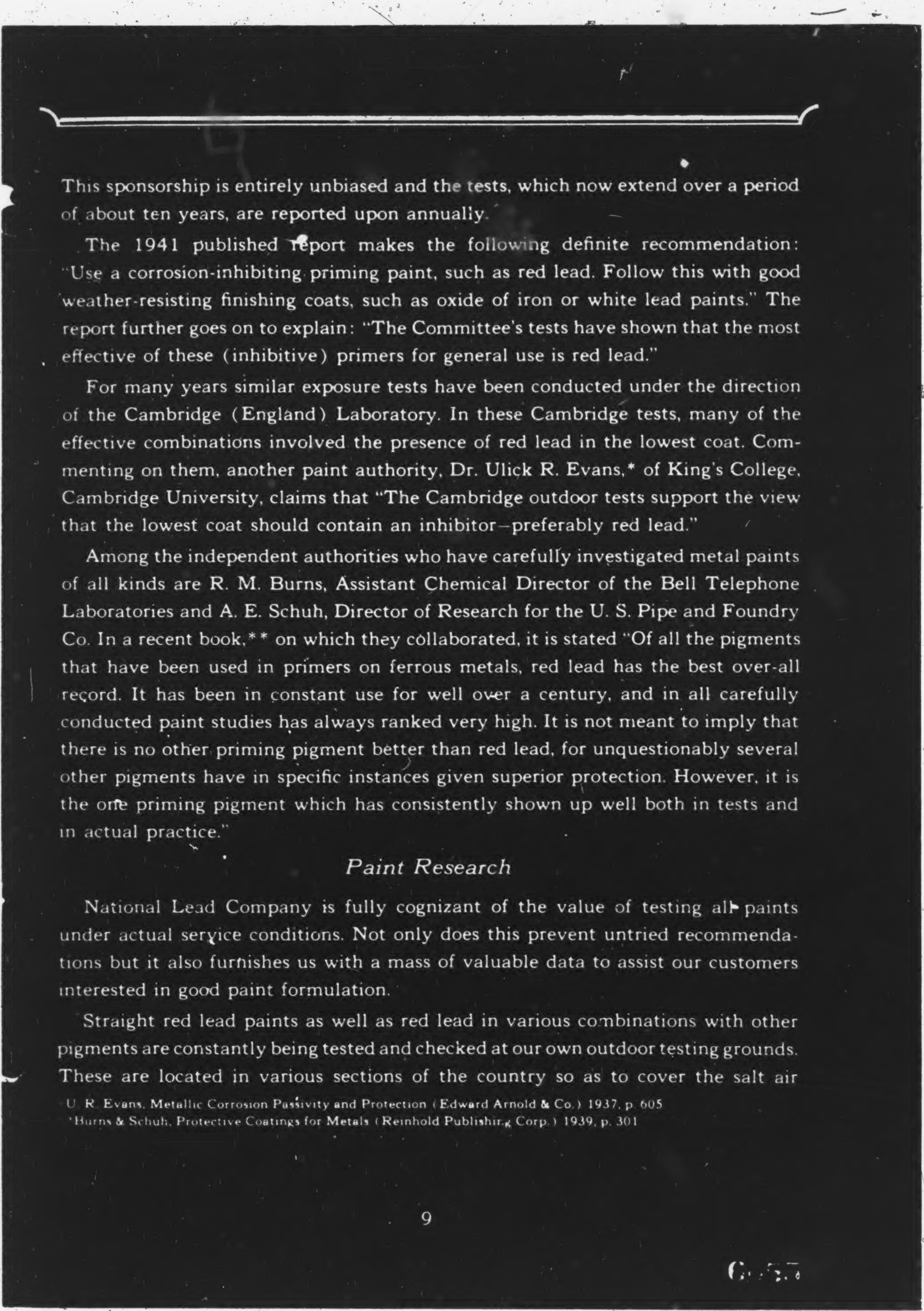


FIGURE 1

Graph showing results of test by A. H. Stuart. In the electrical potential measurement method which he used, a lower point on the scale indicates a less anodic condition of the metal and therefore greater resistance to rusting. It will be noticed that the treated rod was definitely less anodic than the untreated one. Also, while the protective action slowly diminished it was still present at the end of the test period.

January 1939 issue of Paint Manufacture



This sponsorship is entirely unbiased and the tests, which now extend over a period of about ten years, are reported upon annually.

The 1941 published report makes the following definite recommendation: "Use a corrosion-inhibiting priming paint, such as red lead. Follow this with good weather-resisting finishing coats, such as oxide of iron or white lead paints." The report further goes on to explain: "The Committee's tests have shown that the most effective of these (inhibitive) primers for general use is red lead."

For many years similar exposure tests have been conducted under the direction of the Cambridge (England) Laboratory. In these Cambridge tests, many of the effective combinations involved the presence of red lead in the lowest coat. Commenting on them, another paint authority, Dr. Ulick R. Evans,* of King's College, Cambridge University, claims that "The Cambridge outdoor tests support the view that the lowest coat should contain an inhibitor—preferably red lead."

Among the independent authorities who have carefully investigated metal paints of all kinds are R. M. Burns, Assistant Chemical Director of the Bell Telephone Laboratories and A. E. Schuh, Director of Research for the U. S. Pipe and Foundry Co. In a recent book,** on which they collaborated, it is stated "Of all the pigments that have been used in primers on ferrous metals, red lead has the best over-all record. It has been in constant use for well over a century, and in all carefully conducted paint studies has always ranked very high. It is not meant to imply that there is no other priming pigment better than red lead, for unquestionably several other pigments have in specific instances given superior protection. However, it is the one priming pigment which has consistently shown up well both in tests and in actual practice."

Paint Research

National Lead Company is fully cognizant of the value of testing all paints under actual service conditions. Not only does this prevent untried recommendations but it also furnishes us with a mass of valuable data to assist our customers interested in good paint formulation.

Straight red lead paints as well as red lead in various combinations with other pigments are constantly being tested and checked at our own outdoor testing grounds. These are located in various sections of the country so as to cover the salt air

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*U. R. Evans, Metallic Corrosion Passivity and Protection (Edward Arnold & Co.) 1937, p. 605

**Burns & Schuh, Protective Coatings for Metals (Reinhold Publishing Corp.) 1939, p. 301

[illegible]

exposure of the coasts, the industrial atmosphere around large cities and the relatively pure air of rural locations. They include also marine tests of various types such as exposure to salt water, tidal waters and river water, both clear and industrially polluted. Climatic differences are likewise taken into account, the test locations ranging from Long Island to Florida, from the east coast to the west.

Information gathered at these various test stations is continually being drawn upon for the benefit of those who seek help in solving some difficult exposure problem or who wish to formulate paints to meet special requirements.

Red Lead with Other Pigments

There have been many tests as well as innumerable practical examples to show that the full value of red lead as a protective against rust is realized in straight red lead paints. However, there is also a growing volume of evidence that the strong inhibitive character of red lead and the ability to form useful lead soap compounds increase the protection and length of life of a multi-pigment paint when red lead is included as one of the important components of the pigment phase.

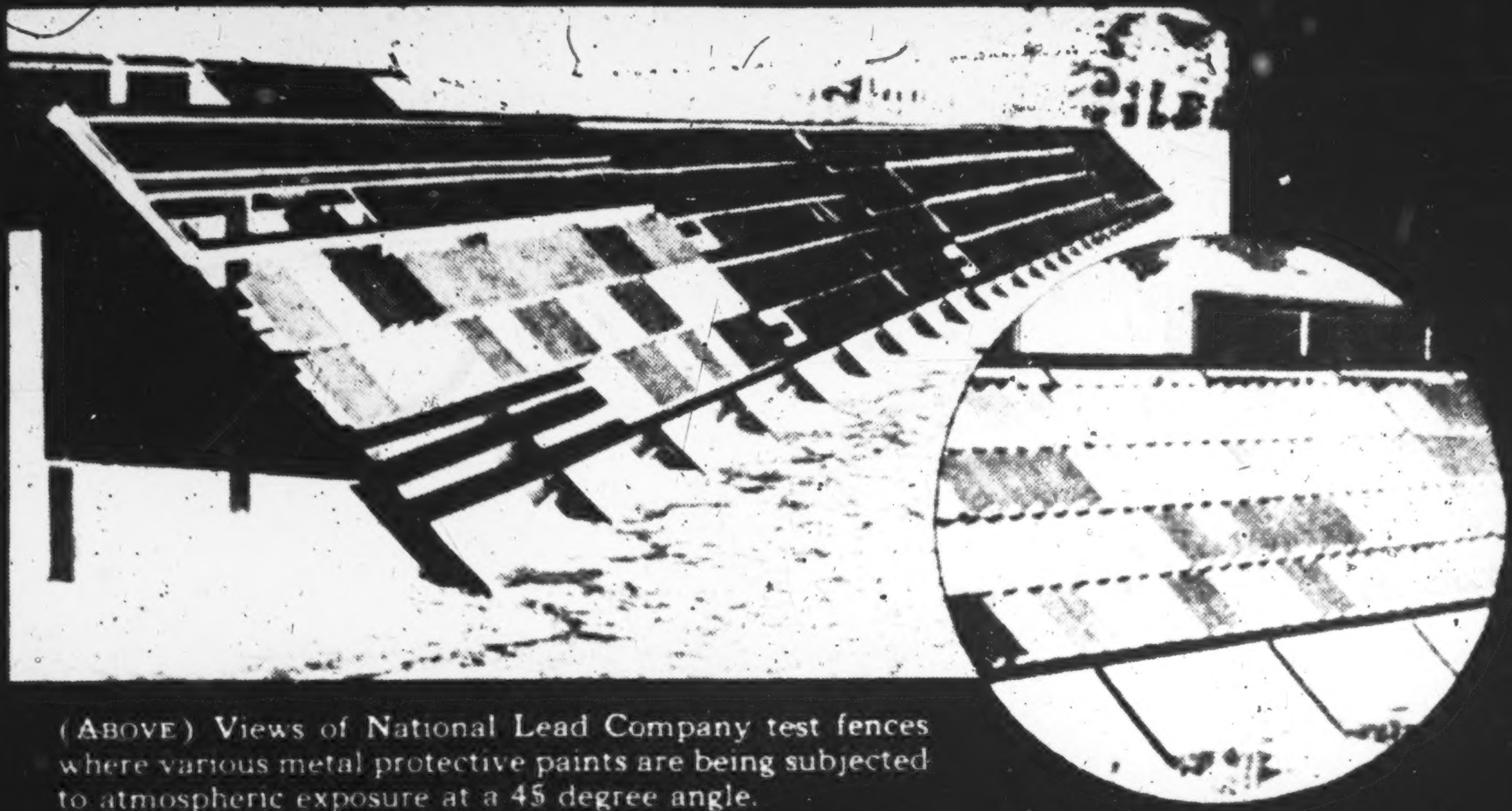
Chapter III contains several formulations from established specifications—Federal, state and commercial—which call for red lead either as a single pigment or combined in various percentages with other pigments. This is an excellent indication of the general acceptance of red lead for the desirable properties that it provides in metal priming paints.

Vehicle Compatibility

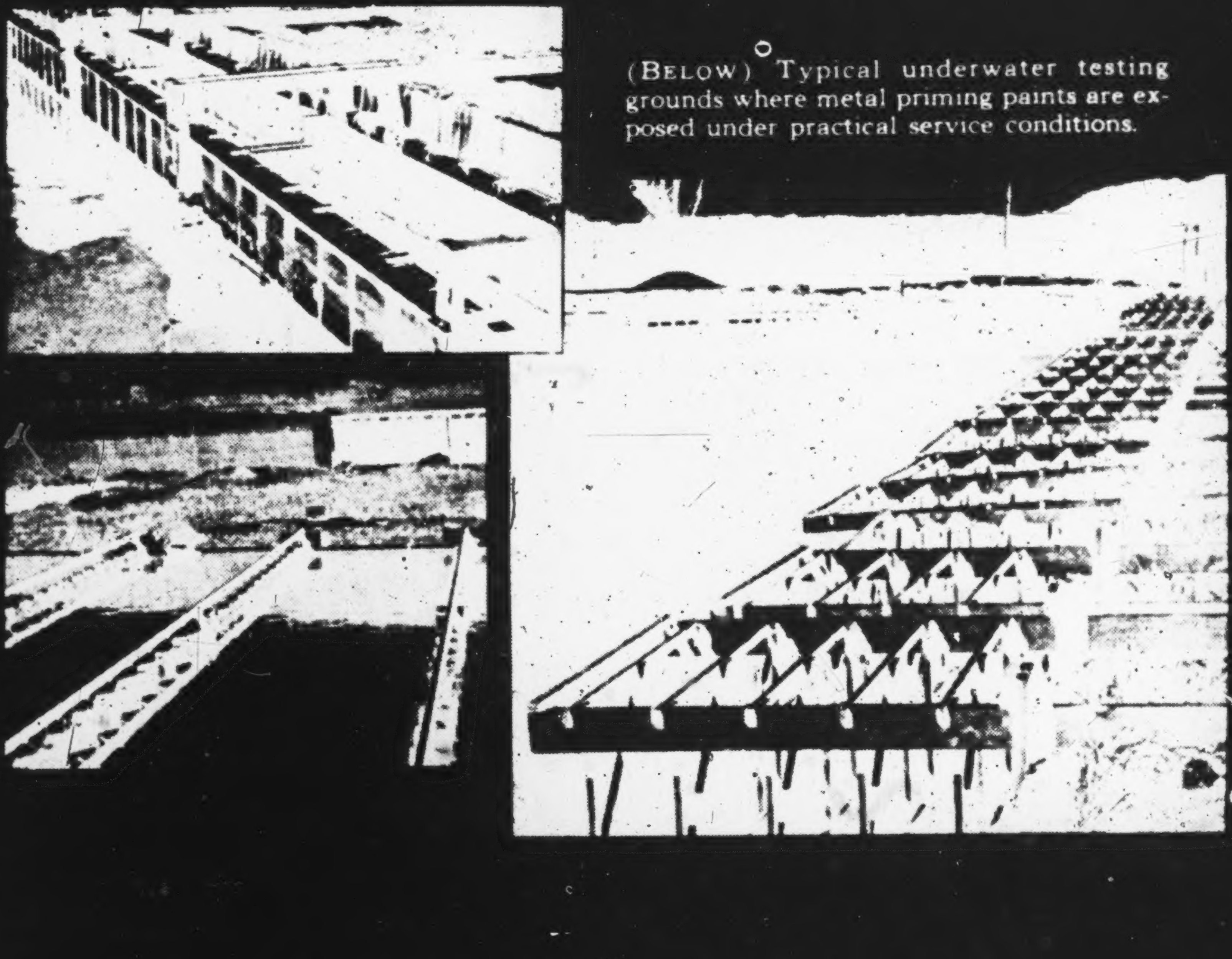
The formulation of certain types of paints involves the use of vehicles other than linseed oil. In this respect, although essentially basic, red lead is compatible with practically all types of vehicles commonly used in metal priming paints. For example, varnishes made with alkyd resins, phenolic resins, and modifications of these, as well as various other resins, chlorinated rubber, and different heat treated drying oils, have been successfully used with red lead. Some of the formulas given in Chapter III include a few of the paint vehicles that are specified.

Of course, the choice of vehicle usually depends upon the type of service or exposure for which the paint is intended. Along this line we have compiled data to assist in the formulation of various vehicles with red lead to accomplish specific results. This information is available upon request.

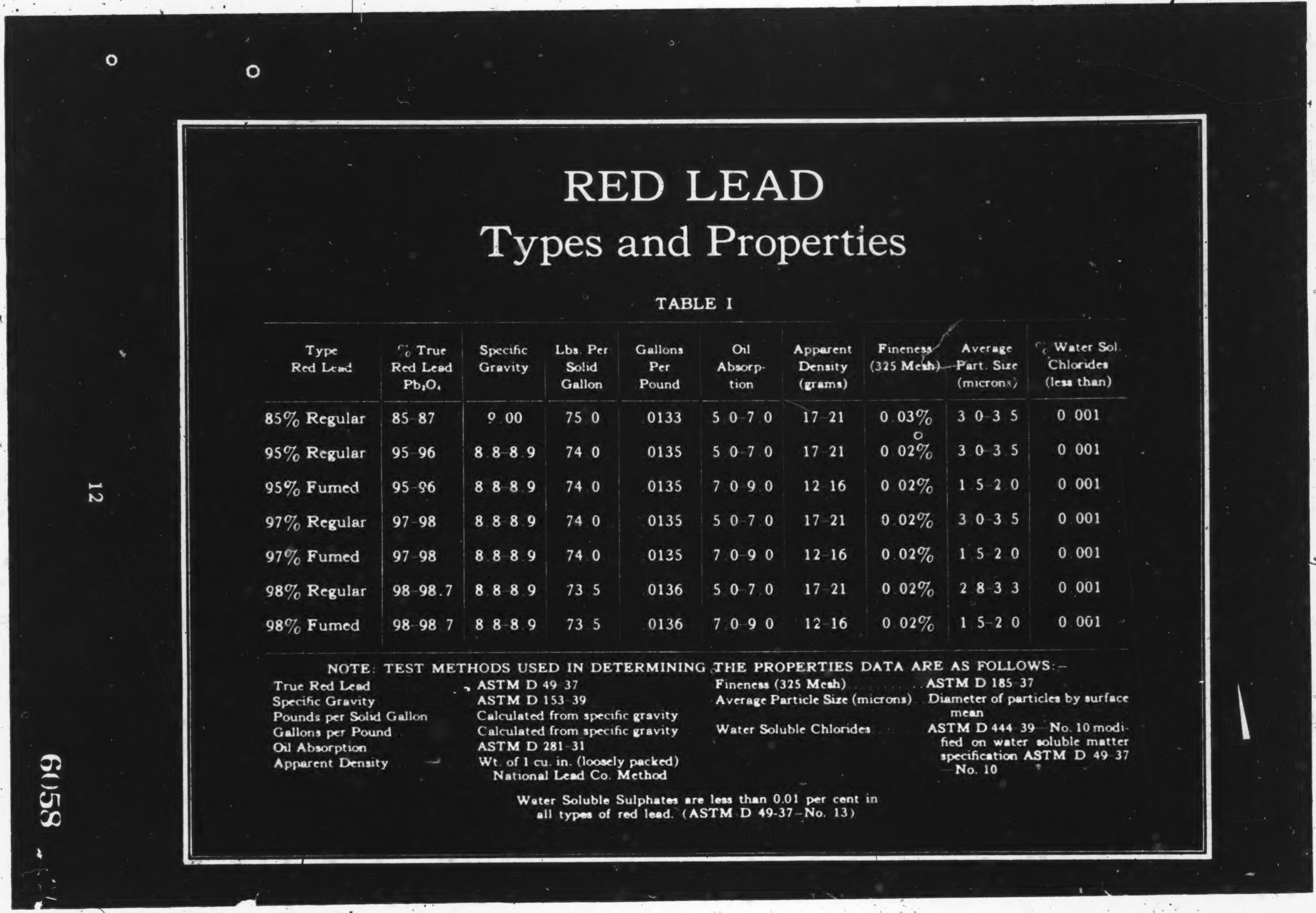
Respondent's Exhibit No. 189.



(ABOVE) Views of National Lead Company test fences where various metal protective paints are being subjected to atmospheric exposure at a 45 degree angle.



(BELOW) Typical underwater testing grounds where metal priming paints are exposed under practical service conditions.



RED LEAD
Types and Properties

TABLE I

Type Red Lead	% True Red Lead Pb_3O_4	Specific Gravity	Lbs. Per Solid Gallon	Gallons Per Pound	Oil Absorption	Apparent Density (grams)	Fineness (325 Mesh)	Average Part. Size (microns)	% Water Sol. Chlorides (less than)
85% Regular	85-87	9.00	75.0	.0133	5.0-7.0	17-21	0.03%	3.0-3.5	0.001
95% Regular	95-96	8.8-8.9	74.0	.0135	5.0-7.0	17-21	0.02%	3.0-3.5	0.001
95% Fumed	95-96	8.8-8.9	74.0	.0135	7.0-9.0	12-16	0.02%	1.5-2.0	0.001
97% Regular	97-98	8.8-8.9	74.0	.0135	5.0-7.0	17-21	0.02%	3.0-3.5	0.001
97% Fumed	97-98	8.8-8.9	74.0	.0135	7.0-9.0	12-16	0.02%	1.5-2.0	0.001
98% Regular	98-98.7	8.8-8.9	73.5	.0136	5.0-7.0	17-21	0.02%	2.8-3.3	0.001
98% Fumed	98-98.7	8.8-8.9	73.5	.0136	7.0-9.0	12-16	0.02%	1.5-2.0	0.001

NOTE: TEST METHODS USED IN DETERMINING THE PROPERTIES DATA ARE AS FOLLOWS:—

True Red Lead	ASTM D 49-37
Specific Gravity	ASTM D 153-39
Pounds per Solid Gallon	Calculated from specific gravity
Gallons per Pound	Calculated from specific gravity
Oil Absorption	ASTM D 281-31
Apparent Density	Wt. of 1 cu. in. (loosely packed) National Lead Co. Method
Fineness (325 Mesh)	ASTM D 185-37
Average Particle Size (microns)	Diameter of particles by surface mean
Water Soluble Chlorides	ASTM D 444-39—No. 10 modified on water soluble matter specification ASTM D 49-37—No. 10

Water Soluble Sulphates are less than 0.01 per cent in all types of red lead. (ASTM D 49-37—No. 13)

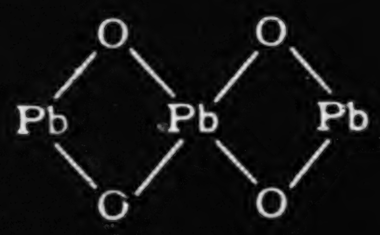
Red Lead
Types & Properties

CHAPTER II

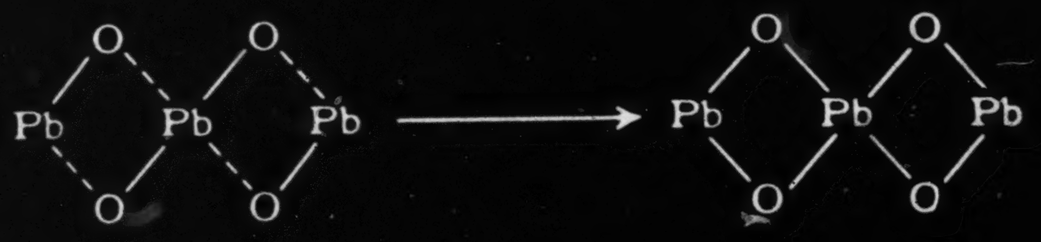
RED LEAD

Composition – Manufacture – Grades

PURE red lead is an oxide of lead, expressed by the chemical formula Pb_3O_4, and is the lead salt of ortho plumbic acid (plumbous ortho plumbate). This is the structural formula:



which is derived from the reaction:



$$PbO + PbO_2 + PbO \longrightarrow Pb_3O_4$$

Processes Involved

While the chemical reactions remain exactly the same as explained above there are two distinct processes generally employed for making red lead. In the more widely used method the metallic lead is heated in a furnace until converted to litharge. In the other process molten metallic lead is "atomized" by forcing it with compressed air into the center of a gas flame. This immediately converts it into litharge as a fume which is collected in filter bags. Of course, in each case a furnace is used to convert the litharge to red lead.

There is no difference in the chemical composition or the specific gravity of the two red leads. Comparative properties of the two types and their various grades are listed in Table I on page 12 of this booklet.

Number of Grades

The usual commercial red lead used by the paint industry is of four variations designated as the 85%, 95%, 97% and 98% grades. This refers to the minimum true red lead (Pb O) content. The remainder is practically all litharge (PbO) since pure commercial red lead contains only a fraction of one per cent of other materials.

It is generally accepted that some litharge content is a desirable factor in red lead paint performance. This is probably due to its basic nature as well as its ability to form relatively insoluble lead soaps.

Red lead with a litharge content of as high as 15% is employed by some because it combines quickly with the vehicle due to the increased reactivity. The film obtained with such a paint also acquires "through" hardness more rapidly than one made with red lead with a higher Pb O content. Because the 85% grade red lead combines with the vehicle faster, the paint should be applied the same day as mixed. In fact, such paints are generally mixed by adding the dry pigment to the vehicle on the job.

The 95%, 97% and 98% red leads make paint with good storage properties and for this reason are used almost exclusively for ready-mixed red lead paints. The 95% is generally used in mixed pigment paints and the higher percentages are preferred for straight red lead paints.

CHAPTER III

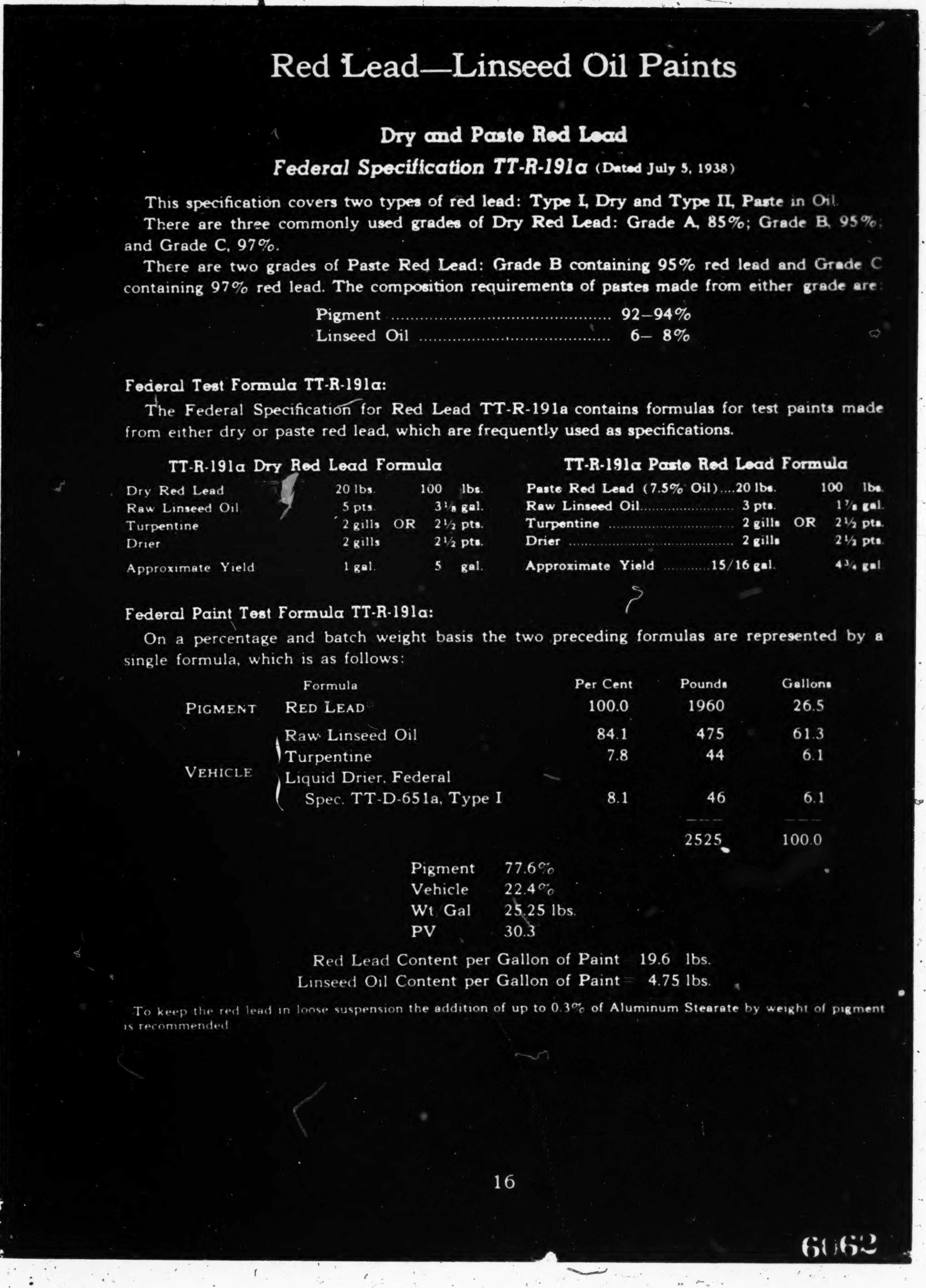
Formulas and Specifications

RED lead is a part of most Federal Specifications for metal priming paints. It is also included in the Highway Department Specifications of all of the forty-eight states as well as in numerous railway and municipal recommendations. A typical selection has been made from these to include with the formulations in this booklet as a helpful reference. Paints produced in our laboratory according to the suggested formulas fully met our standards of quality and performance and also the requirements of the particular specifications indicated.

It is well recognized that the drawing up of a paint specification is dependent upon such factors as cost, drying time, availability of materials, conditions of exposure, pigment and vehicle compatibility and others. In consequence, it is impossible to set down hard and fast rules. This is why we include this chapter only as a suggestion of what has been done and what can be done with red lead as part of the formulation.

We have much data available from long experience with the paint makers' and users' problems. For those with specific requirements we recommend that they utilize the facilities of the National Lead Company Research Laboratories through one of the branch offices listed in this booklet.

Respondent's Exhibit No. 189.



Red Lead—Linseed Oil Paints

Dry and Paste Red Lead

Federal Specification TT-R-191a (Dated July 5, 1938)

This specification covers two types of red lead: Type I, Dry and Type II, Paste in Oil.

There are three commonly used grades of Dry Red Lead: Grade A, 85%; Grade B, 95%; and Grade C, 97%.

There are two grades of Paste Red Lead: Grade B containing 95% red lead and Grade C containing 97% red lead. The composition requirements of pastes made from either grade are:

Pigment	92–94%
Linseed Oil	6– 8%

Federal Test Formula TT-R-191a:

The Federal Specification for Red Lead TT-R-191a contains formulas for test paints made from either dry or paste red lead, which are frequently used as specifications.

TT-R-191a Dry Red Lead Formula

Dry Red Lead	20 lbs.		100 lbs.
Raw Linseed Oil	5 pts.		3⅛ gal.
Turpentine	2 gills	OR	2½ pts.
Drier	2 gills		2½ pts.
Approximate Yield	1 gal.		5 gal.

TT-R-191a Paste Red Lead Formula

Paste Red Lead (7.5% Oil)	20 lbs.		100 lbs.
Raw Linseed Oil	3 pts.		1⅞ gal.
Turpentine	2 gills	OR	2½ pts.
Drier	2 gills		2½ pts.
Approximate Yield	15/16 gal.		4¾ gal.

Federal Paint Test Formula TT-R-191a:

On a percentage and batch weight basis the two preceding formulas are represented by a single formula, which is as follows:

	Formula	Per Cent	Pounds	Gallons
PIGMENT	RED LEAD	100.0	1960	26.5
VEHICLE	Raw Linseed Oil	84.1	475	61.3
	Turpentine	7.8	44	6.1
	Liquid Drier, Federal Spec. TT-D-651a, Type I	8.1	46	6.1
			2525	100.0

Pigment	77.6%
Vehicle	22.4%
Wt Gal	25.25 lbs.
PV	30.3

Red Lead Content per Gallon of Paint 19.6 lbs.

Linseed Oil Content per Gallon of Paint = 4.75 lbs.

To keep the red lead in loose suspension the addition of up to 0.3% of Aluminum Stearate by weight of pigment is recommended.

Red Lead Base: Linseed Oil, Ready-Mixed Paint

Federal Specification TT-P-86 (Dated September 9, 1939)

	Formula	Per Cent	Pounds	Gallons
PIGMENT	RED LEAD, 97% grade*	100.0	1957	26.4
VEHICLE	Raw Linseed Oil	94.3	536	69.1
	Petroleum Spirits and Drier†	5.7	32	4.5
			2525	100.0

Pigment	77.5%
Vehicle	22.5%
Wt. Gal.	25.25 lbs. (25.0 lbs. Specified Minimum)
PV	27.6

Red Lead Content per Gallon of Paint	19.5 lbs.
Linseed Oil Content per Gallon of Paint	5.3 lbs.

TT-P-86 Dry Red Lead Mixing Formula

Dry Red Lead (97% grade)	100	lbs.
Raw Linseed Oil	3½	gals.
Turpentine or Petroleum Spirits	1	pt.
Liquid Drier (TT-D-651a, Type I)	1	pt.
Approximate Yield	4⅛	gals.

TT-P-86 Paste Red Lead Mixing Formula

Paste Red Lead (7.5% Oil)	100	lbs.
Raw Linseed Oil	2½	gals.
Turpentine or Petroleum Spirits	1	pt.
Liquid Drier (TT-D-651a, Type I)	1	pt.
Approximate Yield	4¾	gals.

*To keep the red lead in loose suspension the addition of up to 0.3% of Aluminum Stearate by weight of pigment is recommended.

†Drier: 0.3% Lead, 0.02% Manganese and 0.01% Cobalt based on oil content.

Red Lead Base: Linseed Oil, Ready-Mixed Paint

Federal Specification TT-P-86, Amendment No. 1 (Dated September 1, 1943)

	Formula	Per Cent	Pounds	Gallons
PIGMENT	RED LEAD, 97% grade	99.7	1876.0	25.4
	Aluminum Stearate	0.3	5.6	.6
VEHICLE	Linseed Replacement Oil	100.0	544.0	74.0
			2425.6	100.0

Pigment	77.6%
Vehicle	22.4%
Wt. Gal.	24.25 lbs. (24.0 lbs. Specified Minimum)
PV	36.5

Red Lead Content per Gallon of Paint	18.8 lbs.
Linseed Oil Content per Gallon of Paint	3.6 lbs.
	3.75 lbs. (Maximum)

Per Cent Volatile in Vehicle 35.0

Consistency at 25°C. ± 0.25°, 175 grams (77 K.U.) to 300 grams (95 K.U.)
Stormer Viscosimeter (Paddle Type Rotor)

TT-P-86, Amendment No. 1, Dry Red Lead Mixing Formula:

Dry Red Lead (97% grade)	100	lbs.
Linseed Replacement Oil (TT-O-371)	4	gals.
Approximate Yield	5⅜	gals.

TT-P-86, Amendment No. 1, Paste Red Lead Mixing Formula:

Paste Red Lead (7.5% Oil)	100	lbs.
Linseed Replacement Oil (TT-O-371)	2 to 2⅜	gals.
Turpentine or Petroleum Spirits	2 to 3	pts.
Yield	4½ to 5	gals.

*The specification states that good results have been obtained with a vehicle containing 39% raw or alkali refined linseed oil, 26% pale heat bodied linseed oil (Z2), and 35% thinner and drier. To avoid afterbodying with basic pigments, manufacturers are cautioned to use linseed replacement oil having a low acid value (not over 8 based on total solids) and that the bodied linseed oil used should be one processed at low temperature. The complete extracted vehicle should meet the requirements of Federal Specification TT-O-371, Type I, dated May 1, 1943. Linseed Replacement Oil, except that the requirements for appearance, color and viscosity shall be waived.

Red Lead, Ready-Mixed Paint

American Association of State Highway Officials' Specification M72-42 (Dated 1942)

	Formula	Per Cent	Pounds	Gallons
PIGMENT	DRY RED LEAD, 95% grade	100	1962	26.6
VEHICLE	Mixture of Raw (M125-42) and Boiled (M126-42) Linseed Oils*	100	569	73.4
			2531	100.0

Pigment	77.5% (77-80% Specified)		
Vehicle	22.5%	Red Lead Content per Gallon of Paint =	19.6 lbs.
Wt Gal	25.3 lbs	Linseed Oil Content per Gallon of Paint =	5.69 lbs.
PV	26.5		

*Specification states Boiled Linseed Oil may constitute up to 50% of total Oil Content

Red Lead (Dry and Paste in Oil) and Paint Made Therefrom

American Association of State Highway Officials' Specification M71-42 (Dated 1942)

Paint made according to the mixing formulas given previously under Federal Specification TT-R-191a (Test Formulas) will meet the requirements of this specification.

Note: The raw linseed oil called for may be replaced with boiled linseed oil to the extent of 50 per cent of the total oil content.

Red Lead-Linseed Oil Paint for Structural Metal—Heavy Weight

	Formula	Per Cent	Pounds	Gallons
PIGMENT	DRY RED LEAD, 97% grade	100.0	2281.0	30.8
VEHICLE	Raw Linseed Oil	94.8	507.0	65.4
	Thinner and Drier*	5.2	28.0	3.8
			2816.0	100.0

Pigment	81.0%		
Vehicle	19.0%	Dry Red Lead Content per Gallon of Paint	22.8 lbs.
Wt Gal	28.1 lbs.	Linseed Oil Content per Gallon of Paint	5.06 lbs.
PV	32.0		

0.3% Lead, 0.02% Manganese and 0.01% Cobalt based on oil content

Red Lead-Linseed Oil Paint—Light Weight

	Formula	Per Cent	Pounds	Gallons
PIGMENT	DRY RED LEAD, 97% grade, Fume Type	99.6	1384.0	18.7
	Aluminum Stearate	.4	5.5	.7
VEHICLE	Raw Linseed Oil	39.2	233.7	30.1
	Pale Heat Bodied Linseed Oil (Z2)	20.8	123.6	15.4
	Thinner and Drier	40.0	238.0	35.1
			1984.8	100.0

Pigment	70.0%		
Vehicle	30.0%	Dry Red Lead Content per Gallon of Paint	13.8 lbs.
Wt Gal	19.8 lbs.	Linseed Oil Content per Gallon of Paint	3.57 lbs.
PV	30.0		

0.3% Lead, 0.02% Manganese and 0.01% Cobalt based on oil content

Red Lead—Mixed Pigment—Linseed Oil Paints

Red Lead and Oil, Ready-Mixed Primer

U. S. Maritime Commission Specification No. 52MC20 (Dated April 12, 1943)

	Formula	Per Cent	Pounds	Gallons
PIGMENT	DRY RED LEAD, 97% grade	96.1	1826	24.7
	Magnesium Silicate, 52MC11, Type I	3.6	68	2.9
	Aluminum Stearate	.3	5	.6
VEHICLE	Raw Linseed Oil	95.2	535	69.0
	Petroleum Spirits and Drier*	4.8	27	4.0
	Approximate Yield			101.2

Pigment	77.2%
Vehicle	22.8%
Wt Gal	24.3 lbs.
PV	29

Linseed Oil Content per Gallon of Paint 5.3 lbs.
Consistency 68-78 KU

*Drier: 0.3% Lead, 0.02% Manganese and 0.01% Cobalt based on oil content.

Red Lead Paint (Extended)

*Southern Railway System Specification No. 48A** (Dated September 22, 1939)

	Formula	Per Cent	Pounds	Gallons
PIGMENT	RED LEAD, 95% Min. Pb O,	75	818	11.05
	Diatomaceous Silica	10	109	5.68
	Magnesium Silicate	15	163	6.85
VEHICLE	Raw Linseed Oil	82	468	60.39
	Thinner and Drier**	18	102	15.69
			1660	99.66

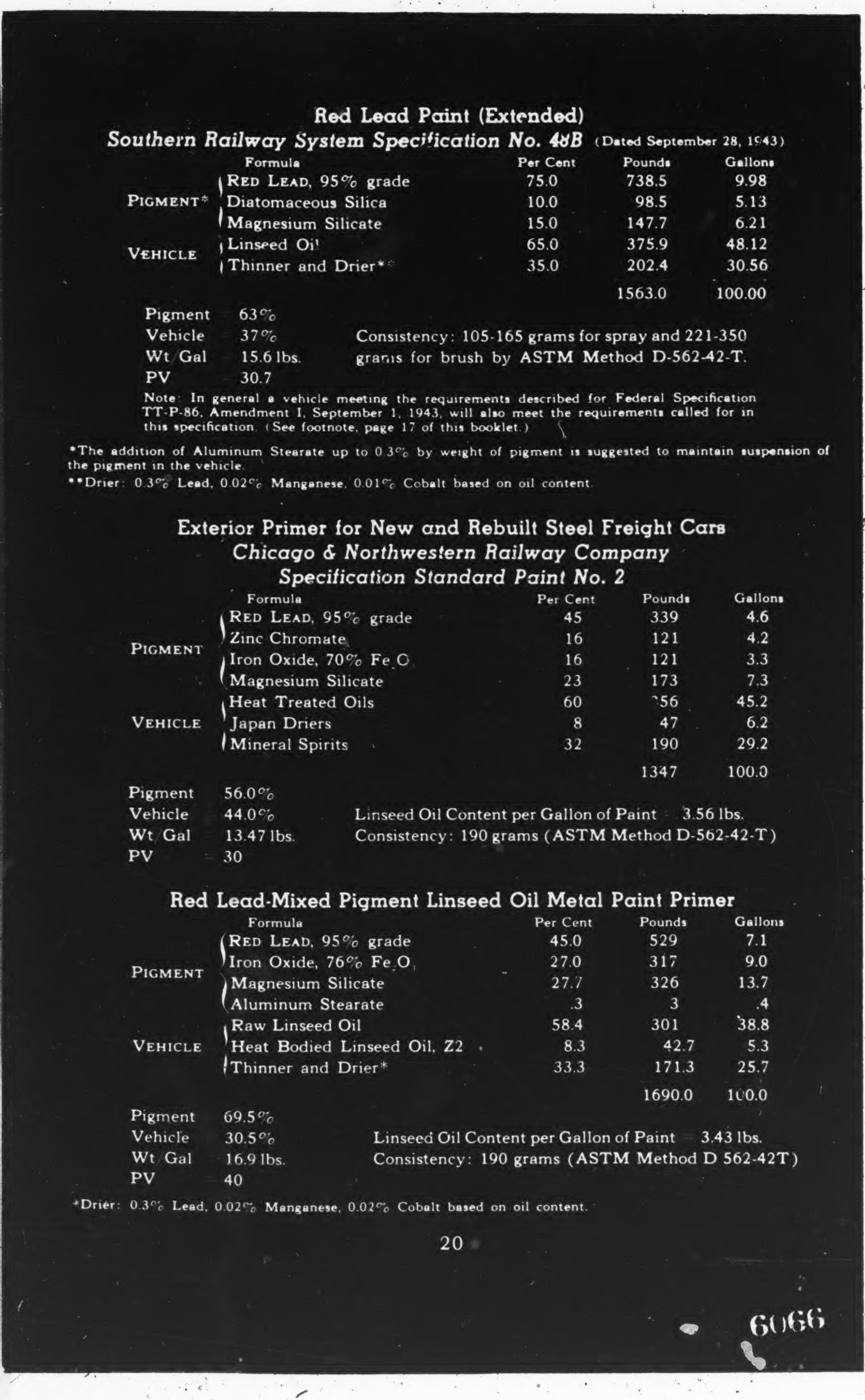
Pigment	65.6%
Vehicle	34.4%
Wt Gal	16.6 lbs.
PV	28.0

Linseed Oil Content per Gallon of Paint 4.68 lbs.

Consistency at 77° F, 60-75 KU for spray and 85-100 KU for brush (Stormer Viscosimeter—Fork Type)

*This specification is inactive for the duration. It has been replaced by Specification No. 48B (see page 20) which complies with War Production Board linseed oil limitation order M-332.

**Drier: 0.3% Lead, 0.02% Manganese and 0.01% Cobalt based on oil content.



Red Lead Paint (Extended)

Southern Railway System Specification No. 48B (Dated September 28, 1943)

	Formula	Per Cent	Pounds	Gallons
PIGMENT*	RED LEAD, 95% grade	75.0	738.5	9.98
	Diatomaceous Silica	10.0	98.5	5.13
	Magnesium Silicate	15.0	147.7	6.21
VEHICLE	Linseed Oil	65.0	375.9	48.12
	Thinner and Drier**	35.0	202.4	30.56
			1563.0	100.00

Pigment 63%
Vehicle 37%
Wt/Gal 15.6 lbs.
PV 30.7

Consistency: 105-165 grams for spray and 221-350 grams for brush by ASTM Method D-562-42-T.

Note: In general a vehicle meeting the requirements described for Federal Specification TT-P-86, Amendment I, September 1, 1943, will also meet the requirements called for in this specification. (See footnote, page 17 of this booklet.)

*The addition of Aluminum Stearate up to 0.3% by weight of pigment is suggested to maintain suspension of the pigment in the vehicle.

**Drier: 0.3% Lead, 0.02% Manganese, 0.01% Cobalt based on oil content.

Exterior Primer for New and Rebuilt Steel Freight Cars

Chicago & Northwestern Railway Company

Specification Standard Paint No. 2

	Formula	Per Cent	Pounds	Gallons
PIGMENT	RED LEAD, 95% grade	45	339	4.6
	Zinc Chromate	16	121	4.2
	Iron Oxide, 70% Fe O	16	121	3.3
	Magnesium Silicate	23	173	7.3
VEHICLE	Heat Treated Oils	60	356	45.2
	Japan Driers	8	47	6.2
	Mineral Spirits	32	190	29.2
			1347	100.0

Pigment 56.0%
Vehicle 44.0%
Wt/Gal 13.47 lbs.
PV 30

Linseed Oil Content per Gallon of Paint 3.56 lbs.
Consistency: 190 grams (ASTM Method D-562-42-T)

Red Lead-Mixed Pigment Linseed Oil Metal Paint Primer

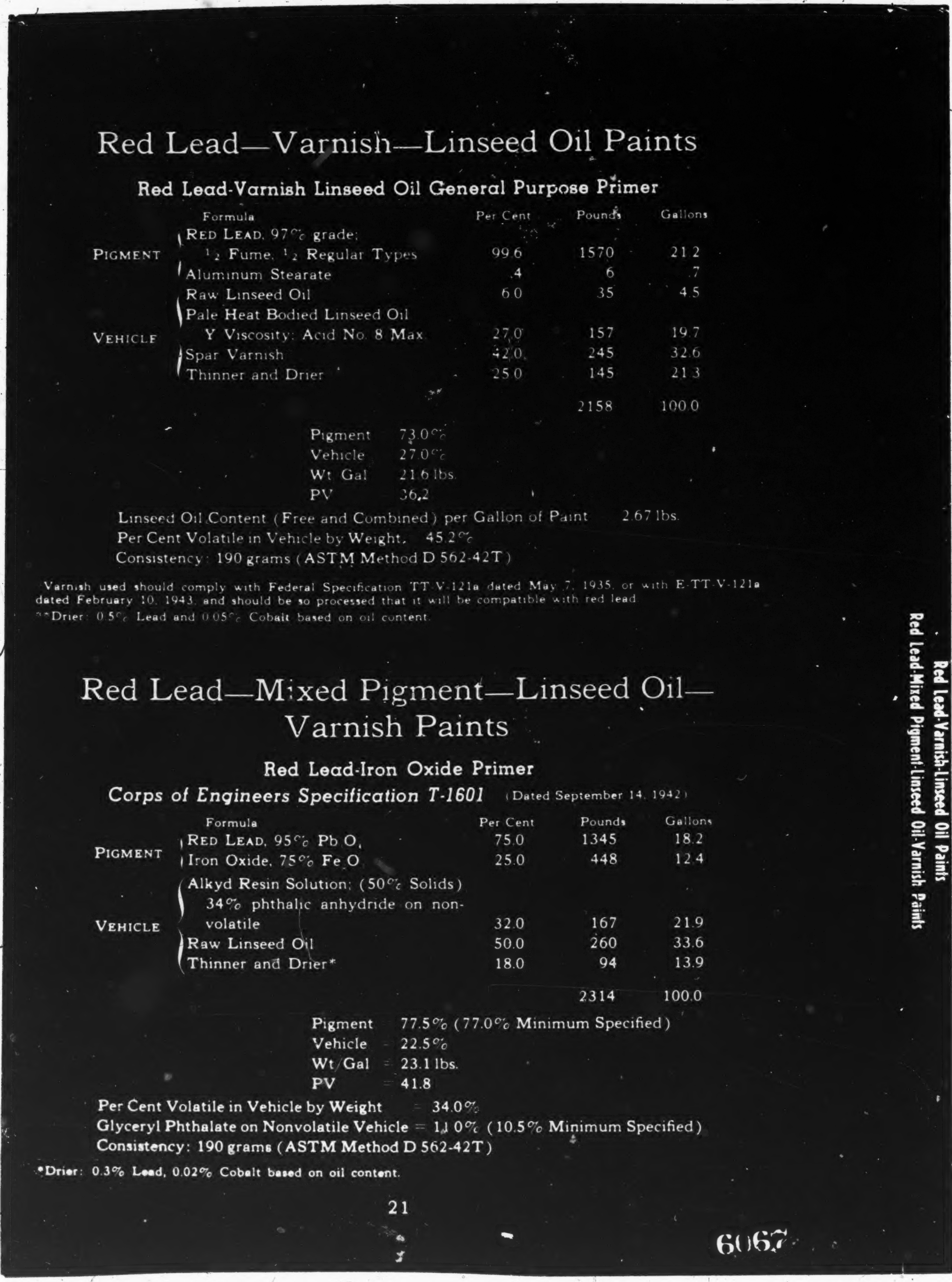
	Formula	Per Cent	Pounds	Gallons
PIGMENT	RED LEAD, 95% grade	45.0	529	7.1
	Iron Oxide, 76% Fe O	27.0	317	9.0
	Magnesium Silicate	27.7	326	13.7
	Aluminum Stearate	.3	3	.4
VEHICLE	Raw Linseed Oil	58.4	301	38.8
	Heat Bodied Linseed Oil, Z2	8.3	42.7	5.3
	Thinner and Drier*	33.3	171.3	25.7
			1690.0	100.0

Pigment 69.5%
Vehicle 30.5%
Wt/Gal 16.9 lbs.
PV 40

Linseed Oil Content per Gallon of Paint 3.43 lbs.
Consistency: 190 grams (ASTM Method D 562-42T)

*Drier: 0.3% Lead, 0.02% Manganese, 0.02% Cobalt based on oil content.

Respondent's Exhibit No. 189.



Red Lead—Varnish—Linseed Oil Paints

Red Lead-Varnish Linseed Oil General Purpose Primer

	Formula	Per Cent	Pounds	Gallons
PIGMENT	RED LEAD, 97% grade: ½ Fume, ½ Regular Types	99.6	1570	21.2
	Aluminum Stearate	.4	6	.7
VEHICLE	Raw Linseed Oil	6.0	35	4.5
	Pale Heat Bodied Linseed Oil Y Viscosity: Acid No. 8 Max	27.0	157	19.7
	Spar Varnish	42.0	245	32.6
	Thinner and Drier	25.0	145	21.3
			2158	100.0

Pigment 73.0%
Vehicle 27.0%
Wt Gal 21.6 lbs.
PV 36.2

Linseed Oil Content (Free and Combined) per Gallon of Paint 2.67 lbs.
Per Cent Volatile in Vehicle by Weight, 45.2%
Consistency: 190 grams (ASTM Method D 562-42T)

Varnish used should comply with Federal Specification TT-V-121a dated May 7, 1935, or with E-TT-V-121a dated February 10, 1943, and should be so processed that it will be compatible with red lead.

**Drier: 0.5% Lead and 0.05% Cobalt based on oil content.

Red Lead—Mixed Pigment—Linseed Oil—Varnish Paints

Red Lead-Iron Oxide Primer

Corps of Engineers Specification T-1601 (Dated September 14, 1942)

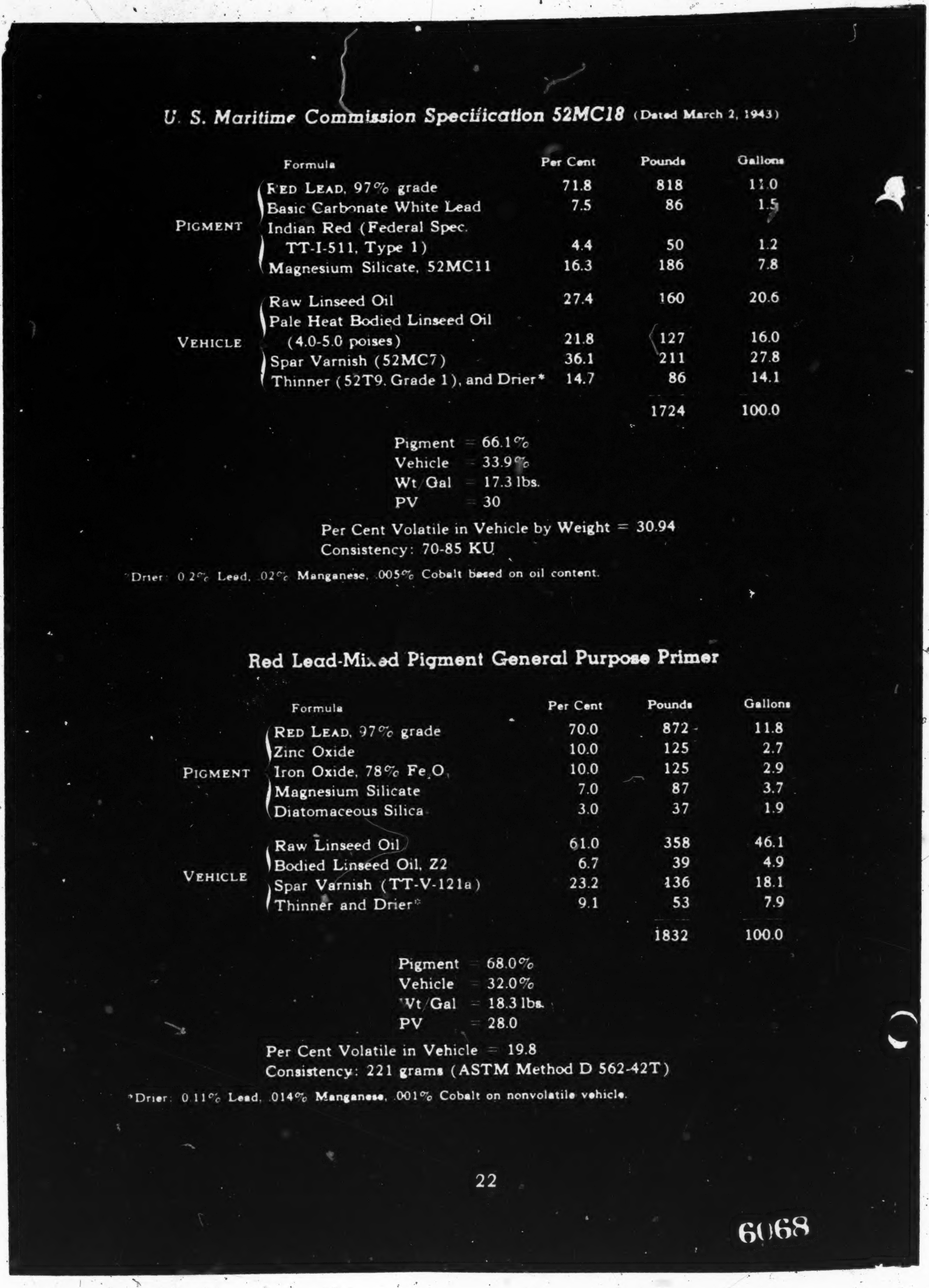
	Formula	Per Cent	Pounds	Gallons
PIGMENT	RED LEAD, 95% Pb O	75.0	1345	18.2
	Iron Oxide, 75% Fe O	25.0	448	12.4
VEHICLE	Alkyd Resin Solution: (50% Solids) 34% phthalic anhydride on non-volatile	32.0	167	21.9
	Raw Linseed Oil	50.0	260	33.6
	Thinner and Drier*	18.0	94	13.9
			2314	100.0

Pigment 77.5% (77.0% Minimum Specified)
Vehicle = 22.5%
Wt/Gal = 23.1 lbs.
PV = 41.8

Per Cent Volatile in Vehicle by Weight = 34.0%
Glyceryl Phthalate on Nonvolatile Vehicle = 11.0% (10.5% Minimum Specified)
Consistency: 190 grams (ASTM Method D 562-42T)

*Drier: 0.3% Lead, 0.02% Cobalt based on oil content.

Respondent's Exhibit No. 189.



U. S. Maritime Commission Specification 52MC18 (Dated March 2, 1943)

	Formula	Per Cent	Pounds	Gallons
PIGMENT	RED LEAD, 97% grade	71.8	818	11.0
	Basic Carbonate White Lead	7.5	86	1.5
	Indian Red (Federal Spec. TT-I-511, Type 1)	4.4	50	1.2
	Magnesium Silicate, 52MC11	16.3	186	7.8
VEHICLE	Raw Linseed Oil	27.4	160	20.6
	Pale Heat Bodied Linseed Oil (4.0-5.0 poises)	21.8	127	16.0
	Spar Varnish (52MC7)	36.1	211	27.8
	Thinner (52T9, Grade 1), and Drier*	14.7	86	14.1
			1724	100.0

Pigment = 66.1%
Vehicle = 33.9%
Wt/Gal = 17.3 lbs.
PV = 30

Per Cent Volatile in Vehicle by Weight = 30.94
Consistency: 70-85 KU

*Drier: 0.2% Lead, .02% Manganese, .005% Cobalt based on oil content.

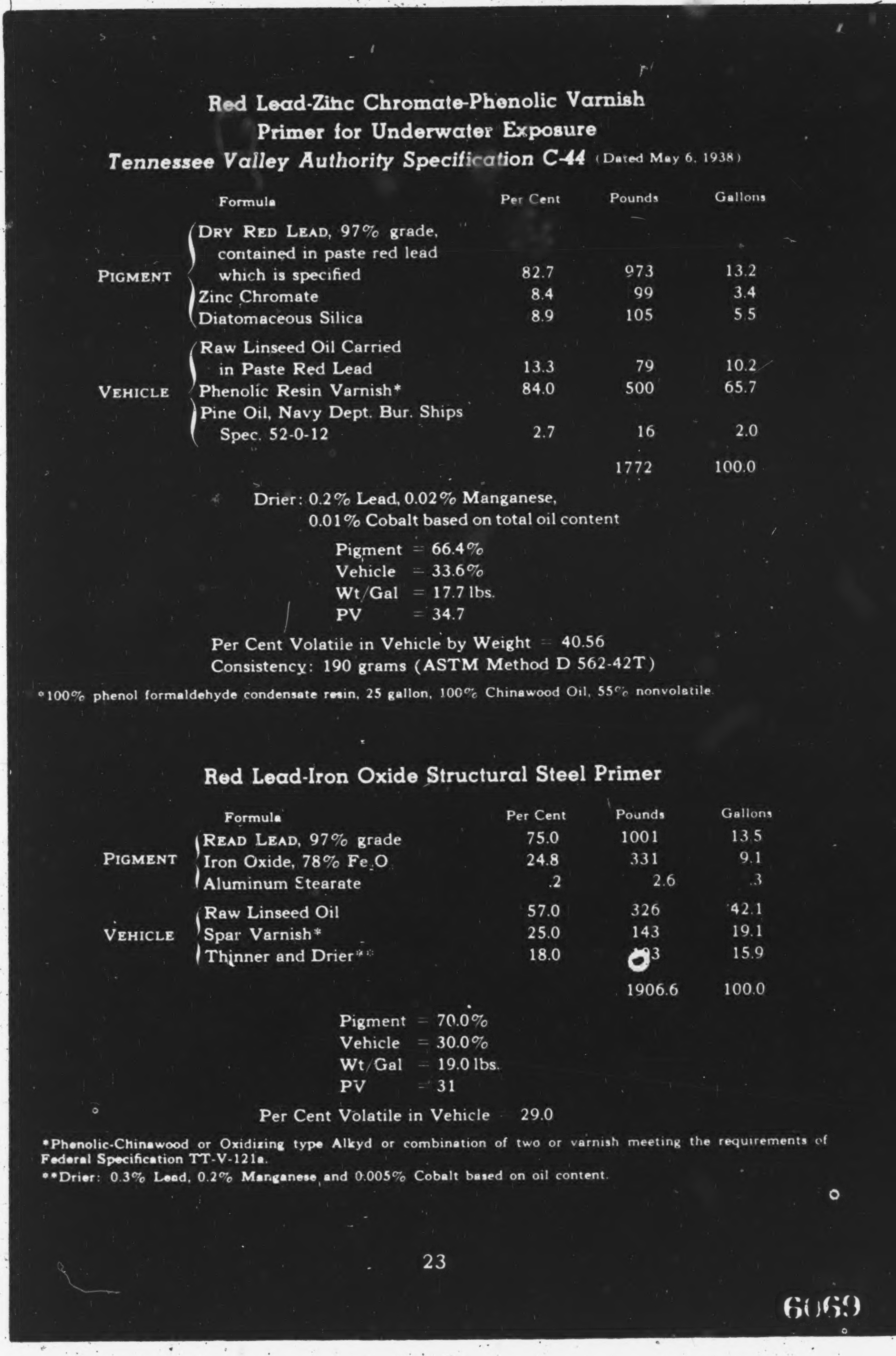
Red Lead-Mixed Pigment General Purpose Primer

	Formula	Per Cent	Pounds	Gallons
PIGMENT	RED LEAD, 97% grade	70.0	872	11.8
	Zinc Oxide	10.0	125	2.7
	Iron Oxide, 78% Fe_2O_3	10.0	125	2.9
	Magnesium Silicate	7.0	87	3.7
	Diatomaceous Silica	3.0	37	1.9
VEHICLE	Raw Linseed Oil	61.0	358	46.1
	Bodied Linseed Oil, Z2	6.7	39	4.9
	Spar Varnish (TT-V-121a)	23.2	136	18.1
	Thinner and Drier*	9.1	53	7.9
			1832	100.0

Pigment = 68.0%
Vehicle = 32.0%
Wt/Gal = 18.3 lbs.
PV = 28.0

Per Cent Volatile in Vehicle = 19.8
Consistency: 221 grams (ASTM Method D 562-42T)

*Drier: 0.11% Lead, .014% Manganese, .001% Cobalt on nonvolatile vehicle.



Red Lead-Zinc Chromate-Phenolic Varnish Primer for Underwater Exposure

Tennessee Valley Authority Specification C-44 (Dated May 6, 1938)

	Formula	Per Cent	Pounds	Gallons
PIGMENT	DRY RED LEAD, 97% grade, contained in paste red lead which is specified	82.7	973	13.2
	Zinc Chromate	8.4	99	3.4
	Diatomaceous Silica	8.9	105	5.5
VEHICLE	Raw Linseed Oil Carried in Paste Red Lead	13.3	79	10.2
	Phenolic Resin Varnish*	84.0	500	65.7
	Pine Oil, Navy Dept. Bur. Ships Spec. 52-0-12	2.7	16	2.0
			1772	100.0

Drier: 0.2% Lead, 0.02% Manganese,
0.01% Cobalt based on total oil content

Pigment = 66.4%
Vehicle = 33.6%
Wt/Gal = 17.7 lbs.
PV = 34.7

Per Cent Volatile in Vehicle by Weight = 40.56
Consistency: 190 grams (ASTM Method D 562-42T)

*100% phenol formaldehyde condensate resin, 25 gallon, 100% Chinawood Oil, 55% nonvolatile.

Red Lead-Iron Oxide Structural Steel Primer

	Formula	Per Cent	Pounds	Gallons
PIGMENT	READ LEAD, 97% grade	75.0	1001	13.5
	Iron Oxide, 78% Fe.O	24.8	331	9.1
	Aluminum Stearate	.2	2.6	.3
VEHICLE	Raw Linseed Oil	57.0	326	42.1
	Spar Varnish*	25.0	143	19.1
	Thinner and Drier**	18.0	1[illegible]3	15.9
			1906.6	100.0

Pigment = 70.0%
Vehicle = 30.0%
Wt/Gal = 19.0 lbs.
PV = 31

Per Cent Volatile in Vehicle 29.0

*Phenolic-Chinawood or Oxidizing type Alkyd or combination of two or varnish meeting the requirements of Federal Specification TT-V-121a.

**Drier: 0.3% Lead, 0.2% Manganese and 0.005% Cobalt based on oil content.

Red Lead—Varnish Paints

Quick-Drying (Synthetic) Red Lead

U. S. Maritime Commission Specification MC 52-A-1 Class XXII

(Dated June 6, 1939)

	Formula	Per Cent	Pounds	Gallons
PIGMENT	RED LEAD, 97% grade	99.6	1312	17.7
	Aluminum Stearate	0.3	4	.5
VEHICLE	Alkyd Oxidizing Type Resin (Mineral Spirits Solution 50% Solids), containing a minimum of 34% Phthalic Anhydride in solids	80.0	487	63.2
	Plasticizer	0.1	1.5	.2
	Additional Mineral Spirits	20.0	121	18.4
			1925.5	100.0

Drier: 0.03% Cobalt based on vehicle solids
Antiskinning agent : 0.1 lb. per 100 gallons paint

Pigment	68.3%
Vehicle	31.7%
Wt Gal	19.25 lbs.
PV	41.0

Phthalic Anhydride on total vehicle 13.6% (13.0% minimum specified)
Consistency: 160 grams (ASTM Method D 562-42T)

When approved by the Maritime Commission limited amounts of suspending agents, antiskinning agents, etc., may be included to meet the full requirements of the specification. See specification for detailed vehicle information.

Glyceryl Phthalate, Exterior, Marine, Red Lead Paint

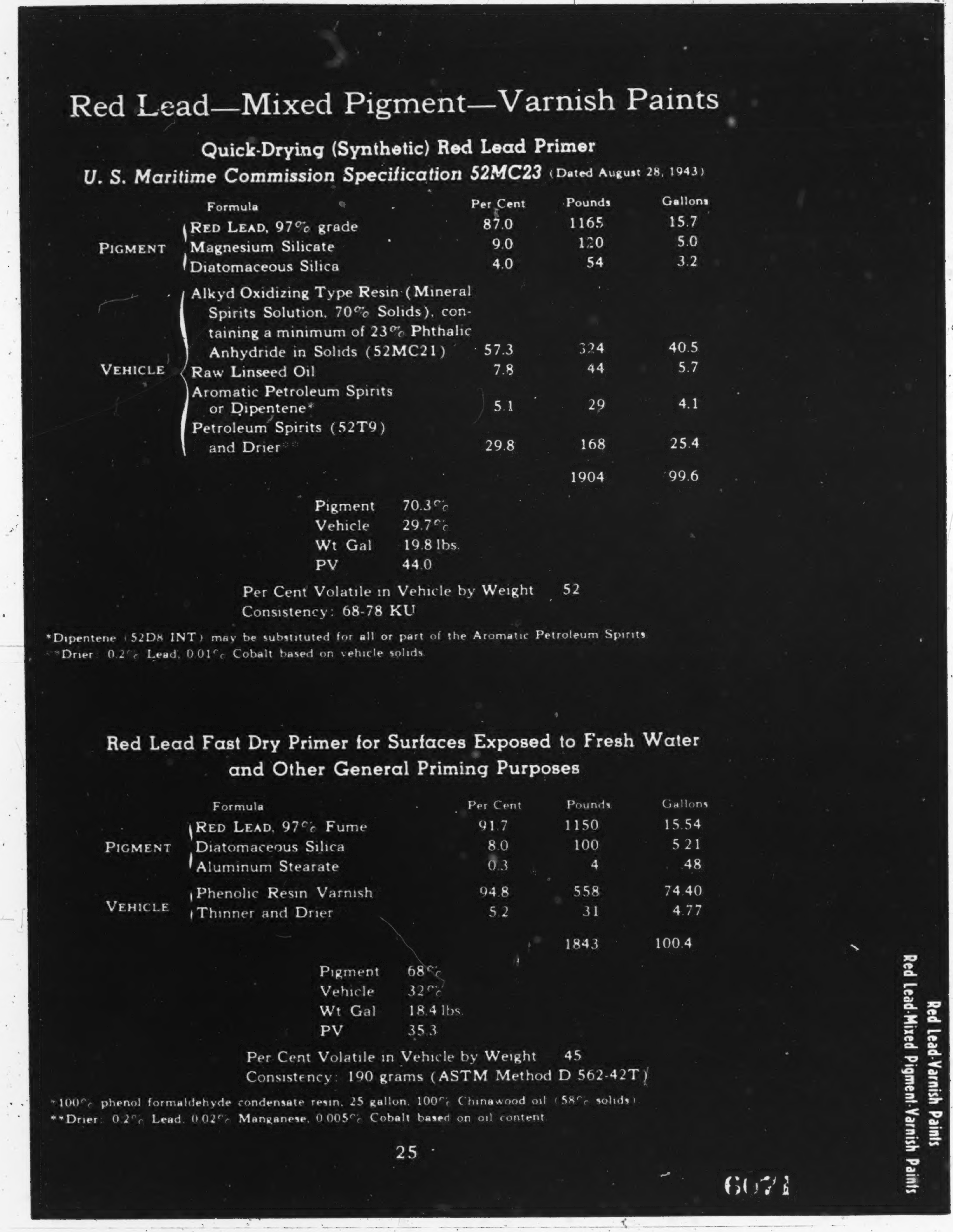
U. S. Treasury Department Specification No. 358 (Dated July 8, 1939)

	Formula	Per Cent	Pounds	Gallons
PIGMENT	RED LEAD, 95% grade	100.0	1325	17.9
VEHICLE	Alkyd Oxidizing Type Resin (Mineral Spirits Solution 70% Solids), containing a minimum of 27% Phthalic Anhydride in solids	78.5	498	61.5
	Additional Petroleum Thinner	21.5	137	20.6
			1960	100.0

Drier: 0.2% Lead and 0.01% Cobalt on vehicle solids
Antiskinning Agent: 0.1 lb. per 100 gallons of paint

Pigment	67.5%
Vehicle	32.5%
Wt Gal	19.6 lbs.
PV	31.0

Consistency: 165 grams (ASTM Method D 562-42T)



Red Lead—Mixed Pigment—Varnish Paints

Quick-Drying (Synthetic) Red Lead Primer

U. S. Maritime Commission Specification 52MC23 (Dated August 28, 1943)

	Formula	Per Cent	Pounds	Gallons
PIGMENT	RED LEAD, 97% grade	87.0	1165	15.7
	Magnesium Silicate	9.0	120	5.0
	Diatomaceous Silica	4.0	54	3.2
VEHICLE	Alkyd Oxidizing Type Resin (Mineral Spirits Solution, 70% Solids), containing a minimum of 23% Phthalic Anhydride in Solids (52MC21)	57.3	324	40.5
	Raw Linseed Oil	7.8	44	5.7
	Aromatic Petroleum Spirits or Dipentene*	5.1	29	4.1
	Petroleum Spirits (52T9) and Drier**	29.8	168	25.4
			1904	99.6

Pigment	70.3%
Vehicle	29.7%
Wt Gal	19.8 lbs.
PV	44.0

Per Cent Volatile in Vehicle by Weight 52

Consistency: 68-78 KU

*Dipentene (52D8 INT) may be substituted for all or part of the Aromatic Petroleum Spirits

**Drier: 0.2% Lead, 0.01% Cobalt based on vehicle solids

Red Lead Fast Dry Primer for Surfaces Exposed to Fresh Water and Other General Priming Purposes

	Formula	Per Cent	Pounds	Gallons
PIGMENT	RED LEAD, 97% Fume	91.7	1150	15.54
	Diatomaceous Silica	8.0	100	5.21
	Aluminum Stearate	0.3	4	.48
VEHICLE	Phenolic Resin Varnish	94.8	558	74.40
	Thinner and Drier	5.2	31	4.77
			1843	100.4

Pigment	68%
Vehicle	32%
Wt Gal	18.4 lbs.
PV	35.3

Per Cent Volatile in Vehicle by Weight 45

Consistency: 190 grams (ASTM Method D 562-42T)

*100% phenol formaldehyde condensate resin, 25 gallon, 100% Chinawood oil (58% solids)

**Drier: 0.2% Lead, 0.02% Manganese, 0.005% Cobalt based on oil content

6071

Red Lead-Varnish Paints
Red Lead-Mixed Pigment-Varnish Paints

Respondent's Exhibit No. 189.

TRADE MARK
REG U S PAT OFF

NATIONAL LEAD COMPANY

111 Broadway, New York 6 • 116 Oak Street, Buffalo 3 • 900 West 18th
Street, Chicago 80 • 659 Freeman Avenue, Cincinnati 3 • 1213 West Third
Street, Cleveland 13 • 722 Chestnut Street, St. Louis 1 • 2240-24th Street,
San Francisco 10 • National-Boston Lead Co., 800 Albany Street, Boston 6 •
National Lead & Oil Co. of Penna., 1376 River Ave., Pittsburgh 30 •
John T. Lewis & Bros. Co., Widener Building, Philadelphia 7

F-9-44

Respondent's Exhibit No. 197.

RES. 197-A

TRADE SALES DEPT.
OCT 11 1938

SHERWIN-WILLIAMS

(SUGGESTED)

RESALE PRICES

WHITE LEAD and ZILO

SEPTEMBER 26, 1938

PRICE PER POUND	100 lb. Kegs	50 lb. Kegs	25 lb. Kegs	12½ lb. Pails	*5 lb. Cans	*1 lb. Cans
CONSUMERS PRICE	11¾	12	12¼	12½	14¾	16¾
PAINTERS PRICE	10¾	11	11¼	11½	13¾	15¾

*NOTE—1 and 5 pound cans availabe White Lead in Oil (heavy paste) only.

The above prices should be advanced ¼ cent when deliveries are received from the following points—

Des Moines, Ia.
Duluth, Minn.
Minneapolis, Minn.

THE SHERWIN-WILLIAMS CO.
CHICAGO, ILL.

FEDERAL TRADE COMMISSION
No. 5253 RESPONDENT Exhibit No. 197-A
MATTER OF National Lead Co. 10/15/47 WITNESS Brown
REPORTER: FEDERAL REPORTING CO.

SHERWIN-WILLIAMS

CHICAGO, ILL. SEPTEMBER 26, 1938

NET PRICES FOR AUTHORIZED DEALERS ONLY

Subject to change without notice

O D P WHITE LAED IN OIL AND ZILO

PRICE PER HUNDRED POUNDS					
100 lb. Kegs.	50 lb. Kegs	25 lb. Pails	12½ lb. Pails	5 lb. Cans	1 lb. Cans
$8.50	$8.75	$9.00	$9.25	$10.50	$12.00

TERMS

On White Lead, Zilo and other lead products, sixty days net or 2 per cent discount if paid within ten days from date of invoice

SHIPPING POINTS

The prices printed on this card are f. o. b.

Chicago, Ill.
Milwaukee, Wis.
Indianapolis, Ind.

The following differentials will be added to all prices shown above on deliveries from S-W branches named below and should be added to resale prices shown on opposite page.

Des Moines, Ia. ....¼c per lb.
Duluth, Minn. ....¼c per lb.
Minneapolis, Minn. ....¼c per lb.

[redacted]

Res. 197-H

SHERWIN-WILLIAMS

(SUGGESTED)

RESALE PRICES

WHITE LEAD and ZILO

SEPTEMBER 26th, 1938

PRICE PER POUND	100 lb. KEGS	50 lb Kegs	25 lb Kegs	12½ lb Pails	*5 lb. Cans	*1 lb Cans
CONSUMERS PRICE	11¾	12	12¼	12½	14¾	16¾
PAINTERS PRICE	10¾	11	11¼	11½	13¾	15¾

*NOTE—1 and 5 pound cans available White Lead in Oil heavy paste only.

FEDERAL TRADE COMMISSION
5253 Exhibit No. 197-H

THE SHERWIN-WILLIAMS CO.
NEWARK, NEW JERSEY

SHERWIN-WILLIAMS

NEWARK, N. J. SEPT. 26th, 1938

NET PRICES FOR AUTHORIZED DEALERS ONLY

Subject to change without notice.

O D P WHITE LEAD IN OIL AND ZILO

PRICE PER HUNDRED POUNDS					
100 lb Kegs	50 lb. Kegs	25 lb. Kegs	12½ lb Pails	5 lb Cans	1 lb Cans
8.50	8.75	9.00	9.25	10.50	12.00

TERMS

On O D P White Lead in Oil and Zilo sixty days net or 2 per cent discount if paid within ten days from date of invoice.

IPPING POINTS

The prices printed on this card are f. o. b.

Newark, N. J.	Albany, N. Y.
New Haven, Conn.	Syracuse, N. Y.

[redacted]

Respondent's Exhibit No. 198.

Res. 198-A

THE SHERWIN-WILLIAMS CO.

(SUGGESTED)

RESALE PRICES

WHITE LEAD and ZILO

SEPTEMBER 26, 1939

GENERAL TRADE SALES DEPT. OCT 9 [illegible]

PRICE PER POUND	100 lb. Kegs	50 lb. Kegs	25 lb. Kegs	12½ lb. Pails	*5 lb. Cans	*1 lb. Cans
CONSUMERS PRICE	12¾	13	13¼	13½	15¾	17¾
PAINTERS PRICE	11¾	12	12¼	12½	14¾	16¾

*NOTE—1 and 5 pound cans availabe White Lead in Oil (heavy paste) only.

The above prices should be advanced ¼ cent where deliveries are received from the following points—

Des Moines, Ia.
Duluth, Minn.
Minneapolis, Minn.

THE SHERWIN-WILLIAMS CO.

CHICAGO, ILL.

FEDERAL TRADE COMMISSION
DOCKET No. 5253 ~~COMMISSION~~ RESPONDENT EXHIBIT No. 198-A
IN THE MATTER OF National Lead Co.
DATE 6/15/47 WITNESS Brown
REPORTER FEDERAL REPORTING CO.

THE SHERWIN-WILLIAMS CO

CHICAGO, ILL. SEPTEMBER 26, 1939

NET PRICES FOR AUTHORIZED DEALERS ONLY

Subject to change without notice

O D P WHITE LEAD IN OIL AND ZILO

PRICE PER HUNDRED POUNDS					
100 lb. Kegs.	50 lb. Kegs	25 lb. Pails	12½ lb. Pails	5 lb. Cans	1 lb. Cans
$9.50	$9.75	$10.00	$10.25	$11.50	$13.00

TERMS

On White Lead, Zilo and other lead products, sixty ys net or 2 per cent discount if paid within ten days m date of invoice

SHIPPING POINTS

The prices printed on this card are for delivery from

Chicago, Ill.
Indianapolis, Ind.

Add ¼c per pound for delivery from

Minneapolis, Minn.
Duluth, Minn.

For delivery from other S-W branches not listed above 1c per pound is added to these prices.

[redacted]

Res. 198-H

SHERWIN-WILLIAMS

(SUGGESTED)

RESALE PRICES

WHITE LEAD and ZILO

SEPTEMBER 26th, 1939

GENERAL TRADE SALES DEPT. [illegible]

PRICE PER POUND	100 lb. KEGS	50 lb KEGS	25 lb Kegs	12½ lb Pails	*5 lb Cans	*1 lb Cans
CONSUMERS PRICE	12¾	13	13¼	13½	15¾	17¾
PAINTERS PRICE	11¾	12	12¼	12½	14¾	16¾

*NOTE—1 and 5 pound cans available White Lead in Oil heavy paste only.

FEDERAL TRADE COMMISSION
Docket No. 5253 ~~COMMISSION~~ RESPONDENTS Exhibit No. 198-H

THE SHERWIN-WILLIAMS CO.

NEWARK, NEW JERSEY

SHERWIN-WILLIAMS

NEWARK, N. J. SEPTEMBER 26th, 1939

NET PRICES FOR AUTHORIZED DEALERS ONLY

Subject to change without notice.

O D P WHITE LEAD IN OIL AND ZILO

PRICE PER HUNDRED POUNDS					
100 lb Kegs	50 lb. Kegs	25 lb. Kegs	12½ lb Pails	5 lb Cans	1 lb Cans
9.50	9.75	10.00	10.25	11.50	13.00

TERMS

On O D P White Lead in Oil and Zilo sixty days net or 2 per cent discount if paid within ten days from date of invoice.

SHIPPING POINTS

The prices printed on this card are f. o. b.

Newark, N. J.	Albany, N. Y.
New Havn, Conn.	Syracuse, N. Y.

[redacted]

Code { A - Local City Delivery
B - Free delivery area for shipping Point
C - Prepaid & Received or Collect Freight

Southwestern (Kansas City Mo) Division

		Invoice No	Origin		Destination		Marking		Code
The Denver & Salt Lake Ry Co	D	4331	Denver	Colo	Utah Junct	Colo	Fob Denver		
Dept of Justice	T	4252	Chicago	Ill	Denver	Colo	Fob Denver-Prepay	Government	
St Louis Lumber Co	SL	4298	"	"	St Louis	Mo	Fob Chicago-Frt All }	Part of with 4299 + 4300	
"	SL	4299	"	"	"	"	"		
U.S. Treas Dept	SL	4544	St Louis	Mo	St Louis	Mo		Government	A
[illegible] Salisbury Lab Inc	T	[illegible]	Kansas City	Mo	Kansas City	"			A
Consumers Co-op Assn	T	6656	Kansas City	Mo	Mo	"			A
U.S. Treas Dept	SL	5310	Chicago	Ill	St Louis	Mo	Prepaid	Government	A
" "	L	6452	St Louis	Mo	" "	"		Government-Bid	A
C P Franks State Prison CST	D	4539	Denver	Colo	Colo Spring	Colo	Fob Colo Spr	Government	
Guy H James	OC	3653	Okla City	Okla	Aylesworth	Okla	Fob OC		
State Board of Pub Aff	OC	3438	" "	"	Talihina	"	Fob Talihina-Prepaid	Government	
Bd of Ed City of St Louis	SL	5273	St Louis	Mo	St Louis	Mo	Fob St. Louis		
[illegible] Paint Co	KC	7571	Kansas City	Mo	Pueblo	Colo	Fob Pueblo		
[illegible] Co	SL	6148	St Louis	Mo	St Louis	Mo	Fob St Louis		
[illegible] Nebr [illegible]	Omaha	16194	Omaha	Nebr	Omaha	Nebr	Fob Omaha	Government	
[illegible] Co	Omaha	15224	"	"	Sioux City	Iowa	Fob Omaha	Invoice show [illegible] ppd	
	Omaha	15712	Sioux City	Iowa	" "	"	Fob Sioux City Collect		
Alloy [illegible] Mfg Co	SL	5397	St Louis	Mo	St Louis	Mo	Fob St Louis		
[illegible] Co	Omaha	4035	Omaha	Nebr	Omaha	Nebr	Fob Omaha		
[illegible] Board [illegible] Affairs	OC	614	Okla City	Okla	Talihina	Okla	Fob Talihina Prepaid	Government	
[illegible]	OC	3453	" "	"	Raston		Fob-OC Prepaid		
[illegible] Mach Wks	OC	3705		"	Monahans	Tex	Prepaid	Frt Added face of invoice	
[illegible]	SL	2752	St Louis	Mo	St Louis	Mo	Fob St. Louis		
[illegible]	SL	5159	"	"	"	"	" " "	Government	
[illegible]	SL	5332	"		"	"	" " "		
	SL	9205	"	"		"	" " "		
[illegible] Co	SL	655[illegible]				"	" " "		

FEDERAL TRADE COMMISSION
Docket No. 5253 RESPONDENT Exhibit No. 205-A
IN THE MATTER OF National Lead Co
DATE 10/16/47 WITNESS H. C. Lemke
REPORTER: FEDERAL REPORTING CO.
BY W. T. Moore

3110

Respondent's Exhibit No. 205.

6104
①

South Atlantic (Philadelphia) District

		Invoice No.	Origin	Destination	Marking	Code
x General Chem Co	P	4600	Phila Pa	McClymont Del	Fob Dest-Prepay	
Westinghouse [illegible] Inc	P	[illegible]	"	Phila Pa		A
	P	9613	"	"		A
	P	4464	"	"		A
	P	4464	"	"		A
	P	[illegible]		"		A
[illegible] Bldg [illegible] Co	Ch	1101	Charleston S C	Charleston S C	Call	
"	Ch	[illegible]	"		"	
	Ch	[illegible]	"		"	
	R	[illegible]	Richmond Va	[illegible]	[illegible] prepaid	
[illegible] Hardware	R	9550	"		"	
x [illegible] Hdwe Co	R	[illegible]	"	[illegible] Va	Exp collect	
Samuel M Langston	P	[illegible]	Phila Pa	Camden NJ	Fob Phila	
Western Electric Co	B	6678	Baltimore Md	Baltimore Md		A
Lowe Brothers	B	[illegible]	"	Ferndale Md	Will Call	
	B	[illegible]	"	"		C
[illegible] Co	B	5921	"	Baltimore "	Beaver	
R E [illegible] & Sons	R	[illegible]	"	Alexandria Va	Prepaid	
x		[illegible]68	"	"	"	
Robert [illegible] Co	B	5533	"	Baltimore Md		A
	B	9366	"	" "		A
	B	[illegible]	"	" "		A
	B	9821	"	"		A
Walter [illegible]	P	[illegible]	Phila Pa	Phila Pa		A
Walter [illegible]	P	[illegible]	"	Moulton NJ		A
[illegible]	P	5403	"	Phila Pa		A
[illegible]	P	[illegible]	"	"		A

FEDERAL TRADE COMMISSION
Docket No. 5253 Exhibit No. 205-B
IN THE MATTER OF National Lead Co
DATE 10/16/47 WITNESS H. C. Lembe
REPORTER FEDERAL REPORTING CO.
BY W. L. Morse

Respondent's Exhibit No. 205.

So. Pacific (Los Angeles, Calif) District

FEDERAL TRADE COMMISSION
Docket No. 5253 Exhibit No. 205-C
In the matter of National Lead Co.
Date 10/16/47 Witness H. C. Franke
REPORTER: FEDERAL REPORTING CO.
By W. L. Moore

		Invoice No	Origin	Destination	Marking			Code
	California Ship Supply Co	LA 12685	Los Angeles Cal	San Pedro	Will Call			
	Oster Paint + Glass Co	LA 13305	" " "	Miami Ariz				C
X	Phelps Dodge Mercantile Co	LA 11409	" " "	Douglas "	Frt Alld -	ptc/L	(LA RH29)	
	Airsearch Mfg Co	LA 11765	" " "	Los Angeles				A
	"	LA 12653	" "	" "				A
	"	LA 15239	" "	" "				A
	"	LA 14761	" "	" "				A
	"	LA 10772	" "	" "				A
	California Ship Supply Co	LA 10550	" "	San Pedro	Will Call			
X	S R Frazee Co	LA 14973	" "	San Diego	Sub San Diego - Frt Alld			
	Am Lead + Color Works	LA 12967	" "	Los Angeles				A
	F.A. Bradley Paint Co	LA 13007	" "	" "				A
	Am Lead + Color Works	LA 14282	" "	" "				A
X	Farmers Hdw + Paint Co	LA 9741	" "	Whittier	Frt Alld.	c/L	CF	
	Garrett Supply Co	LA 15242	" "	Los Angeles				A
	Eagles Hay + Grain Co	LA 14862	" "	" "				A
X	C S Stapley Co	LA 14433	" "	Phoenix Ariz	Frt Prepaid-Alld	c/L		
	Oesler Paint + Glass Co	Phx 2131	Phoenix Ariz	Miami "	Will Call			
X	Posner Paint Store	LA 9068	Los Angeles	Tucson "	Frt Allowed	c/L		
X	"	LA 13050	" "	" "	Frt Prepaid - Sub Tucson			
	John Suverkrop Lbr Co	LA 9493	" "	Riverside Cal				C
	Hellman Hdwe Co	LA 7681	" "	Los Angeles				A
	Neon Specialties Corp	LA 9642	" "	Las Vegas Nev				C
X	Carl Hart Paint Store	LA 9768	" "	Burbank Cal	Frt Allowed		Free Delivery Area	
	Garrett Supply Corp	LA 9897	" "	Los Angeles				A
	Leo F. Schrumpf	LA 13767	" "	San Gabriel				C
	Garrett Supply Corp.	LA 12650	" "	Los Angeles				A
	" "	LA 12571	" "	" "				A
	W. W. Clark	LA 11948	" "	" "				A
	Los Angeles Art Glass Co.	Holly 99	Hollywood	Los Angeles	Pick up.			
	Robt Thomas Hdwe Variety Str.	LA 11044	Los Angeles	" "				A
	T. J. Brown	LA 10289	Los "	Hynes	Waiting			
	"	LA 10700	" "	"	"			
	Utility Trailer Mfg Co	LA 9584	" "	Los Angeles				A
	"	LA 11658	" "	" "				A
		LA 12984	" "	" "				A
		LA 13880	" "	" "				A
	John Suverkrump Lbr Co	LA 8986	" "	Redlands Cal.	Will Call			
	" "	LA 8980	" "	San Bernardino	" "			
	Hann Story Co	LA 9784	" "	Los Angeles				A
X	W. R. [illegible] Co	LA 11482	" "	Long Beach	Frt Allowed		Free Delivery Area	
	John Suverkrump Lbr Co	LA 12405	" "	Riverside				C
	McReynolds	LA 15215	" "	Ventura	Frt Allowed			
	US Electrical Meters Inc.	LA 13375	" "	Los Angeles				A
	Pacific Electric RR Co	LA 9954	" "	" "	fob Frt House			
	John Suverkrump Lbr Co	LA 14964	" "	Riverside				C
	Walton Hardware Co	LA 8702	" "	Arcadia				C

3112

Respondent's Exhibit No. 205.

So Pacific (Los Angeles [illegible]) [illegible]

			Invoice No	Origin	Destination	Marking		Code
Y	Al Larson Boat Co	LA	10165	Los Angeles	Terminal Is.	Prepaid	Free Delivery Area	
X	" " "	LA	6878	" "	" "	"	" " "	
	A T & S F RR Co	LA	2360	" "	San Bernadino			C
	Pacific Electric Ry Co	LA	10209	" "	Torrance			C
	S K Frazer Co	LA	11415	" "	San Diego	Frt Allowed c/l		
	" "	LA	13314	" "	" "	" " c/l		
X	" "	LA	15301	" "	" "	" "		
	Posner Paint Store	Phx	2094	Phoenix Ariz	Tucson Ariz	Prepay Frt All'd		
X	" "	LA	14091	Los Angeles	" "	" " " "		
	Guitzers Hdwe	Phx	657	Phoenix Ariz	Flagstaff	" Frt Allowed		
	O'Keefe & Merritt Co	LA	13352	Los Angeles	Los Angeles			A
X	Fellows & Stewart Inc	LA	13146	" "	Terminal Is	Prepaid	Free Delivery Area	
	Grayson Heat Control Ltd	LA	13373	" "	Linwood	Will Call		
Y	Defense Plant Corp	LA	13674	" "	Gardena	Prepaid Frt All'd	Government Free Delivery Area	
X	No American Aviation Co Inc	LA	11330	" "	Inglewood	"	Free Delivery Area	
	O'Keefe & Merritt Co	LA	10738	" "	Los Angeles			A
	" "	LA	11733	"	"			"
	" "	LA	13370	"	"			"
	" "	LA	14141	" "	" "			"
	Grayson Heat Control Ltd	LA	10720	" "	[illegible]ood	Will Call		
Y	No American Aviation Co Inc	LA	11133	" "	[illegible]d	Prepaid Frt All'd	Free Delivery Area	
X	[illegible] Dept	LA	15267	" "	[illegible]ity Nev	Prepaid	Government	
	[illegible] Trailer Coach Co	LA	13582	" "	[illegible]ngeles			A
	"	LA	14111	" "	" "			"
	"	LA	14345	" "				"

FEDERAL TRADE COMMISSION
Docket No. 5253 RESPONDENT Exhibit No. 205 D
IN THE MATTER OF National Lead Co
DATE 10/16/47 WITNESS H C [illegible]
REPORTER: FEDERAL REPORTING CO.
BY W F Morse

Respondent's Exhibit No. 205.

Respondent's Exhibit No. 205.

FEDERAL TRADE COMMISSION
Docket No. 5253 ~~COMMISSION~~ RESPONDENT Exhibit No. 205-E
IN THE MATTER OF National Lead Co
DATE 10/16/47 WITNESS H. C. Lemke
REPORTER: FEDERAL REPORTING CO.
BY W. L. Morse

So. Pacific (Los Angeles Calif) District

		INVOICE No.		ORIGIN	DESTINATION	MARKING		Code
	B J. Jarrett Hde Co	Phx	528	Phoenix	Phoenix			A
	Arizona Hdwe Co	Phx	562	"	"			A
	" " "	Phx	633	"	"			A
	Posner Paint Store	Phx	660	Phoenix Ariz	Tucson Ariz	Frt Allowed		
	O.S. Stapley Co	Phx	693	"	Phoenix			A
	Arizona Hdwe Co	Phx	745	"	"			A
	Posner Paint Store	Phx	495	Chicago	Tucson			
	" " "	LA	10859	Los Angeles	Tucson	Frt Allowed - pt c/l CF on c/l		
X	Independent Lumber Co	LA	8371	" "	Hawthorne Cal	" "	Free Delivery Area	
	Robt. Thomas Hdwe + Variety		8440	" "	Los Angeles			A
	Live Hdwe Co		8640	" "	So Pasadena			B
	Skidmore Lumber Co		8745	" "	Downey	Waiting		
	Hellman Hdwe Co	LA	9550	" "	Los Angeles			A
	John Soverkrup Lbr Co	LA	9700	" "	" "			A
	Lacquer Distributors Inc	LA	10305	" "	" "			A
	Robt Thomas Hdwe + Variety Store	LA	10211	" "	" "			A
	L.L Pickering	LA	12604	" "	Reseda		Free delivery Area	
X	T.J. Brown	LA	13020	" "	Hynes	Frt Allowed	Free delivery Area	
	Airsupply Co	LA	8365	" "	Los Angeles			A
	The Garrett Supply Co	LA	8632	" "	" "			A
	" " " "	LA	6908	" "	" "			A
	" " " "	LA	13651	" "	" "			A
X	Johnson Paint + Wallpaper Corp	LA	7687	" "	Inglewood	Frt Allowed	Free Delivery Area	
X	Wilmington Hdwe Co	LA	8653	" "	Wilmington	" "	" " "	
	John Soverkrup Lbr Co	LA	13219	" "	Riverside			C
	Utility Trailer Mfg Co	LA	12928	" "	Los Angeles			A
X	S R Frazee Co	LA	7262	" "	San Diego	Frt Allowed + pt c/l		
	"	LA	9573	" "	" "	Frt allowed		
	Fairbanks Morse Co	LA	9636	" "	Los Angeles			A
	Kerker Merrit Co	LA	10554	" "	" "			A
	California Ink Co Inc	LA	12703	" "	" "			A
	Gay Engineering Corp	LA	13238	" "	" "			A

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No Atlantic (Newark, N.J.) District

FEDERAL TRADE COMMISSION
Docket No. 5253 RESPONDENT Exhibit No. 205 F
IN THE MATTER OF National Lead Co
DATE 10/16/47 WITNESS H C Lembe
REPORTER FEDERAL REPORTING CO.
BY V L Moro

		Invoice No		Origin	Destination	Marking			Code
	Crocker Co	B	13125	Boston	Boston	fob Boston Frt	Alld	Free Delivery Area	
	" "	B	14190	"	"	" " "	"	" " "	
	" "	B	13247	"	"	" " "	"	" " "	
	" "	B	13303	"	"	" " "	"	" " "	
	" "	B	15121	"	"	" " "	"	" " "	
	" "	B	10146	"	"	" " "	"	" " "	
	" "	B	10388	"	"	" " "	"	" " "	
	" "	B	10250	"	"	" " "	"	" " "	
	" "	B	10539	"	"	" "	PPD	" " "	
	" "	B	10930	"	"	" "	"	" " "	
	" "	B	11133	"	"	" " Frt	Alld	" " "	
X	G. P. Barney	A	4111	Newark	Adams NY	Prepaid	c/l		
✓	Henry R Bollinger	N	24769	"	Cornwall-on-Hudson	PPD			
✓	" " "	N	[illegible] 25900	"	Newburgh Hudson	Prepaid PPD	pt c/l	with 25898-99-01-02-03	
✓	" " "	N	25599	"	"	"	"	" " 900-01-02-03	
✓	" " "	N	24768	"	Cornwall-on-Hudson	PPD		cross with N 24769	
✓	" " "	N	25895	"	Poughkeepsie	PPD	pt c/l	with 25899-900-01-02-03	
✓	" " "	N	25897	"	"	"	"	" 25898 et seq	
X	Griffin Lumber Co	N	4030	"	Hudson Falls NY	Prepaid	}	Shipped some time	
X	" " "	N	4012	"	" " "	"	}		
	A Mason & Sons Inc	A	5112	Albany	Plattsburg	fob Whse			
X	Mohawk Wallpaper Pt Co	S.	3136	Syracuse	Utica	Prepaid			
X	Northern Hardware Co	A	4625	Newark	Malone	Prepaid	} c/l	Shipped together	
X	" " "	A	4649	"	Malone	Prepaid	}		
	Pelton Hardware	N	25714	"	Middletown	Frt Allowed			
X	B.F Raichle	S	3233	Syracuse	Oswego	Prepaid			
	" " "	S	3260	"	"	FOB Syracuse			
	Henry Walker	N	7948	Newark	Bronx	Fob Dest			
	" "	N	7966	"	New York	Fob Dest			
X	G.P. Barney	N	43996	Syracuse	Watertown	fob Syracuse ½	Alld		
✓	" " "	N	44176	Newark	"	fob Newark 50%	"		
✓	" " "	N	44177	"	Pine Camp NY	Prepaid			
X	" " "	N	44298	Syracuse	Watertown	fob Syracuse 50%	Alld		
X	" " "	S	44312	"	"	" "	"		
	" " "	N	16380	Newark	"		} pt c/l		
	" " "	N	16376	"	"		} "		
	" " "	N	17408	"	"		} "	CF from 16380	
X	Bellingham Hdwe Co	B	13230	Boston	Weymouth Mass	fob Boston Frt	Alld		
X	Henry R Bollinger	N	8908	Newark	Newburgh	fob Dest	c/l }	Shipped together	
X	" " "	A	11574	"	"	Prepaid	c/l }		
X	" " "	A	11645	"	Poughkeepsie	"	c/l }	Shipped together	
X	" " "	A	11605	"	"	"	c/l }		
	" " "	NY	510	"	Hudson	fob Dest			
X	" " "	NY	521	"	Newburgh	" "			
X	" " "	NY	509	"	Poughkeepsie	" "			
X	" " "	N	35109	"	"	fob "	c/l		
	The Pratt Store	Scr	573	Scranton Pa	Honesdale Pa			Invoice Memo	
X	" " "	N	9567	Newark	"	PPD			

Respondent's Exhibit No. 205.

3115

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Respondent's Exhibit No. 205.

North Atlantic (Newark, N.J) District

FEDERAL TRADE COMMISSION
Docket No. 5253 Respondent Exhibit No. 205-G
In the matter of National Lead Co
Date 10/16/47 Witness H. C. Lenihan
Reporter: Federal Reporting Co.
By W. Z. Moore

		Invoice No		Origin		Destination		Marking			Code
	B.F. Reichle	S	44132	Syracuse		Oswego				Invoice Missing	
	" "	S	44287	"		"		Will Call			
	E.L. Durner & Co.	A	11965	Albany		Gloversville	NY	fob Whse			
	A.L. Mason & Sons	A	11933	"		Peru	"	" "			
✓	Pelton Hdwe Co	N	10620	Newark		Middletown	NY	Prepaid – 200# over			
✓	" " "	N	9269	"		"	"	Frt Alld " "			
✓	" " "	N	26649	"		"	"	" " – " "			
X	Hunterdon County Pt Store	N	9555	"		Flemington	NJ	Sob Dest	}		
	J.R. Shults	N	14939	"		Kingston	NY		}	Shipped Together	
X	" " "	N	14936	"		"	"	Sob Dest	}		
	" " "	N	149[illegible]	"		"			}		
	" " "	A	11020	"		"		Sob-Whse			
	"	A	12004	"		Stamford	Conn	" "			
✓	Northern Hdwe Co	N	37153	"		Malone	NY	Sob-Dest	C/L		
✓	Griffin Lumber Co	N	38336	"		Hudson Falls	"	" "			
✓	" " "	N	15516	"		" "	"	" "	} C/L	-Shipped together	
✓	" " "	N	15517	"		" "	"	" "	}		
	" "	A	11645	Albany	NY	" "	"	Sob Whse			
	" "	A	11569	"	"	" "	"	" "			
	" "	A	11426	"	"	" "	"	" "			
	" "	A	11294	"	"	" "	"	" "			

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	INVOICE	NO	ORIGIN	DESTINATION	MARKING	
[illegible]	O	42013	Oakland	Pittsburg		
[illegible]	O	44555	"	Dunsmuir		
Maxwell Wh[illegible] Hdw Co	O	39682	"	Oakland		
Piedmont Board of Education	O	42562	"	Piedmont	Sob Piedmont Government SW truck	
[illegible] Paint Store	O	41235	"	San Francisco	Free Delivery Area	
[illegible] Hardware Co	O	44165		" "	" " "	
[illegible] Hardware Co	O	42560	"	" "	" " "	
City of Oakland	O	43782	"	Oakland		
Yosemite [illegible] Co	O	41952	"	Merced		C
[illegible] Fuel Co	O	35873	"	Madera		C
[illegible] Hdw Co	O	39795	"	Daly City	Free Delivery Area	
[illegible] Manufacturing Co	O	35222	"	Emeryville	" " "	
Burlingame [illegible] Co	O	46619	"	Burlingame	Frt Prepaid -	
Monterey Hardware Co	O	40413	"	Monterey		
[illegible]	Sac	13482	Sacramento	Marysville		C
	Sac	135[illegible]	"	"		C
Mt. Shasta Hardware	Sac	12321	"	Mt Shasta		C
[illegible] Hardware	O	39516	Oakland	Berkeley	Free Delivery Area	
	O	37568	"	"	" " "	
[illegible] Oakland	O	41132	"	Oakland		A
San Rafael Hdwe Co	O	37673	"	San Francisco	" " "	
Mundorf Mercantile Co	O	1039	"	Sonora		C
[illegible] Hardware Co	O	45859	"	Visalia		C
" " "	O	41392	"	"		C
Gillmore & Stornetta	O	46405	"	Point Arena		C
Price Hardware & Furn Co	O	41685	"	Porterville		C
Builders Supply Co	O	24308	"	Gilroy		C
Monterey Hardware	O	25288	"	Monterey	Missing Invoice	
[illegible] & Sons	O	25893	"	San Francisco	Free Delivery Area	
" " "	O	28894	"	" "	" " "	
Maxwell Wholesale Hdw Co	O	28018	"	Oakland		A
K C Heaton Co	O	26984	"	Paso Robles		C
Price Hardware & Furn Co	O	20921	"	Porterville		C
[illegible] Auto Parts	O	27322	"	San Luis Obispo		
De Bem Paint Co	O	22495	"	San Francisco	Free Delivery Area	

FEDERAL TRADE COMMISSION
Docket No. 5253 ~~COMMISSION~~ RESPONDENT Exhibit No. 205-H
IN THE MATTER OF National Lead Co
DATE 10/16/47 WITNESS H. C. Lemke
REPORTER: FEDERAL REPORTING CO.
BY W. Z. Moore

Respondent's Exhibit No. 205.

(7)

Central Pacific (Oakland, Calif) District

	Invoice	No.	Origin	Destination	Marking	Code
[illegible] Feed & Fuel Co	O	28888	Oakland	Madera		C
" "	O	27090	"			C
M Williams & Sons	O	23248	"	Oakland		A
Livingston Dept Store	O	20832	"	Livingston		C
Edwards Hardware Co	O	21679	"	Patterson		C
[illegible] Hardware Co	Santa Rosa	13551	Santa Rosa	Sebastopol	Pick up	
[illegible] Hardware Co	O	26963	Oakland	Vallejo		C
Noah Adams Lumber Co	Sac	1137	Sacramento	Walnut Grove		C
Monterey Hdwe Co	O	21299	Oakland	Monterey		C
Maxwell Wholesale Lbr Co	O	22769	"	Oakland		A
Hall Scott Motor Co	O	25234	"	Berkeley	Free Delivery Area	
M H Whittier & Owners	O	21020	"	San Francisco	Free " "	
Shasta Union High School	O	27089	"	Redding		C
Cranston Bros	O	22865	"	Woodland		C
Kay Manufacturing Co	O	28620	"	Emeryville	" " "	
Western Electric Co	O	22251	"	San Francisco	Prepaid - S-W Truck - Free Delivery Area	
Don Harder's	O	26858	"	Hayward	Will Call	
Lehmann Printing & Litho Co	O	21351	"	San Francisco	Free Delivery Area	
Mendosa's	O	26579	"	" "	" " "	
[illegible] Hdwe Co	SR	13557	Santa Rosa	Sebastopol	- Will Call	
" " "	SR	13533	"	"	- " "	
Johnson Hdwe Co	O	24876	Oakland	Willits		C
[illegible] Co	Sac	926	Sacramento	Folsom	Will Call	
Noah Adams Lbr Co	Sac	2719	"	Clarksburg		
Hing ~~[illegible]~~ Laundry, Troy	O	10224	Oakland	Oakland		
[illegible] Ford Co	O	11157	"	Watsonville		
[illegible] Hardware	O	13620	"	Salinas		
Hall Scott Motor Car Co	O	10591	"	Berkeley	Free Delivery Area	
[illegible] Hardware Co	O	11129	"	San Francisco	" " "	
[illegible] Keller Co	O	13381	"	Concord		
[illegible] Hardware & Paint Co	O	11501	"	Antioch		
A. Sintz Co	O	14736	"	San Francisco	Free Delivery Area	
[illegible] Service Co	O	12623	"	" "	" " "	
San Rafael Hardware	O	11050	"	San Rafael		
Monterey Hardware	O	25255	"	Monterey		C
[illegible] Hardware Co	Sac	2696	Sacramento	Marysville		C
[illegible] Hardware Co	O	15468	Oakland	Salinas		C
Noah Adams Lumber Co	O	39115	"	Walnut Grove		C

FEDERAL TRADE COMMISSION
Docket No. 5253 ~~COMMISSION~~ RESPONDENT Exhibit No. 205-2
IN THE MATTER OF National Lead Co
DATE 10/16/47 WITNESS H E [illegible]
REPORTER FEDERAL REPORTING CO.
BY W [illegible] [illegible]

3118

Respondent's Exhibit No. 205.

6112

R-205H-2

Central Pacific (Oakland Calif. [illegible]

FEDERAL TRADE COMMISSION
Docket No. 5253 Exhibit No. 205-J
In the Matter of National [illegible]
Date 8/6/27 Witness W. C. [illegible]
Reporter Federal Reporting Co.
By W. [illegible]

	Invoice	No	Origin	Destination	Markings	Code
[illegible]	O	37774	Oakland	Oakland		–
[illegible]	O	[illegible]526	"	Richmond	Free Delivery Area	
[illegible] Bros	O	41906	"	San Francisco	" " "	
[illegible]	O	39602	"	"	" " "	
[illegible] Hardware	C	43939	"	Redwood City		–
[illegible]	C	27736	"	Monterey		C
[illegible] Lumber Co	O	25945	"	Redwood City		
[illegible]	O	24325	"	Soquel		C
[illegible] Hardware	O	25200	"	Walnut Creek	Will Call	
[illegible]	C	28162	"	Oakland		–
	O	2516[illegible]	"	"		–
	O	[illegible]948	"	Berkeley	Free Delivery Area	
[illegible] Co	O	26550	"	Pas Robles		
[illegible]	C	22755	"	San Francisco	Free Delivery Area	
[illegible] Co	C	25211	"	Berkeley	" " "	
[illegible] Co	O	26230	"	San Francisco	Prepaid - Sub [illegible] - Free Delivery Area	
[illegible]	O	25963	"	Oakland		–
[illegible] Manufacturing Co	O	25657	"	Emeryville	Free Delivery Area	
[illegible] Printing & Litho Co	O	23216	"	San Francisco	" " "	
[illegible] Lumber [illegible]	O	7920	"	Standard		C
[illegible] Hardware	Sac	[illegible]432	Sacramento	Oroville		C
[illegible] Manufacturing	O	13506	Oakland	Emeryville	Free Delivery Area	
[illegible] Feed Co	O	12635	"	Watsonville	" "	
[illegible] Dredging Co Ltd	O	43451		Alameda	" " "	
		42114	"	"	" " "	
		42712	"	"	" " "	
		39423	"	[illegible] 7th Sts - S.F. - Free Delivery Area		
		[illegible]159	"	"	" " "	
		39205	"	San Francisco	" " "	
[illegible]		[illegible]12		Alameda	" " "	
		3[illegible]56		"	" " "	
		[illegible]12	"	"	" " "	
[illegible] Co		[illegible]		Monterey		–
[illegible]	C	35139	"	Sacramento	Sub Oakland via S.P.	
	C	[illegible]		W. Oakland		
	O	[illegible]	[illegible] Angeles	Los Angeles		A
	O	5186	"	"		
	C	[illegible]	[illegible]land	Bayshore	Sub San Francisco	
		[illegible]24	Los Angeles	Los Angeles		A
		[illegible]42	Oakland	W. Oakland	Sub Oakland	
		33[illegible]	"	Bay Shore	Sub San Francisco	
[illegible] Express Co	O	33854	Los Angeles	Los Angeles		A
	C	[illegible]	"	"		
	C	33586	"	"		A
		335[illegible]	Oakland	Roseville	Sub Berkeley - Free Delivery Area	

Respondent's Exhibit No. 205.

Central Pacific (Oakland Calif.) District

		Invoice No	Origin	Destination	Marking	Code
Pacific Fruit Express Co	O	33886	Oakland	Nampa Id	fob Berkeley - Free Delivery Area	
" " " "	O	39068	Los Angeles	Los Angeles		A
" " " "	O	5724	" "	" "		A
Hall Scott Motor Car Co	O	44387	Oakland	Berkeley	Free Delivery Area	
" " " " "	O	41236	"	"	" " "	
" " " " "	O	37766	"	"	" " "	
County of Alamedo	O	38104	"	San Leandro	fob - Prison Farm - Government - Bid - Free Delivery Area	
Alexander + Baldwin Ltd	O	39675	"	San Francisco	Free Delivery Area	
Theo H Davies + Co Ltd	O	38476	"	" "	" " "	
Theo H Davies + Co Ltd	O	37655	Oakland	San Francisco	" " "	
" " " " "	O	45116	"	" "	" " "	
Pacific Bridge Co	O	23640	"	San Diego	fob - San Diego - Bid	
Pacific Naval Air Bases	O	28439	Oakland	Alameda	Free Delivery Area	
" " " "	O	28438	"	"	" " "	
Hawaiian Dredging Co Ltd	O	23980	"	"	" " "	
" " " "	O	23981	"	"	" " "	
" " " "	O	23982	"	"	" " "	
City + County of San Francisco	O	28599	"	San Francisco	" " "	
" " " " "	O	25746	"	" "	" " "	
" " " " "	O	25062	"	" "	" " "	
Sportsman's Shop	Sacro	1082	Sacramento	Placerville		C
Palace Hardware Co	O	21690	Oakland	Treasure Island	" " "	
Fulton Shipyards	O	27818	"	Antioch	Will Call	
Alexander + Baldwin Ltd	O	25466	"	San Francisco	Free Delivery Area	
Columbia Steel Co	O	27159	"	Pittsburg		
Finance Officer, U.S. Army	O	25423	"	Fort Ord	fob Fort Ord - Government Bid	
Southern Pacific Co	O	25424	"	Los Angeles	fob Oakland thru Lines	
" " "	O	25425	"	" "	" " "	
" " "	O	27799	"	Bayshore	" " "	
" " "	O	28482	"	W. Oakland	" " "	
" " "	O	28841	"	Sacramento	" " "	
Bethleh Alameda Shipyard Inc	O	12680	"	Alameda	fob Alameda - Free Delivery Area	
Moore Dry Dock Co	O	15567	"	Oakland		A
" " " "	O	13565	"	"		A
" " " "	O	14201	"	"		
" " " "	O	11950	"	"		
Southern Pacific Co	O	5549	Los Angeles	Los Angeles		
" " "	O	13566	Oakland	" "	fob Los Angeles -	
Finance Officer, U.S. Army	O	12498	"	Boise Idaho	fob Boise - Government Bid	
De Boom Paint Co	O	15267	"	Richmond	Free Delivery Area	
Alexander + Bald[illegible] Ltd	O	12693	"	San Francisco	fob San Francisco - Free Delivery Area	
Theo H Davies + C[illegible] Ltd	O	15148	"	" "	" " " " "	

FEDERAL TRADE COMMISSION
Docket No. 5253 Respondent Exhibit No. 205-K
IN THE MATTER OF National Lead Co
DATE 10/16/47 WITNESS H. C. Lamb
REPORTER: FEDERAL REPORTING CO.
BY W. F. Morse

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Respondent's Exhibit No. 205.

North Pacific (Portland Ore) District

FEDERAL TRADE COMMISSION
Docket No. 5253 RESPONDENT Exhibit No. 205-L
IN THE MATTER OF National Lead Co.
DATE 10/16/47 WITNESS H. C. Lambe
REPORTER: FEDERAL REPORTING CO.
BY W. L. Moran

		Invoice No		Origin		Destination		Marking			Code
	Grayson & Brown	S	4838	Oakland	Cal	Seattle	Wash				
	U.S. Government	SLC	14724	Salt Lake City		Salt Lake City		Will Call			
	Stadelman Bonn Hdwe	P	14598	Oakland		The Dalles	Ore	Frt Collect			
	Leon B. Morley	P	15722	Portland	Ore	Portland	"				A
	Royal Coal & Lumber Co	SLC	7	Salt Lake City		Logan	Utah				C
	" " "	SLC	48188	" "	"	"	"				C
	Queen Anne Radio & Electric	S	4923	Seattle	Wash	Seattle	Wash				A
	Hubbard Bros	P	14435	Oakland	Cal	Medford	Ore	Fob Oakland. Frt Allowed c/L			
	Oregon Marine Supply Co	P	14714	Portland	Ore	Portland	"				A
	Monroe Hardware Co	Sp	3216	Spokane	Wash	Spokane	Wash				A
	Kennedy Hardware Co	S	695	Oakland	Cal	Anchorage	Ala	Prepaid to Seattle-			
	Kellner & Skaggs	P	21177	Portland	Ore	Enterprise	Ore	Frt Collect			
	Johnson Paint Store	S	4417	Seattle	Wash	Bremerton	Wash				C
	Yakima Hardware Co	S	1674	Chicago	Ill	Yakima	"		c/L		
	Idaho Hdwe & Plumbing Co	P	17085	Chicago	Ill	Boise	Id		c/L		
	" " "	P	17302	"	"	"	"				
	Ken R. Hunks	P	20820	Portland	Ore	Portland	Ore				A
	Basche-Sage Hardware Co	P	17332	Chicago	Ill	La Grande	Ore		c/L	with 17085 + 17302	
	" " "	P	15672	"	"	Baker	"		c/L		
	Big Basin Lumber Co	P	15501	Oakland	Calif	Klamath Falls	Ore	Frt Allowed	c/L		
	Bonneville Lumber Co	SLC	90	Salt Lake City		Idaho Falls	Id				C
	Walters & Taylor	Sp	2881	Spokane	Wash	Moscow	Id				C
	Officer of U.S. Property etc. Officer	SLC	14797	Salt Lake City		Camp Wm	Ut	Deliver		Government	
	U.S. Treasury Dept	S	3950	Seattle	Wash	Ft Lewis	Wash	Prepaid		"	
x	U.S. Govt Office of Quartermaster	S	4744	Seattle	Wash	Ft Missoula	Mont	Prepaid		Government - Bid	
	U.S. Govt Construction Quartermaster	SLC	14767	Salt Lake City		Ogden	Utah			" "	
	"	SLC	48255	" "	"	"	"			" "	
x	"	P	15896	Chicago	Ill	Ft Douglas	Utah	fob - Ft. Douglas		Government - Bid	
x	"	P	15206	"	"	" "	"	Prepaid		" "	
	" U.S. Army	S	232	Seattle	Wash	McChord Field	Wash	"		"	
✓	" U.S. Quartermaster	S	4823	"	"	Ft. Lewis	"	"		" Bid	
x	" U.S. War Dept	S	4778	"	"	Ft. Worden	"	"		" "	
x	" U.S. Quartermaster	S	4323	"		Ft Lewis	"	"		" "	
✓	" U.S. War Dept	P	15420	Portland	Ore	Vancouver	"	"		"	
	" U.S. Engineers	S	4824	Seattle	Wash	Seattle	"				A
	Utah Valley Glass & Paint Co	SLC	48260	Salt Lake City		Provo	Utah	Frt Allowed		- Entire Amt Refunded	
	" " " " "	SLC	131	" "	"	"	"				C
	Thomas Hardware Co	S	4864	Seattle	Wash	Juneau	Ala				C
	F.G. Foster Co	S	1090	Oakland	Cal	Hoquiam	Wash				C
✓	R.L. Elsstrom Co	P	14294	"	"	Salem	Ore	Frt Allowed	c/L		
	Southern Pacific Co	P	14047	Portland	Ore	Brooklyn	Ore				C
	" " "	P	14855	"	"	"	"				C
	" " "	P	16267	"	"	"	"				C
	Hillyard Methodist Church	Sp	2472	Spokane	Wash	Spokane	Wash	Deliver -	Free	Delivery Area	
	" " "	Sp	2537	"	"	"	"	"		" "	
✓	C.R. Harris Paint Hdgrs	S	3830	Oakland	Cal	Olympia	Wash	Boat Prepaid	c/L		

Respondent's Exhibit No. 205.

6115

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Respondent's Exhibit No. 205.

North Pacific (Portland Ore) District

			Invoice No	Origin	Destination	Marking			Code
X	C.R. Harris Paint Hdqts	S	1138	Oakland	Olympia	Boat-Prepaid	c/c		
✓	Hall + Olswang	S	4326	"	Seattle	"	c/c		
	Larson Lumber Co	S	3058	Seattle	Pt. Blakely Wash				C
	" "	S	2256	"	" " "	Call			
X	Chi, Milwauk, St Paul, + Pacific Ry	S	11819	"	Tacoma "	Prepaid			
	Portland Provision Co	P	12314	Portland	Portland				A
	Dresslar Hdwe Co	S	11638	Seattle	Seattle				A
	R.A. Elsstrom	P	11604	Oakland	Salem Ore	Frt Allowed	c/c		
	McGillvray Bros	S	12860	Seattle	Ketchikan Ala				C
	Valley Paint + Glass Serv	S	12479	"	Seattle				A
	Campbell Lumber Co	P	10315	Portland	Longview Wash	Frt Collect			
	C Kraft + Son	S	11504	Seattle	Kodiak Ala				C
	Yakima Hardware Co	S	12182	Chicago Ill	Yakima Wash				
	Walla Walla Lbr Co	P	10499	Portland	Walla Walla "	Frt Collect			
	Georgetown Hdwe + Paint	S	11495	Seattle	Seattle				A
	Stad-lman-Bonn Hdwe Co	P	9794	Portland	The Dalles Ore	Frt Collect			
	Commercial Hdwe Co	O	DD 20003	Oakland	Reno Nev				C
	Valley Paint + Glass Service	S	9473	Seattle	Seattle				A
	Stevens Lumber Co	S	13954	"	Edmonds Wash	Will Call			
	State Highway Dept	S	13735	"	Seattle				A
	Hiram Groves Hdwe Co	P	10709	Portland	Lebanon Ore	Frt Collect			
	Poulsbo Lumber Co	S	11903	Seattle	Poulsbo Wash				C
	Chi Milwauk St Paul + Pacific Ry	S	13117	"	Seattle	Prepaid		Free Delivery Area	
	[illegible] Hdwe	C	DD 19911	Oakland	Yreka Calif				C
	Portland Hardware Co	S	11672	Seattle	Seattle				A
	[illegible] Lumber Co	S	11725	"	Port Blakely Wash				C
		S	12764	"	" "				C
	Government	S	11265	Chicago Ill	Belton Mont	Prepaid		- Government	
	F H Stendahl	S	12239	Seattle	Seattle				A
		S	13590	"	"				A
	[illegible] Washington	S	4183	"	Monroe Wash	Frt PPD		- Government	
	A[illegible] Lumber Co	S	7940	"	Seattle				A
	[illegible] Hardware Co	S	7965	Oakland	Anchorage Ala				
	[illegible] Hdwe Co	S	8323	Seattle	Juneau "				
	[illegible]	S	8680	"	Oroville Wash				C
	[illegible] Hdwe	P	25555	Portland	Grants Pass Ore	Frt Allowed	p c/c		
		P	26142			Collect			
	[illegible] Lumber Co	P	[illegible]	Chicago	Boise Ida		p c/c		
	[illegible]	P	[illegible]	Portland	Medford Ore	Frt Collect			
	[illegible] Bros	P	[illegible]		Portland				A
	[illegible]	S	[illegible]	Seattle	Raymond Wash				C
	[illegible]	P	[illegible]	Portland	Portland				A
	[illegible]	[illegible]	1003	[illegible] City	Provo Utah				C
	[illegible] Co	[illegible]	[illegible]	Portland	Portland				A
		P	[illegible]						A

FEDERAL TRADE COMMISSION
Docket No. 5257 Respondent Exhibit No. 205-M
In the matter of National Lead Co.
Date 10/6/47 Witness H. C. Lemke
Reporter: Federal Reporting Co.
By W. L. Moore

⑫

[illegible]

FEDERAL TRADE COMMISSION

Docket No. [illegible] Exhibit No. [illegible]

IN THE MATTER OF National [illegible]

DATE [illegible] WITNESS [illegible]

REPORTER FEDERAL REPORTING CO.

BY [illegible]

Respondent's Exhibit No. 205.

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Gulf States (Dallas, Texas) District

FEDERAL TRADE COMMISSION
Docket No. 5253 Exhibit No. 205-O
In the matter of National Lead Co
Date 10/16/45 Witness [illegible]
REPORTER: FEDERAL REPORTING CO.
By [illegible]

		Invoice No		Origin	Destination	Marking		Code
	[illegible]	H	1236	Houston Tex	Houston Tex			A
	Marshall Paint & Paper Co	D	17309	Dallas	Cleburne			C
	[illegible] Hack	D	17603	"	DeSota			C
		D	13969		"			C
	Morgan Bldg Specialty Co	D	15878		Dallas			A
	Texas Electric Ry Co	D	18454		"			A
	Magnolia Petroleum Co	D	17841		"			A
	Cross & Co	PA	131	Port Arthur	Port Arthur			A
	Fritz W Glitsch & Son	D	[illegible]069	Dallas	Dallas			A
	Marshall Paint & Paper Co	D	20432	"	Cleburne			C
	[illegible] Paint & Paper Co	D	16514	"	San Angelo		Frt Alld 12¢	
X	[illegible]	D	[illegible]	"	Ruston	[illegible] Prepaid		
	Axtell Co	FW	[illegible]	Fort Worth	Ft Worth			
	[illegible]hmann Mfg Co	H	10302	Houston	Schulenburg	Caller		
	[illegible] Co	G	18	Greenville	Wolfe City	Called for		
	[illegible] Sewell Co	H	4246	Houston	Houston			
	Fritz W Glitsch & Son	D	[illegible]	Dallas	Dallas			
	Lindop Hdwe Co	D	16024	Dallas	Dallas			A
	Morton Salt Co	D	19005	"	Grand Saline			C
	Bruce Campbell Lbr Co	W	21474	Waco	Waco			
	Taylor & Howard	M	[illegible]	Marshall	Leigh	Caller		
	Houghton Bros	D	[illegible]451	Dallas	Temple	Ft Cl	Frt Allo 22¢	
		D	[illegible]					
	Fritz W Glitsch & Son	D	19745		Dallas			
	Houston Shipbldg Corp	H	5278	Houston	Houston			
	The Austin Co	FW	435	Ft Worth	Ft Worth			
	Bruce Campbell	W	[illegible]	Waco	Groesbeck			
	Alamo Iron Works	D	18349	Dallas	San Antonio	Will Call		
	Taylor & Howard	M	5300	Marshall	Leigh	Called for		
	Houston Showcase Mfg Co	H	5271	Houston	Houston			
	Fritz W Glitsch & Son	D	7541	Dallas	Dallas			
	"	D	8194					
	Columbus & Greenville Ry Co	NO	4393	Chicago Ill	Columbus Miss	[illegible]		
X	J.W. Henry Hdwe Co	D	5519	Dallas Tex	Union Miss	PPD		
	Griffin Mfg Co	D	9333		Dallas Tex			A
	Fritz W Glitsch & Son	D	24523	"	"			A
	Houston Showcase Mfg	H	[illegible]	Houston	Houston			
	Lundberg Richter Co Inc	D	10008	Dallas	Laredo			
	LeTourneau Co of Ga	NO	5563	New Orleans La	Vicksburg Miss	fob N.O		
	Higginbotham-Bartlett Co	D	11360	Dallas Tex	Lamesa Tex			
	Tobin Furniture Co	T	129	Texarkana	DeQueen Ark			
	Hawn Lumber Co	D	11627	Dallas	Athens Tex			
	Pendleton Shipyards	NO	5071	New Orleans	New Orleans	fob N.O		

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Respondent's Exhibit No. 205.

Gulf States (Dallas [illegible]

Respondent's Exhibit No. 205.

FEDERAL TRADE COMMISSION
Docket No. [illegible] Exhibit No. [illegible]
IN THE CASE OF National Lead Co
DATE [illegible] WITNESS [illegible]
REPORTER FEDERAL REPORTING CO.
BY [illegible]

		Invoice	No	Origin	Destination	Marking		Code
	[illegible]	FW	845	Ft Worth Tex	Ft Worth Tex			
X	[illegible] Co	D	[illegible]	Dallas	Blakely Ala	PPD	CL	
	[illegible]	H	13411	Houston	Houston			
	[illegible] Co	H	13604	"				
	[illegible]	NO	5742	New Orleans La	New Orleans La			
	[illegible]	NO	[illegible]	"	Marrero	[illegible] N.O.		
X	[illegible]	H	355	Houston Tex	Houston Tex	Prepaid	Government	
	[illegible]	D	24789	Dallas	Dallas			
X	[illegible] Co	D	11026	"	Sherman	PPD		
	[illegible]	D	472		Grand Prairie			C
X	[illegible]	NO	4455		Panama City Fla	Panama City		
	[illegible] Co	D	10624	"	Dallas Tex			
	[illegible] Sons	D	24785	"				
X	[illegible] Co	H	4069	Houston	Corpus Christi	Prepaid		
	[illegible]	H	3637	"	Houston			A
	Panhandle [illegible]	D	13038	Dallas	Borger Tex			
	[illegible]	FW	1556	Ft Worth	Ft Worth			
	[illegible] Co	SA	306	San Antonio	[illegible]			
	[illegible]	WF	[illegible]	Wichita Falls	Graham			
	[illegible]	SA	[illegible]	San Antonio	Carrizo Springs		Invoice Missing	
	[illegible]	H	[illegible]	Houston	Alvin	Collect		
	[illegible]	D	11676	Dallas	San Antonio	Prepaid		
	[illegible]	D	[illegible]	"	Sanderson	"		
	[illegible] Corp	SA	[illegible]	San Antonio	Carrizo Springs			
	[illegible]	D	13676	Dallas	Denton			
	[illegible] Supply	H	7951	Houston	Houston			
	[illegible]	D	15352	Dallas	Pampa			
	[illegible]	D	19738	"	DeSoto	Collect		
		D	[illegible]			"		
	[illegible] Corp	H	10272	Houston	[illegible]			
	[illegible] Co	B	143	[illegible]	[illegible]			
	[illegible]	H	[illegible]	Houston	[illegible]	PPD		
	[illegible]		912	[illegible]			Invoice Missing	

Respondent's Exhibit No. 205.

Gulf States (Dallas Texas) [illegible]

	Invoice No		Origin	Destination	Marking	
Magnolia Pipe Line Co	D	16452	Dallas Tex	Marquez		Invoices Missing
Oil Well Supply Co	D	16460	"	Wewoka Okla		
Sabine Towing Co	PA	124	Port Arthur Tex	Port Arthur		
Texas Pipe Line Co	H	9806	Dallas	Corsicana		
Texas Marine Supply Co	H	4231	Houston	Houston		
Lykes Bros SS Co	NDD	15846	Newark	??		

FEDERAL TRADE COMMISSION
Docket No. 5253 Respondent Exhibit No. 205
IN THE MATTER OF National Lead Co
DATE 10/16/47 WITNESS [illegible]
REPORTER, FEDERAL REPORTING CO.
BY [illegible]

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		Invoice No		Origin		Destination		Marking
✓	Christian Hdwe Co	A	13244	Chicago	Ill	Athens	Ga	Frt Alld Dest C/L
✓	Cayce Yost Co	Kens DD	3325	"		Hopkinsville	Ky	" " "
	" " "	"	11234	"		"	"	Will Call
X	Fowler Flemister Coal Co	A	11232	"		Milledgeville	Ga	Frt Alld Dest
	Deposit Andre Hdwe & Supply Co	Cin	14594	"		Morristown	Tenn	Will Call
X	Gadsden Hdwe Co	A	13026	"		Gadsden	Ala	Frt All Dest C/L
	McMinnville Hdwe Co	A	13186	"		McMinnville	Tenn	Caller
	Chambers Lumber Co	A	5959	Atlanta	Ga	Athens	Ala	Frt Equalized with Nashville
	W Jones & Son	A	6338	"		Thomaston	Ga	
	Fowler Flemister Coal Co	A	3315	"		Milledgeville	"	
	W Jones & Son Hdwe	A	37	"		Thomaston		
X	Gadsden Hdwe Co	A	1577	Chicago	Ill	Gadsden	Ala	Frt Alld Dest C/L
	Cayce Yost Co	Cin	24	Cincinnati	Oh	Hopkinsville	Ky	
	" " "	A	376	"		"		
	" " "	Cin	20177	"		"		
	Gadsden Hdwe Co	A	611	Chicago	Ill	Gadsden	Ala	Frt Alld C/L
X	Hutchens Co	A	1337	Atlanta	Ga	Huntsville	Ala	Frt Equalized with Nashville
	Van Kleeck Co	Penn	375	Pensacola	Fla	Panama City	Fla	Caller
	" "	"	373	"	"	"	"	"
	Fowler-Flemister Coal Co	A	2292	Atlanta	Ga	Milledgeville	Ga	
	" " " "	A	3254	"		"		
	" " " "	A	1799	"		"		
	Cayce Yost Co	Cinn	19544	Cincinnati	Oh	Hopkinsville	Ky	
	Hammer Supply Co	A	11546	Atlanta	Ga	Athens	Tenn	Frt Equalized with Chattanooga
	Thompson Hdwe & Furn Co	A	9412	"		Chattanooga	"	Prepaid
	Conner Bros	Mont	365	Montgomery	Ala	Tuskegee	Ala	"
	Thompson Hdwe & Furn Co	A	8341	Atlanta	Ga	Savannah	Ga	Prepaid Fob Savannah Ga
	" " " "	A	7846	"		"		" " " "
	" " "	Kens DD	8713	Chicago	Ill	"		"
	" " "	A	9566	Atlanta	Ga	"		"
	Newton Coal & Lumber Co	A	9512	"		Griffin	Ga	
	Christian Hdwe Co	A	7541	"		Athens	"	Fob Atlanta
	Shugart & Hunt	Nash	1118	Nashville	Tenn	Franklin	Ky	
	" "	"	962	"		"		
	Grover C Bird	A	6786	Chicago	Ill	Greenville	Tenn	C/L
X	" " "	A	8373	"		"		Prepay
	Gadsden Hdwe Co	A	4066	Atlanta	Ga	Gadsden	Ala	Frt Equalized with Dest
	Henderson [illegible] Supply Co	Cin	766	Cincinnati	Oh	Clarksville	Tenn	
X	" " " "	A	4705	Chicago	Ill	"	"	Frt Equalized with Dest C/L
	Van Kleeck Co	A	14209	Atlanta	Ga	Panama City	Fla	" " " Pensacola
	"	A	3482	"		"		" " " "
X		A	8525	Chicago	Ill	Panama City		Prepaid
X	Hutchens Co	A	9445	"		Huntsville	Ala	Frt Allowed Dest C/L
✓	Deposit Andre Hdwe Co	A	2200	"		Morristown	Tenn	" " "

FEDERAL TRADE COMMISSION
Docket No. 52[illegible]3 Exhibit No. 205 R
IN THE MATTER OF [illegible]
DATE [illegible] FOR [illegible]
REPORTER: FEDERAL REPORTING CO.
BY [illegible]

R

Respondent's Exhibit No. 205.

Respondent's Exhibit No. 205.

WESTERN (Chicago, Ill) DISTRICT

			Invoice No	Origin	Destination	Marking			Code
	[illegible] & Nancy Ins Co	C	5681	Chicago Ill	Chicago Ill				A
X	State Procurement Off	C	5235	"	Burlington Ia	Prepaid		Government	
	U S Treasury Dept	C	56414	"	Chicago Ill				A
	Belt Railway Co of Chicago	C	56958	"	"				A
X	[illegible] Co Mfg Co	C	7356	"	Hammond Ind	Frt Prepd	-	Free Delivery Area	
		C	6392	"	Chicago				A
✓		C	2403	"	Hammond Ind			" " "	
✓		C	7476	"	"			" " "	
	Chicago [illegible] Iron Co	C	7092	"	Chicago Ill				A
		C	56993	"	"				A
		C	3704	"	"				A
		C	880	"	"				A
	[illegible] Indiana R R Co	C	1198	"	"				A
	[illegible] Co	C	55405	"	"				A
		C	2799	"	"				A
	[illegible] Co	C	7941	"	"				A
		C	4538	"	"				A
		C	3582	"	"				A
	[illegible]	C	1929	"	Cloquet Minn	fob Chicago			
	Minneapolis Moline Power Imp Co	Minn	45316	Minneapolis Minn	Minneapolis Minn				A
	Chicago Malleable Castings Co	C	8461	Chicago	Chicago				A
	[illegible] Meyer & Co	C	8529	"	"				A
	Vonnegut Hdwe Co	C	59529	"	Indianapolis	Prepay	c/l		
	Chicago Park Dist	C	1325	"	Chicago				A
	J H W [illegible] & Sons Inc	C	7964	"	"				A
	[illegible] Co	C	[illegible]	"	"				A
	[illegible] Hdwe Co	C	59866	"	"				A
	[illegible] Co	C	4360	"	"				A
		C	7319	"	"				A
		C	56069	"	"				A
	[illegible] Miller	C	8100	"	"				A
	[illegible] Service	NO	29185	New Orleans	New Orleans				A
	E M [illegible]	C	6202	Chicago	Chicago				A
	[illegible] Inc	C	57565	"	Racine Wisc	Prepay	3/4 c/l (CF)		
	[illegible] Service	C	51137	New Orleans	New Orleans				A
	[illegible] T. Miller	C	59369	Chicago	Chicago				A
	"	C	59522	"	"				A
	[illegible] Pump & Engine Co	C	47800	"	"				A
	[illegible]	C	66192	"	" Hts				B
		C	51298	"	" "				~~A~~ B
		C	66101	"	" "				~~A~~ B
	Naylor Pipe Co	C	59915	"	"				A
	" "	C	53427	"	"				A
X	[illegible] Flour Milling Co	Minn	31118	Richmond Va	Keswick Va	Prepaid - Frt Chgs added face of invoice			6^{80}
	Chicago Park District	C	58463	Chicago	Chicago				A
		C	58433	"	"				A
		C	[illegible]	"	"				A
	[illegible] Army	C	41936	"	"				A
	[illegible] Corp	C	[illegible]	"	"				A
	[illegible] Amet Co	C	57801	"	"				A

FEDERAL TRADE COMMISSION
Docket No. 5253 ~~Complaint's~~ Respondent's Exhibit No. 205 5
IN THE MATTER OF National Lead Co
DATE [illegible] WITNESS [illegible]
REPORTER FEDERAL REPORTING CO.
BY [illegible]

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Respondent's Exhibit No. 205.

FEDERAL TRADE COMMISSION
Docket No. 5[illegible] Exhibit No. [illegible]
IN THE MATTER OF National Lead
DATE [illegible]
REPORTER FEDERAL REPORTING CO.
BY [illegible]

	Invoice No.	[illegible]	Destination	Marking
	44577	Cleveland	[illegible]sburg Pa	fob Cleveland Charges added to invoice
	[illegible]	Chicago Ill	Chicago [illegible]	
D	186	Decatur	Decatur	Charges added to invoice
D	182	"	"	" " " "
	20286	Chicago	Chicago	
I	44462	Indianapolis Ind	Indianapolis Ind	
	[illegible]649	Chicago	Chicago	
I	[illegible]8	Indianapolis	Indianapolis	
I	15142	"	"	
I	15141	"	"	
I	15025	"	"	
I	15024	"	"	
C	47131	Chicago Ill	Chicago Ill	
C	40561	"	"	
C	44796	"	"	
C	55260	"	"	
C	4[illegible]	"	"	
C	46635	"	"	
C	41223	"	"	
C	1878	"	"	
C	[illegible]971	"	"	
C	[illegible]656	"	Indianapolis	Prepaid

A

3129

6423

Western (Chicago Ill) District

		Invoice No.		Origin	Destination	Marking				Code
	Chic, Rock Is. + Pac. Ry Co	C	50533	Chicago Ill	Chicago Ill					A
	H W Young + Son	C	50269	"	"					A
	Vonnegut Hdwe Co	Ind	15154	Indianapolis	Indianapolis					A
	Nat'l Decorators Supply Co	"	14502	"	"					A
x	H D White + Co	C	60123	Chicago	Alexandria La	Prepaid - Chg		14^{84} added face Invoice		
	Lite Products Corp	C	56439	Chicago	Chicago					A
	Western Electric Co	C	54585	"	"					A
	Naylor Pipe Co	C	54190	"	"					A
	Diamond T Motorcar Co	C	55250	"	"					A
	Welch Hardware	C	58983	"	Two Harbors Minn	sob Duluth - Pool		C/L to Duluth		
	Vonnegut Hdwe Co	C	47636	"	Indianapolis	Prepay				
	American National Bank	C	57556	"	Chicago					A
	General Mills, Inc	Minn	2254	Minneapolis	Minneapolis					A
	Gipson Lumber Co	C	4108	Chicago	Hastings Minn	Prepay	C/L			
	Ingersoll Steel + Disc Div	C	48999	"	Chicago					A
	Athey Truss Wheel Co	C	50968	"	"					A
	Crane Co	C	46690	"	"					A
	Carnegie Illinois Steel Corp	C	57086	"	So Chicago					B
	Lite Products Corp	C	8233	"	Chicago					A
	Fevor-Kuhl Co	C	57527	"	"					A
	Chicago Park District	C	4840	"	"					A
	Western Electric Co, Inc	C	2707	"	"					A
	Carnegie Illinois Steel Corp	C	8111	"	Gary Ind	sob Dest - Prepd				
	Crane Co.	C	2761	"	Chicago					A
	Athey Thruss Wheel Co	C	55801	"	"					A
	Ingersoll Steel + Disc Div.	C	58201	"	"					A
	Pressed Steel Corp	C	5280	"	"					A
	Chic + West Indiana RR Co	C	5904	"	"					A
	Chicago Bridge + Iron Co	C	57931	"	"					A
	Bowman Elder Receiver	Ind	640	Indianapolis	Indianapolis					A
	Columbia Bank Note Co	C	3405	Chicago	Chicago					A
	Johnson King Co	C	5459	"	"					A

FEDERAL TRADE COMMISSION
Docket No. 5253 RESPONDENT Exhibit No. 205-U
IN THE MATTER OF National Lead Co.
DATE 10/16/47 WITNESS H C Lenk
REPORTER: FEDERAL REPORTING CO.
BY W. R. Moore

North Central (Cleveland [illegible]) District

FEDERAL TRADE COMMISSION
Docket No. [illegible] ~~[illegible]~~ Exhibit No. 205-Y
IN THE MATTER OF National Lead Co.
DATE 10/16/47 WITNESS N. C. Lemke
REPORTER FEDERAL REPORTING CO.
BY W. F. Moss

	[illegible]	No.	Origin	Destination	Marking		J.
A[illegible] Hardware	TW	[illegible]	Cleveland O.	Bay Village O.			
[illegible] Hardware	TW	0353		Cleveland			
[illegible] Co	TW	[illegible]		"			
[illegible] Hardware Co	TW	4115	"	"			
	TW	[illegible]	"	"			
	TW	[illegible]		"			
	TW	[illegible]		"			
	TW	[illegible]		"			
		[illegible]		"			
	TW	[illegible]					A
[illegible] Co	TW	[illegible]	Pittsburg	Homestead	Our Truck		
[illegible] Co	TW	4155	Cleveland	Pittsburg			
		4618	"	Homestead	PPD		
[illegible] Co	C	[illegible]	Cincinnati O.	[illegible]	Will Call		
	C	14555	Chicago Ill	Covington Ky	Frt Allowed	c/l	
	Cn	[illegible]	Chicago Ill	Covington Ky		"	
	C	[illegible]	Cincinnati O.	"			B
		[illegible]					B
	Cn	[illegible]					B
[illegible] Co	Cn	[illegible]	Chicago Ill	Cincinnati Oh	Frt Allowed	c/l	
[illegible]	TW	[illegible]	Cleveland Oh	Cleveland			
[illegible]	TW	[illegible]					
	[illegible]	4015	Pittsburgh	Pittsburgh Pa			
	[illegible]	[illegible]					
[illegible] Co		10155	Detroit Mich	Detroit Mich			
[illegible] Hardware	D	6744	"	"			
[illegible] Hardware Co	C	12162	Cleveland Oh	Bay Village Oh			B
[illegible]	TW	1910	"	Cleveland			
[illegible] Supply Co	TW	[illegible]	"	"			A
[illegible] Co	D	2456	Detroit Mich	Adrian Mich			C
Almont Hardware Co	D	1028		Almont "			C
[illegible] Co	D	1575		Adrian			C
	D	[illegible]		"			C
[illegible] Co	D	[illegible]		Bridgewater			C
[illegible] Co	D	[illegible]		Adrian			C
		4663		"			C
		[illegible]		"			C
		[illegible]					C
		4321					C
		4616					C
Al[illegible] Hardware				Fargo			C
[illegible]		[illegible]		Fowlerville			C
[illegible] Bank		1224		O. Adrian			C
[illegible]		1330		Sandusky			C
		[illegible]		"	" Will Call		
		13006		"	"		

Respondent's Exhibit No. 205.

3131

6125

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North Central (Cleveland, Ohio) District

FEDERAL TRADE COMMISSION
Docket No. 5253 Commission / Respondent Exhibit No. 205-W
In the matter of National Lead Co.
Date 10/10/47 Witness H. C. Fambe
REPORTER: FEDERAL REPORTING CO.
By W. L. Moore

			Invoice No	Origin	Destination	Marking			Code
	[illegible] & Son	T	539	Toledo Oh	Tecumseh Mich				C
	Greene's [illegible] Store	D	7909	Detroit Mich	Ypsilanti "				C
	" "	D	6621	"	"				C
x	Bluefield Hdwe Co	C	11188	Cleveland	Bluefield WVa	Prepaid	c/l		
x	"	C	11755	"	"	"	c/l		
x		C	12396	"	"		c/l		
	[illegible] Lbr Co	C	1192	"	Bradford Pa			Invoice Missing	
	[illegible]	TW	10849	"	W Middlesex Pa				C
		Y	52	Youngstown Oh	" " "	Will Call			
		Y	361	" "	" " "	" "			
		Y	333	" "	" " "	" "			
		TW	24704	Cleveland	" " "				C
		Y	143	Youngstown	" " "	Will Call			
		Y	262	"	" " "	" "			
x	Geddes Hdwe	C	49929	Cleveland	Batavia NY	Prepaid			
x	Edw M Davis Co	C	3326	"	Rock Glen NY	"	c/l		
	Geddes Hdwe	TT	20551	"	Batavia NY				C
	" "	TT	21797	"	" "				C
	" "	B	3559	Buffalo NY	" "				C
x	" "	C	11417	Cleveland Oh	" "	PPD	c/l		
	Morgantown Hdwe Co	Pitts	1218	Pittsburg Pa	Morgantown WVa				C
x	" "	C	11199	Cleveland Oh	" "	PPD	c/l		
	" "	Pitts	14175	Pittsburgh Pa	" "				C
	Bridgewater Lumber Co	D	12401	Detroit Mich	Bridgewater Mich				C
	" " "	D	3650	" "	" "				C
	" "	D	8662	" "	" "				C
	H & R Hardware	TW	58478	Cleveland Oh	Cleveland Oh				A
	Lambert Hardware	TW	17293	Cleveland "	Lockport NY				C
	Mich Potato Growers Exch	D	5156	Detroit Mich	Cadillac Mich				C
x	Trans Off - 735 Eng Div	TW	52672	Cleveland Oh	Bucyrus Oh	PPD & Alld		Government	
	Alvin Rich & Co	TW	40952	" "	Wooster Oh				C
	" "	TW	43517	" "	" "				C
	" "	TW	46152	" "	" "				C
	Jesse Sparthe	TW	61554	" "	McCutchenville				C
	Holland Co	TW	40810	" "	Mt Gilead Oh				C
	Delaware Farmers Exch	TW	61836	" "	Delaware Oh				C
	R T Webb Hdwe	TW	50292	" "	Kipton Oh				C
	"	C	22	" "	" "				C
	Wesbecher Hdwe Co	C	2361	" "	Amherst				C
	J & R Hdwe Co	TW	65579	" "	Cleveland				A
x	Edwin M Davis & Co	C	11386	" "	Rock Glen NY	Prepaid	c/l		
	Paul T. Simpson Hardware	B	5716	Buffalo NY	Randolph NY				C
	" " "	B	5211	"	"				C
	" " "	B	5005	"	"				C
	Seebach & Kimble	R	1583	Rochester NY	Rochester NY				A
	Fairmont Wall Plaster Co	C	9973	Cleveland Oh	Fairmont WVa				C
	Lamberts Hardware	C	11986	" "	Lockport NY				C

6126

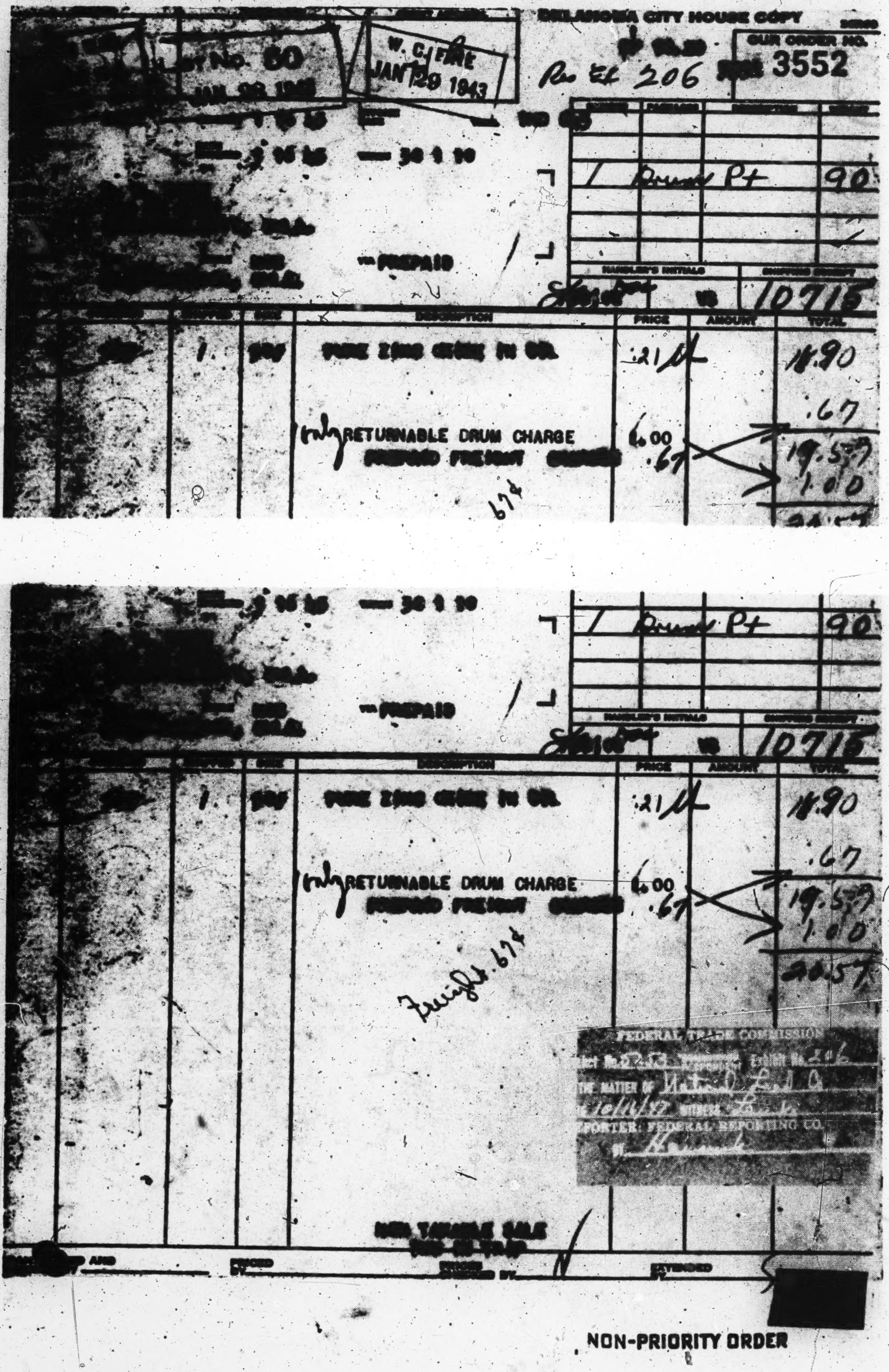
3132

Respondent's Exhibit No. 205.

FEDERAL TRADE COMMISSION
Docket No. 5253 Exhibit No. 205 X
IN THE MATTER OF National Lead Co.
DATE 10/20/47
BY W. L. Mores

[illegible]	[illegible]	24	Rockford			
	E		Rockford			
	[illegible]		[illegible]			
	C	[illegible]		[illegible]	PPD	C/L
		10534			Prepaid	C/L
	WHs	14119		Meadville	PPD	C/L
		[illegible]		Syracuse		
		[illegible]		Olean NY		
		11201			PPD	C/L
	C	4957	"	Rock Glen	Prepaid	C/L
		4627		[illegible]	PPD	
		841			PPD	C/L
	NY	919	[illegible]	Corning NY		
	C	[illegible]		[illegible] Falls	[illegible]	
	M	[illegible]		[illegible]		
	NY	[illegible]	"			
	E	[illegible]	"	Buffalo NY		
	Cin	4745	Cincinnati	Covington Ky		
G[illegible]		11563	Detroit Mich	Alma Mich		

Respondent's Exhibit No. 205.



[illegible] CITY HOUSE COPY

OUR ORDER NO. 3552

Re Ex 206

W. C. FINE
JAN 29 1943

Lot No. 60
JAN 28 1943

PREPAID

1	Drum Pt		90

HANDLER'S INITIALS

10715

ORDERED	SHIPPED	SIZE	DESCRIPTION	PRICE	AMOUNT	TOTAL
	1		PURE ZINC OXIDE IN OIL	.21		18.90
						.67
			only RETURNABLE DRUM CHARGE	1.00		19.57
			PREPAID FREIGHT CHARGES	.67		1.00
						20.57

67¢

PREPAID

1	Drum Pt		90

10715

ORDERED	SHIPPED	SIZE	DESCRIPTION	PRICE	AMOUNT	TOTAL
	1		PURE ZINC OXIDE IN OIL	.21		18.90
						.67
			only RETURNABLE DRUM CHARGE	1.00		19.57
			PREPAID FREIGHT CHARGES	.67		1.00
						20.57

Freight 67¢

FEDERAL TRADE COMMISSION
Dkt No. [illegible] Respondent's Exhibit No. 206
In the Matter of [illegible]
10/14/47 Witness [illegible]
REPORTER: FEDERAL REPORTING CO.
By [illegible]

NON TAXABLE SALE

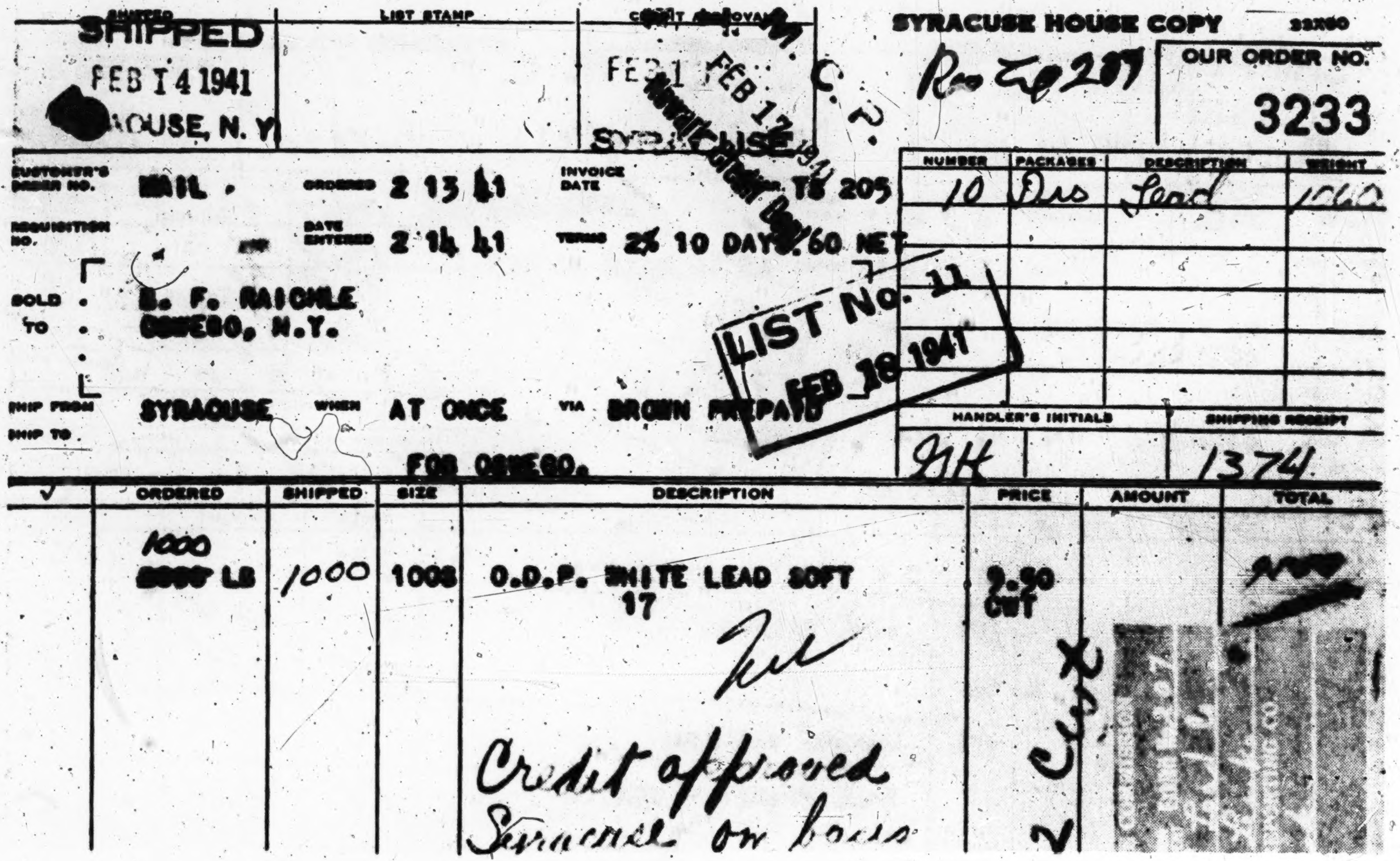
PRICED BY

EXTENDED BY

N

[redacted]

NON-PRIORITY ORDER



SHIPPED
FEB 14 1941
SYRACUSE, N. Y.

LIST STAMP

CREDIT APPROVAL
FEB 1
SYRACUSE
FEB 17 1941
M. C. P.

SYRACUSE HOUSE COPY
Res Ex 207

OUR ORDER NO.
3233

CUSTOMER'S ORDER NO. MAIL. ORDERED 2 13 41 INVOICE DATE TS 205

REQUISITION NO. DATE ENTERED 2 14 41 TERMS 2% 10 DAYS 60 NET

SOLD TO B. F. RAICHLE
OSWEGO, N.Y.

SHIP FROM SYRACUSE WHEN AT ONCE VIA BROWN PREPAID
SHIP TO
FOB OSWEGO.

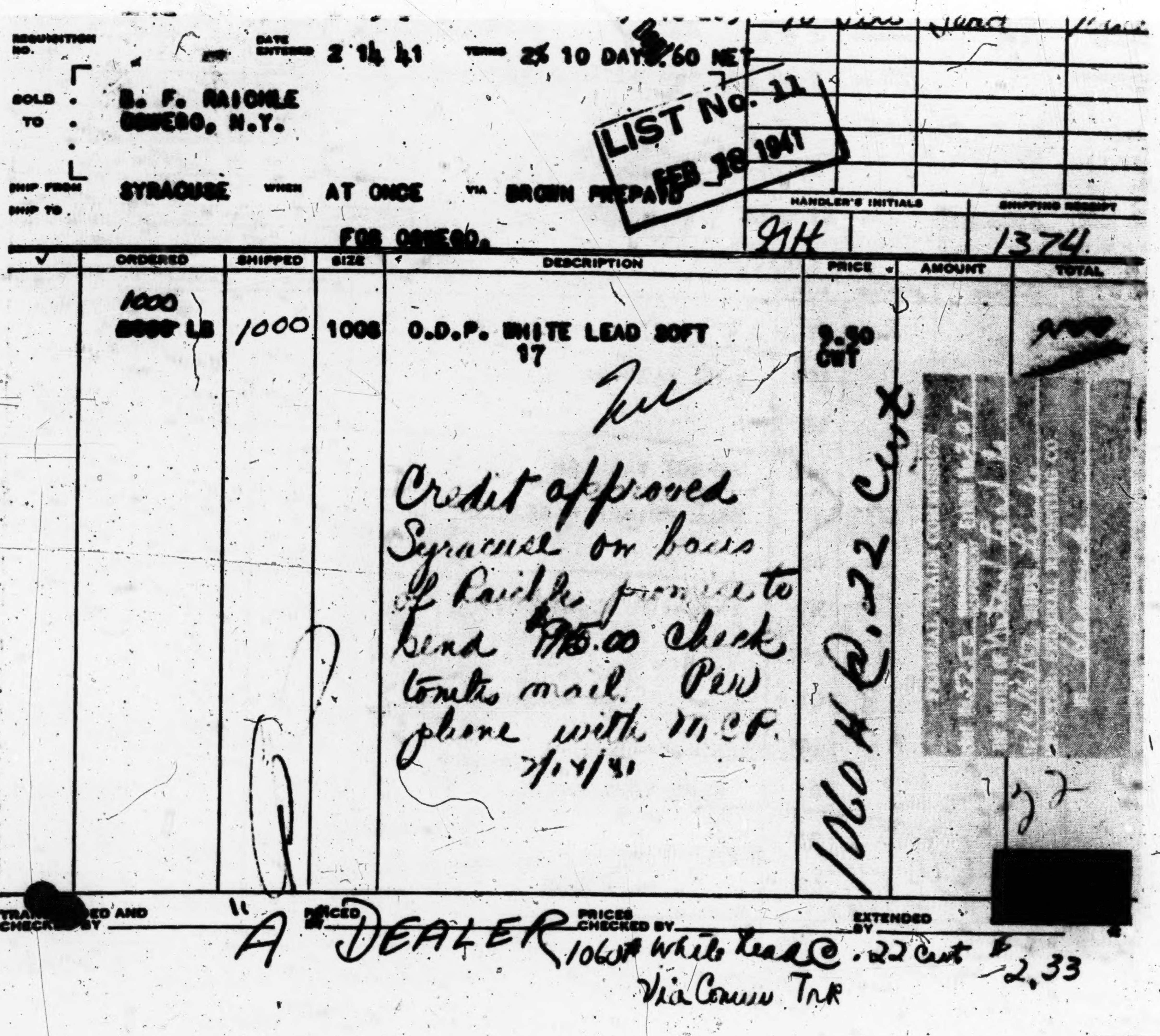
LIST No. 11
FEB 18 1941

NUMBER	PACKAGES	DESCRIPTION	WEIGHT
10	Drs	Lead	1060

HANDLER'S INITIALS	SHIPPING RECEIPT
GH	1374

✓	ORDERED	SHIPPED	SIZE	DESCRIPTION	PRICE	AMOUNT	TOTAL
	~~2000~~ 1000 LB	1000	1008	O.D.P. WHITE LEAD SOFT 17	9.50 CWT		

Credit approved
Syracuse on basis



REQUISITION NO. DATE ENTERED 2 14 41 TERMS 2% 10 DAYS 60 NET

SOLD TO B. F. RAICHLE
OSWEGO, N.Y.

SHIP FROM SYRACUSE WHEN AT ONCE VIA BROWN PREPAID
SHIP TO
FOB OSWEGO.

LIST No. 11
FEB 18 1941

HANDLER'S INITIALS GH SHIPPING RECEIPT 1374

✓ ORDERED ~~2000~~ 1000 LB SHIPPED 1000 SIZE 1008 DESCRIPTION O.D.P. WHITE LEAD SOFT 17 PRICE 9.50 CWT AMOUNT TOTAL

Credit approved
Syracuse on basis
of Raichle promise to
send $75.00 check
tonights mail. Per
phone with M.C.P.
2/14/41

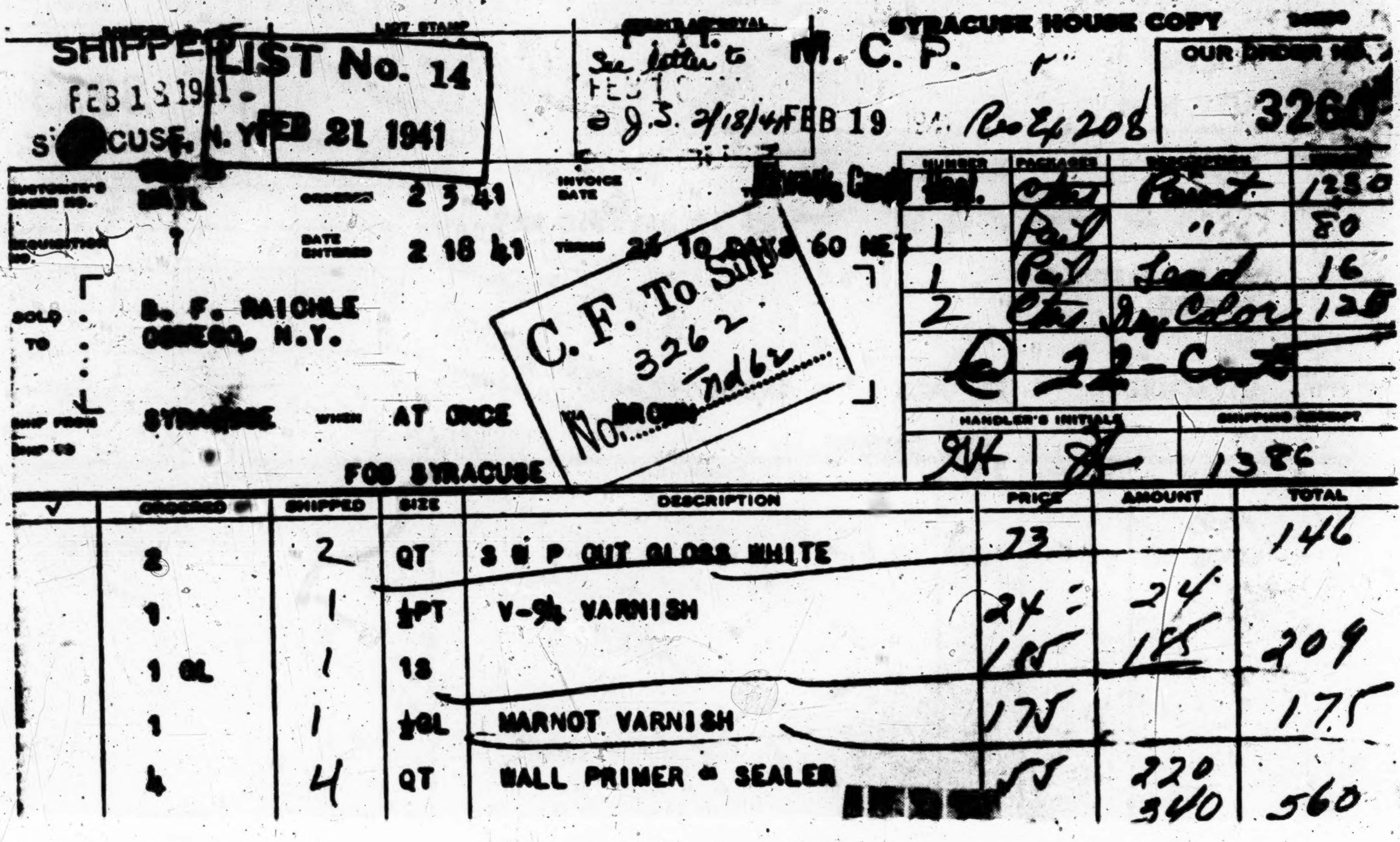
1060 # @ .22 Cwt

[redacted]

TRANSCRIBED AND CHECKED BY "A" PRICED DEALER PRICES CHECKED BY EXTENDED BY

1060# White Lead @ .22 Cwt 2.33
Via Comm Trk

Respondent's Exhibit No. 208.



SHIPPED FEB 18 1941 SYRACUSE, N.Y.

LIST No. 14 FEB 21 1941

CREDIT APPROVAL: See letter to FEB 1 @ J.S. 2/18/41 FEB 19 '41

M. C. P.

Res Ex 208

SYRACUSE HOUSE COPY

OUR ORDER NO. 3260

CUSTOMER'S ORDER NO. MAIL — ORDERED 2 3 41 — INVOICE DATE

REQUISITION NO. ? — DATE ENTERED 2 18 41 — TERMS 2% 10 DAYS 60 NET

SOLD TO B. F. RAICHLE
OSWEGO, N.Y.

SHIP FROM SYRACUSE — WHEN AT ONCE

FOB SYRACUSE

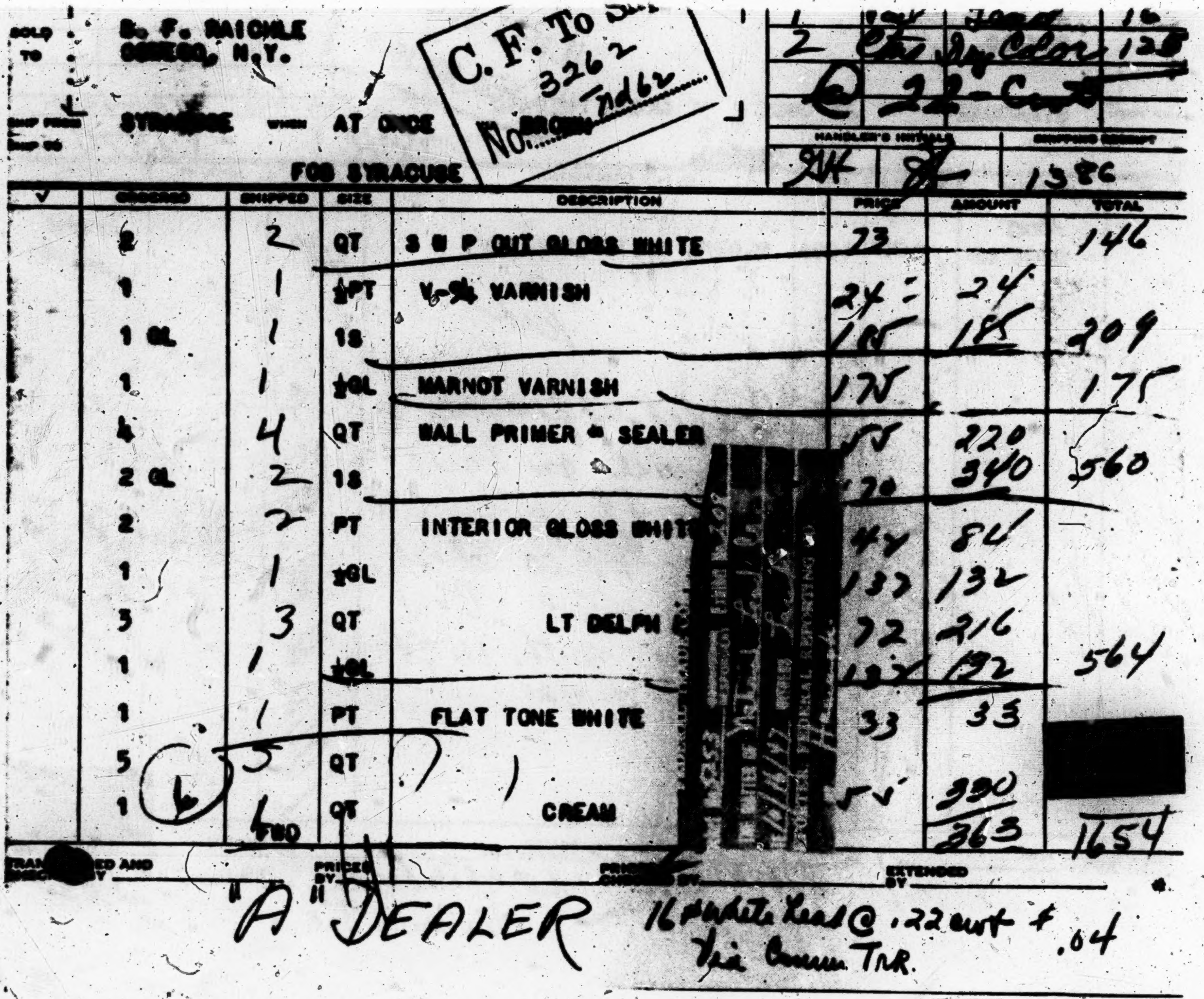
C. F. To Ship 3262 No. Ind62 BROWN

NUMBER	PACKAGES	DESCRIPTION	WEIGHT
	Ctn	Paint	1250
1	Pail	"	80
1	Pail	Lead	16
2	Ctn	Dry Color	125
@	22 - Cwt		

HANDLER'S INITIALS: GH — JH

SHIPPING RECEIPT: 1386

✓	ORDERED	SHIPPED	SIZE	DESCRIPTION	PRICE	AMOUNT	TOTAL
	2	2	QT	S W P OUT GLOSS WHITE	73		146
	1	1	½PT	V-9½ VARNISH	24 =	24	
	1 GL	1	18		185	185	209
	1	1	½GL	MARNOT VARNISH	175		175
	4	4	QT	WALL PRIMER & SEALER	55	220 340	560



SOLD TO B. F. RAICHLE
OSWEGO, N.Y.

SHIP FROM SYRACUSE — WHEN AT ONCE

FOB SYRACUSE

C. F. To Ship 3262 No. Ind62 BROWN

2 Ctn Dry Color 125
@ 22 - Cwt

HANDLER'S INITIALS: GH — JH

SHIPPING RECEIPT: 1386

✓	ORDERED	SHIPPED	SIZE	DESCRIPTION	PRICE	AMOUNT	TOTAL
	2	2	QT	S W P OUT GLOSS WHITE	73		146
	1	1	½PT	V-9½ VARNISH	24 =	24	
	1 GL	1	18		185	185	209
	1	1	½GL	MARNOT VARNISH	175		175
	4	4	QT	WALL PRIMER & SEALER	55	220	
	2 GL	2	18		170	340	560
	2	2	PT	INTERIOR GLOSS WHITE	42	84	
	1	1	½GL		132	132	
	3	3	QT	LT DELPH	72	216	
	1	1	½GL		132	132	564
	1	1	PT	FLAT TONE WHITE	33	33	[redacted]
	5	5	QT		55	330	
	1	1	QT	CREAM		363	1654

TRANSCRIBED AND CHECKED BY — PRICED BY — PRICES CHECKED BY — EXTENDED BY

"A" DEALER

16# White Lead @ .22 cwt + .04
Via [illegible] T.R.R.

DATE 10/10/47 N C
BY W L Moxel

	10594			Prepaid	C/L
HHs	14719		Hredsville	FPD	C/L
			[illegible]		
	4240		Olean NY		
C	11500			FPD	C/L
C	49595	"	Rock Glen	Prepaid	C/L
	8692		[illegible]	FPD	
	8411			FPD	
	2919		Corning NY		
C	1141		[illegible] Falls		
PT	5925				
	1492				
B	41		Buffalo NY		
Cin	4745	Cincinnati	Covington Ky		
D	11563	Detroit Mich	Alma Mich		

Respondent's Exhibit No. 205.

6133 RESPONDENT'S EXHIBIT NO. 213.

1. 1941 Sales of Heavy and Soft Paste White Lead.

Zone	Total Pounds Sold	Total Freight & Cartage	Average Freight per Cwt.
Par	2,560,244	5,281.63	.206
Plus ⅛¢	4,457,515	22,455.32	.504
Plus ¼¢	676,218	4,885.90	.723
Plus ⅜¢	1,225,361	10,280.00	.839
Plus ½¢	422,551	3,835.76	.908
Plus ¾¢	863,528	8,010.32	.927
Plus 1¢	44,288	763.09	1.723

Respondent's Exhibit No. 213.

SHEET NO. 1

NATIONAL LEAD CO.—ST. LOUIS BRANCH

WHITE LEAD IN OIL—TONNAGE & FREIGHT

DIFFERENTIAL TERRITORY—PAR

YEAR 1941

Destination	1 Shipped From	2 Carload Rate to Warehouse	3 L. C. L. Rates from Warehouse to Customer Cartage to R. R.	4 R. R. Rate	5 (2+3+4) Total Applicable Rate	6 Tonnage	7 (5×6) Applicable Freight
ILLINOIS						Pounds	
Aledo	St. Louis			.42	.42	6,050	$ 25.41
Alexander	"			.31	.31	8,150	25.27
Alton	"			.20	.20	51,576	103.15
Anna	"			.33	.33	6,812½	22.48
Belleville	"			.19	.19	19,900	37.81
Bloomington	"			.37	.37	52,375	193.79
Canton	"			.38	.38	6,912½	26.27
Centralia	"			.27	.27	17,750	47.93
Collinsville	"			.19	.19	7,925	15.06
Decatur (	" "		T/L LCL	.22) .32) Avg	.27	158,112½	426.90
Edwardsville	"			.20	.20	14,750	29.50
Fairfield	"			.32	.32	8,524½	27.28
Galesburg	"			.39	.39	35,987½	140.35
Galva	"			.40	.40	9,912½	39.65

SHEET NO. 1

NATIONAL LEAD CO.—ST. LOUIS BRANCH

WHITE LEAD IN OIL—TONNAGE & FREIGHT

DIFFERENTIAL TERRITORY—⅛¢

YEAR 1941

	1	2	3	4	5	6	7
			L. C. L. Rates from Warehouse to Customer		(2+3+4)		(5×6)
Destination	Shipped From	Carload Rate to Warehouse	Cartage to R. R.	R. R. Rate	Total Applicable Rate	Tonnage	Applicable Freight
ILLINOIS						Pounds	
Moline & E. Moline	St. Louis			.43	.43	38,737½	$ 166.57
Rock Island	"			.43	.43	40,185	172.80
Misc. (Other Towns)	"			.35	.35	8,675	30.36
			Total Illinois			87,597½	369.73
IOWA							
Ackley	"			.70	.70	8,825	61.78
Ames	"			.70	.70	22,512½	157.59
Atlantic	"			.76	.76	18,562½	141.08
Boone	"			.70	.70	16,512½	115.59
Burlington	"			.40	.40	86,862½	347.45
Carroll	"			.76	.76	15,700	119.32
Cedar Falls	"			.65	.65	13,725	89.21
Cedar Rapids (	"		T/L	.42)			
(	"		LCL	.56) Avg	.49	118,675	581.51
Chariton	"			.60	.60	15,137½	90.83
Charles City	"			.69	.69	13,625	94.01
Clarinda	"			.72	.72	16,312½	117.45
Clarion	"			.76	.76	8,225	62.51
Clinton	"			.46	.46	29,762½	136.91
Council Bluffs	Omaha	.29		.10	.39	17,400	67.86

Respondent's Exhibit No. 213.

Respondent's Exhibit No. 213.

SHEET NO. 2

NATIONAL LEAD CO.—ST. LOUIS BRANCH
WHITE LEAD IN OIL—TONNAGE & FREIGHT

DIFFERENTIAL TERRITORY—⅛¢

YEAR 1941

	1	2	3	4	5	6	7
			L. C. L. Rates from Warehouse to Customer		(2+3+4)		(5×6)
Destination	Shipped From	Carload Rate to Warehouse	Cartage to R. R.	R. R. Rate	Total Applicable Rate	Tonnage	Applicable Freight
IOWA						Pounds	
Williamsburg	St. Louis			.57	.57	10,162½	$ 57.93
Misc. (Other Towns)	"			.60	.60	379,410	2276.46
			Total Iowa			1,813,182	9924.94
KANSAS							
Atchison	Kansas City	.29		.26	.55	10,372	57.05
Kansas City	"	.29			.29	36,871	106.93
Leavenworth	"	.29		.21	.50	37,962½	189.81
Misc. (Other Towns)	"	.29		.59	.88	1,525	13.42
			Total Kansas			86,730½	367.21

KENTUCKY						
Mayfield	**St. Louis**		**.43**	**.43**	**11,237½**	**48.32**
Paducah	"		**.38**	**.38**	**14,475**	**55.01**
Misc. (Other Towns)	"		**.43**	**.43**	**8,675**	**37.30**
		Total Kentucky			**34,387½**	**140.63**
MINNESOTA						
Austin	**St. Paul**	**.34**	**.38**	**.72**	**8,347**	**60.10**
Duluth	"	**.34**	**.44**	**.78**	**112,363**	**876.43**
Grand Rapids	"	**.34**	**.51**	**.85**	**8,725**	**74.16**
Mankato	"	**.34**	**.34**	**.68**	**15,587½**	**106.00**
Minneapolis	"	**.34**		**.34**	**230,430**	**783.46**
Owatonna	"	**.34**	**.32**	**.66**	**13,737½**	**90.67**
Red Wing	"	**.34**	**.26**	**.60**	**10,224**	**61.34**
Rochester	"	**.34**	**.36**	**.70**	**12,330**	**86.31**
St. Cloud	"	**.34**	**.31**	**.65**	**9,625**	**62.56**
St. Paul	"	**.34**		**.34**	**247,619**	**841.90**
Virginia	"	**.34**	**.50**	**.84**	**13,262½**	**111.41**
Winona	"	**.34**	**.38**	**.72**	**33,125**	**238.50**
Misc. (Other Towns)	"	**.34 plus**	**.30 Avg.**	**.64**	**84,027**	**537.77**
		Total Minnesota			**799,402½**	**3930.61**
NEBRASKA						
Lincoln	**Omaha**	**.29**	**.31**	**.60**	**36,812½**	**220.88**
Omaha	"	**.29**		**.29**	**301,667½**	**874.84**
		Total Nebraska			**338,480**	**1095.72**
MISSOURI						
Bethany	**St. Louis**		**.59**	**.59**	**8,225**	**48.53**
Bonne Terre	"		**.26**	**.26**	**18,537½**	**48.20**
Cape Girardeau	"		**.40**	**.40**	**13,300**	**53.20**

Respondent's Exhibit No. 213.

SHEET NO. 3

NATIONAL LEAD CO.—ST. LOUIS BRANCH

WHITE LEAD IN OIL—TONNAGE & FREIGHT

DIFFERENTIAL TERRITORY.—⅛¢

YEAR 1941

Destination	1 Shipped From	2 Carload Rate to Warehouse	3 L. C. L. Rates from Warehouse to Customer Cartage to R. R.	4 R. R. Rate	5 (2+3+4) Total Applicable Rate	6 Tonnage	7 (5×6) Applicable Freight
MISSOURI						Pounds	
Carrollton	St. Louis			.46	.46	7,896	$ 36.32
Chillicothe	"			.48	.48	11,649½	55.92
Columbia	"			.36	.36	35,100	126.36
Flat River	"			.26	.26	9,925	25.81
Fulton	"			.34	.34	7,337½	24.95
Hannibal	"			.32	.32	23,275	74.48
Independence	Kansas City	.29		.18	.49	10,065½	47.31
Jefferson City	St. Louis			.36	.36	8,285	29.83
Kansas City	Kansas City	.29			.29	433,333	1256.67
Kennett	St. Louis			.62	.62	13,717	85.05
Kirksville	"			.45	.45	6,286	28.29

Respondent's Exhibit No. 243.

NATIONAL LEAD CO.—ST. LOUIS BRANCH

SHEET NO. 1

WHITE LEAD IN OIL—TONNAGE & FREIGHT

DIFFERENTIAL TERRITORY—¼¢

YEAR 1941

	1	2	3	4	5	6	7
			L. C. L. Rates from Warehouse to Customer		(2+3+4)		(5×6)
Destination	Shipped From	Carload Rate to Warehouse	Cartage to R. R.	R. R. Rate	Total Applicable Rate	Tonnage	Applicable Freight
KANSAS						Pounds	
Abilene	Kansas City	.29		.55	.84	2,812½	$ 23.63
Arkansas City	"	.29		.66	.95	2,335	22.18
Baldwin	"	.29		.48	.77	1,150	8.86
Baxter Springs	"	.29		.53	.82	587½	4.82
Beloit	"	.29		.66	.95	612½	5.82
Bonner Springs	"	.29		.20	.49	1,375	6.74
Chanute	"	.29		.44	.73	1,122	8.19
Clay Center	"	.29		.53	.82	800	6.56
Coffeyville	"	.29		.55	.84	5,025	42.21
Concordia	"	.29		.60	.89	775	6.90
Council Grove	"	.29		.46	.75	837½	6.28
El Dorado	"	.29		.55	.84	1,287	10.81
Emporia	"	.29		.42	.71	9,012½	63.99
Ft. Scott	"	.29		.40	.69	1,687½	11.64
Girard	"	.29		.46	.75	1,000	7.50
Goodland	"	.29		.91	1.20	200	2.40
Great Bend	"	.29		.71	1.00	3,262½	32.63
Hays	"	.29		.74	1.03	30	.31
Herington	"	.29		.52	.81	1,450	11.75
Hiawatha	"	.29		.36	.65	3,062½	19.91
Holton	"	.29		.38	.67	237½	1.59
Hutchinson	"	.29		.64	.93	5,637½	52.43
Humboldt	"	.29		.42	.71	650	4.62
Iola	"	.29		.41	.70	1,700	11.90
Junction City	"	.29		.49	.78	2,600	20.28
Lawrence	"	.29		.25	.54	15,047	81.25
Manhattan	"	.29		.44	.73	2,112½	15.42
Mankato	"	.29		.66	.95	586½	5.57
Maryville	"	.29		.49	.78	1,550	12.09
McPherson	"	.29		.61	.90	1,377½	12.40
Norton	"	.29		.79	1.08	4,000	43.20
Olathe	"	.29		.21	.50	6,592½	32.96
Osage City	"	.29		.36	.65	175	1.14
Osawatomie	"	.29		.28	.57	2,800	15.96

Respondent's Exhibit No. 213.

Greenville	"		.26		.26	7,200	18.72
Jacksonville	"		.30		.30	47,662½	142.99
Jerseyville	"		.23		.23	7,200	16.56
Kewanee	"		.42		.42	17,925	75.29
Lawrenceville	"		.37		.37	6,687½	24.74
Lebanon	"		.22		.22	17,237	37.92
Macomb	"		.38		.38	10,937½	41.56
Mattoon	"		.34		.34	52,049½	176.97
Monmouth	"		.39		.39	18,037½	70.35
Mt. Carmel	"		.37		.37	9,262½	34.27
Mt. Vernon	"		.29		.29	15,015½	43.54
Pana	"		.39		.39	9,937½	38.76
Peoria (	"	T/L	.26)				
(	"	LCL	.37	) Avg	.32	181,875	582.00
Quincy (	"	T/L	25)				

						Pounds	
ILLINOIS							
Aledo	St. Louis		.42		.42	6,050	$ 25.41
Alexander	"		.31		.31	8,150	25.27
Alton	"		.20		.20	51,576	103.15
Anna	"		.33		.33	6,812½	22.48
Belleville	"		.19		.19	19,900	37.81
Bloomington	"		.37		.37	52,375	193.79
Canton	"		.38		.38	6,912½	26.27
Centralia	"		.27		.27	17,750	47.93
Collinsville	"		.19		.19	7,925	15.06
Decatur (	"	T/L	.22)				
(	"	LCL	.32	) Avg	.27	158,112½	426.90
Edwardsville	"		.20		.20	14,750	29.50
Fairfield	"		.32		.32	8,524½	27.28
Galesburg	"		.39		.39	35,987½	140.35
Galva	"		.40		.40	9,912½	39.65

Respondent's

ibit No. 213.

Dallas Center	St. Louis			.70		.70	10,500	73.50
Davenport	("		C/L	.26)				
	("		T/L	.30)	Est.	.35	157,025	549.59
	("		LCL	.43)				
Des Moines	("		C/L	.32½)				
	("		T/L	.45)	Est.	.50	233,650	1168.25
	("		LCL	.65)				
Dubuque	("		T/L	.34)				
	("		LCL	.49)	Est.	.40	66,300	265.20
Estherville	"			.84		.84	8,625	72.45

Atlantic								
Boone	"			.70		.70	16,512½	115.59
Burlington	"			.40		.40	86,862½	347.45
Carroll	"			.76		.76	15,700	119.32
Cedar Falls	"			.65		.65	13,725	89.21
Cedar Rapids	("		T/L	.42)				
	("		LCL	.56)	Avg	.49	118,675	581.51
Chariton	"			.60		.60	15,137½	90.83
Charles City	"			.69		.69	13,625	94.01
Clarinda	"			.72		.72	16,312½	117.45
Clarion	"			.76		.76	8,225	62.51
Clinton	"			.46		.46	29,762½	136.91
Council Bluffs	Omaha	.29		.10		.39	17,400	67.86

R

Macon	"		.42	.42	6,312	26.51
Mexico	"		.34	.34	17,261	58.69
Marshall	"		.43	.43	7,974	34.29
Moberly	"		.39	.39	14,512½	56.60
New London	"		.32	.32	9,150	29.28
Poplar Bluff	"		.41	.41	10,900	44.69
Rolla	"		.35	.35	9,422	32.98
St. James	"		.34	.34	7,200	24.48
St. Joseph	Kansas City	.29	.25	.54	82,347½	444.68
Sedalia	St. Louis					

R

Carrollton	St. Louis		.46	.46	7,896	$ 36.32
Chillicothe	"		.48	.48	11,649½	55.92
Columbia	"		.36	.36	35,100	126.36
Flat River	"		.26	.26	9,925	25.81
Fulton	"		.34	.34	7,337½	24.95
Hannibal	"		.32	.32	23,275	74.48
Independence	Kansas City	.29	.18	.49	10,065½	47.31
Jefferson City	St. Louis		.36	.36	8,235	29.83
Kansas City	Kansas City	.29		.29	433,333	1256.67
Kennett	St. Louis		.62	.62	13,717	85.05
Kirksville	"		.45	.45	6,286	28.29

6140

NATIONAL LEAD CO.—ST. LOUIS BRANCH

SHEET NO. 2

WHITE LEAD IN OIL—TONNAGE & FREIGHT

DIFFERENTIAL TERRITORY—¼¢

YEAR 1941

1 2 3 4 5 6

NATIONAL LEAD CO.—ST. LOUIS BRANCH
WHITE LEAD IN OIL—TONNAGE & FREIGHT

SHEET NO. 2

DIFFERENTIAL TERRITORY—¼¢

YEAR 1941

	1	2	3	4	5	6	7
			L. C. L. Rates from Warehouse to Customer		(2+3+4)		(5×6)
Destination	Shipped From	Carload Rate to Warehouse	Cartage to R. R.	R. R. Rate	Total Applicable Rate	Tonnage	Applicable Freight
KANSAS						Pounds	
Ottawa	Kansas City	.29		.29	.58	6,500	$ 37.70
Parsons	"	.29		.49	.78	13,741	107.18
Peabody	"	.29		.55	.84	1,325	11.13
Pittsburg	"	.29		.47	.76	16,987½	129.11
Pratt	"	.29		.72	1.01	1,675	16.92
Russell	"	.29		.71	1.00	300	3.00
Sabetha	"	.29		.38	.67	1,900	12.73
Salina	"	.29		.59	.88	8,450	74.36
Seneca	"	.29		.44	.73	387½	2.83
Smith Center	"	.29		.72	1.01	50	.51
Tonganoxi	"	.29		.26	.55	350	1.93
Topeka	"	.29		.31	.60	29,137½	174.83
Valley Falls	"	.29		.31	.60	2,600	15.60
Wakeeney	"	.29		.78	1.07	187	2.00
Wichita	St. Louis		T/L	.65	.65	60,487½	393.17
Winfield	Kansas City	.29		.64	.93	1,850	17.21
Yates Center	"	.29		.44	.73	762	5.56
Misc. (Other Towns)	"	.29		.45	.74	404	2.99
			Total Kansas			230,584	1622.70
NEBRASKA							
Alliance	Omaha	.29		.77	1.06	3,550	37.63
Ashland	"	.29		.25	.54	512½	2.77
Auburn	"	.29		.34	.63	650	4.10
Aurora	"	.29		.44	.73	1,950	14.24
Beatrice	"	.29		.39	.68	6,055	41.17
Bennington	"	.29		.21	.50	137½	.69
Broken Bow	"	.29		.56	.85	475	4.04
Columbus	"	.29		.37	.66	1,232½	8.13
Crete	"	.29		.35	.64	850	5.44
Dawson	"	.29		.37	.66	300	1.98
Elkhorn	"	.29		.22	.51	550	2.81
Fairbury	"	.29		.42	.71	2,450	17.40
Falls City	"	.29		.40	.69	4,410	30.43
Fremont	"	.29		.26	.55	12,300	67.65

Respondent's Exhibit No. 213.

NATIONAL LEAD CO.—ST. LOUIS BRANCH

SHEET NO. 3

WHITE LEAD IN OIL—TONNAGE & FREIGHT

DIFFERENTIAL TERRITORY—¼¢ **YEAR 1941**

	1	2	3	4	5	6	7
			L. C. L. Rates from Warehouse to Customer		(2+3+4)		(5×6)
Destination	Shipped From	Carload Rate to Warehouse	Cartage to R. R.	R. R. Rate	Total Applicable Rate	Tonnage	Applicable Freight
NEBRASKA						Pounds	
Geneva	Omaha	.29		.42	.71	362½	$ 2.57
Grand Island	"	.29		.46	.75	10,117	75.88
Gretna	"	.29		.22	.51	225	1.15
Hastings	"	.29		.47	.76	3,250	24.70
Herman	"	.29		.26	.55	750	4.13
Holdrege	"	.29		.55	.84	1,150	9.66
Humboldt	"	.29		.37	.66	1,593	10.51
Kearney	"	.29		.52	.81	4,537½	36.75
Lexington	"	.29		.56	.85	100	.85
McCook	"	.29		.65	.94	1,625	15.28
Nebraska City	"	.29		.29	.58	4,445	25.78
Norfolk	"	.29		.41	.70	1,325	9.28
North Platte	"	.29		.64	.93	2,200	20.46
Ogallala	"	.29		.70	.99	175	1.73
Papillion	"	.29		.20	.49	750	3.68
Pawnee City	"	.29		.39	.68	25	.17
Plattsmouth	"	.29		.22	.51	512½	2.61
Ponca	"	.29		.40	.69	250	1.73
Rushville	"	.29		.75	1.04	637½	6.63
St. Paul	"	.29		.47	.76	1,362½	10.36
Scottsbluff	"	.29		.81	1.10	4,375	48.13
Seward	"	.29		.34	.63	2,600	16.38
Sidney	"	.29		.77	1.06	250	2.65
Stanton	"	.29		.39	.68	100	.68
Springfield	"	.29		.22	.51	625	3.19
Tekamah	"	.29		.28	.57	275	1.57
Valentine	"	.29		.65	.94	1,354½	12.73
Wahoo	"	.29		.28	.57	2,337½	13.32
Wausa	"	.29		.45	.74	625	4.63
Wayne	"	.29		.40	.69	650	4.49
Weeping Water	"	.29		.25	.54	100	.54
Wisner	"	.29		.36	.65	37	.24
York	"	.29		.41	.70	1,262½	8.84
Total Nebraska						**85,406½**	**619.78**

Respondent's Exhibit No. 213.

NATIONAL LEAD CO.—ST. LOUIS BRANCH

WHITE LEAD IN OIL—TONNAGE & FREIGHT

DIFFERENTIAL TERRITORY—¼¢

YEAR 1941

Destination	1 Shipped From	2 Carload Rate to Warehouse	3 L. C. L. Rates from Warehouse to Customer Cartage to R. R.	4 L. C. L. Rates from Warehouse to Customer R. R. Rate	5 (2+3+4) Total Applicable Rate	6 Tonnage	7 (5×6) Applicable Freight
NORTH DAKOTA						Pounds	
Bismarck	St. Paul	.34		1.15	1.49	1,787½	$ 26.63
Devils Lake	"	.34		1.01	1.35	500	6.75
Fargo	"	.34		.52	.86	15,587½	134.05
Grafton	"	.34		.81	1.15	100	1.15
Grand Forks	"	.34		.61	.95	10,881½	103.37
Jamestown	"	.34		.95	1.29	1,010	13.03
Minot	"	.34		1.03	1.37	5,700	78.09
Wahpeton	"	.34		.50	.84	379½	3.19
			Total North Dakota			35,946	366.26
SOUTH DAKOTA							
Aberdeen	"	.34		.72	1.06	14,025	148.67
Belle Fourche	Omaha	.29		1.13	1.42	500	7.10
Deadwood	"	.29		1.13	1.42	16,287½	231.28
Hot Springs	"	.29		1.07	1.36	100	1.36
Huron	"	.29		.71	1.00	4,057	40.57
Madison	"	.29		.60	.89	100	.89
Mitchell	"	.29		.64	.93	3,712½	34.53
Newell	"	.29		1.18	1.47	612½	9.00
Rapid City	"	.29		1.08	1.37	6,300	86.31
Redfield	St. Paul	.34		.74	1.08	2,200	23.76
Sioux Falls	Omaha	.29		.52	.81	23,600	191.16
Watertown	St. Paul	.34		.64	.98	1,812½	17.76
Yankton	Omaha	.29		.53	.82	4,100	33.62
			Total South Dakota			77,407	826.01

Respondent's Exhibit No. 213.

Greenville	"		.26	.26	7,200	18.72
Jacksonville	"		.30	.30	47,662½	142.99
Jerseyville	"		.23	.23	7,200	16.56
Kewanee	"		.42	.42	17,925	75.29
Lawrenceville	"		.37	.37	6,687½	24.74
Lebanon	"		.22	.22	17,237	37.92
Macomb	"		.38	.38	10,937½	41.56
Mattoon	"		.34	.34	52,049½	176.97
Monmouth	"		.39	.39	18,037½	70.35
Mt. Carmel	"		.37	.37	9,262½	34.27
Mt. Vernon	"		.29	.29	15,015½	43.54
Pana	"		.39	.39	9,937½	38.76
Peoria ....(	"	T/L	.26)			
(	"	LCL	.37) Avg	.32	181,875	582.00
Quincy ....(	"	T/L	.25)			
(	"	LCL	.35) Avg	.30	66,100	198.30
Springfield ....(	"	T/L	.27)			
(	"	LCL	.31) Avg	.29	94,100	272.89
Taylorville	"		.29	.29	13,150	38.14
Misc. (Other Towns)......	"		.31	.31	314,046	973.54
Total Par Illinois................. (Except St. L. Met Area)					1,293,161	3947.39
ILLINOIS & MISSOURI						
St. Louis proper and Metropolitan Area	"				1,267,083½	1334.24
Total Par Territory..................					2,560,244½	Actual 5281.63

Respondent's Exhibit No. 213.

Respondent's Exhibit No. 213.

Dallas Center	St. Louis			.70		.70	10,500	73.50
Davenport	("		C/L	.26)				
	("		T/L	.30)	Est.	.35	157,025	549.59
	("		LCL	.43)				
Des Moines	("		C/L	.32½)				
	("		T/L	.45)	Est.	.50	233,650	1168.25
	("		LCL	.65)				
Dubuque	("		T/L	.34)				
	("		LCL	.49)	Est.	.40	66,300	265.20
Estherville	"			.84		.84	8,625	72.45
Fairfield	"			.51		.51	15,850	80.84
Fort Dodge	"			.76		.76	24,537½	186.49
Grinnell	"			.60		.60	8,000	48.00
Guthrie Center	"			.73		.73	15,075	110.05
Independence	"			.62		.62	9,812½	60.84
Iowa City	"			.53		.53	30,287½	160.52
Keokuk	"			.39		.39	11,675	45.53

SHEET NO. 1-A

IOWA					Pounds	
Marshalltown	St. Louis		.65	.65	29,437½	$ 191.34
Mason City	"		.75	.75	20,900	156.75
Muscatine	"		.45	.45	18,075	81.34
Newton	"		.63	.63	19,450	122.54
Oskaloosa	"		.57	.57	10,150	57.86
Ottumwa	"		.53	.53	87,128½	461.78
Perry	"		.70	.70	17,700	123.90
Red Oak	"		.75	.75	7,600	57.00
Sac City	"		.78	.78	10,425	81.32
Shenandoah	Omaha	.29	.25	.54	8,302½	44.83
Sioux City	"	.29	.28	.57	123,500	703.95
Storm Lake	St. Louis		.80	.80	10,881½	87.05
Vinton	"		.59	.59	12,100	71.39
Waterloo	"		.63	.63	54,784½	345.14

Macon	"		.42	.42	6,312	26.51
Mexico	"		.34	.34	17,261	58.69
Marshall	"		.43	.43	7,974	34.29
Moberly	"		.39	.39	14,512½	56.60
New London	"		.32	.32	9,150	29.28
Poplar Bluff	"		.41	.41	10,900	44.69
Rolla	"		.35	.35	9,422	32.98
St. James	"		.34	.34	7,200	24.48
St. Joseph	Kansas City	.29	.25	.54	82,347½	444.68
Sedalia	St. Louis		.45	.45	18,562½	83.53
Sikeston	"		.48	.48	9,637½	46.26
Springfield	"		.48	.48	64,852	311.29
Misc. (Other Towns)	"		.44	.44	282,717	1243.95
Total ⅛¢ Missouri					1,147,780	4378.15
WISCONSIN						
Ashland	St. Paul	.34	.52	.86	10,754	92.48
Eau Claire	"	.34	.40	.74	31,900	236.06
La Crosse	St. Louis		.69	.69	63,384½	437.35
Menomonie	St. Paul	.34	.35	.69	11,301	77.98
Superior	"	.34	.44	.78	20,650	161.07
Misc. (Other Towns)	"	.34	.43	.77	11,965	92.13
Total Wisconsin					149,954	1097.07
Total ⅛¢ Differential					4,457,514½	21,304.06
Cartage: Kansas City						357.07
Omaha						234.99
St. Paul & Minneapolis						559.20
						$22,455.32

SHEET NO. 4—Continued

NATIONAL LEAD CO.—ST. LOUIS BRANCH
WHITE LEAD IN OIL—TONNAGE & FREIGHT

DIFFERENTIAL TERRITORY—⅛¢

YEAR 1941

	1	2	3	4	5	6	7
			L. C. L. Rates from Warehouse to Customer		(2+3+4)		(5×6)
Destination	Shipped From	Carload Rate to Warehouse	Cartage to R. R.	R. R. Rate	Total Applicable Rate	Tonnage	Applicable Freight
TENNESSEE							
Brownville	St. Louis			.62	.62	162½	1.01
Covington	"			.62	.62	2,487½	15.42
Dresden	"			.51	.51	1,125	5.74
Dyersburg	"			.57	.57	6,250	35.63
Humboldt	"			.59	.59	4,000	23.60
Jackson	"			.61	.61	4,850	29.59
Martin	"			.51	.51	3,237½	16.51
Memphis	Memphis	.54		.05	.59	209,200	1234.28
Paris	St. Louis			.56	.56	7,199	40.31
Ripley	"			.62	.62	4,500	27.90
Samburg	"			.57	.57	350	2.00
Trenton	"			.59	.59	1,775	10.47
Union City	"			.50	.50	1,737½	8.69
			Total Tennessee			246,874	1451.15
			Grand Total ¼¢ Differential			676,217½	4885.90

SHEET NO. 1

Destination	Shipped From	Carload Rate to Warehouse	Cartage to R. R.	R. R. Rate	Total Applicable Rate	Pounds	Applicable Freight
ALABAMA							
Mobile	New Orleans	.58		.46	1.04	53,262½	$ 553.93
			Total Arkansas			53,262½	553.93
ARKANSAS							
Arkadelphia	St. Louis			.99	.99	225	2.23
Benton	"			.91	.91	1,312½	11.94
Berryville	"			.83	.83	885	7.35
Blytheville	"			.63	.63	8,825	55.60
Boonville	"			1.02	1.02	812½	8.29
Calico Rock	"			.85	.85	462½	3.93
Camden	"			.99	.99	922½	9.13
Clarksville	"			.97	.97	3,037½	29.46

Respondent's Exhibit No. 213.

NATIONAL LEAD CO.—ST. LOUIS BRANCH
WHITE LEAD IN OIL—TONNAGE & FREIGHT

DIFFERENTIAL TERRITORY—⅜¢

YEAR 1941

	1	2	3	4	5	6	7
			L. C. L. Rates from Warehouse to Customer		(2+3+4)		(5×6)
Destination	Shipped From	Carload Rate to Warehouse	Cartage to R. R.	R. R. Rate	Total Applicable Rate	Tonnage	Applicable Freight
Conway	St. Louis			.89	.89	2,725	24.25
Cotter	"			.92	.92	887½	8.17
Dardanelle	"			1.02	1.02	1,075	10.97
Dumas	"			.93	.93	2,000	18.60
El Dorado	"			1.01	1.01	2,181½	22.03
Eureka Springs	"			.83	.83	600	4.98
Fayetteville	"			.83	.83	11,175	92.75
Fordyce	"			.93	.93	3,375	31.39
Forrest City	"			.79	.79	1,475	11.65
Fort Smith	"			.93	.93	22,100	205.53
Harrison	"			.92	.92	787½	7.25
Helena	"			.84	.84	462½	3.89
Hope	"			.99	.99	500	4.95
Hot Springs	"			.94	.94	15,142	142.33
Hughes	"			.79	.79	1,575	12.44
Jonesboro	"			.67	.67	10,429½	69.88
Little Rock (	"		T/L	.58			
(			LCL	.85 Est.	.71	112,500	798.75
Magnolia	"			1.11	1.11	1,662½	18.45
Malvern	"			.91	.91	87½	.80
Marianna	"			.79	.79	150	1.19
Marked Tree	"			.79	.79	2,562½	20.24
Mena	"			1.09	1.09	50	.55
Monticello	"			.99	.99	1,050	10.40
Morrilton	"			.93	.93	7,275	67.66
Nashville	"			1.04	1.04	525	5.46
Newport	"			.79	.79	512½	4.05
Osceola	"			.79	.79	6,637½	52.44
Ozark	"			.97	.97	625	6.06
Paragould	"			.63	.63	3,925	24.73
Pine Bluff	"			.89	.89	15,900	141.51
Prescott	"			.99	.99	812½	8.04
Rector	"			.63	.63	1,012½	6.38
Rogers	"			.83	.83	4,012½	33.30
Russellville	"			.93	.93	2,837½	26.39

Respondent's Exhibit No. 213.

SHEET NO. 2

Respondent's Exhibit No. 213.

NATIONAL LEAD CO.—ST. LOUIS BRANCH

WHITE LEAD IN OIL—TONNAGE & FREIGHT

DIFFERENTIAL TERRITORY—⅜¢

YEAR 1941

	1	2	3	4	5	6	7
			L. C. L. Rates from Warehouse to Customer		(2+3+4)		(5×6)
Destination	Shipped From	Carload Rate to Warehouse	Cartage to R. R.	R. R. Rate	Total Applicable Rate	Tonnage	Applicable Freight
ARKANSAS						Pounds	
Searcy	St. Louis			.79	.79	862	$ 6.81
Siloam Springs	"			.94	.94	875	8.23
Stuttgart	"			.85	.85	775	6.59
Texarkana	"			1.04	1.04	32,862½	341.77
Walnut Ridge	"			.67	.67	2,587½	17.34
West Helena	"			.84	.84	300	2.52
West Memphis	"			.79	.79	1,937½	15.31
West Memphis (Bridge Jct.)	"			.79	.79	25,000	197.50
Wynne	"			.79	.79	1,150	9.09
			Total Arkansas			321,460	2630.55
FLORIDA							
De Funiak Springs.........	New Orleans	.58		.70	1.28	12½	.16
Marianna	"	.58		.76	1.34	675	9.05
Panama City	St. Louis			1.11	1.11	4,500	49.95
Pensacola	New Orleans	.58		.61	1.19	13,762½	163.77
			Total Florida			18,950	222.93

LOUISIANA						
Alexandria	New Orleans	.58	.65	1.23	19,225	236.47
Arabi	"	.58	.20	.78	10,000	78.00
Baton Rouge	"	.58	.35	.93	9,537½	88.70
Burrwood	"	.58	.40	.98	5,000	49.00
Covington	"	.58	.29	.87	5,750	50.03
Lake Charles	"	.58	.68	1.26	14,137½	178.13
Minden	St. Louis		1.11	1.11	5,637½	62.58
Monroe	"		1.04	1.04	11,550	120.12
New Orleans	New Orleans	.58		.58	334,720	1941.38
Shreveport	St. Louis		1.11	1.11	67,775	742.30
Misc. (Other Towns)	New Orleans	.58	.35	.93	50,272	467.53
Total Louisiana					533,604½	4024.24
MISSISSIPPI						
Columbus	St. Louis		.81	.81	9,337½	75.63
Greenville	"		.85	.85	12,975	110.29
Greenwood	"		.83	.83	36,062½	299.32
Hattiesburg	New Orleans	.58	.43	1.01	22,062½	222.83
Jackson	St. Louis		.89	.89	63,200	562.48
Laurel	"		.93	.93	27,000	251.10
Meridian	"		.89	.89	17,675	157.31
Tupelo	"		.74	.74	15,537½	114.98
Vicksburg	"		.92	.92	32,625	300.15
Misc. (Other Towns)	"		.85	.85	61,609	523.68
Total Mississippi					298,084	2617.77
Total ⅝¢ Differential					1,225,361	10,049.42
Cartage New Orleans						230.58
						10,280.00

Respondent's Exhibit No. 213.

SHEET NO. 1

NATIONAL LEAD CO.—ST. LOUIS BRANCH
WHITE LEAD IN OIL—TONNAGE & FREIGHT

DIFFERENTIAL TERRITORY—½¢

YEAR 1941

	1	2	3	4	5	6	7
			L. C. L. Rates from Warehouse to Customer		(2+3+4)		(5×6)
Destination	Shipped From	Carload Rate to Warehouse	Cartage to R. R.	R. R. Rate	Total Applicable Rate	Tonnage	Applicable Freight
COLORADO						Pounds	
Colorado Springs	Denver	.58		.43	1.01	15,137½	$ 152.89
Denver	"	.58	Local	.10	.68	162,237½	1103.22
Grand Junction	"	.58		.99	1.57	12,350	193.90
Pueblo	"	.58		.53	1.11	24,887½	276.25
Lowry Field	"	.58	Local	.10	.68	2,000	13.60
La Junta	"	.58		.64	1.22	175	2.14
			Total Colorado			216,787½	1742.00
OKLAHOMA							
Ada	St. Louis			1.02	1.02	1,100	11.22
Altus	"			1.02	1.02	3,125	31.88
Anadarko	"			1.02	1.02	575	5.87
Ardmore	"			1.19	1.19	6,037½	71.85
Bartlesville	"			1.02	1.02	2,000	20.40
Chickasha	"			1.02	1.02	362½	3.70
Clinton	"			1.02	1.02	2,600	26.52
Durant	"			1.02	1.02	2,612½	26.65
Duncan	"			1.02	1.02	50	.51
Enid	"			1.02	1.02	2,912½	29.71
Ft. Sill	"			1.20	1.20	24,000	288.00
Guthrie	"			1.02	1.02	1,275	13.01
Holdenville	"			1.02	1.02	1,550	15.81
Lawton	"			1.20	1.20	7,050	84.60
McAlester	"			1.02	1.02	4,054	41.35
Muskogee	"			.94	.94	13,375	125.73
Norman	"			1.02	1.02	1,987½	20.27
Nowata	"			1.02	1.02	100	1.02
Oklahoma City	"		T/L	.74	.74	30,580	226.29
Okmulgee	"			1.02	1.02	4,925	50.24
Pawhuska	"			1.02	1.02	700	7.14
Ponca City	"			1.02	1.02	2,462½	25.12
Sapulpa	"			1.02	1.02	2,450	24.99

3154

Respondent's Exhibit No. 213.

SHEET NO. 2

WHITE LEAD IN OIL—TONNAGE & FREIGHT
NATIONAL LEAD CO.—ST. LOUIS BRANCH

DIFFERENTIAL TERRITORY—½¢

YEAR 1941

	1	2	3	4	5	6	7
			L. C. L. Rates from Warehouse to Customer		(2+3+4)		(5×6)
Destination	Shipped From	Carload Rate to Warehouse	Cartage to R. R.	R. R. Rate	Total Applicable Rate	Tonnage	Applicable Freight
OKLAHOMA						Pounds	
Seminole	St. Louis			1.02	1.02	2,500	$ 25.50
Shawnee	"			1.08	1.08	9,662½	104.36
Stillwater	"			1.02	1.02	3,112½	31.75
Tulsa	"		T/L	.64	.64	50,092½	320.59
Vinita	"			1.02	1.02	3,925	40.04
Woodward	"			1.02	1.02	550	5.61
Total Oklahoma						185,726½	1679.73
Cartage: Oklahoma City							30.58
Tulsa							50.09
							1760.40
WYOMING							
Casper	St. Louis			1.55	1.55	3,500	54.25
Cheyenne	"			1.45	1.45	4,475	64.89
Ft. Francis E. Warren	"			1.45	1.45	500	7.25
Sheridan	"			1.79	1.79	11,562½	206.97
Total Wyoming						20,037½	333.36
Grand Total ½¢ Differential						422,551½	3835.76

Respondent's Exhibit No. 213.

SHEET NO. 1

Respondent's Exhibit No. 213.

NATIONAL LEAD CO.—ST. LOUIS BRANCH
WHITE LEAD IN OIL—TONNAGE & FREIGHT

DIFFERENTIAL TERRITORY—¾¢

YEAR 1941

	1	2	3	4	5	6	7
			L. C. L. Rates from Warehouse to Customer		(2+3+4)		(5×6)
Destination	Shipped From	Carload Rate to Warehouse	Cartage to R. R.	R. R. Rate	Total Applicable Rate	Tonnage	Applicable Freight
TEXAS						Pounds	
Abilene	Dallas	.48		.63	1.11	16,450	$ 182.60
Alpine	"	.48		1.25	1.73	250	4.33
Amarillo	St. Louis			1.34	1.34	34,312½	459.79
Athens	Dallas	.48		~~.36~~	~~.84~~	550	4.62
Austin	"	.48		.63	1.11	36,917½	409.78
Beaumont	"	.48		.80	1.28	7,705	98.62
Big Springs	"	.48		.80	1.28	1,712½	21.92
Bonham	"	.48		.40	.88	2,650	23.32
Bowie	"	.48		.41	.89	350	3.12
Breckenridge	"	.48		.54	1.02	637½	6.50
Brenham	"	.48		.65	1.13	912½	10.31
Brownwood	"	.48		.58	1.06	2,200	23.32
Bryan	"	.48		.56	1.04	1,275	13.26

Burnett	Dallas	.48		.65	1.13	2,000	22.60
Cisco	"	.48		.52	1.00	600	6.00
Clarksville	"	.48		.55	1.03	25	.26
Cleburne (R. R. Sales)	"	.48			.48	1,500	7.20
Cleburne	"	.48		.31	.79	2,700	21.33
College Station	"	.48		.56	1.04	737½	7.67
Comanche	"	.48		.52	1.00	1,000	10.00
Corpus Christi	("	.48		.97	1.45	11,840	171.68
	(St. Louis		C/L	.76	.76	120,000	912.00
Corsicana	Dallas	.48		.31	.79	7,650	60.44
Crockett	"	.48		.61	1.09	1,362½	14.85
Cuero	"	.48		.78	1.26	2,887½	36.38
Dallas	"	.48			.48	105,750	507.60
Denison	"	.48		.35	.83	2,987½	24.80
Denton	"	.48		.28	.76	13,050	99.18
Eastland	"	.48		.50	.98	425	4.17
Ennis	"	.48		.26	.74	3,000	22.20
Florine	"	.48		.78	1.26	2,400	30.24
Ft. Sam Houston	"	.48		.78	1.26	15,000	189.00
Ft. Worth	"	.48		.26	.74	39,287½	290.73
Gainesville	"	.48		.39	.87	1,600	13.92
Galveston	Houston	.58		.30	.88	39,050	343.64
Gilmer	Dallas	.48		.52	1.00	200	2.00
Graham	"	.48		.47	.95	3,450	32.78
Hawkins	"	.48		.48	.96	111	1.07
Harlingen	"	.48		1.08	1.56	600	9.36
Honey Grove	"	.48		.45	.93	350	3.26
Houston	Houston	.58			.58	106,662½	618.64
Huntsville	Dallas	.48		.72	1.20	7,337½	88.05
Jacksonville	"	.48		.45	.93	62½	.58

Respondent's Exhibit No. 213.

SHEET NO. 2

WHITE LEAD IN OIL—TONNAGE & FREIGHT
NATIONAL LEAD CO.—ST. LOUIS BRANCH

DIFFERENTIAL TERRITORY—¾¢

YEAR 1941

	1	2	3	4	5	6	7
			L. C. L. Rates from Warehouse to Customer		(2+3+4)		(5×6)
Destination	Shipped From	Carload Rate to Warehouse	Cartage to R. R.	R. R. Rate	Total Applicable Rate	Tonnage	Applicable Freight
TEXAS						Pounds	
Kerrville	Dallas	.48		.89	1.37	287	$ 3.93
Kelley Field	St. Louis			1.40	1.40	20,000	280.00
Lamesa	Dallas	.48		.95	1.43	1,230	17.59
Laredo	"	.48		.99	1.47	2,275	33.44
Lubbock	St. Louis			1.50	1.50	5,575	83.63
Marshall	Dallas	.48		.54	1.02	3,162½	32.26
Midland	"	.48		.86	1.34	13,400	179.56
Mineola	"	.48		.37	.85	1,295	11.01
Mineral Wells	"	.48		.37	.85	3,950	33.58
Nacagdoches	"	.48		.56	1.04	125	1.30
Orange	"	.48		.84	1.32	9,125	120.45
Petrolia	"	.48		.55	1.03	25	.26
Palestine	"	.48		.52	1.00	1,750	17.50

Pampa	Dallas	.48	.89	1.37	200	2.74
Paris	"	.48	.43	.91	3,087½	28.10
Plainview	"	.48	.89	1.37	2,900	39.73
Port Arthur	"	.48	.84	1.32	262½	3.47
Prairie View	"	.48	.55	1.03	12½	.13
Rice	"	.48	.55	1.03	100	1.03
Rusk	"	.48	.50	.98	6,000	58.80
Ranger	"	.48	.47	.95	115	1.09
San Angelo	"	.48	.78	1.26	16,537½	208.37
San Antonio	"	.48	.88	1.36	80,787	1098.70
Sanatorium	"	.48	.80	1.28	1,000	12.80
San Marcos	"	.48	.69	1.17	400	4.68
Seguin	"	.48	.80	1.28	525	6.72
Sherman	"	.48	.33	.81	7,012½	56.80
Stephensville	"	.48	.43	.91	7,500	68.25
Sweetwater	"	.48	.72	1.20	2,825	33.90
Telferner	"	.48	.84	1.32	1,000	13.20
Temple	"	.48	.47	.95	287½	2.73
Terrell	"	.48	.28	.76	2,025	15.39
Uvalde	"	.48	.92	1.40	912½	12.78
Velasco	"	.48	.80	1.28	200	2.56
Victor	"	.48	.84	1.32	6,312½	83.33
Waco	"	.48	.40	.88	36,000	316.80
Wichita Falls	"	.48	.52	1.00	24,700	247.00
Wills Point	"	.48	.31	.79	412½	3.26
Mexia	"	.48	.37	.85	665½	5.66
Total Texas and ¾¢ Differential					863,528	7955.65
Plus Cartage Dallas						54.67
						8010.32

Respondent's Exhibit No. 213.

Respondent's Exhibit No. 213.

SHEET NO. 1

NATIONAL LEAD CO.—ST. LOUIS BRANCH
WHITE LEAD IN OIL—TONNAGE & FREIGHT

DIFFERENTIAL TERRITORY—1¢

YEAR 1941

	1	2	3	4	5	6	7
			L. C. L. Rates from Warehouse to Customer		(2+3+4)		(5×6)
Destination	Shipped From	Carload Rate to Warehouse	Cartage to R. R.	R. R. Rate	Total Applicable Rate	Tonnage	Applicable Freight
NEW MEXICO						Pounds	
Alamagordo	St. Louis			1.69	1.69	1,050	$ 17.75
Albuquerque	"			1.68	1.68	15,750	264.60
Gallup	"			2.27	2.27	437½	9.93
Las Vegas	"			1.59	1.59	587½	9.34
Loving	"			1.65	1.65	700	11.55
Roswell	"			1.58	1.58	2,725	43.06
Santa Fe	"			1.68	1.68	2,800	47.04
Silver City	"			1.98	1.98	687½	13.61
Total New Mexico						24,837½	416.88
TEXAS							
El Paso	"			1.78	1.78	19,450	346.21
Grand Total 1¢ Differential						44,287½	763.09

6150

RESPONDENT EXHIBIT NO. 214.

1941 Sales of Dry White Lead.

	Total Pounds Sold	Total Freight & Cartage	Average Freight per Cwt.
Par	3,577,053	12,559.39	.351
Plus ¼¢	488,550	3,744.59	.766

RESPONDENT'S EXHIBIT NO. 215.

			Manufacturing Branch to Selling Branch to Customer						Mfg. Branch to Customer			
Manufacturing Branch	Weight in Pounds	C. L. Rate Cwt.	Selling Branch	Cost	Rate Cwt. L. C. L.	Customer's Location	Cost	Total Cost	C. L. Rate Cwt.	Total Cost	L. C. L. Rate Cwt.	Total Cost
Pacific Coast—Melrose, Calif.	464,000	—	Melrose	—	.51	Los Angeles, Cal.	2,366.40	2,366.40	.28	1,299.20	.51	2,366.40
	60,000	—	"	—	.15	Palo Alto	90.00	90.00	.09	54.00	.15	90.00
	64,000	—	"	—	.415	Redondo Beach	265.60	265.60	.28	179.20	.415	265.60
	142,000	—	"	—	.30	Stockton	426.00	426.00	.10	142.00	.30	426.00
	266,000	—	"	—	.73	Portland, Ore.	1,941.80	1,941.80	.39	1,037.40	.73	1,941.80
	182,000	—	"	—	.94	Salt Lake City, Utah	1,710.80	1,710.80	.56	1,019.20	.94	1,710.80
	248,000	—	"	—	.85	Seattle, Wash	2,108.00	2,108.00	.44	1,091.20	.85	2,108.00
St. Louis	87,520	—	St. Louis	—	.77	Little Rock, Ark.	673.90	673.90	.46	402.59	.77	673.90
	461,675	—	"	—	1.27	Denver, Colo.	5,863.27	5,863.27	.58	2,677.71	1.27	5,863.27
	170,175	—	"	—	.61	Des Moines	1,038.07	1,038.07	.36	612.63	.61	1,038.07
	917,575	.25	Cincinnati	2,293.94	.34	Louisville, Ky.	3,119.76	5,413.70	.23	2,110.42	.46	4,220.85
	40,000	.585	New Orleans Whse.	234.00	1.05	New Orleans, La.	20.00	254.00	.585	234.00	1.05	420.00
	203,725	.34	St. Paul Whse.	692.67	.05	Minneapolis, Minn.	101.86	794.53	.34	692.67	.70	1,426.08
	204,750	.34	"	696.15	.05	St. Paul	102.38	798.53	.34	696.15	.70	1,433.25
	40,400	—	St. Louis	—	.89	Meriden, Miss.	359.56	359.56	.53	214.12	.89	359.56
	80,400	—	"	—	.46	Kansas City, Mo.	369.84	369.84	.195	156.78	.46	369.84
	216,050	—	"	—	.46	No. Kansas City, Mo.	993.83	993.83	.195	421.30	.46	993.83
	87,000	.32	Cleveland	278.40	.05	Cleveland, Ohio	43.50	321.90	.32	278.40	.64	556.80
	64,200	.25	Cincinnati	160.50	.05	Crooksville, Ohio	32.10	192.60	.25	160.50	.51	327.42
	80,150	.35	Pittsburgh	280.53	.23	E. Liverpool, Ohio	184.35	464.88	.33	264.50	.66	528.99
	200,600	.25	Cincinnati	501.50	.38	Roseville, Ohio	762.28	1,263.78	.30	601.80	.60	1,203.60
	402,800	.25	"	1,007.00	.38	Zanesville, Ohio	1,530.64	2,537.64	.30	1,208.40	.60	2,416.80
	162,800	.25	"	407.00	.70	Erwin, Tenn.	1,139.60	1,546.60	.53	862.84	.89	1,448.92
	75,600	.41	Cinci.-Memphis Whse.	309.96	.05	Memphis, Tenn.	37.80	347.76	.41	309.96	.68	514.08
	80,000	—	St. Louis	—	1.24	Beaumont, Texas	992.00	992.00	.58	464.00	1.24	992.00
	43,500	.48	St. Louis-Dallas Whse.	208.80	.40	Houston, Texas	174.00	382.80	.58	252.30	1.27	552.45
	110,550	.35	Pittsburgh	386.93	.37	Clarksburgh, W. Va.	409.04	795.97	.35	386.93	.70	773.85
	66,500	.25	Cincinnati	166.25	.49	Mannington, W. Va.	325.85	492.10	.35	232.75	.70	465.50
	61,580	.35	Pittsburgh	215.53	.26	Wheeling, W. Va.	160.11	375.64	.33	203.21	.66	406.43
Chicago	943,575	.24	Cincinnati	2,264.58	.34	Louisville, Ky.	3,208.16	5,472.74	.24	2,264.58	.48	4,529.16
	526,000	.23	Detroit	1,209.80	.05	Detroit, Mich.	263.00	1,472.80	.23	1,209.80	.46	2,419.60
	40,000	—	Chicago	—	.39	Grand Rapids	156.00	156.00	.19	76.00	.39	156.00
	110,950	.325	St. Paul Whse.	360.59	.05	Minneapolis, Minn.	55.48	416.07	.325	360.59	.68	754.46
	168,050	.16	St. Louis	268.88	.48	No. Kansas City, Mo.	806.64	1,075.52	.265	445.33	.59	991.50
	702,000	.16	St. Louis	1,123.20	.05	St. Louis	351.00	1,474.20	.16	1,123.20	.46	3,229.20
	83,450	.24	Cincinnati	200.28	.32	Indianapolis, Ind.	267.04	467.32	.20	166.90	.40	333.80
	1,618,000	.25	Cleveland	4,045.00	.05	Cleveland, Ohio	809.00	4,854.00	.25	4,045.00	.51	8,251.80
	502,000	.24	Cincinnati	1,204.80	.33	Columbus, Ohio	1,656.60	2,861.40	.24	1,204.80	.48	2,409.60
	2,128,000	—	Chicago	—	.29	Milwaukee, Wis.	6,171.20	6,171.20	.12	2,553.60	.29	6,171.20
	320,000	.24	Cincinnati	768.00	.05	Norwood, Ohio	160.00	928.00	.24	768.00	.48	1,536.00
Atlantic—Perth Amboy	65,600	—	Perth Amboy	—	.34	Bridgeport, Conn.	223.04	223.04	.17	111.52	.34	223.04
	306,000	—	"	—	.99	Savannah, Ga.	3,029.40	3,029.40	.59	1,805.40	.99	3,029.40
	480,500	.16	Lewis	768.80	.32	Baltimore, Md.	1,537.60	2,306.40	.21	1,009.05	.42	2,018.10
	116,000	.24	Boston	278.40	.05	Boston, Mass.	58.00	336.40	.24	278.40	.48	556.80
Atlantic—Perth Amboy	250,000	.24	Boston	600.00	.05	Everett, Mass.	125.00	725.00	.24	600.00	.48	1,200.00
	120,000	—	Perth Amboy	—	.52	Newport News, Va.	624.00	624.00	.26	312.00	.52	624.00
	200,000	—	"	—	.32	Marcus Hook, Pa.	640.00	640.00	.16	320.00	.32	640.00
	446,000	—	"	—	.37	Schenectady	1,650.20	1,650.20	.19	847.40	.37	1,650.20
	926,000	—	"	—	.44	Providence, R. I.	4,074.40	4,074.40	.22	2,037.20	.44	4,074.40
	967,200	.24	Boston	2,321.28	.05	Malden, Mass.	483.60	2,804.88	.24	2,321.28	.48	4,642.56
John T. Lewis—Philadelphia	101,000	—	Lewis	—	.22	Wilmington, Del.	222.20	222.20	.11	111.10	.22	222.20
	440,500	—	"	—	.32	Baltimore, Md.	1,409.60	1,409.60	.16	704.80	.32	1,409.60
	75,200	—	"	—	.22	Trenton, N. J.	165.44	165.44	.11	82.72	.22	165.44
	132,800	—	"	—	.22	Morrisville, Pa.	292.16	292.16	.11	146.08	.22	292.16
	130,000	—	"	—	.22	Phoenixville, Pa.	286.00	286.00	.11	143.00	.22	286.00
	120,000	.26	Pittsburgh	312.00	.05	Pittsburgh, Pa.	60.00	372.00	.26	312.00	.52	624.00
	81,000	—	Lewis	—	.45	Norfolk, Va.	364.50	364.50	.23	186.30	.45	364.50
	438,000	—	"	—	.45	Richmond, Va.	1,971.00	1,971.00	.23	1,007.40	.45	1,971.00
Grand Total	17,821,375			23,564.77			58,462.60	82,027.37		44,819.61		90,669.81

Summary	Lbs. Shipped	Transportation Charges	Cost Per Cent
Mfg. Branch to Selling Branch (C. L.)--to Customer L. C. L.	17,821,375	82,027.37	460.50
Mfg. Branch to Customer C. L.	17,821,375	44,819.61	251.49
Mfg. Branch to Customer L. C. L.	17,821,375	90,669.81	508.77

6153 RESPONDENT EXHIBIT NO. 216.

NATIONAL LEAD COMPANY

Dry White Lead

	1939	1940	1941
Administrative Expense	$220,433.37	$228,489.65	$216,369.39
Selling Expense	345,183.47	342,160.99	360,534.66
Combined Total	$565,616.84	$570,650.64	$576,904.05
No. of Invoices Processed	76,238	76,853	76,932
Cost per Invoice—Avg.	7.42	7.43	7.50

	Mfg. Br. to Cust. C.L. 20 tons	Mfg. Br. to Cust. L.C.L. 5 tons	Excess L.C.L. Over C.L.
Freight Cost	100.60	50.88	
Invoice Cost	7.45	7.45	
	108.05	58.33	
Per Ton Cost	5.40	11.67	6.27

	Mfg. Br. to Cust. C.L. 20 ton	Mfg. Br. to Sell Br. C.L. Sell Br. to Customer L.C.L.—5 ton	
Freight Cost	100.60	46.05	
Invoice Cost	7.45	7.45	
	108.05	53.50	
Per Ton Cost	5.40	10.70	5.30

6154 RESPONDENT EXHIBIT NO. 217.

NATIONAL LEAD COMPANY

Atlantic Branch

Selling & Administrative Expenses

Account		1939	1940	1941
17	Office Salaries	141,003.32	145,658.75	134,774.01
18	Office Expense	36,341.10	38,737.37	37,618.64
19	Insurance	292.45	301.84	214.32
24	Rent	12,669.66	12,376.78	12,155.21
25	Taxes	14,583.83	15,332.50	15,199.68
27	Bad & Doubtful Accounts	3,038.25	2,917.52	4,499.33
28	Pensions	4,280.56	—	—
30	Group Life Insurance	2,832.37	—	—
30	Pensions & Group Life Insurance	—	7,531.94	7,501.33
37	Unemployment Insurance Tax	4,259.44	4,474.30	3,303.76
38	Federal Old Age Benefits Tax	1,132.39	1,158.65	1,103.11
	Total Administrative Expense	220,433.37	228,489.65	216,369.39
20	Salesmen's Salaries & Expense	133,191.32	136,861.70	138,645.69
21	Advertising	23,690.12	21,849.88	17,236.67
24	Rent	9,541.68	9,315.18	9,313.62
25	Taxes	—	—	—
28	Pensions	10,626.67	—	—
30	Group Life Insurance	6,381.87	—	—
30	Retirement Annuities & Group Life	—	17,559.03	18,729.21
33	Misc. Sales Expense	112,660.07	129,414.04	149,263.75
37	Unemployment Insurance Tax	10,809.68	11,291.47	11,007.18
38	Fed. Old Age Ben. Tax	3,171.26	3,342.48	3,663.33
35	Sales Promotion Expense	35,110.80	12,527.21	12,675.21
	Total Selling Expense	345,183.47	342,160.99	360,534.66
	Total Administrative & Selling Exp.	565,616.84	570,650.64	576,904.05
	Total Regular Number of Invoices Enter.	76,238	76,853	76,932
		7.42	7.43	7.50

6155 RESPONDENT'S EXHIBIT NO. 228.

In the matter of the agreement dated February 26, 1906, and the supplemental agreement dated January 12, 1916, between American Smelting and Refining Company and National Lead Company, covering the sale and purchase of pig lead.

Mutual Release.

This Is To Certify, that each party to the agreements above described has released, discharged and acquitted, and hereby releases, discharges and acquits, the other party of and from all obligations assumed and all liabilities incurred by the other party under and by virtue of the said agreement of February 26, 1906, and/or the said supplemental agreement of January 12, 1916, and all rights, claims and demands of whatsoever nature which either party may have against the other party under and by virtue of the said agreements.

Dated, July ...., 1922.

American Smelting and Refining Company,
by F. H. Brownell,
Vice-President.
Attest: W. E. Morriss,
Secretary.

National Lead Company,
by Edward J. Cornish,
President.
Attest: M. D. Cole,
Secretary.

6167 RESPONDENT'S EXHIBIT NO. 237.

National Lead Company
111 Broadway, New York, N. Y.

The following is carbon copy of telegram sent this day:

April 16, 1941.

Night Letter Sent to Branch Managers.

Mail April nineteenth cards dated twenty-sixth advancing lead in oil half cent a pound agents, dealers, painters and list. Make no announcement before cards are received by the trade.

Harold Rowe.

6168 RESPONDENT'S EXHIBIT NO. 238.

National Lead Company—General Office.
111 Broadway, New York, N. Y.

The following is carbon copy of telegram sent this day:

April 16, 1941.

Night Letter.

R. P. Prentys,
National Lead Company,
2240-24th Street,
San Francisco, California.

Wired branches today as follows "Mail April nineteenth cards dated twenty-sixth advancing lead in oil half cent a pound agents, dealers, painters and list. Make no announcement before cards are received by the trade."

Harold Rowe.

6169 RESPONDENT'S EXHIBIT NO. 239.

National Lead Company
111 Broadway, New York, N. Y.

The following is carbon copy of telegram sent this day:
Copy to Messrs. Rockwell, Cole, Bates, Tibbets, Vettewinkel, Martino.

Note—Following advised by letter: Messrs. McNair, Peters, Melville, Caruth, Gardiner, Irvin.

April 16, 1941.

Night Letter.

E. A. de Campi, National Lead Company, 900 West 18th Street, Chicago, Illinois.
F. K. McCarthy, National Lead Company, 659 Freeman Avenue, Cincinnati, Ohio.
Wm. V. Barlley, National Lead Company, 722 Chestnut Street, St. Louis, Missouri.

Mail April nineteenth cards dated twenty-sixth advancing lead in oil half cent a poudn agents, dealers, painters and list. Make no announcement before cards are received by the trade.

Harold Rowe.

6195 RESPONDENT'S EXHIBIT NO. 247.

Charge to the account of National Lead Company—General Office.

September 19, 1938.

Western Union Form.

Mr. R. P. Prentys,
National Lead Company,
2240-24th Street,
San Francisco, California.

Wired branches today "Mail September twenty-first cards dated twenty-sixth advancing lead in oil half cent pound agents, dealers, painters and list.

Also card dated twenty-sixth advancing distributor and suggested resale prices kegs dry white, litharge, dry red and red in oil half cent pound. Make no announcement before cards are received by trade."

Harold Rowe.

6261 RESPONDENT'S EXHIBIT NO. 305.

National Lead Company
111 Broadway, New York, N. Y.

The following is carbon copy of telegram sent this day:

September 19, 1938.

Day Letter.

H. G. Sidford, National Lead Company, Building.
G. A. Coleman, National-Boston Lead Co., 800 Albany Street, Boston, Mass.
W. R. Melville, National Lead Co., 116 Oak St., Buffalo, New York.
E. A. deCampi, National Lead Co., 900 West 18th Street, Chicago, Ill.
W. A. Dail, National Lead Co., 659 Freeman Ave., Cincinnati, Ohio.
J. L. Caruth, National Lead Co., 1213 West 3rd St., Cleveland, Ohio.
E. F. Beale, John T. Lewis & Bros. Co., Widener Bldg., So. Penn Sq., Philadelphia, Pa.
W. H. Taylor, National Lead & Oil Co. of Penn., 316 Fourth Ave., Pittsburgh, Pa.
J. A. Caselton, National Lead Co., 722 Chestnut Street, St. Louis, Missouri.
S. F. Reeves, Wetherill & Bros. Co., 1328 Chestnut St., Philadelphia, Pa.
Copy sent to Messrs. Carter, Rockwell, Cole, Bates, Bisbee, Tibbets.

Mail September twenty-first cards dated twenty-sixth advancing lead in oil half cent pound agents, dealers, painters and list.

Also card dated twenty-sixth advancing distributor and suggested resale prices kegs dry white, litharge, dry red and red in oil half cent pound.

Make no announcement before cards are received by trade.

Harold Rowe.

6262 National Lead Company, Chicago, Letterhead.

Sept. 19, 1938.

Mr. Harold Rowe, Vice-President,
National Lead Company,
111 Broadway,
New York, N. Y.

Dear Mr. Rowe:

We are just in receipt of your Day Letter reading as follows:

"Mail September Twenty-First cards dated Twenty-sixth advancing Lead in Oil half cent pound Agents, Dealers, Painters and List. Also card dated Twenty-Sixth advancing distributor and suggested resale prices kegs Dry White, Litharge, Dry Red and Red in Oil half cent pound. Make no announcement before cards are received by trade."

Your instructions will be carried out.

Very truly yours,
E. A. de Campi,
Manager.

Respondent's Exhibit No. 305.

6263 John T. Lewis & Bros. Company, Philadelphia,
Letterhead.

September 19, 1938
of
Lewis' 167th year

Mr. Harold Rowe, Vice-President,
National Lead Company,
111 Broadway,
New York, N. Y.

Dear Mr. Rowe:

Mr. Beale has asked that I acknowledge receipt of your wire of this afternoon notifying us of the advance in the price of white-lead and other card products ½¢ per pound all along the line, to be mailed out on the 21st and dated the 26th, with no trade announcement in the meantime.

Yours very truly,

J. W. Gardiner,
Vice-President.

JWG:CC

6264 National Lead Company, St. Louis Branch, Letterhead.

Sept. 19, 1938.

Mr. Harold Rowe, Vice-Pres.,
National Lead Company,
111 Broadway,
New York, N. Y.

Dear Mr. Rowe:

This is to acknowledge your telegram of September 19, addressed to Mr. J. A. Caselton, advancing the price on Lead In Oil ½¢ per pound, notice of which will be mailed on September 21, the price-card will be dated September 26 according to your instructions; also card dated September 26, advancing distributor and suggested resale prices on kegs of Dry White Lead, Litharge, Dry Red Lead and Red Lead In Oil, ½¢ per pound.

No announcement will be made before cards are received by the trade.

Sincerely,

W. H. Lessmann,
Asst. Sales Manager.

WHL/EM

RESPONDENT'S EXHIBIT NO. 306.

1939 * Awarded bid.

1/ 9	U. S. Treas. Dept.	10,000 lbs.—25s	*J. T. Lewis	7.90	(6 mos. same)
		Wh. L-in-O.	Mamolith	8.00	(6 mos. same)
			E-P	8.08	(6 mos.-8.33)
			S-W	8.08	1%
			Det. W. L. Wks.	8.42	1%
			H. B. Davis Co.	8.20	
			Impervious Pt.	8.90	
2/17	U. S. Navy	128,400 lbs.—50-100-bbls. (†)	*Evans	$ 9562.50	1%-30 except (†)
		Dry Red	E-P	9854.50	1%-30 except (†)
			S-W	9854.50	1%-10 except (†)
			Metals Ref.	9754.50	net
			Heyward Pt.	10393.98	¼%-10
		200,000 lbs.—bbls.	*S-W	6.84	1%-10
		Dry White	J. T. Lewis	6.93	net
			E-P	7.00	1%-30
			Mamolith	7.25	1%-10
2/28	U. S. Navy	10,000 lbs.—100s	*Evans	8.25	
		Litharge	S-W	8.50	
			J. Lucas & Co.	8.50	
			Metals Ref.	8,75	
			Hammond	8.75	
			E-P	8.75	
3/24	U. S. Treas. Dept.	100,000 lbs.—100s	*J. T. Lewis	7.24	
		Wh. L-in-O.	Mamolith	7.35	
			E-P	8.08	
			S-W	8.08	
4/ 3	Panama Canal	100,000 lbs.—100s	*Wetherill & Bro.	$ 7670.	
		Wh. L-in-O.	E-P	7690.	
			Mamolith	7700.	
			S-W	8580.	

Respondent's Exhibit No. 306.

* Awarded bid.

5/18	U. S. Treas. Dept.	30,000 lbs.—50s Wh. L-in-O.	*Mamolith	7.23	
			S-W	7.75	
			Aug. Miller & Son	8.50	1%
			J. T. Lewis	8.08	
			E-P	8.08	
7/18	U. S. Navy	12,300 lbs.—100s-25s Litharge	*S-W	$ 847.05	1%-10
			S-P	905.50	1%-30
			J. T. Lewis	907.50	1%-30
			Metals Ref.	968.75	1%-10
			Hammond	971.00	net
		123,200 lbs.—100s-50s-25s-bbls. Dry Red	*S-W	$ 9151.45	1%-10
			E-P	9353.00	1%-30##
			J. T. Lewis	9356.25	1%-10##
			Metals Ref.	9472.25	1%-10
			Hammond	9467.00	net
		200,000 lbs.—bbls. Dry White	*S-W	$ 6.85	1%-10
			J. T. Lewis	7.00	1%-10
			Mamolith	7.00	1%-30
			E-P	7.00	1%-30

Except 600 lbs.—net cash.

6266

1939				WL-O	D.R.
10/25	Panama Canal	100,000 lbs.—100s Wh. L-in-O.	E-P	*8.04	8.50
			Evans Lead	—	*8.39
			Mamolith	8.50	—
		50,000 lbs. Dry Red	Wetherill & Bro.	9.06	
12/12	Panama Canal	100,000 lbs.—100s Wh. L-in-O.	*J. T. Lewis	7.94	
			E-P	8.04	
			Mamolith	8.50	
			S-W	9.00	

Respondent's Exhibit No. 306.

RESPONDENT'S EXHIBIT NO. 307.

* Awarded bid.

1/ 2	U. S. Navy	44,000 lbs.—100-50-25	*Metals Ref.	8.75	net
		Dry Red	E-P	9.00	1%-30
			Evans	9.00	1%-30
			J. T. Lewis	9.00	1%-30
			S-W	9.50	1%-10
1/25	U. S. Treas. Dept.	12,000 lbs.—50s	*J. T. Lewis	8.47	
		Wh. L-in-O.	S-W	8.65	
			E-P	8.82	
1/26	U. S. Navy	106,925 lbs.—100-50-25 &	*Hammond	7.75	†Prices vary according to size package. Those shown are for bbls. at Norfolk, Va.
		Dry Red bbls. (†)	J. T. Lewis	8.00	
			E-P	8.00	
			Metals Ref.	8.00	
			S-W	8.00	
		400,000 lbs.—bbls.	*S-W	6.85	1%-10
		Dry White	E-P	6.86	net
			J. T. Lewis	6.93	net
			Mamolith	6.94	net
1/30	U. S. Navy	10,000 lbs.	*Wetherill & Bro.	7.75	1%
		Litharge	E-P	8.00	1%
			Hammond	8.00	1%
			Metals Ref.	8.50	
			S-W	8.50	1%
2/ 7	Panama Canal	100,000 lbs.	*J. T. Lewis	7.94	net
		Wh. L-in-O.	S-W	8.55	1%-10
			Mamolith	8.50	net
2/12	U. S. Treas. Dept.	80,000 lbs.	*J. T. Lewis	7.94	
		Wh. L-in-O.	Mamolith	8.30	
			S-W	8.25	

* Awarded bid.

				WL-O	D.R.
3/28	Panama Canal	100,000# Wh. L-in-O 50,000# Dry Red	E-P	*7.84	8.15
			Evans	—	*8.1[illegible]
			J. T. Lewis	7.84	8.15
			Mamolith	8.30	—
			S-W	8.75	8.55 1%–10
			Hammond	—	8.65
	Note :—Awards made by drawing lots.		Metals Ref.	—	8.65
5/16	Panama Canal	200,000 lbs. Wh. L-in-O.	*Mamolith	7.74	
			J. T. Lewis	7.79	
			E-P	7.84	
			S-W	7.95	
			H. B. Davis	8.60	
				WL-O	D.R.
7/19	Panama Canal	200,000# Wh. L-in-O. 50,000# Dry Red	E-P	7.69	8.00
			Evans	—	8.00
			Hammond	—	8.50
			J. T. Lewis	7.63	8.00
			Mamolith	*7.62	—
			Metals Ref.	—	*7.95
			S-W	8.60	9.00

6268

1940

7/30	U. S. Navy	366,200 lbs.—all sizes Dry Red	*E-P	$28,645.25
			Evans	28,669.50
			Metals Ref.	28,669.50
			Hammond	29,500.50
			J. T. Lewis	28,669.50
			S-W	29,175.42
		17,200 lbs.—50s Litharge	*E-P	8.25 1%
			Evans	8.25 1%
			Metals Ref.	8.75 net
			Hammond	8.91 net
			J. T. Lewis	8.25 1%
		200,000 lbs.—bbls. Dry White	*Kraft Chem. Co. (MacGregor)	6.80 1%-20
			E-P	6.90 net
			J. T. Lewis	6.93 net
			Mamolith	6.74 net
			S-W	7.25 1%-20

Respondent's Exhibit No. 307.

* Awarded bid.

8/15	U. S. Treas. Dept.	12,500 lbs.—25s Wh. L-in-O.	*S-W	8.00	1%-20	
			Thomkins Pt. Co.	8.74	3%-20	
			Mamolith	8.75	net	
			J. T. Lewis	7.94	net	
			E-P	9.06	net	
9/ 9	Panama Canal	400,000 lbs.—100s Wh. L-in-O.	J. T. Lewis	7.98	1%-20	
			E-P	7.47	net	
			*Mamolith	7.47	net	
			S-W	7.42	net	
		20,000 lbs. Dry Red	*S-W	8.15	1%-20	
			J. T. Lewis	8.25	1%-30	
			E-P	8.25	net	
			Evans	8.25	1%-30	
			Hammond	8.75	1%-20	
10/ 4	U. S. Treas. Dept.	200,000 lbs.—100s Wh. L-in-O.	*J. T. Lewis	6.89		
			E-P	7.39		
			S-W	7.74		
			Mamolith	8.00		
10/11	U. S. Treas. Dept.	45,000 lbs.—50s Wh. L-in-O.	*J. T. Lewis	7.49		
			Mamolith	8.00		
			E-P	8.25		
			S-W	8.30		
				WL-O		D.R.
11/10	Panama Canal	200,000 lbs. Wh. L-in-O. 60,000 lbs. Dry Red	J. T. Lewis	*7.47		—
			E-P	7.68		8.50
			Mamolith	8.50		—
			S-W	8.45	1%-20	9.00
			Evans	—		*8.45
			Metals Ref.	—		8.75
			Hammond	—		10.00

RESPONDENT'S EXHIBIT NO. 308.

1941 * Awarded bid.

1/ 3	U. S. Navy	40,500 lbs.—100s Litharge	*J. T. Lewis	8.50	1%-30
			E-P	8.50	1%-30
			Metals Ref.	8.68	net
1/ 9	U. S. Navy	261,800 lbs.—100s Dry Red	*Evans	8.40	net
			E-P	8.50	net
			Metals Ref.	8.50	net
			S-W	9.50	1%-20
			Hammond	10.00	net
		400,000 lbs.—bbls. Dry White	*Mamolith	7.38	net
			J. T. Lewis	7.42	net
			E-P	7.50	1%-30
			S-W	7.50	1%-30
1/17	U. S. Treas. Dept.	45,000 lbs.—50s Wh. L-in-O.	*J. T. Lewis	7.34	
			Mamolith	7.42	
			E-P	7.48	
2/17	U. S. Treas. Dept.	15,000 lbs.—25s Wh. L-in-O.	*J. T. Lewis	7.54	
			E-P	7.89	
			Mamolith	8.56	
			S-W	8.57	
			Int. Sm. & Ref.	8.62	
2/18	Panama Canal	100,000 lbs.—100s Dry Red	*Metals Ref.	8.55	
			J. T. Lewis	8.65	
			E-P	9.00	
3/ 4	U. S. Navy	19,000 lbs.—50s Dry Red	*Jaegle Pt. & Var.	8.75	net
			Metals Ref.	9.16	net
			J. T. Lewis	9.25	1%-30
			Evans	9.25	1%-30
			E-P	9.25	1%-30

Respondent's Exhibit No. 308.

* Awarded bid.

3/28	U. S. Navy	200,000 lbs.—100s Wh. L-in-O.	*Mamolith	7.28	
			Int. Sm. & Ref.	7.49	
			J. T. Lewis	7.59	
			S-W	7.74	
			E-P	8.75	
4/ 1	U. S. Navy	300,000 lbs.—bbls. Dry White	*E-P	7.20	
			J. R. MacGregor	7.35	
			J. T. Lewis	7.42	
			Mamolith	7.42	
	Panama Canal	100,000 lbs.—100s Dry Red	*E-P	8.85	(Won on draw.)
			J. T. Lewis	8.85	
			Evans	8.85	
			Metals Ref.	9.05	
			Hammond	9.35	

5/22	U. S. Navy	348,900 lbs.—100s Dry Red	*J. T. Lewis	9.70	1%-30
			S-W	10.25	1%-20
			Metals Ref.	10.00	net
			Hammond	10.25	net
			E-P	9.75	1%-30
		500,000 lbs.—bbls. Dry White	*J. R. MacGregor	7.38	
			J. T. Lewis	7.39	
			Mamolith	7.42	
			E-P	7.42	
			S-W	7.50	
5/29	U. S. Navy	52,400 lbs.—100s-50s-25s Litharge	*Metals Ref.	$ 4093.60	net
			J. T. Lewis	4146.00	###
			E-P	4146.00	###
			S-W	4603.00	1%

###100s — net 30
50s)
25s)—1%-30

* Awarded bid.

6/ 3	U. S. Treas. Dept.	60,000 lbs.—50s	*E-P	8.55	
		Wh. L-in-O.	Int. Sm. & Ref.	8.7307	
			J. T. Lewis	8.84	
			The White Co.	9.25	1%-20
			S-W	9.25	
			Mamolith	9.30	
6/11	U. S. Treas. Dept.	15,000 lbs.—25s	*E-P	8.75	
		Wh. L-in-O.	J. Lucas & Co.	8.91	1%-10
			Heyward Pt.	9.15	½%-20
			J. T. Lewis	9.19	net
			The White Co.	9.35	1%-20
			S-W	9.31	net
			Mamolith	9.32	net
			Int. Sm. & Ref.	9.48	net
7/ 9	Panama Canal	50,000 lbs.—100s	*J. T. Lewis	8.80	
		Dry Red	Metals Ref.	9.10	
7/18	U. S. Treas. Dept.	200,000 lbs.—100s	*J. T. Lewis	8.47	
		Wh. L-in-O.	Mamolith	8.80	
			E-P	8.79	
			Int. Sm. & Ref.	9.49	
8/ 4	U. S. Treas. Dept.	35,000 lbs.—50s	*J. T. Lewis	8.99	
		Wh. L-in-O.	E-P	9.06	
			Mamolith	9.06	
			S-W	9.07	
			Int. Sm. & Ref.	9.23	
8/27	Panama Canal	50,000 lbs.—100s	*Metals Ref.	8.85	
		Dry Red	J. T. Lewis	8.90	
			E-P	9.40	
		500 lbs.—bbls.	*Mamolith	8.25	
		Dry White	J. T. Lewis	9.17	
			E-P	9.80	

Respondent's Exhibit No. 308.

Respondent's Exhibit No. 308.

* Awarded bid.

8/28	U. S. Treas. Dept.	30,000 lbs.—25s Wh. L-in-O.	*Mamolith		9.04	
			J. T. Lewis		9.30	
8/29	Panama Canal	25,000 lbs.—100s Wh. L-in-O.	*J. T. Lewis		9.06	
			Mamolith		9.18	
			E-P		9.80	
		5,000 lbs.—bbls. Dry White	*J. T. Lewis		9.17	
			Mamolith		9.57	
			E-P		9.55	
9/23	U. S. Treas. Dept.	440,000 lbs.—100s Wh. L-in-O.	*Mamolith		8.57	
			J. T. Lewis		8.82	
			E-P		9.80	
10/24	U. S. Navy	1,000,000 lbs.—bbls. Dry White	J. R. MacGregor		7.50	2%-10
			J. T. Lewis	#	7.40	
			E-P		7.50	1%-30
			Mamolith	%	7.35	
			S-W		7.50	

# Awarded 800,000 lbs.
% Awarded 200,000 lbs.

Note: Mamolith & S-W both restricted their quantity to 200,000 lbs. Navy would not accept MacGregor quotation because it was based on $5.85 pig lead with adjustment in case of an advance.

		200,000 lbs.—100s Dry Red	*Evans		8.30	
			E-P		8.35	
			Hammond		8.35	
			Metals Ref.		9.10	
			S-W		Could not quite.	
10/31	U. S. Navy	58,250 lbs.—50s Litharge	*Metals Ref.		8.95	net
			J. T. Lewis		9.00	1%-30
			E-P		9.00	1%-30
12/ 9	Panama Canal	500,000 lbs.—100s Wh. L-in-O.	*J. T. Lewis		$47,000.	
			E-P		47,500.	

In the

United States Court of Appeals

For the Seventh Circuit

NATIONAL LEAD COMPANY,
Petitioner,
No. 10839 *vs.*
FEDERAL TRADE COMMISSION,
Respondent.

THE SHERWIN-WILLIAMS COMPANY,
Petitioner,
No. 10840 *vs.*
FEDERAL TRADE COMMISSION,
Respondent.

THE EAGLE-PICHER COMPANY, ET AL.,
Petitioners,
No. 10841 *vs.*
FEDERAL TRADE COMMISSION,
Respondent.

ANACONDA COPPER MINING COMPANY, ET AL.,
Petitioners,
No. 10842 *vs.*
FEDERAL TRADE COMMISSION,
Respondent.

Petitions for Review of Order of the Federal Trade Commission.

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373 **BEFORE FEDERAL TRADE COMMISSION.**

* * (Caption—5253) * *

MOTION TO DISMISS AMENDED COMPLAINT.

(Received Jan. 8, 1947.)

Comes now the respondent, Anaconda Copper Mining Company, a corporation, by its attorneys, Chadbourne, Wallace, Parke & Whiteside, and moves upon the amended complaint herein and the affidavit of E. O. Sowerwine, vice president of said respondent, verified January 6, 1947, attached hereto, that the Federal Trade Commission enter an order dismissing the amended complaint herein as to this respondent for the following reasons:

1. That it appears from the face of the amended complaint herein that the charges relate to prices, terms of sale, offers to sell and sale of lead pigments in commerce. That the evidence in this proceeding does not show that Anaconda Copper Mining Company was ever engaged in the manufacture or sale of lead pigments. That the annexed affidavit of E. O. Sowerwine shows that respondent has never engaged in the business of the man-
374 ufacture or sale of lead pigments; that International Smelting and Refining Company, a wholly owned subsidiary of Anaconda Copper Mining Company, at the time of the issuance of the amended complaint herein was engaged in the manufacture and sale of the lead pigments, dry white lead and white lead-in-oil; that International Smelting and Refining Company is now completely and permanently out of the business of the manufacture and sale of lead pigments; that there is no reason to believe that it will ever re-enter said business; that Anaconda Copper Mining Company does not ever intend to engage in the business of the manufacture or sale of lead pigments; and that there is no reason to believe the respondent will ever enter into or engage in said business.

2. In view of these facts, there would, therefore, seem to be no significance to the present proceeding, and
375 since it affirmatively appears that there is now no sufficient public interest to sustain the amended com-

plaint herein as to this respondent, it is respectfully submitted that the amended complaint be dismissed as to this respondent.

January 6, 1947.

Chadbourne, Wallace, Parke & Whiteside,
By ....
Office and Post Office Address:
No. 25 Broadway,
Borough of Manhattan,
New York 4, N. Y.,
Attorneys for Respondent, Anaconda Copper Mining Company.

* * (Caption—5253) * *

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT.

State of New York, } ss:
County of New York. }

Comes now E. O. Sowerwine, vice president of Anaconda Copper Mining Company, a corporation, and, being duly sworn, deposes and says as follows:

That Anaconda Copper Mining Company has never engaged in the manufacture or sale of lead pigments; that a wholly owned subsidiary, International Smelting and Refining Company, a corporation, was at one time engaged in the manufacture and sale of dry white lead and white lead-in-oil, but is now completely and permanently out of the business of the manufacture and sale of lead pigments, and there is no reason to believe that
377 it will ever re-enter said business; that Anaconda
Copper Mining Company does not intend to engage in the business of the manufacture or sale of lead pigments; and that there is no reason to believe that either it or any of its subsidiaries will enter into or engage in said business.

E. O. Sowerwine.

Sworn to before me this 6th day of January, 1947.

Frank G. Ryan,
Notary Public, State of New York
Residing in Westchester County
N. Y. Co. Clk's No. 407, Reg. No. 520-R-7
Commission expires March 30, 1947.

378 **Before Federal Trade Commission.**

* * (Caption—5253) * *

MOTION TO DISMISS AMENDED COMPLAINT.

(Received Jan. 8, 1947.)

Comes now the respondent, International Smelting and Refining Company, a corporation, by its attorneys, Chadbourne, Wallace, Parke & Whiteside, and moves upon the amended complaint herein and the affidavit of Frederick Laist, vice president of said corporation, verified January 6, 1947, attached hereto, that the Federal Trade Commission enter an order dismissing the amended complaint herein as to this respondent for the following reasons:

1. That it appears from the face of the amended complaint that the charges therein contained relate to prices,
terms of sale, offers to sell, and sale of lead pigments in
commerce. That Commission's Exhibits 836 A, B, K and
L in this proceeding show that respondent had permanently gone out of the business of the manufacture and
sale of lead pigments. That the annexed affidavit of
Frederick Laist, vice president of International Smelt-
379 ing and Refining Company, shows that respondent
has permanently discontinued the manufacture and
sale of lead pigments; that respondent has sold its only plant where lead pigments were manufactured and the property it is erected on; that respondent has sold all the machinery and other equipment necessary to the production of lead pigments which it owned; that respondent has shipped all lead pigments, which were on hand when production was stopped, to customers; that, with the exception of a few individuals, all qualified technical and sales personnel have either remained with the purchaser of said plant or secured employment elsewhere than with respondent; that respondent is, in fact, permanently out of the business of the manufacture and sale of lead pigments; that respondent has no intention of ever re-entering said business; and that there is no reason to believe that respondent will ever re-enter said business.

2. In view of these facts and since any order aris-
380 ing out of this proceeding will relate to future opera-

tions of this respondent in the manufacture and sale of lead pigments and since said respondent has permanently discontinued such business and since there would, therefore, seem to be no purpose in continuing the respondent as a defendant and placing upon it the burden and expense of further defending this action and since it further affirmatively appears that there is now no sufficient public interest to sustain the amended complaint herein as to this respondent, it is rspectfully moved that the amended complaint be dismissed as to this respondent.

January 6, 1947.

Chadbourne, Wallace, Parke & Whiteside,
By Robert C. Gormley,
Office and Post Office Address:
No. 25 Broadway,
Borough of Manhattan,
New York 4, N. Y.,
Attorneys for Respondent,
International Smelting
and Refining Company.

381 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT.

State of New York, }
County of New York. } ss:

Comes now Frederick Laist, vice president of International Smelting and Refining Company, a corporation, and, being duly sworn, deposes and says as follows:

That International Smelting and Refining Company was through its Pigment Division at East Chicago, Indiana, engaged prior to August 1, 1946, in the manufacture and sale of dry white lead and white lead-in-oil, these being the only lead pigments manufactured or sold by said Company; that in May, 1946, it was decided to suspend operations and permanently discontinue the manufacture

and sale of said lead pigments; that the reasons for
382 this action were that these operations had become uneconomical due to an ever decreasing tonnage of lead bullion available to respondent and increased labor costs; that International Smelting and Refining Company has now in fact permanently discontinued the business of the manufacture and sale of said lead pigments; that this was accomplished by stopping the production and manufacture of said lead pigments in July 1946 and declining to accept orders from the trade after August 1, 1946, by shipping all such materials on hand to customers by the end of that month, and by selling the plant and property where these materials were manufactured and all physical assets and equipment used in the manufacture of said lead pigments; that, with the exception of a few individuals, all qualified technical and sales personnel connected with the manufacture and sale of said lead pigments have either been retained by the purchaser of said plant or secured employment elsewhere than with the International Smelting and Refining Company; that, as evidenced by the attached exhibits A, B and C, it is common knowledge
383 among the trade that International Smelting and Refining Company is permanently out of the business of the manufacture and sale of lead pigments; that International Smelting and Refining Company has no intention to ever re-enter said business; that in view of all the facts and circumstances, there is no reason to believe that International Smelting and Refining Company will ever again engage in the manufacture and sale of lead pigments.

Frederick Laist.

Sworn to before me this 6th day of January, 1947.

Veronica T. Burke,
Notary Public, State of New York
Residing in Bronx County
Bronx Co. Clk's No. 196, Reg. No. 144-B-7
N. Y. Co. Clk's No. 259, Reg. No. 277-B-6
Commission expires March 30, 1947.

384

"Exhibit A."

The following is a copy of an announcement distributed to the Trade:

Letterhead of

**International Smelting and Refining Company,
East Chicago, Indiana.**

Pigment Division.

June 1st, 1946.

To the Trade:

Our operations at East Chicago have been seriously affected by the trouble with which every concern has to contend. We refer principally to shortages of labor and supplies, higher prices for both of these, quotas which reduce volume and automatically increase production costs and restrictions on prices for finished products.

Because of these conditions operations at East Chicago have been unsatisfactory for some time. Since it appears unlikely that there will be sufficient relief reasonably soon it has been decided that operations will be discontinued permanently.

We expect to fulfill any second quarter obligations to our regular customers that we may have. All available tonnage will be distributed equitably and the regular grades will be furnished to the extent that this is possible.

We appreciate the consideration the trade has shown us during the many years we have been in business. We regret this action is necessary but feel no other course is open to us.

International Smelting and Refining Company.

385 "Exhibit B."

The following is an extract from the Paint, Oil & Chemical Review of June 13, 1946:

International Refining Bows to Post War Difficulties.

Operations of the pigments division, International Smelting & Refining Co., a subsidiary of Anaconda Copper Company, will be permanently discontinued, according to company announcement. The plant in East Chicago, Ind., manufactures white lead, zinc oxide and other pigments. The company will fulfill second quarter obligations to regular customers. All available tonnage will be distributed equitably and regular grades furnished to the extent possible. The plant operations have been seriously affected by shortages of raw materials and labor, higher prices for both; quotas which reduce the output volume and automatically increase production costs; and price restrictions on finished products. Since it appears that sufficient relief will not be forthcoming soon it has been decided that operations be permanently discontinued, an official of the firm stated.

386A "Exhibit C."

The following is a copy of an announcement distributed to the trade.

Letterhead of

International Smelting and Refining Company,
East Chicago, Indiana.

Pigment Division.

June 20, 1946.

To the Trade:

It has been decided to permanently suspend operations at the East Chicago Plant of the International Smelting and Refining Company and discontinue the business.

We appreciate the consideration the trade has shown us during the many years we have been in business. We regret this action is necessary but feel no other course is open to us.

International Smelting and Refining Company.

392 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

MOTION OF RESPONDENT, NATIONAL LEAD COMPANY, TO DISMISS AMENDED COMPLAINT AND STATEMENT AND BRIEF IN SUPPORT THEREOF.

(Received Feb. 25, 1947.)

Alexander & Green,
Attorneys for Respondent,
National Lead Company,
Office & Post Office Address,
No. 120 Broadway,
New York 5, N. Y.

James D. Ewing,
Eugene Z. DuBose,
of Counsel.
February 25, 1947.

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396 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

MOTION TO DISMISS AMENDED COMPLAINT.

Comes now the respondent, National Lead Company, and by its counsel moves upon the amended complaint herein and upon all proceedings heretofore had herein that the Federal Trade Commission enter an order dismissing the amended complaint herein upon the ground that there has been a failure of proof with respect to both Counts of the amended complaint, as more fully set forth in the supporting statement and brief forming part of this motion and hereto annexed.

Respondent respectfully requests oral argument before the Commission.

Respectfully submitted,
Alexander & Green,
James D. Ewing,
of Counsel,
Attorneys for Respondent,
National Lead Company,
Office & Post Office Address,
No. 120 Broadway,
New York 5, N. Y.

February 25, 1947.

397 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

STATEMENT AND BRIEF IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT.

Statement.

Respondent National Lead Company makes this motion to dismiss the amended complaint at the close of the Commission's case upon the ground that, as a matter of law, there has been a failure of proof with respect to both counts of the amended complaint.[1]

The respondents are as follows: (1) National Lead Company; (2) Eagle-Picher Company and its subsidiary, Eagle-Picher Sales Company; (3) The Glidden Company; (4) The Sherwin-Williams Company; (5) Anaconda Copper Mining Company, and (6) International Smelting and Refining Company.

Count I of the amended complaint, in effect, charges respondents with a monopoly to fix prices of lead pigments in interstate commerce in violation of Section 5 of the Federal Trade Commission Act and Count II charges respondents upon essentially similar allegations with a violation of Section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act. We submit that the essential charge in the amended complaint is that of monopoly to fix prices and indeed, at the time the Commission rested its case, Trial Counsel for the Commission stated that it was his feeling "that this case is essentially a price-
398 fixing and monopoly case and that that is the essential charge" (Tr. 2068). It is to this charge, therefore, that this brief primarily will be directed, although, of course, we maintain and we shall show that there has been no proof under Count II showing any violation of the Robinson-Patman Act.

The Commission is wholly familiar with the recent line of cases dealing with manufacturers who were members of a trade association and who were charged with violating both the Federal Trade Commission Act and the Clayton Act. Those cases are: *Dietzgen Co.* v. *Federal Trade Commission,* 142 F. (2d) 321; *U. S. Malsters Ass'n* v. *Federal Trade Commission,* 152 F. (2d) 161; *Milk and Ice Cream Can Institute* v. *Federal Trade Commission,* 152 F. (2d) 478; *Fort Howard Paper Co.* v. *Federal Trade Commission,* 156 F. (2d) 899; and the recent *Cement* decision, *Aetna Portland Cement Co.* v. *Federal Trade Commission,* 157 F. (2d) 533; all decided by the Circuit Court of Appeals for the Seventh Circuit.

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[1] Respondents Anaconda Copper Mining Company and International Smelting & Refining Company have heretofore on January 8, 1947 moved to dismiss the amended complaint upon separate grounds. The other respondents are making separate motions to dismiss.

There is a marked difference between the situations which obtained in the cases just cited and that disclosed by the Commission's case in this proceeding.

The Commission's own proof in the instant case shows:

(1) There was no exchange of price information between respondents either through Lead Industries Association or otherwise at any time, even during N. R. A. days.

(2) There was no agreement to fix prices nor any "planned common course of action" which resulted in the adoption of uniform prices at any time, even during N. R. A. days.

(3) There was no agreement or concerted action to curtail production at any time, even during N. R. A. days.

(4) The Lead Industries Association was not used as a medium for the exchange of freight factors, freight rates, individual production data, items of past, present or future individual transactions, prices or any other individual sales, freight or production factors. Hence this case does not involve practices similar to those condemned by the Commission and the Courts in the cases cited (excepting the *Cement* case, of course).

389 (5) The Lead Industries Association was composed not only of these respondents but of lead mining companies, lead smelters and refiners, and other companies with interests diverse from those of these respondents.

(6) In this case the present record indicates that any similarity or identity of card or list prices of respondents was the result of the price leadership of the National Lead Company. That price leadership under the circumstances here disclosed does not constitute any violation of law (*U. S.* v. *U. S. Steel Corporation,* 251 U. S. 417; *U. S.* v. *International Harvester Co.,* 274 U. S. 693; *U. S.* v. *Stand-*

ard Oil of N. J., 47 F. [2d] 288; and *cf.*, *U. S.* v. *Socony-Vacuum Oil Co.*, 210 U. S. 150, 198-199).[1]

Although probably it will be disputed by Trial Counsel for the Commission, we respectfully submit that the sole question for the Commission, insofar as Count I of the amended complaint is concerned, is: Does the existence of substantial similarity in card or list prices within an industry which has a demonstrated price leader, without more, constitute "reliable, probative, and substantial evidence" of a conspiracy or combination to monopolize and fix prices in that industry?

The Trial Examiner has stated that this proceeding is being conducted under the Administrative Procedure Act (Tr. 1903). Section 7 (c) of that Act provides that the proponent of a rule or order shall have the burden of proof and that no rule or order shall be issued except upon consideration of the whole record and except as supported by and in accordance with the "reliable, probative, and substantial evidence." Our position is not only that Trial Counsel for the Commission in the proof submitted by him has wholly failed to sustain the burden of proof but also that, viewed as a whole, the record contains no reliable, probative and substantial evidence, proving any of the charges of the amended complaint.

400 We therefore earnestly urge that the Commission, in the interest of respondents and of the public at large, dismiss both counts of the amended complaint. In the alternative, we urge that the Commission dismiss Count I and all of Count II, except insofar as the Commission may feel that there is some proof under Count II, establishing a *prima facie* case (which we deny) with respect to quantity, trade (i. e., "functional") or regional discounts resulting from the pricing methods used by some or all of the respondents.

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[1] **References in this brief involving an assumption that National Lead Company is the price leader are for the purposes of this motion only and are not to be construed as admissions. When in this brief we refer to the fact that others "follow" National's card or list prices, the word "follow" or its like is used in the sense of voluntarily and without compulsion, pressure or influence on the part of National. References in this brief to card or list prices are to the prices paid by purchasers from the manufacturer or its agents or dealers or distributors.**

The Pleadings.

The original complaint was served and filed in November, 1944, and dealt solely with a product known as white lead manufactured by the respondents, among others.

The amended complaint was not served and filed in November, 1944, and dealt solely with a product known as white lead manufactured by the respondents, among others.

The amended complaint was not served and filed until April, 1946, almost seventeen months after the filing of the original complaint. The amended complaint broadened the issues so as to cover "lead pigments", defined in the amended complaint as including white lead, blue lead, red lead, litharge, orange mineral and grinders' lead paste.

Count I of the amended complaint in effect sets forth two charges: (1) that National Lead Company has monopolized or attempted to monopolize the interstate sale of lead pigments and (2) that all of the respondents have combined, conspired and cooperated to hinder, lessen and eliminate price competition in the sale of lead pigments, and in so doing have employed certain unfair, oppressive and discriminatory acts, methods and practices.

The allegations with respect to the first aspect of the monopoly charge are set forth in Paragraph Seven A of Count I, wherein it is alleged that beginning with 1891, when it was formed, National Lead Company began upon a program of aggrandizement which resulted in the acquisition of properties of various concerns manufacturing lead pigments, linseed oil and kindred products; that National Lead Company also secured control over a substantial part of the capital stock of respondent, Eagle-Picher Lead Company; and that National, through its relationship with American Smelting & Refining Company "and others",
exerts a "monopolistic influence" upon the determina-
401 tion and quotation of ~~the~~ market prices on pig lead
which is used in the manufacture of lead pigments
(see subdivision [8] of Paragraph Seven A of Count I, which frankly is as confusing to us as was the proof offered in support thereof before the Trial Examiner).

The essential charge in Count I of the amended complaint is set forth in subdivision B of Paragraph Seven. This is the part of the amended complaint which charges the respondents with a combination and conspiracy to fix prices. Subdivisions (1) through (7) of this portion of the amended complaint allege that respondents conspired and agreed among themselves with respect to the following acts and practices:

(1) That respondents agreed to adopt and did adopt and maintain a system of delivered price quotations which prevented reflection of any differences in the costs of delivery as between purchasers of lead pigments;

(2) That respondents agreed to adopt and did adopt and maintain a plan whereby the United States was divided into so-called zones, in each of which prices to all purchasers of a class were "matched", except that by prearrangement and understanding the offers made in some instances by respondents, Glidden, Sherwin-Williams and International, were below the "matched offers" of respondents, National and Eagle-Picher;

(3) That the respondents agreed to seek and secure and did secure the cooperation of Lead Industries Association and its officers, employees and agents in fixing and adopting non-competitive terms and conditions of sale;

(4) That respondents exchanged directly and through the office of Lead Industries Association price factors and information concerning price factors which were used by the respondents in calculating and determining their offers to sell lead pigments;

(5) That respondents agreed to adopt and did adopt and maintain so-called consignment or agency agreements under the leadership of National Lead Company for the purpose of preventing dealers from selling
402 white lead (as distinguished from all lead pigments) and from selling lead products at prices lower than the offers made by respondents;

(6) That respondents agreed to fix and did fix prices, terms and conditions of sale of lead pigments;

(7) That respondent National Lead Company entered into certain contracts with E. I. du Pont de Nemours Company, Inc. for the purpose of promoting maintenance of levels of price fixed by National and other producers and sellers of white lead (again as distinguished from all lead pigments).

Paragraphs Eight and Nine of Count I deal with the alleged unfair acts and pricing methods indulged in by the respondents in furtherance of the combination and conspiracy alleged in Paragraph Seven. A detailed analysis of these paragraphs is hardly necessary and they may be summarized as alleging that respondents employed certain zones, which differed as to the various lead pigments, in which there was a base zone with an established differential above the base price for the other zones (Paragraph Eight); that respondents required their dealers to resell products at fixed prices and terms; that there were fixed differentials for various sized kegs of lead pigment running from 12½ pounds to 100 pounds; that each respondent from time to time entered into so-called quarterly contracts with large industrial consumers; and that respondents issued cards or price lists setting forth the terms of sale to various classes of customers and for various types of pigments, so that any given prospective purchaser of lead pigment in any given quantity, at any given destination, would pay the same price to any respondent except that Anaconda, Sherwin-Williams and Glidden at times offered to sell at a small differential below the prices of National and Eagle-Picher (Paragraph Nine).

Paragraphs Ten, Eleven and Twelve of the amended complaint contain the usual conclusions that, as a result of the unfair and oppressive discrimination of prices by respondents, there was a substantial lessening of competition among respondents, all to the prejudice of the public and of purchasers of lead pigments.

Count II of the amended complaint deals with the alleged violation of Section 2 (a) of the Clayton Act as amended
403 by the Robinson-Patman Act. There are two main features under this count: first, it is claimed that where the same price is charged to all purchasers within a zone, regardless of the location of the purchaser, there is discrimination in price within the meaning of the Robinson-Patman Act by reason of the fact that those purchasers located near the producing mills are deprived of their natural advantage freightwise (the so-called "mill net" theory) (Paragraphs Eight and Nine); second, it is stated that when sales are made to customers located at or near the borders of adjoining or contiguous zones the prices charged to purchasers in the zone having a lower differential are discriminatory insofar as purchasers in the higher zone are concerned (Paragraph Ten). Paragraph Eleven does also contain the omnibus allegation that the quantity, trade (i. e., "functional") and regional discounts quoted

by respondents are discriminatory, but, as we have said, we believe that the main questions concerned in Count II deal with the so-called mill net theory as it applies to a uniform delivered price throughout any one particular zone and the use of the zone system insofar as purchasers located at or near the borders of adjoining or contiguous zones are concerned.

The respondents' answers are in effect a general denial of the material allegations of the amended complaint. There are also certain affirmative allegations in some of the answers and certain affirmative defenses which are not material on this motion.

Proceedings.

As we have stated, the original complaint was served and filed in November, 1944. Thereafter answers were filed by the respective respondents. Hearings were had in January, February and May, 1945, in New York, Cincinnati, Cleveland and Washington. These hearings were devoted primarily to identification of documents. No further hearings were held until June, 1946, but meanwhile, in April, 1946, the amended complaint was served, broadening the scope of the proceeding to include all lead pigments as defined in the amended complaint, whereas the original complaint was concerned only with white lead.

Hearings were had under the amended complaint in Washington on June 17, 18, 19 and 20, 1946; in New
404 York on June 24, 25, 26 and 27; in Cleveland on July 24 and 25; in St. Louis on July 29 and 30; in Washington on October 2, 3 and 4; in Chicago on November 13 and 14; in Kansas City on November 18; in St. Louis on November 19; in Nashville, Tennessee, on November 21; in Birmingham, Alabama, on November 22; and finally on January 7 and 8, 1947, in Washington, at which time Trial Counsel for the Commission rested. It was at these hearings in 1946 that most of the documentary evidence theretofore marked for identification was introduced in evidence and oral testimony given. The record now comprises more than 2,000 pages of transcript and approximately 3,500 pages of documentary exhibits.

We shall refer from time to time to evidence, documentary and parol, received over timely objection on the part of the respondents. Such references are not to be construed as a waiver by respondents of any timely objections heretofore made and respondents reserve all their rights with respect thereto. Moreover, any statement concerning the testimony and exhibits shall not be construed as an admission of the accuracy thereof, nor shall any statement in this brief be construed as an admission of fact upon the part of any respondent. We are here, for the purposes of this motion only, taking all of the evidence introduced by Trial Counsel for the Commission at its face value.

The Facts.

A. The Products Involved:

The amended complaint served in April, 1946, defines the term "lead pigments" to include white lead, blue lead, red lead, litharge, orange mineral and grinders' lead paste, in both dry form or in oil in the form of a paste after being mixed with linseed or other oils. While Paragraph Five of the amended complaint deals with the use of lead pigments in the manufacture of paint, the proof has shown that the lead pigments (as defined in the amended complaint) involved in this proceeding not only are used in the manufacture of certain types of paint but, as oxides (red lead and litharge), so-called, form one of the principal material items in the manufacture of storage batteries.

White lead is sold as dry white lead and as white lead in oil. Dry white lead is used in the manufacture of paint
405 by paint grinders and white lead in oil is mixed with other ingredients to form outside house paints.

Red lead, an oxide, is used in red lead paint and in the manufacture of storage batteries.

Litharge, so far as this proceeding is concerned, is used primarily in the manufacture of storage batteries.

The other lead pigments referred to in the amended complaint, namely, blue lead, orange mineral, and grinders' lead paste, are insignificant items and therefore will not be discussed since almost the entire body of the evidence, both parol and documentary, deals with white lead, red lead and litharge.

B. The Respondents:

National Lead Company is the largest producer of white lead and lead oxides. During the period involved in this proceeding (frequently denominated by Trial Counsel for the Commission as the "normal period" from 1936 to 1941) National Lead produced approximately 60% of the white lead in oil, from 30% to 35% of the dry white lead, and 50% of the oxides, red lead and litharge (Tr. 1647, 1665, 1666; Com. Ex. 664). The combined total percentage for white lead in oil and dry white lead was 58.8% in 1938 and 53% in 1941 (Com. Ex. 669). National's white lead plants are located at Perth Amboy, New Jersey, Philadelphia, Chicago, St. Louis, and Oakland, California (Tr. 1071-1072). Its oxides, red lead and litharge, are produced at nine plants located in Brooklyn, Philadelphia, Charleston, West Virginia, St. Louis, Chicago, Dallas, Atlanta, Los Angeles, and San Francisco (Tr. 1625).

While formerly National secured the bulk of its corroding pig lead from the American Smelting & Refining Co., it has purchased the raw material from a number of companies, including the St. Joseph Lead Co., U. S. Smelting & Refining Co., American Smelting & Refining Co., Anaconda Sales Company, and three or four others (Tr. 1068). The largest single source of supply at the present time is the St. Joseph Lead Co. (Tr. 1069).

Eagle Picher Company for the period from 1930 to the
present time produced from 15 to 20% of the white lead
406 in oil and approximately 10% of the dry white lead
(Tr. 1560, 1561). Its combined total for dry white lead and white lead in oil was 14.3% in 1938 and 12.5% in 1941 (Com. Ex. 669). This respondent produced white lead at its plant in Cincinnati and its oxides, read lead and litharge, in Joplin, Missouri, and Newark, New Jersey (Tr. 1552, 1564). The bulk of its corroding lead is purchased from the U. S. Smelting & Refining Co., East Chicago, Indiana, although Eagle-Picher produces some lead itself in the Tri-State area of Missouri, Kansas and Oklahoma (Tr. 1561-1562).

The Glidden Company has two divisions, one, the Metals Refining Co., acquired by Glidden in 1928 or 1929, which produces oxides, red lead and litharge, at Hammond, Indiana, and the other, Euston Lead Co., acquired about 1923, which produces white lead at its plant in Scranton, Pennsylvania (Tr. 1230, 1231, 1233). In 1943 Glidden produced between 6 and 7% of the red lead in oil and a smaller percentage of dry red lead and litharge. It also produced 8% or 9% of white lead in oil and approximately 16% to 18% of dry white lead (Tr. 1307, 1308).

The Sherwin-Williams Company produces white lead and oxides (red lead and litharge) only at its plant in Chicago (Tr. 1313). It obtains its pig lead requirements from practically all suppliers (Tr. 1313). In 1944, Sherwin-Williams produced about 5% of the white lead in oil used in this country and approximately the same percentage for many years prior thereto. For many years its dry white lead and litharge sales represented less than 1% respectively of the total sales in this country, while its dry red lead and red lead in oil sales were approximately nil (Tr. 1331-1332). Sherwin-Williams obviously is not an important factor in the sale of dry lead pigments. It does not compete in the sale of oxides to battery manufacturers (Tr. 1648).

Anaconda Copper Mining Company has never engaged in the business of the manufacture or sale of lead pigments. Neither International Smelting & Refining Co., the subsidiary of Anaconda Copper Mining Co., nor its predecessor, the Anaconda Lead Products Co., ever produced oxides. Anaconda Lead Products Co. began the production of dry
white lead at its plant in East Chicago, Indiana, in
407 1919 and the production of white lead in oil at the same
plant in 1931. In 1936 the International Smelting & Refining Co. acquired the property and assets of Anaconda Lead Products Co. The principal source of supply of pig lead was lead bullion smelted by the International Smelting & Refining Co. in Utah and refined in East Chicago, Indiana. A small amount was also secured through the treatment of secondary lead purchased on the open market (Com. Ex. 836-A-N). For the period from 1937 to 1943 International's percentage of the white lead in oil business varied from approximately 3% to 4% and its percentage of dry white lead for the same period varied between approximately 10% and 19% (Com. Exs. 741, 836-J). International's combined percentage for dry white lead and white lead in oil was 6.6% in 1938 and 8.8% in 1941 (Com. Ex. 669).[1]

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[1] This same exhibit shows the following combined percentages for other companies in the period 1937-1941 (some of whom are not respondents): W. P. Fuller, approximated 3% during this period; MacGregor, an increase from 1.6% in 1938 to 3.2% in 1941; "other companies" (stated to include Glidden and Sherwin-Williams) 17.1% in 1938, 18.3% in 1939, 21.4% in 1940, and 19.3% in 1941.

C. The Pricing Methods of the Respondents:

Since the essential charge in Count I is a price fixing monopoly, it will be necessary to consider the pricing methods used by the various respondents. In this connection it will be well to bear in mind that there were not only differences which existed among the respondents themselves but also that the three main products involved, namely, white lead in oil, dry white lead, and oxides, were sold on different bases, although all were sold on a uniform delivered price basis throughout particular territories.

White lead, whether dry or in oil, is essentially a standardized product. Although sometimes one customer, for example, a potter or ceramic manufacturer, will want a slightly different grade than that used by the paint manufacturer, and certain paint manufacturers might want a product of a particular particle size, the Federal specifications for white lead do not permit of substantial physical or chemical difference (Tr. 1073, 1074).

White lead in oil is sold on a basis which differs
408 from that used in the sale of dry white lead. This is the result of practices ancient in the industry and of subsequent historical growth. White lead in oil had been sold to dealers or distributors, until the adoption by National Lead Company and Eagle-Picher Company of the so-called "agency" contracts which will be discussed hereafter (infra, pp. 22-24). National Lead Company, at least as far back as 1920, had a system of differential points, that is, cities or towns located throughout the United States which took a stated differential over the base price. (See Com. Ex. 659-C-P, setting forth the old differential points for the Atlantic, Boston, Buffalo, Chicago, Cincinnati, Cleveland, Pittsburgh, Philadelphia and St. Louis Branches of the National Lead Company.) Naturally, the other producers, in order to compete with National, could sell for no more than the price quoted by National Lead at these differential points. During the NRA days there was some discussion about the points as to which a particular differential might be applicable and although there was some discussion about adopting a zoning method for purposes of the Code, no agreement was reached among the white lead producers (which included the respondents in this proceeding) (Com. Exs. 501-A-D, 505-A-B). Nevertheless, sometime between November, 1933, and June, 1934, National Lead Company adopted the so-called "zone method"

(Tr. 1154), which was merely a simplification of the historical differential and equalization point method employed by National Lead at least as far back as 1920. This will be discussed more fully hereafter (infra, pp. 24-27). With the adoption of this method National Lead thereupon sold, either directly or through its agents, white lead in oil on the basis of this zone method, which roughly divided the country into a par and six differential zones (see Com. Ex. 580). Eagle-Picher sold its white lead in oil during the same period on the basis of substantially similar zones, although there were differences, particularly in the Far West (see Com. Exs. 585, 589-A-B). Sherwin-Williams, however, continued to sell through its shipping points which method had been followed by the company since prior to 1924 (Tr. 869-870, 1316-1317); Glidden sold on the basis of differential territories, without using any zone map (Com. Ex. 593; Tr. 1254, 1289, 1293), and apparently
409 it was not until 1937 that International Smelting & Refining Co. used a zone map in the sale of white lead in oil (Com. Exs. 591, 592, 836-E).[1]

Dry white lead in barrels or bags (constituting the most significant method by which dry white lead is sold) was sold by National Lead Company on the basis of two zones, a par zone, a par zone which extended through all the eastern and southern States and a 25¢ per 100 pounds differential zone comprising the western States beginning with the eastern boundaries of New Mexico, Colorado, Wyoming and Montana (Answer of Respondent National to Amended Complaint, Par. 7). As in the case of white lead in oil the other producers could sell at no higher price than National Lead Company if they were to be competitive.

There were also different zones adopted by National Lead Company for red lead and litharge. When these products were sold in less than carload lots there was a par zone comprising all of the northeastern, middle west, and some of the southern States with 25¢ per 100 pounds being added for customers in Alabama, Florida, Georgia, Louisiana, Mississippi, Texas, California, and territories west of the Cascade Mountains in Oregon and Washington, 50¢ for customers in Colorado, Montana, New Mexico and Wyoming, and 75¢ for customers in Arizona, Idaho, Nevada,

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[1] All of the lead pigments in kegs of 100 pounds or less were also sold on this same zone basis but obviously these smaller keg products did not constitute a significant factor in the industry as a whole.

Utah, and the territory east of the Cascade Mountains in Oregon and Washington. Red lead and litharge in carload lots were sold on the basis of a par zone and a 25¢ per 100 pounds differential zone which included the States of Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, Montana, Nevada, New Mexico, Texas, Utah, Wyoming, and the territory east of the Cascade Mountains in Oregon and Washington (Answer of Respondent National to Amended Complaint, Par. 7).[2] Again, if they were to be competitive, the other producers could not sell at prices in the various territories higher than the prevailing prices at which National Lead Company was selling any particular product.

Although undoubtedly there is some similarity in all 410 oxides used in the storage battery business, nevertheless, the testimony was clear from the purchasers called as witnesses by the Trial Counsel for the Commission, that some of these purchasers felt that there were great differences in the quality of storage battery oxides offered by the various producing respondents and in the services they obtained from the various respondents (Tr. 1736, 1738, 1741, 1817-1819, 1852, 1854).

D. Price Leadership of National and Similarity of Prices:

As we have stated, when analyzed, the record is barren of any evidence showing exchange of price information or price factors either directly between the respondents or through the agency of Lead Industries Association. Similarly, there is no evidence showing any agreement or concerted action with respect to fixing prices. The present record before the Commission indicates, however, that the price leader in the field of lead pigments was National Lead Company.

During the so-called "normal period", 1936 to 1941, the record shows National produced slightly more than 60% of the white lead in oil, from 30%-35% of the dry white lead, and approximately 50% of the oxides, red lead and litharge. National Lead Company has five plants producing white lead and nine plants producing oxides. None of the other producing respondents had as large a production as National Lead, although the percentage of business done by some, notably Eagle-Picher and Glidden, was substantial, and none had more than two plants producing either oxides or white lead. Thus, Eagle-Picher had its white lead plant in Cincinnati and its two oxide plants in Joplin, Missouri, and Newark, New Jersey. Glidden had its oxide mill in Hammond, Indiana (Metals Refining Co.) and its white lead plant in Scranton, Pennsylvania (Euston Lead Co.). Sherwin-Williams, although a minor factor in the sale of lead pigments, produced both white lead and oxides only in Chicago, and International Smelting & Refining Co., which did not produce oxides, had its white lead plant in East Chicago, Indiana. It will be recalled that National Lead produced both white lead and oxides in Chicago.

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[2] Sometime during 1941, Arkansas and Oklahoma, which had theretofore been in the 25¢ zone, both as to carload and less than carload lots, were placed by National in the par zone (Tr. 1633-1634).

That National's card or list price changes were followed (without agreement or compulsion) by other companies is clearly shown when comparison is made between Commission's Exhibit 655-A-C, card or list price changes for National for white lead in oil reflecting among other factors
changes in the New York pig lead price, and Com-
411 mission's Exhibit 658, similar list price changes of
Eagle-Picher for white lead in oil from 1936 to October 1, 1939. A comparison of these two exhibits shows the following difference in dates of list price changes:

Price	Date of National's	Date of Eagle-Picher's	
$13.00	3/ 1/37	9/14/37	
12.50	10/19/37	10/20/37	
11.75	1/10/38	1/11/38	
11.25	3/10/38	3/11/38	
11.75	9/26/38	10/ 1/38	
12.25	2/27/39	3/ 1/39	
12.75	9/26/39	10/ 1/39	
13.25	4/26/41	5/ 1/41	(Comm.'s Ex. 660-H).

Similar results are shown by a comparison of National's card or list price changes for white lead in oil with those of the other producing respondents (Com's. Exs. 663-K, 662-A-Z-26, 661-A-Z-194, 738-A-M). Obviously, a competitor would be able to secure from the trade list price changes announced by National and be in a position to follow those card or list prices as of the effective date.

There is no proof whatsoever of any agreement on the part of the other producers to "follow" National's card or list prices and no proof of any compulsion practiced by

National upon those companies. Obviously, therefore, National's card or list prices were "followed" by the other producers as a matter of individual economic choice.

As for oxides, they have been sold by National for many years on the basis, generally, of $1.50 per 100 pounds over the New York pig lead price for litharge and $2.50 per 100 pounds over the New York pig lead price for red lead (Tr. 1635, 1636). Changes in oxide prices, so far as National was concerned, were made from time to time when the market for pig lead advanced or declined as much as 5¢ per 100 pounds but no change in card prices was made until pig lead prices had changed 25¢ per 100 pounds (Tr. 1637-1638). Here again, with National doing approximately 50% of the oxide business and having nine plants producing that material, the other producing respondents could not sell at any price higher than National's if they wished to obtain any of the oxide business.

412 Commission's Exhibit 655-A-C, referred to above, clearly indicates, we submit, the absence of any price fixing monopoly. The typical monopoly price is one which is fairly rigid and maintained at a high level without regard to costs, the law of supply and demand, or competitive conditions within and without the industry. Commission's Exhibit 655-A-C shows clearly that neither of these conditions existed in the prices at which National offered white lead in oil. For example, as of January 2, 1931, National quoted a card or list price for white lead in oil at $13.25 per hundred pounds while the average pig lead price for the preceding six months was approximately $5.25 (Com. Ex. 655-A). Yet in 1937, as of October 19 of that year, National quoted a card or list price for white lead in oil of $12.50 per hundred pounds compared with an average pig lead market price for the preceding six months of approximately $6.15 (Com. Ex. 655-C). The lower card price in 1937, as against the higher pig lead price, reflects the downward trend in the demand for white lead in oil which began in 1936 (Com. Ex. 851-A). By contrast, compare the rigid prices established by the Big Three Tobacco Companies in *American Tobacco Co.* v. *United States,* 90 Law Ed. 1095. There (at p. 1108) the Supreme Court pointed out as significant the fact that in 1931, when the tobacco leaf was selling at its lowest price during a period of twenty-five years, the so-called Big Three raised simultaneously the list price of cigarettes

from $6.40 to $6.85 per thousand. Again, in *United States Maltsters Ass'n* v. *F. T. C.*, 152 F. (2d) 161 the Court, after referring to the fact that barley represented from 80 to 85% of the cost of manufacturing the malt, stated (p. 163): "While the cost of such barley has varied considerably, the price at which the members [of the Maltsters Association] sold their malt remained the same."

Briefly summarized, therefore, all of the vast amount of documentary evidence introduced by trial counsel for the Commission as to prices shows merely the existence of substantial identity of card or list prices among the producing respondents with a demonstrated price leader, National Lead Company.

E. Lead Industries Association:

Lead Industries Association was organized as an unincorporated association in November, 1928 (Tr. 996-
413 997). During the period involved in this proceeding its membership included more than fifty companies, among whom were these respondents (Com. Ex. 498-A-K), It included not only mining companies but smelters, refiners and other companies, as well as manufacturers of lead pigments, some of whom are respondents in this proceeding (Tr. 997).

According to the testimony of Mr. Wormser, Executive Secretary of the Association, the white lead group of manufacturers was not active in Lead Industries Association until the days of NRA. This group became inactive after the decision of the Supreme Court in the *Schechter* case and did not again become active until the advertising promotional campaign of 1937 or 1938 which was designed to stimulate the use of white lead (Tr. 997-998).

From the time the Association was formed, the manufacturers of lead pigments filed monthly reports showing volume of sales and production and stock on hand, but prices were never reported to the Association (Tr. 1083, 1330; Com. Ex. 836-J). The Association in return compiled only an overall statistical survey of the industry which it circulated to the members (Tr. 1330, 1331; Com. Exs. 670, 836-J). The report from the Association to the members did not in any case show individual shipments, production or stock on hand, and it merely gave an overall total combined figure for each respective category. It did not issue any publication to the trade setting forth purported current market quotations on lead pigments (Tr. 1039) and it did not furnish information or quotations on lead pigments to any trade publication (Tr. 1040).

It is clear, therefore, that the Lead Industries Association was never used either by these respondents or by the other members as a medium to exchange price factors or individual production factors, as a means of curtailing production, or in any other manner as a means of "tampering with the price structure".

F. NRA Days and the Code:

The Circuit Court of Appeals for the Seventh Circuit, in *Aetna Portland Cement Co.* v. *Federal Trade Commission, supra,* held that activity of the members of an industry during the NRA Code days could not be used as the basis of a charge of monopoly either during that period or at any other time (157 F. [2d] at 549). The only
414 evidence in this case showing any sort of concerted action is concerned with the activities of these respondents and others during the Code days. Certainly those activities alone are not competent to prove any of the charges of the amended complaint.

1. Committee Meetings.

The Lead Pigments Division of the Lead Industries Association, which had been charged with the duty of writing and submitting an appropriate code, met on various occasions from July, 1933, to January, 1934. There were two committees of the Lead Pigments Division, one, the so-called Dry Products Committee, and the other, the White Lead in Oil Committee (see Com. Exs. 501-A-D, 800-A-C).

Apparently the main work of the Dry Products Committee was concerned with drawing a supplementary code dealing with conditions of sale for oxides in carload and less than carload lots (see, e. g., Com. Exs. 504-A-B, 801-A-B).

The White Lead in Oil Committee not only discussed such terms and conditions of sale for dry white lead (Com. Exs. 803, 804) but also discussed many other problems. Among the problems was the use of the so-called "agency plan" which had been used in the first part of 1933 by National and Eagle-Picher in their eastern territories. Apparently each of these two companies had been able thereby to eliminate the practice among certain dealers of selling white lead in oil below cost and as a loss leader (see infra, pp. 22-24). At the same meeting at which the agency plan was discussed the question of freight differentials was also discussed and it was suggested that a zone basis might be worked out (Com. Ex. 501-A-D). No agreement could be secured on the agency method since it appeared that companies other than National and Eagle-Picher were not enthusiastic about adopting this method (Com. Exs. 506-D-F, 712-A-E). Moreover, no agreement was made in regard to zones and the minutes of the White Lead in Oil Committee meeting of October 28, 1933 (Com. Ex. 505-A) stated specifically that freight and zoning problems were discussed "without any understanding or agreement being made". The record shows no further discussions of these two subjects in the period of the Code days or at any other time.

415 Both Committees of the Lead Pigments Division, however, did agree upon a form of the Code (Com. Ex. 809) and on a schedule of standard conditions for the sale of oxides and dry white lead (Com. Exs. 804, 805-A-C).

Deputy Administrator Janssen of the National Recovery Administration suggested a rather drastic price filing section for the Code (Com. Ex. 518-A-B) which the Lead Pigments Division rejected and in place thereof adopted (Com. Ex. 803) Section 2 of Article VII of the Code which provided that each member of the Lead Industries Association engaged in the manufacture and sale of lead pigments should file a list of prices under which his products would be sold and a memorandum of any of his conditions of sale at variance with those set forth in Schedule A (the so-called Supplementary Code dealing with standard conditions of sale for Oxides and Dry White Lead) (Com. Ex. 809). Any changes in prices or conditions of sale were required to be reported to the Secretary within twenty-four hours, and information supplied the Secretary was to be reissued to the reporting members. However, even this rather mild provision for filing price lists and conditions of sale was not followed. The members of the Lead Pigments Division were not in favor of such action and, therefore, an exemption from the provisions of this section was obtained in June, 1934 and a further extension was requested in September of that year (Com. Ex. 507-A-M).

So far as the record indicates, no price lists or memoranda of sales conditions were ever filed under that section of the Code.

Some of the members of the Lead Pigments Division had consulted counsel upon the question as to whether or not they could follow the standard terms of sale set forth in Schedule A of the Code before the Code went into effect, and while, as one member expressed it, counsel did not give a "go ahead signal", it was felt by most of the members that in view of the fact that the standard terms of sale in Schedule A of the Code "left the question of price strictly a matter between buyer and seller", the members could follow standard conditions of sale without violating any law (Com. Exs. 517-A, 523).

We submit that this is indicative of the ever-present thought in the minds of the members of the Lead Pigments
416 Division (even in the Code days, when limitations on price competition and production were openly advocated by the N. R. A.) not to do anything which might contravene either the letter or the spirit of any statute prohibiting restraints upon trade.

Moreover, in the minutes of the Dry Products Committee meeting of October 27, 1933, where the standard conditions of sale for oxides and dry white lead were discussed and drafted, it was agreed "in deference to existing statutes, that no reference to prices should appear in the outlines [i. e., conditions of sale set forth in Schedule A of the Code] except for the specification that 'prices were to be agreed upon between buyer and seller'" (Com. Ex. 504-B). An examination of Schedule A of the Code (Com. Ex. 809) reveals that the standard conditions of sale for both oxides and dry white lead contain no price fixing conditions. Article I, dealing with the sale of oxides in lots of less than 20 tons (less than carload lots) provides merely that the price shall be the seller's card or quoted price in effect on the date the order is received with an allowance of "not more than" ½¢ per pound for minimum shipments of 5 tons, and that red lead containing 97% and 98% PB_3O_4 should be sold at "not less than" ¼¢ and ½¢ respectively over the seller's price for grades of lower PB_3O_4 content. Article II, dealing with conditions for the sale of oxides in carload lots, provided that the price should be determined "by adding a differential, as agreed upon by Buyer and Seller" to the price of common lead at New

York. Article III, which deals with dry white lead, provided that the price thereof should be the seller's card or quoted price in effect on the date the order was received.

The Code itself (Com. Ex. 809) therefore did not provide for any fixing of prices. Of course, we concede that if the members of the Lead Pigments Division had filed price lists or their respective variations from the Code terms of sale, as required by Section 2 of Article VII of the Code, this might possibly have had some indirect effect upon prices, but, as we have seen, the members of the industry specifically requested and received an exemption from the requirements of this Section and there is no proof that price lists or terms of sale were ever filed. True,
417 after the termination of the Code, National and Eagle-Picher in general followed the terms of sale with respect to oxides and dry white lead which had theretofore been incorporated in Schedule A of the Code (Tr. 1607-1617, 1650-1654, 1657-1659), but there is not a scintilla of evidence or any proof from which any inference might be drawn that this was done collusively, or in accordance with any "planned common course of action" or by agreement, conspiracy or otherwise than voluntarily.

2. Agency Contracts.

For many years the white lead in oil business had suffered from the actions of certain dealers who sold white lead in oil to the retail trade at a price below cost to the dealers themselves, thereby demoralizing the industry (Com. Exs. 506-D, 706-F). Leaders of the industry had been well aware of this situation, which, as one of them said, "threatened to engulf it [the industry] completely" (Com. Ex. 712-A).

In January, 1933 National and Eagle-Picher experimented with agency arrangements in their eastern territories and during that summer exchanged information as to their success in eradicating the evil of selling white lead in oil below cost (Com. Ex. 712-A). Apparently the dealers of National were well satisfied with the agency arrangement and National so informed Eagle-Picher (Com. Exs. 684, 686). During the course of the Code negotiations, agency as a feature of the Code was discussed (Com. Ex. 501-A-D), but many of the manufacturers of white lead in oil objected thereto; in fact, Sherwin-Williams and Glidden were "radically opposed" to the idea because of its consignment feature. (Com. Ex. 506-E). Nevertheless, National and Eagle-Picher, which had experimented each with the agency methods of selling with success in eradicating the evils, each extended its method on a nationwide basis[1] in November, 1933, and in October National notified Eagle-Picher that it so intended to extend its agency method (Com. Ex. 599).

The agency method of selling was to appoint a reliable dealer as a manufacturer's agent to sell white lead in oil (Com. Ex. 595), title to which was to remain in the
418 manufacturer (see, e. g., Com. Ex. 613-A-C). The
agency, however, was not exclusive and the agent was free to handle the goods of other manufacturers (Com. Ex. 506-E). The agent agreed to sell the manufacturer's white lead in oil at a stated price and he was to be compensated therefor by the difference between a stated amount and the price at which he sold the product to the purchasers in the retail market (Com. Ex. 613-A-C). Sales were periodically reported by the agent, who was thereafter billed for the goods sold by him upon the basis of the commission differential just mentioned (Tr. 638; Com. Ex. 752-A-Z-144).

The agency contract was based upon that used by the General Electric Company in its sale of Mazda lamps (Com. Ex. 506-D), which had received court approval in *United States v. General Electric Co.*, 272 U. S. 476. As stated by an official of Eagle-Picher, it was felt that this method was the only "legal means" by which the extremely dangerous situation, threatening the very existence of the industry, could be cured (Com. Ex. 706-F).

There is no question but that National and Eagle-Picher informed each other as to their practice and experience in establishing the agency method. There is, however, no proof of any compulsion exerted by either company upon the other, nor is there any proof or even suggestion that, during the course of this interchange of information as to the agency method, there was any agreement or "planned common course of action" either to adopt the agency plan or to fix basic prices at which white lead in oil would be sold to the public under the agency plan.

Some time in 1939 (Com. Ex. 649-A-C) Glidden also began to sell through distributors under a distributor agreement whereby title to the white lead in oil remained in the manufacturer until sold by the distributor to the particular purchaser (Com. Ex. 650-A-C), but there was no proof that Glidden ever sold any substantial percentage by this method. Sherwin-Williams remained opposed to the idea, for it never adopted any agency method. This is hardly strange, since Sherwin-Williams sold to the public mainly through its own retail stores located at various cities throughout the country (Com. Ex. 652-A-L; Tr. 869-870).

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[1] Except that National never used the agency method on the Pacific Coast (Tr. 1091).

International Smelting & Refining Company did not
419 adopt the agency method but did sell white lead in oil
on consignment beginning in November, 1932 (Com.
Ex. 836-E).[1]

3. Zones.

National Lead Company sometime between the fall of 1933 and June, 1934, adopted a zone method of selling white lead in oil (which also applied to other keg products of 100 pounds or less, insignificant factors in this proceeding) (Tr. 1154; Answer of Respondent National to Amended Complaint, Par. 7). This was an outgrowth of selling on the basis of equalization and differential points which, as the record shows, was the practice at least as far back as 1920. Commission's Exhibit 659-C-P shows that under the system of differential and equalization points certain cities in various territories took a differential price over the base price and freight charges for shipments to points other than those named as differential or equalization points were "equalized" with those particular cities. At a meeting of the White Lead in Oil Committee during the Code days in August, 1933 (Com. Ex. 501-A-D), there was some discussion among the members of the white lead in oil group as to just what cities or points took on the differential over par or base price. Apparently there was no uniform practice among the manu-

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[1] In addition, National Lead Company also sold white lead in oil under its Dutch Boy label under Fair Trade Agreements (Com. Ex. 619-A-C) where such was permitted by State law (Com. Ex. 576-A-E) pursuant to the provisions of the Miller-Tydings amendment to the Sherman Act (15 U. S. C. A. Sec. 1). However, we fail to see how this is of any relevance in this proceeding.

The record indicates that National discontinued the agency method in January, 1944, and Glidden its distributor method in July, 1942 (Com. Exs. 624-A-B, 651).

facturers and it was then suggested that a zone method might be worked out. In September, 1933, Mr. Maston of Eagle-Picher Company wrote to Wormser, Executive Secretary of Lead Industries Association, enclosing a proposed map together with the differential and equalization points list used by Eagle-Picher (Com. Ex. 513-A-E). He stated that he was forwarding this map and the list to Anaconda, Sherwin-Williams, Euston Lead and Wetherill. It was also stated that National Lead Company was fully informed of the details and was gathering further data on this important matter. The other companies were to
420 submit their suggestions at the next group meeting.

However, at the next meeting in October, 1933, although freight and zoning problems were discussed, no understanding or agreement could be reached (Com. Ex. 505-A-B). The suggested zone map and the differentials appearing thereon which Maston forwarded to the various companies (Com. Ex. 513-E) were not the map and differentials ultimately adopted by National Lead Company (Compare Com. Ex. 580).

The record does not indicate when a zone method was adopted by either National Lead Company or Eagle-Picher Company, and the only testimony upon this point is that zones were adopted by each company sometime between the fall of 1933 and June, 1934 (Tr. 1551, 1579-1581). The zone methods adopted by National Lead and Eagle-Picher differed with respect to the states in the Rocky Mountain and Pacific Coast Areas (Compare Com. Ex. 580 with Com. Exs. 585, 589-A-B). The zone map used by National Lead was simply a simplication of the differential and equalization point method which National Lead had used as far back as 1920 (Com. Ex. 659-C-P). Obviously, under the old system, there was some attempt to approximate an average of freight rates applicable between established shipping points and the particular differential or equalization points. The zones adopted by National Lead for its white lead in oil business represent in substance a graphic presentation of the old differential and equalization points system, and in almost every instance it will be found that under the zone differential method the differential quoted for any particular point was the same or less than the differential quoted under the old system of differential and equalization points (Com. Ex. 808-H).

There is a wealth of documentary evidence in the record

dealing with freight rates but we believe the most accurate summary thereof will be found in the Commission's Exhibit 751-A-F. While no attempt will be made here to present a detailed chart, we submit that, if the Commission picked out any particular shipping point and any point of destination, it will see that in almost every instance the differential on the zone map of ⅛¢, ¼¢, ½¢, ⅜¢ per pound, or whatever the differential may be, is less than the difference between the average freight in the par zone and the freight to the differential zone. It is therefore apparent that National Lead in adopting its zone method
421 made an honest attempt to have the zone differentials not exceed the increase in the average freight charge per pound in those areas.

So far as dry while lead is concerned, National Lead had only two zones, a par zone, which extended to the far western states, which in turn comprised the 25¢ zone (*supra,* p. 14). It does not appear in the record whether this was the result of the adoption of any zone map as such, nor does it appear when this method of selling dry white lead was first used by National Lead.

Oxides were sold by National Lead on the basis of two zoning methods, one which applied to less than carload lots and another to carload lots (*supra,* p. 14). Again, it does not appear when this method was first used by National Lead or when it was first used by any of the other producing respondents.

The reasons for the use by National Lead of different zones for different products are not difficult to ascertain. White lead in oil was sold through agents or dealers located in many cities throughout the United States. Dry white lead, however, for the most part, was shipped directly from the plant or warehouse to the customer (Tr. 698). An examination of the tabular resumé of National's invoice data (Com. Ex. 752-A-Z-144) reveals that, in most instances, dry white lead was shipped in large quantities. Moreover, freight rates on dry white lead, in most instances, were from 25% to 30% lower than those for white lead in oil (Com. Ex. 751-B). Taking these factors into consideration, therefore, National Lead sold dry white lead on the basis of a larger base or par zone. The same considerations applied to the zone basis used by National Lead for the sale of oxides in carload lots, while the sale of oxides in less than carload lots on the basis of four zones would reflect a portion of the increased costs of transportation for the shipment of such quantities (the established rates for less than carload lots frequently being as much as 40 or 50% more than the carload rate [Com. Ex. 751-A]).

There is no showing that at any time there was any agreement among any of the respondents to adopt any particular zone map or the zone method used by National Lead. Eagle-Picher used a similar zone map with respect
to white lead in oil so far as the territories east of the
423 Rocky Mountains was concerned (Com. Ex. 585).

While Eagle-Picher quoted a similar differential for the far western states on dry white lead, it made no sales in that area (Tr. 1576), and, apparently, so far as oxides are concerned, Eagle-Pitcher employs a system which differs from that of National Lead (see paragraph 13 of answer of Eagle-Picher to amended complaint). Glidden does not use zone maps but sells all of its lead pigments on the basis of such differential territories as are dictated by competitive considerations (Com. Ex. 593; Tr. 1254, 1289, 1293), although, as alleged in its answer to the amended complaint (Paragraph Eighth) its sales of certain of the lead pigments in certain territories are negligible or non-existent. Sherwin-Williams used no zones whatever for white lead in oil but had "shipping points" which carried a differential over its base price according to the location of the particular shipping point. For example, it had five shipping points in Texas (Com. Ex. 778-A). It maintains warehouses in twenty-five cities (Com. Ex. 775-A-B) and since 1933 from seven to twenty such shipping points in the northeastern states alone (Com. Ex. 662-W-2-26). It was the general custom and established policy of Sherwin-Williams for the purchaser to pay the freight from the nearest shipping point (Tr. 1529). International Smelting & Refining Company, so far as white lead in oil is concerned, apparently did not use any zone map until 1937 (Com. Ex. 836-E). International's zone method for dry white lead was first used in October, 1935, when two zones were set up, a par zone, and the Pacific Coast which carried a differential of ¼¢ per pound (Com. Ex. 836-I).

There is thus no proof of any agreement or "planned common course of action" among the respondents with respect to the adoption of zones or differential territories.

422 In the above discussion we have not referred to
Commission's Exhibit 519-A-B. Commission's Ex-

hibit 519-A is a letter, dated February 2, 1934, from Mr. Wormser, Secretary of Lead Industries Association, to Mr. Maston, Vice President of Eagle-Picher Company, in which Mr. Wormser expressed his thanks to Mr. Maston for mailing him a copy of the zone map for the "White Lead-In-Oil Industry". Commission's Exhibit 519-B is a letter dated January 31, 1934, from Mr. Maston to Mr. Wormser, which reads as follows:

> "I am enclosing Zone Map for the White Lead in Oil industry. I believe you will find it self explanatory.
>
> When new points are set up or any suggested change in the differential made they can in the future be passed through your office.
>
> From this map we will eventually build up an official freight arrangement for this division of the lead industry."

The evidence does not show what the zone map enclosed by Mr. Maston was, or whether it corresponded to any zone map ultimately adopted by any respondent. We repeat that the record does not show what map Mr. Maston referred to in his letter of January 31, 1934 (Com. Ex. 519-B) nor has any such map been identified or received in evidence. The letter was written during NRA days and for all that the record shows it would seem to represent a further effort by Mr. Maston to induce the Lead Pigments Division to adopt or include in the proposed Code (still under consideration in January, 1934) a zone map for white lead-in-oil producers; an effort similar to that evidenced by his letter to Mr. Wormser of September 14, 1933 (Com. Ex. 513-B). We say this pointing out again that the maps adopted by National Lead Company and Eagle Picher differed; that International Smelting & Refining Company did not use any zone map until 1937; that Sherwin-Williams and Glidden never used maps. The record shows, as we have said, that Sherwin-Williams did not sell white lead in oil on a zone basis but rather used "shipping points" carrying differentials over its base price. Furthermore, there is no evidence that "When new points are set up or any suggested change in the differential made they" were "passed through" Mr. Wormser's office.

G. Documents Apparently Relied on by Trial Counsel for the Commission:

We have heretofore stated that there is no evidence, documentary or otherwise, showing any exchange of price information among the respondents. From the remarks of counsel for the Commission at various times during the hearings, however, we believe that he will attempt to rely upon the documents discussed below to support his 424 contention that information as to prices or price factors was exchanged between the respondents. An examination of these documents will reveal, we submit, that they in no wise support that contention. In any case, it is certain that they are not "reliable, probative and substantial" evidence to support that conclusion.

(1) So-called "Specimen" Letter from Pacific Coast Branch of National Lead Company dated January 26, 1937 (Commission's Ex. 581 A-E).

This exhibit, a series of letters and schedules constituting "Notice to the Trade", related to price changes as to certain of National's products which were to become effective on the date of the so-called specimen letter, January 26, 1937. The notices were addressed to the San Francisco, Oakland and San Jose trade by National Lead Company's Pacific Coast Branch. They related only to prices in the territory of the Pacific Coast Branch. Copies of these papers were located by any attorney examiner for the Federal Trade Commission in the files of Eagle-Picher (Tr. 299). There is no testimony as to how they arrived in the files of Eagle-Picher. Moreover, we fail to see its significance in any event, since the letter, dated January 26, purports to announce an advance in prices for the Pacific Coast Branch territory for white lead, white lead in oil, red lead, both dry and in oil, and litharge in 100 pound kegs or smaller packages effective as of the date of the letter itself. The fact is that Eagle-Picher had already changed its prices as of January 1, 1937 (Com. Ex. 658). Hence nothing could be more far-fetched than to claim that these papers establish an agreement or "planned common course of action" to fix prices between National and Eagle-Picher.

(2) Telegram from Pacific Coast Branch of National Lead to Eagle-Picher dated March 12, 1941 (Commission's Ex. 701).

This was a telegram from Scott, of the Pacific Coast Branch of National Lead Company, to Hayt, of the Eagle-Picher Company, stating that "effective immediately" the "Manila" (presumably Philippine Islands) prices of white lead in oil and dry red lead in 25 pound kegs had been increased ½¢ and that the price was "now" 10½¢ 425 (presumably per pound). Again, there is no showing as to why this telegram was sent but in any event we fail to see how some isolated instance relating to an increase in certain prices in Manila could possibly be relevant to any issue involved in this proceeding.

(3) Letter dated December 14, 1933 from National Lead Company to Sherwin-Williams Co. of Canada, Ltd. (not a respondent) (Commission's Ex. 525).

This was a letter from the main office of National Lead Company addressed to the Canadian company above named enclosing a price card "mailed to the trade today" announcing a change in the price of dry white lead and basic sulphate in amounts of less than 20 tons. There is no proof to show any connection between Sherwin-Williams Co. of Canada, Ltd. and The Sherwin-Williams Company which is a respondent in this proceeding.[1] For all that appears, the Canadian company was merely another customer and a member of the general "trade" to all of the members of which apparently a price card had been mailed. Obviously, therefore, this exhibit is wholly irrelevant and immaterial.

(4) Letter from Hayt, Eagle-Picher, to Reque, National Lead Company, dated July 26, 1940 (Commission's Ex. 710) and reply thereto dated July 30, 1940 (Commission's Ex. 708).

The letter from Hayt of Eagle-Picher of July 26, 1940, addressed to Reque of National Lead in Chicago, refers to a telephone conversation between the two parties and states that the new white lead paint which Eagle-Picher was trying out was still very much on a "experimental basis", particularly from the marketing angle. Among other things, the letter sets forth the list price at which Eagle-Picher will attempt to market the product. The reply from Reque of National Lead to Hayt merely expresses appreciation for the letter and Reque's wishes to Hayt for the best of luck. The subject of the letter, of course, is a new ready-mixed *paint* and not the raw 426 material ingredients thereof, one of which would be white lead. The correspondence therefore has nothing to do with any of the products involved in this proceeding. We fail to see how these letters are in any way relevant or material.

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[1] At the hearing where this exhibit was introduced, counsel for respondent Sherwin-Williams stated that that company, on December 14, 1933, did not own the controlling interest or any substantial portion of the stock of the Sherwin-Williams Company of Canada (Tr. 602).

(5) Letter from Dice, Eagle-Picher, to Wormser, Lead Industries Association, dated November 16, 1937 (Commission's Ex. 696) and reply thereto dated November 19, 1937 (Commission's Ex. 697).

In the letter from Dice to Wormser the writer thanks Wormser for taking him to lunch with Messrs. Wilson and Martino (of National Lead Company). The writer expresses the fear that the conversation might not have been very interesting to Wormser "because the trend which it took involved National Lead and Eagle policies more than industry problems." In his reply Wormser states that he was glad that Dice was able to meet Messrs. Wilson and Martino, and that he was extremely interested in the conversation that took place "for I felt that if we had more of them in our industry quite a few of our problems would disappear." Just what was the topic of conversation is not revealed, but we have never heard anyone claim that to discuss mutual problems or policies with a competitor constituted a violation of any known law. Moreover, in 1937 or 1938, an advertising promotional campaign to stimulate trade in white lead was under way (Tr. 998) and for all that appears, the conversation might have been concerned with this activity. These exhibits, therefore, are not worthy of any further comment other than to state that they are obviously wholly irrelevant and immaterial.

(6) Oil, Paint and Drug Reporter.

Trial counsel for the Commission apparently attempted to show from the testimony of the President of the corporation which publishes the trade paper known as the Oil, Paint and Drug Reporter that somehow or other this

publication was used as a medium to exchange price information among the respondents and thereby to further the alleged conspiracy to fix prices. The attempt was wholly ineffectual and actually turned out to be a "boomerang", to employ the vernacular. Certain pages from the Oil, Paint and Drug Reporter for certain days in
427 May, June and August, 1934, were introduced into evidence (Com. Ex. 808 A-N) and certain of these pages carry current market quotations on various lead pigments. Mr. Auchincloss, President of the corporation which publishes this trade magazine, stated that various reporters for his magazine would attempt to obtain current price quotations from producers of various commercial articles, including lead pigments; that the price quotations were the result of a purely reportorial operation and if a reporter obtained a price change from one supplier he would then check with the others without revealing the name of the first supplier who might be quoting the price change (Tr. 1112, 1116, 1134-1138). In selecting the basic material which was later edited and reproduced in the trade paper, representatives of the Oil, Paint and Drug Reporter obtained information from various sources. This information was later sifted, correlated, edited, and eventually published, so that the final published item might not be the actual information obtained by the reporter from any particular one of the sources he interviewed (Tr. 1137).

H. Testimony of Purchasers:

Trial Counsel for the Commission called various purchasers of dry white lead and oxides who gave testimony which will be summarized below. This testimony apparently was introduced to support the charge in Count II of the amended complaint as to alleged violations of the Robinson-Patman Act, but we respectfully submit that none of the testimony from these witnesses added anything to the case.

(1) Purchasers of White Lead.

At the hearings in St. Louis on July 29 and 30, 1946, certain local paint manufacturers were called to the stand by Trial Counsel for the Commission. All of the manufacturers involved purchased dry white lead and therefore all were in the par territory, since it will be recalled that dry white lead (except as to keg products of 100 pounds

or less) is sold on the basis of a par zone which extends throughout all the east, middle west and south, and as far west as the line formed by the eastern boundaries of New Mexico, Colorado, Wyoming and Montana. From the testimony of these manufacturers it appeared that the white
428 lead content of house paints might vary from three
to eight pounds per gallon of paint (Tr. 1367, 1381, 1392, 1397); that some of them did business as far south as Texas and Louisiana (Tr. 1339, 1367, 1368, 1398, 1423); that the raw material cost per gallon of paint might be in the neighborhood of $1.50 per gallon and that the list price thereof would be $2.65 per gallon (Tr. 1346); one of the paint manufacturers sold on a uniform delivered price for any area (Tr. 1346, 1348); a second absorbed a portion of the freight for sales to Texas (Tr. 1401); another added a certain amount to the price for delivery in distant areas such as Texas (Tr. 1368-1369), and one claimed an f. o. b. price St. Louis, the customer paying the freight (Tr. 1423), although on cross-examination this witness had difficulty in explaining his ability to compete with the others who sold at a uniform price both in St. Louis and at distant points (Tr. 1445-1447). The four witnesses called at the hearings in St. Louis were asked whether or not a saving of five or ten cents a gallon on material costs would affect them from a competitive standpoint and their answers may be summarized as ranging between "Yes", to "Perhaps", to "No" (Tr. 1359, 1360, 1378, 1402, 1425, 1426). (Obviously, since all of these purchasers bought their dry white lead in the par zone, and did business only in that zone, the testimony would seem to be relevant only from the standpoint of the so-called "mill net" theory hereafter discussed).

(2) Purchasers of Oxides.

Various storage battery manufacturers were called to the stand at the hearings in November, 1946, held in Chicago, Kansas City, St. Louis, Nashville and Birmingham (Tr. 1672-2018). In addition, certain testimony from a battery manufacturer in Dallas, Texas, was introduced at the hearings in January, 1947, in Washington, by way of stipulation (Tr. 2022-2024).

These witnesses testified that in a standard 15-plate storage battery there would be approximately 23 pounds of lead products of which approximately 10 or 11 pounds

represented lead pigments and the balance antimonial lead (which is not involved in this proceeding) (Tr. 1677, 1680, 1717). All testified that the storage battery business was highly competitive and some testified that a saving of
429 5¢ or 10¢ per battery in material costs would be of
advantage to them from the competitive standpoint, particularly in the lower priced 13-plate battery field where the independent manufacturers were subjected to indirect cheap competition of the mail order houses such as Sears, Roebuck and Montgomery, Ward (Tr. 1732-1733, 1879-1880, 1909, 2015). Others, however, stated that such a difference in material costs would have no effect from a competitive standpoint (Tr. 1798, 1866-1867, 1868, 1869, 1898).

All of the witnesses were located in the par zone for oxides except those in Birmingham, Alabama, and the one in Dallas, Texas, who were located in the 25¢ zone. Again, apparently, the testimony was aimed in support of the "mill net" theory and possibly also at the zone system, although the differential per standard 15-plate battery of ¼¢ per pound would be only 2½¢ and would hardly appear to be important from a competitive standpoint.

Some of the witnesses testified that in their opinion there were differences in oxides from the standpoint of performance, and three of them specifically mentioned National Lead Company, which company in the opinion of these witnesses offered storage battery oxides which were definitely superior in performance to those produced by other manufacturers (Tr. 1736, 1737-1738, 1740, 1741, 1817, 1818-1819, 1854-1855). Some of the witnesses further stated that, in addition to purchasing oxides from one or more of the producing respondents in this action, purchases had also been made from the Hammond Lead Company of Hammond, Indiana, which is not a respondent in this proceeding (Tr. 1676, 1702, 1760, 1881, 1915, 2022).

I. Testimony Relating to National Lead Company:

Various documents and other testimony were introduced apparently in an attempt to prove the subordinate charge in Count I of the amended complaint to the effect that National Lead Company, beginning in 1891, the date of its incorporation, had attempted to monopolize the lead pigments industry.

A complete refutation of this charge is found in the

Commission's own proof with respect to the other respondents. Thus, as we have shown, from 1930 on, Eagle-
430 Picher produced from 15 to 20% of the white lead in
oil, and 10% of the dry white lead. Glidden purchased Metals Refining Company in 1928 or 1929 and was thereafter able successfully to engage in the oxides business. It acquired Euston Lead Company, manufacturer of white lead, in 1923 and both of those divisions of Glidden are still in business. Anaconda Lead Products Company, the predecessor of International Smelting & Refining Company, began the production of dry white lead in 1919 and the production of white lead in oil in 1931 and, while Sherwin-Williams is a minor factor in the sale of lead pigments, it has remained in the lead pigments business and in 1943 produced 5% of the white lead in oil used in this country. In addition, other companies (who were not named respondents here), such as W. P. Fuller & Son, MacGregor, and Hammond Lead Company were also engaged in the manufacture of lead pigments. In the field of oxides, Hammond and Fuller were two of the principal competitors of National, in addition to Eagle-Picher, Glidden, and those storage battery manufacturers who produced oxides for their own use (Tr. 1647). It is difficult to reconcile these facts with the charge that beginning in 1891 National Lead Company began a program which resulted in a monopoly of the lead pigments industry.

Various exhibits dealing with early meetings of the Board of Directors of National Lead Company were introduced in evidence (Com. Exs. 3-A through 11-D). These showed that some of the Guggenheims were at sometime in the early history of National Lead Company members of the Board of Directors of that Company. There are also documents (admitted over respondents' objections) indicating that the Guggenheims and Thomas Fortune Ryan were among the founders of American Smelting & Refining Company (Com. Exs. 22-A-Z-47, 92). Counsel also introduced in evidence a contract executed in 1906 between American Smelting & Refining Company and National Lead under which National Lead agreed for a period of fifteen years to purchase the bulk of its corroding pig lead requirements from American Smelting & Refining Company (Com. Ex. 93-A-I). That contract of course expired in 1921, and the testimony is that at the present time National Lead purchases the greatest portion of its corroding

pig lead requirements from the St. Joseph Lead Com-
431 pany (Tr. 1069). However, apparently all of this background testimony was put into the record in an attempt to show that somehow or other National Lead Company in its relationship with American Smelting & Refining Company was able to control the market price of pig lead. Just how this evidence tends to support that suggested conclusion it is difficult for us to perceive. As a matter of fact, we regard the allegations of subdivision (8) of Paragraph Seven A, which make this charge, as completely preposterous and wholly unsupported by any proof (even the most remote hearsay, such as were many of the exhibits introduced ostensibly to support this charge).

The testimony of E. A. Behr, for many years Assistant Sales Manager of American Smelting & Refining Company, who had been in the Sales Department of that Company since 1907, makes this abundantly clear. Mr. Behr testified that prices of pig lead were established by American Smelting & Refining Company through its own committee, which considered the law of supply and demand and decided whether prices were too high or too low and recommended any change accordingly. Sometimes price decisions were made by Behr alone; at other times by the Manager of the Sales Department and Behr, and, on occasion, the Chairman of the Board or the President of the Company participated. While National Lead Company was the largest buyer of corroding pig lead from American Smelting & Refining Company, corroding pig lead represented only 25% to 35% of the total lead production of American Smelting & Refining Company. That Company also sold common desilverized lead and chemical pig lead as well as small lots of soft Missouri lead. Electrical manufacturing companies, cable companies and wire companies were also large customers of American Smelting & Refining Company (Tr. 1214-1221).

The amended complaint also charges that National has secured control over a substantial part of the capital stock of Eagle-Picher. It was shown that beginning in August, 1930, shares of Eagle-Picher were transferred to the name of Edward J. Cornish, of National Lead Company, and that purchases were made in his name through June, 1932, at which time the total number of 44,900 shares of Eagle-Picher were in the name of Edward J. Cornish. In

432 February and March, 1937, the bulk of these shares was sold and on March 10, 1937, there remained in the name of Edward J. Cornish 3,500 shares of Eagle-Picher. In February, 1943 these 3,500 shares were transferred to the name of National Lead Company (Com. Ex. 700-A-B). There is no showing of what the total number of outstanding shares of Eagle-Picher Company was at any time during the period 1930-1943. In any event, by 1937 only 3,500 shares were held in the name of Edward J. Cornish who apparently was the nominee of National Lead Company (Com. Ex. 700-A). There is no proof whatever in the record of any action on the part of National Lead indicating the slightest attempt to exercise domination or control of Eagle-Picher or to influence that company in the management or conduct of its business.

Paragraph Seven B, subdivision (7), of the amended complaint sets forth an even more fantastic charge, namely, that National Lead Company entered into contracts and "understandings" with du Pont "for the purpose and with the effect of promoting maintenance of the levels of price fixed by National and other producing and primary sellers of white lead." In the first place, the exact nature of the charge set forth in this allegation is difficult to ascertain. We suppose that a translation of this allegation into understandable terms might run as follows: That National Lead, by certain contracts it made with du Pont, thereby (in some occult fashion) helped to maintain the fixed price at which it and other sellers of white lead sold that product. To support this charge trial counsel for the Commission introduced certain contracts between du Pont and National Lead and certain correspondence which amounted to an extension of these contracts. On examination these contracts turned out to be nothing more than conversion contracts whereby for a stated sum, fixed by a formula set forth in the contracts, National Lead agreed to take pig lead belonging to du Pont and convert it into white lead (Com. Ex. 797-C-Z-6). If thereby National promoted "maintenance of the levels of price fixed" by it and other producing sellers of white lead, we simply fail to understand how this was accomplished.

We therefore respectfully submit that there has been not only a complete failure of proof as to the charge
433 of monopoly leveled at National Lead Company as an independent respondent but also affirmative proof to the contrary.

J. Summary.

In the foregoing discussion of the facts, we of course have not made reference to every bit of the testimony or every piece of documentary evidence which has been introduced in evidence, much of which we claim is inadmissible either as hearsay or as irrelevant. We have tried, however, to summarize the testimony relating to the main issues in the proceeding and to give a fair and accurate summary of the proof offered by Trial Counsel for the Commission. We respectfully submit that this summary of the proof to date shows conclusively that the allegations of Paragraph Seven B of the amended complaint, the crux of the Commission's case on the conspiracy or monopoly charge, have not been supported by any evidence and certainly not by the "reliable, probative and substantial" evidence nor by the greater weight of the evidence. Thus, there has been no showing of any combination or conspiracy among the respondents:

(1) To adopt and maintain a system of delivered price quotations;

(2) To adopt and maintain a system of zones;

(3) To secure the cooperation of Lead Industries Association in fixing and adopting non-competitive terms and conditions of sale;

(4) To exchange directly and through the Lead Industries Association price factors and information concerning price factors;

(5) To adopt a system of consignment or agency agreements;

(6) To fix prices and terms and conditions of sale for lead pigments.

Similarly, there is no proof

(7) That respondent National Lead entered into contracts with du Pont "for the purpose of promoting maintenance of the levels of price fixed by National and other producing and primary sellers of white lead."

434 We also maintain that there has been a failure of proof as to Count II of the amended complaint charging violations of the Robinson-Patman Act, and we shall discuss this in Point II (*infra*, pp. 47-51).

Point I.

There is no proof whatsoever of any conspiracy, combination, agreement or "planned common course of action" constituting a price-fixing monopoly within the meaning of the cases.

In view of the summary of the testimony which we have just given, it might appear redundant to discuss the cases dealing with the subject of monopoly, but we believe an analysis of those cases clearly demonstrates that none of the activities engaged in by the respondents in this proceeding amounts to a violation of law.

For the most part, the proof offered by trial counsel for the Commission concerns similarity of card or list prices of respondents and the activities of respondents during the days of NRA. As to the former, we have found no case which suggests that similarity or identity of prices, standing alone, constitutes proof of a conspiracy or combination in restraint of trade. As to the latter, the activities and the discussions at the various committee meetings and the later correspondence among certain of the respondents in connection therewith, were all part of an attempt to draw a workable code which Congress in enacting the National Industrial Recovery Act required that all industries attempt to do. Hence, they are in no way proof of any combination or conspiracy to monopolize the lead pigments trade.

An analysis of the leading cases under the Sherman Act and under Section 5 of the Federal Trade Commission Act, dealing with activities of manufacturers who were members of a trade association, clearly supports the conclusions just referred to. Under the Sherman Act we find the following cases:

Maple Flooring Assn. v. *United States*, 268 U. S. 563 (1925);

Cement Mfrs. Assn. v. *United States*, 268 U. S. 588 (1925);

Sugar Institute v. *United States*, 297 U. S. 553 (1936);

435 *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940).

Other pertinent cases under the Sherman Act are:

United States v. *Standard Oil Co. of New Jersey,* 47 F. (2d) 288 (D. C., E. D. Mo., 1931);

United States v. *Aluminum Co. of America,* 148 F. (2d) 416 (C. C. A., 2d, 1945).

Of the cases involving Section 5 of the Federal Trade Commission Act, the following should be considered:

Dietzgen Co. v. *Federal Trade Comm.,* 142 F. (2d) 321 (C. C. A., 7th, 1944);

United States Maltsters Assn. v. *Federal Trade Comm.,* 152 F. (2d) 161 (C. C. A., 7th, 1945);

Milk and Ice Cream Can Institute v. *Federal Trade Comm.,* 152 F. (2d) 478 (C. C. A., 7th, 1946);

Fort Howard Paper Co. v. *Federal Trade Comm.,* 156 F. (2d) 899 (C. C. A., 7th, 1946);

Aetna Portland Cement Co. v. *Federal Trade Comm.,* 157 F. (2d) 533 (C. C. A., 7th, Sept. 10, 1946).

In the *Maple Flooring* case, *supra,* the defendants, who manufactured flooring, were members of an association which, among other things, gathered and collated information on the cost of lumber, manufacturing costs, percentage of waste, etc., which was distributed among the members thereof; the Secretary of the Association compiled and distributed booklets showing freight rates; members made weekly reports on sales giving quantity, grade, delivery prices, average freight rate to destination and commissions paid, and the Association reported back to each member such information as to each sale. Similar activities were involved in the *Cement* case (1925), and in both cases the Supreme Court in 1925 held that there was "no prohibited concert of action".[1]

436 In the *Sugar Institute* case activities similar to those performed by the trade associations in the *Maple Flooring* and *Cement* cases were involved and, in addition, as the Supreme Court pointed out, the Sugar Institute took steps to compel its members to adhere to prices which it had announced. The Supreme Court in that case did not condemn announcement of prices and terms of sale. It stated (p. 601):

> "* * * The vice in that agreement was not in the

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[1] *Corn Products Co.* v. *Comm'n,* 324 U. S. 726, 735.

> mere open announcement of prices and terms in accordance with the custom of the trade. That practice which had grown out of the special character of the industry did not restrain competition. The trial court did not hold that practice to be illegal and we see no reason for condemning it. The unreasonable restraints which defendants imposed lay not in advance announcements, *but in the steps taken to secure adherence,* without deviation, to prices and terms thus announced. It was that concerted undertaking which cut off opportunities for variation in the course of competition however fair and appropriate they might be * * *." (Italics ours.)

At other places in the Court's decision reference is made to "policing" "recommendations of the Institute concertedly observed", "restrictions imposed by the Institute", "obligations to adhere", and "rigid enforcement".

In the instant case the respondents did not even exchange among themselves or through Lead Industries Association information as to prices or terms of sale, the practice which was declared legal in the *Sugar Institute* case. Much less was there here any "policing" or "rigid enforcement" by the respondents either collectively or through the offices of the Lead Industries Association.

In the *Socony-Vacuum* case, *supra,* the respondents were oil companies located in the middle west, who admittedly through agreement among themselves launched upon a plan to buy "distress" gasoline in the east Texas and mid-continent areas in order to maintain the retail prices of gasoline in the mid-west area. While acquiescence on the
part of NRA officials was urged, it was shown that the
437 activities continued *by agreement* after NRA was de-
clared unconstitutional in the *Schechter* decision.

Similarly, the recent cases cited above, involving proceedings initiated by the Federal Trade Commission under Section 5 of the Federal Trade Commission Act, present circumstances which are entirely different from those obtaining in this proceeding.

In the *Dietzgen Co.* case, *supra,* the respondents were members of an organization known as the Scientific Apparatus Makers of America. In June or July, 1932, they met in Detroit and *agreed* on a price list to become effective July 10, 1932. Thereafter, during the NRA period, the respondents complied with the Code until NRA was declared unconstitutional. In June, 1935, however, the respondents *again met and agreed* to keep the Code prices in effect, and in October, 1935, they met at Cleveland and agreed that it was unfair to sell for less than the lowest price of any member. A similar *agreement* was made at a meeting in Chicago in June, 1936. The Commission further offered proof showing that the majority of the respondents had submitted identical Government bids in nineteen instances, in sums varying from $3,441.20 to $34,095.50.

In the *Maltsters Assn.* case, *supra,* the Association received from its members daily reports of sales showing the date of sale, destination of shipment, grade and quantity, and the prices received. This information was compiled in the office of the Association and a daily sales report was sent to members showing the name of the seller, the date sold, quantity and grade, and the price received, without, however, identification of the particular buyer or the destination of the shipment. Similar weekly and monthly reports were made to the Association and by the Association to the members. When a member of the Association made an offer to sell at a price different from that at which it had theretofore been selling malt, it advised the Association, generally by wire, of such price change and the Association relayed that information to other members, usually by telegram. Many other activities of the Association members of a similar nature are set forth in the Court's opinion, among them the fact that in February,
1935, a representative of the Brewers Association met
438 with the Executive Committee of the Maltsters Asso-
ciation to discuss an allowance of a cash discount on the purchase of malt which resulted in the quotation of the same cash discount to brewers by all members of the Maltsters Association. Moreover, the President of the Maltsters Association testified that members were expected to maintain the prices filed with the Association until the latter was notified of a change. Indeed, the respondents conceded that their collective activities "constituted an agreement". The Court also adverted to the fact that, although the price of barley, representing from 80 to 85% of the cost of manufacturing malt, varied considerably, "the price at which the members sold their malt remained the same" (p. 163).

In the *Milk and Ice Cream Can* case, *supra,* the Court pointed out that the activities of the Milk and Ice Cream Can Institute followed very closely those under consideration in the *Maltsters* case. The Court summarized some of the activities of the members of the Institute, pointing out that the Institute members used a freight equalization plan and that they did not dispute the fact that this freight equalization system "was used for the express purpose of effecting a uniform delivered price" (p. 481). Similarly, there the members of the institute made a daily report of sales and the Secretary of the Institute took steps to supervise the price activities of the members and would from time to time, upon evidence or suspicion of variation in price, call such deviations to the attention of the members as a whole and from time to time requested members to review their data to determine if price discrepancies were due to errors in compilation. Detailed reports were made to the Institute and upon occasion the members were required to submit evidence as to the correctness thereof. In its brief in the Circuit Court of Appeals the Institute conceded that these reports could not be made "without a planned or agreed common course of action" (p. 482). The Institute moreover established the classification of buyers with a specified discount allowable to each class which the members were expected to follow. These were merely some of the circumstances (which the Court stated it had "merely touched upon") supporting the finding by the Commission that there was an understanding or agreement to do away with price competition.

439 In the *Fort Howard Paper Co.* case, *supra,* the facts were entirely dissimilar from those disclosed by the Commission's own proof in this proceeding. There the NRA Code contained standard practices which covered terms, dating, contracts, freight allowances, standards of length, width, and waste of crepe paper, bulk and package, together with a provision as to prices. This trade agreement was to put into effect in August, 1933, and was followed all during the Code days and *thereafter* by *agreement* among the members of the crepe paper industry. Similarly, minutes of the meeting of the Crepe Paper Association in August, 1933, disclosed that there were three zones established by agreement for certain types of paper, and two zones for packaged crepe paper. There were also provisions for classification of customers with

specified variation in the price lists according to classification and dates set for the price lists to go into effect. Each manufacturer was to publish a price list and send a copy to the Association and there were further meetings during the NRA period confirming prices or re-editing the price lists "so there would be no confusion of prices". Moreover, *after* NRA was invalidated by the *Schechter* decision, the members of the Association met and the minutes of their meeting of June 11, 1935, show that the members *agreed* to continue to operate under the same agreements as were in effect under the Code. On June 2 and 3, 1936, the members discussed the question of adopting a new price structure to simplify the old form and on June 3 a new form of price list was unanimously adopted effective June 8, 1936. The minutes of the meetings held on June 23 and 24, 1937 show that it was agreed to use jobbers' prices with no excess for cutting when quoting on crepe paper cut in pieces. The minutes of the meeting held on May 17, and 18, 1938, show that it was agreed that each member was to phone or wire the Secretary of the Association when its published price list was changed and, in addition, all but one member agreed to send copies of orders and invoices to the office of the Secretary of the Association. Moreover, the record was replete with correspondence between the Association and its members showing the existence of *actual price agreements.*

It was in the light of these circumstances that the Court
stated that a conspiracy or combination to eliminate
440 price competition existed and that the zone system
there actually established by *agreement* clearly was tinged with "artificiality". In the instant proceeding there is no proof of any such agreement either as to prices or zones or any other aspect of the industry.

It is interesting to note that in the *Fort Howard Paper Co.* case, *supra*, the Court stated (p. 905):

> "* * * True, the mere filing of price lists, or the use of pricing zones, or the existence of an identical or substantially similar price for a standard product is not conclusive evidence of an illegal conspiracy."

And in the instant case none of the producing respondents ever filed any price lists, nor did all of them follow the same zoning system, and the only circumstance here in any way similar to the case just discussed is the existence of substantially identical card or list prices.

We shall make no comment upon the recent *Cement* decision of the Circuit Court of Appeals, Seventh Circuit, other than to say that the members of the Cement Institute went much further in their activities than did the respondents in this proceeding.

In this proceeding, on the proof offered by Trial Counsel for the Commission, there is not one bit of evidence upon which any combination, agreement, conspiracy, planned common course of action, or common concert of action may be predicated, whether directly or by inference.

At all times during the NRA days, the members of the Lead Pigments Division were careful not to violate the statutes prohibiting restraint of trade. Thus, in the conditions of sale set forth in Schedule A of the Code (Com. Ex. 809), it was agreed not to mention prices "in deference to existing statutes" (Com. Ex. 504-A-B). The members refused to adopt the stringent price filing section recommended by the Deputy Administrator of NRA (Com. Exs. 518-A-B, 803, 805-A-C). Instead, they substituted a milder provision for the filing of price lists and deviations from the terms of sale set forth in the Code. Even as to this milder section the members of the industry were not in agreement and in June, 1934, they obtained an exemption from the requirements both as to filing of price lists
441 and the following of the Code terms of sale for oxides and dry white lead. An extension of this exemption was requested in September, 1934:

> "Inasmuch as the Lead Pigments Division has not yet been able to determine upon the modification of Article VII, Section 2 [the section of the Code requiring the filing of price lists and deviations from standard terms of sale] it desires * * *." (Commission's Ex. 507-C, letter from Wormser, Secretary of Lead Industries Association, to Deputy Administrator Janssen of the NRA.)

While the agency method and zones were discussed at Code meetings, no agreement could be reached. In fact, some of the members of the industry were "radically opposed" to the consignment feature in the agency method which resulted in "locking up" assets (Com. Ex. 595) of the manufacturer at various points over the country. Indeed, while National Lead and Eagle-Picher extended the agency method in November, 1933, Glidden made no similar move until July, 1939; Sherwin-Williams never used either agency or consignment, and International Smelting & Refining never used any agency agreement but had sold on a consignment arrangement since November, 1932. Similarly as to zones, as we have seen, the meeting of the White Lead in Oil Committee on October 28, 1933, shows clearly that no agreement was or could be reached.

Agency methods of course were adopted by National Lead and Eagle-Picher to eliminate the economic evil which resulted from the action of dealers selling white lead in oil below cost. Even had there been an agreement among all respondents as to the agency method, we submit that thereby no violation of law would have been proved under the principle of *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344. Moreover, the zones adopted by National Lead and by Eagle-Picher were not artificial. An examination of National's zones clearly shows that they were developed as an outgrowth and simplification of the old differential and equalization point method, representing an attempt to reflect average freight rates. A look at National's zone map will disclose the careful and realistic
442 account taken of variances in competitive conditions
in certain territories. While generally state boundaries form the basis for zone divisions, they are not arbitrarily or artificially followed. The Commission will note the recognition of the existence of competing communities along the Mississippi River and the zone drawing in disregard of State lines to reflect existing competitive territories so as to include comparable territories in the appropriate zone, regardless of state lines, and exclude such as would be inappropriate.

The following language in the recent *Cement* decision, in the light of the facts just discussed, is particularly applicable here (157 F. [2d] 533, 548):

> "* * * We have read all this evidence as it appears in respondents' appendix and if it reveals anything it is the great divergence of opinion which existed between members of this industry. It was with difficulty that many of them were persuaded to agree to what was proposed and done in connection with the Code. In fact, some never did agree. They were a queer lot of conspirators."

Far more aptly might it be said that the respondents in this proceeding "were a queer lot of conspirators".

The significant fact in this case, a fact which clearly distinguishes this proceeding from any of the recent proceedings instituted by the Commission charging respondents with violations of Section 5 of the Federal Trade Commission Act, is that the record shows no meetings of respondents, no "collective" activities, no agreement on any phase of their business, after NRA was declared unconstitutional, and, as we have shown, such activities as respondents did engage in during NRA days in attempting to draft a workable Code were wholly different from the activities of the respondents in the cases just discussed.

There remains the question of the substantial identity or similarity of card or list prices, and on this we refer the Commission to our summary of the facts, where we clearly show, we submit, that under the Commission's own proof nothing more was established than the price
443 leadership of National Lead Company, with the card
or list prices announced by National Lead Company in most instances being followed (without agreement or compulsion) by the other producing respondents, a situation which has never been considered illegal (*U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 198-199; *U. S.* v. *International Harvester Co.*, 274 U. S. 693; *U. S.* v. *Standard Oil Co. of New Jersey*, 47 F. [2d] 288; *Cement Mfrs. Assn.* v. *U. S.*, 268 U. S. 588, 605).

Moreover, with respect to the charge that National Lead Company itself was a monopoly, we believe that we have shown that the contrary affirmatively appears from the Commission's own proof. On the percentages of National's production alone the proof shows that the charge has not been supported by the evidence. National's combined percentage of dry white lead and white lead in oil business for the years 1938 to 1941 decreased from 58% to 53% while its oxides business remained in the neighborhood of 50%. Such figures alone would be sufficient to prove that no monopoly existed (*U. S.* v. *Aluminum Co. of America*, 148 F. [2d] 416, 424; *U. S.* v. *International Harvester Co.*, 274 U. S. 693).

We respectfully urge, therefore, that since there has been a complete failure of proof as to Count I of the amended complaint, the Commission should dismiss that portion of the amended complaint in its entirety.

Point II.

There has been no proof of any violation of the Robinson-Patman Act.

Count II of the amended complaint alleges violations of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. As we have stated, there are two main features under this Count, one dealing with the method of selling on a uniform delivered price basis throughout one zone, and the other dealing with the zone system itself with alleged discriminations resulting where purchasers are located in contiguous or adjacent zones with corresponding differentials. A wealth of documentary evidence was introduced in an attempt to support these charges. For the most part this consists of summaries pre-
444 pared by Attorney-Examiners for the Federal Trade Commission showing certain selected data gathered by the Examiners from invoices supplied by the respective respondents.

It will be recalled that so far as National Lead Company is concerned there are three zoning methods, one applicable to white lead in oil, one to dry white lead and the other (subdivided into two zoning methods) dealing with oxides. Throughout the East and Middle West (but not the Far West) Eagle-Picher used similar zoning methods while Glidden, although not using zones as such, met competition by quoting similar differentials throughout the particular territories covered by National's and Eagle-Picher's zones. International Smelting & Refining used the same zones for white lead in oil in 1937 and for dry white lead in 1935, whereas Sherwin-Williams sold by shipping points which in various territories carried similar differentials with the customer usually paying the freight from the nearest shipping point.

1. Uniform Delivered Prices.

The charge under this aspect of Count II of the amended complaint is based upon the so-called "mill net theory" developed at length by Professor Fetter[1] of Princeton University. The theory, when announced by Fetter, was an economic one. At the time Congress enacted the Robinson-

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[1] See, Fetter, *The Masquerade of Monopoly* (Harcourt, Brace, 1931).

Patman Act, there was an attempt made to embody in that Act a definition of price in accordance with the mill net theory, but Congress rejected that definition. This legislative history is, of course, well known to the Commission and is referred to by the Supreme Court in *Corn Products Co.* v. *The Commission*, 324 U. S. 726, at 736-737.

Counsel for the Commission in recent proceedings, as well as this proceeding, have maintained that this alleged economic principle is now embodied in Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act. The Commission is, of course, familiar with the wording of that Section which prevents discriminations with a
proviso to the effect that "nothing herein contained
445 shall prevent differentials which make only due allow-
ance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *".

The argument of counsel for the Commission is to the effect that the *permissive* language of the proviso is actually a *requirement*.[1] In other words, counsel claims that the proviso, which by its terms permits differentials which make such "due allowance" for differences in the cost of manufacture, sale or delivery, actually should be construed so as to *require* all prices to reflect such differences. Even assuming the validity of this patent distortion of the plain meaning of the words employed in the proviso to Section 2(a) of the Robinson-Patman Act, the argument would still fall without the further assumption that "price" should be defined as "the amount received by the vendor after deducting actual freight or cost of other transportation, if any, allowed or defrayed by the vendor", a definition which Congress specifically rejected in enacting the Robinson-Patman Act.

We believe a complete answer to the contention of counsel for the Commission on this point is found in the following language of the Supreme Court in *Trade Commission* v. *Staley Co.*, 324 U. S. 746, at page 757:

> "But it does not follow that respondents may never absorb freight when their factory price plus actual freight is higher than their competitor's price, *or that*

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[1] See Wooden, *Delivered Price Systems' Defense*, (1946) 15 Geo. Wash. L. Rev. 1, 14-16.

sellers, by so doing, may not maintain a uniform delivered price at all points of delivery, for in that event there is no discrimination in price." (Italics ours.)[2]

2. Zones.

In the first place, all the data relating to the invoices which show periodical billing to agents of any of the 446 respondents should not be considered by the Commission, since these do not represent sales. Under the agency or consignment agreements title to white lead in oil remained in the manufacturer until sold by the agent to the retail trade. Obviously, therefore, transactions between any of the respondents and their agents do not constitute sales.

Secondly, there is no proof which shows that the use of zone differentials for white lead in oil (to the extent employed) has involved a discrimination in price between purchasers of similar commodities the effect of which may have been substantially to lessen competition or tend to create a monopoly. Nor has there been any proof showing that the zone differentials did not make due allowance for differences in the costs of sale and delivery resulting from differences in the methods or quantities in which the pigments in question were sold and delivered. It is clear that the zone differentials reflect increasing freight rates and result in price differences which make no more than "due allowance" for differences in such costs.

In this connection, it will be recalled that in *Salt Producers Ass'n.* v. *Federal Trade Commission*, 134 F. (2d) 354 (C. C. A., 7th, 1943), the Court stated (page 358):

> "We must take judicial cognizance of the fact that the Government postal service has established statutory zones and uniform prices fixed within said zones (39 U. S. C. A., §§ 292, 293). Likewise, railroad tariffs are also based on zones."

There are only two zones for dry white lead, one a par zone covering the east and south, and second, covering the far west. All of the customers of dry white lead who testified purchased their products in the par zone and did all of their business in the par zone.

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[2] Mr. Wooden, Assistant Chief Counsel for the Commission, has stated his belief that this language indicates no more than a "momentary aberration of thought" on the part of the Supreme Court, or at most "dictum", *op. cit. supra*, page 19. We respectfully submit, however, that whether dictum or not, this clear statement of the Supreme Court should be accorded its full meaning by the Commission.

So far as oxides are concerned, the only testimony with respect to zones other than the par zone came from customers located in Alabama and Texas, where a 25¢ per 100 pound differential exists. Even if the differential were not justified by the increase in freight rates, this would mean, at most, as we have shown, a differential of 2½¢ per standard 15-plate storage battery. Certainly the rule of *de minimis* would apply here.

So far as quantity or functional (i. e., "trade") dis-
counts are concerned, Trial Counsel for the Commis-
447 sion has only shown that there were differences, with-
out showing any facts from which it could be inferred that those differentials might have substantially lessened competition or that they were disproportionate to the direct or indirect costs of sale or delivery. In that connection, we respectfully refer the Commission to the *Sugar Institute* case, where the Supreme Court agreed with the lower court in holding that the refusal to grant quantity or other discounts where the discounts would result in economies to the sugar refiners was illegal (297 U. S. at 594-595).

We respectfully submit, therefore, that as to the zone method and as to quantity and trade discounts there has been no showing of any discrimination within the meaning of the Robinson-Patman Act.

If, however, the Commission feels that the evidence as to zones and quantity and functional discounts submitted by Trial Counsel for the Commission is sufficient to make out a *prima facie* case, which we deny, we respectfully submit that in any case so much of Count II as relates to any alleged discriminations resulting from a *uniform* delivered price be dismissed.

Conclusion.

The Commission should enter an order dismissing the amended complaint.

Respectfully submitted,
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448 Before the Federal Trade Commission.

* * (Caption—5253) * *

MOTION TO DISMISS AND STATEMENT AND BRIEF IN SUPPORT OF MOTION TO DISMISS.

(Received Feb. 25, 1947.)

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451 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

MOTION TO DISMISS.

Now come the respondents, The Eagle-Picher Company and The Eagle-Picher Sales Company, by their counsel, at the conclusion of the Federal Trade Commission's prima facie case, and move that the Amended Complaint herein be dismissed for the following reasons which are more fully set forth in the accompanying statement and brief:

As to both counts:

1. The practices complained of are proper as a matter of law.
2. The Commission has failed to carry its required burdens of proof.

As to Count I specifically:

1. The alleged monopoly of The National Lead Company constitutes no illegal method of competition by these respondents.
2. The Commission has not substantiated any of the charges of the Amended Complaint by evidence.

As to Count II specifically:

1. The evidence discloses no illegal restraint of trade.
2. The Commission has not conformed to the requirements of due process of law.

452 The respondents respectfully request oral argument of this motion.

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453 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

STATEMENT AND BRIEF IN SUPPORT OF MOTION TO DISMISS.

I. The Complaint Should Be Dismissed as a Matter of Law.

The broad issue before the Commission in this case is a very simple one indeed. The Complaint charges that the respondents have failed to sell lead pigments f. o. b. mill. Count I charges that the failure is the result of the action of National abetted by each respondent and hence, is an unfair method of competing and a violation of Section 5 of the Federal Trade Commission Act. Count II charges that the specified failure is a violation of Section 2 (a) of the Clayton Act.

This broad issue was recently adjudicated in the Seventh Circuit Court of Appeals in the case of *Aetna Portland Cement Co.* v. *Federal Trade Commission*, 157 F. 2d 533:

> "The Commission's order proposes to eliminate the sale of cement on a delivered price basis, notwithstanding the almost unanimous desire on the part of dealers and purchasers that it be so sold. *Instead, it would require that cement be sold on an F. O. B. Plant Basis* * * *. We know of no criticism so often and so forcibly directed at courts, particularly Federal Courts, as their propensity for usurping the functions of Congress. If this pricing system which Congress has over the years steadfastly refused to declare illegal, although vigorously urged to do so, is now to be outlawed by the courts, it will mark the high tide in judicial usurpation." (Emphasis supplied.)

It is preposterous to require these respondents to now assume the burden of going forward to disprove or
454 rebut charges as to conduct which has been declared unequivocably illegal by a court of high dignity and outstanding experience in Federal Trade Commission cases. The Commission, in the exercise of its judicial function, is obligated to follow the decision in the *Cement* case

as a matter of comity and to dismiss this complaint, regardless of the consistency of this action with the Commission's litigious contentions as appellant before reviewing courts. If the Commission, acting in the capacity of the inferior court, ignores the logic of a reversing decision in a case closely akin, then the Commission is transparently confusing its several functions, the compatibility of which has been critically and repeatedly questioned by outstanding legal scholars.

The Commission has applied to the Supreme Court for a writ of certiorari in the *Cement* case. If this is granted, then the decision of that case by the Supreme Court will profoundly affect both the ultimate outcome and the necessary defensive procedure in this case.

True, the multiple zone system used in the sale of white lead in oil and the quantity discounts applicable to various lead pigments present minor issues not specifically involved in the *Cement* case, but these issues are but incidental to the broader issues which are common to the two cases. The Supreme Court's treatment of the Seventh Circuit Court of Appeals attack on the evidence, findings, and order in the *Cement* case will constitute a guide for the conduct of the present case, not only in respect to issues which are common, but as to all issues involving conspiracy or concerted action.

Hence, the Commission is respectfully urged to decide this motion in conformity with presently existing law and precedent and to dismiss this case, subject to the provisions of Rule XXVI of the Commission Rules, the pertinent portion of which reads:

> "In any case where * * * an order dismissing a proceeding has been issued by the Commission, the Commission may * * * (b) in the case of an order dismissing a proceeding at any time thereafter, give reasonable notice to all respondents and to all intervenors, if any, of a hearing as to whether the said proceeding should be reopened. If after said hearing the Commission shall have reason to believe that conditions of fact or of law have so changed since the said order was made as to require, or that the public interest requires, the reopening of such proceeding,
> 455 the Commission will issue an order for the reopening of the same."

It is respectfully submitted that this procedure should be followed because it will not close the door to the legitimate protection of the public interest, should the law change, but will safeguard these respondents against months of expensive hearings and, likewise, conserve the public resources.

II. The Commission Has Failed to Carry Its Burdens of Proof.

In the present case the Commission has failed to carry its requisite burdens of proof by evidence which would satisfy a court or by evidence even faintly probative, as pointed out clearly and in detail in the brief of the other respondents. The mere superficial resemblance of some of the evidence in this case to evidence suspiciously blessed by reviewing courts in earlier Commission cases provides no reliable precedent here for the Commission as plaintiff, because the overall judicial responsibility of the Commission has been purposefully accentuated in no uncertain terms by the Administrative Procedure Act.

But, this Act is not the sole criterion circumscribing the Commission's lawful power. It is merely a guide defining due process of law for administrative procedures which have no judicial counterparts, and that is not the case here. Count I charges a price fixing conspiracy violative of Sections 2 and 1 of the Sherman Act. Count II charges violation of Section 2 (a) of the Clayton Act. Both of the offenses charges may be redressed by civil (or criminal) action brought in the name of the United States, in a Federal District Court, as well as by the instant administrative procedure. But seldom does an administrative procedure have a full and complete judicial counterpart to serve as a yard stick, as is the case here. The civil sanctions here sought must not be imposed on the basis of proof of lesser dignity than that required in a court proceeding directed to the same acts and seeking the same remedies. Otherwise, due process of law has been effectively circumvented.

456 This argument is not directed to the issue before the Seventh Circuit Court of Appeals in the case of *Marquette* v. *Federal Trade Commission*, 147 F. 2d 589. There is no thought here to recuse the Commission or to suggest that the Department of Justice act in lieu of the Commission, although the bar cannot be oblivious to the gratui-

tous dicta of the Seventh Circuit Court of Appeals decision in that case:

> "(10) In conclusion, we are not unsympathetic to the criticism directed at the Commission by Marquette, a criticism much aimed at all administrative agencies, to the effect that their multiple functions as prosecutor, judge and jury constitute an abridgment of the cherished right to a fair and impartial hearing. On the other hand, as already pointed out, they are the creatures of Congress and it is not within the province of courts either to emasculate or enlarge the powers which it has conferred. Any appeal for relief should be made to Congress rather than to the courts."

We respectfully submit that when the Commission chooses to act in a case in which the jurisdiction of the Department of Justice is coordinate, as here, then the Commission inherently assumes the full responsibility of the courts in a corresponding action by the Department of Justice. It is respectfully submitted that the evidence of the Commission which constitutes its prima facie case, despite its impressive volume, falls unmistakably short of carrying the burdens of proof required of a plaintiff in administrative procedure or in a court of equity.

III. Count I Charges a Monopoly By National, Which, Even if True, Is Neither the Responsibility of the Commission Nor of These Moving Respondents.

At the time of the passage of the Federal Trade Commission Act, the power to enforce the Sherman Act was deliberately withheld from the Commission by Congress. Later the Commission contended, and the Supreme Court held, that certain types of concerted action might well 457 be unfair methods of competition, as well as violations of the Sherman Act. This opened the door to the Commission which has gradually overlapped the function of the Department of Justice in so far as the civil aspects of Section 1 of the Sherman Act are concerned.

Now, the Commission is contending that the alleged attempt, commencing in 1891, by one lone respondent to monopolize, which is forbidden by Section 2 of the Sherman Act, is not only an unfair method of competition, but the joint responsibility of all of the respondents. The pleading poses a novel issue which makes this proceeding a case of first impression.

Paragraph Two of the Amended Complaint commences:

> "Respondent National Lead Company is charged in this Count I of the amended complaint with having monopolized and attempted to monopolize the interstate sale of lead pigments and with having acted unlawfully to secure a monopolistic control over the prices of lead pigments in the United States * * *."

Eagle-Picher in moments of bitterness, as well as the Commission, may suspect National of secretly harboring monopolistic ambitions, but neither has any proof and certainly none is contained in the record. In any event, what has National's attempt to monopolize to do with Eagle-Picher and how can National's corporate state of mind constitute an unfair method of competition by Eagle-Picher?

The Commission charges that National has been a monopolistic combine since 1891, that it benefited by the alleged skullduggery of the Messrs. Guggenheim and Thomas Fortune Ryan during early years of this century, that it maintained an illicit relationship with the American Smelting and Refining Company and that its monopolistic position has been contractually supported by E. I. du Pont de Nemours & Company. As far as Eagle-Picher is concerned, the Department of Justice is welcome to dissolve the National Lead Company any time it see fit if, indeed, the facts are as alleged in the Complaint in this case. But Eagle-Picher strenuously objects to being doubly victimized, first by National's alleged impropriety and second by this assault on National by the Commission. Why should Eagle-Picher be penalized for alleged misconduct by 458 National? The Government since 1890, one year before National's founding, has had statutory power to control National. The Commission, since its founding, has had the power to limit unfair methods of competition by National. Why should Eagle-Picher now be attacked because it is asserted that National is an illegal monopoly? There is no legal relationship between the fairness of Eagle-Picher's competitive methods and National's monopolistic position.

National, in its brief, concedes that it is the low cost producer with five white lead plants to Eagle-Picher's one and nine lead oxide plants to Eagle-Picher's two. If National took advantage of its size and cut prices to force Eagle-

Picher out of business, then National would be violating the Sherman Act. But the mere presence in the field of the more powerful competitor does not obligate Eagle-Picher to become the aggressor in a highly hazardous price war or render illegal competitive practices by Eagle-Picher which would be legal in the absence of the alleged monopolistic competitor.

If Eagle-Picher is following National's price or marketing leadership, as may be argued from the record, this policy is not rendered illegal merely because National harbors the intent to monopolize or is attempting to monopolize. In other words, no matter how black National's intent may be, Eagle-Picher cannot be blamed merely for its failure to thwart it and certainly cannot be tarred with a competitor's alleged guilty intent. There is no proof in the record of any corporate intent on the part of National or proof of any knowledge of National's intent on the part of Eagle-Picher.

IV. The Evidence Establishes No Inference That Eagle-Picher Has Participated in an Unfair Method of Competition.

The spurious legal logic of this basic pleading taints and contaminates the subordinate allegations. The remainder of Paragraph Two, Count I, which follows the portion previously quoted reads:

> "and with having combined, conspired and cooperated
> with the other respondents to hinder, lessen and elimi-
> 459 nate price competition in the sale of lead pigments in
> the United States. It and each of the other respond-
> ents are charged with using unfair, oppressive and dis-
> criminatory acts, methods and practices in connection
> with the sale of lead pigments in the United States."

It is to be noted that the charge as a whole is not that the respondents have conspired as a group, but that National has attempted to secure monopolistic control over the price of lead pigments and National has cooperated with each of the other respondents to eliminate price competition. The other respondents are charged at most with contributing to National's delinquency in violating Section 2 of the Sherman Act.

There is absolutely nothing in the record to indicate that Eagle-Picher has been aware of National's cooperation, except that as stated, National has not forced Eagle-Picher out of business by cutting prices. Mr. Hayt and Mr. Zoller, both Vice Presidents in the Eagle-Picher organization, testified fully and frankly in this case, and not one word of their testimony indicates any sort of conspiracy or combination to further or participate in National's alleged monopolistic control over prices.

Of course, certain practices became standardized throughout all American industries during the N. R. A. days and Eagle-Picher has not changed these practices, legal per se, and commenced under government sanction. There is no evidence that either Mr. Hayt or Mr. Zoller, who respectively head the white lead and pigment departments of Eagle-Picher, has had any sort of agreement or understanding, engraved or tacit, with officers or representatives of National in respect to either methods of selling or prices.

From the size and the location of the plants of the respective companies it may be readily inferred that Eagle-Picher has not been in a position to commence a different merchandising policy on its own initiative. Why, for instance, would Eagle-Picher, with one of its two major lead oxide plants located at Joplin, Missouri, choose to sell on an f. o. b. basis at Joplin? Obviously, Eagle-Picher must absorb freight to meet National's price, and, as a mat-
460 ter of fact, that is exactly what Eagle-Picher has done; that is, sold f. o. b. Joplin, freight allowed which, of course, is equivalent to selling at a delivered price.

An Eagle-Picher customer located in Chicago wants to use his lead oxide in Chicago, not Joplin, and one cannot sell the customer on how cheap the product is at Joplin. Some plants have higher fixed charges, some higher taxes, some higher rent, some higher labor costs, some higher cost of raw materials, some higher sales cost, and some higher delivery cost. Is Eagle-Picher to be deemed guilty of conspiracy because it has chosen to take advantage of the favorable economic factors attendant to the Joplin location and to absorb the disadvantageous delivery cost?

This discussion is not directed to the Robinson-Patman phase of the case, that is, Count II, but is directed to the question of whether or not these facts establish any inference of conspiracy to uphold National's pre-eminence, in the absence of any proof whatsoever of actual agreement as to prices or methods.

Paragraph Seven A of the amended complaint which is headed "Charges Particularized" is directed entirely to the alleged monopolistic activities of National and does not concern itself with the other respondents.

Paragraph Seven B charges that "National has also combined and conspired with the few remaining small and ostensibly independent manufacturers and primary sellers of lead pigments in the United States." The charge is not an industry wide conspiracy to fix prices, but, again, cooperation between National and each other respondent. Paragraph Seven A and B merely repeat with greater particularly the charge of Paragraph Two, which has been previously quoted.

The novel issue raised by the pleading of Count I of the complaint really amounts to this: Is an entire industry to be held guilty of indulging in an unfair method of competition because one member of it has achieved a dominant position? The answer is that Congress withheld the power to enforce the Sherman Act from the Commission and that the left-handed effort to enforce Section 2 in this case poses incongruous issues. If it were the charge in this case that
National and Eagle-Picher conspired to fix the prices
461 of lead pigments then the Complaint could have said so
relatively simply. The Complaint cannot now be amended to make this charge because the evidence would not support it.

Is it the unescapable inference of the record that Eagle-Picher has collaborated with National, just because prices and selling methods have tended towards uniformity? No, it is the pleading of the Amended Complaint, itself, that Eagle-Picher is too small to be more than "ostensibly independent."

The Complaint should be dismissed as to Count I because (1) the charge constitutes an attempted usurpation of power over existing monopolies, which is unprecedented and unauthorized and (2) no part of any charge is substantiated by probative evidence.

V. Due Process Requires the Commission to Discriminate Its "Discriminations".

The Commission has failed to maintain its burden of proof as to Count II, that the respondents have violated Section 2 (a) of the Robinson-Patman Act. Not all price variations or differentials are violations of the Act, the requisite conditions being stated in the Act as follows:

"and where the effect of such discrimination may be

> substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them:"

There is disagreement between the Second Circuit Court of Appeals and the Seventh Circuit Court of Appeals as to whether or not proving one or more of these conditions is requisite as part of the Government's prima facie case in view of the provision of Section 2 (b):

> "(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section * * *."

462 The Second Circuit Court of Appeals held in the case of ***Moss* v. *Federal Trade Commission*** CCA, 148 F. 2d 378, that the mere showing of a price variation shifted the burden of proof to the respondents to justify the variation. On the other hand, the Seventh Circuit in its first decision in the *Staley* case, *Staley* v. *Federal Trade Commission* CCA, 135 F. 2d 453, took the opposite view, stating:

> "The Commission seems to think that this element of the offense is a conclusion that follows from discrimination. But it takes discrimination plus the other element as to substantially lessening competition, or tending to create a monopoly, to sustain the complaint. The latter elements are not conclusions to be drawn from the facts of discrimination. They are essential additional elements of fact that must be proved and incorporated in the findings. Congress was dealing with competition, which it sought to protect, and monopoly which it sought to prevent. A showing of discrimination in price is not enough. There must be evidence to support a finding, and there must be a finding based on that evidence, to show wherein competition is substantially lessened or monopoly fostered. It is not every discrimination that is unlawful. Congress knew that all discriminations might have some effect upon competition, but Congress was not dealing with the minor effects of discrimination. The discrimination had to be such that it substantially affected competition.

> *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356, 42 S. Ct. 360, 66 L. Ed. 653. The Commission has failed to make a finding covering these essential elements of the cause of action.
>
> "If there were a finding covering these elements essential to support the order, we find no evidence in the record to support such a finding. There should be evidence to prove in what respect the acts of price discrimination substantially lessen competition or promote monopoly. The Commission cannot depend upon a showing of discrimination alone. Congress was not outlawing discrimination. It was outlawing discrimination only when such discrimination was shown to have substantially lessened competition or promoted monopoly."

We submit that the decision in the latter case is the better judicial reasoning; otherwise, the order drawn might 463 not be based on any finding supported by actual evidence that the critical and limiting conditions of the statute were met. Supposing a company were unable financially to mount the elaborate defense which might be required under the Second Circuit rule. Should such a company be subject to a restrictive order in the absence of affirmative proof of violation of the law?

If Section 2 (b) of the Clayton Act does in fact permit an order without proof, then the statute, so interpreted, is clearly unconstitutional because it is contrary to the due process of law clause of the Fifth Amendment to the Constitution. Any ambiguity or conflict between the requirements of Sections 2 (a) and 2 (b) is certainly resolved by the burden of proof requirement of the Administrative Procedure Act, which provides in Section 7 (c) that " * * * the proponent of a rule or order shall have the burden of proof."

The present record constitutes an apt illustration of the complications and difficulties which would inherently follow the application of the rule of the *Moss* case to a complex case. The record in the present case is replete with thousands of invoices, price cards, etc., of the various respondents. Any two different prices for the same product, not too widely separated timewise, might constitute justification for a finding of illegal price discrimination. Obviously, it would take thousands and thousands of pages of record for the respondents to attempt to justify each pair of different prices. It is difficult to believe that the Commission seriously proposes to place the burden on the respondents of presenting such an elaborate defense.

The procedural problem was discussed informally between counsel for the respondents and counsel for the Commission, and the latter felt that it was only fair to make a statement on the record for the purpose of alleviating the burden. This statement reads as follows:

> "Mr. Wright: I stated to counsel yesterday that I would make a statement regarding the issues in this matter, and I pointed out at that time I have no authority to amend the complaint. So that when I speak on this subject, all I can say is what I intend myself to urge in this proceeding as the issues, and I wish counsel would bear that in mind.
>
> 464 "I believe it was agreed by counsel yesterday that as to Count I there is no confusion with respect to the issues which are involved.
>
> "When we come to Count II, involving the charges of violation of Section 2 (a) of the Clayton Act, paragraph 6 contains a general allegation of violation of Section 2 (a), and I will agree that under that paragraph, conceivably, almost any violation of Section 2 (a) could be found by the Commission.
>
> "To a more limited extent, the same is true of paragraph 11, which refers to classification of customers, quantity, trade and regional discounts. However, as to paragraphs 7, 8, 9 and 10 of Count 2, I believe it is clear as to exactly the nature of the allegations. In other words, these allegations relate solely to the discriminations which flow from the use of the zone systems as to these various products; and I don't believe the issues raised by paragraphs 7, 8, 9 and 10 could be more clearly stated than they are in the complaint.
>
> "I assume that the confusion which has been stated relates particularly to Paragraphs 6 and 11, and that under the provisions of Section 2 (b) of the Clayton Act, and the decision of the Circuit Court in the *Moss* case, that counsel may feel that it is necessary that an affirmative defense be submitted as to each of the many, many, many transactions appearing in the record where a price difference is shown. I am aware that the record contains a good many instances of de-

parture from the announced terms and conditions of sale in the customary quotations of the respondents, and of the prices, terms and conditions which I contend were adopted by collusion and agreement. Many of these transactions may involve a violation of Section 2 (a), and may be subject to corrective action by the Commission; however, it is my idea that this case is essentially a price-fixing and monopoly case and that that is the essential charge. And I believe it would be unfair to the respondents and to the Commission, too, to encompass within this proceeding a hundred or more unrelated, really, individual price discrimination cases. Hence, I will state that I do not intend to urge to the Examiner and the Commission that these individual instances of discrimination which do not follow the method and the system of the pattern of the announced prices and terms and conditions of sale of the respondents should be considered within this proceeding.

"Now I will state that I consider the discriminations which are alleged in Count II to have the effect
465 of eliminating and suppressing competition between and among the respondents and that certain of the discriminations also have the effect of injuring and suppressing competition in the secondary lines in which customers of the respondent are engaged."

In the first place, this statement is by no means definite, and moreover, counsel for the Commission, in making the statement, frankly pointed out that it was in no wise binding upon the Commission. Now obviously, in the present case, either the Commission should adopt the rule of the *Staley* case, as distinguished from the *Moss* case, or alternatively, should amend the Complaint to conform to the evidence, as permitted by rule, or supplement the complaint by a statement in the nature of a Bill of Particulars to crystallize the issues of the case and advise the respondents which price variations may be regarded as typical, or are to be relied upon by the Commission. If the Commission fails to more fully and formally advise the defendants of the identity of the transactions complained of, then the respondents will have been denied the opportunity to offer defense to specific charges in this case, which constitutes departure from due process of law. The greater the burden of justification shifted to respondents under the *Moss* case, the greater is the injury to respondents if the burden is indefinite. Sooner or later the Commission will have to identify and interpret the specific evidence upon which it relies. No time except now can be fair to the respondents.

The requirements of due process in administrative law of judicial nature were clearly outlined by Chief Justice Hughes in the case of *Morgan* v. *United States*, 304 U. S. 1:

> "The right to a hearing embraces not only the right to present evidence BUT ALSO A REASONABLE OPPORTUNITY TO KNOW THE CLAIMS OF THE OPPOSING PARTY AND TO MEET THEM * * *.
>
> "No such reasonable opportunity was afforded appellants * * *. Nor did the oral argument reveal these claims in any appropriate manner. The discussion by counsel for the Government was 'very general' as he said, in order not to take up 'too much time * * *.'
>
> 466 "Congress in requiring a 'full hearing,' had regard to judicial standards,—not in any technical sense but with respect to those FUNDAMENTAL REQUIREMENTS OF FAIRNESS WHICH ARE THE ESSENCE OF DUE PROCESS IN A PROCEEDING OF A JUDICIAL NATURE * * *.
>
> "The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps." (Emphasis supplied)

The *Morgan* case is not a Federal Trade Commission case. That issue was raised before the Sixth Circuit Court of Appeals in the case of *E. B. Muller & Co.* v. *Federal Trade Commission*, 142 F. 2d 511. In that case the court stated:

> "(15) The most serious contentions raised by petitioners are that they were not accorded a full and fair hearing and were denied due process (1) because they were not furnished the particulars of the charge as to discrimination, and (2) because they were not granted a subpoena duces tecum as prayed. The right to a full and fair hearing is one of the substantial rights of a litigant, constituting one of the rudiments of fair play. *Chicago, M. & St. P. R. Co.* v. *Polt*, 232 U. S. 165, 168, 34 S. Ct. 301, 58 L. Ed. 554. *Ohio Bell Tel. Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 292, 304, 57 S. Ct. 724, 730, 81 L. Ed. 1093. It

> includes not only the right to present evidence, but also 'a reasonable opportunity to know the claims of the opposing party and to meet them.' *Morgan* v. *United States,* 304 U. S. 1, 18, 58 S. Ct. 773, 776, 999, 82 L. Ed. 1129. Cf. *Powhatan Mining Co.* v. *Ickes,* 6 Cir., 118 F. 2d 105."

The court refused to reverse the Commission on this issue of due process of law stating:

> "Moreover, petitioners had the right under Section 5 (c) of the Federal Trade Commission Act (Title 15 U. S. C. Section 45, 15, U. S. C. A. Section 45 (c), if they were prejudiced, to apply to this court for leave to adduce additional evidence to explain and justify the transactions found by the Commission to constitute unlawful discrimination. No such application was made. The Supreme Court has held that even 467 in case of an arbitrary refusal to receive testimony, when petitioners fail to avail themselves of this right (*Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 226, 59 S. Ct. 206, 83 L. Ed. 126), due process is not denied. We conclude that the petitioners were not refused a fair trial in this regard."

Nevertheless, despite this technical rationalization of the Commission's conduct the court admonished:

> "We think that since the statute imposes upon the petitioners the burden of rebutting a prima facie case of discrimination, Title 15 U. S. C. Section 13 (b), 15 U. S. C. A. Section 13 (b), the Commission's counsel should in fairness have specified the individual or group transactions which he claimed constituted unlawful discriminations. He should have stated that he relied on the transactions between Franck, Reily & Company, Merchants Coffee Company, American Coffee Company, Southern Coffee Mills Company of New Orleans, and Golden Gate Supply Company of San Francisco, and other instances of discrimination specified in the findings of the Commission with reference to the selling of granulated chicory of like grade and quality to some customers at materially higher prices than to others, not justified by cost differences."

The present case is far more complex than the *Muller* case in that many more products are involved. In the present case the respondents cannot know how to prepare their defense, as is evidenced by the quoted statement of the Trial Attorney for the Commission, that the evidence would permit many, many, many more issues than it is his personal intention to urge. Under these conditions it is respectfully submitted that the Commission should here heed the advisory dicta of the Sixth Circuit Court of Appeals rather than pursue a doubtful course which may or may not prove fair, depending upon the Commission's ultimate but still undisclosed position.

468 VI. Competition Among the Battery Manufacturers Has Not Been Restrained.

Despite the doctrine of the *Moss* case, the Commission chose to delineate competitive conditions in the battery manufacturing industry throughout the Middle West. It must be assumed that the Commission, in undertaking the burden of showing the stifling of competition among the customers of the respondents, advanced its strongest possible case. Each and every one of the witnesses testified that the industry was highly competitive and each recognized many, many competitors of his own organization, some large and some small, judging from their names. Incidentally, the name of a company is a poor criterion by which to judge its competitive potency in any given field. For instance, the name of one of the respondents in this case, the Anaconda Copper Mining Company, is an imposing name, yet its participation in the white lead business has been trifling and half-hearted. Thus, as to the competitors of the battery manufacturers who appeared as witnesses, the record provides no clue to the seriousness and dignity of the competition of any particular rival battery manufacturer. But the record is rife with reference to widespread and active competition being existent in fact in the battery industry.

Some of these battery manufacturers testified that if they could save five or ten cents a battery, then they would be better off. Naturally! In general, individual witnesses differed as to whether or not their competitive positions would be improved by a saving so minor as five or ten cents a battery.

The Commission took a day's testimony in Birmingham, Alabama, which consisted of the testimony of two local battery manufacturers. One witness, Mr. McKinley, testified (Record 2003) as follows:

"Q. Mr. McKinley, if you were able to save on your cost of materials, ten cents per battery, how would that have affected your competitive ability in 1936-1941?

"The Witness: Well, on the quantity of batteries which we were making it would amount to about ten dollars a month, which with us might have made the difference between profit and loss. Of course we are small operators."

469 The second witness, Mr. Burke, testified (Record 2007, 2014, 2015):

"Q. About what was your production of batteries in 1941?

"A. Well, we weren't running but about 300 a month then, two or three hundred a month. * * *

"Q. Mr. Burke, going back now to this period of 1936 to 1941, if you had been able to purchase the materials that went into the manufacture of your batteries, at five cents per battery cheaper than you did, and provided that your competitors had paid what they did, would that have affected your ability to compete in your market area? * * *

"Trail Examiner Norwood: At a saving of five cents on a battery.

"The Witness: Of course in that period five cents ment a whole lot more than five cents does now, and the ability to buy at a lower price, of course, even at five or ten cents a battery, would make the difference between staying in the business and not staying in it."

Thus, Mr. Burke, like Mr. McKinley, testified that a saving which might amount to ten to fifteen dollars a month to his company would have made the difference between staying in business and going out of business. We respectfully submit that any hypothetical lessening of competition by the pricing policies of the respondent clearly falls within the *de minimis* rule.

It is problematical whether or not these witnesses would save five or ten cents a battery if the respondents were forced to sell at mill net, particularly the battery manufacturers located at points remote from the respondents' plants, for instance, those located in Kansas City, Nashville, Birmingham, and Dallas. Whether or not Eagle-Picher could ship from its Joplin plant to compete in the Chicago area under these conditions, is an open question.

The Amended Complaint asserts that Eagle-Picher is so small as to be only ostensibly independent of National. If Eagle-Picher with only two oxide plants is compelled by the order of the Commission to compete with Na-
470 tional, which has nine oxide plants, on the basis of selling at a uniform f.o.b. price, then Eagle-Picher will probably have to relinquish the lead oxide business, as Anaconda, in anticipation of uncertainty, did in respect to the white lead business. If National has been since 1891 the colossus dominating the lead pigment business, as charged in the Amended Complaint, and if the sole fault of the other respondents is *tacit acquiescence* in National's methods and dominance, then obviously, the Commission will not be acting in the public interest if it penalizes Eagle-Picher for the benefit of National.

But apparently the testimony of the battery manufacturers was intended to be related more to the quantity discounts of the respondents than to the freight rate aspects of the case. Also apparently, there is no consistency to the thinking underlying the charges of the Complaint, for a Cease and Desist Order would lead to chaos, not only in the lead pigment industry, but in the paint and battery industries. Whether or not the pieces of the business structure thus blown sky high would, when they came down to earth, happen to form a pattern more conducive to the public weal, is guesswork at best. But to dynamite a business structure in which there is keen, widespread, and active competition, with no thought through theory of constructive betterment, just pious hope, and faith in disruption, is a course which is highly irresponsible.

Naturally, the battery manufacturers are trying to cut their costs generally. Some battery manufacturers operate in lofts, attics, cellars, and abandoned garages. Others have neat plants with lawns and flower beds in front; the cost of the lead oxides going into the battery is but one of many costs and a relatively minor one. It is not sound to infer that the quantity discounts which are available to all purchasers on a uniform basis have *substantially* lessened competition just because a few purchasers tried to assemble batteries without capital or credit.

Section 2(a) of the Clayton Act uses two different words, "discrimination" and "differential" to express prices which are at a variance. For instance, the first two "provided" clauses of Section 2(a) read:

471 "Provided, That nothing herein contained shall

> prevent DIFFERENTIALS which make only due allowance for DIFFERENCES in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered:
>
> "Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render DIFFERENTIALS on account thereof unjustly DISCRIMINATORY or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit DIFFERENTIALS based on differences in quantities greater than those so fixed and established." (Emphasis supplied)

Differentials are not illegal; only discriminations are illegal. Price differentials are not evidence of discriminations, standing alone. This thought, while not embodied in court decisions, is conspicuous by its absence from court decisions as pointed out by no less a student and authority on the Robinson-Patman Act than Tom C. Clark, himself, Attorney-General of the United States, in an article appearing in the *Harvard Business Review* for the Autumn of 1945:

> "Surprisingly, the Court does not appear to have questioned whether 'discriminations in price' and 'differentials in price', as those terms are used in the act, could be two different and independent phenomena, each with a separate meaning (hence the statutory choice of words)."

Price differentials which are published and uniform to all should not be treated, prima facie, as discriminations within the condemnation of the statute but may, if unwarranted, be made illegal discriminations by administrative action of the Federal Trade Commission. In the portion of Section 2(a) quoted above, the second "provided" clause specifies that the Federal Trade Commission may hold hearings and, on the basis of evidence, fix and determine the points at which quantity differentials be-
472 come forbidden discriminations. The Commission has had the lead pigment industry under investigation and

surveillance for over twenty years, but has taken no action to determine the status of the industry-wide discounts utilized in the sale of these pigments. If these quantity discounts have been improper, the Commission has been ignoring its administrative duty for ten years. The Commission brings this drastic action without ever having even investigated to find out whether or not the quantity differentials were discriminatory in fact.

The Commission may take judicial notice of the fact that the freight rates on carload shipments are less than the freight rates on less-than-carload shipments. Delivery cost alone justifies a lower price to the carload buyers. The Commission, as a party litigant, is attempting to shift the burden of justification of the quantity discounts to each individual respondent under Section 2(b) without having performed its own primary duty as an administrative agency, of determining a reasonable quantity discount for the industry as a whole.

Now obviously, if a company makes one deal for a small quantity of goods, and then makes a second deal at an arbitrary and much lower price for a bigger order and competition between the customers is in fact affected, then the seller alone can come up with the figures necessary to determine whether or not that particular deal was an unlawful discrimination. But where, as here, a quantity discount was adopted with Government approval during the N.R.A. and has obtained throughout the industry ever since, and the Commission has the power to redetermine the industry-wide justification for the differential but has not acted, the Commission is in a poor position to attempt to infer now from the type of evidence in this case that the differential has been discriminatory.

The statute clearly specifies that the Commission has power "to fix and establish quantity limits and revise the same as it finds necessary * * * where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly". Now, the 473 testimony negatives any possible thought that quantity differentials have promoted monopoly in the battery business or that the available purchasers in carload quantities are so few as to render differentials *unjustly* discriminatory. The record shows that the respondents have lent assistance to small and obscure enterprises which have prospered in competition with the larger accounts.

The statute as a whole must be taken as the declaration of Congressional intent and policy. Any phrasing of it which may be ambiguous when standing alone must be read in relation to the other portions. Section 2(a) of the Clayton Act evidences no legislative intent to disbar quantity differentials unless monopoly is promoted or the beneficiaries are too few in number for the differentials to be just. Surely the Commission, by acting as a party plaintiff, cannot do what it is not permitted to do when acting in its primary capacity as an administrative body. There is no fairness or justice in the Commission's plaintiff-policy of picking out individual companies as targets for restrictive action when the Commission has administrative powers which might be constructively employed.

In the present case, each respondent is asked to justify its quantity discount individually in respect to every possible pair of transactions, and the number of permutations and combinations of transactions is almost infinite. In the industry-wide procedure provided for in the quoted portions of the statute, quantity discounts can be determined which are fair to the industry as a whole. Otherwise, there is chaos and everyone has to meet the price of the most reckless operator.

Section 11 of the Clayton Act provides for enforcement of the Commission's orders by the appropriate Circuit Court of Appeals. If the Commission has neglected its duty of correcting discriminatory differentials, can it ask the Circuit Court of Appeals as a court of equity to enforce its order? For the Commission, acting in the public interest, is not without other and more comprehensive means of relief, and further, having neglected its own primary duty, is somewhat in the position of a private litigant coming into a court of equity with unclean hands.

474 It is respectfully submitted that the testimony of the battery manufacturers discloses no lessening of competition between the customers of the respondents and that any lessening of competition which might be theorized from the testimony falls clearly within the *de minimis* rule. In fact, as stated, the testimony discloses intense active and widespread competition in the battery industry throughout the entire midwestern part of the United States, which area alone was selected by the Commission for examination.

VII. The Commission Has Proved No Restraint of Trade By Freight Absorption.

The Commission took the testimony of paint manufacturers in St. Louis, apparently in the effort to prove that freight absorption placed the witnesses or their companies at a competitive disadvantage. Apparently, the Commission seeks to draw the inference from this testimony that the witnesses would be better able to compete in the southwestern territory, Arkansas and Texas, for instance, against the local paint manufacturers if the respondents did not absorb the freight incident to the shipments to the local competitors.

The idea that this practice violates the Robinson-Patman Act is humourously ridiculous on its face. Does the Commission, as plaintiff, actually think that Senator Robinson of Arkansas, and Representative Patman of Texas, conspired to sell their constituents down the river to benefit the paint mixing citizens of metropolitan St. Louis! If so, the Commission, as a court, knows better. Frequently, it is necessary for the Courts in passing on a statute to attempt to divine Congressional intent. Mr. Justice Jackson is reported to have remarked during the hearing in the Lewis contempt case, that some of his colleagues seem to be preoccupied in psychoanalyzing Congress. It should require no Freud to surmise that the Commission's present litigious position is enough to make Senator Robinson turn over in his grave.

The Commission owes a duty to these respondents to protect them against having to defend against a charge which is absurd on its face and does violence to the most elemental horse sense.

475 How could the Commission have chosen more potent testimony to undermine its own position! The paint grinders in St. Louis and the paint grinders in Arkansas and Texas pay exactly the same delivered price for dry white lead. The St. Louis manufacturer, in order to sell in Texas, must in one way or another absorb the freight charges to Arkansas and Texas, whereas the Arkansas and Texas manufacturers have had the freight charge on the heavy ingredients of their products absorbed by the respondents.

Concededly, this gives the Texas manufacturer a competitive advantage in Texas, but on the other hand, if the respondents sold at a uniform price, f.o.b. mill, without freight absorption, the Texas paint manufacturers might be out of business. The paint industry would have to be centralized in the proximity of the pigment producing plants of the respondents. Perhaps this might be to the respondents' advantage, but it is highly debatable as to whether or not it would be to the advantage of the public as a whole. In any event, the Robinson-Patman Act did not propose or presume to settle this broad economic issue; and certainly the esteemed legislators, whose name the Act bears, would never have sponsored it if they deemed it a death sentence to their local industries.

The Robinson-Patman Act, at the time of its passage, was popularly and colloquially called the "chain store act" and while it has been interpreted by the courts to prohibit price differentials predicated upon the forceable collection of phantom freight, the Act in no way suggests the impropriety of uniform prices to the customers which are achieved by different freight absorption.

As pointed out in the brief for the National Lead Company and the other respondents, the Supreme Court stated in the case of *Federal Trade Commission* v. *Staley Co.,* 324 U. S. 746, at page 757:

> "But it does not follow that respondents may never absorb freight when their factory price plus actual freight is higher than their competitor's price, or that sellers, by so doing, may not maintain a uniform dedivered price at all points of delivery, for in that event there is no discrimination in price."

476 In the *Cement* case, the court summarized the situation very aptly:

> "Furthermore, the basing point price system has been in use by industry for almost a half century. There has been and is a marked diversity of opinion among economists, lawmakers and people generally as to whether it is good or bad. Numerous bills have been introduced in Congress seeking to outlaw its use. Countless time has been spent in hearings by Congressional committees, before whom it has been assailed and defended. The pages of the Congressional Record bear mute but indisputable proof of the fact that Congress has repeatedly refused to declare its use illegal. There is no occasion to relate this Congressional history. It is a matter of common and general knowledge. In the Corn Products case, the court in

> commenting upon some of this legislative history stated (324 U. S. at page 737, 65 S. Ct. at page 967, 89 L. Ed. 1320): 'We think this legislative history indicates only that Congress was unwilling to require f.o.b. factory pricing, and thus to make all uniform delivered price systems and all basing point systems illegal per se.' Notwithstanding this Congressional attitude as recognized by the Supreme Court, this court is now urged to hold that the system is illegal per se, and to require that cement be sold on an f.o.b. plant basis. * * *
>
> "In our judgment, the question as to whether the basing point price system should be declared illegal rests clearly within the legislative domain."

Apart from the discussion of Congressional intent by the courts it seems clear to us that the word "price" as used in the Act comprehends a delivered price. Otherwise the first "provided" clause of Section 2 (a) would not make sense.

> "Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or Delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered:"

The cost of delivery is clearly treated as a component "price" and hence the "price" must be a delivered 477 price. The provision clearly permits selling at differential delivered prices where differentials in cost of delivery justify. But the seller is no more required to sell at differential delivered prices than he is to give quantity discounts. Each is permissive only if justified. Just how it can be argued that the Act requires f.o.b. selling, when the opposite is indicated in so many words, passes all understanding.

VIII. Conclusion.

Since the filing of this Amended Complaint the Cement case has been decided by the Court of Appeals and there can be no argument at present that in view of this authoritative decision, as well as the dicta of the Corn Products and Staley cases, Section 2 (a) of the Clayton Act does not prohibit delivered price selling. The Complaint should be dismissed as a matter of law, permanently unless the

Cement decision is reversed. The record in this case, despite its volume is but a mere shell which contains no substance which substantiates the allegations of the Complaint, much less carries a plaintiff's proper burden of proof. The strange charge that these respondents have condoned National's monopoly provides a case of first impression which fails in all respects because no method of unfair competition by these respondents can be inferred from the evidence and because these respondents are not responsible legally for National's alleged monopolistic intent or conduct.

The Commission has failed to observe due process of law in respect to its Clayton Act case because the Commission has not frankly, fully, and fairly advised the respondents of the charges to be met specifically by them. The attempt to prove substantial restraint of trade in the sale of lead oxides to battery manufacturers falls short of the requirements of the statute. The Commission's whole theory of construction of the Robinson-Patman Act is reduced to absurdity by the testimony of the paint manufacturers. No differentials in these respondents' prices have been proven illegal price discriminations.

478 It is respectfully submitted that the Amended Complaint herein should be dismissed, because the evidence, as a matter of law, provides no grounds for a Cease and Desist Order.

Respectfully submitted,
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Attorneys for Respondents, The Eagle-Picher Company and The Eagle-Picher Sales Company.

479 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

MOTION TO DISMISS AMENDED COMPLAINT.

(Received Feb. 25, 1947.)

Comes now the respondent, The Sherwin-Williams Company, and by its counsel moves, upon the amended complaint herein and upon all proceedings heretofore had herein, that the Federal Trade Commission enter an order dismissing the amended complaint herein as to it upon the ground that there has been a failure of proof with respect to both Counts of the amended complaint.

Solely for the purposes of this motion to dismiss the amended complaint, and based solely upon the evidence adduced by the Commission, this respondent, in the interest of minimizing the burden on the Commission with respect to factual statements and briefs, is content to rely upon the factual statements and briefs filed by other respondents.

It should be noted, however, that, if the motions to dismiss are denied, the issues as finally drawn after the presentation of all evidence by this respondent may be substantially different from those now presented.

Respectfully submitted,

Davies, Richberg, Beebe, Busick
& Richardson,
(Illegible),
Of Counsel,
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815 Fifteenth Street,
Washington 5, D. C., and

T. J. McDowell,
Office & Post Office Address,
101 Prospect Avenue, N. W.,
Cleveland 1, Ohio,
Attorneys for Respondent,
The Sherwin-Williams
Company.

February 25, 1947.

* * * * *

481 BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 6th day of March, A. D. 1947.

Commissioners:
Garland S. Ferguson, Chairman,
Ewin L. Davis,
William A. Ayres,
Robert E. Freer,
Lowell B. Mason.

* * (Caption—5253) * *

ORDER DENYING MOTIONS TO DISMISS COMPLAINT.

This matter coming on to be heard by the Commission upon the motions of respondents Anaconda Copper Mining Company and International Smelting and Refining Company that the amended complaint herein be dismissed as to said respondents, and the Commission having considered said motions, the affidavits attached thereto, the memorandum of the attorney supporting the complaint in opposition to said motions, and the record herein, and the Commission being now fully advised in the premises;

482 And it appearing that respondent Anaconda Copper Mining Company, until recently, has been engaged, through its controlled or wholly owned subsidiaries, in the manufacture and sale of the products involved in this proceeding (lead pigments); that the discontinuance by respondent International Smelting and Refining Company of its lead pigment business did not occur until after the issuance and service of both the original and amended complaints herein and after much of the evidence in support of the complaint had been introduced; that said respondents are large smelters and refiners of pig lead, that lead pigments account for the consumption of much of the pig lead used in the United States, and that in view of the relationship between the pig lead and lead pigment businesses it is not unlikely that said re-

spondents may in the future see fit to re-enter the latter business;

And the Commission being of the opinion, in view of the above facts, that the withdrawal of said respondent from the lead pigment business does not afford sufficient basis for the dismissal of said respondents from this proceeding, and that considerations of public interest indicate that said respondents should be retained in the proceeding:

It Is Ordered that said motions be, and they hereby are, denied.

By the Commission.

(Seal)

Otis B. Johnson,
Secretary.

• • • • •

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 9th day of April, A. D. 1947.

Commissioners:

Garland S. Ferguson, Chairman,
Ewin L. Davis,
William A. Ayres,
Robert E. Freer,
Lowell B. Mason.

• • (Caption—5253) • • •

ORDER DENYING MOTIONS TO DISMISS AMENDED COMPLAINT.

This matter coming on to be heard by the Commission upon the motions of respondents National Lead Company, Eagle-Picher Lead Company, Eagle-Picher Sales Company, The Sherwin-Williams Company, and The Glidden Company that the amended complaint herein be dismissed, and upon the request of certain of said respondents for oral argument on said motions;

And it appearing that the briefs filed in support of and in opposition to said motions are sufficient, together with the record herein, to enable the Commission to pass upon said motions without hearing oral argument thereon:

515 It Is Ordered that said request for oral argument be, and it hereby is, denied.

And the Commission having considered said motions, the briefs in support of and in opposition thereto, including reply brief of National Lead Company, and the record herein, and being now fully advised in the premises;

And the Commission being of the opinion that the evidence introduced in support of the amended complaint constitutes a prima facie showing of violations by the respondents of the statutes referred to in such complaint;

And it further appearing that the amended complaint charges the respondents with systematically discriminating in prices and is directed against the alleged system or method of discriminating in prices and in terms and conditions of sale of the respondents and not against individual instances of departure therefrom; and it further appearing that the attorney supporting the complaint has stated on the record that he does not intend to urge individual instances of discrimination which do not follow such system or method; and the Commission being of the opinion that any uncertainty or confusion which may heretofore have existed as to the theory and scope of the proceeding has been removed through such statement and through this order:

It It Ordered that said motions to dismiss the amended complaint herein be, and they hereby are, denied.

By the Commission.

(Seal)

Otis B. Johnson,
Secretary.

• • • • •

586 Before the Federal Trade Commission.

* * (Caption—5253) * *

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND REASONS THEREFOR, OF RESPONDENT, NATIONAL LEAD COMPANY.

(Received Dec. 29, 1947.)

Alexander & Green,
Attorneys for Respondent,
National Lead Company,
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James D. Ewing,
Eugene Z. DuBosé,
Of Counsel.

December 29, 1947.

587 Before the Federal Trade Commission.

* * (Caption—5253) * *

Comes now the respondent, National Lead Company, by its attorneys, Alexander & Green, and submits the following proposed findings of fact, conclusions of law, and the reasons therefor:

Findings of Fact.

The Respondents.

1. (a) National Lead Company (hereinafter referred to as "National") is a New Jersey corporation with its principal offices at 111 Broadway, New York, N. Y. (answer of respondent National).

(b) The Eagle-Picher Company (hereinafter referred to as "Eagle-Picher") referred to in the amended complaint as "Eagle-Picher Lead Company", is an Ohio corporation with its principal offices at The American Building, Cincinnati, Ohio. Eagle-Picher Sales Company, a

Delaware corporation having its principal offices at the same address, is a wholly-owned subsidiary of Eagle-Picher (answer of respondent Eagle-Picher).

(c) The Glidden Company (hereinafter referred to as "Glidden") is an Ohio corporation having its principal offices at Union Commerce Building, Cleveland, Ohio (answer of respondent Glidden).

(d) The Sherwin-Williams Company (hereinafter referred to as "Sherwin-Williams") is an Ohio corporation having its principal offices at 101 Prospect Avenue, N. W., Cleveland, Ohio (answer of respondent Sherwin-Williams).

588 (e) International Smelting & Refining Company (hereinafter referred to as "I. S. & R."), a Montana corporation with its principal offices at 25 Broadway, New York, N. Y., is a wholly-owned subsidiary of Anaconda Copper Mining Company (hereinafter referred to as "Anaconda"), a Montana corporation having its principal offices at the same address (answers of respondent Anaconda and I. S. & R.).

The Products Involved in This Proceeding.

2. (a) The term "Lead Pigments", as defined in the amended complaint, includes the following:

(1) "White lead", both basic carbonate and basic sulphate of lead;
(2) "Blue lead";
(3) "Red lead" (also known as an "oxide" of lead);
(4) "Litharge" (also known as an "oxide" of lead);
(5) "Orange mineral";
(6) "Grinders' lead paste".

Such products have been sold by some of the respondents in either dry form or in oil in the form of paste when mixed with linseed or other oils (Paragraph Four, Amended Complaint).

(b) "Pig lead" is derived from smelting and refining lead ore and lead concentrates which are the forms in which lead is produced by the mines. Lead ore and lead concentrates are mined at various points in the United States and other countries, notably Mexico, and the more important mines in the United States are located in the

Rocky Mountain States and in the so-called "Tri-State area" formed by the intersection of the boundaries of Missouri, Oklahoma and Kansas. The lead ore and concentrates so mined are shipped to smelters and refineries where the impurities are removed to form common desilverized ~~pig lead~~ and corroding pig lead. Common desilverized pig lead and corroding pig lead are sold by the smelters and refineries to various manufacturers of lead prod-
ucts, including lead pigments, oxides, cables, ammuni-
589 tion, extruded and rolled lead products, and various
alloys and other products (2123-24, 2125-27, 2129-40, 4091).

3. The lead pigments, including oxides, so manufactured from pig lead are sold by some or all of respondents herein and other companies to various types of purchasers, including the paint trade, paint manufacturers, industrial concerns for their own consumption, battery manufacturers, ceramic and pottery manufacturers and the oil and gasoline industry (1070, 1073, 1566, 1599, ~~1628-32~~, 2547, 2765, 3073).

4. (a) Basic carbonate of white lead has been made from corroding pig lead by various methods, including the Dutch, Lennox, Carter and electrolytic process. The process is slow and involves many steps. Although most basic carbonate of white lead differs only slightly chemically, the physical characteristics of the material as made by the various methods or by different manufacturers vary considerably, particularly with relation to size of particle, whiteness, hiding power, ease of application or the particular use to which the purchaser may wish to put the product (1660, 2882; Resp. Ex. 156; 1073, 2903-05, 3615-16).

(b) Red lead and litharge are made by roasting pig lead in ovens or furnaces. Litharge is the result of the first step of roasting and red lead is made by further roasting (2943-44). Red lead is made in grades of 95%, 97% and 98% red lead. 98% red lead is the highest quality red lead and can be made in 48 hours (3872). The red lead and litharge manufactured by some of the respondents and other companies are not identical products but vary according to the particular method of manufacture and the use to which the purchaser may wish to put the particular product (1736-40, 1767-68, 1817-20, 1854-56, 2767-68, 3439-41, 3443-44, 3467-70, 3621-22).

5. (a) Dry white lead, basic carbonate, has been sold by the respondents to paint grinders or manufacturers

for use as one of the ingredients in the manufacture of
ready-mixed paints (1070, 2999). While formerly basic
carbonate of lead was used as one of the principal
590 ingredients in some of the best paints, beginning with
1930 and in subsequent years, basic carbonate of lead
in dry form has been used in smaller quantities and in
place thereof paint manufacturers have used basic sul-
phate of lead, lithopone, leaded zinc oxide, titanium di-
oxide, or a combination of two or more such products with
basic carbonate of lead (1408-09, 1424, 1661, 2583, 2998-99,
3337, 3340-42, 3346, 3354-55).

(b) Dry white lead, basic sulphate, has also been sold by some of the respondents to paint manufacturers for the same use either alone or as combined with zinc oxide to form leaded zinc oxide (3349, 3354-55).

(c) White lead in oil is basic carbonate of white lead mixed with linseed oil to form a paste (Resp. Ex. 156; 2879-80, 2889) and this has been sold by the respondents either through agents to dealers, painters, industrial consumers, governmental agencies and individual householders or directly to distributors and the same classes of customers (Answers of respondents). White lead in oil has been used, when mixed with other oils and thinners, as an exterior house paint of high quality (2887-88). The mixing of white lead in oil with the other ingredients necessary to render it ready for application requires some skill on the part of the consumer (2286). During the last fifteen or twenty years the sales of white lead in oil have steadily declined as the result of the competition furnished by ready-mixed paints which offer the consumer a paint ready for application (Resp. Ex. 140; Com. Ex. 851-A; 3617-18, 3662-63, 3672). During the past decade at least one of the respondents has sold a ready-mixed pure white lead paint ready for use by the painter or other consumer (3662-63, 3665). White lead in oil has also been sold in the form of grinders' paste to manufacturers of paint products (3985).

(d) Red lead in the form of red lead in oil is used as one of the principal ingredients in red lead paint and has been sold to railroads, steamships, industrial accounts and to the paint trade (3000; Com. Ex. 615A-D). Dry red lead is also used in the manufacture of electric storage battery plates and by the paint and varnish trade (2999).

591 (e) Litharge is used in the manufacture of electric storage battery plates and to some extent by the paint trade, pottery business and the oil and gasoline industry (2547, 2765, 3000, 3073).

(f) Blue lead and orange mineral are insignificant items of commerce.

The Business of Respondents.

6. During the period from 1936 to 1941, respondent, National, produced approximately 60% of the white lead in oil sold on the market, from 30% to 35% of the dry white lead, basic carbonate, sold on the market and approximately 50% of the oxides, red lead and litharge, sold on the market (1647, 1665-66; Com. Ex. 664). The combined total percentage of dry white lead, basic carbonate, and white lead in oil sold on the market for this respondent was 58.8% in 1938 and 53% in 1941 (Com. Ex. 669). In addition, respondent, National, sold small quantities of basic sulphate of lead but it has never been a significant factor in the industry with respect to this product (3349). Respondent, National, manufactures basic carbonate of white lead at plants located at Perth Amboy, New Jersey, Philadelphia, Chicago, St. Louis and Oakland, California (1071-72). Its oxide plants are located in Brooklyn, Philadelphia, Charleston, West Virginia, St. Louis, Chicago, Dallas, Atlanta, Los Angeles and San Francisco (1625). The Dallas plant was put into operation in 1940 or 1941 and the Atlanta plant in 1942 (1625). While, prior to 1921, respondent, National, secured the bulk of its pig lead requirements from American Smelting and Refining Company (Comm. Ex. 93A-I), in more recent years it has purchased pig lead from a number of smelters and refineries, including St. Joseph Lead Co., U. S. Smelting & Refining Co., American Smelting and Refining Company, Anaconda Sales Co., and others (1068; Resp. Ex. 173).

7. During the period from 1930 to 1946, respondent, Eagle-Picher, produced from 15% to 20% of the white lead in oil sold on the market and approximately 10% of the dry white lead, basic carbonate, sold in the United States (1560-61). In addition, this respondent pro-
592 duced and sold substantial quantities of basic sulphate of lead either as such or as mixed with zinc oxide to form leaded zinc oxide (3357, 4129). During the period from 1937 to 1944, respondent, Eagle-Picher, pro-

duced and sold the following quantities of dry white lead, basic carbonate, and basic sulphate of lead (4129):

Sales Tonnages.

Year	Basic White Lead Carbonate	Basic White Lead Sulphate
1937	4,533	7,348
1938	3,356	5,955
1939	3,246	5,315
1940	2,769	4,986
1941	5,163	8,066
1942	3,116	5,820
1943	3,113	3,889
1944	3,666	4,342

In addition, respondent Eagle-Picher's production of leaded zinc oxide (basic sulphate of lead combined with zinc oxide [3355]) during 1941-1942 was approximately three and one-half times its production of basic white lead sulphate (3357). Respondent, Eagle-Picher, produced white lead at its plant in Cincinnati, Ohio, and its oxides, red lead and litharge, at plants located in Joplin, Missouri, and Newark, New Jersey (1552, 1564). In addition, it manufactured basic white lead sulphate and leaded zinc oxide at its Galena, Kansas plant (3421). It also manufactures leaded zinc oxide at Hillsboro, Illinois (3600). The bulk of its pig lead is purchased from U. S. Smelting & Refining Co., East Chicago, Indiana, although respondent, Eagle-Picher, produces a high grade ore itself in the Tri-State area from which it manufactures basic sulphate of lead and zinc oxide (1561-62, 3437).

Prior to World War II and in 1945 and 1946, respondent, Eagle-Picher, produced and sold a ready-mixed pure white lead paint known as R. T. U. (3662-63, 3665).

8. From 1932 to 1943, respondent Glidden produced between 2% and 9% of the white lead in oil sold in this
593 country (Resp. Ex. 144), between 8% and 18% of the dry white lead, basic carbonate, sales (Resp. Ex. 145), and between approximately 4% and 8% of the oxides, red lead and litharge, sold in the industry (Resp. Ex. 146). Respondent, Glidden, has two divisions, Euston Lead Co., Scranton, Pennsylvania, acquired in 1924, which produces basic carbonate of lead, and Metals Refining Co., Hammond, Indiana, acquired in 1929, which produces red lead and litharge (1230, 1231, 1233, 2455, 2732). Respondent,

Glidden, is also a large manufacturer of ready-mixed paints (2553, 2661).

9. While respondent, Sherwin-Williams, produces white lead and oxides, red lead and litharge, at its plant in Chicago (1313), it does not sell oxides to battery manufacturers (1648). In 1944 and for many years prior thereto, respondent, Sherwin-Williams, sold about 5% of the white lead in oil and less than 1% of the dry white lead, litharge, and red lead sold in this country (1331-1332). Respondent, Sherwin-Williams, also manufactures ready-mixed paints.

10. Respondent, Anaconda, has never engaged in the business of the manufacture or sale of lead pigments. Neither respondent, Anaconda, nor any of its subsidiaries has ever produced any oxides, red lead or litharge. In 1919, Anaconda Lead Products Co., a subsidiary of respondent, Anaconda, began the production of dry white lead, basic carbonate, at its plant in East Chicago, Indiana, and the production of white lead in oil at the same plant in 1931. In 1936, respondent, I. S. & R., acquired the property and assets of Anaconda Lead Products Co. The principal source of pig lead for this respondent was lead bullion smelted in Utah and refined in East Chicago, Indiana (Com. Ex. 836A-N). From 1937 to 1941, respondent, I. S. & R., sold from 3% to 4% of the white lead in oil sold in this country and from 10% to 19% of the dry white lead, basic carbonate (Com. Exs. 741, 836-J). Its combined percentage of the white lead in oil and dry white lead, basic carbonate, sales was 6.6% in 1938 and 8.8% in 1941 (Com. Ex. 669).

594 In July, 1946, respondent I. S. & R. discontinued the production and sale of white lead in oil and dry white lead, basic carbonate (Com. Ex. 836-B), and on October 1, 1946, it sold the plant in East Chicago, Indiana, where these materials had been manufactured, to respondent Eagle-Picher (2035) after having received a number of bids from other companies, not respondents in this proceeding (3545).

11. Basic carbonate of white lead has been produced by companies other than respondents, including MacGregor and W. P. Fuller & Son (Com. Ex. 669); white lead in oil has been produced by many manufacturers of ready-mixed paints (2525); while oxides, red lead and litharge, have been produced by Hammond Lead Co., Hammond, Indiana

(1647, 1676, 1702, 1760, 1881-82, 1915, 1918, 2022), and by storage battery manufacturers for their own consumption (1647).

Respondent, National Lead Company.

12. On or about December 8, 1891, respondent, National, was formed by the acquisition of properties formerly owned by Cornell Lead Co. of Buffalo, N. Y., The National Lead & Oil Co. of New York, N. Y., Atlantic White Lead & Linseed Oil Co. of New York, N. Y., Salem Lead Co. of Massachusetts, The J. H. Morley Lead Co. of Cleveland, Ohio, The Eckstein White Lead Co. of Cincinnati, Ohio, Anchor White Lead Co. of Cincinnati, Ohio, Maryland White Lead Co. of Baltimore, Maryland, American White Lead Co. of Louisville, Kentucky, Kentucky Lead & Oil Co. of Louisville, Kentucky, Southern White Lead Co. of Chicago, Illinois, D. B. Shipman White Lead Works of Chicago, Illinois, Southern White Lead Company of St. Louis, Missouri, St. Louis Lead and Oil Co. of St. Louis, Missouri, Collier White Lead & Oil Co. of St. Louis, Missouri, and Red Seal Castor Oil Co. of St. Louis, Missouri, together with the following shares of stock in the following companies:

1195 shares Cornell Lead Co.
9993 shares The National Lead & Oil Co. of N. Y.
495 shares Atlantic White Lead & Linseed Oil Co.
670 shares Salem Lead Co.
595 1995 shares The J. H. Morley Lead Co.
6495 shares The Eckstein White Lead Co.
531 shares Anchor White Lead Co.
295 shares Maryland White Lead Co.
950 shares American White Lead Co.
267 shares Kentucky Lead & Oil Co.
9995 shares Southern White Lead Co. of Illinois.
2995 shares D. B. Shipman White Lead Works
9993 shares Southern White Lead Co. of Missouri.
2995 shares St. Louis Lead & Oil Co.
993 shares Collier White Lead & Oil Co.
495 shares Red Seal Castor Oil Co.,

the sixteen companies whose properties were acquired as aforesaid having been previously engaged in the manufacture, sale and distribution of white lead, linseed oil and kindred products, the stock ownership of which had been in or controlled by the National Lead Trust.

In February, 1906, it acquired all of the stock of United Lead Company, which company was engaged principally in the manufacture, sale and distribution of metallic lead and lead alloy products

In February, 1907, it acquired all of the stock of the Magnus Metal Company (Magnus Company, Inc.) This company never engaged in the manufacture, sale or distribution of white lead, linseed oil or kindred products.

In March, 1913, it acquired all of the stock of the Heath & Milligan Manufacturing Company, and in September, 1919, disposed of such stock to The Glidden Company.

In March, 1906, it acquired all of the stock of Carter White Lead Company, which had properties in Chicago, Illinois, and Omaha, Nebraska; in July, 1912, it acquired all of the stock of Matheson Lead Company; in 1915, the River Smelting & Refining Company was organized jointly by National Lead Company and Stone & Webster; in March, 1916, it acquired all of the stock of Bass-Hueter Paint Company; in December, 1917, it organized National Lead Company S. A. (Argentina) as a wholly owned subsidiary; in January, 1919, it acquired the properties and assets of Hirst & Begley Company (17-19).

596 13. From the date of its organization, it was the expressed intention of respondent, National, not to become a monopoly in any line of commerce nor to engage in any monopolistic activities (Resp. Ex. 179-E).

14. Early in its history, respondent, National, closed many of the plants manufacturing lead products, amalgamated others and enlarged existing plants, all of which was intended to and did promote more efficient and economical methods of manufacture and lower prices to the purchasing public (Resp. Exs. 175-A, 179-D).

15. Eventually respondent, National, established branch offices at the following points: New York, Philadelphia, Boston, Buffalo, Pittsburgh, Cincinnati, Cleveland, Chicago, St. Louis and San Francisco (Resp. Ex. 153). The territories served by these branches were in most instances the territories which theretofore had been served by the predecessor companies prior to acquisition by respondent, National (2891-92).

16. In the summer of 1930, officials of respondent, National, were approached by A. & J. Frank, brokers in Cincinnati, who called attention to the fact that shares of common stock of respondent, Eagle-Picher (then known as "Eagle-Picher Lead Company") were being offered for sale at low prices (3308, 3311). In accordance with its policy of occasionally making short-term investments in the stocks of other industrial companies, and taking into consideration the low price (3305), respondent, National, beginning on July 29, 1930 and continuing from time to time through June 13, 1932, bought for investment 44,900 shares of common stock of respondent, Eagle-Picher, at a total purchase price of $226,630 (Resp. Ex. 183). These shares were purchased in the name of respondent National's nominee, E. J. Cornish, who was then its president (3308, 4121). At that time there were issued and outstanding approximately 900,000 shares of common stock of respondent, Eagle-Picher (4122-23). The bulk of the shares of stock of respondent, Eagle-Picher, so purchased by respondent, National, was sold by it in the early part of 1937 and by March 5, 1937, respondent, National, held
597 only 3,500 shares of common stock of respondent,
Eagle-Picher (Resp. Ex. 183). These were subsequently transferred to the name of respondent, National, and were sold in June, 1944 (Com. Ex. 700-B, Resp. Ex. 183). The total sales price received by respondent, National, in the sale of the 44,900 shares of common stock of respondent, Eagle-Picher, was $1,086,014.03 (Resp. Ex. 183), so that respondent, National, made a profit on this investment of $859,384.03. In addition, on April 13, 1932 respondent, National, purchased 50 shares of preferred stock of respondent, Eagle-Picher, for $2,600 which it sold on February 27, 1937 for $5,197.50 (Resp. Ex. 183). At no time was respondent, National, represented on the Board of Directors of respondent, Eagle-Picher, and respondent, National, voted the stock of the respondent, Eagle-Picher, by proxy. Respondent, National, made no attempt at any time to exercise any sort of control over respondent, Eagle-Picher, and made no attempt at any time to influence respondent, Eagle-Picher, in the conduct or management of its business (3308-09). Following a suggestion made the early part of 1931 by one Frederick Hertenstein, a vice-president and director of respondent, Eagle-Picher, that E. J. Cornish,

president of respondent, National, consider the purchase of a large block of stock of respondent, Eagle-Picher, respondent, National, on or about May 12, 1931 sent Hertenstein a letter, addressed to the President and Directors of respondent, Eagle-Picher, containing a proposal that respondent, National, purchase the assets and goodwill of respondent, Eagle-Picher, with the request that Hertenstein present it in proper form to the company. Hertenstein never delivered this letter as requested. He expressed the opinion that the offer was unsatisfactory, and returned the letter to respondent, National, without presenting it to the Board of Directors of respondent, Eagle-Picher, and nothing further came of the proposed transaction. The Department of Justice was kept informed as to all the negotiations in connection with this proposal and was asked to express its opinion as to the legality of the proposed transaction. The Department of Justice on or about May 8, 1931 stated that it preferred to express no opinion as to the legality of the transaction. A copy of the letter sent to Hertenstein was forwarded to the Department of Justice (Com. Ex. 866A-B; 4182-83).

598 17. Prior to January, 1942 when the Office of Price Administration was established, the cost to respondent, National, of its inventories of corroding pig lead and of the lead content of basic carbonate of lead in process and in finished stock was the most important single factor in its determination of its selling price of basic carbonate of white lead, both dry and in oil (Par. 6, answer of respondent, National; Resp. Ex. 154A-I). In addition, with respect to dry white lead, basic carbonate, the price at which respondent, National, sold this product also depended upon the price of competitive pigments such as basic sulphate of lead, leaded zinc oxide and titanium dioxide. In setting a price for white lead in oil, respondent, National, also took into consideration the prices at which competitive ready-mixed paints were being sold (2998-99). The price at which respondent, National, sold red lead and litharge depended upon the day to day market price for pig lead from which such oxides were made and to the price of pig lead was added a charge to cover the process of conversion from pig lead to litharge or red lead, as the case might be (1635-36).

18. Respondent, National, has never at any time exerted any influence upon American Smelting and Refining Com-

pany or any other producer of pig lead with respect to the determination of the price at which such producers would sell pig lead on the market (1220-21, 3278, 4087). It was to the interest of respondent, National, to obtain pig lead at the lowest possible price to it, while it was to the interest of American Smelting and Refining Company and the miners from whom that company purchased lead ore or lead concentrates to obtain the highest possible price for its pig lead (4087, 4088*). In so doing, American Smelting and Refining Company, the largest producer of pig lead in the world (4091), attempted to sell on the market pig lead in the same quantities and upon the same price basis as it was then purchasing the raw material, lead ore or lead concentrates, from the miners (4088, 4088*). American Smelting and Refining Company determined the price at which it sold pig lead and from time to time quoted prices f. o. b. New York, which was one of the chief markets for such product (1220, 2386, 4088).

599 In 1906 respondent, National, entered into a contract with American Smelting and Refining Company requiring respondent, National, for a period of fifteen years to purchase the bulk of its pig lead requirements from American Smelting and Refining Company (Com. Ex. 93A-I). This contract expired in 1921 and, although American Smelting and Refining Company attempted to obtain an extension thereof, respondent, National, refused to give one on the ground that such a contract was too onerous a burden upon it (4083-84). Thereupon, respondent, National, and American Smelting and Refining Company signed a mutual release with respect to the obligations created by said 1906 contract (4085; Resp. Ex. 228) and from 1921 on respondent, National, purchased pig lead from American Smelting and Refining Company and other producers of pig lead on a month to month basis at a spot price or at an average monthly price (3279-80, 4085-86). From 1936 to 1941, respondent, National, made purchases of pig lead as follows (Resp. Ex. 173):

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* There are two pages of the Transcript marked 4088. The reference is to the second of such pages marked 4088.

Pig Lead Purchases.
(Tons)

	1936	1937	1938	1939	1940	1941
A. S. & R. Company**	48,422	51,113	39,126	41,819	47,885	77,010
St. Joseph Lead Company	53,217	58,305	43,181	48,623	53,734	51,994
St. Joseph Lead Company (Mine La Motte)	—	—	—	—	—	871
Bunker Hill Smelter	—	—	3,000	4,806	4,175	5,133
St. Louis Smelting & Refining Works	10,263	7,282	2,269	11,791	8,624	5,112
Cerro de Pasco	—	—	1,624	2,750	3,480	11,270
Others	9,920	13,131	7,820	12,415	15,297	*60,005
Totals	121,822	129,831	97,020	122,204	133,195	211,395

* Anaconda Sales Co.	5,000
U. S. Smelting	2,000
American Metal Co.	8,000
C. Tennant Sons & Co.	45,005

** American Smelting & Refining Company.

600 19. During its entire history, respondent, National, has never attempted to obtain, nor has it obtained, a monopoly of or monopoly power or control over the manufacture, pricing, sale or distribution of lead pigments in commerce or any of them (See Reasons for Proposed Findings).

Lead Industries Association and the N. R. A. Period.

20. Respondents (with the exception of respondents, Anaconda and I. S. & R.) and more than forty other companies have been members of the Lead Industries Association since its organization in 1928. International Smelting Company, the predecessor of respondent I. S. & R., became a member in 1929 (Com. Exs. 498A-K, 499A-H).

21. Lead Industries Association was formed in November, 1928 to foster scientific research and promotional work for the lead industry and to disseminate pertinent information concerning lead products and to act as representative of the lead industry before the public (Resp. Ex. 1). From its inception, its membership has included practically all of the mining companies, smelters, refiners and manufacturers of lead products (2131-48; Resp. Exs. 15A-B) of which the miners, smelters and refiners have constituted the dominant group (2536).

22. Article 3 of the constitution of Lead Industries Association reads as follows (Resp. Ex. 1):

> "Article 3.
>
> Limitations.
>
> No agreement, understanding, combination or arrangement or any form of concerted action to curtail production, fix prices, suppress competition, or in any other manner to restrain trade or commerce, or to monopolize, or attempt to monopolize any part of the trade or commerce of the country shall be permitted in the Lead Industries Association, nor any other act or acts which may be in contravention of law or good business practice. Each member of the association shall be wholly free to conduct its business without legal or moral accountability to the association or to any member thereof."

601 23. Shortly after the formation of Lead Industries Association, its Secretary, Felix E. Wormser, was requested to furnish and did furnish the Department of Justice with the details of the Association's organization and proposed activity (Resp. Exs. 14, 15A-B, 16, 17, 18, 19, 20, 21, 22, 23), and from the time of its organization the Department of Justice and the Federal Trade Commission, as well as other public agencies, were furnished with copies of the statistical reports issued by the Lead Industries Association to its members (2188-89).

24. Since its organization, Lead Industries Association has received from respondents (other than respondent Anaconda) and other manufacturers of lead pigments monthly reports showing individual statistics as to production, shipment, and stock on hand and in turn each month Lead Industries Association has furnished its members with reports of the total of such figures for the entire industry (2186-87; Com. Ex. 670). No individual report by any member has ever been furnished to any other member (2186-87) and at no time has Lead Industries Association ever received from its members or disseminated to such members any price data, whether as to past or future transactions (2187-88). Lead Industries Association did not issue any publication to the trade setting forth current market quotations on lead pigments (1039) and it did not furnish

information or quotations on lead pigments to any trade publication (1040).

25. Lead Industries Association has done notable work in connection with the subject of lead poisoning, both as to research and public education (2537), and from time to time has engaged in promotional campaigns designed to increase the production of and to widen the market for lead pigments and other lead products (Resp. Exs. 31C, 50B-D, 52G, 59C; 2296, 2298, 2372). In addition, Lead Industries Association has represented the lead industry before various scientific and medical associations and has appeared for the lead industry before various legislative bodies (2537).

26. In 1933, after the enactment of the National Industrial Recovery Act, the members of Lead Association
602 expressed reluctance to the formulation of any Code
for the lead industry, but at the urgent insistence of N. R. A. officials the Lead Industries Association in July, 1933 drafted a so-called "Master Code" which dealt primarily with wages and hours and had no provisions with respect to trade practices (Resp. Exs. 50K, L, O; 2153-54; Resp. Ex. 77A-F; 2308). This was presented for approval to officials of the N. R. A., but these officials insisted that the Code for the lead industry include schedules for trade practices and price reporting (Resp. Exs. 81A-B; 2170; Com. Ex. 518A, 2397-98). Complying with this insistence, the members of the lead industry attempted to draft supplementary codes for the lead pigment manufacturers containing such provisions (Resp. Ex. 50K-L). The manufacturers of lead pigments constituted the Lead Pigments Division for Code purposes and in connection with the drafting of schedules of trade practices, two committees were appointed, one, the White Lead in Oil Committee, and the other, the Dry Products Committee (Com. Exs. 501-A-D, 508C, 800A-C). The Dry Products Committee, in turn, was subdivided into two groups, one representing the manufacturers of dry white lead and the other, producers of oxides (2175). Respondents, with the exception of respondent, Anaconda, and other companies not respondents in this proceeding, were represented on both committees.

27. The White Lead in Oil Committee and the Dry Products Committee met on various occasions between July, 1933 and January, 1934 in an attempt to draft supplementary codes acceptable to the N. R. A. (Com. Exs.

501A-D, 502A-C, 504A-B, 505A-B, 799, 800A-C, 801A-B, 802A-B, 803, 805A-C; Resp. Exs. 83A-Z-3, 85AZ-13; 134A-E, 135A-B, 136A-B, 137A-B, 138A-B). Many topics were discussed at those meetings, including terms and conditions of sale, the agency method of selling and freight and zoning problems (id.). Various proposed supplementary codes were drafted and submitted to the N. R. A. which, in turn, made many suggestions as to the final wording (id.; Resp. Ex. 159D). One of the suggestions of Deputy Administrator Janssen concerned the filing of prices and terms of sale with the Code Authority and the provision suggested
603 would have had the effect of requiring rigid adherence to announced prices and terms of sale (Com. Ex. 518A-B). The Lead Pigments Division, while reluctant to the adoption of any price filing provision (Resp. Ex. 50-O), rejected the suggested provision and, instead, substituted a provision which merely required the filing of prices and deviations from the terms of sale for oxides and dry white lead, basic carbonate, set forth in Schedule A of the Lead Code (Com. Ex. 803). No agreement or understanding was reached by or among any of the respondents as to the use of the agency method of selling or zones (Com. Exs. 506E, 505A). Schedule A of the Lead Code (Com. Ex. 809), setting forth the terms of sale for oxides and dry white lead, contained no reference to prices because the respondents and other manufacturers of lead pigments did not wish to contravene the anti-trust statutes even for Code purposes (Com. Ex. 504B).

28. The Code for the Lead Industry was approved on May 24, 1934 (Com. Ex. 809) and shortly thereafter the respondents and other manufacturers of lead pigments, being unwilling to report prices or to be required to follow the terms of sale of Schedule A, requested and obtained a temporary exemption from Section 2 of Article VII of the Lead Code dealing with the filing of prices and deviations from the terms of sale set forth in Schedule A as well as from the requirements of Schedule A (Resp. Exs. 6A-I, 7A-C, 8A-B). A further exemption was requested in September, 1934 (Com. Ex. 507A-G, Resp. Ex. 9A-F) and neither Section 2 of Article VII of the Lead Code nor Schedule A ever became enforceable or effective under the terms of the Lead Code (Resp. Ex. 9E-F; 2228-30).

29. From June, 1934 until the N. R. A. was declared unconstitutional, the Lead Code was administered by a Code

Authority composed of the Executive Committee of Lead Industries Association and the chairmen of the various divisions of the Association (Resp. Exs. 127A-G, 13A-D).

30. In the fall of 1933 (Com. Exs. 705A-D, 706A-D) and again in November, 1934, the paint industry attempted 604 to persuade the N. R. A. that the manufacturers of white lead should be subject to the provisions of the Paint Code but some of the respondents and the Code Authority for the Lead Code successfully resisted both attempts (Resp. Ex. 11A-F; 2238-39). Some of the respondents and other manufacturers of white lead felt that if lead pigments were brought under the Paint Code, the prices for white lead would be raised to the detriment of the public and their own competitive position with respect to the paint industry (id.). This feeling was based upon the fact that the Paint Code (Resp. Ex. 12) contained a provision prohibiting sales below cost and cost was defined in such an arbitrary fashion as to make it inevitable that white lead prices would be greatly increased over their customary level (2239-45).

31. On June 11, 1935, shortly after the N. R. A. was declared unconstitutional, the Code Authority met informally and wound up its affairs (Resp. Ex. 13A-D).

32. In November, 1935, George L. Berry, Esq., Coordinator for Industrial Cooperation, invited representatives from Lead Industries Association to Washington to consider voluntary action to continue the activities of the N. R. A., and the Executive Committee of Lead Industries Association, at a meeting held on November 22, 1935, resolved as follows (Resp. Ex. 92A-B):

> "Whereas, the Lead Industries Association was invited, under date of October 9, 1935, to attend a conference in Washington, called by Mr. George L. Berry, Coordinator for Industrial Cooperation, 'for the purpose of conferring upon the advisability of developing a permanent structure contemplating the furtherance of prosperity and stability in our industrial life', and 'for consideration of the best means of accelerating industrial recovery, eliminating unemployment and maintaining business and labor standards'; and
>
> Whereas, the Lead Industries Association in reply declared itself as opposed to the aforesaid governmental conference at this time as tending to confuse and disturb industry, although indicating a willingness to send a representative if desired; and

605 Whereas, Mr. Berry's letter of November 7, 1935, giving details of the conference, undisclosed by the invitation of October 9, from which it appears that the meeting will be so conducted that representatives of the Lead Industries Association might be held to have committed the industry and its members to a program adopted at the conference because of participation in it; and

Whereas, majority action upon matters placed before the conference might by implication bind an unwilling minority; and

Whereas, the Lead Industries Association basically represents a natural resource industry, producing diversified lead products from mine to finished material, with mining and smelting operations generally conducted in remote localities under operating conditions dissimilar to those usually found in other industries, and with problems peculiarly its own; and

Whereas, the lead industry has made greater progress out of the depression from the standpoint of both employer and employee since the termination of N. R. A. than it did before;

Now, Therefore, Be It Resolved, that it is undesirable for the lead industry as a unit to send a representative to the meeting called by Mr. George L. Berry, to be held in Washington on December 9, 1935."

33. During the course of N. R. A., respondent, National, through its president, E. J. Cornish, expressed its policy to the effect that N. R. A. was only temporary and should not be made the cloak for price-fixing activities (Resp. Ex. 168, 3067) and on June 6, 1935, the Executive Committee of respondent, National, resolved that the termination of N. R. A. did not require any change in company practices theretofore followed (Resp. Ex. 182).

The Agency Method.

34. In December, 1932, the Atlantic Branch (in New York) of respondent, National, first began to employ the agency method of selling white lead in oil in an attempt to forestall the wide-spread practice of certain dealers who were using Dutch Boy white lead in oil produced
606 by respondent, National, as a "loss leader" to attract the retail trade by selling the product at retail at cost or very little above cost (2905-07).

35. The agency method of selling white lead in oil was to enter into written contracts with reliable dealers (Com. Ex. 595) who, under the terms of the contract, were to act as the manufacturer's agent in selling the product, title to which remained in the manufacturer (Com. Ex. 613A-C). Under the terms of the agency contract, the agent agreed to sell the product at a stated price and he was to be compensated for his services by receiving the difference between a stated amount (sometimes called the "agent's price" [Com. Ex. 656A-B]) and the price at which he sold the product to purchasers in the retail market. Sales were periodically reported by the agent to the manufacturer who thereafter billed the agent for the goods sold by him upon the basis of the commission differential just described (638; Com. Ex. 752A-Z-144).

36. The agency method as originally employed by the Atlantic Branch of respondent, National, and as later extended, was based upon a similar method that had been used by the General Electric Company in its sale of Mazda lamps (Com. Ex. 506-D). The agency, however, was not exclusive and the agent was free to handle the goods of manufacturers other than respondent, National (Com. Ex. 706B-D).

37. Following the inauguration of the agency plan by the Atlantic Branch of respondent, National, in the early part of 1933, respondent, National, extended the use of the plan to its eastern territories (Com. Ex. 712A).

38. About the same time, respondent, Eagle-Picher, also experimented with the use of the agency method of selling white lead in oil (Com. Ex. 712A) and during the summer of 1933 respondent, Eagle-Picher, was informed by respondent, National, that the latter's agents for the most part were in favor of the continuation of the agency method (Com. Exs. 684, 686).

607 39. When in October, 1933, it became apparent that the initial attempt of the paint industry, which was opposed to the use of the agency method, to have the white lead industry brought under the Paint Code would not be successful, respondent, National, thereupon determined to extend the use of the agency method of selling white lead in oil to all of its branches, with the exception of the Pacific Coast and the method was so extended in November, 1933 (Com. Exs. 596A-B, 597, 598).

40. At the time respondent, National, determined to

extend the use of the agency method on a nation-wide basis, it so informed respondent, Eagle-Picher (Com. Ex. 599) and the latter also extended the method on a nation-wide basis at or about the same time (Com. Ex. 629 A-C).

41. There was no agreement at any time between respondent, National, and respondent, Eagle-Picher, or any other respondent as to the use of the agency method nor was participation by the other respondents in the use of the plan invited or suggested at any time by respondent, National, which determined to employ the agency plan regardless of the action of any other manufacturer of white lead in oil (See Reasons for Findings).

42. Although the agency method was discussed when supplementary codes were being drafted by the Lead Pigments Division during N. R. A. days, no agreement as to the inclusion of this plan in the Code could be reached since some of the manufacturers of white lead in oil, notably, respondent, Sherwin-Williams, and respondent, Glidden, were opposed to the plan because of its consignment feature (Com. Ex. 506-E).

43. Admittedly, consignment of goods under the agency method was an economic evil from the manufacturer's standpoint since it resulted in tying up inventories scattered throughout the territories in which agents were located
(2909), but in the view of respondent, National, this dis-
608 advantage was more than outweighed by the advantage
of eradicating the demoralizing situation created by the retailers' practice of selling white lead in oil as a "loss leader" (2907).

44. Respondent, Glidden, employed the agency method for only a short time between 1939 and 1941 or 1942 (Com. Ex. 649A-C; 2522), but it sold no substantial percentage of white lead in oil by this method (Com. Ex. 772A-Z-31).

45. Respondent, Sherwin-Williams, never used the agency method.

46. Respondent, I. S. & R., did not employ the agency method but did use a so-called "consignment arrangement" for the sale of white lead in oil beginning in November, 1932 (Com. Ex. 836E).

47. In January, 1944, respondent, National, discontinued the use of the agency method and it has not employed that method since that time (Com. Ex. 624A-B; Resp. Ex. 158).

48. Since the discontinuance of the agency method, respondent, National, has sold white lead in oil to distributors

to whom resale prices have been suggested but not required (Resp. Ex. 158; 3939).

49. The agency method of selling was never used by any respondent in selling any lead pigments other than white lead in oil.

Zones.

A. White Lead in Oil.

50. Since at least as early as 1910, respondent, National has sold white lead in oil on the basis of zone or territorial differentials (2893). From 1910 up until the adoption of a zone map in the latter part of 1933, these territorial differentials were expressed in terms of delivery, differential and equalization points (2894; Com. Ex. 659C-P). Delivery points were those cities and towns in the par territory of the Northeastern and Midwestern States which represented
609 the chief markets for white lead in oil where free delivery was made to the customer or distributor, i. e., where a flat price with no additional charge for freight was made, regardless of the location of the delivery point. Differential points were towns and cities located in other areas of the United States where a differential premium over the base price was charged to compensate in part for the greater freight charges incurred by respondent, National (Com. Ex. 659C-P). Differential points carrying the same, or nearly the same, differential premium would be included in the same territory so that in one group of States the differential points would carry a premium of ⅛¢ per lb. over the base price, while other groups of States would contain respectively differential points carrying a premium of ¼¢, ⅜¢, ½¢, ⅝¢, ⅞¢, ¾¢ or 1¢ per lb. over the base price as the case might be (Resp. Ex. 147). Equalization points were towns located both in par and in differential territories with which freight would be equalized in case shipments of white lead in oil were made to points which were not either delivery or differential points. In other words, if a shipment were made to a customer located in a town other than a delivery or differential point, the customer would pay a freight charge in addition to the price, equivalent to the difference between the freight to destination and the freight to the equalization point, but the freight charge in no case would be greater than the applicable freight between the equalization point and the destination of the shipment (2948).

51. From time to time new delivery or differential points were added and changes were made in differential premiums (Com. Ex. 659C-P).

52. The possibility of setting up zones under the proposed supplemental code for the manufacturers of lead pigments was discussed at meetings of the White Lead in Oil Committee of the Lead Pigments Division during the latter part of 1933, but no agreement among respondents and the other manufacturers of white lead in oil could be reached, and therefore zones for white lead in oil were not included in the proposed supplemental code (Com. Exs. 501A-D, 505A-B).

610 53. During the course of the discussions in the White Lead in Oil Committee meetings, respondent, National, gathered various material to be presented to the White Lead in Oil Committee with respect to the zones for white lead in oil (Com. Ex. 513A-B).

54. When it became apparent that the members of the White Lead in Oil Committee could not agree on the use of zones as a part of the supplemental code for the manufacturers of lead pigments, respondent, National, determined itself to employ a zone map setting forth in a convenient form a modification of the territorial or zone differentials which had been employed by it at least as far back as 1910 (2916; Resp. Ex. 147).

55. Instead of using the old and cumbersome method of delivery, differential and equalization points, respondent, National, determined to set forth by territorial division flat differentials and to portray the zones pictorially upon a map (Com. Ex. 580). This was done shortly after the agency method was established on a nationwide basis by respondent, National, in November, 1933, and one of the reasons for the use of the zone map as such was to simplify the agency set up (2916).

56. When respondent, Eagle-Picher, learned that National had begun to use a zone map for the sale and distribution of white lead in oil, it also employed a similar method of distribution (1551). In addition, respondent, Glidden, and in 1936, respondent, I. S. & R., followed the practices established by National in connection with the use of the zone map (2508-09, 3512-13), with the exception that these respondents did not employ a zone map as such and apparently it was not until 1937 that respondent, I. S. & R., employed any zone map for the sale and distribution of

white lead in oil (Com. Ex. 836-E). Respondent, Glidden, on the other hand, has never used any zone map as such for the sale and distribution of white lead in oil (Com. Ex. 593; 1254, 1289, 1293, 2590).

611 57. There was no agreement between respondent, National, or any of the other respondents in this proceeding as to the use of a zone map for the sale and distribution of white lead in oil, nor was participation in the use of such a map invited or suggested at any time by respondent, National, to any of the other respondents in this proceeding (2561-62, 2916, 3539, 3662).

B. Dry White Lead, Basic Carbonate.

58. For some time prior to 1933, dry white lead, basic carbonate, sold at a higher price of ¼¢ per pound in the Pacific Coast area and in the other States west of the Rocky Mountains, 2625).

59. In June, 1934, respondent, National, made a slight change and included in the Pacific Coast area the States of New Mexico, Colorado, Wyoming and Montana, so that from that time on respondent, National, charged a differential of ¼¢ a pound higher for sales of dry white lead, basic carbonate, in States west of the line formed by the eastern boundary of the States just mentioned than it did throughout the rest of the country where a flat price was charged (Resp. Ex. 159A).

60. Some of the other respondents made sales of dry white lead, basic carbonate, in the far western States and when on occasion they did some of them followed the competitive price established for those States (1576, 2624, 3497-98).

61. There was no agreement at any time between respondent, National, or any other respondent in this proceeding as to the establishment of a differential price for dry white lead, basic carbonate, in the far western States, nor was participation in the employment of this method of sale invited or suggested by respondent, National, to any of the other respondents at any time (2561-62, 2921, 2996, 3508, 3662).

C. Oxides, Red Lead and Litharge.

62. In December, 1933, there was some discussion among
respondents (respondents Anaconda and I. S. & R.
612 were not parties to this discussion and neither company
has ever manufactured or sold red lead or litharge)
and other manufacturers of red lead and litharge as to the
possibility of including in the supplementary code for oxides
(red lead and litharge) differential zones for the southern
and western States, but no agreement among respondents
or the other manufacturers of oxides was made (Resp. Ex.
138A-B; 2561-62, 2595, 3059, 3637).

63. On or about May 11, 1934, respondent, National, in connection with the terms and conditions of sale for oxides set forth in Articles I and II of Schedule A of the Lead Code, which was approved shortly thereafter on May 24, 1934, determined to set up zones for the sale and distribution of oxides in southern and western territories to compensate in part for the increased freight charges in those areas (Resp. Ex. 159B-I). Prior to 1934, respondent, National, had on occasion charged freight in addition to a flat price where the freight was more than 25¢ per cwt. for carload shipments and, in connection with less than carload shipments, had charged freight in addition to the price from certain designated warehouses (3060-62, 3075-76).

64. In the early part of June, 1934, respondent, National, made certain changes in the zones for oxides, so that the zones as revised were as follows (Resp. Ex. 159A):

For lots of less than 20 tons ¼¢ per pound was added in Florida, Georgia, Alabama, Mississippi, Louisiana, Arkansas, Texas, Oklahoma, California and west of the Cascade Mountains in Oregon and Washington; ½¢ per pound was added in New Mexico, Colorado, Wyoming and Montana; ¾¢ per pound was added in Arizona, Idaho, Nevada, Utah and west of the Cascade Mountains in Oregon and Washington. In addition, for shipments in lots of 20 tons or more, ¼¢ per pound was added in Florida, Georgia, Alabama, Mississippi, Louisiana, Arkansas, Texas, Oklahoma, New Mexico, Colorado, Wyoming, Montana, Idaho, Utah, Arizona, Nevada and east of the Cascade Mountains in Oregon ~~and Washington~~.

65. When these terms were announced to the trade in
the latter part of May and the early part of June, 1934
613 by respondent, National respondents Glidden and
Eagle-Picher, as well as other manufacturers of oxides,

began to quote similar differentials in the sale and distribution of oxides in the southern and western States just mentioned (1580, 2552-53, 2686). These respondents did not do any considerable business in oxides in the far western States and in quoting similar differentials for the southern and southwestern States these other respondents, who did make sales of oxides, quoted such differentials to meet the terms established by respondent, National, and to obtain some compensation for the greater freight charges incurred by such respondents (id.).

66. There was no agreement at any time between respondent, National, or any of the other respondents engaged in the sale and distribution of oxides as to the use of zones for the sale and distribution of oxides, nor was participation in the use of such zones invited or suggested by respondent, National, to any of the other respondents at any time (2561-62, 2595, 3059, 3637).

Prices.

67. There was no uniformity or identity of prices among respondents and other manufacturers of lead pigments with respect to the sale and distribution of lead pigments as defined in the amended complaint.

A. White Lead in Oil.

68. Some of the respondents* from time to time issued and published price cards or bulletins in connection with the sale and distribution of white lead in oil (Com. Exs. 659A, B, Q-Z-51, 660A-Z-2, 663A-K, 738A-M) and while, from time to time, the published so-called "list" prices of the respondents were the same, no substantial percentage of the sales of white lead in oil of the respondents was made at list prices (2995). For the most part these respondents received a net return represented by the price at which respondents sold to their dealers or distributors for resale
614 or the sum which they received from their agents who
sold to the trade on behalf of such respondents from consigned goods in the hands of the agents (Com. Exs. 752A-Z-144, 754A-Z-60, 772A-Z-31, 795A-Z-14).

69. From time to time after the employment of its

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* The methods employed by respondent, Sherwin-Williams are described in the proposed findings submitted by counsel for that company.

agency method in November, 1933, respondent, National, changed the net amount which its agents were required to return to it and determined various quantity and trade prices which the agent under his agency contract agreed to observe (Com. Ex. 656A-B).

70. Respondent, National, has produced white lead in oil under its Dutch Boy label which for a period of more than 35 years has had the highest consumer acceptance and has been recognized in the trade and by the competitors of respondent, National, as being the criterion of quality in the white lead in oil market (2499, 2525, 2895-97, 3513).

71. Respondent, Eagle-Picher, produced white lead in oil under the Eagle brand and under the Hammer brand (1554) and its Eagle brand of white lead in oil was recognized in the trade and by its competitors as occupying a position next to Dutch Boy in consumer acceptance and quality (2525). In setting the amount which it would receive from its agents in the sale of Eagle brand white lead in oil, respondent, Eagle-Picher, usually obtained the same net return which was received by respondent, National, from its agents selling Dutch Boy white lead in oil (Com. Ex. 754A-Z-60). However, although its published prices to the trade were in general similar to those of respondent, National, respondent, Eagle-Picher, did not at all times receive the same or as high a price in its direct sales to the trade of Eagle and Hammer brands of white lead in oil (id.; 3667, 3681). Moreover, in the sale of its Hammer brand of white lead in oil, respondent, Eagler-Picher, received from its agents a net sum which in most instances was ¼¢ a pound less than the net sum received by respondent, National, from its agents in the sale of Dutch Boy white lead in oil (1554).

72. Respondent, Glidden, produced white lead in oil under the Euston label and from 1936 through 1941 re-
615 spondent, Glidden, customarily received from its
dealers or distributors ¼¢ to 1/5¢ per pound less than respondent, National, received from its agents in the sale of Dutch Boy white lead in oil (Com. Ex. 772A-Z-31).

73. Respondent, Sherwin-Williams, customarily received prices for its white lead in oil which differed from those of respondent, National (see Proposed Findings of Respondent Sherwin-Williams).

74. Respondent, I. S. & R., produced white lead in oil under the "Anaconda" label and customarily received from

its dealers a price ¼¢ per pound less than the net sum received by respondent, National, from its agents in the sale of Dutch Boy white lead in oil (3513).

B. Dry White Lead, Basic Carbonate.

75. In the sale of dry white lead, basic carbonate, respondent, National's Dutch Boy brand was again the criterion of quality with the highest consumer acceptance among paint manufacturers, the chief purchasers of this product (2499, 2525).

76. While, for the most part (Com. Ex. 754A-Z-60), respondent, Eagle-Picher, was able to secure for its dry white lead, basic carbonate, a price as high or in most instances nearly as high as the price received by respondent, National, for its dry white lead, basic carbonate, on occasion Eagle-Picher received from purchasers in large quantities a price for its dry white lead, basic carbonate, which was ¼¢ per pound less than that received by respondent, National, for its dry white lead, basic carbonate (id.). In addition, respondent, Eagle-Picher, could produce more cheaply than its competitors basic sulphate of lead from its own mines in the Tri-State area and beginning about 1930 respondent, Eagle-Picher, stressed the sale of basic sulphate of lead (either as such or as combined with zinc oxide to form leaded zinc oxide) to paint manufacturers, and from 1936 to 1941 its sales of basic sulphate of lead were in excess of its sales of dry white lead, basic carbonate (1561-62, 3421, 3437, 3352, 3357, 4129). In addition, its production of leaded zinc oxide during 1941-1942 was three and one-half times its production of basic sulphate of lead (3357).
616 None of the other respondents stressed the sale of basic sulphate of lead and none had facilities for the production of basic sulphate of lead in the same quantities produced by respondent, Eagle-Picher. Respondent, Eagle-Picher, customarily sold basic sulphate of lead to paint manufacturers at ½¢ per pound less than it sold dry white lead, basic carbonate (3347, 3382).

77. Respondent, Glidden, up until 1941 customarily sold dry white lead, basic carbonate, at 1/5¢ per pound less than the price at which respondent, National, sold its dry white lead, basic carbonate (Com. Ex. 772A-Z-31). By 1941, respondent, Glidden, having improved the quality of its dry white lead, basic carbonate (2489, 2534), was then able to command a price as high but no higher than the price of

respondent, National, for its dry white lead, basic carbonate (Com. Ex. 772A-Z-31).

78. Respondent, Sherwin-Williams, accounted for less than 1% of the sales of dry white lead, basic carbonate, for the period from 1930 to 1941.

79. In the latter part of the decade 1930-1940 respondent, I. S. & R., customarily sold its dry white lead, basic carbonate, at the same price that respondent, National, received for its dry white lead, basic carbonate (3505).

80. With respect to both dry white lead, basic carbonate, and white lead in oil, in the early part of the twentieth century and through the decade from 1920 to 1930 the market had been flooded by many adulterated products purporting to be pure white lead in oil or pure dry white lead, basic carbonate (2502-03, 3514-15). There thus had been created in the minds of the trade, which had come to recognize Dutch Boy dry white lead, basic carbonate, and white lead in oil as the criterion of quality, a feeling that any brand of white lead in oil or dry white lead, basic carbonate, which sold for prices substantially lower than the prevailing prices at which Dutch Boy white lead in oil and dry white lead were being sold, was in all probability an 617 adulterated product (id.). Thus the constant endeavor of respondents, other than respondent, National, was to improve the quality of their product so that they might receive the same or approximately the same price (id.). In addition, respondent, National, was the only multiple producer of basic carbonate of white lead, dry and in oil, and had efficient methods of production as well as a large production of such products (2500). At no time could the respondents (other than respondent Sherwin-Williams) get a price higher than that obtained by respondent, National, and they could not afford to charge a price much lower without losing money or without incurring the resistance of the trade from the feeling that such products were probably adulterated (2502-03, 3514-15).

C. Oxides.

81. In 1927 respondent, National, established minimum differentials over pig lead for the sale of litharge and red lead of 1½¢ and 2½¢ per pound respectively (Resp. Ex. 177A-B). The prices charged for red lead and litharge were changed when pig lead changed as much as 5¢ per cwt. and usually published price changes were made when pig

lead advanced or decreased as much as 25¢ per 100 pounds (1637-38). In 1927 the respondent, National, also adopted a price for less than carload lots for litharge and red lead of 2½¢ and 3½¢ per pound over pig lead (Resp. Ex. 177A-B).

82. Since 1927, respondent, Eagle-Picher, and since shortly after 1929 when it acquired Metals Refining Company, respondent, Glidden, have customarily followed the prices set by respondent, National, in the sale of red lead and litharge (1618, 2545, 2552-53). In addition, Hammond Lead Company, Hammond, Indiana, not a respondent in this proceeding, has produced and sold red lead and litharge (1647, 1676, 1702, 1760, 1881-82, 1915, 1918, 2022). Some of the larger battery manufacturers have also produced red lead and litharge for their own use (1647).

83. The chief purchasers of red lead and litharge in dry form have been battery manufacturers who purchased
618 the material as one of the chief raw materials used in
the manufacture of electric storage battery plates (1601-02, 1641-42). The red lead and litharge produced by respondent, Glidden, respondent, Eagle-Picher, and respondent, National, as well as by the other manufacturers of litharge and red lead, have not been identical and while many manufacturers prefer the products manufactured by respondent, National, others have preferred those manufactured by respondent, Eagle-Picher, or respondent, Glidden, or the products produced by other manufacturers of red lead and litharge who are not respondents in this proceeding (1736-40, 1767-68, 1817-20, 1854-56, 2767-68, 3439-41, 3443-44, 3467-70, 3621-22). In addition, respondents, National, Eagle-Picher and Glidden, have offered technical services and advice on methods of manufacture of storage batteries and both respondent, Eagle-Picher, and respondent, National, have well staffed technical and laboratory departments whose chief duty it is to consult with battery manufacturers on the type of red lead or litharge needed by any such manufacturer and who give technical advice as to methods of manufacture (3443, 3453, 3464-65).

84. In the sale of lead pigments and oxides to governmental agencies, all of the respondents who produce and sell such products have made bids to governmental agencies and have sold to such governmental agencies at prices greatly at variance with each other where the governmental award involved quantities varying from 5,000 pounds to 1,000,000 pounds and covered such products as white lead

in oil, dry white lead, basic carbonate, dry red lead and litharge (4095-96; Resp. Exs. 306A-B, 307A-B, 308A-C).

85. Sales to governmental agencies by manufacturers engaged in interstate commerce are not subject to the provisions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

Terms and Conditions of Sale.

86. Respondents have never agreed to fix nor has there been any common or concerted action among respondents
(other than action taken in connection with the formu-
619 lation of supplementary codes during N. R. A. days) to
fix terms and conditions at which lead pigments are sold and offered for sale in commerce (2561-62, 2996, 3508-09, 3539, 3637, 3662).

87. Some of the respondents and other manufacturers of oxides, red lead and litharge and dry white lead, basic carbonate, did agree, for purposes of the Code, to include as Schedule A of the Lead Code (Com. Ex. 809) certain conditions for the sale of oxides in less than 20 tons, for the sale of oxides in lots of at least 20 tons and for the sale of basic lead carbonate, dry white lead. Many of the terms and conditions set forth in Schedule A of the Lead Code had been used by respondent, National, and followed by some of the other respondents prior to 1933 (Resp. Exs. 181A-B; Com. Exs. 659A, B, Q-Z-51). The only significant changes set forth in Schedule A of the Lead Code were with respect to the sale of lead oxides in 5 ton lots and in connection with the sale of dry white lead, basic carbonate, in lots of less than 20 tons. With respect to the price for the sale of oxides in 5 ton lots, Article 1 of Schedule A provided that the price thereof be not more than ½¢ per pound less than the seller's card or quoted price. Article 3 of Schedule A provided that the price for a minimum of 20 ton lots of dry white lead, basic carbonate, should be not more than ½¢ less per pound than that charged for smaller quantities (Com. Ex. 809).

88. While exemption was obtained by respondents and other manufacturers of lead pigments from the requirements of Schedule A, while the Code was in effect (Com. Ex. 507A-C, Resp. Exs. 6A-I, 7A-C, 8A-B, 9A-F), respondents were permitted to follow the term thereof (Section 5, National Industrial Recovery Act, 48 Stat. 195, 198) and

in general respondent, National, and respondent, Eagle-Picher, did follow the terms and conditions of sale set forth in Schedule A during the time that the Lead Code was effective (Resp. Ex. 159A-J; 1617).

89. After the N. R. A. was declared unconstitutional, respondent, National, as a matter of individual choice followed most of the terms and conditions of sale theretofore set forth in Schedule A of the Lead Code with 620 respect to oxides and dry white lead, basic carbonate, but not all the terms have been followed nor has there been any rigid adherence to such terms on the part of respondent, National (Resp. Ex. 182; 1650-54, 1657-58).

90. Since June, 1935 respondent, Eagle-Picher, as a matter of individual choice has in general followed some of the terms and conditions theretofore set forth in Schedule A of the Lead Code but not all of such conditions (1612-17).

91. There was no agreement or understanding between respondent, National, and respondent, Eagle-Picher, or any other respondent since June, 1935 with respect to the terms and conditions of sale of lead oxides, dry white lead, basic carbonate, or any other lead pigment (2561-62, 2996, 3508-09, 3539, 3637, 3662).

92. There was no exchange of price information between respondents either through Lead Industries Association or otherwise at any time even during the N. R. A. days (2187-88).

93. There was no agreement to fix prices nor any planned common course of action among respondents which resulted in the adoption of uniform prices for lead pigments at any time even during the N. R. A. days (see Reasons for Findings).

94. There was no agreement or concerted action among respondents to curtail production at any time even during the N. R. A. days (see Reasons for Findings).

95. At no time did respondents either through Lead Industries Association or by any other method exchange freight factors, freight rates, individual production data, items of past, present or future individual transactions, prices, or any other individual sales, freight or production factors (2186-88).

96. There was no agreement nor planned common course of action among respondents at any time to adopt or 621 maintain any system of delivered price quotations with respect to lead pigments (see Reasons for Findings).

97. Respondent, National, heretofore has entered into

contracts with E. I. duPont de Nemours Co., Inc., in which respondent, National, agreed to convert pig lead belonging to E. I. duPont de Nemours Co., Inc. into basic carbonate of white lead (Com. Ex. 797C-Z-6), but these contracts have had no effect upon the prices charged by respondent, National in its sale of white lead products.

98. Respondents have customarily sent to dealers or distributors who purchase direct from them suggested resale prices in connection with the sale of white lead in oil and lead pigments in kegs of 100 pounds or less (Answers of Respondents).

99. Respondent, National, and some of the other respondents, in the sale and distribution of lead pigments in kegs of 100 pounds or less, have employed the same zone basis as is used by respondent, National, in the sale and distribution of white lead in oil (Answers of Respondents).

100. Respondent, National, has sold keg products in 12½ pound, 25 pound, 50 pound and 100 pound kegs, for which customarily it has charged a 25¢ differential above 100 pound kegs for 50 pound kegs, a 25¢ differential above 50 pound kegs for 25 pound kegs, and a 25¢ differential above 25 pound kegs for 12½ pound kegs and some of the other respondents who produce such keg products have followed the differentials established by respondent, National (Answers of Respondents).

101. In connection with the sale of white lead, basic carbonate, whether dry or in oil, some of the respondents have entered into quarterly contracts covering terms of sale and delivery with paint manufacturers and with industrial consumers of such products and in connection with all lead pigments and oxides respondents have from time to time issued price cards or price bulletins to the trade (An-
622 swers of Respondents; Com. Exs. 659A, B, Q-Z-51,
660A-Z-2, 663A-K, 662A-Z-26, 661A-M, 738A-M).

102. None of the above practices or acts of the respondents has been unfair or to the prejudice of the public; none has deprived the public of the benefit of competition; none has created discrimination against any buyers of lead-pigments or lead pigment paint; none has had any tendency or capacity unreasonably to restrain commerce in said products or has actually hindered, frustrated, suppressed or eliminated competition in lead pigments in commerce; and none of the acts or activities of the respondents has constituted unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of

Section 5 of the Federal Trade Commission Act (see Reasons For Findings).

103. There has been at all times and there continues to be active competition among respondents and others in the production and sale of lead pigments, with respect to prices, quality, services and the different commodities produced by the respective respondents (see Reasons For Findings).

As To The Charge Of Price Discriminations.

104. The practice and custom of respondent, National, in selling lead pigments at the same flat price to purchasers located in any given zone were not and do not constitute discriminations in price as to such purchasers of lead pigments (See Reasons For Findings).

105. The practice and custom of respondent, National, in selling lead pigments to purchasers located in different zones carrying different prices were not and do not constitute discriminations in price as to such purchasers of lead pigments (see Reasons For Findings).

106. The practice and custom of respondent, National, in selling lead pigments at different prices to various classes of customers were not and do not constitute discriminations in price as to such classes of customers purchasing lead pigments (see Reasons For Findings).

623 107. The practice and custom of respondent, National, in selling lead pigments at different prices for different quantities of such pigments were not and do not constitute discriminations in price with respect to purchasers of such lead pigments in different quantities (see Reasons for Findings).

108. None of the customs and practices of respondent, National, nor the methods of sale employed by respondent, National, in the sale and distribution of lead pigments have constituted or result in discriminations in price within the meaning of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (see Reasons for Findings).

Conclusions of Law.

1. This proceeding is subject to the provisions of the Administrative Procedure Act (see Reasons for Findings).

2. None of the material allegations of the amended complaint is supported by or is in accordance with the re-

liable, probative and substantial evidence adduced by the hearings in this matter, nor are the material allegations of the amended complaint supported by the greater weight of the evidence so adduced at the hearings in this matter (see Reasons for Findings).

3. The acts of the respondents herein in connection with the preparation of the Lead Code and the supplementary code for the manufacturers of lead pigments and the acts taken in connection with the Lead Code itself cannot be made the basis of a charge of violation of Section 5 of the Federal Trade Commission Act (see Reasons for Findings).

4. The price paid by purchasers of lead pigments is that sum paid to the manufacturers, including these respondents, by the purchaser for delivery of the product to such purchaser (see Reasons for Findings).

624 5. Respondents have not violated and are not violating the provisions of Section 5 of the Federal Trade Commission Act (see Reasons for Findings).

6. Respondents have not violated and are not violating the provisions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (see Reasons for Findings).

7. This proceeding is not in the public interest (see Reasons for Findings).

8. The Federal Trade Commission should enter an order herein dismissing the amended complaint on the merits (see Reasons for Findings).

Reasons for Findings.

1. As to Findings of Fact 1 and 2:

The pleadings and the uncontroverted testimony.

2. As to Findings of Fact 3 to 18, inclusive, 20 to 40, inclusive, 42 to 92, inclusive, 95, and 97 to 101, inclusive:

The pleadings, the uncontroverted evidence and the reliable, probative and substantial evidence herein. Some of these findings will be discussed in more detail hereinafter.

3. As to Finding of Fact 19:

This is a finding of ultimate fact which is a necessary conclusion following from the other Findings of Fact herein.

4. As to Finding of Fact 41:

The record contains no evidence, nor does it contain reliable, probative and substantial evidence from which an inference could reasonably be drawn, that there was any agreement at any time between respondent, National, and respondent, Eagle-Picher, or any other respond- 625 ent as to the use of the agency method in the sale and distribution of white lead in oil or that participation by the other respondents in the use of the agency method was at any time invited or suggested by respondent, National and it is the reasonable inference from the uncontroverted evidence and the reliable, probative and substantial evidence herein that respondent, National, determined to employ the agency method in the sale and distribution of white lead in oil, regardless of the action of any other manufacturer of white lead in oil.

5. With respect to Findings of Fact 50 to 66, inclusive, respondent, National, refers to and incorporates herein the arguments it made in its statement and brief in support of its motion to dismiss the amended complaint filed with the Federal Trade Commission on February 25, 1947, at pages 24 to 27, inclusive, thereof.

With respect to Findings of Fact 62 to 66, inclusive, set forth above, respondent, National, submits that the said findings are fully supported by the reliable, probative and substantial evidence therein referred to. It further submits that Com. Ex. 808 A-N is entitled to no weight whatsoever in connection with the establishment by respondent, National, of zones for oxides (red lead and litharge). In the first place, respondents objected to the offer of this document in evidence and the record clearly shows that the statements therein contained were purely hearsay (1112, 1116, 1134-38). More particularly, certain statements in Com. Ex. 808 E and F to the effect that the manufacturers of oxides had not definitely established the proposed zones for red lead and litharge as of June 4, 1934 are directly contrary to the reliable, probative and substantial evidence contained in Res. Ex. 159 B-J, which shows that respondent, National, itself adopted zones for red lead and litharge on May 11, 1934 without agreement or understanding with any other manufacturer of such products.

6. With respect to Finding of Fact 84, the record contains uncontroverted evidence (therein specifically referred to) that on bids to the United States Treasury Department, the United States Navy and the Panama Canal the respondents and others made the following bids:

1939

2/17	U. S. Navy	128,400 lbs.—50—100—bbls.	*Evans	$ 9562.50	1%—30 except(")	
		Dry Red	E-P	9854.20	1%—30 except(")	
			S-W	9854.52	1%—10 except(")	
			Metals Ref.	9754.50	net	
			Heyward Pt.	10393.98	¼%—10	
		200,000 lbs.—bbls.	*S-W	6.84	1%—10	
		Dry White	J. T. Lewis	6.93	net	
			E-P	7.00	1%—30	
			Mamolith	7.25	1%—10	
4/ 3	Panama Canal	100,000 lbs.—100s	*Wetherill & Bro.	$ 7670.		
		Wh. L-in-O.	E-P	7690.		
			Mamolith	7700.		
			S-W	8580.		
7/18	U. S. Navy	12,300 lbs. 100s—25s	*S-W	$ 847.05	1%—10	
		Litharge	E-P	905.50	1%—30	
			J. T. Lewis	907.50	1%—30	
			Metals Ref.	968.75	1%—10	
			Hammond	971.00	net	
		123,200 lbs.—100s—50s—25s	*S-W	9151.45	1%—10	
		Dry Red bbls.	E-P	9353.00	1%—30	##
			J. T. Lewis	9356.25	1%—10	##
	## Except 600 lbs.—		Metals Ref.	9472.25	1%—10	
	net cash.		Hammond	9467.00	net	
		200,000 lbs.—bbls.	*S-W	$6.85	1%—10	
		Dry White	J. T. Lewis	7.00	1%—10	
			Mamolith	7.00	1%—30	
			E-P	7.00	1%—30	
12/12	Panama Canal	100,000 lbs.—100s	*J. T. Lewis	7.94		
		Wh. L-in-O.	E-P	8.04		
			Mamolith	8.50		
			S-W	9.00		
			1940	WL-O		D.R.
7/19	Panama Canal	200,000# Wh. L-in-O.	E-P	7.69		8.00
		50,000# Dry Red	Evans	—		8.00
			Hammond	—		8.50
			J. T. Lewis	7.63		8.00
			Mamolith	*7.62		—
			Metals Ref.	—		*7.95
			S-W	8.60		9.00

1940 (Continued)

7/30	U. S. Navy	366,200 lbs.—all sizes Dry Red	*E-P	$28,645.25		
			Evans	28,669.50		
			Metals Ref.	28,669.50		
			Hammond	29,500.50		
			J. T. Lewis	28,669.50		
			S-W	29,175.42		
		17,200 lbs.—50s Litharge	*E-P	8.25	1%	
			Evans	8.25	1%	
			Metals Ref.	8.75	net	
			Hammond	8.91	net	
			J. T. Lewis	8.25	1%	
		200,000 lbs.—bbls. Dry White	*Kraft Chem. Co. (MacGregor)	6.80	1%—20	
			E-P	6.90	net	
			J. T. Lewis	6.93	net	
			Mamolith	6.74	net	
			S-W	7.25	1%—20	
9/ 9	Panama Canal	400,000 lbs.—100s Wh. L-in-O.	J. T. Lewis	7.47	net	
			E-P	7.47	net	
			*Mamolith	7.42	net	
			S-W	7.98	1%—20	
		20,000 lbs. Dry Red	*S-W	7.15	1%—20	
			J. T. Lewis	8.25	1%—30	
			E-P	8.25	net	
			Evans	8.25	1%—30	
			Hammond	8.75	1%—20	
				WL-O		D.R.
12/10	Panama Canal	200,000 lbs. Wh. L-in-O. 60,000 lbs. Dry Red	J. T. Lewis	*7.47		—
			E-P	7.68		8.50
			Mamolith	8.50		—
			S-W	8.45	1%—20	9.00
			Evans	—		*8.45
			Metals Ref.	—		8.75
			Hammond	—		10.00
			1941			
1/ 9	U. S. Navy	261,800 lbs.—100s Dry Red	*Evans	8.40	net	
			E-P	8.50	net	
			Metals Ref.	8.50	net	
			S-W	9.50	1%—20	
			Hammond	10.00	net	
		400,000 lbs.—bbls. Dry White	*Mamolith	7.38	net	
			J. T. Lewis	7.42	net	
			E-P	7.50	1%—30	
			S-W	7.50	1%—30	

1941 (Continued)

3/28	U. S. Navy	200,000 lbs.—100s Wh. L-in-O.	*Mamolith	7.28	
			Int. Sm. & Ref.	7.49	
			J. T. Lewis	7.59	
			S-W	7.74	
			E-P	8.75	
5/22	U. S. Navy	348,900 lbs.—100s Dry Red	*J. T. Lewis	9.70	1%—30
			S-W	10.25	1%—20
			Metals Ref.	10.00	net
			Hammond	10.25	net
			E-P	9.75	1%—30
		500,000 lbs.—bbls. Dry White	*J. R. MacGregor	7.38	
			J. T. Lewis	7.39	
			Mamolith	7.42	
			E-P	7.42	
			S-W	7.50	
7/18	U. S. Treas. Dept.	200,000 lbs.—100s Wh. L-in-O.	*J. T. Lewis	8.47	
			Mamolith	8.80	
			E-P	8.79	
			Int. Sm. & Ref.	9.49	
9/23	U. S. Treas. Dept.	440,000 lbs.—100s Wh. L-in-O.	*Mamolith	8.57	
			J. T. Lewis	8.82	
			E-P	9.80	
10/24	U. S. Navy	1,000,000 lbs.—bbls. Dry White	J. R. MacGregor	7.50	2%—10
			J. T. Lewis	# 7.40	
			E-P	7.50	1%—30
			Mamolith	% 7.35	
			S-W	7.50	

# Awarded 800,000 lbs.
% " 200,000 lbs.

Note: Mamolith & S-W both restricted their quantity to 200,000 lbs. Navy would not accept MacGregor quotation because it was based on $5.85 pig lead with adjustment in case of an advance.

		200,000 lbs.—100s Dry Red	*Evans	8.30	
			E-P	8.35	
			Hammond	8.35	
			Metals Ref.	9.10	
			S-W	Could not quote.	

* Awarded bids.

In the above tabulations, "Mamolith" is a trade name of respondent, Glidden; "E-P" stands for respondent, Eagle-Picher; "S-W" refers to respondent, Sherwin-Williams; "J. T. Lewis" and "Evans" refer to respondent, National, and "Metals Ref." refers to Metals Refining Company, a division of respondent, Glidden.

629 Sales to governmental agencies are not governed by Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. Therefore, where the strictures of the Robinson-Patman Act did not apply, it is obvious that the respondents engaged in vigorous and active price competition.

Moreover, Findings of Fact 68 to 83, inclusive, set forth the reliable, probative and substantial evidence to show competition among respondents and other manufacturers of lead pigments and related products with respect to prices, quality, service and the different commodities produced by the respective companies. Price competition with respect to sales governed by the Robinson-Patman Act was not as vigorous or as marked as in those cases involving sales to governmental agencies where the Robinson-Patman Act does not apply. However, price competition does not mean price warfare. An attempt to indulge in such price competition by any of the respondents or other manufacturers of lead pigments might well have constituted a violation of Section 3 of the Robinson-Patman Act (49 Stat. 1528, 15 U. S. C. A. Sec. 13a), which makes it unlawful, under penalty of fine or imprisonment, for any person engaged in interstate commerce "* * * to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

7. As to Findings of Fact 93, 94 and 96:

The record contains no evidence, nor does it contain reliable, probative and substantial evidence from which an inference could reasonably be drawn, that there was any agreement to fix prices or any planned common course of action among respondents which resulted in the adoption of uniform prices for lead pigments at any time even during the N. R. A. days, or that there was any agreement or concerted action among respondents to curtail production at any time even during the N. R. A. days, or that there was any agreement or planned common course of action among respondents at any time to adopt or maintain any system of delivered price quotations with respect to lead pigments.

630 8. As to Finding of Fact 102:

This is a finding of ultimate fact which is a necessary conclusion following from the other Findings of Fact herein.

9. As to Finding of Fact 103:

The reliable, probative, substantial and uncontroverted evidence herein establishes that there has been at all times and that there continues to be active competition among respondents and others in the production and sale of lead pigments with respect to prices, quality, services and the different commodities produced by the respective respondents in this proceeding. In addition, this is also a finding of ultimate fact which is a necessary conclusion following from the other Findings of Fact herein.

10. As to Finding of Fact 104:

The practice and custom of respondent, National, in selling lead pigments at the same flat price to purchasers, located in any given zone or territory do not constitute discrimination in price as to such purchasers. A flat uniform price to all purchasers cannot result in any discrimination in price since there is no difference in price to the respective purchasers. As was stated by the Supreme Court in *Trade Commission* v. *Staley Co.*, 324 U. S. 746, at page 757:

> "But it does not follow that respondents may never absorb freight when their factory price plus actual freight is higher than their competitor's price, *or that sellers, by so doing, may not maintain a uniform delivered price at all points of delivery, for in that event there is no discrimination in price.*" (Italics ours.)

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, contains the following proviso:

> "*Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery
> 631 resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *".

In connection with the words in this proviso which read "* * * which make only due allowance * * *", the Senate Committee Report No. 1502, dated February 3, 1936, states in part as follows (CCH, Trade Regulation Service, Par. 2212):

> "This phrase is carried over from the present act, but as coupled with the remainder of the clause, is here extended to limit quantity differentials, as well as those on account of selling and transportation costs.

It marks the zone within which differentials may be granted. *The bill neither requires nor compels the granting of discriminations or differentials of any sort. It leaves any who wish to do so entirely free to sell to all at the same price regardless of differences in cost,* or to grant any differentials not in excess of such differences." (Italics ours.)

11. As to Finding of Fact 105:

With respect to the custom and practice of respondent, National, in selling white lead in oil in different zones at differentials of fractions of a cent over the base or par price, there is no evidence nor any reliable, probative and substantial evidence that this method of sale in any way violates Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. The reliable, probative and substantial evidence establishes that the differentials over the base price charged in the differential zones do not exceed the difference between the average cost of delivering the white lead in oil to purchasers in the par or base zone and the similar average costs of delivering white lead in oil to purchasers in the respective differential zones. (Resp. Exs. 165A-O, 166A-B, 169A-N, 170A-B, 171, 162A-D, 213A-Q, 214.) The zones for white lead in oil were not artificial and in substance have been employed by the National Lead Company at least as far back as 1910 (Finding of Fact 50 above). Moreover, for many years respondent, National, has made between 75% and 80% of its sales of white lead in oil in the so-called par or base zone (Resp. Exs. 151A-B, 152, 153; 3966).

632 With respect to the two zones employed by respondent, National, in the sale and distribution of dry white lead, namely the par zone, covering all of the States of the United States in the east, south and midwest, and a differential zone carrying a differential ¼¢ per pound for the States west of the line formed by the eastern boundaries of New Mexico, Colorado, Wyoming and Montana, there is no proof in the record nor any reliable, probative and substantial evidence that this method of sale and distribution involves any discrimination in price or may have the effect substantially to lessen competition or tend to create a monopoly in the sale and distribution of dry white lead or in any other way violates Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

With respect to the practice and custom of respondent, National, in selling oxides (red lead and litharge) upon the zone basis referred to above in Finding of Fact 64 herein, there is no proof in the record nor any reliable, probative and substantial evidence that this method of sale and distribution involves any discrimination in price or may have the effect substantially to lessen competition or tend to create a monopoly in the sale and distribution of oxides (red lead and litharge) or in any other way violates Section 2(a) of the Clayton Ast, as amended by the Robinson-Patman Act.

12. As to Finding of Fact 106:

The practice and custom of respondent, National, in selling lead pigments at different prices to different classes of customers do not constitute discriminations in price with respect to such classes of customers within the meaning of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. The reliable, probative and substantial evidence establishes that there is no competition between such classes of customers and therefore the different prices to the different classes could not have any competitive effect as between purchasers belonging to the respective classes of customers (2994-95, 3964-65).

633 13. As to Finding of Fact 107:

The practice and custom of respondent, National, in selling white lead in oil at different prices for different quantities of such pigments (Com. Ex. 656A-B) do not constitute discriminations in price within the meaning of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. There is no evidence in the record nor any reliable, probative and substantial evidence from which an inference could reasonably be drawn that such practice and custom have any competitive effect upon purchasers of white lead in oil in the different quantities at the different quantity prices.

The practice and custom of respondent, National, in selling dry white lead at different prices for different quantities of such pigments do not constitute discriminations in price within the meaning of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. There is no evidence in the record nor any reliable, probative and substantial evidence from which an inference could reasonably be drawn that such practice and custom have any competitive effect upon purchasers of dry white lead in the different quantities at the different quantity prices.

The evidence establishes that respondent, National, since 1934 has sold dry white lead in lots of less than 20 tons (less than carload lots) at a price of ¼¢ a pound more than the price charged by respondent, National, for lots of dry white lead in 20 tons or more (carload lots). The reliable, probative and substantial evidence herein establishes that this differential of ¼¢ per pound does not exceed the difference between the cost of sale and delivery of dry white lead in carload lots and the cost of sale and delivery of dry white lead in less than carload lots (4050-65; Res. Exs. 215A-B, 216, 217).

The practice and custom of respondent, National, in selling oxides (red lead and litharge) at different prices for different quantities of such pigments do not constitute discriminations in price within the meaning of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. There is no evidence in the record nor any reliable, probative and substantial evidence from which an inference could reasonably be drawn that such practice
634 and custom have any competitive effect upon purchasers of oxides (red lead and litharge) in the different quantities at the different quantity prices. The testimony of battery manufacturers who purchased oxides in different quantities at the different quantity prices does not constitute reliable, probative and substantial evidence that there was any adverse effect upon competition as a result of such quantity prices. The evidence of such battery manufacturers herein shows even less competitive effect than did the testimony which was declared to be insufficient to show discriminations in price as the result of quantity differentials in *Morton Salt Co.* v. *Federal Trade Commission,* 162 F. 2d 949 (C. C. A. 7th, 1947).

With respect to the custom and practice of respondent, National, in selling lead pigments in kegs of 12½, 25, 50 and 100 pounds at differentials as set forth in Finding of Fact 100 above, the record contains no evidence nor any reliable, probative and substantial evidence from which an inference could reasonably be drawn that such differentials constituted discriminations in price within the meaning of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. The uncontroverted evidence is to the effect that such differentials in price do not exceed the differences in the costs of manufacture of such keg products in such quantities (Res. Ex. 309; 4175-76).

14. As to Finding of Fact 108:

This is a finding of ultimate fact which is a necessary conclusion following from the other Findings of Fact herein.

15. As to Conclusion of Law 1:

This is covered by the provisions of the Administrative Procedure Act itself and, in addition, the Trial Examiner has ruled that this proceeding is governed by the provisions of the Administrative Procedure Act (1903).

16. As to Conclusion of Law 2:

This follows as a conclusion of law from the Findings of Fact set forth above.

635 17. As to Conclusion of Law 3:

The National Industrial Recovery Act, by Section 5, provided:

> "While this title is in effect * * and for sixty days thereafter, any code, under this title, and any action complying with the provisions thereof taken during such period, shall be exempt from the provisions of the anti-trust laws of the United States." (48 Stat. 195, 198, Act of June 16, 1933).

On June 14, 1935, Congress repealed the provisions of the NRA Act delegating power to the President of the United States to prescribe codes and to provide for enforcement, but in the same act Congress provided that the exemption from the anti-trust laws originally given in Section 5 of the National Industrial Recovery Act, above quoted, should continue with respect to agreements by members of an industry relating to labor conditions and unfair competitive practices which offend against existing laws (49 Stat. 375).

18. As to Conclusion of Law 4:

This follows as a conclusion of law for the reasons given above in connection with Finding of Fact 104 (Paragraph 10 above).

19. As to Conclusions of Law 5, 6, 7 and 8:

These follow as conclusions of law from the Findings of Fact set forth above.

The Administrative Procedure Act (Section 8[b]) provides that in hearings before an administrative agency the respondents shall have a "reasonable opportunity" to submit proposed findings and conclusions to the official who presided at the reception of the evidence. On November 20, 1947 the Trial Examiner herein ruled that all proposed findings, conclusions and the reasons therefor should be submitted to him on or before December 1, 1947. On the same day, namely, November 20, 1947, the respondents formally requested the Federal Trade Commission to extend their time to file such proposals and the reasons therefor until February 15, 1948. The Federal Trade Commission, by order dated December 5, 1947, 636 denied such request but extended respondents' time for filing such proposals and the reasons therefor until December 29, 1947. Respondent, National, respectfully submits that, in view of the size of the record herein and the importance of this proceeding, the time granted by the Federal Trade Commission for the submission of proposed findings and the reasons therefor is inadequate.

Respectfully submitted,
Alexander & Green,
James D. Ewing,
of Counsel,
Attorneys for Respondent,
National Lead Company,
Office & P. O. Address,
No. 120 Broadway,
New York 5, N. Y.

James D. Ewing,
Eugene Z. DuBose,
of Counsel.

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637 Before the Federal Trade Commission.

(Received Dec. 29, 1947.)

* * (Caption—5253) * *

Now come the respondents, The Eagle-Picher Company and The Eagle-Picher Sales Company, by their attorneys, Edmund P. Wood and Richard Serviss, and submit the following proposed findings of fact, conclusions of law, and reasons therefor:

1. These respondents adopt the proposed findings of fact, conclusions of law and reasons therefor submitted by the respondent, National Lead Company.

2. Additionally, these respondents request the following specific findings of fact:

(a) The Eagle-Picher Company and The Eagle-Picher

Sales Company (hereinafter called Eagle-Picher) engage in the business of selling lead pigments in interstate
638 commerce throughout the United States in which business they are second in size to National Lead Company (hereinafter called National). Due to the difference in sizes of the two companies, Eagle-Picher is not in a position to compete with National, on lead pigments manufactured from pig lead, by means of a general policy of price cutting or price war. Nevertheless, it is the policy of Eagle-Picher to compete with National in the sale of lead pigments and Eagle-Picher does so compete actively by means of research which develops different and better products, by means of sales service, by means of technical service to customers providing them with the benefit of Eagle-Picher's research facilities, and by means of national advertising intended to increase consumer acceptance of the Eagle-Picher products.

(b) Particularly, Eagle-Picher research has developed special pigments known as basic lead sulphate, leaded zinc oxide and blue lead which Eagle-Picher manufactures from its own raw materials and sells in competition with pigments manufactured from pig lead. All of the Eagle-Picher organization has been actively engaged in promoting consumer acceptance and greater utilization of these products in competition with those promoted by the other respondents herein.

639 (c) Eagle-Picher's research laboratories have developed many special lead oxides for the storage battery industry and Eagle-Picher's technical experts have instructed the company's customers in the manner of their use, which has improved the competitive position of the Eagle-Picher customers in relation to that of the customers of National and that of the large battery manufacturers which produce their own lead oxides.

(d) Eagle-Picher has not indulged in any unfair method of competition by conspiracy or otherwise.

(e) Eagle-Picher has not discriminated among its customers in its sale of lead pigments.

(f) Eagle-Picher cannot compete with National except by selling on a delivered price basis because of National's greater size and greater number of manufacturing plants.

3. These proposed findings are supported by the records as a whole and particularly by the testimony of the

witnesses produced by The Eagle-Picher Company and the exhibits introduced in connection with their testimony:

	Getz	3328	As to proposed findings (a) and (b)
	Harner	3416	As to proposed findings (a), (b) and (c)
	Chubb	3462	As to proposed findings (c)
640	Vasterling	3591	As to proposed finding (b)
	Mitchell	3620	As to proposed finding (c)
	Bowlbey	3632	As to proposed finding (a)
	Hayt	3659	As to proposed finding (a) and (b)

Respectfully submitted,

Edmund P. Wood,
Richard Serviss,
Attorneys for respondents, The Eagle-Picher Company, The Eagle-Picher Sales Company.

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641 Before the Federal Trade Commission.

* * (Caption—5253) * *

PROPOSED FINDINGS, CONCLUSIONS AND REASONS THEREFOR.

(Received Dec. 29, 1947.)

Comes Now the respondent, Anaconda Copper Mining Company, by its attorneys, Chadbourne, Wallace, Parke & Whiteside, and submits the following proposed findings and conclusions, together with its reasons therefor:

1. The Anaconda Copper Mining Company (hereinafter referred to as "Anaconda") is a Montana corporation, with its principal office located at 25 Broadway, New York 4, New York. (Paragraph "Three" of Amended Complaint and Paragraph "Three" of Amended Answer thereto.)

Reason: Alleged in complaint and admitted in answer.

2. Anaconda has never been engaged in the manufacture or sale of lead pigments. (Com. Ex. 836A-N; Affidavit of E. O. Sowerwine, Vice President of Anaconda in sup-
642 port of motion to dismiss amended complaint, pp. 2075-2077; 3543-3544.)

Reason: There is no evidence that Anaconda was ever engaged in the manufacture or sale of lead pigments, and there is substantial evidence that it was not so engaged.

3. Anaconda has no present intention of entering into the business of the manufacture or sale of lead pigments. (Affidavit of E. O. Sowerwine, Vice President of Anaconda, in support of motion to dismiss amended complaint, pp. 2075-2077; 3543-3544.)

Reason: The only evidence in the case as to the intention of Anaconda with regard to entering the manufacture or sale of lead pigments is an unqualified statement from a Vice President of that Company that it has no such intention.

4. There is no reason to believe that Anaconda or any of its subsidiaries will ever enter into or engage in the manufacture or sale of lead pigments. (Affidavit of E. O. Sowerwine, Vice President of Anaconda, in support of motion to dismiss amended complaint, pp. 2075-2077; 3543-3544.)

Reason: There is no evidence in the record of any
intention on the part of Anaconda or any of its sub-
643 sidiaries to enter into the business of the manufacture
or sale of lead pigments in the future, and there is an
unqualified statement by the Vice President of Anaconda
that it has no such intention.

5. Anaconda did not, nor did any of its officers, directors, employees, representatives or agents, combine, conspire or cooperate with any of the other respondents, or with any of their officers, directors, employees, representatives or agents, or any other person, for the purpose or with the effect of restraining, hindering, suppressing or eliminating competition in prices or terms of sale of lead pigments in commerce. (pp. 3508-3510, 3539-3541.)

Reason: There is no evidence in the record of any such combination, conspiracy or cooperation, and there is uncontroverted testimony that such was not a fact.

Conclusions of Law.

1. Anaconda has not manufactured and does not manufacture or sell any of the lead pigments that are the subject matter of this complaint, and its joinder as a respondent in this proceeding was, therefore, without justification and improper.

2. Anaconda has not combined or conspired or co-
644 operated with any of the respondents for the purpose or with the effect of restraining, hindering, suppressing or eliminating competition in prices or terms of sales of lead pigments in commerce.

3. Anaconda has not engaged in any unfair, oppressive or discriminatory acts, methods or practices in connection with the sale or offers to sell lead pigments in commerce.

4. Anaconda has not discriminated in prices between purchasers of lead pigments of like grade and quality sold for use, consumption or resale within the several states of the United States and the District of Columbia, or has not systematically sold such commodities to any purchasers at a price higher than the price at which commodities of like grade and quality are sold by it to other purchasers and users.

5. The fact that Anaconda may have owned a controlling interest or all of the stock of a corporation does not make it responsible for the actions of such subsidiary, nor would that fact make it a proper party to this action if such subsidiary had been engaged in the manufacture and sale of lead pigments. This is a well established legal principle for which there is ample authority as is evidenced by the following cases:

Martin v. *Development Co. of America*, 240 Fed. 42 (C. C. A. 9th, 1917).

Majestic Company v. *Orpheum Circuit*, 21 F. (2d) 720 (C. C. A. 8th, 1927).

645 *Esmond Mills* v. *Commissioner of Internal Revenue*, 132 F. (2d) 753 (C. C. A. 1st, 1943).

Schenley Corporation v. *United States*, 326 U. S. 432 (1945).

6. None of the material allegations of the amended complaint as to the respondent, Anaconda, is supported by any evidence which has been produced at the hearings in this matter.

7. Anaconda has not violated and is not violating the provisions of Section 5 of the Federal Trade Commission Act.

8. Anaconda has not violated and is not violating the provisions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

9. The Federal Trade Commission should enter an order herein, dismissing the amended complaint as to the respondent, Anaconda.

Chadbourne, Wallace, Parke & Whiteside,
By H. E. Gardiner,
Office and Post Office Address,
No. 25 Broadway,
Borough of Manhattan,
City of New York 4,
Attorneys for Respondent,
Anaconda Copper Mining
Company.

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646 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

PROPOSED FINDINGS, CONCLUSIONS AND REASONS THEREFOR.

(Received Dec. 29, 1947.)

Comes Now the respondent, International Smelting and Refining Company, by its attorneys, Chadbourne, Wallace, Parke & Whiteside, and submits the following proposed findings and conclusions, together with its reasons therefor:

1. The International Smelting and Refining Company (hereinafter referred to as "International") is a Montana corporation, with its principal office located at 25 Broadway, New York 4, New York. (Paragraph "Three" of Amended Complaint and Paragraph "Three" of Amended Answer thereto.)

Reason: Alleged in complaint and admitted in answer.

2. International is a wholly owned subsidiary of respondent, Anaconda Copper Mining Company (herein-
647 after referred to as "Anaconda.") (Paragraph "Three" of Amended Complaint and Paragraph "Three" of Amended Answer thereto.)

Reason: Alleged in complaint and admitted in answer.

3. International manufactured and sold the lead pigments which it produced, namely dry white lead and white lead-in-oil, from October 31, 1936 until the latter part of July, 1946. (Com. Ex. 836A-B; pp. 3489-3510.)

4. The plant at which International produced the lead pigments which it manufactured was located at East Chicago, Indiana. (Com. Ex. 836A-B; p. 3489.)

5. Anaconda Lead Products, a Delaware corporation, in 1920 commenced regular production and sales of dry white lead at East Chicago, Indiana, and continued such production and sale until said plant was acquired by International on October 31, 1936. (Com. Ex. 836A; pp. 3489-3490.)

6. Anaconda Lead Products Company first began to manufacture white lead-in-oil in 1931 at the plant at East Chicago, Indiana, and continued such production and sale until said plant was acquired by International in 1936. (Com. Ex. 836A.)

7. In 1920, Anaconda owned 75% of the stock of the Anaconda Lead Products Company, the remaining 25% being acquired in 1936 prior to its dissoluition. (Com. Ex. 836A; p. 3489.)

648 8. On June 1, 1946, International advised the trade that it had been decided to permanently discontinue production of dry white lead. Production of dry white lead was stopped on June 16, 1946, and no further orders were accepted for that material after August 1, 1946, and all such materials on hand were shipped to customers by the end of that month. (Com. Ex. 836B; Affidavit of Frederick Laist, Vice President of International, in support of motion to dismiss amended complaint; pp. 2075-2077; 3541-3542.)

9. On June 20, 1946, International advised the trade that it had been decided to permanently suspend operations at the East Chicago plant of International and discontinue the business. Production of white lead-in-oil was stopped on July 23, 1946, and no further orders were accepted for that material after August 1, 1946, and all such materials on hand were shipped to customers by the end of that month. (Com. Ex. 836B; Affidavit of Frederick Laist, Vice President of International, in support of motion to dismiss amended complaint; pp. 2075-2077; 3532-3543.)

10. The plant at which International and previously the Anaconda Lead Products Company had manufactured lead pigments at East Chicago, Indiana, and the only plant at which these materials were ever manufactured by either of those companies, was sold to The Eagle-Picher Company on October 1, 1946. (pp. 3542-3543.) 649

11. In order for International to resume the pro-

duction of dry white lead or white lead-in-oil, it would be necessary to purchase or construct a plant for that purpose. (p. 3543.)

Reason: International does not own or control any of the machinery, equipment or plant facilities essential for the production of such lead pigments and none of the properties it does own or control could be readily converted to the production of these materials.

12. There is no reason to believe that International will ever reenter the business of the manufacture and sale of lead pigments. (Affidavit of Frederick Laist, Vice President of International, in support of motion to dismiss amended complaint; pp. 2075-2077; 3543.)

Reason: There has been no change in the conditions which resulted in International's decision to go out of the business of manufacturing lead pigments nor is any such change reasonably foreseeable. Not only did International sell the only property it had for the manufacture of lead pigments but, with the exception of two individuals,
650 none of the personnel engaged in the production and sale of those materials are still employed by the Company.

13. When the Anaconda Lead Products Company first entered the business of selling dry white lead, which was in 1920, it sold this material f.o.b. East Chicago, Indiana, freight allowed to any point in the United States. (Com. Ex. 826A; p. 3497.)

14. Anaconda Lead Products Company in 1935 adopted the two (2) zone system employed by its competitors for the sale of dry white lead. (Com. Ex. 836-I.)

15. International when it entered the dry white lead business continued to sell by this system whereby the United States was divided into what was known as a par zone and the Pacific Coast zone. (Com. Ex. 836-I; pp. 3497-3498.)

Reason: International, being only a small factor in this business, found it necessary to adapt and conform its sales policy to those of its major competitors. (Com. Ex. 836J; p. 3498.)

16. International sold its dry white lead at the prices established by the market leaders, which it learned of through its customers and prospective customers.

651 Reason: International was a small factor in the dry white lead business. This product could not be

sold for a premium and, the margin of profit being narrow, International generally tried to secure the same price realized by its competitors. (Com. Ex. 836J; p. 3498.)

17. International never sold dry white lead under a consignment agreement. (Com. Ex. 836D-E; pp. 3533-3535.)

18. During the years that International was engaged in the manufacture and sale of dry white lead, namely from 1937 through 1945, its position with relation to the total percent of dry white lead sold annually by the industry ranged from a low of 10.49% to a high of 19.43% in 1937. (Com. Ex. 836J.)

19. In 1931 the Anaconda Lead Products Company commenced the production of white lead-in-oil. (Com. Ex. 836A; p. 3510.)

Reason: Competition in the dry white lead business had become so keen that it was necessary to enter this field in order to provide a sufficient outlet for the dry white lead produced by the Anaconda Lead Products Company so that this operation could be conducted at a profit. (p. 3507.)

652 20. The initial sales policy of the Anaconda Lead Products Company for its white lead-in-oil was simply to secure the most it could for what was a new product that was in competition with well established and nationally known materials. (p. 3511.)

21. A policy was subsequently adopted by the Anaconda Lead Products Company of selling its white lead-in-oil at ½¢ per pound under the price secured by its principal competitors for their products, which policy was followed by International during the time that it produced this material. (p. 3512.)

Reason: The white lead-in-oil manufactured by Anaconda Lead Products Company and later by International was unknown to the trade and could not command the same price. This differential was one that enabled Anaconda Lead Products and later International to secure a maximum amount for its product and still provide sufficient inducement to the trade to buy this material over those of its competitors that were more widely known and more intensely advertised. (p. 3515.)

22. Commencing on or about January 1, 1937, and until it went out of the business, International adopted sub-

stantially the same zone system for the sale of its 653 white lead-in-oil as was used by its principal competitors. The nature of this zone system was determined through contacts with customers and prospective customers. (Com. Ex. 836E; pp. 3515-3517.)

Reason: The major producers of white lead-in-oil were selling on a zone system and it was necessary, in order for International to compete with them, to sell on the same basis. (pp. 3515-3516.)

23. International, in pricing its white lead-in-oil, ascertained through its customers, prospective customers and salesmen the prices at which its competitors were selling this material and generally undersold them by ¼¢ per pound. (pp. 3513-3514.)

Reason: International could not secure the same price for its white lead-in-oil as its competitors could for their well established products. To have sold International's material for more than ¼¢ per pound less than competition would have raised a doubt as to its quality, resulting in a loss of sales and also in a loss of return that would have otherwise been available. (pp. 3513-3515.)

24. International never sold white lead-in-oil by 654 consignment contract except in the State of Wisconsin where this means was adopted to protect it under the state law covering the insolvency of vendors. (Com. Ex. 836D-E; pp. 3533-3537.)

25. International supplied its dealers with price cards containing a suggested resale price for its white lead-in-oil but did not require them to follow these, nor was there any action taken against those dealers who did not follow these suggested prices. (pp. 3536-3537.)

26. During the years that International manufactured and sold white lead-in-oil, namely from 1937 through 1945, its position with relation to the lead-in-oil sold annually by the industry ranged from a low of 3.08% in 1943 to a high of 4.03% in 1940. (Com. Ex. 836H-I.)

27. International's prices within each zone in which it sold dry white lead and white lead-in-oil were uniform for each product to the same class of customers in the same quantity bracket. (Com. Ex. 836C-J.)

28. International never agreed with any of the respondents herein, or any other competitors, to a system of delivered price quotations for the sale of lead pigments. (pp. 3508-3539.)

Reason: There is no evidence in the record of any

655 agreement and there is uncontroverted testimony that International was never a party to such an agreement. (pp. 3508, 3539.)

29. International never was a party to any agreement with any of the respondents herein, or with any other competitor, regarding a plan whereby the United States was divided into zones for the purpose of selling lead pigments. (pp. 3508-3539.)

Reason: There is no evidence in the record of any such agreement or negotiations and there is uncontroverted testimony that International never was a party to any such undertaking. (pp. 3508, 3539.)

30. International never used the office of the Lead Industries Association, or its officers, employees and agents of the same, for the purpose of exchanging price factors and information concerning price factors to be used at times by International and any of the respondents herein, or any other competitor, in calculating, determining and announcing price factors to be used at times in selling lead pigments. (pp. 3509, 3539-3540.)

Reason: There is no evidence in the record of any such use of the Lead Industries Association and there 656 is uncontroverted testimony that International was never a party to such use. (pp. 3509, 3539-3540.)

31. International never agreed to adopt or adopted or maintained and used terms and conditions of sale employed in the so-called "consignment" or "agency" agreements under the leadership of respondent, National Lead, for the purpose of preventing dealers from selling white lead and from making offers to sell such products at levels lower than the offers made by the respective respondent producers whose names were affixed to such consignment or agency agreements. (pp. 3509, 3540.)

Reason: There is no evidence in the record of any such agreement or negotiations and there is uncontroverted testimony that International never was a party to any such undertaking. (pp. 3509, 3540.)

32. International never agreed with any of the respondents herein, or any other competitor, to fix or fixed and included in offers to sell, the prices, terms and conditions at which said dry white lead was sold or offered in sale for commerce. (pp. 3509-10, 3540-41.)

657 Reason: There is no evidence in the record of any such agreement and there is uncontroverted testimony that International never was a party to any such undertaking. (pp. 3509-10, 3540-3541.)

Conclusions of Law.

1. This proceeding is subject to the provisions of the Administrative Procedure Act.

2. International has not combined or conspired or cooperated with any of the respondents for the purpose or with the effect of restraining, hindering, suppressing or eliminating competition in prices or terms of sales of lead pigments in commerce.

3. International has not engaged in any unfair, oppressive or discriminatory acts, methods or practices in connection with the sale or offers to sell lead pigments in commerce.

4. International has not discriminated in prices between purchasers of lead pigments of like grade and quality sold for use, consumption or resale within the several states of the United States and the District of Columbia, or has not systematically sold such commodities to any purchasers at a price higher than the price at
658 which commodities of like grade and quality are sold by it to other purchasers and users.

5. None of the material allegations of the amended complaint as to the respondent, International, is supported by any evidence which has been produced at the hearings in this matter.

6. International has not violated and is not violating the provisions of Section 5 of the Federal Trade Commission Act.

7. International has not violated and is not violating the provisions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

8. The Federal Trade Commission should enter an order herein, dismissing the amended complaint as to the respondent, International.

Chadbourne, Wallace, Parke & Whiteside,
By H. E. Gardiner,
Office and Post Office Address,
No. 25 Broadway,
Borough of Manhattan,
City of New York 4,
Attorneys for Respondent, International Smelting and Refining Company.

659 BEFORE THE FEDERAL TRADE COMMISSION.

Docket No. 5253.

In the Matter of

National Lead Company, a corporation,
Eagle-Picher Lead Company, a corporation,
Eagle-Picher Sales Company, a corporation,
Anaconda Copper Mining Company, a corporation,
International Smelting & Refining Company, a corporation,
The Sherwin-Williams Company, a corporation, and
The Glidden Company, a corporation.

FINDINGS AND CONCLUSIONS PROPOSED BY THE SHERWIN-WILLIAMS COMPANY.

(Received Dec. 29, 1947.)

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660 Comes now, The Sherwin-Williams Company, one of the respondents herein, and moves the Trial Examiner, under Rule XXI of the Commission's Rules of Practice, that he include the proposed findings herein later set forth in the recommended decision he is required to file under Rule XXII of the aforesaid Rules of Practice. The evidentiary facts, and reasons, supporting such findings are set out immediately in conjunction with each finding requested.

661 Requested Findings as to Charges Stated in Count I.

Paragraph One: With respect to the general charge stated in Paragraph One of Count I Sherwin-Williams requests the following finding:

> "The record does not establish by the greater weight of reliable, probative and substantial evidence that Sherwin-Williams has violated the provisions of Section 5 of the Federal Trade Commission Act."

The evidentiary facts, and reasons, supporting the foregoing finding are set forth in detail in connection with specific factual findings hereinafter requested.

Paragraph Two: With respect to the charge stated in Paragraph Two of Count I Sherwin-Williams requests the following finding:

> "The record does not establish by the greater weight of reliable, probative and substantial evidence that Sherwin-Williams has combined, conspired or cooperated with the other respondents to hinder, lessen or eliminate price competition in the sale of lead pigments or has used unfair, oppressive or discriminatory acts, methods or practices in the sale thereof in interstate commerce."

The evidentiary facts, and reasons, supporting the foregoing finding are set forth in detail in connection with specific factual findings hereinafter requested but a brief statement of Sherwin-Williams' overall contention is as follows:

1. Sherwin-Williams sets its price on the basis of free delivery at one of its 50 odd shipping points with the customer paying the actual freight therefrom to his own destination except when car load orders are involved. This system is very different from the delivered price system used by other respondents in that it does reflect differences in cost of delivery from Sherwin-Williams' shipping points to the various customer's respective destinations.

2. Sherwin-Williams has not set up a zone system whereby the total cost to its customers is matched with, or at a differential below, the delivered price quoted by any other respondent. Its freight policy, as outlined, precludes such matching. The plan used by Sherwin-Williams is contrary to a zone delivered price system.

3. Sherwin-Williams has not engaged in any unlawful activity with the aid of Lead Industries Association. It has retained its bare membership therein for many years but has not participated in the type 662 of activities sponsored during the N. R. A. Code days since the N. R. A. Code system was held to be illegal. The information it furnishes to, and receives from Lead Industries Association does not concern prices or price factors or terms or conditions of sale.

4. Sherwin-Williams never adopted or used the consignment method of selling white lead.

5. Sherwin-Williams has not exchanged price information with any other respondent and has not agreed with any other respondent relative to prices or terms or conditions of sale for lead pigments.

Paragraph Three: Sherwin-Williams has no objection to a finding conforming to the allegations of Paragraph Three of Count I.

Paragraph Four: Sherwin-Williams has no objection to a finding conforming to the allegations of Paragraph Four of Count I.

Paragraph Five: With respect to the charges stated in Paragraph Five of Count I, Sherwin-Williams requests the following findings:

> "Sherwin-Williams Company produces only white lead carbonate, (dry and in oil) red lead, (dry and in oil) and litharge, which are manufactured only in its Chicago plant from pig lead obtained in the open market from practically all suppliers. It does not produce the other lead pigments involved. It sells and distributes such products in interstate commerce to various classes of customers but the volume of such sales constitutes a very small and negligible part of the total sales of such products by all producers. It also sells such products, particularly white lead in oil, in its own several hundred retail stores in transactions which originate and are completed entirely within the confines of a single state. While Sherwin-Williams uses white lead and red lead in the manufacture of some types of paint there is no evidence that its use of such products in the manufacture of paint is pertinent to this proceeding."

The evidentiary facts supporting the foregoing findings are as follows:

Sherwin-Williams Company produces only white lead carbonate, (dry and in oil) red lead, (dry and in oil) and litharge (Tr. 1313), which are manufactured only in its Chicago plant (Tr. 1313, Tr. 3746) from pig lead obtained in the open market from practically all suppliers (Tr. 1313). It does not produce the other lead pigments involved (Tr. 1313). In 1943 Sherwin-Williams shipped about

5% of the white lead in oil shipped by the industry and
663 approximately the same percentage for many years prior thereto (Tr. 1331). For many years, its dry white lead and litharge shipments to customers represented less than 1%, respectively, of the total shipments while its dry red lead and red lead in oil shipments to customers were approximately nil (Tr. 1331-1332). Sherwin-Williams does not sell dry red lead or litharge on the Pacific Coast (Tr. 1314, Tr. 2066). Its sales of litharge are confined almost entirely to points in the Chicago area with a few isolated shipments to Kentucky and Ohio (Tr. 2066). It does not sell red lead or litharge to the battery manufacturing industry (Tr. 1648, Tr. 4070), and is not an important factor in the sale of lead pigments, particularly red lead and litharge (Tr. 1648).

Paragraph Six: With respect to the charges stated in Paragraph Six of Count I, Sherwin-Williams requests the following finding:

> "Sherwin-Williams has not violated, and is not now violating, the provisions of Section 5 of the Federal Trade Commission Act by combining, conspiring or cooperating with any of the other respondents herein for the purpose or with the effect of restraining, hindering, suppressing or eliminating competition in prices or terms of sale for lead pigments in interstate commerce or by engaging in or continuing unfair, oppressive or discriminatory acts, methods or practices in connection with its sales of lead pigments."

The evidentiary facts supporting the foregoing findings are set forth in detail elsewhere in connection with various requests for specific factual findings.

Paragraph Seven: Sherwin-Williams makes no request for any findings with respect to the charges stated in subparagraph A of Paragraph Seven of Count I.

With respect to the charges stated in subparagraph B of Paragraph Seven of Count I, Sherwin-Williams requests the following finding:

> "Sherwin-Williams has not combined or conspired with any of the other respondents to do or perform, and has not performed, any of the acts, methods or practices set forth in items 1 through 7 inclusive, of subparagraph B of Paragraph Seven of Count I."

The evidentiary facts, and reasons, supporting the foregoing finding are set out in connection with requests for specific findings relative to items 1 through 7, inclusive.

664 As to items 1 and 2 of subparagraph B of Paragraph Seven of Count I, Sherwin-Williams requests the following findings:

"Sherwin-Williams has not agreed to adopt, and has not adopted or maintained, a system of delivered price quotations which prevents reflection of any difference in the cost of delivery of lead pigments to the respective locations of the purchasers thereof. In arriving at its prices for lead pigments Sherwin-Williams has designated 53 (as of September 1939) major cities located strategically in all sections of the United States as shipping points and has established warehouses and shipping facilities thereat. The price quoted at 21 of such cities which are located east of the Mississippi River and north of Kentucky and Virginia is a base price and the price quoted at each of the other designated cities includes an added differential which varies according to the location of such shipping points relative to Chicago. These differentials are not arbitrary mark-ups but are applied for the purpose of recouping, in whole or in substantial part, the freight cost involved in shipping from Sherwin-Williams' sole lead pigment manufacturing plant at Chicago to its various shipping points. Purchasers generally pay the price applicable at the nearest shipping point plus actual freight therefrom to destination. While Sherwin-Williams' price to customers in cities served by the same shipping point or by shipping points having the same price is the same, purchasers in all of such cities have a different total cost to the extent of the difference in the freight costs from such shipping points to the purchasers' respective destinations. Except on orders from governmental agencies and railroad and marine accounts, Sherwin-Williams' price for less than carload quantities is the same as the purchaser's delivered cost only when the purchaser receives delivery at a shipping point or in the suburbs thereof or in contiguous locations thereto or in one of a very few cities which are accorded F. O. B. prices. Purchasers accepting delivery at or near any of Sherwin-Williams' shipping points obtain a lower delivered cost, but not price, than other purchasers

located farther, freight-wise, from the same shipping point or from any other shipping point having the same applicable price. Sherwin-Williams pays the freight on carload or truck load orders but, due to Sherwin-Williams position in the industry, there are relatively few such orders. Other respondents generally sell on a delivered price basis to all classes of customers in any quantity. To the extent that any purchaser from Sherwin-Williams pays any freight his total cost will not be the same as the total cost of similar purchases from such other respondents as sell on a delivered price basis even if there should be any identity of price quotations. Sherwin-Williams has not agreed to adopt and has not adopted or maintained a zoning system whereby price quotations made
665 by it to all purchasers of a class are matched to, or at a set or agreed differential below, the price quotations of any other respondent and differences in location and freight costs from shipping point to destination are disregarded. Sherwin-Williams' policy of charging freight on less than carload orders precludes a matching of its customers total cost with the delivered prices quoted by other respondents except in those cities where Sherwin-Williams maintains a warehouse and no freight cost is incurred and in those very few cities which are quoted on an F. O. B. basis. Further, there is not substantial identity of Sherwin-Williams' prices with the other respondents' prices to customers generally even in those cities or even where carload orders are involved."

The evidentiary facts, and reasons, supporting the foregoing findings are as follows:

As to Items 1 and 2:

Sherwin-Williams sells less than car or truck load quantities of its lead pigments on a shipping point system (Tr. 1318-1319, Tr. 4105-4106, Tr. 3704, Tr. 3754-3756). It has a number of warehouses in strategically located major cities throughout the United States from which it fills its orders (Tr. 3747, Tr. 3754-3756). In September 1939 there were 53 such shipping points (R. X. 198 A-H, C.X.662 Z21, Tr. 3756). Eight (Spokane and Seattle, Washington; Portland, Oregon; Sacramento, Santa Rosa, Los Angeles and Oakland, California and Phoenix, Arizona) are located in the far West (Tr. 3756, Tr. 3850). Sherwin-Williams' other 45 shipping points were strategically located in major cities east of the Rocky Mountains (5 in Texas; 3 each in Ohio and New York; 2 each in Minnesota, Missouri, Oklahoma, Florida, Tennessee, West Virginia, North Carolina and Pennsylvania; and one each in Colorado, Iowa, Nebraska, Louisiana, Alabama, Georgia, South Carolina, Kentucky, Illinois, Indiana, Michigan, Virginia, Maryland, New Jersey, Connecticut, Rhode Island, Massachusetts and Maine) (R.X. 198 A-H and C.X. 662 Z-21). The warehouse or shipping points in each district are named on the dealer cards used in such district (CX 662W, Tr. 3702). With certain exceptions hereinafter noted Sherwin-Williams ships all less than carload shipments from the shipping point nearest the purchaser on a collect basis or freight is prepaid and added to the invoice (Tr. 3758-3759, Tr. 3836-3838, Tr. 3842, Tr. 3849-3850, Tr. 3855, Tr. 4105-4106). The exceptions are:

(1) On all purchases by federal, state, county and municipal governments and agencies connected therewith, Sherwin-Williams pays the freight to destination because such purchasers will not buy on any basis other than a delivered one (Tr. 3746-3747, Tr. 3841-3842);

(2) On all purchases by railroad or marine accounts Sherwin-Williams pays the freight to the nearest point on the purchaser's line (Tr. 3747, Tr. 3842);

666 (3) On purchases for delivery at any one of its shipping points Sherwin-Williams makes no charge for delivery from its warehouse by its own truck or for cartage (Tr. 3756, Tr. 3768, Tr. 3776, Tr. 3836-3838);

(4) On purchases for delivery in Washington, D. C., Gadsden, Alabama, Pensacola, Florida, San Diego, California, Chattanooga, Tennessee or Salem, Oregon, Sherwin-Williams, under authority of its general office, pays the freight from shipping point to such destination (Tr. 3757-3758, Tr. 3852-3855, C.X. 782 F), but such cities are not classified as shipping points for other cities (Tr. 3759);

(5) On purchases for delivery to a suburb of or a contiguous location to, one of its shipping points or one of the six cities specified in item 4, Sherwin-Williams makes no charge for delivery from its warehouse by its own truck or for cartage (Tr. 3768-3769, Tr. 3836-3838), and

(6) Less than carload shipments in the eight far Western states appear to be handled differently from those elsewhere. Commission's Exhibit 782 D indicates that there

are several cities in each of these states in addition to those previously identified as being shipping points or as being within the free delivery area thereof to which deliveries may be made on an F.O.B. basis but there is no indication that they also serve as shipping points. Eight are in Montana, three each are in Washington and Idaho, two each are in Arizona and Utah, one is in Nevada and there are several in California (C.X. 782 D). A number of those in California are obviously within the respective free delivery areas of the Oakland and Los Angeles warehouses. Sherwin-Williams appears to have made flat price increases over the San Francisco price (C.X. 782 D). Apparently no other respondent has a similar system in effect on the West Coast.

In rare cases the shipment may not actually go from the nearest shipping point because of lack of stock (Tr. 3759, Tr. 3699-3700). In such cases the freight is adjusted and equalized between the points involved with the customer paying the difference (Tr. 3760, Tr. 3838-3840), but never more than if the shipment came from his normal shipping point (Tr. 3767-3768, Tr. 3839), since the location of the shipping points prevents this happening (Tr. 3768). Such equalization is not predicated upon any competitive situation (Tr. 3700). In a few instances, as an occasional accommodation to dealer customers with respect to special rush orders, Sherwin-Williams makes deliveries to such customers from stores which are not classified as shipping points and which do not carry warehouse stocks. The tabulation of 845 invoices (C. X. 794) reveals 44 instances of deliveries made from stores which were not shipping points. Fifteen shipments were made by the Salt Lake City & Ogden, Utah stores; fifteen by nine different stores in Texas of which twelve were local deliveries and fourteen by eight other stores of which eight were local deliveries. Local deliveries accounted for one-half of the total (C. X. 794, R.X. 205). If the customer is located in the same city as the store, there is no charge for such delivery
667 but if the customer is located in some other city then the shipment is made on a collect basis (Tr. 3844-3845, Tr. 3769).

The Commission prepared and introduced into evidence as C. X. 794 A-28 a tabulation of information taken from 845 white lead (dry and in oil in containers of 100 pounds, or less) invoices, during three separate three month periods, from all (C. X. 793, Tr. 887) of Sherwin-Williams' ten district offices to various destinations which, together with the time periods, were selected by the Commission's investigator (Tr. 887-891). The investigator who made this tabulation testified "we found that it was necessary to request that all invoices or house copies showing the sale and shipment of white lead be taken from the files of the divisional offices and sent to us as the white lead sales of the Sherwin-Williams Company were very insignificant as far as their total sales of other merchandise was concerned." (Tr. 836). Invoices covering shipments of white lead from all district offices during the three separate periods were submitted and examined (Tr. 887-889). Apparently the invoices not tabulated involved only small quantities of one to five pounds of white lead (Tr. 889). This tabulation did not show who actually paid the freight on the shipments (Tr. 894) so Sherwin-Williams prepared and introduced into evidence a tabulation (R. X. 205 A-X) which shows all information on the same invoices (except 12 which were missing) relative to identifying the method of shipment so far as payment of freight is concerned (Tr. 3771). This tabulation was also supplemented by uncontradicted testimony based both upon a physical examination of the original invoices during the hearing and upon the witnesses' knowledge of Sherwin-Williams' freight and shipping point policies. The examination of invoices was directed particularly to those which did not affirmatively show that the order was to be shipped collect or show the tonnage of the entire order was sufficient for a car or truck load, or the relative location of destination to shipping point (Tr. 3771-3804; Tr. 3836-3856, Tr. 4113). Thirty-three invoices involved governmental orders; 10 involved railroad or marine account orders; 336 (40% of total tabulated) involved deliveries in cities where Sherwin-Williams maintained warehouses; 8 involved deliveries in the six cities which were treated as F.O.B. points; 100 involved deliveries in suburbs or contiguous locations to cities in which Sherwin-Williams maintained warehouses; 4 involved freight equalizations arising through shipment from warehouses other than the one nearest to the customer and 213 invoices involved payment of freight by the respective customers (R.X. 205). In addition there was testimony to the effect that in connection with 16 invoices Sherwin-Williams policy as to charging freight on less than carload shipments was waived because of competitive necessity (Tr. 4104-4113). Excluding the invoices which involved deliveries within a city where Sherwin-Williams maintained a warehouse or in a suburb or contiguous area thereof more than 50% of the invoices involved payment of freight from shipping point by the purchasers thereof (R.X. 205 A-X).

668 When a customer's order amounts to a carload or truck load then Sherwin-Williams ships from its factory in Chicago and pays the freight (Tr. 3707-3709, Tr. 3746, Tr. 3756, Tr. 3840-3841), even though it may not be able to ship the entire order at one time (Tr. 4114). An examination of the 90 invoices wherein Sherwin-Williams paid the freight to destination because the order involved a carload order shows that the total amount of white lead involved in the entire 90 carloads was 225,241 pounds (113 tons) which is equal to between six and seven actual carloads. The largest amount in any one invoice was 4,050 pounds. What actually happened in these 90 instances is that the purchaser ordered a carload of paint products from Sherwin-Williams and the lead pigments included in the order amounted to a relatively small proportion thereof. For the convenience of the examiner in checking the accuracy of the foregoing statement we submit herewith as "Exhibit A" a tabulation of the invoices covering shipments where Sherwin-Williams paid the freight to destination because a carload order was involved which gives the invoice number and the total amount of white lead billed. Another tabulation has been prepared from the information shown on C.X. 794 A-Z8 to demonstrate the fact that Sherwin-Williams' participation in the lead business is largely restricted to small orders. Of the 845 invoices tabulated only 78 involved orders for 1000 to 2000 pounds of lead; only 52 involved orders for from 2000 pounds to 4000 pounds; only 11 involved orders for from 4000 pounds to 6000 pounds; only 6 involved orders for from 6000 pounds to 10,000 pounds and only 11 involved orders for as much as 5 tons and only 3 of these were for more than 5 tons (one for 15,000 pounds, one for 20,000 pounds, and one for 25,000 pounds). The facts as to the orders involving as much as 5 tons are as follows: one was a local delivery to a governmental agency from the St. Louis warehouse; one was a delivery from the Newark, New Jersey warehouse to the Bronx in New York City, which involved a free delivery area as part of metropolitan New York; three were shipments from the Oakland, California warehouse free alongside steamer dock in San Francisco; one

involved a shipment from the plant in Chicago to the United States Government at Fort Douglas, Utah; one involved a shipment from Chicago to a painting contractor in New Orleans, Louisiana and four involved local deliveries from the plant in Chicago to a governmental agency in Chicago. The tabulation has been designated as "Exhibit B". These two tabulations establish that in three separate three month periods selected by the Commission's staff, Sherwin-Williams (1) shipped only 113 tons of white lead in 100 pound or smaller containers which was delivered without a freight charge because it formed part of carload orders including paint products, and (2) shipped only eleven orders for as much as 5 tons of white lead in such containers.

The Commission contends that Sherwin-Williams' bulletins such as C.X. 662 C-D and C.X. 662 S-T serve the same purpose as a zone system but actually such bulletins 669 serve an entirely different purpose for Sherwin-Williams than C.X. 659 C-P (list of delivery, equalization and differential points) served for National before it adopted a zone system, Sherwin-Williams' bulletins were applicable only to the 226 cities in which it had retail stores while National used its list of more than 1000 cities as a guide in pricing its products to its customers generally. Since prior to 1924 (Tr. 1312, 1316-1317) Sherwin-Williams has circulated to its district sales staff and representatives in its own branch stores its General Trade Sales Bulletins (C.X. 594 A-B, C.X. 662 C-D, C.X. 662 G-H and C.X. 662 S-T) for the sole purpose of advising them as to the price differentials in effect on the date thereof "For Sherwin-Williams' warehouses and stores" (Tr. 3697). The same list is used for white lead in oil, dry white lead, dry red lead, red lead in oil and litharge (Tr. 1318). Such bulletins serve no purpose for quoting prices or making billings to any customers (Tr. 3697). Sherwin-Williams' roster of retail stores as of June 1, 1943 shows that Sherwin-Williams had 270 retail stores located in 245 different cities of the United States (C.X. 652 A-K). The Trade Sales Bulletin bearing the nearest date (May 21, 1942) lists the same cities but does not include those on the Pacific Coast (C.X. 594 A-B, C.X. 662 S-T). The roster of retail stores includes ten cities not shown on the bulletin but the roster is almost a full year later in date. Apparently, these ten cities are ones where no stores were operated by Sherwin-Williams in May 1942 but were in June 1943 (See C.X.

652 D, Emporia, Kansas is one of the ten). Stores were increasing in number as there were 322 on October 1, 1944 (C.X. 776). The bulletin includes eleven cities not listed on the roster. Five of them (Boston, Charleston, Minneapolis, Philadelphia and Sioux City) were warehouse points and were not classified as retail stores (C.X. 654). One is an obvious mistake in printing. (Danbury, Illinois is listed on bulletin and Danbury, Connecticut is listed on roster.) Apparently the other five (Fargo, Indianapolis, (which was a shipping point in 1939, R.X. 198 A), New York, Shreveport and Sioux Falls) represent stores closed between May 21, 1942 and June 1, 1943. A comparison of cities named on the roster of stores and warehouses (C.X. 652 A-K, C.X. 654) with those named on the bulletin (C.X. 594 A-B, C.X. 662 C-D, C.X. 662 S-T) supports Sherwin-Williams contention that such bulletins serve no purpose other than as above stated. These exhibits do not constitute a list of Sherwin-Williams shipping points (Tr. 3713-3714, Tr. 3846). Less than carload shipments to customers located in the cities listed on C.X. 662 S-T which are not shipping points are made on a freight collect basis from shipping point (Tr. 3850).

On December 30, 1932, National Lead began its system of selling white lead in oil through agents as well as through dealers and in the fall of 1933 expanded the system to cover all of the United States except the Pacific Coast (R.X. 158, C.X. 685, C.X. 706 D, C.X. 506 D-F). In 1933 Eagle-Picher began selling white lead in oil in the same manner (C.X. 712 A, C.X. 626-628). Glidden later adopted the consignment method for selling white lead in oil 670 (C.X. 649 A-C, C.X. 650 A-C). Apparently all abandoned the system later. Sherwin-Williams has never used the agency or consignment method of selling white lead in oil (Tr. 3701). A comparison of National's prices and Sherwin-Williams' prices for white lead in oil discloses substantial differences in the prices charged to those who purchased such products for resale. National's price announcements for this period are shown on respondent's Exhibit 158 and Sherwin-Williams' prices for the same period are shown on Commission's Exhibits 662 Z5 through 662 Z26. In January 1937 Sherwin-Williams' quotation to dealers in any quantity was 9¼¢ per pound but National's quotation ranged from 11½¢ per pound for less than 500 pounds to 10¾¢ per pound for 1000 pounds. In March 1937 Sherwin-Williams' quotation to dealers in any quantity was $9.80 per 100 pounds but National's quotation ranged from 12½¢ per pound to 11¾¢ per pound for 1000 pounds. In September 1937 Sherwin-Williams' quotation to dealers in any quantity was $9.75 per 100 pounds but National's quotation was $11.00 per 100 pounds. In all subsequent quotations both National and Sherwin-Williams quoted dealers only one price for any quantity and Sherwin-Williams' quotations were more than 1¢ per pound lower than National's. (October 1937, January 1938, March 1938, September 1938, February 1939, September 1939, April 1941 and January 1942). National's charge against its agents was always lower than its price to dealers (R.X. 158). Sherwin-Williams' dealers compete with both National's dealers and agents. Sherwin-Williams' lower quotation is offset to varying amounts since National's quotations are for delivery at the purchaser's destination and Sherwin-Williams' quotations are for delivery at a shipping point and the purchaser must pay the freight therefrom on less than carload orders. The result, therefore, is that the delivered price to a customer of National's and the delivered cost to a customer of Sherwin-Williams' varies with each transaction depending not only on the difference in prices but also on the amount of freight paid by Sherwin-Williams' customers. The delivered cost to Sherwin-Williams' dealers might even be higher than National's delivered price to its dealers. There is no satisfactory way to compare Sherwin-Williams' prices to its dealers and their delivered costs with the charges made by National against its agents because the two classes function so differently. Sherwin-Williams' dealers have to bear additional costs and assume additional risks which National's agents did not have to assume. (C.X. 613) The same relation existed as between Sherwin-Williams' dealer customers and the agents of Glidden (C.X. 650) and Eagle-Picher (C.X. 626-C.X. 631 F).

As to items 3 and 4 of subparagraph B of Paragraph Seven of Count I, Sherwin-Williams requests the following findings:

> "There is no evidence that Sherwin-Williams sought or secured, or agreed with any of the other respon-
> 671 dents to seek or secure, from Lead Industries Association, its officers, employees or agents any advice, assistance or cooperation in fixing, adopting, publishing or using non-competitive terms and conditions for the sale of lead pigments or that any representatives

of Lead Industries Association ever participated in any discussions concerning prices, price factors or terms and conditions of sale with Sherwin-Williams or any of its representatives subsequent to the meetings held during the Code days in 1933 and 1934. There is no evidence that the Association was ever used in any way by Sherwin-Williams to exchange price factors or information concerning such factors or that Sherwin-Williams ever furnished any of its prices or any price information to any other respondent or ever received any such information from such sources or that its prices and terms and conditions of sale of lead pigments in interstate commerce are not competitive."

The evidentiary facts, and reasons, supporting the foregoing findings are as follows:

Lead Industries Association was organized in 1928 as an unincorporated association (Tr. 996-997) and during the period involved its membership included more than fifty miners, smelters and refiners of lead and manufacturers of various lead products, including manufacturers of lead pigments (C.X. 498 A-K) (Tr. 997). Sherwin-Williams has been a member of the Association since its inception (C.X. 498 A-K, Tr. 1010) but has never been represented on its Board of Directors or Executive Committee. (Tr. 1011, C.X. 499 A-H). The White Lead in Oil and Dry Products Committees of the Association first became active in the summer of 1933 as a result of a meeting of the Lead Pigments Division on July 20, 1933, where there was discussion as to suitable trade practices to be included in the Supplemental Code (N.R.A.) (C.X. 506 C, C.X. 508 D, C.X. 799, Tr. 997). Sherwin-Williams was not represented at this meeting but was represented at subsequent meetings (C.X. 500 A, C.X. 501 A-D, C.X. 502 A-C, C.X. 504 A-B, C.X. 505 A-B, C.X. 800 A-C, C.X. 801 A-B, C.X. 803 and C.X. 805 A, Tr. 1330). Discussions of trade practices at these meetings were for the purpose of formulating acceptable rules for a supplementary code under N.R.A. (C.X. 508 D, also minutes of all meetings of two Committees). The activities of these Committees ceased in 1935 after the decision of the Supreme Court in the Schechter case (Tr. 998). The white lead group became active in the late 1930's in some promotional work to stimulate the use of white lead. (Tr. 998). Sherwin-Williams was not represented on this Committee (C.X. 500-B) and there is no evidence that Sherwin-Williams' representative in the Association ever took any part in any activity of this Committee or of the Association subsequent to May, 1935 (Tr. 1330). When the White Lead in Oil and Dry Products Committees were considering the provisions which would be submitted to the N.R.A. for inclusion 672 in a supplemental code for the industry, there was discussion and tentative action as to price filing provisions and as to standard terms and conditions for the sale of lead oxides (red lead and litharge) and dry white lead. (C.X. 501 A-D, C.X. 502 A-C, C.X. 504 A-B, C.X. 505 A-B, C.X. 800 A-C, C.X. 801 A-B, C.X. 803 and C.X. 805 A.) The Deputy Administrator of N.R.A. suggested a substitute price filing section (C.X. 518 A-B) which was Section 2 of Article VII and which was not approved by the industry. A less restrictive section was adopted and submitted to N.R.A. (C.X. 803). The Code, approved May 24, 1934 (C.X. 809), contained the price filing provision proposed by the industry (Art. VII, Sec. 2). A three month extension for beginning the enforcement of Art. VII, Sec. 2 and of Schedule "A" was requested and obtained (C.X. 507 C) and a further extension was requested in September 1934 (C.X. 507 A-M). There is no evidence they ever became effective. Sherwin-Williams has never filed any prices or price information in conformity with said Art. VII of the Code during Code days or thereafter (Tr. 2187-2188) and there is no evidence that it ever put Schedule "A" into effect in the sale of its lead oxides or dry white lead.

For many years some of the manufacturers of lead pigments have filed with Lead Industries Association monthly reports showing volume of sales, production and stocks on hand, but prices were never reported to the Association (Tr. 1083, Tr. 1330, C.X. 836 J). The report from the Association to the members did not in any case show individual shipments, production, or stocks on hand, and it merely gave an overall total combined figure for each respective category (Tr. 1330-1331, C.X. 670, C.X. 856 J). It did not issue any publication to the trade setting forth purported current market quotations on lead pigments (Tr. 1039), and it did not furnish information or quotations on lead pigments to any trade publication (Tr. 1040). Even though Sherwin-Williams can determine its own position, percentagewise, in the industry (Tr. 1331) by using such reports, there is no evidence that such reports furnished Sherwin-

Williams with information which it could use unlawfully in calculating, determining and announcing its quotations.

There is no evidence in the record that C.X. 525, which is a carbon copy of a letter under date of December 14, 1933, from Harold Rowe of National Lead Company addressed to Sherwin-Williams Company of Canada at 897 Centre Street, Montreal, Canada, was ever brought to the attention of the respondent, Sherwin-Williams Company; that the addressee of such letter was owned, controlled or dominated in any way by Sherwin-Williams Company; that the addressee had any relationship with National Lead Company other than that of a purchaser or that the letter involved any illegal exchange of information.

673 As to item 5 of subparagraph B of Paragraph Seven of Count I, Sherwin-Williams requests the following finding:

> "Sherwin-Williams did not adopt or use the agency or consignment method of selling white lead and did not conform to the terms and conditions used by such other respondents as did adopt and use such method."

The evidentiary facts, and reasons, supporting the foregoing findings are as follows:

The agency or consignment plan of selling white lead in oil was adopted by National in January 1933 (C.X. 685, C.X. 706 D, C.X. 506 D-F). About the same time Eagle-Picher adopted the plan (C.X. 712 A, C.X. 626, C.X. 627, C.X. 628). This plan was discussed at the meetings of the White Lead in Oil Committee held on August 9, 1933 (C.X. 501 A-D) and on October 28, 1933 (C.X. 505 A-B). On November 15, 1933, National put the plan into effect in all its branches, except the Pacific Coast Branch (C.X. 598, Tr. 1091). Eagle-Picher did likewise. (C.X. 629 A-C, C.X. 704.) Sherwin-Williams was opposed to the plan and openly so stated at the time (C.X. 506-E, C.X. 712 A), and never adopted or used the agency or consignment plan of selling (Tr. 3701).

As to item 6 of subparagraph B of Paragraph Seven of Count I, Sherwin-Williams requests the following finding:

> "Sherwin-Williams has not agreed with any of the other respondents to fix and include in its offers to sell lead pigments common prices, terms or conditions of sale for such products."

The evidentiary facts, and reasons, supporting such finding are set out in detail elsewhere herein in connection with requests for specific findings.

As to item 7 of subparagraph B of Paragraph Seven of Count I, Sherwin-Williams requests the following finding:

> "Sherwin-Williams did not not participate in or have any knowledge of any contracts or agreements between National Lead Company and DuPont."

In support of the foregoing finding it is merely necessary to state that there is no testimony or other evidence connecting Sherwin-Williams with any knowledge of, or participation in, the relations and contracts between National Lead and DuPont, nor is there any evidence from which any such inference can be drawn.

674 Paragraph Eight: With respect to the charges stated in Paragraph Eight of Count I, Sherwin-Williams requests the following finding:

> "In quoting and selling lead pigments in less than carload lots Sherwin-Williams has not divided the entire country into geographical zones whereby it quotes the same delivered cost to all buyers of the same class without regard to the location of such buyers or of the transportation costs involved."

The evidentiary facts, and reasons, supporting such finding are set out in connection with other specific finding requested as to each subparagraph.

As to subparagraph A of Paragraph Eight of Count I, Sherwin-Williams requests the following finding:

> "Sherwin-Williams does not quote or sell lead pigments in steel kegs of 100 pounds or less upon the basis of the geographical divisions and delivered cost differentials set out in the map inserted immediately following subparagraph A of Paragraph Eight of Count I and does not follow the pricing formula therein set forth."

The evidentiary facts and reasons supporting the foregoing finding are as follows:

The map included as part of subparagraph A of Paragraph Eight alleges that each respondent charges a premium of $.75 per 100 pounds over its base prices in Arizona, Utah, Idaho and Montana; a premium of $.25 per 100 pounds over its base price in California and the western

one-half (approximately) of Oregon and Washington and a premium of $.50 per 100 pounds over its base price in Nevada and the eastern one-half of Washington and Oregon (See map). The only price information from Sherwin-Williams' South Pacific Coast (Los Angeles) area is shown on Commission's Exhibits 785-790, inclusive, and 794 EFG. Sherwin-Williams' freight policy applies to the Pacific Coast as well as elsewhere (C.X. 785-790). Commission's Exhibits 785-786 and 790 are of no assistance because there is no evidence as to Sherwin-Williams' base prices for lead pigments during the periods involved. Commission's Exhibits 787 and 788 were put into effect on April 26, 1941, and remained in effect until January 26, 1942 (C.X. 789). At the same time Sherwin-Williams' General Trade Sales Bulletin No. 177 (C.X. 662 MN) was in effect in all areas but the Pacific Coast. A comparison of C.X. 787 and 788 with Commission's Exhibits 662 MN shows that the prices quoted for the various products do not conform at all to the formula charged. The base price for white lead in oil in 100 pounds kegs to dealers was $10.00 on C.X. 662 MN. Adding the differential of $.25 per 100 pounds charged in the Complaint would result in a California price of $10.25 to a dealer. However, the
675 lowest Los Angeles price was actually $11.75 (orders
for less than 500 pounds in 100 pound kegs). In Commission's Exhibits 662 MN the prices quoted for white lead in oil, dry white lead, red lead in oil, dry red lead and litharge vary greatly (at dealer level dry white lead is $9.25 per 100 pounds, dry red lead is $10.25 per 100 pounds and red lead in oil is $11.00 per 100 pounds), but in Commission's Exhibits 787 and 788 all lead pigments, with the exception of red lead in oil which is $1.00 per 100 pounds higher, were offered at the same price. A comparison between Commission's Exhibits 789 and 662 OP reveals the same situation. The Complaint charges that Arizona carries a differential of $.75 per 100 pounds over the base price (See map Paragraph Eight). Actually, Sherwin-Williams' price in Phoenix, Arizona is $.50 per 100 pounds over its actual price in Los Angeles, which is more than $.25 higher than its base price. Its price is still higher in other Arizona cities due to freight costs to purchasers on less than carload shipments from Phoenix (C.X. 787 and 788). Further, a comparison of C.X. 794-G (tabulation of Sherwin-Williams' invoices from the Los Angeles district

in the last three months of 1941) with C.X. 787 and 788 which were then in effect in that area, shows that of the 43 different listings, 34 conformed thereto exactly, 5 conformed to the price quoted for different classifications or for different amounts than actually shipped (Phx. 495, L.A. 13214, L.A. 7262, L.A. 12928 and L.A. 9573) and only 4 failed to conform (L.A. 10859(2), L.A. 7687 and 8653). Even these 4 did not conform to the formula charged in the Complaint.

Sherwin-Williams' price bulletins for Sherwin-Williams' Central Pacific Coast (Oakland) district are Commission's Exhibits 784 BDF, but, with the exception of C.X. 784 D which was in effect in the last three months of 1941, are of no assistance because there is no evidence as to Sherwin-Williams' base prices for lead pigments during the periods involved. Sherwin-Williams' General Trade Sales Bulletin of April 25, 1941 (C.X. 662 MN) was in effect during the same period except on the Pacific Coast. A comparison of these exhibits show that the prices quoted by the Oakland office of Sherwin-Williams for the various products do not conform to the formula charged. Dry white lead, white lead in oil, dry red lead and litharge carried the same price while red lead in oil was $1.00 per 100 pounds higher (C.X. 784 B, D. F). This price identity for such products did not exist in the East (C.X. 662MN). The dealer price for white lead in oil on C.X. 784 D was $11.50 per 100 pounds for less than 500 pounds and on C.X. 662 MN it was $10.00 per 100 pounds and the prices to painters and to retail purchasers, though different, were the same in both areas. A comaprison of C.X. 794 K, L, M and N (tabulation of Sherwin-Williams' invoices from the Oakland district) in so far as they reflect shipments for the last three months in 1941 with the prices quoted in that area during that period (C.X. 784 D) shows that of the 71 different listing 38 conformed exactly, 8 conformed to the prices quoted for other classifications or different amounts,
18 were the result of bids (where quoted prices are not
676 generally followed) and only 7 failed to conform. Further, the prices quoted in the Los Angeles district and in the San Francisco district were not the same, San Francisco being uniformly $.25 per 100 pounds lower according to bulletins in effect at the same time (C.X. 784D and C.X. 787). The price information from Sherwin-Williams' Portland, Oregon district does not furnish an entirely clear

picture of its pricing policy but does supply sufficient information to establish that its policy does not conform to the formula charged (C.X. 781 A-C and C.X. 662 OP). All lead pigments, except red lead in oil, carried the same price (C.X. 781 A-C) but this price identity did not exist in the East, litharge to dealers being $9.75 per 100 pounds and dry red lead $10.75 per 100 pounds and dry white lead and white lead in oil also varying (C.X. 662 O). Red lead in oil was $1.25 per 100 pounds more than white lead in oil in the East (C.X. 662 O) but only $1.00 more in the Portland area (C.X. 781 A-C). The entire price range for sales to dealers in the Portland district (C.X. 781 A-C) was more than $.25 and $.50 greater than the price range in effect in the East at the same time (C.X. 662-OP). This differential does not agree with the one charged. The offices at Los Angeles and Oakland, California and Portland, Oregon serve at least the eight far western states (C.X. 782 D). In 1941 Sherwin-Williams sold only 318 tons of white lead in oil on the Pacific Coast, some of which was purchased by Sherwin-Williams there from W. P. Fuller Company and from Premier Paint nad Color Works and a substantial portion was shipped from Sherwin-Williams' Chicago plant in mixed carload lots with paint. In the forty states east of the Rocky Mountains, Sherwin-Williams had 45 shipping points. (R.X. 198 A-H, C.X. 622 Z21). There are none in eleven states. (New Mexico, Wyoming, North Dakota, South Dakota, Kansas, Arkansas, Wisconsin, Mississippi, Delaware, Vermont and New Hampshire) The result is that in those eleven states there are no cities wherein Sherwin-Williams has any delivered price. Of course, governmental agencies and purchasers, if any, buying in carload quantities obtain delivered prices but all other purchasers in these states must pay the freight from shipping point to destination. Unquestionably some cities in one of these states will be served by one shipping point and others by another and the two shipping points may have different prices. In the other 29 states the customers located in the 45 shipping point cities or in areas contiguous thercto obtain delivered prices but purchasers in all other cities pay freight on less than carload orders. It is obvious, therefore, that the total cost to each purchaser from Sherwin-Williams varies (1) as to the price in effect at the shipping point which services the account, and (2) as to his relative distance, freightwise, from such shipping point. The price may be the same to two different customers yet they may have very different total costs due to differences in freight paid. The charge that Sherwin-Williams quotes on a delivered price basis according to the zones described in Paragraph Eight of Count I cannot be sustained.

677 As to subparagraph B of Paragraph Eight of Count I, Sherwin-Williams requests the following findings:

> "The record establishes that Sherwin-Williams has not engaged in the practice charged in so far as quotations and sales of less than car or truck load orders are concerned and there is no evidence that it has sold carload or truck load lots of dry white lead in barrels on the basis charged. Sherwin-Williams' sale of dry white lead, irrespective of type of container, are negligible."

The evidentiary facts, and reasons, supporting the foregoing findings are as follows:

Sherwin-Williams does not manufacture or sell lead sulphate (Tr. 1313). So far as Sherwin-Williams' practices in selling dry white lead in barrels and bags are concerned the record shows only that on January 28, 1942, Sherwin-Williams quoted this product on the Pacific Coast at a differential of $.25 per 100 pounds over its quotation throughout the rest of the country (C.X. 823 G); that this "Pacific Coast" area included all of the states west of the Rocky Mountains (Tr. 1325); that on February 5, 1943, it issued a quotation to the Federal Government for this product in lots of less than 20 tons (less than car lot) without any indication that such quotation involved any differential (C.X. 782 C), and that the relative position of Sherwin-Williams in shipments of dry white lead (irrespective of size or type of container) to customers in 1943 and for a considerable period prior thereto amounted to "practically nothing—less than one per cent" (Tr. 1331-1332). Sherwin-Williams' policy of requiring purchasers to pay freight on all less than carload orders from its nearest shipping point to destination applies to this product (Tr. 3746) and there is no evidence that any sales were made to customers whose less than carload purchases would fall within the recognized minor exceptions. The reasons why Sherwin-Williams' freight policy cannot result in the same delivered cost, as distinguished from price, to customers differently located, freightwise, from the shipping point have been set out in detail previously in support of findings requested under Paragraph Seven of Count I. Also, it has been shown that when any purchaser from Sherwin-Williams pays any freight his total cost will not be the same as the total cost of similar purchases by similarly located customers of such other respondents as sell on a delivered price basis. There is no evidence that Sherwin-Williams ever used the differential shown in C.X. 823 G in any previous or subsequent bulletin.

As to subparagraphs C and D of Paragraph Eight of Count I, Sherwin-Williams requests the following findings:

> "In quoting and selling dry red lead and litharge in barrels in less than carload lots Sherwin-Williams has
> 678 not quoted or sold said products to customers within the geographical areas described at the delivered cost alleged. In quoting dry red lead and litharge in barrels in carload lots of 20 tons or more it has not quoted such products at differentials over the American Smelting and Refining Company's closing price of common pig lead at New York on the date the order is received. Sherwin-Williams' sales of such products, irrespective of type or size of container, are negligible."

The evidentiary facts and reasons supporting the foregoing findings are as follows:

Sherwin-Williams produces dry red lead and litharge only in Chicago, Illinois (Tr. 1313) and its relative position in shipments of these products (irrespective of type of containers) to customers in 1943, and for many years prior thereto, ranged from less than 1% for litharge to "practically nil" for dry red lead (Tr. 1332). It does not sell either of these products on the Pacific Coast (Tr. 1314, Tr. 1324, Tr. 2066), which includes all of the states west of the Rocky Mountains (Tr. 1325) and is not an important factor in the sale thereof elsewhere (Tr. 1648). For at least twenty years Sherwin-Williams has not manufactured red lead or litharge for use by the battery manufacturing industry (4070) and is not a competitor in that field (Tr. 1648) which was an increasingly important one prior to war time restrictions (Tr. 1640, Tr. 4093). While Sherwin-Williams sells oxides in carload lots (Tr. 1327), there is no evidence in the record that Sherwin-Williams has made carload shipments of red lead or litharge, other than shipments to its own plants, to any point which carries a differential above its own base price (Tr. 2066). Its sales of litharge are confined almost entirely to points in the Chicago area with a few isolated shipments to Kentucky and Ohio (Tr. 2066).

The only evidence in the record relative to Sherwin-Williams' practices in selling red lead and litharge in barrels or bags on either a carload or less than carload basis is C.X. 823 A-F and C.X. 782 C and the stipulation at pages 2065-2066 of the record. Sherwin-Williams' policy of requiring purchasers to pay freight on less than carload orders from its nearest shipping point to destination applies to these products (Tr. 3746). The reasons why Sherwin-Williams' freight policy as to less than carload orders cannot result in the same delivered cost, as distinguished from price, to customers differently located freightwise from a shipping point have been previously discussed. Also, it has been demonstrated previously that when any purchaser from Sherwin-William pays any freight his total cost will not be the same as the total cost of similar purchases by similarly located csutomers of such other respondents as sell on a delivered price basis. There is no evidence that any sales were made to customers whose less than carload purchases would fall within the minor exceptions to Sherwin-Williams' policy of requiring 679 the purchaser to pay the freight from Sherwin-Williams' nearest shipping point to destination on all less than carload shipments.

There is uncontradicted evidence that Sherwin-Williams does not sell oxides on set differentials over the American Smelting and Refining Company's price of common pig lead at New York as alleged (Tr. 1328), but quotes its price therefor on a differential over the New York market quotation for pig lead (Tr. 1328). There is no evidence that Sherwin-Williams did not use this system before 1933. Sherwin-Williams has produced 95%, 97% and 98% red lead since 1932 at least (Tr. 3870), and in the past few years has quoted 97% at 25¢ per 100 pounds over the price of 95% and has quoted 98% at 50¢ per 100 pounds over the price of 95% (C.X. 823 F, C.X. 782 C, Tr. 2065). There is no evidence that Sherwin-Williams adopted the policy of quoting these three grades at different prices prior to January 14, 1942 (C.X. 823 F) and there is no evidence it was done then as a result of any agreement or understanding with any other respondent. The sole difference between the three grades is the extent to which oxidation has been completed (Tr. 3870) and this is accomplished by a longer burning for the two higher grades. (Tr. 3871, Tr. 3877-3878). Sherwin-Williams made studies as to the relative length of time required to burn the different grades (Tr. 3871) then ascertained the comparable production costs (R.X. 209) without regard to overhead burden (Tr. 3874-3882). It was found that the respective differentials quoted by Sherwin-Williams for 97% and 98% red lead were less in each case than the additional cost of producing such grades over the cost of producing 95% red lead (R.X. 209, Tr. 3881).

Paragraph Nine: With respect to the charges stated in subparagraph A of Paragraph Nine of Count I Sherwin-Williams requests the following findings:

> "Sherwin-Williams does not require its customers to resell lead products at prices and terms of sale fixed, determined and published by it and does not control and is not responsible for price levels to consumers or painters except to the extent that consumers and painters purchase their requirements of such products direct from Sherwin-Williams either through its general office or through its retail stores."

The evidentiary facts, and reasons, supporting the foregoing findings are as follows:

In accordance with the policy set by Sherwin-Williams' officials, it has been, and is, the regular practice of Sherwin-Williams in making retail sales of white lead, through and at its own stores (270 in United States on June 1, 1943—C.X. 652 A-L) (321 on October 1, 1944—C.X. 776 A-L), to quote and charge the published delivered prices which were applicable at each such destination (Tr. 680 869-870) as exemplified by C.X. 662 S-T. There is no evidence that Sherwin-Williams ever adopted or used any so-called "Fair Trade Contracts" or took any action to control the resale price of any lead pigment to painters or consumers except in retail stores which it owned and operated. Bulletins such as C.X. 594 A-B, C.X. 662 C-D, C.X. 662 G-H and C.X. 662 S-T, do not contain consumer prices and they are furnished only to Sherwin-Williams' district sales staff and to representatives in its own branches (retail stores owned by Sherwin-Williams) and serve no other purpose (Tr. 3697). Bulletins of the type exemplified by C.X. 662 K-L obviously are not circulated to dealers or others outside Sherwin-Williams' organization because they show prices to dealers and also prices to various classes of customers sold directly by Sherwin-Williams. It never adopted or used the agency plan of selling (Tr. 3701). Sherwin-Williams does furnish to dealers price announcements (Tr. 3696) which suggest to such dealers certain resale prices for white lead in oil (C.X. 662 W-Z26), but not for any other lead pigments and there is no evidence that such dealers felt under any compulsion to, or did, follow such suggestion in reselling or that Sherwin-Williams possessed, or exercised, any power to enforce such suggestions or policed its dealers.

With respect to the charges stated in subparagraph B of Paragraph Nine of Count I Sherwin-Williams requests the following finding:

> "The record contains no evidence that Sherwin-Williams' price differentials, based on the size of containers, were instituted or maintained as a result of any agreement or understanding with any other respondent."

The evidentiary facts, and reasons, supporting the foregoing finding are as follows:

On December 28, 1936 Sherwin-Williams announced that white lead in oil in 50 pound kegs would cost one fourth a cent per pound more than in 100 pound kegs, in 25 pound kegs would cost one-half a cent per pound more and in 12½ pound pails would cost three-fourths a cent per pound more (C.X. 662 E). The price list issued to the trade on January 4, 1937, confirmed this price structure (C.X. 662 Z5). From at least as early as January 6, 1933, which was prior to the meetings held to formulate a code, until January 4, 1937, Sherwin-Williams maintained the same structure except that there was no differential between 50 pound and 25 pound containers. (C.X. 662 W-Z3).

Sherwin-Williams made an analysis of its 1938, 1940 and 1943 contracts for white lead in oil containers and ascertained the actual cost of 100 containers and covers in each of the sizes involved, i.e., 100's, 50's, 25's and 12½'s.
681 The container cost per 100 pounds of material was then computed. The cost of one container for 100 pounds of material was less than the cost of a sufficient number of the smaller size containers for 100 pounds of

material. In only two instances was the differential charged greater than the difference in actual container cost alone and in these two instances the cost was only three cents less than the differential (R.X. 210, Tr. 3882-3885). This cost analysis is also applicable to containers for red lead in oil as they are the same (Tr. 4112). In addition, filling and finishing costs increase as the size of the container decreases (Tr. 3885-3886). The N.R.A. Code contained no provision relative to this subject (C.X. 809). At one meeting there was some discussion as to a differential over barrel prices for 100 pound, 50 pound and 25 pound containers on government, railroad and industrial sales only but no decision appears to have been reached and the differentials discussed were not the ones actually used by Sherwin-Williams from 1933 to 1937 (C.X. 800C).

With respect to the charges stated in subparagraph C of Paragraph Nine of Count I, Sherwin-Williams requests the following findings:

> "So far as requirements contracts are concerned the record shows only that for many years Sherwin-Williams has entered into contracts with purchasers of dry white lead covering quarterly requirements and that Sherwin-Williams does not enter into contracts covering quarterly requirements of dry red lead or litharge. The record contains no published quotations by Sherwin-Williams for dry white lead under such contracts and there is no evidence as to how its price was determined or as to what the terms or conditions of such contracts were. There is no evidence that the quotations of A.S.&R. Co. were used by Sherwin-Williams as a basis for its prices or that the terms and conditions of its contracts were in any way similar to those of the other respondents."

In view of the character of the finding requested it is necessary to refer only to page 1326 of the record. The affirmative portion of the finding is there supported.

With respect to the charges stated in subparagraph D of Paragraph Nine of Count I, Sherwin-Williams requests the following finding:

> "Sherwin-Williams does not issue cards or lists of the types charged which show delivered quotations to various classes of customers and which include the quotations which such purchasers must make in re-

selling such products to consumers or others. Sherwin-Williams does not issue any price cards which provide a formula whereby all prospective customers 682 at any given destination are presented with price quotations which are matched to, or at a set differential below, the price of other respondents for the same quantities, in the same containers, to the same classes of customers."

The evidentiary facts, and reasons, supporting the foregoing finding have been set out in detail in connection with the supporting facts and reasons urged under Items 1 and 2 of Paragraph Seven, under subparagraph A of Paragraph Eight and under subparagraphs A and B of Paragraph Nine. Briefly summarized they are:

1. Sherwin-Williams sells on a basis of shipping points from which the purchaser pays freight to destination.
2. Sherwin-Williams does not sell lead pigments in containers of 100 lb. capacity or less throughout the United States on a zone basis without regard to freight costs.
3. Sherwin-Williams does not have agents and does not use "Fair Trade" contracts with dealers so is unable to, and does not, control the prices obtained in sales by such dealers.
4. Sherwin-Williams has explained and justified its reason for certain differentials as to container sizes.
5. Sherwin-Williams does control the resale price obtained in transactions taking place in the retail stores it operates but not elsewhere.
6. Sherwin-Williams places only one type of price card in the hands of its dealers and the prices therein shown are merely "suggested" and no action is threatened or taken to secure adherence thereto.
7. The shipping point system used by Sherwin-Williams cannot result in the same total cost to Sherwin-Williams' customers as that for similarly situated customers of such respondents as quote and sell on a delivered price basis.

Sherwin-Williams issues to dealers in its products price announcements which show its prices for white lead in oil to such dealers and which also contain suggested resale prices therefor to consumers and to painters. (Tr. 3696, Tr. 3700-3701, C.X. 662 W-Z26). These lists show the F.O.B. prices applicable at the several shipping points listed. When deliveries are to be made to destinations other than such shipping points the price quoted is F.O.B. the shipping point and the purchaser pays the freight therefrom to destination. There is no evidence that Sherwin-Williams places any other type of price announcement in the hands of dealers or makes any suggestions (other than as to white lead in oil) to such dealers relative to their resale price to consumers, painters or any other purchasers.

683 **Paragraph Ten:** With respect to the charges stated in Paragraph Ten of Count I, Sherwin-Williams requests the following findings:

> "Sherwin-Williams does not use the systematic method of quoting delivered costs on lead pigments described in Paragraphs Eight and Nine of Count I for the purpose or with the effect of enabling it to match exactly its offers to sell lead pigments with the offers of the other respondents herein. Sherwin-Williams does not quote lead pigments on a delivered cost basis. It delivers carload orders and orders by governmental agencies free of delivery cost and also delivers orders where the destination is one of Sherwin-Williams' fifty odd shipping points or a contiguous location thereto or one of the few cities accorded an F.O.B. policy free of delivery costs, but, in general, its customers who are located away from the shipping point by which they are serviced must pay the freight from such shipping point to destination. Sherwin-Williams does not systematically discriminate against purchasers located near its various shipping points in favor of customers located, freightwise, at a considerable distance therefrom."

The evidentiary facts and reasons supporting the findings requested are set forth in detail in connection with the specific findings requested in Paragraphs Seven, Eight and Nine hereof and are incorporated herein by reference.

Paragraph Eleven: With respect to the charges stated in Paragraph Eleven of Count I, Sherwin-Williams requests the following findings:

> "Sherwin-Williams has not adopted, used or maintained the zone delivered system of pricing described

> in subparagraph A of Paragraph Eight of Count I. The system adopted, used and maintained by Sherwin-Williams in selling lead pigments does not have the effects alleged in subparagraphs A, B and C of Paragraph Eleven. Sherwin-Williams has not voluntarily or reciprocally surrendered or cancelled any inherent advantage within any territory in consideration of a similar surrender and cancellation of a similar advantage by other respondents. The various respondents have different delivery costs in shipping lead pigments to their respective csutomers which is attributable primarily to the location of the plants of the various respondents. In approximately 80% of the United States respondents other than Sherwin-Williams have a freight advantage. In that portion of the United States closer to Chicago, freightwise, than to cities wherein other lead pigment plants are located, all of the respondents who have plants in Chicago or in the Chicago switching area are on an
> 684 equal footing freightwise. Since Sherwin-Williams' only plant for producing either white lead or red lead and litharge is located in Chicago, it has no territory within which it has a freight advantage."

Some of the evidentiary facts and reasons supporting the finding requested are set forth in detail in connection with the specific findings requested in Paragraphs Seven, Eight and Nine hereof. Other evidentiary facts, and reasons, supporting the findings requested are as follows:

National Lead Company is the largest producer of white lead (dry and in oil), red lead (dry and in oil) and litharge. During the period denominated by Trial Counsel for Commission as the "normal period" from 1936 to 1941, National Lead produced over 60% of the white lead in oil, from 30% to 35% of the dry white lead and 50% of the red lead and litharge (C.X. 578, C.X. 664, Tr. 1647, Tr. 1665-1666). Its white lead plants are located in Perth Amboy, New Jersey; Philadelphia, Pennsylvania; Chicago, Illinois (where it produces 40% of its white lead); St. Louis, Missouri; and Oakland, California (Tr. 1071-1072). It produces red lead and litharge in plants located in Brooklyn, New York; Philadelphia, Penna.; Charleston, West Virginia; St. Louis, Missouri; Chicago, Illinois; Dallas, Texas; Atlanta, Georgia and Los Angeles and San Francisco, California (Tr. 1625). For the period from

1930-1946 Eagle-Picher produced from 15% to 20% of the white lead in oil and approximately 10% of the dry white lead (Tr. 1560-1561). Eagle-Picher produced white lead in its plant in Cincinnati, Ohio (plant recently dismantled) and red lead and litharge in Joplin, Missouri and Newark, New Jersey (Tr. 1552, Tr. 1564). In 1943 Glidden produced between 8% and 9% of the white lead in oil and approximately 15% to 18% of the dry white lead (Tr. 1307-1308). It produces red lead and litharge at Hammond, Indiana, which is in the Chicago switching area and produces white lead at Scranton, Pennsylvania (Tr. 1230-1233). In the period from 1937-1943 International Smelting & Refining Company sold from 3% to 4% of the white lead in oil and from 10% to 19% of the dry white lead (C.X. 741, C.X. 822-J). These products were manufactured at its plant in East Chicago, Indiana, which is within the Chicago switching area. International Smelting & Refining Company discontinued production and sale of white lead and on October 1, 1946 sold its plant at East Chicago, Indiana to Eagle-Picher so that Eagle-Picher now has a plant located in the Chicago area for the production of white lead.

Sherwin-Williams prepared and introduced in evidence as R.X. 199 a map which shows the areas within which each plant may ship white lead (dry and in oil) at a freight advantage over any other white lead plant on the basis of carload and less than carload railroad freight rates in effect on January 15, 1941 (Tr. 3721-3732). An
examination of this exhibit clearly shows that Na-
685 tional Lead's Oakland, Saint Louis and Philadelphia
plants have a freight advantage over any other white lead plant in a major portion of the United States. Eagle-Picher's Cincinnati white lead plant had a freight advantage over any other white lead plant in a substantial area while in operation. Glidden's white lead plant in Scranton, Pennsylvania has a freight advantage over any other white lead plant in the major portions of Pennsylvania and New York. National Lead has a white lead plant in the New York City area and therefore has a freight advantage in New England and the lower portion of New York State over any other plants. National Lead, International Smelting & Refining Company's plant (now owned by Eagle-Picher) and Sherwin-Williams all have the same freight advantage in an area surrounding Chicago. The

net result is that Glidden has a freight advantage in some territory, Eagle-Picher had a freight advantage in some territory and National Lead has a freight advantage in some territory but Sherwin-Williams has no advantage in any territory. This is due to the fact that National Lead and Eagle-Picher (since its acquisition of International Smelting and Refining Company's plant) both have white lead plants in Chicago where Sherwin-Williams' sole plant is located and also have one or more plants elsewhere. A similar map relative to red lead (dry and in oil), was introduced as R.X. 200 (Tr. 3732-3740). The map is equally applicable to litharge. An examination of this exhibit shows that in a major portion of the United States, National Lead has a freight advantage over other red lead and litharge plants due to the fact that it operates nine red lead and litharge plants strategically placed throughout the whole United States. Eagle-Picher has a freight advantage in part of the country by reason of its plant at Joplin, Missouri. National, Glidden and Sherwin-Williams all have red lead and litharge plants in Chicago so they share any freight advantage accruing to Chicago over St. Louis, Missouri; Charleston, West Virginia and Oakland, California, in all of which cities National Lead has plants. Sherwin-Williams has only six shipping points (Detroit, Indianapolis, Minneapolis, Duluth and Sioux City) in the area where Chicago has a freight advantage over other cities in which lead pigment plants (either white lead or red lead and litharge) are located. In shipping lead pigments to each of its other more than 45 shipping points or to areas served by such shipping points, Sherwin-Williams is at a freight disadvantage to one or more of the other respondents. The identity of the specific producer who has the advantage over Sherwin-Williams in each such situation will vary depending upon which one has a plant located closer, freightwise, to such shipping point than Sherwin-Williams' plant at Chicago. In those instances where Sherwin-Williams ships direct from Chicago to purchasers without charging any freight (irrespective of quantity), it is at a disadvantage, freightwise, to at least one of the other respondents in the entire United States except North and South Dakota, Iowa, Minnesota, Wisconsin, Michigan and the northern parts of Illinois, Indiana and Ohio, and even in this area it does not have an advantage, freightwise, over all other respondents.

686 Paragraph Twelve: With respect to the charges stated in Paragraph Twelve of Count I, Sherwin-Williams requests the following finding:

> "Sherwin-Williams has not engaged in any unlawful combinations, agreements or understandings with any of the other respondents and its acts, practices, pricing methods, systems, devices and policies in selling lead pigments are not unfair and prejudicial to the public interest; do not deprive the public of the benefit of competition; do not discriminate against buyers or users of lead pigments and lead paint; do not have a dangerous tendency and capacity to restrain commerce in said products and have not actually hindered, frustrated, suppressed or eliminated competition in such products in commerce. Sherwin-Williams has not engaged in unfair acts or practices or unfair methods of competition within the intent and meaning of Section 5 of the Federal Trade Commission Act."

The evidentiary facts and reasons supporting the finding requested are set forth in detail in connection with the specific findings requested in Paragraphs One through Eleven, inclusive.

All evidentiary facts and reasons relied upon in Paragraphs One through Twelve, inclusive, as supporting specific requested findings are also relied upon, without specific reference, as support for all other findings requested. By setting forth such evidentiary facts and reasons specifically in connection with one requested finding, it is not intended to waive reliance upon such facts and reasons to the extent they support any other requested findings.

Count II.

Paragraph One: With respect to the charges stated in Paragraph One of Count II, Sherwin-Williams requests the following finding:

> "Sherwin-Williams has not violated the provisions of Section 2(A) of an Act of Congress approved October 15, 1914, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and For Other Purposes", as amended by an Act of Congress, approved June 19, 1936, commonly known as the 'Robinson-Patman Act'."

The evidentiary facts and reasons supporting the finding requested are set forth in detail in connection with the specific findings hereinafter requested.

Paragraph Two: With respect to the charges stated in Paragraph Two of Count II, Sherwin-Williams requests the following finding:

687 "Sherwin-Williams has not and is not now unlawfully discriminating as between its customers in the prices it charges, demands, accepts and receives in connection with the sale of lead pigments in commerce."

The evidentiary facts, and reasons, supporting the finding requested are set forth in detail in connection with the specific findings hereinafter requested.

Paragraphs Three to Five, inclusive: With respect to the charges stated in Paragraphs Three to Five, inclusive, of Count II, Sherwin-Williams requests the same findings as it has heretofore requested in connection with Paragraphs Three to Five, inclusive, of Count I and relies upon the same evidentiary facts and supporting reasons therefor as previously set out in connection with its said requested findings.

Paragraph Six: With respect to the charges stated in Paragraph Six of Count II, Sherwin-Williams requests the following finding:

> "In its sale of lead pigments in commerce, as commerce is defined in the Clayton Act, as amended by the Robinson-Patman Act, Sherwin-Williams has not been since June 19, 1936, and is not now, discriminating in price between purchasers of lead pigments of like grade and quality by systematically selling such lead pigments to many purchasers at a price higher than the price at which it sells the same products, or products of like grade and quality, to other competitively engaged customers."

The evidentiary facts and reasons supporting the foregoing requested finding are as follows:

The only testimony in the record from purchasers of lead pigments relative to the competitive effect upon their respective business operations of the pricing practices of the various respondents is that of battery manufacturers located in St. Louis, Missouri; Chicago, Illinois; Kansas City, Missouri; Nashville, Tennessee; Birmingham, Ala-

bama; and Dallas, Texas, who buy red lead and litharge, and that of certain paint manufacturers located in St. Louis, Missouri who primarily buy dry white lead but also buy small amounts of dry red lead. Each of the battery manufacturers who was called as a witness named his own suppliers for red lead and litharge and none of them named Sherwin-Williams (Tr. 1672-2018). Sherwin-Williams does not sell red lead and litharge to the battery manufacturing industry (Tr. 1648, Tr. 4070) and, consequently, the testimony of battery manufacturers as to any pricing practices of suppliers to their industry forms no criterion as to what the effect of Sherwin-Williams' pricing practices may be in those industries to which it does sell
688 red lead and litharge. Similarly, the paint manufacturers who were called as witnesses identified their respective sources of supply and none of them named Sherwin-Williams as a supplier (Tr. 1338-1478). Sales of lead pigments to paint manufacturers are generally made on a contract basis. The record affirmatively shows that Sherwin-Williams did not have any white lead, litharge or red lead contracts in St. Louis during the specific periods concerning which Counsel for the Commission inquired (Tr. 1320). There is no evidence in the record that Sherwin-Williams sold lead pigments to any of the competitors named by the paint manufacturer witnesses. In fact, there is no evidence identifying a single sale by Sherwin-Williams of white lead (dry and in oil) in containers larger than 100 pound kegs or of red lead (dry and in oil) or litharge in containers of any size to any specific purchaser or class of purchasers. Obviously, Sherwin-Williams has sold such products in interstate commerce but there is not a scintilla of evidence to the effect that such products have been sold to any specified class of customers, particularly paint manufacturers. Even if sales at different prices are established there must be a showing that the respective purchasers are in the same general line of business and operate in the same trade area. This has not been done. There must also be evidence that price difference was great enough to have a competitive effect for there to be a discrimination. No attempt was made to produce such evidence except as to battery and paint manufacturers where the products being bought are used by the purchasers in manufacturing their own end products. An amount which might cause that result in that one in-

dustry might not cause it in another. No analogy can be drawn without some comparative basis. Sherwin-Williams has the smallest volume of sales of lead pigments of any respondent so its sales practices could hardly harm any of its competitors. Sherwin-Williams sells primarily to those who use lead pigments in maintenance of their plants and equipment such as railroads, steamship lines, industrial concerns and governmental agencies. The respective lines of commerce of these users can hardly be said to be adversely affected to any appreciable, much less substantial, extent by Sherwin-Williams pricing practices no matter what they might be. At any event such result cannot be inferred from a complete lack of testimony relative thereto. Sherwin-Williams also sells to dealers for resale and to contracting painters for use in doing painting jobs under contract. There is no evidence that Sherwin-Williams has sold to purchasers in either class at a discriminatory price over its price to others who are competitive with such purchasers. In view of this state of the record, how can any inference be made or conclusion drawn as to what competitive effect may be produced by Sherwin-Williams' selling practices? Certainly no inference can be made that there has been a discrimination in price between purchasers competitively engaged when there has been no showing whatever as to what types of purchasers buy white lead (dry and in oil) in containers larger than 100 pound kegs, red lead (dry and in oil) and litharge from Sherwin-Williams. In so far as sales of lead pigments in containers of 100 pounds or less is concerned, there
689 is no evidence that the purchasers to whom Sherwin-Williams sells such products at different prices are competitors. This cannot be assumed from the record. The contrary should be assumed because all purchasers serviced by the same shipping point are quoted the same price. The location of the shipping points reveals that each of them serves a substantial territory. There is no evidence that the sale of lead pigments in containers of 100 pounds or less by dealers who purchase from Sherwin-Williams covers any substantial territory or overlaps the territory of any other dealer purchasing such products at a different price.

Paragraph Seven: With respect to the charges stated in Paragraph Seven of Count II, Sherwin-Williams requests the following finding:

"The record establishes that Sherwin-Williams has

> not engaged in the practice charged in so far as quotations and sales of less than carload orders are concerned. In connection with the sale of lead pigments in containers of 100 pounds or less capacity, Sherwin-Williams has not divided the entire territory of the Continental United States into the geographical zones alleged in Paragraph Eight of Count I and in the map appearing immediately in conjunction therewith for pricing purposes. While Sherwin-Williams sometimes uses a zone system (but not a delivered price system except for carload orders) for quoting such lead pigments as it does sell in containers of more than 100 pounds capacity, the record contains no evidence of any sales of such products in such containers to any customers located in any territories which carry an added differential or at varying prices to customers who are in competition with each other."

The evidentiary facts and reasons supporting the finding requested are set forth fully herein in Paragraphs Seven, Eight and Nine under Count I and in Paragraph Six under Count II and are incorporated herein by reference to the same extent and effect as if such facts and reasons were set forth in full and repeated verbatim hereat.

Paragraph Eight: With respect to the charges stated in Paragraph Eight of Count II, Sherwin-Williams requests the following finding:

> "Sherwin-Williams does not quote prices in its offers to sell in interstate commerce and does not sell in interstate commerce on a basis where the delivered cost on a specified quantity of lead pigments to any one of its customers located at or near its shipping point amounts to as much as the delivered cost on the same quantity of lead pigments to other customers located farther, freightwise, from the same shipping 690 point, except in those few instances where carload shipments are involved and Sherwin-Williams pays the freight irrespective of the location of the purchaser and in transactions with governmental agencies. Sherwin-Williams' carload shipments of lead pigments are negligible but occasionally relatively small amounts of lead pigments are shipped in connection with carload orders of paint products on which Sherwin-Williams pays the freight irrespective of

the customers' location. Transactions with governmental agencies are not subject to restrictions of the Clayton Act, as amended by the Robinson-Patman Act."

The evidentiary facts, and reasons, supporting the foregoing finding requested are set forth fully in connection with the finding requested in Paragraphs Seven, Eight and Nine under Count I and are also incorporated herein by reference to the same extent and effect as if such facts and reasons were set forth in full and repeated verbatim hereat.

Paragraph Nine: With respect to the charges stated in Paragraph Nine of Count II, Sherwin-Williams requests the following finding:

> "Sherwin-Williams does not effect sales in less than carload lots in accordance with the zone delivered pricing method and practice described in Paragraph Eight of Count I and buyers from it do not pay in accordance with quotations of delivered costs matched with delivered prices quoted by other respondents. Sherwin-Williams does not discriminate in price in favor of more distantly located customers who are competitive with customers more closely located to its shipping points."

The evidentiary facts, and reasons, supporting the finding requsted are set forth fully herein in Paragraphs Seven, Eight and Nine under Count I and are also incorporated herein by reference to the same extent and effect as if such facts and reasons were set forth in full and repeated verbatim hereat.

Paragraph Ten: With respect to the charges stated in Paragraph Ten of Count II, Sherwin-Williams requests the following finding:

> "Sherwin-Williams does not make sales on less than carload orders to customers on the basis of a zone delivered pricing method and practice. Consequently, it does not make sales in such quantities to customers located at or near borders of adjoining or contiguous zones. There is no evidence that any of Sherwin-Williams' customers who are competitive with other of its customers pay prices different from the prices paid to Sherwin-Williams by such competitive customers."

691 The evidentiary facts and reasons supporting the foregoing finding requested are set forth in connection with the finding requested in Paragraph Six hereof under Count II and in connection with the findings requested in Paragraphs Seven, Eight and Nine hereof under Count I and are also incorporated herein by reference to the same extent and effect as if such facts and reasons were set forth in full and repeated verbatim hereat.

Paragraph Eleven: With respect to the charges stated in Paragraph Eleven of Count II, Sherwin-Williams requests the following finding:

> "In connection with the sale of lead pigments in commerce, Sherwin-Williams does not charge, demand, accept or receive higher prices from any of its customers than from other competitively engaged customers. There is no evidence that dealer customers of Sherwin-Williams serviced by shipping points having a different price applicable thereat are engaged in competition with each other."

The evidentiary facts, and reasons, supporting the foregoing requested finding are as follows:

Since December 28, 1936, Sherwin-Williams has had only one class of dealers and has made no distinction between any of its dealer customers except such distinction as may arise by reason of dealers being serviced by shipping points having different prices applicable thereat (C.X. 662 E-F, C.X. 662 I-R, C.X. 662 U-V). There is no evidence that such dealers as may pay different prices are in competition with each other. Sherwin-Williams has classified certain customers who purchase for use rather than resale into the following classifications:

(1) Contracting painters and large maintenance accounts sold direct;

(2) Industrial accounts (including public utilities, privately-owned street railways, petroleum industry);

(3) Railroad and marine accounts;

(4) Federal Government, States and Municipalities, and municipally-owned street railways and W.P.A. accounts, and

(5) Small consumers.

Obviously, the members of these classifications are not competitive in any way with the members of any other classification or with dealers. They use lead pigments purchased from Sherwin-Williams in maintenance of their plants and properties and not for resale either in the same form or as a substantial component of another product. Sherwin-Williams' stores are billed by it on the same basis as its dealers and such stores resell at the consumer prices set by Sherwin-Williams (Tr. 3709).

692 Paragraph Twelve: With respect to the charges stated in Paragraph Twelve of Count II, Sherwin-Williams requests the following finding:

> "Sherwin-Williams does not match its offer to sell lead pigments in commerce to prospective dealer purchasers at all, or any substantial number of, destinations at, or at a fixed differential below, the offers of other respondents."

The evidentiary facts, and reasons, supporting the requested finding are set forth fully herein in Paragraphs Seven, Eight and Nine under Count I and are also incorporated herein by reference to the same extent and effect as if such facts and reasons were set forth in full and repeated verbatim hereat.

Paragraph Thirteen: With respect to the charges stated in Paragraph Thirteen of Count II, Sherwin-Williams requests the following finding:

> "Pricing practices followed by Sherwin-Williams have not had the effects alleged in subparagraphs A, B, and C of Paragraph Thirteen."

The evidentiary facts, and reasons, supporting the requested findings are set forth in detail in connection with the specific findings requested in Paragraphs Seven, Eight, Nine and Eleven under Count I and in Paragraph Six under Count II and are also incorporated herein by reference to the same extent and effect as if such facts and reasons were set forth in full and repeated verbatim hereat.

Paragraph Fourteen: With respect to the charges stated in Paragraph Fourteen of Count II, Sherwin-Williams requests the following finding:

> "Pricing practices of Sherwin-Williams as disclosed in the record do not constitute violations of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act."

All evidentiary facts, and reasons, relied upon in Paragraphs One through Twelve, inclusive, under Count I and all evidentiary facts and reasons relied upon in Paragraphs One through Thirteen, inclusive, under Count II as supporting specific requested findings are relied upon without specific reference as support for the finding hereinabove requested.

693 Conclusions of Law.

Sherwin-Williams requests that the Examiner incorporate in his recommended decision the following conclusions of law:

1. Sales made by Sherwin-Williams at and through its several hundred retail stores located throughout the United States are intra-state transactions and are not subject to the provisions of the Federal Trade Commission Act or the Clayton Act, as amended by the Robinson-Patman Act.
2. Sales made by Sherwin-Williams to purchasers who do not buy for resale and who are not competitive with each other do not come within the provisions of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.
3. The acts of Sherwin-Williams in connection with the preparation of the Lead Code and in connection with its operation prior to the invalidation of the National Recovery Act by the decision of the Supreme Court in the Schecter case cannot be made the basis of a charge of conspiracy to restrain trade in violation of Section 5 of the Federal Trade Commission Act.
4. The term "price" as used in Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, means "the sum paid by the purchaser to the seller for the products purchased."
5. Varying mill net returns from sales where customers paid the same price to Sherwin-Williams for the products purchased do not constitute price discriminations within the prohibitions of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. Mere difference in price is not a discrimination in price within the meaning of Section 2(A) of the Clayton Act, as amended by the Robinson-Patman Act.
6. Sherwin-Williams has not violated and is not now violating the provisions of Section 5 of the Federal Trade Commission Act.

7. Sherwin-Williams has not violated and is not now violating the provisions of Section 2(A) of the Clayton Act, as amended by the Robinson-Patman Act.

8. This proceeding is not in the public interest.

9. As a matter of law the Federal Trade Commission should enter an order dismissing the Amended Complaint as to the respondent Sherwin-Williams.

Respectfully submitted this 29th day of December, 1947.

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T. J. McDowell,
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Dec. 29, 1947.

694 "Exhibit A".

Respondent's Exhibit No.	Commission's Exhibit No.	Invoice Number	White Lead Billed	Pounds, Total White Lead Billed
205–A	794–C	4297	1035	
		4298	175	1210
205–C	794–E	11409	200	
		9741	400	
		14433	471	
		9068	100	1171
205–D	794–F	11415	348	
		13314	75	423
205–E	794–G	7262	1200	
		10859	156	
		495	400	1756
205–F	794–I	4111	400	
		23535	1000	
		25900	14½	
		25899	700	
		25898	15	
		25897	650	

Respondent's Exhibit No.	Commission's Exhibit No.	Invoice Number	White Lead Billed	Pounds Total White Lead Billed
		4625	150	
		4649	60	
		44312	500	
		16380	350	
		16376	500	
		17498	24	
		8908	2500	
		11574	4125	
		11645	862½	
		11605	4237½	
		35109	28	16,118
205–G	794–J–I	9555	60	
		14939	2400	
		14936	575	
		14938	50	
		37153	700	
		38336	200	
		15516	2400	
		15517	1200	7585
205–L	794–P	14435	783	
		1674	1626½	
		17085	912	
		17302	1340	
		17332	450	
		15672	3156	
		15501	1125	
		14294	2300	
		3830	730	
		1090	1540	13,963
695 205–M	794–Q	1138	500	
		4326	779½	
		11604	2000	
		12182	3690	
		7968	1300	
		25588	100	
		26344	210	8,580
205–N	794–R	17151	400	400
205–O	794–T	17481	500	500
205–P	794–U	7962	1800	
		4955	825	2,625

Respondent's Exhibit No.	Commission's Exhibit No.	Invoice Number	White Lead Billed	Pounds Total White Lead Billed
205-R	794-Y	13244	832	
		7325	1000	
		11232	612½	
		13026	48	
		1577	500	
		611	875	
		6786	1000	
		8373	4800	
		4708	150	
		8525	175	
		9445	850	
		7200	3025	13,868
205-S	794-Z	59529	630	
		59565	2500	3,130
205-U	794-Z-2	58983	525	
		4108	291	816
205-V	794-Z-4	14588	1100	
		4220	2000	
		14857	1050	4,150
205-W	794-Z-5	11188	300	
		11755	200	
		12346	700	
		49923	510	
		3326	2700	
		11417	1860	
		11199	2935	
		11386	2000	11,205
205-X	794-Z-6&7	12875	4050	
		14719	1592	
		11300	900	
		49575	2500	
		14622	1175	
		841	924	12,641
		10894	1500	
			Grand Total	225,241

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"Exhibit B".

White Lead Shipments by Sherwin-Williams in Commission's Exhibit 794 A-Z8 Which Involved More Than 1000 Pounds Each.

Comm. Ex. No.	1000# to 2000#	2000# to 4000#	4000# to 6000#	6000# to 10,000#	10,000# and over
794 C	3	1			1
794 D	2				
794 E		2		1	
794 F	3		1		
794 G	1				
794 I	10	6	2		1
794 J	2	2			
794 K		2			
794 M	8	2		2	3
794 N	8	12	3	1	
794 P	10	4	1	2	1
794 Q	2	2			
794 R	1	1			
794 T	2	1			
794 U	2				
794 Y	7	3	2		
794 Z	2	6			5
794 Z1	3	1			
794 Z2	4	2	1		
794 Z4	3	1			
794 Z5	2	3			
794 Z6-7	3	1	1		
	78	52	11	6	11

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697 **Before Federal Trade Commission.**

* * (Caption—5253) * *

PROPOSED FINDINGS AND CONCLUSIONS.

Comes now the attorney in support of the complaint and files this his proposed findings and conclusions, said proposed findings and conclusions being filed at this time pursuant to ruling of the Trial Examiner that additional proposals as to findings and conclusions may be filed with the Examiner or with the Commission:

I. Products, Parties, Trade and Commerce.

A. Products.

The products involved in this proceeding are known in the trade and by the respondents themselves as "lead pigments" and as used herein such term is defined to include all of the various oxides, carbonates and sulphates of lead described hereinafter with more particularity whether or not such products are used as pigments.

1. Basic carbonate white lead.

Basic carbonate white lead in dry form is a fine white powder used extensively as a pigment in paints and protective coverings as well as in the manufacture of ceramics, putty, and other products. It has a chemical formula of approximately $2PbCO_3 . Pb(OH)_2$. The original commercial process of manufacture is known as the Old Dutch process, wherein buckles of metallic lead are immersed in earthenware pots containing acetic acid and stored in a stack between layers of tanbark for from 100 to 120 days. The reaction of the acetic acid on the metallic lead forms basic carbonate, which is screened and ground into a fine white powder. (RX 156) The Old Dutch process is no longer conducted on any considerable scale, having been largely replaced by the Carter process wherein molten lead is atomized and exposed to sprays of acetic acid, water and carbon dioxide gas in a slowly revolving drum. In the Carter process corroding time is reduced to approximately ten days. (RX 156) Basic carbonate was produced by the International Smelting & Refining Company and is presently produced by the Eagle-Picher Company in Chicago through a process of electrolysis.

Dry white lead is sold for the most part to paint and ceramic manufacturers for use by them as a raw material in further manufacturing processes and as so sold is customarily packaged in 600 pound containers.

698 2. Basic sulphate white lead.

Basic sulphate white lead is a white pigment similar to basic carbonate white lead which may be produced either by processing metallic lead or by fuming lead concentrates without reducing the basic raw material to metallic lead. It is marketed in bags of 50 pounds or steel containers of from 425 to 625 pounds and used extensively in the manufacture of mixed paint.

3. White lead-in-oil.

White lead-in-oil is the term customarily used to refer to basic carbonate white lead mixed with linseed oil to form a heavy paste. It is sold to dealers for resale to painters and members of the general public and its principal ultimate use is as a paint, after mixture with additional oil, mineral spirits and dryers. White lead-in-oil when so mixed is now and has for many years been known in the trade and by consumers as a protective covering of the finest quality for houses and other wooden structures. Both white lead-in-oil and mixed paints containing white lead as a pigment are generally regarded by painters and consumers as being superior to preparations containing other pigments.

4. Litharge.

Litharge is a sub-oxide of lead, having the approximate chemical formula PbO, which is produced by heating metallic lead in the presence of air in a furnace. There are many different grades and types of litharges, depending upon the use for which they are manufactured. Litharge is used in the manufacture of paint and varnish, in the "sweetening" of gasoline by the petroleum refining industry, and in the production of agricultural insecticides. The largest use of litharge is in the manufacture of electric storage batteries where it is the basic raw material for both negative and positive battery plates. The litharges sold by the respondents to the battery manufacturing industry are sometimes referred to in the trade and by the respondents as oxides of lead. Litharge is customarily sold to industrial consumers in containers of 600 pounds.

5. Red Lead.

Red lead, having the approximate chemical formula Pb_3O_4, is produced by a further heating and oxidation of litharge and is manufactured in several grades and qualities depending upon the extent to which the roasting and refining processes are carried. (RX 156) Red lead is now and has for many years been regarded as the finest pigment for metal protective paint, and is used to a large extent as a pigment in the paint manufacturing industry. It is also used extensively in the manufacture of electric storage batteries, in producing agricultural insecticides, and in petroleum refining.

699 Red lead is also mixed with linseed oil to form a paste known as red lead-in-oil, sold largely to dealers for resale to painters and consumers for use directly as a paint upon addition of oils and dryers.

6. Miscellaneous pigments.

A number of other miscellaneous products are likewise known to the industry as lead pigments, including blue lead, a form of basic sulphate of lead produced by the fuming of lead concentrates; orange mineral, a pigment produced by further processing red lead or basic carbonate white lead; and grinders' lead-in-oil which is basic carbonate white lead mixed with linseed oil to form a paste of thinner consistency than white lead-in-oil and ordinarily sold to the paint manufacturing industry.

7. Pig lead.

Pig lead is the term used to describe metallic lead which is customarily marketed in the form of pigs or bars containing approximately 90 pounds each. Lead is mined extensively in the United States, the principal part of domestic production being produced in Idaho, Montana, Colorado, Utah, and Arizona.

Lead is also mined extensively in what is known as the tri-state area, comprising the territory in the southwest corner of Missouri and contiguous areas in Oklahoma and Kansas; and in Southeastern Missouri and southern Illinois.

Pig lead is the basic raw material from which lead pigments are manufactured, except that some basic sulphates and litharges are produced from fuming lead concentrates. Except as to respondent Anaconda, whose supplies of lead were derived from its own smelters and refineries (CX 836C), all of the respondents purchase the major part of their requirements of lead on the open market. Respondent Eagle-Picher has produced as much as 66⅔% and as little as 10 or 15% of its own requirements of lead in the period from 1930 to date. (Tr. 1569-70.)

B. Parties.

1. National Lead Company.

National Lead Company is a New Jersey corporation with its principal offices at 111 Broadway, New York, New York, and is sometimes hereinafter referred to as National. National presently operates factories producing lead pigments as follows:

	Brooklyn, N. Y.	White Lead
		Red Lead
		Litharge
	Perth Amboy, N.J.	White Lead
	Philadelphia, Penna.	White Lead
		Red Lead
		Litharge
700	Charleston, W. Va.	Red Lead
		Litharge
	Atlanta, Ga.	Red Lead
		Litharge
	Chicago, Ill.	White Lead
		Red Lead
		Litharge
	St. Louis, Mo.	White Lead
		Red Lead
		Litharge
	San Francisco, Calif.	White Lead
		Red Lead
		Litharge
	Los Angeles, Calif.	Red Lead
		Litharge
	Dallas, Texas	Red Lead
		Litharge

National is by far the largest producer and seller of lead pigments in the United States, accounting for between 60 and 63% of the shipments of white lead-in-oil from 1939 to 1942; about 50% of the dry white lead and about 50% of the red lead and litharge. In addition to its business in the lead pigments, National is a very large producer of titanium pigments, and is also a producer of linseed oil and of many different products composed principally of lead.

National was organized in December, 1891, and acquired the physical properties of the following concerns immediately after its organization:

Cornell Lead Company, Buffalo, N. Y.
The National Lead and Oil Company, New York, N. Y.
Atlantic White Lead & Linseed Oil Company, New York, N. Y.
Salem Lead Company, Salem, Mass.
The J. H. Morley Lead Company, Cleveland, Ohio.
The Eckstein White Lead Company, Cincinnati, Ohio.
Anchor White Lead Company, Cincinnati, Ohio.
Maryland White Lead Company, Baltimore, Md.
American White Lead Company, Louisville, Ky.
Kentucky Lead and Oil Company, Louisville, Ky.
Southern White Lead Company, Chicago, Ill.
D. B. Shipman White Lead Works, Chicago, Ill.
Southern White Lead Company, St. Louis, Mo.
St. Louis Lead and Oil Company, St. Louis, Mo.
Collier White Lead and Oil Company, St. Louis, Mo.
Red Seal Castor Oil Company, St. Louis, Mo.
(CX 3-B and C).

701 In addition National acquired at the same time controlling stock interests in the following concerns:

St. Louis & Zacatecas Ore Company.
St. Louis Smelting & Refining Company.
Western White Lead Company.
John T. Lewis & Bros. Company.
Beymer Bauman Lead Company.
Fahnestock White Lead Company.
Pennsylvania White Lead Company.
Armstrong-McKelvy Lead & Oil Company.
Davis-Chambers Lead Company.
The American Oxide Company.
Union White Lead Manufacturing Company.
Brooklyn White Lead Company.
Bradley White Lead Company.

Lenox Smelting Company.
Jewett White Lead Company.
Ulster Lead Company.
Rio Grande Smelting Company.
(CX 3-D).

During 1902 National began negotiating with Messrs. Thomas Fortune Ryan, Daniel Guggenheim, and H. H. Rogers, looking to the purchase of the properties and businesses of the following concerns:

Hoyt Metal Company, St. Louis, Mo.
Chadwick-Boston Lead Company, Boston, Mass.
Tatham & Bros., New York, N. Y., and Philadelphia, Pa.
Gibson & Price Mfg. Co., Cleveland, Ohio.
James Robertson Mfg. Co., Baltimore, Md.
Raymond Lead Co., Chicago, Ill.
E. W. Blatchford Mfg. Co., Chicago, Ill.
Lawrence Shot Lead Company, Omaha, Neb.
Markle Bros., E. St. Louis, Ill.
American Shot & Lead Company, New York, N. Y., Cincinnati, Ohio, St. Louis, Mo.
Kahn Bros. & Co., New York, N. Y.
Thomas W. Spark, Philadelphia, Penna.
Ronalds, Johnson & Co., Brooklyn, N. Y.
L. M. Rumsey Mfg. Co., St. Louis, Mo.
N. O. Nelson, St. Louis, Mo.
W. J. Matheson & Co., Ltd., New York, N. Y.
Wetherill & Bro., Philadelphia, Penna.
N. Z. Graves & Co., Philadelphia, Penna.
McDougall White Lead Co., Buffalo, N. Y.
Sterling White Lead Co., Pittsburgh, Pa.
The Davis Lead Co., Pittsburgh, Pa.
Gebhart White Lead Co., Dayton, Ohio.
The Eagle White Lead Co., Cincinnati, Ohio.
Carter White Lead Company, Chicago, Ill., and Omaha, Neb.
Hammar Bros. White Lead Company, St. Louis, Mo.
Union Lead & Oil Company, Brooklyn, N. Y.
(CX 5-B and C.)

702 Those negotiations do not appear to have been completed, and in June, 1903, the following companies were acquired by the United Lead Company, organized by a syndicate which had a controlling interest in American Smelting & Refining Co. (CX 22P):

American Shot & Lead Company.

Gibson & Price Mfg. Co.
McDougall White Lead Co.
White Metal Company.
Markle Lead Works.
Union Lead & Oil Company.
Gebhart White Lead Co.
James Robertson Mfg. Co.
E. W. Blatchford Mfg. Co.
Tatham & Bros.
Raymond Lead Co.
Chadwick-Boston Lead Company.

Efforts by the promotors of the transaction to acquire Picher Lead Company, Bender & Aldred, and the Carter White Lead Company were not successful. (CX 22P)

In February, 1906, National acquired the securities of United Lead Company and control of the constituent concerns listed above (CX 9A). In March, 1906, National acquired the Carter White Lead Company, with properties in Chicago, Illinois, and Omaha, Nebraska; in July, 1912, it acquired all of the stock of Matheson Lead Company (Answer of National). The properties of Evans Lead Company, producing red lead and litharge in Charleston, W. Va., were acquired in 1935; the properties of Wetherill & Bros., producing lead pigments in Philadelphia, Penna., were acquired in the early '30's. In 1931 National sought to acquire the assets and properties of respondent Eagle-Picher which is the successor to the interests of the Picher Lead Company, The Eagle White Lead Company, and Hammer White Lead Company mentioned above. An offer to purchase the assets of respondent Eagle-Picher was made by National in June, 1931, but was not accepted by that company (CX 866). During 1930 and for two years thereafter, National acquired capital stock in respondent Eagle-Picher through purchases by E. J. Cornish, Chairman of the Board of National, in his own name. Such acquisitions of stock occurred during the period from 1932 to 1935, and at one time some 50,000 shares were owned by Mr. Cornish, such shares being held by him for the benefit of National (RX 183). There is evidence that Cornish and F. M. Carter, then president of National, were seeking to secure for National a controlling stock interest in respondent Eagle-Picher during the period of such stock acquisitions and as late as 1935 (CX 527, 528).

2. The Eagle-Picher Company and The Eagle-Picher Sales Company.

The Eagle-Picher Company and The Eagle-Picher Sales Company, described in the amended complaint as Eagle-Picher Lead Company and Eagle-Picher Sales Company, are Ohio and Delaware corporations, respectively, with principal offices at 901 Temple Bar Building, Cincin-
703 nati, Ohio. The Eagle-Picher Company, sometimes hereinafter referred to simply as Eagle-Picher, is engaged in mining, smelting, refining and sale of metallic lead, metallic lead products, lead pigments, and other articles of commerce. The Eagle-Picher Sales Company is a wholly owned and controlled subsidiary of Eagle-Picher and its acts have been for the benefit and in behalf of Eagle-Picher and will be treated hereinafter for the purpose of these findings as the acts of Eagle-Picher.

Eagle-Picher maintains factories producing basic carbonate white lead, both dry and in oil, at Chicago, Illinois (the factory formerly operated by International Smelting & Refining Company and acquired by Eagle-Picher in 1946) and at Cincinnati, Ohio. Factories producing red lead and litharge are operated at Joplin, Missouri, and Newark, New Jersey. Basic sulphate white lead is produced at Galena, Kansas, and Joplin, Missouri. Eagle-Picher is engaged in the mining of lead ores in the tristate field (a geographical area comprising the contiguous sections of southwest Missouri, Kansas and Oklahoma) and operates plants reducing such ores to concentrates and metallic lead in and around Joplin, Missouri. Eagle-Picher is the second largest producer of lead pigments, and accounted for from 15 to 20 per cent of white lead in oil and from 8 to 12 per cent of dry basic carbonate shipments during the period from 1930 to 1946 (Tr. 1560).

Eagle-Picher's former position in the industry is increased by the acquisition of the producing facilities of respondent International Smelting & Refining Company, and its percentage of dry white and white lead-in-oil, with the addition of the shipments accounted for by International in 1942, is enlarged to from 18.5 to 23.5 per cent of white lead-in-oil and to from 22 to 26 per cent of dry basic carbonate (CX 836 H, I, J). In shipments of oxides, Eagle-Picher is also in second position in the industry, after National.

In addition to its production of white leads, red lead and litharge, Eagle-Picher is a producer of lithopone and a large producer and seller of zinc oxide and leaded zinc pigments, consisting of a combination of basic sulphate white lead and zinc oxide.

3. Anaconda Copper Mining Company and subsidiaries.

Anaconda Copper Mining Company is a Montana corporation with principal office at 25 Broadway, New York, New York, and is sometimes hereinafter referred to simply as Anaconda. Respondent International Smelting & Refining Company is a Montana corporation with principal offices at 25 Broadway, New York, New York, and is sometimes hereinafter referred to simply as International.

Anaconda is one of the world's largest producers and fabricators of non-ferrous metals, including copper, lead and zinc. Prior to 1936 dry white lead and white lead-in-oil were produced by Anaconda Lead Products
704 Company, a subsidiary of Anaconda, and were sold and distributed in commerce by Anaconda Lead Products Company and Anaconda Sales Company, a wholly owned and controlled Anaconda subsidiary. In 1936 the assets and properties of the Anaconda Lead Products Company were acquired by International and the former company dissolved in the latter part of 1936 after having been engaged in the production and sale of white lead since 1920. From 1936 to the fall of 1946 lead pigments produced by International were sold and distributed by that company or by Anaconda Sales Company, the division of business between the two depending upon the states in which business was done. (CX 836; Tr. 3497)

The principal officers of International and Anaconda are the same, and it is apparent from the record that respondent International and the former Anaconda Lead Products Co. were in fact operating divisions of respondent Anaconda, having no substantial identity of their own. (Tr. 3549-52) It is concluded that the acts of respondent International, of Anaconda Lead Products Company, and of Anaconda Sales Company were for and in behalf of respondent Anaconda, and for the purposes of these findings will be treated as the acts of respondent Anaconda.

Anaconda ceased the manufacture and sale of lead pigments subsequent to the filing of the amended complaint in this proceeding, during July or August of 1946. Anaconda still produces lead ores and refined metallic lead; and is also engaged in the production of zinc oxide.

4. The Sherwin-Williams Company.

The Sherwin-Williams Company is an Ohio corporation with its principal office at 101 Prospect Avenue, Cleveland, Ohio, and is sometimes hereinafter referred to simply as Sherwin-Williams. Sherwin-Williams operates a factory producing white lead, red lead and litharge in the metropolitan area of Chicago, Illinois, and is one of the largest, if not the largest, manufacturers and sellers of mixed paints and related items, operating numerous paint producing plants and warehouses throughout the country. Sherwin-Williams also operates directly more than 200 retail stores located throughout the country selling mixed paints, lead pigments, and related items to consumers and the general public.

A considerable portion of the lead pigments produced by Sherwin-Williams is used by it directly in the manufacture of paint and related products and the remainder of its production is shipped and sold to others. The record shows that Sherwin-Williams is not engaged in the sale of red lead or litharge to the battery manufacturing industry, but is engaged in sale of such products to paint and varnish manufacturers and other users. Sherwin-Williams is a producer of a number of pigments which are said to be in competition with the lead pigments, including lithopone and zinc oxide.

5. The Glidden Company.

The Glidden Company is an Ohio corporation with its principal offices in Union Commerce Building, Cleveland, Ohio, and is sometimes hereinafter referred to simply as Glidden.

705 Glidden operates a white lead producing plant in Scranton, Pennsylvania, and a lead refining and red lead and litharge producing plant in Hammond, Indiana, in the Chicago, Illinois, switching area. Like Sherwin-Williams, Glidden is a large producer and seller of mixed paint and related items, and operates some 60 retail stores selling mixed paint, lead pigments, and related products directly to consumers and the general public. Glidden's white lead producing plant was formerly operated as the

Euston Lead Co., acquired in 1925; and its red lead and litharge producing plant was formerly operated as Metals Refining Co., acquired by Glidden in 1929.

Glidden is the largest domestic producer of lithopone, a pigment competitive with dry white lead. (Tr. 2648)

6. Non-Respondents Concerned in the Proceeding.

a. Lead Industries Association.

Lead Industries Association is a voluntary unincorporated trade association (Tr. 996) organized in 1928 to serve the mutual interests of the entire lead industry. It is composed of a Mining Division, a Smelting and Refining Division, a Lead Pigments Division, and a Metallic Lead Products Division. (Tr. 2368) During the pre-Code and Code period the Lead Pigments Division was further separated into a White Lead-in-Oil Committee and a Dry Products Committee, the latter having further sub-divisions into an Oxide Committee and a Dry White Lead Committee. (Tr. 2370) Members of the Lead Industries Association comprise practically the entire lead mining, smelting, and refining industry of the United States, as well as most of the industries using lead as a basic raw material, including manufacturers of lead pigments, lead sheets, pipe, shot, solder, and related items. (CX 500 A-H).

b. American Smelting and Refining Company.

American Smelting and Refining Company is a corporation with its principal office and place of business in New York, New York, and sometimes hereinafter referred to as A. S. & R. A. S. & R. is the world's largest smelter and refiner of lead, producing between thirty and forty per cent of the entire world supply of refined lead (Tr. 4093), and accounting for more than half the domestic supply (Tr. 4091). A. S. & R. operates lead smelters at East Helena, Montana; Selby (San Francisco), California; El Paso, Texas; Leadville, Colorado; Murray, Utah; and East St. Louis, Illinois, which process ores and concentrates from four or five hundred lead mines (Tr. 4090). The position of A. S. & R. in the domestic lead market, and its dominance thereof, is demonstrated by the fact that the respondents herein agreed to use its daily quotations of lead prices as the sole basis for quoting spot carload prices on red lead and litharge (CX 809; CX 615; RX 137).

c. Trade and Commerce of the Respondents.

Each of the respondents is now and has for many years been engaged in commerce, as commerce is defined in 706 the Federal Trade Commission Act, selling and shipping lead pigments manufactured at the various producing points, as set forth above, to customers located in nearly every state of the United States, except insofar as respondents Anaconda and International have not been engaged in the lead pigments business since the fall of 1946. Each of the respondents seeks to enjoy and does enjoy national distribution of lead pigments and other products manufactured by them, except that respondents Eagle-Picher and Anaconda do a limited amount of business on the Pacific coast and in states west of the Rocky Mountains. (CX 752; 749; 843; 754; 854; 833; 794; 798; 831; 852; 739).

Between them the respondents account for practically the entire production of lead pigments, there being only a few small producers of such products for sale in commerce in the United States other than the respondents. It is to the respondents herein that purchasers and consumers must look for their supplies of lead pigments, and the respondents have the power to, and do, control the supply of lead pigments available for shipment in commerce. (CX 669) In addition to the power of the respondents to control directly trade and commerce in lead pigments, between them they account for a substantial portion of the production of and trade and commerce in competing products used as pigments in mixed paints and for other similar purposes. Glidden is the largest producer in the country of lithopone (Tr. 2648). Eagle-Picher and Anaconda are producers of zinc oxide (Tr. 3640, 2653). National and E. I. duPont de Nemours have recently been found to have a monopoly power in production and sale of titanium pigments, which are also produced and sold by Glidden through its subsidary American Zirconium Company. (Tr. 2648-50). Eagle-Picher and Sherwin-Williams both produce lithopone. (Tr. 2652).

II. The Lead Pigments Industry Up to 1933.

There were a number of witnesses called to testify who had been active in the lead pigments industry during the period prior to 1933 and back as far as 1910 (witnesses Sprague, Rowe, McNair, Coolidge, Hurless, Hayt and Zoller). The recollection of these witnesses as to the organization of the industry and of the methods employed prior to 1933 in quoting and selling lead pigments were very vague. It is apparent, however, that until the organization of National Lead Company in 1891 the industry was characterized by a large number of producing plants located throughout the United States. An indication of the number of factory and producing points prior to the date of National's organization is contained in a price announcement in 1899 of the Atlantic White Lead and Linseed Oil Company which was later absorbed by National, becoming a constituent part of National's Atlantic branch (Tr. 3944-45). This announcement offered to equalize freight with 69 cities located in Texas, Virginia, West Virginia, Georgia, South Carolina, Florida, Alabama, Maryland, New Jersey, and New York.

Since its organization National has acquired numerous competitors in the lead pigments business through purchase of capital stock or assets and has abandoned production at most of the acquired plants. By 1933 there
707 were less than a dozen white lead producing plants
still in operation. There remained plants in San Francisco (National and W. P. Fuller, an independent); in Chicago (National, Sherwin-Williams and Anaconda); in Perth Amboy, N. J., St. Louis and Philadelphia (all National); in Scranton, Pa. (Glidden); and in Cincinnati (Eagle-Picher).

In 1933 there remained plants producing red lead or litharge for sale in commerce, in Chicago (National, Glidden & Hammond Lead Products Company, operated by the former proprietors of Metals Refining Company, acquired by Glidden in 1929); in St. Louis (National); in Joplin, Mo. (Eagle-Picher); in Brooklyn (National); in Newark (Eagle-Picher); in Philadelphia (National); in Charleston, W. Va. (Evans Lead Company, acquired in 1934 or 1935 by National); in San Francisco (National and W. P. Fuller, an independent); and in Los Angeles (Morris P. Kirk & Sons, a subsidiary of National).

While the number of producing plants had been reduced materially by 1933 the industry appears to have retained to some extent vestiges of localized pricing at that time.

As to white lead-in-oil and other lead pigments packaged in steel kegs containing 100 pounds or less, a system of differential or warehouse points was commonly employed up to 1933 or 1934. Commission's Exhibit 659-C through P is a list of the delivery and equalization points of the Atlantic, Boston, Buffalo, Chicago, Cincinnati, Cleveland, Pittsburgh, Philadelphia, and St. Louis branches of the National Lead Company. The exhibits are dated as far back as December 30, 1920, but are indicated to have been revised up to as late as March 30, 1933. This exhibit shows 589 different towns and localities as free delivery points or equalization points, located in forty different states. To the points marked either "D" or "E" lead pigments were quoted at the base price with the addition of whatever freight differential in fractional cents per pound appears opposite each point in the list. To all other towns and localities except those specifically designated freight was equalized with the nearest equalization point, designated with an "E". Thus on Commission's Exhibit 659-O there appears only one town each in the states of Alabama, Arkansas, Kentucky and Louisiana. In quoting to a customer in Alabama, ¼¢ per pound was first added to the base quotation and then the freight rate was calculated to the customer's destination. In the event the rate to the destination was more than the freight rate to the equalization point, Mobile, the additional sum by which the freight rate was more than the Mobile rate was added to the delivered price.

It is readily apparent that this method of quoting, requiring knowledge of all of the different free delivery and equalization points and of the base additions applicable to each of them, together with the freight rates to the points and to all of the other cities and towns not listed as delivery or equalization points for purposes of the freight equalization calculation, made the method of pricing a highly complicated one in which a seller could never be sure in advance of what his competitor was quoting unless he had advance knowledge of his competitor's listed points and of the freight rates used by his competitor in making the calculations of equalization of freight rates (C.X. 501-C; Tr. 2600-1).

708 There were other practices prevalent in the industry in 1933 which affected materially the cost of lead pigments to purchasers. Dry white lead, for instance, was sold at times on differential contracts—whereby a price was quoted at a fixed differential over the prevailing market price of pig lead, the basic raw material (C.X. 754,

754-760). Guarantees were customarily entered into protecting customers over quarterly periods against declines in price by the seller, not only as to the dry pigments sold in barrels and drums but as to white lead-in-oil and the so-called keg products (C.X. 501-C). As to the oxides, red lead and litharge, differential contracts had been employed for several years prior to 1933, covering sales both to carload and less-than-carload purchasers. The differential to carload purchasers of litharge and red lead had been for some years in the range of $1.50 and $2.50 per hundred pounds respectively over the price of pig lead, but there was apparently no common understanding in the industry as to which quoted price of pig lead was to be used in pricing such differential contracts and the differential had not been uniformly $1.50 on litharge or $2.50 on red lead of standard grades (R.X. 177-B; R.X. 159-E; R.X. 138-A). As near as can be determined from the fragmentary documents on the subject and the imperfect recollections of witnesses who testified on former practices in the oxide field, territory differentials and zones were not employed prior to 1933 and freight was charged to the customer or paid by him on many transactions (Tr. 3076; 3084). Prices on the Pacific Coast prior to 1933 appeared to have been below those in the east (Tr. 3946).

As to all of the lead pigments there was a diversity of practices by the various respondents as to the time within which orders might be accepted for shipment at the old price following an advance in the price and as to datings of invoices giving purchasers the benefit of such old prices. As to dry white lead there was no provision for quantity discounts nor was there any higher differential to the Pacific Coast (Tr. 3946, 3947-3950). In spite of the imperfect recollections of the witnesses called as to the details it appears that there were diversities as between the respondents on many different practices relating to prices and terms and conditions of sale of lead pigments at the time when respondents met together in the fall of 1933 for the ostensible purpose of considering and drafting a Supplementary Code of Fair Competition for the Lead Pigments Industry (Tr. 1605; 2634).

709 III. Cooperative Activities 1933-1934.

During the summer of 1933 the respondents began meeting together through the Lead Industries Association for the purpose of drafting a Supplementary Code of Fair Competition for the Lead Pigments Industry. A basic code had already been promulgated covering labor provisions and other matters not related strictly to trade practices of the producers. The Lead Pigments Division of Lead Industries Association was the medium through which the discussions and group actions of the respondents took place.

The Chairman of the Lead Pigments Division of Lead Industries Association was F. M. Carter, President of National. The Chairman of the White Lead-in-Oil Committee was at first Willard E. Maston, Vice President of Eagle-Picher, followed by F. M. Carter, President of National. The Chairman of the Dry Products Committee of the Lead Pigments Division of the Association was also F. M. Carter, President of National. The Dry Products Committee in its later meetings apparently split into the Lead Oxide Committee, representing the red lead and litharge producers as distinguished from the white lead producers, and its chairman was Harold Rowe, Assistant to the President of National. In any event, the Lead Pigments Division and its various sub-divisions, all constituted practically the same group, National being represented primarily by its President, F. M. Carter, and Harold Rowe; Eagle-Picher by Messrs. Bendelari, its President, and Roosevelt and Maston, Vice Presidents; Glidden by its Vice President Paul E. Sprague; Sherwin-Williams by its Vice President S. B. Coolidge Jr.; and Anaconda Lead Products Company by F. O. Case, its Sales Manager.

All of the respondents participated actively in the entire series of meetings discussed in more detail below, although one or more of them may not have attended any particular meeting.

At the meetings on July 19 and July 20 a draft of a Supplementary Code of Fair Competition had been prepared but so many questions regarding trade practices were raised that it was agreed to meet again early in August for further discussions (C.X. 799; R.X. 134 A-E).

The following paragraphs were adopted at the August 8 meeting of the Dry Products Committee (C.X. 800 A-C):

"Oxides—

1. Red lead over 90% true red lead shall be sold at the following premiums over grades with lower true red lead content:

90% to 98% true red lead $.25 per cwt.
98% and over true red lead $.50 per cwt.

2. Only two grades of guaranteed red lead shall be sold, *i.e.* grinders red lead guaranteed 95% and red lead guaranteed 98%. Under 95% red lead may be labeled as desired.

710 3. Price shall be a differential over the lead market in effect on (a) the date sale is made, or (b) some future date, or (c) the average during some future period, the basis to govern to be specified at the time each sale is made.

4. American Smelting & Refining Company's official price shall govern all spot sales, but either the A. S. & R. or Engineering and Mining Journal price may be used for average price contracts. The metal basis for spot orders on any day shall be the A. S. & R. price in effect at the close of business on the previous day.

5. Carload sales shall consist of at least one minimum carlot as defined in freight tariffs in effect on date of sale for freight movements from Member's shipping point to point where Buyer accepts delivery. Trust delivery of carload orders must be completed within three days from start of delivery.

6. On spot sales delivery or billing shall be complete in 30 days from date of sale.

7. As agreed between Member and Buyer, always with reasonable notice to Member, and in the case of sales on an average market basis, Member shall require Buyer to specify amount to be supplied on said basis prior to the beginning of the period whose average governs the price, and such sale is to constitute a firm sale. Deferred deliveries are to be billed on the basis originally applicable to the sale and additional requirements are to take the spot price.

8. Terms shall be 1% for cash not beyond 10 days from date of shipment and net cash 30 days from date of shipment.

9. Delivery place shall be F.O.B. Member's shipping point.

10. Freight shall be equalized with the nearest manufacturing point, with allowance of actual carload rate up to 40¢ per 100 lb., rail tariffs to govern.

11. Any tax or other governmental charge upon the production and/or sale and/or shipment of products of this Division imposed by the Federal authorities and hereafter becoming effective within the life of a sales contract shall be added to the price provided in the contract and shall be paid by the buyer.

12. The price paid for l.c.l. shipments shall be a flat price established by the seller.

13. Nothing in any part of the Code shall be deemed to hamper full freedom of action of any Member in settling accounts or extending delivery with buyers whose credit position may require special action or adjustment.

711 14. Maximum allowance to customers using their own carriers shall be the regular tariff rate.

15. No allowance shall be made for warehousing in customer's warehouses unless they are recognized commercial warehouses.

16. No allowance shall be made for cartage in excess of 10¢ per 100 lbs. except in New York metropolitan district and any in excess of this amount shall be reported to the Secretary.

17. No rebate on customers' stocks shall be allowed on account of price decline.

18. Options given to bidders on bid business shall be contingent upon award of the contract to the bidder.

19. On Government bids and on railroad (and industrial) business the following package differentials over l.c.l. barrel prices are hereby established:

100 lb. kegs	$ .50
50 lb. kegs	$ .75
25 lb. kegs	$1.00

"Consignment accounts were discussed. The general sense of the meeting was to abolish consignment accounts; but the explanation of one member for his use of consignments in certain inaccessible localities caused this question to be passed over for further consideration.

"There was a difference of opinion as to whether no allowance or a limited allowance should be made on returnable packages.

"It was felt that in the case of off-grade material sold as such, a satisfactory differential below the standard grades should be developed.

"It was the sense of the meeting that grave danger for the lead oxide business existed in the manufacture of the oxides by the users themselves, this being particularly true of large battery manufacturers who now are manufacturing black oxide for their own use. It was felt that it would be contrary to the spirit of the N. R. A. for users of the oxides to install their own oxide manufacturing equipment when the capacity of the industry is already in excess of requirements and so long as oxides can be purchased at a fair price. Such a procedure could not increase employment and would be contrary to the declared purpose of the Act 'to promote the fullest possible utilization of the present productive capacity of industries.' It was felt that some means of licensing new productive equipment might be sought as provided for in the cotton textile and other codes."

712 On the following day the Dry Products Committee took up the matter of practices to be included in a Supplementary Code for dry white lead in which it was agreed to adopt Items Nos. 9, 11, 14, 15, 16, 17, 18, 19 and 20 as set forth in the minutes of the August 8 meeting of the Oxide group the day before as set forth above (R.X. 135 A-B).

Meeting again on September 6 and 7 the Dry Products Committee decided to frame uniform sales contracts covering dry white lead and red lead and litharge and discussed the possibility of limiting the installation of facilities for production of red lead and litharge. It was agreed as to contracts covering the sale of dry white lead at a differential over pig lead prices that the names of customers be filed with the Association (C.X. 801; R.X. 136).

A further meeting of the Dry Products Committee was held in Chicago on October 27, 1933, at which the third draft of the Supplementary Code was discussed and agreed upon. The following appears in the minutes (C.X. 504-B):

"After much study and discussion outlines setting forth Uniform Bases for the sale of Lead Oxides and Dry White Lead in Carlots and Less Than Carload Lots, respectively, were drafted, subject to further study by the members. The suggested outlines appear on pages appended.

"It was agreed, in deference to existing statutes, that no reference to prices should appear in the outline except for the specification that 'prices were to be agreed upon between buyer and seller.'

"A question arose as to the possibility of adopting the provisions of the Supplementary Code for the Pigments Division immediately rather than waiting for the approval of the President, but as the decision hinged upon the legality of the Code provisions, the Secretary was requested to procure a legal opinion on the subject, reporting to the Chairman."

It will be noted that the minutes direct the Secretary to consult counsel about the advisability of putting uniform contract provisions into effect prior to approval of the Code. The Secretary did consult counsel about this matter and wired and wrote to Carter, the President of National, as follows (C.X. 522-B):

"I called on Mr. Locke this afternoon to obtain his opinion with respect to the legality of immediately installing a Uniform Basis of Sale for the Lead Oxides and Dry Products by agreement among the producers. Mr. Locke read the Supplementary Code provisions, Article II, and also the suggested outlines of the Uniform Basis for Sale. Although he noted that stipulations as to price had been omitted from the outlines, he felt that it might be unsafe to have an agreement prior to the approval of our Code as factors other than price in the Uniform Sales Contracts might possibly be picked up by the authorities as having a bearing on price and hence being in restraint of trade.

713 "He suggested that the best practical solution for the moment seemed to be the adoption of the Uniform Basis of Sale by one or more of the interested members, which could be followed voluntarily by the others, without agreement on the subject but merely because it was individually to their best interests to do so.

"I wired you the substance of Mr. Locke's views for no doubt you will wish to discuss the subject further with other members who now happen to be in Chicago."

On November 9, 1933, Carter wrote to Paul Sprague, of Glidden, sending copies to officials of Eagle-Picher, Anaconda and Sherwin-Williams as follows (C.X. 523):

"While legal counsel did not give Mr. Wormser a go ahead signal on the question as to whether the adoption of a uniform sales contract would be in strict conformity with the Sherman Act, it is our own conclusion that the common use of a contract which sets forth general terms, specifies grades, etc. but is entirely free from any price agreement would not be subject to criticism or involve us in trouble with the Sherman Act, or similar legislation."

The next day Carter wrote W. P. Fuller & Company in San Francisco to the same effect, including:

"* * * Furthermore, it is believed by all members of the Pigment Section, who were present during the discussions, that it is desirable to have the privilege of using such uniform sales contracts embodied as a feature in the Code." (C.X. 517-A.)

Again the Oxide Committee of Lead Pigments Division met in Chicago on December 14 and 15 and 27 and 28, 1933. The following appears in the minutes of December 14 and 15 meetings (R.X. 137 A-B):

"After considerable discussion, it was agreed that ninety day contracts should be discontinued because it had become a general practice in the trade not to enforce delivery and on that account they were really only options to buy. It was decided that an outline for the sale of oxides on the basis of manufacturer's card price should be drawn up including certain conditions agreeable to all concerned. In this connection some of the points considered were:

(1) Additional price for red leads containing 95%, 97% and 98% Pb_3O_4.

(2) Protection against decline on orders for shipment within thirty days.

(3) Allowance for deliveries to one destination in 5-ton and in 20-ton lots.

714 "It was the opinion of all present that the practice of selling oxides at a differential over pig lead had spread to such an extent that it had become one of the most serious abuses in the trade. It was voted to have presented at the next meeting a basis for sale at the card price and also one at differential over lead, one of the conditions of the latter to be that spot sales shall be based on pig lead at the close of the market on the date they are made.

"Pending the adoption of our code, it was decided that no new commitments would be made:

(1) On card price beyond February 28, 1934.

(2) On differential basis beyond 60 days. (After January 1, 1934, the limit becomes February 28.)"

The following appears in the minutes of the December 27 and 28 meeting (R.X. 138-A):

"There was further discussion of the advisability of making quarterly contracts with small buyers. It was decided that these should be eliminated. The basis for sale at card price was submitted and approved in the form attached. Consideration was given to the question of establishing zones in the West and South where manufacturers would make a uniform addition of their base prices to compensate for the high freight rates. It was suggested that all members investigate this matter so that action might be taken at the next meeting.

"Regarding the clause in the code covering filing of price schedules, etc., it was agreed that exceptions reported to the Secretary should include all details and that in reissuing the information to members of the group he shall give only the names of the buyer and the seller.

"A basis for sale at differentials over lead was agreed upon but it was felt that there was no need of filing it with the code because all buyers in that classification would be considered as exceptions."

At the same time that the members of the Dry Products Group were meeting together, the White Lead-in-Oil Committee also took up industry problems in selling white lead-in-oil and other lead pigments in kegs. This group comprised substantially the same officials representing the respondents, and its chairman was Mr. Willard Maston, Vice President of Eagle-Picher, followed by Mr. Carter, President of National. Among the more important matters discussed at the initial meeting of the White Lead-in-Oil Committee on August 9, 1933, as quoted from the minutes were (C.X. 501 B-C):

"The Agency or Consignment method of marketing White Lead-in-Oil, as now being used in a restricted
715 territory, extending from New York City south to and including Washington, was thoroughly explained and discussed. At the present time the National Lead Co. and the Eagle-Picher Lead Co. are selling almost exclusively under this plan, and report that jobbers and dealers with hardly a dissenting voice have approved the plan. The Agency plan is not the exclusive type designed to give certain rights or privileges, which competitors cannot meet, but one under which a Distributor may sell as many brands as he chooses. It is expected the two com-

panies now using the Agency plan will extend it over a much wider area on or before October first. Under the Agency plan of selling, it is evident many of the abuses and non-profit sales among distributors can be corrected at the same time it removes the practice of—Price Guarantees, Spring Datings, deviation from terms, etc. This method of selling will in the future be described as the 'Agency Plan.'

"*Freight Differentials:* There is a lack of just what points in the country take on advance differentials over the par list price. It was suggested that a zone basis similar to that used by the Linseed Oil group might be worked out and thus simplify the arrangement. The Chairman agreed to offer further suggestions at the next meeting."

"The West Coast situation was briefly discussed, and it was agreed that the Committee should work out some plan for coordinating with this group of manufacturers whereby their territorial conditions as to prices, terms, etc. would not be disturbed. It might be necessary to establish a dividing line between East and West to avoid confusion.

"The question of open quotations on Government and State business was thoroughly discussed. Any plan to eliminate excessively low bids would be helpful to the entire industry. The possibility of apportioning such business was discussed. There was a difference of opinion as to the method which might be used—the following being suggested:

Capacity
Last year's Government and State business
Average last three years Government & State business
Average last ten years Government & State business

The group was asked to give this further thought."

In the minutes for the White Lead-in-Oil Committee meeting of October 28 the following appears (C.X. 505-A):

> "The Chairman described the new Agency System which the National Lead Company was putting into effect for the sale of its lead-in-oil products, stating that it was an adaptation of a method used by General
> 716 Electric and other companies and was designed to correct destructive price cutting in the white lead-in-

oil business which had seriously affected the marketing of the product. Some other members stated they too were planning to use the consignment system.

"Freight and zoning problems were discussed without any understanding or agreement being made."

On September 8, 1933 (following a meeting of the Committee on September 6, the minutes of which contain no reference to the Agency or zone plans) Carter wrote the General Manager of E. I. du Pont de Nemours Company of Wilmington, Delaware, referring to the fact that National was representing that company in the Code discussions, and advising him as follows (C.X. 506-D):

> "The only feature which I expect you will find it difficult to agree with is the Agency System for selling white lead, in oil, which we are expecting to adopt later in the season. It has not been announced nor are we in a position to say anything about it, but we discussed it with members of the Pigment Section. Under this Agency System, we will follow the plan which we have been testing out during the current year in some of the eastern markets. Under this plan, we consign a stock to the dealer, and he acts as our agent. It is practically the same plan as has been in successful use for many years by the General Electric Co. for the sale of Mazda lamps. It permits us to control the resale price, which is a feature of vital importance to the corroder selling in markets like the New York district, for example, where, under present conditions, prices were absolutely demoralized, lead in oil being sold some times below the cost to the dealer."

On September 14, Maston, as chairman of the White Lead-in-Oil Committee, wrote the Secretary of the Association and representatives of the other respondents enclosing what purports to be a zone map and a list of old freight differentials used in marketing white lead-in-oil, stating (C.X. 513-B):

> "The National Lead Company is fully informed of the details, and are gathering further data on this important matter. When suggestions come in I shall endeavor to get them in shape so that a final report may be submitted for approval of the next group meeting.
>
> "For your information file I am sending you a map and list of freight differentials points."

Following the last recorded meeting of the White Lead-in-Oil Committee during the Code period, on January 31, 1934, Maston wrote the Secretary of the Association as follows (C.X. 519-B):

> "I am enclosing Zone Map for the White Lead in Oil industry. I believe you will find it self-explanatory.
>
> 717 "When new points are set up or any suggested change in the differential made they can in the future be passed through your office.
>
> "From this map we will eventually build up an official freight arrangement for this division of the lead industry."

The Secretary of the Association acknowledged this letter on February 2, 1934, stating (C.X. 519-A):

> "Thank you for mailing me a copy of the zone Map for the White Lead-in-Oil Industry."

The map referred to in C.X. 519-A and B was never produced and was apparently no longer in the files of the Association, so that it does not appear in the record.

The Code of Fair Competition for the Lead Industry as approved on May 24, 1934 (C.X. 809), deals principally with working conditions and other practices relating to employees in the industry. The final product of the meetings of the Lead Pigments Division are found in Article VII of the Code. Section 1, of this Article contains provisions against misbranding, misrepresentations, commercial bribery, inducing breach of contract, guarantees of life of products, false and derogatory statements regarding competitors, and use of lead pigments as a loss leader.

Section 2. of Article VII required each producer to file a list of prices with the Code Authority and a memorandum of any terms or conditions of sale at variance with those set forth in Schedule A of the Code.

Section 3. required submission to the Secretary of monthly reports of production, stocks and inventories and shipments.

Schedule A contained three articles—relating to conditions for sale of lead oxides in lots of less than 20 tons; conditions for sale of lead oxides in lots of more than 20 tons; and conditions for sale of dry white lead. Nowhere in the Code, nor for that matter in any draft of a Code produced at the meetings of the Pigments Division, is there any reference to zone or territorial differences or to use of consignment contracts or arrangements on white lead-in-oil. The pricing provisions for oxides in carload lots set forth use of American Smelting & Refining Company quotations in quoting over pig lead prices, and set forth the differentials between the grades of red lead, but "out of deference to the statutes" the matter of how prices were to be arrived at was for the most part entirely omitted from Schedule A of the Code.

Furthermore, it appears from the record that the industry requested and received exemption from the provisions of Section 2 of Article VII and of Schedule A, so that at no time were prices or variations filed with the Secretary, nor were these provisions of the Code actually in force and effect.

718 National and Eagle-Picher adopted and put into effect the Agency Plan on November 15, 1933, following the discussions of the White Lead-in-Oil Committee and the correspondence about it with their competitors. As was stated in the letter from Harold Rowe to all branch managers, under date of November 9, 1933, advising them that the Agency Plan was to go into effect on November 15 (C.X. 601-B):

> "It should be kept in mind that the purpose of the whole Agency Plan is to control the dealers' selling price of white lead, so that he may be assured of a reasonable profit."

The record indicates that Anaconda adopted the so-called Agency arrangement at about the same time and continued thereafter to market approximately 50% of its white lead-in-oil by this means (Tr. 3535-36).

The record is somewhat hazy as to exactly the dates on which the various zone systems were first put into operation by the respondents. In the letter of November 9, 1933, referred to above (C.X. 601-A) Rowe advised his branch managers that all cities where agencies are established will be considered delivery and equalization points, so that apparently the white lead-in-oil zone method was not put into operation until after that date. It is probable that the zone systems were initiated some time in May or June, 1934, or in the period of time immediately preceding those months. On June 9, 1934, Harold Rowe instructed all of the branch managers of National as follows (R.X. 159-A):

> "Please refer to our general letter of May 11th to which was attached Conditions for Sale, etc., of Oxides

and Dry White Lead. Since that date the zone differentials for oxides in the territory served by the Pacific Coast have been determined and a change has been made in New Mexico, Colorado, Wyoming and Montana applying to less carload lots.

"On dry white lead there has also been a change from our original instructions, in that a differential of ¼¢ a pound has been added to the par price in those four states.

"The new zone schedules are as follows—

Oxides

For lots of less than 20 tons add differentials as shown to par card prices:

¼¢ per pound in Florida, Georgia, Alabama, Mississippi, Louisiana, Arkansas, Texas, Oklahoma, California and west of Cascade Mountains in Oregon and Washington.

½¢ per pound in New Mexico, Colorado, Wyoming, and Montana.

719 ¾¢ per pound in Arizona, Idaho, Nevada, Utah and east of Cascade Mountains in Oregon and Washington.

For 20-ton lots add ¼¢ per pound in Florida, Georgia, Alabama, Mississippi, Louisiana, Arkansas, Texas, Oklahoma, New Mexico, Colorado, Wyoming, Montana, Idaho, Utah, Arizona, Nevada and east of Cascade Mountains in Oregon and Washington.

Dry White Lead

For lots of 20 tons and for smaller quantities add ¼¢ per pound in New Mexico, Colorado, Wyoming, Montana, Arizona, Utah, Idao, Nevada, California, Oregon and Washington.

"We appreciate that the whole zone set-up is very confusing, particularly in view of the fact that there is a different arrangement for oxides, dry white lead and white lead-in-oil. Fortunately you are only concerned with the states in your territory. It seems important, however, that you should have full information available in your office. In the hope that it will help to simplify this complicated matter we are planning to make up colored maps for each product which will be sent to you as soon as they can be completed."

National did not wait for Code approval to put into effect what had been agreed upon as the terms and conditions of sale for dry white lead. On December 7, 1933, the Executive Committee resolved to establish the terms and conditions of sale of dry white lead as set forth in Article III of Schedule A of the Code, effective January 1, 1934, more than six months prior to the approval of the Code (Tr. 4076-77).

That this actually occurred is further borne out by the letter to all National branch managers by Harold Rowe on May 11, 1934, which contains the following (RX 159-B):

"Enclosed herewith are copies of the Conditions for Sale of Lead Oxides and Dry White Lead which have been included in the Lead Code as finally submitted to the N. R. A. for approval. We have postponed putting the oxide schedules into effect for several weeks in the hope that our code would be signed. Rather than wait any longer we have decided to adopt them for orders taken after May 31st. The necessary changes in the Conditions for Sale of Dry Lead were made on January 1st.

"It is planned to have those branches which issue oxide price cards send out on May 21st a notice similar to the one attached. (On such notices as are sent to customers in states carrying the extra ¼¢ differential all prices listed will be ¼¢ higher. In many cases it probably will be 720 advisable to notify customers by letter or through your salesmen.

"The most important changes are—

(1) The requirement of 20 tons in one lot to obtain a differential price and

(2) The adoption of a price for 5-ton lots.

We appreciate that the new basis will not be entirely satisfactory to every buyer of oxides, but we believe it to be more reasonable and fair than the practices of the past which have led us into many inequitable arrangements for which the only justification was that they were forced on us by competition. Buying on differential, originally limited to the largest accounts, has spread to such an extent as to include some customers whose tonnage would scarcely amount to a carload a year. The 5-ton price is being introduced to take care of the medium sized buyer who is unable to meet the 20-ton requirement, but who is entitled to something better than the occasional user of a single barrel.

"Along with this letter we are sending you interpretations of several of the clauses in 'Schedule A', and some instructions which we hope will answer the questions that naturally will arise. If you are in doubt on any points please write us at once.

"Orders may be taken between May 21st and 31st on the present basis for shipment up to June 30th. The new conditions of sale will apply to all orders received on and after June 1st."

Attached to the letter quoted above are the "Interpretations" of Schedule A of the Code which make it apparent what the respondents actually intended to put into effect and operation above and beyond what is stated in the literal text of Schedule A. For instance, it is stated in interpreting Article I of Schedule A that certain states will take a ¼¢ differential over the par zone; that "all sellers have agreed to discontinue the old ninety-day card price contracts"; and that as to the rule against protection against price decline "there was a great deal of discussion and it was finally decided to make a definite rule which is intended to mean that the price to apply on any order is that 'in effect on the date order is received'" (RX 159-D).

Regarding the provisions of Article II of Schedule A, sales of red lead and litharge in carload lots, the "Interpretation" contains the following (RX 159-E):

"The differentials, which will apply to 20-ton lots, will be as follows in par territory:

$1.50 for Litharge and Special Negative Battery Oxide.
$1.75 for Special Positive Battery Oxide.
$2.50 for Red Lead up to and including 95%.

721 "There will be an advance of ¼¢ a pound for shipments to Florida, Georgia, Alabama, Mississippi, Louisiana, Arkansas, Texas, Oklahoma, New Mexico, Colorado, Wyoming and Montana. (Schedules for states served by Pacific Coast not yet determined.)"

There is no issue over the adoption of the Agency Plan by National and Eagle-Picher on November 15, 1933, and over the fact that the respondents each began to employ the various zone systems at sometime in the period from November, 1933 to June, 1934, except as to the position taken by Sherwin-Williams, which will be discussed in more detail below. It is clear that a number of other significant changes in trade practices were likewise first employed by the respondents following the discussions in the Lead Pigments Division more fully set forth above.

All of the officials of the various respondents who were called as witnesses denied the existence of any agreements or understandings with other respondents as to prices, terms or conditions of sale subsequent to the Code period, and all of them denied any price fixing agreements at that time. However, the character of the Code discussions can be appreciated more fully in the light of the following testimony by Mr. Paul Sprague, Vice President of Glidden and a principal participant in the Lead Pigments Division meetings (Tr. 2633-34):

"Q. Now getting to those discussions in the Code period, I assume now you are referring to the meetings of the various branches of the Pigments Division. At those meetings did the members present discuss fully the practices which were then and had been in the past employed in marketing these various pigments?

A. Well, the meetings that I attended discussed quite thoroughly all phases that related to the problems of the industry in the light of the situation in those days—everything we could think of.

Q. Did those discussions include suggestions by those present as to improvements which could be made in the marketing practices of the industry?

A. Very definitely, sir, they did.

Q. And those were full and complete discussions of those problems?

A. I can recall of no limits that were placed on anybody in those discussions.

Q. Were those people in general agreement as to many of the things which were discussed as improvements, as to the value of them in the industry?

A. Well, the history of those meetings was this, that there were many differences of opinion and as they met further and wrestled with problems they probably had the same situation as confronted General Marshall, they finally threshed them out to a point where they could agree on recommendations for the Code."

722 Since the discussions between the respondents and their agreements went to practices which were never included in any draft of a Code, and were apparently never intended to be included in such Code, as well as to prac-

tices which were covered by provisions of a Supplementary Code which the respondents never permitted to become operative, the conclusion is inescapable that the discussions set forth more fully above were for the purpose of a cooperative revision of pricing practices in the industry beyond the sanction of the National Industrial Recovery Act.

The respondents were aware of their responsibilities under the Anti-Trust laws and that they were not being invited by the Government to enter into a price fixing conspiracy. In the minutes of the Dry Products Committee meeting of October 27, 1933, appeared the following (CX 504-B):

"It was agreed, in deference to existing statutes, that no reference to prices should appear in the outlines except for the specification that 'prices were to be agreed upon between buyer and seller'."

Further, counsel was consulted about adoption of the various practices prior to Code approval and made the suggestion, which appears to have been followed, that such action "by agreement" might be a violation of law, so that one company should announce a change in practices and the rest of them follow:

"without agreement on the subject but merely because it was individually to their best interests to do so." (CX 522-B)

Furthermore, the President of National on July 28, 1934, made a public announcement to the press showing his awareness of the existence of the Anti-Trust laws and expressing his opinion that the N. R. A. Codes provided an illusory exemption from the provisions of such laws (RX 168).

The record is clear that the respondents reached understandings and agreements between and among themselves in the period from July, 1933 to June, 1934 to do the following things (except that Anaconda and International did not participate as to red lead and litharge):

(1) Sell white lead-in-oil and other lead pigments packaged in kegs or cans of 100 pounds or less on the basis of flat delivered prices to customers within designated zones, and with uniform differentials applicable within such zones, as set forth in the white lead-in-oil and keg products zone map attached hereto and made a part hereof;

(2) Sell white lead-in-oil on the basis of consignment contracts or arrangements for the purpose of controlling

resale prices in the trade and preventing competition between themselves and their customers (except that Sherwin-Williams and Glidden did not take part in this understanding);

723 (3) Sell lead pigments in kegs and cans at uniform differentials of 25¢ per 100 pounds between keg sizes of 12½, 25, 50 and 100 pounds;

(4) Eliminate and refrain from permitting guarantees against declines in price upon lead pigments packaged in kegs or cans and red lead and litharge in less than carload lots;

(5) Sell dry white lead (both basic carbonate and basic sulphate) upon the basis of flat delivered price quotations to customers; within designated zones, and with uniform differentials applicable to such zones, as set forth in the dry white lead zone map attached hereto and made a part hereof;

(6) Sell dry white lead upon uniform discounts and terms of sale, with a uniform addition to price quotations for delivery in lots of less than twenty tons;

(7) Eliminate and refrain from entering into contracts to supply dry white lead at a stated differential over the price of pig lead;

(8) Sell red lead and litharge in drums or barrels and in quantities of less than twenty tons upon the basis of flat delivered price quotations to customers within designated zones, and with uniform differentials applicable to such zones, as set forth in the less-than-carload red lead and litharge zone map attached hereto and made a part hereof;

(9) Sell red lead and litharge in drums or barrels and in quantities of more than 20 tons upon the basis of flat delivered price quotations to customers within designated zones, and with uniform differentials applicable to such zones, as set forth in the carload red lead and litharge zone map attached hereto and made a part hereof.

(10) Eliminate and refrain from entering into contracts to supply red lead and litharge in quantities less than 20 tons at a stated differential over the price of pig lead;

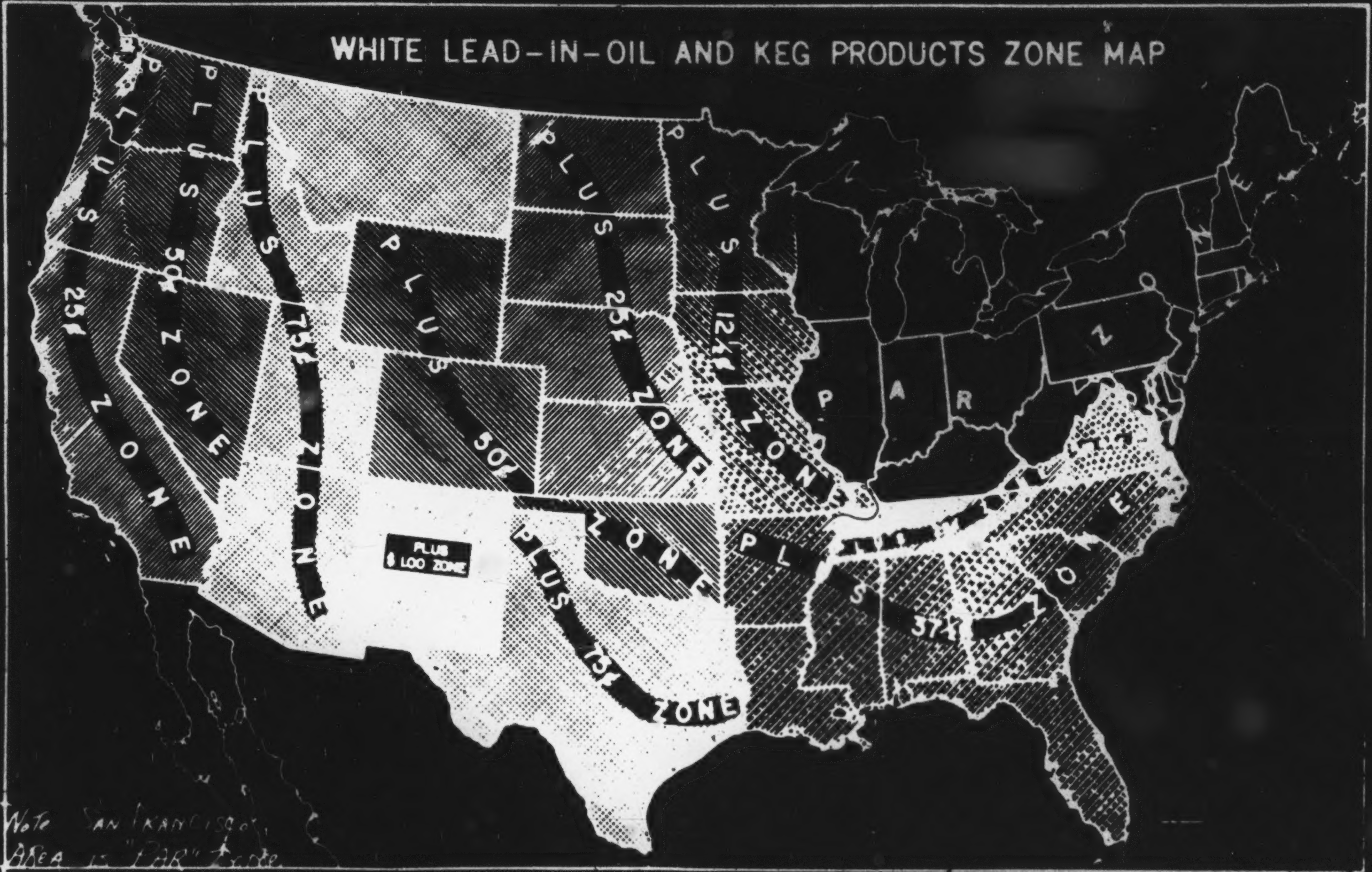
(11) Quote and sell red lead and litharge in quantities of less than 20 tons on the basis of price cards distributed to the trade and calculated on a differential over pig lead prices to move up or down with fluctuations in the lead

market in multiples of not less than 25¢ per hundred pounds;

(12) Quote and sell red lead and litharge in 20 ton quantities on the basis of differentials over the price of pig lead as quoted by the American Smelting and Refining Co. for delivery in New York as follows, to move up or down with fluctuations of pig lead prices in multiples of not less than 5¢ per hundred pounds:

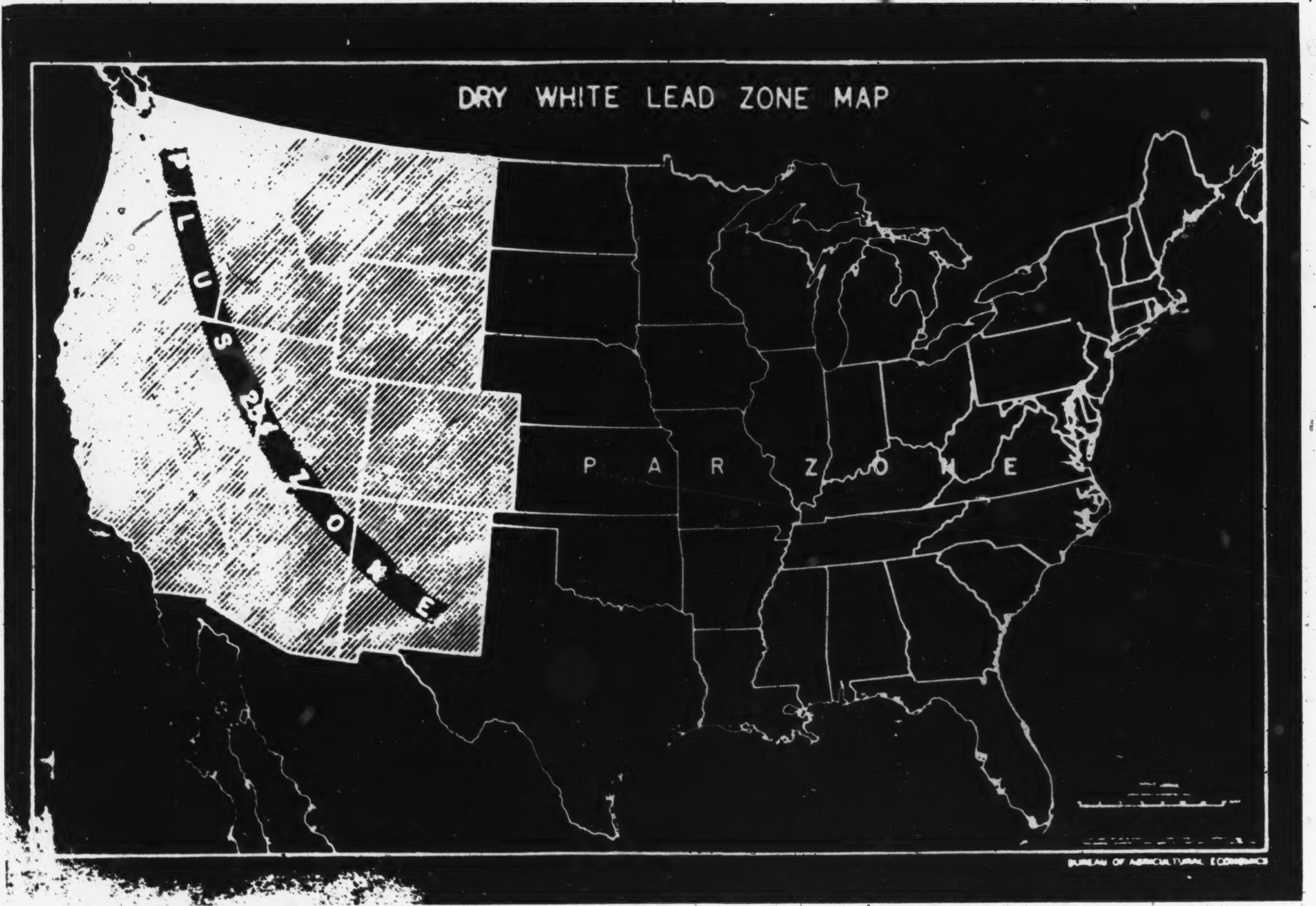
Litharge	$1.50 per cwt.
Litharge (75%) Red lead (25%) ..	1.75 per cwt.

WHITE LEAD-IN-OIL AND KEG PRODUCTS ZONE MAP


PLUS 25¢ ZONE
PLUS 50¢ ZONE
PLUS 75¢ ZONE
PLUS 50¢ ZONE
PLUS $1.00 ZONE
PLUS 75¢ ZONE
PLUS 25¢ ZONE
PLUS 12½¢ ZONE
PAR ZONE
PLUS 37½¢ ZONE
Note San Francisco Area is "PAR" Zone
BUREAU OF AGRICULTURAL ECONOMICS

724

3405

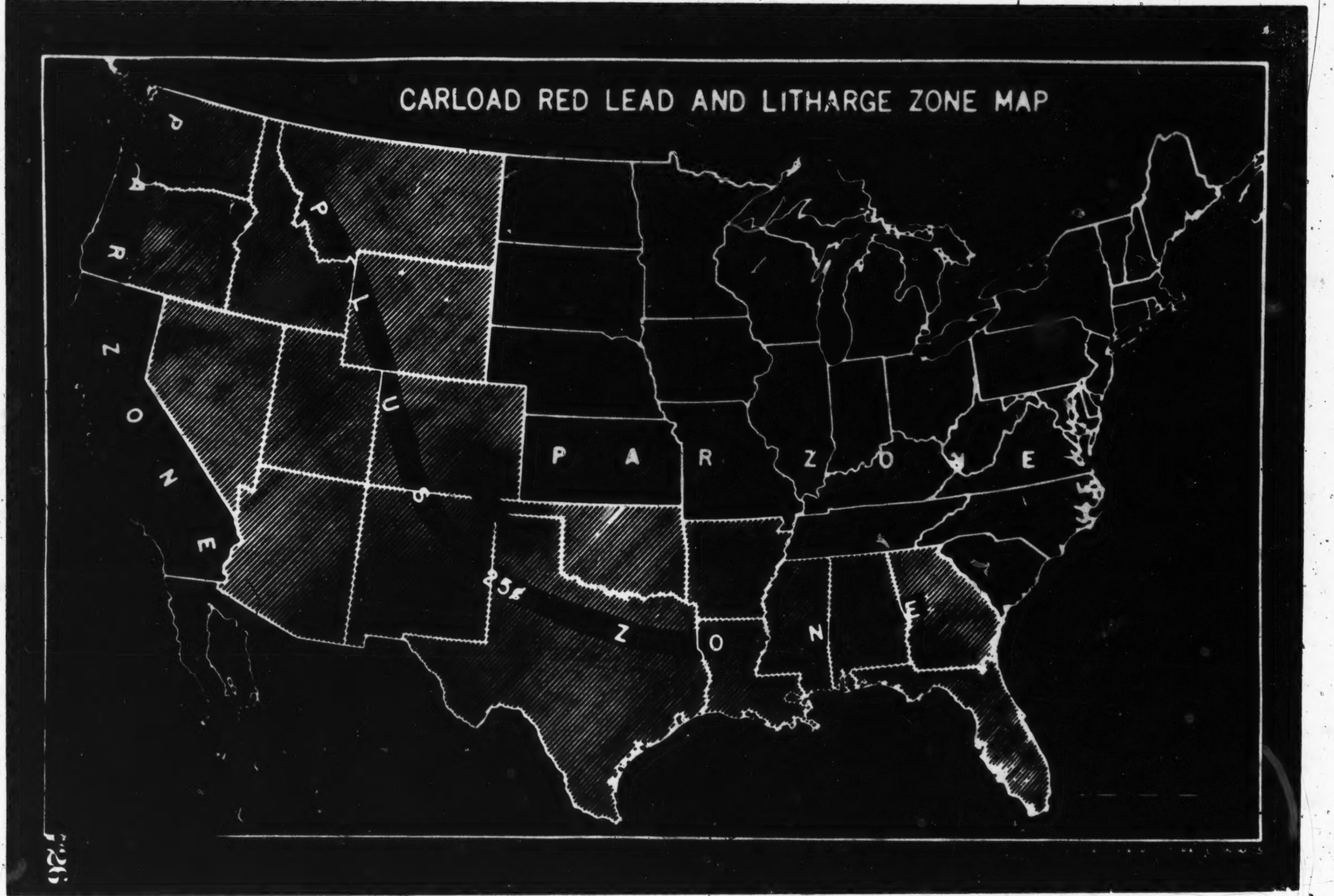


DRY WHITE LEAD ZONE MAP

PLUS ZONE
PAR ZONE

BUREAU OF AGRICULTURAL ECONOMICS

3406

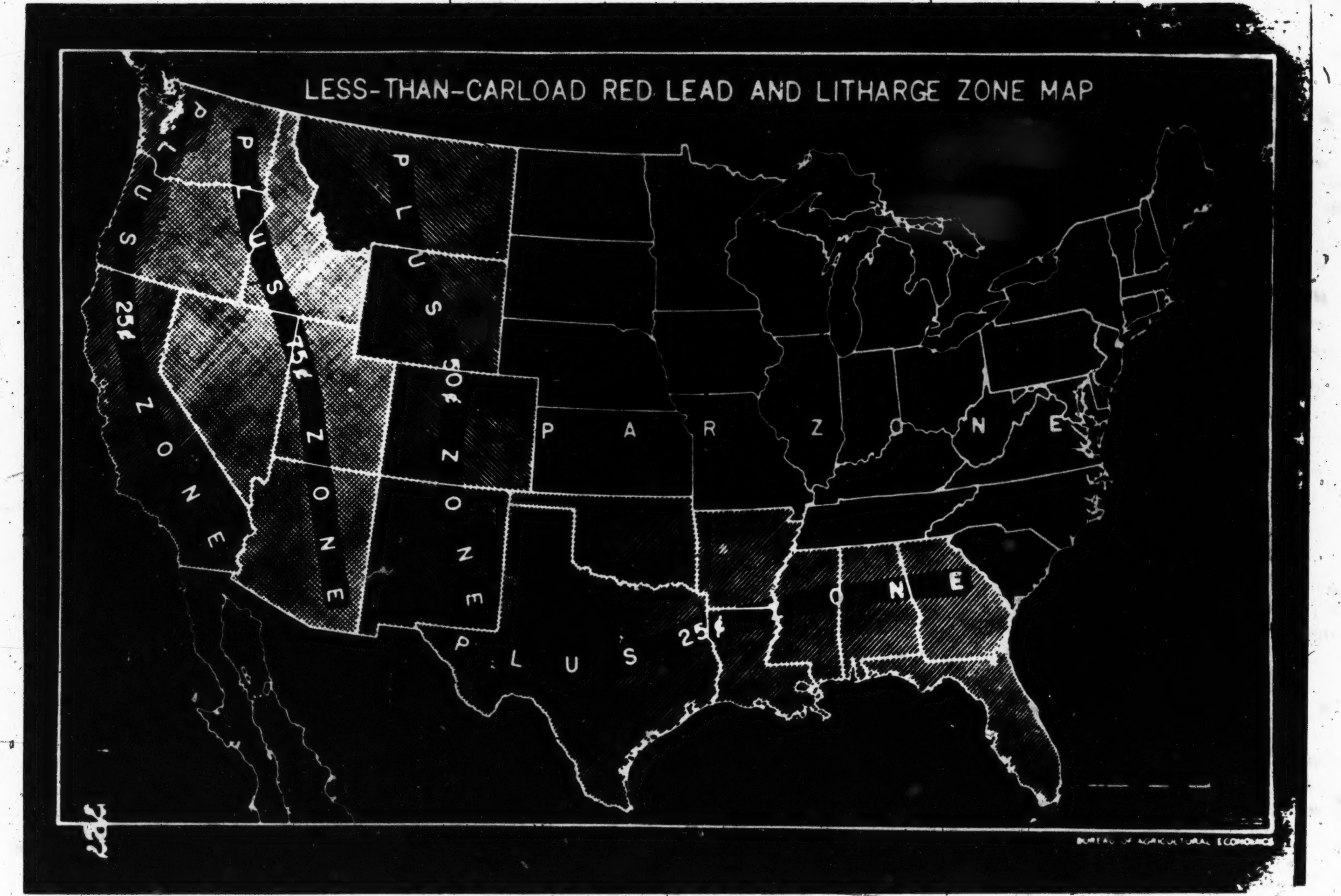


CARLOAD RED LEAD AND LITHARGE ZONE MAP

PAR ZONE
PLUS
PAR ZONE
25¢ ZONE

726

3407



LESS-THAN-CARLOAD RED LEAD AND LITHARGE ZONE MAP

PLUS 25¢ ZONE
PLUS 75¢ ZONE
PLUS 50¢ ZONE
PAR ZONE
PLUS 25¢ ZONE

BUREAU OF AGRICULTURAL ECONOMICS

3408

728 95% Red Lead	$2.50 per cwt.
97% Red Lead	2.75 per cwt.
98% Red Lead	3.00 per cwt.

(13) Fix arbitrary discriminations between carload, 5 ton and less than 5 ton purchases of oxides in 600 pound barrels by calculating card prices, as set forth in (6) above, on the basis of the following differentials over the American Smelting and Refining Co.'s New York price of pig lead:

Litharge	$2.50
Litharge (75%)—Red Lead (25%)	2.75
95% Red Lead	3.50
97% Red Lead	3.75
98% Red Lead	4.00

(14) Establish arbitrary prices, terms and conditions of sale applicable to sales to customers classified as government, railroads, steamship lines and industrial.

IV. Adherence to the Conspiracy.

With certain exceptions the respondents have followed the pricing practices and terms and conditions of sale, agreed upon as found above, from 1934 to the present time.

The pricing practices of National are well documented both by copies of price announcements, by invoice records showing sales pursuant to the agreed provisions and by testimony of National officials who were called as witnesses. Commission's Exhibit 752 A-Z144 is a tabulation of invoices compiled directly from the records of National showing sales of lead pigments in about 60 different cities during two quarters of 1941 and one quarter of 1943. The adherence to the zone system and the trade classifications shown from these thousands of transactions demonstrate an inflexible adherence to the zone system by National. National's practices in selling in accordance with the system was described by the manager of the Trade Sales Department, Mr. McCarthy, as follows (Tr. 1099):

"Q. Mr. McCarthy, are the sales of lead pigments by the National Lead Company generally made at the published prices and announcements of the National Lead Company over the period of your experience with the company?

A. Definitely."

The manager of the Dry Products Department of National, Mr. Merson, was called as a witness and testified that the company has generally followed, at least from 1938, when he assumed his present position, the terms and conditions of sale set forth in Schedule A of the Supplementary Code (Tr. 1650-1656) and that National has 729 generally employed the differentials of $1.50 for litharge and $2.50 for red lead over American Smelting & Refining Company's quotations on spot sales or American Smelting and Refining Company, American Metal Market, or Engineering and Mining Journal average price quotation of pig lead (Tr. 1636, 1652).

The prices, terms and conditions of sale generally employed by National during the period from 1934 to date, in the form of price cards, price announcements and instructions to branch managers as to pricing showing adherence to the system appear in the record as Commission's Exhibits 595, 659, 806, 862; Respondent's Exhibits 154, 158, 167.

The only deviations from the trade practices and pricing methods shown in the record as to National are in some sales to very large battery manufacturers and in some bids to three Federal Government Departments (CX 843-850; RX 306-308). The record shows that both Eagle-Picher and National, in the period of the last quarter of 1941 at least, made concessions from the regular differentials on carload purchases of battery oxides by the large battery manufacturers. These deviations may be assumed to be the result of pressure on the respondents by very large consumers of battery oxides who might have been in a position to produce their own red lead and litharge unless some concession were made to them, as more fully set forth below. As to the bids submitted in 1941 to the United States Navy, United States Treasury and Panama Canal, there is considerable dissimilarity in offered prices. On the other hand, in bids submitted to the cities of Cincinnati and Milwaukee (CX 864, 865) the various respondents quoted identical bids, strictly in accordance with their announced terms and conditions of sale. In view of the background of respondents' discussions in the White Lead-in-Oil Committee meeting of August 9 (CX 501) where they sought to reach an understanding on a method of allocating Government business between them by prearrangement and collusive bids, it is not thought that the evidence as to dissimilar bids to the three Government Departments is persuasive evidence of substantial competition between them. Even if such were the case, however, price differences as to one particular type of customer, and rigid adherence to the agreed system as to all other types of customers, including other agencies, does not detract from the conspiracy as found.

The record shows that Eagle-Picher followed the pricing practices and policies of the National Lead Company from 1934 on with but a single exception—that in some instances Eagle-Picher did not follow certain quantity allowances as to white lead-in-oil sold direct to painters, a very minor part of the business in white lead-in-oil. Like National, Eagle apparently found it necessary to depart on occasion from the regular carload differentials in selling to very large battery manufacturers who were in a position to produce their own oxides (CX 854 A-D). An official of Eagle-Picher who was called upon to testify stated that Eagle had followed the zones since 1933 or 1934 substantially as they are set out in the maps attached hereto
730 (Tr. 1550). The same official testified as follows (Tr. 3686-87):

"Q. Well, then, if these prices of white lead in oil move on a whole scale, so that the list price, dealer price and painter price would be affected by any change, can you tell me of any changes now in the period up to the end of 1945 in that scale, in that whole scale of prices, leaving for the moment the question of quantities and quantity discounts, where such changes by National have not been followed by Eagle-Picher?

A. Not in that period you mentioned, I don't think there were any exceptions or occasions where they didn't follow."

Another official of Eagle-Picher testifying regarding the dry products, testified that the carload differentials, card prices and zones, as well as most of the terms and conditions of sale as set forth in Schedule A have been followed by Eagle-Picher in the period subsequent to the Code (Tr. 1590-1621).

The price cards, announcements to the trade, instructions to salesmen and branch officials, and invoice records of Eagle-Picher during the period subsequent to the Code likewise show adherence by that company to the agreed pricing methods and terms and conditions of sale (CX 585-590; 658; 660; 754; 838; 840).

The record shows that Anaconda, along with its subsidiaries, adhered to the zone methods and pricing policies agreed upon as to white lead-in-oil and dry white lead, the only two pigments produced by them, from the Code period to 1946, with one deviation. An official of International was called as a witness and testified as follows (Tr. 3505):

"Q. Subsequent to the adoption of the two-zone system in the sale of dry white lead, did you ever sell that commodity at a price less than that sold by your competitors?

A. No."

The same witness testified later (Tr. 3585):

"Our prices were based on what our competitors were doing."

The only deviation by Anaconda was in sales of white lead-in-oil. The Anaconda brand was relatively a newcomer into the industry and difficulty was encountered in establishing it with dealers against the better known Dutch Boy and Eagle brands. Thus, while the same resale prices to consumers and painters were set by Anaconda as were set by National and Eagle-Picher, the dealer price was 25¢ per hundred lower, for the purpose of giving the dealer an extra compensation of 25¢ per hundred pounds for handling the lesser known brand (Tr. 3513; 3585).

When asked about adopting the two-zone for their selling dry white lead, a witness for International testified as follows (Tr. 3498):

731 "Q. Why did those companies adopt this two-zone system for selling dry white lead?

A. Well, we adopted it because it was adopted by our competitors, and we went along on the same basis."

The evidence in the record in the form of price cards, price announcements, zone maps, and stipulated facts, shows that Anaconda and International followed the system adopted in 1933 and 1934, with the one deviation noted above, from the Code period to 1946 (CX 591, 592, 661, 738, 739, 795 and 836).

Respondent Glidden likewise adopted and followed the agreed pricing practices and terms and conditions of sale, with minor deviations, from the period of the Code to the present time. The invoices, price cards, instructions to salesmen and other documents in the file, including tabulations of sales records, show adherence to the zone system and the other practices, with the exception that for a period of time Glidden offered dealers purchasing white lead-in-oil outright a price 20% lower than the price to dealers on consignment and the prices of respondents National and Eagle-Picher. Since resale prices to consumers and painters were identical with those of the other respondents, this concession, as the similar concession of Anaconda and of Sherwin-Williams, served as an added incentive to the dealer to promote the sale of Glidden's products, without disturbing the resale price level.

Glidden did not enter the agreement to adopt the Agency Plan in 1933 and when it did utilize Agency contracts in the period from 1939 to 1941 it apparently did so with some reluctance.

An indication of the extent to which Glidden followed the actions of its competitors is the statement of Sprague, its Vice President and a principal participant in the Pigments Division meetings, that the regarded price competition as an unhealthy condition in the industry and that it was never to Glidden's interest to initiate any change in prices (Tr. 2561). Mr. Sprague stated all through his testimony that it had been Glidden's practice from the Code period onward to follow the prices of National. One exception to that in the period before 1936 was a differential of ⅛¢ per pound on dry white lead sales to paint manufacturers which had been granted by Glidden up to that time to overcome the reluctance of paint manufacturers to purchase from a competitor (Tr. 2458-2656).

The extent of following of National and other respondents by Glidden is illustrated by Commission's Exhibit 774 which is a letter from the manager of Glidden's San Francisco Branch under date of July 6, 1945, transmitting price information to the central office of Glidden which contains the following note;

"Due to the fact that we have been unable to find any price list for the first and last quarter of 1941, Mr. Ehrke suggested that you may want the National Lead price list for Pacific Coast Branch which was effective May 28, 1940. He says these prices were the same as ours."

732 The documents in the record in the form of price cards, price announcements, instructions to branches, invoices, and tabulations of invoices showing adherence to the agreed terms and conditions of sale and pricing practices are Commission's Exhibits 757 through 767, 771, 772, 798, 810, 829, 830, 831 and 841.

With some deviations, respondents Sherwin-Williams has also adopted and put into effect in the period from the Code the agreed pricing practices and terms and conditions of sale. It is the contention of Sherwin-Williams that zones are not employed in quoting and selling on lead pigments and that the present method is one of free delivery and equalization points as previously utilized in the industry prior to the conspiracy. This contention will not withstand close inspection and it appears from the testimony of witnesses and from price cards and announcements of the company that it follows the zone methods and other conditions and terms of sale with a few deviations. In billing to all of its company-owned stores Sherwin-Williams follows the zones and differentials as set forth in the map; and it follows such zones and differentials in selling to customers wherever located who purchase in truckload quantities. Such quantities may be as little as 10,000 pounds and include paint or any other item sold by Sherwin-Williams. When it had been testified by a Vice President of Sherwin-Williams that the company invariably added freight charges in sales of white lead-in-oil away from the shipping points appearing on its price cards, numerous invoices were presented, which had originally been recorded in tabulation form in Commission's Exhibit 662 A-Z26, showing that Sherwin-Williams did not require customers in towns away from its shipping points to pay additional charges (CX 833 A-Z100).

Following this evidence, officials of Sherwin-Williams were called who modified the original statement of policy and testified that the company added freight charges to customers located away from shipping points only when such customers purchased in quantities of less than carload or truckload and except when competitors' use of the zone method required Sherwin-Williams to absorb or pre-pay freight charges (witnesses Brown, Tr. 3694; Lemke, Tr. 3743; and Lewis, Tr. 4103).

It is found, upon the basis of the documents in the form of invoices, price cards, bulletins to branches, and testimony of these witnesses, that Sherwin-Williams followed the zone method and other trade practices in all but a few transactions.

The following of the system in quoting on various lead pigments by Sherwin-Williams is graphically set forth in Commission's Exhibit 662-A through Z26 and in Commission's Exhibits 777 through 782-F. Except that Sherwin-

Williams quoted a dealer price 25¢ lower on white lead-in-oil than that quoted by National and Eagle-Picher, and in the same manner as respondents Glidden and Anaconda, the use of the zone methods and other practices has been in conformance with the similar actions of the other respondents.

In addition to the price information in the form of exhibits cited above, the record contains other evidence of conformity with the system, including Commission's Exhibits 784, 794 A-Z13, 823 A-G (showing use of the zone and other practices on dry red lead and litharge) and 833 A-Z100.

733 V. Discriminations Under Count II.

The discrimination in price found to be supported by the record fall into two principal categories—discriminations in not realized prices and in systematic variations thereof through zone differentials and transportation charges; and discriminations arising through differing quantity bases in the sale of red lead and litharge, and in classifying customers for white lead-in-oil by National.

In the lead pigments industry the cost of the basic raw material pig lead, is an inescapable item which usually amounts to 50% or more of the producer's quoted prices. Sprague, testifying in behalf of Glidden, characterized the producer of red lead and litharge as a converter and the spread between the cost of the pig lead and the selling price as a toll (Tr. 2563). Respondent's Exhibit 142 shows the metallic lead content of the principal pigments as follows:

White lead-in-oil	73.6%
Dry basic carbonate	80%
Red Lead	90.66%
Litharge	92%

Since none of the respondents is in a position to produce, in the sense of mining or smelting or refining, more than a fraction of the requirements of pig lead, each of the respondents must maintain a working inventory of metallic lead which, in the case of Glidden at least, is kept at a minimum to avoid speculation in the metal market. Thus, Glidden seeks to buy pig lead as it sells lead pigments (Tr. 2546-47). This being the case, price, in the sense of being the gross operating revenue from sales of lead pigments, is the amount received by the respondents at the shipping point less the cost of the basic raw material, lead. In most instances, this gross revenue at the shipping point is less than the cost of the pig lead and it must bear all of the factory costs, overhead, depreciation, taxes, selling and credit expenses, and profit.

In processing 100 pounds of pig lead a respondent may expect to produce 105 pounds of litharge or 109 pounds of red lead. Figured on the basis of 92% lead content, as in Respondent's Exhibit 142, in the last quarter of 1941 pig lead was quoted on the New York market at $5.85 a hundred and litharge in carload quantities was figured at $7.35, so that the cost of metallic lead as contained in the finished product was $5.382, and the gross margin between the lead cost and the delivered price quotation was $1.968 per hundred pounds. Actually, this gross margin is too large since there is an inescapable loss in the process of manufacture.

Assuming for convenience a loss of lead in processing of $.018 per hundred pounds, the highest net return that could be received from a carload sale of litharge would be $1.95, deducting the inescapable pig lead cost. Since the price to a 5-ton purchaser is based on the card relationship to pig lead, it was, in the last quarter of 1941, $.40 per hundred higher; and the less-than-five ton price $.90 higher. The highest net return to the respondents on this basis, as between the three classes of customers is thus:

734

	Per cwt.	Per 600 # drum
Carload	$1.95	$11.70—65 or more drums
5-ton	2.35	14.10—17 or more drums
Less 5-ton	2.85	17.10—Less than 17 drums

Expressed in this fashion, it is apparent that the respondents receive nearly 50% more gross revenue from sales to purchasers of 17 or fewer drums of litharge than from purchasers of 65 or more drums. Translated into the competitive situation existing among purchasers in the battery manufacturing industry, this differential between the carload and less-than-five ton purchasers means a saving in materials cost of $.10 in favor of the larger purchaser.

The record shows that the storage battery industry is constituted of more than 200 companies, ranging from multiple plant operations of the United States Electric

Storage Battery Company, and its subsidiaries Willard and Grant, to small proprietorships whose production of batteries may be less than 50 units a day. The testimony in the record, by officials of the respondents and representatives of the various battery manufacturers who were called as witnesses shows that the storage battery business in the period from the Code to 1941 was characterized by sharp price competition, particularly on the part of some of the large battery manufacturers such as Globe-Union Company (a subsidiary of Sears, Roebuck & Company), National Battery Company, and Bowers Battery Company. During most of the period small 13-plate 60-ampere automotive batteries were being marketed at retail prices at or below the cost of production.

It is clear from the record that a saving of as much as 10¢ per battery on material costs would have been a matter of considerable competitive importance to the customers of the respondents who purchased in the higher price categories on red lead and litharge, and that they were during more normal competitive times at a distinct disadvantage in seeking to compete with the more favored larger customers (testimony of witnesses Eagan, Tr. 1923; Florence, Tr. 1905; Lunkes, Tr. 1872; Sweet, Tr. 1748).

The price difference of nearly $6.00 per barrel between the two classes of customers is still further widened by the fact that in many instances the smaller purchasers are located in the same city as the respondents' producing plants, and the larger customers taking the more favorable price are so located that the respondents must allow a reduction of as much as $3.00 per barrel additional for shipping costs. Thus National sold in 1941 to two small battery manufacturers located in St. Louis, Missouri, delivering by its own truck out of its St. Louis plant at the less-than-five ton price, which is $5.40 per barrel higher than the carload price, and to two small battery manufacturers at the five-ton price which is $2.40 per barrel higher than the carload price (CX 853F); and at the same time sold on the carload basis to large manufacturers of storage batteries in Omaha, Nebraska, where the carload freight rate is $1.74 per barrel; Indianapolis, Indiana, where the rate is $1.32 a barrel; in Muncie, Indiana, where the rate is $1.44 a barrel; and in Niagara Falls, New York, where the rate is $2.36 a barrel (CX 853-F, G). The carload customers involved in the transactions to Omaha, Indianapolis, Muncie

and Niagara Falls were all shipped out of the St. Louis branch, and were Grant Storage Battery Company, a Willard-Exide subsidiary; Prest-o-lite Company, Inc.,
735 one of the largest manufacturers of batteries and Delco-Remy Division of General Motors Corporation. The four less-than-carload accounts in St. Louis are manufacturers who produce batteries on a small scale with very limited distribution (Tr. 1919-20, 1924). The proprietor of one of these customers, Sidney Battery Manufacturing Company, listed as a five-ton purchaser, was called as a witness and testified that he had been a customer of National Lead Company out of the St. Louis plant for approximately twelve to fifteen years, purchasing on either the less-than-five ton or the five ton basis and engaged in producing up to 135 storage batteries per day, the capacity of his plant. This witness testified that competitive conditions during the period from 1936 to 1941 in the sale of storage batteries in the St. Louis area were "so bad that the only way we could get by and make a living was to use the old battery cases over again"; that the competition of Grant Storage Battery Company, Majestic and Monark of Chicago, and Sears-Roebuck was such that the enterprise had gone "broke" in about 1933; and that in the following period his company could not manufacture batteries for sale at prices comparable with those offered at retail by Sears-Roebuck (Tr. 1926-28).

Commission's Exhibit 853-A shows that during the same period of time National sold Globe-Union, Inc., the battery manufacturing subsidiary of Sears-Roebuck, on the carload basis, shipping from St. Louis to Memphis, Tennessee, at a rail freight rate of $1.98 per barrel, and from St. Louis to Milwaukee, Wisconsin, at a rate of 96¢ per barrel.

Numerous small battery manufacturers, purchasing from respondents Glidden, Eagle-Picher, and National, were called to testify. These witnesses had all purchased at the five ton or less-than-five ton price and were engaged in sharp competition with other customers of these respondents located both in Chicago and at distant points who purchased on the carload basis. Several of these witnesses testified that in the period from 1936 to 1940 price competition was so severe in the storage battery industry that they were unable to meet the prices of the large manufacturers without incurring a net loss. They stated that a saving in material costs amounting to from 5 to 10¢ per storage battery would have made considerable difference in their ability to compete during the period from 1936 to 1941 (Tr. 1753, 1761, and 1880).

The respondents are willing to accept on sales of litharge to carload purchasers a gross revenue after shipping costs of as little as $9.00 a barrel, while at the same time requiring small independent manufacturers located in the same cities as the respondents' factories and in direct competition with the carload purchasers to pay a price yielding nearly twice this gross revenue after shipping costs.

It is apparent from the record that the wide disparity in prices to the less-than-carload and carload purchasers in the oxide field can be accounted for by the fact that the extremely large producers of storage batteries do in some instances produce their own oxides and may be in a position to do so economically if their consumption is in excess of 4,000 tons per year. This fact may account for some of
the deviations below the differential of $1.50 over the
736 New York price of pig lead which are shown to have
been made by National and Eagle-Picher to such large battery manufacturers notably Grant, in Minneapolis and Omaha.

Unfortunately for the small battery manufacturer who makes from 50 to 150 batteries a day, or even in excess of that number, not only can he never construct furnaces costing many hundreds of thousands of dollars to produce his own litharge and red lead—he cannot even invest the several thousand dollars necessary to purchase a car of litharge for delivery at one time; and some of them could not in 1941 make the outlay of $775 necessary to purchase 10,000 pounds at one time at a saving of $3 per barrel (Tr. 1886).

The zone system in oxides as practiced by respondents discriminates between geographical areas in the differentials between zones, with the effect of further widening the discriminations against l. c. l. purchasers in some instances. National operates plants producing red lead and litharge in Dallas, Texas, and in Atlanta, Georgia. Both of these plants are located in a premium zone, so that in delivering to customers in Dallas from the Dallas plant a differential of ½¢ a pound or $1.50 per barrel is added, although the only transportation costs involved are deliveries in company-owned trucks from the plant to customers in the same city.

The record shows that National sells to Vitalic Battery Company, Inc., of Dallas, Texas, on the carload basis, delivery being made out of the Dallas plant at switching costs of $8.30 per car. It was stipulated in the record that if an official of Vitalic were called as a witness he would testify that red lead and litharge have been purchased from Eagle-Picher and National on the published carload prices for delivery in Dallas; that the company markets storage batteries in Texas, Oklahoma, Missouri, Kansas, Arkansas, Louisiana, and New Mexico; that the cost of lead oxides amounts to approximately 33% of the total material cost; and that the battery business is highly competitive in its market arrangements in normal times, chiefly from the following concerns:

Willard Storage Battery Company
Exide Storage Battery Company
National Battery Company
Sears, Roebuck & Company (Globe-Union)
Montgomery Ward
Western Auto Supply
Auto-Lite
Continental & Lyle

It was further stipulated that in normal times, in the period from 1937 to 1941:

"a saving in material cost of 5 to 10¢ per battery would be an important saving to us in times of normal competition." (Tr. 2022-24.)

The record shows that these large competitors of Vitalic are located in the par zone where the delivered price is $1.50 a barrel less than in Dallas, and that in some instances the freight rates absorbed by the National Lead
737 Company in shipping to such customers in the par zone
are in excess of the sum added to the price to the customer in Dallas (CX 853 A-W).

In following out the zone system Glidden was willing to sell litharge and red lead in carload quantities to customers in Philadelphia, Reading, Pa., and Corydon, Iowa, reducing its gross revenue by 41¢ and 38¢ per hundred pounds respectively, a shrinkage of more than 20% in what it actually realized at the mill, while at the same time imposing the par zone price on carload purchasers in the city of Chicago where trucking charges were 11¢ a hundredweight (CX 852-B). In the case of Glidden's sales of red lead and litharge to 5 ton and less-than-5-ton purchasers, its mill net realization was shrunk as much as $1.00 in selling to distant customers as against those located in the Chicago area (CX 852-B and C). Out of the St. Louis branch of the National Lead Company sales were made locally of red lead and litharge to purchasers on the 5 ton and less-than-5-ton basis and deliveries made in company-owned trucks, realizing the highest possible sales revenue, and at the same time shipments were made to purchasers in the same category at more distant points resulting in a shrinkage of the net realization of more than 50¢ per hundred pounds (CX 853 E, F, G).

In the case of Eagle-Picher, sales were made of red lead and litharge out of the Newark plant to nearby customers, shrinking net realization by 9¢, at the same time as much as 94¢ per hundred pounds was being absorbed in shipping to more distant customers (CX 854-A through D). Likewise, from from the Joplin, Mo., plant Eagle-Picher was quoting and selling red lead and litharge in the last quarter of 1941 at points on the Pacific Coast, taking the par zone quotation, shrinking its net realization as much as 71¢ per hundred pounds, while quoting and selling to customers in and around Joplin and Kansas City where it realized 50¢ per hundred pounds more for its products (CX 854-A through D).

Furthermore, Eagle-Picher maintains its principle producing plant at Joplin, in the southwest corner of Missouri, less than a score of miles from both the Arkansas and Oklahoma borders. Joplin is in the heart of the tri-state lead field and it is in this field that Eagle-Picher conducts lead mining, smelting and refining operations as well as operating its red lead and litharge plants. Eagle-Picher is shown to be entirely willing to ship pigments produced at Joplin over most of the par zone; into North Dakota, Minnesota, Michigan, Ohio, and Kentucky, at the so-called par price shrunk by the freight involved, yet until it was made "par" territory in 1942, a differential of 25¢ per hundred pounds was added for sale of red lead and litharge to customers in Oklahoma and Arkansas, less than a dozen miles away.

Commission's Exhibit 752-Z120 and Respondent's Exhibit 162-B and C show sales by National to competitors named by the St. Louis paint manufacturers who are located in Kansas City, Omaha, Houston and Dallas in less than carload quantities where National, by pursuing the zone system and absorbing or allowing freight charges to destination, shrank its St. Louis price by amounts of 19½¢, 39¢, $1.32, and 48¢ respectively per hundred pounds.

738 To have granted the customers located in the same city with its St. Louis plant the benefit of their advantageous location in the form of a price from which was removed the arbitrary average differential for transportation, would have enabled the paint company customers of National to compete in their former markets without the injury which they have suffered as a result of the zone system.

Respondent's Exhibit 214 is a calculation by the St. Louis Branch of National showing that in 1941 the average freight and cartage on dry white lead sales out of that branch was 35¢ per hundred pounds. The actual cost of cartage in selling to the St. Louis paint manufacturers was no more than 10¢ per hundred pounds and is included in the first figure. Thus, the calculation of prices by National so as to include in its delivered price quotations an item of 35¢ per hundred pounds for dry white lead, imposes upon customers located adjacent to its plant, requiring them in effect to pay the freight to distant customers with whom they are in sharp and bitter price competition.

Regarding zone discriminations in the sale of dry white lead, a number of witnesses were called who were engaged in the manufacture and sale of ready-mixed paint and related items in the city of St. Louis, competing with some of the respondents here as well as with other large manufacturers of paint. The substance of their testimony is that in normal times the mixed-paint business is one characterized by sharp competition; that outside house paints containing lead pigments are the leading competitive item in a paint line; and that, in the period from 1936 to 1941 there was a very close margin of profit in the sale of ready-mixed outside white paint containing lead pigments (testimony of witnesses Casey, Haddock, Niedt and Waters, Tr. 1388-1478). It was testified that the small St. Louis paint manufacturers located in the same city with the National plant were engaged in competition with paint manufacturers in the states of Texas, Mississippi and Tennessee, as well as other states, and that the freight costs of shipping paints into these areas circumscribe the business of the St. Louis paint manufacturers. Prior to 1932 the St. Louis manufacturers were able to command a 15¢ higher delivered price on paint in the state of Texas than locally in St. Louis, but since that time they have been required by competition to lower their Texas prices in ~~order~~ to compete (Tr. 1359). It was stated by one of these witnesses (Tr. 1449):

"I mean by that that outside white paint is the most highly competitive item in the paint line; your margin of profit is less in that product than any product you have. As a result, a difference of two cents would make a difference of a profit or loss in the number of cases in selling a gallon of paint at a distant point.

Q. Do you mean to convey by your answer that that two cents' difference would enable you to go seeking new customers at more distant points?

A. It would keep us from getting business if we (illegible) weren't competitive at those points."

739 The same witness testified that a difference in cost of two cents per gallon on outside white paint in normal times:

"would represent the difference between a profit and a loss on a gallon of paint" (Tr. 1452).

The same witness stated as follows later in his cross-examination by respondent's counsel (Tr. 1458-59):

"Q. Now, is it your concept that for a 2¢ per gallon savings in price a distributor or a retailer is going to switch from one product to another?

A. No, I wouldn't say he would switch for 2¢ a gallon, but he wouldn't be able to get some business if he was higher priced than his competitors in that area.

Q. And you are not selling to the public, are you, you are selling to retailers and distributors?

A. Distributors, yes.

Q. So that the retailer or distributor wouldn't switch from one line of paint to yours for a 2¢ a gallon saving?

A. I couldn't answer that.

Q. Well, you have already said "no"?

A. Well, normally I would say "no", that is right.

Q. Would a 3¢ per gallon savings cause a retailer or distributor to switch from one line of outside white to another?

A. No.

Q. Would 4¢?

A. It would get him thinking, and at 4¢, possibly he would be on the fence at 4.

Q. At 5¢?

A. I would say that 5¢ would be the difference of getting it and not getting it.

Q. 5¢ per gallon?

A. Yes.

Q. Now, would 3¢ make that difference if it were a saving just in outside white and wouldn't affect the whole line of the manufacturer?

740 A. It would have quite a bearing on it, in view of the fact that outside white paint is the main item in any paint line and you must be competitive in that field in order to sell the rest of your line. It is the first thing that a customer wants to know, is how much is your outside white, what is the formula; and that oftentimes makes the difference of whether you sell him your complete line or not."

The differentials between zones on keg products do not reflect the differing costs of doing business in the zone areas, even on an average transaction basis as distinguished from a comparison of individual transactions, and it is concluded that the zones were adopted and have been utilized by the respondents as a convenient method of matching prices on a common basis rather than in any attempt to reflect accurately the differences in cost of doing business with customers in such territories.

In selling and shipping white lead-in-oil into Dallas, Texas, from its St. Louis plant National adds to the par zone delivered quotation the sum of 75¢ per hundred pounds, yet the carload freight rate from its St. Louis plant to its Dallas warehouse is only 46¢ per hundred pounds. Customers in Dallas are thus required to pay a "freight differential" nearly twice the actual freight rate from St. Louis to Dallas on account of their location in the Texas zone, yet National is perfectly willing to and does ship and sell white lead-in-oil from its various shipping points into other localities in the par zone, where no premium is added, and which involve higher freight rates than that to Dallas from St. Louis (CX 751).

Respondent National offered some evidence to show that, on an average basis and taken for each of its selling branches separately, the zone differentials reflect average differences in freight costs in doing business as between the zones. Thus, it was shown that as to 1941 sales of white lead-in-oil in the Philadelphia Branch that average freight and cartage in the par zone was \$.197, in the plus 12½¢ zone, \$.495; and in the plus 37½¢ zone, \$.808 (RX 166). By the same token, National computes its 1941 average freight and cartage of white lead-in-oil in the St. Louis Branch at figures running from $.206 in the par zone to $1.723 in the $1.00 zone.

In view of the relationship that exists between the costs of transporting lead pigments from shipping point to customer and the net realized price to the producer, it would not appear proper to so lump together ~~their~~ average freight costs, disregarding the discriminations which result against particular customers who are located in and around the producing points and from whom the respondents exact the highest net price. That average costs of shipping to customers over an area of a score or more states amounts to some arbitrary figure would not appear to justify exacting such amount in the form of a higher net price from those customers located in and around the producing points.

The conclusion is inescapable that the zone delivered price quotations are not in fact prices but are simply a means whereby the respondents may nullify any advantage, one over the other, in their location as to any market. Respondent's Exhibits 199 and 200 are maps prepared by Sherwin-Williams purporting to show, on the basis
741 of published rail tariffs, the areas surrounding each producing plant in which that plant would have a freight rate advantage over any other plant. Examining Respondent's Exhibit 200, which relates to red lead, it will be seen that each of the respondents has some territory within which it has an advantage, except that Glidden and Sherwin-Williams are located in Chicago where National also has a plant so that in the territory including northwest Ohio, portions of Indiana, Illinois, Iowa, Nebraska, North and South Dakota, and ~~in~~ Minnesota, Wisconsin and Michigan the three producers share an advantage over other plants.

It is concluded that the discriminations as practiced in the zone method are for the purpose of nullifying and neutralizing, on a reciprocal basis, these advantages or disadvantages of location with reference to the various markets.

There is one additional practice of discrimination, with differing prices to different classes of competing customers, which was only practiced by respondent National. National received and accepted 1¢ per pound more for white lead-in-oil from customers it classified as "dealers" than from customers classified as "agents". The record shows that dealers and agents are generally in the same business—i. e., hardware stores, lumber yards and the like, engaged in resale to painters and consumers of paint and allied products. It was testified by Fred McCarthy, the manager of trade sales of National, that even the favored customers —the agents—complained that the margin between the agent price and the resale price was too low to permit a reasonable margin of profits by the agents, and that white lead-in-oil was known in the trade as a low margin product (Tr. 3005-6). The further shrinkage of this margin to the dealer customers by National is one which necessarily may be substantially to lessen competition on the part of the dealer customers, based on the admissions of this witness.

VI. Effects of the Respondents' Practices.

The effects of the respondents' practices as set forth above in fixing and maintaining prices, terms and conditions of sale pursuant to combination, agreement and planned common course of action have been to deprive the public and customers of the respondents of the benefits of free and open competition between them, and to maintain the prices of lead pigments at levels above those that would prevail were it not for such combination, agreement and planned common course of action. Through and pursuant to such practices customers in many areas have been, and are, required to pay substantial arbitrary and unwarranted sums to the respondents in order that the respondents may maintain and operate the zone systems of selling and other practices adopted by collusion and agreement for their mutual benefit.

The effects of the respondents' practices as set forth above in discriminating in price between various purchasers, depending upon the location or the quantity in which such purchasers buy have been and are to injure, suppress and destroy competition in price between and among the respondents themselves, and to injure, suppress and destroy competition between and among such purchasers from the respondents. Inherent in use of the zone method of quoting identical delivered prices by the re-
742 spondents is a systematic discrimination against those customers located near respondents' producing plants and in favor of those customers at a distance. By this means respondents have deprived their nearby customers of the natural benefit of their locations near the respondents' plants and prevented such customers from competing with those located at a distance. The effects of the zone systems thus employed are magnified and increased by the arbitrary and unjustified differences in prices at which red

lead and litharge are quoted and sold to purchasers classified as carload, 5-ton and less-than-5-ton purchasers, which have the further effect of placing at a competitive disadvantage small purchasers of such products, many of whom are located in the same cities as respondents' producing plants.

The effect of National's practice of acquiring, and seeking to acquire, the capital stock, physical properties and assets of competing enterprises has been to give it a position of such dominance in the lead pigments industry that any further acquisition or increase in its relative size in the industry would doubtless deprive the remaining producers of any further freedom of action in marketing lead pigments.

VIII. Conclusions and Recommendations.

It is concluded that the respondents have been and (except for Anaconda and International) still are engaged in unfair methods of competition and unfair practices within the meaning of Section 5 of the Federal Trade Commission Act through their combination, conspiracy, agreements, understandings and planned common courses of action to fix, maintain and impose prices, terms and conditions of sale and suppress competition in the marketing of lead pigments, as more fully set forth in Parts III and IV hereof; that respondent National has been and is now engaged in unfair methods of competition and unfair practices within the meaning of Section 5 of the Federal Trade Commission Act through its practice of acquiring and seeking to acquire ownership or control of the business and properties of competitors engaged in production or sale of lead pigments; and that the respondents herein have been and (except for Anaconda and International) still are discriminating in price, in the course of their business in commerce, in violation of Section 2(a) of the Clayton Act, as amended, as more fully set forth in Part V hereof.

Wherefore it is respectfully urged that the Trial Examiner recommend to the Commission pursuant to Rule 22(a) of the Rules of Practice that it enter findings and conclusions as set forth above, together with appropriate form of order to cease and desist from the practices in violation of laws as set forth above.

Jos. S. Wright,
Assistant General Counsel.

December 29, 1947.

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772 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

(Received May 7, 1948.)

Now come the respondents, The Eagle-Picher Company and The Eagle-Picher Sales Company, by their attorneys, Edmund P. Wood and Richard Serviss, and pursuant to the invitation of the Trial Examiner at the hearing on January 7, 1948, request these further findings of fact specific to those respondents as part of Paragraph 2 of the proposed findings of fact submitted by Eagle-Picher on January 29, 1947.

(g) Eagle-Picher has not acted in concert with the other respondents herein or any of them since the invalidation of the National Industrial Recovery Act, in respect to terms or conditions of sale of lead pigments, and there is no evidence that it has. More specifically, the current situation was correctly summarized by Joel M. Bowlby, President of Eagle-Picher, who testified that since the time he became president of the company, September, 1941, down to the present, no agreements have existed with the other respondents herein or any of them, affecting prices or terms or conditions of sale of lead pigments, and this testimony is uncontradicted.

773 (h) The pricing policies of Eagle-Picher have not had the effect of substantially lessening competition or tending to create a monopoly in the sale of lead pigments, and the record does not purport to evidence a single specific instance of such effect.

(i) The competition of the customers of Eagle-Picher which purchase lead pigments from Eagle-Picher, has not been injured, destroyed or prevented by the pricing policy followed by Eagle-Picher, and the record does not purport to evidence a single specific instance of such effect.

(j) No lead pigment customer of Eagle-Picher has knowingly received the benefit of discrimination from Eagle-Picher which injured, destroyed or prevented competition and the record does not purport to evidence a single specific instance of such effect.

(k) The record shows that Eagle-Picher followed the pricing practices and policies of the National Lead Company from 1934 on with but a single exception—that in some instances Eagle-Picher did not follow certain quantity allowances as to white lead-in-oil sold direct to painters, a very minor part of the business in white lead-in-oil.

4. Basis for Proposed Findings.

The proposed finding, 2-g, is predicated upon the negative aspects of the record as a whole, and upon the testimony of Mr. Bowlby, page 3636, line 15, through page 3637, line 16, which reads as follows:

774 "Q. And when you became president of the company in September, 1941, did you further familiarize yourself with competitive policies?

A. I have, since becoming president, kept myself informed on competitive policies of the various divisions.

Q. What was your purpose in familiarizing yourself with those policies?

A. Something that is obviously necessary to an understanding of the business and the establishment of other general policies which are dependent upon the competitive position of the company.

Q. Now, did you at any time find any agreements or understandings between your company and National Lead Company, or any of the other companies engaged in the sale of lead pigments, affecting prices or terms or conditions of sale?

A. No, I never found any such agreements.

Q. At the time you became president of the company, were you concerned in any respect as to whether such agreements existed or not?

A. No, I don't believe it ever crossed my mind that such agreements might exist.

Q. If you had found any such agreements, what would have been your policy in respect to them?

A. Well, I certainly would have looked into their propriety, and if I had found that there were any improper agreements of that nature in existence, I would have taken the necessary steps to terminate them."

The findings, 2-h, i, and j, are based upon the negative aspects of both the record and the Proposed Findings of Fact filed by the attorneys for the Commission on December 29, 1947. Neither suggests any specific instance of alleged substantial lessening, injury, destruction, or prevention of competition by Eagle-Picher's pricing policy. No instance is cited or relied upon by the Commission.

Since the proposed findings are negative, there can be no specific citation to the record, which, as a whole, is barren of what ought to be there, if the Commission is to succeed in this action.

775 Eagle-Picher's proposed finding, 2-k, is copies from Page 29 of the Commission's Proposed Findings and Conclusions, and is a facsimile of the first sentence of the last paragraph on that page.

5. Counsel for Eagle-Picher respectfully request that the Trial Examiner pass upon Eagle-Picher's proposed findings, 2-a through 2-k, under the provisions of the Administrative Procedure Act.

6. Argument.

a. Eagle-Picher Has Followed National's Pricing Policy Without Agreement.

The Findings of Fact proposed on behalf of the Commission in part follow the theory stated by counsel for the Commission at the conclusion of its case:

"* * * In other words, that paragraph (Seven B) charges a combination and a conspiracy between and among the various respondents, not individual conspiracies each with National.

* * * Now as to the specific dates and acts, I believe it is plain from the proof which has been offered in this case exactly the period of the conspiracy which is covered by it. Certainly the evidence introduced in the form of documentary evidence covering the activities of the respondents shows the conspiracy which is the subject of this complaint to be one which was initiated sometime around the year 1933, and which we contend has been in existence from that time until the present.

* * * It is my theory of this case that all of the respondents were engaged in a conspiracy to do the acts which are set forth in Paragraph Seven-B of Count I, and it was a conspiracy by and with each other and for the benefit of all of the alleged conspirators." (R. 2088, 2089.)

As to Eagle-Picher, counsel for the Commission has altered his position critically, in that he now asks the Trial Examiner to find, not that Eagle-Picher has an agreement or understanding with the other respondents herein, but

that Eagle-Picher has been following National's pricing
776 policy. The latter position is the correct one, and
hence, Eagle-Picher has adopted the Commission's phraseology on page 29 of its Proposed Findings, and is requesting that finding as its own finding, 2-k.

The record does not even suggest that Eagle-Picher's pricing policies have at any time been influenced by those of any respondent other than National, and Eagle-Picher has at all times conceded that it followed National. But following is not the equivalent of agreement to follow, and while agreement is one of several possible inferences from a parallel course of conduct, it is by no means the only one, nor is it obligatory. Mr. Bowlby, President of Eagle-Picher, testified in no uncertain terms, under oath, not only that Eagle-Picher did follow National, but that there were no agreements between Eagle-Picher and National or others affecting prices or terms or conditions of the sale of lead pigments. It is respectfully submitted that the evidence in this case does not compel an inference of agreement, and that to do so, it would have to be overwhelming, which it is not. The technicalities of evidence apart, the responsible head of a national corporation should not be constructively adjudged a perjurer, except where the weight of the adverse evidence positively requires the conclusion. In this case it does not, as counsel for the Commission spontaneously recognized in requesting his finding that Eagle-Picher followed National in its pricing policy.

Further, the Commission alleged in its complaint, Paragraph Seven-B, that Eagle-Picher was too comparatively weak to be more than "ostensibly independent". The record as a whole tends to confirm this allegation of the complaint, and the Eagle-Picher witnesses have admitted that the company cannot price most of its products independently. The only thing which can be said against Eagle-Picher is that it has not taken the initiative in altering
777 pricing methods and practices adopted at about the
time alleged by the Commission, that is, during the N. R. A. period. Only National could or can do that, and if the Commission has made out the case it asserted in its complaint, namely, that National's policy has not only been monopolistic, but successfully so, then no blame attaches to Eagle-Picher for not attempting the impossible and it is superfluous to infer any sort of agreement by Eagle-Picher.

b. Eagle-Picher Has Acted in Good Faith, Competing Where Possible, Conforming Where Necessary.

Eagle-Picher refuted the averment in Paragraph Twelve of the complaint, that "respondents' acts, practices, pricing methods, systems, devices and policies * * * have actually hindered, frustrated, suppressed and eliminated competition * * *". Eagle-Picher proved that it has at all times been actively and aggressively competing with National, by conducting extensive research to differentiate its products from National's and to secure the greatest consumer acceptance and utilization of its new products, which are for the most part chemically equivalent to National's, but superior in physical properties and in their adaptability to the specific problems peculiar to the individual customer. Eagle-Picher's testimony establishes uncontestably that it is competing in good faith with National by the only means available to it. No other means is possible, according to the Commission's own theory of this case.

There is and can be no charge that Eagle-Picher adopted pricing policies which it now follows in 1933-34 in anything but good faith. The record shows that National, or at least its president, did not believe that the N. R. A. was legal, so National may have been collaborating under coercion with its tongue in its cheek, but there is no evidence
778 that the Eagle-Picher executives did not follow the directives of the White House and its boisterous subordinates without a qualm of doubt. True, the zone system for white lead in oil and consignment selling were discussed, but omitted from the codes, because some companies, such as Sherwin-Williams, preferred different selling methods, and did not choose to bind themselves, but Eagle-Picher's choice of following National's practices was not only in accord with the spirit of the N. R. A. days, but compelled by Eagle-Picher's relative position in the industry. The standardization of selling practices to eliminate chiseling and price cutting was the objective of the codes, and the conduct of the docile, if gullible, conformers should be judged only against the background of that time, in so far as good faith or bad faith is concerned. Eagle-Picher commenced to follow National's pricing policies in good faith during the N. R. A. period, and has continued to do so since, not by agreements, but as a matter of necessity, because it lacks the power and capacity to do otherwise.

c. Eagle-Picher Justified under Section 2-b of the Robinson-Patman Act as to Quantity Discounts.

It cannot be seriously argued that Eagle-Picher would not price itself out of the market if it failed to offer quantity discounts equal to those published by National. Hence, as to quantity discounts, Eagle-Picher is and has been meeting the equally low price of National in good faith.

Counsel for the Commission and for Eagle-Picher have joined in requesting the finding of fact that Eagle-Picher has followed National as to pricing policies, and Eagle-Picher has adopted the Commission's proposed finding as its own 2-k. Unless the Trial Examiner chooses to reject this agreed statement of fact, it follows that Eagle-Picher's position in respect to quantity discounts is 779 completely justified under Section 2-b of the Robinson-Patman Act.

Whether the size of National's published discounts transcends the legal must be determined in respect to National alone because Eagle-Picher has had no choice but to meet the discount of its stronger competitor or price itself out of the market. It may be argued that if National's quantity discounts are illegal, then Eagle-Picher's are, too, under the doctrine of the Staley case, which held that the adoption of the unlawful pricing practice of another was no excuse for conduct otherwise illegal. But on simple analysis, the quantity discount aspect of this case is clearly distinguished from the holding of the Staley case, in which the court discussed the scope of 2-b, as follows:

> "* * * But it (Section 2-b) does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's 'lower' price and of that only to the extent that it is made 'in good faith to meet an equally low price of a competitor.' "

In the Staley case, the respondent was guilty of extorting phantom freight, that is, charging its neighbor in Peoria phantom freight from Chicago to Peoria, and the Supreme Court held that this had nothing to do with meeting a competitor's low price. In this regard, the Court stated:

> "* * * Instead they maintained their own prices at the level of their competitors' high prices, based upon the competitors' higher costs of delivery, but including phantom freight in their own delivered prices.
>
> * * * We cannot say that a seller acts in good faith when it chooses to adopt such a clearly discriminatory pric-

ing system, at least where it has never attempted to set up a non-discriminatory system, giving to purchasers, who have the natural advantage of proximity to its plant, the price advantages which they are entitled to expect over purchasers at a distance * * *. But it does not follow that
respondents may never absorb freight when their fac-
780 tory price plus actual freight is higher than their com-
petitors' price, or that sellers, by so doing, may not maintain a uniform delivered price at all points of delivery, for in that event there is no discrimination in price."

In effect, the Court held that in the Corn Products and Staley case, the extortion of phantom freight in a single basing point system was illegal per se, and that the adoption of a competitor's illegal system could not be condoned on the pretext that equally low prices were being met, because, in fact, it was equally high prices which were being met.

In the present case, in so far as quantity discounts are concerned, we are dealing solely with low prices. National publishes and has published its quantity discounts, which are available to all. Eagle-Picher must meet these low prices to stay in business, irrespective of whether National's theory of justification of them is sound or unsound legally. This aspect of the case has nothing to do with Eagle-Picher's adoption of other of National's pricing policies and is specific in National's quantity discounts and the low prices at which it thus publicly offers to sell its wares. Eagle-Picher is meeting its competitors' low prices, and nothing more.

Quantity discounts unlike extortion of phantom freight, are not illegal per se, and National's discounts are beyond criticism, unless its mathematical calculations have been faulty. In any event, Eagle-Picher has merely followed National's quantity discounts to meet National's low prices, and has had to do so blindly, regardless of the soundness of National's accounting methods, for which Eagle-Picher is in nowise responsible.

Otherwise expressed, while National may be obligated to justify its published quantity discounts under Section 2-a of the Robinson-Patman Act, Eagle-Picher has a complete
defense for its quantity discounts under Section 2-b.
781 As a practical matter, if National's quantity discounts
require correction, Eagle-Picher's will follow automatically, or Eagle-Picher will be proceeding at its peril,

and it is unnecessary, as well as improper, for Eagle-Picher to be a party to an order from which it is legally entitled to exemption under the express provisions of 2-b.

d. Eagle-Picher Is Justified in Following National's Delivered Price Zone Selling Unless It Is Illegal Per Se.

If delivered price zone selling is akin to extortion of phantom freight and hence, is illegal per se, then Eagle-Picher cannot defend its adoption of National's marketing system under 2-b, in view of the Staley decision. The legality of this type of selling was briefed at length in connection with Eagle-Picher's motion to dismiss, filed at the conclusion of the Commission's case.

If, on the other hand, delivered price zone selling is not illegal per se, but only National's choice of zones or premiums for zones is unjustified, then is Eagle-Picher vulnerable legally for not proceeding independently to hara-kiri economically? While the dicta of the Corn Products and Staley decisions seem to make it abundantly clear that delivered price zone selling cannot violate the provisions of the Robinson-Patman Act, still it may be the Trial Examiner's conclusion that there is not adequate legal justification for each zone and mark-up utilized in respect to each product sold. The question is whether Eagle-Picher, in adhering to National's zones, may defend under 2-b, as is clearly proper in respect to quantity differentials, or whether the Staley test extinguishes such defense. The question is a close one, because while Eagle-Picher is always meeting National's price, it is not always as clearly meeting National's low price out of par territory, as was the case in considering quantity discounts.

782 On the other hand, Eagle-Picher, in following National, did not adopt a system illegal per se, so Eagle-Picher at most would be afoul of the law only adjacent to unwarranted zone boundaries. More specifically, National has plants located in New York, Chicago, Philadelphia, and St. Louis metropolitan areas, as well as elsewhere. Eagle-Picher has the right under Section 2-b to meet National's low prices in these major marketing areas. The question is whether or not Eagle-Picher is always meeting National's low price, or just its price in the premium zones. While the wording of Section 2-b is not completely apt as to such instances, neither is the holding of the Staley decision which condemns only conduct illegal per se as unavailable for defense under 2-b.

As a matter of logic, Eagle-Picher should be permitted to meet National's price, assuming, of course, that delivered price zone, selling is not illegal per se, because Eagle-Picher has to meet National's price in order to stay in business and to prevent National from acquiring the monopoly to which it is alleged to aspire. In general, Eagle-Picher has had to absorb more freight relatively than National, because of its lessor number of plants; consequently, Eagle-Picher does not dare to exploit local situations where it has the advantage, because it is outnumbered by National's plants, and couldn't win in a price war.

Since Eagle-Picher is forced to follow National's zone pricing, Eagle-Picher itself cannot justify under 2-a; that is for National to do to the extent legally requisite. If the system is illegal only as to detail, rather than as a whole, then Eagle-Picher has not adopted a competitor's illegal system, but has merely met prices, some of which turned out to be unjustified. Under these conditions, Eagle-Picher
783 should have the benefit of absolving its pricing under 2-b.

e. The Record Establishes No Instance of Violation of Robinson-Patman by Eagle-Picher.

Section 2 of the Clayton Act, as originally adopted in 1914, prohibited price discriminations of the type intended to drive the seller's competition to the wall. This aspect of price cutting and discrimination was the main bone of contention in the original Standard Oil case, and many other teeth into the original prohibition of the Clayton Act, and The purpose of the Robinson-Patman Act was to put more teenth into the original prohibition of the Clayton Act, and to include the customers of the seller in addition to that between the seller and his own competitors, as originally provided. In the present case, there is no charge of price discrimination violative of Section 2 of the original act; on the contrary, the charge is that prices are too nearly uniform.

The charge in this case is that the pricing policies of the respondents substantially lessen competition between the customers of each individual respondent. There must be interference with competition between two customers of a specific respondent with knowledge of the discrimination by its beneficiary, in order for there to be a violation of the Robinson-Patman Act.

The findings proposed by the Commission provide respondents with absolutely nothing specific to shoot at in this regard. There is no specific finding proposed that any two identified customers of Eagle-Picher have had their competition substantially affected by Eagle-Picher's pricing policies, regardless of whether we look at it from the angle of quantity discount, delivered price selling, or the zone system.

784 Obviously, no respondent can meet the burden of disproving alleged substantial lessening of competition, except in relation to a specific case. Lack of opportunity to defend constitutes denial of due process of law. This aspect of the case was discussed in the brief filed on behalf of Eagle-Picher in support of its Motion to Dismiss the amended complaint, filed at the conclusion of the defendant's case, approximately a year ago.

In short, Eagle-Picher denies that there is a single instance in the record in this case which establishes that Eagle-Picher has violated Section 2-a of the Robinson-Patman Act, and to the extent that the Commission is attempting to try sweeping generalities, Eagle-Picher must respond with the generality that it has been following the pricing policies of National and meeting its prices, as recognized by counsel for the Commission.

7. Conclusion.

The evidence in this case is critically different from that in other adjudicated cases, after which the complaint herein was generally patterned, in four significant respects:

1. The Lead Industries Association has exercised no influence on prices or terms or conditions of sale, either directly or indirectly. This is due to the fact that the membership of the Association is made up on the one hand of mining and smelting interests which produce pig lead and sell it to respondents, and on the other hand, of users of lead pigments purchased from the respondents. The Association could not, if it wished, play the middle against the ends, that is, permit the pig lead pigment manufacturers to aggrandize their position at the expense of the other equally potent interests.

2. Eagle-Picher competes with National by every means possible, short of a price war, and while following
785 prices generally, expends large sums of money annually to differentiate its products and thus offer greater

value to customers at standard prices. This circumstance negatives the notion that the industry is moribund, or controlled to the detriment of competition and the public.

3. The respondents sell at specified and uniform delivered prices within designated zones, and collect no phantom freight.

4. No diminution of competition between any two customers of Eagle-Picher has been specifically shown factually, nor has the evidence even provided any sort of hypothetical case sufficiently crystallized as to be susceptible to rebuttal, as is requisite for te observance of due process of law.

The evidence compels the conclusion that market dominance by National, and collusion of all respondents, both of which are pleaded, are not both necessary inferences, because dominance explains the practices of the respondents fully, whereas collusion is inconsistent with Eagle-Picher's keen competition with National in developing and pushing new and different products. Moreover, National's dominant position is asserted by the Commission itself, in the complaint and in its proposed findings, but the record is negative as to joint action after the N. R. A.

Respectfully submitted,

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786 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

PROPOSAL TO TRIAL EXAMINER OF RECOMMENDED ORDER TO CEASE AND DESIST.

(Received Jan. 23, 1948.)

Comes now the attorney in support of the complaint and urges that the Examiner recommend to the Federal Trade Commission the entry of an order to cease and desist in the above matter as follows:

Recommended Order to Cease and Desist.

This proceeding having been heard by the Federal Trade Commission upon the complaint and amended complaint of the Commission, the answers of the respondents to said complaint and amended complaint, testimony and other evidence in support of and in opposition to the allegations of said complaint and amended complaint taken before an Examiner of the Commission theretofore duly designated by it, recommended decision of the Trial Examiner and exceptions thereto, briefs in support of complaint and in opposition thereto, and oral arguments of counsel, and the Commission having made its findings as to the facts and its conclusion that the respondents have violated the provisions of the Federal Trade Commission Act and of the Clayton Act,

I. It Is Ordered that each of the respondents National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting & Refining Company, The Sherwin-Williams Company, and The Glidden Company, their respective officers, representatives, agents, and employees, in or in connection with the offering for sale, sale, or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, cooperating in, continuing or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between any two or more of said respondents,
787 or between any one or more of said respondents and others not party hereto, to do or perform any of the following things:

1. Quote or sell lead pigments at prices calculated or determined pursuant to or on the basis of zone or territorial divisions as set forth with more particularity in the maps attached to and made a part of the findings of fact (Part III) hereof; or in accordance with any other plan, system, or formula which produces identical delivered price quotations or prices for lead pigments by respondents using such plan, system, or formula.

2. Establish, fix, or maintain prices, terms, or conditions of sale for lead pigments, or adhere to any prices, terms, or conditions of sale so fixed or maintained.

3. Quote or sell red lead and litharge at specified differentials over any particular quotation or particular quotations of pig lead prices.

4. Quote or sell lead pigments at specified price differentials depending upon size or type of container; or upon size or type of shipment to customers; or upon the type of business in which customers may be engaged.

5. Enter into, employ or continue consignment or agency contracts or arrangements whereby prices and selling practices of dealers or distributors are controlled or directed (except that this provision shall not apply to respondents The Sherwin-Williams Company and The Glidden Company).

II. It Is Further Ordered that each of the respondents National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting & Refining Company, The Sherwin-Williams Company, and The Glidden Company, their respective officers, representatives, agents, and employees, in or in connection with the offering for sale, sale, or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, from acting individually, or otherwise, so as knowingly to contribute to the accomplishment of any of the acts, practices or things listed in paragraphs numbered 1 through 5 of Section I of this order, and hereinbefore forbidden.

788 III. It Is Further Ordered that respondent National Lead Company, its officers, representatives, agents, and employees, in or in connection with the manufacture, sale, or distribution of lead pigments in "commerce", as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from acquiring or seeking to acquire, directly or indirectly, by means of any corporate or other device, any interest of ownership or control in the

physical assets, plants or other properties, or in the capital stock of any concern or enterprise which is now or at the time of such acquisition or proposed acquisition may be a competitor of said National Lead Company in the manufacture, sale, or distribution of lead pigments.

IV. It Is Further Ordered that each of the respondents, National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting & Refining Company, The Sherwin-Williams Company, and The Glidden Company, their respective officers, representatives, agents, and employees, directly or indirectly, in connection with the offering for sale, sale, or distribution of lead pigments in commerce, between and among the several states of the United States and in the District of Columbia, do forthwith cease and desist from:

1. Discriminating in price through doing any of the following things for the purpose or with the effect of systematically matching delivered price quotations with other of said respondents, or of producing the equivalent of such matched delivered price quotations through or in connection with systematic discriminations in net shipping point prices received on sales to different purchasers:

(a) Selling lead pigments at prices calculated or determined pursuant to, or in accordance with the zone, delivered-price system.

(b) Selling lead pigments at net shipping point prices which systematically differ by differences in the amount of transportation involved in shipping to such purchasers.

(c) Selling at prices derived by adding to shipping point prices arbitrary sums in lieu of transportation charges which do not reflect substantially the actual differences in charges involved in shipping to such purchasers.

789 2. Discriminating in price between different purchasers of dry red lead and litharge by selling such products of like grade and quality at prices which differ depending upon the quantity ordered or to be delivered to such customers at one time.

3. Discriminating in price as between purchasers of lead pigments of like grade and quality where the effect may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which customers or respondents are engaged, or to injure, destroy, or prevent competition with any person who either grants or receives the benefit of such discrimination.

Provided, however, that nothing herein contained in Section IV of this order shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered; and provided further, that nothing herein contained shall, with respect to any discrimination subsequent to this order or with respect to any charge of violation of this Section IV of this order, prevent a seller-respondent from rebutting a prima-facie case of violation by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet a low price of a competitor, or the services or facilities furnished by a competitor.

Respectfully submitted,
Joseph S. Wright,
Assistant General Counsel.

January 22, 1948.

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* * (Caption—5253) * *

TRIAL EXAMINER'S RULINGS ON PROPOSALS FOR FINDINGS AND CONCLUSIONS SUBMITTED BY COUNSEL.

Counsel in support of the complaint and counsel for all respondents submitted proposed findings and conclusions under Rule XXI of the Commission's Rules of Practice. These are contained in the record and are specified below in connection with the ruling on each proposal. In each case the ruling applies to the proposal and not to the reasons stated therewith. The proposals allowed are deemed to be established by the greater weight of the evidence and are considered in connection with the recommended decision, but are not necessarily incorporated verbatim therein. Many of the denied proposals are taken in substance or in modified form as appears in the recommended decision. In case of conflict or discrepancy between these rulings and the recommended decision, the latter should be taken as correct. The term "Report" will be used hereafter to specify the Trial Examiner's "Report Upon The Evidence" or to other portions of the recommended decision. In making these rulings due consideration was given to arguments and replies to proposals.

To the proposals of Anaconda, the following rulings are made:

Paragraph 1 is allowed. Paragraph 2 is denied for the reason that Anaconda did engage in the manufacture
797 and sale of lead pigments through its wholly owned and controlled subsidiary. Paragraphs 3 and 4 are allowed. Paragraph 5 as stated is denied, but the facts are as shown in the Report. Conclusions of law 1, 2, 3, and 4 as stated are denied for reasons appearing in the report. Conclusion 5 is denied on the authority of the cases cited in view of the evidence showing direct supervision and control of International by Anaconda. The relation is such as to render the parent company responsible for any of the infractions proven against the subsidiary in this action. Conclusions 6, 7, 8, and 9 as stated are denied in all respects not otherwise appearing in the Report.

On International's proposals the rulings are as follows:

Paragraphs 1 through 15 are allowed. Paragraph 16 as stated is denied, since the evidence shows that competitors' prices were otherwise obtained. Paragraph 17 is allowed as modified in the Report; Paragraphs 18 and 19 are allowed. Paragraphs 20, 21, and 22 are denied as stated. Paragraph 23 is allowed with the reservation that it does not state all of its sources of price information. Paragraph 24 is denied except as shown in the Report. Paragraph 25 is denied, as the last statement (following the comma) is too broad. Paragraph 26 is allowed. Paragraph 27 is modified by specifying "delivered prices", and allowed as modified. Paragraphs 28, and 29 as stated are denied in all particulars not included in the Report. Paragraph 30 is denied as stated. Paragraph 31 as stated is denied. Paragraph 32 as stated is denied. Conclusion 1 is denied. The amended complaint in this proceeding was filed on April 12, 1946, and the effective date for procedural requirements under the Act did not obtain until December 11, 1946. The Act exempts all actions initiated prior to the last-named date. However, the proceeding is subject to the requirements of the Commission's Rules of Practice, which anticipated several features of the Procedural Act. The Trial Examiner's statement that he would conduct hearings and receive evidence in conformity to the requirements of the Procedure Act was not advanced as a conclusion or ruling on the law. There was no objection to the statement and, as a matter of fact, we have followed the Act very closely, if not in all respects. Conclusion 2 is denied. Conclusion 3 is denied. Conclusion 4 is denied. Conclusions 5, 6, 7, and 8 as stated are denied except as appears in substance in the Report, which reflects acceptance of many of the proposals and arguments of Anaconda's and International's counsel.

798 On Eagle-Picher's proposals, other than those it adopts in National's proposals, the following rulings are made:

Paragraph 2, subparagraphs (a) through (c) are denied except as shown in the Report. Paragraph 2(d), (e), and (f) are denied as contrary to the weight of the evidence. Paragraph 3 is denied. Rulings on the adopted proposals appear in rulings on National's proposals.

To Eagle-Picher's supplemental proposals the following rulings are made:

Paragraphs (g) through (j) are denied; Paragraph (k) is allowed. Paragraph 5 (page 4): the request is allowed. Some of the counsel's arguments in Paragraph 6 have been well taken, as appears in the Report. Conclusions 1 through 4 are denied except as shown in the Report. The contention of meeting the "equally low price of a competitor" in connection with the discriminations found in this case, cannot be supported by an affirmative finding, for such differences as were shown were pursuant to a general plan followed by each respondent through a number of years. In such circumstances, the good faith clause could not reasonably be invoked.

On Glidden's proposals, the following rulings are made:

Paragraph 1, covering the adoption of National's proposals, Paragraphs 1 through 9, 20 through 88, 91 through 96, and 98 through 103, the rulings are as stated as to each of these paragraphs of National's proposals. Paragraph 2 as stated is denied, except as stated and qualified in the Report. Paragraph 3 as stated is denied as contrary to evidence given by Glidden officials. Paragraph 4 is denied as stated. Paragraphs 5, 6, 7, 8, 9, and 10 are allowed except as to Glidden's method of determining competing prices. Paragraph 11 as stated is denied because it does not state all of its sources of information as shown by the evidence.

Paragraph 12 is allowed. Paragraph 13 is denied except as shown in the Report. The adopted paragraphs will be ruled on elsewhere. Paragraphs 14 and 15 are denied as not
799 clearly reflecting the situation. Paragraph 16 is denied as contrary to the evidence respecting a number of cases and locations. Paragraph 17 is allowed. Paragraph 18 is allowed. Paragraphs 19 and 20 are allowed. Paragraphs 21, 22, 23, 24, and 25 are allowed. Paragraph 26 as stated is denied. The evidence shows some competition for orders, but it is not clear that there was "keen" price competition. And it is not clear that competition from non-lead pigments was particularly strong. Paragraph 27 is denied as irrelevant in the absence of evidence that the agreed "differential" was different from that reflected in prices made by other respondents. Paragraph 28 is denied for the reason that the term "competition" is here used in a different sense than that involved in the issues. The cost to the battery manufacturer of making oxides for his own use is a price limitation on the sellers, and this was shown by the evidence. Paragraph 29 is allowed. Paragraph 30, as stated, is denied, except as shown in the Report. Paragraph 31 is allowed with the substitution of "believes" for "has found" in line 3 from the bottom. Paragraph 32 is denied except that which has been modified and accepted in principle in the Report. Paragraph 33, as stated, is denied except as stated in the Report. Paragraph 34 is denied for the reason that the evidence does not show all of the features as stated. The proposal is rejected as a whole, but some features are accepted in principle in the Report. Paragraph 35 is denied as contrary to the evidence showing that Glidden did sell under the card prices on occasion. The proposal cannot be accepted verbatim, but the relevant points are covered in the Report. Conclusions of Law: Paragraph 1 is allowed. Paragraphs 2, 3, 4, 5, 6, 7, and 8 are denied except as modified and more fully stated in the Recommended Decision.

Rulings on further proposals of Glidden:

Paragraph 36 is allowed. Paragraph 37 is allowed. Paragraph 38 is allowed. Paragraph 39 is denied. Paragraph 40 is denied as stated. This matter was not the subject of factual evidence, and a satisfactory finding could not be made that would go as far as this proposal. Paragraph 41 is allowed. Paragraph 42 is denied. The counsel's arguments on his supplemental proposals on pages 2 and 3 are well taken and have prevailed to a considerable extent, as shown by the Report.

800 To the proposals of Sherwin-Williams the following rulings are entered:

Count I: Paragraphs 1 and 2 are denied. Paragraph 5 is allowed except as to the term "negligible" and as to all transactions being intra-state. The record shows that Sherwin sold inter-state. Paragraphs 6 and 7 are denied except as shown in the Report and except the proposals on page 14 as to consignments and relations with du Pont. These are allowed and reflected in the Report. Paragraph 8 is denied as stated in the several items and except as shown in the Report. Paragraph 9 is denied as stated, but is taken in part as shown in the Report. Paragraph 10 is denied as stated. Paragraph 11 is denied except as shown in the report. Paragraph 12 is denied.

Count II: Paragraphs 1 through 5 are denied except as shown in the Report. Paragraph 6 is denied. Paragraphs 7 and 8 are denied except as shown in the Report. Paragraphs 9 through 14 are denied to the extent not shown in the Report.

Conclusions of Law: Paragraph 1 is allowed as applying to a large portion of its business but not to all, but the evidence is sufficient to show that Sherwin is in commerce as defined and is therefore subject to the Acts specified. Paragraph 2 is denied as not being a sufficient statement of the law on this point. Paragraph 3 is denied for reasons fully stated in the conclusion of law on this point contained in the Report, Paragraph 7-d1. Paragraph 4 is allowed so far as it relates to the intra-zone selling involved in this case (See Paragraph 11-c). Paragraph 5 is allowed to the extent the principles are applied in the report (Id). Paragraphs 6 and 7 are denied. Paragraphs 8 and 9 are denied. Many of the counsel's contentions and arguments are well taken and are reflected in the Report.

To the proposals of National the following rulings are made:

Paragraphs 1 through 9 are allowed, except as to any variations in production figures which the Report contains. Paragraph 10 is allowed except that Anaconda is held as being in the lead pigment business through its controlled subsidiaries. Paragraphs 11 and 12 are allowed. Paragraphs 13 and 14 are denied. Paragraph 15 is allowed. Paragraphs 16 and 17 are denied except as to such por-

tions as are contained in the report. Paragraph 18
801 is denied except as to such portions of it as are used in the Report. Paragraph 19 is denied. Paragraphs 20 through 23 are allowed. Paragraph 24 is denied for the reason that the evidence does not justify the positive and conclusive finding proposed. Paragraph 25 is allowed. Paragraph 26 is denied as to Anaconda's non-participation in Code proceedings. The remainder is allowed, as stated in the Report. Paragraph 27 is denied as stated. Paragraph 28 is allowed. Paragraphs 30 through 33 are allowed, but few of the statements appear to be relevant. Paragraphs 34 to 40, re the "agency" plan, are denied except as to the considerable portion contained in the Report. Paragraph 41 is denied as contrary to the evidence. Paragraph 42 is allowed in the sense that no unanimous conclusion as to the agency plan was reached. Paragraph 43 is allowed. Paragraph 44 is denied except as stated in the Report. Paragraphs 45, 46, and 47 are allowed. Paragraph 48 is denied as a categorical finding. Paragraph 49 is denied except as shown in the Report. Paragraphs 51 and 52 are substantially correct but are denied as a verbatim finding. Paragraph 52 is denied except as the term "agreement" may be confined to agreement to include in the supplemental Code. Paragraphs 53, 54, and 55 are allowed. Paragraph 56 is denied as stated. Paragraph 57 is denied for reasons appearing in the Report. Paragraphs 58 and 59 are allowed. Paragraphs 60 and 61 are denied. Paragraphs 62, 63, are denied as stated. Paragraph 65 is denied as stated. Paragraphs 66 and 67 are denied. Paragraph 68 is denied. Paragraphs 69 and 70 are allowed. Paragraph 71 is denied. Paragraphs 72, 73, 74, and 75 are allowed. Paragraph 76 is denied except as shown in the Report. Paragraph 77, 78, and 79 are allowed. Paragraph 80 is denied except as shown in the Report. Paragraphs 81, 82, 83 are allowed except that paint manufacturers should be included in Paragraph 83. Paragraph 84 is denied. Paragraph 85 asks for a general conclusion of law and does not state factual or legal bases. Sales to the government in this case do not appear to be in violation of Section 2(a) of the Clayton Act. Paragraphs 86 and 88 are denied. Paragraph 87 is allowed as shown in the Report. Paragraphs 89 through 96 are denied except as stated in the report. Paragraph 97 is denied. Paragraphs 98 through 101 are allowed. Paragraphs 102 and 103 are denied. Paragraph 104 is denied as stated, as it is not

clearly confined to shipments within a particular zone to points therein. Paragraphs 105 through 108 are denied.

802 Conclusions of Law: Paragraph 1 is denied except as explained in the ruling on this proposal made by International. Paragraph 2 is denied. Paragraph 3 is denied for reasons stated in the report. Paragraph 4 is denied except as stated in the report. Paragraphs 5 and 6 are denied. Paragraph 7 is denied on the basis of the entire record, which reveals substantial public interest in the proceeding. Paragraph 8 is denied. Under Reason 19 on pages 49 and 50, counsel contend that sufficient time was not allowed for preparing proposals. In view of the fact that all counsel were advised several weeks before the case was closed that much of the details of this work could be prepared in advance and in the further consideration that the time for filing supplementary proposals was extended to January 25, 1948, and that proposals and exceptions may yet be filed before the Commission, I am of the opinion that Section 8(b) of the Administrative Procedure Act and the Commission's Rule XXI have been fully complied with on this point.

As the report will show, many of the reasons and arguments of respondent National's counsel have been well taken and have prevailed in essential particulars.

To the proposals filed by the complainant's counsel the following rulings are made:

Part I on pages 1 to 10 relating to parties and products is allowed except as may be modified and stated in the report. Part II, pages 10 through 12, is allowed as applying to conditions and practices prior to 1933. Part III, page 12, the first 3 paragraphs are allowed. The evidence cited from pages 13 through the first paragraph and quotation on page 22 is not in the form of proposed findings, but is taken in part and made the bases for findings in the report. Part III, page 22, second paragraph, which relates to Anaconda, is denied except as shown in the report. The remainder of page 22 and through page 25 is denied as not being in such form as to permit of specific rulings. Page 25 is allowed in principle and as reflected in the report. Pages 26 through 28 down to Part IV are denied except as to such portions as are reflected in the report. Part IV, pages 28 through 32, is denied as a verbatim finding except as to recitals of evidence, and except as to portions reflected in the report. Part V, the

803 statements on pages 33 through 41 down to Part VI are denied as stated, except as shown in the report. Part VI, pages 41 and 42, the first paragraph is denied except as modified and used in the report. Paragraph 2 is denied as stated. Paragraph 3 is denied as stated. Paragraph 4 is allowed. Part VII is allowed in substance and as stated in the report, which reflects acceptance of many of the counsel's proposals, contentions, and arguments. Complainant's proposed order is allowed in part and denied in part as appears in the report. Paragraph III of the proposed order is denied as unreasonably restrictive and beyond the scope of the Commission's authority.

Transmitted to the Division of Legal Records, with a copy for each party, on this, the 31st day of March, 1948.

John W. Norwood,
Trial Examiner.

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806 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

Before:

Mr. John Norwood, Trial Examiner.
Mr. Joseph S. Wright and Mr. Paul R. Dixon, Attorneys in support of the complaint;
Mr. James D. Ewing and Mr. Eugene Z. DuBose, of Alexander & Green, 120 Broadway, New York, N. Y.,
Mr. Henry E. Gardiner, of Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.,
Mr. Edmund P. Wood, of Wood, Arey, Herron & Evans, Carew Tower, Cincinnati, Ohio,
Mr. Richard Serviss, American Bldg., Cincinnati, Ohio,
Mr. John A. Duncan, M. B. & H. H. Johnson, Union Commerce Bldg., Cleveland, Ohio,
Mr. Roger Hinds, Strange, Myers, Hinds & Wight, 165 Broadway, New York, N. Y.,
Mr. James T. Welch of Davies, Richberg, Beebe, Busick & Richardson, 815 Fifteenth St., Washington, D. C., and
Mr. Thomas J. McDowell, 101 Prospect Avenue, N. W., Cleveland, Ohio,
Attorneys for the respondents.

Trial Examiner's Recommended Decision.

I. Proceedings.

This is a proceeding before the Federal Trade Commission on an amended complaint duly issued on the 12th day of April, 1946, charging the respondents named herein with effecting monopoly, lessening competition, and restraining trade, as hereinafter set out, in violation of the Federal Trade Commission Act (38 Stat. 717; 15 U. S. C. A., Sec. 41; 52 Stat. 111), and with price discrimination in violation of the Clayton Act, as amended by
807 the Robinson-Patman Act (38 Stat. 730; 15 U. S. C.
A., Sec. 12; 49 Stat. 1526; 15 U. S. C. A. Sec. 13, as amended.

The original complaint was filed on the 25th day of November, 1944. Answers were duly filed thereto, and the case was duly assigned to Trial Examiner Webster Ballinger, who held hearings at various times from January 15, 1945, to May 16, 1945, as shown by the record (Tr. 1-523).

On April 12, 1946, the amended complaint was filed and answers thereto were duly filed thereafter. On May 16, 1946, Trial Examiner James A. Purcell was assigned to the case but was prevented by illness from holding hearings. Counsel in support of the complaint and counsel for respondents stipulated that evidence received under the original complaint, except the testimony of J. B. Wilson and H. E. White, could be considered as part of the record under the amended complaint, and that the evidence received by Trial Examiner Ballinger would be considered as if received by Trial Examiner Purcell (Tr. 529, 531). On June 12, 1946, John W. Norwood, Assistant Chief Trial Examiner, was designated to act as Trial Examiner and complete the case in the place and stead of Trial Examiner Purcell. This substitution was agreed to by all counsel (Tr. 532, 533).

Further hearings were held on June 17, 1946, and thereafter as appears in the record.

On the 20th day of November, 1947, reception of evidence was concluded and the Trial Examiner fixed December 1, 1947, as the time for filing proposed findings and conclusions under Rule XXI. The Commission thereafter vacated the Trial Examiner's order and extended the time for filing said proposals to December 29, 1947. Proposals were thereupon duly filed by all parties, and the same, together with the Trial Examiner's ruling on each such proposal, are included in the record. Arguments were heard by the Trial Examiner on January 7th and 12th, 1948, as appears in the record on page 4209, et seq.

The case was closed on the last-named date, and the complete transcript and all exhibits were received by the Trial Examiner on the 21st day of January, 1948, whereupon your Examiner submits his recommended decision as required by law.

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II. Pleadings and Issues.

The Complaint:

The amended complaint names National Lead Company, a corporation, hereafter termed "National", Eagle-Picher Lead Company, a corporation, and Eagle-Picher Sales Company, a corporation, either or both hereafter termed "Eagle-Picher", Anaconda Copper Mining Company, a corporation, and International Smelting & Refining Company, a corporation, either or both hereafter termed "Anaconda", The Sherwin-Williams Company, a corporation, hereafter termed "Sherwin", and The Glidden Company, a corporation, hereafter termed "Glidden", as respondents. Concerning these respondents, the complaint alleges in substance as follows:

Outline of Complaint.

Count One.

The complaint alleges in substance:

1. That National planned to monopolize the production and sale of lead pigments and to that end and effect acquired various properties, including a substantial part of the capital stock of Eagle-Picher (VI, VII);*

2. That National exerted a monopolistic influence on the pricing of pig lead through its relations with American Smelting (VIII);

3. That National contracted with E. I. du Pont de Nemours Company, Inc., hereafter termed "du Pont", for the purpose and with the effect of maintaining price levels fixed by National and primary sellers of white lead (VII-B-7);

4. That all respondents conspired and cooperated in maintaining identical or matched delivered prices on lead pigments through the employment of a zoning system by which each respondent quoted and sold (a) at a uniform base price in the "par" zone and (b) at various specified differentials in the several zones as shown on the map contained in the complaint, which uniform zone prices

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*** Note: Citations in this outline are to the paragraphs and subparagraphs of the complaint covering the particular charge.**

and differentials were not based on differences in costs of delivery (VIII);

809 5. That respondents, through conspiracy, cooperation, and with the purposes aforesaid, pursued the following methods:

(a) Employed the Lead Industries Association in adopting and using non-competitive terms and conditions of sale and in exchanging advance price factors and information (VII-B-3,-4);

(b) Adopted and used uniform "agency" agreements to prevent price variations (VII-B-5) and required agents and dealer customers to resell at prices fixed and published by it (IX-A);

(c) Fixed and quoted uniform prices, terms, and conditions of sale (VII-B-6) and issued price cards or lists of quotations which produced matched prices with Sherwin, Anaconda, and sometimes Glidden, matched at a small differential below National and Eagle-Picher (IX-D);

(d) Quoted uniform differentials between standard containers of 75, 50, 25, and 12½ lbs. (IX-B);

(e) Made quarterly contracts for the sale of lead pigments at a fixed differential over Smelting's New York price for common pig lead (IX-C).

6. The tendency and effect of the aforesaid practices were to restrain trade, suppress competition and create monopoly by (1) depriving purchasers of the natural advantage of location near sources of supply, (2) by surrendering reciprocally their own territorial advantages in order to maintain uniform delivered prices and terms, and (3) by agreeing and adhering to uniform prices, methods and policies (X, XI, XII);

7. That the foregoing acts and practices are to the prejudice of the public and in violation of the Federal Trade Commission Act (XII).

Count Two.

The complaint alleges in substance:

8. That each respondent, through the employment of the zone method, discriminated in price (a) between customers within a given zone and (b) between customers located in different zones, by charging different prices to different customers in competition with each other, which differences were not justified by differences in cost (I through X);

810 9. That each respondent discriminated between competing customers through different trade, regional, and quantity discounts (XI);

10. That these differentials lessened competition substantially in said products between (1) respondents and their competitors, and (2) between the buyers of said products competitively engaged (XIII); and

11. That the foregoing have the tendency and effect of injuring competition, restraining trade, and creating monopoly in these lines of commerce, in violation of the Clayton Act (XIV).

The Answers of all respondents deny each and every allegation and inference that they agreed or conspired to monopolize or restrain trade or collectively to employ any of the particular practices set out in the complaint.

National admits the alleged acquisition of the business, stock and assets of other concerns, but denies any purpose of effect of exerting a monopolistic influence on the price of pig lead, or restraining trade in the lead pigments industry, and of securing and exercising control of Eagle-Picher. National avers that it makes its own prices, terms, and conditions of sale based on trade and economic conditions and without regard to competition, except that of competitive substitutes for lead pigments.

The individual and independent employment of zone pricing, "agency" consignment selling, price cards, and the other particular practices alleged are, with certain variations and exceptions, admitted in the answers of National, Eagle-Picher, International, and Glidden. Sherwin denies zone pricing and the use of the consignment or "agency" plan of selling.

The answers of all but National aver that the employment of such of these practices as they did use was to meet the prices, terms, and conditions made by their competitors and which they determined from market quotations and from competitive quotations made to their customers. All respondents deny violation of the Federal Trade Commission Act.

Anaconda denies any participation in the lead pigments trade and disclaims management of and responsibility for its subsidiary International.

Respondents deny that any of the methods individually employed by them discriminate in price between customers and lessen competition as alleged, and that any of

their practices are in violation of the Clayton Act as
811 amended. They aver that the differences in price as admitted by them are no more than are justified by differences in cost of sale and delivery, or are prices made to meet the equally low prices of competitors.

The Issues:

The foregoing pleadings raise the following principal issues:

Did National, through its various acquisitions, secure and employ monopolistic control over the lead pigments industry?

Did National's relations with Smelting exert a monopolistic influence over the price of pig lead?

Did National conspire with du Pont with the purpose and effect of maintaining fixed price levels on white lead-in-oil?

Did respondents agree to and maintain fixed and identical prices on lead pigments through the co-operative employment of the zone pricing system and the particular practices set out in Paragraph 5(a) through (e) of the outline?

Were the tendencies and effect of these practices to restrain trade, suppress competition, or create monopoly through unequal cost factors and identical delivered prices?

Did respondents' employment of the zone system as alleged involve differences in price between customers (a) located in a zone, and (b) located in different zones, which differences were more than differences in cost of sale and delivery?

Did each respondent so discriminate in price between customers through the granting of different trade, regional, and quantity discounts?

Did these differentials have the tendency and effect of lessening competition substantially (1) between respondents and their competitors and (2) between buyers competitively engaged?

The issues as outlined go to the questions of monopolistic control and tendency, conspiracy, and effects of the zone prices and discounts. The answers to these are largely matters of inference from the circumstances and manner of employment by respondents of the various particular methods admitted and shown. Consequently, the evidence of each method and charge from 1 through 6 and

8 through 10 of the outline will have to be examined
812 for features determinative of their character. The important portions of this evidence, with citations, conclusions, and discussion thereon, will be set out under parallel denotation to that of the foregoing outline. References to the transcript and exhibits are used to designate sufficient of the probative, reliable, and substantial evidence to establish the factual statements to which the citations relate. All important factual statements are based on what the Trial Examiner considers to be the greater weight of the evidence as contained in the entire record.

III. Report Upon the Evidence.

Count One.

The facts of organization, location, control, interstate commerce, and business of each respondents are shown by the record to be substantially as set out in the complaint and as appears hereafter in detail in the recommended findings.

Respondents are manufacturers (corroders) and sellers of lead pigments, which term is used throughout this proceeding as including (1) oxides, consisting of litharge and red lead, which is produced by burning litharge, (2) basic lead carbonate sold as dry white lead or lead-in-oil, and (3) basic lead sulphate, sometimes used as a substitute for basic lead carbonate. Lead oxides and basic lead carbonate are manufactured from corroding pig lead which differs from common pig lead in that it is desilverized. Basic lead sulphate is usually made from common pig lead, but can be manufactured directly from ores (Tr. 2123-6, 3386-7, 3345-52). Oxides in the form of red lead are sold dry or in oil. Respondents Glidden and Sherwin also manufactured and sold mixed paints made from lead pigments produced by them or purchased from others (Complaint and answers; Tr. 2117-27).

At one time National produced pig lead, and one of its subsidiaries now produces a limited amount (CX 93). Basic lead carbonate products are produced by different processes and in different qualities or grades for different uses by paint, ceramic, and other manufacturers, and dry white lead is produced by National in 5 types, all of which are sold at the same prices and discounts and are interchangeable for some purposes (Tr. 1073-4). Other respondents produced different qualities of these products, which they thought superior to those put out by National (Tr. 2542-3, 3581-3). Battery manufacturers preferred some brands of lead oxides over others, and some held the opinion that oxides produced by different 813 respondents are different in quality and chemical characteristics (Tr. 1736-42, 1696, 1817, 1854, 1880). For paint manufacturers the pigments made at different plants contain important differences (Tr. 3599-3602).

National's Acquisitions.

(1-a) The first charge goes directly to the purpose and effect of the admitted acquisitions by National of various lead, pigment, and oil producing properties alleged in the complaint and particularly set out in the recommended findings (See Tr. 17 to 20 and elsewhere as cited below). The acquisitions began about December 8, 1891, immediately after National's organization, and continued through 1919 and thereafter (Tr. 19, Answer). At the first meeting of the Board of Directors, December 8, 1891, the acquisition of sixteen companies previously engaged in the manufacture, sale, and distribution of white lead, linseed oil, and kindred products was approved and thereafter completed as of that date (Tr. 17, 18; CX 5-B,-C).

(1-b) In February, 1906, National acquired the United Lead Company, which had been organized in 1903 by Grant Hugh Brown, Daniel Guggenheim, and Thomas F. Ryan, and which had acquired thirteen other companies controlling many of the principal lead alloy factories and lead works, not theretofore taken over by National, and including also the American Shot and Lead Company, which was itself a consolidation of the principal shot towers of the country (CX 22-P, Tr. 17-20). Most of the concerns acquired by National through the purchase of United had been offered previously to National by Messrs. Guggenheim, Ryan, and H. H. Rogers, the two first named being directors of Smelting Co. (CXs 5-B, 22-P, -V, -R; Tr. 3300). At this time, and until 1911, Smelting was given representation on National's Board of Directors through Daniel Guggenheim, Murray Guggenheim, and Edward Brush, who were also directors of Smelting (CXs 22-R, -V, 92, 180, 181; Tr. 3295. See also Tr. 3283-3302; RXs 175, 179, 180, 181).

(1-c) Thereafter National acquired the Carter White Lead Company (1906), the Matheson Lead Company (1912), the River Smelting & Refining Company (1915), the BasHunter Paint Company (1916), and the Hirst & Begley Company (1919) (Tr. 19), and in about 1944 it acquired the Evans Lead Company at Charleston, West Virginia, which continued to produce litharge and red lead to the extent of about 10% of National's production (Tr. 1625-6, 2375).

814 (1-d) Prior to these acquisitions by National, there were 18 or 20 producers of white lead who were selling in their various localities where they could operate economically. National closed many of these plants, amalgamated others and enlarged existing plants (RXs 175-A, 179-D). The names of some of the acquired properties were retained and operated by National as branches (Tr. 17-20, 1625, 2375, 2891, 2892). National thereafter controlled and operated branches and plants located in New York, N. Y.; St. Louis, Mo.; Dallas, Texas; Omaha, Neb.; Buffalo, N. Y.; Philadelphia, Pa.; Boston, Mass.; New Orleans, La.; Cincinnati, Ohio; Cleveland, Ohio; Atlanta, Ga.; Pittsburgh, Pa.; San Francisco, Calif.; and Chicago, Ill. (Tr. 13, 14, 1068, 1625, 2891-2; CX 481-A, -B).

(1-e) National's percentages of the production of the entire industry in the United States from 1936 to 1941 were estimated as follows:

White lead-in-oil	60%
Dry white lead	30% to 35%
Oxides (red lead and litharge)	50%

(Tr. 1647, 1665; CX 664). In 1943 National produced 60% of the white lead-in-oil and in 1932 it may have gone as high as 70%, but in other years the percentage varied with a downward trend (Tr. 1666). Shipments of white lead, dry and in oil, for the years 1938 through 1941 were shown to reflect the following comparative average percentages for the entire United States for the four-year period:

National	55.475%
Eagle-Picher	13.35 %
International (Anaconda)	7.625%
Fuller	3.225%
McGregor	1.2 %
Sherwin and Glidden combined	19.025%

Eagle-Picher is here shown to be National's largest potential competitor in this line, and their combined production for the years considered was 68.825% of the domestic output (CX 669; Tr. 2193), which percentage has been increased by the recent acquisition by Eagle-Picher of International's lead pigment plant and business (CX 836-P; Tr. 2035, 3545).

National's prices, terms, and conditions of sale were followed generally by all of its domestic competitors (Tr. 1280-5, 1317, 1571, 1764-5, 2640-1). National became a predominant factor in the industry (Tr. 2457) and its competitors felt compelled to follow its prices and terms (Tr. 2522-25; CXs 506-F, 650-A; Tr. 2546, 2553). National
815 advertised its "Dutch Boy" brand and made it a standard, leader, and price criterion in the trade (Tr. 2491-5, 2499-2505). National's facilities for production were at all times adequate to satisfy the entire market demand for white lead (Tr. 2500).

National and Eagle-Picher.

(1-f) Respecting the charge that National secured substantial portions of the capital stock of Eagle-Picher, it was shown that in 1930 National acquired 4,500 shares of the common stock of Eagle-Picher and continued accumulating it until, on June 13, 1932, it owned 44,900 shares of the total 900,000 shares outstanding of common and 50 shares of preferred (Tr. 4122-3). In 1937 National sold all of this but 3,500 shares of common, and in 1944 National sold the remaining 3,500 shares. It realized a gross profit (interest on investment not considered) of $861,981.53 (Tr. 174-7, 185; CX 528; RX 700). National's secretary, Mr. Charles Simon, testified that these stock purchases were for investment, that he thinks National voted the stock but had never been represented on Eagle-Picher's Board of Directors, and that he did not know that National ever exercised any control over that company (Tr. 3304-9). It was not shown elsewhere that National controlled Eagle-Picher through stock ownership. It made an unsuccessful attempt in 1931 to purchase the assets and goodwill of Eagle-Picher (CX 866-A, -B; Tr. 4182-3).

There is some direct evidence, however, of close relations between these two respondents. Eagle-Picher's executive vice-president, Mr. W. R. Dice, in 1937, discussed policies with Messrs. Wilson and Martino, National officials, at a club luncheon to which Mr. Wormser, Secretary of the Association, had invited him (CXs 696, 697; Tr. 2203). Eagle-Picher's files contained National's price changes on the Pacific Coast, and the matter was difficult for Mr. Rowe, of National, to explain (CX 581; Tr. 1161 through 1175). In 1940 Eagle-Picher submitted labels, prices, and description of its new white lead paint to National and referred to a previous conversation about the matter over the telephone. Mr. Reque, in reply to Mr. Hayt's letter, invited him to lunch (CXs 708, 710). Mr. Chinery, Chief Chemist of Eagle-Picher (1940), wrote Mr. Rose, of National, suggesting the increase in Federal specifications of the non-volatile content of flatting oil to 12% "in order to make it harder on the chiselers and others who go out and get flatting oil business on bids based upon specifications" (CXs 691, 692). In 1941 National wired Eagle-Picher its Manila price increase for white lead-in-oil and red lead (CX 701). Other evidence of co-operation between these two is shown below in Paragraphs 4, 5, and elsewhere.

816 National's Relations With Smelting.

(2-a) Respecting the transactions between National and American Smelting & Refining Company, hereafter termed "Smelting", it was shown that the latter, on its organization in 1899, acquired sixteen lead and copper smelters and eight refineries (CX 22-D), and thereafter, in 1901, took over three smelters, one refinery, and other related properties from M. Guggenheim's Sons (CXs 22-G, 92, 498-F, -H; Tr. 2376). After these acquisitions Smelting became the world's largest smelter and refiner of lead, producing between 30% and 40% of the entire world supply of refined lead (Tr. 4093). It operates lead smelters at East Helena, Montana; Selby (San Francisco), California; El Paso, Texas; Leadville, Colorado; Murray, Utah; and East St. Louis, Illinois, which process ores and concentrates from four to five hundred lead mines (Tr. 4090). Smelting purchases from the mines 80% to 90% of the lead ore which it processes, and most of its ore of United States origin is so purchased. It publishes daily the price at which it buys lead ore and the price at which it sells pig lead on the same day (Tr. 4088). Smelting's published prices on common pig lead are the New York market prices and are accepted by pigment producers as a basis for pricing their products (CXs 615, 809; RX 137).

(2-b) On February 6, 1906, at the time it acquired the United properties, National entered into a contract with Smelting by which Smelting was to sell, and National was to buy, (a) all of the latter's requirements of corroding pig lead except so much as National's Collinsville, Illinois, plant supplied not exceeding 30,000 tons per year, and (b) 85% of all of its pig lead requirements, exclusive of corroding lead, less so much chemical lead of other brands as might be demanded by its trade. Smelting was to furnish these requirements up to 85% of its production from domestic ores of all kinds of pig lead, excluding the production of the Selby Company (CX 93-A, -B). If National's Collinsville Smelting plant (the St. Louis Smelting & Refining Company) produced more than the stipulated 30,000 tons per year, National was to sell the surplus to Smelting at 5% less than the latter's prevailing price (CX 93-B, -C).

(2-c) Except for corroding lead, the price to be paid by National under this contract was to be based on the average of Smelting's lowest daily schedule prices for the month of shipment, for 50 tons or more on 30-day delivery at St. Louis and New York City respectively, provided that if this price was more than 1.075¢ per lb. above the average daily spot quotations for soft Spanish lead on the London Metal Exchange for the month in which shipment was
made, then the price was to be adjusted to the said
817 London average plus the differential of 1.075¢, which
differential was based on the prevailing tariff (CX 93-F, -G). The price for corroding lead was to be $2.00 per ton in excess of the above-named price (CX 93-G). And it was stipulated between National and counsel in support of the complaint that "the cost of its inventories of corroding quality pig lead and of the lead content of white lead in process and in the finished stock is the most important single factor in its determination and fixing of its price for white lead (since pig lead is the principal material used in the manufacture of white lead)" (Tr. 20).

(2-d) Concurrently with the acquisition of United and its properties and with the foregoing contract, Smelting entered into a contract with Hoyt Metal Company, acquired by National as a property of United, whereby Hoyt was to purchase and Smelting to sell for a period of fifteen years all of the latter's domestic output of antimonial lead. The price provisions were the same as provided in the Smelting-National contract for other than corroding lead (CX

94-A to -G). The contract contemplated deliveries of not more than 800 tons per month (CX 94-C, -D).

(2-e) The National-Smelting contract gave National control of 85% of Smelting's domestic production of pig lead of all kinds excepting the production of the Shelby Company. Smelting secured 85% of National's consumption of common pig lead and all of its requirements of corroding (or desilverized) lead, less so much chemical or other lead of other brands as National might require. The contract limited National's use of pig lead produced by its own subsidiary (The St. Louis Smelting & Refining Company) to 30,000 tons per year, thus limiting the competition with Smelting from this plant (CX 93, and supra). It also resulted in Smelting's refraining from taking any further interest in the lead manufacturing business (CX 22-Z1, -Z2). The agreement between Smelting and Hoyt (CX 94) took still more of Smelting's output by the amount of all of its production of antimonial lead (Par. 1-g). These agreements contracted the open market supply of lead in the United States considerably in excess of 32% (CX 22-Z3, -Z4). The first contract also set a fixed differential between common pig lead and corroding lead (CX 93-G).

(2-f) National's contract with Smelting expired in 1921, and the companies signed a contract of mutual release (RX 228; Tr. 4085), and made further arrangements whereby National purchased pig lead from Smelting on short term contracts at a spot price or at an average monthly price based on Smelting's daily quotations (CX 113; Tr. 4085-6, 4089). National's president, Judge Cornish, told Smelting officials that it was not necessary
818 to renew the long-term contract "because one company had more lead to sell than any other in the United States and the other company was the largest consumer of lead in the United States, and that there isn't enough lead from which National could supply its demands without buying from Smelting, and Smelting hasn't enough consumers to take all of its production unless National takes some of it"—and that "the contract had a tendency to bind them (National) and handicap their ability sometimes to buy at the lowest price" (Tr. 4084). National's manager of metal purchases submitted the following statement of purchases of common and refined lead used by this company from 1936 to 1941, inclusive:

Sellers	Tons 1936	1937	1938	1939	1940	1941
Smelting	48,422	51,113	39,126	41,819	47,885	77,010
St. Joseph Lead Company	53,217	58,305	43,181	48,623	53,734	51,994
St. Joseph Lead Company (Mine LaMotte)	—	—	—	—	—	871
Bunker Hill Smelter	—	—	3,000	4,806	4,175	5,133
St. Louis Smelting & Refining Works	10,263	7,282	2,269	11,791	8,624	5,112
Cerro de Pasco	—	—	1,624	2,750	3,480	11,270
Others	9,920	13,131	7,820	12,415	15,297	60,005
Totals	121,822	129,831	97,020	122,204	133,195	211,395

The last item (1941) is broken down as follows: Anaconda, 5,000 tons; U. S. Smelting, 2,000; American Metal Co., 8,000; C. Tenant & Sons, 45,005—total 60,005 tons. The St. Louis Smelting & Refining Works belongs to National (RXs 173, 174; Tr. 3272-7).

National's Relations With du Pont.

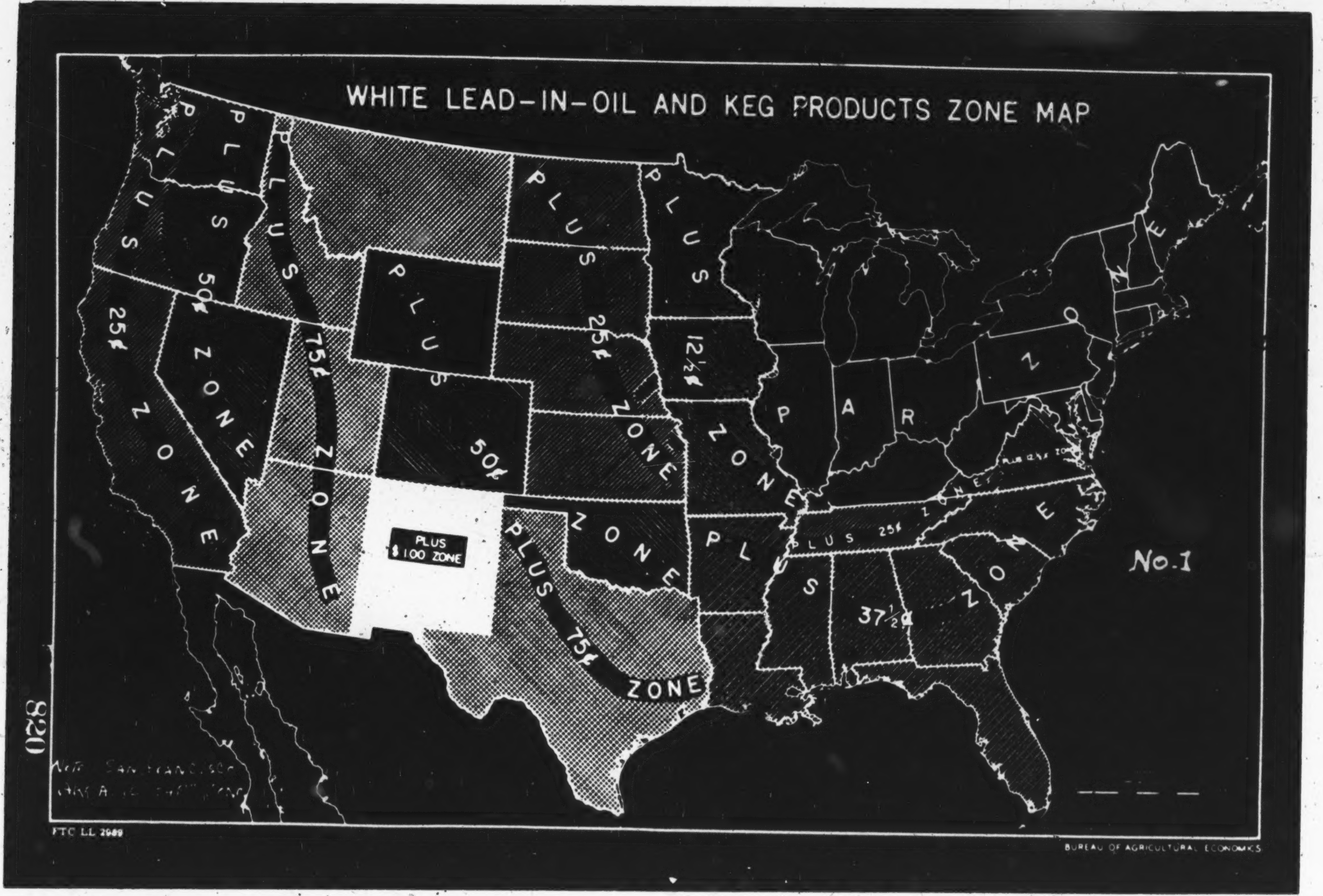
(3) Regarding the third charge involving the transactions and relations between National and du Pont, the record shows that on the 3rd day of February, 1938, du Pont renewed a contract with National which had obtained since 1924 and which was intended to deviate from the old contract by the increase of $25,000 per year of the amounts National was to receive. By the new contract (CX 797-D, -E) du Pont was to furnish National corroding pig lead, linseed oil, and turpentine, which National was to convert into white lead-in-oil to the amount of du Pont's total requirements and to package and ship the same to du Pont's order at a stated charge for processing, packaging, and shipping, with certain variations for different size packages. The raw material was furnished by du Pont and
819. the lead-in-oil belonged to it for sale or use subject to
payment of the aforesaid processing and shipping charges (CX 797-D, -E). The contract contains no provision for the observance by du Pont of prices charged by National or others for lead-in-oil, nor is there direct evidence of any express agreement to that effect. However, du Pont based its calculations to determine the changes in the new contract on the card prices (CX 797-K through Z6) and subsequently requested National to furnish its card prices and changes to its branches in Boston, Flint,

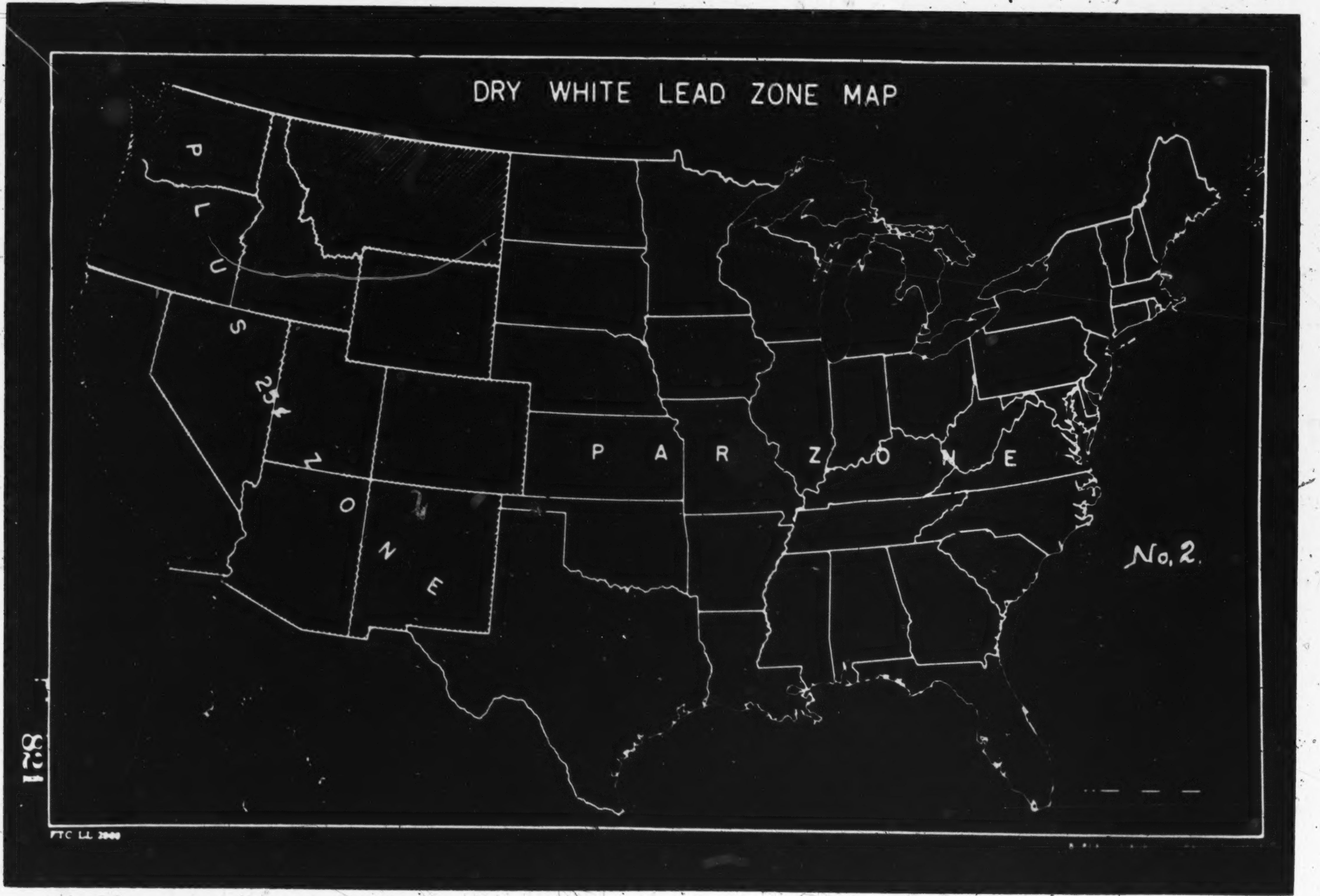
Michigan, Chicago, Philadelphia, Toledo, San Francisco, and Wilmington, Delaware (CX 533). Thereafter du Pont requested a periodical letter from National "covering the price to be in effect for the quarter" (CX 534). Such a letter from National to du Pont, dated September 13, 1940, is shown by CX 535. A change in discount terms announced by du Pont met the approval of Mr. Rowe of National, who wrote his Chicago branch about it and suggested that "perhaps others in the industry will follow this good example" (CX 538). National represented du Pont in code discussions, and the latter was "willing to go along with anything which was agreeable to the others" of the Lead Industries Association, to which du Pont did not belong (CXs 506-A through -F).

The Zone Pricing System.

(4) The fourth charge involves conspiracy between all respondents to maintain identical or matched delivered prices through the co-operative employment of a zone pricing system. The evidence is not conflicting as to the method, and there is little difference as to its use by all except Sherwin, which enters complete denial of its use, and Glidden, which sold f.o.b. various shipping points in the par zone as explained below. It is contended by respondents who did use it that the identity of method and price was not the result of agreement but followed naturally by the individual choice of each producer as the result of National's price leadership and the economic necessity of following market prices determined by the leader, which leader was largely influenced by the price of pig lead. It is necessary, therefore, to set out the details of the system and its use for consideration with other evidence on the issue of conspiracy.

WHITE LEAD-IN-OIL AND KEG PRODUCTS ZONE MAP


PLUS ZONE
PLUS 50¢ ZONE
25¢ PLUS ZONE
PLUS 75¢ ZONE
PLUS 50¢
PLUS 25¢ ZONE
PLUS 12½¢ ZONE
PLUS $1.00 ZONE
PLUS 75¢ ZONE
PLUS 37½¢ ZONE
PLUS 25¢ ZONE
PLUS 12½ ZONE
PAR ZONE
No. 1
820
NOTE: SAN FRANCISCO AREA IS PAR ZONE
FTC LL 2989
BUREAU OF AGRICULTURAL ECONOMICS



DRY WHITE LEAD ZONE MAP

PLUS 25 ZONE
PAR ZONE

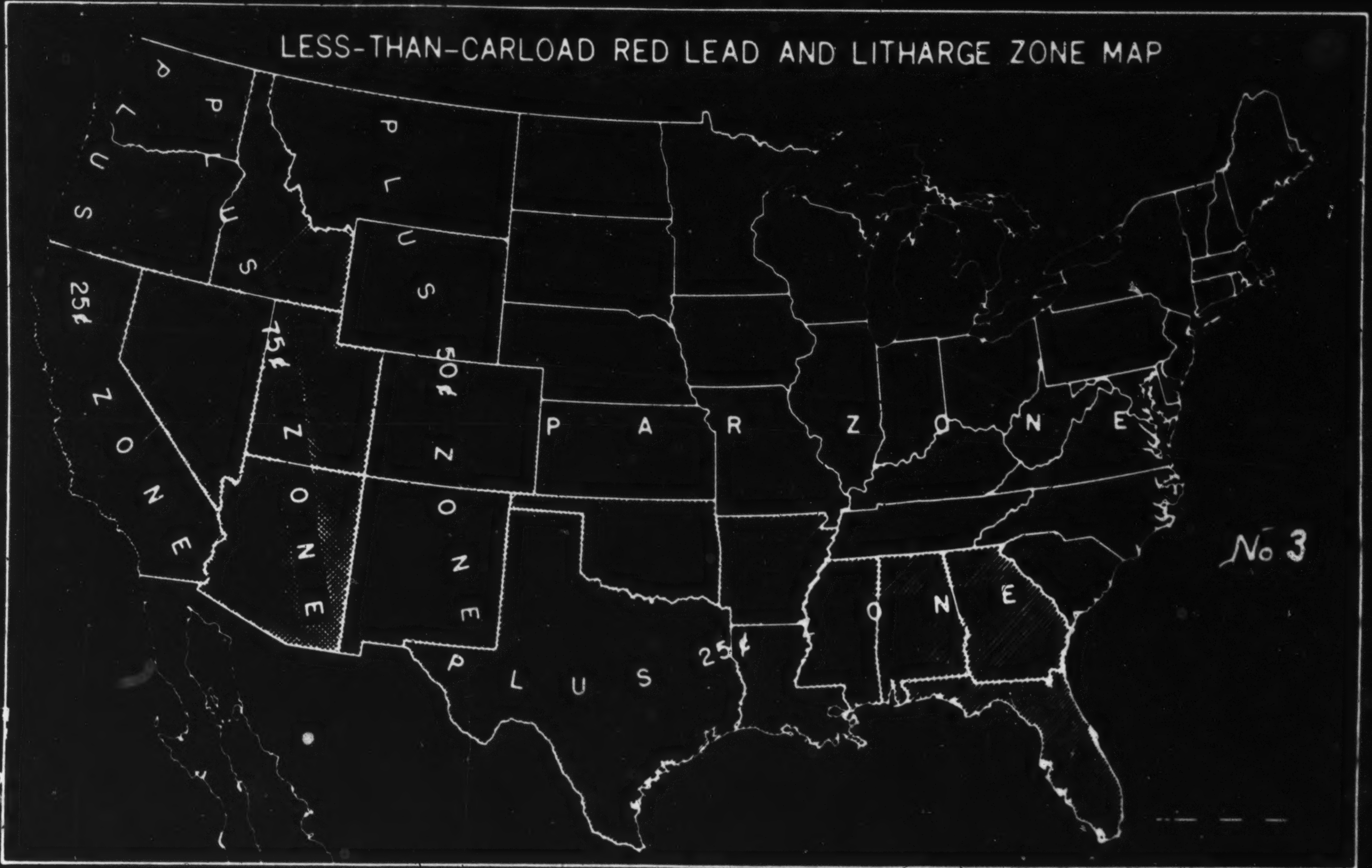
No. 2.

FTC LL 2000

82

3466

LESS-THAN-CARLOAD RED LEAD AND LITHARGE ZONE MAP


P A R Z O N E
PLUS 25¢ ZONE
PLUS 75¢ ZONE
PLUS 50¢ ZONE
PLUS 25¢ ZONE
No 3

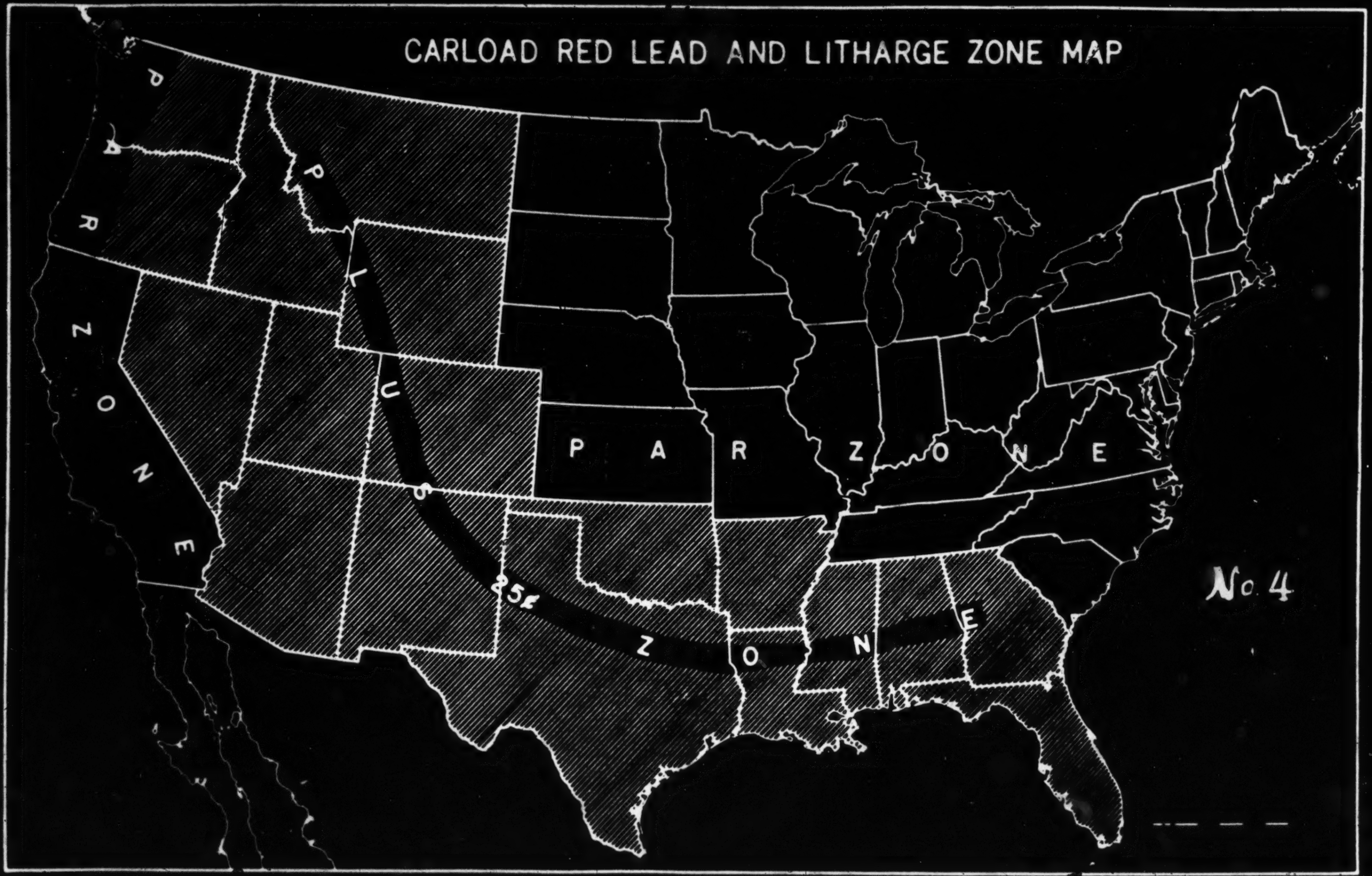
FTC LL 2909

BUREAU OF AGRICULTURAL ECONOMICS

822

3467

CARLOAD RED LEAD AND LITHARGE ZONE MAP


PAR ZONE
PLUS 25¢ ZONE
PAR ZONE
No. 4

FTC LL [illegible]

BUREAU OF AGRICULTURAL ECONOMICS

823

3468

(4-a) The uniform zone pricing system substantially as employed by National and Eagle-Picher and followed in salient features by the other respondents (Tr. 1254, 1549, 2590, 2591, 2639, 3515-18; CX 595) involved the sale of lead pigments on a zone delivered price basis with a flat par price for all deliveries in a par zone, which included several states, and increased differentials over the par price for various zones outside of the par zone. Vendors prepaid or allowed deductions for all transportation
824 charges and made no allowances or adjustments for differences in delivery costs as between various destinations. The plan was operated as follows:

White lead-in-oil and keg products in steel kegs of 100 lbs. or less were sold at the same delivered cost in the par or base zone, consisting of the states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, West Virginia, Ohio, Indiana, Michigan, and all of the states of Wisconsin, Illinois and Kentucky except the towns of Paducah, Cairo, Rock Island, Moline, LaCrosse, Eau Claire, Chippewa Falls, Rice Lake, Ashland and other towns east of the Mississippi River. St. Louis and vicinity was also in the par zone.

The same commodities and packages were sold at the par zone delivered price plus 12½¢ per cwt. in middle and eastern Virginia, Minnesota, Iowa, and Missouri except for St. Louis.

A differential over par of 25¢ per cwt. was charged in Virginia west of Pulaski, and in Tennessee, North Dakota, South Dakota, Nebraska, Kansas, that portion of Washington and Oregon west of the Cascade Mountains, and California.

A differential of 37½¢ over par was charged for deliveries in North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Arkansas and Louisiana.

A differential of 50¢ per cwt. over par was charged for deliveries in Colorado, that portion of Washington and Oregon east of the Cascade Mountains, Nevada, Wyoming and Oklahoma.

A differential of 75¢ per cwt. over par was charged in the states of Montana, Idaho, Utah, Arizona and Texas.

A differential of $1.00 per cwt. over par was charged for deliveries in New Mexico (RXs 147 [Map], 148-A through 149-B, 152 [Map]; Tr. 2893, 2916; CXs 580-8, 589, 593-4; See attached Map No. 1).

Dry white lead and lead sulphate in barrels or in bags was sold at the same par delivered cost to all customers in all states except Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. In the excepted states a differential of 25¢ per cwt. was added (Map No. 2; See also RX 159-A, Tr. 1576, 2624, 3497).

Dry red lead, litharge and other pigments in barrels or bags in less than carload lots were sold at the same delivered cost to all customers in a par zone consisting
825 of all other states other than those named below. A differential of 25¢ per cwt. was added for deliveries to all points and customers in Alabama, California, Florida, Georgia, Louisiana, Mississippi, Oklahoma, Texas and west of the Cascade Mountains in Oregon and Washington.

A 50¢ per cwt. differential was added for deliveries in Colorado, Montana, New Mexico, and Wyoming.

A 75¢ per cwt. over par differential was added for deliveries in Arizona, Idaho, Nevada, Utah and east of the Cascade Mountains in Oregon and Washington (See Map No. 3; also RX 159-A, Tr. 1580, 2552, 2686).

Dry red lead, litharge and other lead pigments in barrels or bags in carload lots of 20 tons or more were sold at a differential of $2.50 per cwt. for red lead and $1.50 per cwt. for litharge over Smelting's closing price for common pig lead at New York on the date the order is received, and were delivered to customers in the par or base zone at the aforesaid delivered price and at 25¢ per cwt. additional for delivery to customers located in Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, Montana, Nevada, New Mexico, Oklahoma, Texas, Utah, Wyoming and east of the Cascade Mountains in Oregon and Washington (See Map No. 4, also RX 159-A; Tr. 1577, 2552, 2682).

It was shown that shipments of these products were made at the aforesaid prices, terms, and differentials from the following, among other points:

Chicago, Illinois; St. Louis, Missouri; Perth Amboy, N. J.; Philadelphia, Pa.; Oakland, California; Cincinnati, Ohio; Scranton, Pennsylvania; Hammond, Indiana; Collinsville, Illinois; Baltimore, Maryland; Joplin, Missouri; Galena, Kansas (Tr. 13, 14, 1564; CX 756-A).

(4-b) The complainant contends that the zone pricing method was discussed on several occasions by representatives of all respondents in the meetings of the Lead Pigments Committees of the Lead Industries Association, convened for the purpose of agreeing on and proposing an N. R. A. Code for the industry; that no proposal for such method was adopted and included in the Code, but that the respondents' minds met on those occasions and that they did agree to and thereafter employ the method outside of and beyond the sanctions of the Code.

The evidence is that on August 8, 1933, the Dry Products Committee discussed and adopted various rules for the equalization of freight (CX 800-A, -C, Pars. 9, 10, 14) which were based on the practice of adjusting freight
826 charges from various shipping or equalization points
established throughout the country, the customer paying freight from these points to his destination (CXs 580, 659-C to -P; Tr. 2893-4, 2948). This had been used by National and others for some time, but in the matter of meeting prices the old method rendered it difficult to locate the various equalization points used by competitors (Tr. 2600-1; CX 501-C). On August 9, 1933, the White Lead in Oil Committee met and considered this problem. The following appears in the minutes:

"Freight Differentials: There is a lack of just what points in the country take on advance differentials over the par list price. It was suggested that a zone basis similar to that used by the Linseed Oil group might be worked out and thus simplify the arrangement. The Chairman agreed to offer further suggestions at the next meeting." (CX 501-B, -C.)

On September 14, 1933, Mr. Maston, of Eagle-Picher, as Chairman of the Lead-in-Oil Committee, wrote the Association Secretary as follows concerning the zoning proposals:

"The National Lead Company is fully informed of the details, and are gathering further data on this important matter. When suggestions come in I shall endeavor to get them in shape so that a final report may be submitted for approval of the next group meeting.

"For your information file I am sending you a map and list of freight differential points." (CX 513-B.)

The minutes of October 28, 1933, of the Lead-in-Oil group state that "Freight and zoning problems were discussed without any understanding or agreement being made" (CX 505-A).

Following the last recorded meeting of the White Lead-in-Oil Committee during the Code period, on January 31, 1934, Maston wrote the Secretary of the Association as follows:

"I am enclosing Zone Map for the White Lead-in-Oil Industry. I believe you will find it self-explanatory.

"When new points are set up or any suggested change in the differential made they can in the future be passed through your office.

827 "From this map we will eventually build up an official freight arrangement for this division of the lead industry" (CX 519-B).

The Secretary of the Association replied to this letter on January 2, 1934, as follows:

"Thank you for mailing me a copy of the Zone Map for the White Lead-in-Oil Industry" (CX 510-A).

(4-c) During the course of committee deliberations as to Code provision, a method was suggested on the advice of legal counsel for employing certain recommended provisions for the supplementary code prior to their approval by the President, and respondents were advised by the Association Secretary as follows:

"He suggested that the best practical solution for the moment seemed to be the adoption of the Uniform Basis of Sale by one or more of the interested members, which could be followed voluntarily by the others, without agreement on the subject but merely because it was individually to their best interests to do so.

"I wired you the substance of Mr. Locke's views for no doubt you will wish to discuss the subject further with other members who now happen to be in Chicago" (CX 522-B. See also CXs 517, 523).

This suggestion was passed around in October, 1933, and is apparently reflected in the minute entry of October 28, 1933, which emphasizes the absence of "any understanding or agreement" in connection with the discussion of freight and zoning problems" (CX 505-A). Very soon thereafter National announced the zone pricing plan.

(4-d) On June 9, 1934, National instructed its branches as follows:

"Please refer to our general letter of May 11th to which was attached Conditions for Sale, etc., of Oxides and Dry White Lead. Since that date the zone differentials for oxides in the territory served by the Pacific Coast have been determined, and a change has been made in New Mexico, Colorado, Wyoming and Montana applying to less carload lots.

"On dry white lead there has also been a change from our original instructions, in that a differential of ¼¢ a pound has been added to the par price in those four states" (RX 159-A).

828 It appears elsewhere that National set up the zone system on a nation-wide basis shortly after it adopted the agency plan (infra) in November, 1933, and continued to use it thereafter (CX 580, RX 147; Tr. 2893, 2916). Anaconda, through its subsidiary, Anaconda Lead Products Company, was involved in discussions of the plan and employed certain features of it until 1936, when the same methods were employed by it through its subsidiary, International (CX. 593; Tr. 1254, 3506-13). While respondents Glidden and Sherwin quoted and sold in the different zones on the differentials used by National, they did not conform in all respects to the announced plan. Glidden did not use a map, and it quoted in the par zone f.o.b. various shipping points, although it appears to have used the differentials in quoting and selling outside of the par zone (Par. 5-c5, infra; Tr. 1254, 1289-90, 2508-9). Sherwin sold f.o.b. various shipping points in the par zone and elsewhere, but applied the announced differentials to carload prices and to delivered prices at specified shipping points in the various zones, and it met zone prices of other respondents at various points in different zones (CXs 662-C to -Y, -Z1, 726; RXs 198, 205; Tr. 3759 to 3812, 4105-8, 4117-19).

Agreement and Price Uniformity Through Particular Practices.

(5) The fifth charge goes to the employment by respondents, through conspiracy and co-operation in the common purpose of maintaining uniform prices, of the particular practices set out in sub-paragraphs (a) through (e) of this charge as outlined. Since the particular practices as individually employed are not controverted in essential respects, the substance of the issue is agreement and co-operation. The decision on this controverted point must rest on (1) direct evidence of agreement and co-operation other than that authorized by the N. I. R. A., and (2) inferences based on features of the practices resorted to and on the manner of their employment. Evidence and conclusions on these points and methods are set out below.

(5-a1) The Lead Industries Association, to which all of the respondents belonged (Tr. 2134; CX 498) was employed by them as heretofore set out in part, in connection with the formulation of a code for the industry as provided by the N. I. R. A. This Association is engaged in a wide range of activities in connection with the entire lead industry. It has a Mining Division, a Smelting and Refining Division, a Metallic Lead Products Division, as well as the Lead Pigments Division, which is involved in this case, and it endeavors to promote improvements in and a wider use of lead in all forms (Tr. 2366, 2368, 2537, 829 2296-72; RXs 31-C, 50-B to -D, 52-G, 59-C). In connection with the lead pigments code, the Association maintained and operated through three Committees: the White Lead-in-Oil Committee, the Dry Products Committee, and the Lead Oxide Committee (Tr. 2160). All respondents were represented on these committees as follows: National by F. M. Carter, president, and Harold Rowe, vice president; Eagle-Picher by Mr. Bendelari, president, and its vice presidents, Messrs. Roosevelt and Maston; Glidden by Mr. Paul E. Sprague, vice president; Sherwin by Mr. S. B. Coolidge, Jr., vice president; and Anaconda (Lead Products Co.) by Mr. F. O. Case, sales manager, and Mr. Clarence Glass. Their participation in various meetings is shown by the minutes cited throughout the report. Other representatives also appeared at various meetings (Tr. 997 through 1018). The Secretary of the Association, Mr. F. E. Wormser, acted as Secretary to the Code Authority and of the Committees, received reports, and otherwise functioned as Association representative in those activities (Tr. 2159 through 2270).

(5-a2) After the adoption of a master code dealing with labor practices and other general matters of trade practice (CX 809), the Committees held meetings to discuss, adopt, and recommend provisions for a supplemental Code to regulate particular methods of packaging, selling, and delivering lead pigments. After numerous meetings and discussions, the Committees formulated and the respondent lead pigments producers agreed to a third draft which was duly recommended, approved, and incorporated in the Code on May 24, 1934 (RX 85-Z5, Z6, 82-D, E; Tr. 991-1018, 2143, 2150-9, 2314). Before the Supplemental Code was put into operation, respondents petitioned for an order of exemption from the terms of Article VII, Section 2 of the Code, a price-filing provision, and Schedule A, rules covering conditions of sale for lead oxides and dry white lead. The exemption was granted by the N. R. A. Administrator and thereafter extended (Tr. 2218-2231; CX 507-A to M), so that these portions of the Code were never effective during the existence of the Code Authority (Tr. 2228, 2402-3; RX 9-E, F).

(5-a3) Schedule A provides for basing carload prices for lead oxides on Smelting's New York price, for differentials between 5-ton lots and less, and includes several other provisions which will be set out below in connection with the evidence bearing on the particular practices to which they relate (CX 809, pp. 378-80). The complainant contends that the recommendations by respondents amount to agreements, and that their employment by respondents was, as the result of the exemptions, never sanctioned by the Code. It is also contended that the Association was used for unhampered discussion and tacit agreement as to zone pricing and consignment arrangements which
830 were not recommended or adopted in the Code. Consequently these Schedule A provisions are relied on as some of the evidence showing agreements as to practices which were unlawfully employed, and as showing use of the Association machinery therefor.

(5-a4) Respondents contend that any agreements reached in the Committees were not agreements to employ the practices discussed, regardless of the Code, but were agreements as to what should be recommended for the Code. Evidence to this effect was received from Mr. Wormser and others (Tr. 2164, 2175, 2185, 2404). As to agreements other than those arrived at for inclusion in the Code, witnesses for all respondents, and for the Association, who had knowledge of the affairs of these concerns, testified that no such agreements as to prices, terms, conditions of sale, or selling methods had, to their knowledge, been made by their companies with other respondents or with any competitors, and that their quoted prices were based independently on market and competitive conditions (See as to National Tr. 2996; Glidden Tr. 2510-13, 2542, 2758, 2760; Eagle-Picher, Tr. 2203, 2353-5, 2406-28, 3632, 3637; Sherwin, Tr. 3701, 2661; Anaconda, Tr. 3508-33, 3537-9; Association, Tr. 2354).

(5-a5) Concerning agreements on matters not included in recommendations for the Code, such as zone pricing and consignment arrangements, it appears as heretofore shown that respondents did not agree to putting a zone provision in the Code (Tr. 2522-4; CX 506-E), and the same appears respecting consignment (Tr. 2180). But these subjects were repeatedly discussed in Committee meetings as shown in the testimony of Mr. Paul Sprague, vice president of Glidden, and elsewhere (Tr. 2633-4). The evidence also indicates that respondents were averse to price-filing provisions, that Article VII, Section 2 was reluctantly adopted as a compromise which eliminated the rigid adherence to announced prices and terms which had been proposed, and that the exemptions heretofore mentioned were largely on account of this price-filing provision (RXs 159-D, 50-O; CXs 518-A, B, 803, 809, 504-B). The last citation relates to the omission from Code provisions of references to prices in deference to the antitrust statutes, and was made the basis of argument pro and con agreement.

(5-a6) It was shown that prices and terms for the sale of lead pigments were never filed with the Association by the members at any time. Production figures were reported by the members, but the information showing the production of individual members was not disseminated (Tr. 2162, 2187-90). It was stated by witness Wormser, Secretary of the Association, that it had never collected or furnished to members any price information, historical or otherwise, and that such statistical information as 831 it did collect and disseminate was furnished others outside of the Association, including interested Government agencies and those engaged in foreign and domestic commerce (Tr. 2188). These statistics related to the production, distribution, marketing, consumption and uses of lead and lead products (Tr. 2352). This witness stated further that the Association has not, except during the period covered by the Code, permitted in the industry any agreements to fix prices and terms, restrain trade, monopolize or curtail production (Tr. 2353-2355).

Further evidence bearing on agreement and co-operation is set out below in connection with the particular practices there considered.

Consignment or "Agency" Agreements.

(5-b1) The consignment plan of selling white lead-in-oil and other keg products was inaugurated by National's Atlantic branch early in 1933 and was thereafter extended to its eastern territories (CX 712-A). Eagle-Picher also started the plan about this time (Id.). These two respondents informed each other of their practices and results in connection with this method, and National informed Eagle-Picher that its agents for the most part were in favor of the continuation of the plan (CXs 684, 685, 686). In November, 1933, National decided to extend the plan on a nation-wide basis and informed Eagle-Picher of that intention (CX 599). Eagle-Picher extended its operations under the plan at about the same time (CX 629-A, C).

(5-b2) This agency or consignment method was put before all respondents in a meeting of the White Lead-in-Oil Committee on August 9, 1933. The minutes on this subject read as follows:

> "The Agency or Consignment method of marketing White Lead-in-Oil, as now being used in a restricted territory, extending from New York City south to and including Washington, was thoroughly explained and discussed. At the present time the National Lead Co. and the Eagle-Picher Lead Co. are selling almost exclusively under this plan, and report that jobbers and dealers with hardly a dissenting voice have approved the plan. The Agency plan is not the exclusive type designed to give certain rights or privileges, which competitors cannot meet, but one under which a Distributor may sell as many brands as he chooses. It is expected the two companies now using the Agency plan will extend it over a much wider area on or before October first. Under the Agency plan of selling, it is
> 832 evident many of the abuses and non-profit sales among distributors can be corrected at the same time it removes the practice of—Price Guarantees, Spring Datings, deviation from terms, etc. This method of selling will in the future be described as the 'Agency Plan'." (CX 501-B, C.)

The plan was discussed at length by Mr. Carter, president of National, in his letter of September 8, 1933, to Mr. Richter, General Manager of du Pont's Fabrics and Finishes Department, in which he says in part:

> "Now, then, we discussed the plan at the meeting of the Pigments Section the other day and found both Sherwin-Williams Co. and Glidden Co. radically opposed because of its consignment features" (CX 506-E).

In another letter Mr. Carter says of Mr. Richter,

> "He has assured me that they would go along and cooperate" (CX 506-C).

This reference is to Code matters of which Mr. Carter and Mr. Wormser were keeping du Pont informed, and

National was representing du Pont in code discussions, although the latter was not a member of the Association (CX 506-D). Agreements to employ a uniform consignment plan were never authorized by the N. R. A. Code.

(5-b3) The consignment contracts, as employed by National and Eagle-Picher, appointed distributors as "agents", in National's contracts (CX 613-A, B, C), and as "consignees" in Eagle-Picher's contracts, which also refer to the relation as an "agency" (CXs 629, 631-F, 635). The provisions of these contracts were the same in all essential particulars. Under their term stocks were consigned to a dealer for resale at prices and terms specified by the consignor. Sales were made by the consignees from these stocks, and monthly settlement for the goods sold during the month was made with the consignor for the total amount so sold less the difference between the prices set for the consignee and the resale prices charged dealers and consumers. This difference (between consignee's cost and his resale price) is termed his compensation. Expenses of storing, shipping, selling, and handling the goods must be met by the consignee who must also pay all taxes. The contracts strictly limit the consignees' authority to the custody and sale of such goods as may be consigned to them. Consignees may not bind consignors respecting any other than consigned goods, or in any other particulars (Id.). National's contracts run between "manufacturer" and "agent". Some of Eagle-Picher's forms refer to 833 "seller" and "distributor" (CXs 629). Consignments were subject to withdrawal at any time, and consignees were required to report stocks on hand (Id.). Mr. Carter spoke of "selling" those who could qualify and subscribe to the requirements of the contract (CX 506-E).

(5-b4) The stated purpose of the consignment plan was resale price control. The plan involved the extra expense to the producer of carrying large inventories of goods stored in distributors' warehouses and was otherwise objectionable (Tr. 2522-24). But in writing to du Pont about the plan, Mr. Carter, president of National, said in part:

"It permits us to control the resale price, which is a feature of vital importance to the corroder selling in markets like the New York district . . . While selling on consignment is admittedly an evil, I now feel confident that of the two evils with which we are confronted, we have chosen the lesser in selecting the agency system" (CX 506-D, E).

Mr. Rowe of National, in a circular to branch managers, November 9, 1933, said in part:

"It should be kept in mind that the purpose of the whole agency plan is to control the dealer's selling price of white lead, so that he may be assured of a reasonable profit" (CX 601-B).

The agency plan was effective in preventing sales below costs and other price-cutting (Tr. 2955-6).

(5-b5) National employed the consignment plan from early in 1933 to January, 1944, when government restrictions caused it to terminate the agreements (CX 624-A, B). Thereafter National made "fair trade agreements" under the Tydings Amendment with respect to its "Dutch Boy" brand of white lead-in-oil (CXs 576, 617, 619). Eagle-Picher began consignments when National did and conformed to National's methods in every essential particular until about March 9, 1942, when it modified the contracts to meet war conditions and reduce stocks. It required consignees to pay at the end of the month for all stocks held by them, but it indicated that the old contracts would be kept in force (CX 647).

Anaconda, through its subsidiary Anaconda Lead Products Company, and later through its subsidiary International Smelting & Refining Company, sold lead-in-oil on the consignment plan from 1933 to 1946, when International went out of the lead pigment business (Tr. 3535, 3542-3). During this time it sold some lead-in-oil on a modified consignment plan. No particular contract form ap-
834 pears to have been used by Anaconda except for dry white lead consigned to dealers in the State of Wisconsin, where a contract was necessary in order to protect the owner of consigned goods in case of bankruptcy of the consignee. This was not shown to be similar to National and Eagle-Picher contracts. Anaconda consigned lead-in-oil in other territory on a plan of its own without written contracts, and without agreement that the consignee sell only at the resale prices suggested by the consignor (Tr. 3508, 3533-6).

Glidden, which had opposed the consignment plan, did not consign stocks until six years after the plan was inaugurated. On the urgence of its salesmen and managers that a consignment arrangement such as that of other lead corroders would double its business, it furnished forms and instructions for consignment selling on July 17, 1939. Glidden's contract and its instructions to salesmen indicate a departure from that of National and Eagle-Picher, in that it offered distributors an exclusive arrangement, whereas the others permitted their consignees to carry consigned stocks of competitors, and they often consigned stocks to more than one dealer in the same territory (CXs 649-A, B, 706, 626, 643, 770-A, B). Glidden abandoned the plan in 1942, and prior to that time consignments were not offered except where it was deemed necessary. Mr. Sprague, Glidden's vice president, testified that they had "bucked this plan for four or five years" (Tr. 2518-2523; CXs 650-A, 651). Glidden's price under this plan was "the same as that of other corroders" (CX 649-A).

Sherwin-Williams never sold on the consignment plan at any time (Tr. 3701).

Recommended Resale Prices.

(5-b6) Respondents' price cards issued periodically to dealers carried complete lists of prices at which it was suggested that they should sell white lead-in-oil or other keg products to consumers and painters. The title terms "dealers' schedule", "resale prices", "painters' price list", and "dealers' recommended selling schedule" are used on these cards, and the prices so set out by all respondents at comparable times were identical except for occasional slight variations by Glidden or Anaconda. The following table contains the card resale prices of all respondents on 100 lbs. as of the dates shown, which are the effective dates on each card:

835

Resp.	In 100 lb. kegs	In 50 lb. kegs	In 25 lb. kegs	In 12½ lb. kegs	Date	Com. Exhibit
National	13.00	13.25	13.50	13.75	9/13/37	659-Z1
Eagle-Picher	13.00	13.25	13.50	13.75	9/14/37	660-A
Anaconda	13.00	13.25	13.50	13.75	9/15/37	661-Z3
Glidden	12.50	12.75	13.00	13.25	10/20/37	663-E
Sherwin	13.00	13.25	13.50	13.75	9/15/37	662-Z9
National	11.75	12.00	12.25	12.50	1/10/38	659-Z15
Eagle-Picher	11.75	12.00	12.28	12.56	1/11/38	660-C
Anaconda	11.75	12.00	12.28	12.56	1/10/38	661-Z1
Glidden	11.75	12.00	12.25	12.50	1/11/38	663-F
Sherwin	11.75	12.00	12.25	12.50	1/11/38	662-Z13

National	12.25	12.50	12.75	13.00	2/27/39	659-Z31
Eagle-Picher	12.25	12.50	12.76	13.04	3/ 1/39	660-F
Anaconda	12.25	12.50	12.75	13.00	3/ 3/39	661-X
Glidden	12.25	12.50	12.75	13.00	2/27/39	663-I
Sherwin	12.25	12.50	12.75	13.00	2/23/39	662-Z19
National	13.25	13.50	13.75	14.00	4/26/41	659-Z41
Eagle-Picher	13.25	13.50	13.75	14.00	5/ 1/41	660-H
Anaconda	13.38	13.63	13.88	14.13	5/ 3/41	661-Z27
Glidden	13.25	13.50	13.75	14.00	4/26/41	663-K
Sherwin	13.25	13.50	13.75	14.00	4/25/41	662-Z23

On all cards the suggested prices to painters were $1.00 less than each quotation given above.

Uniform Quotations.

(5-c1) Regarding the collective fixing, quoting, and employing uniform prices, terms, and conditions of sale, it was shown that respondents, through the Association and Code Committee meetings, discussed, agreed on, and recommended provisions for the collective employment of the following methods:

Pricing lead oxides, or mixtures, in 20-ton lots or more on Smelting's price, or published price, for common pig lead, and selling smaller quantities on "seller's card or quoted price in effect on date order is received", with the reduction of ½¢ per lb. under the card price for 5-ton lots to one delivery;

836 Selling red lead (lead oxide) containing 97% Pb_3O_4 at ¼¢ lb. and that containing 98% at ½¢ lb. over seller's price for lower grades;

Selling basic lead carbonate (dry white lead) at seller's card price or quoted price in effect on date of order, with a reduction of ¼¢ per lb. on 20-ton lots to one buyer and one destination;

Delivering carlots of oxide or basic lead carbonate f. o. b. car, seller's shipping point, or by truck on 3-day deliveries f. o. b. buyer's premises;

Selling on terms of net 30 days on car shipments of oxide and 1% 10 days, 30 days net, on L. C. L. shipments of oxides and on all shipments of basic lead carbonate (CX 809, Schedule A);

Discontinuing guarantees against price declines except for undelivered portions of contract purchases (CXs 505, 506; Tr. 2633-4; Par. 5-a).

(5-c2) References to particular prices as distinguished from price differentials do not appear in Schedule A. and such was purposely avoided (CX 504-B). Many of the terms and conditions included had been employed previously by various respondents (RX 181-A, B; CX 659-A, B, O, Z51), and National put Article II of the supplementary code into operation some months prior to its formal adoption (Tr. 4076-7). The differentials over Smelting's price on pig lead of $1.50 per cwt. for litharge and $2.50 for red lead had been employed for some time prior to 1933, and respondents used them uniformly thereafter (Tr. 1292, 1326-8, 1618-20, 2666, 2692-7; CXs 137-A, 762-B). Prices of oxides in smaller quantities were based on the aforesaid carload prices as determined by these differentials (Tr. 1618-21, 2390-7). The stated differentials between 20 tons and less on lead carbonates and between 5 tons and less on lead oxides appear on the price cards of all respondents quoting on these products after 1933 (CX 659 through 663, 615-B, and citations below).

The lead price basis and the fixed differentials eliminated variable factors in the price structure (Tr. 1618, 2674, 2679; CX 801-I, and supra; RX 141-3). All of the Schedule A methods were consistently observed and practiced by all respondents during and after the Code period with the exception of the stated terms and f. o. b. car deliveries at seller's plant. The dealers' price cards considered below indicate that the terms used varied from 1% ten days, net 30 days to 2% ten days, net 60 days, but at any period the terms of all respondents on similar products and quantities were uniform (CXs 659
837 through 663), and the deliveries were for the most part to buyer's location, to seller's plant with freight allowed, or f. o. b. stated shipping or equalization points (Id. See also RX 159-A to -J, Tr. 1617).

(5-c3) As to the contention by respondents that the similarity between their prices, terms, and differentials was the natural result of National's leadership and not indicative of agreement, Glidden's vice president, Mr. Sprague, testified that National's price made a ceiling for them and that they had to operate in the narrow range between this ceiling and the price of lead (Tr. 2509, 2532, 2546). Mr. McCarthy, General Sales Manager of National, testified that National made prices for basic white lead without regard to competition, but is competitive with other pigments (Tr. 1661); that such prices were made by the general office after the consideration of such factors as the cost of pig lead, containers, labor, freight, research, and advertising as well as current prices of competing pigments such as leaded zinc, zinc oxide, titanium, and others. In prices for lead-in-oil, the cost of linseed oil and the price structure for prepared paints would also be considered (Tr. 2998-9). Other respondents adduced testimony that they obtained National's and Eagle-Picher's prices, terms, and quotations from customers and from trade publications, and that they thereafter met this competition because failure to meet lower prices and terms resulted in loss of orders, while meeting National's price raises, so far as they could, broadened their restricted profit margins and was necessary to their business (Glidden, Tr. 2510-13, 2674, 2457; Sherwin, Tr. 3809-11, 3829, 3833-38; Anaconda, Tr. 3499, 3504-5, 3580).

(5-c4) Some deviations from National's prices were shown and explained. Eagle-Picher sold its Hammer brand at ¼¢ per lb. less than National's white lead-in-oil (Tr. 1554). Glidden sold lead-in-oil to dealers at ½¢ per lb. under National's card price for "Dutch Boy" because of the wide demand National had created through its prestige, advertising, and greater ability to supply the trade (Tr. 2457, 2491, 2499-2502, 2509, 1255). Glidden sometimes made concessions to encourage greater sales effort on the part of dealers, and sometimes it charged dealers 5¢ more per 100 lbs. than National and others charged (CXs 662-Z17, 663-H, 659-Z28; Tr. 2507). In all cases the dealer's resale or "list" prices announced by Glidden were the same as the others (Id.). Anaconda sold lead-in-oil at ¼¢ per lb. below National's "Dutch Boy" brand because its management believed the latter's prestige in the trade was such that Anaconda's brand could not compete at the same price (Tr. 3512-13). This concession was made to the dealer to encourage extra
838 sales effort, but the suggested resale price was not
reduced (Id.). Glidden also sold basic lead carbonate to paint manufacturers at ⅛¢ per lb. under National's competitive levels (Tr. 2535). Both Anaconda and Glidden continually endeavored to produce and did produce improved products in order to build them up to National's price on "Dutch Boy" (Tr. 2542-3, 3581-3). In sales of

lead oxides to large battery manufacturers National and Eagle-Picher made substantial price variations from each other which involved reductions from prevailing price cards and from prices charged other customers during the same months. These sales were in line with the policy discussed in the committee meetings (CX 800-C), of preventing large battery manufacturers from making their own oxides (CXs 840-Z255 over Z253, Z259; 845-P, W, over 845-E et seq.; 659-Z43; Tr. 1576-82, 1596; CXs 853-4). Price variations in bids to governmental agencies are shown hereafter (See also Tr. 2551, RXs 306-8).

(5-c5) Subsequent to those agreements as to what should be recommended for the Code, respondents issued periodical cards containing quotations of prices and terms for sales to dealers and others. Following is a table showing parallel quotations on white lead-in-oil and other keg products per 100 lbs. in 100-lb. or larger containers for the dates shown, which dates correspond to those of the recommended resale price cards set out above in subparagraph 5-b6, to wit:

Resp.	100 lb. keg	Date	Com-Exhibit	100 lb. keg	Date	Com. Exhibit
National	11.00	9/13/37	659-Z-1	10.00*	1/10/38	659-Z-14
Eagle-Picher ...	11.00	9/14/37	660-A	10.00*	1/11/38	660-C
Anaconda	9.88	9/15/37	661-Z-14	8.63	1/10/38	661-Z-12
Glidden	9.50	10/20/37	663-E	8.55	1/11/38	663-F
Sherwin	9.75	9/15/37	662-Z-9	8.50	1/11/38	662-Z-13
National	10.25	2/27/39	659-Z-29	11.25	4/26/41	659-Z-39
Eagle-Picher ...	10.50*	3/ 1/39	660-F	11.50*	5/ 1/41	660-H
Anaconda	9.25	3/ 3/39	661-Z-40	10.38	5/ 3/41	661-Z-69
Glidden	9.00	2/27/39	663-I	11.50	4/26/41	663-K
Sherwin	9.00	2/27/39	662-Z-19	10.00	4/25/41	662-Z-23

* ¼¢ per lb. deducted on orders of 500 lbs. or more.

839 National's and Eagle-Picher's quotations include cost of delivery. Anaconda quotes f. o. b. East Chicago, freight allowed. Glidden quotes f. o. b. the following shipping points:

Baltimore, Md.; Boston, Mass.; Buffalo, N. Y.; Chicago, Ill.; Cleveland, Ohio; Scranton, Pa.; Evansville, Ind.; Long Island City, N. Y.; Reading, Pa.; St. Louis, Mo.; Toledo, Ohio; and Detroit, Mich.

Sherwin quotes f. o. b. the following shipping points:

Altoona, Asntabula, Birmingham, Buffalo, Canton, Charleston, Cleveland, Columbus, Detroit, Huntington, Johnson City, Mansfield, Pittsburgh, Rochester, Uniontown, Warren, Wheeling, and Youngstown.

The foregoing are eastern or par zone prices. To make accurate comparisons as to purchasers' costs, small freight costs from Glidden's and Sherwin's shipping points to each destination would have to be ascertained and added to their lower quotations—and these would be different for each location. However, Anaconda's quotations on a freight-allowed basis were substantially lower than National's and Eagle-Picher's quotations, which are identical with each other in all the periods shown except for the quantity requirement of Eagle-Picher in 1939 and 1941. Prices to consignment accounts were $1.00 to $1.25 lower than the dealer prices set out above (Id.).

Uniform Sales Prices.

(5-c6) Regarding uniformity of prices in actual sales, the tabulations set out below show comparative prices charged on invoices covering sales during quarterly periods selected as representative of general practices as revealed by examinations of a great many retained copies of invoices produced from respondent's files. The invoices tabulated cover less-than-carload shipments from respondents' various production and shipping points to 16 cities in the par zone, including Boston, Milwaukee, St. Louis, and Wheeling, West Virginia.

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SALES OF WHITE LEAD-IN-OIL—PAR ZONE—PRICE PER CWT.—JANUARY THROUGH MARCH, 1941.

Seller	Number of Sales	Class	Under 500 Lbs.	500 Lbs. or Over	References to Exhibits
National	96	Agents	$ 9.75		CX, 752-B, H, M, N, O, Z8-9, Z10, Z18, Z32, Z33-34, Z67-68, Z91, Z98, Z111
	269	"		$ 9.75	
Eagle-Picher..	13	Distributors	9.75		754-F, L, M, O, Q, T, U, Z6
	49	"		9.75	754-B, C, D, F, G, H, I, L, M, O, Q, S, T, U
Anaconda	3	Agents		8.37	795-M, P
Glidden	4	Agents	9.75		772-F, D
	1	"	9.55		772-Z-15
	1	"		8.25	772-Z-15

Seller	Number of Sales	Class	Under 500 Lbs.	500 Lbs. or Over	References to Exhibits
National	6	Dealers	10.75		752-Z-18, Z43, Z69
	11	"		10.75	752-D, P, Z18, Z43, Z94
	1	"	11.00		752-Z-94
Eagle-Picher ..	3	Dealers		10.75	754-Z-31, Z-32
Anaconda	53	Dealers	9.50		795-M, O, P, Q, Z6, Z7
	24	"		9.50	795-M, O, Q, Z6, Z7
	1	"	10.50		795-Q
	1	"		10.25	795-P
Sherwin-Williams....	8	Dealers	9.50		794-D, Z, Z-4
	4	"		9.50	794-D, Z, Z-4
Glidden	6	Dealers	9.55		772-Z15, Z16, E
	1	"	10.75		772-F
	1	"		8.50	772-Z-15
	1	"		8.65	772-Z-15
	1	"		8.78	772-Z-15
	1	"		9.07	772-Z
	32	"		9.55	772-Z-16, Z-17, E, F
	1	"		9.75	772-Z-17

National's card prices for this period were $9.75 to agents and $10.75 to dealers. Eagle-Picher's and Glidden's were the same except for an additional 25¢ on less than 500 lb. quantities (CXs 659-Z-35 to 38, 660-G, 638, 663-J, 649-A. See Tr. 705, 612-48 as to selection of invoices).

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SALES OF WHITE LEAD-IN-OIL—PAR ZONE—PRICE PER CWT.—OCTOBER THROUGH DECEMBER, 1941.

National.....	69	Agents	$10.25		752-B, I, T, U, V, Z12, Z13, Z35, Z39, Z61, Z74-76, Z92, Z98, Z121
	244	" "		$10.25	Ditto
Eagle-Picher ..	9	Distributors	10.25		754-E, H, L, M, Q, T
	50	"		10.25	754-B, C, D, E, F, G, H, I, L, M, O, Q, S, T, U
	1	"		10.00	754-B
	1	"	10.00		754-B
Anaconda	3	Agents		9.835	795-T, X, Z
Glidden	7	Agents	10.25		772-K, Z26, G
	2	"		10.25	772-Z24, J
	1	"	10.375		772-Z-24
	1	"	10.05		772-Z-24
National	6	Dealers	11.25		752-Z-43, Z79
	23	"		11.25	752-E, W, Z61, Z43
	3	"	11.50		752-W
Eagle-Picher ..	1	Dealers	11.25		754-Z24
	1	"	11.75		754-Z25
	3	"		11.25	754-Z30, Z32

Seller	Number of Sales	Class	Under 500 Lbs.	500 Lbs. or Over	References to Exhibits
Anaconda	64	Dealers	10.00		795-Z8, Z10, S, T, U, X, Z
	79	"		10.00	795-S, T, U, X, Z, Z8, Z10, Z11
	1	"	10.50		795-Z10
	1	"	10.75		795-Z10
Sherwin-Williams....	13	Dealers	10.00		794-Z4, Z1, I, Z
	9	"		10.00	794-Z1, Z4, I, Z
	5	"		9.50	794-I
	2	"	10.50		794-Z1
	2	"	10.75		794-Z
Glidden	10	Dealers	10.05		772-Z25, Z24, K, G,
	22	"		10.05	772-Z25, Z24, I, J, K
	1	"	10.75		772-Z24
	1	"	11.25		772-G
	1	"		9.33	772-Z24
	2	"		9.448	772-Z3, G

National's card prices for this period were $10.25 for agents and $11.25 for dealers. Eagle-Picher's were the same except for the addition to dealers of 25¢ per cwt. on less than 500 lbs. (CXs 659-Z39 to 42, 660-H, 688).

842 (5-c7). The foregoing record of 1,230 sales covering two quarterly periods reveals a complete uniformity in price between National and Eagle-Picher, a substantial variation between these and the substantially uniform lower prices charged by Anaconda, Glidden, and Sherwin for the same periods. Two distributor sales out of 123 by Eagle-Picher were 25¢ under National's price to agents, and those items were billed at the regular price, $10.25 "less 25¢". Anaconda conformed to National in 4 and undersold 25¢ or more in 2 sales to agents. Eagle-Picher's prices to dealers in the 8 sales shown were the same or higher than National's card and sales prices. Sales to dealers for both periods show that Anaconda made 220 sales at $1.25 less than National's lowest price, 1 sale at 75¢ lower, and 1 sale at 50¢ lower; Glidden made 70 sales at $1.20 lower than National's lowest price, 2 sales at National's price, 1 at $1.00 under, 1 at 50¢ under, and 6 at more than $1.75 under; Sherwin made 34 sales at $1.25 under, 5 sales at $1.75 under, 2 sales at 75¢ under, and 2 sales at 50¢ under National's lowest price. The deviations by Glidden and Sherwin are subject to the subtraction of a small freight factor which the customer sometimes paid from nearby shipping points (Id.).

(5-c8) Invoices covering 304 sales of white lead-in-oil for January through March, 1941, by National and Eagle-

Picher to Zones 2, 3, 4, 5, 6, and 7 to agents and distributors reveal a strict observance of all zone differentials by both and identical prices in all but three sales over card and three sales under card by National (CXs 752-A through Z116, 754-A through R). The same exhibits reveal 34 lead-in-oil sales to dealers in Zones 2 to 6 by Glidden, Anaconda, and Sherwin, which reveal their strict observance of all zone differentials, price uniformity between them in all premium zones into which two or more shipped, and the same uniform variance from National's and Eagle-Picher's prices that is reflected in their par zone prices (CXs 772-Z15, 794-D, I, Y, Z, 795-M, P, Q).

(5-c9) Sales of dry white lead in car and less than car lots to manufacturers in the par and 25¢ zones are shown by 448 invoices covering the first quarter of 1941. These conform to the zone differentials and follow, with a few exceptions, a price pattern which involves quantity differentials between car lots and less sold to manufacturer customers (CXs 752-G through Z120, 754-W through Z9, 772-Z, 794-Z, 795-M through Z7).

(5-c10) Sales of red lead and litharge (oxides) as evidenced by invoices of National, Eagle-Picher, and Glidden for the last quarter of 1941 follow the formula of $1.50 for litharge and $2.50 for red lead over Smelting's pig lead quotations and the quality differentials on red lead. With occasional exceptions covered by contract sales and 843 sales to battery manufacturers, the prices of the three were uniform. The quantity differentials which each applied were 90¢ per cwt. over car prices for less than 5 tons, and 40¢ over car for 5-ton lots (CXs 831, 840, 842, 843, 845, 846, 847. See also Tr. 1599, 1618, 1637, 2545, 2552, 2682).

Uniform Bidding.

(5-c11) Means of eliminating excessively low bids on government and state purchases were discussed at a meeting of the White Lead-in-Oil Committee on August 9, 1933. The possibility of apportioning such business was considered and the group was asked to give the matter further thought (CX 501-C). On Sherwin's trade bulletins to its managers and salesmen, instructions are given for following large dealers' prices on Government, State, and municipal bids (CX 662-B, F, J. R). Identical bids were repeatedly submitted on basic carbonate white lead from 1938 to 1941 to the City of Cincinnati by National, Eagle-Picher, and Sherwin. These bids were identical to the fourth and final decimal (CX 864; Tr. 4095). Identical bids on white lead-in-oil were submitted to the Milwaukee Board of Purchases as follows: In 1939 by National and Sherwin, both bidding $8.33 per hundred; in 1940 by Eagle-Picher, National, and Sherwin, all bidding $8.57; in 1942 by Eagle-Picher and Sherwin, both bidding $9.80 while National bid $10.05; in 1943 by Eagle-Picher, Sherwin, and National, all bidding $9.80 (CX 865-A through E; Tr. 4096). However, bids by respondents to federal agencies, involving bids to the Treasury Department, the Navy, and the Panama Canal Zone, during 1939, 1940, and 1941, contain twelve cases of unequal bids by respondent and nine cases of identical prices by two or more of them, all respondents, including Glidden, being involved (RXs 306-A, B, 307-A, B, and 308-A, B, C; Tr. 4096).

Container Differentials.

(5-d) Container price differentials were discussed in detail at the meeting of the Lead Pigments Division, Dry Products Committee, on August 8, 1933, and the following provision was tentatively adopted but was not thereafter approved for the Code, to wit:

"On government bids and on railroad (and industrial) business the following package differentials over L. C. L. barrel prices are hereby established:

100 lb. kegs	$ .50
50 lb. kegs	.75
25 lb. kegs	1.00" (CX 800-C).

844 Thereafter all respondents, as shown on the numerous price cards heretofore cited, quoted and charged a differential of 25¢ as between the various container sizes used to contain 100 lbs. of pigment. That is, 100 lbs. in two 50-lb. kegs or cans was sold at 25¢ more than the price for the same quantity in one container. For four 25-lb. containers, 50¢ was added, and for eight 12½-lb. containers, 75¢ was added. All respondents admit employing this practice without deviation, and it was shown by both Sherwin and National that the differentials charged are less than the cost involved as between single containers requiring

only one process of sealing, packing, labeling, and handling, and the costs of the additional containers, each of which is similarly processed (RXs 210, 309; tr. 3882-6, 4175).

Quarterly Contracts.

(5-e) Respecting the making of quarterly contracts by respondents for the sale of lead pigments at a fixed differential over Smelting's New York price for common pig lead, there was an N. R. A. Code provision for contract sales with specific provisions for the basing of prices on the seller's card price on the first day of each quarter (CX 809, Schedule A, Article III), and there was also a provision for basing carload prices on Smelting's market prices on the date orders were received (CX 809, Schedule A, Article II). The matter of uniform sales contracts and conditions therefor was discussed in committee prior to the adoption of the Code, and some of the provisions were incorporated in the second draft (CXs 799-802-A). But these were not adopted and it was not shown that a uniform contract was ever agreed on or used generally. National continued to make quarterly contracts for car lots of lead oxides until 1942, and these followed generally the Code provisions of subsections (b) and (c), Article III of Schedule A (Tr. 1658-60, 3080; CX 809, p. 380). Eagle-Picher continued after the Code to make oxide sales contracts for six months or more (Tr. 1590, 1603, 1618). Sherwin continues to make quarterly contracts for oxides, and the price is based on the New York market for pig lead as published in the Engineering Mining Journal (Tr. 1326-28; CX 823-A to G). In 1941-2 Glidden (Euston) made yearly contracts for white lead, basic carbonate, in which no mention is made of a lead price basis (CXs 811-821). The formula for differentials over pig lead prices was applied solely to carload prices on oxides (litharge and red lead). On less than carloads of oxides the card prices, based on carload prices, were used (CX 809, Id.). These provisions were observed by all except Anaconda, which sold no oxides, during and after the Code period (Id.).

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Red Lead Differentials.

(5-f) All respondents except Anaconda, which sold no red lead or other oxides, quoted and sold red lead on the differentials agreed on for Schedule A. For 97% Pb_3O_4 a charge of ¼¢ per lb. over lower grades was added. For 98% the charge was ¼¢ over the 97% grade (CXs 659 through 663, 752 through 795). The higher grades of red lead are made by extra burning and involve a difference in cost of manufacture, as shown hereafter.

Evidence of Effects.

(6-a) Regarding effects of the practices shown above, it is clear that National's acquisitions and its close co-operation with Eagle-Picher gave the two more than 68% of the white lead, dry and in oil, business and more than 50% of the oxide business in the United States (Par. 1-e). It also appears that the consumption of pig lead by these two respondents was approximately 50% of the total produced and sold for the manufacture of lead pigments in the United States (CXs 98, 851; RXs 173-4), and that the price of lead pigments announced and maintained by National and Eagle-Picher had the effect of placing a ceiling on prices which their smaller competitors could charge and of making profit margins sufficiently narrow to induce these competitors to sell at the highest prices they could get (Pars. 1-f, 2-f, 5-c3). The effect of National's contracts with Smelting was to confine the price on a major part of United States consumption of pig lead to an average monthly price and thus prevent the basing of prices on daily market fluctuations, and to restrict opportunities of buying pig lead at lower prices (Tr. 4084, Par. 1-e).

(6-b) The effect of zone pricing within a zone was to equalize prices between all customers within the zone regardless of proximity to the shipping point. All deliveries were made without extra charge. No allowance was made to the near-mill customer because of the smaller delivery expense, and no extra charge was made to the distant customer because of the increased cost. These delivery costs for a single shipping point varied on white lead-in-oil in the par zone from a few cents per cwt. to 56¢ per cwt., and the average freight for the zone on the shipments from one location was shown to be approximately 20¢ per cwt. (CX 752; RX 166). Therefore, the delivery cost component of all par prices was about 20¢ per cwt. on products which averaged about $9.00 in price per cwt., making the delivery cost involved in each customer's delivered price 2.2 per cent of that price. But an f.o.b. mill price would give the processor at the shipping point an advantage equal to the actual cost of transportation to his competitor's location (Par. 4).

846 For extra price zones, the average freight on keg products was shown to be 49½¢ per cwt. in the plus 12½¢ zone, and 80.8¢ per cwt. in the plus 37½¢ zone (RXs 166-A, 171). On dry white lead the approximate freight overages were: 35¢ in the par zone and 76¢ in the 25¢ zone (RX 214). These differences were less than the average freight differences for a particular zone, but for shipments to near points to zone borders and shipments from points within a premium zone to customers in premium territory, the price differential was more than the freight difference in a substantial number of cases (Par. 4-a to c). This feature is considered under Count Two.

(6-c) The effect of the zone price on competition between customers of respondents was to enable distant processors to compete millwise on an equal cost basis with the near-mill customer, which they could not do if the latter had an f.o.b. mill price. That is, the near-mill processor receiving mill-net prices has an exclusive competitive advantage which extends in diminishing degree all the way to the location of the distant processor who pays mill net plus freight. The near processor is on an equal cost footing at the distant competitor's location and at all points beyond. The latter would have no advantage zone except as against a more distant competitor, and this he must share with the near-mill competitor. This situation was explained by witness Vasterlinger, technical director of Davis Paint Co., Kansas City, Missouri, who said he preferred buying his pigments at a delivered price as long as his competitors buy theirs at the same price, because it prevented his being at a competitive disadvantage in shipping back towards the source of his raw material. He said he would prefer this situation to one which enabled him to make freight savings and not be on an equal basis with competitors nearer the supply (Tr. 3598, 3606-14). Mr. Sprague, vice president of Glidden, said f.o.b. prices would circumscribe and seriously injure the business of his company, and that customer relations were much better under the present system (Tr. 2565-82).

(6-d) Zone pricing simplifies the process of quoting and selling and enables salesmen and customers to avoid complicated freight calculations in order to compare competitors' prices. In the sale of keg products it did not prevent differences between the identical prices of National and Eagle-Picher and the substantially similar prices of Anaconda, Glidden, and Sherwin (Pars. 5-c6 to c9), but the system, as indicated by the price cards and the features heretofore shown, had the effect of facilitating price matching and price uniformity. And the system did produce on
the part of all respondents a complete uniformity of
847 price differentials and uniform prices on dry white
lead and oxides (Pars. 5-c8, c9, c10). But it does not appear clearly that a substantial surrender of territorial advantages by any respondent was involved in the zone pricing system. National had producing and shipping points throughout the country from Boston to San Francisco (Par. 1-d). Eagle-Picher had plants in Cincinnati, Ohio; Joplin, Missouri; and Newark, New Jersey, and now has one in Chicago (Tr. 1552, 1564, 3035). Glidden had plants in Scranton, Pennsylvania and Hammond, Indiana (Tr. 2553, 2561). Anaconda and Sherwin had plants in Chicago (CX 836-A to N; Tr. 1313). It was not shown that any of these locations had substantial advantages which the zone pricing eliminated.

The combined results of the various practices heretofore shown as to tendency and effect of restraining trade and lessening competition are stated below under Conclusions.

Conclusions on Acquisitions and Methods.

(7-a1) The evidence set out in Paragraphs 1-a to e shows that National acquired a predominating position in the lead pigments industry and added to its dominant power by establishing close co-operation with Eagle-Picher (Pars. 1-f, 2-a, e and 5-a to e). National acquired by contract control of 85% of Smelting's output of pig lead and restricted its own use of pig lead produced by its subsidiary, the St. Louis Smelting & Refining Company, to 30,000 tons per year. Through another subsidiary, the Hoyt Metal Company, National acquired control over all of Smelting's output of antimonial lead. These arrangements contracted the supply of pig lead subject to bids and daily market fluctuations by more than 32% of domestic production. They fixed a monthly average which tended to prevent quantity sales of pig lead on a price rise and consequently tended to reduce returns to miners of lead ores. On the other hand, the arrangement, through a substantial contraction of supply, tended to prevent lower prices for pig lead. The effects on prices of pig lead were evidently trade-restraining and monopolistic. National's arrangements since 1921, when the 1906 contract expired, were through short-period contracts which are the same in effect as the requirements of the old contract (Par. 2-d to f). The purpose and effect of National's acquisitions, as shown by the circumstances of their execution and the conduct of the business thereafter, was to control the lead industry and to regulate prices of pig lead and lead pigments.

(7-a2) National's relations with du Pont were such as
to evidence a tacit understanding that the latter would not
deviate from National's prices in the sale of white lead-
in oil, and the two co-operated to maintain price uni-
848 formity. Du Pont was in competition with National in
the sale of this product, which the latter processed
under contract (Pars. 3, 5-b2).

(7-a3) Respondents National and Eagle-Picher promulgated and adhered to the zone pricing system without deviation and in such manner as to produce identical prices, terms, and conditions of sale. Respondent Anaconda, through its subsidaries, employed the zone pricing methods established by National and Eagle-Picher so as to produce (1) substantial price uniformity with all respondents in the sale of dry white lead, and (2) uniform variations in its prices for lead-in-oil and other keg products from prices set by National and Eagle-Picher, and substantially uniform prices with Glidden and Sherwin on these products. Respondents Glidden and Sherwin departed from the zoning method by quoting f.o.b. various shipping and equalization points to many customers, but they observed the zone prices in carload shipments, in establishing shipping point prices, and in selling at competitive points. They thus maintained (1) uniform prices with all respondents on oxides and dry white lead, and with Anaconda in the sale of lead-in-oil and other keg products, and (2) uniform variations from National's and Eagle-Picher's prices on said keg products (Pars. 4-a to e, 5-b, 5-c2, c6).

(7-a4) All respondents employed the Lead Industries

Association as a medium for conferences and agreements respecting methods of selling lead pigments, some of which were agreed on and recommended for the N. R. A. Code, and a number of which were unlawfully employed by respondents as herein appears (Par. 5-a1 to a6).

(7-a5) The "Agency Plan" was employed by National and Eagle-Picher. Some features of it were followed for a short time six years later by Glidden, which had opposed its adoption for the Code. Anaconda followed a modified plan which did not require its consignees to resell at a fixed price. Sherwin did not use the plan in any way (Par. 5-b1 to b6).

(7-a6) All respondents discussed and the Lead Pigments Committees recommended for the Code the pricing methods set out in Paragraph 5-c1, relating to (1) basing lead oxide prices on Smelting's price for common pig lead, (2) allowing ½¢ per lb. under card prices on 5-ton lots of lead oxides, (3) allowing ¼¢ per lb. on 20-ton lots of basic lead carbonate, (4) charging ¼¢ and ½¢ per lb. respectively over lower grades on 97% and 98% red lead (Par. 5-c1), and that they discussed, without recommending for the Code, differentials between containers of 100, 50, 25, and 12½ lbs. (Par. 5-d). Thereafter all respondents ap-
849 plied differentials 2, 3, and 4 as stated above in their quotations and in their sales without a substantial number of deviations (Pars. 5-c2, 5-c3, 5-c5, 5-c6). And all respondents, except Anaconda which sold no oxides, based carload prices for lead oxides on the New York price for common pig lead, which prices were Smelting's prices (Par. 5-c2).

(7-a7) Respondents National and Eagle-Picher, as shown by many price cards and many hundreds of invoices covering sales made in different quarterly periods and in different years, sold lead pigments at identical prices, terms, and differentials (Par. 5-c6), with the exception of sales of oxides to large battery manufacturers (Par. 5-c4).

(7-a8) All respondents discussed bases for quotations in sealed bids to municipal, state, and federal purchasing agencies, and thereafter submitted identical bids in a substantial number of cases (Par. 5-c7); and

(7-a9) Respondents issued periodical price card quotations containing lists of identical resale prices at which dealers were expected to sell lead pigments to consumers and painters (Par. 5-b6).

Conclusions as to Agreements.

(7-b1) From evidence of the various conferences, practices, and results as heretofore set out, it appears that there was agreement between National and Eagle-Picher as to the zoning plan and the agency plan. They quoted and sold white lead-in-oil and other products at identical prices, except to a negligible degree. They employed the same quantity, quality, container, and class differentials. They used the same differentials over pig lead as a basis for prices on lead oxides. They suggested to dealers identical resale prices to consumers and painters, and sold on the same terms and conditions. These similarities of action were subsequent to discussions between themselves and others as to these methods. One of these features, the "Agency Plan", was shown by conclusive evidence to have the purpose and effect of controlling resale prices, preventing "loss leader" selling, and securing better profits to dealers. The zone pricing feature was shown to be a method which facilitated the meeting, or matching, of competitors' prices. The quantity, quality, class, and container differentials were agreed price variations which tended to prevent differences in price as between sellers. The adopted method of basic oxide prices on Smelting's prices furnished a common denominator for maintaining uniform prices on lead oxides. And the continuous uniformity of prices, terms, and conditions of sale in white lead and other
850 keg products not only illustrates the effectiveness of the methods, but also reveals the purpose underlying their employment. These discussions, practices, and results show conclusively that respondents National and Eagle-Picher agreed, co-operated, and pursued the common purpose of fixing and maintaining uniform or identical prices, terms, and conditions of sale, and that the same eliminated price competition between themselves and directly affected more than 68% of the lead pigments trade and indirectly limited price competition in the remaining 32% by circumscribing the price range of their competitors.

Denials were made by various officials of all respondents that there were not, to their knowledge, any agreements by either of them to employ particular methods or to fix and maintain uniform prices and terms other than agreements as to what should be recommended for the N. R. A. Code. And it may be allowed that these officials did not know of any agreements and even that no categorical agreements other than Code agreements were entered into, but the evidence discloses discussions, understandings, and co-operative activities, which, when considered with the results obtained by them, permit of no other conclusion than that of mutual understanding and acceptance of the plan and its objectives and of the intention of each to follow it.

(7-b2) Respondent Anaconda was not shown by direct evidence to have agreed to any pricing methods beyond the showing that its representatives were present at the committee discussions and the adoption of the Schedule A provisions. They introduced denial evidence as to agreements. Whether it agreed through mutual understanding, acceptance, and co-operation to employ the plan regardless of the Code and after the Code period must be determined from the character of its subsequent activities. It failed to employ the agency device in such manner as to enforce resale price conformity (Par. 5-b5), and it failed to employ the zone prices and differentials so as to produce matched prices with National and Eagle-Picher in the sale of white lead-in-oil and other keg products, but on these items its prices, though substantially lower than those of National and Eagle-Picher brands, were very close to the prices of Glidden and Sherwin on similar commodities (Par. 5-c6). Anaconda's zone, quantity, quality, and container differentials were the same as those of all other respondents. It also announced suggested resale prices to dealers which were identical with all other respondents. It was shown that Anaconda had the opportunity of securing prompt information as to competitors' prices and terms, that it was necessary for it to meet price reductions and desirable to meet price increases, and that it sold its
851 lead-in-oil brands at varying prices, but this does not explain away its price uniformity on dry white lead, its identical zone and other differentials, and its suggested resale prices. Agreement to employ these methods and to conform to National's prices within certain limits and to Glidden's and Sherwin's prices with a minimum of deviation appears clearly from these circumstances. In these particulars Anaconda went much beyond the bounds of normal competitive behavior, and it must be inferred that it entered into the general agreement and co-operated in effecting price uniformity.

(7-b3) Respondent Glidden did not conform in all respects to National's and Eagle-Picher's zone-pricing methods, since it used shipping points from which customers paid the freight (Par. 4-d) and it made prices substantially different from those which could not be regarded as matched prices. It did not use any consignment plan until six years after its adoption, and this use was short-lived and not according to pattern. Glidden employed the various zone and other differentials, issued resale price suggestions identical with those of all other respondents, and based its lead oxide prices on Smelting's price for pig lead. Glidden produced evidence to negative agreements and showed the practicability of securing competitors' quotations promptly and the necessity of meeting them in such manner as would enable it to get business and make as large a profit margin as possible. It gave active competition within a limited price range, but it went beyond the requirements even of a limited competition by adhering to the exact zone and other differentials used by its competitors and in the simultaneous utterance of identical resale price suggestions. Its acceptance, assent, and employment of these methods and its co-operation in upholding the price structure of the other respondents and in maintaining price uniformity is apparent from the circumstances.

(7-b4) Respondent Sherwin conformed in part to the zone pricing plan as heretofore shown. It did not use the consignment plan for controlling resale prices, but it issued simultaneously with other respondents identical resale prices for the use of dealers. It also observed all of the quantity, quality, and container differentials and sold oxides on prices based on Smelting's price for pig lead. Sherwin's prices for white lead-in-oil were substantially under National's prices on its "Dutch Boy" brand, but they were approximately the same as those of Anaconda and Glidden for similar brands. On other products, such as dry white lead, Sherwin's prices were in line with National's. The entire price range was set by National, and other respondents were obliged to conform within certain limits, but in the exact observance of differentials
852 and in the simultaneous and identical price suggestions to dealers, Sherwin went beyond the requirements of competition to such an extent that agreement to co-operate in maintaining the price structure and lessening price competition is the more weighty inference (Pars. 4-d, e, 5-b5, 5-c5 to c6).

Conclusions as to Effects.

(7-c1) National's acquisition of the major portion of the lead pigment processing industry, its control by contract of the major portion of the domestic production of pig lead, and its agreement and co-operation with Eagle-Picher in maintaining identical prices and terms between them and in circumscribing the price competition of their smaller competitors and inducing a measure of conformity on the part of the latter to their prices, differentials, terms, and conditions of trade, had the tendency and effect of restraining trade, suppressing price competition, and creating monopolistic conditions (Par. 6-a).

(7-c2) The particular tendencies and effects of the zone pricing system as practiced by respondents were to enable all producers who desired to do so to match the prices of competitors and to produce identical prices in all zones to all buyers in a given trade class, or to vary therefrom according to consistent patterns. This had the tendency and effect of suppressing price competition and restraining trade as between them. The practice, as shown, did not have the tendency or effect of suppressing price competition between purchasers in the same zone, for it enabled all who purchased for resale to secure their goods at the same cost, so that they had an equal competitive advantage. This carries no inducement to sellers to maintain the same resale price, but had the beneficial effects contemplated by the Robinson-Patman Amendment. As between near-mill purchasers and others in the same zone, the flat zone price enlarges the areas of equal competitive opportunity and tends to distribute the locations of processing enterprises in a way that is economically healthful. But it was shown that the differentials between zones were often unfair as trade-restraining, since the price differences were more than differences in transportation or other costs (Pars. 6-b, c).

(7-c3) The zoning system did operate to prevent near-mill customers from having any special advantage over their competitors located at a distance. This cost the near-mill customer in the par zone 2.2% over an f. o. b. mill price and failed to extend his exclusive advantage from half-way to all the way to his far competitor's door. But respondents' failure to extend this special advantage
853 to near-mill customers does not, in the absence of

large freight factors, appear to involve substantial effects which would tend to lessen price competition. The practices as employed here were not shown to involve an undue increase of prices generally in order to enable sellers to ship beyond their legitimate territories (Pars. 6-a to d).

(7-c4) The effects shown throughout the record of the combined results of zone pricing consignment selling, uniform differentials, uniform terms and conditions of sale, were to produce identical prices, terms, and conditions of sale, were to produce identical prices, terms, and conditions of sale between National and Eagle-Picher and produce substantial uniformity of price differentials, terms and conditions by Anaconda, Glidden, and Sherwin, and prices by these three which varied according to pattern and according to differences of brand and quality. The various differentials and the oxide price formula operated to establish an inflexible price structure which eliminated variations in price based on quantity, quality, cost of delivery, container costs, or other price factors which an unrestrained marketing system would provide for the purposes of bargain and sale. The price structure maintained by respondents is such that all delivered prices on the various grades, quantities, and qualities advance or recede, with the change of one price factor. This facilitates price-matching, and has the tendency and effect of suppressing, restricting, and restraining price competition as between the sellers (Par. 6).

(7-c5) The practice of respondents in simultaneously announcing suggested resale prices at which dealers are expected to sell had the effect of discouraging and lessening price competition between their customers who could fail to be influenced by the knowledge that all of their limited sources of supply are interested in their maintaining price uniformity between themselves (Par. 5-b6).

Conclusions of Law.

(7-d1) None of the practices herein found to have been employed by the respondents come under the exemptions of the National Industrial Recovery Act for the reason that the provisions of the Code covering some of the practices were suspended by an exemption under Section 3(a) of the Act which was issued on application of respondents. This act was extended at their request, so that

these Code provisions were never effective during the existence of the Code Authority. The exemptions, under Section 5 of the Act, which applies to "any code, agreement, or license approved, prescribed, or issued and
854 in effect under this title, and any action complying with the provisions thereof taken during such period * *", do not apply to any agreements or methods not protected by a Code provision which was in effect at the time they were entered into and employed within the exemption period thereafter. Other of the practices were never adopted and incorporated in the Code or supplemental code, and were not protected by this Act either during or after the Code period. Practices covered by the provisions which were adopted and suspended, as well as the other practices, were also employed before and more than sixty days after the termination of the Code and the expiration of the exemption period provided in Section 5 (See *Fort Howard Paper Co.* v. *Federal Trade Commission,* 156 Fed. (2) 899).

(7-d2) The acts and practices set forth in Pars. 7-b1 through 7-b4 constitute conspiracy by all respondents to fix and maintain uniform prices, differentials, terms, and conditions of sale in the lead pigment industry, which conspiracy was carried out by all respondents through the various methods heretofore shown. While some of the respondents were not shown to have employed all of the particular methods alleged and considered, and while there were some variations in practice and results as between respondents, the evidence is clear and substantial that each respondent went beyond the requirements of competition, and beyond the requirements imposed by National's price leadership, in the matter of identical bidding and in practice of the various methods which they had discussed together, and in the institution and maintenance of a uniformity of prices, terms, and conditions of sale, all of which could not have resulted from other than agreement and conspiracy (See *Eastern States Lumber Ass'n* case, 234 U. S. 600; *Frey & Sons* v. *United States,* 256 U. S. 208; *Wholesale Grocers of El Paso* v. *Federal Trade Commission,* 277 Fed. 657; *United States* v. *Schenck,* 253 Fed. 212, 249 U. S. 47 and cases there cited).

(7-d3) The acts and practices of respondent National in acquiring competing units of the lead industry, and in resorting to monopolistic practices by unduly influencing the price of pig lead, in monopolizing the major portion of the domestic supply of pig lead, and in monopolizing the major portion of the production and sale of oxides and lead pigments so as to enable it to control prices, terms, and conditions of trade and restrict price competition, are to the prejudice of the public and the lead industry, and are in violation of the Federal Trade Commission Act.

(7-d4) The acts and practices of all respondents in agreeing and co-operating to influence uniform resale prices on the part of dealers by the simultaneous 855 utterance of identical resale price suggestions constitute conspiracy to restrain trade, are to the prejudice of the public and the lead industry, and are in violation of the Federal Trade Commission Act.

(7-d5) The acts and practices of all respondents in agreeing and co-operating to effect uniformity of prices, terms, and conditions in the sale of lead pigments by adopting and employing uniform zone prices and identical zone, quantity, quality, and container differentials and by uniformly basing prices of lead oxides on the prices of American Smelting & Refining Company for common pig lead, constitute conspiracy to restrict price competition between themselves, and had the tendency and effect of restraining trade to the prejudice of the public and the lead industry, and are in violation of the Federal Trade Commission Act.

(7-d6) The acts and practices of respondents National and Eagle-Picher in agreeing and co-operating to produce and in producing identical prices in the sale of lead pigments by their dealer customers, through the use of consignment agreements with said dealers, constitute conspiracy to restrain trade, are to the prejudice of the public and the lead industry, and are in violation of the Federal Trade Commission Act.

Count Two.

The first charge in the count, numbered 8 in the outline, is that the zone pricing discriminates in price (a) between customers located in the same zone, and (b) between customers located in different zones, the customers being in competition with each other, and the price differences not being justified by differences in cost.

The second charge (No. 9) alleges discriminations arising out of differences in price effected through different trade, regional, and quantity discounts.

The facts relating to zone pricing, price differences, differentials, and other features bearing on the issues under this count which are set out in the Report on the Evidence under Count One, are adopted and applied to the issues under this Count, except that the facts of interstate commerce heretofore set out are adopted and applied to "commerce" as the term is defined in the Clayton Act. Other facts and their bases will be considered as cited.

(8-a1) The facts heretofore set out show that the flat price in a given zone is a delivered price which is paid by the customer for two economic values or "goods", 856 (1) the commodity produced at the mill, and (2) transportation. As between customers at different locations the cost of transportation varies, while the cost of the commodity at the mill is the same. But the net mill price of the commodity varies inversely with the freight cost, so that the two combined are equal to the fixed delivered price. That is, $P = F + N$, wherein P is the delivered price, F is the actual freight or delivery cost, and N is the net amount received by the mill for the commodity. The net price (N) is made to vary irrespective of its uniform cost, and the price of F is made the same irrespective of differing costs. There is no base price to which varying amounts of freight are added, but the delivered price is based on raw material, production, and selling costs plus an average freight factor, which gives the near as well as the distant customer the same total price. Where the average freight increment of the price to near-mill customers is more than the actual cost of delivery, the seller receives a profit on the freight which increases his mill net; but where the distant customer receives more freight value than the average freight factor in his price, mill net is shrunk by the amount the freight paid exceeds this factor (Pars. 4-a to c). The delivered price in a premium zone may be expressed as $P = N + (F + X)$, in which F is the average par zone freight factor and X is the zone differential. The first equation is the analytical expression of a uniform delivered price as between customers, and the equation last given is that of a differing delivered price.

(8-a2) Shipments made by respondents between various points during the period from January to March, 1941, show the following maximum variations in price and price factors applying to white lead-in-oil per 100 lbs., P being the zone delivered price, N the mill net or realized price for the product, and F the actual freight cost.

Par Zone.

From Chicago to Wheeling, W. Va.	P $9.75	F $ .56	N $9.19
From Chicago to Milwaukee, Wis.	P 9.75	F .29	N 9.46

(Here Milwaukee is 27¢ freightwise nearer the mill, but it pays 27¢ per 100 more than Wheeling to own the goods at the mill, or 27¢ more freight to respondents for the shorter haul than it would have to pay the railroad.)

857 Second Zone, 12.5¢ Over Par.

From St. Louis, Mo., to Sioux City, Ia.	P $9.875	F $ .89	N $8.985
From St. Louis, Mo. to Kansas City, Mo.	P 9.875	F .29	N 9.585

(Kansas City pays 60¢ per 100 lbs. over Sioux City.)
(CX 752-Z111, Z114.)

Third Zone, 25¢ Over Par

From St. Louis, Mo., to Fargo, N. D.	P $10.00	F $1.19	N $8.81
From St. Louis, Mo., to Union City, Tenn.	P 10.00	F .50	N 9.50

(Union City pays 69c more at the mill.)
(CX 752-Z113, Z115.)

Fourth Zone, 37,5¢ Over Par

From Chicago, Ill., to Atlanta, Ga.	P $10.125	F $ .63	N $9.495
From Philadelphia, Pa., to Charleston, S. C.	P 10.125	F .89	N 9.235

(Atlanta pays 26¢ over Charleston.)
(CX 752-Z10, Z67.)

Fifth Zone, 50¢ Over Par

From St. Louis, Mo.
to Oklahoma City, Okla. P $10.25 F $1.08 N $9.17

From St. Louis, Mo.,
to Denver, Colo. P 10.25 F 1.47 N 8.78

(Oklahoma City pays 39¢ per 100 more at the mill.)
(CX 752-Z112, Z113.)

Sixth Zone, 75¢ Over Par

From St. Louis, Mo.,
to Amarillo, Texas P $10.50 F $1.47 N $9.03

From St. Louis, Mo.,
to Dallas, Texas P 10.50 F .55 N 9.95

(Dallas pays 92¢ more for 55¢ worth of freight, or for its lead-in-oil at the mill.)
(CX 752-Z112, Z113.)

858 Seventh Zone, $1.00 Over Par.

From St. Louis, Mo.,
to El Paso, Texas P $10.75 F $1.77 N $8.98

(El Paso pays a mill price of 97¢ less than Dallas, which is 500 miles nearer the shipping point.)
(CX 752-Z-115.)
(Freight data taken from CXs 742, 749, and 751-A and -B.)

(8-a3) As shown above, discriminations based on differences in mill net may be in favor of the purchasers in the distant zone, who receive much more in transportation value. The advantage to El Paso, as shown above, was less by $1.00 because of the differential. But in border territory, as between St. Louis, Missouri, and near points where the freight is negligible, the different prices resulting from the additions of ⅛ or ¼¢ per lb. involved a discrimination against customers so located by the added amounts, and would lessen their ability to sell and ship back towards St. Louis. These results follow selling into a premium zone from a lower pricing zone, or from the same premium zone, and were not shown to have been based on differences of delivery or other costs, although the differing prices were uniformly quoted and charged (Count One, Par. 4; CXs 752, 754, 772, 852-854; Tr. 1702, 1736, 1825, 2012, 1340, 1361, 1676, 1696, 1369-79, 1981-94, 1878-85, 2000; RX 214, and *supra*). National sold oxides from its plants in Dallas, Texas, and Atlanta, Georgia, to nearby battery manufacturers and others in the same zones at the zone premium of ½¢ per lb. Some deliveries were by truck in the same city as the plant, and others were at negligible distances freightwise (CXs 813, 847, 853; Tr. 1576-82, 1596, 2022; Par. 5-c4).

(8-a4) Eagle-Picher shipped oxides and other pigments from its borderline plant in Joplin, Missouri, to near and far points in different zones. For keg products this plant is in the 12½¢ zone and is about 15 miles from the 25¢ and 50¢ zones. The 37½¢ zone is about 40 miles distant. For oxides the plant is in the par zone and about 10 miles from the borderline of Oklahoma, which is in the 25¢ zone (See maps). Except at Texarkana, Texas, a border city near Texarkana, Arkansas, Eagle-Picher sells from this plant at the zone prices (Tr. 1549, 1550-1; CX 752-Z116).

It sells to battery manufacturers large and small, and employes quantity differentials (Tr. 1599, CX 854. See also Tr. 1363, 1547-9, 1564, 1570-90, 3415, 3659). The following prices and freight factors per cwt. were shown
859 for shipments of red lead to battery manufacturers
from the Joplin plant:

Destination	Zone Differential	Freights	
Nashville, Tenn.	0	.535	CL
Birmingham, Ala.	.25	.625	CL
Omaha, Neb.	0	.195	CL
Minneapolis, Minn.	0	.38	CL
New Orleans, La.	.25	.45	CL
Council Bluffs, Ia.	0	.76	L 5-ton
O'Keene, Okla.	.25	.73	L 5-ton
Tulsa, Okla.	.25	.44	L 5-ton
Stotts City, Mo.	0	.25	L 5-ton

(CX 854; Tr. 1549-1599.)

Prices and rates are those prevailing from October 1 to December 31, 1941, as shown by CXs 659 through 663 and elsewhere. Commission's Exhibit 844 shows other shipments reflecting similar relations between differing prices and freight. As between these zones, freight differences do not appear to bear any relation to price differences (Id.).

Discriminations Through Differentials.

(9) As to differences in trade, regional quantity, and quality discounts and charges through differentials between agents and dealers, between containers of different sizes, between 97% or 98% red lead over lower grades, and between carloads, 5-ton lots, and smaller quantities, the evidence heretofore set out in Count One will be considered and cited on the issues involving price discrimination.

(9-a) Respondents National, Eagle-Picher, and Anaconda charged consignment dealers in the par zone $1.00 less per cwt. on white lead-in-oil than its price to competing dealers in the same locations (Par. 5-c5), (Tr. 2960, 2961-3, 3005-7). It was shown that profits on this item were close and that the differential was of substantial competitive value (Id.). No justification was shown. In fact, consignment selling appears to be more trouble and expense than selling to dealers who buy and own their own stocks (5-b4).

(9-b) All respondents were shown to have maintained differentials of 25¢ between 100-lb., 50-lb., 25-lb., and 12½-lb. containers of 100 lbs. of keg products. These differentials were shown to be no more than differences in the cost of containers, packaging, and handling, and were therefore not discriminations in price. No effects other than those charged in Count One were shown (Par. 5-d; RX 309; Tr. 4175-6).

860 (9-c) Quality differentials on red lead Pb_3O_4, of ¼¢ per lb. for 97% over lower grades, and ½¢ over for 98%, were shown by many quotations and invoices to have been quoted and charged by all respondents except Anaconda (Par. 5-f). These higher grades of red lead were shown to have required extra processing and thus to involve extra costs which were as much or more than the differentials charged (RX 209; Tr. 3871 through 3882). No lessening of competition or tendency thereto through these differentials was shown.

(9-d) All respondents quoted and charged different prices as between carloads and smaller quantities of oxides. The car price was based on Smelting's price for common pig lead and the card price for smaller quantities involved a difference of 90c per cwt. under the car price except that ½¢ per lb., or 50¢ per cwt. under the card price, was allowed for 5-ton lots. The differentials over car prices were, therefore, 40¢ per cwt. for 5 tons and 90% per cwt. for smaller quantities. (Par. 5-c10).

These price differences in a substantial number of cases were much more than the differences between car and less than car freight rates, and resulted in excess of charge over delivery cost as high as 88¢ per cwt. against the purchaser of small quantities.

The following prices and rates per cwt. show representative results and include shipments by respondents National, Eagle-Picher, and Glidden:

Origin	Destination	Unit	Price Difference ¢	Freight Difference ¢	Lack of Justification ¢
St. Louis	Birmingham	CL	0		
St. Louis	Birmingham	5-ton	40	35	5
Dallas	San Antonio	CL	0		
Dallas	San Antonio	L 5-ton	90	50	40
San Francisco	San Francisco	CL	0	0	
San Francisco	San Francisco	5-ton	40	0	40
Hammond	Chicago	CL	0		
Hammond	Chicago	5-ton	40	4	36
Hammond	Chicago	L 5-ton	90	4	86
Detroit	Detroit	CL	0		
Detroit	Detroit	L 5-ton	90	2	88
Cleveland	Akron	5-ton	0		
Cleveland	Akron	L 5-ton	50	3	47
Chicago	Chicago	CL	0		
Chicago	Chicago	5-ton	40	2	38

(CXs 852-A, B, F, O, 854-C).

861 The foregoing shipments were of red lead. Rates and differentials on litharge were the same, and the prices $1.00 less in all billings. The freight rates on 5-ton and smaller lots were the same. Consequently the lack of justification on shipments under 5 tons can be determined by adding 50¢ to the 5-ton discrimination. This reveals a price difference of 50¢ or more over freight differences at all points, and no case where the differential between 5-ton and smaller shipments is justified. Respondents' own estimates shown for dry white lead indicate an increased cost of about ¼¢ per lb. against less than car lots, but this figure applied to oxides would fall far short of justifying the 90¢ differential in any case, or the 40¢ charge in most cases. (See finding below re RXs 215, 217.) An additional discrimination of 25¢ per cwt. against less than car shipments of oxides was made in shipments to customers in Montana, Wyoming, Colorado, and New Mexico, since these states

are in the 50¢ zone for small shipments and in the 25¢ zone for car lots (See maps 3 and 4; CX 854-B, C).

(9-e) All respondents sold basic lead carbonate (dry white lead) at ¼¢ per lb. under card prices on carload shipments (20 tons or more). This difference is in the majority of cases less than the difference between car and less-than-car freight rates.

Shipments involving points selected at random and considered on the basis of the freight rates contained in Commission's Exhibits 742 and 751-B show the following relations between the 25¢ quantity differential and the difference in freight:

Origin	Destination	CL Rate ¢	LCL Rate ¢	Freight Difference ¢	Justification ¢
Chicago	Atlanta	63	105	42	+17*
Chicago	Buffalo	30	61	31	+ 6
Chicago	Cincinnati	24	48	24	— 1
Chicago	Cleveland	25	51	26	+ 1
Chicago	Detroit	23	46	23	+ 2
Chicago	Pittsburgh	29	59	30	+ 5
Brooklyn	Boston	24	48		— 1
Philadelphia	Baltimore	16	32	16	— 9
St. Louis	Chicago	19½	46	26½	+ 1½
St. Louis	Dallas	55	126	71	+46
St. Louis	Omaha	29	78	49	+24
St. Louis	Kansas City	19½	51	31½	+ 6½
St. Louis	St. Paul	34	88	54	+29

* This results from subtracting the 25¢ CL differential from the freight difference. (CXs 742, 761-B, 751, 752).

862 The minus quantities given above show lack of justification. The largest one amounts to 1/9 of a cent per pound, and sales to the great majority of points show that respondents usually take a freight loss on the smaller quantities. Respondents also introduced a tabulated study of the differences in average sales and freight costs between car and less than car shipments. This is based on sales from National's Atlantic branch, and lacks sufficient detail to reveal exact differences. It is, however, taken as an estimate of cost differences to show an average cost excess of about ¼¢ per lb. on less than car over car shipments of dry white lead. The freight figures tabulated above and numerous others in the record indicate that this estimate

is approximately correct (RXs 215-A, B, 216; Tr. 4135-79, 4160).

(9-f) All respondents employed a price differential of ¼¢ per lb. between 500 lbs. and less on white lead-in-oil and other keg products. This bore no relation to freight differences, as both quantities bore the same LCL rate. No other cost differences between these quantities were shown.

Effects of Discrimination.

(10-a) The effects of zone differentials in border territory and of added amounts for shipments originating and terminating in the same premium zone was shown to increase the cost of oxides from ¼¢ to ½¢ per lb. over prices charged other customers, which differences were not based on differences in transportation or other costs (Par. 8-a3). To these effects was added, as against the less-than-5-ton purchaser, small battery manufacturers in the Birmingham territory, a quantity differential of 55¢ per cwt. (90¢ less a freight difference of 35¢) (CX 853-B). Similar discriminations in varying amounts over ¼¢ per lb. are seen from a comparison of items shown in Paragraph 9-d and in Commission's Exhibits 853-A to I, 854-A to C. The discriminations against the small dealer in Denver, Colorado, on shipments from Joplin, Missouri, were 90¢ quantity differential plus a 25¢ difference between car and LCL zoning, less 71¢ freight difference, or 44¢ per cwt. (CX 854-B, G), to which may be added ¼¢ as compared with a nearby competitor in Kansas or in other locations carrying the same or less freight costs (Map 3). These unjustified differentials amount to ½¢ per lb. or more in a substantial number of cases (See Pars. 8-a3, 9-d).

(10-b) It was shown that oxides were used by large and small battery manufacturers, and that batteries contained from 9 to 12 lbs. each of lead oxides. These discriminations approximating ½¢ per lb. on the lower-priced
863 oxides, amount to from 4½¢ to 6¢ per battery for the oxides alone (Tr. 1677, 1680, 1717, 1755, 1797, 1839, 1846). Three battery manufacturers, located in Chicago, testified that a saving of from 5¢ to 10¢ per battery would not have a substantial effect on their competitive position. The President of one of these said a 5¢ to 10¢ savings would not be substantial, but admitted that sometimes his profit might have been less than 25¢ per battery (Tr. 1798,

1803). The President of another, the Volta Battery Co., said he wouldn't let a nickel per battery stand in his way, and that National had helped him start in business (Tr. 1866-69). The Manager of Franklin Storage Battery Co., which makes batteries and battery plates for other battery manufacturers, testified that ½¢ per pound would not be "a drop in the bucket" on battery costs, but would make a "lot of difference" in the costs and profits in the manufacture of plates (Tr. 1898-9). Ten small battery manufacturers situated outside of Chicago testified that a saving per battery of 5¢ to 10¢ would be of competitive advantage to them (Tr. 1732, 1761, 1770, 1776, 1732-6, 1840, 1880, 1899, 1923, 1909, 2004, 2015, 2024). Battery manufacturers operating in Birmingham, Alabama, Dallas, Texas, and Nashville, Tennessee, were shown to be in competition with chain and mail-order battery producers and others purchasing at par zone prices (Tr. 1949-50, 1995-8, 2023, 1935, 1972, 1979, 1984).

(10-c) Four paint manufacturers of St. Louis, Missouri, testified as to conditions in their trade. They used variously from 4½ to 8¼ pounds of lead pigments to a gallon of white or tinted outside paint, and from 14 to 20 pounds of red lead in red paint (Tr. 1338-65, 1366-87, 1381, 1389-1410, 1397, 1415-18). These manufacturers were in the par zone but were in competition with other concerns likewise engaged and which are located in the states of Texas, Louisiana, Arkansas, Oklahoma, Mississippi, Kansas and Tennessee (Tr. 1352-5, 1363, 1367-8, 1376, 1423-7, 1398). Officials of the Mound City Paint & Color Co., of St. Louis, Missouri, testified that a 5¢ per gallon saving would be equal to his profit on many items and would enable him to sell further from his plant (Tr. 1360). The Vice President of St. Louis Surfacer & Paint Co. swore that a matter of a few cents per gallon would determine the business in many instances and that a saving of 5¢ to 10¢ per gallon would enable him to extend his business (Tr. 1429-30). The President of Steelcote Manufacturing Co., of St. Louis, Missouri, testified that "5¢ per gallon would not be a great saving and would not make very much difference, but 10¢ would be more" (Tr. 1402). Witness J. P. Haddock, Secretary of Vane Calvert Paint Co., St. Louis, said that a 10¢ per gallon saving might be a factor in getting business in ordinary times, but that 5¢ would not be enough in a competing area (Tr. 1378).

864 (10-d) The price difference on red lead of ½¢ or more between car and less-than-car shipments made a difference to small paint manufacturers of 7¢ to 10¢ per gallon (Par. 9-d). On dry white lead it is not clear that there is a substantial unjustified quantity differential between CL and LCL purchasers (Par. 9-e). The zone differential between Dallas and St. Louis is ¼¢ on less than car lots of red lead, and nothing on carlots. This makes a total cost difference of about ¾¢ per lb., or about 10¢ to 15¢ per gallon of red paint as between the small Dallas manufacturer and the large manufacturer in St. Louis. There is no price difference on oxides in car lots between the two cities. As between large and small paint manufacturers at all points in the ½¢ zone, there is an unjustified price difference of ¼¢, or about 5¢ per gallon of red paint (Par. 8-a4, Maps 3 and 4). On dry white lead the paint manufacturers of Dallas, St. Louis, Birmingham and other points in the par zone, as shown on Map 2, pay the same delivered price and are all on an equal competitive basis. There are some discriminations in favor of par zone manufacturers against nearby manufacturers in the ¼¢ zone for dry white lead.

(10-e) In the sale of lead-in-oil and other keg products, the quantity differential of ¼¢ per lb. as between 500 lbs. and less was not shown to have any basis in differences of costs of any kind. The difference between consignment dealers' prices and those of other dealers was not shown to be based on differing costs, and gave the consignment dealer an advantage of 1¢ per lb. over competitors in the same location. Differences in mill nets resulting from shipments from par points to par destinations or from par points to premium zone destinations where the added increment was no more than the additional freight were not shown to have involved local price or cost disadvantages as between dealers at the various points. And it was not shown that there was ~~any such~~ disadvantage to any processors of keg products.

(10-f) As between respondents, the zone prices, as well as the quantity, quality, and container differentials, appear from all the evidence to have had the tendency and effect of producing uniformity of prices and lessening price competition between themselves. This results from the uniform employment of the methods as the result of a general understanding, acceptance and voluntary employment of the plan, and not from discrimination per se (See Count One).

(10-g) Respondents' intra-zone prices involving differences in mill nets and average freight increments latent in the delivered price amounting to no more than 2½% to 3½% of the same, which delivered price was the same to all customers in the zone regardless of distance, were not shown to have lessened competition between these customers. The theory of the complainant is that purchasers located near production and shipping points paid prices yielding the highest mill nets and were the ones receiving the maximum disadvantage. But these were claimed and shown to be the principal ones who were crowding the distant manufacturers of batteries and paints to the competitive wall. Were they given an f. o. b. mill price equal to that of their distant competitors and thus enabled to enjoy a predominating advantage up to the door of these competitors and an equal advantage in all of the distant competitors' territory, the small concerns located further from shipping points would be run out of business, and the competition now afforded by these would be destroyed. This would impose on the distant purchasers the necessity of choosing between moving to the source of supply or going out of business (Pars. 4-a to c, 8-a2, 8-a4). In the absence of excessive freight factors which would produce higher prices to the public and substantial economic disparities between customers, it cannot reasonably be inferred that the prices here employed intra-zone lessen competition between customers to a substantial degree.

(10-h) Respondents' inter-zone prices are in fact different prices. They differ to the extent of the zone premiums, and are justified only where the additional freight equals or exceeds the zone premium. Where the differences in freight or other costs do not equal or exceed the differences in price, they are discriminatory. In a substantial number of cases the zone prices were not so justified. Cases pointed out in Paragraphs 8-a3, a4, 10-a, d, and elsewhere are discriminatory, and such discriminations, in numerous cases, were shown to be substantial and sufficient to lessen competition between respondents' customers (Par. 10-a to e).

(10-i) The different charges made by respondents based on sizes of containers for lead-in-oil and other keg products were no more than allowable differences in costs, and were therefore not discriminatory prices. These charge variations were the same to all customers and had no effect on competition between customers (Par. 9-b). Respondents' differing charges between grades of red lead as shown in Paragraph 9-c were no more than corresponding differences in cost as between the grades. The prices were given to all customers, and had no effect on competition between customers.

866 (10-j) The differing prices between carloads of oxides and 5-ton lots, and between these and smaller quantities, which were charged by all respondents except Anaconda, and the extra zone charge for less-than-car quantities in the states of Montana, Wyoming, Colorado, and New Mexico, were not justified by differences in costs of manufacture, sale, or delivery, and were therefore discriminatory. The effects of these were shown to be substantial and to have the tendency and effect of lessening competition between large nad small customers, to the injury of the latter (Pars. 9-d, 10-a to d).

(10-k) The differential charged by all respondents on basic lead carbonate (dry white lead) of ½¢ per lb. between car and less-than-car shipments was no more than differences in the cost of sale and delivery of said products. No lessening of competition between customers was shown to have resulted from this practice.

(10-l) The differential of ½¢ per lb. between 500-lb. and smaller lots of white lead-in-oil and other keg products was not not shown to be justified by differences in cost of any kind. In the retailer and painter trade where this was applied, the differential does not appear to have substantial effects, since the purchase of the larger quantity involved approximately the outlay of $50 and was within the reach of the smallest dealer. No competition was shown between customers who bought the different quantities, and no inference of injury can be drawn with respect thereto.

(10-m) The discrimination set out in Paragraphs 10-h and 10-j were not shown to have lessened competition between sellers. The question of discrimination involved in this case is individual and must be considered with respect to each respondent acting alone from the standpoint of effects as between its customers. Effects arising from co-operatively employing the same discriminations, or from employing the same methods which are not discriminatory but which produce identical prices, are considered and disposed of under Count One. It is not thought, therefore, that the discriminatory acts of any individual respondent had the effect of lessening competition between it and other respondents except as the same were collusively employed.

Conclusions of Law.

(11-a) The employment by each respondent of interzone price differentials where the price differences were more than differences in freight or other costs, as shown in Paragraph 10-h, and where the differences, as shown, were substantial, had the tendency and effect of less-
867 ening competition between customers of the sellers
and of creating a trade advantage in favor of customers in the par zone or elsewhere who received the lower prices. In these instances all of the unequal features of "phantom freight" were present, and customers so discriminated against were disadvantaged competitively at all points. The practice in the circumstances shown is violative of the Clayton Act as amended (49 Stat. 1526; 15 U. S. C. A. Sec. 13; *Sugar Institute* v. *United States*, 297 U. S. 553, 591, 605. See also *Western Union* case, 181 U. S. 92).

(11-b) The employment by all respondents except Anaconda of differentials between carloads, 5-ton lots, and smaller quantities of oxides, and the imposition of an additional ¼¢ per lb. charge on less than car lots in the states of Montana, Wyoming, Colorado, and New Mexico, as set out in Par. 10-j hereof and in the base material cited, were not justified by any differences in costs and were discriminations between large and small customers which lessened competition between them, and are in violation of the Clayton Act as amended (*supra*). (See *Corn Products Refining Company* v. *Federal Trade Commission*, 324 U. S. 726, and cases there cited.)

(11-c) The employment by an individual respondent of a flat delivered price in a specified territorial zone where, as in this case, the delivered prices were based on average delivery costs for the zone, and where no substantial lessening of competition was shown in any line of commerce in which customers of the seller were engaged, does not come under the prohibitions of Section 2(a) of the Clayton Act, as amended. The delivered prices employed were not derived from any formula involving varying amounts of freight from arbitrary or actual shipping points to be added to an f. o. b. mill or base price, such as used and considered in the case of *Corn Products Refining Company* v. *Federal Trade Commission,* 324 U. S. 726. Nor were the effects shown in that case the same as in the instant case. In the *Corn Products* case a base price, substantially an f. o. b. mill price, given the favored near-mill customers in Chicago was the measure of discrimination against those distant competitors whose prices were increased by different amounts in excess of the actual costs of transportation. In this case, costs are equalized between all customers in a zone, so that no one is at a competitive disadvantage. And so the situation which the Commission sought to relieve in the *Corn Products* case—that of the near-mill customer having an undue advantage of location—is relieved by the respondent who uses an equalized price based on reasonable factors.

868 The court said, in the Corn Products case:

"Since petitioners' basing point system results in a Chicago delivered price which is always lower than any other, including that at Kansas City, a natural effect of the system is the creation of a favored price zone for the purchasers of glucose in Chicago and vicinity, which does not extend to other points of manufacture and shipment of glucose. Since the cost of glucose, a principal ingredient of low-priced candy, is less at Chicago, candy manufacturers there are in a better position to compete for business, and manufacturers of candy located near other factories producing glucose, distant from the basing point, as Kansas City, are in a less favorable position. The consequence is, as found by the Commission, that several manufacturers of candy, who were formerly located in Kansas City or other cities served from petitioners' Kansas City plant, have moved their factories to Chicago."

The question here is not whether a base or f.o.b. mill price which produces differing prices is unlawful, but whether the absence of differing prices and of f.o.b. mill price bases is unlawful where such absence insures equal costs to all customer competitors in a zone. The purpose of the Clayton Act is not to force lower prices or even to forbid the inclusion of arbitrary cost factors which normal competition would eliminate. But the Act is directed to the securing of such treatment of customers as will enable them

to be on an equal competitive basis. It did not seek to protect natural advantages of location. They need no protection. The Federal Trade Commission Act, based on the policy underlying the Sherman Act, seeks to enhance competition and produce differing prices, but Section 2(a) of the Clayton Act is a limitation on such differing prices as may be sufficient to protect customers from unequal costs, so that they may sell on equal terms with their competitors. Price for the purposes of the Clayton Act, in the absence of uneconomic or unlawful factors, is the total price or cost to the customer, for this is the essence of his ability to compete. Whether or not the supplier makes a large or a small mill net is of no consequence on the single question of equal prices between competing customers. In this case the Commission is asked to forbid the equalized price and thus force the maintenance of a "favored price zone" which would prevent a seller from building his business on the firmer foundation afforded by an increased number of customers and territorial outlets, and would tend to eliminate all processors not located at sources of supply. It would
869 require a strained construction of the Clayton Act to
force sellers to maintain inflexible mill nets, and such a construction would tend to restrict competition as between sellers, and would be in conflict with the Sherman Act.

In discussing the rejected provision of the Robinson-Patman Bill which defined "price" as "the amount received by the vendor after deducting actual freight or other cost of transportation", the Corn Products opinion says:

> "Such a drastic change in existing price systems as would have been effected by the proposed amendment engendered opposition, which finally led to the withdrawal of the provision by the House Committee on the Judiciary. 80 Cong. Rec. 8102, 8140, 8224. We think this legislative history indicates only that Congress was unwilling to require f.o.b. factory pricing, and thus to make all uniform delivered price systems and all basing points systems illegal per se."

(See also *Maple Flooring Ass'n* v. *United States,* 268 U. S. 563; *Cement Manufacturers Association* v. *United States,* Id. 588; *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.,* 144 Fed. (2) 221 and cases there cited.)

It is clear from these opinions and from other cases cited therein that intra-zone pricing by an individual seller employed as shown in this case is one of the methods which Congress did not wish to forbid and that it is not unlawful under the Clayton Act.

(11-d) The acts and practices of respondents set out in Paragraphs 10-i, 10-k, and 10-l were, for reasons there stated, not in violation of the said Clayton Act. The differences between car and less-than-car shipments of basic lead carbonate, the container differentials, the quality differentials for red lead, and the differentials between 500 lbs. and less on keg products are no more than "differences which normally arise in the buying of smaller or larger quantities" or in the buying of different qualities (*Morton Salt Co.* v. *Federal Trade Commission*, 162 Fed. (2) 949; *Corn Products* case, *supra*).

870 IV. Recommended Findings and Conclusions.

The undersigned Trial Examiner recommends that the Commission adopt as its report the foregoing report upon the evidence excepting such portions as it may eliminate or alter and assign reasons or bases therefor, and that it make the following findings as to the facts based on the same and on the entire record, to wit:

Paragraph 1-A: National Lead Company, hereinafter referred to as "National", is a New Jersey corporation with its principal offices at 111 Broadway, New York, New York. The names "John T. Lewis Company" and "Evans" designate divisions of National's business, and are hereafter used in connection with its transactions.

Paragraph 1-B: The Eagle-Picher Company referred to in the amended complaint as "Eagle-Picher Lead Company", is an Ohio corporation with its principal offices at the American Building, Cincinnati, Ohio. The Eagle-Picher Sales Company, a Delaware corporation having its principal offices at the same address, is a wholly-owned subsidiary of Eagle-Picher. Both of these companies will be hereafter referred to as "Eagle-Picher". The terms "Hammar" and "Eagle" are terms appearing in the evidence to designate the products of this company.

Paragraph 1-C: The Anaconda Copper Mining Company is a Montana corporation with its principal office located at 25 Broadway, New York, New York. The International Smelting & Refining Company, a Montana corporation with its principal office at the same location, is a wholly-owned subsidiary of Anaconda Copper Mining Company, either or both of which companies will be hereafter referred to as "Anaconda". Prior to the organization of International in 1936, Anaconda operated through its subsidiary, Anaconda Lead Products Company. International sold its lead pigment plant and business to Eagle-Picher in 1946, and Anaconda was not thereafter in the lead pigment business.

Paragraph 1-D: The Sherwin-Williams Company, hereafter referred to as "Sherwin", is an Ohio corporation having its principal offices at 101 Prospect Avenue, N. W., Cleveland, Ohio.

Paragraph 1-E: The Glidden Company, hereafter referred to as "Glidden", is an Ohio corporation having its principal offices at Union Commerce Building, Cleveland, Ohio. The term "Mamolith" is a trade name of respondent Glidden, and the Metals Refining Company is the name of one of its divisions.

871 Paragraph 1-F: The aforesaid respondents are manufacturers and sellers of lead pigments, which term, as used in the pleadings and the record, includes (1) oxides, consisting of litharge and red lead, which is produced by burning litharge, (2) basic lead carbonate sold as dry white lead or lead-in-oil, and (3) basic lead sulphate, sometimes used as a substitute for basic lead carbonate. Lead oxides and basic lead carbonate are manufactured from corroding pig lead which differs from common pig lead in that it is desilverized. Basic lead sulphate is usually made from common pig lead, but can be manufactured directly from ores. Oxides in the form of red lead are sold dry or in oil. Respondents Glidden and Sherwin also manufactured and sold mixed paints made from lead pigments produced by them or purchased from others.

National produces dry white lead in 5 types, all of which are sold at the same prices and discounts, and are interchangeable for some purposes. Other respondents produce different qualities of these products, which they claim are superior to those put out by National. Battery manufacturers preferred some brands of lead oxides over others, and some held the opinion that oxides produced by different respondents are different in quality and chemical characteristics. For paint manufacturers the pigments made at different plants contain important differences. These respondents produce practically all but a small quantity of the lead pigments produced and sold in the United States, except that Anaconda and International have not been engaged in the lead pigments business since the fall of 1946. Eagle-Picher and Anaconda do only a limited amount of business on the Pacific Coast and in states west of the Rocky Mountains. Anaconda sold no oxides, and Sherwin did not sell oxides to battery manufacturers.

Paragraph 1-G: Each of the respondents is now and has for many years been engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, selling and shipping lead pigments manufactured at the various producing points hereinafter set out to customers located in other states of the United States than the state of production and shipment in a continued flow of interstate trade and commerce.

Paragraph 1-H: Immediately after its organization in December, 1891, respondent National acquired 16 companies previously engaged in the manufacture, sale and distribution of white lead, linseed oil and kindred products. In February, 1906, National acquired the United Lead Company, which had been organized in 1903 by Grant Hugh Brown, Daniel Guggenheim, and Thomas F. Ryan, and
872 which had acquired thirteen other companies controlling many of the principal lead alloy factories and lead works, not theretofore taken over by National, and including also the American Shot and Lead Company, which was itself a consolidation of the principal shot towers of the country. Most of the concerns acquired by National through the purchase of United had been offered previously to National by Messrs. Guggenheim, Ryan, and H. H. Rogers, the two first named being directors of Smelting. At this time, and until 1911, Smelting was given representation on National's Board of Directors through Daniel Guggenheim, Murray Guggenheim, and Edward Brush, who were also directors of Smelting. Thereafter National acquired the Carter White Lead Company (1906), the Matheson Lead Company (1912), the River Smelting & Refining Company (1915), the Bas-Hunter Paint Company (1916), and the Hirst & Begley Company (1919), and in about 1944 it acquired the Evans Lead Company at Charleston, West Virginia, which continued to produce litharge and red lead to the extent of about 10% of National's production.

Paragraph 1-I: Prior to those acquisitions by National, there were 18 or 20 producers of white lead who were selling in their various localities where they could operate economically. National closed many of these plants, amalgamated others and enlarged existing plants. The names of some of the acquired properties were retained and operated by National as branches. National thereafter controlled and operated branches and plants located in New York, N. Y.; St. Louis, Mo.; Dallas, Texas; Omaha, Neb.; Buffalo, N. Y.; Philadelphia, Pa.; Boston, Mass.; New Orleans, La.; Cincinnati, Ohio; Cleveland, Ohio; Atlanta, Ga.; Pittsburgh, Pa.; San Francisco, Calif.; and Chicago, Ill.

Paragraph 1-J: National's percentage of the production of the entire industry in the United States from 1936 to 1941 were estimated as follows:

White lead-in-oil	60%
Dry white lead	30% to 35%
Oxides (red lead and litharge)	50%

In 1943 National produced 60% of the white lead-in-oil and in 1932 it may have gone as high as 70%, but in other years the percentage varied with a downward trend. Shipments of white lead, dry and in oil, for the years 1938 through 1941 were shown to reflect the following comparative average percentages for the entire United States for the four-year period:

873 National	55.475%
Eagle-Picher	13.35%
International (Anaconda)	7.625%
Fuller	3.225%
McGregor	1.2%
Sherwin and Glidden combined	19.025%

Eagle-Picher is here shown to be National's largest potential competitor in this line, and their combined production for the years considered was 68.825% of the domestic output, which percentage has been increased by the recent acquisition by Eagle-Picher of International's lead pigment plant and business.

National's prices, terms and conditions of sale were followed generally by all of its domestic competitors. National became a predominant factor in the industry, and its competitors felt compelled to follow its prices and terms to a considerable extent. National advertised its "Dutch Boy" brand and made it a standard, leader, and price criterion in the trade. Its facilities for production were at all times adequate to satisfy the entire market demand for white lead.

Paragraph 1-K: It was shown that National owned various amounts of the capital stock of Eagle-Picher, and that in June, 1932, it owned 44,900 shares of the total outstanding 900,000 shares of the common stock. It realized a gross profit of $861,981.53 on these investments. It is not shown that National ever controlled Eagle-Picher through these holdings, or that it was ever represented on the latter's Board of Directors. National made an unsuccessful attempt in 1931 to purchase the assets and goodwill of Eagle-Picher. There is direct evidence of close relations between these two respondents. Eagle-Picher's executive vice-president, Mr. W. R. Dice, in 1937, discussed policies with Messrs. Wilson and Martino, National officials, at a club luncheon to which Mr. Wormser, Secretary of the Association, had invited him. Eagle-Picher's files contained National's price changes on the Pacific Coast, and in 1940 Eagle-Picher submitted labels, prices, and description of its new white lead paint to National and referred to a previous conversation about the matter. This was followed by a luncheon between the parties. Eagle-Picher's Chief Chemist, Mr. Chinery, wrote Mr. Rose, of National, suggesting the increase in Federal specifications of the non-volatile content of flatting oil to 12% "in order to make it harder on the chiselers and others who go out and get flatting oil business on bids based upon specifications". In 1941 National wired Eagle-Picher its Manila prices for white lead in oil and red lead. Other evidence of co-operation between these two appears below.

874 Paragraph 2-A: Respecting the transactions between National and American Smelting & Refining Company, hereafter termed "Smelting", it was shown that the latter, on its organization in 1899, acquired sixteen lead and copper smelters and eight refineries, and thereafter, in 1901, took over three smelters, one refinery, and other related properties from M. Guggenheim's Sons. After these acquisitions Smelting became the world's largest smelter and refiner of lead, producing between 30% and 40% of the entire world supply of refined lead. It operates lead smelters at East Helena, Montana; Selby (San Francisco), California; El Paso, Texas; Leadville, Colorado; Murray, Utah; and East St. Louis, Illinois, which process ores and concentrates from four to five hundred lead mines. Smelting purchases from the mines 80% to 90% of the lead ore which it processes, and most of its ore of United States origin is so purchased. It publishes daily the price at which it buys lead ore and the price at which it sells pig lead on

the same day. Smelting's published prices on common pig lead are the New York market prices and are accepted by pigment producers as a basis for pricing their products.

Paragraph 2-B: On February 6, 1906, at the time it acquired the United properties, National entered into a contract with Smelting by which Smelting was to sell, and National was to buy, (a) all of the latter's requirements of corroding pig lead except so much as National's Collinsville, Illinois, plant supplied not exceeding 30,000 tons per year, and (b) 85% of all of its pig lead requirements, exclusive of corroding lead, less so much chemical lead of other brands as might be demanded by its trade. Smelting was to furnish these requirements up to 85% of its production from domestic ores of all kinds of pig lead, excluding the production of the Selby Company. If National's Collinsville Smelting plant (the St. Louis Smelting & Refining Company) produced more than the stipulated 30,000 tons per year, National was to sell the surplus to Smelting at 5% less than the latter's prevailing price.

Paragraph 2-C: Except for corroding lead, the price to be paid by National under this contract was to be based on the average of Smelting's lowest daily schedule prices for the month of shipment, for 50 tons or more on 30-day delivery at St. Louis and New York City respectively, provided that if this price was more than 1.075¢ per lb. above the average daily spot quotations for soft Spanish lead on the London Metal Exchange for the month in which shipment was made, then the price was to be adjusted to the said London average plus the differential of 1.075¢, which differential was based on the prevailing tariff. The price for corroding lead was to be $2.00 per ton in excess of the above-named price. And it was stipulated between
875 National and counsel in support of the complaint
that "the cost of its inventories of corroding quality pig lead and of the lead content of white lead in process and in the finished stock is the most important single factor in its determination and fixing of its price for white lead (since pig lead is the principal material used in the manufacture of white lead)".

Paragraph 2-D: Concurrently with the acquisition of United and its properties and with the foregoing contract, Smelting entered into a contract with Hoyt Metal Company, acquired by National as a property of United, whereby Hoyt was to purchase and Smelting to sell for a period of fifteen years all of the latter's domestic output of antimonial lead. The price provisions were the same as provided in the Smelting-National contract for other than corroding lead. The contract contemplated deliveries of not more than 800 tons per month.

Paragraph 2-E: The National-Smelting contract gave National control of 85% of Smelting's domestic production of pig lead of all kinds excepting the production of the Shelby Company. Smelting secured 85% of National's consumption of common pig lead and all of its requirements of corroding (or desilverized) lead, less so much chemical or other lead of other brands as National might require. The contract limited National's use of pig lead produced by its own subsidiary (The St. Louis Smelting & Refining Company) to 30,000 tons per year, thus limiting the competition with Smelting from this plant. It also resulted in Smelting's refraining from taking any further interest in the lead manufacturing business. The agreement between Smelting and Hoyt took still more of Smelting's output by the amount of all of its production of antimonial lead. These agreements contracted the open market supply of lead in the United States considerably in excess of 32%. The first contract also set a fixed differential between common pig lead and corroding lead.

Paragraph 2-F: National's contract with Smelting expired in 1921, and the companies signed a contract of mutual release, and made further arrangements whereby National purchased pig lead from Smelting on short term contracts at a spot price or at an average monthly price based on Smelting's daily quotations. National's president, Judge Cornish, told Smelting officials that it was not necessary to renew the long-term contract "because one company had more lead to sell than any other in the United States and the other company was the largest consumer of lead in the United States, and there isn't enough lead from which National could supply its demands without buying from Smelting, and Smelting hasn't enough consumers to take all of its production unless National takes some of it", and that "the contract had a tendency to bind them (National) and handicap their ability sometimes to buy at the lowest price".

876 Paragraph 3: Regarding the third charge involving the transactions and relations between National and du Pont, the record shows that on the 3rd day of Febru-

ary, 1938, du Pont renewed a contract with National which had obtained since 1924 and which was intended to deviate from the old contract by the increase of $25,000 per year of the amounts National was to receive. By the new contract du Pont was to furnish National corroding pig lead, linseed oil, and turpentine, which National was to convert into white lead in oil to the amount of du Pont's total requirements and to package and ship the same to du Pont's order at a stated charge for processing, packaging, and shipping, with certain variations for different size packages. The raw material was furnished by du Pont and the lead in oil belonged to it for sale or use subject to payment of the aforesaid processing and shipping charges. The contract contains no provision for the observance by du Pont of prices charged by National or others for lead in oil, nor is there direct evidence of any express agreement to that effect. However, du Pont based its calculations to determine the changes in the new contract on the card prices, and subsequently requested National to furnish its card prices and changes to its branches in Boston, Flint, Michigan, Chicago, Philadelphia, Toledo, San Francisco, and Wilmington, Delaware. Thereafter du Pont requested a periodical letter from National "covering the price to be in effect for the quarter". Such a letter from National to du Pont, dated September 13, 1940, is shown by Commission's Exhibit 535. A change in discount terms announced by du Pont met the approval of Mr. Rowe of National, who wrote his Chicago branch about it and suggested that "perhaps others in the industry will follow this good example". National represented du Pont in code discussions and the latter was "willing to go along with anything which was agreeable to the others" of the Lead Industries Association, to which du Pont did not belong.

Paragraph 4-A: The uniform zone pricing system substantially as employed by National and Eagle-Picher and followed in salient features by the other respondents involved the sale of lead pigments on a zone delivered price basis with a flat par price for all deliveries in a par zone, which included several states, and increased differentials over the par price for various zones outside of the par zone. Venders prepaid or allowed deductions for all transportation charges and made no allowances or adjustments for differences in delivery costs as between various destinations. The zones and added differentials on the various

products are as shown on Maps 1, 2, 3, and 4 of the Trial Examiner's report upon the facts, which maps and the descriptive matter in Paragraph 4-a of said report are
877 hereby incorporated in these findings. It was shown that shipments of these products were made at the aforesaid prices, terms, and differentials from the following, among other points:

Chicago, Illinois; St. Louis, Missouri; Perth Amboy, N. J.; Philadelphia, Pa.; Oakland, Calif.; Cincinnati, Ohio; Scranton, Pa.; Hammond, Ind.; Collinsville, Illinois; Baltimore, Maryland; Joplin, Missouri; Galena, Kansas.

Paragraph 4-B: On August 8, 1933, the Dry Products Committee of the Lead Pigments Association working on N. R. A. Code proposals discussed and adopted various rules for the equalization of freight, which were based on the practice of adjusting freight charges from various shipping or equalization points established throughout the country, the customer paying freight from these points to his destination. This had been used by National and others for some time, but in the matter of meeting prices the old method rendered it difficult to locate the various equalization points used by competitors. On August 9, 1933, the White Lead-in-Oil Committee met and considered this problem. Thereafter Eagle-Picher wrote Mr. Wormser of zoning proposals, enclosing a map and stating that National was fully informed of the details. The matter was again considered on October 28, 1933, by the Lead-in-Oil Committee as disclosed by the minutes, which stated that no "understanding or agreement" was made. Further correspondence referring to a map and differential points was had between Messrs. Maston and Wormser.

Paragraph 4-C: During the course of committee deliberations as to Code provisions, a method was suggested on the advice of legal counsel for employing certain recommended provisions for the supplementary code prior to their approval by the President, and respondents were advised by the Association Secretary as follows:

"He suggested that the best practical solution for the moment seemed to be the adoption of the Uniform Basis of Sale by one or more of the interested members, which could be followed voluntarily by the others, without agreement on the subject but merely because it was individually to their best interests to do so. .

"I wired you the substance of Mr. Locke's views for no doubt you will wish to discuss the subject further with other members who now happen to be in Chicago."

This suggestion was passed around in October, 1933, and is apparently reflected in the minute entry of October 28, 1933, which emphasizes the absence of "any under-
878 standing or agreement" in connection with the discussion of freight and zoning problems". Very soon thereafter National announced the zone pricing plan.

Paragraph 4-D: On or about June 9, 1934, National set up the zone system on a nation-wide basis and continued to use it thereafter. Anaconda, through its subsidiary, Anaconda Lead Products Company, was involved in discussions of the plan and employed certain features of it until 1936 when the same methods were employed by it through its subsidiary, International. While respondents Glidden and Sherwin quoted and sold in the different zones on the differentials used by National, they did not conform in all respects to the announced plan. Glidden did not use a map, and it quoted in the par zone f.o.b. various shipping points, although it appears to have used the differentials in quoting and selling outside of the par zone. Sherwin sold f.o.b. various shipping points in the par zone and elsewhere, but applied the announced differentials to carload prices and to delivered prices at specified shipping points in the various zones, and it met zone prices of other respondents at various points in different zones.

Paragraph 5-A1: The Lead Industries Association, to which all of the respondents belonged, was employed by them as heretofore set out in part, in connection with the formulation of a code for the industry as provided by the N. I. R. A. This Association is engaged in a wide range of activities in connection with the entire lead industry. It has a Mining Division, a Smelting and Refining Division, a Metallic Lead Products Division, as well as the Lead Pigments Division, which is involved in this case, and it endeavors to promote improvements in and a wider use of lead in all forms. In connection with the lead pigments code, the Association maintained and operated through three Committees: the White Lead-in-Oil Committee, the Dry Products Committee, and the Lead Oxide Committee. All respondents were represented on these committees as follows: National by F. M. Carter, president, and Harold Rowe, vice president; Eagle-Picher by Mr. Bendelari, president, and its vice presidents Messrs. Roosevelt and

Maston; Glidden by Mr. Paul E. Sprague, vice president; Sherwin by Mr. S. B. Coolidge, Jr., vice president; and Anaconda (Lead Products Co.) by Mr. F. O. Case, sales manager, and Mr. Clarence Glass. Their participation in various meetings is shown by the minutes cited throughout the report. Other representatives also appeared at various meetings. The Secretary of the Association, Mr. F. E. Wormser, acted as Secretary to the Code Authority and of the Committees, received reports, and otherwise functioned as Association representative in these activities.

879 Paragraph 5-A2: After the adoption of a master code dealing with labor practices and other general matters of trade practice, the Committees held meetings to discuss, adopt, and recommend provisions for a supplemental Code to regulate particular methods of packaging, selling, and delivering lead pigments. After numerous meetings and discussions, the Committees formulated and the respondent lead pigments producers agreed to a third draft which was duly recommended, approved, and incorporated in the Code on May 24, 1934. Before the Supplemental Code was put into operation, respondents petitioned for an order of exemption from the terms of Article VII, Section 2 of the Code, a price-filing provision, and Schedule A, rules covering conditions of sale for lead oxides and dry white lead, as hereafter set out. The exemption was granted by the N. R. A. Administrator and thereafter extended, so that these portions of the Code were never effective during the existence of the Code Authority.

Paragraph 5-A3: Concerning agreements on matters not included in recommendations for the Code, such as zone pricing and consignment arrangements, it appears as heretofore shown that respondents did not agree to putting a zone provision in the Code, and the same appears respecting consignment. But these subjects were repeatedly discussed in Committee meetings as shown in the testimony of Mr. Paul Sprague, vice president of Glidden, and elsewhere. The evidence also indicates that respondents were averse to price-filing provisions, that Article VII, Section 2 was reluctantly adopted as a compromise which eliminated the rigid adherence to announced prices and terms which had been proposed, and that the exemptions heretofore mentioned were largely on account of this price-filing provision.

Paragraph 5-A4: It was shown that prices and terms for the sale of lead pigments were never filed with the Association by the members at any time. Production figures were reported by the members, but the information showing the production of individual members was not disseminated. It was stated by witness Wormser, Secretary of the Association, that it had never collected or furnished to members any price information, historical or otherwise, and that such statistical information as it did collect and disseminate was furnished others outside of the Association, including interested Government agencies and those engaged in foreign and domestic commerce. These statistics related to the production, distribution, marketing, consumption and uses of lead and lead products.

880 Paragraph 5-B1: The consignment plan of selling white lead-in-oil and other keg products was inaugurated by National's Atlantic branch early in 1933 and was thereafter extended to its eastern territories. Eagle-Picher also started the plan about this time. These two respondents informed each other of their practices and results in connection with this method, and National informed Eagle-Picher that its agents for the most part were in favor of the continuation of the plan. In November, 1933, National decided to extend the plan on a nation-wide basis and informed Eagle-Picher of that intention. Eagle-Picher extended its operations under the plan at about the same time.

Paragraph 5-B2: This agency or consignment method was put before all respondents in a meeting of the White Lead-in-Oil Committee on August 9, 1933. The plan was discussed at length by Mr. Carter, president of National, in his letter of September 8, 1933, to Mr. Richter, General Manager of du Pont's Fabrics and Finishes Department, in which he says in part:

> "Now, then, we discussed the plan at the meeting of the Pigments Section the other day and found both Sherwin-Williams Co. and Glidden Co. radically opposed because of its consignment features."

In another letter Mr. Carter says of Mr. Richter,

> "He has assured me that they would go along and cooperate."

This reference is to Code matters of which Mr. Carter and Mr. Wormser were keeping du Pont informed, and National was representing du Pont in code discussions, although the latter was not a member of the Association.

Agreements to employ a uniform consignment plan were never authorized by the N. R. A. Code.

Paragraph 5-B3: The consignment contracts, as employed by National and Eagle-Picher, appointed distributors as "agents", in National's contracts, and as "consignees" in Eagle-Picher's contracts, which also refer to the relation as an "agency". The provisions of these contracts were the same in all essential particulars. Under their terms stocks were consigned to a dealer for resale at prices and terms specified by the consignor. Sales were made by the consignees from these stocks, and monthly settlement for the goods sold during the month was made with the consignor for the total amount so sold less the difference between the prices set for the consignee and the resale prices charged dealers and consumers. 881 This difference (between consignee's cost and his resale price) is termed his compensation. Expenses of storing, shipping, selling, and handling the goods must be met by the consignee who must also pay all taxes. The contracts strictly limit the consignees' authority to the custody and sale of such goods as may be consigned to them. Consignees may not bind consignors respecting any other than consigned goods, or in any other particulars. National's contracts run between "manufacturer" and "agent". Some of Eagle-Picher's forms refer to "seller" and "distributor", while others name "manufacturer" and distributor". Consignments were subject to withdrawal at any time, and consignees were required to report stocks on hand. Mr. Carter spoke of "selling" those who could qualify and subscribe to the requirements of the contract.

Paragraph 5-B4: The stated purpose of the consignment plan was resale price control. The plan involved the extra expense to the producer of carrying large inventories of goods stored in distributors' warehouses and was otherwise objectionable. But in writing to du Pont about the plan, Mr. Carter, president of National, said in part:

"It permits us to control the resale price, which is a feature of vital importance to the corroder selling in markets like the New York district * * * while selling on consignment is admittedly an evil, I now feel confident that of the two evils with which we are confronted, we have chosen the lesser in selecting the agency system."

Mr. Rowe of National, in a circular to branch managers, November 9, 1933, said in part:

"It should be kept in mind that the purpose of the whole agency plan is to control the dealer's selling price of white lead, so that he may be assured of a reasonable profit." The agency plan was effective in preventing sales below costs and other price-cutting.

Paragraph 5-B5: National employed the consignment plan from early in 1933 to January, 1944, when government restrictions caused it to terminate the agreements. Thereafter National made "fair trade agreements" under the Tydings Amendment with respect to its "Dutch Boy" brand of white lead-in-oil. Eagle-Picher began consignments when National did and conformed to National's methods in every essential particular until about March
882 9, 1942, when it modified the contracts to meet war conditions and reduce stocks. It required consignees to pay at the end of the month for all stocks held by them, but it indicated that the old contracts would be kept in force.

Anaconda, through its subsidiary Anaconda Lead Products Company, and later through its subsidiary International Smelting & Refining Company, sold lead-in-oil on the consignment plan from 1933 to 1946, when International went out of the lead pigment business. During this time it sold some lead-in-oil on a modified consignment plan. No particular contract form appears to have been used by Anaconda except for dry white lead consigned to dealers in the State of Wisconsin, where a contract was necessary in order to protect the owner of consigned goods in case of bankruptcy of the consignee. This was not shown to be similar to National and Eagle-Picher contracts. Anaconda consigned lead-in-oil in other territory on a plan of its own without written contracts, and without agreement that the consignee sell only at the resale prices suggested by the consignor.

Glidden, which had opposed the consignment plan, did not consign stocks until six years after the plan was inaugurated. On the urgence of its salesmen and managers that a consignment arrangement such as that of other lead corroders would double its business, it furnished forms and instructions for consignment selling on July 17, 1939. Glidden's contract and its instructions to salesmen indicate a departure from that of National and Eagle-Picher, in that it offered distributors an exclusive arrangement, whereas the others permitted their consignees to carry consigned stocks of competitors, and they often consigned stocks to more than one dealer in the same territory. Glidden abandoned the plan in 1942, and prior to that time consignments were not offered except where it was deemed necessary. Mr. Sprague, Glidden's vice president, testified that they had "bucked this plan for four or five years". Glidden's price under this plan was "the same as that of other corroders".

Sherwin-Williams never sold on the consignment plan at any time.

Paragraph 5-B6: Respondents' price cards issued periodically to dealers carried complete lists of prices at which it was suggested that they should sell white lead-in-oil or other keg products to consumers and painters. The title terms "dealers' schedule", "resale prices", "painters' price list", and "dealers' recommended selling schedule" are used on these cards, and the prices so set out by all respondents at comparable times were identical except for occasional slight variations by Glidden or Anaconda.

883 Paragraph 5-C1: Regarding the collective fixing, quoting, and employing uniform prices, terms, and conditions of sale, it was shown that respondents, through the Association and Code Committee meetings, discussed, agreed on, and recommended provisions for the collective employment of the following methods:

Pricing lead oxides, or mixtures, in 20-ton lots or more on Smelting's price, or published price, for common pig lead, and selling smaller quantities on "seller's card or quoted price in effect on date order is received", with the reduction of ½¢ per lb. under the card price for 5-ton lots to one delivery;

Selling red lead (lead oxide) containing 97% Pb_3O_4 at ¼¢ lb. and that containing 98% at ½¢ lb. over seller's price for lower grades;

Selling basic lead carbonate (dry white lead) at seller's card price or quoted price in effect on date of order, with a reduction of ¼¢ per lb. on 20-ton lots to one buyer and one destination;

Delivering carlots of oxides or basic lead carbonate f.o.b. car, seller's shipping point, or by truck on 3-day deliveries f.o.b. buyer's premises;

Selling on terms of net 30 days on car shipments of oxides and 1% 10 days, 30 days net, on L. C. L. shipments of oxides and on all shipments of basic lead carbonate;

Discontinuing guarantees against price declines except for undelivered portions of contract purchases.

Paragraph 5-C2: References to particular prices, as distinguished from price differentials, do not appear in Schedule A, and such was purposely avoided. Many of the terms and conditions included had been employed previously by various respondents, and National put Article II of the supplementary code into operation some months prior to its formal adoption. The differentials over Smelting's price on pig lead of $1.50 per cwt. for litharge and $2.50 for red lead had been employed for some time prior to 1933, and respondents used them uniformly thereafter. Prices of oxides in smaller quantities were based on the aforesaid carload prices as determined by these differentials. The stated differentials between 20 tons and less on lead carbonates and between 5 tons and less on lead oxides appear on the price cards of all respondents quoting on these products after 1933.

884 The lead price basis and the fixed differentials eliminated variable factors in the price structure. All of the Schedule A methods were consistently observed and practiced by all respondents during and after the Code period with the exception of the stated terms and f.o.b. car deliveries at seller's plant. The dealers' price cards indicate that the terms used varied from 1% ten days net 30 days to 2% ten days net 60 days, but at any period the terms of all respondents on similar products and quantities were uniform, and the deliveries were for the most part to buyer's location to seller's plant with freight allowed, or f.o.b. stated shipping or equalization points.

Paragraph 5-C3: As to the contention by respondents that the similarity between their prices, terms, and differentials was the natural result of National's leadership and is not indicative of agreement, Glidden's vice president, Mr. Sprague, testified that National's price made a ceiling for them and that they had to operate in the narrow range between this ceiling and the price of lead. Mr. McCarthy, General Sales Manager of National, testified that National made prices for basic white lead without regard to competition, but is competitive with other pigments; that such prices were made by the general office after the consideration of such factors as the cost of pig lead, containers, labor, freight, research, and advertising as well as current prices of competing pigments such as leaded zinc, zinc oxide, titanium, and others. In prices for lead-in-oil, the cost of linseed oil and the price structure for prepared paints would also be considered. Other respondents adduced testimony that they obtained National's and Eagle-Picher's prices, terms, and quotations from customers and from trade publications, and that they thereafter met this competition because failure to meet lower prices and terms resulted in loss of orders, while meeting National's price raises, so far as they could, broadened their restricted profit margins and was necessary to their business.

Paragraph 5-C4: Deviations from National's prices were shown and explained. Eagle-Picher sold its Hammer brand at ½¢ per lb. less than National's white lead-in-oil. Glidden sold lead-in-oil to dealers at ½¢ per lb. under National's card prices for "Dutch Boy" because of the wide demand National had created through its prestige, advertising, and greater ability to supply the trade. Glidden sometimes made concessions to encourage greater sales effort on the part of dealers, and sometimes it charged dealers 5¢ more per 100 lbs. than National and others charged. Anaconda sold lead-in-oil at ½¢ per lb. below National's "Dutch Boy" brand because its management believed the latter's prestige in the trade was such that
885 Anaconda's brand could not compete at the same price.

In sales of lead oxides to large battery manufacturers, National and Eagle-Picher made substantial price variations from each other which involved reductions from prevailing price cards and from prices charged other customers during the same months.

Paragraph 5-C5: Subsequent to these agreements as to what should be recommended for the Code, respondents issued periodical cards containing quotations of prices and terms for sales to dealers and others. Following is a table of par zone prices showing parallel quotations on white lead-in-oil and other keg products per 100 lbs. in 100-lb. or larger containers for the dates shown, which dates correspond to those of the recommended resale price cards heretofore mentioned, to-wit: [Include here the tabulation based on the price cards which is set out in Paragraph 5-c5 of the Report Upon The Evidence].

National's and Eagle-Picher's quotations include cost of delivery. Anaconda quotes f.o.b. East Chicago, freight allowed. Glidden quotes f.o.b. the following shipping points:

Baltimore, Md.; Boston, Mass.; Buffalo, N. Y.; Chicago, Ill.; Cleveland, Ohio; Scranton, Pa.; Evansville, Ind.; Long Island City, N. Y.; Reading, Pa.; St. Louis, Mo.; Toledo, Ohio; and Detroit, Mich.

Sherwin quoted f.o.b. the following shipping points: Altoona, Ashtabula, Binghampton, Buffalo, Canton, Charleston, Cleveland, Columbus, Detroit, Huntington, Johnson City, Mansfield, Pittsburgh, Rochester, Uniontown, Warren, Wheeling, and Youngstown.

Prices to consignment accounts were $1.00 to $1.25 lower than the dealer prices set out above.

Paragraph 5-C6: Regarding uniformity of prices in actual sales, the tabulations set out below show comparative prices charged on invoices covering sales during quarterly periods selected as representative of general practices as revealed by examinations of a great many retained copies of invoices produced from respondents' files. The invoices tabulated cover less than carload shipments from respondents' various production and shipping points to 16 cities in the par zone, including Boston, Milwaukee, St. Louis, and Wheeling, West Virginia: [Included here the two tabulations set out in Paragraph 5-c6 of the Report Upon The Evidence].

886 Paragraph 5-C7: The foregoing record of 1,230 sales covering two quarterly periods reveal a complete uniformity in price between National and Eagle-Picher, a substantial variation between these and the substantially uniform lower prices charged by Anaconda, Glidden, and Sherwin for the same periods. The deviations by Glidden and Sherwin are subject to the subtraction of a small freight factor which the customer sometimes paid from nearby shipping points.

Paragraph 5-C8: Invoices covering 304 sales of white lead-in-oil for January through March, 1941, by National and Eagle-Picher to zones 2, 3, 4, 5, 6, and 7 to agents and distributors reveal a strict observance of all zone differentials by both and identical prices in all but three sales over card and three under card by National. The same exhibits reveal 34 lead-in-oil sales to dealers in zones 2 to 6 by Glidden, Anaconda, and Sherwin, which reveal their strict observance of all zone differentials, price uniformity between them in all premium zones into which two or more shipped, and the same uniform variance from National's and Eagle-Picher's prices that is reflected in their par zone prices.

Paragraph 5-C9: Sales of dry white lead in car and less than car lots to manufacturers in the par and 25¢ zones are shown by 448 invoices covering the first quarter of 1941. These conform to the zone differentials and follow, with a few exceptions, a price pattern which involves quantity differentials between car lots and less sold to manufacturer customers.

Paragraph 5-C10: Sales of red lead and litharge (oxides) as evidenced by invoices of National, Eagle-Picher, and Glidden for the last quarter of 1941 follow the formula of $1.50 for litharge and $2.50 for red lead over Smelting's pig lead quotations and the quality differentials on red lead. With occasional exceptions covered by contract sales and sales to battery manufacturers, the prices of the three were uniform. The quantity differentials which each applied were 90¢ per cwt. over car prices for less than 5 tons, and 40¢ over car for 5-ton lots.

Paragraph 5-C11: Means of eliminating excessively low bids on government and state purchases were discussed at a meeting of the White Lead-in-Oil Committee on August 9, 1933. The possibility of apportioning such business was considered and the group was asked to give the matter further thought. On Sherwin's trade bulletins to its managers and salesmen, instructions are given for following large dealers' prices on Government, State, and municipal bids. Identical bids were repeatedly submitted on
887 basic carbonate white lead from 1938 to 1941 to the
City of Cincinnati by National, Eagle-Picher, and Sherwin. These bids were identical to the fourth and final decimal. Identical bids on white lead-in-oil were submitted to the Milwaukee Board of Purchases as follows: In 1939 by National and Sherwin, both bidding $8.33 per hundred; in 1940 by Eagle-Picher, National, and Sherwin, all bidding $8.57; in 1942 by Eagle-Picher and Sherwin, both bidding $9.80 while National bid $10.05; in 1943 by Eagle-Picher, Sherwin, and National, all bidding $9.80. However, bids by respondents to federal agencies, involving bids to the Treasury Department, the Navy, and the Panama Canal Zone, during 1939, 1940, and 1941, contain twelve cases of unequal bids by respondents and nine cases of identical prices by two or more of them, all respondents, including Glidden, being involved.

Paragraph 5-D: Container price differentials were discussed in detail at the meeting of the Lead Pigments Division, Dry Products Committee, on August 8, 1933, and the following provision was tentatively adopted but was not thereafter approved for the Code, to-wit:

"On government bids and on railroad (and industrial) business the following package differentials over L.C.L. barrel prices are hereby established: 100 lb. kegs $.50, 50 lb. kegs $.75, 25 lb. kegs $1.00."

Thereafter all respondents, as shown on the numerous price cards heretofore cited, quoted and charged a differential of 25¢ as between the various container sizes used to contain 100 lbs. of pigment. That is, 100 lbs. in two 50-lb. kegs or cans was sold at 25¢ more than the price for the same quantity in one container. For four 25-lb. containers, 50¢ was added, and for eight 12½-lb. containers, 75¢ was added. All respondents admit employing this practice, and it was shown by both Sherwin and National that the differentials charged are less than the cost involved as between single containers requiring only one process of sealing, packing, labeling, and handling, and the costs of the additional containers, each of which is similarly processed.

Paragraph 5-E: Respecting the making of quarterly contracts by respondents for the sale of lead pigments at a fixed differential over Smelting's New York price for common pig lead, there was an N. R. A. Code provision for contract sales with specific provisions for the basing of prices on the seller's card price on the first day of each quarter, and there was also a provision for basing carload prices on Smelting's market prices on the date orders were received. The matter of uniform sales contracts and
888 conditions therefor was discussed in committee prior to the adoption of the Code, and some of the provisions were incorporated in the second draft. But these were not adopted, and it was not shown that a uniform contract was ever agreed on.

Paragraph 5-F: All respondents except Anaconda, which sold no red lead or other oxides, quoted and sold red lead on the differentials agreed on for Schedule A. For 97% Pb_3O_4 a charge of ¼¢ per lb. over lower grades was added. For 98% the charge was ¼¢ over the 97% grade. The higher grades of red lead are made by extra burning and involve a difference in cost of manufacture, as shown hereafter.

Paragraph 6-A: Regarding effects of the practices shown above, National's acquisitions and its close co-operation with Eagle-Picher gave the two more than 68% of the white lead, dry and in oil, business and more than 50% of the oxide business in the United States. It also appears that the consumption of pig lead by these two was approximately 50% of the total produced and sold for the manufacture of lead pigments in the United States, and that the price of lead pigments announced and maintained by National and Eagle-Picher had the effect of placing a ceiling on prices which their smaller competitors could charge and of making profit margins sufficiently narrow to induce these competitors to sell at the highest prices they could get. The effect of National's contracts with Smelting was to confine the price on a major part of the United States consumption of pig lead to an average monthly price and thus prevent the basing of prices on daily market fluctuations and to restrict opportunities of buying pig lead at lower prices.

Paragraph 6-B: The effect of zone pricing within a zone was to equalize prices between all customers within the zone regardless of proximity to the shipping point. Delivery costs from a single shipping point varied on white lead-in-oil in the par zone from a few cents per cwt. to 56¢ per cwt., and the average freight for the zone on the shipments from one location was shown to be approximately 20¢ per cwt., on products which averaged about $9.00 in price per cwt., making the delivery cost involved in each customer's delivered price 2.2 per cent of that price. But an f.o.b. mill price would give the processor at the shipping point an advantage equal to the actual cost of transportation to his competitor's location. Costs for truck deliveries or car switching were often involved in local sales.

889 For extra price zones, the average freight on keg products was shown to be 49½¢ per cwt. in the plus 12½¢ zone, and 80.8¢ per cwt. in the plus 37½¢ zone. On dry white lead the approximate freight overages were 35¢ in the par zone and 76¢ in the 25¢ zone. These differences were less than the average freight differences for a particular zone, but for shipments to near points to zone borders and shipments from points within a premium zone to customers in premium territory, the price differential was more than the freight difference in a substantial number of cases.

Paragraph 6-C: The effect of the zone price on competition between customers of respondents was to enable distant processors to compete millwise on an equal cost basis with the near-mill customer, which they could not do if the latter had an f.o.b. mill price. That is, the near-mill processor receiving mill-net or base prices has an exclusive competitive advantage which extends in diminishing degrees all the way to the location of the distant processor who pays mill net plus freight. The near processor is on an equal cost footing at the distant competitor's location and at all points beyond. The latter would have no advantage zone except as against a more distant competitor, and this he must share with the near-mill competitor. Distant processors prefer the zone price to one which enables them to make freight savings and not be on an equal basis with competitors nearer the supply.

Paragraph 6-D: Zone pricing simplifies the process of quoting and selling and enables salesmen and customers to avoid complicated freight calculations in comparing prices. In this way the system had the effect of facilitating price matching and producing price uniformity. And it did produce on the part of all respondents a complete uniformity of price differentials and uniform prices on dry white lead and oxides.

Conclusions and Reasons.

Paragraph 7-A1: The evidence heretofore set out shows that National acquired a predominating position in the lead pigments industry and added to its dominant power by establishing close co-operation with Eagle-Picher. National acquired by contract control of 85% of Smelting's output of pig lead and restricted its own production of pig lead. These arrangements contracted the supply of pig lead subject to bids and daily market fluctuations by more than 32% of domestic production. They fixed a monthly average which tended to prevent quantity sales of pig lead on a price rise and consequently tended to reduce returns to miners of lead ores. On the other hand, the
890 arrangement through a substantial contraction of supply, tended to prevent lower prices for pig lead. The effects on prices of pig lead were trade-restraining and monopolistic. The purpose and effect of National's acquisitions, as shown by the circumstances of their execution

and the conduct of the business thereafter, was to control the lead industry and to regulate prices of pig lead and lead pigments.

Paragraph 7-A2: National's relations with du Pont were such as to evidence a tacit understanding that the latter would not deviate from National's prices in the sale of white lead-in-oil, and the two co-operated to maintain price uniformity in the sale of this product which National processed under contract.

Paragraph 7-A3: Respondents National and Eagle-Picher promulgated and adhered to the zone pricing system without deviation and in such manner as to produce identical prices, terms, and conditions of sale. Respondent Anaconda, through its subsidiaries, employed the zone pricing methods established by National and Eagle-Picher so as to produce (1) substantial price uniformity with all respondents in the sale of dry white lead, and (2) uniform variations in its prices for lead-in-oil and other keg products from prices set by National and Eagle-Picher and substantially uniform prices with Glidden and Sherwin on these products. Respondents Glidden and Sherwin departed from the zoning method by quoting f.o.b. various shipping and equalization points to many customers, but they observed the zone prices in carload shipments, in establishing shipping point prices, and in selling at competitive points. They thus maintained (1) uniform prices with all respondents on oxides and dry white lead, and with Anaconda in the sale of lead-in-oil and other keg products, and (2) uniform variations from National's and Eagle-Picher's prices on said keg products.

Paragraph 7-A4: All respondents belonged to and employed the Lead Industries Association as a medium for conferences and agreements respecting methods of selling lead pigments, some of which were agreed on and recommended for the N. R. A. Code, and a number of which were unlawfully employed by respondents as herein appears.

Paragraph 7-A5: The "Agency Plan" was employed by National and Eagle-Picher. Some features of it were followed for a short time six years later by Glidden, which had opposed its adoption for the Code. Anaconda followed a modified plan which did not require its consignees to resell at a fixed price. Sherwin did not use the plan in any way.

891 Paragraph 7-A6: All respondents discussed and the Lead Pigments committees recommended for the Code the following pricing methods: (1) basing lead oxide prices on Smelting's price for common pig lead, (2) allowing ½¢ per lb. under card prices on 5-ton lots of lead oxides, (3) allowing ¼¢ per lb. on 20-ton lots of basic lead carbonate, (4) charging ¼¢ and ½¢ per lb. respectively over lower grades on 97% and 98% red lead, and they discussed, without recommending for the Code, differentials between containers of 100, 50, 25, and 12½ lbs. Thereafter all respondents applied differentials 2, 3, and 4 as stated above in their quotations and in their sales without a substantial number of deviations. And all respondents, except Anaconda which sold no oxides, based carload prices for lead oxides on the New York price for common pig lead, which prices were Smelting's prices.

Paragraph 7-A7: All respondents discussed bases for quotations in sealed bids to municipal, state, and federal purchasing agencies, and thereafter submitted identical bids in a substantial number of cases; and

Paragraph 7-A8: Respondents issued periodical price card quotations containing lists of identical resale prices at which dealers were expected to sell lead pigments to consumers and painters.

Paragraph 7-B1: From evidence of the various conferences, practices, and results as heretofore set out, it appears that there was agreement between National and Eagle-Picher as to the zoning plan and the agency plan. They quoted and sold white lead-in-oil and other products at identical prices, except to a negligible degree. They employed the same quantity, quality, container, and class differentials. They used the same differentials over pig lead as a basis for prices on lead oxides. They suggested to dealers identical resale prices to consumers and painters, and sold on the same terms and conditions. These similarities of action were subsequent to discussions between themselves and others as to these methods. One of these features, the "Agency Plan", was shown by conclusive evidence to have the purpose and effect of controlling resale prices, preventing "loss leader" selling, and securing better profits to dealers. The zone pricing feature was shown to be a method which facilitated the meeting, or matching, of competitors' prices. The quantity, quality, class, and container differentials were agreed price variations which tended to prevent differences in price as be-

tween sellers. The adopted method of basing oxide prices on Smelting's prices—furnished a common denominator for maintaining uniform prices on lead oxides. And
892 the continuous uniformity of prices, terms, and conditions of sale in white lead and other keg products not only illustrates the effectiveness of the methods, but also reveals the purpose underlying their employment. These discussions, practices, and results show conclusively that respondents National and Eagle-Picher agreed, co-operated, and pursued the common purpose of fixing and maintaining uniform or identical prices, terms, and conditions of sale, and that the same eliminated price competition between themselves to a substantial degree.

Paragraph 7-B2: Respondent Anaconda was not shown by direct evidence to have agreed to any pricing methods beyond the showing that its representatives were present at the committee discussions and the adoption of the Schedule A provisions. It failed to employ the agency device in such manner as to enforce resale price conformity, and it failed to employ the zone prices and differentials so as to produce matched prices with National and Eagle-Picher in the sale of white lead-in-oil and other keg products, but on these items its prices, though substantially lower than those of National and Eagle-Picher brands, were very close to the prices of Glidden and Sherwin on similar commodities. Anaconda's zone, quantity, quality, and container differentials were the same as those of all other respondents. It also announced suggested resale prices to dealers which were identical with all other respondents. Agreement to employ these methods and to conform to National's prices within certain limits and to Glidden's and Sherwin's prices with a minimum of deviation appears clearly from these circumstances. In these particulars Anaconda went much beyond the bounds of normal competitive behavior, and it must be inferred that it entered into the general agreement and co-operated in effecting price uniformity.

Paragraph 7-B3: Respondent Glidden did not conform in all respects to National's and Eagle-Picher's zone-pricing methods, since it used shipping points from which customers paid the freight, and it made prices substantially different from these. It did not use any consignment plan until six years after its adoption, and this use was short-lived and not according to pattern. Glidden employed the various zone and other differentials, issued re-

sale price suggestions identical with those of all other respondents, and based its lead oxide prices on Smelting's price for pig lead. It gave active competition within a limited price range, but it went beyond the requirements even of a limited competition by adhering to the exact zone and other differentials used by its competitors and in the simultaneous utterance of identical resale price suggestions. Its acceptance, assent, and employment of these
893 methods and ~~its~~ co-operation in upholding the price structure of the other respondents and in maintaining price uniformity is apparent from the circumstances.

Paragraph 7-B4: Respondent Sherwin conformed in part to the zone pricing plan as heretofore shown. It did not use the consignment plan for controlling resale prices, but it issued simultaneously with other respondents identical resale prices for the use of dealers. It also observed all of the quantity, quality, and container differentials and sold oxides on prices based on Smelting's price for pig lead. Sherwin's prices for white lead-in-oil were substantially under National's prices on its "Dutch Boy" brand, but they were approximately the same as those of Anaconda and Glidden for similar brands. On other products, such as dry white lead, Sherwin's prices were in line with National's. The entire price range was set by National, and other respondents were obliged to conform within certain limits, but in the exact observance of differentials and in the simultaneous and identical price suggestions to dealers, Sherwin went beyond the requirements of competition to such an extent that agreement to co-operate in maintaining the price structure and lessening price competition is the more weighty inference.

Paragraph 7-C1: National's acquisition of the major portion of the lead pigment processing industry, its control by contract of the major portion of the domestic production of pig lead, and its agreement and co-operation with Eagle-Picher in maintaining identical prices and terms between them and in circumscribing the price competition of their smaller competitors and inducing a measure of conformity on the part of the latter to their prices, differentials, terms, and conditions of trade, had the tendency and effect of restraining trade, suppressing price competition, and creating monopolistic conditions.

Paragraph 7-C2: The particular tendencies and effects of the zone pricing system as practiced by respondents were to enable all producers to match the prices of com-

petitors and to produce identical prices in all zones to all buyers in a given trade class, or to vary therefrom according to consistent patterns. This had the tendency and effect of suppressing price competition and restraining trade as between them. The practice, as shown, did not have the tendency or effect of suppressing price competition between purchasers in the same zone, for it enabled all who purchased for resale to secure their goods at the same cost so that they had an equal competitive advantage. As between near-mill purchasers in the same zone
and others, the flat zone price enlarges the areas of
894 equal competitive opportunity and tends to distribute
the locations of processing enterprises. But it was shown that the differentials between zones were often unfair as trade restraining, since the price differences were more than differences in transportation or other costs.

Paragraph 7-C3: The zoning system operated to prevent near-mill customers from having any special advantage over their competitors located at a distance. This cost the near-mill customer in the par zone 2.2% over an f.o.b., mill price, less local delivery costs, and failed to extend his exclusive advantage from half-way to all the way to his far competitor's door. The practices as employed here were not shown to involve an undue increase of prices generally in order to enable sellers to ship beyond their legitimate territories.

Paragraph 7-C4: The effects shown throughout the record of the combined results of zone pricing, consignment selling, uniform differentials, uniform terms and conditions of sale, were to produce identical prices, terms, and conditions of sale between National and Eagle-Picher and produce substantial uniformity of price differentials, terms and conditions by Anaconda, Glidden, and Sherwin, and prices by these three which varied according to pattern and according to differences of brand and quality. The various differentials and the oxide price formula operated to establish an inflexible price structure which eliminated variations in price based on quantity, quality, cost of delivery, container costs, or other price factors which an unrestrained marketing system would provide for the purposes of bargain and sale. The price structure maintained by respondents is such that all delivered prices on the various grades, quantities, and qualities advance or recede with the change of a base price factor. This facilitates price-matching, and has the tendency and effect of suppressing, restricting, and restraining price competition as between the sellers.

Paragraph 7-C5: The practice of respondents in simultaneously announcing suggested resale prices at which dealers are expected to sell had the effect of discouraging and lessening price competition between their customers who could not fail to be influenced by the knowledge that all of their limited sources of supply are interested in their maintaining price uniformity between themselves.

Conclusions of Law.

Paragraph 7-D1: None of the practices herein found to have been employed by the respondents come under the exemptions of the National Industrial Recovery Act
895 for the reason that the provisions of the Code covering some of the practices were suspended by an exemption under Section 3(a) of the Act which was issued on application of respondents. This act was extended at their request, so that these Code provisions were never effective during the existence of the Code Authority. The exemptions, under Section 5 of the Act, which applies to "any code, agreement, or license approved, prescribed, or issued and in effect under this title, and any action complying with the provisions thereof taken during such period * * *", do not apply to any agreements or methods not protected by a Code provision which was in effect at the time they were entered into and employed prior to the termination of the exemption period. Other of the practices were never adopted and incorporated in the Code or supplemental code, and were not protected by this Act either during or after the Code period. Practices covered by the provisions which were adopted and suspended, as well as the other practices, were also employed before and more than sixty days after the termination of the Code and the expiration of the exemption period provided in Section 5.

Paragraph 7-D2: The acts and practices set forth in Paragraphs 7-B1 through 7-B4 constitute conspiracy by all respondents to fix and maintain uniform prices, differentials, terms, and conditions of sale in the lead pigment industry, which conspiracy was carried out by all respondents through the various methods heretofore shown. While some of the respondents were not shown to have employed all of the particular methods alleged and considered, and while there were some variations in practice and results as between respondents, the greater weight of the reliable, probative and substantial evidence renders it clear that each respondent went beyond the requirements of competition, and beyond the requirements imposed by National's price leadership, in the matter of identical bidding and in practice of the various methods which they had discussed together, and in the institution and maintenance of a uniformity of prices, terms, and conditions of sale, and that these acts and practices were the results of agreement and conspiracy.

Paragraph 7-D3: The acts and practices of respondent National in acquiring competing units of the lead industry, and in resorting to monopolistic practices by unduly influencing the price of pig lead, in monopolizing the major portion of the domestic supply of pig lead, and in monopolizing the major portion of the production and sale of oxides and lead pigments so as to enable it to control prices, terms, and conditions of trade and restrict price competition, are to the prejudice of the public and the lead industry, and are in violation of the Federal Trade Commission Act.

896 Paragraph 7-D4: The acts and practices of all respondents in agreeing and co-operating to influence uniform resale prices on the part of dealers by the simultaneous utterance of identical resale price suggestions constitute conspiracy to restrain trade, are to the prejudice of the public and the lead industry, and are in violation of the Federal Trade Commission Act.

Paragraph 7-D5: The acts and practices of all respondents in agreeing and co-operating to effect uniformity of prices, terms, and conditions in the sale of lead pigments by adopting and employing uniform zone prices and identical zone, quantity, quality, and container differentials and by uniformly basing prices of lead oxides on the prices of American Smelting & Refining Company for common pig lead, constitute conspiracy to restrict price competition between themselves and to employ the said methods to that end, and these acts and practices had the tendency and effect of restraining trade to the prejudice of the public and the lead industry, and are in violation of the Federal Trade Commission Act.

Paragraph 7-D6: The acts and practices of respondents National and Eagle-Picher in agreeing and co-operating to produce and in producing identical prices in the sale of lead pigments by their dealer customers, through the use of uniform consignment agreements with said dealers, constitute conspiracy to restrain trade, are to the prejudice of the public and the lead industry, and are in violation of the Federal Trade Commission Act.

Paragraph 8-A: The charge in Count Two, numbered 8 in the outline, is that the zone pricing discriminates in price (a) between customers located in the same zone, and (b) between customers located in different zones, the customers being in competition with each other, and the price differences not being justified by differences in cost.

The second charge (No. 9) alleges discriminations arising out of differences in price effected through different trade, regional, and quantity discounts.

The facts relating to the parties, zone pricing, price differences, differentials, and other features bearing on the issues under this count which are set out in the Report Upon The Evidence under Count One, are adopted and applied to the issues under this count except that the facts of interstate commerce heretofore set out are adopted and applied to "commerce" as the term is defined in the Clayton Act. Other facts and their bases will be considered as cited.

897 Paragraph 8-A1: The facts heretofore set out show that the flat price in a given zone is a delivered price which is paid by the customer for two economic values or "goods", (1) the commodity produced at the mill, and (2) transportation. As between customers at different locations the cost of transportation varies, while the cost of the commodity at the mill is the same. But the net mill price of the commodity varies inversely with the freight cost so that the two combined are equal to the fixed delivered price. That is, $P = F + N$, wherein P is the delivered price, F is the actual freight or delivery cost, and N is the net amount received by the mill for the commodity. The net price (N) is made to vary irrespective of its uniform cost, and the price of F is made the same irrespective of differing costs. There is no base price to which varying amounts of freight are added, but the delivered price is based on raw material, production, and selling costs plus an average freight factor which give the near as well as the distant customer the same total price. Where the average freight increment of the price to near-mill customers is more than the actual cost of delivery, the seller receives a profit on the freight which

increases his mill net; but where the distant customer receives more freight value than the average freight factor in his price mill net is shrunk by the amount the freight paid exceeds this factor. The delivered price in a premium zone may be expressed as $P = N + (F + X)$, in which F is the average par zone freight factor and X is the zone differential. The first equation is the analytical expression of a uniform delivered price as between customers, and the equation last given is that of a differing delivered price.

Paragraph 8-A2: Shipments made by respondents between various points during the period from January to March, 1941, show the following maximum variations in price and price factors applying to white lead-in-oil per 100 lbs., P being the zone delivered price, N the mill net or realized price for the product, and F the actual freight cost, to wit: [Include here tabulation based on invoices as set out in Paragraph 8-a2 of the Report Upon The Evidence.]

Paragraph 8-A3: As shown above, discriminations based on differences in mill net may be in favor of the purchasers in the distant zone, who receive much more in transportation value. The advantage to El Paso, as shown above, was less by $1.00 because of the differential. But in border territory, as between St. Louis, Missouri, and near points where the freight is negligible, the different prices resulting from the additions of ⅛¢ or ¼¢ per lb. involved a discrimination against customers so located by the added amounts, and would lessen their ability to
898 sell and ship back towards St. Louis. These results follow selling into a premium zone from a lower pricing zone, or from the same premium zone, and were not shown to have been based on differences of delivery or other costs, although the differing prices were uniformly quoted and charged. National sold oxides from its plants in Dallas, Texas, and Atlanta, Georgia, to nearby battery manufacturers and others in the same zones at the zone premium of ½¢ per lb. Some deliveries were by truck in the same city as the plant, and others were at negligible distances freightwise.

Paragraph 8-A4: Eagle-Picher shipped oxides and other pigments from its borderline plant in Joplin, Missouri, to near and far points in different zones. For keg products this plant is in the 12½¢ zone, and is about 15 miles from the 25¢ and 50¢ zones. The 37½¢ zone is about

40 miles distant. For oxides the plant is in the par zone and about 10 miles from the borderline of Oklahoma, which is in the 25¢ zone (See maps). Except at Texarkana, Texas, a border city near Texarkana, Arkansas, Eagle-Picher sells from this plant at the zone prices. It sells to battery manufacturers large and small, and employs quantity differentials. The following prices and freight factors per cwt. were shown for shipments of red lead to battery manufacturers from the Joplin plant:

Destination	Zone Price Differential	Freight	
Nashville, Tenn.	0 (Par)	53½¢	CL
Birmingham, Ala.	25¢	62½¢	CL
Omaha, Neb.	0	19½¢	CL
Minneapolis, Minn.	0	38¢	CL
New Orleans, La.	25¢	45¢	CL
Council Bluffs, Ia.	0	76¢	L 5-ton
O'Keene, Okla.	25¢	73¢	"
Tulsa, Okla.	25¢	44¢	"
Stott City, Mo.	0	25¢	"

Prices and rates are those prevailing from October 1 to December 31, 1941, as shown by Commission's Exhibits 659 through 663 and elsewhere. Commission's Exhibit 844 shows other shipments reflecting similar relations between differing prices and freight. As between these zones, freight differences do not appear to bear any relation to price differences.

Paragraph 9-A: Respondents National, Eagle-Picher, and Anaconda charged consignment dealers in the par zone $1.00 less per cwt. on white lead-in-oil than its price to competing dealers in the same locations. It was shown that profits on this item were close and that the differential was of substantial competitive value. No justification
899 was shown. In fact, consignment selling appears to be more trouble and expense than selling to dealers who buy and own their own stocks.

Paragraph 9-B: All respondents were shown to have maintained differentials of 25¢ between 100-lb., 50-lb., 25-lb., and 12½-lb. containers of 100 lbs. of keg products. These differentials were shown to be no more than differences in the cost of containers, packaging, and handling, and were not shown to have lessened competition in any line of commerce. No effects other than those charged in Count One were shown.

Paragraph 9-C: Quality differentials on red lead, Pb_3O_4, of ¼¢ per lb. for 97% over lower grades, and ½¢ over for 98%, were shown by many quotations and invoices to have been quoted and charged by all respondents except Anaconda. These higher grades of red lead were shown to have required extra processing and thus to involve extra costs which were as much or more than the differentials charged. No lessening of competition or tendency thereto through these differences was shown.

Paragraph 9-D: All respondents quoted and charged different prices as between carloads and smaller quantities of oxides. The car price was based on Smelting's price for common pig lead and the car price for smaller quantities involved a difference of 90¢ per cwt. under the car price except that ½¢ per lb., or 50¢ per cwt. under the card price, was allowed for 5-ton lots. The differentials over car prices were, therefore, 40¢ per cwt. for 5 tons and 90¢ per cwt. for smaller quantities.

These price differences in a substantial number of cases were much more than the differences between car and less than car freight rates, and resulted in excess of charge over delivery cost as high as 88¢ per cwt. against the purchaser of small quantities.

The following prices and rates per cwt. show representative results and include shipments by respondents National, Eagle-Picher and Glidden: [Here include tabulation from Paragraph 9-d of the Report Upon The Evidence].

The foregoing shipments were of red lead. Rates and differentials on litharge were the same, and the prices $1.00 less in all billings. The freight rates on 5-ton and smaller lots were the same. Consequently the lack of justification on shipments under 5 tons can be determined by adding 50¢ to the 5-ton discrimination. This reveals a price difference of 50¢ or more over freight differences
at all points and no case where the differential be-
900 tween 5-ton and smaller shipments is justified. Re-
spondents' own estimates shown for dry white lead indicate an increased cost of about ¼¢ per lb. against less than car lots, but this figure applied to oxides would fall far short of justifying the 90¢ differential in any case, or the 40¢ charge in most cases. An additional discrimination of 25¢ per cwt. against less than car shipments of oxides was made in shipments to customers in Montana, Wyoming, Colorado, and New Mexico, since these states are in

the 50¢ zone for small shipments and in the 25¢ zone for car lots (See maps 3 and 4).

Paragraph 9-E: All respondents sold basic lead carbonate (dry white lead) at ¼¢ per lb. under card prices on carload shipments (20 tons or more). This difference is in the majority of cases less than the difference between car and less-than-car freight rates.

Shipments involving points selected at random and considered on the basis of the freight rates contained in Commission's Exhibits 742 and 751-B show the following relations between the 25¢ quantity differential and the difference in freight: [Here include tabulation and material below it in Paragraph 9-e of the Report Upon The Evidence].

Paragraph 9-F: All respondents employed a price differential of ¼¢ per lb. between 500 lbs. and less on white lead-in-oil and other keg products. This bore no relation to freight differences, as both quantities bore the same L.C.L. rate. No other cost differences between these quantities were shown.

Paragraph 10-A: The effects of zone differentials in border territory and of added amounts for shipments originating and terminating in the same premium zone were shown to increase the cost of oxides from ¼¢ to ½¢ per lb. over prices charged other customers, which differences were not based on differences in transportation or other costs. To these effects was added, as against the less-than-5-ton purchaser, small battery manufacturers in the Birmingham territory, a quantity differential of 55¢ per cwt. (90¢ less a freight difference of 35¢). Similar discriminations in varying amounts over ¼¢ per lb. are seen from a comparison of items shown in Commission's Exhibits 853-A to I and 854-A to C. The discriminations against the small dealer in Denver, Colorado, on shipments from Joplin, Missouri, were 90¢ quantity differential plus a 25¢ difference between car and L.C.L. zoning, less 71¢ freight difference, or 44¢ per cwt., to which may be added ¼¢ as compared with a nearby competitor in Kansas or in 901 other locations carrying the same or less freight costs (Map 3). These unjustified differentials amount to ½¢ per lb. or more in a substantial number of cases.

Paragraph 10-B: It was shown that oxides were used by large and small battery manufacturers, and that batteries contained from 9 to 12 lbs. each of lead oxides. Price differences resulting from the zone differentials alone amounted to ¼¢ to ½¢ per lb. as between competing battery manufacturers, and quantity differentials added from ¼¢ to ½¢ more, making differences in costs of 5¢ to 10¢ per battery. This was shown to have substantial competitive effects as between buyers in different zones and buyers of different quantities. Battery manufacturers operating in Birmingham, Alabama, Dallas, Texas, and Nashville, Tennessee, were shown to be in competition with each other and with chain and mail-order battery producers and others purchasing at par zone prices.

Paragraph 10-C: Four paint manufacturers of St. Louis, Missouri, testified as to conditions in their trade. They used variously from 4¼ to 8¼ pounds of lead pigments to a gallon of white or tinted outside paint, and from 14 to 20 pounds of red lead in red paint. These manufacturers were in the par zone but were in competition with other concerns likewise engaged and which are located in the states of Texas, Louisiana, Arkansas, Oklahoma, Mississippi, Kansas and Tennessee. Cost differences of from 5¢ to 10¢ per gallon of paint were shown to have substantial competitive effects in this trade.

Paragraph 10-D. The price difference on red lead of ½¢ or more between car and less-than-car shipments made a difference to small paint manufacturers of 7¢ to 10¢ per gallon. On dry white lead it is not clear that there is a substantial unjustified quantity differential between carload and L. C. L. purchasers. The zone differential between Dallas and St. Louis is ¼¢ on less than car lots of red lead, and nothing on car lots. This makes a total cost difference of about ¾¢ per lb., or about 10¢ to 15¢ per gallon of red paint as between the small Dallas manufacturer and the large manufacturer in St. Louis. There is no price difference on oxides in car lots between the two cities. As between large and small paint manufacturers at all points in the ½¢ zone, there is an unjustified price difference of ¼¢, or about 5¢ per gallon of red paint (Maps 3 and 4). On dry white lead the paint manufacturers of Dallas, St. Louis, Birmingham and other points in the par zone, as shown on Map 2, pay the same delivered price and are
902 all on an equal competitive basis. There are some discriminations in favor of par zone manufacturers against nearby manufacturers in the ¼¢ zone for dry white lead.

Paragraph 10-E: In the sale of lead-in-oil and other keg products, the quantity differential of ¼¢ per lb. as between 500 lbs. and less was not shown to have any basis in differences of costs of any kind. The difference between consignment dealers' prices and those of other dealers was not shown to be based on differing costs, and gave the consignment dealer an advantage of 1¢ per lb. over competitors in the same location. Differences in mill nets resulting from shipments from par points to par destinations or from par points to premium zone destinations where the added increment was no more than the additional freight were not shown to have involved local price or cost disadvantages as between dealers at the various points. And it was not shown that this involved any such disadvantage to any processors of keg products.

Paragraph 10-F: As between respondents, the zone prices, as well as the quantity, quality, and container differentials, appear from all the evidence to have had the tendency and effect of producing uniformity of prices and lessening price competition between themselves. This results from the uniform employment of the methods as the result of a general understanding, acceptance and voluntary employment of the plan, and not from discriminations per se.

Conclusions and Reasons.

Paragraph 10-G: Respondents' intra-zone prices involving differences in mill nets and average freight increments latent in the delivered price amounting to no more than 2½% to 3½% of the same, which delivered price was the same to all customers in the zone regardless of distance, were not shown to have lessened competition between these customers. The theory of the complaint is that purchasers located near production and shipping points paid prices yielding the highest mill nets and were the ones receiving the maximum disadvantage. But these were claimed and shown to be the principal ones who were crowding the distant manufacturers of batteries and paints to the competitive wall. Were all customers given an f.o.b. mill price, the near-mill customer would enjoy a predominating advantage up to the door of his distant competitor and an equal advantage in all territory beyond, so that the small concerns located further from shipping points would be run out of business, and the competition now afforded by these would be destroyed. It cannot, therefore, reasonably be inferred that the prices here employed intra-zone lessen competition between customers to a substantial degree.

903 Paragraph 10-H: Respondents' inter-zone prices are in fact different prices. They differ to the extent of the zone premiums, and are justified only where the additional freight equals or exceeds the zone premium. Where the differences in freight or other costs do not equal or exceed the differences in price, they are discriminatory. In a substantial number of cases the zone prices were not so justified. Cases heretofore pointed out are discriminatory, and such discriminations, in numerous cases, were shown to be substantial and sufficient to lessen competition between respondents' customers.

Paragraph 10-I: The different charges made by respondents based on sizes of containers for lead-in-oil and other keg products were no more than allowable differences in costs, and were therefore not discriminatory prices. These charge variations were the same to all customers and had no effect on competition between customers. Respondents' differing charges between grades of red lead as shown were no more than corresponding differences in cost as between the grades. The prices were given to all customers, and had no effect on competition between customers.

Paragraph 10-J: The differing prices between carloads of oxides and 5-ton lots, and between these and smaller quantities, which were charged by all respondents except Anaconda, and the extra zone charge for less-than-car quantities in the states of Montana, Wyoming, Colorado, and New Mexico, were not justified by differences in costs of manufacture, sale, or delivery, and were therefore discriminatory. The effects of these were shown to be substantial and to have the tendency and effect of lessening competition between large and small customers, to the injury of the latter.

Paragraph 10-K: The differential charged by all respondents on basic lead carbonate (dry white lead) of ¼¢ per lb. between car and less-than-car shipments was no more than differences in the cost of sale and delivery of said products. No lessening of competition between customers was shown to have resulted from this practice.

Paragraph 10-L: The differential of ¼¢ per lb. between 500-lb. and smaller lots of white lead-in-oil and other keg products was not shown to be justified by differences in costs of any kind. In the retailer and painter trade where this was applied, the differential does not appear to have substantial effects, since the purchase of the larger quantity involved approximately the outlay of $50 and was within the reach of the smallest dealer. No competition was 904 shown between customers who bought the different quantities, and no inference of injury can be drawn with respect thereto.

Conclusions of Law.

Paragraph 11-A: The employment by each respondent of inter-zone price differentials where the price differences were more than differences in freight or other costs, as heretofore shown, and where the differences, as shown, were substantial, had the tendency or effect of lessening competition between customers of the sellers and of creating a trade advantage in favor of customers in the par zone or elsewhere who received the lower prices. In these instances all of the unequal features of "phantom freight" were present, and customers so discriminated against were disadvantaged competitively at all points. The practice in the circumstances shown is violative of the Clayton Act as amended (49 Stat. 1526; 15 U. S. C. A. Sec. 13; *Sugar Institute* v. *United States,* 297 U. S. 553, 591, 605. See also *Western Union* case, 181 U. S. 92).

Paragraph 11-B: The employment by all respondents except Anaconda of differentials between carloads, 5-ton lots, and smaller quantities of oxides, and the imposition of an additional ¼¢ per lb. charge on less than car lots in the states of Montana, Wyoming, Colorado, and New Mexico, were not justified by any differences in costs and were discrimination between large and small customers which lessened competition between them, and are in violation of the Clayton Act as amended (*supra.* See *Corn Products Refining Company* vs. *Federal Trade Commission,* 324 U. S. 726, and cases there cited).

Paragraph 11-C: The employment by an individual respondent of a flat delivered price in a specified territorial zone where, as in this case, the delivered prices were based on average delivery costs for the zone, and where no substantial lessening of competition was shown to have resulted therefrom in any line of commerce in which customers of the seller were engaged, does not come under the prohibitions of Section 2(a) of the Clayton Act, as amended.

Paragraph 11-D: The acts and practices of respondents set out in Paragraphs 10-I, 10-K, and 10-L were, for reasons there stated, not in violation of the said Clayton Act. The differences between car and less than car shipments of

basic lead carbonate, the container differentials, the quality
differentials for red lead, and the differentials between 500
lbs. and less on keg products are no more than "dif-
905 ferences which normally arise in the buying of smaller
or larger quantities" or in the buying of different
qualities (*Morton Salt Co. v. Federal Trade Commission*,
162 Fed. (2), 949; *Corn Products* case, *supra*).

It is therefore recommended that the Commission issue and serve upon the respondents the following order based on the foregoing facts and conclusions and on the entire record, to wit:

V. Recommended Order.

This proceeding having been heard by the Federal Trade Commission upon the complaint and amended complaint of the Commission, the answers of the respondents thereto, testimony and other evidence thereon taken before a duly authorized Trial Examiner of the Commission, the recommended decision of the Trial Examiner and exceptions thereto, briefs in support of complaint and in opposition thereto, and oral arguments of counsel, and the Commission having made its findings as to the facts and its conclusion that the respondents have violated the provisions of the Federal Trade Commission Act and of the Clayton Act,

1. It Is Ordered that each of the respondents National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting & Refining Company, The Sherwin-Williams Company, and The Glidden Company, their respective officers, representatives, agents, and employees, in or in connection with the offering for sale, sale, or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, co-operating in, continuing or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between any two or more of said respondents and others not parties hereto, to establish and maintain uniform prices, terms, price differentials and/or conditions of sale, and inducing resale price uniformity through the employment of the following or similar methods, to wit:

1-A. Quoting and/or selling lead pigments at specified price differentials depending upon size or type of containers; or upon size or type of shipment to customers; or upon the type of business in which customers may be engaged;

906 1-B. Quoting and/or selling red lead and litharge at specified differentials over any particular quotation or particular quotations of pig lead prices;

1-C. Issuing to dealers suggested resale prices, dealers' price schedules, or list prices with the purpose and effect of inducing dealers to observe uniform resale prices and refrain from price competition between themselves;

1-D. Quoting and/or selling lead pigments at price differentials between zones as involved in the delivered price zoning system set out in Paragraph 2 below, or as involved in any similar plan producing identical or uniform price variations between territorial divisions.

2. It Is Further Ordered that each of the respondents National Lead Company, The Eagle-Picher Company, Anaconda Copper Mining Company and International Smelting & Refining Company, their respective officers, representatives, agents and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in said commerce, do forthwith cease and desist from entering into, co-operating in, continuing or carrying out any plan, common course of action, understanding, agreement, combination or conspiracy between any two or more of them, or between any one or more of said respondents and others not parties hereto, to establish and maintain uniform prices, terms, price differentials conditions of sale, and/or inducing resale price uniformity through the employment of the following or similar methods, to wit:

2-A. Quoting and/or selling lead pigments at delivered prices calculated or determined pursuant to or on the basis of zone or territorial divisions as set forth with more particularity in the maps attached to and made a part of the findings of fact hereof, or in accordance with any other co-operative plan, system, or formula which produces identical or uniform delivered price quotations or prices for lead pigments by respondents using such plan, system, or formula;

2-B. Entering into, employing, or continuing consignment or agency contracts or arrangements whereby prices and selling practices of dealers or distributors are controlled or directed, except that this provision shall not apply to Respondents Anaconda and International.

907 3. It Is Further Ordered that respondent National Lead Company, its officers, representatives, agents, sale, employees, in or in connection with the manufacture, sale, or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from acquiring or seeking to acquire, directly or indirectly, by means of any corporate or other device, any interest of ownership or control in the physical assets, plants or other properties, or in the capital stock of any concern or enterprise which is now or at the time of such acquisition or proposed acquisition may be an actual or potential competitor of said National Lead Company in the manufacture, sale, or distribution of lead pigments.

4. It Is Further Ordered that each of the respondents, National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting & Refining Company, The Sherwin-Williams Company, and The Glidden Company, their respective officers, representatives, agents, and employees, in connection with the offering for sale, sale, or distribution of lead pigments in commerce, as "commerce" is defined in the Clayton Act, between and among the several states of the United States and in the District of Columbia, do forthwith cease and desist from discriminating directly or indirectly in the price of said products of like grade and quality as among customers who are in competition with each other when the differences in price are not justified by differences in the cost of manufacture, sale, and/or delivery resulting from the differing methods or quantities in which such products are sold or delivered by the following or similar methods, to wit:

4-A. Selling lead pigments at different zone delivered prices to customers located in different zones who are in competition with each other;

4-B. Selling lead oxides at different quantity price differentials between car and 5-ton shipments and between 5-ton and smaller shipments to customers who are in competition with each other (except that this provision shall not apply to respondent Anaconda Copper Mining Company or to respondent International Smelting & Refining Company).

5. Is Is Further Ordered that each respondent shall, within sixty (60) days after service upon it of this order,

file with the Commission a report in writing setting
908 forth in detail the manner and form in which it has complied with this order.

Rulings on the proposed findings and conclusions submitted by counsel are transmitted to the Records Division herewith.

This at Washington, D. C., on the 31st day of March, 1948.

Respectfully submitted,
John W. Norwood,
Trial Examiner.

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912 Before Federal Trade Commission.

• • (Caption—5253) • •

EXCEPTIONS OF COUNSEL SUPPORTING THE COMPLAINT TO THE TRIAL EXAMINER'S RECOMMENDED DECISION.

(Received May 21, 1948.)

Come Now Joseph S. Wright and Paul R. Dixon, counsel supporting the complaint in the above matter, and except to the Trial Examiner's Recommended Decision, as follows:

Exception I.

Exception is taken to failure of the Trial Examiner to include in his statement of the allegations of the complaint on page 4 and in his statement of the issues raised by the pleadings on page 6 the allegations of the complaint contained in Paragraphs Eight, Nine and Ten of the amended complaint and the issues raised by the pleadings of use by each of the respondents of the various zone delivered price quotations and methods of quoting prices for the purpose and with the effect of enabling them to eliminate price competition by quoting identical delivered prices. The allegations of Paragraphs Eight to Ten of Count I of the amended complaint are in addition to the conspiracy and combination charges and raise issues in addition to those stated by the Trial Examiner at page 6 of his Recommended Decision.

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Exception II.

Exception is taken to the oversimplification of the definition of the products involved in the proceeding at page 7, and to omission of the detailed definitions and descriptions contained in Part I, Paragraphs 1 through 7 on pages 1 to 3 of the proposed findings and conclusions submitted to the Trial Examiner by the undersigned.

Exception III.

On page 7 the Trial Examiner finds that respondents Glidden and Sherwin also manufactured and sold mixed paints. In fact, each of the respondents except Anaconda and International have at some time during the period covered by the record produced and sold mixed paints or the equivalent, lead pigments in such form that they may be applied directly without further processing.

Exception IV.

Exception is taken to the Trial Examiner's statement appearing in Paragraph (1-d) on page 9 and 1-I on page 63 listing together the branch offices and plants of National in such fashion as to indicate that pigment manufacturing plants are operated in Omaha, Nebraska; Buffalo, New York; Boston, Massachusetts; New Orleans, Louisiana; Cincinnati and Cleveland, Ohio; and Pittsburgh, Pennsylvania. While those cities designated particularly above are branch offices of National, no pigment manufacturing operations are conducted therein nor have such operations been conducted for many years.

Exception V.

Exception is taken to failure of the Trial Examiner to find in Paragraph (1-f) on page 10 and 1-K on page 64 that the Eagle-Picher acquired by National in the early 1930's was acquired in the name of E. J. Cornish as an individual, who was at the time Chairman of the Board of the National Lead Company, and that other stocks owned by National were held in the name of the corporation outright (tr. 3313-14); and that the real purpose of holding such stock in the name of Cornish was to conceal the purpose of National to acquire control of Eagle-Picher.

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Exception VI.

Exception is taken to the statement at various places in the Trial Examiner's Recommended Decision to the effect that respondent Glidden "sold f. o. b. various shipping points in the par zone". This statement appears in Paragraph (4) on page 14, Paragraph (4-d) on page 19, Paragraph (5-c5) on page 30, Paragraph (7-a3) on page 39, Paragraph (7-b3) on page 42, Paragraph 4-D on page 69, Paragraph 5-C5 on page 76, Paragraph 5-C7 on page 77, Paragraph 7-A3 on page 81, and Paragraph 7-B3 on page 83.

Respondent Glidden admitted in its answer to the amended complaint, and has never sought to indicate otherwise in this proceeding, that it has employed the zone method of pricing substantially as set forth in the complaint. (See answer of Glidden pp. 3, 4, 8; Glidden Proposed Finding No. 14.)

Exception VII.

Attorney in support of the complaint excepts to the Trial Examiner's findings that Sherwin-Williams did not follow the zone system at the following places: Paragraph (4) on page 14, Paragraph (4-d) on page 19, Paragraph (5-c5) on page 30, Paragraph (7-a3) on page 39, Paragraph 4-D on page 69, Paragraph 5-C5 on page 76, Paragraph 5-C7 on page 77, Paragraph 7-A3 on page 81, Paragraph 7-B4 on page 84.

An examination of the white lead-in-oil price lists of both respondents Glidden and Sherwin-Williams discloses a statement on the face of each a list of f. o. b. points or shipping points (see Cx. 662-Y and 663-A).

Both price cards, without more, would indicate an offer to sell at the listed points, the customer to pay the freight to destination. In fact, however, the lists of points on both Glidden and Sherwin-Williams price cards are warehouse points rather than points for price making. As shown above under Exception VI, listing of f. o. b. points did not mean that Glidden added freight to any zone delivered price.

915 It is plain from the record that Sherwin-Williams likewise followed the zone system in its quotations of prices on lead pigments, and that the so-called list of

shipping points on the Sherwin-Williams price lists were not in fact f. o. b. points from which freight was added in any but a small number of instances, as will appear more fully below. The General Trade Sales Bulletins from the headquarters of the Sherwin-Williams Company to the branches and sales personnel frequently refer to the zones. For instance, Cx 662-f, General Trade Sales Department Bulletin No. 24, under date of December 28, 1936, contains the following statement:

> "Zone Differentials.
>
> On all the above prices where the delivery point is outside the Eastern territory add to these prices the full advance differential shown on the attached price list insert."

Other subsequent Trade Sales Department Bulletins contain similar instructions and above them contain the descriptions:

"Consumers Prices—Eastern Zone"

"S-W Dealers—Eastern Zone"

(Cx 662-I and following sub-numbers).

Ex. 782-D is a price bulletin by the San Francisco office of Sherwin-Williams showing the application of the zone system as such to all of the business of Sherwin-Williams on the Pacific Coast.

As to red lead and litharge, Cx. 823 A-G shows that while Sherwin-Williams apparently did charge freight on less-than-carload shipments of these products from warehouses (823-A and B) during 1932 and 1933, beginning in 1934 when the zone system was adopted delivered price quotations were made in accordance with the zone plan adopted by the industry and continuing down to 1942 (823-C to G).

Respondent Sherwin-Williams sought to introduce evidence that it had not followed the zone system, in spite of the exhibits referred to above and in spite of the fact 916 that at no point in any of the price lists, nor in the instructions to branch personnel as to the method of quoting prices, is there any indication that freight is to be added from the so-called shipping points on the price cards. A vice-president of Sherwin-Williams testified categorically that it was the unfailing practice of the company to add some freight charge on any shipment to a destination other than a listed shipping point. (Tr. 1314-20)

The introduction of more than a hundred invoices into the record (Cx. 833A to Z 100) showed this statement to be entirely contrary to the facts; and other witnesses were offered by Sherwin-Williams to attempt to explain away the discrepancy between the printed pricing instructions and invoices on the one hand and the testimony of the witness Coolidge on the other. This explanatory testimony (witnesses Brown, tr. 3694; Lemke, tr. 3743; and Lewis, tr. 4103) is conflicting and vague and does not refute the inference that must be drawn from the invoices appearing in the record showing adherence to the zone system in actual sales and from the detailed instructions to sales personnel as to pricing practices.

It is submitted, therefore, that there is no basis for the finding of the Trial Examiner that either Glidden or Sherwin-Williams did not follow the zone system to practically the same extent as all of the other respondents.

Exception VIII.

Exception is taken to statement of the Trial Examiner in Paragraph (4-a) at page 16 that "Dry red lead, litharge and other lead pigments in barrels or bags in carload lots of 20 tons or more were sold at a differential of $2.50 per cwt. for red lead and $1.50 per cwt. for litharge over Smelting's closing price * * *". The record shows that only red lead and litharge were sold at such differentials and that so-called card prices were quoted on all other lead pigments.

Exception IX.

Exception is taken to Paragraphs (5-a2) and (5-a3) at page 20 and 5-A2 and 5-A3 at page 70. In these paragraphs the Trial Examiner finds that the purpose of the committee meetings were for recommending
917 provisions of a Supplemental Code of Fair Competition "to regulate particular methods of packaging, selling, and delivering lead pigments", and further finds that Schedule A of the Code "provides for basing carload prices for lead oxides on Smelting's New York price, * * *"

It is apparent from all of the documents relating to the Code discussions and the various drafts of Codes adopted by the committees and by the final approved draft of the Code itself (Cx. 809) that it was never intended that the

Code would itself regulate or establish any business practices. Schedule A did not provide that carload prices were to be based in any particular fashion. The only provision of the Code which could possibly be relied upon by the respondents as a defense in this case was Article VII, Section 2, and the attached Schedule A, which provided for nothing more than the *filing* with the Code Authority details of transactions which were made on any other basis than those contained in Schedule A.

Exception X.

Exception is taken to all of those figures appearing in the table set out by the Trial Examiner in Paragraph (5-b6) at page 26 which are not identical one with the other for comparable dates.

The Trial Examiner lists a card of Glidden under date of 10/20/37 which appears to be 50¢ lower than all of the cards of the other respondents under dates of September 13 to 15, 1937. One price card of respondent Glidden was not furnished the Commission, and by the serial numbers appearing upon the previous and subsequent cards (Cx. 663-D, E) it is apparent that there was a price card on about September 15, 1937 which does not appear in the record. An examination of the price cards of the other respondents on about 10/20/37 shows them to be identical with Glidden, so that it is an unwarranted assumption that Glidden was 50¢ below scale on 9/15/37.

The quotations for Eagle-Picher and Anaconda for 25 lb. and 12½ lb. kegs during January, 1938, and March, 1939, appear in the Trial Examiner's table to be slightly higher than those of the other respondents. Eagle-Picher and Anaconda chose to quote on these smaller packages
918 a price per unit of 25 or 12½ lbs. rather than a price based on 100 lbs., as did the other respondents. Since there is a fraction of a cent involved in dividing the cwt. price by 4 or 8 to determine the 25 or 12½ lb. container price, in quoting on such single containers Eagle-Picher and Anaconda used the even cent next above the fraction. In computing his table the Trial Examiner apparently multiplied this unit price by 4 or 8, multiplying the "breakage" in the unit price. This is not a real price difference since in quoting on a single unit any of the other respondents would have used the full cent above the fraction. Furthermore, all of the respondents, including

Eagle-Picher and Anaconda customarily quoted a 50¢ differential per cwt. between each size of container from 100 lbs. down to 12½ lbs.

In the price quotation of Anaconda under May 3, 1941, the Trial Examiner included a price card for the plus ⅛¢ zone, or zone 2, which was 12½¢ above the par zone quotation (see tr. 231). The Trial Examiner should have cited Cx. 661-V which is the par zone price card for the same date which is identical with the comparable prices of the other respondents (tr. 229).

The Trial Examiner should have found that the consumer, painter and industrial price quotations of the respondents are and have been identical in every respect during the period of the conspiracy.

Exception XI.

Exception is taken to Paragraph 5-B6 on page 73 where the Trial Examiner finds that there were slight variations in quoted prices by Glidden or Anaconda based upon the errors in the table subject to Exception X.

Exception XII.

Exception is taken to the so-called table of parallel quotations on white lead-in-oil in Paragraph (5-c5) on page 29. It is apparent that the Trial Examiner has placed side by side quotations of National to "dealers" as that term is understood by National, rather than "distributors"
919 who were in fact the bulk of the dealers to whom a lower price was given; has included quotations applicable to other zones than the par zone; and has used at least one price list which is on a different date than those of the other respondents. The net result of the scrambling of quotations indicates a dissimilarity in prices to dealers which did not in fact exist.

At that time, and at all times during the period from 1933 to 1942 at least Eagle-Picher and National quoted the same prices to comparable classes of customers for comparable products and the prices of respondents Glidden, Sherwin-Williams and Anaconda were customarily 25¢ below National's Dutch Boy and Eagle-Picher's Eagle brands of white lead-in-oil.

Exception XIII.

Exception is taken to the table entitled "Sales of White Lead-in-Oil—Par Zone—Price per Cwt.—January Through March, 1941" in Paragraph (5-c6) on pages 31 and 32.

While the Trial Examiner's conclusion in Paragraph (5-c7) on page 33 that the record of sales reveals a complete uniformity in price between National and Eagle-Picher, there are errors in separating "agents", "distributors" and "dealers" into comparable classes. The classification "dealers", as employed by Eagle and National, was a special classification of accounts to whom consignment sales were not offered and who were quoted and sold at a price of $1.00 per cwt. above competing dealers who were sold on the consignment basis. Inclusion of these transactions as to "dealers" for National and Eagle-Picher with "dealers" of Anaconda, Sherwin-Williams and Glidden makes it appear that there was a much more substantial difference in prices offered by the respondents than was the fact and throws the table completely out of line. The following statement in Paragraph (5-c7) at page 33 that there were substantial variations between the prices of National and the substantially uniform lower prices of Anaconda, Glidden and Sherwin-Williams is not justified. Exception is also taken to a similar statement in Paragraph 5-C7 at page 77. A checking of the citations of the Trial Examiner to the above table reveals numerous errors not only in classification of customers but in the prices shown by the original exhibits to have been charged.

920 Exception XIV.

Exception is taken to the Trial Examiner's statement in Paragraph (5-c7) on page 33, based upon the table covered by the previous exception, that two distributor sales by Eagle-Picher were 25¢ under National's price to agents; to the statement that Anaconda made 220 sales at $1.25 less than National's lowest price; that Glidden made 70 sales at $1.20 lower than National's lowest price; and that Sherwin-Williams made 34 sales at $1.25 and 5 sales at $1.75 under National's lowest price.

The two sales which were said to be deviations by Eagle-Picher were sales of Hammer Brand white lead-in-oil, Eagle-Picher's second brand which customarily and regularly sells at 25¢ less than its own Eagle Brand and National's Dutch Boy. The more than 300 sales said to have been made by Anaconda, Glidden and Sherwin-Williams at more than $1.00 less than National's lowest price apparently are derived from the last part of the table on page 32 where National and Eagle's "dealer" price was used instead of the "agent" or "distributor" price to customers comparable with the "dealers" of Anaconda, Sherwin-Williams and Glidden. By reducing the stated National and Eagle-Picher price of $11.25 to the proper $10.25 price to agents and distributors, the seemingly wide disparity in prices between the respondents disappears. By applying the proper $10.25 price, the price difference is customarily 25¢ as to Anaconda and Sherwin-Williams and 20¢ as to Glidden, which were the differentials in prices to comparable dealers which maintained over a considerable period of time, and as charged in the complaint (Paragraph 7 B-2, Count I).

Exception XV.

Exception is taken to the Trial Examiner's statement in Paragraph (5-c10) on pages 33 and 34 "with occasional exceptions covered by contract sales and sales to battery manufacturers, prices of the three were uniform".

The word "some" should be inserted before the second word "sales" and the word "large" should be inserted before the word "battery" so that the finding will reflect accurately the record, which shows that only on occasional instances involving large battery manufacturers who were in a position to produce their own oxides did the respondents make concessions from the "regular" prices. The same exception applies to comparable Paragraph 5-C10 on page 77.

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Exception XVI.

Exception is taken to so much of the Trial Examiner's findings in Paragraphs (6-b) (6-c) and (6-d) on pages 36 to 38 and to Paragraphs 6-B, 6-C, and 6-D on pages 79 and 80 as indicate that there is no substantial disadvantage or injury to any group of customers inherent in the zone system as practiced by the respondents or that the zone system does not involve a substantial surrender of territorial advantages by any respondent.

The detailed reasons in support of this exception will appear subsequently in the exceptions to comparable findings as to Count II and in the main brief in support of the complaint and will not be repeated here.

For the purposes of Count I of the complaint it is sufficient to find that the use of the zone system did in fact eliminate competition in a substantial fashion between and among the respondents and did deprive customers wherever located from the natural benefits of that competition.

The Trial Examiner does so find that the effect of zone pricing system as practiced by the respondents enabled all producers to eliminate competition and had the tendency and effect of suppressing competition and restraining trade. The findings mentioned above in 6-B, C and D indicating an advantage to distant customers in the zone system and indicating that there was no surrender of territorial advantage are gratuitous and in the latter instance contrary to the record.

Exception XVII.

Exception is taken to the finding of the Trial Examiner in Paragraph (7-b2) on page 41 and 7-B2 at page 83 that respondent Anaconda is not shown to have agreed to any pricing methods and that it failed to employ zone prices and differentials so as to produce matched prices with National and Eagle-Picher.

While the Trial Examiner does find in these paragraphs that Anaconda participated in the conspiracy, the statements excepted to indicate that the participation was on a limited and perhaps reluctant basis. The evidence is 922 clear that Anaconda did adopt at about the same time as the other respondents the zone system and that it quoted and sold in accordance therewith, publishing list and resale prices identical in every respect with the prices of the other respondents. It is conceded that on white lead-in-oil Anaconda dealers were given a price 25¢ lower than those of National and Eagle-Picher. This was explained by Anaconda as an effort to compensate the dealer for his handling of a brand of product less well known than Dutch Boy or Eagle (tr. 3513).

As the Trial Examiner found, the representatives of Anaconda participated in the meetings of the committees out of which arose the agreement to employ the zone system and there is nothing in the record as to their adoption of it which places them on any different basis than the other respondents.

Exception XVIII.

Exception is taken to the Trial Examiner's finding in Paragraph (7-C2) on page 43 and 7-C2 on pages 84 and 85 to the effect that while the zone system had the effect of suppressing competition and restraining trade as between the respondents it did not have the tendency or effect of suppressing competition between purchasers in the same zone. This whole statement is as follows:

"The practice, as shown, did not have the tendency or effect of suppressing price competition between purchasers in the same zone, for it enabled all who purchased for resale to secure their goods at the same cost, so that they had an equal competitive advantage. This carries no inducement to sellers to maintain the same resale price, but had the beneficial effects contemplated by the Robinson-Patman Amendment. As between near-mill purchasers and others in the same zone, the flat zone price enlarges the areas of equal competitive opportunity and tends to distribute the locations of processing enterprises in a way that is economically healthful."

923 The Trial Examiner is in error in his statement that the zone system did not have the tendency or effect of suppressing competition in the secondary line as will more fully appear in exceptions to similar findings relating to Count II and in the brief, The Trial Examiner is in error in his construction of the Robinson-Patman amendment as being intended to prevent near mill purchasers from receiving the natural benefit of their location and in his conclusion that it is to their competitive advantage to enable distant competitors to purchase at the same cost and then ship finished products back to compete with them.

Exception XIX.

Exception is taken to Paragraph (7-c3) on pages 43 and 44 and 7-C3 on page 85.

The use by the Trial Examiner of the arbitrary figure 2.2% as a measure of the freight disadvantage to the near mill purchaser (the source of which is seen in Paragraph (6-b) on page 36) is entirely misleading and in fact the freight disadvantage is often considerably greater. The Trial Examiner states that failure to extend the freight advantage to near-mill customers does not, in the absence of large freight factors, appear to involve substantial effects which would tend to lessen price competition, and he further states in the same paragraph, "The practices as employed here were not shown to involve an undue increase of prices generally in order to enable sellers to ship beyond their legitimate territories."

While these points encompass the whole question of whether the flat zone price involves discriminations affecting substantially competition in the secondary line, a question which can only be dealt with adequately in the main brief, one situation shown in the record clearly refutes the Trial Examiner's statements in this paragraph. Rx. 162-C shows freight costs on shipments of dry white lead to Texas points from the St. Louis plant of National ranging from a minimum of $.58 per cwt. to a maximum of $1.88 per cwt. These freight charges range from 7.4% to 24% of the then current delivered price of dry white lead in less-than-carload quantities (7¾¢ per lb.). Testimony of the St. Louis paint manufacturer customers of National shows that they were engaged in vigorous competition with the Texas customers receiving freight advantages of as much as 24%.

924 In Paragraph 10-c on page 92 the Trial Examiner finds that there is as much as 8¼ lb. of white lead in a gallon of paint and that manufacturers of paint in St. Louis were in competition with Texas manufacturers to an extent that cost differences of from 5 to 10¢ per gallon of paint have substantial competitive effects in the trade. In the face of the Trial Examiner's own findings and the respondents' own exhibits showing the amount of freight absorbed in shipping white lead from St. Louis to Texas, is is apparent that the St. Louis manufacturers were placed at a cost disadvantage of up to more than 15¢ per gallon of outside white paint, which cannot be characterized as insignificant or without injury to competition in the secondary line.

Furthermore, inclusion in the zone price of an "average" freight figure has the necessary effect of enhancing unduly the price of pigments to the near-mill customers and is in every respect comparable to the "phantom freight" charges found by the Supreme Court to be objectionable in the "Corn Products" case (*Corn Products Refining Co.* v. *F. T. C.*, 324 U. S. 726).

Exception XX.

Exception is taken to that portion of Paragraph (10-d) on page 55 which relates to the carload differential on dry white lead; to Paragraph (10-k) on page 57; to Paragraph (9-e) on page 52; to Paragraph 9-E on page 91; to Paragraph 10-K on page 94.

In all of these paragraphs the Trial Examiner deals with the ¼¢ per lb. quantity discount on dry white lead. It is conceded that the record shows the difference in carload as against less-than-carload freight rates to be sufficient to justify this price difference in most transactions where rail freight is involved. However, the principal paint manufacturing centers of the United States are in and around St. Louis, Missouri; Chicago, Illinois; Philadelphia, Pennsylvania; and New York, New York; all of them cities containing a white lead producing plant of one or the other of the respondents. There is no evidence which would justify the ¼¢ differential as to customers where the mode of delivery is local cartage, and apparently respondent
925 National recognizes that this differential as applied to
the local customers cannot be justified since in the cost data which were introduced for the purpose of justifying this differential (Rx. 215 A-B) all sales to customers in and around the manufacturing plant cities were pointedly omitted and the justification figures relate only to those transactions where rail freight is involved.

Exception XXI.

Exception is taken to Paragraph (10-b) on pages 53 and 54 and the corresponding Paragraph 10-B on page 92.

The Trial Examiner errs in failing to conclude on the evidence of various battery manufacturers called as witnesses that the storage battery manufacturing business was highly competitive on a price basis from 1933 to 1941; that price differences of a very few cents on smaller batteries determined sales; that large battery manufacturer customers located at considerable distances from the factories of the respondents regularly offered for sale storage batteries in Chicago, St. Louis, and other pigment producing centers, at prices below the cost of manufacture of comparable products to the smaller battery producers located in such centers (tr. 1674-2017).

The Trial Examiner errs in finding that the ten small battery manufacturers who testified that a saving in cost of materials of from 5 to 10¢ per battery would be of competitive advantage were located outside of Chicago. Reference to the transcript citations by the Trial Examiner shows that five of these battery manufacturers were located in the city of Chicago, Illinois, and two of them in St. Louis, Missouri, where oxide plants of National and Glidden (Hammond, Indiana, in the Chicago switching area) are located.

The Trial Examiner erred further in failing to include the cities of Chicago, Kansas City, and St. Louis, Missouri, as among those cities where battery manufacturers were in competition with chain and mail order battery producers.

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Exception XXII.

Exception is taken to the findings of the Trial Examiner in Paragraph (10-d) on page 55 and Paragraph 10-D on page 92.

The Trial Examiner is in error in his statement that there is no difference in zone differential on carload sales of red lead and litharge between Dallas, Texas, and St. Louis, Missouri. A glance at the "Carload Red Lead and Lead Zone Map" (Map No. 4 following page 14 of the Recommended Decision) shows that there was a 25¢ per cwt. differential between St. Louis and Dallas in carload quotations.

The Trial Examiner is in error in stating that since identical delivered price quotations on dry white lead are made to paint manufacturers in Dallas, St. Louis, Birmingham, and other points in the par zone, they are "all on an equal competitive basis". In fact, the dry white lead purchasers in St. Louis and other factory cities are deprived by such quotations of the natural advantage of their proximity to the plants and are required literally to pay the freight on dry white lead to their competitors in such localities as Dallas, Birmingham, and other more distant points.

Exception XXIII.

Exception is taken to Paragraphs (10-f) on page 55 and (10-m) on page 57, as well as the corresponding Paragraph 10-F on page 93.

The Trial Examiner states that the zone prices as well as quantity, quality and container differentials have the

effect of producing uniformity in prices and lessening competition as between themselves, and that this is the result of agreement and understanding rather than discrimination. This apparently is a suggestion that systematic discriminations, as are inherent in the use of the zone system by the respondents, cannot, if they are held to be part of an illegal conspiracy to fix prices, also be held to constitute discrimination under the Clayton Act. The record is
927 plain that the zone system produces systematically varying mill net discriminations, which cannot be justified on the basis of cost differences, for the very purpose of eliminating competition in the line of commerce in which the respondents are engaged. Thus, it is perfectly proper, and counsel supporting the complaint urge it most strenuously, that not only should the agreement and understanding to use the zone system be declared unlawful under Section 5 of the Federal Trade Commission Act, but that systematic use by each of the individual sellers for the purpose of eliminating competition, without regard to collusion and agreement, be declared unlawful under Count II of the amended complaint and Section 2 of the Clayton Act as amended. Full citation of the authorities on this point must necessarily await treatment in the main brief in support of the complaint.

Exception XXIV.

Exception is taken to Paragraphs (10-g) on page 56, (11-c) on pages 58 to 60, and the corresponding paragraphs 10-G on page 93 and 11-C on page 95.

All of the above cited paragraphs are to the effect that the delivered price applicable to any single zone is not, as utilized by the respondents here, a violation of Section 2 of the Clayton Act. This is based upon the conclusion of law that the delivered price quotation is necessarily the price in any transaction and that since there is no difference in delivered price to any customer within a zone on account of his location, there is no discrimination under Section 2(a). The Trial Examiner in effect lauds the single zone system, suggesting gratuitously that it promotes competition by placing the distant customers on an equal competitive footing with the near-mill customers.

Necessarily, comprehensive treatment of the facts and authorities in support of this exception must await the main brief in support of the complaint. Hence, reference will only be made to the Trial Examiner's own finding in Paragraph 8-A1 on page 88, wherein he recognizes that there are two separate and distinct economic values, namely the cost of the goods and the cost of transporting the goods.

928 This finding takes into account the obvious—that there is necessarily included in the zone delivered price quotations of the respondents an arbitrary amount added to what the respondents expect to receive for their product at the mill, intended to cover cost of transportation incurred directly by the respondents or to be deducted from the invoice price or credited to buyers for transportation charges incurred by them. It also takes into account that this "hidden freight charge" is a separate thing from the cost of the goods placed in the hands of the carrier for shipment. The Trial Examiner should have found that the "hidden freight charge" is in fact a "phantom freight charge" when it is imposed upon near-mill customers and that there is involved an element of systematic freight absorption in selling to customers where freight charges must be absorbed above the hidden freight factor. The Trial Examiner should have found that the delivered price quotation was not in fact the price of the goods and that the respondents systematically discriminate in sales within any zone by varying the net price received at the shipping point with the amount of actual transportation involved. The Trial Examiner should have found that this systematic price discrimination was practiced for the purpose and with the effect of eliminating competition between the respondents and of nullifying any advantages of location to the market.

Exception XXV.

Exception is taken to Paragraph 2-B of the Recommended Order on page 97, which relieves respondents Anaconda and International from its provisions.

It is plain that Anaconda through its subsidiaries entered into "consignment arrangements" covering a large portion of its sales to dealers, and entered into consignment contracts, as such, in the State of Wisconsin. The only one of the respondents which did not participate in some way in the conspiracy to employ agency contracts was respondent Sherwin-Williams. It is submitted, however, that there should be no exception to the provisions of Paragraph 2-B

which covers a course of conduct clearly unlawful under Section 5 of the Federal Trade Commission Act and found to have been practiced in the industry for the purpose
929 of price fixing. That certain respondents did not participate in all of the overt acts of the conspiracy, or participated in them reluctantly, need not stay the Commission from ordering that all of the respondents refrain from conspiring to use such practices in the future.

Exception XXVI.

Exception is taken to failure of the Trial Examiner to include inhibitions in the order, based upon Paragraphs Eight to Ten of Count I of the amended complaint, as follows:

3. It Is Further Ordered that each of the respondents National Lead Company, The Eagle-Picher Company, Anaconda Copper Mining Company and International Smelting & Refining Company, their respective officers, representatives, agents and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in said commerce, do forthwith cease and desist from doing any of the following things for the purpose or with the effect of systematically matching delivered-price quotations with other of said respondents:

3-A. Quoting or selling lead pigments at delivered prices calculated or determined pursuant to or on the basis of zone or territorial divisions, or in accordance with any other plan, system, or formula which produces identical or uniform price quotations or prices.

3-B. Quoting or selling lead pigments at delivered prices which systematically reflect the inclusion of a transportation factor greater or less than the actual cost of transportation to the point of shipment or to destination.

Exception XXVII.

Exception is taken to failure of the Trial Examiner to include in the Recommended Order a prohibition against the type of price discrimination which he found to have
930 been practiced by respondents National, Eagle-Picher, and Anaconda in Paragraph 9-A on pages 89 and 90.

The Trial Examiner's finding that there was a discrimination between the so-called "distributors" and "dealers"

is sound and the record amply supports the conclusion that for the purposes of Section 2(a) of the Clayton Act the relations of the respondents to their so-called consignment distributors made the latter customers. It was admitted by National's Manager of Trade Sales that distributors and dealers were engaged in the same business, often in the same cities, and that they were in many instances in competition with each other. He further admitted that white lead-in-oil was known in the trade as a low-margin item and that National had received many complaints from the favored distributors that their margin was too low. It necessarily follows that if the margin to distributors was too low for them, the margin to dealers, from 25 to 33⅓% less than the margin to distributors, is likely to have serious competitive effects upon the dealers (Tr. 3001-3007; Tr. 3902; Cx. 858, 859, 860).

Exception XXVIII.

Exception is taken to the Trial Examiner's conclusion in Paragraph 11-D on page 95 that the ¼¢ per lb. differential for carload shipments of white lead does not constitute a violation of Section 2(a) of the Clayton Act, and to his failure to include in his Recommended Order an inhibition against engaging in this discrimination in sales to competing customers in or near the white lead producing points (see Exception XX supra).

Exception XXIX.

Exception is taken to failure of the Trial Examiner to include in his Recommended Order a prohibition against the discriminations practiced by the respondents in systematically varying their net prices in sales within zones as recommended by counsel supporting the complaint in Paragraph IV(1) and sub-numbers of the Recommended Order to Cease and Desist proposed to the Trial Examiner under date of January 22, 1948.

931

Exception XXX.

In addition to the foregoing, counsel supporting the complaint except to every portion of the Trial Examiner's Recommended Decision which is inconsistent with and con-

trary to the Proposed Findings, Conclusion and Order to Cease and Desist filed with the Trial Examiner by counsel supporting the complaint on December 29, 1947, and January 22, 1948.

Respectfully submitted,
Joseph S. Wright,
Assistant General Counsel,
Paul R. Dixon,
Trial Attorney.

Richard P. Whiteley,
Chief Trial Counsel.

May 20, 1948.

933 UNITED STATES OF AMERICA.

Before the Federal Trade Commission.

* * (Caption—5253) * *

EXCEPTIONS OF RESPONDENT, NATIONAL LEAD COMPANY, TO THE TRIAL EXAMINER'S RECOMMENDED DECISION.

Comes now the respondent, National Lead Company, by its attorneys, Alexander & Green, and, pursuant to Rule XXIII of the Rules of Practice of this Commission, submits the following exceptions to the Trial Examiner's Recommended Decision herein and to the failure of said Trial Examiner to include proposed findings and conclusions heretofore requested by this respondent under Rule XXI of said Rules of Practice:

Exceptions to Section I of the Recommended Decision, entitled "Proceedings":

1. This respondent excepts to the statement in the third sentence of the fourth full paragraph on page 2 of the Recommended Decision that "Proposals were thereupon duly filed by all parties, * * *". The proposals submitted by the attorney in support of the amended complaint were not filed within the time fixed by the Commission.

Exceptions to Section II of the Recommended Decision, entitled "Pleadings and Issues":

2. This respondent excepts to item "2" under "Count One" of "Outline of Complaint" on page 3 of the Recom-

mended Decision (Paragraph Seven A [8] of the Amended Complaint).

934 3. This respondent excepts to item "5 (d)" on page 4 of the Recommended Decision (Paragraph Nine B of the Amended Complaint).

4. This respondent excepts to item "5 (e)" on page 4 of the Recommended Decision (Paragraph Nine C of the Amended Complaint).

5. This respondent excepts to the second full paragraph on page 5 of the Recommended Decision, which purports to summarize the answer of this respondent to the amended complaint (Answer to Amended Complaint of Respondent, National Lead Company).

6. This respondent excepts to the third full paragraph on page 5 of the Recommended Decision as being an incomplete, as well as inaccurate, summary of the answers of the respondents to the amended complaint (Answers to Amended Complaint of all respondents).

7. This respondent excepts to the inclusion on page 6 of the Recommended Decision of the following as one of "The Issues" herein:

> "Did National, through its various acquisitions, secure and employ monopolistic control over the lead pigments industry?" (Federal Trade Commission Act, Section 5.)

8. This respondents excepts to the inclusion on page 6 of the Recommended Decision of the following as one of "The Issues" herein:

> "Did National's relations with Smelting exert a monopolistic influence over the price of pig lead?" (Tr. 4209-4252; Proposed Findings and Conclusions submitted by the attorney in support of the amended complaint; Federal Trade Commission Act, Section 5.)

9. This respondent excepts to the inclusion on page 6 of the Recommended Decision of the following as one of "The Issues" herein:

> "Did National conspire with du Pont with the purpose and effect of maintaining fixed price levels on white lead-in-oil?" (Amended Complaint, Paragraph Seven
> 935 B [7]; Tr. 4209-4252; Proposed Findings and Conclusions submitted by the attorney in support of the amended complaint; Federal Trade Commission Act, Section 5.)

10. This respondent excepts to the inclusion on page 6 of the Recommended Decision of the following as one of "The Issues" herein:

> "Were the tendencies and effect of these practices to restrain trade, suppress competition, or create monopoly through unequal cost factors and identical delivered prices?" (Amended Complaint, Paragraph Eleven; Federal Trade Commission Act, Section 5; Sherman Act, Sections 1 and 2.)

11. This respondent excepts to the inclusion on page 6 of the Recommended Decision of the following as one of "The Issues" herein:

> "Did respondents' employment of the zone system as alleged involve differences in price between customers (a) located in a zone, and (b) located in different zones, which differences were more than differences in cost of sale and delivery?" (Clayton Act, Section 2[a].)

12. This respondent excepts to the inclusion on page 6 of the Recommended Decision of the following as one of "The Issues" herein:

> "Did each respondent so discriminate in price between customers through the granting of different trade, regional and quantity discounts?" (Clayton Act, Section 2[a].)

13. This respondent excepts to the second sentence in the paragraph beginning at the bottom of page 6 of the Recommended Decision upon the ground that there is no room for the employment of "inference" where there is reliable, probative and substantial evidence and that, in any event, no "inference" could be drawn which conflicts with such reliable, probative and substantial evidence.

14. This respondent excepts to the first three full sentences appearing at the top of page 7 of the Recommended Decision upon the ground that, in many instances, "important portions" of the evidence have not been set
936 forth in the Recommended Decision, reliable, probative and substantial evidence has been ignored, evidence has been misquoted, and no reasonable regard has been had for the greater weight of the evidence herein.

Exceptions to Section III of the Recommended Decision, entitled "Report Upon the Evidence":

15. This respondent excepts to the first paragraph under the heading "Count One" of the "Report Upon the Evidence" upon the ground that the facts of organization, location, control, interstate commerce and business of each respondent are not shown by the record to be substantially as set out in the amended complaint.

16. This respondent excepts to the second and third paragraphs under the heading "Count One" of the "Report Upon the Evidence" appearing at page 7 and the top of page 8 of the Recommended Decision, except the last sentence thereof which appears as the first full sentence at the top of page 8 of the Recommended Decision, insofar as the same do not correspond to paragraphs 2 through 5 inclusive of the proposed findings of fact heretofore submitted by this respondent and the record citations contained in said proposals are herein incorporated by reference.

17. This respondent excepts to the statement in the second sentence of the second paragraph under the heading "Count One" of the "Report Upon the Evidence" appearing at page 7 of the Recommended Decision to the effect that corroding pig lead differs from common pig lead in that the former is desilverized (Com. Ex. 93-G*; Com. Ex. 113; Tr. 1214, 2124).

18. This respondent excepts to the first sentence of the last paragraph beginning on page 7 of the Recommended Decision, which reads as follows:

> 937 "At one time National produced pig lead, and one of its subsidiaries now produces a limited amount (CX 93)." (Com. Ex. 22-Z-1; Resp. Ex. 173.)

19. This respondent excepts to item "(1-a)", under the heading "National's Acquisitions", on page 8 of the Recommended Decision (Answer of this respondent to amended complaint; Tr. 17-20; Com. Ex. A-Y; Resp. Ex. 179-E).

20. This respondent excepts to item "(1-b)" on page 8 of the Recommended Decision (Com. Exs. 5-B, 22-P et seq.; Resp. Exs. 176 A-B, 180 A-B; Tr. 3300, 3310, 3317-18).

21. This respondent excepts to the statement in item "(1-c)" on page 8 of the Recommended Decision that this

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*** This is one of the exhibits heretofore objected to by respondents, as to which appeal from the ruling of the Examiner has been reserved by stipulation to the final argument on the merits herein. Any reference herein to such exhibits as to which objections have heretofore been made is not to be deemed a waiver of any objection by any respondent thereto.**

respondent acquired Evans Lead Company in "about 1944" (Tr. 1625-26).

22. This respondent excepts to item "(1-d)" on page 9 of the Recommended Decision (Resp. Exs. 153, 175-A, 179-D; Tr. 2891-92, 1071-72, 1625).

23. This respondent excepts to the statement in item "(1-e)" on page 9 of the Recommended Decision to the effect that its production of "Dry white lead" from 1936 to 1941 was 30% to 35% upon the ground that this percentage refers only to "dry white lead, basic carbonate" (See Proposed Findings of this respondent, paragraph 6 thereof, and record references therein contained).

24. This respondent excepts to the statement in item "(1-e)" on page 9 of the Recommended Decision that the percentage of white lead-in-oil produced by this respondent in 1932 "may have gone as high as 70%" (Tr. 1666).

25. This respondent excepts to the chart in item "(1-e)" on page 9 of the Recommended Decision purporting to show the comparative average percentages of production of white lead, dry and in oil, of the respondents and other companies for the years 1938 through 1941 as being inaccurate (Com. Ex. 669).

938 26. This respondent excepts to the statement in item "(1-e)" on page 9 of the Recommended Decision to the effect that respondent, Eagle-Picher was a "potential" competitor of this respondent (See Proposed Findings submitted by respondents, The Eagle-Picher Company and the Eagle-Picher Sales Company, and the record references therein contained; Proposed Findings submitted by this respondent, paragraphs 3 to 7, inclusive, thereof, and the record references therein contained).

27. This respondent excepts to the statement in item "(1-e)" on page 9 of the Recommended Decision purporting to set forth the "combined" production of this respondent and respondent, Eagle-Picher, of white lead, dry and in oil, as being inaccurate and upon the further ground that there is no warrant in the record to "combine" the production of these two respondents.

28. This respondent excepts to the statement in item "(1-e)" on page 9 of the Recommended Decision to the effect that the percentage of production of respondent, Eagle-Picher, has been "increased" by the latter's acquisition of respondent International's lead pigment plant "and business" as being unsupported by the record.

29. This respondent excepts to the statement in item

"(1-e)" on page 9 of the Recommended Decision that its prices, terms and conditions of sale were followed generally "by all of its domestic competitors" as being unsupported by the record.

30. This respondent excepts to the statement in item "(1-e)" on page 9 of the Recommended Decision to the effect that it became a "predominant" factor in the (lead pigments) industry as being unsupported by the reliable, probative and substantial evidence herein.

31. This respondent excepts to the statement in item "(1-e)" on page 9 of the Recommended Decision to the effect that its competitors "felt compelled" to follow its prices and terms as being unsupported by the record.

939 32. This respondent excepts to the statement in item "(1-e)" appearing at the top of page 10 of the Recommended Decision to the effect that its facilities for production were at all times adequate to satisfy the entire market demand for white lead as erroneous (Tr. 2500) and as unsupported by the reliable, probative and substantial evidence.

33. This respondent excepts to the first paragraph of item "(1-f)" appearing on page 10 of the Recommended Decision insofar as the same fails to include the statements made in paragraph 16 of the Proposed Findings of this respondent (See record references contained in said Proposed Findings, paragraph 16).

34. This respondent excepts to the statements in item "(1-f)" on page 10 of the Recommended Decision which refer to Mr. Charles Simon as "secretary" of this respondent and that he testified "that he did not know that" this respondent ever exercised any control over respondent, Eagle-Picher (Tr. 3304, 3309).

35. This respondent excepts to the second paragraph of item "(1-f)" on page 10 of the Recommended Decision upon the ground that neither the record references therein made nor any other evidence in this proceeding in any way supports the statement there made that "There is some direct evidence, however, of close relations between these two respondents" (referring to this respondent and respondent, Eagle-Picher) (See, e.g., Tr. 1576, 2202).

36. This respondent excepts to the first sentence of item "(2-a)", under the heading "National's Relations With Smelting", on page 11 of the Recommended Decision upon the ground that there is no reliable, probative and substan-

tial evidence to support the statements made in that sentence.

37. This respondent excepts to the statement in the second sentence of item "(2-a)" on page 11 of the Recom-
mended Decision to the effect that American Smelting
940 & Refining Company produced between 30% and 40%
of the world supply of refined lead. (This respondent has proposed corrections to Tr. 4093 which, if made, would alter the percentage stated.).

38. This respondent excepts to the last sentence of item "(2-a)" on page 11 of the Recommended Decision as unsupported by the record.

39. This respondent excepts to item "(2-b)" on page 11 of the Recommended Decision (Com. Ex. 93 A-I).

40. This respondent excepts to the first two sentences of item "(2-c)" appearing at the bottom of page 11 and the top of page 12 of the Recommended Decision (Com. Ex. 93 F-G).

41. This respondent excepts to the statement in the first sentence of item "(2-d)" on page 12 of the Recommended Decision to the effect that Hoyt Metal Company was acquired by this respondent as a property of United Lead Company upon the ground that there is no reliable, probative and substantial evidence to support this statement.

42. This respondent excepts to the second sentence of item "(2-d)" on page 12 of the Recommended Decision (Com. Ex. 94 A-G).

43. This respondent excepts to item "(2-e)" on page 12 of the Recommended Decision (Com. Exs. 22 A-Z-47, 93 A-I, 94 A-G, 851 A-B; Resp. Ex. 173; Tr. 1068-69, 1214-17, 3277, 3280, 4084 et seq.).

44. This respondent excepts to the first sentence of item "(2-f)" appearing on page 12 of the Recommended Decision (Resp. Ex. 228; Com. Ex. 113; Tr. 3277, 3280, 4084 et seq.).

45. This respondent excepts to the second sentence of item "(2-f)" appearing at the bottom of page 12 and the top of page 13 of the Recommended Decision (Tr. 4084 et seq.).

46. This respondent excepts to the statement in the
third sentence of item "(2-f)" on page 13 of the Rec-
941 ommended Decision to the effect that the chart there
quoted represents purchases by this respondent of "common and refined lead" for the years shown (Tr. 3277).

47. This respondent excepts to the last sentence of item "(2-f)" on page 13 of the Recommended Decision as being unsupported by the record references therein made.

48. This respondent excepts to the first sentence of item "(3)", under the heading "National's Relations With du Pont", on page 13 of the Recommended Decision upon the ground that the statements therein made are unsupported by the record.

49. This respondent excepts to the words "direct" and "express" in the fourth sentence of item "(3)" on page 14 of the Recommended Decision as expressing inferences not warranted by the record.

50. This respondent excepts to the fifth, sixth, seventh, eighth and ninth sentences of item "(3)" appearing on page 14 of the Recommended Decision (Com. Exs. 797 K-Z-6, 533, 534, 535, 538, 506 A-F; Tr. 1103).

51. This respondent excepts to the first sentence of item "(4)", under the heading "The Zone Pricing System", appearing on page 14 of the Recommended Decision (Amended Complaint, Paragraph Seven B).

52. This respondent excepts to the second sentence of item "(4)" on page 14 of the Recommended Decision as being unsupported by the record.

53. This respondent excepts to so much of the third sentence of item "(4)" as refers to "identity of method and price" among respondents and to the "price" of pig lead as being the major factor in determining this respondent's prices. (See, e. g., Resp. Exs. 306 A-B, 307 A-B, 308 A-C; Tr. 20.)

942 54. This respondent excepts to the first sentence of item "(4-a)" on page 14 of the Recommended Decision as containing inferences and conclusions unsupported by the record (See Proposed Findings of this respondent, paragraphs 50 to 66, inclusive, thereof, and record references therein contained).

55. This respondent excepts to the second sentence of item "(4-a)" which appears at the bottom of page 14 and the top of page 15 of the Recommended Decision. (See, e. g., Resp. Exs. 165 A-O, 166 A-B, 169 A-N, 170 A-B, 171, 162 A-D, 213 A-Q, 214.)

56. This respondent excepts to the word "plan" in the third sentence of item "(4-a)" on page 15 of the Recommended Decision as being unsupported by the record.

57. This respondent excepts to the outline on page 15 of the Recommended Decision purporting to set forth the

method by which white lead-in-oil and keg products were sold. (See, e. g., Proposed Findings of this respondent, paragraphs 50 to 57, inclusive, thereof, and record references therein made.)

58. This respondent excepts to the paragraph beginning on the fourth line of page 15 of the Recommended Decision beginning with the words "White lead-in-oil and keg products" (Clayton Act, Section 2[a]).

59. This respondent excepts to the paragraph beginning on line 37 of page 15 of the Recommended Decision with the words "Dry white lead and lead sulphate" (Resp. Ex. 159-A; Tr. 1576, 2624, 2625, 3497; Clayton Act, Section 2[a]).

60. This respondent excepts to the entire latter portion of item "(4-a)" beginning with the paragraph at the bottom of page 15 of the Recommended Decision and the words "Dry red lead, litharge and other pigments" and continuing with the remainder of that paragraph on page 16 of the Recommended Decision, and the other 943 paragraphs in said item "(4-a)" on page 16 of the Recommended Decision down to item "(4-b)" on page 16 of the Recommended Decision (See, e. g., Proposed Findings of this respondent, paragraphs 62 to 66, inclusive, thereof, and the record references therein contained; Proposed Findings of this respondent, paragraphs 6 to 11, inclusive, thereof, and the record references therein contained; Clayton Act, Section 2[a]).

61. This respondent excepts to all except the first paragraph of item "(4-b)" beginning with the second paragraph of said item at the bottom of page 16 and continuing to the top of page 18 of the Recommended Decision (Record references contained in said item "(4-b)"; Proposed Findings of this respondent, paragraphs 26 to 33, inclusive, thereof, and record references therein contained, paragraphs 50 to 66, inclusive, thereof, and record references therein contained; Reply of this respondent to Proposals Submitted by Counsel for the Commission, page 3 thereof, and record references therein contained).

62. This respondent excepts to item "(4-c)" on page 18 of the Recommended Decision (Com. Exs. 505-A, 517-A, 523; Resp. Exs. 147, 168, 182; Tr. 2916, 3067).

63. This respondent excepts to item "(4-d)" on pages 18 and 19 of the Recommended Decision (Record references contained in said item "(4-d)"; Proposed Findings

of this respondent, paragraphs 50 to 66, inclusive, thereof, and record references therein contained).

64. This respondent excepts to item "(5)", under the heading "Agreement and Price Uniformity Through Particular Practices", appearing on page 19 of the Recommended Decision as being unsupported by the record.

65. This respondent excepts to the first and third sentences of item "(5-a1)" on page 19 of the Recommended Decision (Record references therein contained; Proposed Findings of this respondent, paragraphs 20 and 26 thereof and record references therein contained).

944 66. This respondent excepts to the fourth sentence of item "(5-a1)" appearing at the top of page 20 of the Recommended Decision (Com. Exs. 501 A-D, 508 C, 800 A-C; Tr. 2175).

67. This respondent excepts to the fifth and sixth sentences of item "(5-a1)" appearing on page 20 of the Recommended Decision upon the ground that there is nothing in the record to show that "All respondents" were represented on the Committees during N. R. A. days or that all participated in the various meetings of the Committees.

68. This respondent excepts to the first three sentences of item "(5-a2)" on page 20 of the Recommended Decision (Proposed Findings of this respondent, paragraphs 26 and 27 thereof, and record references therein contained).

69. This respondent excepts to the last sentence of item "(5-a2)" on page 20 of the Recommended Decision as being incomplete (Resp. Exs. 6 A-I, 7 A-C, 8 A-B, 50-O).

70. This respondent excepts to the last sentence of item "(5-a3)" appearing at the top of page 21 of the Recommended Decision insofar as the same may be interpreted as representing the conclusions of the Trial Examiner, as distinguished from those of counsel in support of the amended complaint, upon the ground that said conclusions find no support in the record.

71. This respondent excepts to the second sentence of item "(5-a4)" on page 21 of the Recommended Decision insofar as the same implies that evidence to the effect stated was found only in the parol testimony of Wormser and others (Com. Exs. 501 A-D, 502 A-C, 504-A-B, 505 A-B, 799, 800 A-C, 801 A-B, 802 A-B, 803, 805 A-C; Resp. Exs. 83 A-Z-3, 85 A-Z-13, 134 A-E, 135 A-B, 136 A-B, 137 A-B, 138 A-B).

72. This respondent excepts to the first sentence of item "(5-a5)" on page 21 of the Recommended De-
945 cision insofar as the same implies that there is any proof in the record of "agreements" as to the matters therein referred to, upon the ground that there is no proof in the record of any such "agreements." (See also, Com. Ex. 505-A.)

73. This respondent excepts to the second sentence of item "(5-a5)" on page 21 of the Recommended Decision upon the ground that the same is unsupported by the record.

74. This respondent excepts to the third sentence of item "(5-a5)" appearing on page 21 of the Recommended Decision upon the ground that the same is an incomplete summary of the record references therein made.

75. This respondent excepts to the words "except during the period covered by the Code" in the fifth sentence of item "(5-a6)" appearing on the top of page 22 of the Recommended Decision as being an inaccurate summary of the testimony referred to (Tr. 2353-55).

76. This respondent excepts to the second paragraph of item "(5-a6)" appearing on page 22 of the Recommended Decision as unsupported by the record.

77. This respondent excepts to the first two sentences of item "(5-b1)", under the heading "Consignment or 'Agency' Agreements", on page 22 of the Recommended Decision (Tr. 2905-07; Com. Exs. 506-D, 595, 613 A-C, 706 B-D, 712 A).

78. This respondent excepts to the first two sentences of item "(5-b2)" on page 22 of the Recommended Decision (Com. Ex. 501-A; Tr. 2160).

79. This respondent excepts to the last sentence of item "(5-b2)" on page 23 of the Recommended Decision insofar as the same implies there were "Agreements to employ a uniform consignment plan", upon the ground that the implication is not supported by the record.

946 80. This respondent excepts to item "(5-b3)" on pages 23 and 24 of the Recommended Decision (Com. Exs. 613 A-C, 626, 629 A-C, 506-E, 752 A-Z-144; Tr. 638).

81. This respondent excepts to item "(5-b4)" on page 24 of the Recommended Decision upon the ground that the same is incomplete (Com. Exs. 506-D, 706-F; *United States v. General Electric Co.,* 272 U. S. 476; *Fed. Trade Comm. v. Curtis Co.,* 260 U. S. 568, 581).

82. This respondent excepts to the second sentence of

item "(5-b5)" on page 24 of the Recommended Decision (Com. Ex. 576).

83. This respondent excepts to the third sentence of item "(5-b5)" on page 24 of the Recommended Decision upon the ground that the same is unsupported by the record.

84. This respondent excepts to the fourth sentence of item "(5-b5)" on page 24 of the Recommended Decision upon the ground that the record contains no reliable probative and substantial evidence in support thereof.

85. This respondent excepts to the first two sentences of the second paragraph of item "(5-b5)" appearing at the bottom of page 24 of the Recommended Decision (Com. Ex. 836-E; Tr. 3535).

86. This respondent excepts to so much of the third sentence of the third paragraph of item "(5-b5)" on page 25 of the Recommended Decision as refers to "consignees" and "dealer" of this respondent and respondent, Eagle-Picher (Com. Exs. 613 A-C, 629 A-C).

87. This respondent excepts to item "(5-b6)", under the heading "Recommended Resale Prices", on pages 25 and 26 of the Recommended Decision (Record references therein made; Com. Exs. 656 A-B, 659 A, B, Q through Z-51; Resp. Exs. 229 through 305-D, inclusive; Tr. 2502-03, 3514-15, 2995).

947 88. This respondent excepts to item "(5-c1)", under the heading "Uniform Quotations", on pages 26 and 27 of the Recommended Decision upon the ground that neither the record references therein made nor any other portion of the record supports the statements there made.

89. This respondent excepts to the first sentence of item "(5-c2)" on page 27 of the Recommended Decision as containing inferences unwarranted by the record (Com. Ex. 504-B).

90. This respondent excepts to so much of the second sentence of item "(5-c2)" on page 27 of the Recommended Decision as implies that it put Article "II" of the Supplementary Code as finally adopted into effect some months prior to its formal adoption (Compare Tr. 4077 with Schedule A, Article III of Com. Ex. 809).

91. This respondent excepts to the third, fourth and fifth sentences of item "(5-c2)" on page 27 of the Recommended Decision (Record references therein made; Proposed Findings of this respondent, paragraphs 81 and 82, thereof, and record references therein made).

92. This respondent excepts to the entire second paragraph of item "(5-c2)" appearing on pages 27 and 28 of the Recommended Decision upon the ground that neither the record references therein made nor any other portion of the record supports the statements there made.

93. This respondent excepts to all except the first sentence of item "(5-c3)" on page 28 of the Recommended Decision (Record references therein contained; Tr. 1067, 3666-67; Resp. Exs. 299 through 305-D).

94. This respondent excepts to the first sentence of item "(5-c4)" on page 28 of the Recommended Decision as containing inferences unwarranted by the record.

948 95. This respondent excepts to the statement in the fourth sentence of item "(5-c4)" on page 28 of the Recommended Decision that "sometimes it [Glidden] charged dealers 5¢ more per 100 lbs. than National and others charged" (Com. Exs. 662-Z-17-Z-18, 663-H, 659-Z-28).

96. This respondent excepts to the tenth and eleventh sentences of item "(5-c4)" which appear on page 29 of the Recommended Decision as being unsupported by the record.

97. This respondent excepts to all of item "(5-c5)" that appears on page 29 of the Recommended Decision (Record references therein made; see also, exception 87, above, and record references there made).

98. This respondent excepts to the first sentence appearing on page 30 of the Recommended Decision (which sentence is a part of item "[5-c5]") and to the last sentence of said item "(5-c5)" as being unsupported by the record.

99. This respondent excepts to the statement in the next to the last sentence of item "(5-c5)" on page 30 of the Recommended Decision to the effect that its "quotations" and those of respondent, Eagle-Picher, were "identical" in the periods referred to as being unsupported by and contrary to the record (See, e. g., Tr. 4095-96; Resp. Exs. 306 A-B, 307 A-B, 308 A-C).

100. This respondent excepts to item "(5-c6)", under the heading "Uniform Sales Prices", which appears on pages 30 to 32, inclusive, of the Recommended Decision in its entirety (Record references therein made; Tr. 638; Com. Exs. 613 A-C, 629 A-C; *United States v. General Electric Co.*, 272 U. S. 476; *Fed. Trade Comm. v. Curtis Co.*, 260 U. S. 568, 581).

101. This respondent excepts to item "(5-c7)" on page

33 of the Recommended Decision (see exception 98, above, and record references and authorities there cited).

102. This respondent excepts to item "(5-c8)" on page 33 of the Recommended Decision as being unsupported by the record.

949 103. This respondent excepts to item "(5-c9)" on page 33 of the Recommended Decision as being unsupported by the record.

104. This respondent excepts to item "(5-c10)" on pages 33 and 34 of the Recommended Decision as being unsupported by either the record references there made or other portions of the record.

105. This respondent excepts to item "(5-c11)", under the heading "Uniform Bidding", on page 34 of the Recommended Decision as being unsupported by the record and the record references therein made.

106. This respondent excepts to all of item "(5-d)", under the heading "Container Differentials", as appears on page 34 of the Recommended Decision (Com. Ex. 800 A-C).

107. This respondent excepts to that portion of item "(5-d)" which appears on page 35 of the Recommended Decision, beginning with the first word of said page and continuing through the word "deviation" on the ninth line of said page, as being unsupported by the record (See, e. g., Com. Ex. 659 Q-V; Answers of all respondents to Amended Complaint).

108. This respondent excepts to the fourth sentence of item "(5-e)", under the heading "Quarterly Contracts", on page 35 of the Recommended Decision (Tr. 1658-60, 3080).

109. This respondent excepts to the last three sentences of item "(5-e)" on page 35 of the Recommended Decision as unsupported by the record.

110. This respondent excepts to the first three sentences of item "(5-f)", under the heading "Red Lead Differentials", on page 36 of the Recommended Decision as unsupported by the record.

111. This respondent excepts to item "(6-a)", under the heading "Evidence of Effects", on page 36 of the
950 Recommended Decision as unsupported by either the
record references therein made or any other portion of the record.

112. This respondent excepts to the sixth sentence of

item "(6-b)" which appears as the last sentence on page 36 of the Recommended Decision as being hypothetical and not supported by the record.

113. This respondent excepts to a portion of the ninth sentence of item "(6-b)" on page 37 of the Recommended Decision, beginning with the word "but" on the seventh line of said page and continuing for the rest of that sentence, as being unsupported by the record.

114. This respondent excepts to the first three sentences of item "(6-d)" beginning on page 37 and extending to the second line of page 38 of the Recommended Decision and to the second paragraph of said item on page 38 of the Recommended Decision as being unsupported by the record.

115. This respondent excepts to the use of the word "system" ir item "(6-d)" which appears on the fourth line of page 38 of the Recommended Decision upon the ground that it suggests inferences and conclusions unsupported by the record.

116. This respondent excepts to items "(7-a1)", "(7-a2)", "(7-a3)", "(7-a4)", "(7-a5)", "(7-a6)", "(7-a7)", "(7-a8)" and "(7-a9)", all under the heading "Conclusions on Acquisitions and Methods", on pages 38, 39 and 40 of the Recommended Decision as either unsupported by the evidence or directly contrary to the reliable, probative and substantial evidence herein.

117. This respondent excepts to item "(7-b1)" appearing under the heading "Conclusions as to Agreements" on pages 40 and 41 of the Recommended Decision as either unsupported by the evidence or directly contrary to the reliable, probative and substantial evidence herein.

951 118. This respondent excepts to item "(7-b2)" on pages 41 and 42 of the Recommended Decision, except for the second sentence thereof appearing on page 41 of the Recommended Decision, as containing statements, inferences and insinuations unsupported by the evidence or directly contrary to the reliable, probative and substantial evidence herein.

119. This respondent excepts to item "(7-b3)" on page 42 of the Recommended Decision, except for the statements therein made that respondent, Glidden, used shipping points from which customers paid the freight and made prices substantially different from those of this respondent, that respondent, Glidden, did not use any consignment plan

until six years after the adoption of the agency plan by this respondent, and that respondent Glidden's use thereof was short-lived and according to its own individual method, that Glidden produced evidence showing the existence of no agreement and showing the practicability of securing its competitors' quotations promptly and the necessity of meeting them in such manner as would enable it to do business and make as large a profit margin as possible, and that respondent, Glidden, gave active competition, upon the ground that the portions of such item excepted to contain statements, inferences and insinuations either unsupported by the evidence or directly contrary to the reliable, probative and substantial evidence herein.

120. This respondent excepts to item "(7-b4)" on pages 42 and 43 of the Recommended Decision, except for the statement that respondent, Sherwin-Williams, did not use any consignment method, upon the ground that said item contains statements, inferences and insinuations either unsupported by the evidence or directly contrary to the reliable, probative and substantial evidence herein.

121. This respondent excepts to item "(7-c1)", under the heading "Conclusions as to Effects", on page 43 of the Recommended Decision as either unsupported by the evidence or directly contrary to the reliable, probative and substantial evidence herein.

952 122. This respondent excepts to the first, second and last sentences of item "(7-c2)" on page 43 of the Recommended Decision as either unsupported by the evidence or directly contrary to the reliable, probative and substantial evidence herein.

123. This respondent excepts to item "(7-c3)" on pages 43 and 44 of the Recommended Decision insofar as the same may be deemed to differ from item "(11-c)" on pages 58 to 60, inclusive, of the Recommended Decision (except for the words therein specifically excepted to hereinafter), and insofar as said item "(7-3c)" may be said to imply that a near-mill customer would receive any benefit through f.o.b. mill pricing, under the circumstances disclosed by this record, for the reasons set forth in said item "(11-c)".

124. This respondent excepts to items "(7-c4)" and "(7-c5)" on page 44 of the Recommended Decision as being either unsupported by the evidence or directly contrary to the reliable, probative and substantial evidence herein.

125. This respondent excepts to item "(7-d1)", under the heading "Conclusions of Law", on pages 44 and 45 of the Recommended Decision (Resp. Exs. 6 through 8, inclusive. See also: National Industrial Recovery Act, Section 5, 48 Stat. 195, 198; *Eugene Dietzgen Co.* v. *Federal Trade Com'n,* 142 F. 2d 321, 329; *Aetna Portland Cement Co.* v. *Federal Trade Com'n,* 157 F. 2d 533, 549, rev'd on other grounds, ... U. S. ....).

126. This respondent excepts to item "(7-d2)" on page 45 of the Recommended Decision (See, e. g.: *Sugar Institute* v. *United States,* 297 U. S. 553; *Cement Mfrs. Assn.* v. *United States,* 268 U. S. 588; *Maple Flooring Assn.* v. *United States,* 268 U. S. 563; *Aetna Rortland Cement Co.* v. *Federal Trade Com'n, supra; United States* v. *General Electric Co.,* 272 U. S. 476; *Fed. Trade Comm.* v. *Curtis Co.,* 260 U. S. 568, 581; *U. S.* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 198-199; *U. S.* v. *U. S. Steel Corporation,* 251 U. S. 417; *U. S.* v. *International Harvester Co.,* 274 U. S. 693; *U. S.* v. *Standard Oil of N. J.,* 47 F. 2d 288; *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344).

953 127. This respondent excepts to item "(7-d3)" on page 45 of the Recommended Decision as being unsupported by and contrary to the record and upon the further ground that the matters referred to in said item are not within the jurisdiction of the Federal Trade Commission as set forth in the Federal Trade Commission Act. (In addition, see: *U. S.* v. *U. S. Steel Corporation,* 223 Fed. 55, 251 U. S. 417; *U. S.* v. *International Harvester Co.,* 274 U. S. 693; *U. S.* v. *Aluminum Co. of America,* 148 F. 2d 416, 424.)

128. This respondent excepts to items "(7-d4)", "(7-d5)" and "(7-d6)" on pages 45 and 46 of the Recommended Decision as being unsupported by and contrary to the record and the Federal Trade Commission Act. (See authorities cited supra.)

129. This respondent excepts to the third paragraph under the heading "Count Two" on page 46 of the Recommended Decision, insofar as the same incorporates the items set forth in the "Report Upon the Evidence" at pages 7-46 of the Recommended Decision, in the same manner as hereinabove set out in exceptions 15 through 128 hereinabove.

130. This respondent excepts to item "(8-a1)" on pages 46 and 47 of the Recommended Decision as unwarranted

by the facts or the law. (See Clayton Act, Section 2[a]; *Trade Commission* v. *Staley,* 324 U. S. 746; *Corn Products Co.* v. *Comm'n.,* 324 U. S. 726.)

131. This respondent excepts to item "(8-a2)" on pages 47, 48, and 49 of the Recommended Decision (Record references therein made; Tr. 442-60, 529-30. See also, authorities cited in exception 130 above.)

132. This respondent excepts to all except the last sentence of item "(8-a3)" on page 49 of the Recommended Decision as unsupported by either the record references therein made or any other portion of the record.

133. This respondent excepts to item "(8-a4)" on pages 49 and 50 of the Recommended Decision as unsupported by either the record references therein made or any other portion of the record.

954 134. This respondent excepts to items "(9)" and "(9-a)", under the heading "Discriminations Through Differentials", on page 50 of the Recommended Decision as being unsupported by the record). (See, also, exception 81, above, and record references and authorities there cited.)

135. This respondent excepts to the first and last sentences of item "(9-b)" on page 50 of the Recommended Decision as containing statements and inferences not warranted by the record.

136. This respondent excepts to the first sentence of item "(9-c)" on page 51 of the Recommended Decision as unsupported by the record.

137. This respondent excepts to item "(9-d)" on pages 51 and 52 of the Recommended Decision as unsupported by the record.

138. This respondent excepts to the first sentence of item "(9-e)" on page 52 of the Recommended Decision as unsupported by the record.

139. This respondent excepts to the entire second paragraph of item "(9-e)" on page 52 of the Recommended Decision and the first two sentences on page 53 of the Recommended Decision as unsupported by the record references therein made (Tr. 442-60, 529-30).

140. This respondent excepts to the statement in the fourth sentence on page 53 of the Recommended Decision, which sentence is a part of item "(9-e)", to the effect that Resp. Exs. 215-A-B and 216 were studies based on sales from this respondent's "Atlantic branch", as contrary to the evidence. (Tr. 4051 et seq.).

141. This respondent excepts to the statement in the fifth sentence on page 53 of the Recommended Decision, which sentence is a part of item "(9-e)" to the effect that in respondents' study the difference in average sales and freight costs between carload and less-than-carload shipments of dry white lead was "about ¼¢ per lb.", as being inaccurate (Resp. Ex. 216).

955 142. This respondent excepts to the first and last sentences of item "(9-f)" on page 53 of the Recommended Decision as unsupported by the record.

143. This respondent excepts to item "(10-a)", under the heading "Effects of Discriminations", on page 53 of the Recommended Decision as unsupported by the record.

144. This respondent excepts to the first two sentences of item "(10-b)" at the bottom of page 53 and the top of page 54 of the Recommended Decision as unsupported by the record. (See, e. g., Tr. 1717, 1796-97, 1876.)

145. This respondent excepts to the entire latter portion of item "(10-b)", beginning with the third sentence thereof, on page 54 of the Recommended Decision as being an inaccurate summary of the testimony and the record references therein cited.

146. This respondent excepts to item "(10-c)" on page 54 of the Recommended Decision in its entirety as containing statements contrary to the evidence in some instances, misquotation of the testimony, and incomplete statements of the evidence (Record references therein made; see also: Tr. 1411-12, 1422, 1441-1473).

147. This respondent excepts to the first, third, fourth, fifth, sixth and last sentences of item "(10-d)" on page 55 of the Recommended Decision as unsupported by the record.

148. This respondent excepts to the second sentence of item "(10-d)" on page 55 of the Recommended Decision upon the ground that the uncontradicted evidence establishes that the differential between carload and less-than-carload shipments of dry white lead, basic carbonate, was less than the difference in the respective costs of sale and delivery of the two quantities (Tr. 4050-65; Resp. Exs. 215 A-B, 216, 217; see, also, item "[10-k]" on page 57 of the Recommended Decision).

956 149. This respondent excepts to the first sentence of item "(10-e)" on page 55 of the Recommended Decision as unsupported by the record (See, e. g., Resp. Ex. 217).

150. This respondent excepts to the second sentence of item "(10-e)" on page 55 of the Recommended Decision as supported by the record.

151. This respondent excepts to the last two sentences of item "(10-e)" on page 55 of the Recommended Decision upon the ground that the record establishes that there were no discriminations in prices within the meaning of Section 2(a) of the Clayton Act arising out of or in connection with the territorial differential method of selling lead pigments as employed by this respondent (*Trade Commission* v. *Staley Co.*, 324 U. S. 746; see, e. g.: Tr. 3966; Resp. Exs. 165 A-O, 166 A-B, 169 A-N, 170 A-B, 171, 162 A-D, 213 A-Q, 214).

152. This respondent excepts to item "(10-f)" on page 55 of the Recommended Decision, except for the last six words which read "and not from discriminations per se", as unsupported by the record.

153. This respondent excepts to the words in the first sentence of item "(10-g)" on page 56 of the Recommended Decision, under the heading "Conclusions and Reasons", which read "average freight increment latent", to the third sentence of said item, and to the words in the last sentence of said item which read "In the absence of excessive freight factors which would produce higher prices to the public and substantial economic disparities between customers", as unwarranted by the facts in this case or by the law (Clayton Act, Section 2[a]; Senate Committee Report No. 1502, dated February 3, 1936; *Corn Products Co.* v. *Comm'n*, 324 U. S. 726; *Trade Commission* v. *Staley Co.*, 324 U. S. 746).

154. This respondent excepts to the second clause of the second sentence of item "(10-h)" on page 56 of the Recommended Decision, beginning with the words "and are justified", and to the remainder of said item, as being unsupported by the record.

957 155. This respondent excepts to item "(10-j)" on page 57 of the Recommended Decision as being unsupported by the record.

156. This respondent excepts to the word "all" in the first line of item "(10-k)" on page 57 of the Recommended Decision as unsupported by the record.

157. This respondent excepts to the first sentence of item "(10-l)" on page 57 of the Recommended Decision as unsupported by the record (See, e. g., Resp. Ex. 217).

158. This respondent excepts to the word "discrimina-

tions" in the first line of item "(10-m)" on page 57 of the Recommended Decision as unsupported by the record.

159. This respondent excepts to the last two sentences of item "(10-m)" on page 57 of the Recommended Decision insofar as the same purport to state that there were any discriminations or discriminatory practices of any respondent in this proceeding or that the methods referred to were employed "co-operatively" or "collusively" by any of the respondents, upon the ground that said statements are unsupported by and directly contrary to the record.

160. This respondent excepts to items "(11-a)" and "(11-b)", under the heading "Conclusions of Law", on pages 57 and 58 of the Recommended Decision as unsupported by the record and contrary to law (Clayton Act, Section 2[a]).

161. This respondent excepts to the following words which are found in the third paragraph of item "(11-c)" and which appear as part of the sixth sentence of the second paragraph on page 59 of the Recommended Decision: "The Federal Trade Commission Act, based on the policy underlying the Sherman Act, seeks to enhance competition and produce differing prices, * * *", upon the ground that this statement finds no warrant in the law (See *U. S.* v. *U. S. Steel Corp.*, 251 U. S. 417, 451; *Swift & Co.* v. *U. S.*, 196

958 U. S. 375, 400; *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 198-99; *U. S.* v. *International Harvester Co.*, 274 U. S. 693; *U. S.* v. *Standard Oil Co. of New Jersey*, 47 F. [2d] 288; *Cement Mfrs. Assn.* v. *U. S.*, 268 U. S. 588, 605).

162. This respondent excepts to the words in the seventh sentence in the third paragraph of item "(11-c)" (which appears as the second paragraph on page 59 of the Recommended Decision) which read "in the absence of uneconomic or unlawful factors" as being unwarranted by the law (Clayton Act, Section 2[a]; *Trade Commission* v. *Staley Co., supra;* Senate Committee Report No. 1502, dated February 3, 1936).

Exceptions to Section IV of the Recommended Decision, entitled "Recommended Findings and Conclusions":

163. This respondent excepts to the statement in the second sentence of the first paragraph of Paragraph 1-F on page 62 of the Recommended Decision to the effect that corroding pig lead differs from common pig lead in that the former is desilverized, for the same reasons as are set forth in exception 17 hereinabove.

164. This respondent excepts to the statement in the fifth sentence of the second paragraph of Paragraph 1-F on page 62 of the Recommended Decision to the effect that the respondents herein produce practically all but a small quantity of the lead pigments produced and sold in the United States, upon the ground that the statement finds no support in the evidence.

165. This respondent excepts to the first sentence of Paragraph 1-H on page 62 of the Recommended Decision as being unsupported by the record.

166. This respondent excepts to the second, third and fourth sentences of Paragraph 1-H on pages 62 and 63 of the Recommended Decision, for the same reasons as are set forth in exception 20 hereinabove.

959 167. This respondent excepts to the statement in the last sentence of Paragraph 1-H on page 63 of the Recommended Decision to the effect that this respondent acquired Evans Lead Company in "about 1944", for the same reasons as are set forth in exception 21 hereinabove.

168. This respondent excepts to Paragraph 1-I on page 63 of the Recommended Decision, for the same reasons as are set forth in exception 22 hereinabove.

169. This respondent excepts to the statements contained in Paragraph 1-J on pages 63 and 64 of the Recommended Decision to the effect that its dry white lead production was from 30% to 35%, that in 1932 its production of white lead in oil might have gone as high as 70%; that the percentages were as set forth in the tabulation at the top of page 64, that Eagle-Picher was a "potential competitor" of this respondent, that the "combined production" of this respondent and Eagle-Picher was as stated, that the percentage of Eagle-Picher has been increased by its acquisition of International's lead pigment plant and business, and to the first, second and last sentences of the last paragraph of said Paragraph 1-J, for the same reasons as are set forth in exceptions 23 through 32, inclusive, hereinabove.

170. This respondent excepts to Paragraph 1-K on page 64 of the Recommended Decision, for the same reasons as are set forth in exceptions 33 and 35 hereinabove.

171. This respondent excepts to the first, second and last sentences of Paragraph 2-A on page 65 of the Recommended Decision, for the same reasons as are set forth in exceptions 36, 37 and 38 hereinabove.

172. This respondent excepts to Paragraph 2-B on page

65 of the Recommended Decision, for the same reasons as are set forth in exception 39 hereinabove.

960 173. This respondent excepts to the first two sentences of Paragraph 2-C on page 65 of the Recommended Decision, for the same reasons as are set forth in exception 40 hereinabove.

174. This respondent excepts to all except the last sentence of Paragraph 2-D on page 66 of the Recommended Decision, for the same reasons as are set forth in exceptions 41 and 42 hereinabove.

175. This respondent excepts to Paragraph 2-E on page 66 of the Recommended Decision, for the same reasons as are set forth in exception 43 hereinabove.

176. This respondent excepts to Paragraph 2-F on page 66 of the Recommended Decision, for the same reasons as are set forth in exceptions 44 and 45 hereinabove.

177. This respondent excepts to the first sentence of Paragraph 3 on page 67 of the Recommended Decision, for the same reasons as are set forth in exception 48 hereinabove.

178. This respondent excepts to the words "direct" and "express" in the fourth sentence of Paragraph 3 on page 67 of the Recommended Decision, for the same reasons as are set forth in exception 49 hereinabove.

179. This respondent excepts to the fifth, sixth, seventh, eighth and ninth sentences of Paragraph 3 on page 67 of the Recommended Decisions, for the same reasons as are set forth in exception 50 hereinabove.

180. This respondent excepts to Paragraph 4-A on pages 67 and 68 of the Recommended Decision, for the same reasons as are set forth in exceptions 54, 55, 57, 58, 59 and 60 hereinabove.

181. This respondent excepts to Paragraph 4-B on page 68 of the Recommended Decision, for the same reasons as are set forth in exception 61 hereinabove.

961 182. This respondent excepts to Paragraph 4-C on pages 68 and 69 of the Recommended Decision, for the same reasons as are set forth in exception 62 hereinabove.

183. This respondent excepts to Paragraph 4-D on page 69 of the Recommended Decision for the same reasons as are set forth in exception 63 hereinabove.

184. This respondent excepts to the first, third, fourth, fifth and sixth sentences of Paragraph 5-A1 on page 69 of

the Recommended Decision, for the same reasons as are set forth in exceptions 65, 66 and 67 hereinabove.

185. This respondent excepts to Paragraph 5-A2 on page 70 of the Recommended Decision, for the same reasons as are set forth in exceptions 68 and 69 hereinabove.

186. This respondent excepts to Paragraph 5-A3 on page 70 of the Recommended Decision, for the same reasons as are set forth in exceptions 72, 73 and 74 hereinabove.

187. This respondent excepts to the first two sentences of Paragraph 5-B1 on page 71 of the Recommended Decision, for the same reasons ase are set forth in exception 77 hereinabove.

188. This respondent excepts to the first and last sentences of Paragraph 5-B2, on page 71 of Recommended Decision, for the same reasons as are set forth in exceptions 78 and 79 hereinabove.

189. This respondent excepts to Paragraph 5-B3 on pages 71 and 72 of the Recommended Decision, for the same reasons as are set forth in exception 80 hereinabove.

190. This respondent excepts to Paragraph 5-B4 on page 72 of the Recommended Decision, for the same reasons as are set forth in exception 81 hereinabove.

962 191. This respondent excepts to the second, third and fourth sentences of the first paragraph of Paragraph 5-B5 on pages 72 and 73 of the Recommended Decision, to the first two sentences of the second paragraph of said Paragraph 5-B5 on page 73 of the Recommended Decision, and to the words "consignees" and "dealer" appearing in the third sentence of the third paragraph of said Paragraph 5-B5 on page 73 of the Recommended Decision, for the same reasons as are set forth in exceptions 82 through 86, inclusive, hereinabove.

192. This respondent excepts to Paragraph 5-B6 on page 73 of the Recommended Decision, for the same reasons as are set forth in exception 87 hereinabove.

193. This respondent excepts to Paragraph 5-C1 on page 74 of the Recommended Decision, for the same reasons as are set forth in exception 88 hereinabove.

194. This respondent excepts to the first sentence of the first paragraph of Paragraph 5-C2, to that portion of the second sentence of said Paragraph 5-C2 which states that National put Article "II" of the supplementary code into operation some months prior to its formal adoption,

and to the third, fourth and last sentences of the first paragraph of said Paragraph 5-C2 on page 74 of the Recommended Decision, and to all of the second paragraph of said Paragraph 5-C2 on page 75 of the Recommended Decision, for the same reasons as are set forth in exceptions 89 through 92, inclusive, hereinabove.

195. This respondent excepts to all except the first sentence of Paragraph 5-C3 on page 75 of the Recommended Decision, for the same reasons as are set forth in exception 93 hereinabove.

196. This respondent excepts to the first sentence of Paragraph 5-C4, to the statement in the third sentence of said Paragraph 5-C4 which states that sometimes respondent, Glidden, charged dealers 5¢ more per 100 lbs. than
963 this respondent and others, and to the last sentence of said Paragraph 5-C4 on pages 75 and 76 of the Recommended Decision, for the same reasons as are set forth in exceptions 94, 95 and 96 hereinabove.

197. This respondent excepts to the first paragraph of Paragraph 5-C5 and to the first and last sentences of the second paragraph of said Paragraph 5-C5 on page 76 of the Recommended Decision, for the same reasons as are set forth in exceptions 97 and 98 hereinabove.

198. This respondent excepts to Paragraph 5-C6, Paragraph 5-C7, Paragraph 5-C8, Paragraph 5-C9, Paragraph 5-C10, and Paragraph 5-C11, on pages 76, 77 and 78 of the Recommended Decision, for the same reasons as are set forth in exceptions 100 through 105, inclusive, hereinabove.

199. This respondent excepts to the first, second, third and fourth sentences, and to the first portion of the fifth sentence of Paragraph 5-D on page 78 of the Recommended Decision, down to but not including the words "and it was shown", for the same reasons as are set forth in exceptions 106 and 107 hereinabove.

200. This respondent excepts to the omission from the end of the last sentence of Paragraph 5-E on page 79 of the Recommended Decision of the words "or used generally" as set forth in the third sentence of item "(5-e)" on page 35 of the Recommended Decision.

201. This respondent excepts to the first three sentences of Paragraph 5-F on page 79 of the Recommended Decision, for the same reasons as are set forth in exception 110 hereinabove.

202. This respondent excepts to Paragraph 6-A on page 79 of the Recommended Decision, for the same reasons as are set forth in exception 111 hereinabove.

203. This respondent excepts to the third sentence of the first paragraph of Paragraph 6-B on page 79 of the Recommended Decision, for the same reasons as are set forth in exception 112 hereinabove.

964 204. This respondent excepts to that portion of the last sentence of the second paragraph of Paragraph 6-B on page 80 of the Recommended Decision, beginning with the word "but" on the seventh line of said page and continuing throughout the rest of said paragraph, for the same reasons as are set forth in exception 113 hereinabove.

205. This respondent excepts to Paragraph 6-D on page 80 of the Recommended Decision, for the same reasons as are set forth in exception 114 hereinabove.

206. This respondent excepts to Paragraph 7-A1, Paragraph 7-A2, Paragraph 7-A3, Paragraph 7-A4, Paragraph 7-A5, Paragraph 7-A6, Paragraph 7-A7 and Paragraph 7-A8 on pages 80, 81 and 82 of the Recommended Decision, for the same reasons as are set forth in exception 116 hereinabove.

207. This respondent excepts to Paragraph 7-B1 on pages 82 and 83 of the Recommended Decision, for the same reasons as are set forth in exception 117 hereinabove.

208. This respondent excepts to Paragraph 7-B2 on page 83 of the Recommended Decision, for the same reasons as are set forth in exception 118 hereinabove.

209. This respondent excepts to Paragraph 7-B3 on pages 83 and 84 of the Recommended Decision, in the same manner and for the same reasons as are set forth in exception 119 hereinabove.

210. This respondent excepts to Paragraph 7-B4 on page 84 of the Recommended Decision, in the same manner and for the same reasons as are set forth in exception 120 hereinabove.

211. This respondent excepts to Paragraph 7-C1 on page 84 of the Recommended Decision, for the same reasons as are set forth in exception 121 hereinabove.

965 212. This respondent excepts to the first two sentences of Paragraph 7-C2 on page 84 of the Recommended Decision and to the last sentence of said Paragraph 7-C2 on page 85 of the Recommended Decision, for

the same reasons as are set forth in exception 122 hereinabove.

213. This respondent excepts to Paragraph 7-C3, Paragraph 7-C4 and Paragraph 7-C5 on page 85 of the Recommended Decision, in the same manner and for the same reasons as are set forth in exceptions 123 and 124 hereinabove.

214. This respondent excepts to Paragraph 7-D1, Paragraph 7-D2, Paragraph 7-D3, Paragraph 7-D4, Paragraph 7-D5 and Paragraph 7-D6 on pages 85, 86 and 87 of the Recommended Decision, for the same reasons as are set forth in exceptions 125 through 128, inclusive, hereinabove.

215. This respondent excepts to the third paragraph of Paragraph 8-A on page 87 of the Recommended Decision, in the same manner and for the same reasons as are set forth in exception 129 hereinabove.

216. This respondent excepts to Paragraph 8-A1 and Paragraph 8-A2 on page 88 of the Recommended Decision, for the same reasons as are set forth in exceptions 130 and 131 hereinabove.

217. This respondent excepts to all except the last sentence of Paragraph 8-A3 on pages 88 and 89 of the Recommended Decision, for the same reasons as are set forth in exception 132 hereinabove.

218. This respondent excepts to Paragraph 8-A4 and Paragraph 9-A on pages 89 and 90 of the Recommended Decision, for the same reasons as are set forth in exceptions 133 and 134 hereinabove.

219. This respondent excepts to the first and last sentences of Paragraph 9-B on page 90 of the Recommended Decision, for the same reasons as are set forth in exception 135 hereinabove.

966 220. This respondent excepts to the first sentence of Paragraph 9-C on page 90 of the Recommended Decision, for the same reasons as are set forth in exception 136 hereinabove.

221. This respondent excepts to Paragraph 9-D on pages 90 and 91 of the Recommended Decision, for the same reasons as are set forth in exception 137 hereinabove.

222. This respondent excepts to the first sentence of the first paragraph and to all of the second paragraph of Paragraph 9-E on page 91 of the Recommended Decision,

for the same reasons as are set forth in exceptions 138 and 139 hereinabove.

223. This respondent excepts to the first and last sentences of Paragraph 9-F on page 91 of the Recommended Decision, for the same reasons as are set forth in exception 142 hereinabove.

224. This respondent excepts to Paragraph 10-A, Paragraph 10-B and Paragraph 10-C on pages 91 and 92 of the Recommended Decision, for the same reasons as are set forth in exceptions 143 through 146, inclusive, hereinabove.

225. This respondent excepts to all except the seventh sentence in Paragraph 10-D on pages 92 and 93 of the Recommended Decision, for the same reasons as are set forth in exceptions 147 and 148 hereinabove.

226. This respondent excepts to Paragraph 10-E on page 93 of the Recommended Decision, in the same manner and for the same reasons as are set forth in exceptions 149, 150 and 151 hereinabove.

227. This respondent excepts to all of Paragraph 10-F on page 93 of the Recommended Decision, except the last six words thereof which read "and not from discriminations per se", for the same reasons as are set forth in exception 152 hereinabove.

967 228. This respondent excepts to the words in the first sentence of Paragraph 10-G on page 93 of the Recommended Decision which read "average freight increments latent", and to the third sentence of said Paragraph 10-G, for the same reasons as are set forth in exception 153 hereinabove.

229. This respondent excepts to the second clause of the second sentence of Paragraph 10-H on page 94 of the Recommended Decision, beginning with the words "and are justified", and to the remainder of said paragraph, for the same reasons as are set forth in exception 154 hereinabove.

230. This respondent excepts to Paragraph 10-J on page 94 of the Recommended Decision, for the same reasons as are set forth in exception 155 hereinabove.

231. This respondent excepts to the word "all" in the first line of Paragraph 10-K on page 94 of the Recommended Decision, for the same reasons as are set forth in exception 156 hereinabove.

232. This respondent excepts to the first sentence of

Paragraph 10-L on page 94 of the Recommended Decision, for the same reasons as are set forth in exception 157 hereinabove.

233. This respondent excepts to Paragraph 11-A and Paragraph 11-B on page 95 of the Recommended Decision, for the same reasons as are set forth in exception 160 hereinabove.

Exceptions to Section V of the Recommended Decision, entitled "Recommended Order":

234. This respondent excepts to the preamble and paragraphs "1" and "2" and sub-paragraphs thereof of the "Recommended Order" on pages 96 and 97 of the Recommended Decision as unwarranted by the evidence herein or by the Federal Trade Commission Act or the Clayton Act.

968 235. This respondent excepts to paragraph "3" of the "Recommended Order" on page 98 of the Recommended Decision as unwarranted by the record herein or the Federal Trade Commission Act and "as unreasonably restrictive and beyond the scope of the Commission's authority" in accordance with the Trial Examiner's Rulings on Proposals submitted by counsel in support of the amended complaint (see Trial Examiner's Rulings on Proposals for Findings and Conclusions Submitted by Counsel, page 8).

236. This respondent excepts to paragraph "4" of the "Recommended Order" on page 98 of the Recommended Decision as unwarranted by the record herein, or by the Clayton Act.

237. This respondent excepts to paragraph "5" of the "Recommended Order" on pages 98 and 99 of the Recommended Decision as unwarranted by the record herein or by the Federal Trade Commission Act or the Clayton Act.

Exceptions to the Trial Examiner's failure to find in accordance with Proposals for Findings and Conclusions submitted by this respondent, and as set forth in the Trial Examiner's Rulings on Proposals for Findings and Conclusions Submitted by Counsel, heretofore filed:

238. This respondent excepts to the failure of the Trial Examiner to find in haec verba as requested in paragraphs 1 through 10, inclusive, and 26 of the Proposed Findings submitted by this respondent and to the Trial Examiner's failure to rule upon, and to find as requested in, paragraphs 29, 50, and 64 of the Proposed Findings submitted by this respondent.

239. This respondent excepts to the Trial Examiner's denial of the findings requested in paragraphs 13 through 19, inclusive, 24, 27, 34 through 42, inclusive, 44, 48, 49, 51, 52, 56, 57, 60 through 63, inclusive, 65 through 68, inclusive, 71, 76, 80, 84, 85, 86, 88 through 97, inclusive, 102 through 108, inclusive, of the Proposed Findings submitted by this respondent.

969 240. This respondent excepts to the denial of the Conclusions of Law requested by this respondent in its proposals and numbered 1 through 8, inclusive.

In addition, this respondent adopts as its own and incorporates herein by reference the exceptions taken by each other respondent herein to the Recommended Decision of the Trial Examiner herein, except to the extent, if any, that any one or more of them may be inconsistent with the foregoing numbered exceptions.

Pursuant to the ruling of the Trial Examiner herein, this respondent reserves the right to file further proposals and further exceptions at the time of the submission of its brief on the merits and the argument of the case before the Commission.

This respondent respectfully requests argument on the above exceptions at the time of the argument before the Commission on the merits.

Respectfully submitted,

Alexander & Green,
James D. Ewing,
Of Counsel,
Attorneys for Respondent,
National Lead Company,
No. 120 Broadway,
New York 5, N. Y.

James D. Ewing,
Eugene Z. DuBose,
Of Counsel.

* * (Caption—5253) * *

EXCEPTIONS OF RESPONDENT, ANACONDA COPPER MINING COMPANY, TO TRIAL EXAMINER'S RECOMMENDED DECISION AND TO SAID TRIAL EXAMINER'S FAILURE TO INCLUDE PROPOSED FINDINGS AND CONCLUSIONS REQUESTED BY SAID RESPONDENT.

(Received May 21, 1948.)

Comes now the respondent, Anaconda Copper Mining Company (hereinafter referred to as "Anaconda"), by its attorneys, Chadbourne, Wallace, Parke & Whiteside, and, pursuant to Rule XXIII of the Rules of Practice of this Commission, submits the following exceptions to the Trial Examiner's Recommended Decision herein and to the failure of said Trial Examiner to include proposed findings and conclusions heretofore requested by this respondent under Rule XXI of said Rules of Practice.

971 Exceptions to Section II of the Recommended Decision Entitled "Pleadings and Issues".

1. Page 3, first unnumbered paragraph,* Anaconda excepts to the action of the Examiner in treating it and International Smelting and Refining Company as one and the same for the reason that such assumption is not supported by the record, is opposed to the reliable and probative evidence that has been received and contrary to the law. [Tr. 3537-3538]

Martin v. *Development Co. of America*, 240 Fed. 42 (C. C. A. 9th, 1917);
Majestic Company v. *Orpheum Circuit*, 21 F. (2d) 720 (C. C. A. 8th, 1927);
Esmond Mills v. *Commissioner of Internal Revenue*, 132 F. (2d) 753 (C. C. A. 1st, 1943);
Schenley Corporation v. *United States*, 326 U. S. 432 (1945).

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* The pages and paragraphs referred to at the outset of each exception identify that portion of the Trial Examiner's Recommended Decision to which exception is being taken.

2. Page 5, second unnumbered paragraph from bottom of page, Anaconda excepts to this paragraph as not constituting a complete and accurate summary of its answer. [Anaconda's answer to amended complaint.]

972 3. Page 7, Anaconda excepts to the first three full sentences appearing at the top of the page for the reason that important parts of the evidence have not been set forth in the Recommended Decision, much reliable and substantial evidence has been ignored and little attention has been paid to the greater weight of the evidence herein.

Exceptions to Section III of the Recommended Decision Entitled "Report Upon the Evidence".

Count I.

4. Anaconda excepts to the findings as to it in the following enumerated Paragraphs where it is referred to as "Anaconda" or by such collectives as "respondents," "all respondents," "as between respondents," "each respondent," "other respondents," "competitors" or "smaller competitors" on the ground that each and all of such findings are unsupported by the record as to this respondent: Page 9, (1-e); Page 14, (4) and (4-a); Page 16, (4-b); Page 18, (4-c); the first unnumbered paragraph on Page 19; Page 19, (5-a1); Page 20, (5-a2) and (5-a3); Page 21, 5-a4) and (5-a5); Page 22, (5-b2); Page 24, (5-b5); Page 25, (5-b6); Page 26, (5-c1); Page 27, (5-c2); Page 28, 973 (5-c3) and (5-c4); Page 29, (5-c5); Page 30, (5-c6); Page 33, (5-c7) and (5-c8); Page 34, (5-c11) and (5-d); Page 35, (5-e); Page 37, 6-c) and (6-d); Page 39, (7-a3), (7-a4), (7-a5) and (7-a6); Page 40, (7-a8), (7-a9) and (7-b1); Page 41, (7-b2); Page 42, (7-b4); Page 43, (7-c1), (7-c2) and (7-c3); Page 44, (7-c4), (7-c5) and (7-d1); Page 45, (7-d2) and (7-d4), and Page 46, (7-d5).

5. Anaconda adopts as its own and incorporates herein by reference, each and every exception and the authorities in support thereof to the Examiner's Recommended Decision which are taken by the other respondents herein to his report upon the evidence and conclusions as to conspiracy, collusion, agreement and cooperation between or among any or all of said respondents.

Count II.

6. Anaconda excepts to the findings and conclusions as to it in the following enumerated Paragraphs where it is referred to as "Anaconda" or by such collectives as "respondents," "all respondents," "as between respondents," "each respondent," "other respondents," "competitors" or "smaller competitors" on the ground that each and all of such findings are unsupported by the record as to
974 this respondent: the third unnumbered paragraph on Page 46; Page 47, (8-a2); Page 50, (9-a) and (9-b); Page 51, (9-d); Page 52, (9-e); Page 53, (9-f); Page 56, (10-g), (10-h) and (10-i); Page 57, (10-k) and (11-a).

7. Pages 46 and 47, Paragraph (8-a1), Anaconda excepts to this paragraph as being unwarranted by the evidence or by law.

> Clayton Act, Section 2(a);
> *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726;
> *Federal Trade Commission* v. *A. E. Staley Co.*, 324 U. S. 746.

Exceptions to Section IV of the Recommended Decision Entitled "Recommended Findings and Conclusions".

8. Page 61, Paragraph 1-C, Anaconda excepts to having all references to it and respondent, International Smelting and Refining Company, combined under the name of "Anaconda" in this and subsequent paragraphs of the recommended findings and conclusions. [Record references and authorities in support of this exception are the same as those cited by respondent in Exception "1," Page 2 herein.]

975 9. Anaconda excepts to the findings and conclusions as to it in the following enumerated Paragraphs where it is referred to as "Anaconda" or by such collectives as "respondents," "all respondents," "as between respondents," "each respondent," "other respondents," "competitors" or "smaller competitors" on the ground that each and all of such findings are unsupported by the record as to this respondent: Page 62, 1-F and 1-G; Page 64, 1-J; Page 67, 4-A; Page 68, 4-C; Page 69, 4-D and 5-A1; Page 70, 5-A2 and 5-A3; Page 71, 5-B2; Page 73, 5-B5 and 5-B6; Page 74, 5-C1, 5-C2, 5-C3 and 5-C4; Page 76, 5-C5

and 5-C6; Page 77, 5-C7, 5-C8 and 5-C11; Page 78, 5-D and 5-E; Page 79, 6-A; Page 80, 6-C and 6-D; Page 81, 7-A3, 7-A4 and 7-A5; Page 82, 7-A6, 7-A7 and 7-A8; Page 83, 7-B2; Page 84, 7-C1 and 7-C2; Page 85, 7-C4, 7-C5 and 7-D1; Page 86, 7-D2; Page 87, 7-D4 and 7-D5; Page 88, 8-A1 and 8-A2; Page 89, 9-A; Page 90, 9-B and 9-D; Page 91, 9-E and 9-F; Page 93, 10-F and 10-G; Page 94, 10-H, 10-I, 10-K and 10-L; and Page 95, 11-A.

10. Anaconda adopts as its own, and incorporates herein by reference, each and every exception and the authorities in support thereof to the Examiner's Recom-
976 mended Decision which are taken by the other respondents herein to his recommended findings and conclusions as to conspiracy, collusion, agreement and cooperation between or among any or all of said respondents.

Exceptions to Section V of the Recommended Decision Entitled "Recommended Order".

11. Page 96, Paragraph 1, Page 97, Paragraph 2, Page 98, Paragraphs 4 and 5, Anaconda excepts to its inclusion in the Recommended Order for the reason that there is no evidence in the record that it has been a party to any of the acts complained of in the amended complaint and there is uncontradicted evidence that Anaconda is not engaged in any of the activities covered by the order, and the Examiner has found that there is no reason to believe respondent will ever enter into or engage in the manufacture or sale of lead pigments. [Affidavit of E. O. Sowerwine, Vice President of Anaconda, in support of motion to dismiss amended complaint, pp. 2075-2077; 3543-3544; Trial Examiner's rulings on proposals for findings and conclusions submitted by counsel, March 31, 1948, pp. 1-2.]

977-A Exceptions to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested Under Rule XXI Submitted by This Respondent.

12. Anaconda excepts to the Examiner's denial of the findings requested in Paragraphs "2" and "5" of its proposed Findings and Conclusions and Reasons therefor which were duly filed in this proceeding.

13. Anaconda excepts to the Examiner's denial of Para-

graphs "1," "3" and "4" to "9," inclusive, of the Conclusions of Law requested by it and reasserts that these Conclusions were proper statements of the law on the points involved and that the denial thereof was contrary to both the evidence and the law.

Anaconda adopts as its own, and incorporates herein by reference, each and every exception and the authorities in support thereof to the Examiner's Recommended Decision which are taken by the respondent, International Smelting and Refining Company.

Pursuant to the ruling of the Examiner herein, this respondent reserves the right to file further proposals and further exceptions at the time of submission of its brief on the merits and the argument of the case before the Commission.

977-B This respondent respectfully requests argument on the above exceptions at the time of the argument before the Commission on the merits.

Respectfully submitted,

Chadbourne, Wallace, Parke & Whiteside,
By /s/ H. E. Gardiner,
Office and Post Office Address,
No. 25 Broadway,
Borough of Manhattan,
City of New York,
Attorneys for Respondent, Anaconda Copper Mining Company.

978 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

EXCEPTIONS OF RESPONDENT, INTERNATIONAL SMELTING AND REFINING COMPANY, TO TRIAL EXAMINER'S RECOMMENDED DECISION AND TO SAID TRIAL EXAMINER'S FAILURE TO INCLUDE PROPOSED FINDINGS AND CONCLUSIONS REQUESTED BY SAID RESPONDENT.

Comes now the respondent, International Smelting and Refining Company, hereinafter referred to as "International"), by its attorneys, Chadbourne, Wallace, Parke & Whiteside, and, pursuant to Rule XXIII of the Rules of Practice of this Commission, submits the following exceptions to the Trial Examiner's Recommended Decision herein and to the failure of said Trial Examiner to include proposed findings and conclusions heretofore requested by this respondent under Rule XXI of said Rules of Practice.

979 Exceptions to Section II of the Recommended Decision Entitled "Pleadings And Issues".

1. Page 1, first unnumbered paragraph*, International excepts to the action of the Examiner in treating it and Anaconda Copper Mining Company as one and the same for the reason that such assumption is not supported by the record, is opposed to the reliable and probative evidence that has been received and contrary to the law. [Tr. 3537-3538; *Martin* v. *Development Co. of America,* 240 Fed. 42 (C. C. A. 9th, 1917); *Majestic Company* v. *Orpheum Circuit,* 21 F. (2d) 720 (C. C. A. 8th, 1927); *Esmond Mills* v. *Commissioner of Internal Revenue,* 132 F. (2d) 753 (C. C. A. 1st, 1943); *Schenley Corporation* v. *United States,* 326 U. S. 432 (1945).]

2. Page 5, third unnumbered paragraph, International excepts to this statement, it being an inaccurate and incomplete statement of its answer to the amended complaint.

3. Page 6, International excepts to the inclusion of the following as one of the "issues" herein:

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* The pages and paragraphs referred to at the outset of each exception identify that portion of the Trial Examiner's Recommended Decision to which exception is being taken.

980 "Were the tendencies and effect of these transactions to restrain trade, suppress competition, or create monopolies through unequal cost factors and identical delivered prices."

[Amended Complaint, Paragraph "Eleven"; Federal Trade Commission Act, Section 5; Sherman Act, Sections 1 and 2.]

4. Page 6, International excepts to the inclusion of the following as one of the "issues" herein:

"Did respondent's employment of the zone system, as alleged, involve differences in price between customers (a) located in a zone and (b) located in different zones, which differences were more than differences in cost, sale and delivery?"

[Clayton Act, Section 2(a).]

5. Page 6, International excepts to the paragraph following the paragraph hereinabove quoted because of the inclusion of the words "so discriminate" on the same grounds as objected to in "4" above.

6. Page 6, International excepts to the second sentence in the paragraph beginning at the bottom of the page for the reason that it is improper to attempt to answer the issues by "inference" were it would conflict with reliable probative and substantial evidence.

981 7. Page 7, International excepts to the first three full sentences appearing at the top of the page for the reason that important parts of the evidence have not been set forth in the Recommended Decision, much reliable and substantial evidence has been ignored and little attention has been paid to the greater weight of the evidence herein.

Exceptions to Section III of the Recommended Decision Entitled "Report Upon the Evidence".

Count I.

8. Page 14, Paragraph (4) International excepts to the second sentence as being unsupported by the record.

9. Page 16, Paragraph (4-b) and Page 18, Paragraph (4-c), International excepts to these paragraphs on the ground that they are not supported by the record as to this respondent.

10. Page 19, Paragraph (5), International excepts to the next to the last sentence for the reason that it is im-

proper to attempt to answer the issues by "inference" where it would conflict with reliable probative and substantial evidence.

982 II. International excepts to the following enumerated Paragraphs on the ground that each and all of such findings are unsupported by the record as to this respondent: Page 19, (5-a1); Page 20, (5-a2); Page 22, (5-b2); Page 26, (5-c1); Page 27, (5-c2); Page 33, (5-c8) and (5-c9).

12. Page 35, Paragraph (5-d), International excepts to that part of the paragraph appearing on this page as being unsupported by the record. [Answers of all respondents to amended complaint.]

13. Page 37, Paragraph (6-c) and the second and third sentences of Paragraph (6-d), International excepts to the cited portions of these Paragraphs as being unsupported by the record as to this respondent.

14. Page 38, Paragraph (6-d), International excepts to the statement that Anaconda of International had a plant in Chicago. [Tr. 3489-3543.]

15. Pages 39 and 40, Paragraphs (7-a3), (7-a4), (7-a6), (7-a8) and (7-a9), International excepts to these Paragraphs as being unsupported by the record as to this respondent.

983 16. Page 40, Paragraph (7-b1) and Page 41, Paragraph (7-b2), International excepts to these Paragraphs as they contain statements, inferences and insinuations unsupported by the evidence.

17. Pages 43 and 44, Paragraphs (7-c1), (7-c2), (7-c4) and (7-c5), International excepts to these Paragraphs as being unsupported by the evidence or directly contrary to the reliable probative and substantial evidence herein.

18. Page 44, Paragraph (7-d1), International excepts to this Paragraph. [National Industrial Recovery Act, Section 5; 48 Stat. 195, 198.]

19. Page 45, Paragraphs (7-d2), (7-d4) and (7-d5), International excepts to these Paragraphs on the Ground that they are unsupported by the record as to this respondent. [*Eugene Dietzgen Co.* v. *Federal Trade Commission,* 142 F. (2d) 321, 329; *Sugar Institute* v. *United States,* 297 U. S. 553; *Maple Flooring Ass'n* v. *United States,* 268 U. S. 563; *United States* v. *General Electric Co.,* 272 U. S. 476; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 198-99; *United States* v. *U. S. Steel Corporation,* 251 U. S. 417; *United States* v. *International Harvester Co.,*

274 U. S. 693; *United States* v. *Standard Oil of New*
984 *Jersey*, 47 F. (2d) 288; *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344.]

20. International adopts as its own, and incorporates herein by reference, each and every exception and the authorities in support thereof to the Examiner's Recommended Decision which are taken by the other respondents herein to his report upon the evidence and conclusions as to conspiracy, collusion, agreement and cooperation between or among any or all of said respondents.

Count II.

21. Page 46, International excepts to the third unnumbered Paragraph under this subject in so far as the same incorporates the items set forth in the Report Upon The Evidence at Pages 7 to 46 on the same grounds as hereinabove set out in this respondent's exceptions to Count I.

22. Page 46, Paragraph (8-a1), International excepts to this Paragraph as being unwarranted by the evidence or by law. [Clayton Act, Section 2(a); *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726; *Federal Trade Commission* v. *A. E. Staley Co.*, 324 U. S. 746.]

985 23. Page 49, Paragraph (8-a3), International excepts to this Paragraph as being unsupported by record references or any other portion of the record.

24. Page 50, Paragraph (9-a), International excepts to references that Anaconda charged consignment dealers in the par zone $1.00 less per cwt. than its price to competing dealers at the same locations as being unsupported by the record as to this respondent.

25. Page 56, Paragraph (10-h), International excepts to this Paragraph as being unsupported by the record as to this respondent.

26. Page 57, Paragraph (10-l), International excepts to the first sentence as being unsupported by the record as to this respondent.

27. Page 57, Paragraph (10-m), International excepts to the word "discriminations" in the first line, and to the last two sentences of said Paragraph as being unsupported by the record as to this respondent.

28. Page 57, Paragraph (11-a), International excepts to this Paragraph for the reason that it is unsupported by

the evidence and is contrary to law. [*Federal Trade* 986 *Commission* v. *A. E. Staley Co.*, 324 U. S. 746; *United States* v. *U. S. Steel Corp.*, 251 U. S. 417, 451; *Swift & Co.* v. *United States*, 196 U. S. 375, 400; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 198-99; *United States* v. *International Harvester Co.*, 274 U. S. 693; *United States* v. *Standard Oil Co. of New Jersey*, 47 F. (2d) 288.]

Exceptions to Section IV of the Recommended Decision Entitled "Recommended Findings and Conclusions".

29. Page 61, Paragraph 1-C, International excepts to having all references to it and respondent, Anaconda Copper Mining Company, combined under the name of "Anaconda" in this and subsequent paragraphs of the recommended findings and conclusions. [Record references and authorities in support of this exception are the same as those cited by respondent in Exception "1," Page 2 herein.]

30. International excepts to the findings and conclusions in the following enumerated Paragraphs on the ground that each and all of such findings are unsupported by the record as to this respondent; Page 62 1-G; Page 68, 4-C; Page 69, second sentence of 4-D; Page 69, 5-A1; Page 70, 5-A2
987 and 5-A3; Page 71, 5-B2 and Page 72, 5-B4.

31. Page 73, second sentence of the first unnumbered paragraph of Paragraph 5-B5, International excepts to the finding that it or Anaconda sold dry white lead on a consignment basis in Wisconsin. [Tr. 3533.]

32. International excepts to the findings and conclusions in the following enumerated Paragraphs on the ground that each and all of such findings are unsupported by the record as to this respondent: Page 74, 5-C1; Page 76, 5-C5; Page 77, 5-C8 and the first two sentences of 5-C11; Page 78, 5-D; Page 80, 6-D; Page 81, 7-A3 and 7-A4; Page 82, 7-A6, 7-A7 and 7-A8.

33. Page 83, Paragraph 7-B2, International excepts to this Paragraph, with the exception of the second sentence, on the ground that the findings as to it are unsupported by the record and cannot be "inferred" from the evidence that has been received.

34. Page 84, Paragraph 7-C2 and Page 85, Paragraph 7-C4, International excepts to these Paragraphs as being without foundation in law and unsupported by the record as to this respondent.

35. Page 85, Paragraphs 7-C5 and 7-D1, International

988 excepts to these Paragraphs on the ground that these findings are unsupported by the record as to this respondent.

36. International excepts to the findings in the following enumerated Paragraphs as being unsupported by the record and without foundation in law: Page 85, 7-D1; Page 86, 7-D2; Page 87, 7-D4 and 7-D5.

37. Page 87, the third unnumbered paragraph of Paragraph 8-A, International excepts to this Paragraph in so far as the same incorporates the facts relating to the parties, zone pricing, price differences, differentials and other features bearing on the issues under Count II, which are set out in the Report Upon the Evidence under Count I, and adopts as its exceptions and authorities thereto those exceptions hereinabove set out by this respondent to Count I.

38. Page 88, Paragraph 8-A1, International excepts to this Paragraph as being unwarranted by the evidence or by law. [Clayton Act, Section 2(a); *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726; *Federal Trade Commission* v. *A. E. Staley Co.*, 324 U. S. 746.]

989 39. International excepts to the findings and conclusions in the following enumerated paragraphs on the ground that each and all of such findings are unsupported by the record as to this respondent: Page 89, 9-A; Page 91, 9-E and 9-F; Page 93, first two sentences of 10-E and 10-F; Page 94, 10-H, 10-J and 10-L.

40. Page 95, Paragraph 11-A, International excepts to this Paragraph on the ground that it is unsupported by the record and contrary to law. [*Federal Trade Commission* v. *A. E. Staley Co.*, 324 U. S. 746.]

41. International adopts as its own, and incorporates herein by reference, each and every exception and the authorities in support thereof to the Examiner's Recommended Decision which are taken by the other respondents herein to his recommended findings and conclusions as to conspiracy, collusion, agreement and cooperation between or among any or all of said respondents.

Exceptions to Section V of the Recommended Decision Entitled "Recommended Order".

42. Page 96, Paragraph 1, Page 97, Paragraph 2 and Page 98, Paragraphs 4 and 5, International excepts to its inclusion in the Recommended Order for the reason that the record does not sustain the finding that it was
990 a party to, or was engaged in, any of the acts com-

plained of in the amended complaint, and there is uncontradicted evidence that International is not engaged in any of the activities covered by the order, and the Examiner has found that it is no longer in the business of selling or manufacturing lead pigments and that there is no reason to believe International will ever reenter or reengage in the manufacture or sale of lead pigments. [Com. Ex. 836B; Affidavit of Frederick Laist, Vice President of International, in support of motion to dismiss amended complaint; pp. 2075-2077; 3541-3543; Trial Examiner's rulings on proposals for findings and conclusions submitted by counsel, March 31, 1948, p. 2.]

Exceptions to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested Under Rule XXI Submitted by This Respondent.

43. International excepts to the Examiner's denial of the findings requested in Paragraphs "16," "20," "21," "22," "25," "28," "29," "30," "31" and "32" of its proposed Findings and Conclusions and Reasons therefor which were duly filed in this proceeding.

44. International excepts to the Examiner's denial of Paragraphs "1" to "8," inclusive of the Conclusions of
Law requested by it and reasserts that these Conclu-
991 sions were proper statements of the law on the points
involved and that the denial thereof was contrary to
both the evidence and the law.

Pursuant to the ruling of the Examiner herein, this respondent reserves the right to file further proposals and further exceptions at the time of submission of its brief on the merits and the argument of the case before the Commission.

This respondent respectfully requests argument on the above exceptions at the time of the argument before the Commission on the merits.

Respectfully submitted,
Chadbourne, Wallace, Parke & Whiteside,
By A. E. Gardiner,
Office and Post Office Address,
No. 25 Broadway,
Borough of Manhattan,
City of New York,
Attorneys for Respondent, International Smelting and Refining Company.

993 **Before the Federal Trade Commission.**

* * (Caption 5253) * *

EXCEPTIONS ON BEHALF OF THE SHERWIN-WILLIAMS COMPANY TO THE TRIAL EXAMINER'S RECOMMENDED DECISION.

(Received May 21, 1948.)

Comes now the respondent, The Sherwin-Williams Company, by its attorneys, pursuant to Rule XXIII of the Commission's Rules of Practice, and submits its exceptions to the Trial Examiner's Recommended Decision herein and to the Trial Examiner's failure to include therein the findings and conclusions requested by it under Rule XXI of said Rules of Practice.

A. In so far as Section II, entitled "Pleadings and Issues", of the Trial Examiner's Recommended Decision is concerned Sherwin takes the following exceptions:

1. Sherwin excepts to Item 5(d) on page 4 of the Recommended Decision (Paragraph 9(B), Count I of the Amended Complaint).

2. Sherwin excepts to Item 5(e) on page 4 of the Recommended Decision (Paragraph 9(C), Count I of the Amended Complaint).

3. Sherwin excepts to the third full paragraph on page 5 of Section II of the Recommended Decision as not constituting a complete and accurate summary of its Answer (Sherwin's Answer to Amended Complaint).

994 4. Sherwin excepts to the Trial Examiner's failure to include in Section II of the Recommended Decision a summary of its special defenses (Sherwin's Answer to Amended Complaint, pages 16-19).

5. Sherwin excepts to that portion of Section II of the Trial Examiner's Recommended Decision entitled "The Issues" in its entirety (compare Trial Examiner's statement with Amended Complaint and Sherwin's Answer thereto; also see Federal Trade Commission Act, Sec. 5; Clayton Act, Sec. 2(a) and Tr. 4209-4252).

6. Sherwin excepts to the Trial Examiner's failure to include in that portion of Section II of the Recommended Decision entitled "The Issues" a statement relative to the issues raised by Sherwin in its special defenses. (Com-

pare Trial Examiner's statement with Sherwin's Answer to Amended Complaint, pages 16-19).

7. Sherwin excepts to the first three full sentences appearing at the top of page 7 of the Recommended Decision for the reasons that important portions of the evidence have not been set forth in the Recommended Decision, much reliable and substantial evidence has been ignored and no reasonable regard has been had for the greater weight of the evidence herein.

B. In so far as Section III, entitled "Report Upon the Evidence", and Section IV, entitled "Recommended Findings and Conclusions", and concerned, Sherwin takes the following exceptions:

8. Sherwin excepts to the Trial Examiner's failure to state in the second paragraph of that portion of Section III of the Recommended Decision, which is entitled "Count One", that Sherwin does not manufacture or sell basic lead sulphate or any other lead pigments except red lead, litharge and basic lead carbonate and also excepts to the Examiner's failure to include a statement to such effect in Paragraph 1-F of Section IV of the Recommended Decision (Tr. 1313).

9. Sherwin excepts to the Trial Examiner's failure to state in that portion of Section III of the Recommended Decision, which is entitled "Count One", that for over twenty years Sherwin has not manufactured red lead or litharge for use by the battery manufacturing industry and is not a competitor in that field which has been an increasingly important one since the advent of the automobile and the internal combustion engine (Tr. 1640, 1648, 4070, 4093).

995 10. Sherwin excepts to the last sentence in the second paragraph of that portion of Section III of the Recommended Decision entitled "Count One" for the reason that the record does not establish the fact that it purchases lead pigments from others for the purpose stated, and also excepts to the last sentence of Paragraph 1-F of Section IV of the Recommended Decision for the same reason.

11. Sherwin excepts to the Trial Examiner's failure to report in that portion of Section III of the Recommended Decision entitled "Count One" as follows: "Sherwin's only lead pigment plant is located in Chicago, Illinois. In 1943, and for many years prior thereto, Sherwin shipped about 5% of the white lead in oil shipped by the industry.

For many years its shipments of dry white lead and litharge to customers represented less than 1%, respectively, of the total industry shipments, while its shipments of dry red lead and red lead in oil were approximately nil. Sherwin is not an important factor in the sale of lead pigments, particularly red lead and litharge, and it does not sell dry read lead or litharge on the Pacific Coast. Its sales of litharge are confined almost entirely to points in the Chicago area with a few isolated shipments to Kentucky and Ohio. The record contains no evidence that carload shipments of red lead and litharge are made by Sherwin to purchasers located in differential territories." Sherwin also excepts to the Trial Examiner's failure to include in Paragraph 1-F of Section IV of the Recommended Decision a finding to the foregoing effect (Tr. 1313-1332, 1648, 2065-2066, 3746).

12. Sherwin excepts to the sentence which immediately precedes the second tabulation in Paragraph 1-e of Section III, and also in Paragraph 1-J of Section IV, of the Recommended Decision, for the reason that such sentences do not indicate that the term "white lead, dry and in oil," includes only basic carbonate (CX 666, CX 669), and also excepts to the Examiner's failure (1) to report that basic lead sulphate is used to a substantial extent by Eagle, and to some extent by National, as an alternative product to basic carbonate in sales to paint manufacturers, and (2) to report, in so far as the record discloses, the extent of the production and sale of basic sulphate by Eagle and National (Tr. 1560-1561, 3344-3352, 3354-3357, 4129).

13. Sherwin excepts to the second tabulation in Paragraph 1-e of Section III, and also in Paragraph 1-J of Section IV, of the Recommended Decision (CX 669, Tr. 1560-1561, 2193, 3344-3352, 3354-3357, 4129). 996

14. Sherwin excepts to the sentence immediately following the second tabulation in Paragraph 1-e of Section III, and also in Paragraph 1-J of Section IV, of the Recommended Decision for the reason that there is not included therein an additional statement relative to Eagle's and National's production and sale of basic lead sulphate as an alternative product for basic carbonate (Tr. 1560-1561, 3344-3352, 3354-3357, 4129).

15. Sherwin excepts to the first two sentences in the last subparagraph in Paragraph 1-e of Section III, and in the last subparagraph of Paragraph 1-J of Section IV, of the Recommended Decision, except the statement to the effect

that National became a predominant factor in the industry. (The Citations urged in connection with exception 17 are relied upon in support of the foregoing exception).

16. Sherwin excepts to the last sentence in Paragraph 2-a of Section III, and in Paragraph 2-A of Section IV, of the Recommended Decision (Tr. 1327-1328, 2065-2066).

17. Sherwin excepts to Paragraph 4-a of Section III, and to Paragraph 4-a of Section IV, of the Recommended Findings in that the first sentence thereof erroneously indicates, by use of the term "the other respondents", that Sherwin followed the salient features of the zone pricing system therein described and in that the description of the system and the citations set forth on pages 14, 15 and 16 (which description and maps are incorporated in Paragraph 4-A of Section IV by reference) do not accurately reflect Sherwin's pricing and freight practices as established by the record. Sherwin also excepts to the Examiner's failure to include in Section III an accurate statement of its pricing practices and to include in Section IV a recommended finding based thereon (Tr. 836, 887-891, 894, 1312-1319, 1324-1325, 1327-1328, 1331-1332, 1640, 1648, 206 2066, 3697, 3701-3702, 3704, 3707-3709, 3746-3747, 3754-3759, 3768-3769, 3771-3804, 3836-3856, 4075, 4093, 4104-4113; CX 506 E, 594, AB, CX 613, CX 626-631-F, CX 650, CX 659 C-P, CX 662, A-226, CX 781 A-C, CX 782 CDF, CX 784 BDF, CX 787-789, CX 793, CX 794, A-Z 8, CX 823 A-G; RX 158, RX 198 A-H, RX 205 A-X, RX 209; Answers of Sherwin, Glidden and International to 997 Amended Complaint: For an accurate summary of Sherwin's pricing and freight practices see Proposed Findings submitted by Sherwin and especially Paragraphs Seven, Eight and Nine under Count I).

18. Sherwin excepts to the last subparagraph of Paragraph 4-a of Section III, and to the last sentence in the last subparagraph of Paragraph 4-A of Section IV, of the Recommended Decision for the reason that the Examiner fails to state which respondents have plants located in each of the various cities therein named and which pigments are produced in each of such plants and also fails to affirmatively state that Sherwin's only lead pigment plant is located in Chicago, Illinois (Tr. 1313 and Examiner's citations).

19. Sherwin excepts to the first two sentences of the second subparagraph of Paragraph 4-b of Section III, and the first two sentences of Paragraph 4-B of Section IV, of

the Recommended decision (RX 6 A-1, 7 A-C, 8 AB, 9 A-F, 12, 13 A-D, 50 KLO, 77 A-F, 81 AB, 83, A-Z3, 85 A-Z13, 92 AB, 127 A-G, 134 A-E, 135 AB, 136 AB, 137 AB, 138 AB, 159 D, 198 A-H; CX 501 A-D, 502 AC, 504 AB, 505 AB, 507 A-M, 508 C, 518 AB, 594 AB, 654, 652 A-K, 659 C-P, 662 CDGHST, 705 A-D, 706 A-D, 776, 799, 800 A-C, 801 AB, 802 AB, 803, 805 A-C, 809; Tr. 1313, 1316-1318, 2153-2154, 2170, 2175, 2228-2230, 2238-2245, 2308, 2397-2398, 3697, 3699-3700, 3713-3716, 3759-3760, 3767-3768, 3838-3840, 3846, 3850; in addition, the citations urged in connection with exception 17 are also relied upon in support of the foregoing exception).

20. Sherwin excepts to Paragraph 4-c of Section III, and of Paragraph 4-C of Section IV, of the Recommended Decision (CX 504 B, CX 505 A, CX 507 A-M, CX 517 A, CX 518 AB, CX 523, CX 803 and Examiner's citation).

21. Sherwin excepts to Paragraph 4-d of Section III, and to Paragraph 4-D of Section IV, of the Recommended Decision. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17 and 19).

22. Sherwin excepts to the second sentence of Paragraph 5 of Section III of the Recommended Decision, for the reason that the record establishes substantial variance between the practices employed by it individually as compared to practices employed by the other respondents herein. (Citations relied upon for the foregoing ex-
998 ception are the same as those urged in connection with exceptions 17 and 19).

23. In so far as Paragraphs 5-a-1, 5-a-2, 5-a-3, 5-a-4, 5-a-5 and 5-a-6 of Section III, and Paragraphs 5-A-1, 5-A-2, 5-A-3, and 5-A-4 of Section IV, of the Recommended Decision are concerned, Sherwin, for brevity and in order to avoid duplication, adopts and incorporates herein by reference the exceptions taken to said paragraphs by respondent National and relies upon the same citations, together with the citations appearing herein in connection with exception 19, as support for such exceptions.

24. Sherwin excepts to Paragraphs 5-a-1, 5-a-2, 5-a-3, 5-a-4, 5-a-5 and 5-a-6 of Section III, and to Paragraphs 5-A-1, 5-A-2, 5-A-3 and 5-A-4 of Section IV, of the Recommended Decision in so far as such paragraphs may infer that Sherwin actually agreed to employ the provisions of Schedule "A", except if and when said Schedule "A" became an effective part of the N. R. A. Code for the In-

dustry (which it did not), or that Sherwin actually employed the provisions of said Schedule "A" as a result of any agreement to do so or otherwise. (Tr. 1327, 2066, CX 823 CD; in addition, the citation urged in connection with exceptions 17 and 26 are relied upon in support of the foregoing exception).

25. Sherwin excepts to Paragraphs 5-b-6 of Section III, and to Paragraph 5-B-6 of Section IV, of the Recommended Decision. (Tr. 869-870, 3696-3697; 3700-3701; RX 229-305; CX 506 E, CX 539, CX 576 A-E, CX 594 AB, CX 652 A-L, CX 662 CDGHKLST, CX 662 Z5-Z26, CX 684-685, CX 776 A-L; in addition, the citations urged in connection with exception 17 are relied upon in support of the foregoing exception).

26. Sherwin excepts to Paragraph 5-c-1 of Section III, and to Paragraph 5-C-1 of Section IV, of the Recommended Decision for the reason that neither the record references therein cited nor the record as a whole supports the statements therein made. (Tr. 1313-1314, 1324-1328, 1331-1332, 1648, 1650, 2065-2066, 3746, 3874-3882, 4070, 4093; CX 823 A-G, CX 782 C; RX 209; in addition, the citations urged in connection with exceptions 17 and 19 are relied upon in support of the foregoing exception).

27. Sherwin excepts to the first sentence of Paragraph
5-c-2 of Section III, and of Paragraph 5-C-2 of Sec-
999 tion IV, of the Recommended Decision in so far as
such sentences imply an unlawful purpose to the
avoidance of reference to particular prices in Schedule
"A" as such inference is entirely unwarranted by the
record (Tr. 2218-2234, Tr. 2402-2403; RX 6-I, 8-AB, 9 A-F,
78-BC; CX 504-B, 507 A-M, 517-A, 523).

28. Sherwin excepts to the third, fourth and fifth sentences of Paragraph 5-c-2 of Section III, and of Paragraph 5-C-2, of the Recommended Decision as not being supported either by the record citations therein given or by the record as a whole (Tr. 1326-1328, Tr. 2065-2066 and citations by Examiner).

29. Sherwin excepts to the entire second subparagraph of Paragraph 5-C-2 of Section III, and of Paragraph 5-C-2 of Section IV, of the Recommended Decision for the reason that the statements made in such subparagraph are not sustained by the record citations therein given or by the record as a whole. (Citations relied upon for the foregoing exception are the same as those urged in connection with exceptions 17, 19 and 26).

30. Sherwin excepts to the fourth sentence of Paragraph 5-c-4 of Section III, and of Paragraph 5-C-4 of Section IV, of the Recommended Decision for the reason that the statements contained therein are not supported by the citations given or by the record as a whole. (Citations relied upon for the foregoing exception are the same as those urged in connection with exceptions 17, 19 and 26).

31. Sherwin excepts to the second sentence of Paragraph 5-c-5 of Section III, and of Paragraph 5-C-5 of Section IV, of the Recommended Decision for the reason that such sentence erroneously states that the table immediately following refers (1) to white lead in oil and other keg products, and (2) involves 100 pounds or larger containers. (The citations relied upon in support of the foregoing exception are those given by the Examiner in the table immediately following this sentence).

32. Sherwin excepts to the completeness and accuracy of the table set out in Paragraph 5-c-5 of Section III, and incorporated by reference in Paragraph 5-C-5 of Section IV, of the Recommended Decision. (Tabulation pages 31 and 32 of Recommended Decision and exhibits there cited; Tr. 2095-2909; CX595, CX599, CX 613 A-C, CX 506 DE, CX 712 A, CX 596 AB, CX 597, CX 598, CX 685, 1000 CX 629 A-C; in addition, the citations urged in connection with exception 17 are relied upon in support of the foregoing exception).

33. Sherwin excepts to that portion of Paragraph 5-c5 of Section III and of Paragraph 5-C5 of Section IV, of the Recommended Decision which erroneously indicates that certain shipping points were used by Sherwin during the entire period reflected in the tabulation also appearing in such paragraphs. (The citations relied upon are those given by the Examiner in the tabulation).

34. Sherwin excepts to the second sentence of the last subparagraph of 5-c5 of the Recommended Decision. (The citations urged in connection with exception 39 are relied upon in support of the foregoing exception).

35. Sherwin excepts to the Examiner's failure to include in Paragraph 5-C5 a statement to the effect that freight costs from Sherwin's shipping points to purchasers' destination would have to be ascertained and added to the quotations appearing in the table set out in full in Paragraph 5-c5, and incorporated in Paragraph 5-C5 by reference, in order to make accurate comparison as to the

purchasers' relative costs in buying from the various respondents. (Citations relied upon for the foregoing exception are the same as those urged in connection with exceptions 17 and 32).

36. Sherwin excepts to the second sentence in Paragraph 5-c6 of Section III, and in Paragraph 5-C6 of Section IV, of the Recommended Decision, and to the correctness of the tabulations appearing in such paragraphs for the reason that the statements made therein and the figures in such tabulations are not supported by the Examiner's citations.

37. Sherwin excepts to the statement in the first sentence in Paragraph 5-c7 of Section III, and in Paragraph 5-C7 of Section IV, of the Recommended Decision, to the effect that its customers have substantially the same delivered cost as do customers of Glidden and International. (Tr. 1249, 2639-2640, 3516; Answers of International and Glidden to Amended Complaint; in addition, the citations urged in connection with exception 17 are relied upon in support of the foregoing exception).

1001 38. Sherwin excepts to the statement in Paragraph 5-c7 of Section III of the Recommended Decision setting forth the number of sales made by it at varying amounts under National's lowest price, and also to the correctness of the variances stated (CX 794-D, I, Z- Z-1, and Z4, CX 613, CX 626-631 F, CX 650, CX 662 Z5-Z26; RX 158).

39. Sherwin excepts to the statement in the last sentence in Paragraph 5-c7 of Section III, and in Paragraph 5-C7 of Section IV, of the Recommended Decision to the effect that the deviations by Sherwin are subject to the subtraction of a small freight factor which the customer sometimes paid from nearby shipping points, as such statement does not fairly reflect the status of the record and is not supported by the greater weight of the reliable, probative and substantial evidence in the record. (CX 662-Z21, CX 793, CX 794-D, I, J1, Z1, Z2, Z4, Z5, Z6 and Z7, CX 833 A-Z100; RX 198 A-H, RX 205 A-X; Tr. 836, 887-894, 1249, 2639-2640, 3516, 3746, 4104-4113; in addition, the citation urged in connection with exception 17 are relied upon in support of the foregoing exception).

40. Sherwin excepts to the last sentence of Paragraph 5-c8 of Section III, and of Paragraph 5-C8 of Section IV, of the Recommended Decision, as not being supported by

the record (CX 794, D-I, Y, Z; RX 198 A-H; Tr. 3801; in addition, the citations urged in connection with exception 17 are relied upon in support of the foregoing exception.)

41. Sherwin excepts to Paragraph 5-c9 of Section III, and to Paragraph 5-C9 of Section IV, of the Recommended Decision, as not being supported by the citations given or by the record as a whole. (The citations relied upon for the foregoing exception are the same as those urged in connection with exception 17; also Tr. 1337-1480).

42. Sherwin excepts to the juxtaposition existing between the third sentence and the first and second sentences of Paragraph 5-c-11 of Section III, and of Paragraph 5-C-11 of Section IV, of the Recommended Decision for the reason that such juxtaposition gives rise to an improper inference that Sherwin's instructions in the third sentence were given as a result of the events described in the first two sentences and such inference is not warranted from the exhibits cited or from the record.

1002 43. In the event the words "instructions are given for following large dealers' prices", in the third sentence of Paragraph 5-c11 of Section III, and of Paragraph 5-C11 of Section IV, of the Recommended Decision, are to be interpreted as meaning that Sherwin's managers and salesmen are instructed to follow its large competitors' (such as National and Eagle) prices on government, state and municipal bids, then Sherwin excepts to such interpretation as not being warranted from the exhibits cited or from the record as a whole (CX 662 A and exhibits cited by Examiner.)

44. Sherwin excepts to the third sentence of Paragraph 5-c11 of Section III, and of Paragraph 5-C11 of Section IV, of the Recommended Decision, in so far as such sentence indicates that such instructions are now in effect or were in effect over a substantial period of time extending at least from November 6, 1936, to May 1942.

45. Sherwin excepts to the fourth, fifth, sixth and seventh sentences of Paragraph 5-c-11 of Section III, and of Paragraph 5-C-11 of Section IV, for the reason that such sentences do not correctly state all the facts with respect to the transactions therein referred to and do not correctly reflect the number of instances in which the respondents bid varying prices in competitive bids or the extent of such variance (Citations in support of the foregoing exceptions are the same as those relied upon by the Examiner).

46. Sherwin excepts to all of Paragraph 5-d of Section III, and of Paragraph 5-D of Section IV, of the Recommended Decision, except that portion of the last sentence of such paragraph beginning with the words "and it was shown" in the seventh line from the end thereof, for the reason that the statements contained therein are not supported by the record (CX 662-W, Z3, Z5, O, CX 823-G).

47. Sherwin excepts to the sixth sentence of Paragraph 5-e of Section III of the Recommended Decision for the reason that the citation to the record in support thereof reveals that the testimony cited was directly to the contrary and the exhibits cited have no connection whatever with the subject matter.

48. Sherwin excepts to the last three sentences of Paragraph 5-e of Section III for the reason that neither the citations given by the Examiner nor the record as a
1003 whole establish that its formula for pricing oxides in
carload quantities was the same as that of any other respondent or that its less than carload prices for oxides was based on a formula derived from its carload price for such products (CX 809, CX 823 A-F).

49. Sherwin excepts to Paragraph 5-f of Section III, and of Paragraph 5-F of Section IV, of the Recommended Decision for the reason that neither the exhibits cited nor the record as a whole establishes the fact nor justifies the inference that Sherwin sells 97% and 98% red lead at the added differentials stated because of any provisions of Schedule "A" of the N. R. A. Code for the industry or pursuant to any agreement or understanding to do so. (CX 782-C, CX 823-EF; Tr. 3870).

50. Sherwin excepts to the first sentence of Paragraph 6-a of Section III, and of Paragraph 6-A of Section IV, of the Recommended Decision for the reason that the extent of control stated for white lead does not include basic sulphate of lead which is used interchangeably with basic carbonate to a substantial extent by Eagle and to some extent by National. (Citations urged in support of the foregoing exceptions are the same as those relied upon in connection with exceptions 12, 13 and 14).

51. Sherwin excepts to the second and third sentences of Paragraph 6-b of Section III of the Recommended Decision for the reason that the statements contained therein do not accurately or correctly describe Sherwin's pricing methods and excepts to the Examiner's failure to set out in such paragraph and in Paragraph 6-B of Section IV a

correct statement of Sherwin's practices. (Citations urged in support of the foregoing exception are the same as those relied upon in exceptions 17 and 26).

52. Sherwin excepts to the second and third sentences in Paragraph 6-d of Section III, and in Paragraph 6-D of Section IV, of the Recommended Decision, for the reason that the statements therein contained are unsupported by the record in so far as Sherwin is concerned. (Citations urged in support of the foregoing exception are the same as those relied upon in exceptions 17, 26, 36, 37, 38, 39 and 40).

53. Sherwin excepts to the Examiner's failure to include in Paragraph 6-D of Section IV of the Recom-
1004 mended Decision a finding based upon the statements contained in the last six sentences of the first subparagraph of Paragraph 6-d of Section III.

54. Sherwin excepts to Paragraph 7-a3 of Section III, and to Paragraph 7-A3 of Section IV, of the Recommended Decision for the reason that the statements contained therein are contrary to and not supported by the record. (Citations urged in support of the foregoing exception are the same as those relied upon in exceptions 17, 19, 25, 26, 37, 38, 39, 40 and 41.)

55. Sherwin excepts to all of Paragraph 7-a4 of Section III, and of Paragraph 7-A4 of Section IV, of the Recommended Decision for the reason that the statements contained therein are contrary to the reliable, probative and substantial evidence contained in the record. (Citations urged in support of the foregoing exception are the same as those relied upon in exceptions 17, 19, 23, 24, and 26.)

56. Sherwin excepts to Paragraph 7-a6 of Section III, and of Paragraph 7-A6 of Section IV, of the Recommended Decision for the reason that the statements contained therein are contrary to the reliable, probative and substantial evidence in the record. (Citations urged in support of exceptions 17, 26, 27, 28, 29, 31, 32, 33, 34, 36 and 46, whether set forth verbatim or by reference, are relied upon in support of the foregoing exception.)

57. Sherwin excepts to Paragraph 7-a8 of Section III, and to Paragraph 7-A7 of Section IV, of the Recommended Decision for the reason that the conclusion therein stated is not warranted upon consideration of the weight of the reliable, probative and substantial evidence in the record. (Citations urged in support of exceptions 43 and 45,

whether set forth verbatim or incorporated by reference, are relied upon in support of the foregoing exception.)

58. Sherwin excepts to Paragraph 7-a9 of Section III, and of Paragraph 7-A8 of Section IV, of the Recommended Decision for the reason that the conclusion therein stated is not warranted upon consideration of the weight of the reliable, probative and substantial evidence in the record. (Citations urged in support of exceptions 17 and 25 are relied upon in support of the foregoing exception.)

1005 Sherwin excepts to the second sentence of the second sub-paragraph of Paragraph 7-b1 of Section III of the Recommended Decision in so far as such sentence states that the evidence discloses that Sherwin had a mutual understanding with any of the other respondents concerning the plan described in Paragraph 7-b1 or accepted the plan and its objectives and agreed to follow it for the reason that neither the record nor the inferences reasonably to be drawn therefrom support such statements. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 19, 26 and 27).

60. Sherwin excepts to that portion of Paragraph 7-b2 of Section III, and of Paragraph 7-B2 of Section IV, of the Recommended Decision, which state that its prices, though substantially lower than those of National and Eagle, were very close to the prices of Glidden and International for the reason that such statements are not supported by the record. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 19, 26, 38, 39 and 40).

61. Sherwin excepts to the next to the last sentence in Paragraph 7-b2 in Section III, in Paragraph 7-B2 of Section IV, of the Recommended Decision, in so far as such sentences state that there was an agreement between either Anaconda or International to conform to Glidden's and Sherwin's prices with a minimum of deviation, for the reason that the statements contained therein are not supported by the reliable, probative and substantial evidence contained in the record. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 19, 26, 38, 39 and 40).

62. Sherwin excepts to the third sentence in Paragraph 7-b3 of Section III, and in Paragraph 7-B3 of Section IV, of the Recommended Decision in so far as such sentences

state that the practices therein attributed to Glidden were identical to those used by Sherwin for the reason that the statements contained therein are not supported by the reliable, probative and substantial evidence contained in the record. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 19, 26, 37, 38, 39 and 40).

1006 63. Sherwin excepts to Paragraph 7-b4 of Section III, and to Paragraph 7-B4, of Section IV, of the Recommended Decision, except that portion of the second sentences thereof which states that Sherwin did not use the consignment plan for controlling retail prices, for the reason that the statements contained therein are not supported by the reliable, probative and substantial evidence contained in the record. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 19, 25, 26, 38, 39, 40 and 46.)

64. Sherwin excepts to the first two sentences and the last sentence of Paragraph 7-c2 of Section III, and of Paragraph 7-C2 of Section IV, of the Recommended Decision, for the reason that the statements contained therein are not supported by the reliable, probative and substantial evidence contained in the record. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 19, 25, 26, 38, 39, 40 and 46.)

65. Sherwin excepts to Paragraphs 7-c4 and 7-c5 of Section III, and to Paragraph 7-C4 and 7-C5 of Section IV, of the Recommended Decision for the reason that the statements contained therein are not supported by the reliable, probative and substantial evidence contained in the record. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 19, 25, 26, 38, 39, 40 and 46).

66. Sherwin excepts to Paragraphs 7-d1, 7-d2, 7-d4 and 7-d5 of Section III, and to Paragraphs 7-D1, 7-D2, 7-D4 and 7-D5 of Section IV, of the Recommended Decision for the reason that the conclusions stated in said paragraphs are either not supported by the record at all or are directly contrary to the weight of the reliable, probative and substantial evidence appearing in the record and are contrary to law. (Citations relied upon in connection with the foregoing exception are the same as those specifically relied upon in support of each and every specific exception herein

stated; RX's. 6 through 8, inclusive; see also: National Industrial Recovery Act, Section 5, 48 Stat. 195, 198; *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. 2d 321, 329; *Aetna Portland Cement Co.* v. *Federal Trade Commission*, 157 F. 2d 533, 549; *Sugar Institute* v. *United States*, 297 U. S. 553; *Cement Mfrs. Assn.* v. *United States*, 268 U. S. 488; *Maple Flooring Assn.* v. *United States*,
1007 268 U. S. 563; *U. S.* v. *Socony-Vacuum Oil Co.*, 310
U. S. 198-199; *U. S.* v. *U. S. Steel Corporation*, 251 U. S. 417; *U. S.* v. *International Harvester Co.*, 274 U. S. 693; *U. S.* v. *Standard Oil of N. J.*, 47 F. 2d 288; *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344; *U. S.* v. *U. S. Steel Corporation*, 233 Fed. 55, 251 U. S. 417; *U. S.* v. *Aluminum Co. of America*, 148 F. 2d 416, 424).

67. Sherwin excepts to the third paragraph of Count Two (page 46) of Section III, and the third subparagraph of Paragraph 8-A (page 87) of Section IV, of the Recommended Decision in so far as such paragraphs incorporate, by reference, the facts relating to zone pricing, price differences, differentials and other features bearing on the issues under Count Two, which are set out in Section III at pages 7-38, inclusive, to the same extent as if the specific exceptions heretofore taken were again restated verbatim. (The citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 8-53, inclusive.)

68. Sherwin excepts to Paragraph 8-a1 of Section III, and to Paragraph 8-A1 of Section IV, of the Recommended Decision for the reason that the statements contained therein, in so far as Sherwin is concerned, do not accurately portray its basic freight policy as disclosed in the record, and excepts to the Examiner's failure to correctly describe its pricing and freight policies. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 19, 25, 26, 38, 39, 40 and 46.)

69. Sherwin excepts to Paragraph 8-a2 of Section III, and to Paragraph 8-A2 of Section IV, of the Recommended Decision for the reason that the freight tabulations set forth in Paragraph 8-a2, and incorporated in Paragraph 8-A2 by reference, are neither applicable to nor properly descriptive of any of Sherwin's shipping or freight practices. (Citations urged in support of this exception are the same as those relied upon in connection with exception 17; Tr. 3777).

70. Sherwin excepts to Paragraph 8-a3 of Section III, and to Paragraph 8-A3 of Section IV, of the Recommended Decision for the reason that the statements therein contained do not accurately reflect Sherwin's shipping or freight practices as disclosed in the record and neither the citations to the transcript nor the citations to various Commission's Exhibits reveal in any way Sherwin's 1008 freight or shipping policies. (Citations urged in support of the foregoing exception are the same as those relied upon in exception 17; also, Tr. 4070, 1338-1480, 1672-2018).

71. Sherwin excepts to Paragraph 9 of Count Two of Section III wherein the Examiner has incorporated the evidence set out in Count One of Section III of the Recommended Decision relative to differences in trade, regional, quantity, and quality discounts and charges through differentials between agents and dealers, between containers of different sizes, between 97% or 98% red lead over lower grades, and between carloads, 5-ton lots, and smaller quantities, into Paragraph 9, Count Two of Section III, by reference. Sherwin, therefore, by reference, reaffirms and incorporates hereat, each and every exception it has heretofore taken to specific statements by the Trial Examiner relative to the evidence bearing upon the aforementioned subjects and relies upon the same citations which it has heretofore identified with each such specific exception.

72. Sherwin excepts to Paragraph 9-b of Section III, and to Paragraph 9-B, of the Recommended Decision in so far as the statements contained therein imply that such container differentials as were utilized by Sherwin were utilized as a result of any agreement or understanding with any other respondent herein, or with any one else (RX 210, CX 662-A, CX 662-W, Y, Z1, Z3, Z5, CX 800 A-C, Tr. 3882-3886).

73. Sherwin excepts to the first sentence in Paragraph 9-c of Section III, and in Paragraph 9-C of Section IV, of the Recommended Decision in so far as such sentences imply that such quality differentials on various grades of red lead as were utilized by Sherwin were utilized as a result of any agreement or understanding with any other respondent herein, or with any one else (RX 209, CX 782-C, CX 823-EF, Tr. 3870-3882).

74. Sherwin excepts to Paragraph 9-d of Section III, and to Paragraph 9-D of Section IV, of the Recommended

Decision for the reason that the statements contained therein do not correctly and accurately reflect Sherwin's pricing policy for carloads and smaller quantities of oxides, and neither the tabulation therein set forth nor the exhibits therein referred to by the Examiner are applicable in any way to Sherwin's pricing or freight policies for 1009 oxides. (Citations urged in support of the foregoing exception are the same as those relied upon in Exceptions 17, 21, 26, 27, and 28).

75. Sherwin excepts to the first sentence of Paragraph 9-e of Section III, and of Paragraph 9-E of Section IV, of the Recommended Decision in so far as such sentences might imply that such differentials as were utilized by Sherwin in connection with carload shipments are basic lead carbonate, were utilized as the result of any agreement or understanding with any other respondent herein or any one else, for the reason that the record does not disclose that Sherwin ever sold basic lead carbonate in carload shipments of 20 tons or more at one-quarter cent per pound less than its card prices for such products prior to 1942 (CX 823-G).

76. Sherwin excepts to Paragraph 9-f of Section III, and to Paragraph 9-F of Section IV, of the Recommended Decision, for the reason that the statements contained therein are not supported by the record as a whole in so far as Sherwin's sales to dealers purchasing for resale are concerned. (Citations urged in support of the foregoing exception are the same as those relied upon in exceptions 17, 21, 27, and 28; and also CX 662 I through R, U, V, Z9 through Z25; Tr. 1338-1480, 1672-2018, 4070.)

77. Sherwin excepts to Paragraph 10-a of Section III, and to Paragraph 10A of Section IV, of the Recommended Decision for the reason that the statements therein made are not supported by the record in so far as Sherwin is concerned and the exhibits cited by the Examiner have no relation whatever to Sherwin or its pricing practices. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 21, 26, and 27; Tr. 1338-1480, 1682-2018, 4070.)

78. Sherwin excepts to Paragraph 10-b of Section III, and to Paragraph 10-B of Section IV, of the Recommended Decision in so far as the Examiner fails to affirmatively state in such paragraphs that for over twenty years Sherwin has not manufactured or sold oxides for use by the battery manufacturing industry (Tr. 4070).

79. Sherwin excepts to Paragraphs 10-c and 10-d of Section III, and to Paragraphs 10-C and 10-D of Section IV, of the Recommended Decision for the reason that the Examiner fails to affirmatively state therein that the record does not disclose sales of dry white lead or dry
1010 red lead, the products under discussion in such paragraphs, by Sherwin to paint manufacturers generally or to the specific manufacturers whose testimony is outlined in such paragraphs (Tr. 1338-1480).

80. Sherwin excepts to Paragraph 10-c of Section III, and to Paragraph 10-C of Section IV, of the Recommended Decision for the reason that such paragraphs contain many statements which are either contrary to the evidence or are incomplete statements of the evidence. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exception 17; also Tr. 1338-1480).

81. Sherwin excepts to Paragraph 10-d of Section III, and to Paragraph 10-D of Section IV, of the Recommended Decision, for the reason that the statements contained therein do not correctly and accurately reflect price differentials in effect in the area discussed in such paragraphs. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exception 17; also Tr. 1338-1480).

82. Sherwin excepts to Paragraph 10-f of Section III, and to Paragraph 10-F of Section IV, of the Recommended Decision for the reason that the statements contained therein are unsupported by the record in so far as Sherwin is concerned in that it has not employed zone prices and has not employed quantity, quality and container differentials as a result of any understanding or agreement with any of the other respondents herein. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 19, 26, 38, 39, and 40).

83. Sherwin excepts to the first sentence of Paragraph 10-g of Section III, and of Paragraph 10-G of Section IV, of the Recommended Decision in so far as such sentences indicate that Sherwin's pricing practices involve a delivered price which is the same to all customers in a zone, regardless of distance, as not being supported by the record. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 19, 26, 38, 39 and 40.)

84. Sherwin excepts to the last sentence of Paragraph 10-g of Section III, and of Paragraph 10-G of Section 1011 IV, of the Recommended Decision as not being a correct statement of the law. (Clayton Act, as amended, Sec. 2(a); Senate Committee Report 1502, dated February 3, 1936; *Corn Products* v. *F. T. C.*, 324 U. S. 726; *F. T. C.* v. *Staley*, 324 U. S. 746).

85. Sherwin excepts to Paragraph 10-h of Section III, and to Paragraph 10-H of Section IV, of the Recommended Decision, for the reason that in so far as Sherwin is concerned the record does not support a finding that such sales as it has made to customers differently located at different prices were discriminatory or had any competitive effect whatever. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exception 17; also Tr. 1338-1480, 1672-2018, 4070.)

86. Sherwin excepts to Paragraph 10-j of Section III, and to Paragraph 10-J of Section IV, of the Recommended Decision for the reason that the statements therein contained do not accurately reflect Sherwin's shipping or freight practices as disclosed in the record, and for the further reason that the record does not disclose that such quantity or other differentials as may have been used by Sherwin in the sale of oxides were discriminatory or had any adverse competitive effect whatever between its various customers. (Citations urged in support of the foregoing exception are the same as those relied upon in exceptions 17, 21, 26, 27, and 28; also Tr. 1338-1480, 1672-2018).

87. Sherwin excepts to Paragraph 10-k of Section III, and to Paragraph 10-K of Section IV, of the Recommended Decision in so far as such paragraphs indicate that Sherwin sold basic lead carbonate at a one-quarter cent differential between carload and less than carload lots prior to 1942 (CX 823-G).

88. Sherwin excepts to the first sentence of Paragraph 10-l of Section III, and of Paragraph 10-L of Section IV, of the Recommended Decision for the reason that the statements contained therein are not supported by the record in so far as Sherwin's sales to dealers purchasing for resale are concerned. (Citations urged in support of the foregoing exception are the same as those relied upon in exceptions 17, 21, 27 and 28; also CX 662 I through R, U, V, Z9 through Z25, Tr. 1338-1480, 1672-2018, 4070).

1012 89. Sherwin excepts to the first and last sentences of Paragraph 10-m of Section III of the Recommended

Decision in so far as the Examiner characterizes the practices described in Paragraphs 10-h and 10-j as involving discriminations for the reasons set out in connection with exceptions 85 and 86. (Citations urged in support of the foregoing exception are the same as those relied upon in exceptions 17, 21, 26, 27 and 28; also Tr. 1338-1480, 1672-2018, and 4070.)

90. Sherwin excepts to the third sentence of Paragraph 10-m of Section III of the Recommended Decision in so far as it states that Sherwin has cooperatively employed discriminatory practices or other methods which produce prices which are identical with those of each of the other respondents, for the reason that such statements are not supported by the record as a whole.

91. Sherwin excepts to Paragraphs 11-a and 11-b of Section III, and to Paragraphs 11-A and 11-B of Section IV of the Recommended Decision for the reason that the statements contained therein are not supported by the record and constitute an incorrect statement of the law. (Clayton Act, as amended, Section 2(a); Senate Committee Report 1502, dated February 3, 1946; *F. T. C.* vs. *Staley*, 324 U. S. 746, together with all citations stated or referred to and relied upon in exceptions 67 through 89).

92. Sherwin excepts to that portion of the seventh sentence in the third subparagraph of Paragraph 11-c of Section III of the Recommended Decision which reads "in the absence of uneconomic or unlawful factors", for the reason that such statement is unwarranted under the law. (Clayton Act, as amended, Section 2(a); Senate Committee Report 1502, dated February 3, 1946; *F. T. C.* vs. *Staley*, 324 U. S. 746, together with all citations stated or referred to and relied upon in exceptions 67 through 89).

93. Sherwin adopts as its own each and every exception taken by each other respondent to Sections II, III and IV of the Recommended Decision and incorporates herein, by reference, each such exception together with all citations in support thereof; provided, however, that this exception shall not control in the event there should be a conflict between any specific exception taken by Sherwin, as set out in exceptions 1 through 92, inclusive, and any exception taken by another respondent.

1013 94. Sherwin excepts to the Examiner's failure to report and to recommend a finding relative to its special defenses as follows:

"Sherwin has not voluntarily or reciprocally surrendered or cancelled any inherent advantage within any territory in consideration of a similar surrender and cancellation of a similar advantage by any other respondent. The various respondents have different delivery costs in shipping lead pigments to their respective customers which is attributable primarily to the location of the plants of the various respondents. In approximately 80% of the United States respondents other than Sherwin have a freight advantage over Sherwin. In that portion of the United States closer to Chicago, freightwise, than to cities wherein other lead pigment plants are located, all of the respondents who have plants in Chicago or in the Chicago switching area are on an equal footing freightwise. Since Sherwin's only plant for producing either white lead or red lead and litharge is located in Chicago, it has no territory within which it has a freight advantage. National Lead Company is the largest producer of white lead (dry and in oil), red lead (dry and in oil) and litharge. During the period denominated by Trial Counsel for the Commission as the 'normal period' from 1936 to 1941, National Lead produced over 60% of the white lead in oil, from 30% to 35% of the dry white lead and 50% of the red lead and litharge. Its white lead plants are located in Perth Amboy, New Jersey; Philadelphia, Pennsylvania; Chicago, Illinois (where it produces 40% of its white lead); St. Louis, Missouri; and Oakland, California. It produces red lead and litharge in plants located in Brooklyn, New York, Philadelphia, Penna.; Charleston, West Virginia; St. Louis, Missouri; Chicago, Illinois; Dallas, Texas; Atlanta, Georgia, and Los Angeles and San Francisco, California. For the period from 1930-1946 Eagle-Picher produced from 15% to 20% of the white lead in oil and approximately 10% of the dry white lead. The figures for Eagle do not include its production of lead sulphate, which is used extensively by it interchangeably with basic carbonate and which substantially exceeds its production of basic carbonate. Eagle-Picher produced white lead in its plant in Cincinnati, Ohio (plant recently dismantled) and red lead and litharge in Joplin, Missouri and Newark, New Jersey. In 1943 Glidden produced between 8% and 9% of the white lead in oil and approximately 15% to 18% of the dry white lead. It produces red lead and litharge at Hammond, Ind., which is in the Chicago switching area and produces white lead at Scranton, Pennsylvania. In the period from 1937-1943

International Smelting & Refining Company sold from 1014 3% to 4% of the white lead in oil and from 10% to 19% of the dry white lead. These products were manufactured at its plant in East Chicago, Indiana, which is within the Chicago switching area. International Smelting & Refining Co. discontinued production and sale of white lead and on October 1, 1946 sold its plant at East Chicago, Indiana to Eagle-Picher so that Eagle-Picher now has a plant located in the Chicago area for the production of white lead. Sherwin prepared and introduced in evidence as RX 199 a map which shows the areas within which each plant may ship white lead (dry and in oil) at a freight advantage over any other white lead plant on the basis of carload and less than carload railroad freight rates in effect on January 15, 1941. An examination of this exhibit clearly shows that National Lead's Cleveland, St. Louis and Philadelphia plants have a freight advantage over any other white lead plant in a major portion of the United States. Eagle-Picher's Cincinnati white lead plant had a freight advantage over any other white lead plant in a substantial area while in operation. Glidden's white lead plant at Scranton, Penna. has a freight advantage over any other white lead plant in the major portions of Pennsylvania and New York. National Lead has a white lead plant in the New York City area and therefore has a freight advantage in New England and the lower portion of New York State over any other plants. National Lead, International Smelting & Refining Company's plant (now owned by Eagle-Picher) and Sherwin all have the same freight advantage in an area surrounding Chicago. The net result is that Glidden has a freight advantage in some territory, Eagle-Picher had a freight advantage in some territory and National Lead has a freight advantage in some territory but Sherwin has no advantage in any territory. This is due to the fact that National Lead and Eagle-Picher (since its acquisition of International Smelting and Refining Company's plant) both have white lead plants in Chicago where Sherwin's sole plant is located and also have one or more plants elsewhere. A similar map relative to red lead (dry and in oil) was introduced as R.X. 200. The map is equally applicable to litharge. An examination of this exhibit shows that in a major portion of the United States, National Lead has a freight advantage over other red lead and litharge plants due to the fact that it operates nine red lead and litharge plants strategically

placed throughout the whole United States. Eagle-Picher has a freight advantage in part of the country by reason of its plant at Joplin, Missouri. National, Glidden and Sherwin all have red lead and litharge plants in Chicago so they share any freight advantage accruing to Chicago
1015 over St. Louis, Missouri; Charleston, West Virginia and Oakland, California, in all of which cities National Lead has plants. Sherwin has only six shipping points (Detroit, Indianapolis, Minneapolis, Chicago, Duluth and Sioux City) in the area where Chicago has a freight advantage over other cities in which lead pigment plants (either white lead or red lead and litharge) are located. In shipping lead pigments to each of its other more than 45 shipping points or to areas served by such shipping points, Sherwin is at a freight disadvantage to one or more of the other respondents. The identity of the specific producer who has the advantage over Sherwin in each such situation will vary depending upon which one has a plant located closer, freightwise, to such shipping point than Sherwin's plant at Chicago. In those instances where Sherwin ships direct from Chicago to purchasers without charging any freight (irrespective of quantity), it is at a disadvantage, freightwise, to at least one of the other respondents in the entire United States except North and South Dakota, Iowa, Minnesota, Wisconsin, Michigan and the northern parts of Illinois, Indiana and Ohio, and even in this area it does not have an advantage, freightwise, over all other respondents.'' (CX 578, 664, 741, 882-J, RX 199, RX 200; Tr. 1071-1072, 1230-1233, 1307-1308, 1552, 1560-1561, 1564, 1625, 1647, 1665-1666, 3721-3732, 3732-3740.)

C. In so far as Section V, entitled "Recommended Order", of the Trial Examiner's Recommended Decision is concerned, Sherwin takes the following exceptions:

95. Sherwin excepts to Paragraph 1, including subparagraphs 1-A, 1-B, 1-C and 1-D, for the reason that the weight of the reliable, probative and substantial evidence in the record does not show that Sherwin has entered into, cooperated in or carried out any planned common course of action, understanding, agreement, combination or conspiracy to establish and maintain uniform prices, terms, price differentials and/or conditions of sale, or to induce resale price uniformity in connection with the sale and distribution of lead pigments.

96. Sherwin excepts to Paragraph 4, including subparagraphs 4-A and 4-B for the reason that the weight of

the reliable, probative and substantial evidence in the record fails to disclose (1) that Sherwin has sold lead pigments at different zone delivered prices to customers located in different zones who are in competition with each
other; (2) that Sherwin has sold lead oxides at dif-
1016 ferent quantity price differentials between carload
and 5 ton shipments and between 5 ton and smaller shipments to customers who are in competition with each other, or (3) that even if Sherwin had engaged in the practices hereinabove described in (1) and (2), which is not admitted, any detrimental competitive effect has been shown in the record.

97. Sherwin excepts to Items 1, 2 and 4 of the Recommended Order for the reason that each and every provision thereof is contrary to both the evidence in the record and to the provisions of the Federal Trade Commission Act and of the Clayton Act, as amended by the Robinson-Patman Act.

D. With respect to the Trial Examiner's Rulings on Proposals for Findings and Conclusions submitted by Sherwin under Rule XXI of the Commission's Rules of Practice, specific exceptions are taken as follows:

98. Sherwin excepts to the Examiner's denial of the findings requested in Paragraph One relating to Count I.

99. Sherwin excepts to the Examiner's denial of the findings requested in Paragraph Two relating to Count I.

100. Sherwin excepts to the Examiner's ruling in deleting the word "negligible" in the third sentence of Paragraph Five relating to Count I.

101. Sherwin excepts to the Examiner's refusal to grant the Finding stated in the fourth sentence of Paragraph Five relating to Count I, which reads "It also sells such products, particularly white lead in oil, in its own several hundred retail stores in transactions which originate and are completed entirely within the confines of a single state". Sherwin has never denied that it is engaged in interstate commerce but contends that the particular phase of its business therein described is not interstate commerce and that sales made by it in its local retail stores are not subject to the jurisdiction of the Commission.

102. Sherwin excepts to the manner in which the Examiner has ruled on the proposals contained in Paragraphs Six, Seven, Eight, Nine, Ten, Eleven and Twelve relating to Count I, and in Paragraphs One through Fourteen relating to Count II, for the reason that the Examiner's rul-

ing does not comply with the requirements of Rule
1017 XXI and does not furnish it with the specific information contemplated by the rule as to which requested findings were denied in toto, which were denied in part and modified, which were not ruled upon at all or which were adopted in whole or in part. While Sherwin has attempted to take specific exceptions to the many findings in the report which are contrary to findings requested by it, it has has been possible, in some instances to determine just what action has been taken by the Examiner with respect to specific findings requested by it. Consequently Sherwin finds it necessary, due to the character of the Examiner's rulings, to except to the failure of the Examiner to make each and every finding specifically requested in each of the above enumerated paragraphs of its proposed findings and for such purpose incorporates the proposed finding submitted by it herein by reference. (In support of such exception Sherwin relies upon the record and exhibit citations set out in detail in connection with each of such requested findings.)

103. Sherwin excepts to the Examiner's denial of conclusion of law number 1 as requested by it and reasserts that the mere fact that it is engaged in interstate commerce is not a sufficient basis, in law, for the denial of the conclusion of law requested.

104. Sherwin excepts to the Examiner's denial of conclusion of law number 2 requested by it and reasserts that the proposed conclusion is a sufficient statement of the law on the point.

105. Sherwin excepts to the Examiner's denial of conclusion of law number 3 requested by it and reasserts that the conclusion requested is a proper statement of the law on the point.

106. Sherwin excepts to the Examiner's partial denial of conclusion of law number 4 for the reason that the proposed conclusion properly states the law, and for the further reason that the definition of the term "price" requested in such conclusion has no relation whatever to zones.

107. Sherwin excepts to the Examiner's denial of conclusion of law number 5 requested by it for the reason that it constitutes a proper statement of the law on the point and for the further reason that the criterion as to whether there has been a violation of the Clayton Act is not difference in

price but discrimination in price, plus a detrimental competitive effect.

1018 108. Sherwin excepts to the Examiner's denial of conclusions of law 6, 7, 8 and 9 requested by it for the reason that the denial thereof is contrary to both the evidence and the law.

Respectfully submitted this 21st day of May, 1948.

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* * * * *

1045 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

(Received May 25, 1948.)

Now come the respondents, The Eagle-Picher Company and The Eagle-Picher Sales Company (hereinafter called "Eagle-Picher") by their attorneys, Edmund P. Wood and Richard Serviss, and adopt as their own the exceptions taken by each other respondent herein to the "Trial Examiner's Recommended Decision".

A. In view of the fact that the Recommended Decision of the Trial Examiner treats the practices of Eagle-Picher as incidental or tributary to those of National, thus dispersing direct and indirect reference to them throughout the Recommended Decision, and rendering it difficult to challenge each allusion to Eagle-Picher separately and individually, Eagle-Picher asserts the two following general exceptions to the Trial Examiner's Recommended Decision:

1. As to Count I, the Trial Examiner erred in holding or insinuating that National lawlessly achieved a monopolistic position of industrial dominance, that Eagle-Picher 1046 aided, abetted, supported, and contributed to National's monopolistic delinquency and now partici-

pates in the illegal fruits as virtual co-partner in criminal monopoly, that National procured this sinister intimacy by the device of its erstwhile minority stock ownership in Eagle-Picher, and that these conclusions are compelled by the manifest intimations of the evidence, in weighing which the categorical statements of top executives, whose honesty is not questioned, must be disregarded as unqualified, in favor of possible inferences emanating from the extraneous doings and scrivenings of underlings, which, although irrelevant, should be regarded as transcending normal competitive amenities. Eagle-Picher excepts to and objects to each and every item which holds, insinuates, implies, suggests, infers, or intimates to this general effect, positively or negatively, or both.

—Reason: The Trial Examiner so erred because he chose to ignore the testimony offered on behalf of Eagle-Picher, and because he disregarded the established law of evidence that inferences cannot be used to contradict direct and positive testimony, unless they are inescapable. More particularly, it was testified that Eagle-Picher had no agreements with National and competed with it actively but had no alternative to following National's prices on products made from pig lead, because Eagle-Picher was not relatively strong enough to start or finish a price war. This direct and positive testimony, which is more particularly identified below in Paragraphs B-1, 2, 3, and 4, stands uncontradicted in the record, and the Trial Examiner's laborious deduction of intricate and sinister conspiracy is completely
unnecessary to explain the transparently simple, com-
1047 monplace competitive situation. (See Paragraphs
(1-f), on Page 10; (7-c1), on Page 43; (6-A), on Page 79; and (7-A1), on Page 80, of the Trial Examiner's Recommended Decision.)

2. As to Count II, the Trial Examiner erred in that, after holding that the price discriminations of the respondents should be treated individually (Page 57, Paragraph (10-m)), he concluded that Eagle-Picher was violating Section 2(a) of the Clayton Act, without making the appropriate and necessary findings of fact as to Eagle-Picher. More specifically, the Examiner held:

"The question of discrimination involved in this case is individual and must be considered with respect to each respondent acting alone from the standpoint of effects as between its customers."

However, the Recommended Decision contains no finding that any two or more actual customers of Eagle-Picher were affected by Eagle-Picher's price differentials or that anything more specific than hypothetical competition between hypothetical customers might be affected. The Recommended Decision goes beyond due process of law in recommending a restraining order against Eagle-Picher, in the absence of a clear-cut finding that Eagle-Picher's individual pricing practices substantially affected the competition between identifiable customers.

Reason: At the close of the Commission's case, Eagle-Picher moved to dismiss the complaint, on the ground, among others, that the evidence in respect to violation of Section 2(a) of the Clayton Act was too vague and indefinite to permit proper defense or rebuttal and hence, Eagle-Picher, denied opportunity for intelligent defense, 1048 was being deprived of due process of law. The proposed finding that Eagle-Picher has violated this Act is unsupported by any finding as to when, where, how, or whom. If Eagle-Picher's price differentials have substantially lessened competition among its customers, or if their effect may be to substantially lessen competition, then certainly the Recommended Decision should have identified the customers so affected with sufficient particularity to permit Eagle-Picher to at least argue the matter before the Commission.

The record indicates throughout that Eagle-Picher has many customers, and that there is much competition in at least several of the industries in which Eagle-Picher customers engage. The Trial Examiner speculated academically as to hypothetical effects on hypothetical customers, but did not instance from the record any proved violation of law. As basis for the Recommended Order, the Recommended Decision should have found that the effect of Eagle-Picher pricing practice X may be to substantially lessen competition between Eagle-Picher customers A and B. There should have been such a finding in respect to each pigment and each price differential. Instead, the Trial Examiner merely found that the effect of the Eagle-Picher differentials was to maybe lessen competition. In short, the Recommended Decision in substance substitutes "maybe" for "may be" in the statute, which renders defense impossible, and denies Eagle-Picher due process of law.

B. Further, Eagle-Picher excepts to the refusal of the Trial Examiner to make the following findings of fact, proposed to him by Eagle-Picher, and supported by the evidence:

1049 1. "The Eagle-Picher Company and The Eagle-Picher Sales Company (hereinafter called Eagle-Picher) engage in the business of selling lead pigments in interstate commerce throughout the United States in which business they are second in size to National Lead Company (hereinafter called National). Due to the difference in sizes of the two companies, Eagle-Picher is not in a position to compete with National, on lead pigments manufactured from pig lead, by means of a general policy of price cutting or price war. Nevertheless, it is the policy of Eagle-Picher to compete with National in the sale of lead pigments and Eagle-Picher does so compete actively by means of research which develops different and better products, by means of sales service, by means of technical service to customers providing them with the benefit of Eagle-Picher's research facilities, and by means of national advertising intended to increase consumer acceptance of the Eagle-Picher products."

2. "Eagle-Picher has not acted in concert with the other respondents herein or any of them since the invalidation of the National Industrial Recovery Act, in respect to terms or conditions of sale of lead pigments, and there is no evidence that it has. More specifically, the current situation was correctly summarized by Joel M. Bowlby, president of Eagle-Picher, who testified that since the time he became president of the company, September, 1941, down to the present, no agreements have existed with the other respondents herein or any of them, affecting prices or terms or conditions of sale of lead pigments, and this testimony is uncontradicted."

3. "Particularly, Eagle-Picher research has developed special pigments known as basic lead sulphate, leaded zinc oxide and blue lead which Eagle-Picher manufactures
1050 from its own raw materials and sells in competition
with pigments manufactured from pig lead. All of the Eagle-Picher organization has been actively engaged in promoting consumer acceptance and greater utilization of these products in competition with those promoted by the other respondents herein."

4. "Eagle-Picher's research laboratories have developed many special lead oxides for the storage battery industry and Eagle-Picher's technical experts have instructed

the company's customers in the manner of their use, which has improved the competitive position of the Eagle-Picher customers in relation to that of the customers of National and that of the large battery manufacturers which produce their own lead oxides.''

5. ‘‘Eagle-Picher has not indulged in any unfair method of competition by conspiracy or otherwise.''

6. ‘‘Eagle-Picher has not discriminated among its customers in its sale of lead pigments.''

7. ‘‘Eagle-Picher cannot compete with National except by selling on a delivered price basis because of National's greater size and greater number of manufacturing plants.''

8. ‘‘The pricing policies of Eagle-Picher have not had the effect of substantially lessening competition or tending to create a monopoly in the sale of lead pigments, and the record does not purport to evidence a single specific instance of such effect.''

9. ‘‘The competition of the customers of Eagle-Picher which purchase lead pigments from Eagle-Picher, has not been injured, destroyed or prevented by the pricing policy followed by Eagle-Picher, and the record does not purport to evidence a single specific instance of such effect.''

1051 Reasons: Eagle-Picher's proposed exceptions Nos. 1, 2, 3 and 4, are supported by the testimony of Alvin C. Goetz, Tr. 3328; Harold R. Harner, Tr. 3416; M. F. Chubb, Tr. 3462; W. W. Vasterling, Tr. 3591; J. O. Mitchell, Tr. 3620, J. M. Bowlby, Tr. 3632-A; and W. H. Hayt, Tr. 3659.

Proposed findings Nos. 5 and 6 are negative in form and are supported by the negative aspects of the record. Proposed finding No. 7 may be found in substance in the Recommended Decision, but the Trial Examiner refused to make this proposed finding with quotable conciseness. Proposed findings Nos. 8 and 9 are negative, and are predicated upon the negative aspects of the record.

C. More specifically, Eagle-Picher excepts to said Recommended Decision in the following particulars:

1. Page 6, under ‘‘The Issues'':

‘‘Did National, through its various acquisitions, secure and employ monopolistic control over the lead pigments industry?

Did National's relations with Smelting exert a monopolistic influence over the price of pig lead?

Did National conspire with du Pont with the purpose and effect of maintaining fixed price levels on white lead-in-oil?"

The reason for the exception is that none of these activities comes under Section 5 of the Federal Trade Commission Act, or Section 2(a) of the Clayton Act, or under any other statute under which the Federal Trade Commission has jurisdiction. These issues might pertain to alleged violation by National of Section 2 of the Sherman
1052 Act, but the Federal Trade Commission is without power to enforce this section of the Sherman Act, in so far as mere purpose or intent to monopolize is concerned, because intent per se is not an unfair method of competition. These issues, properly, have nothing to do with the Eagle-Picher respondents; Eagle-Picher is not responsible for the sole and long past actions of National, and should not be prejudiced by these false issues relating solely to National.

2. Page 9, (1-e)

This paragraph is faulty, in that Eagle-Picher's production of basic lead sulphate and leaded zinc oxide is not taken into account, and further, in that the record does not justify the holding that Eagle-Picher's percentage of business has been increased by its acquisition of International's lead pigment plant. Eagle-Picher did not buy International's business, and there is no reason to believe that Eagle-Picher received a larger share of it than any other respondent.

3. Page 10, (1-f)

Properly, these facts, if true, are not pertinent to the issues of this case. The statement that it was not shown that National controlled Eagle-Picher through stock ownership is warranted, but this finding alone should disqualify all other evidence pertaining to National's financial interest in Eagle-Picher. The evidence which is discussed in the second paragraph of (1-f) is too trifling for proper consideration in relation to any valid issues in the case.

4. Page 35, (5-e)

The record does not justify the interpretation placed upon it as to Eagle-Picher.

1053 5. Page 36, (6-a)

There is nothing in the record to justify the Examiner's implication that prices were fixed jointly by National and Eagle-Picher. Eagle-Picher does not except to the finding that the prices set by National "had the effect of placing a ceiling on prices which their smaller competitors could charge and of making profit margins sufficiently narrow to induce these competitors to sell at the highest prices they could get (Pars. 1-f, 2-f, 5-c3)."

6. Page 38, (7-a1) and (7-a2)

These conclusions have nothing to do with any proper issue in the case, as explained in relation to the analysis of "Issues".

7. Page 39, (7-a3)

There is nothing in the record to show that "Respondents National and Eagle-Picher promulgated and adhered to the zone pricing system without deviation and in such manner as to produce identical prices, terms, and conditions of sale." Eagle-Picher in general followed National's pricing, as to products made from pig lead, but did not "promulgate" the pricing system. The acquisition is without evidentiary support.

8. Page 40, (7-a7)

This statement is inaccurate, because it does not take into account Eagle-Picher's sale of basic sulphate white lead and blue lead, which competed against National's basic carbonate white lead and red lead, respectively.

9. Page 40, (7-a8)

There is nothing in the record to show that the Eagle-Picher respondents "discussed bases for quotations
1054 in sealed bids to municipal, state, and federal purchasing agencies." Paragraph 15-c7), to which the Examiner refers in (7-a8) comprises only an analysis of invoices, and provides no basis for the Trial Examiner's unsupported charge that discussion of quotations in sealed bids took place. There is no such evidence in the record.

10. Page 40, (7-b1)

Eagle-Picher has always admitted following generally the price leadership of National in respect to prices and terms and conditions of sale, of most of its products. There is no evidence in the case to warrant the inference that these prices and terms and conditions of sale were arrived at by collusion between National and Eagle-Picher. The evidence is to the contrary, and is designated with particularity in the exceptions to the Trial Examiner's refusal to make the findings requested by them.

11. Page 43, (7-c1)

The conclusions stated in this paragraph are excepted to for the reasons set forth in the exception to Paragraph (7-b1).

12. Page 44, (7-c4)

There is no evidence in this record as to what an unrestrained marketing system would provide in the way of price variation for the purposes of bargain and sale. In an industry in which price leadership obtains, some conformity in pricing is to be expected; the assumption to the contrary is without judicial sanction, and must be predicated upon some undisclosed, obscure, out-moded text on economics, of which these respondents have no knowledge.

1055 13. Page 44, (7-c5)

Inasmuch as the Miller-Tydings Act legalizes the fixing of resale prices, it is not within the province of the Federal Trade Commission to condemn under the Federal Trade Commission Act those who sought and obtained a legal result. A legalized method of competition cannot be an unfair method of competition. After the Miller-Tydings Act was passed, the Commission altered many orders previously issued.

14. Page 44, (7-d1)

The suspension of the enforceability of Schedule A and Article VII, Section 2, of the N. R. A. Code was without legal significance as to those who voluntarily adopted the practices approved therein.

15. Page 45, (7-d2)

There was no conspiracy. The simpler and correct explanation of such conformity of prices, terms and conditions of sale as existed, insofar as Eagle-Picher is concerned, is that Eagle-Picher deliberately and purposefully followed the pricing policy of National as to products made from pig lead, which it had a right to do legally.

16. Page 45, (7-d3)

The delineated activities of National are not in violation of the Federal Trade Commission Act, because monopolistic purpose, even if proved, violates only Section 2 of the Sherman Act, and is not an unfair method of competition. Further, the Federal Trade Commission Act was intended to nip monopolistic tendencies in the bud, whereas the alleged improper conduct of National took place in the long past, and the issue itself is improper in this case.

1056 17. Page 45, (7-d4)

Eagle-Picher acted within its rights in following generally the pricing policies of the National Lead Company as to products made from pig lead.

18. Page 46 (7-d5) and (7-d6)

The conclusions stated in this paragraph are excepted to for the reasons asserted in the exception to Paragraph (7-54).

19. Pages 49 and 50, (8-a4)

This item is unsupported by either the record references therein made or any other portion of the record.

20. Page 56, (10-h)

The cases pointed out in Paragraphs 8-a3, a4, 10-a, and d, are not discriminatory in the sense in which the word is used in Section 2(a) of the Clayton Act, and the price differentials shown to exist were not shown to be substantial or to lessen competition between Eagle-Picher's customers.

21. Page 57 (10-j)

It is not shown that the price differences in question were discriminatory in the sense of Section 2(a) of the Clayton Act, that they were substantial, or that they had the tendency or effect of lessening competition between large and small customers, to the injury of the latter.

22. Page 57, (11-a)

The Trial Examiner erred in considering individual sales to customers in premium zones, instead of considering the zone price, that is, the average of all of 1057 the transactions within the zone. Zone selling is legal. (*Salt Producers Association* v. *Federal Trade Commission*, 134 Fed. (2d) 354). There is no showing that individual customers were damaged or put at a competitive disadvantage in competition with customers in a different zone.

23. Page 58, (11-b)

It is improper to hold that prices are discriminatory and violative of Section 2(a) of the Clayton Act, in the absence of proof that competition, in this case among customers, may be lessened.

24. Page 61, "IV. Recommended Findings and Conclusions"

This section of the Trial Examiner's Recommended Decision, that is, from Page 61 to Page 96, "Recommended Order", is essentially a repetition of the foregoing sections to which specific exceptions have been noted. Eagle-Picher particularly excepts to Page 81, (7-A3); Page 82, (7-A8); Page 84, (7-C1); Page 85, (7-D1); Page 86, (7-D2);

Page 87, (7-D5); Page 87, (7-D6); Page
age 92, (10-D); for the reasons previ-

her excepts to the inclusion of the find-
, 2-A, 2-B, 2-C, 2-D, 2-E, 2-F, and 3,
s in the case, for the reasons described
ption No. 1.
-J)
cept to the recommended finding that
rcentage of the lead pigment business
d by its recent acquisition of Interna-
ent plan and business. The Trial Ex-
in error as to Eagle-Picher's acquiring
's business, because it did not, and there
the record to suggest that it did. Fur-
s nothing in the record to show that
uisition of International's plant in any
gle-Picher's business or percentage.
-K)
jects to the inclusion of the finding that
gle-Picher stock. In view of the finding
not control Eagle-Picher, the inclusion
he stock ownership is improper. Obvi-
xaminer was prejudiced by this circum-
exaggerated the importance of trivial
the companies itemized in said Para-
ularly, Eagle-Picher objects to the state-
her's files contained National's price
cific Coast", because there was just one
Eagle-Picher files, showing one change
nal on the Pacific Coast whereas the
ing intimates greater intimacy. Eagle-
ne characterization of the itemized trivia
e of close relations between these two
ne of the specified contacts between Na-
Picher personnel was improper, and all
nited number of casual and isolated law-
over fifteen years, is inadequate basis
nference that the parties were engaged
piracy.
6-A).
cepts to the first sentence of this para-
s National and Eagle-Picher as an en-
bjects to all casual insinuations through-
ke effect.

1059 28. Page 80, (7-A1).

Eagle-Picher excepts to the latter part of the first sentence, which asserts that National added to its dominant power by establishing close cooperation with Eagle-Picher. There is nothing in the record to show that Eagle-Picher cooperated with National to a degree greater than that compelled by the position of National which the Trial Examiner held to be dominant. Further, it is the strategy of the Trial Examiner, in his compounding of this paragraph, to tie Eagle-Picher into National's acquisition of competitors many years ago, and its historic relations with American Smelting and Refining Company. If National's early operations were improper, then Eagle-Picher, as its "largest potential competitor", was the chief victim. If National's early history here has any pertinency, then the Federal Trade Commission has been guilty of thirty years' gross dereliction, and the Trial Examiner's present attempt to implicate Eagle-Picher, as an incident to his condemnation of National, merely adds insult to injury. In short, the Trial Examiner's report is hopelessly inconsistent in every particular and respect, including every insinuation, as well as statement, by which it attempts to tie National and Eagle-Picher together as twin culprits. (See Paragraph 7-D-3 on Page 86.)

29. Page 82 (7-B1).

Eagle-Picher excepts to the statement in the first and last sentence as not supported by any evidence whatsoever. Eagle-Picher followed National's prices and terms and conditions of sale, because National was the price leader, but there is not one iota of evidence in the record that the prices and terms and conditions of sale resulted from joint action.

1060 30. Page 94, (10-H).

Eagle-Picher objects to the inference of this paragraph that it indulged in discrimination to substantially lessen competition between its customers. There is no evidence whatsoever in the record that any Eagle-Picher price differential substantially lessened competition between Eagle-Picher's customers, and Trial Examiner's Recommended Decision cites no such case.

31. Page 95, (11-A).

The zone system is legal, (*Salt Producers Association* v. *Federal Trade Commission*, 134 Fed. (2d) 354.) and hence, the average zone freight is the critical factor in determining legality, rather than specific zone border examples. The record does not show any instance in which Eagle-Picher's customers, located in different zones, were in competition with each other, and none is suggested in the Trial Examiner's Recommended Decision.

32. Page 95, (11-B).

There is no instance of competition between Eagle-Picher's customers being substantially lessened by the quantity differentials referred to in said paragraph, and such quantity differentials are entirely legal.

1061 33. Page 95, (V. Recommended Order).

Eagle-Picher excepts to the order recommended by the Trial Examiner on the ground that each and every provision of it is unwarranted by both the evidence and the law.

Respectfully submitted,
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* * * * *

1082 Before the Federal Trade Commission.

* * (Caption—5253) * *

APPEAL TO COMMISSION FROM RULINGS OF THE TRIAL EXAMINER.

(Received Nov. 16, 1948.)

Comes now the respondent, National Lead Company, herein and by its counsel respectfully appeals to the Federal Trade Commission, pursuant to Rule XX of the Rules of Practice of this Commission, from the rulings of the Trial Examiner herein overruling objections of respondents to the introduction of certain exhibits, and hereby makes application that the Commission reverse the said rulings of the Trial Examiner and strike the said exhibits from the record herein.

The facts supporting this application and the contentions of respondent with respect thereto are set forth in the attached brief.

Respectfully submitted,

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1083 Before the Federal Trade Commission.

* * (Caption—5253) * *

BRIEF ON APPEAL TO COMMISSION FROM RULINGS OF THE TRIAL EXAMINER.

Statement.

At a hearing held on November 13, 1947, it was stipulated and agreed by and between counsel for the Commission and counsel for the respondents that, subject to the approval of the Commission, the requirements of Rule XX of the Rules of Practice of the Commission to the contrary notwithstanding, motions for reconsideration and reversal of rulings of the Trial Examiner admitting or excluding testimony or evidence, and appeals to the Commission from such rulings, should be made to the Commission at the time of briefing and arguing the case to the Commission on the merits, and that no party should be deemed thereby to have waived any objection or any exception to such ruling or right to urge such objection or exception to the Commission at the time of the argument. It was expressly stated that the purpose of the stipulation was to expedite the determination of this matter before the Trial Examiner and the Commission (Tr. 4073-74). This stipulation was approved by order of the Commission dated November 18, 1947.

The Trial Examiner stated that an automatic exception would be granted to every ruling upon objection and that all respondents would have the benefit of objections by and exceptions to any one respondent (Tr. 3-4, 529-30).

1084 In this brief we shall enumerate the exceptions, the exhibits objected to, and the transcript page numbers of the objections taken, and shall set forth the reasons supporting our contention that the rulings of the Trial Examiner admitting such exhibits should be reversed and the exhibits stricken from the record.

A. Exceptions to N. R. A. Exhibits

Exception No.	Exhibit No.	Objection
1	Com. Ex. 711	Tr. 691
2	Com. Ex. 799)	Tr. 1023, 1024
3	Com. Ex. 800 A-C)	
4	Com. Ex. 801 A-B)	
5	Com. Ex. 802 A-B)	
6	Com. Ex. 803)	
7	Com. Ex. 804)	
8	Com. Ex. 805 A-C)	
9	Com. Ex. 501 A-D	Tr. 1049
10	Com. Ex. 502 A-C	Tr. 1050
11	Com. Ex. 504 A-B	Tr. 1050
12	Com. Ex. 505 A-B	Tr. 1051
13	Com. Ex. 506 A-F	Tr. 1052
14	Com. Ex. 507 A-M)	Tr. 1052-53
15	Com. Ex. 508 A-D)	
16	Com. Ex. 510 A-I)	
17	Com. Ex. 511 A-E)	
18	Com. Ex. 513 A-E	Tr. 1054
19	Com. Ex. 514 A-H	Tr. 1055
20	Com. Ex. 515 A-K	Tr. 1056
21	Com. Ex. 516 A-C	Tr. 1057
22	Com. Ex. 517 A-D	Tr. 1057
23	Com. Ex. 518 A-B	Tr. 1058
24	Com. Ex. 519 A-B	Tr. 1058
25	Com. Ex. 520 A-B	Tr. 1059
26	Com. Ex. 521 A-B	Tr. 1059
27	Com. Ex. 522 A-I	Tr. 1059
28	Com. Ex. 523	Tr. 1060
29	Com. Ex. 524 A-E	Tr. 1060, 1061

1085 These documents, consisting of minutes of a number of meetings of the various committees of the Lead Pigments Division of the Lead Industries Association held during the period 1933-1934, and related documents, were all objected to upon the ground that they were N. R. A. documents and thus could not be made the basis of a charge of conspiracy in violation of Section 5 of the Federal Trade Commission Act. The stated objections are supported by the following authorities:

Section 5, National Industrial Recovery Act, 48 Stat. 195, 198;

Eugene Dietzgen Co. v. *Federal Trade Com'n,* 142 F. 2d 321, 329 (C. C. A. 7th, 1944), cert. den. 323 U. S. 720;

Allied Paper Mills v. *Federal Trade Commission,* 168 F. 2d 600, 605 (C. C. A. 7th, 1948);

Aetna Portland Cement Co. v. *Federal Trade Com'n,* 157 F. 2d 533, 549 (C. C. A. 7th, 1946);

Trade Comm'n v. *Cement Institute,* 333 U. S. 683, 704-705 (1948).

In the event that the Commission reverses the Trial Examiner's rulings with respect to this evidence introduced by counsel for the Commission and strikes the said exhibits from the record, respondent consents that the following N. R. A. exhibits introduced by it, in explanation of the documents introduced over respondents' objection by counsel for the Commission, also be stricken from the record:

Resp. Ex. 6 A-I
Resp. Ex. 7 A-C
Resp. Ex. 8 A-B
Resp. Ex. 9 A-F
Resp. Ex. 11 A-F
Resp. Ex. 12
Resp. Ex. 13 A-D
Resp. Ex. 127 A-G
Resp. Ex. 128 A-E
Resp. Ex. 129 A-X
Resp. Ex. 130 A-H
Resp. Ex. 131 A-G
1086 Resp. Ex. 132 A-T
Resp. Ex. 133 A-Z-7
Resp. Ex. 134 A-E

Resp. Ex. 135 A-B
Resp. Ex. 136 A-B
Resp. Ex. 137 A-B
Resp. Ex. 138 A-B
Resp. Ex. 139

B. Exceptions to Other Exhibits

Exception No.	Exhibit No.	Objection
30	Com. Ex. 624 C	Tr. 561, et seq.

This was a memorandum signed by one Diemont, allegedly an agent of National Lead Company, and was admitted on condition that it was shown that Diemont was such an agent as to bind National Lead Company by his statements (Tr. 566). No such showing was made. The exhibit was objected to upon the ground that it was not shown who Diemont was and therefore the document should be stricken. In any event, Com. Ex. 624 A-B shows that the agency of Diemont, whatever might have been its nature, was terminated prior to his execution of the document admitted.

Exception No.	Exhibit No.	Objection
31	Com. Ex. 525	Tr. 601-02

This was a letter from National Lead Company to The Sherwin-Williams Company of Canada, Ltd., dated December 14, 1933, enclosing a price announcement to the trade. This exhibit was received subject to connection (Tr. 602) and no evidence connecting Sherwin-Williams Company of Canada, Ltd. with any respondent was ever offered. The objection was that the document was obviously without the scope of this proceeding and irrelevant and the objection should have been sustained.

1087

Exception No.	Exhibit No.	Objection
32	Com. Exs. 691, 692	Tr. 672

These were letters in 1940 between certain employees of Eagle-Picher Company and National Lead Company, relative to increasing the Federal Specifications for flatting oil, a product not involved in this proceeding. The documents were objected to upon the ground that they were irrelevant and the objection should have been sustained.

Exception No.	Exhibit No.	Objection
33	Com. Exs. 696, 697	Tr. 675

These were letters in 1937 between Dice, Executive Vice-President of Eagle-Picher Company, and Wormser of Lead Industries Association, relating to a luncheon at which Wormser had introduced Dice to Messrs. Wilson and Martino of National Lead Company, and at which "policies" of National Lead Company and Eagle-Picher Company were discussed. This was admitted subject to connection (Tr. 675) and no evidence showing such connection was offered. Objection was made upon the ground that the documents were irrelevant and the objection should have been sustained.

Exception No.	Exhibit No.	Objection
34	Com. Ex. 701	Tr. 682

This was a wire on March 12, 1941 from Scott of the Pacific Coast Branch of National Lead Company to Eagle-Picher Company, Cincinnati, Ohio, relative to a change in the Manila (Philippine Islands) prices of white lead in oil and dry red lead. The exhibit was objected to upon the ground that it was wholly irrelevant and the objection should have been sustained.

Exception No.	Exhibit No.	Objection
35	Com. Exs. 708 and 710	Tr. 689

1088 These exhibits were letters exchanged between Hayt of Eagle-Picher and Reque of National in July, 1940, relating to a new white lead paint which Eagle-Picher was trying out and which was very much on an "experimental basis". Among other things, the letter from Hayt of Eagle-Picher (Com. Ex. 710) sets forth the list price at which Eagle-Picher would attempt to market the product. The reply from Reque (Com. Ex. 708) merely expresses appreciation for the letter and Reque's wishes to Hayt for the best of luck. Since the exhibits referred to a ready-mixed paint and not lead pigments, the objection made on the ground that the documents were irrelevant should have been sustained.

Exception No.	Exhibit No.	Objection
36	Com. Exs. 797 C-Z-6, 533, 534, 535, 577 A-C	Tr. 946 Tr. 948

Com. Ex. 797 C-Z-6 consisted of certain contracts between National and duPont de Nemours Co., Inc., and certain cost data of duPont's relating to the contracts, whereby duPont was to supply all of the raw materials which National was to convert into white lead in oil, title to all of which was to remain in duPont at all times. The other exhibits constitute correspondence relating to these contracts. The objections to these documents upon the ground that they were wholly irrelevant, incompetent and immaterial should have been sustained.

Exception No.	Exhibit No.	Objection
37	Com. Ex. 538	Tr. 1103

This was a letter from Mr. Rowe of National to Reque of National's Chicago office, dated April 8, 1941, in which Rowe referred to certain preceding correspondence relating to cash discounts and then stated that he noticed an article in the Oil, Paint and Drug Reporter "in which the duPont Company announces a change in their policy"
to take effect on and after May 1. The letter con-
1089 tinued, "Perhaps those in the industry will follow this
good example which would make it possible for us to do likewise without too much disturbance among our dealers". The objection upon the ground that the document was wholly irrelevant and immaterial should have been sustained.

Exception No.	Exhibit No.	Objection
38	Com. Ex. 808 A-N	Tr. 1130, et seq.

This exhibit consisted of certain pages from the Oil, Paint and Drug Reporter of certain selected dates in May, June and August, 1934. The testimony of Mr. Auchincloss, President of the corporation which published the

Oil, Paint and Drug Reporter, showed that the statements therein contained were purely reportorial hearsay (Tr. 1112, 1116, 1134-38). The objection on the ground that the document was irrelevant, incompetent, and immaterial, and purely hearsay as to respondents, should have been sustained.

Exception No.	Exhibit No.	Objection
39	Com. Ex. 22A-Z-47	Tr. 971-72

This exhibit consisted of an alleged history of American Smelting & Refining Company up to about 1914, which had been prepared for his own use by a former employee of that company. It was not an official record of American Smelting & Refining Company, nor was it prepared by an officer of that company in the due course of business (Tr. 38, et seq.). The objection upon the ground that the document was incompetent, irrelevant and immaterial, and purely hearsay as to respondents, should have been sustained.

Exception No.	Exhibit No.	Objection
40	Com. Ex. 92	Tr. 967-69

This exhibit was a report prepared by the majority of the members of a committee of stockholders of
American Smelting & Refining Company on an un-
1090 identified investigation of the affairs of the American
Smelting & Refining Company. The objection upon
the ground that the document was purely hearsay, irrelevant and immaterial should have been sustained.

Exception No.	Exhibit No.	Objection
41	Com. Ex. 93 A-I	Tr. 978

This was a contract executed between American Smelting & Refining Company and National in 1906 relating to pig lead purchases by National from American Smelting & Refining Company, and on its face the document shows that it expired in 1921. The objection upon the ground that the document was wholly irrelevant and immaterial should have been sustained.

Exception No.	Exhibit No.	Objection
42	Com. Ex. 94 A-G	Tr. 978

This was a contract executed in 1906 between American Smelting & Refining Company and Hoyt Metal Company, referring to the purchases by the latter company of antimonial lead from American Smelting & Refining Company. The objection on the ground that the document was wholly irrelevant and immaterial should have been sustained.

Exception No.	Exhibit No.	Objection
43	Com. Exs. 101, 103, 104 A-B, 105, 107, 108, 113, 118, 123, 136, 147, 158, 160, 173, 235, 238, 247, 270, 288, 309, 323, 336, 243, 365, 381, 388, 390, 393, 401, 409 A-B, 410, 411, 425, 428, 460, 476 A-B, 480, 481 A-B, 482, 483, 489, 490, 491, 492	Tr. 1206-07 Tr. 2041-45

1091 These exhibits consisted of certain monthly and sixty-day contracts executed between American Smelting & Refining Company, on the one hand, and National, Eagle-Picher and Sherwin-Williams, respectively, on the other hand, relating to purchases of pig lead from American Smelting & Refining Company, as well as correspondence relating to such contracts. The objections on the ground that the documents were wholly irrelevant, incompetent and immaterial should have been sustained.

Exception No.	Exhibit No.	Objection
44	Com. Ex. 493 A-G	Tr. 1208

This was a contract between American Smelting & Refining Company and the Clayton Silver Mines, apparently a mining company but not identified anywhere in the record. The objection upon the ground that the document was wholly irrelevant, incompetent and immaterial should have been sustained.

Exception No.	Exhibit No.	Objection
45	Com. Exs. 25, 27, 28 and 29	Tr. 2048-52

These exhibits consisted of correspondence between Morton Trust Company and American Smelting & Refining Company written in 1906. The objection that the documents were wholly irrelevant, incompetent and immaterial, and purely hearsay, should have been sustained.

Exception No.	Exhibit No.	Objection
46	Com. Exs. 527, 528	No. 4193, et seq.

These exhibits consisted of letters written in 1935 by
one Chatfield to officials of National. The testimony of
Chatfield reveals that he was trying to work up a deal to
sell stock of Eagle-Picher to National but that nothing
came of the deal (Tr. 177). The objection to the doc-
1092 uments upon the ground that they were incompetent,
irrelevant, immaterial and purely hearsay was origi-
nally sustained (Tr. 594). The Trial Examiner stated that
the Commission would have the chance later to offer con-
necting proof. None was offered, although later the docu-
ments were admitted over the same objection (Tr. 4197).
The objection, therefore, should have been sustained.

Conclusion.

The rulings of the Trial Examiner admitting the exhibits above-listed over respondents' objections should be reversed and the exhibits should be stricken from the record.

Respectfully submitted,
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James D. Ewing,
Of Counsel.

Dated, November 16, 1948.

1094 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

APPEAL BY THE SHERWIN-WILLIAMS COMPANY FROM RULINGS OF TRIAL EXAMINER.

(Received Nov. 16, 1948.)

Comes now The Sherwin-Williams Company, one of the respondents herein, by its attorneys, and, pursuant to Rule XX of the Commission's Rules of Practice (except to such extent as compliance therewith was waived by Commission order of November 18, 1947), appeals to the Commission from adverse rulings made by the Trial Examiner in the course of the hearings herein relative to the admission of documentary evidence and parol testimony, to which objection was seasonably taken. In support of such appeal Sherwin relies upon the following assignments of error on the part of the Trial Examiner.

1. The Examiner erred in receiving in evidence Commission's Exhibit 525 (Tr. 603). This exhibit is a copy of a letter dated December 14, 1933 from National Lead 1095 Company to Sherwin-Williams Company of Canada, Ltd., enclosing a price card mailed to the trade relative to a price change for dry white lead and basic sulphate in lots of less than twenty tons. When this document was offered in evidence the Examiner, after objections had been interposed, stated, "I will receive it subject to connection." (Tr. 602). No connection was ever attempted. There was no showing as to the extent, if any, to which there was any control over the addressee by the respondent Sherwin; that the information contained therein was transmitted to respondent Sherwin or that any relationship other than that of seller and purchaser existed between National Lead Company and the addressee. In view of the foregoing, it is obvious that the relevancy of such document to this proceeding has not been established and the required connection has not been forthcoming.

2. The Examiner erred in receiving in evidence Commission's exhibit 594-AB. (Tr. 829). This exhibit shows the price differentials in effect for Sherwin's stores and warehouses on May 21, 1942. It is a duplicate of Commission's exhibit 662-S and T. (Tr. 831). On appeal we

would make no point of such duplication were it not for
the remarks made by Counsel for the Commission at the
time objection was made to such duplication of exhibits.
Before the hearings commenced counsel for Sherwin were
requested to stipulate that certain photostats sup-
1096 plied by counsel for the Commission were authentic
and genuine copies of documents issued by Sherwin.
This was agreed to and the stipulation was read into the
record. (Tr. 275-281). Among such documents were Commission's Exhibits 662-S and T. Later, other photostatic copies of the same document were marked as Commission's Exhibits 594-A and B (Tr. 316-317) and were offered in evidence. (Tr. 828). Objection was interposed on the ground that such documents were duplicate photostatic copies of Exhibits 662-S and T. (Tr. 828-829). Then Counsel for the Commission (Mr. Wright) stated, "* * * but, furthermore, the identification of 594-A and B distinguished it from the identification of 662-S". (Tr. 829). Further, Counsel for the Commission (Mr. MacIntyre) stated, "As to the significance of the documents, the difference is set forth in connection with the record identification of the two" (Tr. 829) and "but from different people and under different circumstances, and there is a factual showing in the record that distinguishes them" (Tr. 830). Counsel for the Commission are thus apparently contending that there was some malevolent significance to be attached to the different sources from which the exhibits were alleged to have been obtained. There were no two sources. There was only one and any contention otherwise is ridiculous. A simple physical comparison of the photostats which are Commission's exhibits 594-A and 662-S will readily demonstrate the single source. When R. T. Dunn interviewed
Mr. Shindler of Sherwin on December 23, 1943, he
1097 obtained one printed copy of the list dated May 21,
1942 and marked it Exhibit E to his interview.
Thereafter we dealt only with different sets of photostatic copies of the one document furnished by Mr. Shindler. The foregoing exception is taken only for the purpose of attempting to clear the record from any improper implications arising through remarks of Counsel for the Commission, who insisted there was present something more than mere duplication.

3. The Examiner erred in failing to exclude Commission's exhibit 742 when the stipulation appearing at pages

529-530 of the record was entered into. When the Amended Complaint was issued it was agreed that the testimony of Hugh E. White and evidence introduced into the record through said White would not be considered as a part of the record under such Amended Complaint. (Tr. 529). This exhibit was prepared by White and introduced into the record through him and was relied upon by the Trial Examiner in his report upon the facts (Ex. Rec. Dec., p. 49, 52), but should not have been.

4. The Examiner erred in receiving in evidence Commission's Exhibit 793. (Tr. 869). This exhibit is a map of the United States which sets out the boundaries of the ten district offices of Sherwin. (Tr. 866-867). Counsel for the Commission conceded "there is no allegation on the part of the attorneys for the Commission that this is a zone map used in the pricing of lead pigments" (Tr. 868) but contended "We propose to connect that up with the method of the Sherwin-Williams Company of receiving orders and of shipping orders to customers, which we will show,
1098 the areas from which they ship and from which they
receive orders, and it is relevant and material as showing the method of doing business of the Sherwin-Williams Company in connection with the sale of lead pigments." (Tr. 868-869). Thereafter, the said map was never referred to in the record and no testimony or other evidence was ever produced along the lines indicated by Counsel when the exhibit was offered and received in evidence. There is no testimony as to what part, if any, these ten district offices play in either the receipt of orders for lead pigments from, or shipments of such products into, the areas surrounding the respective offices. Sherwin maintains warehouses in about fifty-three cities from which less than car load and less than truck load shipments are made. (R. X. 198-A-H; C. X. 662-Z-21; Tr. 3756). Carload or truck load shipments are made from the plant in Chicago, Illinois. (Tr. 3746). So far as the record discloses this map illustrates merely the location, for general administrative purposes, of Sherwin's district offices. It must be remembered that Sherwin is one of the largest, if not the largest, paint manufacturers in the country and sells paint in several hundred of its own retail paint stores as well as through thousands of independent paint retailers. Consequently, it is perfectly normal and proper for it to maintain these district offices to perform certain func-

tions relative to the distribution of its principal sales item, paint, which is not involved in this proceeding. In
1099 view of the lack of connection, which Counsel for the Commission promised when the exhibit was received, we submit that the exhibit should now be excluded as not being relevant, competent or material to any issues in the case.

5. The Examiner erred in permitting a statement made by counsel for Sherwin to appear in the record, at pages 869 and 870, in the face of objection thereto. The statement referred to reads

> "Counsel for Sherwin-Williams agrees that it effects sales of white lead at retail to its customers through and at the location of its retail stores as they are listed on Commission's Exhibit 652-A to L, inclusive.
>
> "And further states that it is and has been the regular practice of Sherwin-Williams Company in making sales of white lead through and at the location of its above-referred-to retail stores to quote and charge its published delivered prices as are shown to have been applicable at each such destination. The practice thus followed has been and is in accordance with the policy of Sherwin-Williams Company pursuant to the instructions of its manufacturing officials."

It is contended that while the foregoing statement is a correct one, the facts there stated are not material to any lawful issue herein. We contend that "sales made by Sherwin at and through its several hundred retail stores located throughout the United States are intrastate transactions and are not subject to the provisions of the Federal Trade Commissions Act, as amended, or the Clayton Act, as amended." (Sherwin's Requested Conclusion of Law 1.) This contention is predicated upon the holding of the Supreme Court in the case of *Federal Trade Com-*
1100 *mission* v. *Bunte Bros.*, 312 U. S. 349. In the present case there is even more reason to hold that the transactions are intrastate and beyond the jurisdiction of the Commission because they involve sales in regularly operated retail stores, whereas the shipments in the Bunte case were made from the manufacturing plant. The principle announced in the case of *California Rice Industry* v. *Federal Trade Commission*, 102 F. (2nd) 716, is not applicable because in that case the sales were F. O. B. mill or dock

ut of state, whereas purely local retail sales
ere. The Examiner recognized the correct-
above-quoted contention. (See Examiner's
erwin's Proposals as to Conclusion of Law
be no question but that such transactions
mmerce" within the meaning of the Federal
ssion Act. In so far as the Clayton Act is
re was no showing whatever that any sales
vin in any of its retail stores were discrimi-
ny other sales made by Sherwin or by any
ent which were interstate in character. In
h failure of proof there is no basis for con-
uch transactions are within the scope of the
Also, see paragraph 3 of Section IV of
f herein.

miner erred in receiving in evidence Com-
ibits 652 A-L (Tr. 827) and Commission's
-N (Tr. 838). These two series of exhibits
lentify the location and supervisory person-
erwin's retail paint stores and are not mate-
y lawful issue herein. The basis for urging
nateriality is the same as that set forth in
error number 6 hereof.

miner erred in receiving in evidence Com-
bits 490, 491 and 492 (Tr. 2045) over timely
2044-2045). Item 8 of subparagraph A of
ven of the Amended Complaint raises an
e relationship between National Lead Com-
erican Smelting and Refining Company but
e Amended Complaint is there any charge
relationship between Sherwin and Ameri-
nd Refining Company. These three exhibits
es of two purchase contracts by Sherwin for
at a set price, of certain quantities of cor-
om American Smelting and Refining Com-
py of one letter from Sherwin to American
Refining Company inquiring as to whether
can supply any part of Sherwin's require-
following month. None of these documents
r material upon any lawful issue herein so
n is concerned.

Wherefore, Sherwin requests that the Commission, upon consideration of this appeal, reverse the rulings of the Trial Examiner as set out in the foregoing assignments of error.

Respectfully submitted,
Raymond N. Beebe,
T. J. McDowell,
James T. Welch.

Of Counsel
Davies, Richberg, Beebe, Busick
& Richardson

November 16, 1948.

• • • • •

1155 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

Commissioners:
James M. Mead, Chairman.
Lowell B. Mason.
John Carson.
Stephen J. Spingarn.
Albert A. Carretta.

ORDER DISPOSING OF RESPONDENTS' EXCEPTIONS TO RECOMMENDED DECISION.

This matter is before the Commission for its consideration of the respondents' exceptions to the hearing examiner's recommended decision herein.

I. Exceptions of Respondent National Lead Company.

Because of the respondent's failure in some instances to specify the portions of the record or the authorities relied on, as required by Rule XXIII of the Commission's Rules of Practice, and its failure in other instances to state the grounds or bases for its contentions with sufficient definiteness and precision to enable the Commission to readily observe the alleged errors of the hearing examiner upon examination of the record citations given, the follow-
1156 ing exceptions are denied: 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 18, 19, 20, 22, 38, 39, 40, 42, 43, 44, 45, 47, 48, 49, 50, 51, 52, 53, 55, 57, 58, 59, 60, 61, 62, 63, 64,

65, 66, 68, 76, 80, 81, 82, 85, 92, 93, 94, 95, 96, 98, 100, 101, 102, 103, 104, 105, 106, 109, 110, 111, 112, 113, 114, 116, 117, 118, 119, 120, 121, 122, 124, 126, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 142, 143, 144, 145, 146, 147, 149, 150, 152, 153, 155, 156, 157, 158, 161, 162, 165, 166, 168, 172, 173, 174 (part), 175, 176, 177, 178, 179, 180 (part), 181, 182, 183, 184, 189, 190, 195, 196, 198, 199, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225 (part), 226, 227, 228, 230, 231, 232.

The other exceptions are disposed of as hereinafter indicated (page references are to the recommended decision).

Exception No. 1. The respondent excepts to the statement (page 2) that "Proposals (for findings and conclusions) were thereupon duly filed by all parties, * * *," on the ground that the proposals submitted by counsel in support of the amended complaint were not filed within the time fixed by the Commission.

The record shows that the proposed findings and conclusions of counsel in support of the complaint were filed on December 31, 1947. The Commission, by its order issued November 26, 1947, had provided that "Counsel may file proposed findings and conclusions, together with their reasons therefor, with the Trial Examiner on or before December 29, 1947, pursuant to Rule XXI of the Rules of Practice." It appears, however, that this order was entered upon an appeal filed by the respondents from a ruling of the examiner fixing December 1, 1947, as the date for filing proposed findings and conclusions, and thus, the sole purpose and effect of the order was to extend from December 1 until December 29, 1947, the time within which the
proposed findings and conclusions might be filed. The
1157 order did not otherwise interfere with the authority
of the hearing examiner, expressed in Rule XXI, to fix the time for the filing of such proposals, and while the record does not show the entry of an order by the examiner further extending the time within which counsel in support of the complaint might file his proposals, the mere fact that they were thereafter received and considered raises a presumption that such time was extended, and the examiner's recitation that the documents were "duly filed by all parties" renders the presumption conclusive. This exception is denied.

Exceptions Nos. 2, 3 and 4. The respondent excepts to the statements (pages 3 and 4) that the complaint alleged in substance, among other things, (1) that respondent National exerted a monopolistic influence on the pricing of pig lead through its relations with American Smelting and Refining Company; (2) that the respondents, through conspiracy, quoted uniform differentials as between standard containers of seventy-five, fifty, twenty-five, and twelve and one-half pounds; and (3) that the respondents, by conspiracy, made quarterly contracts for the sale of lead pigments at a fixed differential over American Smelting and Refining Company's New York price for common pig lead. The amended complaint, in Paragraphs Seven A (8) and Nine B and C of Count 1, does in very specific language contain the allegations stated by the examiner. These exceptions are denied.

Exception No. 13. The respondent excepts to the statement appearing on page 6 that the answers to the questions in the case as outlined by the hearing examiner are largely matters of "inference", the respondent contending that where there is reliable, probative, and substantial evidence there is no room for the employment of "inference". It is noted, however, that the complete statement of the hearing examiner is that the answers "are largely matters of inference from the circumstances and manner of employment by respondents of the various particular methods admitted and shown," thus indicating that the examiner's findings
1158 were not based on mere inferences unsupported by the evidence, but rather upon all of the evidence, including that showing the conditions existing in the industry and the actual practices in which the respondents engaged. In this view of the examiner's statement, the observation was not incorrect, and the respondent's objection thereto is without foundation. The exception is denied.

Exceptions Nos. 17 and 163. The respondent excepts to the hearing examiner's statements (pages 7 and 62) that corroding pig lead differs from common pig lead in that it is desilverized. In this statement the hearing examiner was in error, and the exceptions are well taken. The record shows that corroding pig lead is simply a purer form of lead than common pig lead, and that either corroding pig lead or common pig lead may be desilverized. These exceptions are granted.

Exceptions Nos. 21 and 167. The respondent excepts to the statements (pages 8 and 63) that National Lead Company acquired the Evans Lead Company, of Charleston, West Virginia, in "about 1944". The testimony of an official of respondent National was that Evans Lead Company was acquired sometime between 1931 and 1933, and nothing to the contrary appears. The date stated by the hearing examiner was an error, and the exceptions thereto are granted.

Exceptions Nos. 23 and 169 (part). The respondent excepts to the statements on pages 9 and 63 to the effect that its production of "dry white lead" from 1936 to 1941 was estimated as from 30% to 35% of the entire industry. As the respondent contends, this reference should have been limited to "dry white lead, basic carbonate", and inasmuch as the term "dry white lead" would include basic sulphate as well as basic carbonate, the statements as made were inaccurate. The exceptions are granted.

Exceptions Nos. 24 and 169 (part). The respondent excepts to the statements (pages 9 and 63) that the per-
1159 centage of white lead-in-oil produced by this respondent in 1932 "may have gone as high as 70%" of all of the white lead-in-oil produced in the country. The evidence on this point is that in 1943 the respondent's share of the white lead-in-oil business was approximately 60%. The record further shows that in 1932 and thereabout National's percentage was slightly higher, and that in years after that its percentage varied with a downward trend. There is nothing specific, however, to show that in 1932, National's percentage of the business was as high as 70%, or that it approximated that percentage, and the hearing examiner's statements were mere speculation. These exceptions are granted.

Exceptions Nos. 25, 27 and 169 (part). The respondent excepts to the charts appearing on pages 9 and 64, purporting to show the comparative percentages of production of white lead, dry and in oil, of the respondents and others, for the years 1938 through 1941, as being inaccurate. In these charts, the hearing examiner showed, among other things, that respondent National's percentage of the white lead business for the years stated was 55.475%. This figure should have been 55.575% and to this extent the charts are inaccurate. The hearing examiner also stated that the combined production of respondents National and Eagle-Picher for the same years was 68.825%. Due to the above inaccuracy in computing National's percentage, this figure was also inaccurate to the extent that it should have been

68.925%. To the extent indicated, these exceptions are granted; otherwise they are denied.

Exceptions Nos. 26 and 169 (part). The respondent excepts to the hearing examiner's statements (pages 9 and 64) to the effect that respondents Eagle-Picher and National were "potential" competitors. Insofar as these statements convey the impression that there was no real active price competition between these two respondents in the sale of their products, the statements are justified. To the extent that they connote a total absence of competitive effort as between the respondents in the development 1160 of the quality of their products and in the field of technical services offered customers, the statements are too broad. To the extent indicated these exceptions are granted; otherwise they are denied.

Exceptions Nos. 28 and 169 (part). The respondent excepts to the statements (pages 9 and 64) to the effect that the percentage of lead pigments production of respondent Eagle-Picher was "increased" by the acquisition by Eagle-Picher of the lead pigment plant and business of respondent International Smelting and Refining Company. On this point the record does show that on October 1, 1946, respondent Eagle-Picher acquired the lead pigment plant of respondent International. It does not show, however, that the lead pigment "business" of respondent International was acquired, and there is no evidence of any kind tending to show what effect, if any, Eagle-Picher's acquisition of this plant had on its relative position in the industry. These exceptions are granted.

Exceptions Nos. 29, 30, 31, 32 and 169 (part). The respondent excepts to the hearing examiner's statements (pages 9 and 64) that National's prices, terms and conditions of sale were followed generally by "all" of its domestic competitors; that it became a "predominant" factor in the industry; that its facilities for production were adequate to satisfy the entire market; and that its competitors "felt compelled" to follow its prices, all as being unsupported by the evidence. While the record is clear that all of the respondents in this proceeding followed generally the prices, terms and conditions of sale set by respondent National, it does not affirmatively show that those few lead pigments manufacturers who are not respondents did likewise. To the extent that the hearing examiner implied to the contrary, he was in error. The record further

shows, however, that respondent National did become a predominant factor in the industry in the sense that by 1935 it had become by far the largest and most powerful manufacturer of lead pigments and as such the undisputed
market leader; and it also shows that National's fa-
1161 cilities were adequate to supply the entire market and
that its competitors who are the respondents in this proceeding did feel that they could not avoid following its prices. On these points the examiner's statements are correct. To the extent indicated these exceptions are granted; otherwise they are denied.

Exceptions Nos. 33, 34 and 170 (part). The respondent excepts to the hearing examiner's summary of the facts concerning respondent National's ownership of approximately 50,000 shares of the capital stock of respondent Eagle-Picher, as set forth on pages 10 and 64, for the reason that said summary fails to include certain statements appearing in paragraph 16 of the respondent's proposed findings. There is no contention on the part of respondent National, and there could be none, that the hearing examiner's summary is in any respect inaccurate. Moreover, it appears that the additional statements proposed by the respondent, while also true, would contribute nothing to the significance of the facts stated by the hearing examiner. Such additional statements, if made, would have been only a recitation of the details of the circumstances of National's acquisition of its holdings of Eagle-Picher's stock, and the omission of these details, which, however, have been considered by the Commission, was not erroneous.

The respondent excepts also to the hearing examiner's reference to the witness, Charles Simon, as "secretary" of respondent National, and to his statement that this witness testified that "he did not know that National ever exercised any control over respondent Eagle-Picher." The record in this proceeding shows that the witness, Charles Simon, was treasurer of respondent National, and not that he was secretary. The transcript of this witness' testimony fairly considered also indicates that the witness intended to testify as a fact that while respondent National voted its stock in Eagle-Picher, it did not control Eagle-Picher's business affairs, and to the extent, if any, that the hearing examiner's statement imputes to this testimony any different meaning, the statement is erroneous. These exceptions are granted in part and denied in part as indicated.

1162 Exceptions Nos. 35 and 170 (part). The respondent excepts to the statements (pages 10 and 64) that there is some direct evidence of close relations between respondents National and Eagle-Picher. There is no merit to these exceptions. The record shows, among other things, discussions between officials of the two companies concerning price changes, changes in certain Federal specifications, and various industry problems. A substantial portion of the evidence in this entire proceeding has to do with the cooperation of these two and other respondents in an effort to overhaul the pricing practices of the lead pigments producers. These exceptions are denied.

Exceptions Nos. 36, 37 and 171. The respondent excepts to the hearing examiner's statements (pages 11 and 65) that American Smelting and Refining Company, on its organization in 1899, acquired sixteen lead and copper smelters and eight refineries, and thereafter, in 1901, took over three smelters, one refinery and other related properties from M. Guggenheim's Sons. Exception is also taken to the statement that American Smelting and Refining Company produced between 30% and 40% of the world's supply of refined lead. Both of these statements are fully supported by the record. Commission's Exhibit 22 shows in detail the properties acquired by American Smelting and Refining Company at the time of its organization, and thereafter, in conformity with the hearing examiner's recital; and the testimony appearing at page 4093 of the transcript covers the percentage of refined lead produced by American Smelting and Refining Company. These exceptions are denied.

Exceptions Nos. 41 and 174 (part). The respondent excepts to the hearing examiner's statements (pages 12 and 66) to the effect that Hoyt Metal Company was acquired by National as a property of United Lead Company. These exceptions are well taken. The record shows that Hoyt Metal Company was a constituent company of respondent National Lead Company, but it does not show that it was acquired as a property of United Lead Company. These exceptions are granted.

1163 Exception No. 46. The respondent excepts to the hearing examiner's statement on page 13 to the effect that the chart there quoted represents National's purchases for the years shown of "common and refined lead". This statement is inaccurate only in that it should have referred to "common and corroding pig lead" instead of to "common and refined lead". To this extent the exception is granted; otherwise it is denied.

Exceptions Nos. 54 and 180 (part). The respondent excepts to the hearing examiner's basic description of the uniform zone pricing system, set forth on pages 14 and 67, citing in support of these exceptions paragraphs 50 to 66 of the respondent's proposed findings and the authorities there cited. These exceptions are without foundation. The purpose of the statement objected to was to describe generally the uniform zone pricing system as used by the respondents after 1934 in order that the material following might be readily understood. Apparently, the respondent's objection is that the hearing examiner did not at this point in his report adopt the respondent's theory of the evolution of the system from the delivery and equalization point system employed in the industry prior to 1934, but even if that theory of the zone system's development had been adopted, its statement at this point in the report would not have been necessary. The hearing examiner's statement as made appears to be factually correct, and the respondent has not indicated otherwise. The exceptions are denied.

Exception No. 56. The respondent excepts to the use by the hearing examiner of the word "plan", on page 15, in describing the operation of the respondent's zone pricing system. The basis of the objection is not stated in the exception. It appears that the effective employment of the zone delivered pricing system as developed by the respondents did necessarily involve a "plan", and the hearing examiner's use of this designation cannot be said to have been improper. The exception is denied.

1164 Exception No. 67. The respondent excepts to the hearing examiner's statements on page 20 to the effect that the participation of certain named individuals and other representatives of the respondents in various meetings of the committees of the Lead Industries Association during N. R. A. days is shown by the minutes of these meetings. The objection is on the ground that there is nothing in the record to show that "all respondents" were represented on the committees or that they all participated in the various meetings. The hearing examiner did not so state. He did state, and correctly, that all of the respondents belonged to the association; and the minutes of the various committee meetings do show, as the hearing examiner found, that F. M. Carter and Harold Rowe, of National, Messrs. Bendelari, Roosevelt and Maston, of Eagle-Picher, Paul E. Sprague, of Glidden, S. B. Coolidge, Jr., of Sherwin-Williams, F. W. Case, of International, and other representatives of the respondents participated in the various meetings. This exception is denied.

Exceptions Nos. 69 and 185. The respondent excepts to the statements (pages 20 and 70) to the effect that an exemption from the terms of Section 2 of Article VII of the Code for the Lead Industry, and from Schedule A attached to the code, was granted the respondents by the N.R.A. Administrator and thereafter extended so that these portions of the code were never effective. The objection is that the statement is "incomplete". Presumably, this is because the hearing examiner did not also say that the exemption order applied to other manufacturers of lead pigments as well as to the respondents. Insofar as the statement implies that the order applied only to the respondents it is inaccurate and to this extent the exceptions are granted. In all other respects the statement is correct, and except as indicated the exceptions are denied.

Exception No. 70. The respondent excepts to the following statement on page 21 insofar as it may be interpreted as representing the conclusion of the hearing examiner:

> "Consequently, these Schedule A provisions are relied on as some of the evidence showing agreements
1165
> as to practices which were unlawfully employed, and as showing use of the association machinery therefor."

When read in its context, this statement is subject to but one interpretation, namely, that counsel in support of the complaint relies on the provisions of Schedule A as some of the evidence showing unlawful agreements among the respondents. The hearing examiner was not in this paragraph of his report stating any conclusions whatever. This exception is denied.

Exception No. 71. The respondent excepts to the statement (page 21) that "Evidence to this effect (that agreements reached in the association committee meetings were solely with respect to recommendations of provisions to be included in the code) was received from Mr. Wormser and others", insofar as said statement implies that evidence to the effect stated was found only in the parol testimony of Wormser and others. To the Commission the statement quoted does not imply that the only evidence bearing on the proposition was the parol testimony referred to. The affirmative recognition that certain evidence tended to support the respondent's contention does not necessarily mean that there was no other evidence to the same effect. At the same time, it is to be noted that the minutes of the various committee meetings and other documents cited by the respondent constitute evidence of agreements covering subjects other than those relating to provisions to be recommended for inclusion in the code as well as evidence of the formulation of such recommendations. This exception is denied.

Exceptions Nos. 72, 73, 74 and 186. The respondent excepts to the hearing examiner's references (pages 21 and 70) to "agreements on matters not included in recommendations for the Code, such as zone pricing and consignment contracts", on the ground that there is no proof of such "agreements". The respondent's position on
these matters is untenable. Both the testimony and
1166 the documents in the record clearly show that in many
of the committee meetings and elsewhere the subjects of zone pricing and consignment agreements were freely discussed, and the circumstances under which both of these practices were adopted and thereafter used is convincing evidence of the fact that the respondents did reach definite and certain agreements and understandings concerning them. These exceptions are denied.

Exception No. 75. The respondent excepts to the statement (page 22) that the witness, Wormser, "stated further that the Association has not, except during the period covered by the Code, permitted in the industry any agreements to fix prices and terms, restrain trade, monopolize or curtail production". The objection is that this statement is an inaccurate summary of Mr. Wormser's testimony. The inaccuracy, if any, in the statement occurs in the possible implication that Wormser admitted that during the code period there were among members of the industry agreements to fix prices and restrain trade. As the respondent contends, this witness did not admit this to have been true, and to the extent that the hearing examiner's statement may be subject to the interpretation that he did, said statement is inaccurate and to this extent the exception is granted. In all other respects the exception is denied.

Exceptions Nos. 77 and 187. The respondent excepts to the statements (pages 22 and 70) that "The consignment plan of selling white lead-in-oil and other keg products was inaugurated by National's Atlantic branch early in 1933 and was thereafter extended to its eastern territories. Eagle-Picher also started the plan about this time." These statements are in error in three respects: (1) The agency or consignment plan of selling applied only to white lead-in-oil transactions and was never used in connection with "other keg products"; (2) The plan was inaugurated by National's Atlantic branch early in 1932, not in 1933;
and (3) Eagle-Picher began using the plan at about
1167 the time National extended it to its other branches,
in 1933. To the extent indicated these exceptions are granted; otherwise they are denied.

Exceptions Nos. 78, 79 and 188. The respondent excepts to the statements (pages 22, 23 and 71) (1) that the agency or consignment method of selling was put before all respondents in a meeting of the White Lead-in-Oil Committee on August 9, 1933, and (2) that agreements to employ a uniform consignment plan were never authorized by the N.R.A. code. The first of these statements is inaccurate in that The Glidden Company, one of the respondents herein, was not represented at the meeting of August 9, 1933, at which the agency or consignment method was discussed. The second statement is correct in all respects. In the Commission's view of the evidence, there were agreements between respondents National and Eagle-Picher, participated in by respondent Anaconda (International), to sell white lead-in-oil in accordance with the agency or consignment plan, and such agreements were never authorized by any provision of the code. To the extent indicated the exceptions are granted; otherwise they are denied.

Exceptions Nos. 83, 84 and 191 (part). The respondent excepts to the statements (pages 24 and 72) to the effect (1) that Eagle-Picher began the use of consignment contracts when National did and conformed to National's methods in every essential particular until about March 9, 1942, and (2) that after 1942 Eagle-Picher required consignees to pay at the end of the month for all stocks held by them, but it indicated that the old contracts would be kept in force. Except in one particular, these statements appear to be correct. The one exception is that National began using agency or consignment contracts in its Atlantic branch early in 1932. Eagle-Picher did not begin using such contracts until National extended the plan to its other branches in 1933. To the extent of correcting this inaccuracy the exceptions are granted; otherwise they are denied.

1168 Exceptions Nos. 86 and 191 (part). The respondent excepts to the hearing examiner's reference to National's and Eagle-Picher's "consignees" and "dealers" under their agency or consignment contracts, appearing on page 25. The references appear in the hearing examiner's description of Glidden's consignment contracts, and the terms as used have no particular significance. Technically, the consignees of National's white lead-in-oil were designated "agents" in the contracts, and Eagle-Picher's consignees were designated "distributors". They were nevertheless "consignees", and the hearing examiner's reference to them in that manner cannot possibly be prejudicial. These exceptions are denied.

Exceptions Nos. 87 and 192. The respondent excepts to the hearing examiner's statements (pages 25 and 73) to the effect that the respondents' suggested resale prices for white lead-in-oil and other keg products, with certain exceptions, were identical, and to the table included in the report to illustrate this fact. The various price cards in the record, as well as the testimony of many witnesses, clearly show that the prices at which the respondents suggested to dealers that they resell white lead-in-oil and other keg products were substantially the same at all comparable times. It does appear, however, that the table included in the report to illustrate this fact is erroneous in at least one respect, namely, it compares the suggested resale prices shown on the price card of respondent Glidden dated October 20, 1937, with the suggested prices of the other respondents dated September 13, 14 or 15, 1937, with the result that it indicates a difference in resale prices as between this respondent and the others which did not actually exist. Respondent Glidden's price card for September 13, 14 or 15, 1937, was not furnished, but a comparison of its cards for other periods with the cards of the other respondents for the same periods shows that at all comparable times the suggested resale prices of all were the same. The only respect in which this respondent's prices differed from the prices of the other respondents was in the price to dealers to compensate the dealers for handling Glidden's less popular products. To the extent indicated these exceptions are granted; otherwise they are denied.

1169 Exceptions Nos. 88 and 193. The respondent excepts to the hearing examiner's summary (pages 26-7 and 74) of the agreements with respect to provisions to be recommended for the code, which were entered into by the respondents as a result of the association meetings, regarding the collective fixing, quoting and employing uniform prices, terms and conditions of sale of lead pigments. The fact that the practices and methods referred to by the hearing examiner were freely discussed in the various committee meetings and recommended for inclusion in the supplemental code for the lead pigments industry is clear from the minutes of the various meetings and from the testimony of the witnesses who participated therein. Thus, the inference that the respondents did agree on the collective use of such practices and methods which were thereafter uniformly employed by all of them in the sale of their products is inescapable. These exceptions are denied.

Exceptions Nos. 89, 90, 91 and 194. The respondent excepts to the hearing examiner's statements (pages 27 and 74) (1) that references to particular prices as distinguished from price differentials were purposely omitted from the code provisions; (2) that respondent National put Article II of the supplemental code into effect some months prior to its formal adoption; and (3) the general nature of the code provisions concerning the differentials over American Smelting and Refining Company's prices for pig lead to be allowed in the sale of lead oxides. The fact that references to particular prices were purposely omitted from the code is clearly established, the evidence being that this was done in an attempt to avoid a direct violation of the antitrust laws. In stating that a part of the supplemental code was put into effect by National prior to its formal adoption, the hearing examiner was correct, but in this connection, he should have referred to Article III of Schedule A attached to the code and not to Article II of the supplemental code. His statement of the code provisions respecting the differentials to be charged over American Smelting and Refining Company's price on pig lead for lead oxides was inaccurate only in that it failed to specifically show that the stated differentials applied only to sales in carload quantities. In all other respects, the statements objected to appear to be accurate. To the extent indicated these exceptions are granted; otherwise they are denied.

1170 Exceptions Nos. 97 and 197. The respondent excepts to the table of "parallel" quotations on white lead-in-oil "and other keg products," set forth on pages 29 and 76. While the respondent did not particularize the errors claimed to exist in this tabulation, it does appear that the table is inaccurate. In preparing the table the hearing examiner apparently has included quotations of respondent National to "dealers" as that term is used by National, rather than "distributors"; has included quotations applicable to zones other than the par zone; and has used at least one price card (that of respondent Glidden) bearing a date different from the dates on the other cards used. In addition, the hearing examiner erroneously stated that the quotations given applied to "other keg products" and to containers larger than one hundred pounds. To the extent indicated these exceptions are granted.

Exception No. 99. The respondent excepts to the statement (page 30) to the effect that its "quotations" and those of respondent Eagle-Picher were "identical" in the periods there referred to, except for the quantity requirement of Eagle-Picher in 1939 and 1941. It is apparent that the hearing examiner in this statement was referring to "quotations" to dealers and others occupying similar positions. The "quotations" referred to by the respondent, on the other hand, in support of its exception were to government agencies, differences in which did exist, as the hearing examiner found. This exception is denied.

Exception No. 107. The respondent excepts to the hearing examiner's statement (page 35) to the effect that the respondents were shown to have quoted and allowed a uniform differential of twenty-five cents as between the various container sizes used to contain one hundred pounds of lead pigments, and to his statement that the use of this practice was admitted by all respondents. The fact that all of the respondents charged the differential referred to was established by the evidence, and it does not appear that this was seriously contested. In fact, evidence was introduced by both National and Sherwin-Williams to show that this differential was less than the costs involved as between single containers requiring only one process
1171 of sealing, packing, labeling and handling, and the costs of additional containers, each of which required the same processing. It may not be a precise statement to say, as the hearing examiner said, that all respondents ad-

mitted the practice, but the fact that it was used is clear. Except insofar as the exception relates to the statement that the respondents "admit" the use of the practice in question, the exception is denied. To the extent that it challenges the use of the word "admit" the exception is granted.

Exception No. 108. The respondent excepts to the statement (page 35) that "National continued to make quarterly contracts for car lots of lead oxides until 1942, and these followed generally the code provisions of subsections (b) and (c), Article III of Schedule A". The fact that quarterly contracts for the sale of dry white lead were made until 1942 was established by the testimony of the witness, McCarthy, and appears on pages 1658 and 1659 of the transcript. It does not affirmatively appear, however, that quarterly contracts for the sale of lead oxides were made by National during the period specified, and this exception is accordingly granted.

Exception No. 115. The respondent excepts to the hearing examiner's use of the word "system" in describing the territorial or zone pricing practices shown to have been engaged in. There is no merit in this exception. Obviously, the practice, as employed by the respondents, involving as it did, the sale of lead pigments on a zone delivered price basis, with a flat par price for all deliveries in a par zone, and increased uniform differentials over the par price for various zones other than the par zone, was a pricing "system" within the ordinary and commonly accepted meaning of the word. This exception is denied.

Exception No. 123. The respondent excepts to the hearing examiner's conclusion (page 43) to the effect that the zoning system used by the respondents operated to prevent near-mill customers from having any special advantage over their competitors located at a distance. The hearing examiner further found, however, that the respondents' failure to extend this advantage to near-mill customers had no adverse competitive effects within any
1172 one zone. The respondent's objection is to the implication that f.o.b. pricing would ever afford near-mill customers special benefits. The evidence is that such pricing would provide the customers nearer the mill with an exclusive competitive advantage which would extend in diminishing degree all the way to the location of the distant purchaser who would pay the mill net price plus freight. Thus, the near-mill customer would be on an

ting with the distant purchaser at the lat-
and at all points beyond. Under the re-
tem of selling to all customers in a zone at
ered price, this advantage to the near-mill
noved. The exception is denied.

Ios. 125, 126, 127, 128, 160, 214 and 233. The
epts to the hearing examiner's conclusions
44, 45, 46, 57, 58, 85, 86, 87 and 95) that the
ve violated the Federal Trade Commission
yton Act, as amended, in the manner and to
e stated. For the reasons set forth in its
he facts in this proceeding, the Commission
greement with these conclusions of the hear-
and is of the opinion that the respondent's
hese conclusions are without merit. They
denied.

Nos. 140 and 141. The respondent excepts
its (page 53) that a tabulated study intro-
spondents to show the differences in average
ht costs between car and less-than-car ship-
hite lead (Resps.' Exs. 215 and 216) "was
from National's Atlantic Branch" and that
ws an average cost excess of about one-
er pound on less-than-car shipments. The
ontention is that these statements are con-
idence and inaccurate. In connection with
the evidence is that the freight figures on
cover shipments of white lead from all of
nches, but that the invoices used in the
assumed to be typical of all shipments were
he Atlantic branch only. The hearing ex-
statement that the difference in average
freight costs as shown by the tabulation was
pound" did not purport to state the differ-
sion, and it appears that the approximation
lose to the differences actually shown. To
ated the exceptions are granted; otherwise
l.

Ios. 148 and 225 (part). The respondent
hearing examiner's statements (pages 55
On dry white lead it is not clear that there
l unjustified quantity differential between
rchasers", the respondent contending that
ted evidence establishes that the differen-
rload and less-than-carload shipments of

dry white lead was less than the difference in the respective costs of sale and delivery of the two quantities. On this point, the record does show that the differences in freight rates as between carload and less-than-carload shipments of white lead were sufficient to justify this price difference of one-quarter cent in transactions in which rail freight was a factor. It further appears, however, that white lead is sold in large quantities in and around the paint manufacturing centers of St. Louis, Chicago, Philadelphia and New York, and that in such sales deliveries are made from the respondents' lead producing plants in these localities by local cartage, with the result that in such transactions rail freight is not a factor in computing delivery costs. The record contains no evidence of any kind to show that in these instances the one-quarter cent differential can be justified, and respondent National apparently recognized that no such justification was possible since the cost data submitted by it included no transactions other than those in which rail freight was involved. These exceptions are denied.

Exception No. 151. The respondent excepts to the statements appearing on page 55 to the effect that differences in the respondents' mill nets resulting from shipments from par points to par destinations and from par points to premium zone destinations where the added in-
1174 crement was no more than the additional freight were not shown to have involved cost disadvantages as between dealers and processors purchasing the respondents' products, for the reason that the statement should have been that there were no discriminations in prices at all within the meaning of Section 2(a) of the Clayton Act, as amended, arising out of the use of the territorial method of selling as employed by the respondents. The Commission does not agree with the respondent in this respect. For the reasons set forth in its findings as to the facts herein, the Commission is of the opinion that the record does show that there were involved in the respondents' zone pricing system unlawful discriminations as between purchasers of the respondents' products located in different zones. This exception is denied.

Exceptions Nos. 154 and 229. The respondent excepts to the hearing examiner's statements (pages 56 and 94) that the respondents' inter-zone prices "are justified only where the additional freight equals or exceeds the zone premium". In view of the fact that the respondents' efforts to justify their zone differentials were based on the theory that such differentials did not exceed differences in the average freight charges applicable to the several zones, the hearing examiner's statements are sound. The exceptions are denied.

Exception No. 159. The respondent excepts to the hearing examiner's reference on page 57 to effects arising from the respondents "cooperatively" or "collusively" employing the same discriminations, on the ground that the record does not show that any discriminations or other practices were "cooperatively" or "collusively" employed. For the reasons stated in its findings as to the facts, however, the Commission is of the opinion that the respondents did act "cooperatively" and "collusively" in the matter of fixing and maintaining prices, terms and conditions for the sale of their lead pigments, and it follows that the hearing examiner's use of these terms was not erroneous. This exception is denied.

1175 Exception No. 164. The respondent excepts to the statement (page 62) that "The respondents produce practically all but a small quantity of the lead pigments produced in the United States * * *", on the ground that the statement finds no support in the evidence. The Commission is of the opinion that the record does amply support the statement. There are in the country a few relatively small independent producers of lead pigments other than the respondents, and some of the manufacturers of mixed paints were shown to have produced some of their own requirements of white lead-in-oil, but it is to the respondents that purchasers and consumers must look generally for their supplies of lead pigments, and the respondents have the power to and do control the supply of lead pigments available for shipment in commerce. Illustrative of this situation is the showing made that in 1943 respondent National alone produced 60% of the white lead-in-oil sold in the United States, and the further showing that in the years 1938 through 1941 the respondents combined accounted for approximately 95% of all shipments of white lead, both dry and in oil. The hearing examiner's statement is unassailable and the exception thereto is denied.

Exception No. 200. The respondent excepts to the statement (page 79) to the effect that it was not shown that a uniform contract for the sale of lead pigments was agreed on, for the reason that the statement is incomplete in that it fails to show that a uniform contract was not used. It is true, as the respondent contends, that the record does not show that a uniform contract was used generally in the sale of lead pigments. To the extent that the hearing examiner's statement may be said to imply otherwise this exception is granted. In all other respects it is denied.

Exceptions Nos. 234, 235, 236 and 237. The respondent excepts generally to the recommended order to cease and desist included in the recommended decision and specifically to each of the paragraphs and subparagraphs thereof, on the ground that said order and each of its
1176 parts is unwarranted by the record or by the Federal
Trade Commission Act or the Clayton Act, as amended. For the reasons set forth in its findings as to the facts and its conclusion in this proceeding, the Commission is of the opinion that the respondents have violated the Federal Trade Commission Act and Section 2(a) of the Clayton Act, as amended, and further that the issuance of an appropriate order to cease and desist is necessary and in the public interest. Insofar as the Commission's order is in substance the same as that recommended by the hearing examiner, the recommended order has been adopted. Insofar as the two are not the same, said recommended order has not been adopted, not for any of the reasons assigned by the respondent but solely because the Commission is of the opinion that provisions other and different from those recommended will more adequately correct the evils found to exist. These exceptions are denied.

Exceptions Nos. 238, 239 and 240. The respondent excepts to the hearing examiner's failure to find in haec verba as requested in a number of specified paragraphs of its proposed findings, and excepts to the denial of a number of other proposed findings and conclusions, and in addition adopts as its own and incorporates in its exceptions by reference all of the exceptions taken by each of the other respondents herein except those that may be inconsistent with the exceptions of this respondent. To the extent, if any, that the Commission's findings as to the facts and conclusions incorporate any of the respondent's proposals and conclusions which were not adopted or which were rejected by the hearing examiner, the rulings of the hearing examiner on the same are disapproved and the respondent's exceptions are granted. In all other respects and in all other instances the rulings of the examiner on the proposals are approved and the respondent's exceptions are denied.

1177 II. Exceptions of Respondent the Sherwin-Williams Company.

The exceptions of this respondent noted in the left-hand column below are in substance or effect the same as the exceptions of respondent National Lead Company noted in the right-hand column of the tabulation, each of which has been disposed of hereinabove, and the ruling on each of these corresponding exceptions is the same:

Exceptions of The Sherwin-Williams Company	Exceptions of National Lead Company
1	3
2	4
3	6
7	14
12 (part)	23
13	25
15	29
16	38
19	61
20	62
21	63
23	65 to 76, inclusive
25	87
26	88
27	89
28	91
29	92
30	95
31	97
32	97
36	100
40	102
41	103
45	105
46	106 and 107
48	109
52	114

	Exceptions of the Sherwin-Williams Company	Exceptions of National Lead Company
	54 to 58, inclusive	116
	63	120
	64	122
1178	65	124
	66	125, 126 and 128
	67	129
	71	134
	76	142
	77	143
	80	146
	81	147
	84	153
	86	155
	87	156
	89	159
	91	160
	92	162
	93	240
	95 (part)	234
	97	234 and 236
	98 to 108, inclusive	239 and 240

In the exceptions numbered 5, 33, 34, 39, 51, 60 and 62 the respondent has failed in some instances to specify the portions of the record or the authorities relied on, as required by Rule XXIII of the Commission's Rules of Practice, and has failed in other instances to state the grounds or bases for its contentions with sufficient definiteness and precision to enable the Commission to readily observe the alleged errors of the hearing examiner upon examination of the record citations. These exceptions are accordingly denied.

The other exceptions are disposed of as hereinafter indicated.

Exception No. 6. The respondent excepts to the hearing examiner's failure to include in his outline of the principal issues in this proceeding (page 6) a statement of the issues raised by Sherwin-Williams in the special defenses set up in its answer to the amended complaint.
1179 The special defenses so raised by Sherwin-Williams
are (1) that its pricing activities have been pursued

in good faith to enable it to compete in the sale of lead pigments with other sellers, and that such activities have not constituted unfair methods of competition or unfair acts or practices within the meaning of the Federal Trade Commission Act or unlawful price discriminations under subsection (a) of Section 2 of the Clayton Act, as amended; (2) that any pricing system for the lead pigments industry which would result in a uniform net return on all sales, or any other system substantially different from that used by the respondent, would have the tendency and capacity to create territorial spheres of monopoly for some sellers, with the effect of excluding others having a freight disadvantage from the market; and (3) that where its net return from sales of identical quantities to identical classes of purchasers in different competitive areas varies, such variance does not constitute an unlawful price discrimination within the purview of Section 2(a) of the amended Clayton Act. It was not necessary for the hearing examiner to include specifically any of the issues raised by these defenses. As the hearing examiner stated, the principal and ultimate issues for decision in this case, among others, are whether the respondents agreed to maintain fixed and identical prices on lead pigments through the cooperative employment of the zone pricing system and other practices alleged; whether the use of the respondents' zone pricing system involved unjustified price differences between customers located in a single zone and between customers located in different zones; and whether the price differences, if they existed, had the tendency and effect of lessening competition. The answer to the question whether or not the respondents have violated the Federal Trade Commission Act or Section 2(a) of the Clayton Act, as amended, or both, depends altogether on the final disposition of these issues, and the matters raised in this respondent's special defenses, while proper subjects for consideration in connection with the main issues, are only subsidiary to such issues. This exception is denied.

1180 Exceptions Nos. 8 and 9. The respondent excepts to the hearing examiner's failure to state on pages 7 and 62 that Sherwin-Williams does not manufacture or sell basic lead sulphate or any other lead pigments except red lead, litharge and basic lead carbonate, and that for over twenty years Sherwin-Williams has not sold red lead or litharge to the battery manufacturing industry. As the respondent contends, the record does disclose that Sherwin-Williams does not manufacture or sell basic lead sulphate or any other lead pigment except red lead, dry and in oil, litharge, white lead, basic carbonate, and white lead-in-oil (which, however, are the principal lead pigments with which this proceeding is concerned, the other lead pigments being blue lead, orange mineral and grinders lead paste), and that it does not sell oxide to battery manufacturers. It was not necessary, however, for these facts to be stated at the points referred to in the recommended decision, especially since they were recognized by the hearing examiner at other places in the report. On the other hand, the Commission has no desire to minimize them, and to the extent that the recommended decision as a whole fails to clearly portray the facts stated it is deficient. Insofar as these exceptions complain of the failure of the hearing examiner to include these facts on pages 7 and 62 of the recommended decision, they are denied. To the extent, if any, that the recommended decision as a whole fails to clearly show the facts, the exceptions are granted.

Exception No. 10. The respondent excepts to the statements (pages 7 and 62) that "Respondents Glidden and Sherwin also manufactured and sold mixed paints made from lead pigments produced by them or purchased from others", on the ground that the record does not establish the fact that Sherwin-Williams purchases lead pigments from others for the purpose stated. To the extent that the above statement implies that Sherwin-Williams purchases lead pigments from others for use in the manufacture of mixed paints it is unsupported, and to this extent this exception is granted.

1181 Exception No. 11. The respondent excepts to the hearing examiner's failure to include on pages 7 and 62 a detailed statement of Sherwin-Williams' competitive position in 1943 in the sale of white lead-in-oil and its relative position in the sale of other lead pigments. The part of the recommended decision in which the respondent desired this information consists of a general statement of the business in which the respondents in the proceeding are engaged and general information concerning the products with which the proceeding is concerned. It would not have been consonant with the method of presentation followed by the hearing examiner for the detailed facts respecting the competitive position of Sherwin-Williams to have been included at this point in the report, and the fact that it was not so included was not erroneous, especially since all of the pertinent facts were stated elsewhere. This exception is denied.

Exceptions Nos. 12 (part) and 14. The respondent excepts to the hearing examiner's failure to state, on pages 9 and 64, (1) that basic lead sulphate is used to a substantial extent by Eagle-Picher, and to some extent by National, as an alternative product to basic carbonate in sales to paint manufacturers, and (2) insofar as the record discloses, the extent of the production and sale of basic sulphate by Eagle-Picher and National. The hearing examiner, on pages 9 and 64, was discussing the acquisitions of respondent National Lead Company, and as an incident thereto included a tabulation showing the percentages of white lead-in-oil for the entire industry sold by National and by the other respondents, respectively, during the years 1938 through 1941. The importance of white lead-in-oil in the paint manufacturing industry having been clearly established in the record, the competitive positions of National and the other respondents in the sale of this product obviously is a matter of primary importance in the proceeding, and the fact that lead sulphate may be used also by paint manufacturers is more or less immaterial. Even if it be conceded that National and Eagle-Picher did sell quantities of it to paint manufacturers, that part would not detract from the significance of the percentages 1182 of white lead-in-oil sold by the respondents, and the examiner's failure to state that basic lead sulphate was also sold by National and Eagle-Picher could not prejudice this respondent in any way. These exceptions are denied.

Exceptions Nos. 17, 68, 69, 70, 74, 82 (part), 83 and 85. In these exceptions the respondent objects to various statements made by the hearing examiner in which he either said or implied that respondent Sherwin-Williams, along with the other respondents in this proceeding, employed the zone delivered pricing system in selling lead pigments. Throughout the proceeding it has been the contention of Sherwin-Williams that it does not now, and that it never has, employed the zone pricing system, but has sold its lead pigments on a basis of free delivery and equalization points similar to the method used by all the members of industry prior to 1933, and that all of the statements indicating that it uses a zone system are erroneous. For the reasons set forth in its findings as to the facts being issued in this proceeding, the Commission is of the opinion that Sherwin-Williams' position in this respect cannot be supported. It was shown, among other things, that notwithstanding the company's professed policy of requiring purchasers to pay freight charges in sales to locations other than certain shipping points, Sherwin-Williams in a majority of the transactions concerning which evidence was introduced absorbed the transportation costs, with the result that the prices paid and received in the transactions were exactly the same as though such prices had been computed in accordance with the zone system employed by the other respondents. The Commission is of the opinion, therefore, that for all practical purposes the company used the system and that the statements of the hearing examiner to that effect were fully justified. The exceptions to such statements are denied.

Exception No. 18. The respondent excepts to the hearing examiner's listing of the cities (pages 16 and 68) from which shipments of certain lead pigments were made and sold in accordance with the zone pricing system and 1183 priced through the use of certain differentials over American Smelting and Refining Company's price for pig lead, without at the same time stating which of the respondents have plants located at the various cities named. The hearing examiner at this point in his report was describing generally the zone pricing system under which he found that the respondents, acting cooperatively, priced their products. For the purpose of this description it was not necessary for him to there show which of the respondents had plants located at the various cities from which the shipments were made. The critical question in connection with the phase of the case to which the examiner was then addressing himself was whether or not the respondents had entered into an unlawful combination to use the zone system of pricing, and the answer to this question did not depend upon an answer to the further question which of the respondents had plants in which cities. This exception is denied.

Exception No. 22. The respondent excepts to the statement on page 19 as follows: "Since the particular practices as individually employed are not controverted in essential respects, the substance of the issue is agreement and cooperation." The respondent's objection is that "the record establishes substantial variance between the practices employed by it (Sherwin-Williams) individually as compared to practices employed by the other respondents herein." The hearing examiner elsewhere in his report clearly pointed out the differences between the practices of this respondent and the practices of the others. Moreover, he did not at this point in the report say that the practices of all of the respondents were the same, but only that the particular practices as individually employed were not controverted in essential respects. The exception is denied.

Exceptions Nos. 24, 49, 59, 61, 72, 73, 75, 82 (part), 90 and 95 (part). In these exceptions the respondent objects to various statements and conclusions, and to one of the provisions of the recommended order based thereon, 1184 in which the hearing examiner either said or necessarily implied that respondent Sherwin-Williams was a party to an understanding or agreement among the respondents to fix and maintain prices, terms and conditions of sale of lead pigments and that the use of the zone pricing system and the other practices described in the recommended decision were employed by said respondents, including Sherwin-Williams, pursuant to said understanding or agreement. The respondent's contention is that it was not a party to any such understanding or agreement and that none of its pricing practices have been the result of any cooperation with any other respondent. For the reasons set forth in its findings as to the facts in this proceeding, the Commission has reached the conclusion that the respondents, including Sherwin-Williams, availed themselves of the opportunity afforded by the National Industrial Recovery Act to cooperatively revise the pricing practices of the lead pigments industry, and that they entered into and thereafter carried out certain definite understandings and agreements for the purpose of accomplishing that result. The Commission is of the opinion, therefore, that the hearing examiner's statements and inferences to which the respondent objects were fully justified, and these exceptions are accordingly denied.

Exception No. 35. The respondent excepts to the hearing examiner's failure to state on page 76 that the freight costs from Sherwin-Williams' shipping points to purchasers' destinations would have to be ascertained and

added to the quotations appearing in the table set out in full on page 29 and incorporated on page 76 by reference (showing certain price quotations on white lead-in-oil in 100-pound containers), in order to make accurate comparison as to the purchasers' relative costs in buying from the various respondents. In view of the fact that in the transactions shown Sherwin-Williams quoted f.o.b. certain shipping points, it would not be possible, of course, to determine the final cost to a customer of this seller without adding to its quotations the transportation charges
from its shipping point to the customer's location;
1185 and in view of the further fact that the quotations
of National and Eagle-Picher included costs of delivery, a comparison of a purchaser's relative costs in buying from the respective respondents would necessitate the addition to Sherwin-Williams' quotations of the cost of delivery from its shipping point. The exception to the hearing examiner's failure to state this fact on page 76 is granted.

Exceptions Nos. 37 and 38. The respondent excepts to the statements (pages 33 and 77) to the effect that the record of 1230 sales of white lead-in-oil tabulated on pages 31 and 32 shows (1) that the prices of Anaconda (International), Glidden and Sherwin-Williams were substantially uniform, and (2) that Sherwin-Williams made a certain number of sales under National's lowest price. For the reasons assigned in support of the ruling granting exception No. XIII to the recommended decision filed by counsel in support of the complaint the tabulation of sales set out on pages 31 and 32 of the recommended decision is inaccurate in a number of respects. Hence, any conclusions to be derived from the tabulation are also inaccurate, and the respondent's exceptions thereto are accordingly granted.

Exceptions Nos. 42, 43 and 44. The respondent excepts to the statements (pages 34 and 77) to the effect that instructions were given on Sherwin-Williams' trade bulletins for large dealers' prices to be followed on government, state and municipal bids, insofar as said statements say or imply that Sherwin-Williams' managers and salesmen were instructed to follow its large competitors' prices on government, state and municipal bids. If in the statements referred to the hearing examiner intended to convey the impression that Sherwin-Williams instructed its managers

and salesmen to follow its large competitors' prices when submitting bids to the government, states or municipalities, the statements are erroneous. There is no testimony or
other evidence to support that interpretation of the
1186 instructions, and the instructions themselves appar-
ently meant only that quotations to the government,
states and municipalities should be on the same basis as quotations to Sherwin-Williams' large dealers.

The respondent also objects to the above statements for the reason that they imply that the instructions referred to are now in effect. There is no indication that this is the case. To the extent that the hearing examiner's statements are subject to the interpretations indicated, these exceptions are granted.

Exception No. 47. The respondent excepts to the statement (page 35) to the effect that Sherwin-Williams continues to make quarterly contracts for oxides, and the price is based on the New York market for pig lead. The statement is erroneous. The record citations given by the hearing examiner reveal that up to the time of the hearings in this case Sherwin-Williams did enter into contracts for the sale of white lead covering the quarterly requirements of purchasers, but that it did not enter into such contracts for the sale of oxides. This exception is granted.

Exception No. 50. The respondent excepts to the statements (pages 36 and 79) to the effect that National's acquisitions and its close cooperation with Eagle-Picher gave the two respondents more than 68% of the white lead, dry and in oil, business in the United States. This statement is inaccurate to the extent that it includes basic sulphate of lead business as well as basic carbonate of lead business. The record discloses that for the years 1938 through 1941 National's percentage of the entire white lead, dry and in oil, business in the United States (not including white lead, basic sulphate, business) was 55.575% and that Eagle-Picher's share of the same business was 13.35%. Thus, the combined production of these two of white lead, dry and in
oil (excluding white lead, basic sulphate) for the years
1187 stated was 68.925%. To the extent, if any, that this
percentage figure would be either raised or lowered
by taking into consideration the white lead, basic sulphate, business, the amount of which is not disclosed in the record, this exception is granted.

Exception No. 53. The respondent excepts to the hearing examiner's failure to state on page 80, in connection with his statement that the respondents' zone pricing system had the effect of facilitating price matching and producing price uniformity, that it was not shown that a substantial surrender of territorial advantages by any respondent was involved. The inclusion of this statement was not necessary at this point. The hearing examiner was there considering the general effects of the respondents' zone pricing system under Count I of the amended complaint, and in that connection the question whether or not the respondents had surrendered any territorial advantages is immaterial. This exception is denied.

Exceptions Nos. 78 and 79. The respondent excepts to the hearing examiner's failure to state on pages 54 and 92, in connection with his statements of the effects on battery manufacturers and paint manufacturers of the price differences resulting from the discriminations practiced by the respondents in the sale of oxides and white and red lead, (1) that Sherwin-Williams does not sell oxides to battery manufacturers, and (2) that the record does not disclose sales by this respondent of dry white lead or dry red lead to paint manufacturers. The record does disclose that Sherwin-Williams for a number of years had not sold oxides to battery manufacturers, and to the extent that the hearing examiner's failure to mention this fact on pages 54 and 92 conveys the impression that Sherwin-Williams sold oxides to battery manufacturers, the recommended decision is erroneous. (The record further discloses that Sherwin-Williams did sell lead pigments to paint manufacturers.) The hearing examiner was of the opinion, however, and the Commission agrees, that the evidence in this proceeding definitely connects Sherwin-Williams up with the overall conspiracy, found to have existed among the
1188 respondents, to fix and maintain prices, terms and conditions of sale of lead pigments. The fact that one co-conspirator does not participate in each and every one of the acts or practices involved in a conspiracy is not determinative of the extent to which such co-conspirator should be held, and consequently, the fact that Sherwin-Williams did not sell oxides to battery manufacturers is not as important an element in this case as Sherwin-Williams contends. Thus, the Commission holds only that Sherwin-Williams was entitled to have stated in the recommended decision the fact that it does not sell oxides to battery

manufacturers, and does not hold that this fact is of any particular significance in determining whether or not this respondent is answerable for the over-all conspiracy. To the extent indicated Exception No. 78 is granted. Exception No. 79 is denied.

Exception No. 88. The respondent excepts to the sentence (page 57) "The differential of ¼¢ per lb. between 500-lb. and smaller lots of white lead-in-oil and other keg products was not shown to be justified by differences in costs of any kind" for the stated reason that it is not supported by the record insofar as Sherwin-Williams' sales to dealers purchasing for resale are concerned. The reasoning set forth in the ruling on Exceptions Nos. 78 and 79 is equally applicable here. The record shows that one of the practices involved in the proceeding was that of charging a differential of one-quarter cent per pound as between 500-pound lots and quantities less than five hundred pounds of white lead-in-oil, and the hearing examiner on page 57 was discussing this practice generally and the competitive effects thereof. The correctness of the statements made is not questioned by Sherwin-Williams, and it was not necessary in the statement of this phase of the case to refer to the particular practices of the individual respondents. This exception is denied.

Exception No. 94. The respondent excepts to the hearing examiner's failure to include in his recommended
1189 decision, substantially in haec verba, certain of Sherwin-Williams' proposed findings having to do with the
fact that the respondents were not shown to have surrendered any inherent territorial advantages in the use of the zone system, and specifying the cities in which the lead pigment plants of the various respondents are located and the competitive positions of the respondents in the industry. The pertinent facts with respect to all of these matters were sufficiently set out in the recommended decision, and all of such facts were considered. It was not necessary for the precise form requested by Sherwin-Williams to be followed. This exception is denied.

Exception No. 96. The respondent excepts to paragraph 4 of the recommended order to cease and desist, on the ground that the record fails to disclose that Sherwin-Williams has sold lead pigments at different zone delivered prices to competing customers located in different zones; or that it has sold oxides at different quantity differentials between carload and 5-ton and smaller quantities. For the reasons set out in its findings as to the facts in this proceeding, the Commission is of the opinion that Sherwin-Williams has, with certain exceptions, employed the zone delivered pricing system in substantially the same manner as have the other respondents. The record also shows, and Sherwin-Williams does not deny, that it, along with the other respondents, has quoted and charged different prices as between carloads and smaller quantities of oxides. The competitive effects of both of these practices having been established and found, an effective prohibition against the continuation of such practices is appropriate. The fact, if it be a fact, that the evidence in the record does not include actual instances in which Sherwin-Williams sold to competing customers in different zones in accordance with the zone pricing system or in which it sold oxides to competing purchasers in carload lots at one price and in quantities less than carloads at another price is immaterial. The recommended order was properly directed against Sherwin-Williams as well as the other respondents, and this exception is accordingly denied.

1190 III. Exceptions of Respondent The Glidden Company.

The exceptions of respondent Glidden enumerated in the left-hand column below are in substance or effect the same as the exceptions of respondents National Lead Company or The Sherwin-Williams Company, or both, shown in the middle and right-hand columns of the tabulation, respectively, each of which has been disposed of hereinabove, and the ruling on each of these corresponding exceptions is the same.

Exceptions of The Glidden Company	Exceptions of National Lead Company	Exceptions of The Sherwin-Williams Company
1	3	1
2	4	2
3	6	3
4 and 6		6
5		5
7	14	7
8	15	

Order Disposing of Exceptions.

of en	Exceptions of National Lead Company	Exceptions of The Sherwin-Williams Company
	16	
		10
		11
	23 (part)	12 (part)
	25	~~13~~
	25 and 27	11
	27	
	30	
	38	16
		17
	54	
	56	
	57	
	58	
	59	
	60	
	61	19
	62	20
	63	21
	63	21
		22
	65 to 76, inc.	23
		24
	87	25
	88	26
	89	27
	91	28
	92	29
	95	30
	97	31
	97	32
		33
		34
		35
	100	36
		37 and 38
		37
		38
		39
	102	40

Exceptions of The Glidden Company	Exceptions of National Lead Company	Exceptions of The Sherwin-Williams Company
50	103	41
51	104	
52		44
53	105	45
54	105	
55	106 and 107	46
56	109	48
57		49
58		50
59		51
60	114	52
61		53
62	116	54
63	116	55
64	116	56
65	116	57
66	116	58
67		59
68		60
69		61
70	119	62
71	120	63
72	121	
73	122	64
74	124	65
75	125, 126 and 128	66
76	129	67
77		68
78		69
79		70
80	134	71
81	135	
82		73
83		74
84	142	76
85	143	77
86	144 and 145	
87		79
88	146	80
89	147	81

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Exceptions of The Glidden Company	Exceptions of National Lead Company	Exceptions of The Sherwin-Williams Company
90	149, 150 and 151	
91		82
92		83
93	153	84
94		85
95	155	86
96	156	87
97	157	
98	159	89
99		90
100	160	91
101	162	92
102		95
103	236	97
104	237	
105 to 108, inc.	238 to 240, inc.	98 to 108, inc.

In its exception No. 32, respondent Glidden excepts to the following sentences appearing on pages 25 and 73 of the recommended decision: "Glidden's price under this plan (the consignment plan of selling white lead-in-oil)
1193 was 'the same as that of other corroders' ", for the stated reason "that it is not evidence of agreement or conspiracy but merely evidence that Glidden is a price follower". There is no indication whatever that the hearing examiner considered the identity of Glidden's prices under its consignment plan of selling with the prices of the other corroders as evidence of agreement or conspiracy. On the contrary, he expressly stated in his report that Glidden was opposed to the plan; that it did not consign stocks until six years after the plan was inaugurated; and that when it did do so its plan differed from that of the other respondents in a number of respects. It does not follow, however, because of these facts that Glidden may escape the result of the Commission's corrective action against this practice, for, as the hearing examiner found, the use of the consignment plan of selling was only one of the many practices covered by the general price-fixing conspiracy entered into and carried out by the respondents, including respondent Glidden, the use of each of which practices contributed to and made more effective the over-all conspiracy, and it is

necessary in such circumstances for the Commission to restrain each of the respondents not only in respect of the particular practices engaged in by it but in respect of all of the practices covered by the conspiracy. Glidden's exception No. 32 is denied.

IV. Exceptions of Respondents Anaconda Copper Mining Company and International Smelting and Refining Company.

Respondent Anaconda Copper Mining Company in its exceptions numbered 1, 6 and 8, and respondent International Smelting and Refining Company in its exceptions numbered 1 and 29 each excepts to the action of the hearing examiner throughout the recommended decision in treating Anaconda and International as one. The arguments are that these two respondents are separate corporations; that Anaconda is not even engaged in the lead pigments business; and that there is no record basis for the view that Anaconda is responsible for the acts or practices of International. It appears from the record, however, that
1194 for sixteen years prior to 1936 white lead and white lead-in-oil were produced by Anaconda Lead Products Company, a subsidiary of respondent Anaconda Copper Mining Company, and were sold and distributed in commerce by Anaconda Lead Products Company and Anaconda Sales Company, another subsidiary of Anaconda Copper Mining Company. In 1936 the assets and properties of Anaconda Lead Products Company were acquired by respondent International, also a subsidiary of Anaconda Copper Mining Company, and Anaconda Lead Products Company was thereupon dissolved. From 1936 until the fall of 1946 International continued the production of white lead and white lead-in-oil, and these products were sold and distributed by both International and Anaconda Sales Company, the division of business between the two depending upon the states in which business was done.

The principal officers of International and Anaconda Copper Mining Company are the same, and it is clear that respondent International and the former Anaconda Lead Products Company were in fact operating divisions of respondent Anaconda Copper Mining Company, with no substantial separate identities of their own.

In view of these facts, the hearing examiner was fully justified in disregarding the separate corporate entities of these two respondents and treating them as one, and the exceptions to this action are accordingly denied.

The exceptions of these respondents enumerated under their respective names in the columns below are in substance or effect the same as the exceptions of respondents National Lead Company, The Sherwin-Williams Company or The Glidden Company, shown in the columns under their respective names, each of which has been disposed of hereinabove, and the ruling on each of these corresponding exceptions is the same.

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Exceptions of Anaconda	Exceptions of International	Exceptions of National	Exceptions of Sherwin-Williams	Exceptions of Glidden
2	2	6	3	3
	3	10		
3	7	14	7	7
	4	11		
5, 10	20, 41	240	93	108
	5	12		
	6, 10	13		
7	22	130		
	8	52		
	9	61, 62	19, 20	25, 26
	12	107	46	55
	13	114	52	60
	15	116	54 to 58, inc.	62 to 66, inc.
	16	117, 118		
	17	121, 122, 124	64, 65	72, 73, 74
	18	125, 126, 128	66	75
	19	126, 128	66	75
	21	129	67	76
	23	132		
	24	134	71	80
	25		85	94
	26	157		97
	27	158, 159	89	98
	28	160	91	100
	33	208		
	34	212		

Exceptions of Anaconda	Exceptions of International	Exceptions of National	Exceptions of Sherwin-Williams	Exceptions of Glidden
	35	213, 214		
	36	214		
	37	215		
	38	216		
	40	233		
12, 13	43,44	238 to 240, inc.	98 to 108, inc.	105 to 108, inc.

1196 The other exceptions of these respondents are disposed of as follows:

Separate Exceptions of Respondent Anaconda.

In its exceptions 4 and 9, Anaconda excepts to a number of paragraphs in the recommended decision in which it is referred to as "Anaconda" or by such collectives as "respondents", "all respondents", "as between respondents", "each respondent", "other respondents", "competitors" or "smaller competitors", for the reason that each and all of such findings are unsupported by the record as to this respondent. The grounds relied upon in support of these exceptions are not specified. It is assumed, however, that the objection is founded upon the proposition that Anaconda is not engaged in the lead pigments business and that the evidence in support of the hearing examiner's findings as applied to Anaconda related primarily to the acts and practices of respondent International Smelting and Refining Company, another corporation. This respondent's exception No. 11, objecting to its inclusion in the recommended order is based upon the same argument. For the reasons given in its ruling on Anaconda's exceptions numbered 1, 6 and 8 and International's exceptions 1 and 29, the Commission is of the opinion that the hearing examiner's treatment of these respondents as one was fully justified. It follows that the above-mentioned exceptions must be, and they are, denied.

Separate Exceptions of Respondent International.

In its exceptions 11, 30, 32, 39 and 42, respondent International excepts to a number of paragraphs in the recommended decision, including the fact that it was named in the recommended order, on the stated grounds that all of the findings specified are unsupported by the evidence and that the record does not show that International was a party to, or engaged in, any of the acts complained of in the amended complaint. These exceptions are so general in their scope and so indefinite in their nature as to make it impossible for the Commission to determine with any degree of certainty just what the respondent's position is with respect to them. The exceptions are therefore 1197 denied, for the reason that they do not comply with the requirements of Rule XXIII of the Commission's Rules of Practice in that they do not specify the portions of the record or the authorities relied upon to sustain each point, and for the further reason that the Commission, after considering the record, is of the opinion that this respondent was a party to, and did participate in, the acts and practices attacked in the amended complaint.

In its exception No. 14, International objects to the hearing examiner's statement (page 38) that Anaconda had a plant in Chicago. The record shows that the plant to which the hearing examiner referred was located in East Chicago, Indiana, and to the extent of correcting the statement to specify this location, this exception is granted.

In its exception No. 31, this respondent excepts to the statement (page 73) to the effect that it sold dry white lead on a consignment basis in the State of Wisconsin. This exception is granted. The evidence is that International did sell white lead-in-oil on the basis of a consignment contract in the State of Wisconsin, but there is no indication that dry white lead was ever sold by it on a consignment basis.

V. Exceptions of Respondents The Eagle-Picher Company and the Eagle-Picher Sales Company.

After stating that the recommended decision of the hearing examiner treats the practices of Eagle-Picher as incidental or tributary to those of National, "thus dispersing direct and indirect reference to them throughout the Recommended Decision, and rendering it difficult to challenge each allusion to Eagle-Picher separately and individually", Eagle-Picher in its exceptions A-1 and A-2 asserted two general exceptions, to-wit, (1) as to matters arising under Count I of the complaint, that the hearing examiner erred in holding that National acted illegally in attaining or attempting to attain a monopolistic position

of dominance in the lead pigments industry and that
1198 Eagle-Picher has contributed in any way to National's monopolistic delinquency, and (2) as to matters arising under Count II, that the examiner erred in that he concluded that Eagle-Picher was violating Section 2(a) of the Clayton Act, as amended, without making the appropriate and necessary findings of fact as to Eagle-Picher. In its exception B, the respondent excepts just as generally to the hearing examiner's refusal to grant certain of Eagle-Picher's proposed findings of fact.

This material, while entirely appropriate for inclusion in a brief on the merits of the case, is not in the form of exceptions to specified portions of the recommended decision and does not meet the requirements of Rule XXIII of the Commission's Rules of Practice governing exceptions to recommended decisions. In view of the Commission's inability to rule on the exceptions without in effect quoting in haec verba its findings as to the facts and conclusion in this proceeding, said exceptions are denied.

Eagle-Picher's exceptions C-1 to C-33, inclusive, are in substance or effect the same as certain of National's exceptions, each of which has been disposed of hereinabove, and the ruling on each of the exceptions of Eagle-Picher enumerated in the left-hand column below is the same as the ruling on the corresponding exception of National shown in the right-hand column of the tabulation.

Exceptions of Eagle-Picher	Exceptions of National
C-1	7, 8 and 9
2 and 25	23 and 28
3	33, 34 and 35
4	108 and 109
5	111
6	116
7	116
8	116
9	116

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Exceptions of Eagle-Picher	Exceptions of National
C-10	117
11	121
12	124
13	124
14	125
15	126

Exceptions of Eagle-Picher	Exceptions of National
16	127
17	128
18	128 and 129
19	133
20	154
21	155
22	160
23	160
24	167, 168, 170, 171, 172, 173, 174, 175, 176, 206, 211, 214, 218 and 225
26	170
27	202
28	206
29	207
30	229
31 and 32	233
33	234 to 237, inc.

By the Commission, Commissioner Carretta not participating for the reason that oral argument on the merits was heard prior to his appointment to the Commission.

D. C. Daniel,
Secretary.

Issued: January 12, 1953.

1200 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

Commissioners:

James M. Mead, Chairman,
Lowell B. Mason,
John Carson
Stephen J. Spingarn,
Albert A. Carretta.

ORDER GRANTING IN PART AND DENYING IN PART EXCEPTIONS OF COUNSEL IN SUPPORT OF THE COMPLAINT TO THE RECOMMENDED DECISION.

This matter is before the Commission for its consideration of a number of exceptions to the hearing examiner's recommended decision, filed by counsel in support of the complaint.

Exception No. I. This is an exception to the hearing examiner's failure to include in his statement of the issues in this proceeding (page 6 of the recommended decision) the question whether or not each of the respondents has used the various zone delivered price quotations and methods of quoting prices alleged in Paragraphs Eight, Nine and Ten of Count I of the amended complaint for the purpose and with the effect of eliminating price competition, it being the contention of counsel that the allegations of Paragraphs Eight to Ten attack the pricing prac-
1201 tices of each of the respondents individually aside
from any element of conspiracy. The Commission does not so construe the amended complaint. The manner in which this document was prepared makes it apparent that Paragraphs Eight and Nine of Count I were intended to allege, in effect, that pursuant to and in furtherance of the conspiracy alleged in general terms in Paragraph Seven, each of the respondents used the zone methods of selling therein described, and that each of the respondents employed certain terms and conditions in selling their lead pigments. Paragraph Ten alleges that each of the respondents used the systematic method of quoting delivered costs on lead pigments described in Paragraphs Eight and Nine "for the purpose and with the effect of enabling the

respondents to match exactly their offers to sell lead pigments to any prospective purchaser at any destination, thereby eliminating competition between and among themselves", thus indicating that the allegations of Paragraphs Eight and Nine are not a charge in addition to the conspiracy but constitute only a description of the manner in which the conspiracy previously referred to was effectuated; and all doubt on the point is removed by the allegations of Paragraph Twelve (conclusion) to the effect that "The combinations, agreements and understandings of the respondents and their acts, practices, pricing methods, systems, devices and policies as hereinbefore alleged, all and singularly, are unfair and to the prejudice of the public", etc. If it had been the Commission's intention to charge that the acts of each of the respondents individually were unlawful, it could and undoubtedly would have so alleged in clear and unambiguous terms. The hearing examiner's statement of the issues was not erroneous in the respect mentioned, and this exception is denied.

Exception No. II. Counsel excepts to the hearing examiner's failure to include in his description of the products involved in the proceeding (page 7) the detailed definitions and descriptions contained in the proposed findings submitted by counsel in support of the complaint. It does appear to the Commission that certain of the issues in this proceeding cannot be thoroughly understood without more detailed information concerning the prod-
1202 ucts involved and the competitive position they occupied than that supplied by the hearing examiner. To the extent that such information was not supplied, this exception is granted.

Exception No. III. This is an exception to the hearing examiner's finding (page 7) that "Respondents Glidden and Sherwin also manufactured and sold mixed paints * * *", on the ground that each of the other respondents, except International, at one time or another also produced and sold mixed paints or the equivalent. If by the statement objected to the hearing examiner intended to imply that Glidden's and Sherwin-Williams' position was substantially different from that of the other respondents insofar as this case is concerned, the implication was unjustified. It does appear, however, that the percentage of business in mixed paints done by Glidden and Sherwin-Williams in relation to their lead pigments business probably was greater than the percentages of mixed paint business done by the other respondents, and the statement of this fact, as such, was not erroneous. To the extent indicated, this exception is granted; otherwise it is denied.

Exception No. IV. This is an objection to the hearing examiner's statements on pages 9 and 63 listing together the branch offices and plants of respondent National Lead Company in such fashion as to indicate that pigment manufacting plants are operated by National in Omaha, Nebraska; Buffalo, New York; Boston, Massachusetts; New Orleans, Louisiana; Cincinnati, Ohio; and Pittsburgh, Pennsylvania. The exception is well taken. The cities designated are locations of branch offices of National Lead Company, but as far as the record shows no pigment manufacturing operations are conducted therein. This exception is granted.

Exception No. V. Exception is taken to the statements on pages 10 and 64 to the effect that by 1932 National Lead Company had accumulated 44,900 shares of the capital stock of respondent Eagle-Picher, for the reason that the statement does not show that the stock was acquired in the name of E. J. Cornish as an individual, who was at the time Chairman of the Board of Directors of National Lead Company, and does not show that other
1203 stocks held by National was held in the name of the
corporation. Both of these facts are matters of importance in connection with the question whether respondent National actually sought to obtain control of respondant Eagle-Picher, nad they should have been specifically mentioned. The exception is granted.

Exception No. VI. This is an exception to the statements appearing at various places in the recommended decision to the effect that respondent Glidden "quoted" or "sold" "f. o. b. various shipping points in the par zone". To the extent that such statements imply that Glidden did not employ the zone method of pricing substantially as set forth in the amended complaint and in conformity with the practices of the other respondents, the statements are erroneous. Glidden admitted in its answer, and has not sought to deny, that it has employed this system of selling its lead pigments. On certain of its price cards, respondent Glidden did list a group of f. o. b. points, but the record shows that these were warehouse points rather than delivery points and that Glidden in fact did not add freight from these points to its zone delivered quotations. To the extent that the hearing examiner's statements imply otherwise, this exception is granted.

Exception No. VII. This exception has to do with a number of statements in the recommended decision to the effect that respondent Sherwin-Williams did not follow the zone system of pricing its products. As shown in the Commission's findings as to the facts being issued in this proceeding, Sherwin-Williams did contend that its policy was to sell its lead pigments in accordance with a free delivery point system, under which it charged to purchasers located away from a delivery point transportation charges from the delivery point to the purchaser's location. The facts developed in the hearings indicate, however, that in a majority of instances Sherwin-Williams' price quotations were actually zone delivered prices and that except in a small number of cases the company absorbed all transportation costs to purchasers' locations.

The Commission has accordingly concluded that
1204 Sherwin-Williams sold its lead pigments under the
zone delivered price system in substantially the same manner as did the other respondents, and the statements of the hearing examiner implying the contrary are erroneous. This exception is granted.

Exception No. VIII. Objection is made to the statement (page 16) that "Dry red lead, litharge and other lead pigments in barrels or bags in carload lots of 20 tons or more were sold at a differential of $2.50 per cwt. for red lead and $1.50 for litharge over Smelting's closing price", on the ground that only red lead and litharge were sold at such differentials. In including pigments other than red lead and litharge in this statement the hearing examiner was in error. Prices on lead pigments other than red lead and litharge in carload quantities were quoted on the respondents' regular price cards. This exception is granted.

Exception No. IX. Counsel excepts to the hearing examiner's statements (pages 20 and 70) to the effect (1) that the purpose of the 1933-1934 meeting held by the several committees of the Lead Industries Association was to recommend provisions for a supplemental code of fair competition "to regulate particular methods of packaging, selling and delivering lead pigments", and (2) that "Schedule A provides for basing carload prices for lead oxides on Smelting's New York price * * *". The rec-

ord shows that the various committee meetings at which the respondents were represented were held in 1933 and 1934 to discuss, adopt and formulate recommendations for provisions to be included in a supplemental N. R. A. Code for the lead pigments division of the lead industry. Just what these provisions might be and what form they might take were open questions, and as far as the record shows it might or might not have been the purpose of some or all of the participants to work on provisions for the regulation of methods of packaging, selling and delivering lead pigments. As it actually turned out, the discussions at the meetings and the agreements there made did cover a number of subjects which were not included in any recommendation for the code and which apparently were
never intended to be covered in any code provision;
1205 and the record thus shows that the legitimate pur-
poses of the meetings were to that extent transcended. If by the above statement the hearing examiner meant that the occasion for the meetings was lawful, there can be no objection to it. If he intended to imply that all of the objectives sought by the participants were legitimate, that implication is erroneous.

The Commission finds no fault with the second statement objected to, namely, that Schedule A attached to the code provided for basing carload prices for lead oxides on Smelting's New York prices. Article II of Schedule A did provide that in the sale of oxides in carload lots the price should be determined by adding a differential to the New York common pig lead price quotations of American Smelting and Refining Company (or, under certain conditions the quotations of the American Metal Market and the Engineering and Mining Journal) and that is the meaning the Commission finds in the hearing examiner's statement.

To the extent indicated, this exception is granted; otherwise, it is denied.

Exceptions Nos. X and XI. Counsel in support of the complaint excepts to the hearing examiner's tabulation of the par zone recommended resale prices of all of the respondents on one hundred pounds of white lead-in-oil, set forth on page 26. To the extent that the objection goes to the inclusion in the tabulation of respondent Glidden's price card dated October 20, 1937, thus comparing Glidden's price card of that date with the price cards of the

other respondents dated September 13, 14 and 15, 1937, the tabulation is erroneous. The tabulation is also misleading in that it conveys the impression that differences existed between certain of the resale prices suggested by Eagle-Picher and Anaconda, on the one hand, and those suggested by the other respondents, on the other, which and 11, 1937, quotations of Anaconda and Eagle-Picher, respectively, on 25 and 12½-pound packages of pigments were on a per unit basis, whereas the quotations of
1206 the other respondents for comparable dates were
based on one hundred pounds. The tabulation also erroneously included a price quotation of Anaconda dated May 3, 1941, for the plus ⅛¢ zone, which was 12½¢ above the par zone quotation.

Counsel also excepts to the statement on page 73 that there were slight variations in quoted prices by Glidden and Anaconda, based upon the above tabulation.

Because of the errors in the tabulation above mentioned, these exceptions are both granted.

Exceptions Nos. XII, XIII and XIV. Exceptions are taken to (1) the so-called table of parallel quotations on white lead-in-oil shown on page 29; (2) the table entitled "Sales of White Lead-in-Oil—Par Zone—Price Per Cwt.—January Through March, 1941", shown on pages 31 and 32; and (3) the statements summarizing the Sales of White Lead-in-Oil, January through March, 1941, table, made on page 33. Both of the tables referred to are erroneous. In both of them the hearing examiner has included quotations of National to "dealers" as that term is used by National, rather than its quotations to "distributors", who were in fact the bulk of the dealers to whom National gave a lower price; and in the table of "parallel quotations" he has included quotations applicable to zones other than the par zone, and has used a price card by Glidden which was issued on a different date than the cards of the other respondents mentioned. The Sale of White Lead-in-Oil, January through March, 1941, table being erroneous, the summary of the table necessarily reflects the errors and is also erroneous. The exception to these tabulations and to the summary are granted.

Exception No. XV. This exception is to the hearing examiner's statement (pages 33-34 and 77) to the effect that sales of red lead and litharge, as evidenced by certain invoices of National, Eagle-Picher and Glidden followed

the regular formula "with occasional exceptions covered by contract sales and sales to battery manufacturers", on the ground that the word "some" should be inserted before the second word "sales" and the word
1207 "large" should be inserted before the word "bat-
tery" so that the finding will accurately reflect the record. The record does show that only on occasional instances involving large battery manufacturers who were in a position to produce their own oxides did the respondents make concessions from their regular prices. To the extent, if any, that the hearing examiner's statements imply otherwise, the statements are inexact and to that extent the exception is granted. In all other respects the statement is accurate and the exception is denied.

Exception No. XVI. Counsel in support of the complaint objects to so much of the reportand recommended findings on pages 36 to 38 and on pages 79 and 80 as indicate that the respondents' use of the zone pricing system was not shown to have deprived any group of customers of any rights inhering to them as a result of their proximity to the manufacturers' producing points and that the use of the system was not shown to have involved a substantial surrender of territorial advantages by any respondent. On the pages to which these exceptions refer the hearing examiner was discussing generally the evidence of the effects of the respondents' zone pricing on competition under Count I of the amended complaint. For the purposes of this count it was sufficient to find that the use of the system by conspiracy had the effect of hindering or restraining competition to a substantial degree between and among the respondents and of depriving customers, wherever located, of the benefits of that competition. The hearing examiner found as a fact that the respondents' acts and practices did have those effects, and the additional statements to the effect that customers were not shown to have been deprived of any rights they had by reason of their locations and that the respondents were not shown to have given up any substantial territorial advantages were mere gratuities and their consideration under Count I is unnecessary. For this reason, the exception to said statements is granted, it being understood, however, that this

sarily constitute an approval of the entire
sel in support of the complaint concerning
effects of the use of the zone pricing sys-

on No. XVII. This exception is to the hear-
iner's statements (pages 41 and 72) that
naconda was not shown by direct evidence
to any pricing methods beyond the show-
resentatives were present at the committee
d the adoption of the Schedule A provi-
hearing examiner subsequently found, Ana-
iary, International Smelting and Refining
adopt the zone system at about the same
e other respondents, and it did thereafter
in accordance with that system, publishing
prices identical with the prices of the other
xcept that on white lea[illegible]n-oil its prices
e cents lower than those of National and
o compensate the dealers for handling a
ct less well known than National's "Dutch
le-Picher's "Eagle" brands). The finding
(International) participated in the con-
ly justified by the record, and to the extent,
statement objected to places this respondent
bstantially different from that of the other
e exception is granted.

os. XVIII and XIX. Each of these excep-
he hearing examiner's statements (pages
) that the zone system of pricing as em-
espondents was not shown to have had the
ffect of suppressing competition between
he same zone. The statements are in the
ategory as the statements covered by the
tion No. XVI, and the rulings on the ex-
o are the same as the ruling heretofore
xception XVI.

. XX. Counsel in support of the complaint
statements on pages 52, 55, 57, 91 and 94
effect that the one-quarter cent per pound
l employed by the respondents as between
nd smaller quantities of dry white lead was
e justified on the basis of differing freight
icable to the two quantities. This exception
he record does show that the difference in

carload as against less-than-carload freight rates was sufficient to justify this price difference in most transactions in which rail freight was involved. The record further shows, however, that substantial quantities of dry white lead are sold in and around the cities in which the respondents' white lead producing plants are located and that in such transactions the mode of delivery is local cartage in which no rail freight is involved. The record contains no evidence of any kind tending to justify on a cost of delivery basis or otherwise the one-quarter cent differential as to customers in these transactions and under these circumstances, and the exception to the hearing examiner's unqualified statements is accordingly granted.

Exception No. XXI. Exception is taken to the failure of the hearing examiner to include on pages 53-54 and 92 a finding of all of the facts shown by the record concerning the effects of the respondents' discriminatory prices in the sale of oxides on battery manufacturers. Specifically, counsel in support of the complaint contends, and the Commission agrees, that the hearing examiner should have found that the storage battery manufacturing business was highly competitive on a price basis from 1935 to 1941; that large battery manufacturers located at a considerable distance from the factories of the respondents regularly offered for sale storage batteries in Chicago, St. Louis and other pigment producing centers, at prices below the cost of manufacture of comparable products to the smaller battery producers located in such centers; and that the cities of Chicago, Kansas City and St. Louis were among the cities where battery manufacturers were in competition with chain and mail order producers. The hearing examiner also erred in stating that the ten small battery manufacturers who testified that a saving in cost of materials of from five to ten cents per battery would be of competitive advantage were located outside of Chicago (five
1210 of the ten were from Chicago), but the Commission
finds no fault with the statement of the effect of their testimony. Except insofar as this exception states that the hearing examiner should have found that "price differences of a very few cents on smaller batteries determined sales," the exception is granted.

Exception No. XXII. This exception relates to the hearing examiner's statements (pages 55 and 92) to the effect that there is no difference in zone differentials on carload sales of red lead and litharge as between Dallas, Texas and St. Louis, Missouri. This is an obvious error. St. Louis was in the par zone for both carload and less-than-carload shipments of red lead and litharge, while Dallas was in the twenty-five cent premium zone for sales of these products in both quantities. This exception is granted.

Exceptions Nos. XXIII, XXIV and XXIX. In these exceptions counsel in support of the complaint excepts to the hearing examiner's failure to include in the recommended decision a finding to the effect that the use by each of the respondents of the zone system of pricing produces systematically varying mill net discriminations in violation of Section 2(a) of the Clayton Act, as amended, and to his failure to include in the recommended order an appropriate prohibition based on such a finding. It may be that in a case in which this question is properly raised a finding similar to the one requested and an order based thereon would be appropriate. The Commission is of the opinion, however, for the reason given in the "Conclusion" appended to its findings as to the facts being issued in this proceeding, that the allegations of the amended complaint in this case purporting to charge that each of the respondents, through the use of the zone method of pricing has discriminated in price as between customers in the same zone in violation of Section 2(a) of the amended Clayton Act does not state a cause of action. Hence, it will not consider any of the contentions of counsel in support of the complaint or of counsel for the respondents on this point. These exceptions are accordingly denied.

1211 Exception XXV. Exception is taken to the hearing examiner's failure to include respondents Anaconda and International in that part of the recommended order to cease and desist appearing on page 97. This exception is well taken. The record shows that Anaconda through its subsidiaries participated with the other respondents in the over-all conspiracy found to have existed and thus engaged in a course of conduct clearly unlawful under the Federal Trade Commission Act. The fact that certain members of a conspiracy may not have engaged in all of the overt acts or practices covered by the conspiracy, or may have engaged in some of them reluctantly, does not mean that it is not necessary for the Commission to restrain such members, along with the others, from conspiring to engage in such acts or practices in the future, and does not operate to prevent the Commission from doing so when in its discretion such action is found to be necessary: This exception is granted.

Exceptions Nos. XXVI, XXVII and XXVIII. Counsel in support of the complaint excepts to the hearing examiner's failure to include in the recommended order provisions (1) prohibiting each of the respondents from quoting or selling lead pigments at prices determined pursuant to a zone or other pricing system producing uniform prices or reflecting a transportation factor greater or less than the actual cost of transportation when done for the purpose or effect of systematically matching delivered price quotations with other respondents; (2) prohibiting each of the respondents from discriminating in price between competing customers through the use of consignment arrangements; and (3) prohibiting each of the respondents from discriminating in price between competing customers through the use of differentials as between sales of carloads and smaller quantities of white lead in and around the producing points of this product. Counsel's request for a provision prohibiting each of the respondents from selling its lead pigments in accordance with a zone delivered price system is based upon his argument, made in support of his exception No. I, that the amended complaint
1212 charges, and the proof supports the charge, that each of the respondents individually has violated the Federal Trade Commission Act through the use of the zone pricing system. As shown by the ruling on exception No. I, the Commission does not consider this to be one of the charges of the complaint. Thus, the Commission does not agree with counsel in his position that the order to cease and desist should contain any provision based on that theory. The Commission is of the opinion, however, in view of all of the facts and circumstances in the case, that in order to effectively prevent the respondents from continuing to attain certain of the objectives of their unlawful conspiracy and so continue to deprive the purchasers of lead pigments of the advantages of real price competition among the producers it is necessary for each of the respondents to be restrained from continuing to use the zone delivered price system and from using any other similar system for the purpose or with the effect of matching the prices of other lead pigment producers. Accordingly, the Commission's order to cease and desist in this proceeding will include

such a prohibition. Based upon the record showing that it is fully justified, the order will also include a provision prohibiting each of the respondents from discriminating in price as between competing customers through the use of price differentials as between sales of lead pigments in carloads and in smaller quantities. To the extent that these provisions comply with the request of counsel in support of the complaint, his exceptions to the recommended order are granted. The order will not include a provision prohibiting discriminations as between competing dealers through the use of consignment arrangements for the reason that the record does not show that the dealers with whom the respondents entered into consignment arrangements were "purchasers" within the meaning of Section 2(a) of the Clayton Act, as amended, and the exception to the omission of this provision from the recommended order is denied.

Exception No. XXX. This is a general exception "to
every portion of the Trial Examiner's Recommended De-
cision which is inconsistent with and contrary to the
1213 Proposed Findings, Conclusion and Order to Cease
and Desist filed with the Trial Examiner by counsel
supporting the complaint on December 29, 1947, and Janu-
ary 22, 1948". This exception does not comply with the
requirements of Rule XXIII of the Commission's Rules
of Practice, and is accordingly denied.

By the Commission, Commissioner Carretta not participating for the reason that oral argument on the merits was heard prior to his appointment to the Commission.

D. C. Daniel,
Secretary.

(Seal)

Issued: January 12, 1953.

1214 Before Federal Trade Commission.

* * (Caption—(5253) * *

Commissioners:

James M. Mead, *Chairman,*
Lowell B. Mason,
John Carson,
Stephen J. Spingarn,
Albert A. Carretta.

ORDER DISPOSING OF RESPONDENTS' APPEALS FROM RULINGS OF HEARING EXAMINER.

This matter is before the Commission for its consideration of appeals filed by the respondents, National Lead Company, The Sherwin-Williams Company and The Glidden Company, from a number of rulings of the hearing examiner relating to the admission into the record and retention of certain parol and documentary evidence. Pursuant to the provisions of a stipulation entered into by and between counsel and thereafter approved by the Commission, said appeals and the briefs in support thereof were filed at the time of the filing of the respondents' briefs on the merits of the case.

1215 1. Appeal of Respondent National Lead Company.

The first twenty-nine exceptions noted in the appeal of respondent National Lead Company relate to the admission in evidence of a series of exhibits designated Commission's Exhibits 501-A to 524-E, inclusive, as well as the series of Commission's exhibits numbered 799 to 805-C, inclusive, and Commission's Exhibit 711. These documents, consisting of copies of minutes of a number of meetings of the various committees of the Lead Pigments Division of the Lead Industries Association held during the period 1933-1934, and related documents, were objected to upon the ground that they were N.R.A. documents and hence, inadmissible by reason of the provisions of Section 5 of the National Industrial Recovery Act. Respondent National also moves that a series of similar exhibits introduced by it in explanation of the Commission's exhibits above specified be stricken from the record in the event the rulings of the hearing examiner receiving the Commission's exhibits are reversed.

There is no merit in the respondent's contentions. The exhibits objected to are not "N.R.A. exhibits", as they are characterized by the respondent, but are the minutes of the meetings of various divisions of a private organization and copies of correspondence between officials of the respondents and other private parties. Moreover, the discussions engaged in at the meetings concerning the establishment of the zone pricing system, consignment contracts and other matters had to do in part with subjects which apparently were never intended to be included in any N.R.A. code and in part with subjects which were subsequently covered by the provisions of a supplemental code, but which were never effective. Thus, Section 5 of the National Industrial Recovery Act, providing that actions complying with the provisions of any code, agreement or license approved, prescribed or issued and in effect under the Act should be exempt from the provisions of the antitrust laws for the period of time therein stated, has no application to
1216 the activities to which these exhibits relate and do not
in any sense render them inadmissible in evidence. In view of the showing that the respondents, after invalidation of the N.R.A., continued without change the use of the zone pricing system and the various other trade practices discussed in the meetings of which these exhibits are the minutes, the exhibits were properly admitted to prove the nature and origin of the agreements found to have been unlawful.

In its exception No. 30 the respondent points out that Commission's Exhibit 624-C, being a memorandum signed by one Diemont, allegedly an agent of National Lead Company, was admitted on the condition that it be shown that Diemont was such an agent as to bind National Lead Company by his statements, and that no such showing was ever made. Counsel in support of the complaint concedes that this exhibit was not sufficiently connected up or identified to make it binding upon National Lead Company or any of the other respondents in this case, and it follows that the respondent's objection to the retention of this exhibit is well taken.

This respondent's exception No. 31 concerns the receipt by the hearing examiner of Commission's Exhibit 525, being a copy of a letter dated December 14, 1933, addressed to The Sherwin-Williams Company of Canada, Ltd., and

signed by Harold Rowe, then assistant to the president of
respondent National, enclosing an announcement of price
changes on dry white lead and basic sulphate in lots of
less than twenty tons. Objection to the document having
been made on the ground, among others, that there was no
showing that The Sherwin-Williams Company of Canada,
Ltd., was subject to the control of respondent Sherwin-
Williams or otherwise affiliated with it, the exhibit was re-
ceived by the hearing examiner "subject to connection".
The record does not disclose that any effort was thereafter
made to establish any connection between the addressee of
this letter and any of the respondents in this case, includ-
ing respondent Sherwin-Williams, and there is no showing
of any relationship between such addressee and re-
1217 spondent National other than that of purchaser and
seller. In the circumstances it cannot be said that
the contents of this letter are relevant to any of the issues
in this proceeding and the exhibit will not be considered.

Exceptions Nos. 32 and 33 relate to the reception in evidence of Commission's Exhibits 691, 692, 696 and 697, being copies of correspondence between certain officials of respondents Eagle-Picher and National and the Lead Industries Association. Objections to these documents were made upon the ground that they were irrelevant. It appears, however, that these exhibits were offered for the purpose of showing a disposition on the part of National Lead Company and The Eagle-Picher Company to work together in solving their common problems in the distribution of lead pigments and related products, and inasmuch as the correspondence has to do with meetings and discussions between these respondents on such matters, the exhibits are relevant and competent to show that there was no real price competition between National Lead Company and The Eagle-Picher Company.

The document concerned in exception No. 34 is a telegram dated March 12, 1941 from the Pacific Coast branch of National Lead Company to The Eagle-Picher Company at Cincinnati, Ohio, announcing a change in prices of white lead-in-oil and dry red lead applicable to Manila, The Philippine Islands. The exhibit was objected to upon the ground that it was "wholly irrelevant". It seems obvious to the Commission, however, that an exchange of price information between the two largest producers of white lead-in-oil and dry red lead has a direct bearing on the issues in this proceeding, one of which is promotion of a price-fixing conspiracy by the exchange of such information.

Exception No. 35 has to do with the receipt in evidence of Commission's exhibits 708 and 710, being letters exchanged between officials of respondents National and Eagle-Picher in July 1940, concerning the prices at which Eagle-Picher would attempt to market a new white lead paint. The respondent's objection is based upon the fact that the letters referred to a ready-mixed paint and not lead pigments and that, therefore, the documents were irrelevant. There is no merit in this argument. The
1218 record clearly shows that there is a direct relationship between white lead-in-oil and mixed paints, white lead paint being basically white lead-in-oil to which mineral spirits and thinners have been added. In view of the over-all conspiracy with which this proceeding is concerned, evidence showing the exchange of price information on mixed paints is clearly relevant and admissible.

Exception No. 36 relates to the receipt of Commission's Exhibits 797-C to Z-6, inclusive, 533, 534, 535 and 577-A to C, inclusive. The objections were that these documents were irrelevant, incompetent and immaterial. Commission's Exhibit 797-C to Z-6, inclusive, consists of certain contracts between respondent National and E. I. duPont de Nemours Company, Inc., and certain cost data of duPont relating to the contracts, under which duPont was to supply the raw materials which National was to convert into white lead-in-oil and supply to duPont for sale and distribution. The other exhibits consist of correspondence relating to these contracts. The amended complaint, in Paragraph Seven B (7), specifically charges that one of the methods and practices used by respondent National in promoting the alleged conspiracy between it and the other respondents was to enter into contracts and understandings with duPont de Nemours Company, Inc., a large paint manufacturer, for the purpose and with the effect of maintaining fixed prices on white lead. Exhibits other than those to which the respondent has objected show that in the meetings of the Lead Industries Association at which certain agreements relating to price fixing were discussed National was acting as agent of duPont and otherwise disclose the position of duPont in the lead pigments pricing picture. The exhibits showing the relations between National and duPont, whereby National undertook to manufacture white lead-in-oil for duPont, were properly received to complete this picture.

Exception No. 37 concerns the receipt of Commission's Exhibit 538, being a letter from Mr. Rowe of respondent National to Mr. Reque of National's Chicago office, dated April 8, 1941, in which Mr. Rowe stated that he had
1219 seen an article in the Oil, Paint and Drug Reporter
wherein the duPont Company had announced a change in its policy on cash discounts, and in which Mr. Rowe expressed the hope that the industry generally would go along with this company's policy. Objection was on the ground that the document was irrelevant and immaterial. It appears that this exhibit, as well as Commission's Exhibit 808-A to N, inclusive, consisting of certain pages from the Oil, Paint and Drug Reporter for certain dates in May, June and August 1934, objection to which was also raised in the respondent's exception No. 38, were introduced for the sole purpose of establishing the approximate date on which the zone method of pricing lead pigments originated. The record shows that the Oil, Paint and Drug Reporter is the nation's oldest trade journal, and that it is unquestionably regarded as an authoritative source of information on market prices and marketing practices in the lead pigments and related industries. Thus, the fact that there appeared in this publication on a certain date information showing fundamental changes in methods of pricing in the industry is relevant and material to the issues in this proceeding, and, although the exhibits admittedly are hearsay, they are admissible for the reason that they are hearsay of a kind "that usually affects fair-minded men in the conduct of their daily and more important affairs" (*John Bene & Sons, Inc.* v. *Federal Trade Commission*, 229 Fed. 468).

The respondent's exceptions Nos. 39, 40, 41, 42, 43, 44 and 45 relate to the admission in evidence of a large number of documents detailing the early relations of American Smelting and Refining Company, respondent National Lead Company and a number of other concerns which figured prominently in the mining, smelting, refining and processing of lead, together with certain contracts between American Smelting and Refining Company, the respondents in this proceeding, and others. Some of these documents supply historic details of the relationship that existed between American Smelting and Refining Company and respondent National and bear directly on the allegations of Paragraph Seven A (8) of the complaint. As conceded by counsel in support of the complaint, others of the
1220 documents have little bearing upon the existence of

the alleged conspiracy among the respondents or the price discriminations charged in Count II of the complaint. However, they do relate directly to the acquisitions of competitors and others engaged in the lead pigments business involved in the charge against National in Count I of the complaint and serve to provide background information. They also tend to show the control of the market for metallic lead and the interdependence of these respondents upon the suppliers of lead and the prices which the respondents have paid for this commodity. The Commission is unable to perceive of any possible prejudice to the rights of the respondents as a result of the receipt of these documents and is of the opinion that they should remain in the record as a pertinent part of the background of the case.

In its exception No. 46 the respondent contends that the hearing examiner erred in receiving Commission's Exhibits 527 and 528, being copies of letters written in 1935 by one Albert Chatfield to the chairman of the board of directors and president, respectively, of respondent National Lead Company. The letters set forth the difficulties Chatfield was having in obtaining for the addressees 625,000 shares of the common stock of respondent Eagle-Picher. On the initial offer the documents were rejected by the hearing examiner upon the ground that they had not been sufficiently connected up, but when it later appeared that the addressee of one of the letters was chairman of the board of respondent National and was the owner of about 50,000 shares of stock in respondent Eagle-Picher, and that this stock was held in the chairman's name for respondent National at the time these letters were written, and when it further appeared that the board of directors of National Lead Company had made a formal offer to acquire Eagle-Picher, the hearing examiner reversed his earlier ruling and received the exhibits. In the circumstances shown to have existed these letters clearly are competent and material to establish a link in the chain of National's alleged efforts to acquire control of its
1221 leading competitor in the sale of lead pigments, and the hearing examiner's ruling admitting them in evidence was correct.

It Is Ordered that the appeal of respondent National Lead Company from the rulings of the hearing examiner be, and it hereby is, granted in part and denied in part, as hereinabove indicated.

2. Appeal of Respondent The Sherwin-Williams Company.

This respondent's first exception has to do with the receipt in evidence of the letter dated December 14, 1933, from Mr. Rowe of National Lead Company to The Sherwin-Williams Company of Canada, Ltd., appearing in the record as Commission's Exhibit 525 and is in substance identical with respondent National's exception No. 31, which has been granted. This exception of respondent Sherwin-Williams will be granted for the same reasons.

Sherwin-Williams' exception No. 2 constitutes an objection to Commission's Exhibit 594-A and B on the ground that the document comprising this exhibit is a photostatic copy of Commission's Exhibit 662-S and T which was received under a stipulation between counsel. It does appear that Exhibit 594-A and B is the original of a document of which Exhibit 662-S and T is a duplicate. There was a difference in the identification of the two exhibits, however, Exhibit 662-S and T being described in the stipulation merely as a "two-page document issued by Sherwin-Williams Company", while Exhibit 594-A and B was definitely identified by the Commission's attorney-examiner who obtained it as Sherwin-Williams' lead and zilo price differentials for warehouses and stores, excepting Pacific Coast districts. Obviously, this description of the document is much more valuable to the record than the simple recitation that a list composing it is a "two-page document", and inasmuch as retention of the original cannot possibly prejudice the rights of respondent Sherwin-Williams, who does not deny the material facts stated in the identification, this exception will be denied.

1222 In its exception No. 3 Sherwin-Williams contends that the hearing examiner erred in failing to exclude from the record Commission's Exhibit 742, being a tabulation of less-than-carload freight rates applicable to the movement of certain lead pigments from and to a number of specified points, as of January 1, 1941. As stated by the respondent, this was an exhibit introduced in connection with the testimony of the witness, Hugh E. White, and the stipulation of counsel entered into at the time of the issuance of the amended complaint excluded from consideration under such amended complaint the testimony of Mr. White and the exhibits introduced in connection therewith. It appears, however, that the hearing examiner probably did rely in part upon Commission's Exhibit 742 in his illustration of the relationships between the twenty-five cents quantity differential and the differences in freight, as between carload and less-than-carload shipments of dry white lead, given in paragraph 9 (e) of his recommended decision. In so doing, the hearing examiner erred, and the respondent's exception to his action in this respect is well taken.

Exception No. 4 relates to the receipt in evidence of Commission's Exhibit 793, being a map of the United States outlining the boundaries of the ten district offices of respondent Sherwin-Williams. At the time of its receipt, counsel in support of the complaint conceded that "there is no allegation on the part of the attorneys for the Commission that this is a zone map used in the pricing of lead pigments", but stated that "We propose to connect that up with the method of Sherwin-Williams Company of receiving orders and shipping orders to customers, which we will show, the areas from which they ship and from which they receive orders, and it is relevant and material as showing the method of doing business of Sherwin-Williams Company in connection with the sale of lead pigments". Certain evidence was thereafter introduced bearing on respondent Sherwin-Williams' method of doing business, but there is no explanation of the significance of the districts shown on this map, and, as far as the record shows, the map merely illustrates the location, for general administrative purposes, of Sherwin-Williams' dis-
1223 trict offices. Thus, the relevancy of this map is not apparent and it will not be considered in the Commission's disposition of this proceeding.

In its exception No. 5 Sherwin-Williams objects to the appearance in the record of a statement made by the respondent's counsel to the effect that Sherwin-Williams makes sales of white lead at retail to its customers through its retail stores as they are listed on Commission's Exhibit 652-A to L, inclusive, and that it regularly charges such customers its published delivered prices for the respective localities in which these stores are found. Objection to the appearance of the statement is based upon the argument that the statement relates to purely intrastate transactions and that the Commission has no jurisdiction over such transactions.

In disposing of this exception it is not necessary for the question of the Commission's jurisdiction over Sherwin-

Williams' intrastate sales to be determined. The admitted practices of Sherwin-Williams of charging its retail customers at certain designated localities the respondent's regular published prices applicable to such localities has a direct bearing on the question whether Sherwin-Williams actually used the zone delivered pricing system pursuant to the alleged conspiracy in which it is charged with having participated, and so is a matter to be considered. The hearing examiner's denial of the respondent's contention that this statement is immaterial to the issues in the case was correct.

Commission's Exhibits 652-A to L, inclusive, and 776-A to N, inclusive, are documents showing the locations of Sherwin-Williams retail paint stores to which the statement dealt with in the foregoing ruling relates, and the receipt in evidence of these exhibits is the subject matter of Sherwin-Williams' exception No. 6. The reasons for such exception are the same as those assigned in support of exception No. 5. For the same reasons given for the ruling on said exception No. 5, this exception will likewise be denied.

1224 Sherwin-Williams' exception No. 7 is that the hearing examiner erred in receiving in evidence Commission's Exhibits 490, 491 and 492, being copies of two contracts between Sherwin-Williams and American Smelting and Refining Company, providing for the purchase and sale, at a stated price, of certain quantities of corroding lead, and a copy of a letter from Sherwin-Williams to American Smelting and Refining Company concerning the purchase of lead. It is true, as the respondent contends, that the amended complaint in this proceeding does not directly charge Sherwin-Williams with having conspired with American Smelting and Refining Company in an effort to fix the price of pig lead, but these exhibits were not offered or considered for the purpose of establishing any such conspiracy. The proceeding does directly involve the relationship between pig lead, and its price, and lead pigments, and the contracts and correspondence to which this objection relates do show a course of dealing between Sherwin-Williams and American Smelting and Refining Company, and in this way contribute to a better over-all understanding of the lead pigments business. In the absence of any indication that the hearing examiner received these exhibits for any other purpose, his action cannot be said to have been erroneous.

It Is Ordered that the appeal of respondent The Sherwin-Williams Company from the rulings of the hearing examiner be, and it hereby is, granted in part and denied in part, as shown.

3. Appeal of Respondent The Glidden Company.

This respondent's appeal consists of an application for reversal of the hearing examiner's rulings striking from the record certain testimony of the witnesses, Paul E. Sprague and David N. Burruss, Jr. This testimony had to do with the respondent's effort to justify on a cost basis the price differentials shown to have been made by Glidden in selling its white lead-in-oil, dry white lead, red lead and litharge in carload, 5-ton and less-than-5-ton quantities.

1225 The Commission is convinced, after careful consideration of the record, that the hearing examiner's rulings were correct. The testimony of Mr. Sprague, vice president of respondent Glidden, in substance was that he knew that the cost of doing business with the small customers was enough higher than the cost of selling to the larger customers to more than justify the quantity differentials between the two. He admitted, however, that he had made no cost survey, and affirmatively stated that the only basis for his testimony was his general knowledge of the business. The testimony of Mr. Burruss was to the same general effect. This witness did say on direct examination that he had made a survey of Glidden's less-than-carload accounts, but on cross-examination he explained that his "survey" consisted of making inquiry of Glidden's credit department as to how much of their expense was applicable to the small accounts. He readily admitted that he did not know how the credit department obtained the information it later furnished him; that he had no idea as to what records were available as a source of the information; and, further, that the information he received from the credit department which served as the basis for his testimony was a mere verbal statement which did not purport to distinguish between the costs involved in producing or selling lead pigments in 5-ton lots and in quantities smaller than five tons.

The inadequacy of such testimony to justify price discriminations under Section 2 of the Clayton Act, as

amended, is obvious. Under this statute a person against whom a prima facie case of price discrimination has been made has the burden of proving affirmatively, if possible, that the discriminations made no more than "due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are * * * sold or delivered". The evidence of the witnesses Sprague and Burruss being only general statements and conclusions based on general impressions and not on any definite cost factors fails completely to sustain in any affirmative sense the burden
1226 so placed on the respondent. Thus, the testimony,
even if admitted, would have no substantial probative value and would avail the respondent nothing.

In the view of the Commission, however, this testimony, without further support, is wholly inadmissible for the reasons (1) it is pure hearsay, and not hearsay of a kind which would persuade prudent men to rely upon it in determining whether their costs of delivery were equal to or more than their price differentials; (2) the testimony, being hearsay, would provide counsel in support of the complaint no adequate basis for cross-examination of the witnesses concerning the factors which were taken into account in reaching the broad general conclusions; and (3) the acceptance of such testimony in justification of price discriminations shown to have been made would tend to impose upon counsel in support of the complaint the burden of showing by the books and records of a respondent that the discriminations shown to have been made were not justified, which burden may not be so imposed.

It Is Ordered that the appeal of respondent The Glidden Company from the rulings of the hearing examiner be, and it hereby is, denied.

By the Commission, Commissioner Carretta not participating for the reason that oral argument on the merits was heard prior to his appointment to the Commission.

D. C. Daniel,
Secretary.

Issued: January 12, 1953.

1227 **Before Federal Trade Commission.**

* * (Caption—5253) * *

Commissioners:

James M. Mead, Chairman.
Lowell B. Mason.
John Carson.
Stephen J. Spingarn.
Albert A. Carretta.

FINDINGS AS TO THE FACTS AND CONCLUSION.

Pursuant to the provisions of the Federal Trade Commission Act and to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (the Clayton Act), as amended by an Act approved June 19, 1936 (the Robinson-Patman Act), the Federal Trade Commission, on November 25, 1944, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging said respondents with the use of unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in the sale of
1228 white lead, in violation of the provisions of the Federal Trade Commission Act, and with having discriminated in price in the sale of white lead, in violation of the provisions of subsection (a) of Section 2 of the aforesaid Clayton Act, as amended.

After the filing of the respondents' answers to said complaint, certain testimony and other evidence in support of the allegations of the complaint were introduced before a hearing examiner of the Commission theretofore duly designated by it. Subsequently, on April 12, 1946, the Commission issued and afterwards served upon said respondents an amended complaint, charging them with the use of unfair methods of competition in commerce and unfair acts and practices in commerce in the sale of various lead pigments, in violation of the provisions of the Federal Trade Commission Act, and with having discriminated in price in the sale of various lead pigments, in violation of the provisions of subsection (a) of Section 2 of said Clayton Act, as amended. The respondents' answers to said amended complaint were duly filed, and it was stipulated by and between counsel in support of the amended complaint and the respondents, by their respective counsel, that the testimony and other evidence theretofore received in support of the original complaint (with the exception of certain specified testimony and other evidence, which were excluded) might be considered as a part of the record under the amended complaint to the same extent and effect as if said testimony and evidence had been introduced after the issuance of said amended complaint.

Thereafter, further testimony and other evidence in support of and in opposition to the allegations of said amended complaint were introduced before a substitute hearing examiner (the respondents having consented to the substitution of hearing examiners), and said testimony and other evidence were duly recorded and filed in the office of the Commission. In due course the proceeding regularly came on for final hearing before the Commission upon the amended complaint, the respondents' answers thereto, the testimony and other evidence, the hearing examiner's recommended decision and exceptions thereto, briefs
1229 and oral arguments of counsel, including briefs and
arguments in support of and in opposition to the respondents' appeals from a number of rulings of the hearing examiners with respect to the receipt of documentary evidence and other testimony; and the Commission, having duly considered the matter and having disposed of the exceptions to the recommended decision and the respondents' appeals, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

Findings as to the Facts.

Paragraph One: (a) Respondent National Lead Company, hereinafter sometimes referred to as "National", is a New Jersey corporation, with its principal offices located at 111 Broadway, New York, New York. This respondent is the largest producer and seller of lead pigments in the United States, and it presently operates factories producing lead pigments at Brooklyn, New York (white lead, red lead and litharge), Perth Amboy, New Jersey (white lead), Philadelphia, Pennsylvania (white lead, red lead and litharge), Charleston, West Virginia (red lead and litharge), Atlanta, Georgia (red lead and litharge), Chicago, Illinois (white lead, red lead and litharge), St. Louis, Missouri (white lead, red lead and litharge), San Francisco, California (white lead, red lead and litharge), Los Angeles, California (red lead and litharge), and Dallas, Texas (red lead and litharge). During the period from 1936 to 1942, respondent National accounted for between 60% and 63% of the shipments of white lead-in-oil, from 30% to 35% of the dry white lead, basic carbonate, and approximately 50% of the red lead and litharge sold in the United States. In 1938, the percentage of white lead-in-oil and dry white lead, basic carbonate, combined, sold by this respondent was 58.8% of the total of these products sold, and in 1941, its share of the total sales of the same two products was 53%. Respondent National is also a very large producer of titanium pigments, and in addition produces linseed oil and many different products composed principally of lead.

1230 (b) Respondent The Eagle-Picher Company, erroneously named in the amended complaint as "Eagle-Picher Lead Company", is an Ohio corporation, with its principal offices located in the American Building, Cincinnati, Ohio. Respondent The Eagle-Picher Sales Company is a Delaware corporation, with its principal offices at the same address and is a wholly-owned subsidiary of respondent The Eagle-Picher Company. All of the acts of respondent The Eagle-Picher Sales Company referred to herein have been for the benefit and in behalf of respondent The Eagle-Picher Company and for the purpose of these findings, will be treated hereinafter as the acts of The Eagle-Picher Company. Both of these respondents are hereinafter sometimes referred to collectively simply as "Eagle-Picher".

Respondent Eagle-Picher is engaged in the business of mining, smelting, refining and selling metallic lead products, lead pigments and other articles of commerce. It maintains a factory producing basic carbonate of white lead, both dry and in oil, at East Chicago, Indiana (a factory formerly operated by respondent International Smelting and Refining Company and acquired by Eagle-Picher in 1946). Its factories producing red lead and litharge are operated at Joplin, Missouri and at Newark, New Jersey, and it produces basic sulphate of white lead at Galena, Kansas and Joplin, Missouri. Eagle-Picher is engaged in mining lead ores in the so-called "Tri-State" area (a geographical area comprising the contiguous sections of Missouri, Kansas and Oklahoma) and operates plants reducing such ores to concentrates and metallic lead in and around Joplin, Missouri. This respondent is the second largest producer of lead pigments in the United States, and during the period from 1930 to 1946, it accounted for from 15% to 20% of the white lead-in-oil and from 8% to 12% of the dry white lead, basic carbonate, sold in the United States. Eagle-Picher is also a producer of lithopone, a product apparently sold in competition with lead pigments, and is a large producer and seller of zinc oxide and leaded zinc pigments consisting of a combination of white lead, basic sulphate, and zinc oxide.

1231 (c) Respondent Anaconda Copper Mining Company, hereinafter sometimes referred to as "Anaconda", is a Montana corporation, with its principal office located at 25 Broadway, New York, New York. Respondent International Smelting and Refining Company, hereinafter sometimes referred to as "International", is a Montana corporation, with its principal office at the same location, and it is a wholly-owned subsidiary of respondent Anaconda Copper Mining Company.

Respondent Anaconda is one of the world's largest producers and fabricators of non-ferrous metals, including copper, lead and zinc. Prior to 1936, dry white lead and white lead-in-oil were produced by Anaconda Lead Products Company, a subsidiary of Anaconda, and were sold and distributed in commerce by Anaconda Lead Products Company and Anaconda sales Company, another wholly-owned and controlled Anaconda subsidiary. In 1936, the assets and properties of Anaconda Lead Products Company were acquired by respondent International, and the former company was dissolved after having been engaged in the production and sale of white lead since 1920. From 1936 to the fall of 1946, lead pigments produced by respondent International were sold and distributed by that company or by Anaconda Sales Company, the division of business between the two depending upon the states in which business was done. From 1937 to 1941, respondent Anaconda (International) sold from 3% to 4% of the white lead-in-oil and from 10% to 19% of the dry white lead, basic carbonate, sold in the country. Its percentage of the national sales of white lead-in-oil and dry white lead, basic carbonate, combined, was 6.6% in 1938 and 8.8% in

1941. Neither respondent Anaconda nor any of its subsidiaries has ever produced red lead or litharge.

The principal officers of respondents Anaconda and International have always been the same, and it is apparent from the record that respondent International and the former Anaconda Lead Products Company were in fact mere operating divisions of respondent Anaconda, with no substantial separate identity of their own. All of
1232 the acts of respondent International, of Anaconda
Lead Products Company, and of Anaconda Sales Company referred to in these findings were for and in behalf of respondent Anaconda and such acts will hereafter be treated as the acts of respondent Anaconda.

Respondent Anaconda (International) ceased the manufacture and sale of white lead, both dry and in oil, in July or August 1946, but it still produces lead ores and refined metallic lead.

(d) Respondent The Sherwin-Williams Company, hereinafter sometimes referred to as "Sherwin-Williams", is an Ohio corporation, with its principal office located at 101 Prospect Avenue, N. W., Cleveland, Ohio. This respondent operates a factory producing white lead, red lead and litharge in the metropolitan area of Chicago, Illinois, and is one of the largest, if not the largest, manufacturers and sellers of mixed paints and related items in the United States, operating numerous paint producing plants and warehouses throughout the country. Respondent Sherwin-Williams operates more than two hundred retail stores located throughout the country selling mixed paints, lead pigments and related items to consumers and the general public.

A substantial portion of the lead pigments produced by Sherwin-Williams is used by it directly in the manufacture of paint and related products, and the remainder of its production is sold and shipped to others. This respondent is not engaged in the sale of red lead or litharge to the battery manufacturing industry, but it is engaged in the sale of such products to paint manufacturers and other users. Sherwin-Williams is also a producer of a number of pigments said to be in competition with lead pigments, including lithopone.

(e) Respondent The Glidden Company, hereinafter sometimes referred to as "Glidden", is an Ohio corporation, with its principal offices in the Union Commerce

Building, Cleveland, Ohio. This respondent operates
1233 a white lead producing plant in Scanton, Pennsylvania, and a lead refining and red lead and litharge producing plant in Hammond, Indiana, in the Chicago, Illinois, switching area. Like Sherwin-Williams, respondent Glidden is a large producer and seller of mixed paints and related items and operates some thirty retail stores selling mixed paint, lead pigments and related products directly to consumers and the general public. From 1932 to 1943, it accounted for from 2% to 9% of the National sales of white lead-in-oil, from 8% to 18% of the sales of dry white lead, basic carbonate, and from 4% to 8% of the red lead and litharge sales in the country. Glidden's white lead producing plant was formerly operated by the Euston Lead Company, now a division of Glidden, and was acquired by Glidden in 1925; and its red lead and litharge producing plant was formerly operated by Metals Refining Company, now also a division of Glidden, and was acquired by Glidden in 1929. Respondent Glidden probably is the largest domestic producer in the United States of lithopone.

(f) Other organizations to which references will be made in these findings which are not respondents herein are Lead Industries Association and American Smelting and Refining Company.

Lead Industries Association is a voluntary unincorporated trade association organized in 1928 to serve the interests of those who mine, smelt, refine and manufacture lead and lead products, including lead pigments. It is composed of a mining division, a smelting and refining division, a lead pigments division and a metallic lead products division. During and preceding the period of the National Recovery Administration, the lead pigments division of the association was further separated into a white lead-in-oil committee and a dry products committee, the latter being further divided into an oxide committee and a dry white lead committee. Members of the Lead Industries Association comprise practically the entire lead mining, smelting and refining industry of the United
1234 States, as well as most of the industries using lead as a basic raw material, including manufacturers of lead pigments, lead sheets, pipe, shot, solder and related items.

American Smelting and Refining Company is a corporation, with its principal office and place of business located in New York, New York. This company, hereinafter sometimes referred to as "A. S. & R.", is the world's largest smelter and refiner of lead, producing between 30% and 40% of the entire world's supply of refined lead and accounting for more than half of the domestic supply. A. S. & R. operates lead smelters at East Helena, Montana, Selby (San Francisco), California, El Paso, Texas, Leadville, Colorado, Murray, Utah and East St. Louis, Illinois, which process ores and concentrates from four hundred to five hundred lead mines. This company purchases from the mines 80% to 90% of the lead ore which it processes and most of its ore of United States origin is so purchased. It publishes daily the prices at which it buys lead ore and the prices at which it sells pig lead on the same day. The position of A. S. & R. in the domestic lead market is demonstrated by the fact that the respondents herein agreed to use its daily quotations of lead prices as the basis for quoting spot carload prices on red lead and litharge.

Paragraph Two: Each of the respondents named in subparagraphs (a) to (e), inclusive, of Paragraph One is now and for many years last past has been engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act and in the Clayton Act, selling and shipping lead pigments manufactured at the various producing points hereinabove set forth to customers located in States of the United States other than the states of production (except that respondents Anaconda and International have not engaged in the lead pigments business since the fall of 1946). Each of said respondents seeks to enjoy and does enjoy national distribution of lead pigments and other products manufactured by it, except that respondents Eagle-Picher and Anaconda do only a limited
1235 amount of business on the Pacific Coast and in the
states west of the Rocky Mountains and except that respondent Sherwin-Williams does not sell dry red lead or litharge on the Pacific Coast.

Together the respondents account for practically the entire production of lead pigments in the country, there being only a few small producers of such products for sale in commerce in the United States other than said respondents. It is to these respondents that purchasers and consumers throughout the country must look for their supplies of lead pigments, and the respondents have the power to and do control the supply of lead pigments available for shipment in commerce. The respondents also account for a substantial portion of the national production of and trade in commerce in a number of competing products, including lithopone, zinc oxide and titanium, used as pigments in mixed paints and for other similar purposes.

Paragraph Three: The term "lead pigments" as used in these findings includes all of the various carbonates and sulphates of lead, and oxides, hereinafter more particularly described, whether or not such products are actually used as pigments.

(a) Dry white lead, basic carbonate, is a fine white powder produced from metallic lead, used extensively as a pigment in paints and protective coverings as well as in the manufacture of ceramics, putty and other products. It is sold principally to paint and ceramic manufacturers for use by them as a raw material in further manufacturing processes; and as so sold is customarily packaged in 600-pound containers.

(b) Dry white lead, basic sulphate, is a white pigment similar in appearance to dry white lead, basic carbonate, which may be produced either by processing metallic lead or by fuming lead concentrates without reducing the basic raw material to metallic lead. It is marketed in bags of fifty pounds or steel containers of from four hundred and twenty-five to six hundred and twenty-five pounds, and is used extensively either alone or as combined with zinc oxide to form leaded zinc oxide in the manufacture of mixed paints.

1236 (c) White lead-in-oil is the term customarily used to refer to white lead, basic carbonate, with linseed oil added to form a paste. It is sold principally to dealers for resale to painters and members of the general public, and its primary ultimate use, after being mixed with additional oil, mineral spirits and dryers, is as an exterior house paint. White lead-in-oil, when so mixed, is now and for many years has been known in the trade and by consumers as a protective covering of the finest quality for houses and other wooden structures.

(d) Litharge is a sub-oxide of lead having the approximate chemical formula PbO, which is produced by heating metallic lead in the presence of air in a furnace. There are many different grades and types of litharges, depending upon the use for which they are manufactured. Litharge is used in the manufacture of paints and varnishes, in the "sweetening" of gasoline by the petroleum refining industry, and in the production of agricultural insecticides. The largest use of litharge is in the manufacture of electric storage batteries where it is the basic raw material for both the negative and positive battery plates. The litharges sold to the battery manufacturing industry by the respondents (except for the respondent Anaconda (International), who has never sold litharges, and the respondent Sherwin-Williams, who sells no litharge to battery manufacturers) are sometimes referred to in the trade and by the respondents as oxides of lead. Litharge is customarily sold to industrial consumers in containers of six hundred pounds.

(e) Red lead, having the approximate chemical formula Pb_3O_4, is produced by a further heating and oxidation of litharge, and is manufactured in several grades and qualities, depending upon the extent to which the roasting and refining processes are carried. Red lead is now and for many years has been regarded as the finest pigment for metal protective paint and is used to a large extent as a pigment in the paint manufacturing industry. It is also used extensively in the manufacture of electric storage batteries, in producing agricultural insecticides, 1237
and in petroleum refining. Red lead is also mixed with linseed oil to form a paste known as red lead-in-oil which is sold largely to dealers for resale to painters and consumers for use directly as a paint after the addition of oils and dryers.

(f) A number of other miscellaneous products are likewise known to the industry as lead pigments, including blue lead, a form of basic sulphate of lead produced by the fuming of lead concentrates; orange mineral, a pigment produced by further processing red lead or white lead, basic carbonate; and grinders' lead-in-oil, which is white lead, basic carbonate, mixed with linseed oil to form a paste of thinner consistency than white lead-in-oil, and is ordinarily sold to the paint manufacturing industry.

(g) Pig lead is not a lead pigment, but is the term used to describe metallic lead which is customarily marketed in the form of pigs or bars containing approximately ninety pounds each. It is the basic raw material from which lead pigments are manufactured, except that some basic sulphates and litharges are produced from fuming lead concentrates. Except as to respondent Anaconda, whose supplies of lead were derived from its own smelters and refineries, all of the respondents herein during all of the time covered by these findings have purchased the major part of their requirements of pig lead on the open market. It appears, however, that during the period from 1930 to the date of the hearings in this proceeding respondent Eagle-Picher at various times produced as much as 66⅔% and as little as 10% or 15% of its own requirements of lead.

Paragraph Four: (a) Respondent National Lead Company was formed on or about December 8, 1891, by the acquisition of the physical properties and stock ownership of Cornell Lead Company, of Buffalo, New York, The National Lead & Oil Company, of New York, New York, Atlantic White Lead & Linseed Oil Company, of New York, New York, Salem Lead Company, of Salem, Massachusetts, The J. H. Morley Lead Company, of Cleveland, Ohio, The Eckstein White Lead Company, of Cincinnati, Ohio,
1238 Anchor White Lead Company, of Cincinnati, Ohio,
Maryland White Lead Company, of Baltimore, Maryland, American White Lead Company, of Louisville, Kentucky, Kentucky Lead and Oil Company, of Louisville, Kentucky, Southern White Lead Company, of Chicago, Illinois, D. B. Shipman White Lead Works, of Chicago, Illinois, Southern White Lead Company, of St. Louis, Missouri, St. Louis Lead and Oil Company, of St. Louis, Missouri, Collier White Lead and Oil Company, of St. Louis, Missouri, and Red Seal Castor Oil Company, of St. Louis, Missouri, all of which companies were previously engaged in the manufacture and in the sale and distribution of white lead, linseed oil and kindred products, and the stock ownership of which had been in or controlled by the National Lead Trust. In addition and at the same time National Lead Company acquired controlling stock interests in St. Louis and Zocatecas Ore Company, St. Louis Smelting and Refining Company, Western White Lead Company, John T. Lewis & Bros. Company, Beymer Bauman Lead Company, Fahnestock White Lead Company, Pennsylvania White Lead Company, Armstrong-McKelvy Lead & Oil Company, Davis-Chambers Lead Company, The American Oxide Company, Union White Lead Manufacturing Company, Brooklyn White Lead Company, Bradley White Lead Company, Lenox Smelting Company, Jewett White Lead Company, Ulster Lead Company, and Rio Grande Smelting Company.

In February 1906, respondent National acquired all of the stock of United Lead Company, which company had been organized in 1903 by Messrs. Grant Hugh Brown, Daniel Guggenheim and Thomas Fortune Ryan, and which had acquired thirteen other companies controlling many of the principal lead alloy factories and lead works of the United States, including the American Shot and Lead Company, which was itself a consolidation of the principal shot towers of the country. Most of the concerns so acquired by National through the purchase of United had been previously offered to National by Messrs. Guggenheim, Ryan and H. H. Rogers, the first named individuals being directors of American Smelting and Refining Company. At this time and until 1911, American Smelting and Refining Company was represented on respondent National's Board of Directors by Daniel Guggenheim, Murray Guggen-
1239 heim and Edward Brush, who were also directors of American Smelting and Refining Company. In March 1906, National acquired all of the stock of Carter White Lead Company, which had properties in Chicago, Illinois, and Omaha, Nebraska, and in July 1912, it acquired all of the stock of Matheson Lead Company. In 1915, the River Smelting and Refining Company was organized jointly by National and Stone & Webster. In 1916, National acquired all of the stock of Bass-Hueter Paint Company; in January 1919, it acquired the properties and assets of Hirst & Begley Company; and sometime between 1931 and 1933, it acquired the properties of the Evans Lead Company, a concern producing red lead and litharge in Charleston, West Virginia. In the 1930's, also, respondent National acquired the properties of Wetherill & Bros., producing lead pigments in Philadelphia, Pennsylvania.

Prior to these several acquisitions by National Lead Company there were in the United States eighteen or twenty producers of white lead who were selling their products in the various localities where they could operate economically. National closed many of these plants, amalgamated others and enlarged a number of the existing plants. The names of some of the acquired properties were retained and the properties were thereafter operated by National as branches.

(b) By 1930, National Lead Company had become a predominant factor in the lead pigments industry. There is evidence that at about this time National sought to fur-

ther enhance its position in the industry by the acquisition of the assets and properties of its largest competitor, respondent Eagle-Picher. It was shown that beginning in July of 1930 and continuing from time to time through June 13, 1932, respondent National bought in the name of E. J. Cornish, Chairman of the Board of Directors of National Lead Company, 44,900 shares of the common stock of respondent Eagle-Picher, and that in 1931 National made an unsuccessful attempt to purchase the entire assets and good will of The Eagle-Picher Company. It was not shown that National ever actually controlled respondent
1240 Eagle-Picher or that it was ever represented on the
latter's Board of Directors, but there is evidence that as late as 1935 Mr. Cornish and F. M. Carter, then president of National, were seeking to secure for National a controlling stock interest in respondent Eagle-Picher. There is further evidence of close relations between these two respondents, particularly during the period from 1931 to 1941. In 1937, for example, Eagle-Picher's executive vice president, Mr. W. R. Dice, discussed policies with Messrs. Wilson and Martino, National officials, at a club luncheon to which Mr. F. B. Wormser, secretary of the Lead Industries Association, had invited him. The record further shows that Eagle-Picher's files contained National's price changes on the Pacific Coast and that in 1940, Eagle-Picher submitted labels, prices and descriptions of its new white lead paint to National and referred to a previous conversation over the telephone about this matter. This was followed by a luncheon between the interested parties. At one time Eagle-Picher's chief chemist, Mr. Frank L. Chinery, wrote to Mr. Rose of National suggesting an increase in Federal specifications of the non-volatile content of flatting oil to 12% "in order to make it harder on the chiselers and others who go out and get flatting oil business on bids based upon specifications" (Comm. Ex. 691), and in 1941, National wired Eagle-Picher its Manila prices for white lead-in-oil and red lead as follows:

"Effective immediately prices Manila white lead-in-oil and red lead dry in twenty-five pounds increased half cent now ten and a half cents CIF terms net 60 days" (Comm. Ex. 701).

Various other instances of similar cooperation between these two competitors were shown to have occurred.

(c) In February 1906, at the time National Lead Com-

pany acquired the stock of United Lead Company, respondent National entered into a contract with American Smelting and Refining Company under the terms of which A. S. & R. was to sell and National was to buy (a) all of the latter's requirements of corroding pig lead (a very pure form of lead) except so much as National's plant
1241 located at Collinsville, Illinois supplied, not exceeding 30,000 tons per year, and (b) 85% of all of its pig lead requirements, exclusive of corroding lead, less so much chemical lead of other brands as might be demanded by its trade. A. S. & R. was to furnish these requirements up to 85% of its production from domestic ores of all kinds of pig lead, excluding the production of the Selby Company. If National's Collinsville smelting plant (formerly belonging to the St. Louis Smelting and Refining Company) produced more than the stipulated 30,000 tons per year, National was to sell the surplus to A. S. & R. at 5% less than the latter's prevailing price. For common pig lead, the price to be paid by National under this contract was to be the average of A. S. & R.'s lowest daily schedule of prices for the respective qualities and brands specified in National's orders for the calendar month preceding the month of shipment for fifty tons or more, on 30-day delivery, at St. Louis and New York City, respectively, provided that if this price was more than 1.075 cents per pound above the average daily spot quotations for soft Spanish lead on the London Metal Exchange for the month in which shipment was made, then the price was to be adjusted to the said London average, plus the differential of 1.075 cents, which differential was based on the prevailing tariff. The price for corroding pig lead was to be $2.00 per ton in excess of the price for common pig lead (Comm. Ex. 93-A-G, inc.). The significance of this contract in relation to the future prices of white lead in the industry is shown by a stipulation entered into by and between counsel that "the cost of its (National's) inventories of corroding quality pig lead and of the lead content of white lead in process and in finished stock is the most important single factor in its (National's) determination and fixing of its price for white lead since pig lead is the principal material used in the manufacture of white lead" (Tr. 20).

Concurrently with the acquisition of the stock of United Lead Company by National Lead Company and with the

execution of the foregoing contract between respond-
1242 ent National and American Smelting and Refining
Company, American Smelting and Refining Company entered into a contract with Hoyt Metal Company, a constituent company of National, under which Hoyt was to purchase and A. S. & R. was to sell for a period of fifteen years all of the latter's domestic output of antimonial lead. This contract contemplated deliveries of not more than eight hundred tons of antimonial lead per month, and the price to be paid by Hoyt for lead shipped to it each month was to be the average daily price of common desilverized lead as quoted in said month by A. S. & R. for lots of fifty tons or more for delivery in St. Louis and New York City, respectively, within thirty days, with the same provision for adjustment with the London Metal Exchange quotations as that contained in the A. S. & R.-National contract with respect to common pig lead (Comm. Ex. 94-C-G, inc.).

The contract between National and A. S. & R. expired in 1921, whereupon the companies signed a contract of mutual release and made further arrangements whereby National thereafter purchased pig lead from A. S. & R. and from others on short-term contracts at a spot price or at an average monthly price based on A. S. & R.'s daily quotations. As stated by the former head of American Smelting and Refining Company, the reason given by National's president for not continuing the 1906 contract was that one company (A. S. & R.) had more lead to sell than any other in the United States and the other company (National) was the largest consumer of lead in the United States, and "there isn't enough lead to supply the National Lead's demands unless we (National) buy from the A. S. & R. and there aren't enough consumers to use all of the A. S. & R. production unless the National Lead takes some of it", and, further, that "We, the National Lead, do not want to be bound by a certain amount from you (A. S. & R.) —that handicaps our ability to buy perhaps at the lowest price, which is our ultimate objective, and on that account we feel that it is wiser for us not to be bound to take any specific amount" (Tr. 4084).

(d) On February 3, 1938, respondent National Lead Company entered into a contract with E. I. duPont de Nemours & Co., Inc., concerning the manufacture and
1243 packaging of white lead-in-oil by National for duPont, which contract was similar to one which had been

in effect between the parties since 1924. The principal difference was that the payments to National by duPont were to be increased over those which would have been made under the 1924 contract by not more than $25,000 per year. Under the terms of the new contract duPont was to furnish National corroding pig lead, linseed oil and titanium which National was to convert into white lead-in-oil to the amount of duPont's total requirements and package and ship the same to duPont's order at a stated charge for processing, packaging and shipping, with certain variations between different size packages. The raw material was furnished by duPont and the lead-in-oil belonged to it for sale or use, subject to payment of the aforesaid processing and shipping charges (Comm. Ex. 797-C and D). The contract contained no provision for the observance by duPont of prices charged by National or others for lead-in-oil, nor is there direct evidence of any express agreement between the parties to that effect. It is shown, however, that duPont based its calculations of the amounts to be paid under the new contract on National's card prices for lead-in-oil and subsequently requested National to furnish its card prices and changes to duPont's branches (Comm. Ex. 533). Thereafter, duPont requested a periodical letter from National "covering the price to be in effect for the quarter" (Comm. Ex. 534), and such a letter from National to duPont, dated September 13, 1940, is in evidence as Commission's Exhibit 535. Moreover, a subsequent change in discount terms announced by duPont met the full approval of Mr. Harold Rowe, one of National's vice presidents, who wrote National's Chicago branch about it and suggested that "Perhaps others in the industry will follow this good example * * *" (Comm. Ex. 538). National represented duPont in discussions concerning a proposed supplemental code for the lead pigments division of the lead industry under the N. R. A., hereinafter discussed in more detail, and duPont was shown to have been "willing to go along with anything which was agreeable to the others" of the Lead Industries Association to which duPont did not belong (Comm. Ex. 506-D).

1244 Paragraph Five: As a direct result of the acquisitions hereinabove described, culminating in the disappearance from the field of some fifty competitors in the period from 1891 to 1935, respondent National Lead Com-

pany acquired a predominant position in the lead pigments industry, and as a result of its close cooperation with respondent Eagle-Picher and its contracts with American Smelting and Refining Company National's dominant power was materially increased. The record shows that by 1938 National and Eagle-Picher had obtained more than 68% of the white lead, dry and in oil, business (not including basic sulphate of lead) and more than 50% of the oxide business, in the United States. The consumption of pig lead by these two respondents was approximately 50% of the total produced and sold for the manufacture of lead pigments in the country. And the price of lead pigments announced and maintained by National and Eagle-Picher as a consequence of their dominating positions had the effect of placing a ceiling on prices which their smaller competitors could charge and of making profit margins sufficiently narrow to induce these competitors to sell at the highest prices they could get. Under its contract with American Smelting and Refining Company, National acquired control of 85% of A. S. & R.'s domestic production of pig lead and restricted its own use of pig lead produced by its subsidiary, the St. Louis Smelting & Refining Company, to 30,000 tons per year, thus limiting the competition with A. S. & R. from this plant. Under the same contract A. S. & R. secured 85% of National's consumption of common pig lead and all of its requirements of corroding pig lead, less so much chemical lead of other brands as National might require, and under the contract between A. S. & R. and Hoyt, National acquired control over all of A. S. & R.'s output of antimonial lead; and as a result of both of the contracts A. S. & R. thereafter refrained from taking any further interest in the manufacture of lead pigments. These arrangements contracted the supply of pig lead subject to bids and daily market fluctuations by more than 32% of the domestic production. They fixed a monthly average which tended to prevent quantity sales of pig lead on a price rise and, consequently, tended to reduce returns
to miners of lead ores. On the other hand, the ar-
1245 rangements, through a substantial contraction of sup-
ply, confined the price on a major part of the United States consumption of pig lead to an average monthly price and thus prevented the basing of prices on daily market fluctuations and restricted opportunities of buying pig lead at lower prices. These effects on prices of pig lead were

obviously trade restraining and monopolistic. National's arrangements since 1921, when its 1906 contract with A. S. & R. expired, have been through short-period contracts which have had the same effect as the original contract.

In the light of the circumstances, the Commission is of the opinion, and finds, that the purpose and effect of National's acquisitions and of its arrangements and cooperation with American Smelting and Refining Company and with respondent Eagle-Picher was to substantially control the lead pigments industry and to regulate prices of pig lead and lead pigments; and that the purpose and effect of its relations with duPont was to establish an understanding that the latter would not deviate from National's prices in the sale of white lead-in-oil and would cooperate with National to maintain price uniformity in the sale of this product, which National processed for it under contract.

Paragraph Six: (a) By 1933 there were still in operation in the United States less than a dozen white lead producing plants. At that time there remained plants in San Francisco, operated by respondent National and W. P. Fuller & Son, an independent; in Chicago, operated by National and respondent Sherwin-Williams; in East Chicago, Indiana, operated by respondent Anaconda's subsidiary, respondent International Smelting and Refining Company; in Perth Amboy, New Jersey, St. Louis and Philadelphia, all operated by National; in Scranton, Pennsylvania, operated by respondent Glidden; and in Cincinnati, operated by respondent Eagle-Picher. In 1933, there remained plants producing red lead or litharge for sale in commerce in Chicago, operated by National, Glidden, and Hammond Lead Products Company (former proprietors of Metals Refining Company, acquired by Glidden in 1929); in
1246 St. Louis, operated by National; in Joplin, Missouri,
operated by Eagle-Picher; in Brooklyn, operated by National; in Newark, New Jersey, operated by Eagle-Picher; in Philadelphia, operated by National; in Charleston, West Virginia, operated by National (formerly belonging to Evans Lead Company); in San Francisco, operated by National and W. P. Fuller & Son; and in Los Angeles, operated by Morris P. Kirk & Sons, a subsidiary of National.

(b) Although the number of lead pigment producing plants had been reduced materially by 1933, it does appear that up to that time the industry had retained some vestiges of localized pricing of lead pigments. With respect to white lead-in-oil and other lead pigments packaged in steel kegs containing one hundred pounds or less, a system of differential or warehouse points was commonly employed. Commission's Exhibit 659-C to P, inclusive, is a list of the delivery and equalization points of the Atlantic, Boston, Buffalo, Chicago, Cincinnati, Cleveland, Pittsburgh, Philadelphia and St. Louis branches of National Lead Company. The sheets comprising this list are dated as far back as December 30, 1920, but the notations thereon indicate that they were revised up to as late as March 30, 1933. They show five hundred and eighty-nine different towns and localities located in forty different states as free delivery or equalization points. To the points marked either "D" or "E" lead pigments were quoted at the base price, with the addition of whatever freight differential in fractional cents per pound appears opposite each point on the list. To all other towns and localities, excepting those otherwise designated, freight was equalized with the nearest equalization point, marked on the list with an "E". Thus, on Commission's Exhibit 659-O there appears only one town each in the States of Alabama, Arkansas, Kentucky and Louisiana. In quoting to a customer in Alabama, for example, one-quarter of a cent per pound was first added to the base quotation and then the freight was calculated to the customer's destination. In the event the rate to the destination was more than the freight rate to Mobile, the equalization point, the additional sum by which the freight rate was more than the rate of Mobile was added to the delivery price.

1247 It is readily apparent that this method of quoting prices, requiring knowledge of all of the different free delivery and equalization points in the country and of the additions applicable to each of them, together with the freight rates to the points and to all of the other cities and towns not listed as delivery or equalization points for purposes of the freight equalization calculation, was a highly complicated method in which a seller could never be sure in advance of what his competitor was quoting unless he had advance knowledge of his competitor's listed points and of the freight rates used in making his calculations.

(c) Up to 1933, there were also prevalent in the industry other practices which naturally affected the cost of lead pigments to purchasers. At times, for instance, dry white lead was sold on differential contracts under which prices were quoted at fixed differentials over the prevailing market price of pig lead, the basic raw material. Guarantees were also customarily entered into by the sellers, protecting purchasers over quarterly periods against declines in prices, not only as to the dry pigments sold in barrels and drums but, also, as to white lead-in-oil and the so-called keg products. With respect to oxides, red lead and litharge, differential contracts had been employed for several years covering sales to both carload and less-than-carload purchasers. The differentials to carload purchasers of these products had been in the range of $1.50 and $2.50 per hundred pounds, respectively, over the price of pig lead, but apparently there had been no common understanding in the industry as to which quoted price of pig lead was to be used, and the differentials were not uniformly $1.50 on litharge or $2.50 on red lead of standard grades. As nearly as can be determined from the fragmentary documents on this subject and the imperfect recollections of witnesses who testified on former practices in the sale of oxides, territorial differentials and zones were not employed prior to 1933, and on many transactions freight was charged to the customer or paid by him. Prior to 1933, prices on the Pacific Coast appear to have been below those in the East.

1248 With respect to all of the pig lead pigments, there was before 1933 a diversity of practices among the various respondents as to the time within which orders might be accepted for shipment at the old price following an advance in price and as to datings of invoices, giving purchasers the benefit of such old price. As regards dry white lead, there was no provision for quantity discounts, nor was there a higher differential for the Pacific Coast.

(d) Such was the general condition with respect to prices and terms and conditions of sale of lead pigments in the industry at the time the respondents began meeting together in 1933 for the ostensible purpose of considering the drafting of a supplemental code of fair competition for the lead pigments industry.

Paragraph Seven: (a) The respondents in this proceeding, with the exception of respondents Anaconda and International, and a number of other companies, including mining companies, smelters, refiners and manufacturers of

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lead products generally, have been members of the Lead Industries Association since its organization in 1928. International Smelting Company, the predecessor of respondent International Smelting and Refining Company, became a member in 1929. The Lead Pigments Division of the Lead Industries Association, composed of the manufacturers of lead pigments, including the respondents, was the medium through which the discussions and group actions which were destined to revolutionize the pricing practices and methods of the respondent, took place.

(b) The chairman of the Lead Pigments Division of the Association was Mr. F. M. Carter, president of respondent National Lead Company. The chairman of the White Lead-in-Oil Committee of this division was at first Mr. Willard E. Maston, vice president of respondent Eagle-Picher, and later Mr. Carter. The chairman of the Dry Products Committee of the Lead Pigments Division was also Mr. Carter, president of respondent National. In later meetings the Dry Products Committee apparently was further subdivided into a Lead Oxide Committee, which 1249 represented the red lead and litharge producers as distinguished from the white lead producers, and its chairman was Mr. Harold Rowe, then assistant to the president of respondent National Lead Company. In any event, the Lead Pigments Division of the Lead Industries Association and its various subdivisions all constituted practically the same group, respondent National being represented primarily by its president, F. M. Carter, and the assistant to its president, Harold Rowe; respondent Eagle-Picher, by Messrs. Bendelari, its president, and Roosevelt and Maston, its vice presidents; respondent Glidden, by its vice president, Paul E. Sprague; respondent Sherwin-Williams, by its vice president, S. B. Coolidge, Jr.; and Anaconda Lead Products Company, a subsidiary of respondent Anaconda Copper Mining Company, by its sales manager, F. O. Case. The participation of these representatives in various meetings is vividly shown by the minutes appearing in the record, and is clear that all of the respondents (respondent Anaconda, by its subsidiaries) participated actively in the entire series of meetings hereinafter referred to, although one or more of the representatives may not have attended any one particular meeting. In connection with the activities of the association during the N. R. A. period, Mr. F. E. Wormser, secretary of the association, acted as secretary to the Code Authority and of the Committees and received reports and otherwise functioned as association representative.

Paragraph Eight: For the purpose of drafting a supplemental code of fair competition for the lead pigments division of the lead industry under the National Industrial Recovery Act, the White Lead-in-Oil Committee and the Dry Products Committee of the Lead Pigments Division of the Lead Industries Association met on various occasions between July 1933 and January 1934. A great many topics were discussed at those meetings, including terms and conditions of sale of lead pigments, the agency or consignment method of selling white lead-in-oil, freight and zoning problems, and others.

1250 (a) At meetings held on July 19 and July 20, 1933, a draft of a supplemental code had been prepared, but the minutes of those meetings show that so many questions regarding trade practices were raised that it was agreed the committee should meet again on August 8 for further discussions. As disclosed by the minutes of its meeting held on August 8, the Dry Products Committee, presided over by Mr. Harold Rowe, adopted, among others, the following rules and took the following action applicable to lead oxides:

"1. Red lead over 90% true red lead shall be sold at the following premiums over grades with lower true red lead content:

90% to 98% true red lead	$ .25 per cwt.
98% and over true red lead	$ .50 per cwt.

"2. Only two grades of guaranteed red lead shall be sold, i.e. grinders red lead guaranteed 95% and red lead guaranteed 98%. Under 95% red lead may be labeled as desired.

"3. Price shall be a differential over the lead market in effect on (a) the date sale is made, or (b) some future date, or (c) the average during some future period, the basis to govern to be specified at the time each sale is made.

"4. American Smelting & Refining Company's official price shall govern all spot sales, but either the A. S. & R. or Engineering and Mining Journal price may be used for average price contracts. The metal basis for spot orders on any day shall be the A. S. & R. price in effect at the close of business on the previous day.

"5. Carload sales shall consist of at least one minimum carlot as defined in freight tariffs in effect on date of sale for freight movements from Member's shipping point to point where Buyer accepts delivery. Trust delivery of carload orders must be completed within three days from start of delivery.

1251 "6. On spot sales delivery or billing shall be complete in 30 days from date of sale.

"7. As agreed between Member and Buyer, always with reasonable notice to Member, and in the case of sales on an average market basis, Member shall require Buyer to specify amount to be supplied on said basis prior to the beginning of the period whose average governs the price, and such sale is to constitute a firm sale. Deferred deliveries are to be billed on the basis originally applicable to the sale and additional requirements are to take the spot price.

"8. Terms shall be 1% for cash not beyond 10 days from date of shipment and net cash 30 days from date of shipment.

"9. Delivery place shall be F.O.B. Member's shipping point.

"10. Freight shall be equalized with the nearest manufacturing point, with allowance of actual carload rate up to 40¢ per 100 lb., rail tariffs to govern.

"11. Any tax or other governmental charge upon the production and/or sale and/or shipment of products of this Division imposed by the Federal authorities and hereafter becoming effective within the life of a sales contract shall be added to the price provided in the contract and shall be paid by the buyer.

"12. The price paid for l.c.l. shipments shall be a flat price established by the seller.

"13. Nothing in any part of the Code shall be deemed to hamper full freedom of action of any Member in settling accounts or extending delivery with buyers whose credit position may require special action or adjustment.

"14. Maximum allowance to customers using their own carriers shall be the regular tariff rate.

1252 "15. No allowance shall be made for warehousing in customer's warehouses unless they are recognized commercial warehouses.

"16. No allowance shall be made for cartage in excess of 10¢ per 100 lbs. except in New York metropolitan district and any in excess of this amount shall be reported to the Secretary.

"17. No rebate on customers' stocks shall be allowed on account of price decline.

"18. Options given to bidders on bid business shall be contingent upon award of the contract to the bidder.

"19. On Government bids and on railroad (and industrial) business the following package differentials over l.c.l. barrel prices are hereby established.

100 lb. kegs	$ .50
50 lb. kegs	$ .75
25 lb. kegs	$1.00

"Consignment accounts were discussed. The general sense of the meeting was to abolish consignment accounts, but the explanation of one member for his use of consignments in certain inaccessible localities caused this question to be passed over for further consideration.

"There was a difference of opinion as to whether no allowance or a limited allowance should be made on returnable packages.

"It was felt that in the case of off-grade material sold as such, a satisfactory differential below the standard grades should be developed.

"It was the sense of the meeting that grave danger for the lead oxide business existed in the manufacture of the oxides by the users themselves, this being particularly
1253 true of large battery manufacturers who now are
manufacturing black oxide for their own use. It was felt that it would be contrary to the spirit of the N.R.A. for users of the oxides to install their own oxide manufacturing equipment when the capacity of the industry is already in excess of requirements and so long as oxides can be purchased at a fair price. Such a procedure could not increase employment and would be contrary to the declared purpose of the Act 'to promote the fullest utilization of the present productive capacity of industries.' It was felt that some means of licensing new productive equipment might be sought as provided for in the cotton textile and other codes." (Comm. Ex. 800-A, B and C.)

On the following day the Dry Products Committee took up the matter of practices to be included in a supplemental code for dry white lead, and it was then agreed to adopt as applicable to this product items Nos. 9, 11, 14, 15, 16, 17, 18, 19 and 20, as set forth in the minutes of the August 8 meeting of the Oxide group (Resps.' Ex. 135-A). Meeting again on September 6 and 7, the Dry Products Committee discussed the subject of uniform sales contracts specifically designed for use in selling dry white lead and red lead and litharge, authorized the preparation of contract forms for this purpose, and discussed also the possibility of limiting the installation of facilities for the production of red lead and litharge. As to contracts covering the sale of dry white lead at a differential over pig lead prices it was agreed that the names of customers would be filed with the association (Comm. Ex. 801; Resps.' Ex. 136-B).

A further meeting of the Dry Products Committee was held on October 27, 1933, at which the third draft of a supplemental code was discussed and agreed upon. The following appears in the minutes of that meeting:

"After much study and discussion outlines setting forth Uniform Bases for the Sale of Lead Oxides and Dry White Lead in Carlots and Less Than Carload Lots, respectively, were drafted, subject to further study by the members. The suggested outlines appear on pages appended.

1254 "It was agreed, in deference to existing statutes, that no reference to prices should appear in the outlines except for the specification that "prices were to be agreed upon between buyer and seller.'

"A question arose as to the possibility of adopting the provisions of the Supplementary Code for the Pigments Division immediately rather than waiting for the approval of the President, but as the decision hinged upon the legality of the Code provisions, the Secretary was requested to procure a legal opinion on the subject, reporting to the Chairman." (Comm. Ex. 504-B.)

Pursuant to the direction contained in these minutes, the secretary did consult counsel concerning the subject matter therein referred to, and, on October 30, 1933, he wrote to Mr. Carter, president of respondent National, as follows:

"I called on Mr. Locke this afternoon to obtain his opinion with respect to the legality of immediately installing a Uniform Basis of Sale for the Lead Oxides and Dry Products by agreement among the producers. Mr. Locke read the Supplementary Code provisions, Article II, and also the suggested outlines of the Uniform Basis for Sale. Although he noted that stipulations as to price had been omitted from the outlines, he felt that it might be unsafe to have an agreement prior to the approval of our Code as factors other than price in the Uniform Sales Contracts might possibly be picked up by the authorities as having a bearing on price and hence being in restraint of trade.

"He suggested that the best practical solution for the moment seemed to be the adoption of the Uniform Basis of

Sale by one or more of the interested members, which could be followed voluntarily by the others, without agreement on the subject but merely because it was individually to their best interests to do so.

1255 "I wired you the substance of Mr. Locke's views for no doubt you will wish to discuss the subject further with other members who now happen to be in Chicago." (Comm. Ex. 522-B.)

The telegram referred to in this letter reads as follows: "Locke believes agreement upon suggested uniform basis of sale pending approval from Washington to code might place us on uncertain legal ground and might be embarrassing later stop He suggests one member use uniform basis and others follow voluntarily". (Comm. Ex. 522-A.)

On November 9, 1933, Mr. Carter wrote to Mr. Paul E. Sprague, vice president of Metals Refining Company (owned by respondent Glidden since 1929), sending copies to officials of respondents Eagle-Picher, International and Sherwin-Williams, concerning this subject, as follows:

"While legal counsel did not give Mr. Wormser a go ahead signal on the question as to whether the adoption of a uniform sales contract would be in strict conformity with the Sherman Act, it is our own conclusion that the common use of a contract which sets forth general terms, specifies grades, etc. but is entirely free from any price agreement would not be subject to criticism or involve us in trouble with the Sherman Act, or similar legislation." (Comm. Ex. 523.)

On the next day Mr. Carter wrote to Mr. W. P. Fuller, Jr., president of W. P. Fuller & Son, in San Francisco, to the same effect, including in his letter this statement:

"Furthermore, it is believed by all members of the Pigment Section, who were present during the discus-
1256 sions, that it is desirable to have the privilege of using such uniform sales contract embodied as a feature in the code." (Comm. Ex. 517-A.)

The Oxide Committee of the Lead Pigments Division met again on December 14 and 15 and on December 27 and 28, 1933. According to the minutes of the meetings of December 14 and 15, the following action was taken:

"After considerable discussion, it was agreed that ninety day contracts should be discontinued because it had become a general practice in the trade not to enforce delivery and on that account they were really only options to buy. It was decided that an outline for the sale of oxides on the basis of manufacturer's card price should be drawn up including certain conditions agreeable to all concerned. In this connection some of the points considered were:

(1) Additional price, for red leads containing 95%, 97% and 98% Pb_3O_4.

(2) Protection against decline on orders for shipment within thirty days.

(3) Allowance for deliveries to one destination in 5-ton and in 20-ton lots.

"It was the opinion of all present that the practice of selling oxides at a differential over pig lead had spread to such an extent that it had become one of the most serious abuses in the trade. It was voted to have presented at the next meeting a basis for sale at the card price and also one at differentials over lead, one of the conditions of the latter to be that spot sales shall be based on pig lead at the close of the market on the date they are made.

"Pending the adoption of our code, it was decided that no new commitments would be made:

1257 (1) On card price beyond February 28, 1934.

(2) On differential basis beyond 60 days. (After January 1, 1934, the limit becomes February 28.)" (Resps.' Ex. 137-A and B.)

The minutes of the meetings of December 27 and 28 show the following:

"There was further discussion of the advisability of making quarterly contracts with small buyers. It was decided that these should be eliminated. The basis for sale at card price was submitted and approved in the form attached. Consideration was given to the question of establishing zones in the West and South where manufacturers would make a uniform addition of their base prices to compensate for the high freight rates. It was suggested that all members investigate this matter so that action might be taken at the next meeting.

"Regarding the clause in the code covering filing of price schedules, etc., it was agreed that exceptions reported to the Secretary should include all details and that in reissuing the information to members of the group he shall give only the names of the buyer and the seller.

"A basis for sale at differentials over lead was agreed upon but it was felt that there was no need of filing it with the code because all buyers in that classification would be considered as exceptions." (Resps.' Ex. 138-A.)

(b) Simultaneously with the meetings of the dry products group hereinabove referred to, the White Lead-in-Oil Committee of the Lead Pigments Division of the association also held a number of meetings at which were discussed industry problems of selling white lead-in-oil and other lead pigments in kegs. Among the more important matters discussed at the initial meeting of this committee, held on August 9, 1933, and the actions taken thereon, as reflected by the minutes of that meeting, were the following:

1258 "The Agency or Consignment method of marketing White Lead-in-Oil, as now being used in a restricted territory, extending from New York City south to and including Washington, was thoroughly explained and discussed. At the present time the National Lead Co. and the Eagle-Picher Lead Co. are selling almost exclusively under this plan, and report that jobbers and dealers with hardly a dissenting voice have approved the plan. The Agency plan is not the exclusive type designed to give certain rights or privileges, which competitors cannot meet, but one under which a Distributor may sell as many brands as he chooses. It is expected the two companies now using the Agency plan will extend it over a much wider area on or before October first. Under the Agency plan of selling, it is evident many of the abuses and non-profit sales among distributors can be corrected at the same time it removes the practice of—Price Guarantees, Spring Datings, deviation from terms, etc. This method of selling will in the future be described as the 'Agency Plan.'

"Freight Differentials: There is a lack of just what points in the country take on advance differentials over the par list price. It was suggested that a zone basis similar to that used by the Linseed Oil group might be worked out and thus simplify the arrangement. The Chairman agreed to offer further suggestions at the next meeting.

"The West Coast situation was briefly discussed, and it was agreed that the Committee should work out some plan for coordinating with this group of manufacturers whereby their territorial conditions as to prices, terms, etc. would not be disturbed. It might be necessary to establish a dividing line between East and West to avoid confusion.

1259 "The question of open quotations on Government and State business was thoroughly discussed. Any plan to eliminate excessively low bids would be helpful to the entire industry. The possibility of apportioning such business was discussed. There was a difference of opinion as to the method which might be used—the following being suggested:

Capacity.
Last year's Government and State business.
Average last three years Government & State business.
Average last ten years Government & State business.

The group was asked to give this further thought." (Comm. Ex. 501-B and C.)

In the meeting of this committee, held on October 28, 1933, the following occurred:

"The Chairman described the new Agency System which the National Lead Company was putting into effect for the sale of its lead-in-oil products, stating that it was an adaptation of a method used by General Electric and other companies and was designed to correct destructive price cutting in the white lead-in-oil business which had seriously affected the marketing of the product. Some other members stated they too were planning to use the consignment system.

"Freight and zoning problems were discussed without any understanding or agreement being made." (Comm. Ex. 505-A.)

In a letter to the general manager of E. I. duPont de Nemours & Co., Inc., dated September 8, 1933 (following a meeting of the committee on September 6, the minutes of which contain no reference to the agency or zone plans), Mr. Carter, president of respondent National, in referring to the fact that National was representing duPont in the code discussions, stated as follows:

1260 "The only feature which I expect you will find it difficult to agree with is the Agency System for selling white lead, in oil, which we are expected to adopt later in the season. It has not been announced nor are we in a position to say anything about it, but we discussed it with members of the Pigment Section. Under this Agency System, we will follow the plan which we have been testing out during the current year in some of the eastern markets. Under this plan, we consign a stock to the dealer, and he acts as our agent. It is practically the same plan as had been in successful use for many years by the General Electric Co. for the sale of Mazda lamps. It permits us to control the resale price, which is a feature of vital importance to the corroder selling in markets like the New York district, for example; where, under present conditions, prices were absolutely demoralized, lead in oil being sold some times below the cost to the dealer." (Comm. Ex. 506-D.)

On September 14, 1933, Mr. Maston, as chairman of the White Lead-in-Oil Committee, wrote Mr. Wormser, secretary of the association, and representatives of certain of the respondents, enclosing what purported to be a zone map and a list of old freight differentials used in marketing white lead-in-oil. In this letter Mr. Maston stated:

"The National Lead Company is fully informed of the details, and are gathering further data on this important matter. When suggestions come in I shall endeavor to get them in shape so that a final report may be submitted for approval of the next group meeting.

"For your information file I am sending you a map and list of freight differential points." (Comm. Ex. 513-B.)

1261 In another letter to the secretary of the association, dated January 31, 1934, following the last meeting of the White Lead-in-Oil Committee during the N. R. A. period, Mr. Maston referred to another zone map as follows:

"I am enclosing Zone Map for the White Lead in Oil industry. I believe you will find it self-explanatory.

"When new points are set up or any suggested change in the differential made they can in the future be passed through your office.

"From this map we will eventually build up an official freight arrangement for this division of the lead industry." (Comm. Ex. 519-B.)

The secretary of the association acknowledged receipt of this letter on February 2, 1934, stating:

"Thank you for mailing me a copy of the Zone Map for the White Lead-in-Oil Industry." (Comm. Ex. 519-A.)

The map referred to in this letter was never produced and apparently was no longer in the files of the association, so that it does not appear in the record.

Paragraph Nine: The Code of Fair Competition for the Lead Industry was approved on May 24, 1934, and appears in the record as Commission's Exhibit 809. Article VII of this code, dealing with trade practice rules for the lead pigments division of the industry, was the final product of the meetings of the lead pigments committees of the Lead Industries Association above described. Section 1 of this article contained provisions against misbranding or misrepresentation of lead pigments, commercial bribery, induc-

ing a breach or cancellation of contract, guaranteeing the life or service of lead pigments, making false or derogatory statements regarding competitors, and selling lead pigments at a concession or using them to influence the sale of other merchandise. Section 2 of Article VII required
1262 each member of the industry producing lead pigments to file with the Code Authority a list of prices at which his products would be sold and a memorandum of any of his conditions of sale at variance with those set forth in Schedule A of the code. Section 3 required that each producer of lead pigments submit to the secretary monthly reports of production, stocks on hand and total monthly shipments. Schedule A, attached to the code, contained three articles—one relating to conditions for the sale of lead oxides in lots of less than twenty tons, the second relating to conditions for the sale of lead oxides in lots of twenty tons or more, and the third relating to conditions for the sale of dry white lead, basic carbonate.

Nowhere in the code, nor in any preliminary draft of a code produced at the meetings of any of the committees, is there any reference to the use of zones or to territorial differences in the prices of lead pigments, or to the use of agency or consignment contracts or arrangements in the sale of white lead-in-oil. Schedule A did provide that in the sale of oxides in carload lots the price should be determined by adding a differential to the pig lead price quotations of American Smelting and Refining Company, and did set forth differentials between the different grades of red lead, but the matter of how prices were to be arrived at was for the most part entirely omitted. Furthermore, the record shows that shortly after the code was approved the respondents and other manufacturers of lead pigments requested and obtained from the National Recovery Administration an express exemption from all of the provisions of Section 2 of Article VII and from all of the requirements of Schedule A, so that at no time were prices or variations filed with the secretary of the association and at no time were the provisions of Article VII of the code or of Schedule A attached to the code in force or effect.

Paragraph Ten: (a) The evidence in the record discloses that the meetings and discussions hereinabove referred to, during the period from July 1933 to June 1934, resulted in understandings and agreements between and

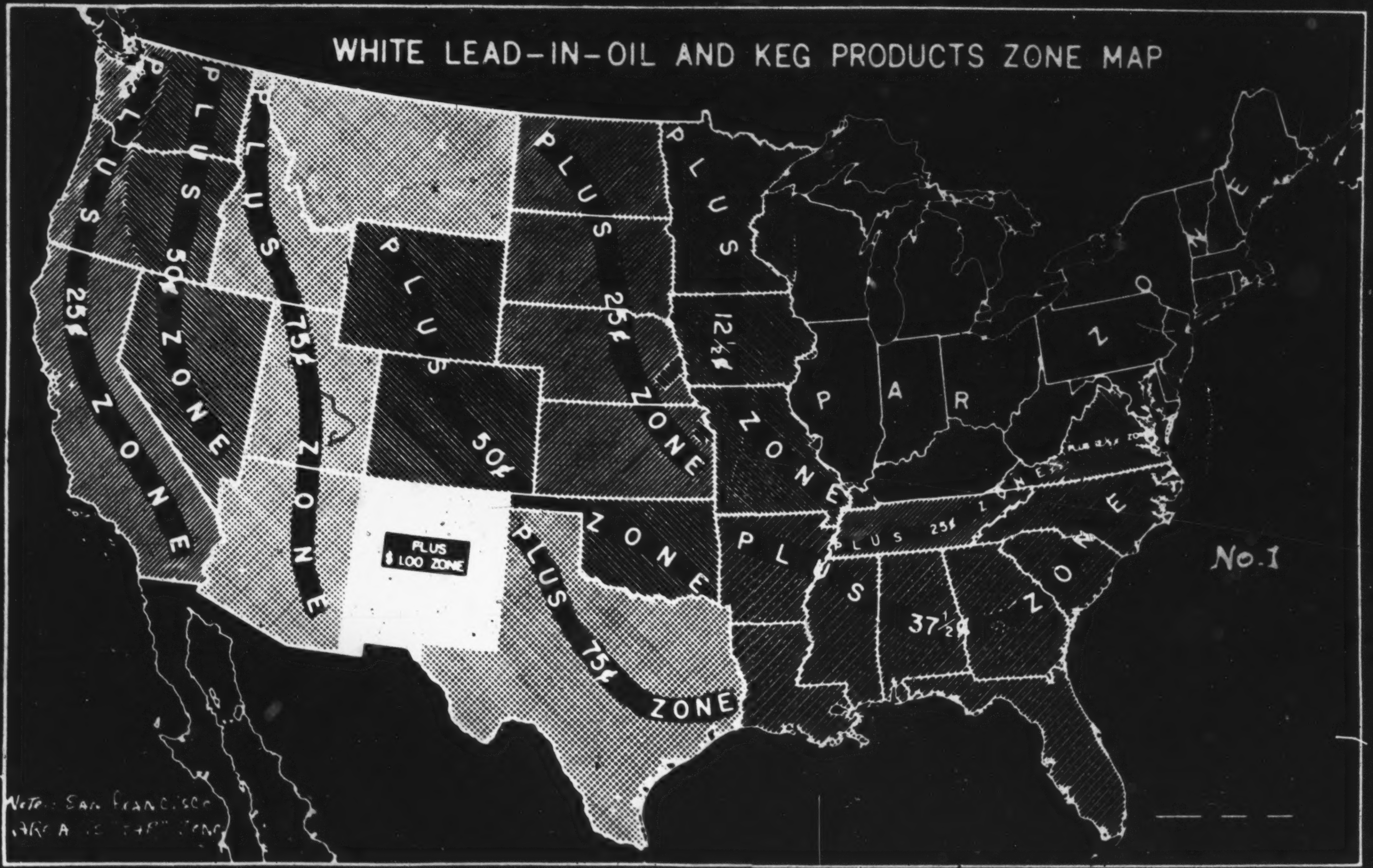
among the respondents to do the following specific
1263 things (except that respondents Anaconda and International did not participate in the agreements concerning red lead and litharge, which products they did not sell, and except that respondents Glidden and Sherwin-Williams did not take part in the agreement to use the agency or consignment method of selling white lead-in-oil):

(1) To sell white lead-in-oil and other lead pigments packaged in kegs or cans of one hundred pounds or less on the basis of flat delivered prices to customers within designated zones, with uniform differentials applicable as between such zones, the approximate boundaries of which zones and the differentials applicable thereto are shown on the White Lead-in-Oil and Keg Products Zone Map included in these findings.

(2) To sell dry white lead (both basic carbonate and basic sulphate) on the basis of flat delivered price quotations to customers within designated zones, with uniform differentials applicable as between such zones, the approximate boundaries of which zones and the differentials applicable thereto are shown on the Dry White Lead Zone Map included in these findings.

(3) To sell red lead and litharge in drums or barrels and in quantities of less than twenty tons on the basis of flat delivered price quotations to customers within designated zones, with uniform differentials applicable as between such zones, the approximate boundaries of which zones and the differentials applicable thereto are shown on the Less-Than-Carload Red Lead and Litharge Zone Map included in these findings.

(4) To sell red lead and litharge in drums or barrels and in quantities of twenty tons or more on the basis of flat delivered price quotations to customers within designated zones, with uniform differentials applicable as between such zones, the approximate boundaries of which zones, and the differentials applicable thereto are shown on the Carload Red Lead and Litharge Zone Map included in these findings.



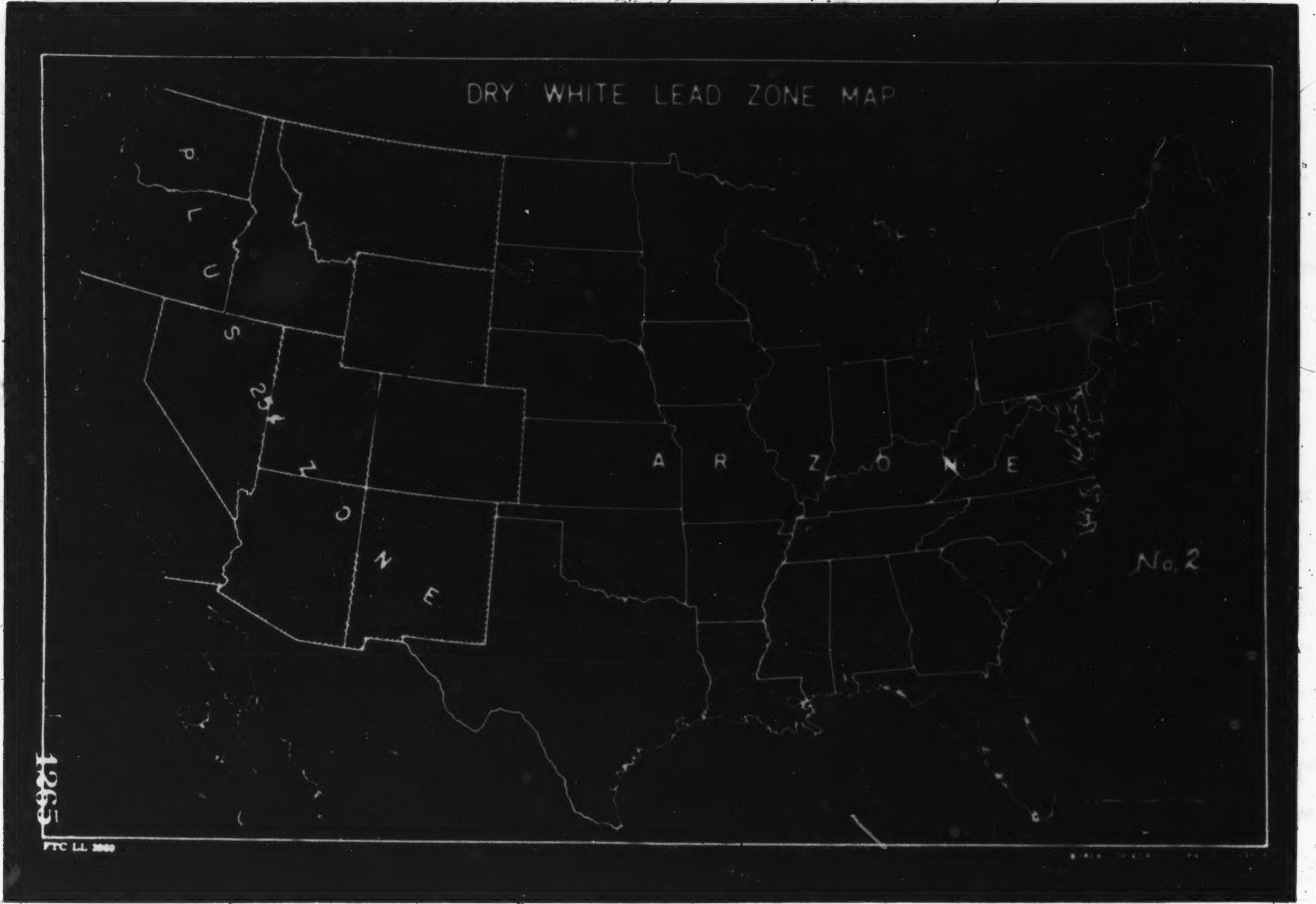
WHITE LEAD-IN-OIL AND KEG PRODUCTS ZONE MAP

PLUS 25¢ ZONE
PLUS 50¢ ZONE
PLUS 75¢ ZONE
PLUS 50¢
PLUS $1.00 ZONE
PLUS 75¢ ZONE
PLUS 25¢ ZONE
ZONE
PLUS 12½¢ ZONE
PLUS 37½¢ ZONE
PLUS 25¢ ZONE
PLUS 2½¢ ZO
PAR ZONE
No. 1
BUREAU OF AGRICULTURAL ECONOMICS

Note: San Francisco Area is "Par" Zone

FTC LL 2960

1264

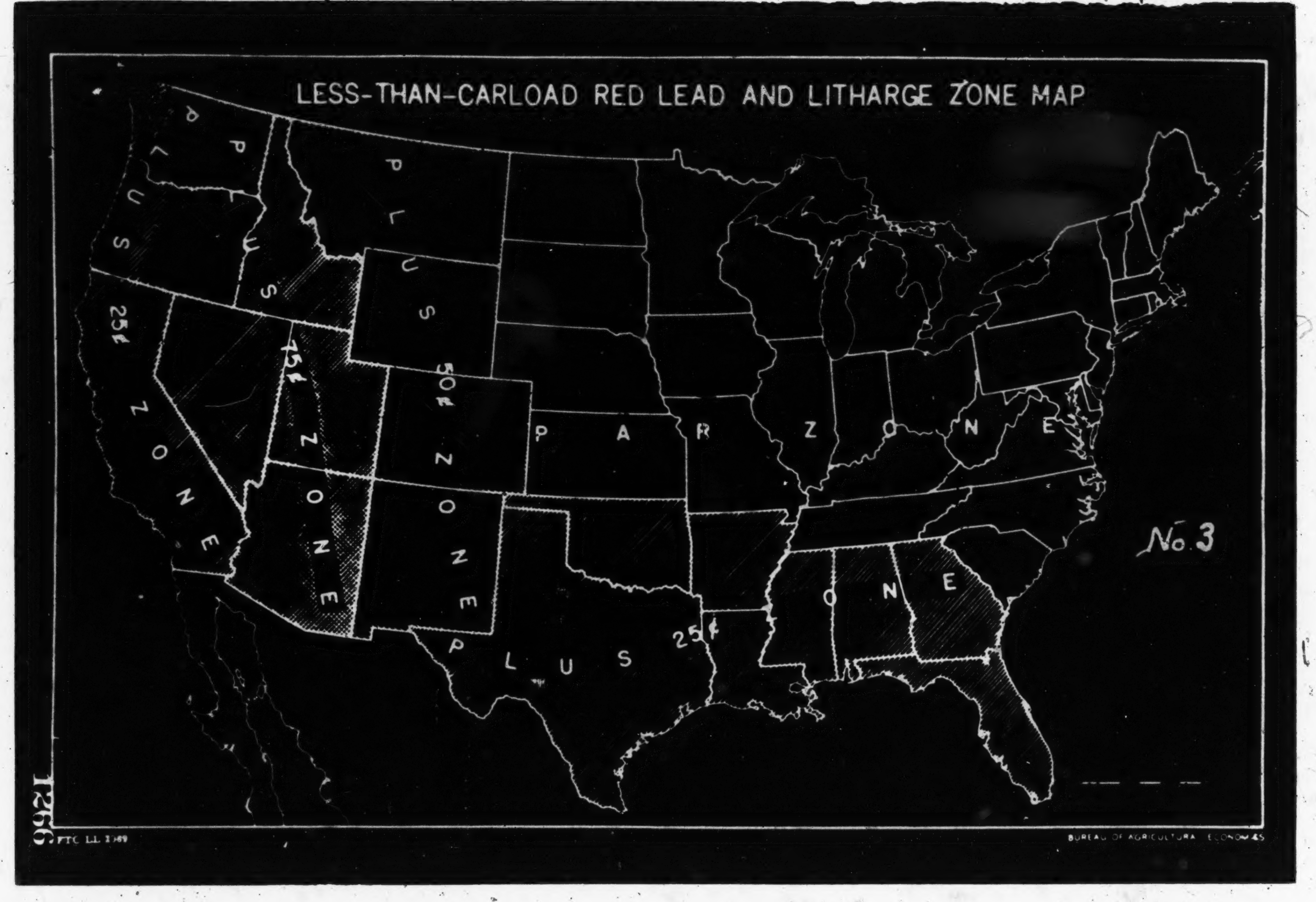


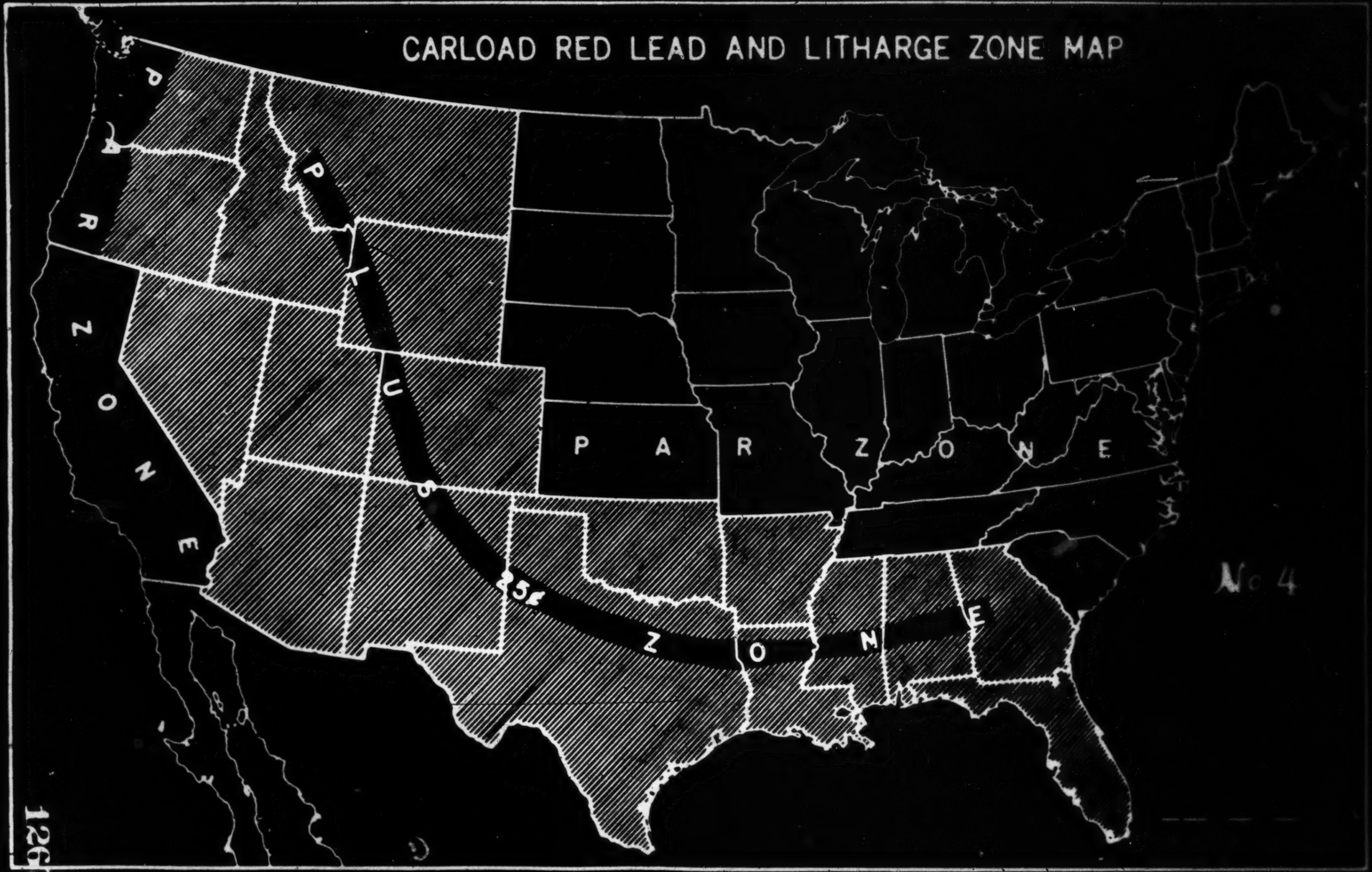
DRY WHITE LEAD ZONE MAP

PLUS ZONE
25¢
AR ZONE
No. 2
1265
FTC LL

37764

LESS-THAN-CARLOAD RED LEAD AND LITHARGE ZONE MAP


PLUS 25¢ ZONE
PLUS 75¢ ZONE
PLUS 50¢ ZONE
PAR ZONE
ONE
PLUS 25¢
No. 3
1266
FTC LL 1169
BUREAU OF AGRICULTURAL ECONOMICS



CARLOAD RED LEAD AND LITHARGE ZONE MAP

PAR ZONE
PLUS 25¢ ZONE
PAR ZONE
No 4
126

BUREAU OF AGRICULTURAL ECONOMICS

1268 (5) To sell white lead-in-oil on the basis of consignment contracts or arrangements for the purpose of controlling resale prices in the trade and preventing competition between themselves and their customers.

(6) To sell lead pigments in kegs and cans at uniform differentials of twenty-five cents per hundred pounds between keg sizes of twelve and one-half, twenty-five, fifty and one hundred pounds.

(7) To allow uniform discounts and terms of sale in transactions involving the sale of dry white lead, with a uniform addition to price quotations for delivery in lots of less than twenty tons.

(8) To quote and sell red lead and litharge in 20-ton quantities on the basis of fixed differentials over the price of pig lead as quoted by the American Smelting and Refining Company.

(9) To quote and sell red lead and litharge in quantities of less than twenty tons on the basis of price cards distributed to the trade and calculated on a fixed differential over pig lead prices.

(10) To fix arbitrary price differences between carload, five-ton and less-than-five-ton purchasers of red lead and litharge in 600-pound barrels, by calculating card prices on the basis of fixed differentials over the American Smelting and Refining Company's price of pig lead.

(11) To refrain from entering into contracts to supply red lead and litharge in quantities of less than twenty tons at a stated differential over the price of pig lead.

(12) To eliminate guarantees against declines in price in sales of red lead and litharge in less-than-carload lots.

1269 Two of the practices covered by these agreements and understandings, namely, the use of the zone delivered pricing system and the agency or consignment method of selling, require further explanation, and these explanations are being set forth in the following Paragraphs Eleven and Twelve. The other practices embodied in the understandings are self-explanatory and are sufficiently described in the recitations hereinafter made concerning their use.

(b) From the foregoing it is apparent that the discussions between the respondents and the agreements for concerted action reached by them in 1933 and 1934 had to do in part with practices which were never covered in any draft of a supplemental code and which apparently were never intended to be covered in a code, as well as with practices which were covered by provisions of a code but which the respondents never permitted to become operative. Therefore, it is the Commission's conclusion that the discussions engaged in for the ostensible purpose of adopting a supplemental code of fair competition were actually engaged in for the purpose, and certainly they had the effect, of cooperatively revising the pricing practices in the industry in a manner far beyond the sanction of the National Industrial Recovery Act. Nor is the Commission impressed by the respondents' argument that they were being invited by the Government to enter into a price-fixing conspiracy. The evidence discloses that the respondents were well aware of the provisions of the antitrust laws and of their duties and responsibilities thereunder. In the Minutes of the Dry Products Committee meeting of October 27, 1933, for example, there appeared the following notation:

"It was agreed, in deference to existing statutes, that no reference to prices should appear in the outlines except for the specification that 'prices were to be agreed upon between buyer and seller.'" (Comm. Ex. 504-B).

It further appears that the respondents were careful to consult their counsel with respect to the adoption of the various practices prior to the approval of the code, and that they were advised that such action "by agreement" might be a violation of law but that one company 1270 might announce a change in practices and the rest of them follow such change "without agreement on the subject but merely because it was individually to their best interests to do so" (Comm. Ex. 522-B). It also further appears that on July 28, 1934, the president of respondent National made a public announcement to the press in which he said, among other things:

"The suspension of the anti-trust laws which was effected by the National Industrial Recovery Act is only temporary, in my opinion. When the anti-trust laws return many companies may again have to learn to operate on an efficient, economical basis." (Resps.' Ex. 168.)

Thus, the Commission is of the opinion, and finds, that the respondents' contention that their price fixing activities were solely in response to Governmental demands and that their meetings were devoted exclusively to efforts to formulate a supplemental code of fair competition under the National Industrial Recovery Act has no foundation in fact.

Paragraph Eleven: The uniform zone pricing system as devised by the respondents in 1933 and 1934 and thereafter employed by respondents National and Eagle-Picher and followed in salient features by the other respondents involved the sale of lead pigments on a territorial zone delivered price basis, with a flat par price for all deliveries in a par zone, which included several states, and fixed differentials over the par price applicable to the various zones outside of the par zone. The sellers prepaid or allowed deductions for all transportation charges and made no allowances or adjustments for differentials in delivery costs as between various destinations in each of the zones. The record shows that shipments of lead pigments were made by the respondents on this basis from the following, among other, points: Chicago, Illinois; St. Louis, Missouri; Perth Amboy, New Jersey; Philadelphia, Pennsylvania; Oakland, California; Cincinnati, Ohio; Scranton, Pennsylvania; Hammond, Indiana; Collinsville, Illinois: Baltimore, Maryland; Joplin, Missouri, and Galena, Kansas.

The exact date on which the zone delivered price systems for selling the various lead pigments involved were first put into operation by the respondent is not clearly 1271 shown. It is probable, however, that they were initiated sometime in May or June 1934, for on June 9, 1934, Mr. Harold Rowe, assistant to the president of respondent National, in a letter advising all of National's branch managers of the new zone schedules for oxides and dry white lead, among other things, said:

"We appreciate that the whole zone set-up is very confusing, particularly in view of the fact that there is a different arrangement for oxides, dry white lead and white lead-in-oil. Fortunately you are only concerned with the states in your territory. It seems important, however, that you should have full information available in your office. In the hope that it will help to simplify this complicated matter we are planning to make up colored maps for each product which will be sent to you as soon as they can be completed." (Resps.' Ex. 159-A.)

Paragraph Twelve: The agency or consignment plan of selling white lead-in-oil was inaugurated by the Atlantic branch of respondent National Lead Company early in 1932, and in 1933 was extended to National's other eastern territories. The record shows that from the beginning respondent National kept Eagle-Picher fully informed as to its practices and the results that were obtained in connection with the use of this method, and shows further that in November 1933, when National decided to extend the plan on a nation-wide basis, it informed Eagle-Picher of that intention. Eagle-Picher had begun using the plan itself at about the time National had extended its use to all of the eastern territories, and when National extended its use on a nation-wide basis Eagle-Picher did likewise.

Under the consignment plan of selling as employed by respondents National and Eagle-Picher, the sellers appointed dealers as "agents" (in the case of National) and as "distributors" (in the case of Eagle-Picher), and under the terms of the contracts with the dealers stocks were consigned to the "agent" or "distributor" for resale at prices and terms specified by the consignor. Sales were made by the consignees from these stocks and monthly settlements for the goods sold during the month were
1272 made with the consignor for the total amounts so sold,
less the differences between the prices set forth for the consignee and the resale prices charged dealers and consumers. This difference between the consignee's cost and his resale price was his compensation. Expenses of storing, shipping, selling and handling the goods were met by the consignee, who also paid all taxes. The contracts strictly limited the consignee's authority to the custody and sale of such goods as were consigned to him. Consignees could not bind consignors respecting any other than consigned goods or in any other particulars. National's contracts ran between "manufacturer" and "agent". Some of Eagle-Picher's referred to "seller" and "distributor", while others specified the "manufacturer" and "distributor". Consignments were subject to withdrawal at any time, and the consignees were required to report periodically their stocks on hand. The acknowledged purpose of the consignment plan of selling was resale price control. The plan involved the extra expense to the producer of carrying large inventories of goods stocked in distributors' warehouses, however, and was otherwise objectionable. In writing to du Pont about the plan in September 1933, Mr. Carter, president of respondent National, said in part:

"It permits us to control the resale price, which is a feature of vital importance to the corroder selling in markets like the New York district * * * While selling on consignment is admittedly an evil, I now feel confident that of the two evils with which we are confronted, we have chosen the lesser in selecting the agency system." (Comm. Ex. 504-D and E.)

And in a circular to branch managers, dated November 9, 1933, Mr. Rowe, of National, said in part:

"It should be kept in mind that the purpose of the whole Agency Plan is to control the dealers' selling price of white lead, so that he may be assured of a reasonable profit." (Comm. Ex. 601-B.)

1273 The record is clear that the agency or consignment plan was effective in preventing sales of white lead-in-oil below cost and other price cutting practices.

Respondent National employed the consignment plan of selling white lead-in-oil from the early part of 1932 to January 1944, when government restrictions caused it to terminate its agency agreements. Respondent Eagle-Picher conformed to National's methods in every essential particular until March 9, 1942, when it modified its contracts to meet war conditions and reduce stocks. Thereafter, Eagle-Picher required consignees to pay at the end of each month for all stock held by them, but it indicated that in other respects the old contracts would be kept in force.

Respondent Anaconda, at first through its subsidiary, Anaconda Lead Products Company, and later through its subsidiary, respondent International Smelting and Refining Company, sold lead-in-oil on the consignment plan from 1933 to 1946, when International went out of the lead pigments business. No particular contract form appears to have been used by these respondents, except in the case of shipments consigned to dealers in the State of Wisconsin, where a contract was necessary in order to protect the owner of consigned goods in case of bankruptcy of the consignee, and this contract was not shown to have been similar to those of National and Eagle-Picher. In other territories their consignment was on a plan of their own, without written contracts and without agreement on the part of the consignee to sell only at retail prices suggested by the consignor.

Respondent Glidden, who had opposed the consignment plan, did not consign stocks until some six years after the plan was inaugurated. At the insistence of its salesmen and managers it furnished forms and instructions for consignments selling on July 17, 1939. Glidden's contracts and its instructions to salesmen indicate a departure from the plan followed by National and Eagle-Picher in that Glidden offered distributors an exclusive arrangement, whereas the others permitted their consignees to carry consigned stocks of competitors, and 1274 they often did so. Glidden abandoned the plan in 1942, and prior to that time consignments were not offered except where it was deemed necessary. Glidden's price under the plan, when it was used, was the same as that of other corroders.

Respondent Sherwin-Williams never sold on the agency or consignment plan at any time.

Paragraph Thirteen: With certain exceptions, the respondents have followed the pricing practices and have adhered to the terms and conditions for the sale of lead pigments agreed upon in 1933 and 1934 as herein found from 1934 to the present time. Illustrative of the manner and extent to which this has been done are the following facts and circumstances:

(a) The record shows that at all times during the period from 1933 to at least 1942 the prices of respondents National and Eagle-Picher on white lead and other keg products of comparable grades sold to comparable classes of dealers were substantially the same, and on such products the prices of respondent Glidden, Sherwin-Williams and Anaconda were customarily twenty-five cents per hundred pounds below the prices of National's "Dutch Boy" and Eagle-Picher's "Eagle" brands of white lead. This difference of twenty-five cents was due primarily to the wide demand which National had created through its prestige, advertising and greater ability to supply the trade with its well known "Dutch Boy" brand of white lead-in-oil, and it was felt by Glidden, Sherwin-Williams and Anaconda (International) that their products could not command the same price. In all cases, however, the dealer's resale or list prices were the same as those of National and Eagle-Picher, and the twenty-five cents concessions were made to the dealer to encourage extra sales effort on his part to sell the lesser known brands. This has been true not only as to sales in the par zone but also as to sales in all of the other zones. Invoices covering three hundred and four sales of white lead-in-oil during the period from January through March, 1941 by National and Eagle-Picher to agents and distributors in Zones 2, 3, 4, 5, 6 and 7, as shown on the White Lead-in-Oil Map, tabulated in Commission's Exhibits 752-A to Z-16, inclusive, and 754-A to R, inclusive, reveal a strict observance of zone differentials by both of these respondents and identical prices in all but six sales, three of which were over the card price and three under the card price by National. Commission's Exhibits 772-Z-15, 794-D, 1275 I, Y and Z, and 795-M, P and Q discloses thirty-four lead-in-oil sales to dealers in Zones 2 to 6 by respondents Glidden, Anaconda and Sherwin-Williams during the same period, which reveal the strict observance by these respondents of all zone differentials, price uniformity between them in all premium zones into which two or more of them shipped and the same uniform variance from National's and Eagle-Picher's prices that is reflected in their par zone prices. Sales of dry white lead in carload lots and in quantities less than carloads to manufacturers in the par and twenty-five cent zones during the first quarter of 1941 are shown by four hundred and forty-eight invoices in the record (Comm. Exs. 752-G to Z-120, inclusive; 754-W to Z-9, inclusive; 772-Z; 794-Z; 795-M to Z-7, inclusive). In making these sales the respondents conformed strictly to the zone pricing system, including the zone differentials provided therein, and followed, with few exceptions, a price pattern which involved quantity differentials between carloads and less than carloads sold to manufacturer customers. It is thus clearly established that from and after the early part of 1934 the pricing of lead pigments in accordance with the zone delivered pricing system herein described was the accepted practice among the respondents, and, in fact, the only respondent in this proceeding to seriously deny that it has used such system in the sale of its products is respondent Sherwin-Williams. The contention of this respondent in this respect is separately treated hereinafter.

(b) The respondents' price cards issued periodically during the period covered by this proceeding carried not only the prices at which products would be sold to dealers and others, but also complete lists of prices at which it was suggested that the dealers and others sell white lead-in-oil and other keg products to consumers and painters. The terms used on these cards for such suggested resale prices were "Dealers' Schedule", "Resale Prices", "Painters' Price List" and "Dealers' Recommended Selling Schedule", and the prices set forth under these designations by all of the respondents at comparable times were substantially identical. The following table contains the card resale prices of the respondents for white lead-in-oil as of the dates shown, which were the effective dates for each of the cards:

Resp.	In 100 lb. kegs	In 50 lb. kegs	In 25 lb. kegs	In 12½ lb. kegs	Date	Comm. Exhibit
National	13.00	13.25	13.50	13.75	9/13/37	659-Z1
Eagle-Picher	13.00	13.25	13.50	13.75	9/14/37	660-A
Anaconda	13.00	13.25	13.50	13.75	9/15/37	661-Z3
*Glidden						
Sherwin-Williams	13.00	13.25	13.50	13.75	9/15/37	662-Z9
National	11.75	12.00	12.25	12.50	1/10/38	659-Z15
**Eagle-Picher	11.75	12.00	12.28	12.56	1/11/38	660-C
**Anaconda	11.75	12.00	12.28	12.56	1/10/38	661-Z1
Glidden	11.75	12.00	12.25	12.50	1/11/38	663-F
Sherwin-Williams	11.75	12.00	12.25	12.50	1/11/38	662-Z13
National	12.25	12.50	12.75	13.00	2/27/39	659-Z31
**Eagle-Picher	12.25	12.50	12.76	13.04	3/ 1/39	660-F
Anaconda	12.25	12.50	12.75	13.00	3/ 3/39	661-X
Glidden	12.25	12.50	12.75	13.00	2/27/39	663-I
Sherwin-Williams	12.25	12.50	12.75	13.00	2/23/39	662-Z19
National	13.25	13.50	13.75	14.00	4/26/41	659-Z41
Eagle-Picher	13.25	13.50	13.75	14.00	5/ 1/41	660-H
**Anaconda	13.25	13.50	13.76	14.00	5/ 3/41	661-V
Glidden	13.25	13.50	13.75	14.00	4/26/41	663-K
Sherwin-Williams	13.25	13.50	13.75	14.00	4/25/41	662-Z23

On all cards the suggested prices to painters were $1.00 less than each quotation given above.

* The price cards of respondent Glidden for this period was not furnished. This respondent's price cards for other dates; however, show that its resale prices were identical with those of the other respondents for the comparable dates.

** The apparent differences in the quotations of respondents Eagle-Picher and Anaconda for the 25-pound and 12½-pound kegs during January 1938, March 1939 and May 1941 may be explained, at least in part, by the fact that Eagle-Picher and Anaconda quoted on these smaller packages a price per unit of 25 or 12½ pounds, rather than a price based on 100 pounds, as did the other respondents. Since there is a fraction of a cent involved in dividing the hundredweight price by 4 or 8 to determine the 25- or 12½-pound container price, Eagle-Picher and Anaconda evidently used the even cent next above the fraction in quoting on such single containers for the periods mentioned. This does not necessarily represent a real price difference between Eagle-Picher and Anaconda on the one hand and the other respondents on the other, for it is entirely possible that any of the other respondents in quoting on a single unit would also use the cent above the fraction.

(c) The differentials over American Smelting and Refining Company's price on pig lead of $1.50 per hundredweight for litharge and $2.50 per hundredweight for red lead in carload quantities had been employed in the industry for some time prior to 1933, and each of the respondents, except Anaconda (International), who sold no oxides, used them uniformly thereafter (Tr. 1292, 1326-1328, 1618-1620, 2666, 2692-2697; Comm. Exs. 137-A, 762-B). Actual sales of red lead and litharge as evidenced by a large number of invoices in the record of respondent's National, Eagle-Picher and Glidden for the last quarter of 1941 follow in regular patterns the formula of $1.50 for litharge and $2.50 for red lead over A. S. & R.'s pig lead quotations, and with occasional exceptions covered by contract sales and some sales to large battery manufacturers, the prices of the three were uniform. Prices of oxides in quantities smaller than carloads have been based on the aforesaid carload prices as determined by these differentials (Tr. 1618-1621, 2390-7). It is also shown that the quantity differentials stated in Schedule A attached to the supplemental code between twenty tons and less on lead carbonates and between five tons and less on lead oxides were allowed on the price cards of all respondents quoting on these products after 1933 (Comm. Exs. 659-663, inclusive, 615-B). In addition, it appears
1278 that all of the other conditions provided in Schedule
A for the sale of oxides, except the stated terms of sale and f. o. b. car deliveries at seller's plant, were consistently observed and practiced by all of the respondents during and after the code period. The dealers' price cards in the record indicate that the terms of sale used by the respondents have varied from 1% ten days, net thirty days to 2% ten days, net sixty days, but that at any one period the terms of all of the respondents on similar products and quantities have been uniform, and deliveries, for the most part, have been to the buyer's location, to the seller's plant with freight allowed, or f. o. b. stated shipping or equalization points.

(d) As shown in Paragraph Eight (a) hereof, container price differentials were discussed in detail at the meeting of the Dry Products Committee of the Lead Pigments Division of the association on August 8, 1933, and the following provision was tentatively adopted, but was not thereafter incorporated into the code:

"On Government bids and on railroads (and industrial) business the following package differentials over l.c.l. barrel prices are hereby established:

100 lb. kegs	$ .50
50 lb. kegs	$ .75
25 lb. kegs	1.00"

(Comm. Ex. 800-C)

Both the testimony and the numerous price cards in the record show that thereafter all of the respondents quoted and charged a differential of twenty-five cents as between various container sizes used to contain one hundred pounds of pigments, that is, one hundred pounds of pigments in two 50-pound kegs or cans were sold at twenty-five cents more than the price for the same quantity in one container. For four 25-pound containers, fifty cents was added, and for eight 12½-pound containers, seventy-five cents was added. This practice was employed by all of the respondents without deviation, and both National
1279 Lead Company and The Sherwin-Williams Company
introduced evidence purporting to show that the differentials so charged were less than the costs involved as between single containers requiring only one process of sealing, packing, labeling and handling and the additional containers, each of which has to be similarly processed.

(e) With respect to quarterly contracts for the sale of lead pigments, there was in the supplemental code for the lead pigments industry a provision for contract sales of dry white lead, basic carbonate, with specific provisions for the basing of prices on the seller's card price on the first day of each quarter (Comm. Ex. 809, Schedule A, Article III). There was also in the code a provision for basing carload prices of oxides on A. S. & R.'s market prices on the dates orders were received. The matter of uniform sales contracts and conditions to carry these provisions into effect was discussed in committee meetings prior to the adoption of the code, and some of the provisions were incorporated into the second draft (Comm. Exs. 800-C; 801-A; 802-A), but these were not adopted into the final draft of the code, and it was not shown that a uniform contract was ever finally agreed upon or used generally. The respondents, except respondent Anaconda (International), did continue to make quarterly contracts for sale of lead pigments, however, and the agreed upon formula for differentials over pig lead prices was applied by all of them to carload prices on oxides. On less than carloads of oxides, the card prices based on the carload prices were uniformly used.

(f) The supplemental code for the lead pigments industry, in Article I of Schedule A thereof, also contained a provision under which 97% or 98% red lead (Pb_3O_4) should be sold at not less than one-quarter cent and one-half cent per pound, respectively, over the seller's price for grades of lower Pb_3O_4 content. Both during and subsequent to the code period all of the respondents, except Anaconda (International) which sold no red lead or other oxides, quoted and sold red lead on the differentials agreed upon and so included in the code. For 97% Pb_3O_4, a charge of one-quarter cent per pound over lower grades was added and for 98% the charge was one-quarter 1280 cent over the price of the 97% grade. The fact that these differentials were uniformly applied was not denied, but the respondents did contend that the increased costs of manufacturing 97% and 98% red lead as compared with the costs of manufacturing 95% red lead fully justified the increased prices for those products. In this connection the record shows that the higher grades of red lead are made by extra burning and that their production does involve a difference in the cost of manufacture, and this phase of the subject is more particularly referred to hereinafter.

(g) Means of eliminating low bids on government and state purchases had been discussed at a meeting of the White Lead-in-Oil Committee on August 9, 1933. The possibility of apportioning such business among the respondents and the method by which it might be accomplished were considered, and the group was asked to give the matter additional thought (Comm. Ex. 501-C). The record does not disclose any further joint discussion of this subject, but it does contain tabulations of a number of bids to purchasers in this category subsequent to 1933. It is shown, for example, that from 1935 to 1941, sixteen separate bids were submitted to the City of Cincinnati for the sale of basic carbonate of white lead by respondents National, Eagle-Picher and Sherwin-Williams. Eleven of these bids were identical to the fourth decimal (Comm. Ex. 864; Tr. 4095). Identical bids on white lead-in-oil were also submitted to the City of Milwaukee Board of Purchases as follows: In 1939, by National and Sherwin-

Williams, both bidding $8.33 per hundred; in 1940, by Eagle-Picher, National and Sherwin-Williams, all bidding $8.57; in 1942, by Eagle-Picher and Sherwin-Williams, both bidding $9.80 (while National bid $10.05); and in 1943, by Eagle-Picher, National and Sherwin-Williams, all bidding $9.80 (Comm. Ex. 865-A to E, inclusive; Tr. 4096). The record further shows that in bids submitted during 1939, 1940 and 1941 to the United States Navy, the United States Treasury and the Panama Canal Zone there were twelve cases of unequal bids by the respondents, with only nine cases of identical prices by two or more of them, all respondents being involved in these bids (Resps.' Exs. 306-A and B, 307-A and B and 308-A, B and C; Tr. 4096), but in view of the background of the respondents' 1281 discussions where they sought to reach an understanding on a method of allocating government business between themselves by prearrangement and collusive bids, this evidence as to the dissimilar bids to the three government departments is not persuasive to show substantial competition among them. Price differences as to one particular type of customer does not detract from the illegality of the conspiracy found in the face of rigid adherence to the agreed system as to all other types of customers, including government agencies.

Paragraph Fourteen: The adherence by each of the respondents individually to the trade practices and pricing methods agreed upon by them in 1933 and 1934 is clearly demonstrated in the record.

(a) Commission's Exhibit 752-A to Z-144 is a tabulation of invoices compiled directly from the records of respondent National Lead Company, showing sales of lead pigments by that company in about sixty different cities during two quarters of 1941 and one quarter of 1943. The prices and the trade classifications shown on this tabulation covering thousands of transactions clearly demonstrates an inflexible use of the zone delivered pricing system by National Lead Company in strict conformity with that agreed upon. This company's practices in selling in accordance with its published prices were described by the manager of the Trade Sales Department, Mr. McCarthy, as follows:

"Q. Mr. McCarthy, are the sales of lead pigments by the National Lead Company generally made at the published prices and announcements of the National Lead

Company over the period of your experience with the company?"

"A. Definitely." (Tr. 1099)

The manager of National's Dry Products Department was called as a witness and testified that the company had generally followed, at least from 1938 when he assumed his present position, the terms and conditions of sale set forth in Schedule A of the supplemental code, and that National has generally employed the differentials of $1.50 for litharge and $2.50 for red lead over American Smelting and Refining Company's quotations on spot sales, 1282 or American Smelting and Refining Company's, American Metal Market's or Engineering and Mining Journal's average price quotations of pig lead. The prices, terms and conditions of sale generally employed by National during the period from 1934 to date of the hearings in this proceeding in the form of price cards, price announcements and instructions to branch managers as to pricing, showing adherence to the system, appear in the record as Commission's Exhibits 595, 659, 806 and 862 and Respondents' Exhibits 154, 158 and 167.

Insofar as respondent National is concerned, the only important deviations from the trade practices and pricing methods agreed upon by the respondents have been in some sales to very large battery manufacturers and in the bids to the three government departments referred to in Paragraph Thirteen (g) hereof. In the period of the last quarter of 1941, National did make concessions from the regular differentials on carload purchases of battery oxides by the large battery manufacturers. The record shows, however, that one of the problems of the industry was to overcome the possibility of large battery manufacturers producing their own oxides, and it may be assumed that National's concessions to these purchasers have been the result of pressure on it by the large consumers of these products who might have been in a position to produce their own red lead and litharge if the concessions were not allowed.

(b) With but a single exception, respondent Eagle-Picher followed the pricing practices and policies of National Lead Company in all aspects from and after 1934. The exception was that in some instances Eagle-Picher did not follow National in granting quantity allowances on white lead-in-oil sales direct to painters, which, however, was a very minor part of Eagle-Picher's business in white lead-in-oil. Like National, Eagle-Picher apparently found it necessary to depart on occasions from the regular carload differentials in selling battery oxides to very large battery manufacturers who were in a position to produce their own oxides. The manager of Eagle-Picher's White Lead Division testified unequivocally that Eagle-Picher had used the zones since 1933 or 1934 substantially as they are shown on the maps included herein. The same official also testified as follows:

1283 "Q. Well, then, if these prices of white lead-in-oil move on a whole scale, so that the list price, dealer price and painter price would be affected by any change, can you tell me of any changes now in the period up to the end of 1945 in that scale, in that whole scale of prices, leaving for the moment the question of quantities and quantity discounts, where such changes by National have not been followed by Eagle-Picher?"

"A. Not in that period you mentioned, I don't think there were any exceptions or occasions where they didn't follow it." (Tr. 3686 and 3687)

Another official of Eagle-Picher (manager of the Pigment Division and a director of the company) while testifying regarding the sale of dry products stated that the carload differentials, card prices and zones, as well as most of the terms and conditions of sale as set forth in Schedule A attached to the supplemental code have been followed by Eagle-Picher in the period subsequent to the code's adoption (Tr. 1590-1621). When asked about adopting the two-zone system for selling their dry white lead, this witness testified as follows:

"Q. Why did these companies adopt this two-zone system for selling dry white lead?"

"A. Well, we adopted it because it was adopted by our competitors, and we went along on the same basis."

The price cards, announcements to the trade, instructions to salesmen and branch officials and invoice records of respondent Eagle-Picher for the years subsequent to 1934 likewise clearly show adherence by this company to the agreed pricing methods and terms and conditions of sale (Comm. Exs. 585-590, 658, 660, 754, 838 and 840).

(c) The extent of the adherence of respondent Anaconda (International Smelting and Refining Company and the other subsidiaries of Anaconda Copper Mining

1284 Company) to the zone methods and pricing policies agreed upon in connection with sales of white lead-in-oil and dry white lead, the only two pigments produced by them, is best demonstrated by the testimony of one of the officials of respondent International. This witness testified in part as follows:

> "Q. Subsequent to the adoption of the two-zone system in the sale of dry white lead, did you ever sell that commodity at a price less than sold by your competitors?
>
> "A. No." (Tr. 3505)

The same witness later testified:

> "Our prices were based on what our competitors were doing." (Tr. 3585)

When asked about the adoption of the zone system for the sale of dry white lead, the witness responded as follows:

> "Q. Why did these companies adopt this two-zone system for selling dry white lead?"
>
> "A. Well, we adopted it because it was adopted by our competitors, and we went along on the same basis." (Tr. 3498)

The only deviation by these respondents from the agreed upon practices was in connection with sales of white lead-in-oil. The Anaconda brand of white lead-in-oil was relatively a newcomer into the industry, and difficulty was encountered in establishing it with dealers against the better known "Dutch Boy" brand of National and the "Eagle" brand of Eagle-Picher. Thus, while the same resale prices to consumers and painters were set by the Anaconda subsidiaries as were set by National and Eagle-Picher, their dealer price on white lead-in-oil was twenty-five cents per hundred pounds lower, for the purpose of giving the dealer an extra compensation of twenty-five cents per hundred pounds for handling the lesser known brand. The 1285 evidence in the form of price cards, price announcements, zone maps and stipulated facts shows that with the single exception noted the subsidiaries of respondent Anaconda Copper Mining Company acting for and on behalf of said respondent followed the practices adopted in 1933 and 1934 from the code period to 1946, when they ceased the manufacture and sale of lead pigments (Comm. Exs. 591, 592, 661, 738, 739, 795 and 836).

(d) The invoices, price cards, instructions to salesmen and other documents in the record, including tabulations of sales records (Comm. Exs. 757-767, inclusive, 771, 772, 798, 810, 829, 830, 831 and 841), show that respondent Glidden likewise adopted and followed the agreed pricing practices and terms and conditions of sale, with minor deviations, from the period of the code to the date of the hearings in this proceeding. The one major exception was that for a period of time respondent Glidden offered dealers purchasing white lead-in-oil outright a price twenty cents lower than the prices obtained by respondents National and Eagle-Picher for their brands of white lead-in-oil. Since resale prices to consumers and painters were identical with those of the other respondents, this concession, as was true with similar concessions by Anaconda and Sherwin-Williams, serve primarily as an added incentive to the dealer to promote the sale of Glidden's products without disturbing the fixed resale price level. An indication of the extent to which Glidden followed the actions of its competitors is the statement of its vice president, Paul E. Sprague, a principal participant in the pigments division meetings in 1933, that it was never to Glidden's interest to initiate a change in the price of lead pigments (Tr. 2561). Mr. Sprague stated all through his testimony that it had been Glidden's practice from the code period onward to follow the prices of National. One exception was that in the period before 1936 Glidden allowed a differential of one-eigh cent per pound on dry white lead sales to paint manufacturers to overcome the reluctance of the manufacturers to purchase from a competitor.

1286 The existence of a well understood policy on the part of Glidden to follow National and the other respondents in these matters is illustrated by Commission's Exhibit 774, which is a letter from the manager of Glidden's San Francisco branch under date of July 6, 1945, transmitting price information to the central office of Glidden and which contains the following note:

"Due to the fact that we have been unable to find any price list for the first and last quarters of 1941, Mr. Ehrke suggested that you may want the National Lead price list for Pacific Coast Branch which was effective May 28, 1940. He says these prices were the same as ours."

As noted elsewhere, respondent Glidden did not participate in the agreement to adopt the consignment plan of selling white lead-in-oil in 1933, and when it did use agency contracts in the period from 1939 to 1941 it apparently did so with some reluctance.

(e) It is the contention of respondent Sherwin-Williams that it does not at any time employ the zone system in quoting and selling its lead pigments and that its present method is one of free delivery and equalization points as previously utilized in the industry as a whole. It appears from the testimony of witnesses and from the price cards and announcements of the company, however, that Sherwin-Williams' deviations from the zone pricing methods since 1934 have been the exception rather than the rule. In selling to all of its company-owned stores, Sherwin-Williams has consistently used the zones and the differentials set forth in the maps included herein, and in selling to customers, wherever located, who purchase in truckload quantities, and to all other customers who could purchase from a competitive seller on the zone basis, its sales and differentials have been on the same basis. Moreover, a "truck load" under Sherwin-Williams' practice includes quantities as little as ten thousand pounds and may include paint or any other item sold by Sherwin-Williams.

1287 An examination of Sherwin-Williams' white lead-in-oil price sheets in the record discloses on the face of each a list of shipping points (Comm. Ex. 662-Y to Z-25, inc.), which lists without more, would indicate offers to sell at the listed points, with the customers paying the freight from such points to their locations. It is evident, however, that the so-called shipping points on the Sherwin-Williams price lists were not in fact f. o. b. points from which freight was added in any but a small number of instances. The General Trade Sales Bulletins from the headquarters of the Sherwin-Williams Company to the branches and sales personnel frequently referred to the zones. For instance, Commission's Exhibit 662-F, General Trade Sales Department Bulletin No. 24, under date of December 28, 1936, contained the following statement:

> "Zone Differentials
>
> On all the above prices where the delivery point is outside the Eastern territory add to these prices the full advance differential shown on the attached price list insert."

Other subsequent Trade Sales Department Bulletins contained similar instructions and above them the descriptions:

"Consumers Prices—Eastern Zone"

"S-W Dealers—Eastern Zone" (Comm. Ex. 662-I to V, inc.)

The adherence of Sherwin-Williams to the zone pricing system in at least a part of the country is illustrated by Commission's Exhibit 782-D, which is a price bulletin issued by the San Francisco office of Sherwin-Williams showing the application of the zone system as such to all of the business of Sherwin-Williams on the Pacific Coast. Commission's Exhibit 823-A to G, inclusive, shows that while Sherwin-Williams apparently did charge freight on less-than-carload shipments of red lead and litharge from warehouses during 1932 and 1933, beginning in 1934 when the zone system was adopted delivered price quotations on these products were made in accordance with the zone plan adopted by the industry, which practice continued down to 1942.

1288 After it had been testified by a vice president of Sherwin-Williams that the company invariably added freight charges to sales of white lead-in-oil away from the shipping points appearing on its price-cards, numerous invoices were produced (tabulated in Comm. Ex. 662-A to Z-26, inclusive) showing that in a large number of instances Sherwin-Williams did not require customers in towns away from its shipping points to pay additional transportation charges. Following this evidence, officials of Sherwin-Williams were called who modified the original statement of policy and testified that the company added freight charges to customers located away from the shipping points, except when such customers purchased in carload or truck load quantities and except when competitors' use of the zone method required the company to absorb or prepay freight charges in order to meet the local competitive situation (Tr. 3694, 3743 and 4103). The evidence shows that as a matter of fact these two exceptions from the policy embraced a majority of Sherwin-Williams' sales and that in most of its transactions Sherwin-Williams did sell in accordance with the zone system and did absorb the transportation charges. Except that Sherwin-Williams quoted a dealer price twenty-five cents per hundred pounds lower on white lead-in-oil than that quoted by respondents National and Eagle-Picher (in the same manner as did respondents Glidden and International), its use of the zone pricing methods and other practices agreed upon in 1933 and 1934 has been in conformance with the similar actions of the other respondents.

Paragraph Fifteen: The combined results of the use by the respondents of the practices herein described have

been to produce substantially identical prices, terms and conditions of sale as between respondents National and Eagle-Picher and to produce substantial uniformity of price differentials, terms and conditions of sale among respondents Anaconda, Glidden and Sherwin-Williams and prices by these three which varied from those of National and Eagle-Picher according to pattern and according to differences of brand and quality of products. The zone pricing feature was shown to be a method which facilitated
1289 the meeting, or matching, of competitors' prices. The
agency or consignment method of selling was shown by conclusive evidence to have had the purpose and effect of controlling resale prices, preventing "loss leader" selling, and securing better profits for dealers. The various differentials have operated to establish an inflexible price structure which has eliminated variations in the prices of lead pigments based on quantity, quality, cost of delivery, container costs and other price factors which an unrestrained market system would provide for the purposes of bargain and sale. The pricing system which has been maintained in the sale of oxides is such that all delivered prices on the various grades, quantities and qualities of these products advance or recede with the change of one price factor; and the continuous rigidity and uniformity in prices, terms and conditions of sale of white lead and other keg products not only illustrates the effectiveness of the respondents' methods in connection with the sale of these products, but also reveals the purposes underlying their employment.

Officials of each of the respondents vigorously assert that there were not to their knowledge any agreements by any of the respondents to employ particular methods or to fix or maintain uniform prices and terms of sale of their products, other than the agreements as to what should be recommended for the supplemental code. It is true that the record does not show the existence of any categorical agreements other than those entered into at the time of the code discussions. The evidence does disclose understandings and cooperative activities, however, which, when considered in the light of the circumstances, leads the Commission to the conclusion, and it accordingly finds, that there was on the part of the respondents a mutual understanding and acceptance of an over-all plan and an intention on the part of each of the respondents to follow it.

Such mutual understanding constituted a conspiracy on the part of all of the respondents to fix and maintain prices, differentials, terms and conditions of sale in the lead pigments industry, which conspiracy was carried out by
1290 all of the respondents through the various methods
herein set forth. While some of the respondents did not employ all of the particular methods, and while there were some variations in practices and results as between respondents, it is clear that each of the respondents has gone far beyond the requirements of competition, and beyond the necessities imposed by National's price leadership, in the practice of the various methods they discussed together and in the maintenance of uniformity of prices, terms and conditions of sale, all of which could not have resulted from other than agreement and conspiracy.

The respondents further contend that the practices found to have been employed by them are not subject to corrective action by the Commission by reason of the provision of Section 5 of the National Industrial Recovery Act (48 Stat. 198), reading as follows:

"While this title is in effect (or in the case of a license, while section 4 is in effect) and for sixty days thereafter, any code, agreement, or license approved, prescribed, or issued and in effect under this title, and any action complying with the provisions thereof taken during such period, shall be exempt from the provisions of the anti-trust laws of the United States."

The Commission is of the opinion, however, that there is no merit in this contention. As hereinabove found, the provisions of the supplemental code for the lead pigments industry covering some of the practices involved were suspended by an exemption by the N.R.A. officials issued upon application of the respondents. This was extended at their request so that these code provisions were never effective. In the opinion of the Commission, this precludes the application of the exemptions provided for in Section 5 of the Act to the practices engaged in pursuant to these provisions. Other practices involved in this proceeding were never adopted and incorporated into the code, and obviously were not protected by Section 5 of the Act either during or after the code period. Moreover, the practices covered by the provisions which were adopted and
1291 suspended, as well as the other practices, were employed both before and for more than sixty days after the termination of the code and the expiration of the ex-

emption period provided in Section 5. Such practices, having been initiated and continued as the result of a price-fixing conspiracy not entitled to any protection provided by the National Industrial Recovery Act or any other statute, are illegal per se and are not immune from the Commission's corrective action.

Paragraph Sixteen: In addition to charging the respondents with the use of unfair methods of competition in commerce and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act, the amended complaint in this proceeding, in Count II thereof, alleges, among other things, that when sales are made to customers located at or near the borders of adjoining or contiguous zones pursuant to the zone delivered pricing method herein described, each of the respondents charges, demands, accepts and receives from some purchasers of its lead pigments higher prices for such products than it receives from other and competing purchasers in different zones, and that as a result of said practice each of the respondents discriminates in the delivered costs of its lead pigments to different purchasers, all in violation of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. Said Count II also alleges that each of the respondents further discriminates in the price of its lead pigments as between competing purchasers of said products by classifying its customers to receive quantity, trade and regional discounts from quoted prices, so that by virtue of such classifications and actions pursuant thereto each of the respondents charges, demands, accepts and receives in connection with sales of its lead pigments in commerce higher prices from some of its customers than from other competing customers. Upon its consideration of the record the Commission makes the following additional findings with respect to the issues raised by these particular allegations.

1292 Paragraph Seventeen: (a) As hereinabove found, each of the respondents (except respondents Anaconda and International) since 1934 has sold its dry red lead and litharge in barrels or bags in less-than-carload lots at the same delivered costs to all customers in a so-called par zone consisting of all the States of the United States other than those specifically named below. In the States of Alabama, Arkansas, California, Florida, Georgia, Louisiana, Mississippi, Oklahoma, Texas and those portions of Oregon and Washington lying west of the Cascade mountains, a differential of twenty-five cents per hundredweight was added for deliveries to all customers at all points. In the case of sales to customers in the States of Colorado, Montana, New Mexico and Wyoming, a differential of fifty cents per hundredweight was added to the par zone price. For deliveries in Arizona, Idaho, Nevada, Utah and those portions of Oregon and Washington lying east of the Cascade mountains, a differential of seventy-five cents over the par zone price was added. Since 1934, each of the respondents has also sold its dry red lead and litharge in barrels or bags in carload lots of twenty tons or more at a differential of $2.50 per hundredweight for red lead and $1.50 per hundredweight for litharge over American Smelting and Refining Company's closing price for common pig lead at New York on the date the order was received, and has delivered these products to customers in the par or base zone at the aforesaid delivered prices. For deliveries to customers in the States of Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, Montana, Nevada, New Mexico, Oklahoma, Texas, Utah, Wyoming and those portions of Oregon and Washington lying east of the Cascade mountains, a premium of twenty-five cents per hundredweight has been added to the par zone prices. The record shows that shipments of dry red lead and litharge have been made by one or another of the respondents at the aforesaid prices and with the stated differentials added from the following, among other, points: Chicago, Illinois; St. Louis, Missouri; Perth Amboy, New Jersey; Philadelphia, Pennsylvania; Oakland, California; Cincinnati, Ohio; Scranton, Pennsylvania; Hammond, Indiana; Collinsville, Illinois; Baltimore, Maryland; Joplin, Missouri; and Galena, Kansas (Tr. 1314, 1564 and Comm. Ex. 756-A).

1293 Large quantities of red lead and litharge so sold by the respondents are sold to the manufacturers of storage batteries. The storage battery industry consists of more than two hundred companies, ranging in size from multiple plant operations of the United States Electric Storage Battery Company and its subsidiaries, Willard and Grant, to small proprietorships whose production of batteries may be less than fifty units per day. During the period from 1934 to 1941, one of the oxide customers of respondent National was Vitalic Battery Company, Inc., of Dallas, Texas, in the twenty-five cent premium zone, which purchased on the carload basis with deliveries being made by National out of the Dallas plant. It was stipulated between counsel that if an official of Vitalic Battery Company were called as a witness he would testify that red lead and litharge have been purchased by Vitalic from respondents National and Eagle-Picher at the published carload prices for delivery in Dallas; that the company markets storage batteries in Texas, Oklahoma, Missouri, Kansas, Arkansas, Louisiana and New Mexico; that the cost of lead oxides amounts to approximately 33% of the total material costs involved in the production of storage batteries; and that the following concerns are Vitalic's chief competitors: Willard Storage Battery Company, Exide Storage Battery Company, National Battery Company and others. These large competitors of Vitalic are all located in the par zone where the delivered price of battery oxides is $1.50 per barrel less than in Dallas.

During the same period of time, 1934 to 1941, respondent Eagle-Picher shipped lead oxides to battery manufacturers from its borderline plant in Joplin, Missouri, to near and far points in different zones. For oxides, this plant is in the par zone and about ten miles from the borderline of Oklahoma, which is in the twenty-five cent premium zone. In the last quarter of 1941 particularly, Eagle-Picher was quoting and selling red lead and litharge at points on the Pacific Coast taking par zone price, while it was quoting and selling to customers in Oklahoma and Arkansas, no more than fifteen miles away from its plant, at a differential of twenty-five cents per hundredweight over the par zone price. At the same time, respondents Glidden and Sherwin-Williams were selling red
1294
lead and litharge on the same zone delivered price basis (except that Sherwin-Williams did not sell to battery manufacturers).

(b) Since 1934, the respondents National Lead Company, The Eagle-Picher Company, The Glidden Company and The Sherwin-Williams Company have consistently quoted and charged different prices as between carload purchasers and less-than-carload purchasers of their oxides. As hereinabove found, the carload price was based on American Smelting and Refining Company's price for common pig lead, and the price for smaller quantities involved a difference of forty cents per hundredweight as between carload and five tons and ninety cents per hundredweight as between carloads and quantities less than five tons. These price differences in a substantial number of cases were much more than the differences between car and less-than-car freight rates and resulted in an excess charge over delivery costs as high as eighty-eight cents per hundredweight against the purchasers of small quantities. The following prices and rates per hundredweight tabulated from Commission's Exhibits 852-A, B, F and O and 854-C show representative results of these differences and include shipments by respondents National, Eagle-Picher and Glidden:

Origin	Destination	Unit	Price Difference ¢	Freight Difference ¢	Lack of Justification on Basis of Freight Rates ¢
St. Louis	Birmingham	CL	0		
"	"	5-ton	40	35	5
Dallas	San Antonio	CL	0		
"	"	L 5-ton	90	50	40
San Francisco	San Francisco	CL	0	0	
"	"	5-ton	40	0	40
Hammond	Chicago	CL	0		
"	"	5-ton	40	4	36
"	"	L 5-ton	90	4	86
Detroit	Detroit	CL	0		
"	"	L 5-ton	90	2	88
Cleveland	Akron	5-ton	0		
"	"	L 5-ton	50	3	47
Chicago	Chicago	CL	0		
"	"	5-ton	40	2	38

1295 All of the shipments included in this tabulation were of red lead. Rates and differentials on litharge were the same, and the prices were $1.00 less per one hundred pounds in all billings. The freight rates on 5-ton and smaller lots were the same. Thus, the lack of justification on shipments under five tons can be determined by adding fifty cents to the 5-ton differential, revealing a price difference of fifty cents or more over freight differences at all points, and no case where the differential between 5-ton and smaller shipments was justified on the basis of freight rates. Respondents' own estimates shown for dry white lead indicate an increased cost of about one-fourth cent per pound against less-than-car lots, but this figure applied to oxides would fall far short of justifying the ninety cents differential in any case or the forty cents charge in most cases. An additional differential of twenty-five cents per hundredweight on less-than-car shipments of oxides was made in the case of shipments to customers in Montana, Wyoming, Colorado and New Mexico, since these States are in the fifty cent zone for small shipments and in the twenty-five cent zone for car lots (Comm. Ex. 854-B, C).

The evidence in the record is that during the period from 1934 to 1941 the storage battery business was characterized by sharp price competition, particularly on the part of some of the large battery manufacturers, such as Globe-Union, Inc., a subsidiary of Sears-Roebuck and Company, National Battery Company and Bowers Battery Company. Illustrative of the competitive importance during this period of the price difference of nearly $6.00 per barrel allowed by the respondents in favor of the manufacturer who purchased his oxides in carload quantities as against the manufacturer who purchased in smaller lots was the following situation. In 1941, National sold to two small battery manufacturers located in St. Louis, Missouri, delivering by its own truck out of its St. Louis plant at the less-than-5-ton price, which was $5.40 per barrel higher than the carload price, and to two small battery manufacturers at the 5-ton price, which was $2.40 per barrel higher than the carload price (Comm. Ex. 853-F), and at the same time sold on the carload basis to larger manufacturers of batteries in Omaha, Nebraska, 1296 where the carload freight rate was $1.74 per barrel, Indianapolis, Indiana, where the rate was $1.32 per barrel, Muncie, Indiana, where the rate was $1.44 per barrel, and Niagara Falls, New York, where the rate was $2.36 per barrel (Comm. Ex. 853-F and G). Deliveries to the carload customers involved in the sales in Omaha, Indianapolis, Muncie and Niagara Falls were all made out of the St. Louis branch and the purchasers were Grant Storage Battery Company, Prest-o-lite Company, Inc., one of the largest manufacturers of batteries, and Delco-Remy Division of General Motors Corporation. The four less-than-carload accounts in St. Louis were manufacturers who produced batteries on a small scale with very limited distribution (Tr. 1919, 1920 and 1924). The proprietor of one of these customers, Sidney Battery Manufacturing Company, a purchaser in 5-ton quantities, was called as a witness and testified that he had been a customer of National Lead Company, receiving deliveries out of the St. Louis plant for approximately twelve to fifteen years, purchasing on either the 5-ton or the less-than-5-ton basis, and engaged in producing up to one hundred and thirty-five storage batteries per day, the capacity of its plant. This witness testified that during the period from 1936 to 1941, competitive conditions in the sale of storage batteries in the St. Louis area "were so bad that the only way we could get by and make a living was to use the old battery cases over again"; that the competition of Grant Storage Battery Company, Majestic and Monarch, of Chicago, and Sears-Roebuck and Company was such that the enterprise had gone "broke" in about 1933; and that in the following period his company could not manufacture batteries for sale at prices comparable with those offered at retail by Sears-Roebuck (Tr. 1926-28). Commission's Exhibit 853-A shows that during the same period of time, respondent National sold battery oxides to Globe-Union, Inc., the battery manufacturing subsidiary of Sears-Roebuck and Company, on the carload basis, shipping from St. Louis to Memphis, Tennessee, at a rail freight rate of $1.98 per barrel, and from St. Louis to Milwaukee, Wisconsin, at a rate of ninety-six cents per barrel.

1297 (c) The price differentials between zones observed by the respondents in the sale of their oxides, as described in subparagraph (a), and the added amounts charged on shipments originating and terminating in the same premium zone over those originating and terminating in the par zone, was shown to increase the cost of oxides to the non-par zone purchaser from one-quarter cent to one-half cent per pound. To this difference was added, in the case of less-than-carload purchasers, the differential charged such purchasers over the carload price. Thus, in the case of small battery manufacturers in Birmingham, Alabama, who purchased in less-than-5-ton quantities, some of whom were shown to be in competition with chain and mail order battery manufacturers located in the par zone, the added quantity differential was fifty-five cents per hundredweight (ninety cents less a rate difference of thirty-five cents). The discriminations against the small dealer in Denver, Colorado, on shipments from Joplin, Missouri, were ninety cents quantity differential, plus a twenty-five cents difference between carload and less-than-carload zoning, less seventy-one cents freight difference, or forty-four cents per hundredweight (Comm. Ex. 854-B and G), as compared with nearby competitors in Kansas and in other locations carrying the same or less freight costs. These unjustified differentials amounted to one-half cent per pound or more in a substantial number of cases. Storage batteries contain from nine to twelve pounds of lead oxides each. Thus, the above-mentioned discrimination amounted to from four and one-half cents to six cents per battery for the oxides alone. In view of the showing made that during the period from 1936 to 1941, a saving of from five cents to ten cents per battery on material costs often would mean the difference between a profit and a loss on low-priced batteries, the competitive effects of these discriminations are readily apparent. The record further shows that even during more normal competitive times, customers required to pay the higher prices under the respondents' schedules are at a distinct disadvantage in seeking to compete in the sale of their products with the respondents' more favored larger customers.

1298 Paragraph Eighteen: In the same way that they sold red lead and litharge on a flat par price for all deliveries in a par zone, adding differentials thereto on sales outside of the par zone, each of the respondents after 1934 sold its white lead, both dry and in oil, at the same delivered prices to all customers in the par or base zones, with the differentials shown on the Dry White Lead and White Lead-in-Oil and Keg Products Maps included in these findings added to such prices on sales to all customers in locations outside of the par zones. Such differentials amounted to one-eighth cent or one-quarter cent per pound as between contiguous zones, with a maximum differential of three-quarters cent per pound as between the par zone and any other zone, and there is in the record evidence tending to show the competitive effect of these differences in sales to purchasers in the vicinities of zone borders. The record shows, for example, that white lead is used extensively in the manufacture of outside paints, and four paint manufacturers of St. Louis, Missouri, testified that they used variously from four and one-half to eight and one-quarter pounds of lead pigments to a gallon of white or tinted outside paint. The testimony of these and other witnesses shows that even in normal times the mixed paint business is one characterized by sharp competition; that outside house paint containing lead pigments is the leading competitive item in a paint line; and that in the period from 1936 to 1941, the margin of profit in the sale of ready-mixed outside paint containing lead pigments was so narrow that a saving of not more than five cents in the price of ingredients for a gallon of paint would amount to the entire profit on some items. It seems clear that in territories near the borders of contiguous price zones the respondents' different prices for their white lead amounting to one-eighth or one-quarter cent per pound involved discriminations as between the purchasers of such products located in the different zones, some of whom, particularly in the St. Louis area, were shown to be in competition with each other.

1299 Respondent National Lead Company offered some evidence to show that on an average basis and taken for each of its selling branches separately, the zone differentials for white lead reflect no more than average differences in freight costs in doing business as between the zones. In the view of the Commission, however, the fact that the average costs of shipping to customers over an area of a dozen or more states amounts to some arbitrary figure does not justify the discriminations which result in particular transactions with individual customers located in border territories.

Paragraph Nineteen: In selling dry white lead, basic carbonate, in both the par zone and the twenty-five cents premium zone, each of the respondents allowed a difference of one-quarter cent per pound under its published card prices on carload shipments of twenty tons or more. Data submitted by the respondents shows that in most cases in which rail freight was a factor the difference between carload and less-than-carload freight rates on white lead were sufficient to justify this price difference. It appears, however, that all of the cost data in the record concerning this twenty-five cents price difference has to do with transactions in which rail freight was involved, and the claimed justification for the differentials is based exclusively on the showing that the price difference was less than the differences between the average freight costs. In this connection, the record shows that the principal paint manufacturing centers of the United States are located in and around St. Louis, Missouri, Chicago, Illinois, Philadelphia, Pennsylvania, and New York, New York, all of them cities containing a white lead producing plant of one or more of the respondents. Furthermore, each of these five areas is among the most substantial consuming areas for dry white lead in the country, and in each of the areas the mode of delivery of lead pigments is local cartage and rail freight is not a cost factor. There are figures in the

record, for example, showing that in 1941, 1,381,000 pounds of dry white lead were sold in St. Louis, in which only local deliveries were involved. The record contains no evi-
1300 dence whatever tending to justify on a cost of delivery basis or otherwise the one-quarter cent differential as to customers in these areas and under these circumstances, and apparently the respondents recognize that this is so since the cost data introduced for the purpose of justifying the differential (Resps.' Ex. 215-A and B) all sales to customers in and around the manufacturing plant cities were pointedly omitted. In view of the competitive situation in the mixed paint industry, and particularly the evidence showing the effect on a paint manufacturer of a saving of as little as five cents in the cost of ingredients of a gallon of outside paint, it is clear that the differential of one-quarter cent per pound between carload and less-than-carload shipments of dry white lead allowed by each of the respondents in the producing areas was discriminatory.

Paragraph Twenty: (a) The respondents' inter-zone prices of lead pigments were in fact different prices. They differed to the extent of the zone premiums, and were justified only where the additional freight or other transportation costs equaled or exceeded the zone premiums. Where the differences in freight or other transportation costs did not equal or exceed the differences in price, the different prices to competing purchasers were discriminatory. The employment by each of the respondents of these inter-zone differentials has had the tendency of lessening competition between customers of the sellers located in different zones who were in competition with each other in the sale of paints, storage batteries and other products manufactured by them and of creating a trade advantage in favor of customers in the par zones and elsewhere who have received the lower prices.

(b) The respondents' differing prices as between carloads and 5-ton lots of oxides and as between 5-ton lots and smaller quantities, and the extra zone charges for less-than-carload quantities sold in the States of Montana, Wyoming, Colorado and New Mexico were not justified by differences in costs of manufacture, sale or delivery, and were discriminatory as between competing purchasers. The effect of these discriminations was shown to have been substantial and to have had the tendency of lessening

1301 competition as between large and small customers of the sellers to the injury of the latter.

(c) The allowance by the respondents of a difference of one-quarter cent per pound on shipments of dry white lead, basic carbonate, in carload quantities was justified on the basis of differences in the costs of delivery in those instances in which rail freight was a factor, but was not justified in cases of sales to purchasers in the proximity of the respondents' producing plants, where the only transportation cost was local cartage. To this extent and in these circumstances, the differing prices to competing customers as the result of such allowances were discriminatory and have had the tendency of lessening competition as between the respondents' customers receiving the different prices.

Paragraph Twenty-One: (a) In response to Count I of the amended complaint, the Commission is of the opinion, and therefore finds, that the acquisition by the National Lead Company of the major portion of the lead pigments processing industry, its control by contract of the major portion of the domestic production of pig lead, and its cooperation with the respondent The Eagle-Picher Company in maintaining identical prices and terms of sale of lead pigments between them and in circumscribing the price competition of their smaller competitors and inducing conformity on the part of such competitors with their prices, terms and conditions of sale had the tendency and effect of restraining trade, suppressing price competition and creating monopolistic conditions in the lead pigments industry.

The Commission is of the further opinion, and finds, that the tendency, capacity and effect of the combinations, conspiracies, agreements and understandings entered into and maintained by all of the respondents, and the acts, practices and methods performed thereunder and in connection therewith, as herein set forth, have been to substantially hinder, frustrate, suppress and eliminate competition among the respondents in the interstate sale of lead pigments; to prevent price competition among and between the respondents in the sale of lead pigments in, among and between the various States of the United
1302 States; to deprive purchasers of lead pigments of the benefits of price competition among the sellers; to create discriminations in price against some purchasers and users of lead pigments and lead pigment paints; and other-

wise to promote the purposes of their combinations, conspiracies, agreements and understandings to fix, adopt and maintain uniform prices and terms and conditions of sale of lead pigments.

(b) In response to Count II of the amended complaint, the Commission is of the opinion, and therefore finds, that the effects of the discriminations in price described in these findings, engaged in by each of the respondents, may be substantially to lessen competition in the interstate sale and distribution of lead pigments between the respondents and their competitors; to tend to create a monopoly in the lines of commerce in which the respondents are engaged; and to injure, destroy or prevent competition in price and otherwise between said respondents and their competitors in the interstate sale and distribution of lead pigments.

The Commission is of the further opinion, and finds, that the additional effects of the aforesaid price discriminations by each of the respondents may be substantially to lessen competition between the purchasers of lead pigments receiving the lower prices from the respondents and other purchasers of such products competitively engaged with said favored purchasers and who pay the higher prices; to tend to create a monopoly in the lines of commerce in which purchasers from the respondents are engaged; and to injure, destroy or prevent competition in the lines of commerce in which such purchasers from the respondents are engaged as between the beneficiaries of the lower prices and competing purchasers who are required to pay the higher prices.

Conclusion.

(a) The acquisition by the respondent National Lead Company of the physical assets and stock ownership of its competitors and the combinations, conspiracies, agree-
1303 ments and understandings of all of the respondents
and the acts and practices pursuant thereto and in connection therewith, under the conditions and in the circumstances herein set forth, have constituted unfair methods of competition in commerce and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act; and the discriminations in price by each of the respondents as herein found have constituted violations of subsection (a) of Section 2 of an Act of Congress entitled "An Act to supplement existing

laws against unlawful restraints and monopolies, and for other purposes'', approved October 15, 1914 (the Clayton Act), as amended by an Act approved June 19, 1936 (the Robinson-Patman Act).

(b) The amended complaint in this proceeding also purported to charge that each of the respondents, through the use of the zone method of pricing and selling its lead pigments, has discriminated in the price of said pigments as between competing customers in the same territorial division or zone. In this connection, however, the amended complaint does not state a cause of action. The allegations are in effect that each of the respondents sells its products in accordance with a zone delivered pricing method and practice, but the alleged discriminations relied on as constituting injury to competition are the differences in the net prices received by each of the respondents at its mill. Thus, the complaint does not clearly show that the alleged unlawful discriminations as between purchasers of the respondents' products who are located in the same zone occur as the result of differences made in actual prices at which the respondents sell their products. For this reason, the Commission is of the opinion that this charge of the complaint should not be further considered.

In support of the allegation that each of the respondents also discriminates in the price of its lead pigments as between competing purchasers of such products by arbitrarily classifying its customers to receive different quantity, trade and regional discounts from quoted prices, certain evidence was introduced tending to show that each of the respondents (1) maintains differentials of twenty-five cents between 100-pound, 50-pound, 25-pound and 12½-
1304 pound containers of one hundred pounds of lead-in-
oil and other keg products; (2) quotes and sells 97% red lead Pb_3O_4 at one-quarter cent per pound over lower grades and 98% red lead Pb_3O_4 at one-half cent per pound over lower grades (this practice was not engaged in by respondents Anaconda and International); and (3) employs a price differential of one-quarter cent per pound as between quantities of five hundred pounds and less of white lead-in-oil and other keg products. It appears from the record as a whole, however, that the different charges based on sizes of containers for lead-in-oil and other keg products were no more than allowable differences in costs of the containers; that the differing charges between the grades of red lead probably did not exceed the differences

in the costs of the extra processing required to produce the higher grades; and that the differential of one-quarter cent per pound as between five hundred pounds and smaller lots of white lead-in-oil was not shown to have resulted in any adverse competitive effects.

By the Commission, Commissioner Carretta not participating for the reason that oral argument on the merits was heard prior to his appointment to the Commission.

Jas. M. Mead,
Chairman.

Issued: January 12, 1953.

Attest:
D. C. Daniel,
Secretary.

1305 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

Commissioners:
James M. Mead, Chairman,
Lowell B. Mason,
John Carson,
Stephen J. Spingarn,
Albert A. Carretta.

ORDER TO CEASE AND DESIST.

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission, the respondents' answers thereto, testimony and other evidence in support of and in opposition to the allegations of said amended complaint taken before hearing examiners of the Commission theretofore duly designated by it (the respondents having consented to the substitution of hearing examiners), the recommended decision of the hearing examiner and exceptions thereto, the respondents' appeals from certain rulings of the hearing examiner, briefs in support of the amended complaint and in opposition thereto, and oral arguments of counsel, and the Commis-
1306 sion having issued its orders disposing of the exceptions to the recommended decision and the appeals and having made its findings as to the facts and its con-

clusion that the respondents have violated the provisions of the Federal Trade Commission Act and the provisions of subsection (a) of Section 2 of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (the Clayton Act), as amended by an Act approved June 19, 1936 (the Robinson-Patman Act):

It Is Ordered that the respondents, National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting and Refining Company, The Sherwin-Williams Company, and The Glidden Company, their respective officers, agents, representatives and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between or among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following things:

1. Establish, fix, or maintain prices, terms, or conditions of sale for lead pigments, or adhere to any prices, terms, or conditions of sale so fixed or maintained.

2. Quote or sell lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system; or quote or sell lead pigments pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for lead pigments at points of quotation or sale or to particular purchasers by any two or more sellers of lead pigments using such plan or system, or which
1307 prevents purchasers from finding any advantage in
price in dealing with one or more as against another seller.

3. Quote or sell lead pigments at specified differentials over any particular quotation or quotations of pig lead prices.

4. Quote or sell lead pigments at specific price differentials based upon differing sizes or types of containers or based upon differing quantities in which such products are sold or delivered.

5. Enter into, employ, or continue in effect, any agency or consignment contract, plan or arrangement under which the resale prices or selling practices of any dealer or distributor are controlled or directed.

6. Issue to dealers suggested resale prices, dealers' price schedules, or list prices for the purpose or with the effect of inducing dealers to observe uniform resale prices and refrain from price competition among themselves.

It Is Further Ordered that nothing contained herein shall be construed as prohibiting the establishment or maintenance of bona fide agreements, understandings or other relations between any of the respondents and its officers, directors and employees, or between any of the respondents and any of its subsidiaries or affiliates, relating to the sole and separate business of said respondent and its subsidiaries or affiliates, when not for the purpose or with the effect of unlawfully restricting competition.

It Is Further Ordered that each of the respondents, its officers, agents, representatives, and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically 1308 matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another.

It Is Further Ordered that each of said respondents, its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the sale of lead pigments in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of lead pigments of like grade and quality:

1. By selling such lead pigments at different zone delivered prices to purchasers located in different territorial zones when such purchasers are in competition with one another in the resale or distribution of said products, either as lead pigments or as components of other products.

2. By selling such lead pigments to purchasers competing in the resale or distribution thereof, either as lead pigments or as components of other products, at different prices which vary according to the quantities in which said products are to such purchasers sold or delivered, except at such differentials as were not shown in this proceeding to have resulted in adverse competitive effects or as were shown to have been justified on the basis of differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which the products were sold or delivered, as stated in the findings as to the facts and conclusion herein.

It Is Further Ordered that the respondent, National Lead Company, its officers, agents, representatives, and employees, do forthwith cease and desist from acquiring or attempting to acquire, directly or indirectly, any interest of ownership or control in the capital stock, or in the physical assets, plants, or other properties, of any concern or enterprise which at the time of such acquisition or attempted acquisition is a competitor of said National Lead Company in the manufacture or in the sale or distribution of lead pigments.

1309 It Is Further Ordered that the respondents, National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting and Refining Company, The Sherwin-Williams Company, and The Glidden Company, shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

By the Commission, Commissioner Mason dissenting and Commissioner Carretta not participating for the reason that oral argument on the merits was heard prior to his appointment to the Commission.

D. C. Daniel,
(Seal) *Secretary.*

Issued: January 12, 1953.

Opinion of the Commission and dissenting opinion by Commissioner Mason are attached.

1310 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * * *

Commissioners:

James M. Mead, Chairman
Lowell B. Mason
John Carson
Stephen J. Spingarn
Albert A. Carretta

OPINION OF THE COMMISSION.

By Mead, Commissioner:

The amended complaint on which this case was tried is in two counts. It charges in Count I that the respondent, National Lead Company, has violated the provisions of the Federal Trade Commission Act by monopolizing, and attempting to monopolize, and acting to control the sale of lead pigments and the prices thereof, through the acquisition of competitors, and otherwise; that the respondent National and the other six respondents have combined and conspired to suppress and eliminate competition in
1311 the sale of lead pigments through the use of a territorial or zone system of pricing and various other practices; and that each of the respondents in carrying out the alleged conspiracy, and for the purpose of suppressing competition in the sale of lead pigments, has engaged in and continued a number of unfair, oppressive and discriminatory acts, methods and practices in the sale of these products. In Count II, each of the respondents is charged with having violated subsection (a) of Section 2 of the amended Clayton Act through price discriminations resulting from the use of zone delivered pricing methods and the employment of various type of discounts granted to some of its customers and withheld from others. The answers filed by the several respondents admitted many of the factual allegations regarding the use of the zone pricing system and the acquisition of competitors by respondent National, but denied that any of the practices were in violation of law, and the case was fully tried before a hearing examiner, whose recommended decision, together with the

exceptions thereto, have been carefully considered by the Commission.

On the conspiracy phase of the case, it is shown in the findings that in the late summer and fall of 1933 the respondents met together in various subcommittees of the Lead Industries Association for the ostensible purpose of drafting a supplemental code of fair competition for the Lead Pigments Industry under the National Industrial Recovery Act; that the respondents, hovewer, did not confine their discussions to proposals to be included in the code, but rather availed themselves of the opportunity of appraising generally the methods of selling theretofore employed in the industry; and that they proceeded to cooperatively revise their pricing practices in a manner far beyond the sanction of the National Industrial Recovery Act. The fact that each of the respondents thereafter followed the pricing practices and adhered to the terms and conditions of sale agreed upon during this period, and the results of the use of these acts and practices, were clearly established.

1312 Various officials of the respondent companies testified that there were not to their knowledge any agreements by any of the respondents to employ particular methods or to fix or maintain uniform prices and terms of sale of their products, other than the agreements as to what should be recommended for the supplemental code. It is true, as the respondents contend, that the record does not show the existence of any categorical agreements other than those entered into at the time of the code discussions. It is well settled, however, that no formal agreement is necessary to bring into existence an unlawful conspiracy and that a combination prohibited by law may, and often must be, found in a course of dealings or other circumstances in the absence of any exchange of words (*United States Malsters Association, et al.* v. *Federal Trade Commission*, 152 F. (2d) 161; *Milk and Ice Cream Can Institute, et al.* v. *Federal Trade Commission*, 152 F. (2d) 478). Moreover, as said by the Court of Appeals for the Seventh Circuit in the case of *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. (2d) 321, 332, "The rule stated in *Interstate Circuit* v. *United States*, 306 U. S. 227, and *U. S.* v. *Masonite*, 316 U. S. 265, applies here. 'Acceptance by competitors, without previous agreement, of in invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish unlawful conspiracy under the Sherman Act.' It is also sufficient to establish unfair methods of competition under the Federal Trade Commission Act.'' In some respects, particularly in the respondents' use after 1933 of the zone pricing system, the facts in this case are strikingly similar to those before the Court in the case of *Fort Howard Paper Company, et al.* v. *Federal Trade Commission,* 156 F. (2d) 899. In discussing the situation there presented the Court said:

> "As we have already observed, we have here a finding of the existence of an agreement to suppress competition. This finding of the Commission was made upon all the evidence, including the conditions existing in the industry. It was not a finding based simply on inference. It was a finding of fact based on actualities. 1313 The existence of substantial similarity in delivered prices to zoned territories having identical zone price differentials, by six manufacturers located at different places, was not a happenstance. Nor, looking at the situation objectively, was it the inevitable and inescapable result of keen competition in a standard product in invariable qualities. To be sure, a keen competitor strives to meet a lowered price of a competitor immediately upon becoming aware of it, but he does not strive to and invariably match a price which is higher than that at which he needs profitably to sell, unless by express, or tacit agreement, all manufacturers have found existence to be less strenuous for all concerned by merely setting a price for three zones in the whole United States, and except for such (identical) zone differentials, discarding and ignoring the substantial item of freight. We are unable to comprehend a manufacturer's disdain of a natural advantage utilizing the same to gain local business, unless he were indoctrinated with the belief (or forced by superior economic competitors to align himself to concerted action of identical delivered prices) that elimination of all competition was economically preferable.
>
> "True, convenience of the use of zones is not to be denied, but mere convenience does not induce competitors approximately one-third of the nation's width apart to consider themselves concentric in mapping of zones. One glance at the three zone map for bulk

> crepe will show the artificiality of the zone structure and intention to obviate any natural advantage of location from price determination. Two of the companies are located in Wisconsin, and the western limits of the zone run merely to the Mississippi River while the eastern boundary runs to the Atlantic 1314 Ocean. Zone 1 is obviously drawn to include all manufacturers and put them on a par. The unfairness of this is shown by the fact that a purchaser in the adjacent states of Minnesota and Iowa would pay the additional fixed price differential to that paid by purchasers in the remote New England states. The zoning system here employed is an enormous exaggeration of the basing point system, having nineteen states as the focal basing point. The packaged crepe zone system split the nation (but not into equal halves) into two parts.
>
> "The zoning system arose under the NRA, which fact saved its illegality for the statutorily exempt period. When that immunity was lifted the illegality was again apparent and it is more than an inference to say that parties continuing to utilize that zoning system, born of agreement, suddenly utilized it in order to meet competition, rather than by tacit agreement." (PP. 906-907.)

In this case, the abritrary nature of the zones used by the respondents is even more apparent than it was in that case. As shown in the findings, respondent National maintains in St. Louis, Missouri, a large plant producing various lead pigments, and sales of white lead-in-oil and "keg products" in Missouri outside the city limits of St. Louis take the Zone 2 price, carrying a premium of 12½ cents per hundredweight over the par zone price. At the same time, shipments of these products are made to Minneapolis, Minnesota, at the basic or par price. A red lead and litharge plant is maintained by National in Dallas, Texas, where 75 cents per hundredweight is added on sales of such products in kegs or cans in that city. Another red lead plant is maintained by National in Atlanta, Georgia, which is in Zone 4 for "keg products", carrying a 37½ cents premium on price, and in Zone 2 for red lead and litharge sold as "dry products", carrying a 25 cents premium. Eagle-Picher maintains mining, smelting and pigment producing operations in the "Tri-State" field of Oklahoma, Kansas

and Missouri, states which fall in Zones 5, 3 and 2, respectively, for "keg products". As the Court recog-
1315 nized in the Fort Howard Paper Company case, it is unreasonable to assume that this exaggeration of the basing point system could have arisen and been followed these many years without some understanding on the part of the respondents.

In connection with the use by the respondents of the agency or consignment method of selling, the various differentials employed, and the issuance of uniform suggested resale prices, the evidence discussed in the findings also discloses understandings and cooperative endeavors which, when considered in the light of the surrounding circumstances, leads the Commission to the conclusion that there was on the part of the respondents a mutual understanding and acceptance of an over-all plan and an intention on the part of each of them to follow it.

The Commission is of the opinion, therefore, and accordingly has found that there existed among the respondents an unlawful conspiracy to fix and maintain prices, differentials and terms and conditions for the sale of lead pigments, which conspiracy was carried out by all of the respondents through the various methods set forth in the findings.

Respondent National Lead Company, upon its organization in 1891, acquired the physical properties and stock ownership of sixteen different companies theretofore engaged in the business of producing lead pigments and other lead products, and at the same time acquired the controlling stock interests in seventeen other companies engaged in the lead pigments and related businesses. In 1906, it acquired all of the stock of United Lead Company, which had been organized in 1903 and which, in turn, had acquired thirteen other companies controlling many of the principal alloy factories and lead works of the United States, including the American Shot and Lead Company, which was itself a consolidation of the principal shot towers of the country. In the same year, National acquired Carter White Lead Company, of Chicago, Illinois, and Omaha, Nebraska, and in 1912 it acquired all of the stock of Mathieson Lead Company. The stock of Bass-Hueter Paint Company
1316 was acquired by National in 1916; the properties and assets of Hirst and Begley Company in 1919; the properties of Wetherill and Brothers in the 1930's; and

some time between 1931 and 1933 National acquired the properties of the Evans Lead Company, a concern producing red lead and litharge in Charleston, West Virginia.

As a result of these acquisitions, culminating in the disappearance of over fifty competitors in the period from 1891 to 1935, respondent National emerged in a position of practical dominance in the Lead Pigments Industry. As an indication of this fact, the record discloses that during the period from 1936 to 1942, respondent National accounted for between 60% and 63% of the shipments of white lead-in-oil, from 30% to 35% of the dry white lead, basic carbonate, and approximately 50% of the red lead and litharge sold in the United States. In 1938, the percentage of white lead-in-oil and dry white lead, basic carbonate, combined, sold by this respondent was 58.8% of the total of these products sold, and in 1941, its share of the total sales of the same two products was 53%. The record further shows that after 1935 the only concern left in the lead pigments business with any practical ability to challenge National's supremacy was The Eagle-Picher Company, and that beginning in 1930 and continuing through 1935, efforts were made by National to acquire a controlling stock interest in this producer also.

In the meantime, National's relationships with American Smelting and Refining Company, the world's largest smelter and refiner of metallic lead, the basic raw material from which lead pigments are manufactured, is a matter of particular importance. In February 1906, at the time of its acquisition of the stock of United Lead Company, respondent National entered into a contract with American Smelting and Refining Company under the terms of which National acquired control of 85% of A. S. & R. Company's domestic production of pig lead, provisions for the price of which were included in the contract, and restricted its
use of pig lead produced by its own subsidiary to
1317 30,000 tons per year. Under the same contract A. S.
and R. Co. secured 85% of National's requirements of common pig lead and all of its requirements of corroding pig lead, less so much chemical lead of other brands as National might need. This contract remained in effect until 1921, when it expired, whereupon the contracting parties made other arrangements. Simultaneously with the execution of the contract between respondent National and American Smelting and Refining Company, another con-

tract was entered into between Hoyt Metal Company, a constituent company of respondent National, and American Smelting and Refining Company, under the terms of which National acquired control over all of A. S. & R. Company's output of antimonial lead.

Together, the above arrangements between National and A. S. & R. Co. contracted the supply of pig lead subject to bids and daily market fluctuations by more than 32% of the domestic production. They also fixed a monthly average price for pig lead which prevented the basing of prices of this product on daily market fluctuations, and thus restricted opportunities of buying pig lead at lower prices. In addition, the agreements resulted in American Smelting and Refining Company taking no further interest in the manufacture of lead pigments.

In the circumstances, it is clear to the Commission that the purpose and effect of National's acquisitions, aided by its arrangements with American Smelting and Refining Company, were to substantially control the lead pigments industry and to regulate the price of the principal basic raw material used in the manufacture of lead pigments. It is equally clear that if in the future National should be successful in acquiring the capital stock control or the assets of The Eagle-Picher Company, or of any of the other concerns now engaged in the manufacture or sale of lead pigments, its position of dominance in the industry will be strengthened even more. The question whether National has already attained such a monopolistic position as to require its dissolution was not tried in this proceeding; nor is it necessary in support of the Commission's authority to act for this question to be determined. As the legislative history of the Federal Trade Commission
1318 Act clearly shows and as the courts have uniformly held, it was not the primary object of that Act to provide a means of breaking up an accomplished monopoly, but rather to enable the Commission to stop monopoly in its incipiency (*Federal Trade Commission* v. *Raladam Company,* 283 U. S. 643; *Fashion Originators' Guild of America, Inc., et al.* v. *Federal Trade Commission,* 312 U. S. 457). In 1920, the Supreme Court in the Gratz case recognized this Congressional intent by declaring that unfair methods of competition might include not only methods that involved deception, bad faith and fraud, but also methods that involved "oppression" or which are "against

public policy because of their dangerous tendency to hinder competition or create monopoly" (253 U. S. 421, 427). In the Beechnut case, decided in 1922, the Supreme Court made a distinction between combinations and conspiracies under the Sherman Act and unfair methods of competition under the Federal Trade Commission Act, and held that the practices of the single trader there involved was a "system" which "necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition in channels of interstate trade which it has been the purpose of all the antitrust acts to maintain", and that it was "within the power of the Commission to make an order forbidding its continuation" (257 U. S. 441, 454). And in the Cement Institute case, the Court stated the applicable law as follows:

> "In the second place, individual conduct, or concerted conduct, which falls short of being a Sherman Act violation may as a matter of law, constitute an 'unfair method of competition' prohibited by the Trade Commission Act. A major purpose of that Act, as we have frequently said, was to enable the Commission to restrain practices as 'unfair' which, although not yet having grown into Sherman Act dimensions would, most likely do so if left unrestrained. The Commission and the Courts were to determine what conduct, even though it might then be short of a Sherman Act violation, was an 'unfair method of competition.' This general language was deliberately left to the 'Commission and the courts' for definition because it was thought
> 1319 that 'There is no limit to human inventiveness in this field; that consequently, a definition that fitted practices known to lead towards an unlawful restraint of trade today would not fit tomorrow's new inventions in the field; and that for Congress to try to keep its precise definitions abreast of this course of conduct would be an 'endless task.' See *Federal Trade Commission* v. *R. F. Keppel & Bro.*, 291 U. S. 304, 310-312, and congressional committee reports there quoted." (333 U. S. 683, 708.)

Having found from the evidence before it that the acquisitions of competitors by respondent National, aided by its arrangements with American Smelting and Refining Company, have had the tendency and effect of restraining trade, suppressing price competition and tending dangerously to create a monopoly in the lead pigments industry, the Commission is of the opinion that it not only has the authority but that it is under a duty to prohibit the further aggrandisement of this respondent through additional acquisitions.

In addition to charging the respondents with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act, the amended complaint, in Count II, alleges that each of the respondents discriminates in the price of its lead pigments as between different purchasers, in violation of Section 2(a) of the amended Clayton Act. Certain of the discriminations, it is alleged, occur as a result of the use of the zone method of pricing and selling to competing customers in the same zone. As stated in the conclusion appended to the findings, the Commission is of the opinion that on this phase of the case the complaint fails to state a cause of action. This is because the allegations are that each of the respondents sells its products in accordance with a delivered pricing system, but the alleged discriminations occur as a result of differing net prices received by each of the respondents at its factory. Thus, the complaint does not show
1320 that the alleged unlawful discriminations as between purchasers located in the same zone occur as the result of differences in actual prices at which the respondents' products are sold. Certain of the other price differences resulting from the classification of customers to receive different quantity, trade and regional discounts either were no more than allowable differences in the costs of containers or were not shown to have resulted in any substantial adverse competitive effects. None of the practices involved in these charges is covered by the order to cease and desist.

As set forth in the findings, each of the respondents after 1934 sold its various lead pigments on the basis of flat delivered prices to customers located within designated zones, with uniform differentials added to these par zone prices in sales outside of the par zones. These inter-zone prices were in fact different prices, differing by the amount of the zone premiums, and could be justified only where the additional freight or other transportation costs exceeded the zone premiums. No such justification was made by any respondent.

The respondents since 1934 have also consistently quoted and charged different prices for their lead pigments as between carload purchasers and less-than-carload purchasers. In the case of oxides, the carload price has been based on American Smelting and Refining Company's price for common pig lead, and the price for smaller quantities has been 40 cents per hundredweight higher on quantities of five tons and 90 cents per hundredweight higher on quantities of less than five tons. In a substantial number of cases these price differences have been much more than the differences between car and less-than-car freight rates and have resulted in an excess charge over delivery costs as high as 88 cents per hundredweight against the purchasers of smaller quantities. In the case of dry white lead the price difference as between carload shipments and less-than-carload shipments has been ¼ cent per pound. In most cases in which rail freight is a factor this price 1321 difference is justifiable on the basis of differences between carload and less-than-carload freight. However, no effort was made by any respondent to justify on a cost of delivery basis or otherwise the ¼ cent differential as to customers in areas in which the mode of delivery is local cartage and rail freight is not a cost factor.

The record shows that large quantities of oxides are sold by the respondents to manufacturers of storage batteries and that large amounts of white lead are sold to manufacturers of mixed paints. During the period from 1934 to 1941, conditions in both the storage battery industry and the mixed paint industry were such that the competitive effects of the respondent's discriminations were readily apparent.

The storage battery industry consists of more than 200 companies, ranging in size from multiple plant operations of the United States Electric Storage Battery Company and its subsidiaries, Willard and Grant, to small proprietorships whose total production may be less than 50 batteries per day. Certain of these manufacturers, including the larger ones, are located in the respondents' par price zone, while others competing with them in the sale of batteries are located in premium zones, where the delivered price of oxides to purchasers in lots smaller than five tons is almost $6.00 per barrel higher than the price to the manufacturer in the par zone purchasing his oxides in carload lots. The evidence is that during the period from 1934 to 1941 the storage battery industry was characterized by particularly sharp price competition and that a saving to a manufacturer of from 5 to 10 cents per battery on material costs often would mean the difference between a profit and a loss on low-priced batteries. So bad was the situation and so narrow were profits during this period, according to one small manufacturer from St. Louis (a purchaser of oxides in lots smaller than carloads), that "the only way we could get by and make a living was to use the old battery cases over again", that the competition of other sellers, including Sears-Roebuck Company (the battery manufacturing subsidiary of which was a purchaser 1322 of oxides in carload quantities), was such that his enterprise had gone "broke", and that his company could not manufacture batteries for sale at prices comparable with those offered at retail by Sears-Roebuck. By other evidence it is shown that during the period from 1935 to 1941 large battery manufacturers located at a considerable distance from the factories of the respondents regularly offered for sale storage batteries in Chicago, St. Louis, and other lead pigment producing centers, at prices which were actually below the cost of manufacture of comparable products to the smaller battery producers located in such centers.

In this situation, the respondents' price differentials between zones, together with the added amounts charged less-than-carload purchasers in both the par zones and the premium zones, making a difference in the cost of oxides of from 4½ to 6 cents per battery against the smaller battery manufacturers located in the premium zones, obviously has had the tendency to injure competition as between the larger and smaller manufacturers. Similar considerations lead to the same conclusion with respect to the price differences on sales of white lead, both dry and in-oil.

In any case in which activity violative of the statutes administered by the Commission is found to exist, it is the Commission's duty to determine to the best of its ability the remedy necessary to suppress such activity and to take every precaution to preclude its revival. In many cases, and particularly in trade restraining conspiracies, a solution of this problem involves the consideration of many factors, including the history of the collective activity and the manner in which it originated. In this case, it was the purpose and the intent of the respondents during the NRA period to cooperatively revise the pricing practices in the lead pigments industry and as a principal part of this re-

vision to establish a uniform zone pricing system. Detailed discussions of this matter were carried on in the meetings held in 1933 and 1934 at which the several respondents were represented. Maps showing the boundaries of the zones to be observed in fixing the delivered prices of the several products involved were distributed; and
1323 each of the respondents since that time, with minor
variations, has followed the pricing system and adhered to the zone boundaries so discussed and shown on these maps. In this situation, and in order to effectively break up the conspiracy, the Commission in its order in this case is providing not only that the respondents cease and desist from "entering into, continuing, cooperating in or carrying out any planned common course of action, understanding, agreement, combination or conspiracy" to engage in the practices found to have been engaged in, but also that each of the respondents individually cease and desist from selling its lead pigments at prices calculated in accordance with a zone delivered price system "for the purpose or with the effect of systematically matching the delivered prices quoted or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another." Such a prohibition is necessary, not because it is unlawful in all circumstances for an individual seller, acting independently, to sell its products on a delivered price basis in specified territories, but to make the order fully effective against the trade restraining conspiracy in which each of the respondents participated.

While the complaint did not in Count I attack the zone pricing practices of each of the respondents aside from the conspiracy, it did in effect allege that each of said respondents, acting pursuant to and in furtherance of the conspiracy, used the zone method of selling. It further alleged that each of them used that system "for the purpose and with the effect of enabling the respondents to match exactly their offers to sell lead pigments to any prospective purchaser at any destination, thereby eliminating competition between and among themselves." Thus, the prohibition against the use by each of the respondents of a zone delivered pricing system where the purpose or effect is to systematically match the quotations or prices of competitors runs directly against the pricing practice alleged to have been engaged in and is fully justified under the

1324 complaint. In the Commission's opinion, it is also appropriate to eliminate the effects of the respondents' price-fixing conspiracy and to guarantee against the continuation of that conspiracy.

The six respondents in this proceeding account for practically the entire production of lead pigments in the country, there being only a few small producers offering such products for sale in commerce in the United States other than said respondents. It is to these respondents that purchasers in commerce throughout the country must look for their supplies of lead pigments, and the respondents have the power to and do control the supply of lead pigments available. The maintenance of the delivered price zones and the quotation of delivered prices therein constituted the very cornerstone of the respondents' conspiracy. It was the adherence by each of them to this system of pricing that made the combination work. It was in this way that the matching of prices, one of the objectives of the conspiracy, was accomplished. Unless and until each of the respondents is prohibited from so adhering to the system and from so using the zones, the evils springing from the combination, one of which is to eliminate price competition, may well continue indefinitely. Unless the respondents, representing practically the entire economic power in the industry, are deprived of the device which made their combination effective, an order merely prohibiting the combination may well be a useless gesture.

The Commission is cognizant of the fact that identity of prices may result from either competitive or non-competitive situations and that the intensity of competitive factors may vary in degree in any industry. Perfect competition, like the perfect price conspiracy, may be hoped for but is rarely obtained. The pricing pattern as used in this industry and as described in the findings as to the facts was not the result of one secret meeting in a smoke-filled room. It is the result of many business experiences and compromises over a period of years.

1325 In the absence of direct admissions of guilt, allegations that sellers have established a zone pricing conspiracy usually present difficult problems for the finder of the facts. In the typical basing point conspiracy case the conspirators (the sellers) must determine the bid price of the commodity delivered at the door of each buyer and this price usually varies with the cost of rail freight from the basing point to the point of delivery. Each seller, therefore, under the basing point system must usually have and use the same freight rate book or other device used by each of the other sellers so that to quote identical prices each seller will use the same figure for the cost of the freight. That is the reason bids under that system have identical prices to the fraction of a cent. Under the basing point system the conspirators must be continually alert and careful in figuring their bids in order to quote identical delivered prices.

By comparison, the zone conspiracy pricing system operates rather simply. Under the basing point system delivered prices, while usually identical at each point of delivery, vary as between different delivery points in the same amounts as do the estimated costs of rail freight from the basing point. In a zone system of pricing the delivered price is the same for every point of delivery within a zone. A zone comprises several states. Once the price in the par zone has been established and the relative price graduations in the other zones have also been established, the system operates substantially automatically and with a minimum of conspiratorial guidance. What would be the situation if the Commission issued only the usual type of conspiracy order in this case—that is, to discontinue agreeing to fix prices, etc.

After the order is issued the respondents might continue to use the same zone pricing system and when questioned by the Commission as to compliance with the order they might truthfully reply that they had not corresponded or conversed with their former conspirators since the issuance of the Commission's order to cease and desist. The respondents, however, would be enjoying all the fruits of their conspiracy—the rigged pricing pattern—and the momentum of the system, so firmly and maturely
1326 established, might last for some time unless effective measures to break it up were taken. That is the purpose of the paragraph of the order to cease and desist directed against each of the respondents individually. For purposes of illustration, let us assume that these seller-respondents were at one time struggling up the long and difficult hill of competition. Let us assume they were operating independently of one another, each one independently making his own decisions as to the production and asking price of his commodity. The road was hard. The potential rewards and the risks were great. There came upon the scene the siren song describing the advantages of

"stabilizing the market" and the avoidance of what is sometimes referred to as "cut throat competition" but which very often is plain unvarnished price competition. The respondents succumbed to the blandishments of this siren song of claimed stability and were lulled into a false sense of security. A competitive industry is a self-disciplined industry. Competition also supplies the needed dynamics. A non-competitive and therefore a non-disciplined industry becomes lethargic and clings to the status quo. Under an expanding dynamic economy, an industry cannot maintain the status quo—it must either move forward or lose ground. The less alert industry with its blunt blade of competition lags behind and may lose its relative place in the market to a newer and more aggressive industry which will accomplish the same end at a lower price.

The purpose therefore of this order is to aid in substituting for the competitive lethargy which has existed in this industry in recent years a condition of sharp and healthy competition. It is hoped that it will be effective in dissipating the dregs of the conspiratorial pricing pattern and that it will bring to this industry, not the gentlemanly understanding at the Country Club or the suave unexpressed agreements of the sales managers over a friendly Scotch and Soda, but the hard price competition of the market places which may not be gentlemanly but is usually fair, particularly to consumers. In such competition the weak might get hurt, but social security is not the province of this Commission. The only way to have competition is to compete. If after competition is restored any of the
respondents can make a proper showing to the Com-
1327 mission that this prohibition or any other prohibition
in the order is no longer necessary or desirable, the Commission will, of course, at that time take such action as may be appropriate in the light of the facts and the law.

The majority of the Commission believes that its power to take the steps it feels necessary to correct the evils found to exist in this industry cannot be seriously questioned. The courts in addition to recognizing the power of the Commission to stop any method of competition, even though individually pursued, if it has a dangerous tendency unduly to hinder competition or create a monopoly (cases previously cited), have also clearly indicated the extent to which the Commission may go in an effort to make its orders effective and to prevent evasion. In the case of *Hershey Chocolate Corporation* v. *Federal Trade*

Commission, for example, the Court of Appeals for the Third Circuit in upholding the Commission's order notwithstanding attack on the ground that it went beyond the scope of the complaint, said:

> "* * * the Commission's power would be limited indeed if it were restricted to enjoin unfair acts of competitors only as evidenced in the past. To be of any value the order must proscribe the method of unfair competition as well as the specific acts by which it has been manifested. In no other way could the Commission fulfill its remedial function." (121 F. (2d) 968, 971-972)

In the case of *Local 167* v. *United States,* 291 U. S. 293, 299, involving conspiracy among a number of defendants, the defendants sought to eliminate from the injunction certain provisions enjoining conduct which they contended had not been proved to be a part of the conspiracy. The Court held—

> "The United States is entitled to effective relief. To that end the decree should enjoin acts of the sort
> 1328 that are shown by the evidence to have been done or threatened in furtherance of the conspiracy. It should be broad enough to prevent evasion. In framing its provisions doubts should be resolved in favor of the Government and against the conspirators."

In *National Labor Relations Board* v. *Express Publishing Company,* 312 U. S. 426, 435-437, the Supreme Court said—

> "A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past.
>
> "It is a salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts.
>
> "Having found the acts which constitute the unfair labor practice the Board is free to restrain the practice and other like or related unlawful acts. * * * The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of

> which in the future is indicated because of their similarity or relation to those unlawful acts * * * found to have been committed * * * in the past.''

In the case of *Haskelite Mfg. Corporation* v. *Federal Trade Commission,* the Court of Appeals for the Seventh Circuit accepted and applied the same principle and held that the Commission could prescribe reasonable requirements and "guarantees against a recurrence of the past unfair and deceptive acts" and which "were calculated to aid in dispelling for the future the unfair and deceptive practices of the past" (127 F. (2d) 765, 766).

Nor is the relief to which the Commission is entitled limited to the performance of "other related unlawful
acts", referred to by the Court in the Express Pub-
1329 lishing Company case. Even acts lawful in them-
selves may be prohibited when they cannot be separated from the unlawful scheme of which they are a part. The applicable law has been settled by the Supreme Court. In the *Ethyl Gasoline* case (*Ethyl Gasoline Corporation, et al.* v. *United States,* 309 U. S. 436), the Supreme Court disposed of a contention that the decree should not extend to the prohibition of a device that could be lawfully used, as follows:

> "Since the unlawful control over the jobbers was established and maintained by resort to the licensing device, the decree rightfully suppressed it even though it had been or might continue to be used for some lawful purposes. The court was bound to frame its decree so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival." (P. 461.)

Two years later in the case of *United States* v. *Univis Lens Company, Inc., et al.,* 316 U. S. 241, the Court again applied the same rule. It said that even assuming the validity of certain licensing restrictions, "these features are so interwoven with and identified with the price restrictions which are the core of the licensing system that the case is an appropriate one for the suppression of the entire licensing scheme even though some of its features, independently established, might have been used for lawful purposes." (P. 254.)

In view of all of the foregoing, the Commission is of the opinion that the prohibition in the order against the persistent, continuing and intended matching of prices through the use by each of the respondents of a zone delivered pricing system is particularly appropriate.

1330 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

DISSENTING OPINION OF COMMISSIONER LOWELL B. MASON.

Two important questions will be answered by what the reviewing courts do with the decision in this case.

First, does this agency have the same scope as a court of equity in the issuance of injunctions?

Second, may the implied conspiracy doctrine be extended to control the general pricing patterns of individuals unassociated with conspiracy? In other words, may the implied conspiracy doctrine be extended to prohibit nonconspiratorial but conscious parallel action?

The order in this case does both, frankly and without equivocation (a fact that should earn the gratitude of all interested in clarity).

Chairman Mead points out in his able opinion that the majority believes the Commission, like courts, may frame its decrees, not only to suppress unlawful practices, but may also take other measures to preclude any possible revival of prohibited acts.

The Commission does not have, and in my opinion it should not have, the general injunctive powers of a court. As was said by the Supreme Court in the Eastman Kodak case: "The Commission exercises only the administrative functions delegated to it by the Act, not judicial powers."[1]

The instant order would enjoin National Lead from acquiring competitors even if there was no adverse
1331 effect on competition, and it would enjoin all defendants from "conscious price parallelism"[2] sans conspiracy.

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[1] *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U. S. 619.

[2] This phrase has been so bruited about that what it means depends on who says it. One thing is certain, however. Everyone agrees it is not of itself illegal. See the Commission's agreed order in *Federal Trade Commission* v. *U. S. Steel Corporation*, Docket 5508.

If we may enjoin acts which are lawful, there will be no further occasion for the judicial process, so far as Government control of business is concerned. As it is now, we are unencumbered with the same rules of evidence[3] or the requirement of full disclosure of charges before trial that courts must observe. Moreover, our findings, embellished as they are with the stamp of expertise, do not attract the same vigilance reviewing justices give findings of *nisi prius* courts.[4]

With equity court powers, but untrammeled with their restrictions, we can make short shrift of those protections to men's liberties that courts so meticulously observe.

We may say with Lady Macbeth, "What need we fear who knows it, where none can call our power to account?"

On the side of speed there is much to recommend our replacing equity courts. On the side of justice there is much to give us pause, for the instant order assumes injunctive powers never dreamed of by the legislature that created us—authorities heretofore never invested in an agency already functioning as investigator, grand jury, prosecutor and petit jury combined.

1332 We are not a court. We are simply a self-operating combination of a grand and petit jury.

Like a grand jury, if we believe the public interest warrants, we issue a presentment to be tried either before ourselves or our hearing examiners in lieu of a petit jury. But, sitting in our quasi-judicial robes, we may go no further than to inhibit those acts we found unlawful in our findings of fact while we sat in our expert jury box.

Thus we may prohibit a man, who advertised brass salt cellars as gold, from doing so again. By the same order, we may ban all related unlawful acts. But to say we may enjoin the man from ever selling salt cellars again is to exercise equity court powers not included in the budget of this agency.

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[3] The Commission is not "restricted to the taking of legally competent and relevant testimony."

[4] Federal Trade Commission findings will not be disturbed if on consideration of the whole record they are supported by "substantial evidence." *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474. Equity court's findings are more vulnerable on appeal and may be set aside under the "clearly erroneous" test. A reviewing court generally abdicates the right to review factual findings of a trial judge on the ground that it will not substitute its judgment on weight of the evidence for that of the judge who hears witnesses and observes their demeanor on the stand. In this respect we Commissioners are no better off than appellate courts. We do not see witnesses face to face. We only read the record of a case after it has been adduced before a trial examiner.

Thus we may prohibit defendants from conspiring together to fix prices but we cannot make one man's legal price illegal merely because others follow. Nor can we foreclose an entrepreneur from quoting any price he chooses merely because someone else got to the market place first with a similar price.

We may prohibit a company from acquiring a competitor if it impairs competition or tends to a monopoly, for that we know to be illegal; but we cannot gaze into a crystal ball and find as a fact today that any or all acquisitions in the near or distant future will be illegal.

The findings of fact and order based on count one violate this latter truism. National Lead is perpetually enjoined against acquiring any competitors. We have sought here to issue an injunction similar to those issued by courts.[5]

While the courts do not need to follow the statutory form required of the Federal Trade Commission by Section 7 of the Clayton Act, they have at times done so, as in *United States* v. *Allied Van Lines* (D. C. N. D.—Illinois,

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[5] The following equity court injunctions contain (in one or another respect) commands which neither Section 5 of the Federal Trade Commission Act nor Section 7 of the Clayton Act give the Federal Trade Commission the right to issue:

In *United States v. National Cash Register Company* (D. C. S. C.—Ohio, Eq. No. 6802) the court prohibited defendants from acquiring any competitors engaged in the same kind of business as the defendants were engaged in, with a proviso that if it could be proved under a later petition that said acquired company could supplement the defendant's business, and that the such acquisition would not substantially lessen competition, the court reserved the right to give approval to such acquisition.

In *United States* v. *Hartford Empire* (D. C. N. D.—Ohio, No. 4426) defendants were prohibited from acquiring the business of a competing firm, unless such acquisition was approved by the court.

In *United States* v. *Foster Kleiser Company* (S. D.—California, Eq. No. R-31-M) defendants were prohibited from acquiring competitors *until further order of this court.*

In *United States* v. *General Outdoor Advertising* (D. C. S. D.—New York, Eq. No. 46-50) the defendants were prohibited from acquiring any additional display plants (except by way of replacement of an existing plant now owned by the defendant) *where the purchase of such acquisition is primarily to exclude competition from the outdoor advertising industry.*

In *United States* v. *Central West Publishing Company* (D. C. N. D.—Illinois, Eq. 3088—1912), the court prohibited the defendant from acquiring any other company engaged in the same type of business as defendant's.

In *United States* v. *Eastman Kodak* (D. C. W. D.—New York, Eq. A-51) the defendants were enjoined from acquiring any competing plant, for *the purpose or with the effect of* restraining trade or creating an unlawful monopoly.

In *United States* v. *California Associated Raisin Company* (D. C. S. D.—California, Eq. No. B-67), defendants were prohibited from acquisition of any competitors which would eliminate or decrease competition in interstate commerce.

No. 44-C-30), and in *United States* v. *American Thread Company* (D. C. N. J.- -Eq. No. 312). In these cases the courts limited their injunction to the acquisition of specific competitors named in the bills of complaint.

1333 On December 31, 1952, the Federal District Court of Massachusetts entered a consent judgment enjoining Hood & Sons and Whiting (milk companies) perpetually from selling the business of one to the other, and further enjoined the two Hood defendants *for a period of time* from acquiring any milk dealers in *specified localities.* Hood & Sons are also required to divest themselves of certain country milk stations located in Maine and Vermont, and to limit the use of others.

1334 Generally speaking, however, equity injunctions are composed on the spot (played by ear, as it were) to fit the particular need of the case as the chancellor saw it. Take for instance, *United States* v. *Gamewell Company* (D. C.—Massachusetts, No. 6150); there the defendant was prohibited from acquiring any company selling equipment (a) useful only in fire alarm systems, or (b) in connection with the manufacture of fire alarm systems. As can be seen from a study of the above cases, courts often give blanket injunctions which forbid acquisitions of any corporations, even if future acquisitions, standing of themselves, might be legal.

There is no special harm in this because equity courts can maintain a continuing jurisdiction over the actions of their litigants. No one is called to book for disobedience of a mandate without having the opportunity to judicially challenge the same.

This same judicial safety valve is guaranteed defendants when the Federal Trade Commission issues a cease and desist order under the Clayton Act. But even while Section 7 of the Clayton Act in effect endows us with certain injunctive powers (we may order a company to disgorge stock or assets of a specific rival), our injunctive powers are circumscribed—as they should be for an agency holding both prosecuting and fact-finding powers. We may only condemn specific acquisitions rather than issue a blanket injunction against all acquisitions. On top of this restriction, Congress permits judicial reviews, at any future time, of our Clayton Act orders.

Whether it be tomorrow, or a year's tomorrow, the Federal Trade Commission must go to a court for sanction and penalties. So under the Clayton Act, Federal Trade Commission injunctions are always subject to judicial scrutiny.

But these judicial protections are skipped in the instant case by charging wrongful acquisitions under the Federal Trade Commission Act instead of under the Clayton Act.[6] Here the Commission evades the necessity of condemning specific acquisitions.

1335 Here the Commission sidesteps certain presumptions of innocence defendants are entitled to when hailed before us under the Clayton Act. These presumptions of innocence would hold under the Clayton Act unless a preponderance of the evidence proved that:

1. The defendant acquired stock or assets of a certain company;
2. That company was in competition with defendant;
3. Such acquisition may have lessened competition or tended to monopoly, etc.

Lastly and perhaps the most vital curtailment of judicial protection found in the instant order is the fact that by arrogating general equity injunctive powers under Section 5 of our own Act, we forestall any judicial challenge to our commands sixty days after we have spoken. For the Federal Trade Commission Act is different from the Clayton Act in that its orders become final and not subject to judicial review if the defendants neglect to perfect an appeal within the time limit.

There are other fundamental dangers in endowing a quasi-judicial agency with equity court powers, as the instant case demonstrates. The law under which we operate has no statute of limitations. Statutes of limitation protect the citizen against charges based on ancient accusations, for the unreasonable delay in bringing a respondent to trial cheats him of the fair opportunity to marshal facts in his own defense.

The nexus of the first charge leveled at National Lead is based on events occurring from 1891 upwards. In a court of law, this evidence might be admissible as "background material"; yet it is difficult to imagine any court trained in the evaluation of evidence accepting the same with the hospitality the Federal Trade Commission has accorded it here. For the Commission in 1953 bases a perpetual injunction against defendant National Lead principally on evidence of consolidations taking place back in Benjamin Harrison's time.

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[6] One must not confuse the Commission's order in *Western Meat*, Docket 456, with the instant case. The *Western Meat* order was not a general injunction.

What has been said with reference to the Commission's assumption of general equity powers to inhibit legal acquisitions applies with greater force to inhibiting legal pricing practices. For acquisitions are matters of single import, occurring but infrequently, whilst the right to set a price upon the fruits of one's labor is a continuous unbroken chain of rights that will be destroyed the minute one is commanded to change prices if he becomes conscious of the fact that others are charging the same.

1336 Assuming for the sake of argument (and it is only on this basis that I can make such an assumption) that respondents conspired to fix prices, the Commission, exercising the administrative functions delegated to it under the Act, may only condemn and inhibit that which it finds to be illegal. In the instant case, however, it has not found individual conscious price parallelism sans conspiracy to be illegal. Nevertheless it has condemned conscious parallelism in its order to cease and desist.

Besides enjoining acts which the Commission has not found illegal, it has overstepped the injunctive authority approved by the Supreme Court in *Federal Trade Commission* v. *Cement Institute* (April 26, 1948). There the defendants objected to paragraph one of an order which prohibited respondents from "quoting or selling cement pursuant to or in accordance with any other plan or system which results in identical price quotations, or prices for cement at points of quotation, or sale, or the particular purchases by respondents using such plan or system, or which prevents purchasers from finding any advantage in price in dealing with one or more of the respondents against any of the other respondents."

These words would have a familiar ring when compared with the order in the instant case but for one important variation—the order in the Cement case was directed solely at conspiratorial concerted action; the order in the instant case is directed at individual activities of each of the respondents—which have not been found to be illegal.

In the Cement case, the court was careful to point out that "This paragraph, like all the others in the order, is limited by the preamble which refers to concerted conduct in accordance with agreement or planned common course of action," and observed that "It is thus apparent that the order by its terms is directed solely at concerted, not individual activity on the part of the respondents."

Thus far we have dealt with the question, has the Commission exceeded its authority in the instant order.

Now we need to look at another phase of the case. Do the facts support a finding of conspiracy to fix prices?

Let us identify the realistic elements of conspiracy and
see if any of them match the facts in this case. Till
1337 now there has never been a quasi-judicial cataloging
of the same, nor have the reviews of our cases by courts been of much help in this quarter, for courts act strictly on an ad hoc basis. Their decisions (like the decisions of consulting physicians reviewing the diagnosis of a practicing doctor) give validity to a first judgment but lack value as a general text. Even the eight most important Federal Trade Commission decisions in the realm of conspiracy[7] serve only to tell whether the evidence in each case was substantial enough to carry the Commission's order.

When administrative agencies keep gauging their decisions on what the courts have refused to reverse, there is a general decline—a watering down, as it were—of the preponderance of evidence rule, especially in matters tried before us, for we are not subjected to the discipline of supporting our issues before a separate and disinterested body.[8]

In this matter let us apply the criterion of conspiracy to the facts on the basis of the preponderance of evidence rule, and perhaps at the outset even indulge in the presumption of innocence, a presumption that has become quite outmoded of late.

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[7] I nominate these eight: *Salt Producers Assn.* v. *Federal Trade Commission*, 134 F. 2d 354; *Federal Trade Commission* v. *Cement Institute, et al.*, 333 U. S. 683; *Phelps Dodge Refining Corp., et al.* v. *Federal Trade Commission*, 139 F. 2d 393; *Milk & Ice Cream Can Institute* v. *Federal Trade Commission*, 152 F. 2d 478; *Bond Crown & Cork Co.* v. *Federal Trade Commission*, 176 F. 2d 974; *Tag Manufacturers Institute* v. *Federal Trade Commission*, 174 F. 2d 452; *Allied Paper Mills* v. *Federal Trade Commission*, 168 F. 2d 600; *Fort Howard Paper Co.* v. *Federal Trade Commission*, 156 F. 2d 899.

[8] There are hopeful signs that courts are becoming aware of this. See: *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231; *Ada J. Alberty* v. *Federal Trade Commission*, 182 F. 2d 36; *Minneapolis-Honeywell Regulator Co.* v. *Federal Trade Commission*, 191 F. 2d 786, certiorari denied by Supreme Court, December 22, 1952; *Tag Manufacturers Institute* v. *Federal Trade Commission*, *supra*; *Carlay Co.* v. *Federal Trade Commission*, 153 F. 2d 493; *Federal Trade Commission* v. *Motion Picture Advertising Service*, 194 F. 2d 633, argument completed in Supreme Court this term; *New Standard Publishing Co.* v. *Federal Trade Commission*, 194 F. 2d 181; and *Dearborn Supply Co.* v. *Federal Trade Commission*, 146 F. 2d 5.

What constitutes a conspiracy?

1338 No one definition seems adequate, but certain sign posts are always found along the conspiracy road. History records them and literature dramatizes them so many times that he who runs can read.

In conspiracy there must be secrecy—a Macbeth whispering to his lady; a group of Boston merchants disguised as Indians, a Guy Fawkes hiding with his fellow travelers in the basement of a Westminster house; Madame Defarge knitting the names of aristocrats in her shawls behind the counter of a wine shop in Saint Antoine.

When it is no longer secret, it's no longer a conspiracy—it's a revolution. The farmers who stood on the bridge at Concord, Washington at Valley Forge, Caesar crossing the Rubicon, Luther nailing his thesis on the cathedral door—these people had dropped secrecy of purpose and were no longer conspirators.

Conspiracy is surrounded with a vague and villainous aura, treachery, hidden plotting, surreptitious meetings and codes.

The law condemns conspiracy because it secretly unites the strength and resources of many to a criminal end and is more tolerant of inferences and conjectures of guilt because its insidious means of accomplishment make the conspirators more difficult to apprehend.

Because the law requires less proof at the same time it imposes greater sanctions against conspiracy, implied conspiracy charges have become a practice peculiar to Anglo-American law. This is especially true when a quasi-judicial agency of the Government seeks to prohibit individuals from doing things which are not illegal.

The growing habit of issuing complaints and orders based on the fiction of conspiracy when no substantive offense can be charged against the single acts involved, constitutes a serious threat to fairness in our quasi-judicial procedure.[9]

If secrecy be one of the sign posts of a real conspiracy, what are its elements in the instant case?

1339 During NRA under the spurring of the Federal Government, the defendants were required to draft a so-called Master Code, and later a supplemental code dealing with prices and terms.

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[9] My apologies go to Mr. Justice Jackson for purloining his phraseology in *Krulewitch* v. *U. S.*, October Term 1948, No. 143, and adapting it to the rationale in this case.

These codes were drawn at NRA meetings held under the aegis of the Federal Government. Following the pattern of every one of the other 557 industrial conferences, price reporting, terms and conditions of sale, methods of selling, freight and zoning problems, as well as hours and labor conditions, were discussed.

These meetings and discussions are the basis for the findings of conspiracy in this case.[10]

Conspirators about to commit crimes conceal their activities in order to prevent detection, conviction and punishment.

With this in mind, nowhere has the reductio ad absurdum been so complete as in the instant case. Here the foundation of the so-called conspiracy was first heralded in a two-day parade down the main stem of New York City, and on the front pages of every newspaper in the United States. While the evidence in this case does not recite the nation's clamorous and enthusiastic participation in that great experiment in a controlled economy (including price-fixing, production controls, etc.) known as NRA, yet I think we can take judicial notice of the era where the illustrious head of NRA once said:

> We "* * * had to have an aroused militant public opinion echoed like a muezzim over the house tops. * * * There was scarcely a national organization with local representation that was not enlisted and responded enthusiastically. * * * The whole radio system of the country was donated. * * * Influential leaders of every party and creed sponsored the drive. * * * The President asked that every one make his loyalty to the program known by exhibiting a blue eagle with the slogan, 'We do our part.' * * * More telegrams and letters poured into Washington than ever before in the history of government. * * * The 1340 enforcement of the law (NRA) was in the hands of the whole people. * * * Like the draft act, the whole law is written to depend on cooperation and popular support. * * * The drive was to get every company under the blue eagle—mobilization of public opinion. Those who cooperated were soldiers against the

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[10] Paragraph 10 (a) of the majority findings of fact: "The evidence in the record discloses that the meetings and discussions hereinabove referred to during the period from July 1933 to June 1934, resulted in understandings and agreements between and among respondents * * *."

> enemy and those who did not were considered the enemy. * * * Climaxed by blue eagle parades all over the country, the one in New York lasting all one day and most of the next night, 96 per cent of commerce and industry was under NIRA."[11]

Today if people were caught doing secretly what in 1934 Government demanded they do publicly, they would be instantly charged with violating the antitrust laws for, as the Administrator of NRA during its heyday said:

> "We did not repeal the antitrust laws. We simply ignored them."
>
> "There is not one single code that is not a combination in restraint of trade."[12]

This last statement may be more rhetorical than true. At any rate, the testimony in the instant case discloses that although the code for the lead industry (with all the fixings above described) was approved on May 24, 1934, the respondents and other manufacturers of lead pigments were unwilling to report prices or to follow the terms of sale set forth in the code. They requested the Government and obtained a temporary exemption from that portion of the lead code dealing with the filing of prices and deviations from the terms of sale as well as from other requirements of Schedule A, and at no time was any agreement or understanding reached among any of the respondents as to the use of methods of selling, or zones.

From the evidence in the case it does not appear that this reluctance to fix prices under the prodding of the Federal Government was generated from any fear that the
Government was masquerading as an agens provo-
1341 cateur, and a decade later might base a conspiracy
charge against the defendants because of these NRA meetings. (See *Federal Trade Commission* v. *National Lead*, Docket 5253.) On the contrary, in my opinion the evidence indicates a healthy and skeptical attitude on the part of the lead pigment entrepreneurs who had no stomach for tying their hands in the competitive battle, no matter how much the NRA wanted them to.

Nor am I willing to cast the Government in such a role that it prosecute in '53 for what it spent millions in '33 to accomplish.

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[11] "The Blue Eagle from Egg to Earth" by Hugh S. Johnson, pp. 255, 261, 203, 250, 267.

[12] "The Blue Eagle from Egg to Earth" by Hugh S. Johnson, pp. 172, 177.

Of all the criticisms leveled at Hugh Johnson's NRA, no one ever charged it with playing decoy to 96 per cent of the entire economy. And we do a great injustice to that well-meaning though ill-fated crusade (which, incidentally, put millions of people back to work and added billions of dollars to the market stream) by basing a conspiracy charge on NRA activities at this late date. If we must do this, it seems we have left out as party defendant the greatest conspirator of them all—ourselves.

Nor do I see any comfort in the prosecution's contention that the defendants are not entitled to NRA immunity, for I see no occasion for immunity. Shall those who refused to don the price-fixing paraphernalia the Government offered them be more put upon than the avid participants?

Another sign post along the conspiratorial road is that a conspiracy not only must have a general aim but must be coupled with a specific vehicle. It might be said that we all have the general aim to live, but it will not do to say we are all conspiring to live, or that all businessmen are conspiring to exist, though these may be the planned common purpose of everyone. There must be some central illegal theme, whether the plot be one to carry out through legal means an illegal end, or a legal end through illegal means.[13]

1342 What sign post was there of a central illegal theme in the alleged lead conspiracy? Unlike historic conspiracies which are closely knit and tied to a definite time,[14] the testimony relating to the alleged lead conspiracy (outside of that dealing with NRA) floats vaguely over many years.

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[13] Sixteenth Century England was full of conspiracies. Nearly every year had its own infamous example. In 1571 there was the Ridolfi plot, in 1585 Parry's plot, the Babington plot of 1586 (which was the basis for the execution of Mary, Queen of Scots). In close succession there were Polwhele's, Collen's, Squire's, Lopez', Yorke's, and Williams' plots. These conspiracies all had one alleged common purpose—the assassination of Queen Elizabeth, but they were different conspiracies, varying widely in details and timing. Each plot culminated with the participants either at the gallows, in exile, imprisoned, or escaped. But each conspiracy had its own separate design or theme, not part of the others.

[14] Sempronius in Addison's Cato exclaims:

"Conspiracies no sooner should be formed than executed.
* * * we must work in haste;
Oh think what anxious moments pass between the birth of plots
And their last fatal periods.
Oh! 'tis a dreadful interval of time,
Filled up with horror all, and big with death!
Destruction hangs on every word we speak,
On every thought, till the concluding stroke
Determines all, and closes our design."

As to this vagueness, I have read the briefs and the relevant testimony, and have listened twice to oral arguments on the merits (as senior Commissioner I sat first with the old Commission, which did not arrive at a decision, and then with the new Commission). I have never observed a charge of conspiracy based on so nebulous a melange of testimony as here presented.

No one claims the evidence has to show "one secret meeting in a smoke-filled room," or any number of meetings, nor do all the conspirators have to be present at any one time and sign their names in blood. But a charge of conspiracy must mean something besides a handle on which to hang orders, else we falter too close to thought control.

In my opinion, some kind of overt acts which implement a meeting of the minds, is a "must" in a conspiracy. In a real conspiracy they are not hard to find.

The truth is, the average price-fixer is about as stupid as his aims.

If ostriches really hide their heads in the sand to avoid detection—real price-fixing conspirators outdo the silliest Struthio Camelus on earth.

1343 They use the same old repetitious and obvious ways to maintain concert of purpose—correspondence (let no one tell you price-fixers don't write), trade convention and committee meeting minutes, association records, black lists, white lists, all vulnerable to statements against interest, statements of disgruntled employees, statements of injured competitors, etc.

But if there is no conspiracy but only a fiction on which to base an order against legal acts, confederating evidence will be vague. Because it is difficult to find? No, because it isn't there.

Such is the state of affairs in this case. After the governmental NRA public hearings of 1933 and 1934, there is no evidence that could be seriously slanted to conspiracy. What is relied upon is interesting principally because it demonstrates the quality of evidence on which the Commission bases its findings. For instance, there is direct and uncontroverted testimony that four years after the NRA (in the year 1937) an official of Eagle-Picher ate lunch with a couple of men from National at their club. Backing up this astonishing (?) evidence of intrigue are further facts, such as, three years later (in 1940) Eagle-Picher was caught red-handed with a copy of National Lead Company's price list in its files. (It should have hid it in a pumpkin.)

After reciting these "evidences" of conspiracy, the findings of fact concludes there were "Various other instances of similar cooperation between these two competitors * * *"

To which I can only ask, "What instances and what cooperation?"

I doubt a reviewing court will be receptive to a finding of conspiracy on such nonsense. As for myself, I'll not play Othello to the prosecution's Iago on such a silly pretext as Picher's price list being found in National's drawers.

Advering to the sign post of a general aim (and its vehicle) for the alleged conspiracy in restraint of trade—one of the specific vehicles to carry out this restraint is tied to the alleged conspiratorial adoption and concerted maintenance of a common price-fixing factor, namely, the planned common use of zone differentials for the averaging of freight charges. Another vehicle is the alleged conspiratorial agreement to use agency methods of selling where distributors were consigned stocks for resale at terms collusively agreed upon by the defendants. Besides these, there are collateral references made to usual
1344 and ordinary trade customs followed in all industries,
with the inference drawn that these trade customs were concertedly agreed upon. I know of no industry engaged in the distribution of any homogeneous products that does not universally and consciously follow a historic pattern grown up in its own trade, dealing with cash discounts, terms of delivery, duration of supply contracts, the use of similar types of containers, with reference to size, weights or amounts,[15] as well as customary methods of billing, shipping, etc.

As to the first vehicle—zone methods had been used by National since 1910, but in 1933 National worked out for its own use a pictorial map of its zones and the differentials it would charge its customers. This method of averaging freight costs was consciously followed by others, though not all.

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[15] Simple examples are: Beer is sold in bottles or barrels; cement in bags or carloads; apples in bushel baskets; oranges in crates—all consciously parallel. The same is even more obvious in the similarity of credit and cash terms in any one trade as well as the particular buying and selling seasons prevalent in specific industries.

As for the second vehicle—conscious parallelism in the use of agency methods—National Lead began using agencies in December, 1932. Eagle-Picher used them in 1933, and Glidden followed the same method six years later, but shortly after discarded them. Sherwin-Williams never used the agency plan at all, while National abandoned it in 1944.

Thus we have as the two alleged central themes or vehicles to carry out the alleged conspiracy, substantially similar factors used in quoting prices, and a substantially similar agency factor.

One of the factors was adopted by one company in 1910, by some of the others in 1933, and by another never at all.

One defendant adopted the second factor in 1932, another in 1933, another in 1939 (but dropped it in 1942), another never utilized it at all. To say the least, this is a lackadaisical conspiracy, with acts you could hardly call contemporaneous.

With the same kind of a timetable, the Boston Tea Party would have been held when Cornwallis was surrendering to George Washington. Macbeth would have sunk the dagger into the King after Birnam Wood had already removed to Dunsinane, and Guy Fawkes would never have seen the basement of Parliament at all.

1345 Another sign post is the presence of "enforcers." Most conspiracies have weak sisters, who must be cajoled or browbeaten into line. Syphax had no stomach for deserting Cato when other Roman Senators sought to deliver Cato into Caesar's hands. It took Sempronius to keep him in line.

Even that bloody old rascal, Macbeth, turned out to be a Caspar Milquetoast at heart and nearly flunked the murder of the King. If it hadn't been for his Lady, he would never have got any further than Thane of Cawdor.

Whether it be the Blackdot of Blind Beggar Pew, or the knife of Long John Silver, in the world of pirates, or whether it be punitive basing points, fighting brands, black lists or association penalties, in the world of commerce—threats, force, intimidation, or things of such ilk are important sign posts along the conspiracy road.

For every "gentlemanly understanding" and "suave unexpressed agreements of sales managers" to fix prices, there will be twice as many eager beavers gnawing the legs off their competitor's share of the market. And it takes more than a "friendly Scotch and soda" to stop them.

Some kind of an "enforcer" comes into play.[16]

1346 I have yet to read the record in a real price-fixing conspiracy where "enforcers" (and their methods to hold the laggards in line) were not part and parcel of the case.

We have no enforcers here.

There are no such sign posts in this record.

The prosecution claims this is because the conspirators, having once discussed zones and agencies in 1933 under NRA, no longer needed to consort and confederate. To accept such an argument belies the Commission's label of expertness. The truth is, unless a price-fixing agreement is armed by an "enforcer" with some private punitive method at hand, the conspiracy lasts no longer than it takes a sales manager to get to the phone to whisper his own private price cut. And this isn't from one to twenty years.

To the fool who subscribes, the glitter in any price-fixing scheme is the hope that all competitors will follow it, but himself.

Added to the lack of conspiratorial sign posts (secrecy, specific vehicles to carry out a general aim, enforcers, etc.) is the uncontradicted testimony of officials[17] that there were never any agreements or understandings by their respective companies with other respondents or with any competitors as to prices, terms, or selling methods.

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[16] The common garden variety of enforcers are:

Punitive basing points—*Cement* case, 333 U. S. 683.

Kangaroo court to prescribe rules and punish violators—*Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission*, 312 U. S. 457.

Policing of job requirements—Count I of *Rigid Steel Conduit* case, 168 F. 2d 175.

Requiring advance notice of price changes—*U. S. Malsters Assn. et al.*, 152 F. 2d 161.

Requiring suppliers to follow white lists—*Wholesale Dry Goods Institute, Inc.*, 139 F. 2d 230.

Prevention of diversions in transit—*American Iron & Steel Institute*, Docket 5508.

Blacklisting—*Arkansas Wholesale Grocers Assn.*, 18 F. 2d 866.

Reporting of price cutters—*Beechnut Packing Co.*, 257 U. S. 150.

Boycott—*Chamber of Commerce of Minneapolis*, 13 F. 2d 673.

Espionage—*Special Accounting Supply Mfgrs. Assn.*, 35 F. T. C. 430.

Issuance of private "certificates of necessity"—*Building Material Dealers Alliance*, 26 F. T. C. 142.

[17] Wormser (Lead Industries Association), McCarthy (National Lead), Sprague (Glidden), Bowlby (Eagle-Picher) and Brown (Sherwin-Williams).

Without proof of conspiracy, the question naturally arises, why was complaint filed, the case tried and an order entered?

In my opinion, the complaint was filed and the case stands or falls on the concurrent knowledge of defendants that the substantial price similarity of their lead pigments was arrived at by substantially similar pricing factors—in short—"conscious parallelism."

For over two decades economic theorists have sought ways to condemn conscious parallelism. The old Federal Trade Commission originated this crusade in the early 1940's and filed numerous complaints accusing defendants with charging prices for their goods with knowledge
1347 that others charged the same price. The first order against conscious parallelism to reach the court was *Federal Trade Commission* v. *Rigid Conduit.*[18] The Circuit Court of Appeals sustained the order and the Supreme Court refused to reverse on a tie vote. However, the decision was a pyrrhic victory, for congressional and public clamor against this decision was so strong that no court proceeding has ever been initiated to enforce it. Until now, all subsequent disposition of cases where conscious parallelism was alleged in the complaint have carefully avoided the type of order issued in *Rigid Conduit.*[19]

But now conscious parallelism again raises its bureaucratic head in this and a companion case,[20] tentatively and collaterally, but not directly, for the instant cases do not find conscious parallelism illegal in their findings of fact, but prohibit it in the orders to cease and desist. The order is justified on what I call a spiral rationale, circular in motion but not coming out where it started:

1. Conscious parallelism is not of itself illegal;
2. But evidence of conscious price parallelism may give the Commission the power to imply conspiracy;
3. Conspiracy is illegal;
4. With a finding of conspiracy, the Commission assumes the power to prevent its continuation by prohibiting conscious price parallelism;
5. Conscious parallelism is illegal.

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[18] *Triangle Conduit and Cable Company* v. *Federal Trade Commission*, 168 F. 2d 175 (7th Cir. 1948), aff'd sub nom *Clayton Mark Co.* v. *Federal Trade Commission*, 336 U. S. 956 (1949).

[19] *Clay Products Association, Inc.*, Docket 5483; *Clay Sewer Pipe Association, Inc.*, Docket 5484.

[20] *Chain Institute, Inc., et al.*, Docket 4878.

Ignoring for the moment the impracticality of carrying out an order against conscious parallelism, and casting aside the question as to whether the Federal Trade Commission is endowed with such complete equity court powers, let us see if there are sounder ways of testing the economic validity of conscious parallelism than all this legalistic folderol about conspiracies that don't exist.

1348 We need tests which can be applied on a factual basis.

At the same time the Commission originated its drive against conscious parallelism as the enemy of free enterprise, a more realistic concept of competition was being developed by economists which held where even if pricing formulas were known and substantially paralleled (as here), "the significant test was to look for the independence and competitiveness of the rivals."[21]

Workable competition, as developed by Professor J. M. Clark, Dean Edward S. Mason and the late Professor Joseph A. Schumpeter, as well as Professors E. P. Lernerd, M. P. McNair and F. S. Teele, placed the emphasis on the longer range aspects of a progressive economy; not on an assumed unchanged equilibrium of demand and supply, but on changes which included population growth, the discovery of natural resources, developments in technology, advances in the art of management, and many others. Stress was laid on the constructive role of entrepreneurs in expanding demand and improving products. National brand advertising was something more than an effort to insulate against the price raids of competitors. It recognized that the businessman often made investments of time and money ahead of current demands. Under the doctrine of workable competition, large business units may have put more competitive pressure on small units than was desirable, but every injury to a small competitor was not necessarily an injury to competition. Competition in a growing economy was bound to put pressure on inefficient competitors, whatever their size.

Some tests under the theory of dynamic workable competition can be well applied to the case at hand. I have lifted these tests bodily from Professor Meriam's thesis and attempted to apply them to the facts in the instant case.

As for the facts, there is no reason to lose the crux of

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[21] R. H. Meriam's "Bigness in the Economic Analysis of Competition," Harvard Business Review, March 1950.

~~this case in long histories of the defendants~~, any one of which would fill a volume. The principal defendants are National Lead, Eagle-Picher, Glidden, Sherwin-Williams, and International Smelting and Refining Company.

The products involved are different kinds of pigments made from lead. Defendants are engaged in other fields of commerce where they may be better situated, but in the lead pigment industry, National is by far and above the important producer and distributor. It was and is,
1349 in the parlance of the trade, the price leader. Its national advertised brand has developed a large public acceptance. National sold 58.8 per cent of the total market in 1938. It was the Kilroy of the lead pigment industry. No matter where a competitor opened up a new plant, National was already there with a production point serving that market area. It owned more production points than all of the other defendants put together.

No matter what you call them, lead pigments are lead pigments. The cost of the raw material that goes in them, the cost of packaging and shipping are substantially similar. Moreover, all manufacturers are consciously aware of the fact that their cost and selling prices are substantially similar to each other. That is to say, the prices of lead pigments in Bull Hook, Montana, are substantially similar to one another in that town, and the prices in New York City are substantially similar to each other in New York.

This, the Commission contends, is conspiracy.

Serious students of workable competition have a less dramatic but, I believe, a more considered answer to the problem. Their answer does not lend itself to cliche thinking. In fact, it requires a working knowledge of the industry in question and a weighing of several economic facts, all at one and the same time.

Though National called the tune on its own prices, there were legal and competitive directions it could not ignore. Handling hundreds of items in an unlimited range of quantities and qualities, with innumerable delivery costs involving not only freight cartage but different packaging charges, it could not let its salesmen free-lance on its price quotations. It had to follow, if it would live, a pricing formula and hope that the formula did not present a big enough error to lay the company open to a Robinson-Patman Act charge of price discrimination (a hope that was not fulfilled).

Whether National liked it or not, the differentials between their raw material cost and what they received for finished lead pigments were not only shrunk by their competition's desire for a greater percentage of the market, but also by the clamor of lithopone, titanium oxide, zinc oxide, and leaded zinc oxide to take over the same market.

These rival commodities are produced in large volume by strong competitors (not parties to this suit).

1350 Under these conditions, any conspiracy by the lead pigment manufacturers to fix prices would have been a bootless venture.

Eagle-Picher, next to National in importance, with four production points, produced approximately one-third as much lead pigments as National. Glidden with three, and Sherwin-Williams with one production point, while strong in the ready-mix paint business, were relatively negligible factors in the production and sale of lead pigments, their interests being mostly in mixing and selling their own paints.

Anaconda never engaged in lead pigments but in 1936 was acquired by International Smelting and Refining, who permanently suspended its lead pigment business in 1946. There is no reason to believe that it will ever reenter the business of the manufacture and sale of lead pigments.

Lead pigments are made from lead. In fine, there is so much lead in lead pigments that the cost of the raw material determines within a few cents the price of the finished product. The price of raw lead is the same for everybody in any place in the United States.

To this structure we must add another layer of verities. Lead is heavy. No matter where it is dug out of the ground, those who control the price of lead (a phenomenon not under attack in this case) see to it that prices are quoted f.o.b. New York. Raw lead costs all defendants the New York price plus what it takes to haul it to their plants.

This is the famous basing point system of pricing (also not under attack in this case). It is the grandfather of all systems—multiple basing points, zone systems, warehouse shipping points, and a host of variations. It is amoral in itself—there is nothing good or bad about it.

It is the use of basing points (or its offspring) as factors to fix conspiratorial prices[22] that has been condemned by the courts.

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[22] See *Federal Trade Commission* v. *Cement Institute*, Nos. 23-34, October Term, 1947.

The same can be said of zone pricing. When zones are used by concerns who have only one point of production and lack the financial strength to maintain distributive
1351 outlets of their own, it is an effective individual means of instantly meeting the price of their biggest rivals who own plants and warehouses all over the country.

In the instant case where one company had production points spread all over the country and held its selling price at a small margin above raw material cost, price-followers with one or a few scattered plants found it not only inconvenient but impossible to do other than to consciously stay within price ranges similar to the leader in each locality.

There is no controversy over this business fact. The defendants, while not all utilizing the same methods of computing prices, followed some price structure which came out with either substantially similar prices or at least followed in a tandem arrangement a price that was consciously and uniformly below. For the most part the companies making lesser known products tagged a respectful 25¢ per cwt. behind National's and Eagle-Picher's advertised brands. Their actions were undoubtedly consciously parallel.

If conscious parallelism be a crime, it is an offense that pervades our entire protoplasmic system, from the amoeba in the Dismal Swamp to the most esoteric Government agency in Washington. It is as much a part of the highest attainments of humanity as it is of the lowest and most despicable forms of vice. To say that one who practices it belongs at either end of the scale is to deny its universality. To condemn it is like condemning the tide.

To determine whether the prohibition of conscious parallelism sans conspiracy comports with sound economic principles in the instant case, the following conclusions are reached.

The evidence shows the general uniformity of price movements in lead pigments lags close behind the movement of its raw material cost. There is a leveling of the peaks and lows by averaging gains against losses in inventory.

The evidence shows price changes are initiated in no regular pattern. The price leader is National Lead in most cases, and its price changes are followed generally. The evidence shows a changing division of the market amongst the various competitors with the principal producer, National Lead, losing its former higher percentage of the total share of the market.

The evidence shows individual companies explore the possibility of increasing or decreasing their positions
1352 in a particular part of the industry, either geographically or by product, as determined by their own views on profit possibilities.

The evidence shows the various defendants in the lead pigments industry act independently on investing in processes or using new manufacturing techniques.

The evidence shows the industry does not function to hold an umbrella over the inefficient as is witnessed by the mortality of many old companies and the entrance of new companies and new competitive commodities in the same market.

The evidence shows that the members of the industry cannot adapt themselves to a status quo because the entrance of new countervailing products affords no condition favorable to stagnation.

The evidence shows that constant and active participation in technological progress, production improvement, expansion of markets, and output and capacity are present.

As to the final test on price quotations and pricing formulas—the evidence shows that National's position as the price leader makes price comparison easier for buyers, but conversely, no system of price quotations can make the price comparison easier for buyers without also making it easier for the sellers. Hence the question must be posed in terms of the actual price behavior of the industry. Because the price of lead pigments is so closely affected by the price of raw lead, the price leader cannot avoid price reductions or price raises.

The evidence shows most price followers have consistently charged less than the nationally accepted brands, and have neither feared nor been deterred by the threat of retaliation for they have cut into the price leader's share of total market.

In a free enterprise economy, new or smaller entrepreneurs have three choices in their use of prices as a means to enter or enlarge their share of a market. They may price above, meet or price below their rivals.

From the business facts in this case it is evident National's competitors have only two choices—to meet or bid below. Under the present order the opportunity for exercise of private judgment in pricing their wares is cut in half.[23]

1353 They may not meet.
They may only bid below National.

In the last analysis, this gives them no choice. It puts those who aspire to supplant the leader in a sort of second class business citizenship.

To condemn conscious parallelism sans conspiracy is to disarm the smaller competitor in his already handicapped battle against multiple-point producers.

I am against it.

Lowell B. Mason,
Commissioner.

As to the Commission's order pertaining to price discrimination, I concur.

Lowell B. Mason,
Commissioner.

1354 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

Commissioners:

James M. Mead, Chairman,
Lowell B. Mason,
John Carson,
Stephen J. Spingarn
Albert A. Carretta.

ORDER CORRECTING PARAGRAPH FOUR (d) OF FINDINGS AS TO THE FACTS.

Whereas, the third sentence of Paragraph Four (d) of the findings as to the facts in this proceeding reads as follows:

"Under the terms of the new contract duPont was to furnish National corroding pig lead, linseed oil and titanium which National was to convert into white lead-in-oil to the amount of duPont's total requirements and package and ship the same to duPont's order at a stated charge for processing, packaging and shipping, with certain variations between different size packages."; and

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[23] "Do forthwith cease and desist from quoting or selling lead pigments * * * in accordance with a zone delivered price system * * * with the effect of systematically *matching* the delivered price quotations or the delivered prices of other sellers of lead pigments * * *."

Whereas, said sentence contains a typographical error in that the word "titanium" therein should have been "turpentine":

1355 Now, Therefore, It Is Ordered that the third sentence of Paragraph Four (d) of the findings as to the facts issued in this proceeding on January 12, 1953 be, and it hereby is, corrected to read as follows:

"Under the terms of the new contract duPont was to furnish National corroding pig lead, linseed oil and turpentine which National was to convert into white lead-in-oil to the amount of duPont's total requirements and package and ship the same to duPont's order at a stated charge for processing, packaging and shipping, with certain variations between different size packages."

By the Commission.

D. C. Daniel,
Secretary.

Issued: February 4, 1953.

In The

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

National Lead Company, *Petitioner,* *against* Federal Trade Commission, *Respondent.*	10839.

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION.

(Filed Mar. 12, 1953.)

To the Honorable Judges of the United States Court of Appeals for the Seventh Circuit:

Now comes your petitioner, National Lead Company, by its attorneys, and presents its petition to review and set aside the order of the Federal Trade Commission (hereinafter referred to as the "Commission") issued January 12, 1953 and served on January 15, 1953, and in support thereof, respectfully states and shows:

1. National Lead Company is a corporation organized and existing under the laws of the State of New Jersey, with its principal place of business located in the City of New York, State of New York

Nature of the Proceedings.

2. On November 25, 1944 the Commission issued and subsequently served its complaint in a proceeding entitled "In the Matter of National Lead Company, et al", Commission Docket No. 5253, charging petitioner and the other respondents named therein with the use of unfair methods of competition in commerce in the sale of white lead in violation of Section 5 of the Federal Trade Commission Act (Title 15, United States Code, Section 45) and with having discriminated in price in the sale of white lead in violation of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended (Title 15, United States Code, Section 13). In addition to petitioner, six other corporations were named as respondents in said complaint.

3. After the filing of respondents' answers to said complaint, certain testimony and other evidence in support of the allegations of the complaint were introduced before a Hearing Examiner of the Commission. Subsequently, on April 12, 1946, the Commission issued and thereafter served upon the same respondents an amended complaint charging petitioner and the other respondents with the use of unfair methods of competition in commerce in the sale of various lead pigments in violation of the provisions of Section 5 of the Federal Trade Commission Act and with having discriminated in price in the sale of various lead pigment in violation of the provisions of subsection (a) of Section 2 of the Clayton Act.

The Amended Complaint.

4. Count I of the amended complaint charged petitioner with having monopolized and attempted to monopolize the interstate sale of lead pigments, with having acted unlawfully to secure a monopolistic control over the prices of lead pigments, with having conspired with the other respondents to eliminate price competition in the sale of lead pigments,

and with having entered into contracts and understandings with E. I. duPont de Nemours & Company, Inc. for the purpose and effect of promoting maintenance of prices of white lead fixed by petitioner and other sellers. Count I further charged that petitioner and the other respondents in connection with the sale of lead pigments agreed to adopt and adopted a system of delivered price quotations which prevented reflection of differences in the costs of delivery from the respective manufacturing plants of the respondents; agreed to adopt and adopted a zone delivered price system; agreed to secure and secured the cooperation of the Lead Industries Association in fixing and adopting noncompetitive terms and conditions of sale; exchanged directly and through the office of the Lead Industries Association price factors and information concerning price factors; agreed to adopt and adopted consignment or agency agreements for the purpose of preventing dealers from selling lead pigments at lower prices; and agreed to fix and fixed prices, terms and conditions of sale.

5. Count II of the amended complaint charged each of the respondents with having discriminated in price in the sale of lead pigments with respect to competing purchasers in any one zone, and competing purchasers in different zones, and with having discriminated in price in the sale of lead pigments as the result of certain quantity, trade and regional discounts.

Answer of Petitioner.

6. Petitioner duly filed its answer to the amended complaint, denying all material allegations thereof charging unfair methods of competition and discriminations in price in the sale of lead pigments.

Hearing Before Trial Examiner.

7. Thereafter further testimony and other evidence in support of and in opposition to the allegations of the amended complaint were introduced before a substituted Hearing Examiner, it having been stipulated by counsel for all parties that the testimony and other evidence theretofore received in support of the original complaint, with certain exceptions, might be considered as a part of the record under the amended complaint.

8. The Trial Examiner's Recommended Decision was

filed on March 31, 1948. Thereafter, counsel for the Commission, counsel for petitioner and counsel for the other respondents filed exceptions to the Trial Examiner's Recommended Decision and the matters came on for oral argument before the Commission on May 19 and 20, 1949. Thereafter, on motion of the Commission, a second argument on the merits was had on February 1 and 2, 1950. On January 12, 1953 the Commission issued orders sustaining in part and denying in part the exceptions theretofore filed by the Commission's counsel and the exceptions theretofore filed by counsel for petitioner and counsel for the other respondents.

The Order to be Reviewed.

9. On January 12, 1953 the Commission made and thereafter on January 15, 1953 served on the petitioner its "Findings as to the Facts and Conclusion" and its "Order to Cease and Desist". A copy of the "Order to Cease and Desist" is attached hereto as Exhibit A. At the same time there were issued by the Commission and served upon the petitioner the "Opinion of the Commission" and the "Dissenting Opinion of Commissioner Lowell B. Mason."

10. The "Order to Cease and Desist" orders the petitioner and the other respondents to forthwith cease and desist from entering into or continuing any planned common course of action, understanding, agreement, combination or conspiracy between any two or more of the respondents, or between any respondents or any other party, to do or perform any of the following acts or things:

> "1. Establish, fix, or maintain prices, terms, or conditions of sale for lead pigments, or adhere to any prices, terms, or conditions of sale so fixed or maintained.
>
> 2. Quote or sell lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system; or quote or sell lead pigments pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for lead pigments at points of quotation or sale or to particular purchasers by any two or more sellers of lead pigments using such plan or system, or which prevents purchasers from finding any advantage in price in dealing with one or more as against another seller.

3. Quote or sell lead pigments at specified differentials over any particular quotation or quotations of pig lead prices.

4. Quote or sell lead pigments at specific price differentials based upon differing sizes or types of containers or based upon differing quantities in which such products are sold or delivered.

5. Enter into, employ, or continue in effect, any agency or consignment contract, plan or arrangement under which the resale prices or selling practices of any dealer or distributor are controlled or directed.

6. Issue to dealers suggested resale prices, dealers' price schedules, or list prices for the purpose or with the effect of inducing dealers to observe uniform resale prices and refrain from price competition among themselves."

11. Said "Order to Cease and Desist" further provides that petitioner and each of the other respondents "do forthwith cease and desist from quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another."

12. Said "Order to Cease and Desist" further orders petitioner and each of the other respondents to cease and desist from discriminating in the price of lead pigments:

"1. By selling such lead pigments at different zone delivered prices to purchasers located in different territorial zones when such purchasers are in competition with one another in the resale or distribution of said products, either as lead pigments or as components of other products.

2. By selling such lead pigments to purchasers competing in the resale or distribution thereof, either as lead pigments or as components of other products, at different prices which vary according to the quantities in which said products are to such purchasers sold or delivered, except at such differentials as were not shown in this proceeding to have resulted in adverse competitive effects or as were shown to have been justified on the basis of differences in the cost

of manufacture, sale, or delivery resulting from the differing methods or quantities in which the products were sold or delivered, as stated in the findings as to the facts and conclusion herein."

13. Said "Order to Cease and Desist" further provides that petitioner "do forthwith cease and desist from acquiring or attempting to acquire, directly or indirectly, any interest of ownership or control in the capital stock, or in the physical assets, plants, or other properties, of any concern or enterprise which at the time of such acquisition or attempted acquisition is a competitor of said National Lead Company in the manufacture or in the sale or distribution of lead pigments.".

Jurisdiction and Venue.

14. This Court has jurisdiction and venue under Section 5 of the Federal Trade Commission Act (Title 15, United States Code, Section 45) and Section 11 of the Clayton Act, as amended (Title 15, United States Code, Section 21).

Said Section 5 of the Federal Trade Commission Act provides in subdivision (c) thereof, in part:

> "(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon

> the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission; * * *."

Said Section 11 of the Clayton Act, as amended, provides in part:

> "* * * the Commission or Board may apply to the United States court of appeals, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, * * *.
>
> Any party required by such order of the Commission or Board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in the court a written petition praying that the order of the Commission or Board be set aside."

15. Your petitioner regularly carries on business in this Circuit within the meaning of Section 5 of the Federal Trade Commission Act, in that it is regularly engaged in the sale of lead pigments and other products to purchasers in this Circuit. In addition, your petitioner is required by said order of the Commission to cease and desist from continuing to use in this Circuit certain acts and practices in the sale of lead pigments in interstate commerce.

Relief Prayed.

Your petitioner therefore prays:

1. That a copy of this petition be served forthwith by the Clerk of this Court upon the Federal Trade Commission pursuant to the provisions of subdivision (c) of Section 5 of the Federal Trade Commission Act.
2. That this Court review said "Findings as to the Facts and Conclusion" and said "Order to Cease and Desist" of the Commission, and set aside and vacate said findings, said conclusion and said order.
3. That this Court grant such other and further relief as this Court may deem proper.

Points on Which Petitioner Intends to Rely.

Petitioner intends to rely on the following points:

(a) The Commission's findings as to the facts are not supported by the evidence.

(b) The Commission's findings as to the facts are insufficient as a matter of law to support the "Order to Cease and Desist".

(c) The "Order to Cease and Desist" prohibits acts, practices and methods of competition which the Commission has no power, authority or jurisdiction to prohibit.

(d) The Commission's findings as to the alleged conspiracy in the sale of lead pigments are not supported by the evidence.

(e) The Commission has neither the power nor the authority to prohibit the petitioner from selling lead pigments in accordance with a zone delivered price method of sale.

(f) The right of each respondent to employ its own zone delivered price method of sale was not an issue raised by the allegations of the amended complaint.

(g) The Commission's findings as to the alleged illegal discriminations in price charged by the petitioner in the sale of lead pigments are not supported by the evidence.

(h) The conclusion that certain of petitioner's prices for lead pigments constitute illegal discriminations in price is contrary to law.

(i) The Commission has neiter the power nor the authority to prohibit the petitioner from acquiring or attempting to acquire any interest of ownership or control in the capital stock or physical assets of any competitor in the manufacture, sale or distribution of lead pigments.

Dated: March 11, 1953.

Alexander & Green,
120 Broadway,
New York 5, N. Y.,
By James D. Ewing,
A Member of said Firm,
Attorneys for Petitioner,
National Lead Company.

Mayer, Meyer, Austrian & Platt,
231 South La Salle Street,
Chicago 4, Illinois,
of Counsel.

Exhibit A.

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

Commissioners:
James M. Mead, Chairman,
Lowell B. Mason,
John Carson,
Stephen J. Spingarn,
Albert A. Carretta.

In the Matter of:
National Lead Company,
a corporation,
Eagle-Picher Lead Company,
a corporation,
Eagle-Picher Sales Company,
a corporation,
Anaconda Copper Mining Company,
a corporation,
International Smelting & Refining
Company, a corporation,
The Sherwin-Williams Company,
a corporation, and
The Glidden Company,
a corporation.

Docket No. 5253.

ORDER TO CEASE AND DESIST.

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission, the respondents' answers thereto, testimony and other evidence in support of and in opposition to the allegations of said amended complaint taken before hearing examiners of the Commission theretofore duly designated by it (the respondents having consented to the substitution of hearing examiners), the recommended decision of the hearing examiner and exceptions thereto, the respondents' appeals from certain rulings of the hearing examiner, briefs in support of the amended complaint and in opposition thereto, and oral arguments of counsel, and the Commission having issued its orders disposing of the exceptions to the recommended decision and the appeals and having made its findings as to the facts and its conclusion that the respondents have violated the provisions of the Federal Trade Commission Act and the provisions of subsection (a) of Section 2 of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by an Act approved June 19, 1936 (the Robinson-Patman Act):

It Is Ordered that the respondents, National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting and Refining Company, The Sherwin-Williams Company, and The Glidden Company, their respective officers, agents, representatives and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between or among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following things:

1. Establish, fix, or maintain prices, terms, or conditions of sale for lead pigments, or adhere to any prices, terms, or conditions of sale so fixed or maintained.
2. Quote or sell lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system; or quote or sell lead pigments pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for lead pigments at points of quotation or sale or to particular purchasers by any two or more sellers of lead pigments using such plan or system, or which prevents purchasers from finding any advantage in price in dealing with one or more as against another seller.
3. Quote or sell lead pigments at specified differentials over any particular quotation or quotations of pig lead prices.

4. Quote or sell lead pigments at specific price differentials based upon differing sizes or types of containers or based upon differing quantities in which such products are sold or delivered.

5. Enter into, employ, or continue in effect, any agency or consignment contract, plan or arrangement under which the resale prices or selling practices of any dealer or distributor are controlled or directed.

6. Issue to dealers suggested resale prices, dealers' price schedules, or list prices for the purpose or with the effect of inducing dealers to observe uniform resale prices and refrain from price competition among themselves.

It Is Further Ordered that nothing contained herein shall be construed as prohibiting the establishment or maintenance of bona fide agreements, understandings or other relations between any of the respondents and its officers, directors and employes, or between any of the respondents and any of its subsidiaries or affiliates, relating to the sole and separate business of said respondent and its subsidiaries or affiliates, when not for the purpose or with the effect of unlawfully restricting competition.

It Is Further Ordered that each of the respondents, its officers, agents, representatives, and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another.

It Is Further Ordered that each of said respondents, its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the sale of lead pigments in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly in the price of lead pigments of like grade and quality:

1. By selling such lead pigments at different zone

delivered prices to purchasers located in different territorial zones when such purchasers are in competition with one another in the resale or distribution of said products, either as lead pigments or as components of other products.

2. By selling such lead pigments to purchasers competing in the resale or distribution thereof, either as lead pigments or as components of other products, at different prices which vary according to the quantities in which said products are to such purchasers sold or delivered, except at such differentials as were not shown in this proceeding to have resulted in adverse competitive effects or as were shown to have been justified on the basis of differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which the products were sold or delivered, as stated in the findings as to the facts and conclusion herein.

It Is Further Ordered that the respondent, National Lead Company, its officers, agents, representatives, and employees, do forthwith cease and desist from acquiring or attempting to acquire, directly or indirectly, any interest of ownership or control in the capital stock, or in the physical assets, plants, or other properties, of any concern or enterprise which at the time of such acquisition or attempted acquisition is a competitor of said National Lead Company in the manufacture or in the sale or distribution of lead pigments.

It Is Further Ordered that the respondent, National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting and Refining Company, The Sherwin-Williams Company, and The Glidden Company, shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

By the Commission, Commissioner Mason dissenting and Commissioner Carretta not participating for the reason that oral argument on the merits was heard prior to his appointment to the Commission.

D. C. Daniel,
Secretary.

(Seal)

Issued: January 12, 1953.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

The Sherwin-Williams Company,
Petitioner,
against
Federal Trade Commission,
Respondent.

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION.

(Filed Mar. 12, 1953.)

To the Honorable Judges of the United States Court of Appeals for the Seventh Circuit:

I.

The Sherwin-Williams Company, petitioner, respectfully represents that it is a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, having its principal office in the City of Cleveland, Ohio; that it is duly authorized to do business in the State of Illinois where it maintains a factory and sales offices for the manufacture and sale of paint, varnish and lacquer products and where it formerly manufactured basic lead pigment products; that it is and was regularly engaged in the sale of such products to purchasers in this circuit and that the methods of selling and other acts carried on or alleged to have been carried on by this petitioner, which are the subject of a "Complaint" and "Cease and Desist Order" issued by the Federal Trade Commission, are within the jurisdiction and venue of this Court.

II.

On November 25, 1944, respondent, Federal Trade Commission, in a proceeding entitled "In the Matter of National Lead Company, *et al.*," Docket No. 5253, issued its complaint against your petitioner and that after the filing of petitioner's answer thereto, on April 12, 1946, the Commission issued its amended complaint against your petitioner, in which complaint it was alleged:

(1) That your petitioner, along with others, engaged in a nation-wide conspiracy among certain lead pigment producers to manipulate and control the prices, terms and conditions under which lead pigments are sold throughout the entire United States, in commerce, by using unfair and discriminatory acts and methods of competition in violation of the provisions of Section 5 of the Federal Trade Commission Act (Title 15, United States Code, Section 45).

(2) That your petitioner engaged in systematic discrimination in prices it charged or that it received from its customers in connection with its sale of lead pigments in commerce, in violation of the provisions of Section 2(a) of the Clayton Act, as amended (Title 15, United States Code, Section 13, as amended).

III.

Thereafter your petitioner filed its answer to the said amended complaint issued against it, by which answer your petitioner admitted it was engaged in the manufacture of lead pigment products, denied that it conspired with or rendered assistance to other respondents or with the Lead Industries Association for the purpose of eliminating price competition, explained that most of its production was not sold but used in the manufacture of paints and that while the total production of combined respondents was substantial, your petitioner's sales were a small and negligible part of the total. Your petitioner denied selling according to the zone method depicted by the Commission and explained its system of pricing to be the result of its own individual course of action. Your petitioner denied stipulating or controlling resale prices, denied unlawful conspiracy to set container differentials, denied ever selling lead pigments on a consignment or agency basis as alleged by the Commission or ever selling to battery manufacturing groups, denied that it had any inherent advantages or that it surrendered inherent advantages to other competitor manufacturers and denied all the material allegations of the complaint charging unfair acts or methods of competition in the sale of lead pigments.

Further, your petitioner denied discriminating between its customers as to prices for lead pigments and explained its classification of customers and differentials in prices to them as having no appreciable effect on commerce so as to be discriminatory under the Clayton Act.

IV.

Subsequently, the Federal Trade Commission held hearings before a trial examiner appointed by the Commission, and received testimony in support of the complaint and in opposition to it, which testimony so taken was reduced to writing and filed in the office of the Federal Trade Commission.

V.

On March 31, 1948, the Trial Examiner of the Federal Trade Commission made and filed his "Trial Examiner's Recommended Decision" in the proceeding, copy of which recommended decision was served upon the petitioner; that thereafter your petitioner filed with the Federal Trade Commission its exceptions to the "Trial Examiner's Recommended Decision"; that thereafter briefs were filed with the Commission in the proceeding by the attorney for the Federal Trade Commission and by the attorney for the petitioner; that thereafter the cause came on for oral argument on May 19 and 20, 1949, and again on February 1 and 2, 1950 before the Commission and following such argument was taken under submission by the Commission.

VI.

Thereafter, on January 12, 1953, the Commission issued in this proceeding a "Finding as to the Facts and Conclusions," an "Order to Cease and Desist" and an Opinion of the Commission together with a Dissenting Opinion.

The order directed against the petitioner is in the following words:

> "It is ordered that the respondent, The Sherwin-Williams Company, its respective officers, agents, representatives and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between or among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following things:

1. Establish, fix or maintain prices, terms, or conditions of sale for lead pigments, or adhere to any prices, terms, or conditions of sale so fixed or maintained.

2. Quote or sell lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system; or quote or sell lead pigments pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for lead pigments at points of quotation or sale or to particular purchasers by any two or more sellers of lead pigments using such plan or system, or which prevents purchasers from finding any advantage in price in dealing with one or more as against another seller.

3. Quote or sell lead pigments at specified differentials over any particular quotation or quotations of pig lead prices.

4. Quote or sell lead pigments at specific price differentials based upon differing sizes or types of containers or based upon differing quantities in which such products are sold or delivered.

5. Enter into, employ, or continue in effect, any agency or consignment contract, plan or arrangement under which the resale prices or selling practices of any dealer or distributor are controlled or directed.

6. Issue to dealers suggested resale prices, dealer's price schedules, or list prices for the purpose or with the effect of inducing dealers to observe uniform resale prices and refrain from price competition among themselves.

It is further ordered that the respondent, The Sherwin-Williams Company, its officers, agents, representatives and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another.

It is further ordered that each of said respondents, its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the sale of lead pigments in commerce, as 'commerce' is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of lead pigments of like grade and quality:

1. By selling such lead pigments at different zone delivered prices to purchasers located in different territorial zones when such purchasers are in competition with one another in the resale or distribution of said products, either as lead pigments or as components of other products.

2. By selling such lead pigments to purchasers competing in the resale or distribution thereof, either as lead pigments or as components of other products, at different prices which vary according to the quantities in which said products are to such purchasers sold or delivered, except at such differentials as were not shown in this proceeding to have resulted in adverse competitive effects or as were shown to have been justified on the basis of differences in the cost of manufacture, sale, or delivery, resulting from the differing methods or quantities in which the products were sold or delivered, as stated in the findings as to the facts and conclusion herein.

It is further ordered that the respondent, The Sherwin-Williams Company, shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order."

VII.

a. The Federal Trade Commission had no basis for concluding that there is or was any combination, conspiracy or agreement between petitioner and others to control prices of lead pigments for the reason that the evidence fails to substantiate such a finding; or in concluding that petitioner sold lead pigments in accordance with a plan or zone system to eliminate competition for the reason that the proof failed to establish such a practice; or in ordering petitioner not to sell lead pigments on agency or consignment contract so as to control resale prices where petitioner never sold lead pigments under agency or consignment plan; or in concluding that petitioner carried out any planned course of action to perform any act in violation of the Federal Trade Commission Act.

b. Further, the Commission had no basis for concluding that the petitioner discriminated in the prices of lead pigments to its customers in "commerce" as defined in the Clayton Act for the reason that there has not been shown a substantial lessening of competition; or that petitioner sold at prices in violation of said Clayton Act and not at prices in good faith to meet competition, which practice is not illegal.

c. In said proceeding before the Federal Trade Commission there was no proof showing or tending to show that your petitioner has committed any act or acts, or engaged in any practice or practices prohibited by the provisions of Section 5 of the Federal Trade Commission Act or Section 2(a) of the Clayton Act, or warranting the issue by the Commission of its "Order to Cease and Desist."

VIII.

The "Findings as to the Facts" of the Commission are not supported by the evidence and are insufficient as a matter of law to support the "Conclusion" or the "Order to Cease and Desist," which "Order" prohibits acts, practices and methods of doing business which the Commission has no authority or power to prohibit and the Federal Trade Commission, in this case, was without authority or jurisdiction to enter any order with respect to your petitioner.

IX.

Wherefore, your petitioner prays:

1 That a copy of this petition be served forthwith by the Clerk of this Court upon the Federal Trade Commission pursuant to the provisions of subdivision (c) of Section 5 of the Federal Trade Commission Act.

2. That this Court review said "Findings as to the Facts and Conclusion" and said "Order to Cease and Desist" of the Commission, and set aside and vacate said findings, said conclusion and said order.

3. That this Court grant such other and further relief as this Court may deem proper.

Dated March 10, 1953.

T. J. McDowell,
J. T. Van Keuls,
Mayer, Meyer, Austrian & Platt,
Attorneys for The Sherwin-Williams Company, Petitioner.

United States Court of Appeals

For the Seventh Circuit.

The Eagle-Picher Company and The Eagle-Picher Sales Company, *Petitioners,* *against* Federal Trade Commission, *Respondent.*	Appeal No. 10841.

PETITION FOR REVIEW.

(Filed March 13, 1953. Kenneth J. Carrick, Clerk.)

Now come petitioners, by their counsel, and respectfully petition this Court to review and set aside an Order to Cease and Desist which respondent issued against petitioners on January 12, 1953. A copy of said Order to Cease and Desist is hereto attached and marked Exhibit "A".

1. The Eagle-Picher Company is an Ohio corporation having its principal place of business at Cincinnati, Ohio, and is the same corporation as the Eagle-Picher Lead Company which is referred to in the attached Order to Cease and Desist. The Eagle-Picher Sales Company is a Delaware corporation, a wholly owned subsidiary of The Eagle-Picher Company, and has its principal place of business at Cincinnati, Ohio. The Federal Trade Commission is a lawfully constituted Government agency which has its principal office in Washington, D. C.

2. On November 25, 1944, respondent issued a com-

plaint and on April 12, 1946, an amended complaint, each charging petitioners and the other corporations identified in the attached Order to Cease and Desist with the use of unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in the sale and distribution of lead pigments, in violation of the provisions of Section 5 of the Federal Trade Commission Act (Title 15, United States Code, Section 45). Respondent also charged petitioners with unlawful price discrimination in the sale of lead pigments, in violation of the provisions of subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (Title 15, United States Code, Section 13, as amended).

3. After due procedure, as provided by law, the respondent made formal written findings that petitioners and the other corporations identified in the attached Order to Cease and Desist had violated the Federal Trade Commission Act by forming and continuing a conspiracy in retraint of trade in relation to pricing and selling lead pigments, and that said respondents used substantially identical zone systems for each classification of lead pigments in pursuance of said illegal conspiracy. The Commission further found that each corporation identified in the attached Order to Cease and Desist had unlawfully discriminated in price and had thereby violated the Clayton Act, as amended by the Robinson-Patman Act, by the use of said zone systems and by the use of unjustified quantity discounts.

4. Purporting to be acting upon the basis of said findings and upon the basis of the opinions of the Commissioners, respondent issued the attached Order to Cease and Desist which enjoins certain practices which respondent found to be illegal, and enjoins certain other practices which respondent did not find to be illegal.

5. Petitioners conduct businesses which are affected by the Order to Cease and Desist, Exhibit "A", within this Seventh Judicial Circuit, which fact, by the terms of said Federal Trade Commission Act and the said Clayton Act, gives this Court jurisdiction and venue in respect to this petition for review. This Court also has jurisdiction and venue under the Administrative Procedure Act, Section 10 of Chapter 324 of the Act of June 11, 1946 (Title 5, United States Code, Section 45).

6. Wherefore, petitioners pray:

a. For an order of this Court which sets aside the hereto attached Order to Cease and Desist, Exhibit "A", issued by the respondent.

b. For an order of this Court setting aside the provisions of said Order to Cease and Desist which enjoin legal conduct on the part of the petitioners, provided said Order to Cease and Desist is not set aside in its entirety.

c. For an order of this Court which modifies the said Order to Cease and Desist by making clear and specific the acts and courses of business from which petitioners must refrain, provided said Order to Cease and Desist is not set aside in its entirety.

7. The points upon which the petitioners intend to rely in support of this petition for review are as follows:

a. Respondent based its Order to Cease and Desist in part on its finding that there was a continuing conspiracy among petitioners and the other corporations identified in the Order to Cease and Desist, whereas the said finding was not supported by substantial evidence.

b. Respondent based its Order to Cease and Desist in part upon its finding that selling lead pigments at different zone delivered prices to purchasers in competition with one another in different zones might tend substantially to lessen competition among them, whereas said finding was not supported by substantial evidence.

c. Respondent based its Order to Cease and Desist in part upon its finding that quantity discounts used by petitioners in the sale of lead pigments tended substantially to lessen competition among the purchasers, whereas said finding was not supported by substantial evidence.

d. Respondent wrongfully exceeded its lawful power and authority and usurped the power of a court of equity by ordering petitioners to cease and desist from acts, conduct and business practices which were not found to be illegal and are not illegal.

e. As a matter of law, respondent misinterpreted and misapplied the Clayton Act, as amended by the Robinson-Patman Act, and in consequence ordered, in effect, that petitioners discontinue selling lead pigments on a zone delivered price basis, whereas this business practice is not prohibited by the Act.

f. Acting independently and in good faith, petitioners employed zone delivered prices and quantity discounts to meet the prices of competitors and particularly those of the National Lead Company. Instead of holding that this business policy constituted justification for petitioners' prices under Section 2 (b) of the Clayton Act, as amended by the Robinson-Patman Act, respondent wrongfully enjoined petitioners from using any delivered price zone system for meeting competitors' prices, even as a matter of individual policy, as well as by conspiratorial agreement.

g. The respondent indulged in an abuse of discretion as the term is used in the Administrative Procedure Act, by arbitrarily finding a "conspiracy" between petitioners and the other corporations identified in the Order to Cease and Desist. The arbitrary nature of this finding of "conspiracy" is revealed by respondent's companion arbitrary action in enjoining petitioners from meeting competitors' zone prices by independent action, as distinguished from continuing the conspiracy". If respondent had not furtively recognized that petitioners were in truth and in fact following the prices of National Lead Company solely as a matter of independent business judgment, as petitioners' officers testified unequivocally, then this injunction against independent action would have been unnecessary. Respondent arbitrarily adopted "conspiracy" as a legal fiction both to fortify this unlawful injunction and to preclude the enjoined practice from constituting good faith, affirmative justification for petitioners' pricing methods, under Section 2 (b) of the Clayton Act, as amended by the Robinson-Patman Act.

h. The portions of said Order to Cease and Desist which relate to alleged price discriminations are too indefinite to enable petitioners to judge the scope of the injunction or its applicability to many specific pricing practices. It would seem to include within its prohibition many price differences which do not affect competition in fact.

i. The said Order to Cease and Desist is not in the public interest because its consequences may be to force petitioners out of the business of manufacturing g lead pigments altogether. National Lead is much larger than petitioners, operates e manufacturing plants and hence is low cost of most lead pigments.

cannot underprice National Lead Company d of time and cannot obtain prices over those ead Company. Therefore, if petitioners are n meeting the prices of National Lead Com- f a zone system or otherwise, petitioners can- lead pigments in competition with National y.

Brown, Fox, Blumberg & Markheim,
231 South La Salle Street,
Chicago 4, Illinois,
By Nathan S. Blumberg,
A Member of Said Firm,
Attorneys for Petitioners, The Eagle-Picher Company and The Eagle-Picher Sales Company.

& Evans,
Tower,
, Ohio,
P. Wood,
r of Said Firm,
nsel for Petitioners,
Eagle-Picher Company and
Eagle-Picher Sales Company.

13, 1953.

Exhibit "A".

UNITED STATES OF AMERICA.

Before Federal Trade Commission.

Commissioners:
James M. Mead, Chairman,
Lowell B. Mason,
John Carson,
Stephen J. Spingarn,
Albert A. Carretta.

In the Matter of
National Lead Company, a corporation,
Eagle-Picher Lead Company, a corporation,
Eagle-Picher Sales Company, a corporation,
Anaconda Copper Mining Company, a corporation,
International Smelting & Refining Company, a corporation,
The Sherwin-Williams Company, a corporation, and
The Glidden Company, a corporation.

Docket No. 5253.

ORDER TO CEASE AND DESIST.

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission, the respondents' answers thereto, testimony and other evidence in support of and in opposition to the allegations of said amended complaint taken before hearing examiners of the Commission theretofore duly designated by it (the respondents having consented to the substitution of hearing examiners), the recommended decision of the hearing examiner and exceptions thereto, the respondents' appeals from certain rulings of the hearing examiner, briefs in support of the amended complaint and in opposition thereto, and oral arguments of counsel, and the Commission having issued its orders disposing of the exceptions to the recommended decision and the appeals and having made its findings as to the facts and its conclusion that the respondents have violated the provisions of the Federal Trade Commission Act and the provisions of subsection (a) of Section 2 of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by an Act approved June 19, 1936 (the Robinson-Patman Act):

It Is Ordered that the respondents, National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting and Refining Company, The Sherwin-Williams Company, and The Glidden Company, their respective officers, agents, representatives and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between or among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following things:

1. Establish, fix, or maintain prices, terms, or conditions of sale for lead pigments, or adhere to any prices, terms, or conditions of sale so fixed or maintained.

2. Quote or sell lead pigments as prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system; or quote or sell lead pigments pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for lead pigments at points of quotation or sale or to particular purchasers by any two or more sellers of lead pigments using such plan or system, or which prevents purchasers from finding any advantage in price in dealing with one or more as against another seller.

3. Quote or sell lead pigments at specified differentials over any particular quotation or quotations of pig lead prices.

4. Quote or sell lead pigments at specific price differentials based upon differing sizes or types of containers

or based upon differing quantities in which such products are sold or delivered.

5. Enter into, employ, or continue in effect, any agency or consignment contract, plan or arrangement under which the resale prices or selling practices of any dealer or distributor are controlled or directed.

6. Issue to dealers suggested resale prices, dealers' price schedules, or list prices for the purpose or with the effect of inducing dealers to observe uniform resale prices and refrain from price competition among themselves.

It Is Further Ordered that nothing contained herein shall be construed as prohibiting the establishment or maintenance of bona fide agreements, understandings or other relations between any of the respondents and its officers, directors and employees, or between any of the respondents and any of its subsidiaries or affiliates relating to the sole and separate business of said respondent and its subsidiaries or affiliates, when not for the purpose or with the effect of unlawfully restricting competition.

It Is Further Ordered that each of the respondents, its officers, agents, representatives, and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another.

It Is Further Ordered that each of said respondents, its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the sale of lead pigments in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of lead pigments of like grade and quality:

1. By selling such lead pigments at different zone delivered prices to purchasers located in different territorial zones when such purchasers are in competition with one another in the resale or distribution of said products,

either as lead pigments or as components of other products.

2. By selling such lead pigments to purchasers competing in the resale or distribution thereof, either as lead pigments or as components of other products, at different prices which vary according to the quantities in which said products are to such purchasers sold or delivered, except at such differentials as were not shown in this proceeding to have resulted in adverse competitive effects or as were shown to have been justified on the basis of differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which the products were sold or delivered, as stated in the findings as to the facts and conclusion herein.

It Is Further Ordered that the respondent, National Lead Company, its officers, agents, representatives, and employees, do forthwith cease and desist from acquiring or attempting to acquire, directly or indirectly, any interest of ownership or control in the capital stock, or in the physical assets, plants, or other properties, of any concern or enterprise which at the time of such acquisition or attempted acquisition is a competitor of said National Lead Company in the manufacture or in the sale or distribution of lead pigments.

It Is Further Ordered that the respondents, National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting and Refining Company, The Sherwin-Williams Company, and The Glidden Company, shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

By the Commission, Commissioner Mason dissenting and Commissioner Carretta not participating for the reason that oral argument on the merits was heard prior to his appointment to the Commission.

/s/ D. C. Daniel,
Secretary.

(Seal)

Issued: January 12, 1953.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Anaconda Copper Mining Company and International
Smelting and Refining Company,
Petitioners,
against

Federal Trade Commission,
Respondent.

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION.

(Filed Mar. 13, 1953. Kenneth J. Carrick, Clerk.)

To the Honorable the Judges of the United States Court of Appeals for the Seventh Circuit:

Now come your petitioners, Anaconda Copper Mining Company and International Smelting and Refining Company, and present their petition to review and set aside an order of the Federal Trade Commission (hereinafter sometimes referred to as the "Commission") and in support thereof respectfully show:

1. At all times hereinafter mentioned, petitioners were, and now are, corporations organized under the laws of the State of Montana. Petitioner International Smelting and Refining Company (hereinafter sometimes referred to as "International") was, and now is, a wholly-owned subsidiary of petitioner Anaconda Copper Mining Company (hereinafter sometimes referred to as "Anaconda"). Respondent is a commission created and established by Section 1 of the Federal Trade Commission Act (38 Stat. 717; 15 U. S. C. A. sec. 41). The Order of the Commission herein sought to be set aside was issued by it in Docket No. 5253 on or about January 12, 1953, and served on petitioners on January 15, 1953, in the proceeding hereinafter described. This petition is filed under, and the jurisdiction of this Court is based on, Section 5 (c) of the said Federal Trade Commission Act, as amended (52 Stat. 111; 15 U. S. C. A. sec. 45 (c) and Section 11 of the Clayton Act, as amended (64 Stat. 1125; 15 U. S. C. A. sec. 21).

2. Petitioner Anaconda has never engaged in the production or sale of any lead pigments and has no intention of engaging in such production or sale. Prior to about September 1946, petitioner International engaged in the production and sale of certain lead pigments, namely, only dry white lead and white lead-in-oil; its production and sale constituted only a small proportion of the total lead pigments produced and sold in the United States. Since that time petitioner International has had no intention of engaging in the production or sale of any lead pigments. On October 1, 1946, it sold the only plant at which these materials were ever manufactured by it.

I.

The Nature of the Proceedings As to Which Review Is Sought.

3. The Order of the Commission herein sought to be set aside was issued in a proceeding begun by the issuance by it of a complaint on or about November 25, 1944. That complaint named as respondents in that proceeding the petitioners herein and National Lead Company, Eagle-Picher Lead Company, Eagle-Picher Sales Company, The Sherwin-Williams Company and The Glidden Company, all of whom were alleged to be engaged, either directly or indirectly, in the manufacture, sale and distribution of lead pigments in commerce. Petitioners filed their separate answers to that complaint on or about November 13, 1945.

4. The Order of the Commission herein sought to be set aside arises out of an amended complaint issued by the Commission in said proceeding on or about April 12, 1946. That amended complaint named as respondents petitioners herein and the others named in the original complaint in said proceeding. Petitioners filed their separate answers to said amended complaint on or about May 24, 1946.

5. The Commission's amended complaint contained two counts, both relating to the sale of lead pigments in commerce. Count I purported to state a charge under Section 5 of the Federal Trade Commission Act, Count II purported to state a charge under Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act. Petitioners' answers denied that they had in any way violated the provisions of either statute and that the proceeding was in the

public interest; both answers expressly reserved all rights to object to the amended complaint for lack of jurisdiction.

6. The Commission's amended complaint, in a branch of the proceeding not involving the other respondents therein, charged that respondent National Lead Company in 1891 "embarked upon the execution of a plan and program to secure unto it a monopoly of and a monopoly power and control over the manufacture, pricing, sale and distribution of lead pigments in commerce." Count I of that complaint also set forth a number of acts, methods and practices alleged to have been engaged in by it in furtherance of and in order to effectuate the purposes of that plan and program.

7. Count I of the Commission's amended complaint also charged that all the respondents in that proceeding, including petitioners herein, had combined, conspired and cooperated for the purpose and with the effect of restraining, hindering, suppressing and eliminating competition in prices and terms of sales of lead pigments in commerce. It alleged that the National Lead Company had cooperated with and received assistance and cooperation from the other respondents in doing and performing a number of acts, methods and practices, including agreeing to adopt, adopting and maintaining "a system of delivered price quotations" and "a plan whereby the United States is divided into so-called zones." It further alleged that each respondent quoted to all buyers of the same class located in the same zone the same delivered cost, irrespective of the location of the buyer within the zone. The effects of the adoption, use and maintenance of the zone delivered price system of pricing and other practices referred to were alleged to include "unfair and oppressive discrimination" by depriving some purchasers of the "natural advantage otherwise accruing to them from proximity to the factories of respondents"; "a substantial lessening of competition among respondents in all parts of the United States"; and the fixation and control of an arbitrary and substantial portion of the delivered cost of the product to any and every purchaser on a basis having no relation to differences in production, selling and actual transportation costs on particular sales.

8. Count II of the Commission's amended complaint incorporated the allegations of Count I with respect to the use of the zone delivered price system. It charged, among other things, that "systematic discriminations in net prices

against nearby customers and in favor of their more distantly located customers are inherent in the use'' of that system ''when sales are effected and the buyers pay in accordance with quotations of Matched delivered costs as made by each of the respondents * * * to their respective customers''; and that, when sales are made to customers located at or near the borders of adjoining or contiguous zones, each respondent ''charges, demands, accepts and receives higher prices from some purchasers than from other and competing purchasers in different zones and there is discrimination in the delivered costs of lead pigments to different purchasers by each of such respondents in addition to substantial differences in the mill net prices received by each of them.''

9. Beginning on January 15, 1945, hearings were held and evidence taken from time to time in various parts of the country before trial examiners appointed by the Commission. Subsequent to the issuance of the amended complaint, it was stipulated that the testimony and other evidence theretofore received in support of the original complaint (with certain specified exceptions) might be considered as part of the record under the amended complaint. Presentation of the Commission's evidence was completed on or about January 8, 1947. Evidence on behalf of petitioners herein and their co-respondents was thereafter taken and the hearings concluded on or about November 20, 1947.

10. On or about January 8, 1947, about the time the Commission completed the presentation of its evidence, petitioners moved that the Commission enter an order dismissing the amended complaint as against them. They contended that there was no purpose in continuing the proceeding and placing upon them the burden and expense of further defense since it affirmatively appeared that there was then no sufficient public interest to sustain the amended complaint as to them. In support of said motions, it was shown that petitioner Anaconda had never engaged in the manufacture or sale of lead pigments, the only products referred to in the amended complaint; and that petitioner International had permanently discontinued the manufacture and sale of lead pigments, had so advised the trade and had sold the only plant at which it had manufactured the lead pigments sold by it. On March 6, 1947, the Commission entered an order denying the motions to dismiss.

11. On or about December 26, 1947, petitioners filed

proposed findings and conclusions, together with their reasons therefor. On or about January 3, 1948, counsel supporting the complaint filed his proposed findings and conclusions, together with his reasons therefor, and on or about January 24, 1948 petitioners filed replies thereto. On January 7 and 12, 1948, oral argument with respect thereto was had before the Trial Examiner.

12. The Trial Examiner's Recommended Decision was filed on or about March 31, 1948. On or about May 20, 1948, petitioners and counsel supporting the complaint filed exceptions to various parts of the Trial Examiner's Recommended Decision and to his failure to include proposed findings and conclusions requested by them. On January 12, 1953, the Commission issued orders disposing of those exceptions to the Recommended Decision.

13. On or about July 15, 1948, counsel supporting the complaint filed his brief, and on or about November 12, 1948 petitioners filed their briefs. On May 19 and 20, 1949, oral argument was had before the Commission. On February 1 and 2, 1950, reargument was had before the Commission, its membership having changed since the prior argument.

14. On January 12, 1953, the Commission issued, and on January 15, 1953 served on petitioners, its Findings as to the Facts and Conclusion and its Order to Cease and Desist, which is the Order herein sought to be set aside. With it were filed an opinion by Commissioner James M. Mead, in which Commissioners John Carson and Stephen J. Spingarn concurred, and a dissenting opinion by Commissioner Lowell B. Mason. Commissioner Albert A. Carretta did not participate for the reason that oral argument on the merits had been held prior to his appointment to the Commission.

II.

Facts and Statutes Upon Which Venue Is Based.

15. Venue is based on the following facts and statutes:

(a) The only plant at which petitioner International manufactured the lead pigments sold by it, and from which said lead pigments were shipped, was located at East Chicago, Indiana, in this Circuit. The methods of competition and acts and practices, which the Commission's Order requires petitioners to cease and desist from using, were allegedly used in this Circuit, and the alleged violations complained of were allegedly committed in this Circuit.

(b) Section 5 (c) of the Federal Trade Commission Act, as amended, provides in part:

> "Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside."

Section 11 of the Clayton Act, as amended, provides in part:

> "* * * the Commission or Board may apply to the United States court of appeals, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, * * *
>
> "Any party required by such order of the Commission or Board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in the court a written petition praying that the order of the Commission or Board be set aside."

III.

Points on Which Petitioners Intend to Rely.

16. The Commission's Findings as to the Facts and Conclusion (except paragraph (b) thereof) and its Order herein sought to be set aside are, to the prejudice of petitioners, erroneous, without foundation in law or fact, unlawful and exceed the jurisdiction of the Commission. Petitioners' acts and practices were not to the prejudice or injury of the public or of petitioners' competitors, and they did not constitute unfair methods of competition in commerce or unfair or deceptive acts or practices in commerce within the intent and meaning of the Federal Trade Com-

mission Act or discriminations in price in violation of the provisions of Section 2 (a) of the Clayton Act, as amended. Without limiting the generality of the foregoing, petitioners assign the following errors and intend to rely on the following points:

With Respect to the Order Sought to Be Set Aside:

(a) The Commission's Order is not supported by its purported "Findings as to the Facts and Conclusion."

(b) The Order is unlawful and exceeds the jurisdiction of the Commission under Section 5 of the Federal Trade Commission Act and Section 2 (a) of the Clayton Act in that (1) there is no evidence that petitioners' acts and practices have been, or are or threaten to be to the prejudice or injury of the public or of any of petitioners' competitors or to constitute unfair methods of competition or unfair or deceptive acts or practices in commerce within the intent and meaning of the Federal Trade Commission Act; and (2) there is no evidence that the effect of the differences in price to different purchasers of lead pigments has been, or are or threaten to be substantially to lessen competition, or to tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such difference in price, or with customers of either of them.

(c) The Order is unlawful and exceeds the jurisdiction of the Commission in that it imposes restrictions on petitioners' respective "officers, agents, representatives and employees" who were not parties to the proceeding before it.

(d) The Order is unlawful and exceeds the jurisdiction of the Commission in that it abridges and nullifies petitioners' right to meet competition and unlawfully usurps the legislative functions and powers of Congress by limiting and proscribing beyond the Commission's power the methods of competition which petitioners may employ, and enjoins, proscribes and fetters petitioners' right to engage in free and fair competition. Without limiting the foregoing:

(1) The third ordering paragraph is unlawful and exceeds the jurisdiction of the Commission in so far as it prohibits each petitioner, individually and in the absence of concerted action, "from quoting or selling

lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another."

(2) The fourth ordering paragraph is unlawful and exceeds the jurisdiction of the Commission in so far as it prohibits each petitioner, individually and in the absence of concerted action, from selling at different prices without regard to the effects of such differences or to whether such differences may be justified under the provisions of Section 2 (a) of the Clayton Act.

(e) The Order is unlawful and exceeds the jurisdiction of the Commission in that there is no evidence that petitioners entered into, continued, cooperated in, or carried out any planned common course of action, understanding, agreement, combination, or conspiracy, or threatened so to do, with respect to doing or performing any of the things prohibited in subparagraphs 1 through 6 of the first ordering paragraph of the Order.

(f) The Order is unlawful and exceeds the jurisdiction of the Commission in that it enjoins methods of competition and acts and practices which are not specified in the amended complaint and are not within the issues raised by the pleadings.

(g) The Order is unlawful and exceeds the jurisdiction of the Commission in that it is so vague and indefinite as not to provide or constitute a standard of conduct by which petitioners can reasonably be expected to be governed in the conduct of their affairs.

With Respect to the Commission's "Findings As to the Facts".

(h) The purported "Findings as to the Facts" are erroneous and not supported by the evidence, are improper in form and substance, and are so incomplete, indefinite, speculative and argumentative as wholly to lack the requisites of findings of facts provided for by law and upon which any order herein may be based in that, among other things:

(1) The Commission has failed to consider and to make findings of fact as to all of the evidence that is material to all of the issues and has considered and made its findings based on only a small part of the evidence and has ignored and has made no findings based on large quantities of direct and uncontradicted evidence, in support of petitioners' position, which met, explained, contradicted or otherwise related to the evidence presented by the Commission.

(2) The extensive quotations of, excerpts from and references to testimony and exhibits are incomplete, misleading and do not fairly represent or characterize the evidence.

(3) Vague, ambiguous and misleading characterizations have been employed to raise implications and inferences not only not warranted or supported by the evidence, but directly contrary to the evidence.

(4) The Commission erred in giving any consideration or weight to or making any findings as to a large quantity of evidence relating to activities pursuant to or arising out of the National Industrial Recovery Act, the preparation and administration of or activities relating to the NRA Code, or action by the Code Authority and other matters connected with or arising out of NRA, on the ground that such evidence furnishes no support for any finding or inference as to any issue in this case.

(i) The finding, in the preamble to the Findings as to the Facts, that the "proceeding is in the interest of the public" is erroneous and not supported by the evidence.

(j) The Commission erred, in making its Findings as to the Facts, in treating both petitioners as one entity and in disregarding their separate, distinct and independent identities and operations, and such findings are erroneous, are not supported by the evidence, and are contrary to law. Without limiting the foregoing:

(1) The findings, in Paragraph One (c), that "The principal officers of respondents Anaconda and International have always been the same"; that "respondent International and the former Anaconda Lead Products Company were in fact mere operating divi-

ion for Review by Anaconda.

pondent Anaconda, with no substantial
tity of their own''; and that ''All of the
ndent International, of Anaconda Lead
npany, and of Anaconda Sales Company
these findings were for and in behalf of
naconda and such acts will hereafter be
ne acts of respondent Anaconda,'' are
l not supported by the evidence.

ractice, in the Findings as to the Facts,
o petitioners collectively as ''Anaconda''
such expressions as ''Anaconda (Inter-
''respondent Anaconda (International
Refining Company and the other sub-
naconda Copper Mining Company)'' and
ries of Anaconda Copper Mining Com-
or and on behalf of said respondent'' is
nd erroneous, is not supported by the
is contrary to law.

ndings are erroneous and not supported
ce to the extent that they state or imply
r Anaconda ever engaged, or is now
he manufacture, sale or distribution of
nents or did or performed any of the
ices which were the subject of the pro-

nission erred in failing to indicate which
and their co-respondents are claimed to
vidence to be connected with all or any
ndings, but has merely referred to ''re-
respondents,'' ''respondents herein,''
ndents,'' and similar ambiguous and in-
y, to imply the connection of all or some
ters referred to in a particular finding
g to designate, name or otherwise iden-
of them are actually connected with or
ected with said matters.

s are erroneous and not supported by
e extent that they state or imply that
tional (1) ever manufactured, sold or
ad pigments other than dry white lead
oil; or (2) ever manufactured, sold or
ad pigments prior to about October 31,
w, or has been since about September

1946, connected in any way with the manufacture, sale or distribution of any lead pigments.

(m) The findings and conclusion are erroneous and not supported by the evidence in so far as they state or imply that petitioners entered into, continued, co-operated in, or carried out any planned common course of action, understanding, agreement, combination, or conspiracy, or threatened to do so, or have done any of the things found to have been done in support of any such planned common course of action, understanding, agreement, combination, or conspiracy, as charged in the amended complaint or otherwise.

(n) The finding in Paragraph One (f), that petitioners "agreed to use [American Smelting and Refining Company's] daily quotations of lead prices as the basis for quoting spot carload prices on red lead and litharge" is erroneous and not supported by the evidence.

(o) The findings, in Paragraph Seven (a), that petitioners were members of the Lead Pigment Division of the Lead Industries Association and that said Division "was the medium through which the discussions and group actions which were destined to revolutionize the pricing practices and methods of the respondents, took place" are erroneous and not supported by the evidence.

(p) The finding, in Paragraph Seven (b), that petitioners or petitioner "Anaconda, by its subsidiaries" "participated actively in the entire series of meetings" thereafter referred to in the findings, is erroneous and not supported by the evidence.

(q) The finding, in Paragraph Ten (a), that "the meetings and discussions" referred to, "during the period from July 1933 to June 1934, resulted in understandings and agreements" between either petitioner and any of its co-respondents to do any of the things thereafter referred to in the findings, is erroneous and not supported by the evidence.

(r) The implication, in Paragraph Ten (b), that petitioners participated in any discussions or reached "agreements for concerted action," and the finding in that paragraph that the discussions "were actually engaged in for the purpose, and certainly they had the effect, of cooperatively revising the pricing practices in the industry in a manner far beyond the sanction of the National Industrial Recovery Act" are erroneous and not supported by the evidence.

(s) The opinion and finding, in Paragraph Ten (b), that there is no foundation in fact to the contention that the alleged "price fixing activities were solely in response to Governmental demands and that their meetings were devoted exclusively to efforts to formulate a supplemental code of fair competition under the National Industrial Recovery Act" are erroneous and not supported by the evidence.

(t) The findings, in Paragraph Eleven. are erroneous and not supported by the evidence to the extent that they imply that petitioners in 1933 and 1934 devised, or participated in the devising of, the "uniform zone pricing system" there described, or that petitioners at any time thereafter followed that system.

(u) The findings, in Paragraph Twelve, are erroneous and not supported by the evidence to the extent that they imply that the consignment arrangement employed by petitioner International or by Anaconda Lead Products Company in the sale of lead-in-oil was the same as, or in an way patterned upon, the consignment plan used by any other respondent.

(v) The finding, in Paragraph Thirteen, that petitioners, from 1934 to the present time, "have followed the pricing practices and have adhered to the terms and conditions for the sale of lead pigments," which the Commission claims were "agreed upon in 1933 and 1934," is erroneous and not supported by the evidence.

(w) The finding, in Paragraph Thirteen (a), that "from and after the early part of 1934 the pricing of lead pigments in accordance with the zone delivered pricing system" described in the findings "was the accepted practice" of petitioners is erroneous and not supported by the evidence.

(x) The finding, in Paragraph Fourteen, is erroneous and not supported by the evidence to the extent that it finds that petitioners adhered to "the trade practices and pricing methods" claimed to have been "agreed upon by them in 1933 and 1934," and to the extent that it implies that petitioners in fact "agreed upon" any such trade practices and pricing methods.

(y) The findings, in Paragraph Fourteen (c), are erroneous and not supported by the evidence in so far as they state or imply that any subsidiaries of petitioner Anaconda acted for or on behalf of said petitioner, or that such subsidiaries or either petitioner herein adhered to the "zone methods and pricing policies" claimed to have been agreed upon in connection with sales of white lead-in-oil and dry white lead, or "followed" from the code period to 1946 the practices claimed to have been "adopted in 1933 and 1934," or that the testimony of an official of petitioner International demonstrates such "adherence," or that petitioners' "only deviation * * * from the agreed upon practices was in connection with sales of white lead-in-oil," or that resale prices to consumers and painters were "set."

(z) The findings, in Paragraph Fifteen, with respect to the "combined results" of the claimed use of the described practices, are erroneous and not supported by the evidence, as are the further findings and conclusions with respect to the claimed "continuous rigidity and uniformity in prices, terms and conditions of sale," "understandings and cooperative activities," "mutual understanding and acceptance [on the part of the respondents] of an over-all plan and an intention on the part of each of the respondents to follow it," and "conspiracy on the part of all of the respondents," and the claim that "each of the respondents has gone far beyond the requirements of competition, and beyond the necessities imposed by National's price leadership," and that their practices "could not have resulted from other than agreement and conspiracy" are erroneous, are not supported by the evidence, and are contrary to law.

(aa) The further findings, opinions and conclusions in Paragraph Fifteen, with respect to the contention that the practices alleged to have been employed by respondents are not subject to corrective action by the Commission by reason of the provisions of Section 5 of the National Industrial Recovery Act, are erroneous, are not supported by the evidence, and are contrary to law.

(bb) The finding, in Paragraph Eighteen, that each of the petitioners "after 1934 sold its white lead, both dry and in oil, at the same delivered prices to all customers in the par or base zones," with certain stated differentials "added to such prices on sales to all customers in locations outside of the par zones"; the further findings and conclusions with respect to the "competitive effect of these differences in sales to purchasers in the vicinity of zone borders" and the implication that petitioners' different prices for white lead "involved discriminations as between purchasers of such products located in the different zones" who "were shown to be in competition with each other" are erroneous, are not supported by the evidence, and are contrary to law.

(cc) The finding, in Paragraph Nineteen, that the "differential of one-quarter cent per pound between carload and less-than-carload shipments of dry white lead allowed by each of the respondents in the producing areas was discriminatory" is erroneous and not supported by the evidence.

(dd) The findings and conclusions, in Paragraph Twenty (a), (b) and (c), with respect to the effects of employment of and justification for "inter-zone prices of lead pigments," "differing prices" for different quantities, and the allowance of a one-quarter cent per pound on shipments of dry white lead in carload quantities to purchasers in the proximity of producing plants are erroneous, are not supported by the evidence, and are contrary to law.

(ee) The opinions, findings and conclusions, in Paragraph Twenty-one (a) and (b), with respect to the "tendency, capacity and effect" of the alleged "combinations, conspiracies, agreements and understandings" and "acts, practices and methods performed thereunder and in connection therewith," and with respect to the "effects" of the alleged "discriminations in price" and the "additional effects of the aforesaid price discriminations" are erroneous, are not supported by the evidence or by the findings, and are contrary to law.

With Respect to the Commission's "Conclusion".

(ff) The conclusion that the alleged "combinations, conspiracies, agreements and understandings" and "acts and practices pursuant thereto and in connection therewith" have constituted "unfair methods of competition in commerce and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act" is erroneous, is not supported by the evidence or by the findings, and is contrary to law.

(gg) The conclusion that the alleged "discriminations in price by each of the respondents" have constituted violations of Section 2 (a) of the Clayton Act, as amended, is erroneous, is not supported by the evidence or by the findings, and is contrary to law.

17. Petitioners also assign as error and intend to rely on the Commission's error in denying, in its Order issued on or about March 6, 1947, their motions to dismiss the amended complaint as to them.

18. Petitioners also assign as error and intend to rely on the Commission's error, in its Orders issued on or about January 12, 1953, in denying various exceptions filed by petitioners to the Trial Examiner's Recommended Decision and in granting certain exceptions filed by counsel supporting the complaint.

IV.

Prayer for Relief.

Wherefore, your petitioners pray that:

1. A certified copy of this petition be forthwith served by the Clerk of this Court upon the Federal Trade Commission and that said Commission be required forthwith, in conformity with the statute, to certify and file in this Court a transcript of the entire record in the proceedings aforesaid, including all the evidence taken and the Findings as to the Facts and Conclusion and the Order to Cease and Desist of the Commission.

2. The Federal Trade Commission be required, further, to certify and file in this Court the Trial Examiner's Recommended Decision and the exceptions duly filed thereto by and on behalf of petitioners and their co-respondents.

3. This Court review the entire record in the proceeding, including all the evidence taken, the several objections, exceptions and motions made on behalf of petitioners and their co-respondents in the course of the proceedings before the Trial Examiner, the Trial Examiner's Recommended Decision, the exceptions filed thereto by and on behalf of petitioners and their co-respondents, the motions made by and on behalf of the petitioners and their co-respondents before the Commission and the rulings thereon by the Commission, the Findings as to the Facts, Conclusion and Order to Cease and Desist, and that this Court set aside, vacate and annul said Findings, Conclusion and Order and order the Commission to dismiss the amended complaint issued by it against your petitioners.

4. Your petitioners have such other, further and different relief as is just.

Dated: March 10, 1953.

Anaconda Copper Mining Company,
Petitioner,
By (Signature illegible),
Secretary.

International Smelting and Refining Company,
Petitioner,
By (Signature illegible),
Secretary.

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Of Counsel.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

National Lead Company, *Petitioner,* *vs.* Federal Trade Commission, *Respondent.*	No. 10839.
The Sherwin-Williams Company, *Petitioner,* *vs.* Federal Trade Commission, *Respondent.*	No. 10840.
The Eagle-Picher Company, *et al.*, *Petitioners,* *vs.* Federal Trade Commission, *Respondent.*	No. 10841.
Anaconda Copper Mining Co., *et al.*, *Petitioners,* *vs.* Federal Trade Commission, *Respondent.*	No. 10842.

STIPULATION.

(Filed July 9, 1953. Kenneth J. Carrick, Clerk.)

Whereas, the record in this case contains more than 4,900 pages of documentary exhibits; and

Whereas, most of the important exhibits will be included in the printed record or presented to the Court for consideration in accordance with the provisions of Rule 14(c) of the Rules of the Court; and

Whereas, the record contains certain bulky exhibits such as series of price lists, invoices, and tabulations, the reproduction of which would be expensive and impracticable.

Now, Therefore, it is stipulated and agreed by and between the petitioners and the respondent that, subject to the approval of the Court, documentary exhibits not included in the printed record or submitted in accordance with the provisions of Rule 14(c) may nevertheless be referred to in briefs and oral argument by any party.

National Lead Company,
By Miles G. Seeley, RWB.

The Sherwin-Williams Company,
By Miles G. Seeley, RWB.

The Eagle-Picher Company,
By Brown, Fox, Blumberg & Markheim.

Anaconda Copper Mining Co.,
By (Signature illegible).

Federal Trade Commission,
By Robert B. Dawkins,
Assistant General Counsel.

Dated: July 6, 1953.

3887 In the United States Court of Appeals for the Seventh Circuit

OCTOBER TERM AND SESSION, 1955

No. 10839

NATIONAL LEAD COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 10840

SHERWIN-WILLIAMS COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 10841

THE EAGLE-PICHER COMPANY, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 10842

ANACONDA COPPER MINING COMPANY, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

PETITIONS FOR REVIEW OF ORDER OF THE FEDERAL TRADE COMMISSION

December 1, 1955

Before LINDLEY, SWAIM and SCHNACKENBERG, Circuit Judges

Opinion

LINDLEY, Circuit Judge. Petitioners seek to set aside a cease and desist order entered by the Federal Trade Commission
3888 on an amended complaint charging them and the Glidden Company with violation of Section 5 of the Trade Commission Act, 15 U. S. C. § 45 (a), and Section 2 (a) of the Clayton

Act, as amended by the Robinson-Patman Price Discrimination Act, 15 U. S. C. § 13. Count I of the complaint, filed April 12, 1946, charged that petitioner, National Lead Company, had violated and was violating "Section 5 * * * by monopolizing, attempting to monopolize and acting to control the sale of lead pigments and the prices thereof in commerce", and that all named parties were violating the Act by combining and conspiring "among themselves and with each other" for the purpose and with the effect of eliminating competition in prices and terms of sale of lead pigments in commerce. Count II charged all parties with discrimination in prices by means of various zone pricing methods and quantity and functional discounts.

Various attacks are made upon the validity of the order, or portions thereof, addressed to the alleged insufficiency of the evidence to support the findings and to the scope of the order. Some of the questions posed apply only to a single petitioner, while others are applicable to all.

I. Propriety of the Order Against Anaconda Copper

We shall first dispose of the contention of petitioner Anaconda Copper Mining Company that the order cannot stand as to it, based on its assertion that it has never engaged in the industry as a producer, distributor or otherwise. In 1919, Anaconda Lead Products Company, a wholly owned subsidiary of Anaconda Copper, began production of lead pigments. International Smelting & Refining Company, another wholly owned subsidiary, acquired all the assets of Anaconda Lead in 1936 and thereafter, until 1946, engaged in production of certain lead pigments which were sold by it and by Anaconda Sales Company, a third subsidiary of Anaconda Copper. International was a respondent in the proceeding and is one of the petitioners here. Anaconda Lead (dissolved in 1936) and Anaconda Sales are not parties.

At the conclusion of the evidence in support of the complaint, Anaconda moved to dismiss as to it urging that the evidence failed to show that it had ever engaged in manufacture or sale of the products. The Commission denied the motion, holding that Anaconda had been engaged in the pigments field "through its wholly owned subsidiaries." The Commission found that International and Anaconda Lead "were in fact mere operating
3889 divisions of respondent Anaconda, with no substantial separate identity of their own", and that all their acts and those of Anaconda Sales were those of Anaconda. On this basis, the cease and desist order was directed against Anaconda Copper.

We have searched in vain for evidence of a substantial character to support the findings on this phase of the case. Though the record shows that International, Anaconda Lead and Anaconda

Sales are wholly owned subsidiaries of petitioner and in September 1947, at a date after International had withdrawn from the field, Anaconda, Anaconda Sales and International were controlled by interlocking boards of directors and officers, there is no evidence which militates against the existence and activity of these subsidiaries as separate entities at any time pertinent to this inquiry. Thus, though the evidence tends to prove the incidents of a parent-subsidiary relationship, a fact which has never been in dispute, the closely correlated operation of International and Anaconda Sales reflects no sinister connotation of domination by their common parent, keeping in mind that the only function for which Anaconda Sales was organized was to sell products produced by International in certain western states in which the latter was not licensed to do business.

These sparse gleanings from the record fail to support the Commission's finding of substantial identity. To come within the applicable rule, there must be evidence of such complete control of the subsidiary by the parent as to render the former a mere tool of the latter, and to compel the conclusion that the corporate identity of the subsidiary is a mere fiction. Press Co. v. N. L. R. B., 118 F. 2d 937, at 946–947, cert. denied 313 U. S. 595 (CA–DC); Owl Fumigating Corp. v. California Cyanide Co., Inc., 30 F. 2d 812 (CA–3). Such a finding has no substantial support in this record. The complaint should have been dismissed as to this petitioner.

II. The Conspiracy Findings

The principal question raised by the remaining petitioners is whether the Commission's findings that the parties conspired to fix and control the prices and bases for sale of lead pigments is supported by substantial evidence. The parties are National Lead Company, Eagle-Picher Lead Company, together
3890 with its affiliate Eagle-Picher Sales Company, The Sherwin-Williams Company and International Smelting & Refining Company. The Glidden Company, though not a petitioner, was also charged as a coconspirator. All are engaged in the production, sale and distribution of lead pigments. National is the leader and produces some 50% or more of the domestic production. Its nearest competitor, Eagle-Picher, accounts for a substantial part of the remaining 50%, while each of the other companies occupies a relatively minor position in the industry.

The three principal products included in the lead pigments category are dry white lead, white lead-in-oil[1] and lead oxides, red lead and litharge. White lead is used principally as a base in paints and its chief market lies in the demands of manufacturers of mixed paints. White lead-in-oil is a semimixed paint consumed principally by the individual painter or painting contractor who prefers to mix his own paints. The oxides are used mostly by the battery industry as the basic constituent in the manufacture of plates.

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[1] This term, when used herein, includes all the so-called keg products, red lead-in-oil, etc. The keg products are used principally as pigments for paints, and marketing practices for these products are the same as those employed in marketing white lead-in-oil.

Throughout the record, a clear distinction is drawn between the several parties' respective actions in sales of each of the three kinds of pigments. Although the evidence as to practices in each of these fields differs, there are, nevertheless, certain threads of similarity in the methods employed by the various petitioners which render it practical to treat the conspiracy question as a unit, pointing out, wherever necessary, the applicability or inapplicability of a particular evidentiary segment to one or more of the several petitioners. Each engages in the production of white leads and oxides, except that International confines its activities to white leads and has never produced oxides.[2] Unless otherwise noted, all facts narrated and all statements pertinent thereto apply to all petitioners alike, except that factual statements and discussions which relate solely to the oxides apply to all petitioners except International.

The facts as found by the Commission follow. Prior to 1933 no standard pricing system was employed in the industry. Each producer established its own practices as to prices and conditions of sale. For the most part, with respect to delivered sales prices, each employed its own system of pricing, based on shipping differentials from centrally located warehousing points. For example, National's lists from 1920, until 1933, include some 589 different cities in 40 states, which it, from time to time, used as free delivery or equalization points. The practices of other petitioners differed quite widely.

In 1933, however, each petitioner participated in discussions looking to the adoption of a code of fair competition under the provisions of the National Industrial Recovery Act. These discussions occurred in two committees set up by the Lead Industries Association, one to draft a code for white lead-in-oil marketing and the other a code for the dry pigments, including dry white lead. Discussion within each group dealt with a wide range of subjects relating to prices, freight, quantity and quality differentials and terms and conditions of sales. Tentative agreements, at least, were reached as to terms of the proposed code, including an agreement to sell pigments only on a delivered price basis.

With respect to white lead-in-oil, prices were to be based on a system of par and premium zones, sales were to be made by agency or consignment methods of merchandising, and premium differentials in steps amounting to ¼ cent per pound on an ascending scale were to be added on sales in 50, 25 and 12½ pound containers over the price based on the norm of a 100 pound container. For dry white lead, a zone system of pricing was approved, as was a ¼ cent per pound premium to be added to less-than-carload shipments of less than 20 tons. In effect, the committee agreed not to adopt uniform conditions for sales, on advice of counsel that to do so might amount to a violation of the antitrust laws. Instead, an alternative course was suggested, namely, that one or more of the parties put into effect the uniform terms under discussion, which the others might follow. Agreements in the group considering oxide sales dealt with separate zone systems for carload and L. C. L. sales, including a standard price for carload sales pegged on the cost of pig lead as shown by daily quotations 3892 of the American Smelting & Refining Company,[3] a price for L. C. L. sales based on a premium differential over the carload price and a premium differential to be added to the price of red lead containing a Pb_3O_4 content of 95% or higher.

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[2] International withdrew from the pigments field entirely in 1946. Its contentions based on this fact are subsequently considered herein.

Certain of these provisions were included in the code, while others apparently never reached that stage. The code, though adopted, never became operative, however, inasmuch as petitioners, immediately upon its adoption, sought and obtained exemption from its terms.

The Commission found that petitioners, during the NRA discussions, agreed to "cooperatively revise the pricing practices" in the industry in such a manner as to constitute a violation of the Trade Commission Act, and effectuated that agreement by adopting uniform methods of pricing and sales throughout the United States. Practices found to have been put in effect pursuant to that plan in the sale of white lead-in-oil follow. Beginning in early 1934, petitioners began pricing the product on a uniform, delivered card price basis in a par zone enclosing all the area bounded roughly by the western borders of the States of Wisconsin and Illinois and by the southern boundaries of the States of Kentucky, West Virginia, Maryland and Delaware, but including the City of Saint Louis, Missouri, and the San Francisco area of California. The remainder of the nation was divided into some 7 premium zones in which premiums ranging from 12½ cents to $1.00 per cwt. were added to the par zone selling price. About the same time, petitioners, except Sherwin-Williams, adopted a consignment method of selling, under which stocks were consigned to dealers to be sold at the standard card price, plus premiums, if any, on a commission basis. Thirdly, a quantity differential was imposed upon sales in container sizes

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[3] This Company will be referred to as AS & R hereafter.

unds as follows: ¼ cent per pound on 50 pound,
nd on 25 pound and ¾ cent per pound on 12½
s. One variation was noted by the Commission,
l, Sherwin-Williams and Glidden systematically
prices to dealers for white lead-in-oil, at about 25
elow that fixed for National's "Dutch Boy" and
"Eagle" brands. It found, however, that the
etitioners was offered to the public at identical
he 25 cent reduction of these companies in dealers'
ce intended to encourage dealer incentive to pro-
products in competition with the widely known
ted "Dutch Boy" and "Eagle" brands.

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ct to sales of dry white lead. All sales were made
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es in states west of this boundary. Uniformly,
ential of 25 cents per cwt. was added to the price
of less than 20 tons.

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differentials of $1.50 and $2.50 per cwt. over
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. sales of five tons or more and of 90 cents per
oad charges for sales of less than five tons. Uni-
rices of 25 and 50 cents per cwt., based on lead
ablished for red lead containing a Pb_3O_4 content
ve. As to sales of all dry products, including
the Commission found that petitioners adopted
1% cash in 10 days, net 30 days or 2% cash in 10
; and that at any given time the terms as quoted
were identical.

ption of Sherwin-Williams, petitioners do not
ng that they employed uniform zone pricing sys-
espect they question only the sufficiency of the
rt the findings that petitioners adopted the zone
to agreement and that all adopted it at or about
The most that can be said of these contentions

is that in some respects the evidence is conflicting. It includes the testimony of petitioners' officers, price cards, invoices and other exhibits on which the Commissions could well find that all petitioners adopted the zone system of pricing shortly following the NRA discussions. The Commission has resolved the conflict in the evidence adversely to petitioners and it is beyond our province to substitute our judgment in that respect.

The argument of Sherwin-Williams that it did not employ the zone system of pricing must also fail. That company employs, for example, an elaborate list of cities throughout the area in which it does business showing many of them as equalization, or par, points, and others as localities warranting, as they say, premium prices ranging from 12½ to 75 cents per cwt. on sales of white lead-in-oil. Comparison of this list with the zone maps employed by the other petitioners reveals that the par and premium city listings conform precisely in physical location and scale of premium charges with the established zone system of other petitioners. In view of this evidence, we cannot say that the finding that this petitioner participated in and used the uniform zone system lacks substantial support.

The most serious attack lodged against the conspiracy findings is that there is no substantial support for a finding of existence of an agreement among the parties to adopt uniform prices and terms of sale. The corollary of that position, viz, that the striking similarity between prices, practices and the conditions of sale fixed by each petitioner is merely the effect of conscious parallelism on the part of petitioners in the sale of products of standard quality and constituent content, is likewise advanced. Although submitted as separate questions, we think the two issues so inextricably related as to require that they be treated together.

Although there is no direct evidence as to formal agreement on the part of petitioners to adopt the zone system and uniform pricing practices, the finding does not necessarily fall. A conspiracy may be proved by circumstantial evidence. Triangle Conduit & Cable Co. v. FTC, 168 F. 2d 175, aff'd. sub. nom Clayton Mark & Co. v. FTC, 336 U. S. 956 (CA-7); Allied Paper Mills v. FTC, 168 F. 2d 600 cert. denied, 336 U. S. 918 (CA-7). As we observed in Fort Howard Paper Co. v. FTC, 156 F. 2d 899, at page 906 (cert. denied 329 U. S. 795):

"Very pertinently it was pointed out in the Malsters case [United States Malsters Ass'n v. FTC (CA-7)], 152 F. 2d at pages 162 and 164: 'As might be expected, there is little, if any, direct proof of an express agreement. Such proof, however, is not necessary. The agreement may be inferred from the acts and conduct of the parties as well as circumstances pertinent thereto.' "

3895 And, in Milk & Ice Cream Can Institute v. FTC, 152 F. 2d 478, we said at page 480:

"In determining whether such finding [of an agreement to fix prices] is supported, it is not necessary, as argued, that there be direct proof of agreement. Such agreement may be shown by circumstantial evidence, and the Commission, the same as any other fact finding body, is entitled to draw any reasonable inference from the circumstances of the situation."

There is before us evidence that petitioners met in 1933 and 1934 in the committees of the Lead Industries Association and discussed and appraised all elements of pricing and sales practices affecting the industry. The minutes of those meetings and the correspondence between the parties, or between certain of them and officers of the committees, support the conclusion that there were wide areas of tentative agreement upon revisions of such practices. As previously stated, some of these tentative agreements were included in the code adopted in May of 1934. We have found that the evidence sustains the finding that all petitioners did, in fact, adopt the zone system of pricing in May 1934 or shortly thereafter. Price cards and other exhibits tend to show that zoning, and other aspects of uniform pricing, were uniformly adopted practically simultaneously by all petitioners and that changes in certain details from time to time have been put into effect by all petitioners practically simultaneously. The inference of agreement, if not necessarily impelled by this evidence, is certainy a reasonable one which the Commission as the trier of fact was entitled to draw therefrom. Milk & Ice Cream Can Institute v. FTC, supra, at 480; Fort Howard Paper Co. v. FTC, supra at 906-7; Allied Paper Mills v. FTC, supra at 607. Our language in the latter case at page 607 is pertinent, to wit:

"We canot say that the Commission's inferences are unreasonable. The petitioners did with varying uniformity use the zoning system of price quoting, and the existence of this plan which equalizes delivered prices of competitors having widely different costs at a given destination, is strong evidence in itself of an agreement to use such plan. * * * Moreover, a uniform participation
by competitors in a particular system of doing business,
3896 where each is aware of the others' acts and where the effect
is to restrain commerce, is sufficient to establish an unlawful conspiracy. William Goldman Theatres, Inc. v. Loew's, Inc., 3 Cir., 150 F. 2d 738, 745."

It is unimportant, we think, that this record does not disclose a closely knit operation by petitioners under a central information gathering and disseminating body as was the fact in such cases as FTC v. Cement Institute, 333 U. S. 683; United States v.

Socony-Vacuum Oil Co., 310 U. S. 150, and the Milk Can Institute case, supra. The absence of this aspect of many price fixing agreements may indicate nothing more than that the very small number of competitors involved in the field rendered needless such a watch-dog agency.

Petitioners, to refute the finding of conspiracy, rely, also, on evidence of sales prices which varied from the card prices. This, it seems to us, is merely an invitation to weigh the evidence and redetermine the facts. However, assuming arguendo that the question is properly ours to decide, it is clear that such off-card sales as the record discloses represent only a minute percentage of the hundreds of sales reflected in invoices included in the record. And, in the oxides field, such sales represent substantially uniform price concessions to large battery manufacturers to discourage them from producing their own supplies of oxides. Furthermore, it is clear that a finding of unbending price uniformity is not a requisite of a finding of conspiracy to control prices, but that any device which has the purpose and effect of fixing prices to consumers is an illegal restraint of trade. United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 222–3, and "it is not important that the prices fixed were not fixed in the sense that they were uniform and inflexible." Allied Paper Mills v. FTC, 168 F. 2d 600, 607 (CA–7). The same principle applies to evidence that petitioners' bids on government contracts frequently were not uniform. We cannot say that the inference of agreement cannot stand in the face of such evidence.

What has been said with reference to agreement disposes in part of the conscious parallelism argument. Petitioners contend that National is the price leader in the field and that the other petitioners merely meet its prices in order to stay in business.
3897 While parallel business behavior among competitors is not illegal per se, Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U. S. 537, 541, we do not believe the protective mantle of "conscious parallelism" can clothe, with immunity a system employed by substantially all members of an industry whereby all offer their products for sale at any given time and at any given point throughout the nation at identical prices, without regard to differences in shipping costs. See Allied Paper Mills case, supra at 607; Fort Howard case, supra, at 907; Milk Institute case, supra at 483. This pricing structure seems so arbitrary and artificial as to negative an inference of innocent parallel behavior and to require an inference of at least tacit prearrangement, in view of the record disclosures that all petitioners participated in discussions at which they explored the advantages of the very pricing practices which shortly later they uniformly adopted. American Tobacco Co. v. United States, 328 U. S. 781,

809; Interstate Circuit, Inc. v. United States, 306 U. S. 208, 226-227; Allied Paper Mills v. FTC, supra at 607-8.

Closely related to the parallel behavior argument is Eagle-Picher's assertion that, although it systematically matched National's pricing and sales practices, it nevertheless competed vigorously with the latter by supplying its customers with technical assistance and other additional services. In view of our conclusion that the finding of an agreement is justified, it is a sufficient answer to this argument to reaffirm the well settled postulate that it is unlawful for competitors, by agreement, to block off any of the normal channels of competition with the purpose of establishing identical prices for products of like grade, even though other facets of normal competition may remain unfettered. FTC v. Cement Institute, supra; United States v. Socony-Vacuum Oil Co., supra. This principle rests on the view that the purchasing public is entitled to an opportunity to bargain with competing firms with regard to purchase prices of products of like quality.

III. Price Discrimination

Under Count II of the complaint, the Commission found that petitioners and Glidden were guilty of price discrimination in the sale of lead pigments in violation of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C.
3898 § 13. Specifically, it found that the zone and quantity differentials were unlawful, except that the carload discount on dry white lead was justified by cost factors on shipments made by rail.

The principal attack on these findings is that there is no substantial evidence of a probability that such price differentials would have an adverse effect on competition between petitioners' various customers. Petitioners argue that the zone boundaries for each type of pigment follow natural trade barriers, that the evidence does not support the finding that competition in fact existed between dealers in the several zones and that the zone and quantity differentials are so insignificant as to negate any effect on competition between purchasers of petitioners' products.

In view of the zealous contention, bordering on an argument that the Commission must prove concretely that petitioners' price differentials have had an unlawful effect on competition, it is well to refer to the test by which such findings must be measured. Evidence of a probability that discrimination in price between competing purchasers will have the effect of injuring competition is sufficient to sustain finding on a § 2 (a) violation. As the Supreme Court said, in Corn Products Refining Co. v. FTC, 324 U. S. 726, 738, the statute "does not require a finding that the discriminations in price have in fact had an adverse effect on competition.

The statute is designed to reach such discriminations 'in their incipiency' before the harm to competition is effected. * * * Cf. Standard Fashion Co. v. Magrane-Houston Co., 258 U. S. 346, 356–357. But, as we held in the Standard Fashion case, supra, with respect to the like provisions of § 3 of the Clayton Act, prohibiting tying clause agreements, the effect of which 'may be to substantially lessen competition' the use of the word 'may' was not to prohibit discriminations having 'the mere possibility' of those consequences, but to reach those which would probably have the defined effect on competition." And in FTC v. Morton Salt Co., 334 U. S. 37, 47, the Court again defined the test in these words: "the Commission is authorized by the Act to bar discriminatory prices upon the 'reasonable possibility' that different prices for like goods to competing purchasers may have the defined effect on competition." Cf. Corn Products Co. v. FTC, supra at 742. When the evidence of record is considered in the light of this test of a reasonable possibility of injury to competition, we must conclude that most of the Commission's findings of § 2 (a) violations are substantially supported.

3899 With respect to white lead-in-oil sales, the Commission found that petitioners discriminated in price in favor of certain dealers by selling their products at a single price within a par zone and at premiums above such price ranging from 12½ cents to $1.00 per cwt. to dealers located outside the zone. It found that these differentials constituted illegal discriminations which tended to injure competition between competing dealers located near the boundaries of adjoining zones.

Petitioners urge that the zone boundaries follow natural trade barriers, and that there is no evidence that dealers do, in fact, compete across those zonal boundaries, inasmuch as the product is marketed by them only locally, as a semimixed paint, to individual painters.

The evidence does tend to indicate, however, that competition is keen between dealers in paint products including white lead-in-oil. Furthermore, the evidence tends to show also that there is more than a reasonable possibility that competition would be likely to cross the arbitrary zonal walls which petitioners have erected. We need only refer to one phase of the proof in this respect, namely, that these zonal boundaries dissect 10 states, in some instances placing a single city or metropolitan area in a preferred zone status over the remainder of the state in which it is located. Illinois, Wisconsin and Kentucky are largely in a par zone, but substantial areas in the western part of each are in the 12½ cent premium zone, while the city of Saint Louis is segregated from the remainder of the State of Missouri in a par as contrasted to a 12½ cent status respectively. The cities of San Francisco, Oakland and Berkeley are par territory, while the remainder of California is in a 25 cent zone. The area immediately encompassing the cities of Omaha, and Lincoln, Nebraska, and the cities of Atchison, Leavenworth and Kansas City, Kansas, are in the 12½ cent zone as contrasted to a 25 cent status for the remaining area of their respective states. The States of Oregon and Washington are divided roughly equally between the 25 and 50 cent zones. Finally, a zonal boundary approximating the location of the Appalachian barrier separates the 25 cent zone of western Virginia from the 12½ cent status of the eastern portion of the State.

With the possible exception of the last mentioned state, the record impels us to conclude that the barriers which
3900 dictated the location of the zonal boundaries were those
due to the location of plants of one or more of petitioners and to possibly other considerations known only to the trade. The inference that this division probably would have the deleterious effect on competition which § 2 (a) proscribes is certainly a reasonable one which the Commission as the trier of the facts was entitled to draw from the evidence before it.

With respect to dry white lead sales, the Commission found that petitioners had discriminated in price by offering their product for sale to all customers within a par zone at a price 25 cents per cwt. below that offered to dealers outside the zone. It found also that the 25 cent carload-L. C. L. differential constituted an illegal discrimination against small purchasers, where delivery was made by local carriers, but found that this differential was a justified cost factor on shipments made by rail. Petitioners challenge each of the adverse findings.

We fail to find in the record any evidence supporting the finding of competitive injury resulting from the zone differential. Petitioners employ two zones in marketing this product, a par zone including all states east of the eastern borders of Montana, Wyoming, Colorado and New Mexico. The states west of this line are in the 25 cent per cwt. premium zone. While there is substantial evidence of a highly competitive relationship between mixed paint manufacturers, the principal consumers of dry white lead, there is no evidence that competition does in fact exist between those in the eastern par zone and those in the Rocky Mountain-Pacific Coast premium zone: To this extent the Commission's order is without basis in fact.

But there is no merit to petitioners' contentions relative to the quantity differential. The evidence tends to indicate, and the Commission found, that a large proportion of mixed paint manufacturing is centralized in and around Chicago, Saint Louis and other metropolitan districts; that one or more of petitioners operate white lead plants in each of these areas; that shipments to such manufacturers are generally by local cartage, and, finally, that the 25 cent per cwt. premium for L. C. L. shipments bears no reasonable relationship to added costs incurred in such shipments. The reasonable probability of injury to competition is certainly a justifiable inference which the Commission was entitled to draw from this showing.

3901 With respect to lead oxides, the Commission found that petitioners, except International, discriminated in price in favor of certain customers as follows: by selling carload lots to all customers in a par zone at a uniform delivered price 25, 50 or 75 cents per cwt. below that accorded to purchasers in each of three premium zones; by a uniform base price of $1.50 for litharge and $2.50 for red lead over AS & R's New York quotation for pig lead and adding the applicable zone differential thereto; and by charging different prices for oxides in carload and L. C. L. purchases, by adding to the carload price 40 cents per cwt. for L. C. L. purchases of more than 5 tons and 90 cents per cwt. on those of less than 5 tons. The Commission found further that the oxides are used principally by the storage battery industry, which is composed of some 200 manufacturers ranging in size from relatively small operators to industrial giants; that this is a highly competitive industry in which the little manufacturer competes not only against Exide, Willard and other large producers, but also against Sears Roebuck and other large mail order and chain store retailers; that each of the price differentials alluded to added as much as 12 cents to the cost of production of a battery, and that an increase in cost of 5 to 10 cents per battery might, and did, during a substantial period of time involved herein, represent the difference between a profitable operation and a losing one on some types of batteries. The most favorable light which the record affords to petitioners is that the evidence as to the fact of competition and the effect of these differentials thereon is conflicting. Consequently, as that conflict has been resolved adversely to petitioners by the triers of fact, we may not substitute our judgment on this phase of the case.

We observe briefly the argument, which applies to all pigments involved, that the price differentials were such an insignificant factor that no threat of adverse effect on competition can be spelled out. For example, the added unit costs of up to 8 cents per gallon of mixed paint and of up to approximately 12 cents per storage battery are singled out. We believe, however, that this raises a question peculiarly within the competence of the Commission, and that its determination thereon, as an expert administrative body, should be accorded full respect. The Commission was conceived and created by Congress as an agency espe-
3902 cially informed and equipped to act to sustain the vigor of
the economic pulse. Perhaps in no other field is the economic pulse, as envisaged in § 2 (a), so critically reflected as it is in the close relationship between added unit cost differences

brought about by discriminatory pricing of raw components entering into the unit and the effect of such cost on competition within an affected industry. The courts are extremely reluctant to set aside the Commission's finding that a discriminatory price, though small, adversely affects the health of competition. See FTC v. Cement Institute, 333 U. S. 683, 726. It is noteworthy also, with respect to the § 2 (a) determinations, that Commissioner Mason, who filed a vigorous dissent against other portions of the Commission's order, concurred fully in the parts pertaining to price discrimination.

IV. Incipient Monopoly

The complaint charged, and the Commission found, that National had, beginning in 1891, engaged in acts tending toward substantial control of and a monopoly in the pigment industry in violation of Section 5 of the Trade Commission Act. Accordingly, it ordered the company to cease and desist from acquiring or attempting to acquire any ownership of the capital stock, or properties of any of its competitors in the lead pigments field.

In this respect, National asserts that the Commission has no power under Section 5 to enjoin acquisitions of stock or assets which do not constitute a violation of Section 7 of the Clayton Act, 15 U. S. C. § 18. Irrespective of the Commission's power under § 5, we think the order so wanting in evidentiary support and so arbitrary that it cannot stand in any event. Therefore, we do not consider the § 5 question.

The Commission found that National was incorporated in 1891, effecting a merger of some 16 companies engaged in pigment production, and that between that date and the mid 1930's it acquired the properties of more than 30 other producers. From 1931 to about 1935, National made several attempts to acquire the facilities of Eagle-Picher, its largest competitor. Thus, beginning in 1931, National purchased substantial holdings of Eagle-Picher stock, though it never attained a position even remotely approaching majority control. The larger part of this stock was
3903* sold in 1937. Approximately 3,500 shares were retained, but these were sold in 1944. Incidentally, whether this represented merely an investment, as National insists, the record discloses that it grossed more than $800,000 in profits on the Picher stock transactions.

In addition to these findings relating to petitioner's history, the Commission relied on evidence relative to certain contracts, to which National was party, to support its ultimate conclusion of incipient monopoly. Three of these were executed on February 26, 1906. By the first, between National and AS & R, the former agreed to buy from the latter all its requirements of corroding lead, except an amount not to exceed 30,000 tons annually produced by Saint Louis Smelting Company, a wholly owned subsidiary of National, and 85% of its requirements of other types of pig lead, but not to exceed 85% of AS & R's production. Prices to be paid by National were pegged to AS & R's daily price quotations. It was agreed, further, that the excess of Saint Louis' production over 30,000 tons per annum would be sold to AS & R at a price substantially below the latter's daily quotation. The contract expired in 1921 and was not renewed. Under the second contract, National acquired all of the capital stock and securities of the United Lead Company, a holding company for all the securities of 13 producers of lead pigments. United was controlled at that time by a syndicate composed largely of AS & R's officers and directors, and AS & R had a substantial interest in United by virtue of stock ownership. By the third agreement, between AS & R and Hoyt Metal Company, a constituent company of National, Hoyt agreed to buy and AS & R to sell the latter's entire production of antimonal lead. The Commission referred to a fourth document, which, perhaps, should be mentioned in passing. In 1924 and in 1938, National agreed to supply du Pont's white lead-in-oil requirements on a processing fee basis. Under the terms of this contract du Pont furnished all raw materials and National manufactured therefrom and shipped the finished product at the former's direction on the payment of an agreed processing fee.

The ultimate finding of incipient monopoly is based on these findings as to transactions in the growth of petitioner to a dominant position in its field. We find the assertion that occurrences concluded more than twenty years before the order was entered can justify a perpetual injunction against any future ac-
3904 quisition of stock or physical assets of National's competitors a startling one. The Commission stated that it had not considered the question of possible antitrust violations in petitioner's growth from 1891 to the middle 1930's. Nevertheless, it relied on findings which can have no purpose save possibly to prove that a monopoly already exists to support its order which is geared solely to prevention of monopolistic practices at some undisclosed future date. Thus, the order is not supported by the findings and must fall under the principles announced in the Universal Camera case. Universal Camera Corp. v. NLRB, 340 U. S. 474.

We are not here concerned with judicial pronouncements that the Commission has authority to determine the scope necessary in a cease and desist order to prevent violations of the Act. See e. g., May Stores Co. v. NLRB, 326 U. S. 376, 390-392. That principle assumes a present violation of the Act, in which case the Commission is given wide latitude in framing its order to compel compliance with the Act.

But such is not the case before us. The Commission has concluded from its findings of past activities, which may have had monopolistic overtones long ago, that petitioner presently harbors a desire to swallow up all competition and that, at some undisclosed time in the future, it intends to do so. Presumably the evidence of this intent is too delicate to stand the light of day, since it cannot be found in the record. Drafted on this basis, the order before us seeks to spank the child, not for naughty acts done or threatened, but on the general principal that he, may somewhere, somehow, in the future engage in mischief. This presumes the existence of a power even broader than that residing in a court of equity. The language of the Court of Appeals for the Fourth Circuit in the New Standard case is pertinent:

> "When an order of the Commission is before us for review, the statute provides that to the extent that we do not modify it, we shall use our injunctive power to enforce it, 15 U. S. C. A. § 45 (c); and it is elementary that a court of equity will not enjoin one from doing what he is not attempting and does not intend to do. * * * While an administrative agency is not a court of equity, its orders must be based on evidence giving them reasonable support, and
> such support is not given for an order relating to present
> 3905 and future practices by evidence relating only to transac-
> tions which occurred a decade before it was entered. * * *
> No one would contend that a cease and desist order should be upheld, if all the evidence supporting it related to business practices which occurred ten years before the filing of the proceeding. * * * " New Standard Pub. Co. v. FTC, 194 F. 2d 181, 183.

V. VALIDITY AND SCOPE OF ORDER

The remaining questions relate to the validity of the order as against International and to its scope as applied to petitioners generally. These questions are hereinafter considered in the order in which they are stated.

A. VALIDITY AS TO INTERNATIONAL

International asserts that the record shows conclusively that it ceased production of lead pigments in 1946; that, therefore, any issue as to its alleged violations has become moot and that the Commission abused its discretion in entering a cease and desist order against it.

The facts pertaining to this question are not in dispute. The original complaint was filed in 1944, and the amended complaint in April 1946. On both dates, and for about 10 years prior to

1946, International was engaged in the production and sale of white lead, both dry and in-oil at East Chicago, Indiana. In July 1946 it ceased production and, during the following month, the sale and distribution of the product was discontinued, and the trade given notice of the cessation. At no time since then, has petitioner engaged in any phase of pigment production or marketing.* In October 1946 it sold its plant and facilities to Eagle-Picher.

On completion of the evidence offered in support of the complaint, this petitioner moved to dismiss the complaint against it on the ground that it had permanently abandoned its pigment activities. Petitioner relied on the facts related above and the supporting affidavit of its vice-president stating that petitioner had sold its plant and facilities; that, with one or two exceptions, all qualified pigments technicians and sales personnel had left its employ, and that the company had no intention "ever to reenter" the field.

3906 The Commission denied the motion in March 1947, on the ground that "it is not unlikely that respondent may in the future see fit to reenter" the field. However, upon the evidence submitted, the trial examiner later found that "There is no reason to believe that International will ever reenter the business of the manufacture and sale of lead pigments." Despite this finding, the Commission's order, issued in 1953, runs against International as well as the other petitioners and Glidden.

In Marlene's, Inc. v. FTC, 216 F. 2d 556, we had occassion to consider a similar situation. What we there said in reviewing decisions relative to the discretion lodged in the Commission to enter orders against discontinued practices is pertinent here; it need not be repeated. Id. at 559, and cases there cited. While the Commission is vested with a broad discretion to determine whether an order is needed to prevent the resumption of unlawful acts which have been discontinued, this "discretion must be confined * * * within the bounds of reasonableness." Id. at 559.

This rule of reasonableness requires something more than a mere guess or suspicion contrary to the evidence and to the finding of the trial examiner that a resumption of discontinued practices may not reasonably be anticipated. As we have stated in our discussion of the monopoly question, the Commission is not empowered to "enjoin one from doing what he is not attempting and does not intend to do." New Standard Pub. Co. v. FTC, supra at 183; FTC v. Civil Service Training Bureau, 79 F. 2d 113 (CA-6).

The distinction on the facts between this cause and such cases as Marlene's Inc. v. FTC, supra, and Galter v. FTC, 186 F. 2d 810, cert. denied 342 U. S. 818 (CA-7), is readily apparent. In each of those cases it appears that the petitioning party was still engaged in the same business in which the unlawful practices had been employed, and there was evidence from which the Commission might properly infer a public need for an order despite the fact that the specific unlawful practices had in fact been discontinued. Such a situation presents quite a contrast to the undisputed fact here that petitioner is no longer engaged in the industry in which the unlawful practice occurred and has divested itself of production properties.

And it is immaterial that petitioner may still be engaged in the smelting and refining of pig lead. No charges were
3907 before the Commision relating to that commodity, and
there is nothing in the record to support any reasonable anticipation that petitioner will ever employ that commodity in pigment production. The cease and desist order entered in the face of this showing is arbitrary and must be set aside.

B. SCOPE OF ORDER

There remains the question of whether the order is too broad, in that it purports to prohibit certain individual activity, i. e., whether the Commission exceeded its authority in this respect. In pertinent part the order prohibits any conspiratorial agreement or other concerted action to do those things which, according to the Commission's findings, amount to statutory violations. It expressly excludes from its edict agreements between any petitioner and its subsidiaries or affiliates which relate solely to the business of such petitioner and do not have the purpose or effect of unlawfully restricting competition. Petitioners do not challenge the propriety of the form of these provisions, but make an attack on the next paragraph, which restricts individual activity as follows:

"It Is Further Ordered that each of the respondents, its officers, agents, representatives, and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another."

This portion of the order is assailed on the grounds first, that it is improper, since the complaint did not charge, and the Commission did not find, that individual use of the zone delivered price method was an unfair method of competition and, second, that the Commission is authorized under Sec. 5 to prohibit unlawful acts only and, conversely, it is without power to prohibit behavior which has not been found to be unlawful.

3908 The Commission insists that the paragraph represents an allowable judgment in its choice of a remedy, as is best shown by the language of its opinion, that "Such a prohibition is necessary, not because it is unlawful in all circumstances for an individual seller, acting independently, to sell its product on a delivered prices basis in specified territories, but to make the order fully effective against the trade restraining conspiracy in which each of the respondents participated."

Reported judicial authorities and the elementary principles of statutory construction compel the conclusion that this paragraph is beyond the power of the Commission and must, therefore, be set aside. The grant of power in Sec. 5 of the Act is expressly restrictive. Under subsection (a) the Commission is empowered to prevent any person "from using unfair methods of competition * * * and unfair or deceptive acts or practices in commerce." Subsection (b) provides that, after a hearing and on a finding "that the method of competition or the act or practice is prohibited" by the Act, the Commission may issue an order requiring the person adjudged guilty of such conduct to "cease and desist from using such method of competition or such act or practice." 15 U. S. C. § 45 (a), (b).

The Commission may exercise only such powers as are granted to it by statute, Arrow-Hart & Hegeman Co. v. FTC, 291 U. S. 587,598, and its remedy against practices must comport precisely with the legislative grant of power. The section is specific; the permissible order is restricted to a prohibition of "unfair methods of competition" found to exist. In the Arrow-Hart case, supra, the Court said, at page 598:

> "The Commission is an administrative body possessing only such powers as are granted by statute. It may make only such orders as the Act authorizes; may order a practice to be discontinued and shares held in violation of the Act to be disposed of; but, that accomplished, has not the additional powers of a court of equity to grant other and further relief by ordering property of a different sort to be conveyed or distributed, on the theory that this is necessary to render effective the prescribed statutory remedy."

To the same effect see FTC v. Eastman Kodak Co., 274 U. S. 619, 623–624; FTC v. Sinclair Refining Co., 261 U. S. 3909 463, 475, 476. While it is true that violations of the Clayton Act were charged in each of these cases, the same principle controls the scope of the permissible remedy under Sec. 5 of the Trade Commission Act. Compare the grant of power under the

21 with that under Sec. 5 of the Trade
C. § 45 (a), (b).
ng that it may prohibit lawful actions
eemed necessary effectively to restrain
Commission relies on certain language
egel Co. v. FTC, 327 U. S. 608, 611–613,

ide discretion in its choice of a remedy
with the unlawful practices in this area
Here, as in the case of orders of other
der comparable statutes judicial review
further than to ascertain whether the
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nission is the expert body to determine
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disclosed. * * * [A]nd the courts will
the remedy selected has no reasonable
ractices found to exist."
ist be read in context, in the light of the
he Commission had determined that
cuna" as applied to coats was mislead-
urther use of the term. The Court of
iegel Co. v. FTC, 150 F. 2d 751 (CA–3).
that use of the trade name was mislead-
t attacked; the only question before the
her t[illegible] Commission properly ordered
urt reversed and remanded, on its de-
nission had not considered whether, by
ng language in connection therewith,
ht be preserved. The quoted language
cussion of the propriety of the excision
that context, does not, we believe, sanc-
gainst lawful acts.
o decision sanctioning an order such as
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g the illegal practice in the precise form
existed in the past." FTC v. Ruberoid
t may frame its order broadly to reach
wful conduct. Thus, in Ruberoid, the
ne use of all price differentials on its
employed by that Company of 5% and
y in violation of § 2 of the Clayton Act,
held that the Commission was not re-
r to the specific differential previously
ater, in the absence of a showing by
ls of less than 5% might be lawfully

The same principle was applied in Hershey Chocolate Corp. v. FTC, 121 F. 2d 968 (CA–3). On a complaint charging unfair methods of competition in the sale of one candy item, the Commission had found that similar unlawful practices were being employed in the sale of several other confectionery items as well. The court sustained an order which prohibited all such unlawful practices which the Commission had found to exist, on the theory that the entire unlawful conduct was related to the specific unlawful practice of which complaint was made.

Other cases cited by the Commission fail to support its contention. In Dorfman v. FTC, 144 F. 2d 737 (CA–8), no question was raised but that the practice prohibited by the challenged portion of the order was unlawful. The determination in California Lumbermen's Council v. FTC, 115 F. 2d 178, 185, cert. denied 312 U. S. 709 (CA–9), was that the practices which the Council insisted were lawful were, in fact, an unlawful restraint of competition, under the holding in Eastern States Lumber Ass'n v. United States, 234 U. S. 600, 612. And, finally, FTC v. Wallace, 75 F. 2d 733 (CA–8), must be read in the light of the unique situation there involved. That was a proceeding brought to enforce an order. The objectionable conduct existing prior to the proceeding in which the order was entered had been accomplished through the offices of an association, composed of all individual respondents, but, as the Commission found, wholly controlled by Wallace. After a cease and desist order was entered, the association was dissolved, but Wallace continued the same practices unabated 3911 in behalf of himself and the other ex-members of the association. The Commission filed a petition against Wallace only, for enforcement of its order. His answer did not deny the averments made; he demurred on the ground, inter alia, that the order restrained concerted conduct and, therefore, enforcement could not be decreed against him alone, to restrain his individual conduct. He did not deny that his own conduct was illegal, but argued merely that it did not come within the purview of the order. The court entered a somewhat unique decree, first modifying the Commission's order to prohibit individual as well as concerted use of the admittedly unfair practice, and then enforcing the order as thus modified, against Wallace alone.

In each of the cases upon which the Commission relies, the courts have sustained restraints only against conduct found to be unlawful, resolving all doubts in favor of the Commission's order in those gray areas wherein the legality or illegality of a particular course of conduct depends on the circumstances surrounding its use. Cf. FTC v. Ruberoid Co., 343 U. S. 470, 473. The individual practices against which this order runs are not shrouded in fog. On the contrary, the Commission expressly pointed out that it had not considered the individual use of the zone system, but concluded that the portion of the order with reference thereto was necessary in order to prevent evasion. This position presents a striking contrast to the language of the Supreme Court in FTC v. Cement Institute, 333 U. S. 683, 727–728, wherein the Court, in affirming an order prohibiting conspiratorial use of a basing point system, carefully pointed out that it did not affect individual use of such system. Although no question of individual restraint was presented, the Court's meticulousness, in emphasizing the limitations of the order before it, is important as indicative of the esteem which it attached to preservation of the individual's right to adopt and employ his own business practices, notwithstanding the fact that concerted action between competitors to employ the same practices may violate the Act.

The part of the order with which we are now concerned does not differ in any significant respect from the one we struck down in Salt Producer's Ass'n v. FTC, 134 F. 2d 354. There, as here, we sustained the Commission's findings that the petitioners, acting in concert, had employed a uniform zone delivered pricing
3912 basis in the sale of salt. There, as here we sustained the determination that such concerted activity was violative of the Act and the order prohibiting its prospective use. There, as here, the complaint contained no allegations with respect to the individual use of the zone system. Petitioners were ordered to cease and desist from employing "any common cause of action * * * establishing or maintaining delivered price zones, or making quotations and sales of salt upon a delivered price basis under a zone system whereby the cost of salt * * * is made identical at all destinations within such zone." We set the order aside saying, 134 F. 2d at page 358:

"The complaint discloses the Commission's aim to eradicate and prohibit all concert of action by these petitioners, looking to the establishment and fixation of prices. There was no indication in the complaint that they were assailing the zone system per se as an unfair method of competition by one manufacturer in relation to two purchasers of his salt, in the same zone, where the freight costs are averaged, and one bears a greater burden than the actual freight cost incurred.

"If the zone system per se is to be condemned, there ought to be a hearing by the Commission and a finding on the precise issue of the unfairness of such a commercial practice."

Although the Salt Producers order is not identical with that before us, we think the two cannot be distinguished in principle. The Commission asserts that the present order does not restrain all individual use of the zone system but only that which has the effect of "systematically matching the prices" of a competitor at a particular designation. The fact remains, however, that there have been no complaint, no hearing and no findings relative to the effect of such parallel individual actions. Salt Producers' Ass'n v. FTC, supra. Cf. FTC v. Gratz, 253 U. S. 421, 424.

Clearly, the Commission was concerned here with enforcement of its order prohibiting concerted action. In justifying the paragraph in question, it pointed up "the likelihood" that petitioners might continue to use the same zone systems and plead that they have abandoned the unlawful agreement and that such use is merely individual parallel conduct. It seems to us that this is an unwarranted anticipation of a situation which may never
3913 arise and an attempt to decide, by an anticipatory order,
questions which will be a subject for this court to consider should some future enforcement proceeding become necessary. We refuse to sustain such a sweeping inroad on individual liberty of competitive action, without a prior determination by the Commission, after an appropriate hearing, that such activity is a violation of the Act. Lawful acts do not become automatically unlawful because of an administrative guess that a declaration of their illegality may facilitate enforcement of a valid order.

If individual use of the zone system by petitioners is to be restrained, that result must be achieved by a proper order in a proceeding conducted in conformity with the statute, in which the invalidity of such conduct is determined. The Commission's power to act is conditioned on such a determination. Salt Producer's Assn. v. FTC supra; Cf. Arrow-Hart & Hegeman Co. v. FTC, 291 U. S. 587; FTC v. Eastman Kodak Co., 274 U. S. 619, 623–624; FTC v. Western Meat Co., 272 U. S. 554; FTC v. Sinclair Refining Co., 261 U. S. 463, 475–476.

The order, as modified by this opinion, will be affirmed. The Commission shall, within 20 days, submit a proposed decree modifying its present order in accord with the views expressed herein and submit the same to petitioners and to this court. Within 10 days thereafter, petitioners shall consent or file objections thereto. The final decree will then be entered.

3915 ## In United States Court of Appeals for the Seventh Circuit

Before Hon. Walter C. Lindley, Circuit Judge, Hon. H. Nathan Swaim, Circuit Judge, Hon. Elmer J. Schnackenberg, Circuit Judge.

Nos. 10839, 10840, 10841, 10842

National Lead Company, et al., petitioners

v.

Federal Trade Commission, respondent

PETITIONS FOR REVIEW OF ORDER OF THE FEDERAL TRADE COMMISSION

This cause came on to be heard on the transcript of the record from the Federal Trade Commission and was argued by counsel.

Judgment

December 1, 1955

On consideration whereof, it is ordered and adjudged by this Court that the decision of the Federal Trade Commission entered in this cause on January 12, 1953, be, and the same is modified in accordance with the Opinion of this Court filed this day, and as so modified, will be affirmed.

The Commission shall, within 20 days, submit a proposed decree modifying its present order in accord with the views expressed herein and submit the same to petitioners and to this court. Within 10 days thereafter, petitioners shall consent or file objections thereto. The final decree will then be entered.

3916 In the United States Court of Appeals for the Seventh Circuit

No. 10839

NATIONAL LEAD COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 10840

THE SHERWIN-WILLIAMS COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 10841

THE EAGLE-PICHER COMPANY, ET AL., PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 10842

ANACONDA COPPER MINING COMPANY, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Final decree

January 5, 1956

[File endorsement omitted]

The National Lead Company, The Sherwin-Williams Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company and the International Smelting & Refining Company having filed in this 3917 Court petitions to review and set aside an order to cease and desist issued on January 12, 1953, by the Federal Trade Commission in a proceeding before the said Commission entitled "In the Matter of National Lead Company, et al., Federal Trade Commission Docket No. 5253;" and the petitions having been heard by this Court on briefs and oral argument; and the Court having on December 1, 1955, filed its opinion providing for modification of said order of the Commission and for affirmance of said order as modified as to all petitioners except Anaconda Copper Mining Company and International Smelting & Refining Company:

Now therefore it is hereby ordered, adjudged, and decreed that with respect to petitioners Anaconda Copper Mining Company and International Smelting & Refining Company the aforesaid order to cease and desist be, and it hereby is, set aside.

It is hereby further ordered, adjudged, and decreed that with respect to petitioners National Lead Company, The Sherwin-Williams Company, The Eagle-Picher Company and The Eagle-Picher Sales Company, the following paragraphs of the aforesaid order to cease and desist be, and they hereby are, set aside:

"It is further ordered that each of the respondents, its officers, agents, representatives, and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another."

* * * * *

3918 "It is further ordered that the respondent, National Lead Company, its officers, agents, representatives and employees do forthwith cease and desist from acquiring or attempting to acquire, directly or indirectly, any interest of ownership, or control in the capital stock, or in the physical assets, plants, or other properties, of any concern or enterprise which at the time of such acquisition or attempted acquisition is a competitor of said National Lead Company in the manufacture or in the sale or distribution of lead pigments."

It is hereby further ordered, adjudged, and decreed that with respect to petitioners National Lead Company, The Sherwin-Williams Company, The Eagle-Picher Company and The Eagle-Picher Sales Company, the aforesaid order to cease and desist be, and the same hereby is, modified to read as follows:

Pursuant to Section 5 of the Federal Trade Commission Act:

It is ordered that the respondents, National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, The Sherwin-Williams Company, and The Glidden Company, their respective officers, agents, representatives and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between or among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following things:

1. Establish, fix, or maintain prices, terms, or conditions of sale for lead pigments, or adhere to any prices, terms, or conditions of sale so fixed or maintained.

2. Quote or sell lead pigments at prices calculated or de-
3919 termined in whole or in part pursuant to or in accordance
with a zone delivered price system; or quote or sell lead pigments pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for lead pigments at points of quotation or sale or to particular purchasers by any two or more sellers of lead pigments using such plan or system, or which prevents purchasers from finding any advantage in price in dealing with one or more as against another seller.

3. Quote or sell lead pigments at specified differentials over any particular quotation or quotations of pig lead prices.

4. Quote or sell lead pigments at specific price differentials based upon differing sizes or types of containers or based upon differing quantities in which such products are sold or delivered.

5. Enter into, employ, or continue in effect, any agency or consignment contract, plan or arrangement under which the resale prices or selling practices of any dealer or distributor are controlled or directed.

6. Issue to dealers suggested resale prices, dealers' price schedules, or list prices for the purpose or with the effect of inducing dealers to observe uniform resale prices and refrain from price competition among themselves.

It is further ordered that nothing contained herein shall be construed as prohibiting the establishment or maintenance of bona fide agreements, understandings or other relations between any of the respondents and its officers, directors and employees, or between any of the respondents and any of its subsidiaries or affiliates, relating to the sole and separate business of said respondent and its subsidiaries or affiliates, when not for the purpose or with the effect of unlawfully restricting competition.

Pursuant to Section 2 of the Clayton Act, as amended:

It is further ordered that each of the said respondents, its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the sale of lead pigments in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discrim-

3920 inating, directly or indirectly, in the price of lead pigments of like grade and quality:

1. By selling such lead pigments, except dry white lead when not sold as a keg product, at different zone delivered prices to purchasers located in different territorial zones when such purchasers are in competition with one another in the resale or distribution of said products, either as lead pigments or as components of other products.

2. By selling such lead pigments to purchasers competing in the resale or distribution thereof, either as lead pigments or as components of other products, at different prices which vary according to the quantities in which said products are to such purchasers sold or delivered, except at such differentials as were not shown in this proceeding to have resulted in adverse competitive effects or as were shown to have been justified on the basis of differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which the products were sold or delivered, as stated in the findings as to the facts and conclusion herein.

It is hereby further ordered, adjudged, and decreed that as so modified the foregoing portion of said order entered pursuant to Section 5 of the Federal Trade Commission Act be, and the same hereby is, affirmed as to said petitioners, and said petitioners are commanded to obey the same and comply therewith.

It is hereby further ordered, adjudged, and decreed that as so modified the foregoing portion of said order entered pursuant to Section 2 of the Clayton Act, as amended, be, and the same hereby is, affirmed as to said petitioners.

It is further ordered, adjudged, and decreed that petitioners National Lead Company, The Sherwin-Williams Company, The Eagle-Picher Company, and The Eagle-Picher Sales Company shall, within ninety days after service upon them of this decree, file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which they have
3921 complied with its said order as herein modified.

Without prejudice to the right of the Federal Trade Commission, the respondent herein, to institute and maintain such proceedings for violation of this decree as may be warranted by law, this Court retains jurisdiction of this cause to enter such further orders or decrees herein from time to time as may become necessary.

By the Court:

(S) Walter C. Lindley,
(S) H. Nathan Swaim,
(S) Elmer J. Schnackenberg,
United States Circuit Judges.

[File endorsement omitted.]

3922 [Clerk's certificate to foregoing transcript omitted in printing.]

3923

Supreme Court of the United States

No. —, October Term, 1955

FEDERAL TRADE COMMISSION, PETITIONER

v.

NATIONAL LEAD COMPANY, THE SHERWIN-WILLIAMS COMPANY, THE EAGLE-PICHER COMPANY AND ANACONDA COPPER MINING COMPANY

Order extending time to file petition for writ of certiorari to April 19, 1956

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 19, 1956.

SHERMAN MINTON,
Associate Justice of the Supreme Court of the United States.

Dated this 30th day of March, 1956.

3925

Supreme Court of the United States

No. 858, October Term, 1955

Order allowing certiorari

Filed June 4, 1956

[Title omitted.]

The petitioner herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1956

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. ——

FEDERAL TRADE COMMISSION, PETITIONER

v.

NATIONAL LEAD COMPANY, THE SHERWIN-WILLIAMS COMPANY, THE EAGLE-PICHER COMPANY, ANACONDA COPPER MINING COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, prays that a writ of certiorari issue to review the judgment entered in the above cause by the United States Court of Appeals for the Seventh Circuit on January 5, 1956, which modified an order issued by the Federal Trade Commission and affirmed the order as thus modified.

OPINION BELOW

The opinion of the court of appeals is reported in 227 F. 2d 825, and is printed in the Appendix, *infra*, pp. 18–56.

JURISDICTION

The judgment of the court of appeals (Appendix, *infra*, pp. 57–62) was entered on January 5, 1956. The time for filing a petition for a writ of certiorari was extended by Mr. Justice Minton on March 30, 1956, to April 19, 1956 (Appendix, *infra*, p. 63). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

In a proceeding under Section 5 of the Federal Trade Commission Act the Commission found that the respondents had agreed to sell lead pigments pursuant to a system of zone delivered prices, with the purpose and effect that, as to all buyers within a particular zone, the price of each respondent exactly matched the price of the other respondents, thereby suppressing competition among them. The Commission concluded that such agreement and concert of action constituted an unfair method of competition prohibited by Section 5. It accordingly entered a cease and desist order against any "planned common course of action", agreement or conspiracy to sell at prices determined pursuant to a zone delivered price system. The order also prohibited each respondent from selling at prices determined in accordance with such price system for the purpose or with the effect of systematically matching the delivered prices of other sellers. This prohibition was imposed in order effectively to terminate respondents' long-continued concert of action and to dissipate the consequences of the past illegal conduct.

The question presented is whether the Commission acted within its statutory authority in directing the individual respondents to cease and desist from selling lead pigments at prices determined in accordance with a zone delivered price system having the purpose or effect of systematically matching the delivered prices of other sellers.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. 45, provides in pertinent part as follows:

> (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * *
>
> (6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> (b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition * * * it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing * * *. * * * If upon such hear-

> ing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. * * *

STATEMENT

This proceeding was instituted in 1944 (R. 3, 26). The amended complaint charged, so far as now material, that respondents had violated Section 5 of the Trade Commission Act by combining and conspiring to restrain and suppress price competition in the sale of lead pigments, and that this was accomplished primarily by dividing the country into geographic zones and charging the same delivered price to all buyers within a particular zone irrespective of the buyer's location (pars. 6, 8; R. 63–4, 67). It was also alleged that each respondent uses this price system "for the purpose and with the effect of enabling the respondents to match exactly their offers to sell lead pigments to any prospective purchaser at any destination, thereby eliminating competition between and among themselves" (par. 10, R. 72).

After an extensive hearing, the Commission made detailed findings of fact (R. 3732–97), and concluded that respondents' agreements and understandings, and their acts pursuant thereto, violated Section 5 (R. 3797). The Commission's order prohibited respondents from entering into or carrying out any "planned common course of action", agreement or conspiracy to sell at prices determined pursuant to "a zone delivered price system" or any other system resulting in identical prices at the points of sale (R. 3800). Each respondent was also ordered to cease and desist from (R. 3801)—

> quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another.

An opinion of the Commission, filed simultaneously with its findings of fact, conclusion and order, explained its reasons for prohibiting individual use of the zone delivered pricing system. The Commission stated that respondents had, during the NRA period, established a uniform zone pricing system and had distributed maps showing the boundaries of the zones to be observed, and that subsequently each respondent had, with minor variations, followed the zone delivered price system and adhered to the zone boundaries shown on these maps (R. 3813-4). The Commission said that, in this situation, an order directing each respondent to desist from use of a zone delivered price system "is necessary * * * to make the order fully effective against the trade restraining conspiracy in which each of the respondents participated" (R. 3814). The prohibition would, in the opinion of the Commission, "eliminate the effects of" their conspiracy and "guarantee against" its continuation (R. 3815).

The Commission also stated that unless the respondents who control practically the entire national production of lead pigments, are individually deprived of "the device which made their combination effective, an order merely prohibiting the combination may well be a useless gesture", and "the evils springing from the combination, one of which is to eliminate price competition, may well continue indefinitely" (*ibid.*). The Commission pointed out that under the zone pricing system the delivered price is the same for every point within a zone, and that once the price in the par zone has been established and the relative price gradations in the other zones have also been established, "the system operates substantially automatically" (R. 3816). Accordingly, "the momentum of the system, so firmly and maturely established, might last for some time unless effective measures to break it up were taken"—the purpose of the prohibition running against each respondent individually (*ibid.*). The Commission further said that if competition is later restored and a proper showing is made that the individual prohibition is no longer necessary, "the Commission will, of course, at that time take such action as may be appropriate in the light of the facts and the law" (R. 3817).

The court of appeals upheld the Commission's finding of conspiracy and its order directed against concerted or conspiratorial action, but rejected the paragraph of the order directed against individual use of zone delivered pricing, as beyond the authority of the Commission under Section 5 (b) of the Federal Trade Commission Act. The court pointed out that Section 5 (a) empowers the Commission to prevent a person from using "unfair methods of competition", and that Section 5 (b) provides that if the Commission finds, after a hearing, that the respondent's "method of competition" is prohibited by Section 5, it may issue an order requiring him to cease and desist from using "*such* method of competition" (emphasis supplied). *Infra,* pp. 48–49. The court reasoned that the Commission may exercise only the powers conferred upon it by statute, that its order "must comport precisely with the legislative grant of power", and that "the permissible order is restricted to a prohibition of 'unfair methods of competition' found to exist" (*infra,* p. 49). The court therefore ruled that the Commission, not having determined that individual use of a zone delivered price system is unlawful, was without authority to prohibit such use.

REASONS FOR GRANTING THE WRIT

If the portion of the order directed against the respondents individually had been rejected upon the ground that it bore no reasonable or persuasive relation to the conduct found illegal, this would have been an exercise of the ordinary reviewing functions of an appellate court. See *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 435–437. A decision so predicated would present no question of law of general importance. But the court of appeals squarely based its decision on its view as to the limited statutory power of the Federal Trade Commission—that Section 5 requires the Commission to confine its prohibitions to conduct found to be unlawful. This interpretation severely limits the Commission's power to prescribe effective remedies against unfair methods of competition. We submit that it is in conflict in principle with numerous decisions of this Court and other courts of appeals, holding that the Commission has wide discretion in fashioning the remedy which it deems necessary, in the particular circumstances involved, to prevent a continuation of conduct constituting a violation of the Federal Trade Commission Act.

The cases on which the court below relied do not support its restrictive interpretation of the scope of the Commission's remedial powers under Section 5. *Arrow-Hart & Hegeman Co.* v. *Federal Trade Commission*, 291 U. S. 587, and *Federal Trade Commission* v. *Western Meat Co.*, 272 U. S. 554, dealt with the relief which the Commission is authorized to order when it finds a violation of Section 7 of the Clayton Act (15 U. S. C. 18), which (as it then stood) made it unlawful for one corporation to acquire capital stock of another corporation where the acquisition might adversely affect competition. Section 11 of that Act (15 U. S. C. 21) stated the relief which the Commission might grant if it found a violation of Section 7, namely, entry of an order requiring the offender to cease and desist from such violation, "and divest itself of the stock * * * held". In view of this specification, it was held that the only divestiture order which the Commission had authority to issue was an order for divestiture of the stock illegally acquired and held.[1]

The court below also relied on *Salt Producers Ass'n* v. *Federal Trade Commission*, 134 F. 2d 354 (C. A. 7), which held that an order directed against zone delivered prices could not be supported upon the basis that this method of pricing is *per se* an unfair method of price competition when the Commission had made no finding to this effect. But the present case presents the quite different issue of whether the Commission, having found that respondents had concertedly established and maintained a non-competitive pricing system, could reasonably conclude that effective termination of this illegal conduct requires a break with the precise pricing pattern which respondents had maintained for a period of some 20 years. And the present order, unlike that in the *Salt Producers* case, is not a blanket condemnation of individual zone delivered prices; they are prohibited only if their purpose and effect is to prevent "purchasers from finding any advantage in price in dealing with one or more sellers as against another" (*supra,* p. 5.).[2]

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[1] *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U. S. 619, which the court below cited, held that the Commission is not authorized to order a divestiture of assets in a proceeding under Section 5 of the Trade Commission Act, but the reason stated was that the question "is in effect ruled by" the decisions denying the Commission's power to grant such relief as against a violation of Section 7 of the Clayton Act. 274 U. S. 624.

The narrow view adopted by the court below of the Commission's statutory power in prescribing a remedy adequate to put a stop to a violation of Section 5 of the Trade Commission Act clearly does not accord with the decisions of this Court defining the remedial powers of the Commission in a proceeding under that section. "The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices" found in such a proceeding. *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 611. "Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices". *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 473. There is a "special reason" why courts "should not lightly modify the Commission's orders made in efforts to safeguard a competitive economy", because Congress, when it passed the Trade Commission Act, envisioned the Commission as a body "trained to combat monopolistic practices", and to this end provided in Section 7 of the Act that if a court concluded that the Government was entitled to a decree in an antitrust case, it might refer the case to the Commission "as a master in chancery, to ascertain and report an appropriate form of decree." *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 726–727.

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[2] For example, each respondent is free to redraw zones and impose a uniform delivered price within each zone—provided there is no systematic matching of price schedules with those of other respondents.

In the *Siegel* case, where the issue was the breadth of a Commission order in a Section 5 proceeding, the Court said (pp. 611–612): "Here, as in the case of orders of other administrative agencies under comparable statutes, judicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy." The first four cases cited in an appended note to illustrate the limited judicial review of orders of other administrative agencies "under comparable statutes" involved orders of the National Labor Relations Board. Since its statutory authority respecting cease and desist orders against unfair labor practices precisely parallels the Federal Trade Commission's statutory authority respecting unfair methods of competition,[3] it is significant that this Court has declared that the Board "has the same power to determine the needed scope of cease and desist orders under the National Labor Relations Act that courts have, when authorized to issue injunctions, in other litigation." *May Stores Co.* v. *National Labor Relations Board,* 326 U. S. 376, 391–392.

In *May Stores* the Court observed that courts of equity grant injunctions "in broad terms" when this is deemed "essential to accomplish the purposes" of the statute being enforced, 326 U. S. 391. The Court quoted in an accompanying note portions of the opinions in two Sherman Act cases, including the statement in *Local 167* v. *United States,* 291 U. S. 293, 299, that the decree "should be broad enough to prevent evasion" (*ibid.*). In other opinions dealing with the relief appropriate in antitrust cases this Court has said that the decree should be framed "so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival" (*Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 461); that it may "prohibit acts which in another setting would be unobjectionable" (*Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 409); that it should, "so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance" (*United States* v. *U. S. Gypsum Co.,* 340 U. S. 76, 88). See also *International Salt Co.* v. *United States,* 332 U. S. 392, 401.

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[3] Section 10 (c) of the National Labor Relations Act, as amended, 61 Stat. 147, 29 U. S. C. 160 (c), provides that if the Board shall find that a person has engaged in an unfair labor practice, it shall issue an order requiring such person to cease and desist from "such unfair labor practice". There is the further provision that the order require such person "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act", but the "effectuate" clause clearly applies only to affirmative action required by a Board order.

This Court has held that the National Labor Relations Board, in determining relief, may give weight to considerations of the foregoing kind. In *International Assn. of Machinists* v. *N. L. R. B.,* 311 U. S. 72, the first case cited in the note in the *Siegel* case previously mentioned (*supra,* p. 12), the Board found that the employer had "assisted" a craft union when it and an industrial union were engaged in rival organizing campaigns. Because of this unfair labor practice by the employer, the Board ordered him to bargain exclusively with the industrial union although, before the order issued, the craft union had notified the Board that it then represented an overwhelming majority of the employees. This Court held that the Board properly acted without investigating this claim or ordering an election. It said that the Board "has the power to take appropriate steps to the end that the effect of those [unfair labor] practices will be dissipated"; that it is for the Board, not the courts, "to determine how the effect of prior unfair labor practices may be expunged"; and that the Board might justifiably conclude that "unless the effect of the unfair labor practices is completely dissipated, the employees might * * * not have the complete freedom of choice which the Act contemplates." 311 U. S. 82.

The decision below in the instant case that the Commission is without statutory authority to prohibit acts not found illegal squarely conflicts, we submit, with the decision of this Court in *Federal Trade Commission* v. *Ruberoid Co.,* 343 U. S. 470. There the Commission found that the respondent had granted discounts of 5% or more and that these discounts constituted a price discrimination prohibited by Section 2 of the Clayton Act. Although no finding was made that a discount of less than 5% violated the section, the Commission's order prohibited sale at any discount whatever. This Court upheld the order. It reaffirmed its ruling in the *Siegel* case that "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist", and it held that "the Commission was not required to limit its prohibition to the specific differential" found to be a violation of the statute. 343 U. S. 473–474. The Court said further (p. 474): "In the absence of any indication that a lesser discrimination might not affect competition there was no need to afford an escape clause through which the seller might frustrate the whole purpose of the proceedings and the order by limiting future discrimination to something less than 5%."

We emphasize that the test applied in the *Siegel* and *Ruberoid* cases, "reasonable relation to the unlawful practices found to exist", necessarily means that the Commission's order may embrace conduct *other than* "the unlawful practices found to exist".

The provision of the Commission's order which is here in issue was designed both to prevent evasion of the prohibition against concerted action and to dissipate the effects of respondents' past illegal conduct (*supra,* pp. 6–7). Under the decisions, the Commission was entitled to frame its order so as to achieve these objectives, and the means adopted for achieving them plainly are within the ambit of an "allowable judgment".

While we have discussed and relied primarily on decisions of this Court, it is noteworthy that courts of appeals have given similar wide berth to the scope of conduct which the Commission may permissibly prohibit in orders directed against violation of Section 5 of the Trade Commission Act. *Consumer Sales Corp.* v. *Federal Trade Commission,* 198 F. 2d 404, 408 (C. A. 2), certiorari denied, 344 U. S. 912; *Independent Directory Corp.* v. *Federal Trade Commission,* 188 F. 2d 468 (C. A. 2); *Hershey Chocolate Corp.* v. *Federal Trade Commission,* 121 F. 2d 968 (C. A. 3).

The court below did not reach the question of whether the Commission's qualified prohibition of individual use of a zone delivered pricing system should have a specific time limitation, in lieu of subjecting respondents to this prohibition until such time as they demonstrate that price competition has been restored. On the contrary, the court struck the prohibition in its entirety, as beyond the Commission's statutory power. The court's *ratio decidendi* is of general application and, if followed by other courts, will severely circumscribe the Commission's power to provide effective relief against violations of the statutes which it administers.

CONCLUSION

The decision below is in conflict with applicable decisions of this Court and other courts of appeals, and it presents a question of law of general importance in the administration of the Federal Trade Commission Act and certain sections of the Clayton Act. It is respectfully submitted that the petition for a writ of certiorari should be granted.

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APRIL 1956.

APPENDIX A

Opinion of the United States Court of Appeals for the Seventh Circuit

Decided December 1, 1955

Before LINDLEY, SWAIM and SCHNACKENBERG, *Circuit Judges.*

LINDLEY, *Circuit Judge.* Petitioners seek to set aside a cease and desist order entered by the Federal Trade Commission on an amended complaint charging them and the Glidden Company with violation of Section 5 of the Trade Commission Act, 15 U. S. C. § 45 (a), and Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Price Discrimination Act, 15 U. S. C. § 13. Count I of the complaint, filed April 12, 1946, charged that petitioner, National Lead Company, had violated and was violating "Section 5 * * * by monopolizing, attempting to monopolize and acting to control the sale of lead pigments and the prices thereof in commerce", and that all named parties were violating the Act by combining and conspiring "among themselves and with each other" for the purpose and with the effect of eliminating competition in prices and terms of sale of lead pigments in commerce. Count II charged all parties with discrimination in prices by means of various zone pricing methods and quantity and functional discounts.

Various attacks are made upon the validity of the order, or portions thereof, addressed to the alleged insufficiency of the evidence to support the findings and to the scope of the order. Some of the questions posed apply only to a single petitioner, while others are applicable to all.

I. PROPRIETY OF THE ORDER AGAINST ANACONDA COPPER

We shall first dispose of the contention of petitioner Anaconda Copper Mining Company that the order cannot stand as to it, based on its assertion that it has never engaged in the industry as a producer, distributor or otherwise. In 1919, Anaconda Lead Products Company, a wholly owned subsidiary of Anaconda Copper, began production of lead pigments. International Smelting & Refining Company, another wholly owned subsidiary, acquired all the assets of Anaconda Lead in 1936 and thereafter, until 1946, engaged in production of certain lead pigments which were sold by it and by Anaconda Sales Company, a third subsidiary of Anaconda Copper. International was a respondent in the proceeding and is one of the petitioners here. Anaconda Lead (dissolved in 1936) and Anaconda Sales are not parties.

At the conclusion of the evidence in support of the complaint, Anaconda moved to dismiss as to it, urging that the evidence failed to show that it had ever engaged in manufacture or sale of the products. The Commission denied the motion, holding that Anaconda had been engaged in the pigments field "through its wholly owned subsidiaries." The Commission found that International and Anaconda Lead "were in fact mere operating divisions of respondent Anaconda, with no substantial separate identity of their own", and that all their acts and those of Anaconda Sales were those of Anaconda. On this basis, the cease and desist order was directed against Anaconda Copper.

We have searched in vain for evidence of a substantial character to support the findings on this phase of the case. Though the record shows that International, Anaconda Lead and Anaconda Sales are wholly owned subsidiaries of petitioner and in September 1947, at a date after International had withdrawn from the field, Anaconda, Anaconda Sales and International were controlled by interlocking boards of directors and officers, there is no evidence which militates against the existence and activity of these subsidiaries as separate entities at any time pertinent to this inquiry. Thus, though the evidence tends to prove the incidents of a parent-subsidiary relationship, a fact which has never been in dispute, the closely correlated operation of International and Anaconda Sales reflects no sinister connotation of domination by their common parent, keeping in mind that the only function for which Anaconda Sales was organized was to sell products produced by International in certain western states in which the latter was not licensed to do business.

These sparse gleanings from the record fail to support the Commission's finding of substantial identity. To come within the applicable rule, there must be evidence of such complete control of the subsidiary by the parent as to render the former a mere tool of the latter, and to compel the conclusion that the corporate identity of the subsidiary is a mere fiction. *Press Co. v. N. L.*

R. B., 118 F. 2d 937, at 946–947, cert. denied 313 U. S. 595 (CA-DC); *Owl Fumigating Corp.* v. *California Cyanide Co., Inc.*, 30 F. 2d 812 (CA-3). Such a finding has no substantial support in this record. The complaint should have been dismissed as to this petitioner.

II. THE CONSPIRACY FINDINGS.

The principal question raised by the remaining petitioners is whether the Commission's findings that the parties conspired to fix and control the prices and bases for sale of lead pigments is supported by substantial evidence. The parties are National Lead Company, Eagle-Picher Lead Company, together with its affiliate Eagle-Picher Sales Company, The Sherwin-Williams Company and International Smelting & Refining Company. The Glidden Company, though not a petitioner, was also charged as a co-conspirator. All are engaged in the production, sale and distribution of lead pigments. National is the leader and produces some 50% or more of the domestic production. Its nearest competitor, Eagle-Picher, accounts for a substantial part of the remaining 50%, while each of the other companies occupies a relatively minor position in the industry.

The three principal products included in the lead pigments category are dry white lead, white lead-in-oil[1] and the lead oxides, red lead and litharge. White lead is used principally as a base in paints and its chief market lies in the demands of manufacturers of mixed paints. White lead-in-oil is a semimixed paint consumed principally by the individual painter or painting contractor who prefers to mix his own paints. The oxides are used mostly by the battery industry as the basic constituent in the manufacture of plates.

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[1] This term, when used herein, includes all the so-called keg products, red lead-in-oil, etc. The keg products are used principally as pigments for paints, and marketing practices for these products are the same as those employed in marketing white lead-in-oil.

Throughout the record, a clear distinction is drawn between the several parties' respective actions in sales of each of the three kinds of pigments. Although the evidence as to practices in each of these fields differs, there are, nevertheless, certain threads of similarity in the methods employed by the various petitioners which render it practical to treat the conspiracy question as a unit, pointing out, wherever necessary, the applicability or inapplicability of a particular evidentiary segment to one or more of the several petitioners. Each engages in the production of white leads and oxides, except that International confines its activities to white leads and has never produced oxides.[2] Unless otherwise noted, all facts narrated and all statements pertinent thereto apply to all petitioners alike, except that factual statements and discussion which relate solely to the oxides apply to all petitioners except International.

The facts as found by the Commission follow. Prior to 1933 no standard pricing system was employed in the industry. Each producer established its own practices as to prices and conditions of sale. For the most part, with respect to delivered sales prices, each employed its own system of pricing, based on shipping differentials from centrally located warehousing points. For example, National's lists from 1920, until 1933, include some 589 different cities in 40 states, which it, from time to time, used as free delivery or equalization points. The practices of other petitioners differed quite widely.

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[2] International withdrew from the pigments field entirely in 1946. Its contentions based on this fact are subsequently considered herein.

In 1933, however, each petitioner participated in discussions looking to the adoption of a code of fair competition under the provisions of the National Industrial Recovery Act. These discussions occurred in two committees set up by the Lead Industries Association, one to draft a code for white lead-in-oil marketing and the other a code for the dry pigments, including dry white lead. Discussion within each group dealt with a wide range of subjects relating to prices, freight, quantity and quality differentials and terms and conditions of sales. Tentative agreements, at least, were reached as to terms of the proposed code, including an agreement to sell pigments only on a delivered price basis.

With respect to white lead-in-oil, prices were to be based on a system of par and premium zones, sales were to be made by agency or consignment methods of merchandising, and premium differentials in steps amounting to ¼ cent per pound on an ascending scale were to be added on sales in 50, 25 and 12½ pound containers over the price based on the norm of a 100-pound container. For dry white lead, a zone system of pricing was approved, as was a ¼ cent per pound premium to be added to less-than-carload shipments of less than 20 tons. In effect, the committee agreed not to adopt uniform conditions for sales, on advice of counsel that to do so might amount to a violation of the antitrust laws. Instead, an alternative course was suggested, namely, that one or more of the parties put into effect the uniform terms under discussion, which the others might follow. Agreements in the group considering oxide sales dealt with separate zone systems for carload and L. C. L. sales, including a standard price for carload sales pegged on the cost of pig lead as shown by daily quotations of the American Smelting & Refining Company[3] a price for L. C. L. sales based on a premium differential over the carload price and a premium differential to be added to the price of red lead containing a Pb_3O_4 content of 95% or higher.

Certain of these provisions were included in the code, while others apparently never reached that stage. The code, though adopted, never became operative, however, inasmuch as petitioners, immediately upon its adoption, sought and obtained exemption from its terms.

The Commission found that petitioners, during the NRA discussions, agreed to "cooperatively revise the pricing practices" in the industry in such a manner as to constitute a violation of the Trade Commission Act, and effectuated that agreement by adopting uniform methods of pricing and sales throughout the United States. Practices found to have been put in effect pursuant to that plan in the sale of white lead-in-oil follow. Beginning in early 1934, petitioners began pricing the product on a uniform, delivered card price basis in a par zone enclosing all the area bounded roughly by the western borders of the States of Wisconsin and Illinois and by the southern boundaries of the States of Kentucky, West Virginia, Maryland and Delaware, but including the City of Saint Louis, Missouri, and the San Francisco area of California. The remainder of the nation was divided into some 7 premium zones in which premiums ranging from 12½ cents to $1.00 per cwt. were added to the par zone selling price. About the same time, petitioners, except Sherwin-Williams, adopted a consignment method of selling, under which stocks were consigned to dealers to be sold at the standard card price, plus premiums, if any, on a commission basis. Thirdly, a quantity differential was imposed upon sales in container sizes less than 100 pounds as follows: ¼ cent per pound on 50 pound, ½ cent per pound on 25 pound and ¾ cent per pound on 12½ pound containers. One variation was noted by the Commission, viz., International, Sherwin-Williams and Glidden systematically fixed their card prices to dealers for white lead-in-oil, at about 25 cents per cwt. below that fixed for National's "Dutch Boy" and Eagle-Picher's "Eagle" brands. It found, however, that the product of all petitioners was offered to the public at identical prices, and that the 25 cent reduction of these companies in dealers' prices was a device intended to encourage dealer incentive to promote sales of the products in competition with the widely known and accepted "Dutch Boy" and "Eagle" brands.

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[3] This Company will be referred to as AS&R hereafter.

The following practices were found to have been adopted with respect to sales of dry white lead. All sales were made at a standard delivered price basis in a par zone, which included all states east of the eastern borders of Montana, Wyoming, Colorado and New Mexico. A premium of 25 cents per cwt. was added on all sales in states west of this boundary. Uniformly, a premium differential of 25 cents per cwt. was added to the price on L. C. L. sales of less than 20 tons.

With respect to oxides sales, the Commission found that petitioners, in 1934, adopted a uniform zone pricing system, with separate zone prices for carload and L. C. L. sales. For purposes of the former, the United States was divided into two par zones and a single premium zone, while, for the latter, a single par zone and three premium zones were established. Prices were fixed on the basis of differentials of $1.50 and $2.50 per cwt. over AS&R's quotation for pig lead, geared to fluctuate up or down with fluctuations of 25 cents or more. This was the standard price for carload sales. A premium of 40 cents per cwt. was added to L. C. L. sales of five tons or more and of 90 cents per cwt. over the carload charges for sales of less than five tons. Uniform premium prices of 25 and 50 cents per cwt., based on lead content, were established for red lead containing a Pb_3O_4 content of 95% and above. As to sales of all dry products, including dry white lead, the Commission found that petitioners adopted terms of sale of 1% cash in 10 days, net 30 days or 2% cash in 10 days, net 30 days, and that at any given time the terms as quoted by all petitioners were identical.

With the exception of Sherwin-Williams, petitioners do not dispute the finding that they employed uniform zone pricing systems. In this respect they question only the sufficiency of the evidence to support the findings that petitioners adopted the zone systems pursuant to agreement and that all adopted it at or about the same time. The most that can be said of these contentions is that in some respects the evidence is conflicting. It includes the testimony of petitioners' officers, price cards, invoices and other exhibits on which the Commission could well find that all petitioners adopted the zone system of pricing shortly following the NRA discussions. The Commission has resolved the conflict in the evidence adversely to petitioners and it is beyond our province to substitute our judgment in that respect.

The argument of Sherwin-Williams that it did not employ the zone system of pricing must also fail. That company employs, for example, an elaborate list of cities throughout the area in which it does business showing many of them as equalization, or par, points, and others as localities warranting, as they say, premium prices ranging from 12½ to 75 cents per cwt. on sales of white lead-in-oil. Comparison of this list with the zone maps employed by the other petitioners reveals that the par and premium city listings conform precisely in physical location and scale of premium charges with the established zone system of other petitioners. In view of this evidence, we cannot say that the finding that this petitioner participated in and used the uniform zone system lacks substantial support.

The most serious attack lodged against the conspiracy findings is that there is no substantial support for a finding of existence of an agreement among the parties to adopt uniform prices and terms of sale. The corollary of that position, viz., that the striking similarity between prices, practices and the conditions of sale fixed by each petitioner is merely the effect of conscious parallelism on the part of the petitioners in the sale of products of standard quality and constituent content, is likewise advanced. Although submitted as separate questions, we think the two issues so inextricably related as to require that they be treated together.

Although there is no direct evidence as to formal agreement on the part of petitioners to adopt the zone system and uniform pricing practices, the finding does not necessarily fall. A conspiracy may be proved by circumstantial evidence. *Triangle Conduit & Cable Co.* v. *FTC,* 168 F. 2d 175, aff'd. sub. nom *Clayton Mark & Co.* v. *FTC,* 336 U. S. 956 (CA–7); *Allied Paper Mills* v. *FTC,* 168 F. 2d 600, cert. denied 336 U. S. 918 (CA–7). As we observed in *Fort Howard Paper Co.* v. *FTC,* 156 F. 2d 899, at page 906 (cert. denied 329 U. S. 795):

> Very pertinently it was pointed out in the *Malsters* case [*United States Malsters Ass'n* v. *FTC* (CA–7)], 152 F. 2d at pages 162 and 164: "As might be expected, there is little, if any, direct proof of an express agreement. Such proof, however, is not necessary. The agreement may be inferred

> from the acts and conduct of the parties as well as circumstances pertinent thereto."

And, in *Milk & Ice Cream Can Institute* v. *FTC*, 152 F. 2d 478, we said at page 480:

> In determining whether such finding [of an agreement to fix prices] is supported, it is not necessary, as argued, that there be direct proof of agreement. Such agreement may be shown by circumstantial evidence, and the Commission, the same as any other fact finding body, is entitled to draw any reasonable inference from the circumstances of the situation.

There is before us evidence that petitioners met in 1933 and 1934 in the committees of the Lead Industries Association and discussed and appraised all elements of pricing and sales practices affecting the industry. The minutes of those meetings and the correspondence between the parties, or between certain of them and officers of the committees, support the conclusion that there were wide areas of tentative agreement upon revisions of such practices. As previously stated, some of these tentative agreements were included in the code adopted in May of 1934. We have found that the evidence sustains the finding that all petitioners did, in fact, adopt the zone system of pricing in May 1934 or shortly thereafter. Price cards and other exhibits tend to show that zoning, and other aspects of uniform pricing, were uniformly adopted practically simultaneously by all petitioners and that changes in certain details from time to time have been put into effect by all petitioners practically simultaneously. The inference of agreement, if not necessarily impelled by this evidence, is certainly a reasonable one which the Commission as the trier of fact was entitled to draw therefrom. *Milk & Ice Cream Can Institute* v. *FTC, supra* at 480; *Fort Howard Paper Co.* v. *FTC, supra* at 906–7; *Allied Paper Mills* v. *FTC, supra* at 607. Our language in the latter case at page 607 is pertinent, to-wit:

> We cannot say that the Commission's inferences are unreasonable. The petitioners did with varying uniformity use the zoning system of price quoting, and the existence of this plan which equalizes delivered prices of competitors having widely different costs at a given destination, is strong evidence in itself of an agreement to use such plan. * * * Moreover, a uniform participation by competitors in a particular system of doing business, where each is aware of the others' acts and where the effect is to restrain commerce, is sufficient to establish an unlawful conspiracy. *William Goldman Theatres, Inc.* v. *Loew's, Inc.*, 3 Cir., 150 F. 2d 738, 745.

It is unimportant, we think, that this record does not disclose a closely knit operation by petitioners under a central information gathering and disseminating body as was the fact in such cases as *FTC* v. *Cement Institute,* 333 U. S. 683; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, and the *Milk Can Institute* case, *supra.* The absence of this aspect of many price fixing .greements may indicate nothing more than that the very small number of competitors involved in the field rendered needless such a watch-dog agency.

Petitioners to refute the finding of conspiracy, rely, also, on evidence of sales prices which varied from the card prices. This, it seems to us, is merely an invitation to weigh the evidence and re-determine the facts. However, assuming *arguendo* that the question is properly ours to decide, it is clear that such off-card sales as the record discloses represent only a minute percentage of the hundreds of sales reflected in invoices included in the record. And, in the oxides field, such sales represent substantially uniform price concessions to large battery manufacturers to discourage them from producing their own supplies of oxides. Furthermore, it is clear that a finding of unbending price uniformity is not a requisite of a finding of conspiracy to control prices, but that any device which has the purpose and effect of fixing prices to consumers is an illegal restraint of trade. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 222–3, and "it is not important that the prices fixed were not fixed in the sense that they were uniform and inflexible." *Allied Paper Mills* v. *FTC,* 168 F. 2d 600, 607 (CA–7). The same principle applies to evidence that petitioners' bids on government contracts frequently were not uniform. We cannot say that the inference of agreement cannot stand in the face of such evidence.

What has been said with reference to agreement disposes in part of the conscious parallelism argument. Petitioners contend that National is the price leader in the field and that the other petitioners merely meet its prices in order to stay in business. While parallel business behavior among competitors is not illegal *per se,* *Theatre Enterprises, Inc.* v. *Paramount Film*

Distributing Corp., 346 U. S. 537, 541, we do not believe the protective mantle of "conscious parallelism" can clothe with immunity a system employed by substantially all members of an industry whereby all offer their products for sale at any given time and at any given point throughout the nation at identical prices, without regard to differences in shipping costs. See *Allied Paper Mills* case, *supra* at 607; *Fort Howard* case, *supra* at 907; *Milk Institute* case, *supra* at 483. This pricing structure seems so arbitrary and artificial as to negative an inference of innocent parallel behavior and to require an inference of at least tacit prearrangement, in view of the record disclosures that all petitioners participated in discussions at which they explored the advantages of the very pricing practices which shortly later they uniformly adopted. *American Tobacco Co.* v. *United States*, 328 U. S. 781, 809; *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 226–227; *Allied Paper Mills* v. *FTC, supra* at 607–8.

Closely related to the parallel behavior argument is Eagle-Picher's assertion that, although it systematically matched National's pricing and sales practices, it nevertheless competed vigorously with the latter by supplying its customers with technical assistance and other additional services. In view of our conclusion that the finding of an agreement is justified, it is a sufficient answer to this argument to reaffirm the well settled postulate that it is unlawful for competitors, by agreement, to block off any of the normal channels of competition with the purpose of establishing identical prices for products of like grade, even though other facets of normal competition may remain unfettered. *FTC* v. *Cement Institute, supra; United States* v. *Socony-Vacuum Oil Co., supra.* This principle rests on the view that the purchasing public is entitled to an opportunity to bargain with competing firms with regard to purchase prices of products of like quality.

III. PRICE DISCRIMINATION.

Under Count II of the complaint, the Commission found that petitioners and Glidden were guilty of price discrimination in the sale of lead pigments in violation of Section 2 (a) of the Clayton Act, as amended, by the Robinson-Patman Act, 15 U. S. C. § 13. Specifically, it found that the zone and quantity differentials were unlawful, except that the carload discount on dry white lead was justified by cost factors on shipments made by rail.

The principal attack on these findings is that there is no substantial evidence of a probability that such price differentials would have an adverse effect on competition between petitioners' various customers. Petitioners argue that the zone boundaries for each type of pigment follow natural trade barriers, that the evidence does not support the finding that competition in fact existed between dealers in the several zones and that the zone and quantity differentials are so insignificant as to negate any effect on competition between purchasers of petitioners' products.

In view of the zealous contention, bordering on an argument that the Commission must prove concretely that petitioners' price differentials have had an unlawful effect on competition, it is well to refer to the test by which such findings must be measured. Evidence of a probability that discrimination in price between competing purchasers will have the effect of injuring competition is sufficient to sustain a finding of a § 2 (a) violation. As the Supreme Court said, in *Corn Products Refining Co.* v. *FTC,* 324 U. S. 726, 738, the statute "does not require a finding that the discriminations in price have in fact had an adverse effect on competition. The statute is designed to reach such discriminations 'in their incipiency' before the harm to competition is effected. * * * Cf. *Standard Fashion Co.* v. *Magrane-Houston Co.,* 258 U. S. 346, 356–357. But, as we held in the *Standard Fashion* case, *supra,* with respect to the like provisions of § 3 of the Clayton Act, prohibiting tying clause agreements, the effect of which 'may be to substantially lessen competition' the use of the word 'may' was not to prohibit discriminations having 'the mere possibility' of those consequences; but to reach those which would probably have the defined effect on competition." And in *FTC* v. *Morton Salt Co.,* 334 U. S. 37, 47, the Court again defined the test in these words: "the Commission is authorized by the Act to bar discriminatory prices upon the 'reasonable possibility' that different prices for like goods to competing purchasers may have the defined effect on competition." Cf. *Corn Products Co.* v. *FTC, supra* at 742. When the evidence of record is considered in the light of this test of a reasonable possibility of injury to competition, we must conclude that *most* of the Commission's findings of § 2 (a) violations are substantially supported.

With respect to white lead-in-oil sales, the Commission found that petitioners discriminated in price in favor of certain dealers by selling their products at a single price within a par zone and at premiums above such price ranging from 12½ cents to $1.00 per cwt. to dealers located outside the zone. It found that these differentials constituted illegal discriminations which tended to injure competition between competing dealers located near the boundaries of adjoining zones.

Petitioners urge that the zone boundaries follow natural trade barriers, and that there is no evidence that dealers do, in fact, compete across these zonal boundaries, inasmuch as the product is marketed by them only locally, as a semi-mixed paint, to individual painters.

The evidence does tend to indicate, however, that competition is keen between dealers in paint products including white lead-in-oil. Furthermore, the evidence tends to show also that there is more than a reasonable possibility that competition would be likely to cross the arbitrary zonal walls which petitioners have erected. We need only refer to one phase of the proof in this respect, namely, that these zonal boundaries dissect 10 states, in some instances placing a single city or metropolitan area in a preferred zone status over the remainder of the state in which it is located. Illinois, Wisconsin and Kentucky are largely in a par zone, but substantial areas in the western part of each are in the 12½ cent premium zone, while the city of Saint Louis is segregated from the remainder of the State of Missouri in a par as contrasted to a

12½ cent status respectively. The cities of San Francisco, Oakland and Berkeley are par territory, while the remainder of California is in a 25 cent zone. The area immediately encompassing the cities of Omaha and Lincoln, Nebraska, and the cities of Atchison, Leavenworth and Kansas City, Kansas, are in the 12½ cent zone as contrasted to a 25 cent status for the remaining area of their respective states. The States of Oregon and Washington are divided roughly equally between the 25 and 50 cent zones. Finally, a zonal boundary approximating the location of the Appalachian barrier separates the 25 cent zone of western Virginia from the 12½ cent status of the eastern portion of the State.

With the possible exception of the last mentioned state, the record impels us to conclude that the barriers which dictated the location of the zonal boundaries were those due to the location of plants of one or more of petitioners and to possibly other considerations known only to the trade. The inference that this division probably would have the deleterious effect on competition which § 2 (a) proscribes is certainly a reasonable one which the Commission as the trier of the facts was entitled to draw from the evidence before it.

With respect to dry white lead sales, the Commission found that petitioners had discriminated in price by offering their product for sale to all customers within a par zone at a price 25 cents per cwt. below that offered to dealers outside the zone. It found also that the 25 cent carload-L. C. L. differential constituted an illegal discrimination against small purchasers, where delivery was made by local carriers, but found that this differential was a justified cost factor on shipments made by rail. Petitioners challenge each of the adverse findings.

We fail to find in the record any evidence supporting the finding of competitive injury resulting from the zone differential. Petitioners employ two zones in marketing this product, a par zone including all states east of the eastern borders of Montana, Wyoming, Colorado and New Mexico. The states west of this line are in the 25 cent per cwt. premium zone. While there is substantial evidence of a highly competitive relationship between mixed paint manufacturers, the principal consumers of dry white lead, there is no evidence that competition does in fact exist between those in the eastern par zone and those in the Rocky Mountain-Pacific Coast premium zone. To this extent the Commission's order is without basis in fact.

But there is no merit to petitioners' contentions relative to the quantity differential. The evidence tends to indicate, and the Commission found, that a large proportion of mixed paint manufacturing is centralized in and around Chicago, Saint Louis and other metropolitan districts; that one or more of petitioners operate white lead plants in each of these areas; that shipments to such manufacturers are generally by local cartage, and, finally, that the 25 cent per cwt. premium for L. C. L. shipments bears no reasonable relationship to added costs incurred in such shipments. The reasonable probability of injury to competition is certainly a justifiable inference which the Commission was entitled to draw from this showing.

With respect to lead oxides, the Commission found that petitioners, except International, discriminated in price in favor of certain customers as follows: by selling carload lots to all customers in a par zone at a uniform delivered price 25, 50 or 75 cents per cwt. below that accorded to purchasers in each of three premium zones; by a uniform base price of $1.50 for litharge and $2.50 for red lead over AS&R's New York quotation for pig lead and adding the applicable zone differential thereto; and by charging different prices for oxides in carload and L. C. L. purchases, by adding to the carload price 40 cents per cwt. for L. C. L. purchases of more than 5 tons and 90 cents per cwt. on those of less than 5 tons. The Commission found further that the oxides are used principally by the storage battery industry, which is composed of some 200 manufacturers ranging in size from relatively small operators to industrial giants; that this is a highly competitive industry in which the little manufacturer competes not only against Exide, Willard and other large producers, but also against Sears Roebuck and other large mail order and chain store retailers; that each of the price differentials alluded to added as much as 12 cents to the cost of production of a battery, and that an increase in cost of 5 to 10 cents per battery might, and did, during a substantial period of time involved herein, represent the difference between a profitable operation and a losing one on some types of batteries. The most favorable light which the record affords to petitioners is that the evidence as to the fact of competition and the effect of these differentials thereon is conflicting. Consequently, as that conflict has been resolved adversely to petitioners by the triers of fact, we may not substitute our judgment on this phase of the case.

We observe briefly the argument, which applies to all pigments involved, that the price differentials were such an insignificant factor that no threat of adverse effect on competition can be spelled out. For example, the added unit costs of up to 8 cents per gallon of mixed paint and of up to approximately 12 cents per storage battery are singled out. We believe, however, that this raises a question peculiarly within the competence of the Commission, and that its determination thereon, as an expert administrative body, should be accorded full respect. The Commission was conceived and created by Congress as an agency especially informed and equipped to act to sustain the vigor of the economic pulse. Perhaps in no other field is the economic pulse, as envisaged in § 2 (a), so critically reflected as it is in the close relationship between added unit cost differences brought about by discriminatory pricing of raw components entering into the unit and the effect of such cost on competition within an affected industry. The courts are extremely reluctant to set aside the Commission's finding that a discriminatory price, though small, adversely affects the health of competition. See *FTC* v. *Cement Institute*, 333 U. S. 683, 726. It is noteworthy also, with respect to the § 2 (a) determinations, that Commissioner Mason, who filed a vigorous dissent against other portions of the Commission's order, concurred fully in the parts pertaining to price discrimination.

IV. INCIPIENT MONOPOLY.

The complaint charged, and the Commission found, that National had, beginning in 1891, engaged in acts tending toward substantial control of and a monopoly in the pigment industry in violation of Section 5 of the Trade Commission Act. Accordingly, it ordered the company to cease and desist from acquiring or attempting to acquire any ownership of the capital stock, or properties of any of its competitors in the lead pigments field.

In this respect, National asserts that the Commission has no power under Section 5 to enjoin acquisitions of stock or assets which do not constitute a violation of Section 7 of the Clayton Act, 15 U. S. C. § 18. Irrespective of the Commission's power under § 5, we think the order so wanting in evidentiary support and so arbitrary that it cannot stand in any event. Therefore, we do not consider the § 5 question.

The Commission found that National was incorporated in 1891, effecting a merger of some 16 companies engaged in pigment production, and that between that date and the mid 1930's it acquired the properties of more than 30 other producers. From 1931 to about 1935, National made several attempts to acquire the facilities of Eagle-Picher, its largest competitor. Thus, beginning in 1931, National purchased substantial holdings of Eagle-Picher stock, though it never attained a position even remotely approaching majority control. The larger part of this stock was sold in 1937. Approximately 3,500 shares were retained, but these were sold in 1944. Incidentally, whether this represented merely an investment, as National insists, the record discloses that it grossed more than $800,000 in profits on the Picher stock transactions.

In addition to these findings relating to petitioner's history, the Commission relied on evidence relative to certain contracts, to which National was party, to support its ultimate conclusion of incipient monopoly. Three of these were executed on February 26, 1906. By the first, between National and AS&R, the former agreed to buy from the latter all its requirements of corroding lead, except an amount not to exceed 30,000 tons annually produced by Saint Louis Smelting Company, a wholly owned subsidiary of National, and 85% of its requirements of other types of pig lead, but not to exceed 85% of AS&R's production. Prices to be paid by National were pegged to AS&R's daily price quotations. It was agreed, further, that the excess of Saint Louis's production over 30,000 tons per annum would be sold to AS&R at a price substantially below the latter's daily quotation. The contract expired in 1921 and was not renewed. Under the second contract, National acquired all of the capital stock and securities of the United Lead Company, a holding company for all the securities of 13 producers of lead pigments. United was controlled at that time by a syndicate composed largely of AS&R's officers and directors, and AS&R had a substantial interest in United by virtue of stock ownership. By the third agreement, between AS&R and Hoyt Metal Company, a constituent company of National, Hoyt agreed to buy and AS&R to sell the latter's entire production of antimonal lead. The Commission referred to a fourth document which, perhaps, should be mentioned in passing. In 1924 and in 1938, National agreed to supply du Pont's white lead-in-oil requirements on a processing fee basis. Under the terms of this contract du Pont furnished all raw materials and National manufactured therefrom and shipped the finished product at the former's direction on the payment of an agreed processing fee.

The ultimate finding of incipient monopoly is based on these findings as to transactions in the growth of petitioner to a dominant position in its field. We find the assertion that occurrences concluded more than twenty years before the order was entered can justify a perpetual injunction against any future acquisition of stock or physical assets of National's competitors a startling one. The Commission stated that it had not considered the question of possible antitrust violations in petitioner's growth from 1891 to the middle 1930's. Nevertheless, it relied on findings which can have no purpose save possibly to prove that a monopoly already exists to support its order which is geared solely to prevention of monopolistic practices at some undisclosed future date. Thus, the order is not supported by the findings and must fall under the principles announced in the *Universal Camera* case. *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474.

We are not here concerned with judicial pronouncements that the Commission has authority to determine the scope necessary in a cease and desist order to prevent violations of the Act. See *e. g., May Stores Co.* v. *NLRB,* 326 U. S. 376, 390–392. That principle assumes a present violation of the Act, in which case the Commission is given wide latitude in framing its order to compel compliance with the Act.

But such is not the case before us. The Commission has concluded from its findings of past activities, which may have had monopolistic overtones long ago, that petitioner presently harbors a desire to swallow up all competition and that, at some undisclosed time in the future, it intends to do so. Presumably the evidence of this intent is too delicate to stand the light of day, since it cannot be found in the record. Drafted on this basis, the order before us seeks to spank the child, not for naughty acts done or threatened, but on the general principle that he, may somewhere, somehow, in the future engage in mischief. This presumes the existence of a power even broader than that residing in a court of equity. The language of the Court of Appeals for the Fourth Circuit in the *New Standard* case is pertinent:

> When an order of the Commission is before us for review, the statute provides that to the extent that we do not modify it, we shall use our injunctive power to enforce it, 15 U. S. C. A. § 45 (c); and it is elementary that a court of equity will not enjoin one from doing what he is not attempting and does not intend to do. * * * While an administrative agency is not a court of equity, its orders must be based on evidence giving them reasonable support, and such support is not given for an

> order relating to present and future practices by evidence relating only to transactions which occurred a decade before it was entered. * * * No one would contend that a cease and desist order should be upheld, if all the evidence supporting it related to business practices which occurred ten years before the filing of the proceeding. * * *" *New Standard Pub. Co.* v. *FTC,* 194 F. 2d 181, 183.

V. VALIDITY AND SCOPE OF ORDER

The remaining questions relate to the validity of the order as against International and to its scope as applied to petitioners generally. These questions are hereinafter considered in the order in which they are stated.

A. VALIDITY AS TO INTERNATIONAL.

International asserts that the record shows conclusively that it ceased production of lead pigments in 1946; that, therefore, any issue as to its alleged violations has become moot and that the Commission abused its discretion in entering a cease and desist order against it.

The facts pertaining to this question are not in dispute. The original complaint was filed in 1944, and the amended complaint in April 1946. On both dates, and for about 10 years prior to 1946, International was engaged in the production and sale of white lead, both dry and in-oil, at East Chicago, Indiana. In July 1946 it ceased production and, during the following month, the sale and distribution of the product was discontinued, and the trade given notice of the cessation. At no time since then, has petitioner engaged in any phase of pigment production or marketing. In October 1946 it sold its plant and facilities to Eagle-Picher.

On completion of the evidence offered in support of the complaint, this petitioner moved to dismiss the complaint against it on the ground that it had permanently abandoned its pigment activities. Petitioner relied on the facts related above and the supporting affidavit of its vice-president stating that petitioner had sold its plant and facilities; that, with one or two exceptions, all qualified pigments technicians and sales personnel had left its employ, and that the company had no intention "ever to re-enter" the field.

The Commission denied the motion in March 1947, on the ground that "it is not unlikely that respondent may in the future see fit to re-enter" the field. However, upon the evidence submitted, the trial examiner later found that "There is no reason to believe that International will ever reenter the business of the manufacture and sale of lead pigments." Despite this finding, the Commission's order, issued in 1953, runs against International as well as the other petitioners and Glidden.

In *Marlene's, Inc.* v. *FTC*, 216 F. 2d 556, we had occasion to consider a similar situation. What we there said in reviewing decisions relative to the discretion lodged in the Commission to enter orders against discontinued practices is pertinent here; it need not be repeated. Id. at 559, and cases there cited. While the Commission is vested with a broad discretion to determine whether an order is needed to prevent the resumption of unlawful acts which have been discontinued, this "discretion must be confined * * * within the bounds of reasonableness." Id. at 559.

This rule of reasonableness requires something more than a mere guess or suspicion contrary to the evidence and to the finding of the trial examiner that a resumption of discontinued practices may not reasonably be anticipated. As we have stated in our discussion of the monopoly question, the Commission is not empowered to "enjoin one from doing what he is not attempting and does not intend to do." *New Standard Pub. Co.* v. *FTC, supra* at 183; *FTC* v. *Civil Service Training Bureau,* 79 F. 2d 113 (CA-6).

The distinction on the facts between this cause and such cases as *Marlene's, Inc.* v. *FTC, supra,* and *Galter* v. *FTC,* 186 F. 2d 810, cert. denied 342 U. S. 818 (CA-7), is readily apparent. In each of those cases it appears that the petitioning party was still engaged in the same business in which the unlawful practices had been employed, and there was evidence from which the Commission might properly infer a public need for an order despite the fact that the specific unlawful practices had in fact been discontinued. Such a situation presents quite a contrast to the undisputed fact here that petitioner is no longer engaged in the industry in which the unlawful practice occurred and has divested itself of production properties.

And it is immaterial that petitioner may still be engaged in the smelting and refining of pig lead. No charges were before the Commission relating to that commodity, and there is nothing in the record to support any reasonable anticipation that petitioner will ever employ that commodity in pigment production. The cease and desist order entered in the face of this showing is arbitrary and must be set aside.

B. Scope of Order.

There remains the question of whether the order is too broad, in that it purports to prohibit certain individual activity, *i. e.*, whether the Commission exceeded its authority in this respect. In pertinent part the order prohibits any conspiratorial agreement or other concerted action to do those things which, according to the Commission's findings, amount to statutory violations. It expressly excludes from its edict agreements between any petitioner and its subsidiaries or affiliates which relate solely to the business of such petitioner and do not have the purpose or effect of unlawfully restricting competition. Petitioners do not challenge the propriety of the form of these provisions, but make an attack on the next paragraph, which restricts individual activity as follows:

> It Is Further Ordered that each of the respondents, its officers, agents, representatives, and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby

> preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another.

This portion of the order is assailed on the grounds first, that it is improper, since the complaint did not charge, and the Commission did not find, that individual use of the zone delivered price method was an unfair method of competition and, second, that the Commission is authorized under Sec. 5 to prohibit unlawful acts only and, conversely, is without power to prohibit behavior which has not been found to be unlawful. The Commission insists that the paragraph represents an allowable judgment in its choice of a remedy, as is best shown by the language of its opinion, that "Such a prohibition is necessary, not because it is unlawful in all circumstances for an individual seller, acting independently, to sell its product on a delivered prices basis in specified territories, but to make the order fully effective against the trade restraining conspiracy in which each of the respondents participated."

Reported judicial authorities and the elementary principles of statutory construction compel the conclusion that this paragraph is beyond the power of the Commission and must, therefore, be set aside. The grant of power in Sec. 5 of the Act is expressly restrictive. Under subsection (a) the Commission is empowered to prevent any person "from using unfair methods of competition * * * and unfair or deceptive acts or practices in commerce." Subsection (b) provides that, after a hearing and on a finding "that the method of competition or the act or practice is prohibited" by the Act, the Commission may issue an order requiring the person adjudged guilty of such conduct to "cease and desist from using such method of competition or such act or practice." 15 U. S. C. § 45 (a), (b).

The Commission may exercise only such powers as are granted to it by statute, *Arrow-Hart & Hegeman Co.* v. *FTC*, 291 U. S. 587, 598, and its remedy against practices must comport precisely with the legislative grant of power. The section is specific; the permissible order is restricted to a prohibition of "unfair methods of competition" found to exist. In the *Arrow-Hart* case, *supra*, the Court said, at page 598:

> The Commission is an administrative body possessing only such powers as are granted by statute. It may make only such orders as the Act authorizes; may order a practice to be discontinued and shares held in violation of the Act to be disposed of; but, that accomplished, has not the additional powers of a court of equity to grant other and further relief by ordering property of a different sort to be conveyed or distributed, on the theory that this is necessary to render effective the prescribed statutory remedy.

To the same effect see *FTC* v. *Eastman Kodak Co.*, 274 U. S. 619, 623–624; *FTC* v. *Sinclair Refining Co.*, 261 U. S. 463, 475, 476. While it is true that violations of the Clayton Act were charged in each of these cases, the same principle controls the scope of the permissible remedy under Sec. 5 of the Trade Commission Act. Compare the grant of power under the Clayton

Act, 15 U. S. C. § 21 with that under Sec. 5 of the Trade Commission Act, 15 U. S. C. § 45 (a), (b).

To support its reasoning that it may prohibit lawful actions where such a course is deemed necessary effectively to restrain an unlawful practice, the Commission relies on certain language in the opinion in *Jacob Siegel Co. v. FTC*, 327 U. S. 608, 611-613, as follows:

> The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce. Here, as in the case of orders of other administrative agencies under comparable statutes judicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy. * * * The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. * * * [A]nd the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.

The quoted language must be read in context, in the light of the facts there involved. The Commission had determined that Siegel's trade name "Alpacuna" as applied to coats was misleading and had prohibited further use of the term. The Court of Appeals affirmed. *Jacob Siegel Co. v. FTC*, 150 F. 2d 751 (CA-3). On certiorari, the finding that use of the trade name was misleading and thus illegal was not attacked; the only question before the Supreme Court was whether the Commission properly ordered excision thereof.

The Court reversed and remanded, on its determination that the Commission had not considered whether, by employing some qualifying language in connection therewith, use of the trade name might be preserved. The quoted language appears in the general discussion of the propriety of the excision order, and, when read in that context, does not, we believe, sanction a prohibition against lawful acts.

We have found no decision sanctioning an order such as this. True, the Commission is not restricted in its choice of a remedy "to prohibiting the illegal practice in the precise form in which it is found to have existed in the past." *FTC* v. *Ruberoid Co.*, 343 U. S. 470, 473. It may frame its order broadly to reach all phases of existing unlawful conduct. Thus, in Ruberoid, the Commission prohibited the use of all price differentials on its findings that differentials employed by that Company of 5% and greater were discriminatory in violation of § 2 of the Clayton Act, as amended. The Court held that the Commission was not required to restrict its order to the specific differential previously used, namely 5% and greater, in the absence of a showing by Ruberoid that differentials of less than 5% might be lawfully employed.

The same principle was applied in *Hershey Chocolate Corp.* v. *FTC*, 121 F. 2d 968 (CA-3). On a complaint charging unfair methods of competition in the sale of one candy item, the Commission had found that similar unlawful practices were being employed in the sale of several other confectionery items as well. The Court sustained an order which prohibited all such unlawful practices which the Commission had found to exist, on the theory that the entire unlawful conduct was related to the specific unlawful practice of which complaint was made.

Other cases cited by the Commission fail to support its contention. In *Dorfman* v. *FTC,* 144 F. 2d 737 (CA–8), no question was raised but that the practice prohibited by the challenged portion of the order was unlawful. The determination in *California Lumbermen's Council* v. *FTC,* 115 F. 2d 178, 185, cert. denied 312 U. S. 709 (CA–9), was that the practices which the Council insisted were lawful were, in fact, an unlawful restraint of competition, under the holding in *Eastern States Lumber Ass'n* v. *United States,* 234 U. S. 600, 612. And, finally, *FTC* v. *Wallace,* 75 F. 2d 733 (CA–8), must be read in the light of the unique situation there involved. That was a proceeding brought to enforce an order. The objectionable conduct existing prior to the proceeding in which the order was entered had been accomplished through the offices of an association, composed of all individual respondents, but, as the Commission found, wholly controlled by Wallace. After a cease and desist order was entered, the association was dissolved, but Wallace continued the same practices unabated in behalf of himself and the other ex-members of the association. The Commission filed a petition against Wallace only, for enforcement of its order. His answer did not deny the averments made; he demurred on the ground, *inter alia,* that the order restrained concerted conduct and, therefore, enforcement could not be decreed against him alone, to restrain his individual conduct. He did not deny that his own conduct was illegal, but argued merely that it did not come within the purview of the order. The court entered a somewhat unique decree, first modifying the Commission's order to prohibit individual as well as concerted use of the admittedly unfair practice, and then enforcing the order as thus modified, against Wallace alone.

In each of the cases upon which the Commission relies, the courts have sustained restraints only against conduct found to be unlawful, resolving all doubts in favor of the Commission's order in those gray areas wherein the legality or illegality of a particular course of conduct depends on the circumstances surrounding its use. Cf. *FTC* v. *Ruberoid Co.,* 343 U. S. 470, 473. The individual practices against which this order runs are not shrouded in fog. On the contrary, the Commission expressly pointed out that it had not considered the individual use of the zone system, but concluded that the portion of the order with reference thereto was necessary in order to prevent evasion. This position presents a striking contrast to the language of the Supreme Court in *FTC* v. *Cement Institute,* 333 U. S. 683, 727–728, wherein the Court, in affirming an order prohibiting conspiratorial use of a basing point system, carefully pointed out that it did not affect individual use of such system. Although no question of individual restraint was presented, the Court's meticulousness, in emphasizing the limitations of the order before it, is important as indicative of the esteem which it attached to preservation of the individual's right to adopt and employ his own business practices, notwithstanding the fact that concerted action between competitors to employ the same practices may violate the Act.

The part of the order with which we are now concerned does not differ in any significant respect from the one we struck down in *Salt Producer's Ass'n* v. *FTC,* 134 F. 2d 354. There, as here, we sustained the Commission's findings that the petitioners, acting in concert, had employed a uniform zone delivered pricing basis in the sale of salt. There, as here we sustained the determination that such concerted activity was violative of the Act and the order prohibiting its prospective use. There, as here, the complaint contained no allegations with respect to the individual use of the zone system. Petitioners were ordered to cease and desist from employing *"any common cause of action* * * * establishing or maintaining delivered price zones, or making quotations and sales of salt upon a delivered price basis under a zone system whereby the cost of salt * * * is made identical at all destinations within such zone.". We set the order aside saying, 134 F. 2d at page 358:

> The complaint discloses the Commission's aim to eradicate and prohibit all *concert* of action by these petitioners, looking to the establishment and fixation of prices. There was no indication in the complaint that they were assailing the zone system *per se* as an unfair method of competition by one manufacturer in relation to two purchasers of his salt, in the same zone, where the freight costs are averaged, and one bears a greater burden than the actual freight cost incurred.

> If the zone system *per se* is to be condemned, there ought to be a hearing by the Commission and a finding on the precise issue of the unfairness of such a commercial practice.

Although the Salt Producers order is not identical with that before us, we think the two cannot be distinguished in principle. The Commission asserts that the present order does not restrain all individual use of the zone system but only that which has the effect of "systematically matching the prices" of a competitor at a particular designation. The fact remains, however, that there have been no complaint, no hearing and no findings relative to the effect of such parallel individual actions. *Salt Producers' Ass'n.* v. *FTC, supra.* Cf. *FTC* v. *Gratz,* 253 U. S. 421, 424.

Clearly, the Commission was concerned here with enforcement of its order prohibiting concerted action. In justifying the paragraph in question, it pointed up "the likelihood" that petitioners might continue to use the same zone systems and plead that they have abandoned the unlawful agreement and that such use is merely individual parallel conduct. It seems to us that this is an unwarranted anticipation of a situation which may never arise and an attempt to decide, by an anticipatory order, questions which will be a subject for this court to consider should some future enforcement proceeding become necessary. We refuse to sustain such a sweeping inroad on individual liberty of competitive action, without a prior determination by the Commission, after an appropriate hearing, that such activity is a violation of the Act. Lawful acts do not become automatically unlawful because of an administrative guess that a declaration of their illegality may facilitate enforcement of a valid order.

If individual use of the zone system by petitioners is to be restrained, that result must be achieved by a proper order in a proceeding conducted in conformity with the statute, in which the invalidity of such conduct is determined. The Commission's power to act is conditioned on such a determination. *Salt producer's Assn.* v. *FTC supra;* Cf. *Arrow-Hart & Hegeman Co.* v. *FTC*, 291 U. S. 587; *FTC* v. *Eastman Kodak Co.*, 274 U. S. 619, 623–624; *FTC* v. *Western Meat Co.*, 272 U. S. 554; *FTC* v. *Sinclair Refining Co.*, 261 U. S. 463, 475–476.

The order, as modified by this opinion, will be affirmed. The Commission shall, within 20 days, submit a proposed decree modifying its present order in accord with the views expressed herein and submit the same to petitioners and to this court. Within 10 days thereafter, petitioners shall consent or file objections thereto. The final decree will then be entered.

APPENDIX B

Judgment of the United States Court of Appeals for the Seventh Circuit

The National Lead Company, The Sherwin-Williams Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company and the International Smelting & Refining Company having filed in this Court petitions to review and set aside an order to cease and desist issued on January 12, 1953, by the Federal Trade Commission in a proceeding before the said Commission entitled "In the Matter of National Lead Company, et al., Federal Trade Commission Docket No. 5253;" and the petitions having been heard by this Court on briefs and oral argument; and the Court having on December 1, 1955, filed its opinion providing for modification of said order of the Commission and for affirmance of said order as modified as to all petitioners except Anaconda Copper Mining Company and International Smelting & Refining Company:

Now therefore it is hereby ordered, adjudged and decreed that with respect to petitioners Anaconda Copper Mining Company and International Smelting & Refining Company the aforesaid order to cease and desist be, and it hereby is, set aside.

It is hereby further ordered, adjudged and decreed that with respect to petitioners National Lead Company, The Sherwin-Williams Company, The Eagle-Picher Company and The Eagle-Picher Sales Company, the following paragraphs of the aforesaid order to cease and desist be, and they hereby are, set aside:

> It is further ordered that each of the respondents, its officers, agents, representatives, and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another.
>
> * * * * *
>
> It is further ordered that the respondent, National Lead Company, its officers, agents, representatives and employees do forthwith cease and desist from acquiring or attempting to acquire, directly or indirectly, any interest or ownership or control in the capital stock, or in the physical assets, plants, or other properties, of any concern or enterprise which at the time of such acquisition or attempted acquisition is a competitor of said National Lead Company in the manufacture or in the sale or distribution of lead pigments.

It is hereby further ordered, adjudged and decreed that with respect to petitioners National Lead Company, The Sherwin-Williams Company, The Eagle-Picher Company and The Eagle-Picher Sales Company, the aforesaid order to cease and desist be, and the same hereby is, modified to read as follows:

Pursuant to Section 5 of the Federal Trade Commission Act:

It is ordered that the respondents, National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, The Sherwin-Williams Company, and the Glidden Company, their respective officers, agents, representatives and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between or among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following things:

1. Establish, fix, or maintain prices, terms, or conditions of sale for lead pigments, or adhere to any prices, terms, or conditions of sale so fixed or maintained.

2. Quote or sell lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system; or quote or sell lead pigments pursuant to or ~~in~~ accordance with any other plan or system which results in identical price quotations or prices for lead pigments at points of quotation or sale or to particular purchasers by any two or more sellers of lead

pigments using such plan or system, or which prevents purchasers from finding any advantage in price in dealing with one or more as against another seller.

3. Quote or sell lead pigments at specified differentials over any particular quotation or quotations of pig lead prices.

4. Quote or sell lead pigments at specific price differentials based upon differing sizes or types of containers or based upon differing quantities in which such products are sold or delivered.

5. Enter into, employ, or continue in effect, any agency or consignment contract, plan or arrangement under which the resale prices or selling practices of any dealer or distributor are controlled or directed.

6. Issue to dealers suggested resale prices, dealers' price schedules, or list prices for the purpose or with the effect of inducing dealers to observe uniform resale prices and refrain from price competition among themselves.

It is further ordered that nothing contained herein shall be construed as prohibiting the establishment or maintenance of bona fide agreements, understandings or other relations between any of the respondents and its officers, directors and employees, or between any of the respondents and any of its subsidiaries or affiliates, relating to the sole and separate business of said respondent and its subsidiaries or affiliates, when not for the purpose or with the effect of unlawfully restricting competition.

Pursuant to Section 2 of the Clayton Act, as amended:

It is further ordered that each of said respondents, its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the sale of lead pigments in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discrimination, directly or indirectly, in the price of lead pigments of like grade and quality:

> 1. By selling such lead pigments, except dry white lead when not sold as a keg product, at different zone delivered prices to purchasers located in different territorial zones when such purchasers are in competition with one another in the resale or distribution of said products, either as lead pigments or as components of other products.
>
> 2. By selling such lead pigments to purchasers competing in the resale or distribution thereof, either as lead pigments or as components of other products, at different prices which vary according to the quantities in which said products are to such purchasers sold or delivered, except at such differentials as were not shown in this proceeding to have resulted in adverse competitive effects or as were shown to have been justified on the basis of differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which the products were sold or delivered, as stated in the findings as to the facts and conclusion herein.

It is hereby further ordered, adjudged and decreed that as so modified the foregoing portion of said order entered pursuant to Section 5 of the

Federal Trade Commission Act be, and the same hereby is, affirmed as to said petitioners, and said petitioners are commanded to obey the same and comply therewith.

It is hereby further ordered, adjudged and decreed that as so modified the foregoing portion of said order entered pursuant to Section 2 of the Clayton Act, as amended, be, and the same hereby is, affirmed as to said petitioners.

It is further ordered, adjudged and decreed that petitioners National Lead Company, The Sherwin-Williams Company, The Eagle-Picher Lead Company and The Eagle-Picher Sales Company shall, within ninety days after service upon them of this decree, file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which they have complied with its said order as herein modified.

Without prejudice to the right of the Federal Trade Commission, the respondent herein, to institute and maintain such proceedings for violation of this decree as may be warranted by law, this Court retains jurisdiction of this cause to enter such further orders or decrees herein from time to time as may become necessary.

By the Court:

(S) WALTER C. LINDLEY,
(S) H. NATHAN SWAIM,
(S) ELMER J. SCHNACKENBERG,
United States Circuit Judges.

Entered: JANUARY 5, 1956.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

October Term 1955

No. —

FEDERAL TRADE COMMISSION, PETITIONER
v.
NATIONAL LEAD COMPANY, THE SHERWIN-WILLIAMS COMPANY, THE EAGLE-PICHER COMPANY AND ANACONDA COPPER MINING COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 19th, 1956.

(S) SHERMAN MINTON,
Associate Justice of the Supreme Court of the United States.

Dated this 30th day of March, 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 63

FEDERAL TRADE COMMISSION, PETITIONER

v.

NATIONAL LEAD COMPANY, THE SHERWIN-WILLIAMS COMPANY, THE EAGLE-PICHER COMPANY, AND THE EAGLE-PICHER SALES COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (R. 3887–3909) is reported in 227 F. 2d 825. The opinion of the Federal Trade Commission (R. 3803–20) and the dissenting opinion of Commissioner Mason (R. 3820–41) are reported, respectively, in 49 F. T. C. D. 875 and 49 F. T. C. D. 889.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1956 (R. 3911). The time for filing a petition for a writ of certiorari was extended by Mr. Justice Minton, on March 30, 1956, to April 19, 1956

(R. 3915). The petition for a writ of certiorari was filed on April 13, 1956, and was granted on June 4, 1956 (R. 3915). 351 U. S. 961. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

In a proceeding under Section 5 of the Federal Trade Commission Act the Commission found that for many years the respondents had been selling lead pigments, by agreement, at prices computed in accordance with a system of zone delivered prices resulting in an exact matching of the prices of other sellers and suppression of price competition. The Commission, having concluded that the respondents were thereby using unfair methods of competition in violation of Section 5, entered an order prohibiting sale, by agreement, at prices computed in accordance with such system. The order additionally prohibited each respondent individually from using such a price system for the purpose or with the effect of "systematically matching" the delivered prices of other sellers. This prohibition was imposed because, the Commission found, it was essential to achieve effective termination of respondents' past illegal conduct.

The question presented is whether the Commission exceeded its statutory authority in directing the individual respondents to cease and desist from selling lead pigments on the basis of the same kind of zone delivered price system which they had long been using by agreement.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. 45, provides in pertinent part as follows:

> (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * *
>
> (6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> (b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition * * * it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing * * *. * * * If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. * * * After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any

time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

STATEMENT

This proceeding was instituted in 1944 (R. 3, 26). The amended complaint charged, so far as now material, that respondents had violated Section 5 of the Trade Commission Act by combining and conspiring to restrain and suppress price competition in the sale of lead pigments[1] (par. 6, R. 63-4). It charged that this suppression of competition was accomplished primarily by dividing the country into geographic zones and charging the same delivered price to all buyers within a particular zone irrespective of the buyer's location (pars. 7B (1)–(2), 8; R. 66, 67–71). It was also alleged that each respondent uses this price system "for the purpose and with the effect of enabling the respondents to match exactly their offers to sell lead pigments to any prospective purchaser at any destination, thereby eliminating competition between and among themselves" (par. 10, R. 72).

---

[1] As found by the court below, the three principal lead pigments are dry white lead, white lead-in-oil (which includes the so-called keg products, red lead-in-oil, etc.), and the lead oxides, red lead and litharge (R. 3889).

Dry white lead is a fine white powder used as a pigment in paints by paint and ceramic manufacturers. White lead-in-oil is white lead with linseed oil added to form a paste, and sold to painters and the general public for use as an exterior house paint after adding additional oil and dryers. Lead oxides and litharge are principally sold to manufacturers of electric storage batteries, lead oxide being the basic raw material of battery plates. (R. 3739-40.)

After an extensive hearing, the Commission made detailed findings of fact (R. 3732–97), and concluded that respondents' agreements and understandings, and their acts pursuant thereto, violated Section 5 (R. 3797). The Commission's order prohibited respondents from entering into or carrying out any "planned common course of action", agreement or conspiracy to sell at prices determined pursuant to "a zone delivered price system" or any other system resulting in identical prices at the points of sale (R. 3800). The order also directed each of the present respondents[2] to cease and desist from (R. 3801)—

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[2] The Glidden Company, one of the companies against which the Commission issued its complaint (R. 3) and against which it issued its order (R. 3800–3), did not petition for review of the Commission's order (R. 3889). The complaint and order were also directed against Anaconda Copper Mining Company and its subsidiary, International Smelting & Refining Company (R. 3, 3800–3), but the court below set aside the order as against these companies (R. 3888–9, 3902–4, 3912), and the petition for certiorari did not question such action. These two companies were accordingly dismissed as parties respondent per stipulation of the parties pursuant to Rule 60 of the Revised Rules of this Court (351 U. S. 921).

> quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another.

An opinion of the Commission, filed simultaneously with its findings of fact, conclusion and order, explained its reasons for prohibiting individual use of the zone delivered pricing system. The Commission stated that respondents, during the NRA period, had established a uniform zone pricing system and had distributed maps showing the boundaries of the zones to be observed, and that subsequently each respondent had followed (with minor variations) the zone delivered price system and adhered to the zone boundaries shown on these maps (R. 3813-4). The Commission said that, in this situation, an order directing each respondent to desist from use of a zone delivered price system "is necessary * * * to make the order fully effective against the trade restraining conspiracy in which each of the respondents participated" (R. 3814). The prohibition would, in the opinion of the Commission, "eliminate the effects of" their conspiracy and "guarantee against" its continuation (R. 3815).

The Commission also stated that unless the respondents, who control practically the entire national production of lead pigments, are individually deprived of "the device which made their combination effective, an order merely prohibiting the combination may well be a useless gesture", and "the evils springing from the combination, one of which is to eliminate price competition, may well continue indefinitely" (R. 3815). The Commission pointed out that under the zone pricing system the delivered price is the same for every point within a zone, and that once the price in the par zone has been established and the relative price gradations in the other zones have also been established, "the system operates substantially automatically" (R. 3816). Accordingly, "the momentum of the system, so firmly and maturely established, might last for some time unless effective measures to break it up were taken"—the purpose of the prohibition running against each respondent individually (*ibid.*). The Commission further said that if competition is later restored and a proper showing is made that the individual prohibition is no longer necessary, "the Commission will, of course, at that time take such action as may be appropriate in the light of the facts and the law" (R. 3817).

The Commission's order was premised upon the facts set forth in its findings, and in particular its findings relating to conspiracy, which the court below held to be supported by substantial evidence (R. 3889).[3] Findings which appear pertinent to the issue now before this Court are set forth below.

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[3] A cross petition for writ of certiorari from the decision below, raising the question whether there was substantial evidence to support the Commission's finding of conspiracy, was denied by this Court. *National Lead Co.* v. *Federal Trade Commission*, 351 U. S. 964.

Up to 1933, a system of differential or warehouse points was commonly employed in the sale of white lead-in-oil. As of March 1933, National Lead had 589 "free delivery" or "equalization" points. Each point had a base price, and the price at other places was determined by adding to the base price the freight from the nearest equalization point. Under this system, a seller could never be sure of his competitor's price at a particular point, in the absence of advance knowledge of his competitor's listed points and of the freight rates used in making his calculations. (Fng. 6 (b), R. 3749.)

Beginning in July 1933, the members of the lead pigments industry (including respondents) participated in a series of meetings for the purpose of drafting a code of fair competition for this industry under the National Industrial Recovery Act (Fngs. 7 (b), 8; R. 3751–2). During discussions of the proposed code, the secretary of the trade association committee which was formulating a code was asked to obtain the opinion of counsel on the legality of immediate agreement among the producers to install a "Uniform Basis of Sale" for lead pigments, and counsel's advice was that the best practical solution "seemed to be the adoption of the Uniform Basis of Sale by one or more of the interested members, which could be followed voluntarily by the others, without agreement on the subject but merely because it was individually to their best interests to do so". (Fng. 8 (a), R. 3755–6.)

The meetings and discussions relative to a code resulted in the members of the industry coming to an understanding and agreement to sell the various lead pigments "on the basis of flat delivered prices to customers within designated zones, with uniform differentials applicable as between such zones." Four separate zoning systems were thereby agreed upon and established. The zoning system for white lead-in-oil and other "keg" products comprised 12 zones, one a "par" zone, two 12½¢ premium zones, three with a 25¢ premium, one a 37½¢ premium, two a 50¢ premium, two a 75¢ premium, and one a premium of $1.00. Altogether different zones were established for dry white lead, for less-than-carload red lead and litharge, and for carload red lead and litharge. (Fng. 10 (a), R. 3761-6.)

With minor exceptions, respondents have adhered to the pricing practices agreed upon in the 1933-1934 meetings (Fngs. 13-14, R. 3772-84). The lead pigment producers agreed during these meetings not only to sell at zone delivered prices pursuant to identical geographical zones, but also to adopt uniform discounts and terms of sale and uniform differentials between various keg sizes, to sell red lead and litharge on the basis of fixed differentials over the price of pig lead as quoted by the American Smelting & Refining Company, to eliminate guarantees against price decline, and to sell white lead-in-oil on the basis of consignment contracts for the purpose of controlling resale prices and preventing competition between the producers and their customers (Fng. 10 (a), R. 3761-2, 3767). The result was to produce substantial identity in prices and in terms and conditions of sale, and the zone pricing feature "facilitated the meeting, or matching, of competitors' prices" (Fng. 15, R. 3784–5).

The court of appeals upheld the Commission's finding of conspiracy and its order directed against concerted or conspiratorial action, but rejected the paragraph of the order directed against individual use of zone delivered pricing. The court pointed out that Section 5 (b) of the Federal Trade Commission Act provides that if the Commission finds in a proceeding brought under that section that the respondent is using an unfair method of competition prohibited by Section 5 (a), it may issue an order requiring him to cease and desist from using "such" method of competition (R. 3905). The court declared: "The section is specific; the permissible order is restricted to a prohibition of 'unfair methods of competition' found to exist" (*ibid.*). It further said that the courts have sustained only prohibitions of the Commission which run against conduct "found to be unlawful" (R. 3907). Since the Commission in the instant case had not passed upon the question whether the individual action prohibited by its order violates the Federal Trade Commission Act, the court held that this prohibition was beyond the Commission's authority and invalid (R. 3908–9).

SUMMARY OF ARGUMENT

The Commission, having found that since 1934 the respondents had sold their goods at prices determined by an agreed upon zone delivered price system which resulted in an exact matching of each others' delivered prices, and that this constituted an unfair method of competition unlawful under Section 5 of the Federal Trade Commission Act, concluded that, in view of the price system's basic simplicity and respondents' long prior adherence to it, it might continue indefinitely without overt agreement. The Commission therefore concluded that actual, as against merely *pro forma*, termination of respondents' unlawful conduct could not be achieved unless the Commission, in addition to prohibiting agreement to use such zone delivered price system, also prohibited each respondent from using a zone delivered price "system" which resulted in "systematically matching" the prices of the other respondents.

The latter prohibition, the legality of which is the sole issue before this Court, clearly bears "reasonable relation" to the violation of the Act found to exist and represents an "allowable judgment" by the Commission with respect to the appropriate and necessary remedy to terminate such violation. *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U. S. 608, 611–613. The prohibition is therefore valid unless the statute impliedly withholds from the Commission any authority whatever to prohibit conduct not found to be illegal in the proceeding on which the Commission's order was based.

The statute grants the Commission unqualified power to *"prevent"* unfair methods of competition and to issue orders directing those found to have used such methods to "cease and desist" therefrom. The implied limitation on the Commission's authority urged by respondents is contrary to the holding of this

Court in *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 473–474. Moreover, it is settled that the Federal Trade Commission and other administrative agencies clothed with comparable statutory authority have powers of prohibition of the same scope as those which a court may exercise when issuing injunctions against statutory violations. When we look to the decisions of this Court dealing with the permissible scope of judgments entered by federal district courts against violators of the antitrust laws, we find many decisions approving judgments which imposed prohibitions and limitations on conduct not in itself illegal or adjudged to be such, to the end that the defendants' past misconduct, and its renewal or revival, be effectively barred.

The prohibition which respondents attack may also be justified as being, in substance, a ban against what would be conspiracy as a matter of law, in that pricing according to a "system", with the effect or purpose of "systematically matching" prices of competitors, would be so linked with their prior agreement to price in this way that it would go beyond the "conscious parallelism" of action which, while evidence of conspiracy, is not of itself conspiracy. Furthermore, when the existence of a continuing conspiracy has been established, abandonment will not be presumed in the absence of "definite proof" thereof. Here, the contested prohibition of the Commission's order merely makes explicit the only definite proof of abandonment which is meaningful—pricing individually on a basis different from the "arbitrary and artificial" pricing system which respondents have used in the past.

ARGUMENT

THE COMMISSION, IN ENTERING ITS ORDER REQUIRING RESPONDENTS TO CEASE AND DESIST FROM FURTHER VIOLATION OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, DID NOT EXCEED ITS STATUTORY AUTHORITY BY INCLUDING A PROHIBITION, FOUND TO BE ESSENTIAL TO PREVENT FURTHER VIOLATION, DIRECTED AGAINST CONDUCT NOT DETERMINED BY THE COMMISSION TO BE EITHER LAWFUL OR UNLAWFUL

The Commission agrees with the statement of the court below that an administrative body such as the Commission may exercise only such powers, including prescription of the remedy, "as are granted to it by statute" (R. 3905). The Commission's relevant statutory powers are those conferred by Sections 5 (a) and 5 (b) of the Trade Commission Act. Section 5 (a) empowers the Commission to "prevent" the use of unfair methods of competition and Section 5 (b) authorizes it, after finding that such an unfair method has been or is being used, to enter an order requiring the offender "to cease and desist" from using such method. No other statutory provision limits the power thus broadly conferred.

The Commission is clothed with wide discretion in determining the prohibitions requisite to bring violations to a stop. In *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U. S. 608, where the petitioner sought modification of an order entered in a proceeding under the Trade Commission Act, this Court stated (pp. 611–612):

> The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of

> trade and commerce. Here, as in the case of orders of other administrative agencies under comparable statutes, judicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy.

The Court also said (pp. 612–613) that the Commission "is the expert body to determine what remedy is necessary", and that it has "wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist."

The doctrine of the *Siegel* case was reaffirmed in *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 726, and *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 473. In the *Cement Institute* case, the Court, in upholding the Commission's order, gave as a reason for rejecting objections to its terms that "the prohibitions in the order forbid no activities except those which if continued would directly aid in perpetuating the same old unlawful practices." 333 U. S. at 727.

Courts of appeals have given similar wide breadth to the scope of conduct which the Commission may prohibit in orders directed against violation of Section 5 of the Trade Commission Act.[4] *E. g.*, *Con-*

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[4] *Salt Producers Assn* v. *Federal Trade Commission*, 134 F. 2d 354 (C. A. 7), upon which the court below relied (R. 3908), is an earlier decision by that court. We believe that the actual holding in that case and its application to the present case are far from clear. See 134 F. 2d at 357–358. In any event, the relevant part of the opinion cites no authorities, and it advances no ground for decision not more fully set forth in the court's opinion in the instant case.

sumer Sales Corp. v. *Federal Trade Commission,* 198 F. 2d 404, 408 (C. A. 2), certiorari denied, 344 U. S. 912; *Independent Directory Corp.* v. *Federal Trade Commission,* 188 F. 2d 468, 470 (C. A. 2); *Hershey Chocolate Corp.* v. *Federal Trade Commission,* 121 F. 2d 968, 971–972 (C. A. 3).

In this case, the grounds for the paragraph of the order directed against individual action are not left to surmise; they are stated in the Commission's opinion. The opinion notes that maintenance of the delivered price zones and quotation of delivered prices therein "constituted the very cornerstone of the respondents' conspiracy", and that it was through adherence to this pricing system that "the matching of prices, one of the objectives of the conspiracy, was accomplished" (R. 3815). The opinion noted that sale at the same delivered price to all purchasers within a given zone and use of precisely the same zones by all the respondents resulted in eliminating price competition (R. 3814). The Commission concluded that this noncompetitive pattern of pricing, continued unchanged since 1934, could not be effectively brought to an end unless its order also included a prohibition against individual use of the device by which price competition had been eliminated (R. 3816–17).[5]

There can be no doubt, therefore, that the Commission exercised an "allowable judgment" in determining that the prohibition against individual action was needed to secure actual, rather than mere *pro forma,* termination of respondents' illegal conduct. It is altogether likely that respondents, without such prohibition, will continue to sell on a noncompetitive basis by pricing in the same way as before, purportedly "without agreement on the subject but merely because it was individually to their best interests to do so" (see *supra*, p. 8). Respondents' noncompetitive pricing, in plain conflict with the policy of the antitrust laws, would then continue indefinitely or at least until a new conspiracy case had been prosecuted to final decision.[6] Avoidance of such a result furnishes warrant for applying "the only practical remedy against continuation of illegal trade practices." *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 186.

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[5] Reasons stated by the Commission for its conclusion are set forth in the Statement (*supra*, pp. 6–7).

Still other considerations justify the presently contested prohibition, which bars each respondent from selling at prices determined pursuant to a zone delivered price "system" for the purpose or with the effect of "systematically" matching the delivered prices of other sellers. Continued use by the respondents of such "system" would be so linked with their past use of this system as to be a *de facto* continuation of concerted action. In the circumstances, such action would go beyond the mere "conscious parallelism" which, while evidence of conspiracy, is not conspiracy *per se* (*Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U. S. 537, 541). Indeed, the court below said that it did not believe that "the protective mantle of 'conscious parallelism' can clothe with immunity a system employed by substantially all members of an industry whereby all offer their products for sale at any given time and any given point throughout the nation at identical prices" (R. 3895).

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[6] The instant case, which was instituted in 1944 (*supra*, p. 6), illustrates the long lapse of time that there may be between commencing such a proceeding and final decision.

There is further warrant for the Commission's order by reason of the established rule that when the existence of a continuing conspiracy has been established, "[i]n the absence of definite proof to that effect, abandonment will not be presumed". *Local No. 167* v. *United States,* 291 U. S. 293, 298. In substance, the contested prohibition merely makes explicit respondents' obligation to furnish "definite proof" of abandonment of concert of action in maintaining a pricing system which the court below deemed "so arbitrary and artificial as to negative an inference of innocent parallel behavior" (R. 3895).

Respondents contended in their brief in opposition (p. 9) that the Commission has no statutory power to include within the prohibitions of its order conduct as to which the Commission has made no determination of illegality. We submit that the law is settled otherwise. In *Federal Trade Commission* v. *Ruberoid Co.,* 343 U. S. 470, the Commission had found that the respondent's discounts of 5% or more constituted price discriminations prohibited by Section 2 of the Clayton Act. (15 U. S. C. 13). There was no finding by the Commission that discounts of less than 5% violated Section 2, but the Commission's order prohibited sale at any discount whatsoever. This Court nevertheless sustained the broad injunction against discounts, ruling that the Commission "was not required to limit its prohibition to the specific differential" shown to have been illegal, and was not required to leave the respondent free to grant discounts of less than 5% and thereby opportunity to "frustrate the whole purpose of the proceedings and the order." 343 U. S. at 474.

Respondents in their brief in opposition (pp. 8–9) state that the issue here presented is whether the Commission is authorized to include within the prohibitions of its order a ban against "a *lawful* pricing method", "lawful action", "*lawful* conduct". But the conduct banned by the contested paragraph of the order is, at best, of doubtful legality. What is prohibited is sale pursuant to a zone delivered price "system" which results in "systematically matching" the prices of other sellers. The Commission has held that individual use of such a pricing method, with knowledge that the other members of the industry did likewise, is an unfair method of competition violative of Section 5, and the Commission's order prohibiting such conduct was upheld.[7] *Triangle Conduit & Cable Co.* v. *Federal Trade Commission,* 168 F. 2d 175, 176, 180–181 (C. A. 7), affirmed by an equally divided Court, 336 U. S. 956 (*sub nomine, Clayton Mark Co.* v. *Federal Trade Commission*).

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[7] In the *Triangle Conduit* case, identity in delivered prices was achieved through a basing point delivered price system, whereas in the present case such identity is achieved through a zone delivered price system. But if there is any distinction between the two systems from the standpoint of legality, respondents' zone delivered price system is the more clearly illegal (see R. 3815–6).

The prohibition which is in issue before this Court clearly bears "reasonable relation to the unlawful practices found to exist", the test applied in the *Siegel* and *Ruberoid* cases. It is equally clear that the Commission exercised an "allowable judgment" respecting the remedy when it concluded that this prohibition is requisite in effectively bringing these unlawful practices to a halt. The prohibition therefore fails only if the statute impliedly withholds from the Commission power to ban conduct not found to be unlawful in the proceeding leading up to the order, no matter how great the need for such prohibition in order to stop the conduct found to be unlawful.

We submit that there is no such implied limitation on the Commission's powers. This Court has held that when a statute authorizes an administrative agency to issue orders to prevent violation of its provisions, the agency has the same power to determine the scope of the needed prohibitions as a court may exercise in issuing injunctions to prevent statutory violations. In *May Stores Co.* v. *National Labor Relations Board,* 326 U. S. 376, this Court, in reviewing an order of the Labor Board, said (pp. 390–392):

> The test of the proper scope of a cease and desist order is whether the Board might have reasonably concluded from the evidence that such an order was necessary to prevent the employer before it "from engaging in any unfair labor practice affecting commerce." § 10 (a). Equity has long been accustomed in other fields to reach conclusions as to the scope of orders which are necessary to prevent interferences

> with the rights of those who seek the courts' protection. Injunctions in broad terms are granted even in acts of the widest content, when the court deems them essential to accomplish the purposes of the act. *We think that the Board has the same power to determine the needed scope of cease and desist orders under the National Labor Relations Act that courts have, when authorized to issue injunctions, in other litigation.* [Emphasis supplied.]

The statutory authority of the Labor Board and that of the Federal Trade Commission are, in the present respect, practically identical.[8] Moreover, this Court has said (with citation of cases involving orders of the Labor Board) that the limits on judicial review of the Trade Commission's determination of the remedy appropriate to prevent further violation are like the limits on judicial review of "orders of other administrative agencies under comparable statutes". *Jacob Siegel Co.* v. *Federal Trade Commission, supra,* at pp. 611–612.

Of course, the prohibitions incorporated in orders of an administrative body, like those imposed by the judgment of a court, must meet the test of having rational relationship to the objective of terminating the misconduct which has been found or adjudicated.

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[8] Section 10 (a), 29 U. S. C. 160 (a), of the National Labor Relations Act empowers the Labor Board to "prevent" any person from engaging in an unfair labor practice, and Section 10 (c), 29 U. S. C. 160 (c), authorizes the Board, if it finds after a hearing that there has been an unfair labor practice, to issue an order requiring the offender to cease and desist from "such" unfair labor practice.

And violation of a statutory command which is specific in character does not warrant prohibiting violation of a different and much more comprehensive command of the statute. *May Stores* case, *supra*, 326 U. S. at 392–393; *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426.

While the opinion in *Arrow-Hart & Hegeman Electric Co.* v. *Federal Trade Commission*, 291 U. S. 587, 598–599, may seem to imply that the Federal Trade Commission's powers of prohibitions are narrower than those of a court, the opinion is to be read in the light of the fact that the Court construed Section 11 of the Clayton Act (15 U. S. C. 21) as specifying the relief which the Commission might grant if it found a violation of Section 7 of the Act (15 U. S. C. 18), namely, to require the offender to "divest itself of the stock held" contrary to the provisions of Section 7.[9]

We believe, therefore, that the powers of prohibition accorded the agency by the Federal Trade Commission Act are substantially equivalent to those which courts exercise when entering judgment against violators of the antitrust laws.[10] It is, accordingly, significant that this Court has frequently upheld judgments imposing obligations or limitations on lawful conduct where such requirements were deemed necessary or appropriate to securing effective relief.

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[9] There was substantial dissent both in this case and in the like decision in *Federal Trade Commission* v. *Western Meat Co.*, 272 U. S. 554. In the former, Chief Justice Hughes and Justices Brandeis, Stone, and Cardozo dissented; in the latter, Chief Justice Taft and Justices Holmes, Brandeis, and Stone dissented.

[10] By Section 4 of the Sherman Act, 15 U. S. C. 4, the several federal district courts are vested with jurisdiction to "prevent and restrain" violations of the Act.

In *International Salt Co.* v. *United States,* 332 U. S. 392, the defendant had leased patented machines with tying provisions found to be illegal under Section 3 of the Clayton Act and Section 1 of the Sherman Act. The judgment required the defendant to offer its machines for lease or sale on terms which would be uniform at any one time, *i. e.,* non-discriminatory.[11] In answer to the appellant's contention that "the injunction should go no further than the violation or threat of violation", this Court, in affirming judgment, said (p. 400):

> When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed.

Other decisions have affirmed judgments which have required a defendant who theretofore had only leased his product to offer it for sale. *Besser Manufacturing Co.* v. *United States,* 343 U. S. 444, 447; *United States* v. *United Shoe Machinery Corp.,* 110 F. Supp. 295, 349–350 (D. Mass.), affirmed *per curiam,* 347 U. S. 521. This Court has also approved numerous judgments providing for compulsory licensing of patents under prescribed limitations in cases in which it was determined that the defendants had, by means of patent license agreements, fixed prices, allocated markets, or monopolized trade. *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 413-418; *United States* v. *National Lead Co.,* 332 U. S. 319, 335-351; *United States* v. *U. S. Gypsum Co.,* 340 U. S. 76, 93-94, 100-103; *Besser Manufacturing Co.* v. *United States,* 343 U. S. 444, 447.

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[11] Non-uniform prices are ordinarily permissible under the Sherman Act, and they are lawful under Section 2 of the Clayton Act unless they have the anticompetitive or monopolistic effect set forth in that section.

The judgments to which we have referred required action not compelled by any statutory provision. They barred use of property which, apart from the judgments, was lawful, *i. e.,* to lease or sell at non-uniform prices, to dispose of property by lease rather than by sale, to refuse to license a patent or to license it at more than a reasonable royalty. Certainly there is no difference in principle between prohibiting conduct not determined to be unlawful—the situation here—and prohibiting (except under specified restrictions) a lawful use of property. In either case the end sought is to secure discontinuance of past misconduct and dissipation of its effects.

United States v. *Bausch & Lomb Co.,* 321 U. S. 707, upheld a prohibition against conduct assumed to be lawful. The defendant Soft-Lite Lens Company had sold its goods under a distribution system which was found to constitute an illegal agreement to fix and maintain resale prices. The defendant, after passage of the Miller Tydings Amendment to the Sherman Act (50 Stat. 693), had entered into many resale price maintenance contracts which this Court assumed to be strictly within the terms of that amendment and therefore not illegal under the Sherman Act. The Court nevertheless sustained judgment provisions which not only prohibited enforcement of the existing "fair trade" contracts but also the making of any new ones for a six-month period. 321 U. S. at 723–724.

In the instant case, the Commission recognized that the prohibition running against the respondents individually might well be warranted or required for only an interim period. The Commission envisaged this prohibition as a necessary means of wiping the slate clean, of bringing into being individual pricing structures and policies which would not be a mere perpetuation of the past illegal price system. The Commission said (R. 3817): "If after competition is restored any of the respondents can make a proper showing to the Commission that this prohibition or any other prohibition in the order is no longer necessary or desirable, the Commission will, of course, at that time take such action as may be appropriate in the light of the facts and the law." Moreover, affirmance of the Commission's order by the reviewing court would not deprive the Commission of jurisdiction to entertain an application to modify or to vacate the prohibition. *American Chain & Cable Co.* v. *Federal Trade Commission,* 142 F. 2d 909, 911–912 (C. A. 4).

This Court, in passing upon the permissible scope of the prohibitions imposed on violators of the antitrust laws, has not applied legalistic or mechanical tests, but rather flexible tests appropriate to the myriad situations which may arise. The Court has recognized that in this field, involving statutes designed to protect the general public as well as those engaged in making, selling, and distributing goods in commerce, there should be no niggardly approach to the question of the scope of permissible relief. The judgment "should be broad enough to prevent evasion" (*Local 167* v. *United States,* 291 U. S. 293, 299); it should be framed "so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival" (*Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 461); it may "prohibit acts which in another setting would be unobjectionable" (*Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 409); it should, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance" (*United States* v. *U. S. Gypsum Co.,* 340 U. S. 76, 88); it should be of sufficient breadth to "effectively pry open to competition a market that has been closed by defendants' illegal restraints" (*International Salt Co.* v. *United States,* 332 U. S. 392, 401).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, with directions to affirm and enforce that part of paragraph 6 of the Commission's order which has been set aside.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 195~~5~~6

No. ~~856~~ 53

Federal Trade Commission,
Petitioner,
vs.
National Lead Company, The Sherwin-Williams Company, The Eagle-Picher Company, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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Dated May 14, 1956.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 858

FEDERAL TRADE COMMISSION,
Petitioner,
vs.
NATIONAL LEAD COMPANY, THE SHERWIN-WILLIAMS COMPANY, THE EAGLE-PICHER COMPANY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

Opinion Below.

The opinion of the Court of Appeals for the Seventh Circuit (Appendix to Petition, pp. 18-56) is reported in 227 F. 2d 825.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented.

The question here presented is not correctly stated in the Petition.

The Commission found that respondents and other manufacturers of lead pigments conspired to adopt the zone method of pricing.[1] There was no charge in the complaint, no testimony and no finding that the individual use of zone pricing constituted an unfair method of competition. The question presented, thus, is whether, under the "unfair methods of competition" clause of Section 5 of the Federal Trade Commission Act, the Commission may compel sellers to give up a method of pricing, not charged or found to be illegal, on the theory that such is necessary to make the order prohibiting continuation of the alleged conspiracy effective.

The Commission asserted that the prohibition of the individual use of the zone method of pricing was necessary in order to insure that respondents would not continue to employ the same method of pricing alleged to have arisen through collusion, by claiming that the continued use was merely the result of individual choice rather than conspiracy. This feature of the case also involves another question. This, as the Court below pointed out (227 F. 2d at 843-844; Appendix to Petition, pp. 55-56), is whether the Commission, by an anticipatory order, may seek to raise an issue which could properly arise only in some future enforcement proceeding seeking compliance with the Commission's order prohibiting concert of action.

Statutes Involved.

The pertinent provisions of Section 5 (a) of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U. S. C. § 45) are set forth in the Petition at pages 3-4. Section 5 (b) of the same Act provides in part as follows (15 U. S. C. § 45):

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[1] Respondents here have filed a cross petition for a writ of certiorari (No. 877) in which, among other things, they seek review of the affirmance of that portion of the Commission's order relating to the conspiracy issue.

> "(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. *The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint.* * * * The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice." (Emphasis supplied.)

Section 9 of the Administrative Procedure Act (60 Stat. 242, 5 U. S. C. § 1008) provides that:

> "In the exercise of any power or authority—
>
> "(a) No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law."

Statement of the Case.

Count I of the amended complaint alleged that respondents and other manufacturers of lead pigments had conspired to establish uniform zone delivered prices in violation of Section 5 of the Federal Trade Commission Act. Paragraph eight of the amended complaint alleged that each respondent adopted certain zone methods; paragraph nine alleged that each respondent adopted certain terms and conditions of sale; and paragraph ten alleged that each of the companies employed the zone method and other uniform terms and conditions of sale for the purpose and with the effect of enabling them to match their prices (R. 67-72).

The Trial Examiner in his recommended decision concluded that Count I related only to conspiratorial action (R. 3452-53).[2] Counsel for the Commission excepted to the failure of the Trial Examiner to hold that paragraphs eight to ten of the amended complaint charged individual use of the zone method as a violation of the Federal Trade Commission Act, separate and apart from the issue of conspiracy (R. 3559).

In ruling on this exception the Commission stated (R. 3709-10):

> "The Commission does not so construe the amended complaint. The manner in which this document was prepared makes it apparent that Paragraphs Eight and Nine of Count I were intended to allege, in effect, that pursuant to and in furtherance of the conspiracy alleged in general terms in Paragraph Seven, each of the respondents used the zone methods of selling therein described, and that each of the respondents employed certain terms and conditions in sell-

---

[2] Count I also alleged that National Lead individually had attempted to monopolize the lead pigments field and the Commission's order contained an injunction against future acquisitions by National Lead (R. 3802). That issue, however, is no longer in the case, since the injunction against National Lead was set aside by the Court below (227 F. 2d at 837-39; Appendix to Petition, pp. 40-44) and no review of that action is sought by the Commission.

> ing their lead pigments. Paragraph Ten alleges that each of the respondents used the systematic method of quoting delivered costs on lead pigments described in Paragraphs Eight and Nine 'for the purpose and with the effect of enabling the respondents to match exactly their offers to sell lead pigments to any prospective purchaser at any destination, thereby eliminating competition between and among themselves', thus indicating that the allegations of Paragraphs Eight and Nine are not a charge in addition to the conspiracy but constitute only a description of the manner in which the conspiracy previously referred to was effectuated; and all doubt on the point is removed by the allegations of Paragraph Twelve (conclusion) to the effect that 'The combinations, agreements and understandings of the respondents and their acts, practices, pricing methods, systems, devices and policies as hereinbefore alleged, all and singularly, are unfair and to the prejudice of the public', etc. *If it had been the Commission's intention to charge that the acts of each of the respondents individually were unlawful, it could and undoubtedly would have so alleged in clear and unambiguous terms.* The hearing examiner's statement of the issues was not erroneous in the respect mentioned, and this exception is denied." (Emphasis supplied.)

In a further ruling on another exception filed by Commission's counsel, the Commission said (R. 3719):

> "Counsel's request for a provision prohibiting each of the respondents from selling its lead pigments in accordance with a zone delivered price system is based upon his argument, made in support of his exception No. I, that the amended complaint charges, and the proof supports the charge, that each of the respondents individually has violated the Federal Trade Commission Act through the use of the zone pricing system. As shown by the ruling on exception No. I, the Commission does not consider this to be one of the charges of the complaint. Thus, the

> Commission does not agree with counsel in his position that the order to cease and desist should contain any provision based on that theory. The Commission is of the opinion, however, in view of all of the facts and circumstances in the case, that in order to effectively prevent the respondents from continuing to attain certain of the objectives of their unlawful conspiracy and so continue to deprive the purchasers of lead pigments of the advantages of real price competition among the producers it is necessary for each of the respondents to be restrained from continuing to use the zone delivered price system and from using any other similar system for the purpose or with the effect of matching the prices of other lead pigment producers."

The Commission made detailed findings of fact (R. 3732-97) and its order, in addition to prohibiting conspiracy or concert of action, enjoined each respondent individually from employing a zone delivered price method "for the purpose or with the effect of systematically matching" the prices of any other seller of lead pigments (R. 3801).

In its opinion the Commission said that this injunction was necessary in order to make the order against conspiracy effective, to eliminate the effects of the conspiracy and to guarantee against its continuation (R. 3814-15). It also said that unless the respondents individually were enjoined from using a zone method, the order prohibiting continuation of the conspiracy "may well be a useless gesture"; that the evils resulting from the conspiracy "may well continue indefinitely"; and that respondents might continue to employ the same method by claiming that such use was not the result of conspiratorial action (R. 3815, 3816).

The Court below, in setting aside this part of the Commission's order, held that the Commission had the statutory authority to prohibit only illegal practices and that here "there have been no complaint, no hearing and no findings relative to the effect of such parallel individual actions" (227 F. 2d at 843; Appendix to Petition, p. 55).

The Court below also said (227 F. 2d at 843-44; Appendix to Petition, pp. 55-56):

> "Clearly, the Commission was concerned here with enforcement of its order prohibiting concerted action. In justifying the paragraph in question, it pointed up 'the likelihood' that petitioners might continue to use the same zone systems and plead that they have abandoned the unlawful agreement and that such use is merely individual parallel conduct. It seems to us that this is an unwarranted anticipation of a situation which may never arise and an attempt to decide, by an anticipatory order, questions which will be a subject for this court to consider should some future enforcement proceeding become necessary. *We refuse to sustain such a sweeping inroad on individual liberty of competitive action, without a prior determination by the Commission, after an appropriate hearing, that such activity is a violation of the Act.* Lawful acts do not become automatically unlawful because of an administrative guess that a declaration of their illegality may facilitate enforcement of a valid order.
>
> If individual use of the zone system by petitioners is to be restrained, that result must be achieved by a proper order in a proceeding conducted in conformity with the statute, in which the invalidity of such conduct is determined. The Commission's power to act is conditioned on such a determination." (Emphasis supplied.)

Argument.

(1) The decision below was clearly correct.

The Court below properly decided, we submit, that the powers of the Commission are to be construed in the light of the Act which gave it birth. We do not have here the question of whether the Commission is to be allowed discretion in its choice of a remedy to deal with an illegal practice (Petition, pp. 10-16). Rather the question here is whether the Commission, on the unfounded assumption that its order enjoining concert of action will probably be evaded, may prevent respondents individually from employing a *lawful* pricing method.[3]

We had thought that it was settled by a long line of authorities, as the Court below held, that the Commission is limited to uprooting practices found by it to be illegal within the meaning of the Federal Trade Commission Act or the Clayton Act (227 F. 2d at 840-44; Appendix to Petition, pp. 47-50).[4] Of course, in so doing, the Commission is not restricted to the precise illegal practice charged in the complaint; it may also reach related illegal practices.[5] But it has no authority, we submit, to condemn practices which do not constitute violations of either statute.

Here the Commission purported to act under Section 5 of the Federal Trade Commission Act. Section 5 (a) of the Federal Trade Commission Act (Petition, p. 3) declares unfair methods of competition to be unlawful and subsection (6) thereof directs the Commission to prevent persons and concerns "from using unfair methods of competition" (ibid.). Section 5 (b) provides the procedure to be followed in carrying out this direction. The Commission must issue a complaint stating in what way a particular practice constitutes an unfair method of competition; the respondent may appear and contest the violation of law "so charged"; a hearing is to be held; the Commission must find that the practice constitutes a method of competition prohibited by the Act; the Commission must state its findings in writing; and finally the Commission must issue an order directing the respondent to cease and desist "from using *such* method of competition" (i.e. such *unfair* method).

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[3] In reality the point at issue will arise only if, at some future date, respondents' compliance with the decree of the Court below is challenged in that Court. See p. 13, *infra*.

[4] *Arrow-Hart & Hegeman Electric Co.* v. *F. T. C.*, 291 U. S. 587, 598; *F. T. C.* v. *Eastman Kodak Co.*, 274 U. S. 619, 623-24; *F. T. C.* v. *Sinclair Refining Co.*, 261 U. S. 463, 475-76; *Salt Producers' Ass'n* v. *Fed. Trade Comm'n*, 134 F. 2d 354 (7th Cir.). Cf. *Trade Comm'n* v. *Cement Institute*, 333 U. S. 683, 727-28. Section 9 of the Administrative Procedure Act (*supra*, p. 3) represents Congressional recognition of the limited nature of the powers granted to administrative agencies.

[5] See, e.g., *Hershey Chocolate Corp.* v. *F. T. C.*, 121 F. 2d 968 (3rd Cir.).

The statutory provisions are, therefore, unambiguous and specific. The complaint must charge an unfair method of competition; hearings must be had upon this issue; and the Commission must find that the practice involved is an unfair method of competition (see pp. 2-3, *supra*).

Concededly here none of these conditions was met. Under its own interpretation of the amended complaint, the Commission did not charge that the individual use of the zone pricing method constituted an unfair method of competition (*supra*, pp. 4-6); no testimony was taken on this score; and the Commission made no finding that such individual use was an unfair method of competition.

We do not dispute the fact that in dealing with illegal acts the Commission has a broad discretion in its choice of a remedy. We merely say that the Commission has no power to enjoin a practice unless and until it properly finds that such practice constitutes a violation of law and certainly it has no such power when it has refused to make such a finding.

The "choice of remedy" cases cited in the Petition (pp. 11-15) have no application whatever, we submit, to the point at issue. None of them upholds the power of an administrative agency to enjoin lawful action.

The Commission argues (Petition, p. 15) that the test applied in the *Siegel* and *Ruberoid* cases[6] "necessarily means that the Commission's order may embrace conduct *other than* 'the unlawful practices found to exist.'" Even if we were to accept that statement, it cannot mean that the Commission's order may ban *lawful* conduct in addition to the specific illegal practices found to exist. In our view, neither case stands for that proposition.

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[6] *Siegel Co. v. Trade Comm'n*, 327 U. S. 608; *Fed. Trade Comm'n v. Ruberoid Co.*, 343 U. S. 470.

In the *Siegel* case this Court remanded the case so that the Commission might determine whether the company's trade name "Alpacuna" could with qualifying language be used in a non-deceptive manner. Implicit in this decision is the principle that the Commission cannot, by a sweeping order, prevent lawful conduct.[7]

The *Ruberoid* case is to the same effect. The order there prohibited only illegal price discrimination. While the evidence before the Commission concerned price differentials of 5% or more, the Commission expressly found that very small price differentials had a material effect on competition. Hence this Court refused to modify the order to allow price differentials of less than 5% and thereby permit the selling company to charge competing purchasers illegal discriminatory prices (343 U. S. at 473-74). With respect to the company's contention that the order prohibited lawful price differentials (viz., price differentials which were cost-justified or made in good faith to meet equally low prices of competitors), this Court said that the provisos of Section 2 (a) and (b) of the Clayton Act were "necessarily implicit" in the order (343 U. S. at 475-76). The decision thus emphasizes that the Commission has the power to suppress only illegal practices.

The Commission's position similarly finds no support in the other cases cited in the Petition. Indeed, they again point up the fact that orders of an administrative agency must fall within the powers granted by Congress. In *May Stores Co.* v. *Labor Board,* 326 U. S. 376, 392-93, this Court struck from the Board's order a broadly worded paragraph (prohibiting only illegal conduct, it may be noted) which bore no reasonable relation to the specific illegal practices found to exist. *I. A. of M.* v. *Labor Board,*

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[7] In *Fed. Trade Comm'n* v. *Beech-Nut Packing Co.,* 257 U. S. 441, 455, the Commission's order was modified so as specifically to permit individual lawful acts which might otherwise be prohibited under the terms of the order. Cf. *Fed. Trade Comm'n* v. *A. P. W. Paper Co.,* 328 U. S. 193.

311 U. S. 72, simply involved the right of the Board to order an employer to bargain exclusively with a particular union, a power granted to the Labor Board under Section 10 of the National Labor Relations Act.[8]

Here the illegality found to exist consisted of the alleged *agreement* among respondents and other manufacturers to establish uniform prices within uniform price zones. Zone methods as such were not under attack. Indeed, the Commission concedes that each respondent individually can legally employ its own zone method (Petition, p. 10, footnote 2).

We believe that it is significant, as the Court below noted, that this Court, in *Trade Comm'n* v. *Cement Institute,* 333 U. S. 683, 727-728, "carefully pointed out" that the Commission's order, prohibiting a conspiracy to use a basing point system, "did not affect individual use of such system" (227 F. 2d at 843; Appendix to Petition, p. 53).

The Commission seeks to distinguish *Salt Producers Ass'n* v. *Fed. Trade Comm'n,* 134 F. 2d 354 (7th Cir.), from the case at bar, but we submit that the Court below was correct in stating that "the two cannot be distinguished in principle" (227 F. 2d at 843; Appendix to Petition, p. 55). In *Salt Producers* the Commission sought to enjoin the individual use of any zone system "whereby the cost of salt delivered to buyers within each respective zone is made identical." Here the paragraph of the order rejected by the Court below sought to enjoin the individual use of any zone method where the purpose *or* effect was to match prices of others sellers. In *Salt Producers* the Commission argued that it had the power to prevent continued use of the "very device" (i.e. the zone method) which created the uniform prices resulting from the salt manufacturers' admitted conspiracy. In that case, as here, there was no charge in the complaint and no finding that the individual use of a zone method was an unfair method of competition and in both cases the Court of Appeals held that under these circumstances the Commission was without power to prohibit the individual use of that system of pricing.[9]

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[8] Section 10 (c) of the National Labor Relations Act (61 Stat. 147, 29 U. S. C. § 160 [c]) provides that the Board may prohibit unfair labor practices with a further provision that its order may require a person engaged in such practices "to take such *affirmative action* * * * as will effectuate the policies of this Act." (Emphasis supplied.) Section 5 of the Federal Trade Commission Act contains no equivalent provision.

The other cases cited in the Petition are similarly inapplicable. *Individual Directory Corp.* v. *Federal Trade Comm'n,* 188 F. 2d 468, concerned an order prohibiting a deceptive practice. *Consumer Sales Corp.* v. *Fed. Trade Comm'n,* 198 F. 2d 404 (cert. denied 344 U. S. 912), and *Hershey Chocolate Corp.* v. *Fed. Trade Comm'n,* 121 F. 2d 968, involved the power of the Commission to enjoin illegal activities related to those charged in the complaint.

We submit, therefore, that the decision below was correct and that the Commission's contentions find no support in reason or authority.

(2) There is no conflict of decision.

Contrary to the Commission's contention (Petition, p. 14), there is no conflict between the decision below and this Court's decision in the *Ruberoid* case (*supra*, p. 10). Furthermore, that case, as well as the others discussed in the preceding section of this brief, clearly indicates that the Commission may prohibit only illegal conduct. Neither *Ruberoid* nor any of the other cases cited in the Petition lends support to the Commission's position.

We know of only one case in which a reviewing court affirmed a Commission order prohibiting the individual use of a delivered price method, *Triangle Conduit & Cable Co.* v. *Fed. Trade Comm'n*, 168 F. 2d 175 (7th Cir.). There, however, the complaint contained two counts: the first charging a conspiracy to use a basing point system, and the second alleging that the individual use of that system by each company with knowledge of the others' use was an unfair method of competition. In addition, the Commission specifically found that such individual use constituted an unfair method of competition.[10] This Court affirmed in a per curiam opinion representing an equally divided Court with Mr. Justice JACKSON not participating (*sub nom. Clayton Mark Co.* v. *Fed. Trade Comm'n*, 336 U. S. 956).

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[9] In this proceeding, where there is a large multiple-plant producer, National Lead, and several smaller producers, the smaller producers should not be handicapped in their choice of any pricing method necessary to meet the competition of their larger rival. See dissenting opinion of Commissioner Mason (R. 3840-41).

There is thus presented no conflict in any decision of this Court or any other Court of Appeals.

(3) There is no important question of Federal law involved.

In the present posture of the case the Commission's principal asserted justification for the injunction against individual use of a zone method—to prevent evasion of the order prohibiting conspiracy—is based upon a premature fear of a situation that may never arise.

It is self-evident that if the Commission's order enjoining the alleged conspiracy be permitted to stand,[11] respondents individually will be compelled to change their respective methods of pricing. If and when that occurs, it will be appropriate for the Commission to consider whether, in the light of the situation as it then exists, there is any question of evasion of the order prohibiting conspiracy. If at that time there is any necessity to modify the order to prevent evasion, the Court below would clearly have the power to do so.

Thus there is no real question of law at this time before the Court. As the Court below said, this portion of the Commission's order "is an unwarranted anticipation of a situation which may never arise and an attempt to decide, by an anticipatory order, questions which will be a subject for this Court to consider should some future enforcement proceeding become necessary" (227 F. 2d at 844; Appendix to Petition, p. 55).

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[10] A spokesman for the Commission subsequently stated that, in his opinion, the second count in the *Triangle Conduit* case was "equivalent" to a charge of conspiracy. Sen. Doc. No. 27, 81st Cong., 1st Sess., 63 (1949). Under these circumstances, therefore, it is clear that the Commission at that time felt that no order could have been entered without a specific count in the complaint directed at individual parallel action. Here, of course, there was no such separate charge.

[11] See cross petition for a writ of certiorari filed by the respondents (No. 877).

Conclusion.

For the foregoing reasons it is respectfully submitted that this Petition for a writ of certiorari should be denied.

Dated May 14, 1956.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1956

No. 63

Federal Trade Commission,
Petitioner,

vs.

National Lead Company, The Sherwin-Williams Company,
The Eagle-Picher Company, and The Eagle-Picher
Sales Company,
Respondents.

On Writ of Certiorari to the United States Court of
Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 63

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

NATIONAL LEAD COMPANY, THE SHERWIN-WILLIAMS COMPANY, THE EAGLE-PICHER COMPANY, and THE EAGLE-PICHER SALES COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS

Opinions Below.

The opinion of the Court of Appeals, Seventh Circuit (R. 3887-3909), is reported in 227 F. 2d 825. The majority opinion of the Federal Trade Commission (R. 3803-20) is reported in 49 F. T. C. 875 and Commissioner Mason's dissenting opinion (R. 3820-41) is reported in 49 F. T. C. 889.

Jurisdiction.

The judgment of the Court of Appeals was entered on January 5, 1956 (R. 3911). The time for filing a petition for a writ of certiorari was extended by Mr. Justice MINTON on March 30, 1956 to April 19, 1956 (R. 3915). Certiorari was granted on June 4, 1956 (R. 3915, 351 U. S. 961). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Question Presented.

In a proceeding under Section 5 of the Federal Trade Commission Act, the Commission found that respondents and certain other companies[1] during the years 1933-1934 conspired to adopt certain specified pricing zones in the sale of lead pigments. There was no charge in the complaint and there was no finding by the Commission that the individual use of such pricing zones or of any other method of zone delivered pricing constituted an unfair method of competition. The Commission entered a cease and desist order which, in addition to prohibiting conspiracy and concert of action, directed each respondent individually to desist from quoting or selling lead pigments at prices calculated in whole or in part pursuant to any zone delivered price system where the purpose or effect would be systematically to match the delivered prices of other sellers. In its opinion the Commission stated that this provision of the order was necessary in order to eliminate the effects of the conspiracy and to guarantee against its continuation.

The question presented is whether, under these circumstances, the Commission had the power to direct each respondent individually to cease and desist from selling lead pigments in accordance with any zone delivered price method where the purpose or effect was systematically to match the delivered prices of any other seller.

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[1] The other companies were Anaconda Copper Mining Company, International Smelting & Refining Company, and The Glidden Company. Glidden did not seek any review of the Commission's order (R. 3889) and the Court of Appeals dismissed the proceeding as to Anaconda and International (R. 3888-89, 3902-04, 3912). Pursuant to stipulation, the latter two have been dismissed as respondents (351 U. S. 921).

Constitutional Provision and Statutes Involved.

The Due Process clause of the Fifth Amendment provides that

> "* * * nor shall any person * * * be deprived of life, liberty, or property without due process of law * * *."

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. § 45, provides in pertinent part as follows:

> "(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * *
>
> "(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> * * * * *
>
> "(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. * * * The testimony in any such

> proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice."

Section 9 of the Administrative Procedure Act (60 Stat. 242, 5 U. S. C. § 1008) provides in part that:

> "In the exercise of any power or authority—
>
> "(a) No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law."

The proviso to Section 2(b) of the Clayton Act (49 Stat. 1526, 15 U. S. C. § 13) reads in part as follows:

> "* * * nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price * * * was made in good faith to meet an equally low price of a competitor * * *."

Statement.

Nature of the proceeding.

The amended complaint, issued on April 12, 1946, contained two counts. Count I charged respondents and others with a conspiracy to adopt certain specific arbitrary pricing zones in the sale of lead pigments (R. 60-74).[2]

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[2] Count I also alleged that National Lead had attempted to monopolize the lead pigments field and the Commission's order contained a paragraph enjoining further acquisitions by that company. The Court of Appeals, however, set aside the injunction (R. 3912) and no review of that determination was sought by the Commission.

Count II was directed at illegal price discriminations and alleged, among other things, that respondents' intra-zone uniform delivered prices constituted illegal price discriminations in that there were variations in the "net" (i.e. "mill net") prices of each seller (R. 74-78).

The products involved.

There are three general types of lead pigments—white lead in oil, dry white lead, and lead oxides (R. 3889).

(1) *White lead in oil.*

White lead in oil (basic carbonate of lead mixed with linseed oil) is sold chiefly to the painter as a semi-mixed paint (R. 3739). Additional oils and thinners must be added before the material can be applied as paint. Ready-mixed paints directly compete with white lead in oil and have largely displaced the latter during the last 20 or 30 years as the standard exterior paint product (R. 1757, 1918, 1945, 1951).

(2) *Dry white lead.*

There are two kinds of dry white lead—basic carbonate and basic sulphate (R. 3739). Both are sold principally to paint manufacturers as a pigment used in the manufacture of ready-mixed paints (R. 3739). While traditionally dry white lead was the basic pigment employed in the formulation of outside ready-mixed paints, beginning with the 1930s its popularity steadily diminished and, in its place, paint manufacturers began to use, in increasing quantities, competitive pigments such as titanium dioxide, lithopone and leaded zinc oxide (R. 625, 630, 1313, 1557-8).

(3) *Lead oxides.*

The two types of lead oxides are litharge and red lead. Litharge is extensively used in the manufacture of electric storage battery plates (R. 3739). Red lead is also used for the same purpose and, in addition, constitutes the principal ingredient in red lead paint, commonly used as a protective coating for iron and steel structures (R. 3740). Many battery manufacturers produce oxides for their own consumption (R. 1823).

Admittedly, lead pigments were sold at low margins over the cost of the chief raw material, pig lead (R. 3747).[3]

The lead pigment manufacturers.

The largest manufacturer is respondent National Lead with a number of plants located in various parts of the United States (R. 3733-3734, 3742). The other companies are relatively small producers of the products here involved, with only one or two plants located in the mid-west or eastern parts of the country (R. 3734-3737).

Pricing practices prior to 1933.

For many years prior to NRA, National Lead had sold white lead in oil on the basis of territorial differentials involving free delivery to specified towns and cities in a large par or base territory and differentials over the par territory for deliveries to certain cities in other areas. The differentials added to the base price were generally uniform in the case of listed cities in a large geographical area. The freight charge to purchasers in localities outside the listed cities was "equalized" with freight to the nearest listed city in the particular territory (R. 3749). One witness, a National Lead branch manager, termed this a zone or territorial differential method and stated that such method had been employed by National Lead at least as far back as 1910 (R. 1495-1496).

The record does not disclose what pricing systems were used by the other respondents prior to 1933 in the sale of white lead in oil.

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[3] White lead in oil, for example, had to be priced so as to be competitive with the more popular ready-mixed paints (R. 1558).

The evidence relating to the methods employed in the sale of dry white lead and lead oxides prior to NRA is extremely fragmentary but it is probable that prior to 1933 dry white lead was sold at a uniform delivered price throughout a large part of the country, while in the sale of lead oxides frequently freight was paid by the purchaser (R. 3750).

Changes instituted during the NRA period, 1933-1934.

The Commission found that in 1933-1934 respondents and the other companies involved, while ostensibly engaged in the drafting of a code for the lead industry and a supplemental code for the lead pigments division of that industry, met and discussed plans to revolutionize their pricing methods. Among the matters discussed was the possible use of certain pricing zones in the sale of white lead in oil and other pigments. The Commission found that, as a result of these discussions, the respondents and the other companies in this proceeding reached agreement on the use of certain zones in the sale of the various lead pigments (R. 3750-3751, 3761-3766).

While respondents are bound by these findings, it nevertheless should be noted that the undisputed evidence, including contemporaneous documents, clearly establishes that the lead pigment manufacturers entered upon these discussions with the utmost reluctance and only at the urgent prompting of NRA officials (R. 1062-1063, 1204; Resp. Ex. 50, R. 1133, 2840-2843; Resp. Ex. 81, R. 1150, 2851). There was no evidence that there were any meetings or discussions among respondents relating to prices or pricing methods after 1934.

The Commission found that the zone plan was probably put into effect around June, 1934, shortly after the NRA Lead Code received Presidential approval (R. 3769). The Commission also found that, with occasional exceptions, respondents and the other lead pigment manufacturers thereafter uniformly followed the zones so established by agreement (R. 3772-3773).

There were four specific zone methods adopted by the lead pigment manufacturers, a multi-zone method for white lead in oil, a two-zone method for dry white lead, and separate zone methods for the sale of lead oxides in less than carload and carload lots, respectively (R. 3762-3766).

The white lead in oil multiple zone method involved approximately thirteen zones with a large par or base zone comprising the eastern and north central states, a small par zone for the San Francisco Bay area; and premium zones where slightly higher differentials, ranging from ⅛ cent to 1 cent per pound, were charged. The zone boundaries were substantially the same as those employed by National Lead under its former "delivery point" method (R. 3763; Resp. Ex. 147, R. 1449, 2953).

The zones for dry white lead consisted of a par zone embracing all of the country up to the Rocky Mountains and a differential zone extending from the Rocky Mountains to the Pacific Coast (R. 3764).

Oxides in less than carload quantities were sold on a multiple zone method consisting of a par zone and four differential zones, while carload quantities were sold in two par zones and one differential zone (R. 3765-3766).

The Commission found that the zones were highly artificial and that the zone boundaries in some instances led to bizarre results with purchasers located near the plants of respondents being charged higher prices than those located at a considerable distance (R. 3789, 3806-07).

There was no testimony concerning the effect of the zone methods employed by respondents. One witness, a paint manufacturer in Kansas City, however, testified that he approved of the uniform delivered intra-zone price for dry white lead because it permitted him to compete on equal terms with paint manufacturers located in the vicinity of white lead plants (R. 1912, 1914, 1915-1916, 3492).

The hearings and proceedings before the Trial Examiner.

During the hearings before the Trial Examiner, there was no suggestion or claim made by Commission's counsel that the individual use of zones was under attack or that the Commission would be asked to enjoin such use, apart from conspiracy. In his argument before the Trial Examiner after the close of testimony, Commission's counsel limited his remarks on pricing zones to the contention that the evidence established that zones were collusively adopted and maintained, and counsel merely asked for an order restraining concerted action in the use of zones (R. 2268-69, 2271-72, 2275, 2282-83, 2292). The order proposed by counsel for the Commission contained no provision relating to the individual use of zones (R. 3439-42) and the Trial Examiner's recommended order was similarly silent on the subject (R. 3556-58).

It was only after the filing of the Trial Examiner's recommended decision that counsel for the Commission raised the point in his exceptions. In these he complained of the failure of the Trial Examiner to list, as one of the issues in the case, the individual use of zone methods and the failure of the Trial Examiner to include in his recommended order a paragraph prohibiting such individual use. Both exceptions were based upon the contention that paragraphs Eight to Ten of Count I of the amended complaint charged that the individual use by respondents of zone methods of pricing, entirely apart from the question of conspiracy, constituted an unfair method of competition (R. 3559, 3575).

The Commission's rulings on exceptions.

In rejecting the first exception of Commission's counsel, based upon the argument that Count I charged that the individual use of pricing zones constituted an unfair method of competition, the Commission ruled (R. 3709-10):

> "The Commission does not so construe the amended complaint. The manner in which this document was prepared makes it apparent that *Paragraphs Eight and Nine of Count I were intended to allege, in effect, that pursuant to and in furtherance of the conspiracy alleged in general terms in Paragraph Seven, each of the respondents used the zone methods of selling therein described,* and that each of the respondents employed certain terms and conditions in selling their lead pigments. Paragraph Ten alleges that each of the respondents used the systematic method of quoting delivered costs on lead pigments described in Paragraphs Eight and Nine 'for the purpose and with the effect of enabling the respondents to match exactly their offers to sell lead pigments to any prospective purchaser at any destination, thereby eliminating competition between and among themselves', thus indicating that the allegations of Paragraphs Eight and Nine are not a charge in addition to the conspiracy but constitute only a description of the manner in which the conspiracy previously referred to was effectuated; and all doubt on the point is removed by the allegations of Paragraph Twelve (conclusion) to the effect that 'The combinations, agreements and understandings of the respondents and their acts, practices, pricing methods, systems, devices and policies as hereinbefore alleged, all and singularly, are unfair and to the prejudice of the public', etc. *If it had been the Commission's intention to charge that the acts of each of the respondents individually were unlawful, it could and undoubtedly would have so alleged in clear and unambiguous terms.* The hearing examiner's statement of the issues was not erroneous in the

> respect mentioned, and this exception is denied." (Emphasis supplied.)

The Commission agreed that its order should contain a prohibition against the individual use of any zone method, but not upon the ground urged by Commission's counsel. It said (R. 3719):

> "Counsel's request for a provision prohibiting each of the respondents from selling its lead pigments in accordance with a zone delivered price system is based upon his argument, made in support of his exception No. I, that the amended complaint charges, and the proof supports the charge, that each of the respondents individually has violated the Federal Trade Commission Act through the use of the zone pricing system. As shown by the ruling on exception No. I, the Commission does not consider this to be one of the charges of the complaint. Thus, the Commission does not agree with counsel in his position that the order to cease and desist should contain any provision based on that theory. The Commission is of the opinion, however, in view of all of the facts and circumstances in the case, that in order to effectively prevent the respondents from continuing to attain certain of the objectives of their unlawful conspiracy and so continue to deprive the purchasers of lead pigments of the advantages of real price competition among the producers it is necessary for each of the respondents to be restrained from continuing to use the zone delivered price system and from using any other similar system for the purpose or with the effect of matching the prices of other lead pigment producers."

The Commission's findings and order.

The Commission in addition found that from the early part of 1934, the accepted practice among respondents was to price lead pigments "in accordance with the zone delivered pricing system herein described" (R. 3773), and it stated that this zone pricing system so agreed upon and so adopted was "a method which facilitated the meeting, or matching, of competitors' prices" (R. 3785). It therefore concluded that the agreement to adopt such zones constituted a violation of Section 5 of the Federal Trade Commission Act (R. 3796-3797).

There was no finding that the individual use of the zone methods described in the findings or of any other zone delivered pricing method constituted an unfair method of competition.

The Commission in effect determined that in this industry price was the actual delivered price and that the variations in the "mill net" prices of each manufacturer did not constitute unlawful price discriminations (R. 3798).

The order of the Commission prohibited any conspiracy or concert of action, among other things, to fix prices or to quote or sell at prices in accordance with a zone delivered price system or any other system resulting in identical price quotations (R. 3800). In addition, the order contained the following paragraph, the propriety of which is the issue before this Court (R. 3801):

> "It Is Further Ordered that each of the respondents, its officers, agents, representatives, and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another."

Opinion of Commission.

In discussing the paragraph of its order above quoted, the majority opinion of the Commission,[4] written by Commissioner Mead, stated (R. 3814-15):

> "* * * Such a prohibition is necessary, not because it is unlawful in all circumstances for an individual seller, acting independently, to sell its products on a delivered price basis in specified territories, but to make the order fully effective against the trade restraining conspiracy in which each of the respondents participated."

It also said (R. 3815):

> "* * * It is to these respondents that purchasers in commerce throughout the country must look for their supplies of lead pigments, and the respondents have the power to and do control the supply of lead pigments available. The maintenance of the delivered price zones and the quotation of delivered prices therein constituted the very cornerstone of the respondents' conspiracy. It was the adherence by each of them to this system of pricing that made the combination work. It was in this way that the matching of prices, one of the objectives of the conspiracy, was accomplished. Unless and until each of the respondents is prohibited from so adhering to the system and from so using the zones, the evils springing from the combination, one of which is to eliminate price competition, may well continue indefinitely. Unless the respondents, representing practically the entire economic power in the industry, are deprived of the device which made their combination effective, an order merely prohibiting the combination may well be a useless gesture."

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[4] There was a vigorous dissent by Commissioner Mason (R. 3820-41). Commissioner Carretta did not participate in the decision for the stated reason that oral argument on the merits was heard prior to his appointment (R. 3802). Commissioner Spingarn, however, who was also appointed to the Commission after the oral argument, did not see fit to disqualify himself (R. 3799).

The majority further stated (R. 3816):

> "* * * What would be the situation if the Commission issued only the usual type of conspiracy order in this case—that is, to discontinue agreeing to fix prices, etc.
>
> "After the order is issued the respondents might continue to use the same zone pricing system and when questioned by the Commission as to compliance with the order they might truthfully reply that they had not corresponded or conversed with their former conspirators since the issuance of the Commission's order to cease and desist. The respondents, however, would be enjoying all the fruits of their conspiracy—the rigged pricing pattern—and the momentum of the system, so firmly and maturely established, might last for some time unless effective measures to break it up were taken. That is the purpose of the paragraph of the order to cease and desist directed against each of the respondents individually. * * *"

The Commission said that if, after competition is restored, respondents "can make a proper showing" that the prohibition is no longer necessary the Commission will take such action "as may be appropriate in the light of the facts and the law" (R. 3817).

Opinion of Court of Appeals.

The Court below set aside the paragraph of the Commission's order under consideration, and held that under the specific language of Section 5 of the Federal Trade Commission Act and prior decisions of this Court, the Commission was limited to proscribing unlawful acts only. It observed that in the instant proceeding there had been no complaint, no hearing and no findings relating to the effect of the individual employment of any zone system (R. 3904-3909, 3912; 227 F. 2d 825, 840-843). It also said (R. 3909, 227 F. 2d at 843-844):

"Clearly, the Commission was concerned here with enforcement of its order prohibiting concerted action. In justifying the paragraph in question, it pointed up 'the likelihood' that petitioners might continue to use the same zone systems and plead that they have abandoned the unlawful agreement and that such use is merely individual parallel conduct. It seems to us that this is an unwarranted anticipation of a situation which may never arise and an attempt to decide, by an anticipatory order, questions which will be a subject for this court to consider should some future enforcement proceeding become necessary. We refuse to sustain such a sweeping inroad on individual liberty of competitive action, without a prior determination by the Commission, after an appropriate hearing, that such activity is a violation of the Act. Lawful acts do not become automatically unlawful because of an administrative guess that a declaration of their illegality may facilitate enforcement of a valid order.

"If individual use of the zone system by petitioners is to be restrained, that result must be achieved by a proper order in a proceeding conducted in conformity with the statute, in which the invalidity of such conduct is determined. The Commission's power to act is conditioned on such a determination. [Citing cases.]"

Summary of Argument.

The zone method of pricing, one of several generic types of pricing employed in American industry, is a lawful, competitive method of doing business. The contested paragraph of the Commission's order, which effectively bans the non-collusive, individual use of zone pricing in the lead pigments field, was beyond the Commission's authority since the Commission is limited to prohibiting unlawful conduct. *Humphrey's Executor* v. *U. S.,* 295 U. S. 602, 620, 628; *Trade Comm'n* v. *Cement Institute,* 333 U. S. 683, 709.

The Commission may act only within the scope of the Congressional grant of authority. *Federal Trade Comm.* v. *Klesner,* 280 U. S. 19, 27. Where, as here, the Commission purports to act under Section 5 of the Federal Trade Commission Act, it can prohibit only those practices which it finds are unfair methods of competition within the meaning of that section and, in the absence of any such finding, the Commission lacks the power to act. *Federal Trade Commission* v. *Sinclair Refining Company,* 261 U. S. 463, 475-476.

In testing the propriety of any injunction issued by the Commission, it is necessary to see whether the complaint alleges that the action enjoined constitutes an unfair method of competition. If there is no such allegation, then it follows that the injunction violates Due Process, for in that event the respondent is given no opportunity to defend himself. *Federal Trade Commission* v. *Gratz,* 253 U. S. 421, 427-428. Here, as the Commission expressly ruled, the complaint contained no charge that the individual use of zone pricing was unlawful and, since the point was raised for the first time after the filing of the Trial Examiner's recommended decision and order, the respondents were denied the privilege of offering evidence designed to show that the use of zone pricing in this industry was a logical, economical, and competitive method of doing business. Under these circumstances, the contested paragraph of the Commission's order was properly stricken by the Court below.

If the contested paragraph were restored to the Commission's order it would effectively prevent competition in the lead pigments field for if any respondent were to adopt his own non-discriminatory zone method, no other seller could meet the lower prices of such manufacturer for in so doing he would be employing "in part * * * a zone delivered price system * * * for the purpose or with the effect" of matching his competitor's price. This would follow despite the fact that Section 2(b) of the Clayton Act (49 Stat. 1526, 15 U. S. C. § 13) expressly permits the meeting of the lower prices of a competitor in good faith competition.

Zone methods may differ radically in the size and number of zones, in the placing of zone boundaries, and in the price differentials between zones. The Commission justified its order on the ground that the respondents had to be prohibited from adhering to "*the* system" and using "*the* zones" which allegedly had been adopted pursuant to conspiracy (R. 3815). However, the order itself forbade the use of *any* zone delivered price system which had the purpose *or* effect of matching a competitor's delivered price. There was no necessity for prohibiting the use of any and all zone methods of pricing since the principal paragraph of the Commission's order effectively banned combination and concert of action to use a zone method or any other pricing system which resulted in identical prices. The Commission's fear that without the proscription of individual action the respondents would merely continue to use "the same zone pricing system" used in the past is wholly unfounded and unrealistic. There is no basis for the assumption that the respondents will ignore the paragraph of the order forbidding conspiratorial action. Furthermore, if respondents were to continue to employ the same system, the Commission would have the right to seek statutory penalties for the violation of the valid portion of its order, since it is clear that the continued performance of acts having their origin in illegal agreement constitutes a renewal of the pre-existing conspiracy. *United States* v. *Borden Co.*, 308 U. S. 188, 202; *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 227.

The contested paragraph of the Commission's order and the similar paragraph in the *Chain Institute* order (49 F. T. C. 1041, 1107) are unprecedented in the history of the Federal Trade Commission and find no support in the authorities. While the Commission has an "allowable choice of remedy", it may not enter orders prohibiting individual, lawful conduct. It may not even prohibit unlawful acts unless they bear a reasonable relation to the specific illegal acts under attack in the complaint. *Federal Trade Comm.* v. *Beech-Nut Co.,* 257 U. S. 441, 455-456; *Trade Comm'n* v. *Cement Institute,* 333 U. S. 683, 721, 727, 729. See also, *Labor Board* v. *Express Pub. Co.,* 312 U. S. 426, 435-439; *Siegel Co.* v. *Trade Comm'n,* 327 U. S. 608, 613-614.

In the light of the circumstances here presented, the Court below was clearly correct in setting aside the contested paragraph and in denouncing it as "a sweeping inroad on individual liberty of competitive action" (R. 3909, 227 F. 2d 825, 844).

POINT I.

The Commission was without power to enjoin the individual use of zone methods. Zone pricing is lawful. There was no charge in the complaint, and there was no evidence or finding that the individual use of zone pricing in this case constituted an unfair method of competition.

Introduction.

The zone method of pricing is one of several generic types employed in American industry. The Report of the Attorney General's National Committee to Study the Antitrust Laws (March 31, 1955) describes these as follows (pp. 209-10):

> "Characteristic of the geographical range encompassed by the American system of distribution, many sellers supply distant markets through 'delivered' prices which reflect some element of freight. Un-

> like an f.o.b. mill quotation which sets a price effective at the *seller's plant*, 'delivered' prices incorporate transportation charges and hence refer to the point of delivery, i.e. the *buyer's location*. Such 'delivered' price quotations are customarily computed by four essential formulas. In single or multiple basing-point pricing, one or several mills serve as referents for a price to which is added the actual freight charge to the buyer's door; likewise, in freight equalization, the most favorably located seller's mill serves as the basis to which the actual freight to the buyer's door is added; in zone pricing, the country is carved into geographic sectors within which all buyers pay the same price regardless of location, though the price varies among the several zones; a uniform 'delivered' price system treats the entire nation as a single market, charging the identical price to all buyers anywhere."

It is clear from the Commission's findings that it has defined the zone delivered price method in the same terms. The Commission stated that the "territorial zone delivered price basis" involved "a flat par price for all deliveries in a par zone, which included several states, and fixed differentials over the par price applicable to the various zones outside of the par zone" (R. 3769).

A. The zone delivered price method, individually employed, is a lawful method of pricing.

The Courts have never held that any method of zone delivered pricing, individually employed and not involving illegal price discriminations, was unlawful.

In 1932 the Federal Trade Commission published its "*Price Bases Inquiry; The Basing Point Formula and Cement Prices*", in which it made the following observations (p. 13):

> "Probably the most important single determinative factor in adopting the use of the delivered price

> uniform for all destinations is the ratio of the delivered cost to total production and delivery cost. If this is low, with only slight differences in delivery cost as between destinations freightwise differently located, *a delivered price uniform* for the country or *for zones may be a method of quoting more convenient to buyer and seller and less costly than an f.o.b. point of origin price. In that case such a price would not be inconsistent with price competition and would not be indicative of any lack of such competition."* (Emphasis supplied.)

In the instant case, the evidence established, and the Trial Examiner found, that the transportation costs latent in the delivered price represented only a small fraction of the delivered price running from approximately 2½% to 3½%, depending upon the product and the zones involved (R. 3553). Use of zones in this industry, therefore, does not involve a disproportionately large freight factor.

In its *"Statement of Policy Toward Delivered Pricing Practices"*, dated October 12, 1948, the Federal Trade Commission said:

> "Where uniformity of delivered prices within a zone or throughout the country has simple and logical explanations in the nature of the market, the product, and the transportation costs, *the observance of such uniformity, even in the parallel action of a number of competitors, does not in and of itself create inference of collusion.* * * * While nation-wide delivered pricing though superficially simple and not inherently persuasive of collusion may be a concomitant factor in a broad pricing conspiracy, *it is not per se unlawful.* * * *" (Emphasis supplied.)

In this proceeding, unlike the *New Cement* case[5], there is no question but that the delivered price was the actual price under the Federal Trade Commission Act and the Clayton Act. Here the Commission expressly rejected the "mill net" theory in the light of the practices as they existed in this industry (R. 3798). In other words, price here was not what was netted by each seller at its plants (i. e., the delivered price less freight cost), but in actuality was the price paid by the purchasers at the point of delivery.

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[5] *Trade Comm'n* v. *Cement Institute*, 333 U. S. 683, 696-97.

Thus, we start out with the proposition that in the lead pigments industry there is nothing inherently unlawful in the employment of a zone delivered price method. Indeed, the Commission in its opinion recognized that it was not "unlawful in all circumstances for an individual seller, acting independently, to sell its products on a delivered price basis in specified territories" (R. 3614).

B. Under Section 5 of the Federal Trade Commission Act the Commission is limited to prohibiting unlawful acts.

The Congressional grant of power to the Federal Trade Commission is contained in Section 5(a) of the Federal Trade Commission Act, which provides (15 U. S. C. § 45(a)):

> "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

It is to be noted that the power is only one to prevent "unfair methods of competition" and nothing is said about prohibition of methods not condemned as unfair.

In *Humphrey's Executor* v. *U. S.*, 295 U. S. 602, 628, this Court said:

> "The Federal Trade Commission is an administrative body created by Congress to carry into effect

> legislative policies embodied in the statute *in accordance with the legislative standard therein prescribed* and to perform other specified duties as a legislative or as a judicial aid." (Emphasis supplied.)

In *Trade Comm'n* v. *Cement Institute*, 333 U. S. 683, 709, this Court observed:

> "These marked differences between what a court must decide in a Sherman Act proceeding and *the duty of the Commission in determining whether conduct is to be classified as an unfair method of competition* are enough in and of themselves to make the *Old Cement* decision wholly inapplicable to our problem in reviewing the findings in this case. *That basic problem is whether the Commission made findings of concerted action, whether those findings are supported by evidence, and if so whether the findings are adequate as a matter of law to sustain the Commission's conclusion that the multiple basing point system as practiced constitutes an 'unfair method of competition,'* because it either restrains free competition or is an incipient menace to it." (Emphasis supplied.)

Mr. Justice Brandeis, speaking for a unanimous court in *Federal Trade Comm.* v. *Klesner*, 280 U. S. 19, 27, said:

> "While the Federal Trade Commission exercises under § 5 the functions of both prosecutor and judge, *the scope of its authority is strictly limited.*" (Emphasis supplied.)

Similarly, in *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U. S. 619, 623, this Court said:

> "The Commission exercises only the administrative functions delegated to it by the Act, not judicial powers. *National Harness, etc. Association* v. *Federal Trade Commission* (C. C. A.), 268 Fed. 705,

707; *Chamber of Commerce* v. *Federal Trade Commission* (C. C. A.), 280 Fed. 45, 48."

Again, in *Arrow-Hart & Hegeman Co.* v. *Federal Trade Comm'n*, 291 U. S. 587, 598, this Court declared:

> "The Commission is an administrative body possessing only such powers as are granted by statute. It may make only such orders as the Act authorizes; may order a practice to be discontinued and shares held in violation of the Act to be disposed of; *but, that accomplished, has not the additional powers of a court of equity to grant other and further relief* by ordering property of a different sort to be conveyed or distributed, *on the theory that this is necessary to render effective the prescribed statutory remedy.*" (Emphasis supplied.)[6]

In enacting Section 9 of the Administrative Procedure Act (60 Stat. 242, 5 U. S. C. § 1008), Congress clearly recognized the limited nature of the authority of administrative agencies when it provided that:

> "In the exercise of any power or authority—
>
> "(a) No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law."

While of course the Commission has ample authority to "prevent" unfair methods of competition (see Com. Br., p. 13), the Federal Trade Commission Act expressly limits that power to the prevention of acts found to be *unlawful*.

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[6] See also, *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463, 475-476.

C. The court below correctly held that in the absence of any charge in the complaint, supporting evidence and finding that the individual use of zone methods of pricing constituted an unfair method of competition, the Commission had no power to enjoin such use.

Section 5(b) of the Federal Trade Commission Act provides (15 U. S. C. § 45(b)):

> "*Whenever the Commission shall have reason to believe that any* such person, partnership, or *corporation has been or is using any unfair method of competition* or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, *it shall issue and serve upon such* person, partnership, or *corporation a complaint stating its charges in that respect* and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. *The* person, partnership, or *corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such* person, partnership, or *corporation to cease and desist from the violation of the law so charged in said complaint.* * * * The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation *an order requiring such* person, partnership, or *corporation to cease and desist from using such method of competition* or such act or practice." (Emphasis supplied.)

Thus, under Section 5(b), the Commission must issue a complaint stating in what way a particular practice constitutes an unfair method of competition; the respondent may appear and contest the violation of law "so charged"; a hearing is to be held; the Commission must find that the practice constitutes a method of competition prohibited by the Act; the Commission must state its findings in writing; and finally the Commission must issue an order directing the respondent to cease and desist "from using *such* method of competition" (i.e., such *unfair* method).

The statutory provisions are, therefore, unambiguous and specific. The complaint must charge an unfair method of competition; hearings must be had upon this issue; and the Commission must find that the practice involved is an unfair method of competition.

These are not merely insignificant procedural requirements but involve fundamental concepts of Due Process. A person or corporation haled before an administrative agency should have the right to know, clearly and without equivocation, what the specific charges are in order that he may be in a position to meet and contest them by producing evidence in a duly convened adversary proceeding. Congress clearly had these considerations in mind when it conferred upon the Commission the specific powers set forth in Section 5 of the Trade Commission Act.

In *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 427-428, this Court said:

> "If, when liberally construed, the complaint is plainly insufficient to show unfair competition within the proper meaning of these words there is no foundation for an order to desist—the thing which may be prohibited is the method of competition specified in the complaint. Such an order should follow the complaint; otherwise it is improvident and, when challenged, will be annulled by the court."[7]

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[7] See also, *Western Sugar Refinery* v. *Federal Trade Commission*, 275 F. 725, 732 (9th Cir.); *Heuser* v. *Federal Trade Comm.*, 4 F. 2d 632, 634 (7th Cir.); *Salt Producers Assn.* v. *Federal Trade Commission*, 134 F. 2d 354, 358 (7th Cir.). Compare *Standard Containers Mfrs. Ass'n* v. *Federal Trade Commission*, 119 F. 2d 262, 264, 266 (5th Cir.).

In *Humphrey's Executor* v. *U. S.*, 295 U. S. 602, 620, the Court said:

> "In exercising this power, the commission must issue a complaint stating its charges and giving notice of hearing upon a day to be fixed. A person, partnership, or corporation proceeded against is given the right to appear at the time and place fixed and show cause why an order to cease and desist should not be issued. There is provision for intervention by others interested. If the commission finds the method of competition is one prohibited by the act, it is directed to make a report in writing stating its findings as to the facts, and to issue and cause to be served a cease and desist order."

Here the complaint did not attack the individual, noncollusive employment of zones. Furthermore, the point was not raised until after the hearings and after the filing of the Trial Examiner's recommended decision and then only upon the ground, expressly rejected by the Commission, that Count I of the amended complaint did in fact charge that such individual use constituted a violation of Section 5 (R. 3709-10). Had respondents been apprised of the fact that the Commission would seek to bar the individual use of zones, they might have been able to offer testimony showing that zone delivered prices were desired by customers, that competitive products such as ready-mixed paints and other pigments were sold on a similar basis, and that other conditions in the market made such pricing a logical and economical method of doing business. That opportunity was denied. We submit that under these circumstances Due Process was thereby violated and that the paragraph of the order under consideration was properly stricken by the court below.

POINT II.

Even if it be assumed that the Commission has broad powers to take such action as may be necessary to insure the effectiveness of its orders and to prevent evasion, the prohibition of the individual use of zone pricing in this case exceeded the authority of the Commission and was properly set aside by the court below.

A. The injunction would hamper competition in this industry.

The contested paragraph of the Commission's order would prohibit "each respondent" individually, without regard to the existence of combination or conspiracy, from selling lead pigments at prices calculated "in whole or in part", according to "a zone delivered price system" (i.e., *any* such system)[8] "for the purpose or with the effect of systematically matching" the delivered prices of any other seller.

If the stricken paragraph were restored to the order, the following might take place:

(1) In an effort to comply with the paragraph prohibiting continuation of the conspiracy, each pigment manufacturer, without consultation or discussion with any other producer, might adopt his own, non-discriminatory zone delivered price method based upon his own costs of delivery. If, as a coincidental result, any two sellers arrived at the same price in any particular locality in the country, under the paragraph in question one of these two sellers would have the choice of making no sales in that locality or of selling at a different, and necessarily lower, price, for otherwise he would be using "in part" a zone system which had the "purpose" or "effect" of "matching" his competitor's prices in that area. By the

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[8] It is thus clear that the paragraph in question does not merely prohibit use of "the same kind of zone delivered price system which [respondents] had long been using by agreement" as claimed by the Commission (Com. Br. p. 2).

same token, if the first seller were to lower his price, then the other seller would be faced with the same dilemma for he too would be forbidden to meet or match the lower price of his competitor.

(2) One seller might adopt an f. o. b. method, with a single mill or plant price to which actual delivery costs were added. In a particular area, however, he might find that the zone prices of a competitor were lower. If the first seller were to lower his delivered price in that area to meet his competitor's price, he might be held to have violated the prohibition for in such case he would be employing "in part" a zone method (i.e., his competitor's) with the "purpose" or "effect" of "systematically matching" (albeit competitively) the delivered prices of his competitor.

(3) As a result of the adoption of individual separate zones by the lead pigment manufacturers, one seller might discover that his zone prices were higher than those of one or more of his competitors in certain areas where the latter were more favorably situated. This seller could not meet the equally low zone price of his competitors in those areas for both the "purpose" and "effect" of such action would be to "match" the delivered prices of the latter, despite the fact that "matching" of prices would be the result of normal competitive pressures and despite the fact that Section 2(b) of the Clayton Act (49 Stat. 1526, 5 U. S. C. § 13) by its terms permits such action.[9]

In an attempt to justify its order, the Commission contended below that the stricken paragraph did not outlaw all zone pricing but merely forbade zone delivered pricing where there was the "purpose" or "effect" of "systematically matching" prices (Respondent's Brief before Court of Appeals, pp. 87-88). Apparently, the Commission used the words "purpose", "effect", "systematically" and "matching" in an attempt to create an aura of illegality but in reality no such sinister meaning should attach to these words.

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[9] Any of these methods would involve "pricing individually on a basis different from the 'arbitrary and artificial' pricing system which respondents have used in the past" which the Commission now claims its contested paragraph "makes explicit" (Com. Br. pp. 12, 17). And the adoption of such pricing methods would obviously be the result of competitive forces and not "a *de facto* continuation of concerted action" as the Commission contends (Com. Br. p. 16).

Where one deliberately lowers his price to meet a competitive offer, he obviously does so with the "purpose" of "matching" that price in a competitive manner. Where, as a result of competitive forces, prices are all lowered to a certain uniform level, the act of selling at the going price will undoubtedly have the "effect" of "matching" competitors' prices.

Again, there is no warrant for suggesting that the words "systematically matching" are synonymous with illegal activity. The same meaning would result from the use of the innocuous words "regularly meeting".

In the *Staley* case,[10] this Court indicated that a seller could adopt his own non-discriminatory method of delivered pricing and then lower that price in certain areas to meet a particular competitive situation. In view of the fact that business is rarely done sporadically in any given area, to meet or match a lower delivered price of a competitor in any given territory in response to a particular competitive problem, one must do so "regularly" or "systematically". The Commission's injunction, however, would prevent that sort of competitive behavior, at least where the competitive weapon is a zone method of pricing.

B. The prohibition of any and all zone methods of pricing is unnecessary to insure effectiveness of the order banning combination and conspiracy.

The Commission has consistently maintained that the injunction against employment of zone methods is necessary to extirpate the effects of the conspiracy. It argues that in so doing it is merely requiring respondents to abstain from employing the vehicle or "device" which forms the "cornerstone" of the conspiracy (Com. Br. p. 15). This contention cannot withstand analysis.

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[10] *Trade Comm'n* v. *Staley Co.*, 324 U. S. 746, 754-55.

While zone pricing is a type of pricing and as such differs from other generic types—f. o. b., basing point, freight equalization, and universal delivered pricing—there is no such thing as "a" zone delivered pricing system as such, except in the broad generic sense. For example, no one could realistically equate the two-zone method heretofore used in the sale of dry white lead with the multiple zone method (employing thirteen zones) used in the sale of white lead in oil (see R. 3763-3764). True, both are "zone" methods but there all similarity ends. The zones differed in number, there was no similarity in zone boundaries, the zone areas were of different sizes and the zone differentials were completely dissimilar. Indeed the Commission here concedes that the zones used in the sale of dry white lead and lead oxides were "Altogether different" from the white lead in oil zones (Com. Br. p. 9).

As indicated, zone methods may differ radically in the number and area of zones, in the placing of zone boundaries, and in the price differentials between zones. Indeed, a zone method may be so designed, with many zones and small zone differentials, as to resemble an f. o. b. method of pricing.

The method employed by National Lead in the sale of white lead in oil prior to the time of the conspiracy could be described as a zone method, for in that method there were many free delivery points in a large par or base territory and differential points, usually carrying the same differential, in other large areas, with the premiums varying from one area to another. Indeed, a National Lead official described this as a zone or territorial method (R. 1495-96). If National Lead, however, were again to employ this concededly valid method of pricing, which was used by it for many years before the formation of the alleged conspiracy, it is not at all certain that, under the stricken paragraph, any other seller would be permitted to meet National Lead's lower prices in any particular area.

In the final analysis, it was not a "zone method", with its many possible variations which formed the "cornerstone" of the conspiracy found by the Commission; rather, in the Commission's view, it was the *agreement upon precise and allegedly artificial pricing zones and zone differentials* which formed the essence of the unlawful arrangement (R. 3805-07).[11]

The Commission's opinion reveals that ultimately it attempts to justify the injunction in question by contending that without such prohibition "* * * the respondents might continue to use *the same zone pricing system* and when questioned by the Commission as to compliance with the order they might truthfully reply that they had not corresponded or conversed with their former conspirators since the issuance of the Commission's order to cease and desist" (R. 3816; see also, Com. Br. pp. 2, 12, 16, 17).

In other words, the Commission fears that without the injunction against individual action, respondents will blithely ignore the prohibition of concerted action contained in the first part of the Commission's order (R. 3800) and will continue to use the precise pricing pattern which was established in 1933-34. To us that fear seems completely unfounded and unrealistic. Not only is there no basis whatever for the assumption that respondents will ignore the paragraph of the order prohibiting continuation of the conspiracy, but the fact is that if respondents were to continue to employ the same or substantially similar zones and zone differentials after the order and judgment below became effective, the Commission would clearly have the right to recover statutory penalties for violation of its order, since it would appear to be well settled that the continued performance of acts having their origin in illegal agreement constitutes a renewal of the pre-existing conspiracy.[12]

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[11] The Commission's Brief (p. 8) refers to the fact that the Commission found that during the discussions of the Code counsel was consulted on the use prior to Code approval of a "Uniform Basis of Sale" and that he gave the advice there reported (R. 3755-56). The "Uniform Basis of Sale" contained no reference to the use of zone pricing and the finding thus has no bearing whatever on the issue before the Court.

We submit that under these circumstances the court below correctly termed the Commission's fear "an unwarranted anticipation of a situation which may never arise and an attempt to decide, by an anticipatory order, questions which will be a subject for this court to consider should some future enforcement proceeding become necessary" (R. 3909, 227 F. 2d 825, 844).

In addition, there is no reason to assume that with the restraint of conspiracy removed from the lead pigments field competition will not be as vigorous under individually established zone methods (should any manufacturer wish to employ such a method) as it would under any other method of pricing.[13]

Furthermore, if in the future the facts before the Commission should indicate that the new zone methods or any other pricing systems adopted by respondents were established through collusion, the Commission again would have an appropriate remedy since the first paragraph of its order prohibits concerted action to sell according to a zone system or "any other plan or system which results in identical price quotations or prices" (R. 3800). In the light of this, there is no basis for the contention that the stricken paragraph "merely makes explicit respondents' obligation to furnish 'definite proof' of abandonment of concert of action" (Com. Br., p. 17).

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[12] *United States* v. *Borden Co.*, 308 U. S. 188, 202; *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 227.

[13] In Landon, *Geographic Price Structures*, 15 Law & Contemp. Prob. 125, 133 (1950), the author states:

> "So long as producers act spontaneously and are free to change prices to meet the individual producer's own conditions or markets, most delivered price systems tend to bring actual pricing close to the level that would prevail under a condition of individual competition."

It would thus seem clear that there is no necessity for the proscription of the individual use of zone methods under the circumstances of this case and that such an order would needlessly restrict the lead pigment manufacturers and deprive them of a valid competitive weapon.

In concluding its discussion of "Delivered Pricing", the Report of the Attorney General's National Committee to Study the Antitrust Laws (March 31, 1955) reads as follows (p. 219):

> "*At any rate, since any competitive 'unfairness' caused by 'delivered' pricing rests primarily in collusion, antitrust policy is not furthered by penalizing it as an 'unfair method of competition' forbidden by Section 5 of the Federal Trade Commission Act unless the elements of conspiracy appear.*
>
> "Therefore, the Committee recommends that the law carefully differentiate competitive and collusive 'delivered' pricing. It is our view that overall antitrust policy is served when sellers are free to meet competition in distant markets by quoting 'delivered' prices to equalize the freight advantages of more favorably situated competitors. Conversely, however, basic antitrust considerations firmly dictate that 'delivered' pricing employed to effectuate price-fixing conspiracies be relentlessly pursued. This delicate adjustment should be guided by recent adjudications defining the essence of antitrust conspiracy as well as the legally relevant concept of 'price.'
>
> "At the same time, since under current legal doctrines the test of 'delivered' prices as an instrument of business rivalry often comes in the context of a 'meeting competition' justification, the Section 2(b) proviso as interpreted by the Committee should correspondingly foster the competitive 'delivered' pricing which comports with overall antitrust policy." (Emphasis supplied.)

C. Under the authorities, the prohibition of the individual, non-collusive use of pricing zones was clearly improper.

Until the entry of its orders in this case and another proceeding[14], decided 35 days after the order here was filed, the Commission in all of its history had never entered a similar injunction under the circumstances here disclosed.

It is interesting to note that the Federal Trade Commission, even as it was constituted prior to the 1953 change of membership, was willing to accept, in settlement of a case against the steel industry, a cease and desist order which merely prohibited the further use of that industry's multiple basing point system pursuant to conspiracy. *Matter of American Iron & Steel Institute, et al.* (F. T. C. Docket 5508), 48 F. T. C. 123 (1951). Not only was there no prohibition of the individual use of the system, but the *Steel* order contained the following paragraph:

> "III. PROVIDED, HOWEVER, That, in interpreting and construing the foregoing provisions of this order, it is understood that:
>
> * * * * *
>
> "(3) The Federal Trade Commission is not acting to prohibit or interfere with delivered pricing or freight absorption as such when innocently and independently pursued, regularly or otherwise, with the result of promoting competition". (48 F. T. C. at 154.)

The consent order in the *Steel* case was in all respects consistent with the Commission's *"Statement of Policy Toward Delivered Pricing Practices"* of October 12, 1948, quoted above (p. 20). The contested paragraph of the order here reflects a diametrically opposed view.

The Commission here contends that the stricken paragraph of its order bans merely conduct which "is, at best, of doubtful legality'' and urges that it simply prohibits sales according to a zone ''system'' which results in ''systematically matching'' delivered prices (Com. Br. p. 18). Again, it would appear that the Commission seeks to suggest that a pricing ''system'' is tinged with illegality, although if one were to use the synonomous word ''method'', the suggestion of illegality disappears. And, as we have shown (*supra*, pp. 27-29), prohibition of ''systematic matching'' of delivered prices effectively eliminates the very type of competitive behavior which the anti-trust laws were designed to foster.

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[14] *Matter of Chain Institute*, F. T. C. Docket 4878, 49 F. T. C. 1041, 1107 (decided February 16, 1953), now awaiting decision in the Court of Appeals, Eighth Circuit.

Despite the fact that the Commission here has abandoned its questionable ''mill net'' theory (R. 3798), it would appear that the stricken paragraph of the orders represents simply another weapon in the Commission's long fight against delivered pricing in American industry.[15] This battle has been waged by the Commission in the face of clearly expressed Congressional intention that delivered pricing, individually employed in a non-collusive fashion, should not be outlawed.[16]

The Commission urges that the individual use of such a pricing method has been condemned by the Commission as an unfair method of competition in *Triangle Conduit & Cable Co.* v. *Federal Trade Commission*, 168 F. 2d 175

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[15] The fight culminated in the Commission's victory in *Trade Comm'n* v. *Cement Institute*, 333 U. S. 683, but the issue there involved combination and concert of action, not individual behavior.

[16] The original draft of the so-called Robinson-Patman Act defined "price" as the amount received by the seller after the deduction of actual delivery costs. See H. R. Rep. No. 2287, Part 2, 74th Cong., 2d Sess. 16 (1936). After debate, however, the definition was withdrawn. 80 Cong. Rec. 8102 *et seq.*, 8140, 8223-8224 (1936). In *Corn Products Co.* v. *Comm'n*, 324 U. S. 726, 737, the Court observed that this legislative history indicated that Congress was unwilling to outlaw delivered price systems. In 1949, following this Court's affirmance by an equally divided vote of *Triangle Conduit & Cable Co.* v. *Federal Trade Commission*, 168 F. 2d 175 (7th Cir.), affirmed *sub nom. Clayton Mark Co.* v. *Federal Trade Commission*, 336 U. S. 956, legislation was introduced designed expressly to permit non-collusive delivered pricing. While the bill was never enacted, nevertheless statements made during the course of Congressional consideration of the bill clearly indicate that Congress again was opposed to any attempt by the Commission and the Courts to prohibit individually employed, non-collusive delivered pricing. See 95 Cong. Rec. 14776-77, 14782 (1949).

(7th Cir.), affirmed by an equally divided court *sub nom. Clayton Mark Co.* v. *Federal Trade Commission,* 336 U. S. 956 (Com. Br. p. 18). The fact is that in the *Triangle Conduit* case there was a separate count of the complaint (Count II) specifically alleging that each of the respondent manufacturers of rigid steel conduit had violated Section 5 of the Federal Trade Commission Act through the concurrent use of a "formula method" of making delivered price quotations, with the knowledge that others did likewise. That issue was openly contested at the hearings and the Commission expressly found that the individual use of the basing point method there involved under those circumstances violated Section 5 of the Federal Trade Commission Act (38 F. T. C. 534, 593). In addition, the Court of Appeals stated that, "In this situation, and indeed all parties to these proceedings agree, the legal question presented is identical" with the one before this Court in the *New Cement*[17] case (168 F. 2d at 181). Of course, the Court of Appeals was in error since *New Cement* concerned the prohibition of concerted action only. In any event, *Triangle Conduit* offers no analogue to the instant case where there was no allegation, and there was no finding that the individual use of zone methods constituted an unfair method of competition.

We wish to make our position clear. It is our contention that the Commission has no power to prohibit the use of lawful delivered pricing, whether it be zone pricing or any other method of pricing, developed as a matter of competitive, individual choice. We particularly urge that the Commission should not be permitted to prohibit such lawful competitive conduct when there have been no complaint, no evidence, and no finding relating to the issue. The Commission "has no general authority * * * to interfere with ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition"; rather, "it is essential that those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs". *Federal Trade Commission* v. *Sinclair Refining Co.,* 261 U. S. 463, 475-476.

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[17] *Trade Comm'n* v *Cement Institute,* 333 U. S. 683.

We do not dispute the fact that the choice of a remedy generally lies within the discretion of the Commission. *Siegel Co.* v. *Trade Comm'n,* 327 U. S. 608, 611-612. Analysis of the cases dealing with the subject, however, reveals that the Court has restricted administrative orders to the prohibition of unlawful conduct and has permitted the agency to prohibit only the unlawful conduct charged in the complaint and "like or related unlawful acts".[18]

While the Commission, like other administrative agencies, has broad discretion in framing its orders, and the courts will ordinarily refrain from substituting their judgment for that of the Commission, this Court has never hesitated to act where the orders of the Commission or some other administrative agency are too broad, or seek to ban unlawful conduct in general terms, or unlawful acts having no reasonable relations to the practices under consideration. See, *Labor Board* v. *Express Pub. Co.,* 312 U. S. 426, 435-439; *May Stores Co.* v. *Labor Board,* 326 U. S. 376, 392-393; *Siegel Co.* v. *Trade Comm'n,* 327 U. S. 608, 613-614. *A fortiori,* a court should not hesitate to set aside prohibitions of *lawful conduct,* particularly where, as here, there is no necessity for such a destructive provision and there has been no finding of a Section 5 violation.

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[18] *Labor Board* v. *Express Pub. Co.,* 312 U. S. 426, 436. Similarly, courts of appeals have limited the Commission's orders to the prohibition of illegal practices closely related to those charged in the complaint. *Consumer Sales Corp.* v. *Fed. Trade Comm'n,* 198 F. 2d 404 (2nd Cir.), cert. denied 344 U. S. 912; *Independent Directory Corp.* v. *Federal Trade Comm'n,* 188 F. 2d 468 (2nd Cir.); *Hershey Chocolate Corp.* v. *Fed. Trade Comm'n,* 121 F. 2d 968 (3rd Cir.). It should be noted, however, that the National Labor Relations Board is authorized to [illegible] "an order requiring such person to cease and desist from such unfair labor practice, *and to take such affirmative action * * * as will effectuate the policies of this Act*" (Section 10(c), National Labor Relations Act, 61 Stat. 147, 29 U. S. C. § 160(c); emphasis supplied). No similar provision appears in the Federal Trade Commission Act. The Commission's Brief fails to note this important distinction between the powers of the Labor Board and those of the Federal Trade Commission (see Com. Br., p. 20, footnote 8). Indeed it asserts that the "statutory authority" of the two agencies "are, in the present respect, practically identical" (Com. Br., p. 20).

In *Federal Trade Comm.* v. *Beech-Nut Co.,* 257 U. S. 441, the Beech-Nut Company was involved in an elaborate resale price maintenance scheme. Under the decision in the *Colgate* case,[10] Beech-Nut was legally entitled to refuse to deal with distributors who ignored its suggested resale prices. However, Beech-Nut went much further and, by the co-operation of many of its dealers, implemented by a system of policing, black lists, white lists, reports on price cutters, and pressure brought to bear on such price cutters, was enabled to maintain its suggested resale prices. The Commission held that the system as a whole violated Section 5 of the Federal Trade Commission Act but its order prevented Beech-Nut *individually* from refusing to sell to distributors who failed to abide by the suggested resale prices or from carrying out a resale price maintenance policy by any other means (see 257 U. S. at 444, footnote 1). This Court ruled that the Commission's order was "too broad" and directed the lower court to enter judgment prohibiting Beech-Nut from carrying out its resale price policy by "coöperative methods" involving the company, its distributors, customers, and agents (257 U. S. at 455-456). It thus permitted the company to continue to refuse to sell to price cutters where such action was taken individually and it banned only co-operative (or concerted) action to implement its policy.

In the *Siegel* case, 327 U. S. 608, the Commission found that the respondent's use of the trade name "Alpacuna" was deceptive and misleading because it suggested that the respondent's products contained "vicuna". The Commission prohibited the use of the word "alpacuna" to describe respondent's product. The respondent argued that the Commission's order was too broad and that it should be allowed to use its well established trade name together with some qualifying language which would remove the possibility of deception. This Court reversed and sent the case back to the Commission to consider the possibility of saving respondent's trade name through the use of some qualifying phrase (pp. 613-14).

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[10] *United States* v. *Colgate & Co.,* 250 U. S. 300.

In *Labor Board* v. *Express Pub. Co.*, 312 U. S. 426, this Court clearly stated that the Labor Board, having found that certain acts were an unfair labor practice, would be limited in its order to proscribing only those acts and "other like or related unlawful acts" (p. 436). It accordingly held that a provision in the Labor Board's order requiring the respondent to refrain from violating the National Labor Relations Act in any manner should be deleted (pp. 430, 439). Applying the same principle, this Court in *May Stores Co.* v. *Labor Board*, 326 U. S. 376, 392-393, struck from the Board's order a broadly worded paragraph prohibiting unlawful conduct which bore no reasonable relation to the specific illegal practices under attack.

In *Trade Comm'n* v. *Cement Institute*, 333 U. S. 683, where the industry-wide employment of a basing point system was involved, this Court, after pointing out that the findings of the Commission established that the system was maintained through concerted action (p. 721), took pains to observe that "the prohibitions in the order prohibit no activities except those which if continued would directly aid in perpetuating *the same old unlawful practices*" and noted that the order did *not* prohibit individual employment of delivered prices (pp. 727-728).[20] The respondents there also objected to another paragraph in the Commission's order prohibiting the use of any plan or system which resulted in identical prices. With respect to this objection, the Court observed (p. 729):

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[20] Again the Commission fails to refer to this important distinction (see Com. Br., p. 14).

> "* * * This paragraph like all the others in the order is limited by the preamble which refers to concerted conduct in accordance with agreement or planned common course of action. The paragraph is merely designed to forbid respondents from acting in harmony to bring about national uniformity in whatever fashion they may seek by collective action to achieve that result. We think that no one would find ambiguity in this language who concluded in good faith to abandon the old practices. * * *"

The thought implicit in all of these cases would appear to be that the Commission, as any other administrative agency, may not enter broadly worded orders prohibiting lawful conduct. Indeed, it may not even prohibit unlawful conduct unless such conduct bears some reasonable relation to the specific subject matter of the action.

The Commission, of course, "exercises only the administrative functions delegated to it by the Act, not judicial powers" (*Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U. S. 619, 623), but even if this were a proceeding before a court of equity, the injunction would have been improper. Thus, in *Hartford-Empire Co.* v. *U. S.*, 323 U. S. 386, this Court struck from the District Court's decree provisions forbidding leases of machinery and requiring, among other things, royalty-free patent licenses, upon the ground that such paragraphs, under the circumstances there disclosed, "go beyond what is required to dissolve the combination and prevent future combinations of like character" (p. 414).

In *United States* v. *Gypsum Co.*, 340 U. S. 76, the District Court had entered a decree which prohibited the defendants from agreeing upon or "adhering" to any system of quoting prices for gypsum products calculated in accordance with a basing point system or any other system which resulted in identical prices (see 340 U. S. at 100). While this Court specifically stated that in framing its decree the trial court was "not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal" (pp. 88-89), it nevertheless modified the decree, in view of defendants' apprehension that the paragraph in question would bar individual non-collusive delivered pricing, so that it should clearly and specifically prohibit only *agreement* upon prices calculated in accordance with a delivered price plan (p. 92).

The cases relied upon by the Commission are not to the contrary. In the *Siegel* case, as we have seen, this Court obviously felt that the Commission's order was needlessly destructive of the seller's valuable property rights in its trade name "Alpacuna" (327 U. S. 608, 613-614).

Contrary to the Commission's suggestion (Com. Br. pp. 17-18), *Fed. Trade Comm'n* v. *Ruberoid Co.*, 343 U. S. 470, did *not* concern the prohibition of lawful conduct. Indeed, this Court there stated that orders of the Commission are not intended as punishment for past acts "but to prevent *illegal* practices in the future" (p. 473; emphasis supplied). The order there prohibited only unlawful price discriminations. While the evidence before the Commission concerned price differentials of 5% or more, "the Commission found that very small differences in price were material factors in competition among Ruberoid's customers, and Ruberoid offered no evidence to the contrary" (pp. 473-474). Hence this Court refused to modify the order to allow price differentials of less than 5% and thereby permit the selling company to charge competing purchasers illegal discriminatory prices (id.). With respect to the company's contention that the order prohibited lawful price differentials (viz., price differentials which were cost-justified or made in good faith to meet equally low prices of competitors), this Court observed that the provisos of Section 2 (a) and (b) of the Clayton Act were "necessarily implicit" in the order (pp. 475-76). In our view *Ruberoid* emphasizes the point that the Commission has the power to suppress only illegal practices.

In *International Salt Co.* v. *U. S.*, 332 U. S. 392, the defendant objected to a provision of the decree which directed it to offer to lease or sell its machines on nondiscriminatory terms to any applicant. In discussing the defendant's objection to this paragraph of the decree, the Court said (p. 399):

> "The specific ground of objection raised by appellant to paragraph sixth is that International may find it necessary in some sections of the country to reduce the rental rates of the machines in order that its machines may compete with those of others. Of course, the Clayton Act itself permits one charged with price discrimination to show that he lowered his price in good faith to meet competition. Obviously, the District Court was not intending to prevent competition or to disable the appellant from meeting or offering it. The Government, too, says it would not oppose permitting a lower price to meet, in good faith, the equally low price of a competitor if the need arose."

Here, on the other hand, the injunction which the Commission seeks to have reinserted in its order would prevent the use of any zone prices to meet competition as permitted by Section 2(b) of the Clayton Act.[21]

The Report of the Attorney General's Committee to Study the Antitrust Laws (March 31, 1955) had the following to say about the Commission's orders in this and the *Chain Institute* cases (p. 217, footnote 273):

> "In each case the Commission issued a cease and desist order on the basis of a Federal Trade Com-

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[21] There was a vigorous dissent in *International Salt* in which the action of the court below was compared with "burning * * * part of a house in order to roast a pig" (p. 403). As indicated, the action of the Commission here went far beyond that which was permitted by a divided Court in *International Salt*.

> mission Act Section 5 violation rooted in collusive pricing conduct. To the extent that these orders deny sellers the right independently to quote 'delivered' prices in meeting rivals' offers, they not only fail to promote effective competition, but also may be vulnerable as prohibiting what the law permits."

In *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173, the defendants had been found guilty of a conspiracy to restrain trade and to monopolize the moving picture business in certain southern states. The conspiracy to monopolize having been established, this Court felt justified in modifying the decree to prevent further acquisitions except upon an affirmative showing that such acquisition would not unreasonably restrain competition (pp. 185-87). Obviously, that decision bears no relation whatever to the injunction here which prohibits a lawful competitive method of doing business.[22]

U. S. v. *Bausch & Lomb Co.*, 321 U. S. 707, concerned the use by the defendant of a specific device, Fair Trade contracts, which " 'came into existence as a patch upon an illegal system of distribution of which they have become an integral part' " (321 U. S. at 716). In that situation, the District Court was held not to have exceeded its discretionary powers in ordering the cancellation of Fair Trade contracts for a period of only six months. This Court, however, specifically denied the Government's request that the prohibition be made permanent (p. 729). Here, on the other hand, not only was the ban on zone pricing made permanent,[23] but the prohibition covered any and all types of zone pricing, not merely the specific zones which were adopted in 1933-1934.

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[22] The other cases involving decrees in antitrust cases are similarly inapplicable. In all a particular, specific device, usually not necessary to the defendants' business, which formed an integral part of the conspiracy, was banned, often for merely a limited period of time. See *Ethyl Gasoline Co.* v. *U. S.*, 309 U. S. 436, 450, 460. For like reasons, cases requiring a defendant to permit customers to purchase as well as lease its products, or to obtain patent licenses on a reasonable-royalty basis, are also inapplicable. *Besser Manufacturing Co.* v. *United States*, 343 U. S. 444; *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass.), aff'd *per curiam*, 347 U. S. 521; *Hartford-Empire Co.* v. *United States*, 323 U. S. 386.

Under these circumstances, we submit that the court below was correct in denouncing the contested paragraph of the order here as "a sweeping inroad on individual liberty of competitive action" (227 F. 2d at 844).

Conclusion.

The Commission is limited to prohibiting unlawful acts. The complaint did not charge a violation of law in the individual employment of zone pricing methods; there was no evidence on the subject adduced at the hearings, and there were no findings that use of such a method violated Section 5 of the Federal Trade Commission Act. Under these circumstances, the Commission's order banning such use violated Due Process and was properly set aside by the court below. In addition, the offending paragraph would prevent a lawful competitive method of doing business and there is no merit whatever to the Commission's contention that such an injunction is necessary to prevent evasion of the paragraph of its order directed at conspiracy or combination. Finally, the cases all clearly indicate that such action on the Commission's part, not dealing with "like or related unlawful acts", extends far beyond the powers of the Commission.

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[23] The Commission suggests that respondents may in the future apply for a modification of its order once competition has been restored (Com. Br., p. 24). Apart from our contention that the stricken paragraph is beyond the scope of the Commission's authority, we believe that the suggested relief which was first mentioned in the Commission's opinion (R. 3817) is largely illusory. In this connection it will be noted that the Commission merely stated that if respondents did make such an application in the future, it would take "such action as may be appropriate in the light of the facts and the law" (id.). Just what this means it is difficult to ascertain. Moreover, if this Court were to say that the Commission could ban a lawful method of pricing without any complaint, evidence or finding on the subject, then the "law" would be settled and an application to the Commission under these circumstances might well be fruitless.

For all of these reasons, we respectfully submit that the judgment below should be affirmed.

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Respectfully submitted,

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